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EDUCATION FOR THE VISUALLY  
IMPAIRED

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## BACKGROUND

The Constitution of the Republic of South Africa, 1996<sup>1</sup> contains a bill of rights which serves as a guide to promote the idea of human rights in South African law. In particular this essay is focused on the rights envisaged for the protection of people living with disabilities, specifically the visually impaired, in South Africa. Section 9<sup>2</sup> of the bill of rights provides protection against unfair discrimination and inequality. Section 9<sup>3</sup> provides a list of grounds upon which unfair discrimination is disallowed, but such protection is not limited to listed grounds.

The apartheid system consisted of harsh racial laws which separated communities along racial lines creating different standards of living for different race groups. The visually impaired were indirectly affected as these racial laws compounded on them. The communities in which they lived in further marginalized them. Separate educational institutions were created for the visually impaired which limited the area of study they could indulge in. The visually impaired today still find themselves marginalized as there has been no attempt to create integrated schooling to address the inequality in education. Furthermore at tertiary level no legislation exists that provides for equal access and protection from discrimination. This failure is evident in the lack of provision in the Higher Education Act<sup>4</sup> for this very purpose.

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<sup>1</sup> The Constitution of the Republic of South Africa, 1996, Constitutional laws Act, Act 5 of 2005).

<sup>2</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>3</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>4</sup> The Higher Education Act 101 of 1997.

## KEY WORDS AND PHRASES

Constitution

Bill of rights

Non discrimination

Equality

Legislation

Human rights

Dignity

Tertiary education

Visually impaired

Constitutional court



## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1. Aims of the study**

The focus of this paper would be on the right of the visually impaired to access tertiary education that is not unfairly discriminative and unequal. The study is intended to highlight the inadequacy in the current legislation on equality such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Higher Education Act 101 of 1997 in properly promoting the ideals and purpose of constitution. Furthermore to analyse the constitutional court's approach to equality and non discrimination in order to provide solutions and recommendations for changes to existing legislation that is indeed to be effective.

It further aim to properly define what it means to have equality for the visually impaired, more especially in tertiary education through the constitutional court's definition of equality and suggesting changes to current legislation on education and equality and non discrimination, in this manner equality and non discrimination can be reached for the visually impaired. The paper will also explore the impact of real and effective access to education on the right to dignity and equality for the visually impaired. This will only be achieved once the imbalances in access to tertiary education and equal treatment of persons with disabilities are fully realized and protected.

## **1.2. Problem statement**

The issue is whether the legislation passed by parliament effectively supports and promotes equality and non discrimination for the visually impaired in tertiary education in South Africa. The constitution provides particular guidance as to what constitutes discrimination and is unfair and further indicates what equality is. These founding principles must be followed to give purpose and meaning to other rights including the right to access to education and human dignity.

Human dignity should be the result of equality and non discrimination for the visually impaired. This would be achieved by providing access to education at tertiary level. An education would give the visually impaired individual a chance at competing in the job market and participate in all areas of society with dignity and worth.

As the situation stands legislation dealing with education and people with disabilities do not provide any effective solution to the problem of lack of dignity and equality, but merely acknowledges the existence of inequality and discrimination and the need to prevent it.

## **1.3. Significance of the study**

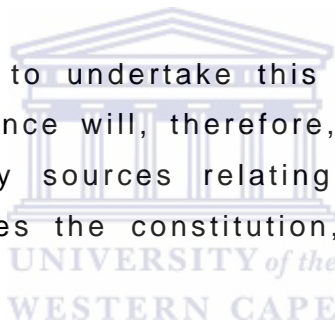
South Africa's constitution forms a framework in which all legislation and policies should be drafted and implemented. The historical background of racial discrimination has compounded the impact that disabled people experience as they were excluded not only on the basis of race but on their disability from accessing tertiary education. Over the last fifteen years of democracy the legislature has not taken any steps to realise the intention of

provisions of the constitution on equality and non discrimination for people with disabilities.

This study will provide solutions to the inequalities in access to tertiary education for the visually impaired, using the guidance of the constitutional court's approach to equality and non discrimination in the many cases that have come before it. The study will further show how simple legislative steps and policy directions could indeed provide improvement to the lives of people with disabilities so as to enable them to participate in society and do so with dignity.

#### **1.4. Methodology**

The method employed to undertake this research is by way of literature review. Reliance will, therefore, be placed on relevant primary and secondary sources relating to human rights and education. This includes the constitution, legislation, case law, books and articles.





## **1.5. Overview of the chapters**

Chapter 1 is introductory and sets out the context of the research, identifies the problem and outlines the methodology.

Chapter 2 discusses the constitutional provisions for equality and non discrimination and the provisions relating to access to education. The chapter will also highlight legislation and the inadequacy thereof.

Chapter 3 provides discussion of the constitutional courts approach to protection against inequality and discrimination. The chapter will also give direction on how the courts approach should be used to promote the interests of the visually impaired.

Chapter 4 discusses the problems faced by the visually impaired at tertiary education level and how this impacts on their rights against discrimination and their right to dignity. The discussion will show how the lack of protection by current legislation prevents them from participating in the education system and society as a whole.

Chapter 5 proposes solutions to the shortfall in the current legislation and how these changes would effectively change the lives of the visually impaired by creating equal opportunity free from discrimination so that they may obtain skills and knowledge to effectively participate in society.

Chapter 6 discusses the recommendations and conclusions of the essay.

## CHAPTER 2

### AN OVERVIEW OF THE CONSTITUTION AND LEGISLATION RELATING TO EQUALITY AND NON DISCRIMINATION

#### 2.1. Introduction

South Africa has endured years of apartheid a system of oppressions and discrimination for many years. The system denied people civil, political and cultural rights. The current dispensation is one based on constitutionalism. The Constitution of the Republic of South Africa 1996<sup>5</sup> has an entrenched bill of rights that gives supreme protection for the rights and freedoms of individuals and groups alike. There are many groups of people that were previously disadvantaged through harsh apartheid legislation and instilled discrimination against persons simply because they were different.

South Africans living with disabilities were not spared and are today still an oppressed and marginalised group in society. The plight of the visually impaired in particular seems more daunting than one would hope. They face not only prejudices on the fact that they have a visual impairment but also on the misconception of mental illness that have developed in society mostly due to ignorance. This is also submitted by Cole<sup>6</sup> when he says that myths and misconceptions of people with disabilities in society in which they are seen as freaks and jokes combined with apartheid laws on race, gender and other grounds these people were placed under additional oppression. South Africa's legal system is one in

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<sup>5</sup> The Constitution of the Republic of South Africa, 1996.

<sup>6</sup> Cole M, Education Equality and Human rights issues of race, gender, special needs, sexuality and social class, 2000, pages 118-119.

which there is a constant battle to merge the old common law and legislation with the constitution.

The historical background out of which the democratic dispensation was born is important in the interpretation and application of the rights found in the bill of rights<sup>7</sup>. The preamble of the constitution<sup>8</sup> provides for an open and democratic society that is to be founded on equality, non racialism and non sexism.

Thus equality is of fundamental importance to achieving democracy in South Africa. The equality clause was included in the bill of rights to ensure the protection and development of democracy<sup>9</sup>.

## 2.2 The Equality Clause of the Constitution

Section 9(1) states that everyone is equal before the law, everyone has the right to equal protection and benefit of the law.<sup>10</sup> Section 9(2) states that equality means the full enjoyment and protection of the law and the promotion and equality by means of legislation and other steps must be taken of achieve such protection for persons or categories disadvantaged by unfair discrimination.<sup>11</sup>

Section 9(3) says that the state may not unfairly discriminate directly or indirectly on one or more of the listed grounds of race, sex, gender, disability, age, conscience, belief, religion, sexual

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<sup>7</sup> Chapter 2 of the Constitution of the Republic of South Africa, 1996.

<sup>8</sup> Chapter 1 of the Constitution of the Republic of South Africa, 1996.

<sup>9</sup> De Vos, *Equality for all? A critical analysis of equality jurisprudence of the constitutional court* THRHR, vol 63 of 2000, para 1.

<sup>10</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>11</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

orientation, culture, marital status, language and birth.<sup>12</sup> Section 9(4) states that no person may discriminate against another on one or more of the listed grounds in subsection (3), national legislation must be enacted to achieve this end.<sup>13</sup> Section 9(5) says that any discrimination on any of the listed grounds is unfair unless proven to be fair.<sup>14</sup>

The idea of equality is broad and abstract. It appears that it means simply to treat people who are the same the same or those that are unlike as unlike. This is what De Vos describes as formal equality as to treat people the same irrespective of their circumstances.<sup>15</sup> Degener and Dereese<sup>16</sup> state that differentiation is not a symptom for discrimination neither is same treatment going to lead to equality. This seems simple enough however no two persons are completely equal in all respects.

Currie and De Waal seem to suggest the same and offer the example of providing education for a sighted child and a blind child to illustrate that while they are the same as children there is an obvious difference between them that cannot be ignored if they are to be treated equally.<sup>17</sup>

The equality is a vague concept which is hard to define and comprehend thus the equality clause incorporates non discrimination as a central point to make equality easier to grasp and apply. Section 9<sup>18</sup> provides the protection against unfair discrimination. Thus those who have been disadvantaged in the

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<sup>12</sup> Section 0 of the Constitution of the Republic of South Africa, 1996.

<sup>13</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>14</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>15</sup> De Vos P, *Equality for All? A critical analysis of equality jurisprudence of the constitutional court*, THRHR 2000, para 4.

<sup>16</sup> Degener T and Dereese K Y, *Human Rights and Disabled Persons*, illustrated edition, 1995, page 40-42.

<sup>17</sup> Currie I, De Waal J, *Bill of rights handbook*, 5<sup>th</sup> edition, 2005, pages 229-231.

<sup>18</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

past should enjoy protection against any unfair discrimination. This is not to say a mere differentiation between people is unacceptable but such differentiation should not be unfair or lead to a disadvantage to one or more persons. It seems therefore discrimination is acceptable so long as it is not unfair meaning it must promote equality on the listed grounds.

The right to equality and non discrimination on one of the listed grounds is presumed to be unfair unless otherwise proven. Any other ground is subject to the limitation clause section 36<sup>19</sup>. This provides for the limitation of any right provided it is reasonable and justifiable in an open and democratic society based on dignity, freedom and equality. An example of such reasonable and justifiable limitation would be where a blind or visually impaired person is denied the right to a driver's license. In the circumstances there is discrimination on a listed ground which would not be seen as unfair. Equality and non discrimination protection should not affirm the category of person such as race, disability, gender, sex but affirm the disadvantage to the person because he or she falls into such a category.

Within the scope of this paper I will be looking at discrimination against the visually impaired in the specific context of education. Therefore I will now discuss the relevant provisions of the constitution relating to the right to education.

### **2.3. The right to access to education**

Section 29<sup>20</sup> subsection (1) says that everyone has the right to basic education and basic adult education and further education which the state must reasonably progressively make available and accessible. The reason why this provision has been specifically

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<sup>19</sup> Section 36 of the Constitution of the Republic of South Africa, 1996.

<sup>20</sup> Section 29 of the Constitution of the Republic of South Africa, 1996.

included in the bill of rights is that the apartheid system used education as one of the many tools of discriminating against people. Cole<sup>21</sup> explains how inequalities were created in education along gender through apartheid legislation so as to give inferior education if any to girls. This was achieved in education by separating educational institutions and their standards of learning creating inequalities along gender lines. Similarly the apartheid government applied the same approach to people along race, disability and other areas of difference in society through legislation that separated these groups as well. In the case of disability separate schooling facilities and curriculums were developed.

These inequalities were filtered down to the visually impaired as they had separate institutions at all educational levels with restricted areas of learning. This meant that they were not afforded the opportunity to study in many fields simply because no provisions were made to accommodate them. Brand and Heyns<sup>22</sup> describe education as a fundamental right that has been constitutionally protected in 59 countries and legislated as so in many others. They further indicate that it is of importance because it is the right that enables society to understand all other rights afforded to them such as civil and political rights all of which requires a basic level of education to understand and exercise.

Thus education is of absolute and critical importance in South Africa as we have the majority of our people living in poverty and with little or no education because of the harsh discriminatory laws which deprived them of an education during the years of apartheid. The right to equality for the visually impaired must therefore be

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<sup>21</sup> Cole M, Education Equality and Human rights issues of race, gender, sexuality, special needs and social class, 2000, pages 24-27.

enforced in the provision of access to tertiary education. The skills obtained at this level will help those with visual impairments to live a life of dignity and self sustainability instead of being wholly dependant on others including the state for financial and other support.

To simply place a visually impaired person in a tertiary institution does not provide equality or prevent discrimination against him or her neither would it qualify as real access to education as was intended by section 29<sup>23</sup>. Reiser<sup>24</sup> says that there should be inclusive education meaning that the special needs must be provided for in order to integrate the disabled into the mainstream education environment so as to have one education system for all.

There must be further legislation to provide steps to eradicate the disadvantage one is faced with due to a visual impairment only once the disadvantages are negated will actual equality be achieved. To this end I will discuss the Promotion of Equality and Prevention of Unfair discrimination Act<sup>25</sup> and the Higher Education Act<sup>26</sup> as they serve to show how ineffective current measures by government have been.

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<sup>22</sup> Brand D and Heyns CH, Socio economic rights in South Africa, 2005, page 57.

<sup>23</sup> Section 29 of the Constitution of the Republic of South Africa, 1996.

<sup>24</sup> Reiser R, Implementing Inclusive Education a commonwealth guide to article 24 of the UN convention on disabled persons, illustrated edition, 2008, pages 21-24.

<sup>25</sup> Act 4 of 2000.

<sup>26</sup> Act 101 of 1997.

## **2.4. The Promotion of Equality and Prevention of discrimination Act and The Higher Education Act**

Section 29<sup>27</sup> provides constitutional protection for the right to access to education and section 9<sup>28</sup> provides for equality and protection against unfair discrimination on a list of grounds including disability. To this end legislation must be enacted to promote and protect these rights thus government has passed The Promotion of Equality and Prevention of Discrimination Act<sup>29</sup>. This Act is an attempt to set legislative ground rules which should guide all other legislation as it deals with equality and discrimination on all listed grounds and further provides for a general protection of equality and prevention of unfair discrimination in Section 6<sup>30</sup>

Section 9<sup>31</sup> read with Section 6<sup>32</sup> provides for the promotion of equality and the prevention of unfair discrimination on the grounds of disability including denying or removing from a person with a disability any supporting or enabling facility necessary for their functioning in society, contravening the South African Bureau of Standards code of practice governing environmental accessibility and failing to eliminate obstacles which restrict a person with a disability from full enjoyment of equal opportunities or failing to reasonably accommodate the needs of such persons.

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<sup>27</sup> Section 29 of the Constitution of the Republic of South Africa, 1996.

<sup>28</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>29</sup> Act 4 of 2000.

<sup>30</sup> Section 6 of Act 4 of 2000.

<sup>31</sup> Section 9 of Act 4 of 2000.

<sup>32</sup> Section 6 of Act 4 of 2000.



Section 27<sup>33</sup> requires legislative steps to be taken by ministers in all departments to provide for and monitor the promotion of equality and prevention of discrimination in all spheres of society. It further requires all non governmental bodies, structures and associations to do the same in their interaction with the public. All these provisions give flesh to the constitution and provide for more regulation and legislation to give effect to the rights of people including the visually impaired.

The Higher Education Act<sup>34</sup> fails to provide any specific or general protection for the visually impaired and this despite its preamble<sup>35</sup> states clearly that it should promote steps and methods to redress past discrimination and promote better education at these institutions which are formed and regulated and funded in terms of the Act itself.

It is submitted thus that the minister of education should act in terms of the obligations created by the Promotion of equality and prevention of discrimination Act<sup>36</sup> to steer higher education towards achieving equality and non discrimination for the visually impaired at tertiary institutions.

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<sup>33</sup> Section 27 of Act 4 of 2000.

<sup>34</sup> Act 101 of 1997.

<sup>35</sup> Act 101 of 1997.

## 2.5. Conclusion

This chapter in conclusion explained the meaning of constitutional provisions in the bill of rights relating to equality and non discrimination and education. It is submitted that one should apply section 9<sup>37</sup> by determining whether or not there is a differentiation between persons and if such differentiation is discriminatory and further determine if it is unfair. It is discriminatory if it falls within the listed grounds. it is automatically unfair and if not it should be proved.

It is further submitted that substantive or real equality is needed to prevent unfair discrimination meaning people should be treated differently in order to change their circumstances that lead to inequalities being imposed on them.

The right to education is one of such importance that without it one would not enjoy any other right provided for in the bill of rights.<sup>38</sup> The visually impaired are given constitutional protection of their rights against discrimination and their right to education as Section 29<sup>39</sup> does not exclude persons with disabilities from the right to access to education.

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<sup>36</sup> Act 4 of 2000.

<sup>37</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>38</sup> Chapter 2 of the Constitution of the Republic of South Africa, 1996.

The Promotion of Equality and Prevention of unfair Discrimination Act<sup>40</sup> seeks to ensure that all legislation and policies of the state are guided towards creating equality and non discrimination with specific reference to the duties of ministers. It also imposes an obligation on individuals to act in accordance with the promotion of equality and prevention of unfair discrimination.

The Higher Education Act<sup>41</sup> only sets out how tertiary institutions should be structured, management is appointed and how they are funded. It fails to give actual direction to policy and regulatory measures needed to promote equality and non discrimination at these institutions.



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<sup>39</sup> Section 29 of the Constitution of the Republic of South Africa, 1996.

<sup>40</sup> Act 4 of 2000.

<sup>41</sup> Act 101 of 1997.

## CHAPTER 3

### THE CONSTITUTIONAL COURTS APPROACH TO EQUALITY AND NON DISCRIMINATION

#### 3.1. Introduction

The Constitution in terms of Section 167<sup>42</sup> provides for the jurisdiction, functioning and establishment of the Constitutional Court. This Court is the highest court in the land and is the supreme institution in relation to constitutional issues and disputes. This sentiment is also suggested by Currie and De Waal<sup>43</sup> as they recognise the Constitutional Court as the Supreme Court on constitutional matters. As the guardian of the constitutional system the Court has made several decisions that have given our jurisprudence some sort of direction so as to guide the country into a particular path to achieving and sustaining democracy, freedom and equality.

Section 9 of the Constitution places non discrimination at the centre of equality meaning that to prove inequality one must show unfair discrimination of some or other sort. This is expressed also by De Vos<sup>44</sup> as he says that the court has focused on non discrimination to ensure that the equality concept is not empty and vague but rather structured.

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<sup>42</sup> Section 167 of the Constitution of the Republic of South Africa, 1996, Act, Act 5 of 2005).

<sup>43</sup> Currie I, De Waal J, Bill of rights handbook, 5<sup>th</sup> edition, 2005, page 103.

<sup>44</sup> De Vos P, *Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court*, THRHR, vol 63 of 2000, pages 2-3.

The Court has developed jurisprudence on several inter related rights, important for the purpose of this paper, being equality and non discrimination and human dignity on issues relating to race, gender and other listed grounds.

Equality and non discrimination as discussed in earlier chapters falls under Section 9<sup>45</sup> of the Constitution which provides for protection against unfair discrimination. Human dignity is provided for in Section 10<sup>46</sup> of the Constitution affording everyone with inherent dignity.

Chaskalson<sup>47</sup> aid that dignity is not a privilege afforded by the state but rather an attribute of life. This means that simply by being born a human being one has dignity and so it should be protected. This also seems to suggest that dignity should be at the centre or be the core value of any other right.

To this end I will now discuss several cases heard and decided by the Constitutional Court in which these rights were discussed and the Court gave direction as to how it would approach the task of protecting these rights. This should give us an idea of how the Court will apply its mind to the issue of the right to education for the visually impaired at tertiary level.

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<sup>45</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>46</sup> Section 10 of the Constitution of the Republic of South Africa, 1996.

### 3.2. Discussion of case law

The Constitutional Court has adopted a structured and consistent approach towards the application and interpretation of the rights in the bill of rights. South Africa's constitution was developed out of a political settlement between the apartheid government and the liberation movements and other stakeholders in the country. This document was drafted with the mindset of never allowing the historic position of inequality and discrimination to prevail. Thus the Court has tried to act in a contextual sense so as to apply meaning to the rights in terms of the historical norm that existed under apartheid. This is to ensure that interpretation of the bill of rights rectifies past injustice. This is also the view of De Vos<sup>48</sup> when he says that the Courts contextual approach is based on past disadvantage to certain parties.

In the matter of Hoffman vs South African Airways 2000 (11) BCLR 121 1(CC)<sup>49</sup> the appellant was refused employment as a cabin attendant because of his Human Immune Virus or HIV status. The respondent argued that he failed the medical test as he was HIV positive and this posed a risk to the safety and health of other crew and passengers.

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<sup>47</sup> Chaskalson A, *Human dignity as a fundamental value of our constitution*, SAJHR, 2000, pages 191- 193.

<sup>48</sup> De Vos P, *Equality for all? A critical analysis of equality jurisprudence of the Constitutional Court*, THRHR, vol 63 of 2000, pages 4-6.

<sup>49</sup> Hoffman vs South African Airways 2000 (11) BCLR1211 (CC).

They also argued that HIV positive persons could not take yellow fever vaccinations as it would make them sick. They had a policy of not employing anyone who is HIV positive. Mr. Hoffman claimed it violated his rights to equality, dignity and fair labour practice and thus was discriminatory. Similarly the visually impaired would have the right to equality and dignity meaning that any exclusion or deprivation of education would be discriminatory.

The Constitutional Court had to deal with the issues of discrimination and dignity. Ngcobo J<sup>50</sup> said that equality must be tested on the grounds of discrimination saying if discrimination is proved one must show it to be unfair. The Court found that to exclude all HIV positive persons from being cabin attendants irrespective of their level of illness was discriminative and unfair. In the same way it could be argued that to deny the visually impaired student tertiary education would be discriminatory and unfair. This is so as disability is a listed ground in Section 9<sup>51</sup> and therefore is automatically unfair.

The Court found that all persons must have their dignity protected and referred to the case of President of the Republic of South Africa vs Hugo 1997 (4) BCLR 708 (CC) in which the Court found there that all human beings are equal with equal dignity.<sup>52</sup> This shows a consistent approach to dignity and the importance the Court places on it. In regard to the impact or effect the discrimination against the fathers who did not get the pardon like Mr. Hugo was that it denied them release only because they men in other words the discrimination suffered was based on their gender.

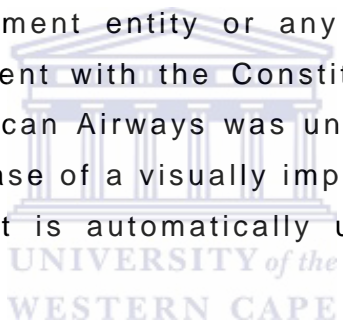
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<sup>50</sup> Hoffman vs South African Airways 2000 (11) BCLR 1211 (CC), para 23.

<sup>51</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

The visually impaired student who is denied an education purely on his or her disability faces the exact same problem of discrimination. However for the visually impaired such discrimination would be unfair.

The Court thus places human dignity at the centre of equality and other rights in a manner that makes dignity not just a right but a fundamental value without which nothing else is possible. In the case of Mr. Hoffman the court found it not only unfairly discriminative but a violation of his right to dignity and thus declared the action as unconstitutional. Ngcobo J<sup>53</sup> said that the policies of any government entity or any other body private or public must be consistent with the Constitution and in this case the policy of South African Airways was unconstitutional. It could be argued that in the case of a visually impaired student that there is discrimination and it is automatically unfair as it is a listed ground of Section 9<sup>54</sup>



In the case of *Jordan and Others vs State and Others* 2002 (11) BCLR 117 (CC)<sup>55</sup>. The question of constitutionality of the states criminalizing the act of giving sexual favours for reward was tested. The contention was that it indirectly discriminated against the prostitute on the basis of gender as most of them are women. The Court had to deal with the issue of equality and human dignity as well as the right to economic trade and privacy. However for the purpose of this paper I will only look at the Courts finding on the issue of equality and dignity.

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<sup>52</sup>Hoffman vs South African Airways 2000 (11) BCLR 1211 (CC){ President of the Republic of South Africa v Hugo 1997 (4) (CC) BCLR 708, para 41}.

<sup>53</sup> Hoffman vs South African Airways 2000 (11) BCLR 1211 (CC) , para 36.

<sup>54</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>55</sup> Jordan and others vs State and others 2002 (11) BCLR 117 (CC).



Ngcobo J<sup>56</sup> said that it was not unfair discrimination to only criminalize being a sex worker as the purchaser of the sex would be liable under another act. He also argued that it is gender neutral and thus the provisions criminalizing the behaviour were not discriminatory on the basis of gender. In a separate judgment Justices Sachs and O'Regan<sup>57</sup> argued that it is common cause that mostly women are prostitutes and mostly men are the customers, thus to directly criminalize the action of the prostitute and not the customer was discriminatory on the basis of gender equality. They further state that it was irrelevant that another law criminalized the act of seeking a sex worker as the provisions perpetuated the stereotype that it is socially acceptable for the man to seek sex from a woman for reward but frowned upon if the prostitute gives the sex for reward.

In the end the Court dismissed the appeal however they indicate clearly that indirect discrimination is not fair and clearly affects the right to dignity. Similarly in the matter of Minister of Finance vs Van Heerden 2004 (11) BCLR 1125 (CC)<sup>58</sup> the court had to deal with the question of whether different provision for pension benefits for pre and post 1994 parliamentarians was unfair discrimination on the basis of race. The Court found that equality and non discrimination are important values in the achieving of democracy.<sup>59</sup>

Whilst there are no direct rules and laws stating that the visually impaired cannot attend tertiary institutions the indirect action of not providing for their needs creates an indirect exclusion which is in turn discriminatory and unfair. The achieving of equality and non discrimination for the visually impaired would indeed be a step

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<sup>56</sup> Jordan and others vs State and others 2002 (11) BCLR 117 (CC), para 9-12.

<sup>57</sup> Jordan and others vs State and others 2002 (11) BCLR 117 (CC), para 58-66.

<sup>58</sup> Minister of Finance vs Van Heerden 2004 (11) BCLR 1125 (CC), para 8-12.

<sup>59</sup> Minister of Finance vs Van Heerden 2004 (11) BCLR 1125(CC), para 22-25.

in the direction of democracy and thus to deny the visually impaired tertiary education simply on the grounds of disability is a violation of the fundamental values of democracy<sup>60</sup>. The Courts approach to equality and dignity in that they relate it to non discrimination is a view also purported by Albertyn and Golblatt<sup>61</sup>

Moseneke J<sup>62</sup> took the view that one must interpret Section 9 of the Constitution in a historical context and thus consider the disadvantage of the past and its effects in order to promote a socially just society. This means that we must determine if the person affected is one who suffered a disadvantage in the past and if so it is unfair and unconstitutional. Steps should be taken to rectify the disadvantage and not to disadvantage the previously advantaged.

The Court found that affirmative action is derived from the equality clause and is to redress past inequalities hence it is an integral part of our equality jurisprudence.<sup>63</sup> The Court thus found that no unfair discrimination occurred as the respondent was still a part of a privileged group who was better off than the majority of the parliamentarians who benefited from the changes to the pension fund scheme. Relating this argument to that of the visually impaired one would state that affirmative action would be grounds to give access to education for the visually impaired and this would be in line with the historical approach of the Court to rectify past injustices.

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<sup>60</sup> Smith N, *Affirmative Action under the new Constitution*, SAJHR, vol 1. 1995, pages 84-101.

<sup>61</sup> Albertyn C and Goldblatt B, *Facing the challenges of transformation difficulties in development of indigenous jurisprudence on equality*, SAJHR vol 14 of 1998, pages 248-232.

<sup>62</sup> Minister of Finance vs Van Heerden 2004 (11) BCLR 1125 (CC), para 26-28.

Affirmative action should not be used to affirm the category of persons such as race, gender and disability but rather to affirm the position of the person or group to negate the disadvantage faced. In this case that of the visually impaired student's it relates to his right to education and protection of his right to equality and non discrimination.

In the matter of *Volks vs Robinson* 2005 (5) BCLR 446 (CC)<sup>64</sup> the Court dealt with a claim that it was unconstitutional to only provide protection for surviving spouses and not for life partners of heterosexual relationships. The Court in its wisdom found it not unfair as the provisions of the relevant Act applied only to people in a marriage; it further stated that the legislature should provide for protection for such persons especially since female partners tend to be most vulnerable in these circumstances.

In light of the decisions of the Constitutional Court it is necessary for the purpose of this paper to discuss how the Courts approach to applying the right to equality and human dignity in pursuit of the right to education for the visually impaired.

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<sup>63</sup> *Minister of Finance vs Van Heerden* 2004 (11) BCLR 1125 (CC), para 29-30.

<sup>64</sup> *Volks vs Robinson* 2005 (5) BCLR 446 (CC).

### **3.3 Application of the constitutional courts approach to equality and dignity to the interest of the visually impaired**

It is apparent that our Court has taken the position of viewing the interests in question in the light of our past history of discrimination and inequality. The Court has thus in all instances looked at whether the interested party was previously disadvantaged and if so is it unfair to continue such disadvantage. Human dignity is a fundamental value which is of such importance it in fact is what makes us human, that is we have dignity inherently. This concept is widely accepted by the Court through its judgments including in the cases of *Volks vs Robinson*<sup>65</sup> and *Jordan and Others vs State and Others*<sup>66</sup> where the court indicated that dignity is central to the right to equality. This is also supported by Fagan<sup>67</sup>

The test used in *Harksen vs Lane and Others*<sup>68</sup> is whether there is a differentiation that is discriminatory and if so is it unfair. This is how the equality provision is applied. It is discrimination if it impairs the dignity of the person affected. *De Vos*<sup>69</sup> argues that the Court seems to apply a contextual approach based on our history and the dignity of a person is at the centre of the right to equality.

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<sup>65</sup> *Volks vs Robinson* 2005 (5) BCLR 446 (CC).

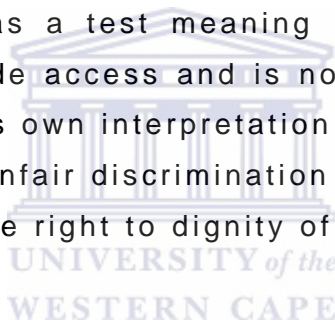
<sup>66</sup> *Jordan and others vs State and others* 2002 (11) BCLR 17 (CC).

<sup>67</sup> Fagan A, *Dignity and unfair discrimination a value misplaced and a right misunderstood*, SAJHR vol 14 of 1998, page 220.

<sup>68</sup> *Harksen vs Lane and Others* 1997 (1) BCLR 1489.

The Court also looks at the idea of affirmative action as a tool to give purpose or effect to the right against non discrimination as was applied in the case of Minister of Finance vs Van Heerden<sup>70</sup>.

The right to equality and non discrimination for the visually impaired in tertiary education would in my view be applied by the Court in a historical context as the visually impaired were a disadvantaged group in society and in many ways still are. The Court may argue that to deny a visually impaired applicant access to a university would be discriminatory. The question would then arise if it would be unfair. This could be determined by using reasonable measures as a test meaning if reasonable measures could be used to provide access and is not done then it would be unfair. Using the Courts own interpretation that dignity of a person is removed if there is unfair discrimination then it would seem that such denial infringes the right to dignity of the visually impaired in society.



### **3.4 Conclusion**

In conclusion of this chapter I would submit that the Constitutional Court has adopted a contextual approach that ensures substantive equality. This approach is one based on a historical background of oppression and discrimination and only if one proves to the Court that the discrimination is based on such a historical ground will one succeed with a claim in the Court.

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<sup>69</sup> De Vos P, *Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court*, THRHR, vol 63 of 2000, para 5-6.

<sup>70</sup> Minister of Finance vs Van Heerden 2004 (11) BCLR 1125 (CC).

However I would believe that the Court is one that is not fixed or rigid in such a manner that it would apply its test strictly meaning if one shows some link to the historical context whether directly or indirectly the court may extend its test to allow a broader meaning of equality.

Thus the Court may in future if circumstances would suggest, like in the case of the visually impaired persons right to education at tertiary institutions, the Court may extend the meaning or its test to ensure reasonable steps or measures are taken to negate the inequality that go beyond the bare meaning of right to education.



## CHAPTER 4

### PROBLEMS FACED BY THE VISUALLY IMPAIRED IN TERTIARY EDUCATION ENVIRONMENTS

#### 4.1. Introduction

The right to equality and non discrimination is one so closely related to human dignity that once cannot operate without the other. It is widely accepted in South Africa that human dignity is the core of all other rights including equality and non discrimination. This was first established in the case of President of the Republic of .South Africa vs Hugo<sup>71</sup> in which the Court said that the right to dignity was core to the right to equality. The intention should always be to promote dignity of a person and this can only be done by ensuring equality and freedom from discrimination.<sup>72</sup>

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Tertiary education has become an integral part of the functioning of society which has made it almost a necessity to study at an institution to attain skills which will make one a productive member of society. The visually impaired find it particularly difficult to access these institutions. This leaves them stranded without any means to economic freedom and a decent life of dignity. The African Charter on Human and Peoples Rights<sup>73</sup> in article 5 provides for, the recognition of the right to dignity as a human being. Section 10<sup>74</sup> of the Constitution provides for the right to inherent dignity.

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<sup>71</sup> President of the Republic of South Africa vs Hugo 1997 (4) (CC) BCLR 708.

<sup>72</sup> De Vos P, *Equality for all? A critical analysis of equality jurisprudence of the Constitutional Court*, THRHR, vol 63 of 2000, pages 3-4.

<sup>73</sup> African Charter on Human and Peoples rights, Article 5.

<sup>74</sup> Section 10 of the Constitution of the Republic of South Africa, 1996.

The fact is that without an education one cannot achieve a life of dignity thus changes of the current system of education in tertiary institutions in South Africa are needed. Thus the core of the education system should be to promote dignity of the students. In order to do this I will look at the main issues facing the visually impaired at tertiary institutions countrywide. I will also look at the impact of not protecting the rights of the visually impaired against inequality and discrimination at tertiary level. In this regard we must look at access to the institution and the type of education offered.

#### **4.2. Inadequacy of Access to tertiary Education**

The main problem is in fact access to tertiary education. This arises due to the educational system of the institutions in that they treat the visually impaired as the problem and decide it best to exclude them from most fields and in some cases from any field of study at the institution. Reiser<sup>75</sup> describes the education system as one that segregates the disabled having separate institutions for them or in other cases the use of integration in which the disabled is forced to fit in with education style of the institution irrespective of his or her special needs.

It is argued by Reiser<sup>76</sup> that the different treatment of the disabled comes from the belief that they are medically unfit and thus must be isolated from everyone else by having separate schools and specialised educators. This leads to a deep form of instilled

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<sup>75</sup> Reiser R, Implementing Inclusive education a commonwealth guide to implementing article 24 of the UN Convention on the rights of people with disabilities, illustrated edition 2008, pages 22-26.

<sup>76</sup> Reiser R, Implementing inclusive education a commonwealth guide to implementing article 24 of the UN convention on the rights of people with disabilities, illustrated edition, 2008, pages 27-32.



discrimination against people with disabilities by society as a whole. In the context of this paper the visually impaired are discriminated against by fellow students, lecturers and general staff of the institutions and this attitude spills over into the greater society as a learned behaviour.

This occurs with the lecturer not willing to assist students to gain access to their readers or other materials, the student body isolating and excluding the visually impaired from activities on the campus and a generally negative attitude by staff who are unwilling to assist students to even deal with use of the internet for research as the facilities do not provide for the visually impaired. The type of discrimination faced by the disabled is also highlighted by Degener and Dereese<sup>77</sup> and also by Reiser<sup>78</sup>.

This leads to severe discrimination as the visually impaired student is seen and treated as incapable, unintelligent and mentally retarded. The discrimination stems from the indifferent attitude of the lecturing staff towards the student and like a domino effect students do the same. They are ridiculed and belittled on a regular basis something that impacts on their dignity and self worth. They are often left without any assistance regarding mobility, access to materials and face insult and attack by other students who are not only ignorant of what it is to be visually impaired but due to historical cultural fears and beliefs that these visually impaired people are witches and demons in some instances.

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<sup>77</sup> Degener T and Dereese Y, Human rights and Disabled persons, Illustrated edition, 1995, pages 40- 44.

<sup>78</sup> Reiser R, Implementing inclusive education a commonwealth guide to implementing article 24 of the UN charter on the rights of people with disabilities, illustrated edition, 2008, pages 131- 135.

So not only are they denied entry to an institution if they are allowed to attend they face mass discrimination. They also have to contend with lack of access to necessary materials such as notes and textbooks or reading materials. Lecturers are not properly trained to teach or give instruction in a classroom with visually impaired student. This further deprives the student of proper access to an education.

A complete renewal in the approach to education is required as segregation leads to absolute inequality and discrimination as well as isolation of the visually impaired and integration only puts the visually impaired individual into an environment that does not assist him in his learning<sup>79</sup>. In South Africa we have a segregated schooling system in which special schools are used to educate the disabled which is different from that of mainstream schooling and in tertiary education a system of integration is used. This compounds the problem as the disabled student is separated initially and then forced to integrate without the support needed he is bound to fail.

The International Convention on Social Economic and Cultural Rights<sup>80</sup> in article 13 declares that the right to education cannot be denied to any individual as it promotes his self worth and human dignity value of his life. Similarly the African Charter on Human and Peoples Rights<sup>81</sup> provides protection for the right to education. Section 29<sup>82</sup> provides for the right to access to education. These are all indications of the importance of education

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<sup>79</sup> Reiser R, implementing inclusive education a commonwealth guide to implementing article 24 of the UN convention on the rights of people with disabilities, illustrated edition 2008, pages 22-261.

<sup>80</sup> article 13 of the ICSECR of 1966.

<sup>81</sup> African Charter on Human and Peoples Rights, article 17.

<sup>82</sup> Section 29 of the Constitution of the Republic of South Africa, 1996.

in the development of not only society but the individual's right to dignity and equality.

Thus lack of access to education for the visually impaired be it relation to access to study or materials and even teaching methods, reasonable accommodation, easy mobility and mere entry to study leads to an infringement of the right to equality and non discrimination for the visually impaired. In light of this I will discuss the effects of not protecting the visually impaired from inequality and discrimination in tertiary education centres.

#### **4.3. The effect of non protection of the right to equality and non discrimination**

Equality and non discrimination is a fundamental right which is recognised as core to human dignity in South Africa especially in the light of the history of Apartheid.<sup>83</sup> For the visually impaired the effects of discrimination and unequal treatment go far beyond deprivation of access to education. Society and communities have in the past and still do segregate and ill treat the visually impaired<sup>84</sup>

For there to be a sense of dignity there must be a sense of belonging in that one must feel as if one belongs to the community. We find that in South Africa from a young age separate the visually impaired with separate schooling and special care centre's. Such segregation leaves them unable to interact with the rest of society creating low self confidence and coupled with little education they find difficulty in obtaining employment.

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<sup>83</sup> Freedman S, *Understanding the Right to Equality*, 1998 SAJHR,243-248.

This leads to the visually impaired becoming dependant on state aid in the form of grants and other limited forms of social assistance by the state. Few if any ever study at tertiary institutions as the environment does not provide for their needs.

It was argued by De Vos<sup>85</sup> that even the constitutional court must approach the rights in the bill of rights with a view of the context of past history. In the case of the visually impaired therefore we must approach their right to equality and non discrimination in context of the oppression and discrimination they faced during apartheid and in many instances still do today. It is demoralising and dehumanising to be treated as inferior and shunned aside by society.

Thus if they are given the opportunity to access inclusive education at tertiary institution where they could gain skills to ensure they are able to obtain work and participate in society then the rights would be accomplished<sup>86</sup>. It is clear then that the impact of discrimination and unequal treatment results in gross deprivation of the right to an education for the visually impaired. A quality education is also important and this is achieved by creating inclusive education for the visually impaired. It also influences society and communities to think unfavourably about the visually impaired and thus they are treated with no regard for their dignity and they lose their self worth.

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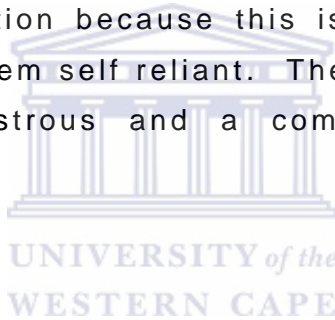
<sup>84</sup> Reiser R, *Implementing inclusive education a commonwealth guide to implementing article 24 of the UN convention on rights for people with disabilities*, illustrated edition, 2008, pages 27-30.

<sup>85</sup> De Vos P, *Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court* THRHR, vol 63 of 2000, pages 4-7.

<sup>86</sup> Reiser r, *Implementing inclusive education a commonwealth guide to implementing article 24 of the UN convention on the rights of people with disabilities*, illustrated edition, 2008, pages 27-30.

The bill of rights in section 9<sup>87</sup> provides expressly for the right to equality and non discrimination for all citizens. This was intended to protect especially the most vulnerable in society such as the young, elderly, poor and disabled. The visually impaired have been particularly excluded group in South Africa in some ways forgotten peoples left aside in the hope that nobody notices and maybe they would just go away.

The right to equality and non discrimination can be used as a tool to save the visually impaired people and protect them. It must be used especially in providing inclusive education for them at the level of tertiary education because this is real skills are gained and this would make them self reliant. The effect of denying such rights would be disastrous and a complete violation of the constitution.



#### **4.4. Conclusion**

The provision of access to tertiary education is important in the achievement of equality and non discrimination in tertiary education for the visually impaired which would lead to a life of dignity. Access is not only giving them entry to the institution but more wider steps to provide adequate lecturing structure, appropriate format of materials, proper accommodation and easy mobility around the institution.

This requires an inclusive education system which should be offered as national system in all institutions. The failure to cover these shortfalls in the current scheme of things will inevitably prolong and may even worsen the state of inequality and gross discrimination faced by visually impaired students at tertiary level.

The obligation is upon the state and the education institutions through Section 9<sup>87</sup> and Section 10<sup>89</sup> as well as Section 29<sup>90</sup> of the Constitution. There is further obligation in terms of the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>91</sup>



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<sup>87</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>88</sup> Section 9 of the constitution of the Republic of South Africa, 1996.

<sup>89</sup> Section 10 of the Constitution of the Republic of South Africa, 1996.

<sup>90</sup> Section 29 of the Constitution of the Republic of South Africa, 1996.

<sup>91</sup> Act 4 of 2000.

## CHAPTER 5

### TOWARDS AN EFFECTIVE AND PRACTICAL SYSTEM FOR THE PROVISION OF EQUAL TREATMENT AND NON DISCRIMINATORY EDUCATION FOR THE VISUALLY IMPAIRED

#### 5.1. Introduction

The promotion of the purpose of the Constitution and all that it is meant to achieve is an obligation on the state. The civil society and community should also abide by the principles of the bill of rights must engage with the government through processes of consultation, protest and the vote to ensure the protection of the rights in the bill of rights afforded to them. It is however the state which is tasked with the creation of the laws and policies needed to advance the constitutional provisions and direct the behaviour of society. This is supported by the suggestions of Currie and De Waal <sup>92</sup> when they state that there is a clear separation of powers and the law making powers rest with parliament.

Section 39<sup>93</sup> states that all legislation must be consistent with the provisions of the constitution and promote equality, justice and fairness in an open democratic society. This provides protection over the state by restricting its legislative powers so that they do not stray from the directives and objects of the constitution. In order to promote the right to equality and non discrimination and access to education at tertiary level for the visually impaired the legislature must develop the law and guide policy in the desired manner.

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<sup>92</sup> Currie I and De Waal J, Bill of rights handbook, 5<sup>th</sup> edition, 2005, pages 18-22.

<sup>93</sup> Section 39 of the Constitution of the Republic of South Africa, 1996.

Through the medium of legislation and policy a life of dignity could be gained for the visually impaired in that they would be given access to tertiary education which is inclusive in nature and protection in turn of their right to equality and non discrimination. This would empower them and enable them to participate in society socially and economically. To this end I will discuss the necessary legislative and policy changes needed.

## **5.2. Legislative and policy changes required**

The current legislation on higher education known as the Higher Education Act<sup>94</sup> does not provide any directive as to how the rights of the disabled should be protected and their educational needs provided for. It simply states how the senate and other structures are formed.<sup>95</sup> The system is based on integration which requires the visually impaired student to enter the existing environment which is not user friendly in terms of his or her needs.

The discrimination faced is one of the degrading attitudes of the instructions population, lack of access to facilities, materials and so forth. All of these things affects the dignity of the student and impedes his learning and development. The visually impaired student who does gain entry to the institution struggles. Very few if any graduate. This leaves them with little skill and they find difficulty in obtaining employment. The visually impaired are thus left to be dependent on the state for social aid and the communities disregard them.

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<sup>94</sup> Act 101 of 1997.

<sup>95</sup> Section 37 of Act 101 of 1997.



South Africa has a political system in which the ruling party is elected on its policies and ideology and these policies are carried forward by parliament when they pass legislation. Whilst the ruling party has a general policy to provide education for all citizens the details of how this is done is left in the hands of parliament. The Higher education Act<sup>96</sup> was intended to provide the framework for tertiary education in South Africa.

Legislation and policy should be directed at social justice instructs in this case the needs of the visually impaired. This would make the legislation more effective in achieving the goals of the constitution. Guto<sup>97</sup> suggests this equality, fairness and justice can only be obtained through social justice legislation. This means that the legislation must be changed to have a more social outlook or effect. In the case of education for the visually impaired the legislation must be directed at making an inclusive education system and institutions.

The idea of inclusive education promoted through legislation is also offered by Reiser<sup>98</sup> when he says that inclusive education should be the target of legislation and policy and must be properly implemented to be effective. The aim is to provide equality and non discrimination as well as access to education for the visually impaired thus it stands to reason that the changes to the law and policy must give effect to aims.

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<sup>96</sup> Act 101 of 1997.

<sup>97</sup> Guto B, S, Equality and non discrimination in South Africa: Political economy of law and banking, illustrated edition, 2001, pages 7-9.

<sup>98</sup> Reiser R, Implementing inclusive education a commonwealth guide to implementing article 24 of the UN convention on the rights of people with disabilities, illustrated edition, 2008, pages 49-50.

It should be approached first by looking at the legislation in this case the Higher Education Act which in Section 37<sup>99</sup> gives the senate of the institution authority to determine admissions policies. While this is in line with the idea of academic autonomy there should be some directive by the act on ensuring that admissions are in line with the concept of equality as purported by the constitution.

In particular there should be attached to the authority to determine admissions policies the obligation to formulate their policy in terms of inclusive education goals.

This would ensure that facilities, materials and lecturing methods are adapted to accommodate the visually impaired student. As it stands currently the system works on the integration of the visually impaired student into the existing environment in which it is almost impossible for him or her to survive. Reiser<sup>100</sup> suggests that integration seeks only to place the disabled in an environment that does not provide for his or her needs thus it places the problem with the student rather than the environment. In such a system the visually impaired student will never be able to cope.

Instead the legislation should require institutions to be more inclusive and in this regard also require retraining of lecturers and in fact all the institutions members.

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<sup>99</sup> Section 37 of Act 101 of 1997.

Lecturers must become aware that a visually impaired student cannot see notes written on a board or viewed on a projector and even further they should be taught to describe the diagrams and specify what they are talking about for example if looking at a family tree the lecturer should refer to the persons a person “A” and “B” rather than” this” a and “that”

These simple changes would give the student real access to education in the classroom and if legislation requires the institution to ensure that all staff are given the necessary training in this regard the lives of the visually impaired students would be greatly eased.

It may well be that many fear that to create inclusive education environment would be to difficult and impact on the learning of other students in a negative manner however these fears can be traced back to the ignorance of what it means to be visually impaired or disabled in general<sup>101</sup>. Society has separated itself from such people for so long that many perceptions which are in large false have arisen. In fact inclusive education will not only be applicable to the visually impaired but also for bridging the gap between the poor student who has never had access to computer and one who in the higher financial bracket as just one example.

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<sup>100</sup> Reiser R, Implementing inclusive education commonwealth guide to implementing article 24 of the UN convention on the rights of people with disabilities, illustrated edition, 2008, pages 22-32.

<sup>101</sup> Reiser R, Implementing Inclusive education a commonwealth guide to implementing article 24 of the UN convention on the rights of people with disabilities, illustrated edition,2008, pages 27-30.

In this regard policy considerations become very important in attaining inclusive education. South Africa has such a diverse population with a broad mix of cultures, class groups, races and of course the disabled who themselves are divided into mentally and physically challenged groups. Policy should be driven by the institutions itself as governments have a short life span of just five years and so tend to have very vague and broad policy documents around which they function.

In other words government has broad policy that is guided by political ideology for example to provide education for all. This may seem reasonable however it usually entails broad programs to enable access and does not deal with specific groups and needs.

This is because governments are elected every five years and each administration may vary the policies of the other and in some cases replaces it as a whole. This leads to inconsistency and half hearted plans so rather the education institutions themselves draw up the policy for inclusive education so as to have a more ongoing process of realising the equality and non discrimination for the visually impaired in education.

However institutions will always be in existence and are the guardians of academic development and in fact determine the workforce and areas of expertise the society will have in future. Degener and Dereese<sup>102</sup> propose the idea of an equalisation of opportunities for the disabled. This should be the approach of policies at institutions to be inclusive so as to create an equal opportunity for the visually impaired student to learn and compete with his peers on an equal footing.

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<sup>102</sup> Degener T and Dereese K, Y, Human rights and disabled persons, illustrated edition, 1995, pages 290-294.

This would give him a fair chance as he would have been taught with the same level of instruction, had access to the same materials and interacted with the lecturer and fellow students in the same way as everyone else.

The next issue is how all of this and other steps could realise a life of dignity for the visually impaired as this is the ultimate aim and desire of the constitution to uphold the dignity of the individual as dignity is the core of all human rights<sup>103</sup>.

### **5.3. Effective realisation of a life of dignity for the visually impaired**

The inherent right to dignity is one which is protected by Section 10<sup>104</sup> of the Constitution. The right to human dignity is said to be the core of all other fundamental rights<sup>105</sup>. It was also confirmed by De Vos<sup>106</sup> that our constitutional court has placed human dignity at the centre of the right to equality. This means that without dignity there can be no equality. The achievement of equality and freedom from discrimination by society can be attained by the visually impaired through education and access to education.

Education is the key to gaining and enforcing ones human rights as it is only those who are even aware that they have these rights who can enforce and enjoy them<sup>107</sup>.

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<sup>103</sup> De Vos P, *Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court*, THRHR vol 63 of 2000, pages 4-6.

<sup>104</sup> Section 10 of the Constitution of the Republic of South Africa, 1996.

<sup>105</sup> Chaskalson A, *Human dignity a fundamental value of our Constitution*, SAJHR, 2000.

<sup>106</sup> De Vos P, *Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court* THRHR, vol 63 of 2000, pages 4-5.

It stands to reason then that education is the medium through which the visually impaired may achieve equality and non discrimination as well as a life of dignity. Section 9<sup>108</sup> together with Section 6<sup>109</sup> of the Promotion of Equality and Prevention of Unfair Discrimination Act provides a framework for the disabled to live a life of comfort and not to be deprived or denied any support or assertive devices he or she may need.

In order to develop the provisions into real and tangible benefits for the visually impaired and other disabled persons a more inclusive education system must be devised to meet the shortcomings of the current system and by investing in changes to the tertiary institutions around the country the government will go a long way in their efforts to promote democracy in South Africa. These changes discussed earlier in this chapter are important not only to make the lives of the visually impaired better but to promote the idea of an open democracy in which all persons can participate in and be a part of.

While this follows on the basis of historical context of rectifying the injustices of apartheid and rightly so, more emphasis should be placed on an inclusive education system that deals with not only past prejudices but more so the current ones facing the visually impaired. After fifteen years of democratic and constitutional rule the landscape of our society has changed somewhat and people from all races, cultural groups fall into different class and other groups so there is a lot more grey areas today.

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<sup>107</sup> Brand D and Heyns CH, Socio economic rights in South Africa, 2005, pages 56-59.

<sup>108</sup>Section 9 of Act 4 of 2000.

This means that while it was clear in the past that black visually impaired persons would have had great disadvantage to white visually impaired persons as an example. In today's South Africa many black people live in the middle and higher income bracket and we have a small but growing poor white population. Thus the needs of the persons in question may vary from person to person. Thus more weight should be placed on the person's current disposition rather than their historic ones if we are to truly be inclusive and equal to all.

Reiser<sup>110</sup>.says inclusive education must be brought about through social legislation and social needs. In light of this I would argue that in a developing country like ours where we are trying to build a more open, democratic and free society social legislation is needed. The social need is to give the visually impaired a life of dignity. The best way to do that is to equip them with skills that enable them to be self reliant and self sufficient, in other words working.

They can obtain these skills through education but only one that affords them equal opportunity to learn and develop. If they are working they are less of a burden to the state and communities in which they live and they would be able to freely participate in social and economic life in the country.

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<sup>109</sup> Section 6 of Act 4 of 2000.

Disability discrimination impacts negatively on access to education and employment<sup>111</sup> thus if you eradicate the discrimination on grounds of disability then you afford the visually impaired a better opportunity to participate in the society and have a more dignified life.

#### **5.4. Conclusion**

In conclusion this chapter sought to give solutions to the plight of the visually impaired in gaining access to tertiary education and protection against discrimination and inequalities in these institutions. The manner in which the visually impaired would have the opportunity for a life of dignity can be created by making inclusive education with additional protection against discrimination at these institutions.

The right to education finds emphasis in Section 29<sup>112</sup> of the Constitution, making education a human right ensures it becomes a central part of humanity. In other words to be human one must have an education. This argument is supported by Brand and Heyns<sup>113</sup> who state that without education a person would not know or even understand his other rights and entitlements.

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<sup>110</sup> Reiser r, Implementing inclusive education a commonwealth guide to implementing article 24 of the UN convention on the rights of people with disabilities, illustrated edition, 2008, pages 30-34.

<sup>111</sup> Vandenhole W, Discrimination and Equality in the view of the UN human rights treaty bodies, 2005, pages 140 -13.

<sup>112</sup> Section 29 of the Constitution of the Republic of South Africa, 1996.

<sup>113</sup> Brand D and Heyns N. H, Socio economic rights in South Africa, 2005, page 57.



It is clear that changes to legislation are needed to advance the right to tertiary education or access thereto for the visually impaired. This is to ensure equal treatment and non discrimination in the standard and type of education they receive as appose to other sighted students. It is only through such changes towards an inclusive education system can they be give a fair chance at a life of dignity and proper skills to participate in the society in which they live be it economically and socially.



## CHAPTER 6

### CONCLUSIONS AND RECOMMENDATIONS

#### 6.1. Introduction

The right to equality and non discrimination has been strongly linked to the right to human dignity. This is evident in the host of international and regional documents providing for such for example the International Convention on Social, Economic and Cultural Rights<sup>114</sup> , The United Nations Convention on the Rights of Persons with Disabilities<sup>115</sup> and the African Charter on Human and Peoples Rights<sup>116</sup>. South Africa has entrenched rights to dignity, non discrimination and equality found in the Constitution<sup>117</sup> Section 29<sup>118</sup> provides for the right to education. This paper sought to look at the right to tertiary education for the visually impaired and the provision of equality and non discrimination therein. In the end all these provisions would lead to a life of dignity for the visually impaired.

The paper drew on the Constitutional Court's approach to equality and non discrimination in relation to dignity on other grounds found in Section 9<sup>119</sup> as well as the current legislation relating to equality and non discrimination and education. In this paper there is a discussion of the problems facing the visually impaired with tertiary education and the effects of non protection for the right to equality and non-discrimination and dignity.

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<sup>114</sup> ECSECR of 1966.

<sup>115</sup> UN Convention on the Rights of People with Disabilities, 2006.

<sup>116</sup> African Charter on Human and People Rights, 1986.

<sup>117</sup> Constitution of the Republic of South Africa, 1006.

<sup>118</sup> Section 29 of the Constitution of the Republic of South Africa, 1996.

This led to discussion on the legislative and policy changes needed and solutions to the lack of equality and non discrimination in tertiary education for the visually impaired.

This chapter will draw conclusions based on the discussion on all the issues in the paper and give recommendations on the way forward in developing equality and non discrimination protection for the visually impaired and advancing the right to dignity.

## **6.2. Conclusions**

The Constitution<sup>120</sup> provides for the right to education and equality and non discrimination as well as dignity. These provisions are fundamental to changing the circumstances of the visually impaired in South Africa. The Promotion of equality and Prevention of Unfair Discrimination Act<sup>121</sup> requires of the state to make provisions through legislation to protect the Constitutional provisions. The Higher Education Act<sup>122</sup> creates the notion of academic autonomy but does not give guidance on policy regarding the disabled in education. The right to education is one of such importance that without it one would not be able to understand and enforce his or her rights<sup>123</sup>. Thus without education the visually impaired would not be able to realise their right to equality and non discrimination and dignity in life.

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<sup>119</sup> Section 9 of the Constitution of the Republic of South Africa, 1996.

<sup>120</sup> The Constitution of the Republic of South Africa, 1996.

<sup>121</sup> Act 4 of 2000.

<sup>122</sup> Act 101 of 1997.

<sup>123</sup> Brand D and Heyns CH, Socio Economic Rights in South Africa, 2005, page 57.

The Constitutional Court has shown in a number of cases such as *Minister of Finance vs Van Heerden*<sup>124</sup> and *Jordan and Others vs State and Others*<sup>125</sup> that the right to equality and non discrimination should be in its view substantive in nature. The Court has adopted an approach of contextual view which looks at the historical position of the person or group in question. However the use of historical background alone is not sufficient. This is because it does not take into account the changes in society over the last fifteen years as the social landscape has changed drastically since the end of apartheid.

The visually impaired have found difficulty in attaining tertiary education. The education system is one of integration which requires the visually impaired student to adapt to the learning environment or simply fail in his attempts to get an education.

De Vos<sup>126</sup> also suggests that the Constitutional Court through its judgments have placed dignity at the centre of equality and non discrimination. The right to education is essential to achieving equality and non discrimination and quality education would ensure a life of dignity. The idea of dignity being the core of all human rights was also expressed by Chaskalson<sup>127</sup>. Without equality and non discrimination the visually impaired cannot achieve dignity.

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<sup>124</sup> *Minister of Finance vs Van Heerden* 2004 (11) BCLR 1125 (CC).

<sup>125</sup> *Jordan and Others vs State and Others* 2002 (11) BCLR 17 (CC)

<sup>126</sup> De Vos P, *Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court*, THRHR vol 63 of 2000.

<sup>127</sup> Chaskalson A, *Human dignity a fundamental value of our Constitution*, SAJHR, 2000.

The reality is that the visually impaired face harsh environments, lack of access to materials, poor teaching or lecturing methods, isolation and separation from their peers amongst others. These problems will persist as long as there is a system of integration and in some cases segregation in institutions. Many of the problems can be easily solved. It is clear that there is a lack of access and in some ways deprivation for the visually impaired in higher education.

South Africa's current legislation on higher education only creates the framework of how universities are structured and formed. It fails to give clear provision for how its policies and plans should be formed and developed. Institutions have academic autonomy with regards to its functioning and policies on admissions, course structure and all other aspects of academic life<sup>128</sup>.

The current legislation and government policy is not detailed enough on issues of education for the visually and the protection of equality and non discrimination and dignity in the area of education. Tertiary institutions as well lack the policies directed at improving the lives of students with visual impairments. The current system seems to fails in creating a life of dignity which is free from inequality and discrimination in education for the visually impaired. In this regard the visually impaired cannot be free to participate in society as they do not get proper education and in turn fail to obtain employment.

### 6.3. Recommendations

This paper sought to discuss the inequality and discrimination facing the visually impaired at tertiary education level and how this impacts on their right to dignity. Equality has been defined by the Constitutional Court as protection of non discrimination. This is evident in its judgments on *Volks vs Robinson*<sup>129</sup> and *President of the Republic of South Africa vs Hugo*<sup>130</sup>. The Court has adopted an approach to these matters of looking at the contextual history which has led to the position of the person or group concerned. This is suggested as well by De Vos<sup>131</sup> as he believes that this is an appropriate measure by the Court. I would submit that whilst the contextual basis may be useful in guiding the Court it cannot be the only means. This is because we have had fifteen years of democracy and the social and economic landscape has changed and individual's circumstances vary significantly from the past.

The Court should therefore take into consideration the current disadvantage imposed upon the person or group in question. In this case the Court should use the contextual approach to determine if the circumstances of the person have changed since the introduction of democracy. If the individual is still disadvantaged or discriminated against steps should be taken to remedy the situation. In the case of the visually impaired student in a tertiary environment he still faces inequalities and discrimination and it impacts on his dignity.

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<sup>128</sup> Section 37 of Act 101 of 1997

<sup>129</sup> *Volks vs Robinson* 2005 (5) BCLR 446 (CC)

<sup>130</sup> *President of the Republic of South Africa vs Hugo* 1997 (4) BCLR 708 (CC)

<sup>131</sup> De Vos P, *Equality for all? A critical analysis of the equality jurisprudence of the Constitutional Court*, THRHR, vol 63 of 2000.

The right to education must be viewed by the Court in light of inclusive education which is the only way to ensure equality and non discrimination and dignity.

The legislation must be enhanced to direct how policy of tertiary institutions should be derived.<sup>132</sup> This means that it should require a policy of inclusive education, a system which modifies the environment to enable the visually impaired student to compete on an equal footing, the actual manner in which it is achieved is in the hands of the institutions as their policy will be determined in accordance with its means. The legislation would thus have the effect of ensuring that the institutions policies are geared towards achieving equality, non discrimination and dignity for the visually impaired. This inclusive policy would be beneficial to other groups at the institution as it could be used to protect their interests as well.<sup>133</sup>

The value of an education for the visually impaired is fundamental to his right to a life of dignity as it would enable him to participate freely in society socially and economically through employment opportunities which would otherwise be impossible. The state must work with the higher education institutions and civil society in creating an inclusive education system which will help change the communities attitude toward the visually impaired from one of suspicion, isolation, disregard and abuse to one of embrace and belonging as a part of them.

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<sup>132</sup> Guto S, Equality and non Discrimination in South Africa, Political Economy of law and banking, illustrated edition, 2001.

<sup>133</sup> Reiser R, Implementing inclusive education a commonwealth guide to implementing article 24 of the UN convention on the rights of people with disabilities illustrated edition, 2008, pages 24-33.

## **Bibliography**

### **Books**

Brand D and Heyns CH, Socio Economic Rights in South Africa, 2005.

Cole M, Education, Equality and Human Rights- issues of gender, race, sexuality, special needs and social class, 2000.

Currie I. And DeWaal .J, Bill of Rights Handbook, 5<sup>th</sup> edition, 2005.

Degener .T Dereese K.Y, Human Rights and Disabled Persons, Illustrated Edition, 1995.

Guto O.B.S, Equality and Non Discrimination in South Africa: Political Economy of Law and Banking, Illustrated Edition, 2001.

Rieser R, Implementing Inclusive Education- a commonwealth guide to implementing Article 24 of the UN convention on the rights of people with disabilities, illustrated Edition, 2008.

Vandenhoe W, Non Discrimination and Equality in the view of The UN Human Rights Treaty Bodies, 2005.

### **Articles**

Albertyn .C and Goldblatt .B, "Facing the challenges of transformation: Difficulties in development of indigenous jurisprudence of equality", SAJHR VOL14 (1998)

Chaskalson .A, "Human dignity as a fundamental value of our constitution" SAJHR (2000)

De Vos .P, "Equality for All? A critical analysis of the equality jurisprudence of the constitutional court" THRHR (2000)

Fagan .A, "Dignity and unfair discrimination: A value misplaced and a right misunderstood" SAJHR VOL 14(1998)

Freedman S. Understanding the Right to Equality, SAJHR,1998

Murphy R, Contemporary debates in Constitutional rights Discourse, SAJHR, 2000



Smith .N, "Affirmative action under the new constitution" SAJHR  
VOL1 (1995)

### **Acts**

The Constitution of the Republic of South Africa, 1996 Act 5 of  
2005

The promotion of equality and prevention of unfair discrimination  
Act 4 of 2000

The Higher Education Act 101 of 1997

### **Case law**

Hoffman vs South African Airways 2000(11) BCLR 1211(CC)

Jordan and Others vs S and Others 2002(11) BCLR 1117 (CC)

Minister of Finance vs Van Heerden 2004(11) BCLR 1125 (CC)

President of the Republic of South Africa vs Hugo 1997 (4) BCLR  
708 (CC)

Volks vs Robinson 2005(5) BCLR 446 (CC)

### **Conventions and treaties**

African charter on human and people's rights

Convention on the rights of persons with disabilities

International Convention on economic, social and cultural rights

Declaration on the rights of deaf-blind persons





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