

Equality and Disability in the Workplace: A South African Approach*

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1 Introduction

My seminar today is about equality in the workplace and has a particular focus on people with disabilities in the South African workplace. In approaching this topic, it is appropriate, I think, that I should, at the outset, reveal some of my overall perspectives or even biases, if I may call them. I am not a labour lawyer by training or orientation, but feel entitled, and, hopefully, qualified to address a topic that encroaches on the traditional domain of labour lawyers. I work within a human rights paradigm. When it comes to the workplace, I very much believe that any protection that job applicants or employees might derive from common law norms and parliamentary legislation, is at best tentative and fragile as it can be sacrificed on the alter of political expediency no matter the nature of the political complexion of the government of the day. Ultimately, rights must be underpinned by fundamental norms that put a premium on the respect for human dignity. My adopted country - South Africa – provides an enabling environment for my thesis, not least because the human rights paradigm is inextricably linked with a constitutional paradigm to be point of conflation.

South Africa has a written constitution (the Constitution).¹ The Constitution is supreme.² The protection and advancements of human rights is one of the founding principles under the Constitution.³ Not surprisingly, the provisions of the Bill of Rights were inspired by international human rights instruments. Indeed, the Constitution requires courts to take into account international law when interpreting provisions of the Bill of Rights.⁴

In this seminar, I intend to delineate and give content to the parameters of the fundamental norms that shape the achievement of equality, and how these norms intersect with people with disabilities in terms of entering into, and advancing in, employment. To give a meaningful picture of how disability intersects with equality in the South African workplace, it is essential that, I begin by sketching out the notion of equality as a founding principle and as well as an imperative under the Constitution. Once this is done, I shall then discuss the measures that have been adopted in order to implement equality. Though in this connection, I would have liked to also look at the broader policy framework, however, on account of constraints of time, I propose to make South Africa's Employment Equity Act⁵ the focal point.

2 Equality

Trying to give content to the meaning of equality can be difficult in any discipline, not least in the sphere of law. Judges concede that equality is a challenging concept. In

¹ Constitution of the Republic of South Act No 108 of 1996. This Constitution (otherwise known the Final Constitution) superseded the Constitution of the Republic of South Act No 200 of 1993, (otherwise known as the Interim Constitution).

² Section 2 of the Constitution says: This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

³ Section 1 of the Constitution provides, inter alia, that: The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms...

⁴ Section 39 of the Constitution.

⁵ Act No 55 of 1998.

Andrews v Law Society of British Columbia, for instance, Justice MacIntyre of the Supreme Court of Canada described equality as a far more ‘elusive concept’ more than any of the other rights in the Canadian Charter of Rights and Freedoms.⁶ Whilst philosophical notions and ideas of fairness, fair treatment, liberty and fraternity broadly stake out the terrain of equality, as a concept, equality defies simple definitions. Equality is fluid concept. For most societies, the parameters of equality have, over time, tended reconstitute to reflect changing human aspirations. However, my seminar is not intended to be a disquisition on equality. I am content to draw sustenance from how South Africa applies equality as a juridical concept.

To give you a sense of contemporary jurisprudential notions of equality in South African, I need to remind you a little about South Africa’s past as a racial oligarchy. Pre-democratic South Africa was a country whose core identity was racial segregation. It was as if everything began and ended with race. The dispensation of rights and privileges was dictated by a state-ordained racial pyramid – whites at the top, Africans at the bottom, and Coloureds and Indians occupying somewhat intermediate positions.⁷ In an inverse sense, state oppression also followed the contours of the same pyramid. In 1994, following the first democratic elections, a cataclysmic change took place. As most of you know, South Africa became a democracy. However, on becoming a democracy, South Africa did not only dismantle the racial apparatus of the state. It went further and forged a revolutionary break with the past, not least in the area of protecting human rights and freedoms. That break was underpinned by the adoption of a democratic constitution. In one of the earliest cases to

⁶ [1989] 1 S.C.R. 143

⁷ Use of racial or even racist categories here is not intended to offend but to portray accurately South Africa’s historical circumstances during apartheid especially. Such categories underpinned not only underpinned official policy, but were also used in legislation for determining access to land, education, and amenities.

come before the Constitutional Court - *S v Makwanyane* - the late Justice Mohammed (then Deputy President of the Constitutional Court), with characteristic vividness of language, described the new Constitution in the following terms:

The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirational egalitarian ethos...⁸

Equality is a pervasive value under the Constitution. It has been described as a core value underpinning post-apartheid South Africa. The right to equality is extensively accommodated in the provisions of the Bill of Rights, and most poignantly in section 9 which says.

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all right and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly discriminate 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.

⁸ 1995 6 BCLR 655 (CC) par 262.

- (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.

To fully comprehend the orientation, and in some respects, unique nature of equality under the Constitution, it serves well to treat section 9 not so much as a discrete, atomistic right, but rather as part of an interconnected web of fundamental norms that ultimately spin around the goal of respecting human dignity in a country that is reinventing itself. Echoing the Universal Declaration of Human Rights, the Constitution recognises that everyone has inherent dignity and the right to have their dignity respected and protected.⁹ Equality under the South African Constitution can be described as means to an end, and that end is respect for human dignity. This is not to suggest that the right to human dignity somehow stands in a hierarchical relationship to other rights, as all rights in the Bill of Rights enjoy parity. Rather, it is to underscore the holistic and enduring nature of human dignity, and its link with the South African approach to equality. Justice O'Regan, a member of the Constitutional Court – the highest court on constitutional matters - said this about the right to human dignity:

Recognising a right to human dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right, therefore, is the foundation of many other rights that are specially enumerated in ...the Bill of Rights.¹⁰

⁹ Section 10 of the Constitution

¹⁰ *S v Makwanyane* 1995 (6) BCLR 655 (6).

Speaking extra-judicially, Chief Justice Chaskalson, the most senior member of the judiciary, has echoed this sentiment by describing human dignity not only as a common thread that runs through the provisions of the Bill of Rights, but also as an attribute of life itself; an attribute from which all the fundamental rights, including the right to equality flow. Indeed, as part of the test for determining unfair discrimination under section 9, the Constitutional Court has incorporated human dignity;¹¹ in doing so the Court has said that discrimination always involves an injury to human dignity, and that inequality cannot be established solely through group based differential treatment.¹² As part of the test for determining unfair discrimination, a court must look at differentiation which perpetuates disadvantage and leads to the scarring of a sense of dignity and self-worth associated with membership of a particular group.¹³

The constitutional link between the right to equality and human dignity can in part be understood as a progeny of the history of South Africa and its history of racial oppression. Apartheid did not only serve to impoverish black people materially. It also served to institutionalise and legitimise white supremacy and its converse, black inferiority. The explicit inclusion of human dignity in the Constitution serves as an important guarantor that fundamental rights of whatever nature are ultimately intended to protect the dignity of every person as a person of equal worth and that this is not a mere aspiration. Rather, there is a duty upon the state and other individuals to respect that dignity. Indeed, it is not insignificant that human dignity is one of two rights (the other being the right to life) that are non-derogable in their entirety under

¹¹ Pretorius et al *Employment Equity Law* (2001).

¹² *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC)

¹³ *Id.*

right under the Constitution.¹⁴ In a Kantian sense, therefore, the duty to respect human dignity can be described as a categorical imperative. It thrives and does not wilt even when the state declares a state of emergency.

Once it is conceded that everyone has a right to human dignity and that there is a corresponding duty to respect that dignity, it becomes difficult to view equality only through the prism of, for example, race or sex. Selecting one or two groups as protected groups when there are a myriad of other groups experiencing discrimination in a comparably serious way becomes unsustainable. Indeed, such a selection becomes, in itself, a manifestation of unfair discrimination. Equally, even accepting that certain groups can be selected as a closed category of protected groups, it becomes untenable to approach equality in the often fractured manner that has typified much of the thinking behind the institution of legislation to eliminate racial and sex discrimination in many Western jurisdictions.¹⁵

To use a canine metaphor, the innovation in the South African Constitution and the interpretation thereof by the Constitutional Court, has been to ensure that it is the dog that wags the tail and not the other way round. The right to equality must strive to be nuanced, coherent and above all universal in its coverage of protected groups so that it becomes responsive to social conditions. Though the contours of section 9 – the equality clause of the Constitution – are still unfolding, the indication is that equality under the Constitution strives to be nuanced, coherent and universal, not least on account of the progressive interpretation thereof by the Constitutional Court. In many significant ways, the equality clause transcends traditional approaches to the mediation of

¹⁴ Section 37(5) of the Constitution.

¹⁵ Fredman S (2001) 'Equality: a new generation?' *Industrial Law Journal* 30(2): 145.

equality. It applies vertically¹⁶ as well as horizontally¹⁷ and, thus, seeks to ensure that discrimination is not privatised. While certain grounds are listed, including disability, the category of protected groups is open rather than closed as section 9(3) is inclusive rather than exhaustive. Grounds that analogous to listed grounds are also protected.

The test that has been developed by the Constitutional Court to determine whether for a ground is analogous to the listed ground has been shaped by the premium put on human dignity. A ground is analogous if it is based on attributes or characteristics that have the potential to impair the fundamental human dignity of persons as human beings, or affects them adversely in a comparable way.¹⁸ Thus, even if the Constitution had not listed disability as a protected ground, disability would still have qualified as an unlisted protected group. Section 9, thus, accommodates new forms of discrimination. As an illustration, in *Hoffmann v South African Airways*, HIV status was treated as an analogous ground by the Constitutional Court, not least because of the capacity of differentiation based on HIV status to impair the dignity of those that are living with HIV/AIDS.¹⁹

Perhaps an even greater significance of section 9 lies in the fact that it marks a departure from the equal treatment or formal equality model. In *The President of the Republic of South Africa and Another v Hugo* Justice Kriegler said:

The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable states may underscore their principles and rights. But in the light of our own particular history, and our vision for the future, a

¹⁶ Section 9(3) of the Constitution.

¹⁷ Section 9(4) of the Constitution.

¹⁸ *Harksen v Lane* NO 1997 (11) BCLR 1489.

¹⁹ 2000 (12) BCLR 1365 (CC).

Constitution was written with equality at its centre. Equality is our Constitution's focus and its organising principle.²⁰

The Constitutional Court has unambiguously said that 'substantive equality' and not merely formal equality is what is envisaged by section 9.²¹ The notion of substantive equality as it is understood by the Constitution is informed by the desire to remedy systemic or structural inequality and, thus, avoid reinforcing or freezing the status quo. Substantive equality treats the formal equality model, that is often described as the Aristotelian model of equality, as both inadequate and flawed for the reason that it is blind or neutral to context. It is oblivious to the fact that we live in a diverse society where there is no level playing field on account of different socio-economic backgrounds. Some individuals or groups of individuals are more vulnerable than others and some have suffered in the past from patterns of disadvantage which will not be halted, but instead will be perpetuated by simply treating everyone as though they were starting from the same position. Thus, when determining whether a complainant has been unfairly discriminated, the larger social context must be taken into account.

Thus, according to the Constitutional Court, when determining whether particular conduct constitutes unfair discrimination, questions must be asked about: the position of the complainants in society; their vulnerability and history such as whether they belong to a group that has suffered from patterns of discrimination in the past; the purpose, nature and history of the discriminatory

²⁰ 1997 (6) BCLR 708 (CC) pars 740-741.

²¹ *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 2000 (1) BCLR 39 (CC); *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC). *Brink v Kitshoff* 1996 (6) BCLR 752 (CC); *Prinsloo v Van Der Linde* 1997 (6) BCLR 759(CC); *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708; *Harsken v Lane* 1997 (11) BCLR 1489; *The City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

provision or conduct in question and whether it relieves or adds to group disadvantage; and the extent to which the discrimination affects the complainants.²² Justice Goldstone captured the underpinnings of substantive equality when he said:

We need, therefore, to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.²³

In subscribing to the notion of substantive equality, the Constitutional Court has not so much broken new ground as align itself with progressive jurisprudence on equality. The approach of the Constitutional Court to equality shares substantial similarities with that of the Supreme Court of Canada. The similarities are not fortuitous. In the early years of constitutional adjudication, when the Constitutional Court did not have indigenous precedents to fall back on, Canadian constitutional jurisprudence played a significant part in giving interpretive content to the provisions of the Bill of Rights under the South African Constitution. The reliance on Canadian jurisprudence drew in part from the similarities in the formulation of fundamental rights in the constitutions of both countries. In part, it also drew from shared judicial sympathies about

²² *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 12 BCLR 1517.

²³ *Harksen v Lane supra*

the limitations of the formal equality model as a constitutional tool for achieving equality in societies where there is already pre-existing structural inequality that has the effect of overburdening some groups more than others, if courts assume similarity in standing groups.²⁴

To underpin substantive equality, the Constitution mandates the adoption of legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.²⁵ The non-discrimination and affirmative action provisions of the Employment Equity Act (EEA), which I discuss later, draw their legitimacy from this mandate, and so do the provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act which governs equality in areas to which the EEA does not apply. The provision of socio-economic rights in the Constitution in the areas of housing,²⁶ health, food, water and social security,²⁷ and education,²⁸ reinforces in an important way the holistic realisation of substantive equality. The socio-economic rights are modelled on the International Covenant for Economic Social and Cultural Rights. They require the state to take, in a positive sense, reasonable legislative and other measures within its available resources to achieve the progressive realisation of the rights.²⁹ Socio-economic rights have the potential to play a crucial role in the realisation of substantive equality by that have been

²⁴ *Andrews v Law Society of British Columbia* [1989] 1 S.C.R. 143

²⁵ Section 9(2) of the Constitution.

²⁶ Section 26 of the Constitution.

²⁷ Section 27 of the Constitution.

²⁸ Section 29 of the Constitution.

²⁹ For example, section 27 provides as follows:

- (1) Everyone has a right to have access to-
 - (a) health services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of each of these rights
- (3) No one may be refused emergency medical treatment

marginalised into a cycle of poverty as well as poor access to health, education etc such as people with disabilities.

3 The duty to accommodate and people with disabilities in South Africa

In attempting to map out the implications of the doctrine of substantive equality for people with disabilities in South Africa, I can do no better than begin by quoting the profound words of a feminist scholar, Elizabeth Spelman, who said:

When you presume, you are not treating me as the person I am. When you do not presume, you are treating me as the person I am in a minimal sense. When you recognise and respond to the person I am, you are treating me as the person I am in a maximal sense.³⁰

The constitutional imperative arising from substantive equality and its underpinnings in human dignity is that equality should be responsive to human diversity. It should take into account the position that people with disabilities were a historically oppressed and marginalised minority. They have not only been the object of invidious discrimination, but perhaps even more significantly, they suffered from systemic discrimination. They have been required to sink or swim in a world organised around the 'able-bodied and 'able-minded'. That world has treated disability not as a range of human diversity but instead as an aberration. In short, people with disabilities neatly fit into a group that attracts robust protection from the equality clause of the Constitution.

Substantive equality dictates that equality for people with disabilities cannot stop with injunctions to refrain from

³⁰ Spelman E (1978) 'On treating persons as persons' *Ethics* 88

invidious discrimination or indirect discrimination. Something more is needed. There must be a practical acknowledgment that people with physical or mental differences that are not catered to by existing societal structures and organisations have a right to participate fully in society. Substantive equality dictates that traditional notions of integrating and assimilating people with disabilities that were promoted by the welfare and medical models of disability, and were premised on leaving the structure and organisation of the workplace unchanged, should be seen as instruments of systemic inequality. The medical model of disability requires change to come from the person with a disability. The person with a disability has to conform to an indifferent environment to become a participant in society. Integration and assimilation premised in this manner, serves to add to the burdens a group that is already vulnerable and overburdened with disadvantages. The corollary of the right to equality of people with disabilities under section 9, is to acknowledge difference and impose upon the state and persons (legal and natural) the duty to accommodate people with disabilities. Accommodating people with disabilities should not be seen as something special or exceptional such an approach has the tendency of making accommodation a privilege. Rather accommodation should be seen as ordinary. It is an integral part of according equality and human dignity to people with disabilities.

The duty to accommodate, which is widely known as the duty of reasonable accommodation or reasonable adjustments, should, in the South African context be seen direct consequence of the *right* to equality of the person with a disability. It is, and it must be emphasized, an *enforceable duty* rather than a mere favour or privilege at the mercy of the employer. Asking the question whether the respondent has provided reasonable accommodation

should be seen as an integral part of determining whether the respondent has explored less discriminatory options prior to the discriminatory conduct in question. As part of illuminating the duty of reasonable accommodation as a constitutional norm, it is important to emphasise that the duty is not confined to people with disabilities only, but has broader application.

Whilst the Constitutional Court has yet to specifically apply substantive equality to reasonable accommodation, the universal character of reasonable accommodation can be gleaned from Canadian jurisprudence. In Canada, the duty to make reasonable accommodation in respect of people with disabilities is in part derived from the construction of section 15 (the equality clause) of the Canadian Charter of Rights and Freedoms of 1982 and in part from Human Rights Codes, and the Canadian Employment Equity Act.³¹ As alluded to earlier, at the level of fundamental law, Canada, perhaps more than any other jurisdiction, provides the best analogy for South Africa. The Supreme Court of Canada has developed reasonable accommodation into a principle for eliminating unfair discrimination with the object of achieving substantive equality.³² In the following comment, Aggarwal, writing about sex discrimination, succinctly captures the premise from which Canadian judges have developed reasonable accommodation:

It is generally recognised that achieving equality requires the accommodation of individual differences. The duty to accommodate recognizes that to treat people equally may mean treating them differently.

³¹ Day & Brodsky 'The duty to accommodate: who will benefit?' (1996) 75 *The Canadian Bar Review* 433-473.

³² Aggarwal *Sex discrimination: employment law and practice* (1994) at 271-312; Gibson *The law of the Charter: equality rights* (1990) at 133-137; Day & Brodsky 'The duty to accommodate: who will benefit?' (1996) 75 *Canadian Bar Review* 433-473; Lepofsky 'The Charter's guarantee of equality to people with disabilities – how well is it working?' (1998) 16 *Windsor Yearbook of Access to Justice* 155-214.

Strictly equal or even handed application of needs or rules or policies, without thought for the differing effect those rules or policies may have on certain individuals or groups, may cause discrimination against them instead of providing them with equality of opportunity. Thus to enjoy equality of opportunity as guaranteed in human rights legislation, people in different circumstances require some form of accommodation, a special treatment of their special needs (for example, women employees may require temporary modifications of their duties because of pregnancy). This requires that some consideration be given to reasonable alterations, i.e., to make some exceptions.³³

Gibson writing about the equality clause of the Canadian Charter of Rights and Freedoms has defined reasonable accommodation as ‘reasonable positive measures to meet the special needs of those who, by reason of disability, religious affiliation, or other protected characteristic, cannot be adequately served by accommodations or arrangements suitable for the majority.’³⁴ Thus, reasonable accommodation obtains for all protected groups that are protected by the Constitution against unfair discrimination

The advantage of the substantive equality approach and its derivative principle – reasonable accommodation – is that it compliments the social model of disability that has so powerfully propounded by disability advocates and theorists like Barnes and Finkelstein.³⁵ The substantive equality approach can be likened to what Minow has described as the ‘social relations approach’ for dealing with the dilemma of difference in a society that is

³³ Aggarwal *supra*

³⁴ Gibson *supra*

³⁵ Barnes C (1991) *Disabled people in Britain and discrimination*; Finkelstein V (1980) *Attitudes and disabled people; issues for discussion*.

committed to inclusion and pluralism rather than exclusion and homogeneity.³⁶ Like Minnow's 'social relations approach', substantive equality questions the assumption that difference is located solely in the person who is different.³⁷ When a source of inequality is located in the individual rather than social arrangements, it tends to confer legitimacy to social inequality.³⁸ Substantive equality does not endorse the status quo of assigning people with disability to their historical position of exclusion from the workplace. Rather, it treats existing institutional arrangements, including workplace arrangements, as possible sources of the problem of difference, especially where the arrangements confirm the distribution of power in ways that are detrimental to the vulnerable and the disadvantaged.³⁹

The Employment Equity Act and people with disabilities

At a policy level, it is apparent that government subscribes to a social model of disability and indeed seeks to comply with the imperative of substantive equality. In 1996, the South African government published its policy on disability in a White Paper – the *Integrated National Disability Strategy*.⁴⁰ Government accepts unequivocally that people with disability have been marginalised and disempowered by society. The strategy formulated by the government for dealing with disability is a holistic one. It advocates a social model of disability in which disability is both a developmental and human rights issue. Government seeks to transform society towards a 'Society for All' in which all sectors, including employment, integrate disability in all their policies and practices so as to raise

³⁶ Minnow (1990) *Making all the difference: inclusion, exclusion and American law*.

³⁷ Minnow *id.*

³⁸ Rioux *supra*.

³⁹ Minnow *supra*.

⁴⁰ Office of the President (1996)

awareness about disability as well as create an enabling environment for people with disabilities.

Government policy must be translated into action. Substantive equality is a crucial instrument for creating a firm and enduring edifice for the realisation of a society that meaningfully acknowledges diversity and the equal worth and dignity of people with disabilities in the South African workplace or elsewhere

In the workplace, the Employment Equity Act of 1998 (EEA) is the principal parliamentary legislation for protecting and promoting constitutional values in the workplace. Its primary aim is to provide for employment equity. Its objects, as professed in the preamble to the EEA, are designed to overcome the disadvantages that have been endured by historically marginalised groups such a people with disabilities. More specifically, the EEA seeks to achieve the following:

- promote the constitutional right to equality
- eliminate unfair discrimination in employment
- ensure the implementation of employment equity to redress the effects of discrimination
- achieve a diverse workforce broadly representative of the people of South Africa

The EEA not only prohibits discrimination, inter alia, on the ground of disability,⁴¹ but also it requires that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy of practice.⁴² The EEA implicitly takes cognisance of the status of people with disabilities as a historically marginalized group by treating people with disabilities as a special group - a designated group - along

⁴¹ Section 6 of the EEA.

⁴² Section 5 of the EEA.

with black people and women.⁴³ As a designated group under the Act, people with disabilities who are employees are entitled to a range of affirmative action measures, including reasonable accommodation. Under the EEA, an employee means not only existing employee, but also a job applicant.⁴⁴ According to the Act, reasonable accommodation means ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or to participate or advance in employment.’⁴⁵ Designated employers are under an obligation to take positive steps in this regard.⁴⁶

The EEA appears to make a rigid distinction between designated and non-designated employers in respect of affirmative action obligations, including, reasonable accommodation. Reasonable accommodation is only explicitly provided for designated employees who apply for jobs with, or work for, employers that are classified as *designated* employers according to Chapter 3 of the EEA. Moreover, reasonable accommodation under the EEA appears to be conceived only as part of affirmative action measures in Chapter 3 of the Act.⁴⁷ The EEA seems to put the matter beyond doubt when it says (in section 4) that Chapter 2, which deals with ‘prohibition of unfair discrimination’, applies to all employees and employers,⁴⁸ and Chapter 3 ‘which addresses ‘affirmative action’ applies only to designated employers and designated

⁴³ Section 1 of the EEA.

⁴⁴ Section 1 of the EEA.

⁴⁵ Section 1 of the EEA.

⁴⁶ According to section 1 of the EEA, a designated employer means: (a) an employer who employs 50 or more employees; (b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 of the EEA; (c) a municipality, as referred to Chapter 7 of the Constitution; (d) an organ of state as defined in section 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service; and an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it a designated employer in terms of this Act, to the extent provided for in the agreement.

⁴⁷ Section 15(2)(c) of the EEA.

⁴⁸ Section 4(1) of the EEA.

groups unless it is provided otherwise.⁴⁹ If section 4 is taken literally, it would mean that a person with a disability can only have a right to reasonable accommodation if he or she is an employee of a designated employer. As submitted earlier, reasonable accommodation is not so limited. Certainly, the doctrine of substantive equality that has been developed by the Constitutional Court and comparative jurisprudence such as that emanating from the Canadian Supreme Court, does not support such a restrictive approach towards reasonable accommodation.

In some respects, a restrictive approach to reasonable accommodation under the EEA, is also reflected in guidelines that have been developed pursuant to the EEA, namely the *Code of Good Practice: Key Aspects on the Employment of People with Disabilities* (the Code)⁵⁰ and the *Technical Assistance Guidelines on the Employment of People with Disabilities* (TAG).⁵¹ According to the Code and TAG, when effecting reasonable accommodation, employers should adopt the 'most cost-effective' means.⁵² While the Code and TAG are correct in identifying cost as a factor to take into account when determining reasonable accommodation, the emphasis on 'cost-effectiveness' risks elevating cost-effectiveness as the sole determinative factor at the expense of other considerations.

The approach to undue hardship, as the limit of the employer's duty to make reasonable accommodation, under both Code and TAG is also rather restrictive.⁵³ According to both the Code and TAG, 'unjustifiable hardship' is action that requires 'significant or considerable

⁴⁹ Section 4(2) of the EEA.

⁵⁰ Department of Labour 2002.

⁵¹ Department of Labour 2003.

⁵² Pars 6.2 and 6.2 respectively.

⁵³ Ngwena & Pretorius (2003) 'Code of Good Practice on the Employment of People with Disabilities; an appraisal' *Industrial Law Journal* 24: 1834-1835.

difficulty of expense'.⁵⁴ Again as comparative jurisprudence shows, undue hardship should be conceived not in isolation but as a disproportionate burden relative to the employers business and resources.⁵⁵ In some cases it might justify significant expense as demonstrated in an American case, *Nelson v Thornburg* where a court ordered a state department to provide reasonable accommodation to three blind workers, including readers, computers and braille forms, notwithstanding that the cost of accommodation was substantial.⁵⁶ This was because the cost of reasonable accommodation was not onerous when the resources at the command of the state department were taken into account.

Another flaw in the approach of the EEA to equality is the seemingly characterisation of reasonable accommodation as affirmative action. According to the EEA, affirmative action measures are 'measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.'⁵⁷ Affirmative action measures that ought to be implemented by a designated employer must include 'making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.'⁵⁸ Thus, at an explicit level at least, reasonable accommodation is cast as an affirmative action duty under the EEA.

The *Technical Assistance Guidelines* that are a gloss on the EEA Code, reinforce, to some extent, the framing of reasonable accommodation as primarily an affirmative

⁵⁴ Pars 6.12 and 6.12 respectively.

⁵⁵ Ngwena & Pretorius 2003: 1835.

⁵⁶ 567 F Supp. 369 (E.D. Pa. 1983).

⁵⁷ Section 15(1) of the EEA.

⁵⁸ Section 15(2)(c) of the EEA.

action measure under the EEA. To explain reasonable accommodation, the *Technical Assistance Guidelines* begin with the following statement;

All designated employers under the Act and Code 'should reasonably accommodate the needs of people with disabilities.' This is both a non-discrimination and an affirmative action requirement. For employers who are recruited to develop employment equity plans, reasonable accommodation is an effective affirmative action measure.⁵⁹

Despite alluding to reasonable accommodation as also constituting a non-discrimination measure, the overall tenor of the *Technical Assistance Guidelines* suggests that they are primarily addressing reasonable accommodation in the context of affirmative action measures and duties upon designated employers.

It is submitted that there is a problem with framing reasonable accommodation as primarily affirmative action duty. Such an approach is apt to confuse, to the extent that it conveys the impression that under the EEA, reasonable accommodation is synonymous with affirmative action and that it only obtains in Chapter III, but not in Chapter II claims. Though reasonable accommodation and affirmative action share an association, there are, nonetheless, distinguishable juridical concepts.⁶⁰ The association or overlap is that both address equality. Both concepts constitute a departure from the neutrality of the formal equality or equal treatment model. They are conscious rather than oblivious to the recognition of individual differences, as well as the

⁵⁹ *Technical Assistance Guidelines* at par 6.1.

⁶⁰ Olenick 'Accommodating the handicapped: rehabilitating section 504 after *Southeastern*' (1980) 80 *Columbia Law Review* 171 at 185-186; Murphy 'Reasonable accommodation and employment discrimination under Title I of the Americans with Disabilities Act' (1991) 64 *Southern California Law Review* 1607.

historical or systemic exclusion of certain groups from participating meaningfully in socio-economic life. Both concepts challenge the status quo; they challenge prevailing norms and standards that have historically served dominant groups. Reasonable accommodation and affirmative action require positive action rather than inaction. They serve to dismantle patterns of systemic discrimination and help to prevent discrimination in the future. However, to conflate reasonable accommodation and affirmative action would be to obscure important differences.

Affirmative action is primarily about remedying a history of disadvantage and marginalisation, but through the route of group preferment, rather than an individualised assessment of disadvantage and need.⁶¹ Once an individual belongs to a designated group, he or she is eligible for preference by a designated employer. Affirmative action assigns preference to one group at the expense of another. Ultimately, affirmative action seeks to achieve group representation. It generally connotes a plan to change the composition of a particular group by means of a quota, goal or other preferential treatment that serves to achieve a desired rate of participation by members of a class that has been disadvantaged by discrimination in the past.⁶²

Reasonable accommodation, on the other hand, does not import preferment of a certain group. It does not aim to achieve a particular rate of participation by people with disabilities. Instead, it requires an individualised assessment of disadvantage and need so as to establish eligibility. Reasonable accommodation is not meant to confer an advantage, but to overcome discrimination in an individual case. Take, for example, the provision of a screen reader for a person with a visual impairment which

⁶¹ Pretorius *et al* *Employment Equity Law*.

⁶² Olenick *supra*

might address the disadvantage faced by that person.⁶³ The screen reader does not amount to group preferment. It is not intended to confer an advantage as it would be of little or no use to a person without a visual impairment. Thus reasonable accommodation is a tool for eliminating barriers that disadvantage people that are different.

It also needs to be pointed out that for the purposes of affirmative action, the EEA has also adopted a restrictive approach in its definition of people with disabilities. The EEA defines people with disabilities as people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment. The EEA does not elaborate further on the meaning of disability. It has been left to the Code and TAG to give meaning to the content of the statutory definition.

The definition of disability under the EEA essentially breaks down into the following into three questions, namely:

- whether the complainant has a physical or mental impairment
- whether the impairment is long-term or recurring
- whether the impairment substantially limits prospects of entering employment or advancing in employment

The adoption of what is clearly a medically orientated definition of disability in South Africa is something of a paradox as it does not sit well with a constitutional jurisprudence that subscribes to substantive equality. As the experience of the United States and the United Kingdom shows, definitions of disabilities that are formulated in legalistic ways, and are inspired by a

⁶³ This example is taken from the report of the Australian Productivity Commission: Productivity Commission *Review of the Disability Discrimination Act 1992* (2004) at 195.

medical rather than a social model of disability, commensurately encourage legalism on part of the respondents and the courts to the point of defeating the end of conferring protection against discrimination.

On the positive side, the recognition of people with disabilities as beneficiaries of affirmative action is, in my view a demonstration of a serious commitment to address structural inequality. To dispel popular (mis)conceptions, it should be emphasised though that affirmative action, as conceived, under the EEA, is not about thumb sucking. It is not about appointing people to positions that they are not qualified. Rather is about preferment of 'suitably qualified' persons that belong to certain historically marginalised groups.⁶⁴ Moreover the application of affirmative action is not beyond the tentacles of the Constitution. Indeed, to be valid, affirmative action must satisfy the requirements of rationality and fairness under section 9 of the Constitution. As part of meeting the constitutional requirements of rationality and fairness, affirmative action under the EEA is conceived in terms in terms of 'goals' rather than 'quotas'. Affirmative actions plans must be informed by objectively verifiable facts rather than intuition.⁶⁵ It remains to be seen, however,

⁶⁴ Section 20(4) says that a person may be suitably qualified for a job as a result of any one of, or a combination of that person's: (a) formal qualifications; prior learning; relevant experience; or capacity to acquire, within a reasonable time, the ability to the job.

⁶⁵ In this connection, for example, section 42 of the EEA requires affirmative actions plans to be informed by the following factors:

- (a) The extent to which suitably qualified people from and amongst different groups are equitably represented within each occupation category and level in that employer's workforce in relation to:
 - (i) demographic profile of the national and regional economically active population;
 - (ii) pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees;
 - (iii) economic and financial factors relevant to the sector in which the employer operates;
 - (iv) present and anticipated economic and financial circumstances of the employer;
 - (v) the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover.

whether the affirmative action provisions of the EEA will impact positively on representation of people with disabilities in the workplace.

Conclusion

Addressing disability discrimination requires a more enduring principle of equality. It requires, in my view, a principle equality that is animated by respect for human dignity It requires a principle of equality that treats disability as a normal range of human diversity rather than an aberration. South Africa has taken a great leap forward in conceptualising equality as an enduring tool for securing as a vision of a diverse, egalitarian society. The Constitution and the interpretation thereof by the Constitutional Court have been enabling rather than disabling. It is less certain, however, whether the Employment Equity Act is faithful to the full tenets of the promise of the Constitution.