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Are the rights of the disabled a reality in South Africa? Part two

Summary

For a long time the rights of disabled persons have been ignored not only in South Africa, but also in the rest of the world. There are many disabled persons who can participate on an equal level with able-bodied persons, but on the other hand there are many disabled persons who are unable to do so due to the nature and severity of their disabilities. Discrimination against disabled persons lead to the exclusion of them to function in a normal way in the community and the denial of their rights and to function freely in society. Legislation can assist in the prevention of discrimination against such persons and also in their upliftment.

Is die regte van die gestremde 'n realiteit in Suid-Afrika?

Die regte van gestremde persone word nie alleen net in Suid-Afrika geignoreer nie, maar ook in die res van die wêreld. Daar is baie gestremde persone wat op gelyke vlak met normale mense kan funksioneer, terwyl daar aan die ander kant ook baie gestremde persone is wat weens die aard en ernstigheid van hul gestremde hede nie in staat is om dit te kan doen nie. Diskriminasie teen gestremde persone lei tot die uitsluiting van hulle reg om op 'n normale wyse te kan funksioneer en dit lei ook tot die miskiening van hul regte en vryhede. Wetgewing kan gebruik word om diskriminasie teen hierdie persone te voorkom en ook om hul in die gemeenskap op te hef.

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6. Labour laws relevant to disability

During the latter half of the 90s, South African labour law was radically revised, *inter alia*, to give effect to the provisions of the new Constitution⁷⁵ and the country's public and international obligation relating to labour relations. An entirely new *Labour Relations Act* 66 of 1995 came into operation on 11 November 1996. During the year 2000 significant amendments were proposed,⁷⁶ by way of a Parliamentary Bill, to the *Labour Relations Act*.⁷⁷ By the end of the decade a new *Basic Conditions of Employment Act* 75 of 1997 was in place, along with new legislation governing discrimination, employment equity, and skills development.

6.1 The *Labour Relations Act* 66 of 1995

6.1.1 Provisions of the Act

In terms of section 187(1)(f) of the *Labour Relations Act*,⁷⁸ certain dismissals are automatically unfair, *inter alia*, if the dismissal is based directly or indirectly, on any arbitrary ground, including disability. Such a dismissal will, however, be fair if it relates to the inherent requirements of the job in question. This defence is available to the employer if he can show that the person, due to the injury or disease, cannot perform the essential functions of the job.⁷⁹

The Act states that certain circumstances will constitute valid reasons for dismissal, *inter alia*, incapacity due to ill health or disability. Guidelines for the dismissal of people on the grounds of incapacity due to ill health and injury and the dismissal of people in cases arising from ill health or injury are laid down in the *Code of Good Practice: Dismissal*.⁸⁰ The key principle in this Code is that, employers and employees should treat one another with mutual respect. A premium is placed on both employment justice and the efficient operation of business. One of the legitimate grounds for termination of an employee's employment is the capacity of the employee.⁸¹ In this instance capacity refers to the employee's incapability due to ill health or injury. In respect of dismissals as a result of incapacity arising from ill health or injury, substantive fairness dictates that the employer will need to conduct an objective assessment and prognosis of the employee's health or injury.

Schedule 8, item 10 of the *Code of Good Practice: Dismissal* gives some guidelines to ensure procedural fairness. It stipulates that when an employee becomes disabled, the employer must determine the nature of the disability.

75 108/1996.

76 The *Labour Relations Amendment Bill* 2000 not passed into law by the time of publication.

77 66/1995.

78 66/1995.

79 Section 187(2)(a).

80 Schedule 8, items 10 and 11 Ito 66/1995.

81 Schedule 8, items 10 and 11.

The *Code of Good Practice: Dismissal* prescribes very specific guidelines that should be followed to dismiss a person on grounds of ill health and injury.

In case of temporary inability to work, all possible alternatives short of dismissal should be considered. In determining alternatives the following relevant factors might be taken into account: the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement.⁸²

Where the disability is of a permanent nature, possible alternatives for dismissal must be sought.⁸³ The employer should ascertain the possibility of alternative employment or the adoption of duties or work circumstances to accommodate the person in order to enable him/her to perform the job. These guidelines should protect people from unfair dismissals based on injury or disease.⁸⁴ The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in cases where the employee is injured at work or incapacitated by work-related illness.⁸⁵

Schedule 11 of the *Code of Good Practice: Dismissal* stipulates that in determining whether a dismissal arising from ill health or injury is unfair, the following must be considered: Is the employee capable of performing the work; and if the employee is not capable, the extent to which the employee is able to perform the work; the extent to which the employee's work circumstances might be adapted to accommodate disability or the extent to which the employee's duties might be adapted; and the availability of any suitable alternative work.⁸⁶

6.1.2 Enforcement of the Act

In all cases the employee should be given an opportunity to be heard, and to be represented by a trade union representative or fellow employee. Disputes that involve people with disabilities will normally be disputes of rights, where the disabled person will claim that the other party is infringing or denying some existing legal right or entitlement. This will include the alleged breach of collective agreements, the failure to comply with the provisions of legislation, and unfair labour practices, and these may be either individual or collective in nature.

Most disputes are first referred to the Commission for Conciliation, Mediation and Arbitration (CCMA)⁸⁷ or, where there is a bargaining council⁸⁸ with jurisdiction in respect of the dispute, to such bargaining council for conciliation. If the dispute is not resolved at that level, the matter is then

82 Schedule 8 :item 10 (1).

83 Schedule 8: item 10 (1).

84 Olivier and others 1999:195.

85 Schedule 8: item 10 (4).

86 Schedule 8: item 11(a),(b).

87 Section 115.

88 Section 28.

referred for arbitration⁸⁹ by the CCMA in respect of certain disputes, and to the Labour Court⁹⁰ for adjudication in respect of other disputes. Where the parties have their own collective agreement setting out a dispute resolution procedure, such procedure shall be followed.⁹¹ Where the parties fall within the ambit of a bargaining council, the dispute resolution procedures of such council are to be followed.⁹²

6.1.3 Evaluation of the Act

The single most important feature of this Act as far as disabled people are concerned, is the fact that the rights of disabled people, in the workplace, are explicitly mentioned and protected under this Act.⁹³

The Act has established a model combining the CCMA, the use of private procedures and the Labour Court.⁹⁴ The main function is to attempt to resolve disputes by conciliation so as to reduce the incidence of industrial action and litigation. This makes the enforcement of rights more accessible and less expensive for disabled employees. In addition the CCMA provides advice, assistance and training. The Act also provides flow diagrams that greatly assist in understanding the procedures to be followed in resolving disputes.⁹⁵

The *Code of Good Practice: Dismissal* provides some guidance to employers on the importance of not equating disability with ill health, and cautions employers against dismissing people with disability on the basis of an incorrect assessment of ill health if they have the necessary capacity to meet the inherent requirements of the job. The weakness of the Act lies, however, in the fact that this provision is not enforceable, but rather provides employers and the courts with guidelines for appropriate practice.⁹⁶

The extreme levels of inequality and ongoing discrimination experienced by disabled people in the workplace suggest that the provisions of the Act are not, in their own, sufficient to remove the discriminatory practices, nor to support the creation of equal employment opportunities for people with disabilities.⁹⁷

Experiences in other countries have shown that it is necessary to enact legislation expressly designed to remove barriers which lead to discrimination against disabled people in the workplace. Such legislation should also provide mechanisms to ensure that disabled people enjoy equal opportunities in the workplace. This should include, for example affirmative action programmes

89 Section 138.

90 Section 158.

91 Section 24.

92 Section 28.

93 Section 187(1)(f).

94 Chapter 7.

95 Schedule 4.

96 *White Paper on an Integrated National Disability Strategy*, November 1997, Chapter 3.

97 *White Paper on an Integrated National Disability Strategy*, November 1997, Chapter 3.

and processes to support diversity.⁹⁸ These recommendations of the *White Paper on an Integrated National Disability Strategy*⁹⁹ were followed and resulted in, *inter alia*, the *Employment Equity Act* 55 of 1998 and the *Skills Development Act* 97 of 1998.

6.2 The *Employment Equity Act* 55 of 1998

6.2.1 Provisions of the Act

The purpose of the *Employment Equity Act* 55 of 1998 is to achieve equality in the workplace in two ways:¹⁰⁰ Firstly, such equality will be achieved by promoting equal opportunities and fair treatment in employment by elimination of unfair discrimination. The second method to be employed in the achievement of workplace equality will be the implementation of affirmative action measures to redress disadvantages in employment. Three categories of people have been identified as having been particularly disadvantaged, namely black people, women and people with disabilities.¹⁰¹ It is the stated purpose of the Act to ensure the equitable representation of these three categories of people in all occupational categories and levels in the workforce.¹⁰²

According to the Department of Labour only 0.53% of the workforce in companies with more than 150 employees, have disabilities. Only 0.3% of professionals and 0.4% of technicians and associated professionals are people with disabilities.

The scope of protection for people with disabilities in employment, under this Act, focuses on the effect of a disability on a person in relation to the working environment, and not on the diagnosis of the impairment. Only people who meet all the criteria in the definition are considered as people with disabilities.¹⁰³

The aim of the *Code of Good Practice on Key Aspects of Disability in the Workplace*¹⁰⁴ is to guide employers and employees on key aspects of promoting equal opportunities and fair treatment for people with disabilities as required by the Act. The Code is intended to help employers and employees understand their rights and obligations, promote certainty and reduce disputes to ensure that people with disabilities can enjoy and exercise their rights at work.¹⁰⁵

98 *White Paper on an Integrated National Disability Strategy*, November 1997, Chapter 3.

99 November 1997.

100 Section 2.

101 Section 1.

102 Preamble of Act.

103 Code of Good Practice on Key Aspects of Disability in the Workplace.

104 Government Notice No. R. 19 April 2001.

105 The Code is issued in terms of section 54(1)(a) of the Act 55/1998 and is based on the Constitutional principle that no one may unfairly discriminate against a person on the ground of disability.

6.2.1.1 Unfair discrimination

The Act prohibits unfair discrimination against disabled employees.¹⁰⁶ Discrimination in this context means an unfair differentiation based on irrelevant legal, social or economic grounds.¹⁰⁷

Direct discrimination is easy to recognise and occurs where a differentiation or distinction between employees is overtly based on an arbitrary ground which is one of the listed grounds or any other arbitrary ground.¹⁰⁸ This type of discrimination will transpire where a person's disability or perceived disability is the reason for less favourable treatment.

Indirect discrimination occurs when a seemingly neutral requirement has a discriminatory *effect* by excluding a certain group of people. This would refer to the situation where a disabled person is required to comply with a requirement, qualification, or condition which, although equally applied to everyone, has the effect of precluding full participation in the opportunity by the majority of disabled people.¹⁰⁹

6.2.1.2 Affirmative action

Affirmative action measures in favour of disabled people have to be taken, which means that an employer will have to identify possible employment barriers and ways to eliminate them.¹¹⁰

The Act requires employers to deal with the under-representation of people with disabilities in the workplace. In this regard an employment audit of the workplace must be done,¹¹¹ and an employment equity plan drafted after consultation with employees.¹¹² The plan must include *inter alia*, numerical goals to address under-representation.¹¹³

6.2.2 Enforcement of the Act

6.2.2.1 Unfair discrimination

Any dispute relating to unfair discrimination must be referred to the CCMA within six months of the act or omission that allegedly constitutes unfair discrimination. The CCMA must attempt to resolve the dispute through conciliation. If the dispute remains unresolved after conciliation then the dispute may be referred to the Labour Court or, if all parties to the dispute consent, to arbitration.¹¹⁴

106 Section 5.

107 Section 6.

108 Section 6(1).

109 Olivier and others 1999:197.

110 Section 15.

111 Section 19.

112 Section 20.

113 Section 20(2)(c).

114 Section 10.

6.2.2.2 Affirmative action

Where a Labour Inspector has reasonable grounds to believe that a designated employer has failed to comply with any of its duties in terms of the Act, the inspector must request the employer to provide a written undertaking that it will comply with these duties within a specified period.¹¹⁵ In order to monitor and enforce compliance with the provisions of the Act, the Labour Inspector may enter certain premises without warrant or notice, question persons and inspect records and documents, articles, substances and machinery, and inspect or question any person about work performed.¹¹⁶

If the employer has refused to give a written undertaking or has failed to comply with an undertaking already given, a Labour Inspector may issue a compliance order.¹¹⁷ Such compliance order has to state what steps the employer should take to comply with the provisions of the Act and the period within which those steps should be taken, as well as the fine that may be imposed on that employer should he fail to comply with the order.¹¹⁸

The employer then has to comply with the compliance order or within 21 days of receipt of the order, object to the compliance order by making written representations to the Director-General.¹¹⁹

After considering the employer's representations, the steps taken by the employer to comply with the relevant provisions, as well as any other relevant matter, the Director-General may confirm, vary or cancel all or any part of the order to which the employer objected. If only a part of the order is varied or confirmed, the Director-General has to specify the time period within which the employer must comply with any order that is confirmed or varied.¹²⁰ An employer who receives an order from the Director-General must comply with that order or appeal to the Labour Court.¹²¹

6.2.2.3 Monitoring compliance with the Act

In terms of section 34 of the Act any employee or trade union representative may bring the alleged contravention of this Act to the attention of another employee, an employer, a trade union, workplace forum, a Labour Inspector, the Director-General or the Commission.

6.2.3 Evaluation

Applicants for employment were previously excluded from the provisions of the *Labour Relations Act*¹²² and accordingly from unfair labour jurisdiction.

115 Section 36.

116 Section 35.

117 Section 37.

118 Section 37(2).

119 Sections 37(5), 39.

120 Section 39(3).

121 Section 40.

122 66/1995.

They will now enjoy protection against both direct and indirect forms of unfair discrimination.¹²³

Chapter II of the Act, which prohibits unfair discrimination, applies to all employees and employers. All employers must take steps to promote equal opportunities in the workplace and to eliminate unfair discrimination in any employment policy or practice. The provisions of Chapter III, dealing with affirmative action, applies to “designated employers” and “designated groups” only.¹²⁴ An economically viable definition is given to designated employers. Collective agreements can however enlarge the number of employers who are bound by this Act. In our view, a very balanced and practical approach was taken by the legislator in this regard.

Du Plessis and others¹²⁵ rightly stress that, although the Act distinguishes between Africans, Coloureds and Indians and between blacks, women and people with disabilities, no preferential ranking is specified. No provision is made for compound groups, such as disabled women or disabled blacks.

Employers are also supposed to train and develop people from the designated groups.¹²⁶ If employers comply, it will play an important role in skills development and will ensure that an increasing number of disabled persons will be qualified to perform an increasing number of jobs.

Another advantage is that if effect is given to this statutory requirement to address under-representation of disabled people in the workplace, it will alleviate the pressure on government’s social assistance schemes to care for these people.¹²⁷

The Act does not require employers to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not black, female or disabled.

Du Plessis and others¹²⁸ are further of the opinion that, it is important to distinguish between the goal of employment equity and the manner in which one goes about achieving this. Whereas the ends of employment equity legislation are largely uncontroversial, the means of achieving it are not and one can expect constitutional challenges to certain aspects of the Act, as well as to employers’ interpretation and implementation thereof. For example,

123 Section 9.

124 Section 1. Designated employers are those employers who employ 50 or more employees, except where such employers employ less than 50 employees and have a annual turnover of at least the amount applicable to them in terms of a schedule to the Act. Municipalities and organs of State, excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service, are also designated employers. An employer will also be bound by a collective agreement which appoints it as a designated employer. It may also volunteer to comply with the act as if it was a designated employer.

125 1998:397.

126 Section 15(1)(d).

127 Olivier and others 1999:198.

128 1998:396.

to have an affirmative action plan that simply leads to the promotion of blacks and females or disabled people without regard to the operational needs of the organisation and without affording non-beneficiaries any chance whatsoever of competing, may well not pass constitutional muster.¹²⁹

The Act provides for the establishment of a Commission for Employment Equity.¹³⁰ The Commission will be allowed to make awards, recognising achievements of employers in furthering the purpose of this Act.¹³¹

6.3 *Skills Development Act 97 of 1998*

The purpose of the *Skills Development Act*¹³² is, *inter alia*, to develop the skills of the South African workforce, to increase the levels of investment in education and training, to improve the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education, to encourage learning and training in the workplace, to assist job-seekers and retrenched employees to find work, and to provide and regulate employment services.¹³³

The focus on skills development of people with disabilities should be the deepening of their specialised capabilities so that they are able to access incomes through formal sector jobs or community projects. The aim should be to promote continuous learning and adaptation to the constantly changing environment. Adult Basic Education Programmes should be linked with skills development.¹³⁴

People with disabilities should be targeted for learnerships. This may require adjustments to the building environment and the acquisition of specialised equipment and technology for training and assessment. Rehabilitated workers can play an important role in facilitating the accommodation of disabled people in learnerships within the labour market.¹³⁵

As seen previously, disabled people are regarded as a disadvantaged group and therefore this Act will also be to their benefit. From 1 April 2000 employers had to pay 0.5% of their payrolls as a levy to the particular SETA¹³⁶ which has jurisdiction over their specific sector.¹³⁷

129 *Public Servants' Association of South Africa and Another v Minister of Justice and Others* 1997(5) BCLR 577 T.

130 Section 29.

131 Section 30(2)(a).

132 97/1998.

133 Section 2.

134 *White Paper on an Integrated Disability Strategy*, November 1997, Chapter 3.

135 *White Paper on an Integrated Disability Strategy*, November 1997, Chapter 3.

136 SETA means a sector education and training authority established in terms of section 9(1).

137 Section 27.

7. Compensation for disabled people

The legislator has taken steps to fund the expenses of and in some instances, to compensate people who are injured or disabled in work related and motor vehicle accidents. Specific legislation exist to establish these funds and to administer them.

7.1 The *Compensation for Injuries and Diseases Act 130 of 1993 (COIDA)*

7.1.1 Provisions of the Act

The *Compensation for Injuries and Diseases Act 130 of 1993* replaces the *Workman's Compensation Act 30 of 1941* and provides for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases. It is important to note that this Act prohibits claims in delict by employees against their employers in respect of injuries suffered by them while at work. Contributions made by employers are thus utilised by Government to compensate victims of industrial accidents and diseases. In order to qualify for compensation an employer-employee relationship must exist; an accident must occur causing injury or death, and the accident must have arisen out of and in the scope of employment. Compensation can also be claimed in cases of occupational disease.¹³⁸

7.1.2 Amount of compensation

The amount of compensation is calculated in accordance with a set formula. Two categories exist, namely, temporary and permanent disability. In the case of permanent disability four categories exist, namely:

- Less than 30 % disabled
- 30 % disabled
- 31-99% disabled
- 100% disabled

Different formulas apply to different categories of disablement. Du Plessis *et al* summarises the formulas as follows:¹³⁹

7.1.2.1 Temporary disablement

In case of temporary total disablement periodic payments of 75 per cent of the employee's monthly earnings up to a maximum amount of R8 180.25

138 Du Plessis and others 1998:92.

139 Du Plessis and others 1998:93-94.

per month is paid.¹⁴⁰ Temporary disablement lasting longer than 24 months is presumed to be permanent.¹⁴¹

Compensation for temporary partial disablement consists of such portion of the amount calculated, above, as the Commissioner may consider equitable.¹⁴² No payment is made in respect of temporary disablement that lasts for three days or less.¹⁴³ An employer in whose service an employee is at the time of the accident is liable for the payment of compensation for the first three months from the date of the accident. After the said three months the compensation paid by the employer, is refunded to him by the Commissioner.¹⁴⁴

7.1.2.2 Permanent disablement

- Less than 30 per cent disablement:
 - lump sum of
 - $\frac{\text{percentage of disablement}}{30} \times \text{monthly earnings} \times 15$
- 30 per cent disablement:
 - lump sum of
 - 15 x monthly earnings up to a certain maximum of R91 650

A minimum of R17 490 will be paid.
- 31-99 per cent disablement:
 - monthly pension for life of
 - $\frac{\text{percentage of disablement}}{100} \times \frac{75}{100} \times \text{monthly earnings}$
- 100 per cent disablement:
 - monthly pension for life of
 - 75 per cent x monthly earnings.

A minimum of R874.50 per month and a maximum of R8 180.25 per month will be paid.

140 Section 47 (1).

141 Section 47(6).

142 Section 47(2)

143 Section 22(2).

144 Section 47(3).

7.1.3 Enforcement of the Act

An employee must notify his employer verbally or in writing of the accident as soon as is reasonably possible, and of his intention to claim compensation.¹⁴⁵ The employer must notify the Commissioner of the accident within seven days if the employee alleges that he has suffered personal injuries, arising out of and in the course of his employment. The prescribed forms to claim compensation are then submitted to the Commissioner.¹⁴⁶ A claim for compensation must be lodged within 12 months of the date of the accident or the date of death.¹⁴⁷

7.1.4 Evaluation

In the *White Paper for Social Welfare*¹⁴⁸ the following observations were made:

- a) The limited scope and poor application of the *Workmen's Compensation Act*,¹⁴⁹ resulted in the systematic transfer of costs from industry to the State (especially to Welfare, and, to a lesser extent, to Health).¹⁵⁰ The compensation system broke down completely in rural areas; rural families and communities bore the burden of diseases and disabilities incurred in the urban workplace which should have been compensated for by employers.¹⁵¹
- b) New rules in occupational and social legislation have led to new gaps in the provision of benefits. There are also inadequate linkages between work-based and State benefits.¹⁵²

According to Olivier and others¹⁵³ various points of criticism can be raised against the current employment injury scheme in South Africa:

- a) Improving the scheme's administration seems to be a major challenge. Improved service is necessary to ensure effective application of the Act. However, disabled workers (due to low incomes and limited skills) are normally not well positioned to exert pressure on government to offer a better service.
- b) A lack of individual contributor record keeping by government hinders financial planning to ensure the future existence of the Fund.
- c) As risk rating is done on industry level, little incentive exists for individual employers to minimise risks at their individual workplaces.

145 Section 38.

146 Sections 39, 40.

147 Section 43.

148 August 1997.

149 30/1941.

150 In 1990 the amount paid nationally through workmen's compensation for work-related disability and illness was less than R200 million, compared with R223 million for state disability grants in 1995 in Gauteng alone. *White Paper for Social Welfare*, August 1997, Chapter 7: item 17.

151 Chapter 7: item 9.

152 Chapter 7: item 10.

153 1999:201-202.

- d) A lack of linkage with other social assistance schemes leads to duplication of payments.
- e) Due to the limited scope and poor application of the Act, a systematic transfer of costs from industry to the State in the form of disability grants has taken place.
- f) There is a number of categories of employees excluded from the Act, for example, domestic workers.

Better administration, improved enforcement and an automatic indexing of pension payments seem essential for the employment injury scheme to achieve its objectives. Benefits received by workers who are disabled due to work-related incidents are seldom sufficient, and do not compensate them for the loss of employment and poor future employment prospects.¹⁵⁴

In the *White Paper on an Integrated National Disability Strategy*¹⁵⁵ it was found that the benefits received by employees under the Workmen's Compensation Act,¹⁵⁶ seldom meet their basic needs and usually do not compensate them for the loss of employment and future employment prospects. Approval of funds for disability related costs, tend to be inconsistent and often reliant on the goodwill of officials.¹⁵⁷

7.2 Road Accident Fund Act 56 of 1996

During 1996, 9 790 persons were killed in road accidents and 60 000 seriously injured in 517 600 accidents. This indicates a potential of 85 000 third party claims per year with actual claims totalling an average of 50 000 per year.¹⁵⁸ It is clear from the *White Paper on a Integrated National Disability Strategy*¹⁵⁹ that road accidents are some of the major causes of disability.

7.2.1 Provisions of the Act

The title of the Act provides that the Act was promulgated:

To provide for the establishment of the Road Accident Fund (RAF);
and to provide for matters connected thereto.

Section 3 states the objective of the Fund as follows:

The object of the Fund shall be the payment of compensation in accordance with this Act for loss or damage, wrongfully caused by the driving of motor vehicles.

154 Olivier and others 1999:202.

155 November 1997.

156 30/1941.

157 Chapter 3.

158 Klopper 2000:19.

159 November 1997, Chapter 7.

The basis of claims for the injury or death of a person resulting from the unlawful and negligent driving of a motor vehicle is delict. The mechanism used by third party compensation legislation to ensure that a motor vehicle accident victim is protected against the non-recovery of his damage due to the fact that the wrongdoer is a “man of straw” and unable to pay such victim’s loss or damage, is the suspension of a victim’s common law delictual claim and the transposition thereof to a statutorily created fund. Consequently, a third party is compelled by law to institute his claim against the RAF, and not against the wrongdoer. Apart from the displacement of liability, actual liability remains largely based on common law principles.¹⁶⁰

It does not always follow that the RAF incurs liability either fully, or at all, for all claims for injury or death arising from the unlawful and negligent driving of motor vehicles. In certain circumstances, liability of the RAF is excluded by the operation of those provisions of the Act excluding or limiting the liability of the RAF¹⁶¹ or by provisions providing for the prescription¹⁶² of a third party claim. A wrongdoer’s common law delictual liability revives in cases where the Act excludes or restricts the liability of the RAF.

Section 17(1) of the Act distinguishes between two distinct types of damage — damage or loss occasioned by the bodily injury of a third party, and the damage and loss caused by the bodily injury or death of any other person. Damage cannot only be claimed by a third party personally, but also by such a third party as a result of the injury or death of another person. The last mentioned type of damage refers to a third party’s loss of maintenance resulting from either the death or injury of his breadwinner. Damage includes past and future loss. As a consequence of the “once and for all” rule, a third party has only one opportunity to recover all his damage.¹⁶³

The victim of a motor vehicle accident can claim damage resulting from bodily injury. This will include: medical and hospital costs, loss of income, travelling and transport costs, costs of a nurse and or assistant, servant, helper or manager, pain and suffering, psychological trauma resulting from physical injury, emotional shock, disfigurement, loss of amenities, loss of general health and shortened life expectancy.¹⁶⁴

7.2.2 Enforcement of the Act

Section 24(1) of the Act makes it compulsory for a claimant to submit his claim on the prescribed form, which contains a medical report. The medical report must be completed before the claim form is submitted to the RAF.¹⁶⁵ These provisions are directory and not peremptory. Consequently, substantial compliance with the provisions of these sections is required. If there is no

160 Section 19.

161 Sections 17, 18, 19, 21, 25.

162 Section 23.

163 Klopper 2000:83-84 and chapter 5.

164 Klopper 2000:79-83.

165 Sections 24(1)(a) and 24(1)(b).

substantial compliance, the claim will be invalid. A defective claim may be rectified after the submission thereof, provided that the claim has not yet prescribed.

Summons may only be served on the RAF after a period of 120 days has elapsed from the submission of the claim, and if the claimant has furnished the compulsory section 19(f) affidavit and all statements and documents relating to the accident within a reasonable period after coming into possession thereof.¹⁶⁶

7.2.3 Evaluation

A wrongdoer's common law delictual liability revives in cases where the Act excludes or restricts the liability of the RAF. If the wrongdoer is a "man of straw," the victim of a motor vehicle accident will not be able to recover his damage and will not only suffer possible disability, but also serious financial loss.

The *White Paper on an Integrated National Disability Strategy*¹⁶⁷ found that the complicated processing procedures often result in suffering or even death of disabled applicants while waiting for the finalisation of the claim. It was also found that people in rural areas, particularly, very seldom have access to legal assistance.¹⁶⁸ In many cases the victim is poor and cannot afford legal assistance. Upon acceptance of the compensation offered in terms of section 17(1) of the Act, a third party claimant is entitled to recover his or her agreed or taxed party and party costs from the RAF.¹⁶⁹

8. Social assistance grants

Most countries around the world provide for some kind of disability benefit as part of their national security programmes. It is typically provided through a combination of short-term illness, long-term pension and need-based social assistance schemes. Of the total South African population, 1.6% receives a disability grant, which is much lower than the estimated number of people with disabilities.¹⁷⁰

8.1 The *Social Assistance Act* 59 of 1992

8.1.1 The aim and application of the legislation

The legislative framework for the payment of social assistance benefits in South Africa is provided by the *Social Assistance Act*,¹⁷¹ as amended, and

166 Sections 24(6)(a) and (b).

167 November 1997.

168 Chapter 3.

169 Section 17(2).

170 *White Paper on Social Welfare*, August 1997, Chapter 7: item 8.

171 55/1992.

the Regulations formulated in terms thereof. The Act provides *inter alia*, for the payment of social grants to people who are unable to care for themselves without such assistance. One of the categories of social grants payable concerns people with disabilities.¹⁷²

A disabled person under the Act means a person older than 18 years who has a physical or mental disability of longer than 6 months duration, which makes him/her unfit to provide sufficiently for his/her own maintenance.¹⁷³

8.1.2 The requirements

To become eligible for such a grant, certain conditions must be met:¹⁷⁴

- a) The person must be an aged person, a disabled person or a war veteran;
- b) Resident in South Africa at the time of application and citizenship;
- c) Proof of inability to support and maintain him-/herself;¹⁷⁵
- d) Proof that the degree of disability is such that it makes the person unable to earn a living and that he/she does not refuse employment within his/her ability;¹⁷⁶
- e) The applicant must not already receive a social grant.

The amount payable is determined in accordance with a set formula. If the amount calculated is less than R100 no grant is payable. Disability grants are means tested and follow on an assessment of the extent of the disability. This grant is paid on a monthly basis and is reviewed annually.¹⁷⁷ In cases where an adult disabled person's health is of such a nature that he/she requires regular attendance, an additional grant in-aid may be awarded. A care dependency grant is available in case of disabled children.¹⁷⁸ The aim of both of these latter grants is to assist in the payment for a person to look after the child or adult.¹⁷⁹

8.1.3 Evaluation

Because of the fact that many people with disabilities do not have access to employment and the benefits associated therewith, many are dependent on government disability grants to survive. Due to shortcomings in the public welfare system many disabled people in need, however, are not awarded grants. In the budget for 2001 the disability grant was increased from R540 to

172 Section 2(a).

173 Section 1.

174 Section 3.

175 Section 1 and regulation 2.

176 Section 1.

177 Section 6 and regulations 12-15.

178 In the budget for 2001 the grants for the disabled were increased from R 540 to R 570 per month.

179 Sections 2(b),(d).

R570 per month. The Financial and Fiscal Commission estimated that only 56% of disabled people receive grants. While the budget brings good news to some disabled people, those who are still on the margins remain excluded from the basic social services that government delivers. The challenge of translating policy into tangible benefits for all disabled people remains.

Presently only 30 737 disabled children receive a Care Dependency Grant. A number of factors contribute to the low take-up rate. The grant was introduced in 1996 and many parents of children with disabilities do not know about the grant or if they do, they have difficulty in accessing it.¹⁸⁰

Little co-ordination exists between the different pieces of legislation such as the *Road Accident Fund Act*,¹⁸¹ the *Compensation for Occupational Injuries and Diseases Act*¹⁸² and social assistance programmes. The means test used to determine entitlement penalises disabled persons with private savings or who take up temporary work. It also serves as a disincentive for work as people forfeit their State medical benefits if they earn a small amount of money. These problems need to be addressed.¹⁸³

It is clear from recent cases that the administration and policies of provincial governments of social grants also poses some problems for disabled people. In *Bushula and others v Permanent Secretary, Department of Welfare, Eastern Cape and Another*,¹⁸⁴ valuable guidance was given to provincial governments in respect of the suspension and/or cancellation of disability grants. To the same effect is *Rangani v Superintendent-General, Department of Health and Welfare, Northern Province*.¹⁸⁵

However, it is clear that these guidelines were not always followed. In the case of *Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others*¹⁸⁶ the Supreme Court of Appeal gave judgement in favour of the respondents. The respondents, the applicants in the Supreme Court,¹⁸⁷ sought two fold relief. The first portion was to reinstate the disability grants they had been receiving under the *Social Assistance Act*,¹⁸⁸ which the province, without notice to them, terminated. The province conceded the claims of the applicants, with payment of arrears and interest.

The second portion of the relief the applicants sought, concerned the plight of many tens of thousands of Eastern Cape disability grantees they alleged, were in a similar predicament as themselves, in that they, too, had their grants unfairly and unlawfully terminated. On their behalf, aiming to secure the reinstatement en masse of their cancelled pensions, the applicants sought

180 *Sowetan*, 6 March 2001.

181 56/1996.

182 130/1993.

183 Olivier and others 1999:203-204.

184 2000(2) SA 849 E.

185 1999(4) SA 385 T.

186 2001(4) SA 1184 A.

187 Called the applicants in the rest of the discussion.

188 59/1992, sections 2(a),3(a).

to institute representative, class action and public interest proceedings in terms of sections 38(b), (c) and (d) of the Constitution.¹⁸⁹

The Court held that:

The most important feature of the class action is that other members of the class, although not formally and individually joined, benefit from, and are bound by, the outcome of the litigation unless they invoke prescribed procedures to opt out of it. ... It is precisely because so many in our country are in a "poor position to seek legal redress", and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice, that both the interim Constitution¹⁹⁰ and the Constitution¹⁹¹ created the express entitlement that, "anyone" asserting a right in the Bill of Rights could litigate "as a member of, or in the interest of, a group or class of persons." All this bears directly on the case before us.¹⁹²

Justice Edwin Cameron held that the department's *en masse* suspension of tens of thousands of disability grants had failed to differentiate between the fraudulent and the deserving and had "savage" consequences. The court held that the ongoing problem of "ghost beneficiaries" did not warrant unlawful action against the entitled. The court accused the province of using obstructive measures in trying to assail the entitlement to legal action of the applicants and the rest of the class.

The Court slammed the department for trying to have the decision set aside on a technical jurisdictional point and by claiming that the people in the class had nothing in common. The Court held:

What they had in common is that they are victims of official excess, bureaucratic misdirection and unlawful administration methods ... The dismal truth is that (this) objection was of a piece with the rest of its filibustering approach to the litigation and as devoid of substance.¹⁹³

The Court also criticised the province for its ineptness, saying re-application for grants was marred by:

Unfulfilled undertakings, broken promises, missed meetings, administrative buck-passing, manifest lack of capacity and, at times, gross ineptitude.¹⁹⁴

The Court held that the province:

Conducted the case as though it was at war with its own citizens, the more shamefully because those it were combating were the least in its sphere ... The applicants formed part of a group of South Africans with the least chance of vindicating their rights through the legal process.¹⁹⁵

189 108/1996.

190 200/1993.

191 108/1996.

192 *Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza and Others* 2001(4) SA 1184 A: 1192G-1194C.

193 *Permanent Secretary, Department of Welfare Eastern Cape v Ngxuza and Others* 2001(4) SA 1184 A: 1195G.

194 *Permanent Secretary, Department of Welfare Eastern Cape v Ngxuza and Others* 2001(4) SA 1184 A: 1195A.

195 *Permanent Secretary, Department of Welfare Eastern Cape v Ngxuza and Others* 2001(4) SA 1184 A: 1195E.

In our view, the two most important points made in this case are the effective use of class action and the courts' uncompromising attitude towards the ineffective administration of the grants.

9. Prevention of disability

The *White Paper on an Integrated National Disability Strategy*¹⁹⁶ advocates that one of the cornerstones of the disability policy is prevention. The majority of disabilities are preventable. There are, however, a number of reasons why there is a failure to prevent disabilities, namely a lack of co-ordination of policies aimed at preventing disability, instances where policy should exist, but it doesn't and existing prevention policies are not effectively linked to identification and early intervention policies.

Primary prevention means trying to prevent diseases and accidents which may cause impairments and disabilities. Policy objectives are therefore:

- a) Healthy lifestyle promotion.¹⁹⁷
- b) Protective measures.¹⁹⁸
- c) Secondary prevention.¹⁹⁹

The strategies to reach these objectives will be:

- a) Avoidance of conflict.²⁰⁰
- b) Decrease in poverty.²⁰¹
- c) Improved health services.
- d) Reduction in accidents.²⁰²
- e) Laws to prevent accidents.²⁰³
- f) Worker check-ups.²⁰⁴

196 November 1997, Chapter 7.

197 The promotion of a healthy lifestyle in the home, at school, in the workplace and on the sports field.

198 Specific protective measures such as immunization, protection against accidents, and protection against occupational hazards.

199 This means early identification of impairments and disabilities followed by prompt treatment (or) early intervention). Secondary prevention may result in: a cure; a slower rate of progression of the impairment; and, the prevention of complications.

200 The avoidance of conflict, war and violence. This includes observance of South Africa's ban on landmines and the pursuit of peace initiatives.

201 An improvement in the educational, economic and social status of the poor.

202 The reduction in occupational and environmental accidents through the adaptation of the environment.

203 The adoption and implementation of legislation to prevent accidents at work and on the roads.

204 For workers at risk.

g) Monitoring of diseases.²⁰⁵

h) Resource allocation.²⁰⁶

The *White Paper on an Integrated Disability Strategy*²⁰⁷ suggests that the following mechanisms should be implemented:

a) Co-ordination of services.²⁰⁸

b) Public education programmes.²⁰⁹

c) Involvement of the disability sector.²¹⁰

d) Personnel training.²¹¹

e) Involvement of role players.²¹²

Due to industrialisation the threat to the health, safety and lives of employees in the workplace increased. In the end it also leads to more people with disabilities. Not only does this ill health, injuries and death cause a lot of trauma but it is also very expensive. It leads to loss in income, medical expenses, loss of productivity and the expensive training of new personnel.²¹³

The State has an interest in minimising the loss of lives and injuries in the workplace. The State took responsibility for this by introducing legislation. The aim of this legislation is twofold. The first category of legislation is those making provision for compensation for injuries, ill health or death sustained in the workplace.²¹⁴ In the second instance, there is legislation of which the main aim is to prevent accidents and injuries. This is done by prescribing safety measures to reduce the risk of injuries. These legislation include the *Occupational Health and Safety Act* 85 of 1993 and the *Mine Health and Safety Act* 29 of 1996.

205 Monitoring of potentially disabling diseases.

206 Adequate recourse allocations, both human and financial.

207 November 1997.

208 The co-ordination of services and programmes between all line functions at all levels of government, establishing early identification and intervention network structures and referral systems.

209 On-going intersectional national awareness programs focusing on disability prevention.

210 Disabled people's organizations are a key component of disability prevention at community level. Their involvement is particularly important in the facilitation of public education programmes, early identification and referral.

211 All health workers, sports administrators, audiologists, speech therapists, shop stewards, teachers and other local role players should receive orientation courses in prevention and intervention.

212 The following role players should be involved in pursuing policy objectives:

a) government, particularly the Departments of Health, Welfare, Labour, Sport, Mineral and energy Affairs and Education.

b) the disability sector.

c) other role players such as trade unions and the Medical Research Council, and

d) international organizations.

213 Van Jaarsveld and others 1999:428.

214 This is discussed in paragraph 6.

9.1 *Occupational Health and Safety Act 85 of 1993*

9.1.1 Provisions of the Act

The *Machinery and Occupational Safety Act* 6 of 1983 was replaced by the *Occupational Health and Safety Act*.²¹⁵ This Act came into operation on 1 January 1994. The long title of this Act reads as follows:

To provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery; the protection of persons other than persons at work against hazards to health and safety arising out of or in connection with the activities of persons at work; to establish an advisory council for occupational health and safety; and to provide for matters connected therewith.²¹⁶

9.1.2 Enforcement of the Act.

The Act prescribes general duties for the employers to their employees. This include an obligation to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of employees.²¹⁷ The Act also impose duties on employers to safeguard the health and safety of people who are not in their employment.²¹⁸ The employee also has some responsibilities for his own and fellow employees' safety.²¹⁹

In the workplace, safety representatives²²⁰ and safety committees²²¹ help to give effect to the Act. The Department of Labour has inspectors to enforce the Act.²²²

9.1.2.1 Safety representatives

Employers must appoint one or more of his full time employees as a safety representative. The Act prescribes the conditions for the appointment of health and safety representatives²²³ The functions of health and safety representatives are to:²²⁴

- a) Review the effectiveness of health and safety measures.
- b) Identify potential hazards and incidents.
- c) In collaboration with his employer, examine the causes of incidents.

215 85/1993.

216 Du Plessis and others 1998:113.

217 Section 8.

218 Section 9.

219 Section 14.

220 Section 17.

221 Section 19.

222 Section 28.

223 Section 17.

224 Section 18.

- d) Investigate complaints by employees relating to health and safety.
- e) Make representations regarding his review, identification or investigation to the employer, committee or inspector.
- f) Inspect the workplace, articles, substances, machinery and safety equipment.
- g) Consult with and accompany inspectors on inspections.
- h) Attend meetings of health and safety committees.
- i) Attend an inspection of an incident.
- j) Attend any investigation or formal inquiry and inspect documents kept by the safety audit.

9.1.2.2 Health and safety committees

An employer who has appointed two or more health and safety representatives must establish one or more health and safety committee(s). The employer is then obliged to consult with such committees on initiating, developing, promoting, maintaining and reviewing measures to ensure the health and safety of all employees.²²⁵ The functions of the committees are to:²²⁶

- a) Make recommendations to the employer or an inspector regarding health and safety matters.
- b) Discuss any incident in which a person was injured, became ill or died and may in writing report on the accident to an inspector.
- c) Keep record of all recommendations made to the employer and reports made to an inspector.

9.1.2.3 Inspectors

The Act is administered by the Department of Labour. The Minister appoints inspectors and a certificate is furnished to each inspector as proof of his appointment, which must be produced on demand.²²⁷ Inspectors have various functions and duties which include:²²⁸

- a) General functions to ensure that the provisions of the Act are complied with.²²⁹
- b) Special powers relating to health and safety.²³⁰ This include the prohibition of an employer and/or employee to continue with the performance of any

225 Section 19.

226 Section 20.

227 Section 28.

228 Section 29.

229 Section 29.

230 Section 30.

act, or use of such plant or machinery which may threaten the health or safety of any person.²³¹

c) Functions with regard to incidents at the workplace.²³²

Any person who is aggrieved by the decision of an inspector may appeal in writing, within 60 days, against such a decision to the Chief Inspector, who must consider the appeal and either confirm it or set it aside.²³³ A further right of appeal lies against the decision of the Chief Inspector to the Labour Court.²³⁴

The Act creates a number of offences.²³⁵ A maximum fine of R50 000 or a jail sentence of a maximum of 12 months or both can be imposed when a person is found guilty.²³⁶ In case of injury to an employee due to the negligence of an employer a maximum fine of R100 000 can be imposed or a jail sentence of two years or both.²³⁷ Whenever a person is convicted of an offence consisting of a failure to comply with a provision of this Act or any direction or notice issued thereunder, the court convicting him may, in addition to any punishment imposed on him in respect of that offence, issue an order requiring him to comply with the said provision within a period determined by the court.²³⁸

9.1.3 Evaluation

According to Van Wyk,²³⁹ the scope of this Act is appropriately wide. It covers the private industry, as well as the public sector; the agricultural sector, domestic workers in private households and persons who are exposed to hazards even though it did not occur in the context of employment.²⁴⁰ Excluded employees like mine workers have a specific bill²⁴¹ with similar provisions.

There are not enough inspectors to enforce the law properly and the process is time consuming. The sentences are not harsh enough in our opinion. In many instances it might be cheaper to pay the fine than to repair or replace machinery. It must also be borne in mind that many people can be injured or killed simultaneously. The amounts payable as compensation

231 Section 30(1)(a)-(d).

232 Section 31, 32.

233 Sections 35(1) and (2).

234 Sections 35(3) and (4).

235 Section 38.

236 Section 38(1).

237 Section 38(2).

238 Section 38(3).

239 Du Plessis and others 1998:114.

240 Exclusions from this Act are as follows: A mine, a mining area or any works as defined in the *Minerals Act* 50 of 1991, except insofar as that Act provides otherwise; certain vessels as defined in the *Merchant Shipping Act* 57 of 1951; the Minister may grant exemptions from any of the provisions of the Act; and labour brokers are not considered to be employers in terms of this Act.

241 *Mine Health and Safety Act* 29/1996.

to disabled employees are in many cases far more than these fines. In our view, the fines do not sufficiently emphasise the seriousness of non-compliance with this Act. On the other hand, the fact that an inspector may prohibit the use of certain plants or machinery, is very positive.

9.2 *Mine Health and Safety Act 29 of 1996*

The protection of the health and safety of employees and other persons in the mining industry is governed by the *Mine Health and Safety Act 29 of 1996*. This Act replaces the relevant provisions of the *Minerals Act 50 of 1991* and applies to mines and works as defined in the Act and mining areas as defined in section 1 of the *Minerals Act of 1991*.

9.2.1 Provisions of the Act

According to the Act the owner or a manager or other person appointed by the owner to perform any function entrusted to the owner by this Act, must take responsibility for the health and safety of employees and other persons at mines. The owner or a manager, if any, must *inter alia*, provide and maintain a working environment that is safe and without risk to the health of employees,²⁴² supply and maintain all the necessary health and safety equipment,²⁴³ appoint persons and provide them with the means to comply with the requirements of the Act,²⁴⁴ establish a health and safety policy²⁴⁵ and provide the necessary health and safety training.²⁴⁶

If employees are exposed to health hazards the manager must establish and maintain a system of medical surveillance of the employees,²⁴⁷ and keep a service record of employees at the mine who perform work in respect of which a medical surveillance is conducted.²⁴⁸

The Act also spells out the duties of employees.²⁴⁹ Every employee, while at a mine, must take reasonable care to protect his own health and safety and that of other persons. He must use and take proper care of protective clothing and equipment, report to his immediate supervisor any situation which presents a risk to the health and safety of the employee and comply with the prescribed health and safety measures. An employee also has the right to leave any workplace whenever circumstances arise which appear to pose a serious danger to his health or safety or when the health and safety representative directs the employee to leave the working place.²⁵⁰

242 Section 5.

243 Section 6.

244 Section 7.

245 Section 8.

246 Section 10.

247 Section 13.

248 Sections 14-19.

249 Section 22.

250 Section 23.

9.2.2 Enforcement of the Act

The Act also provides for the establishment, as well as the rights and powers of health and safety representatives and committees.²⁵¹ An important feature of the appointment of representatives or committees is that the owner of the mine must, after negotiations, conclude a collective agreement with the represented trade union at the mine.²⁵²

A Mine Health and Safety Inspectorate is established by the Act.²⁵³ The Chief Inspector, who is appointed by the Minister,²⁵⁴ must ensure that the provisions of the Act are complied with and enforced and that every duty imposed upon the Chief Inspector, Medical Inspector or inspectors in terms of any other law is performed.²⁵⁵ The inspectors have varied powers²⁵⁶ which include the general functions of inspectors in accordance with the *Occupational Health and Safety Act*.²⁵⁷ Inspectors may recommend to the Principal Inspector of Mines that a fine be imposed on an employer.²⁵⁸ Matters can also be referred to the Attorney-General²⁵⁹ or the Principal Inspector of Mines may disregard the matter or impose a fine to a maximum of R200 000.²⁶⁰

The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of any provision of this Act, except where the Act provides otherwise. The Labour Court has no jurisdiction in respect of offences in terms of this Act.²⁶¹

Any person who contravenes or fails to comply with a provision of this Act or any regulation made under this Act, commits an offence and if convicted may be sentenced to a fine or to imprisonment not exceeding three years.²⁶²

9.2.3 Evaluation of the Act

One of the most important provisions of the Act is section 55H. This section makes provision for the establishment of a fund which is funded by the fines imposed on employees. The money is used to promote health and safety in the mining industry.

No person may discriminate against any employee for exercising any right in terms of this Act or a collective agreement.²⁶³ This gives employees

251 Section 25.

252 Section 26.

253 Section 47.

254 Section 48.

255 Section 49.

256 Section 50.

257 85/1993.

258 Section 55A.

259 Section 55C.

260 Section 55C(2).

261 Section 82.

262 Section 92.

263 Section 83.

the freedom to take responsibility for their own safety without fear of being dismissed.

Despite anything to the contrary contained in any other law, a magistrate's court has jurisdiction to impose any penalty provided for in this Act.²⁶⁴ This ensures that the legal system is more accessible for employees.

10. Other forums to resolve violations of disability rights

10.1 The Human Rights Commission

The Human Rights Commission is an independent constitutional body with national jurisdiction to:

Investigate and to report on the observance of human rights and to take steps to secure appropriate redress where human rights have been violated.²⁶⁵

Section 8 of the *Human Rights Act* 54 of 1994 authorises the Commission to:

Resolve any dispute or rectify any act or omission, emanating from or constituting a violation of or threat to any fundamental right, by mediation, conciliation or negotiation.

Obviously, the Human Rights Commission has a significant role to play in dealing with instances of unfair discrimination in terms of its own Act. This is particularly appropriate in cases where a matter could be settled by informal methods (such as mediation) where a lengthy investigation is necessary or where the nature of the unfair discrimination requires an ongoing audit of rules and practices, monitoring of compliance and education on equality issues.²⁶⁶

11. Conclusion

It is clear that the legislator tried to give effect to sections 9 and 27 of the Constitution.²⁶⁷ Many new laws were promulgated. The effectiveness of these laws still have to be proved.

Some of our concerns include the following: Firstly, a number of forums are created to enforce the different rights of the disabled in different situations. This is positive on the one hand because the justice system gets more and more accessible. Many people are illiterate and will probably not know about all the different forums that exist, and may not be able to choose the best and most cost effective forum for a particular case. Legal aid is available for the poor, but all the legal aid centres are not accessible to all.

264 Section 93.

265 Section 184(2)(a) and (b) of the Constitution 108/1996.

266 Albertyn and others 2001:4.

267 108/1996.

Many people probably don't even know of the legal aid centres that are available. Public education programmes on disability rights have not started yet. How can one enforce a right if one is not aware of the existence of that right? Our last concern with regard to the forums is that the different forums might enforce these rights differently from one another. It might take some time before these rights and their enforcement are clear, through precedents and case law. This uncertainty may also lead to unfair treatment.

It is also clear from *The Permanent Secretary, Department of Welfare, Eastern Cape v Ngxuza* that disabled people are in many cases the victims of official excess, bureaucratic misdirection and unlawful administrative methods.

Of the total South African population, 1.6% receive a disability grant, which is much lower than the estimated number of people with disabilities.²⁶⁸ In our view the administration of disability grants must improve to be effective and to serve the purpose.

History tells that unless particular attention is paid to the rights of persons with disabilities, they could remain invisible.

Therefore one can only hope that section 9 of the *Promotion of Equality and Prevention of Unfair Discrimination Act*,²⁶⁹ which specifically deals with the prohibition of unfair discrimination on grounds of disability, will be in operation soon. The same sentiment goes for the establishment of the Equality courts.

Budgetary constraints will probably always be a problem. Unfortunately the enforcement of the rights of the disabled are in many instances linked to the budget and the economy.

Despite the problems and criticism, acknowledgement should be given to the Government for their concerted efforts to improve the situation for people with disabilities. The people really concerned are positive and thankful for the progress. Mr Johan Viljoen, national director of the National Council for People with Physical Disabilities in South Africa said:

It is with enthusiasm that we as people with disabilities have been set free by the human rights culture and the Employment Equity Act²⁷⁰ in particular. For a very long time in South African history, people with disabilities remained spectators of economic activity, despite their skills and potential.²⁷¹

Henriëtte Bogopane, a disabled Member of Parliament said:

The Employment Equity Act is having an effect. It is slow and there have been problems, but its demands are gradually being met. Bit by bit, some of the fruits of the disabled's struggle for their place in the sun are ripening.²⁷²

268 *White Paper on Social Welfare*, August 1997, Chapter 7: item 8.

269 4/2000.

270 55/1998.

271 *Sowetan*, 1 February 2001.

272 *Mail and Guardian*, 2 August 2001.

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