

JM Reyneke & H Oosthuizen

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

Abstract

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 leads to exclusion from functioning in a normal way in the community and the denial of the right 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 geïgnoreer 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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1. Introduction

People with disabilities form an important minority group within society. Not only in South Africa, but worldwide, disability rights have been a concept long ignored. Fortunately, a new awareness of disability issues and disability rights have started to emerge. Many disabled people can participate on an equal level with able-bodied persons, but in other cases the nature and severity of a disability can disqualify a person from some or all forms of economic and social activities.¹ Albertyn and others² are of the opinion that unfair discrimination on the basis of disability is rooted in incorrect and prejudicial stereotypes of disability and people with disabilities. These stereotypes conjure up images of abnormal, asexual, dependent, helpless and/or incapable people. They also fuel practices, beliefs, interactions and social attitudes towards people with disabilities which lead to exclusion and the denial of rights and freedoms. In many communities in South Africa disability is still seen as an illness, a curse or a shame. As a result, disability is characterised by denial, both on the part of families and the person with a disability. All of these perceptions and practices precipitate and increase the social and economic exclusion of people with disabilities.³

Disabled people have the same rights as able-bodied people. This is emphasised in the Constitution of the Republic of South Africa 108 of 1996. To give effect to these rights much has been done in the past few years. In this article recent developments and new legislation in this regard will be discussed. Emphasis will be placed on:

- i) Disability in South Africa.
- ii) The Constitution and the relevant rights of the disabled.
- iii) The Government's recent White papers on disability.
- iv) New Legislation and the effect thereof.
- v) Compensation for disabled people.
- vi) Social grants.
- vii) Prevention of disability.

2. Disability in South Africa

According to Truter⁴ no reliable statistics on the nature and prevalence of disability in South Africa currently exist. This is due to the fact that different definitions of disability are used, different survey techniques are implemented and a poor service infrastructure exists. Estimates are that between 5 and 12 percent of South Africans are moderately to severely disabled. Statistics further show that only one in five disabled people are economically active and

1 Olivier and others 1999:193.

2 2001:65.

3 Albertyn and others 2001:65.

4 Olivier and others 1999:193.

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that the majority depend on social welfare and family support.⁵ It is clear from the Deputy President's Office on the Status of Disabled Person's *White Paper on an Integrated National Disability Strategy, November 1997*, that people with disabilities in South Africa face high levels of inequality and discrimination and that different factors create underdevelopment, a lack of employment opportunities and a lack of service provision to this sector of society.

There is no general definition of the term "disability" and much depends on the context within which it is used. The definition used in the Social Assistance Act 59 of 1992 to determine entitlement to disability grants describes a disabled person as:

A person who has attained the prescribed age and is owing to his or her physical or mental disability, unfit to obtain by virtue of any service, employment or profession the means needed to enable him or her to provide for his or her maintenance.

The Employment Equity Act 55 of 1998 defines disabled people as:

People who have long-term or recurring physical or mental impairments which substantially limit their prospects of entry into or advancement in employment.

There is also other legislation referring to the rights of the disabled without giving a definition of a disabled person; for example the Constitution of the Republic of South Africa 108 of 1996 and the Labour Relations Act 66 of 1995.

3. The Constitution of the Republic of South Africa 108 of 1996 and the rights relevant to the disabled

In terms of the Constitution of the Republic of South Africa⁶ a natural person has certain rights. These rights are *inter alia* equality, dignity, freedom and security of the person, health care and social security.

3.1 Section 9: Equality

In terms of section 9(1) of the Constitution everybody is equal before the law and has the right to equal protection and benefit of the law. The state may not unfairly discriminate against anyone on grounds of his or her disability. Physically disabled or mentally impaired persons enjoy, therefore, the same rights as any other person.

The Constitution⁷ guarantees in section 9 that, there will be no unfair discrimination against any person and that include all disabled people.

Section 9 reads as follows:

5 Olivier and others 1999:193.

6 108/1996.

7 108/1996.

- (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 rights 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 against anyone on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). *National legislation must be enacted to prevent or prohibit unfair discrimination* (our emphasis).
- (5) Discrimination on one or more of these grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

3.2 Section 10: The right to dignity

In terms of section 10 of the Constitution, everyone has inherent dignity and the right to have their dignity respected and protected. In *S v Makwanyane*⁸ the Court held that:

Recognising a right to dignity is an acknowledgement 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 specifically entrenched in the Bill of Rights.

In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁹ it was held that human dignity also provides the basis for equality — in as much as every person possesses human dignity in equal measure and everybody must be treated as equally worthy of respect.

Although the majority of the Judges of the Constitutional Court rejected Judge Ackerman's broad definition of freedom and dignity, the sentiment of his judgement is important for this discussion and we quote his judgement in *Ferreira v Levin*¹⁰ where he held that:

Human dignity cannot be fully valued or respected unless individuals are able to develop their humanity, their *humanness to the full extent of its potential*. Each human being is uniquely talented. Part of the dignity of every human being is the fact and awareness of this uniqueness. An individual's human dignity cannot be fully respected or valued unless the individual *is permitted to develop his unique talents optimally* (our emphasis).

8 1995(3) SA 391 CC; 1995(6) BCLR 665 CC.

9 1999(1) SA 6 CC.

10 1996(1) SA 984 CC.

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Although disabled, everybody has talents that should be optimally developed. Laws should enforce and various new laws do enforce this sentiment.¹¹

3.3 Section 11: The right to life

Section 11 of the Constitution deals with the right to life. In *S v Makwanyane*¹² Judge O' Regan said the following about the right to life:

... the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, *but the right to human life: the right to share in the experience of humanity*. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured (our emphasis).

3.4 Section 12: The right to freedom and security of the person

Section 12(1) of the Constitution provides for the right to freedom and security of the person. Everyone has this right, as set out in sub-section 1(e) not to be treated in a cruel, inhuman or degrading way. Section 12(2) expressly delineates the ambit of the right to security of the person so as to include protection of physical integrity, and extends it to the protection of psychological integrity.

3.5 Section 27: Right to health care and social security

In terms of section 27 everyone has the right of access to health care services and if anyone is unable to support himself or herself, the right to access to appropriate social assistance, also comes into play.¹³ The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of the rights mentioned in section 27.¹⁴

In *Grootboom v Oostenberg Municipality*,¹⁵ the Constitutional Court considered the extent of the positive duties placed on the state by section 26 (2). According to the Court, this formulation of the subsection serves to limit the state's positive obligations, qualifying them in three ways:

- (a) the obligation to take reasonable legislative and other measures;
- (b) to achieve the progressive realisation of the right; and
- (c) within available resources.

11 See paragraphs 5 and 6.

12 1995(3) SA 391CC; 1995(6) BCLR 665 CC.

13 Section 27(1)(c).

14 Section 27(2).

15 2000(3) BCLR 277 C.

According to the Constitutional Court, the key to justiciability of the socio-economic rights in the Constitution is the standard of reasonableness. Though a considerable margin of discretion must be given to the state in deciding how it is to go about fulfilling the socio-economic rights, the reasonableness of the measures that it adopts can be evaluated by the court. Moreover given that both legislative and other measures must be taken, reasonableness can be evaluated both at the level of a legislative programme and its implementation.¹⁶

The positive dimension of socio-economic rights is further qualified by the use of the phrase employed in sections 26(2) and 27(2) obliging the state to take only those steps:

... within its available resources, to achieve the progressive realisation of ... (the) right.

The meaning of this qualification was interpreted as follows by the Constitutional Court in cases such as *Soobramoney v Minister of Health, KwaZulu-Natal*.¹⁷

What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.

This passage suggests that the positive dimension of socio-economic rights is "realised" or fulfilled through state action "progressively" or over a period of time. The fact that the full realisation of the rights can only be achieved progressively does not alter the obligation on the state to take those steps that are within its power immediately and other steps as soon as possible. The burden is on the state to show that it is making progress towards the full realisation of the rights.¹⁸

The socio-economic rights are further limited by the qualification that they are only available to the extent that state resources permit. In the absence of available state resources, the failure of the state to address socio-economic rights is therefore not a violation of the rights. However, should resources become available, it will be difficult for the state to justify its failure to devote those resources in the fulfilment of the rights. As more resources become available, more must be done to fulfil the rights. This indicates, that an important aspect of the positive dimension of the socio-economic rights is a right to have the state adequately justify its use of public resources to its citizens.¹⁹ This is confirmed by the Constitutional Court of the justifications for

16 De Waal and others 2001:439.

17 1998(1) SA 765 CC; 1997(12) BCLR 1696 CC.

18 De Waal and others 2001:441-442.

19 De Waal and others 2001:442.

their policy advanced by the provincial health authorities in *Soobramoney v Minister of Health, KwaZulu-Natal*.²⁰

As seen above, the rights of disabled people are expressly mentioned in legislation and the implications of many of the constitutional rights are discussed in the case law. The progress that has been made in recent years to give effect to sections 9 and 27 of the Constitution, with specific reference to disabled people will now be discussed.

4. White Papers on disability

A lot of research has been done on disability and disability rights which resulted in the following White Papers issued by *inter alia* The Deputy President's Office on the Status of Disabled Persons, the Department of Social Welfare and Population Development and the Department of Education.

4.1 The White Paper for Social Welfare, August 1997

The Ministry for Welfare and Population Development published the *White Paper for Social Welfare*.²¹ This White Paper foresees the restructuring of services and social welfare programmes in both the public and private sectors. It acknowledges the discrimination suffered by people with disabilities over the years.²² It also acknowledges several problems identified in the social services available to disabled people.

The following problems have been identified with social security pertaining to people with disabilities:²³

- (a) Disabled people's organisations have generally been excluded from social and economic policy formulation.
- (b) There has been little emphasis on training and rehabilitation to integrate disabled people into the economy. The policy has simply been one of passive income maintenance through grants. People with disabilities have been marginalised.
- (c) The meanstest has penalised and demotivated disabled people who have private savings, or who take up (generally lower paid) work, which often lasts only temporarily.
- (d) The meanstest in respect of medical benefits from the state serves as a disincentive for people with disabilities to be employed as they forfeit state medical benefits if they earn approximately R1 700 per month.
- (e) Disability has been assessed on the basis of physical impairment only, and has not taken into account whether a person with a limited disability could find work.

20 1998(1) SA 765 CC; 1997(12) BCLR 1696 CC.

21 August 1997.

22 Chapter 7.

23 Chapter 7: item 8.

The White Paper identifies the domains of social security as poverty prevention, poverty alleviation, social compensation and income distribution. However, statistics show that government is bearing the responsibility for social assistance. It is suggested that a greater investment in social insurance is needed. Greater involvement of the private sector in addressing social security issues, needs to be investigated.²⁴

4.2 White Paper on an Integrated National Disability Strategy, November 1997

The *White Paper on an Integrated National Disability Strategy*²⁵ represents a major change in government thinking on disability issues and is in accordance with international developments. The Strategy acknowledges the fact that people with disabilities are excluded from mainstream society by physical and attitudinal barriers. It advocates a social model of disability. The effect is that disability is now recognised as a human rights and development issue and not merely a welfare issue. The Strategy addresses a wide range of key issues.²⁶ These include prevention, health care, rehabilitation, public education, barrier free access, transport, communication, data collection and research, education, employment, human resource development, social welfare and community development, social security, housing, sport and recreation.²⁷

The objectives of this White Paper include:²⁸

- (a) The facilitation of the integration of disability issues into government's developmental strategies, planning and programmes.
- (b) The development of an integrated management system for coordination of disability planning, implementation and monitoring in the various line functions at all spheres of government.
- (c) The development of capacity building strategies that will enhance Government's ability at all levels to implement recommendations contained in this White Paper.
- (d) A programme of public education and awareness raising aimed at changing fundamental prejudices in South African society.

Olivier and others²⁹ rightly suggest that to meet these objectives the problems experienced with disability state grants,³⁰ workmen's compensation³¹ and road accident compensation³² need to be addressed. It is proposed that

24 Olivier and others 1999:204.

25 November 1997.

26 Olivier and others 1999:205.

27 Executive summary of the White Paper.

28 Chapter 2.

29 1999:205.

30 See paragraph 8.

31 See paragraph 7.1.

32 See paragraph 7.2.

inter-sectoral collaboration between various government departments should take place.³³

4.3 The CASE Report

The so-called CASE Report³⁴ has been published to recommend ways to attain the objectives set out in the *White Paper on an Integrated National Disability Strategy*.³⁵ To overcome the exclusion of people with disabilities the document recommends a comprehensive strategy on social security that includes the following:

- a) Social assistance in the form of grants.
- b) Effective compensation schemes through the Compensation for Occupational Injuries Act 130 of 1993 (COIDA) and the Road Accident Fund Act 56 van 1996 (RAF).
- c) Private sector insurance schemes.
- d) Services relating to education, housing, health care, employment, poverty alleviation and transport.

Implementation of this model requires interdepartmental efforts, as well as public and private sector commitment.³⁶

4.4 Education White Paper 6: Special Needs Education Building an Inclusive Education and Training System, July 2001

4.4.1 Contents of the White Paper

The Constitution³⁷ provides for the right to basic education for everybody.

Section 29 reads as follows:

- (1) Everyone has the right —
 - (a) to a basic education, including adult basic education; and
 - (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.
- (2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of this right, the state must

33 Olivier and others 1999:205–206.

34 A survey was conducted by the Community Agency for Social Enquiry (CASE) after it was awarded a tender by the Department of Health.

35 November, 1997.

36 Olivier and others 1999:206.

37 108/1996.

consider all reasonable educational alternatives, including single medium institutions, taking into account —

- (a) equity;
 - (b) practicability; and
 - (c) the need to redress the results of past racially discriminatory laws and practices.
- (3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that —
- (a) do not discriminate on the basis of race;
 - (b) are registered with the state; and
 - (c) maintain standards that are not inferior to standards at comparable public educational institutions.
- (4) Subsection (3) does not preclude state subsidies for independent educational institutions.

According to the Department of Education's *Education White Paper 6: Special Needs Education Building an Inclusive Education and Training System*,³⁸ special needs education is a sector where the ravages of apartheid remain most evident. Here, the segregation of learners on the basis of race was extended to incorporate segregation on the basis of disability. Apartheid special schools were thus organised according to two segregating criteria, race and disability. In accordance with apartheid policy, schools that accommodated white disabled learners were extremely well-resourced, while the few schools for black disabled learners were systematically under-resourced.³⁹

Learners with disability experienced great difficulty in gaining access to education. Very few special schools existed and they were limited to admitting learners according to rigidly applied categories. Learners who experienced learning difficulties as a result of severe poverty did not qualify for educational support. The categorisation system allowed only those learners with organic, medical disabilities access to support programmes.⁴⁰

From national census data on disabled persons the extent of disparities in the provision of education for learners with disabilities can be seen. Data of people with the following categories of disability were used: sight, hearing, physical, mental, multiple and not specified. The data reveals the distribution of disabled persons per category per province. It further reveals the disparities in provision for learners with disabilities, for example, the incidence of disabilities in the Eastern Cape constitutes 17.39% of the disabled population, yet the province has only 10.79% of the total number of special schools. Gauteng has 17.14% of the disabled population, but has 25.26% of the schools. The Western Cape has 5.47% of the disabled population but has 21.58% of the schools.⁴¹

38 July, 2001.

39 Chapter 1:item 1.

40 Chapter 1:item 1.

41 Chapter 1:item 1.3.1-1.3.3.

A comparison between the overall incidence of disabilities and the number of learners accommodated in schools also reveals stark disparities, for example: 0.28% of learners in the Eastern Cape are enrolled in special schools, yet the overall incidence figure for the population of disabled persons (of all ages) is 17.39%. This pattern is repeated across provinces, indicating that significant numbers of learners who — based on the traditional model — should be receiving educational support in special schools are not getting any. While the national total incidence figure for disabilities (of all ages) is 6.55% the total number of learners in special schools is 0.52%.⁴²

The data further demonstrates that per learner expenditure on learners with disabilities also varies significantly across provinces, ranging from R11 049 in Gauteng to R28 635 in the Western Cape and R22 627 in the Free State. While this distribution of learner expenditure demonstrates inefficiency in the use of resources, it also demonstrates the absence of a uniform resourcing strategy and national provisioning norms for learners with disabilities.⁴³

The World Health Organisation has calculated that between 2.2% and 2.6% of learners in any school system could be identified as disabled or impaired. An application of these percentages to the South African school population would project an upper limit of about 400 000 disabled or impaired learners. Current statistics show that only about 64 200 learners with disabilities or impairments are accommodated in about 380 special schools. This indicates that, potentially, 280 000 learners with disabilities or impairments are unaccounted for.⁴⁴

The results of decades of segregation and systematic under-resourcing are apparent in the imbalance between special schools that cater exclusively for white disabled learners and those that cater exclusively for black disabled learners. It is therefore, imperative that the continuing inequities in the special schools sector are eradicated and that the process through which the learner, educator and professional support services populations become representative of the South African population, is accelerated.⁴⁵

In an inclusive education and training system, a wider spread of educational support services will be created in line with what learners with disabilities require. This means that learners who require low-intensive support will receive this in ordinary schools and those requiring moderate support will receive it in full-service schools. Learners who require high-intensive educational support will continue to receive such support in special schools.⁴⁶

The 20 year Plan was launched in July 2001. The Plan is divided into three main timeframes. Immediate to short-term steps (first two years) will include converting the first special schools into resource centres and completing the audit of special schools. Medium-term steps (three to five years) will focus

42 Chapter 1:item 1.3.4.

43 Chapter 1:item 1.3.6.

44 Chapter 1:item 1.

45 Chapter 1:item 1.

46 Chapter 1:item 1.3.7.

on equipping technical colleges and higher education institutions to address the needs of the disabled, and expanding the number of special schools and full-service schools. Long-term steps (six to twenty years) include the provision of facilities for the 380 special schools, 500 full-service schools and colleges and for the out of school disabled learners.

4.4.2 Evaluation

It is clear from these timeframes that this will be a very long process and it will take time to accommodate all the disabled learners. Unfortunately many disabled learners will, in the next twenty years, not be fortunate enough to benefit from this proposed education system. At least this is a beginning and hopefully the time limits will be met and perhaps shortened.

The White Paper recognises the continued existence of fiscal realities and capacities and thus proposes a realistic time frame of 20 years for the attainment of the inclusive education and training system.⁴⁷

The development of the inclusive education and training system, and in particular, the development of appropriate funding strategies, must take account of various factors that will impact on the nature of, and the extent to which such a system can be developed. Foremost among these factors are human resource, fiscal and institutional capacities.⁴⁸

The high (although improving) learner educator ratios are putting a considerable burden on all professionals in the education system, both in teaching and management. Expanding access and provision to disabled children and youth of school-going age that are currently out of school implies a steep increase in demands placed on these professionals. Given the current financial capacity, as well as the inability of the education system to produce adequate numbers of such individuals in the short term, progress towards the inclusive education and training system will depend heavily on more effective usage of current skills in the special needs sector. This is a fundamental proposition of the White Paper.⁴⁹

In the context of the current low growth rate of the South African economy and the relatively large slice of the budget that is allocated to education in nominal terms, it is unlikely that significantly more public resources in real terms will be allocated to the sector in the next few years.⁵⁰

The policies outlined in this White Paper will lead to the more cost effective usage of resources in the long term when the proposed model is fully operational. However, in the short-term it is clear that additional funding will be required for special needs education — such funding will have to be sought from a range of sources, in particular the provincial education budgets and donor funding, both local and international.⁵¹

47 Chapter 3: item 3.2.6.

48 Chapter 3 item 3.2.1.

49 Chapter 3 item 3.2.2.

50 Chapter 3: item 3.2.3.

51 Chapter 3: item 3.2.4.

In our view, the whole philosophy of integrating disabled children into society is applaudable and will probably remove many unfounded and prejudicial stereotypes of disability and people with disabilities. It however, remains to be seen whether all the proposals are practical and whether they could be implemented successfully. The chances of success are limited when budgetary constraints are taken into account.

It is clear that in order to succeed with the proposals in this White Paper persistence, commitment, coordination, support, monitoring, evaluation, follow-up and leadership will be needed.

5. New legislation

To give effect to sections 9 and 27 of the Constitution,⁵² including protecting the fundamental rights of disabled people, a number of new laws have been promulgated in the past few years. The most important acts are: *The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000* and *The Employment Equity Act 55 of 1998*.

An equitable and just system should aim at preventing disability if possible, to compensate for disability where it occurs, to help people recover from disability and the resulting loss of income, and to integrate people into society by ensuring access to employment and other social activities. Preference should be given to prevention and rehabilitation and positive incentives should be available to persons to continue with employment. For those who cannot provide for themselves a social security net, which is just and accessible, will have to be made available.⁵³ In our view some of these goals are, to some extent, secured in the new legislation.

5.1 The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The Promotion of Equality and Prevention of Unfair Discrimination Act⁵⁴ contains a comprehensive list of grounds on which discrimination is prohibited. One of these grounds is disability.

5.1.1 Provisions of Act 4 of 2000

Section 6⁵⁵ states the following:

Neither the State nor any person may unfairly discriminate against any person.⁵⁶

52 108/1996.

53 Olivier and others 1999:209-210.

54 4/2000.

55 4/2000.

56 This section commenced on the 1st of September 2000.

Section 9 provides for the prohibition of unfair discrimination on ground of disability and reads as follow:⁵⁷

Subject to section 6 no person may unfairly discriminate against any person on the ground of disability, including —

- (a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society;
- (b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;
- (c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.

It is clear that these provisions are aiming at the integration of people with disabilities in society.

This Act approaches unfair disability discrimination not by defining the concept of disability or a disabled person, but from the idea of equality as embracing the full and equal inclusion of all disabled people within society through the removal of barriers and the development of positive measures. This is based on a notion of inclusion that shifts the norms of society to include a broad understanding of diversity and human worth. It is a more radical concept than integration which tends to mean that disabled people will be absorbed into the dominant culture when and if they are ready. While integration places the onus on the disabled person to adapt to the society's status quo, the concept of inclusion requires society to take the lead in addressing the social, economic and physical environment to ensure that all disabled people are recognised and included as full and equal citizens. Within this model, the Act seeks to address the discrimination experienced by people with disabilities as well as those who are perceived to have a disability.⁵⁸

Albertyn and others⁵⁹ give the following examples of unfair disability discrimination. They state that section 9 provides examples of unfair disability discrimination within the principle of substantive equality that contemplates the removal of obstacles as well as the development of an inclusive environment through positive measures.

Section 9(a) involves an understanding of what is encompassed within the idea of facilities, and especially the concept of accessibility. These tend to be understood in a very narrow physical sense such as the provision of a ramp or braille translation. However, the social model underlying the Act, emphasises a shift from the immediate needs of the individual to include an understanding of the social environment and social perceptions.

“Enabling facilities” refer not only to physical structures and barriers, such as ramps, but also to the social and environmental context that denies

⁵⁷ This section is not in operation yet.

⁵⁸ Albertyn and others 2001:65-66.

⁵⁹ 2001:66.

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access. For example, disability discrimination in the arena of employment does not only mean the absence of physical structures, but also the attitudes and norms that assume that people with disabilities cannot do the job and are thus excluded from the opportunity to take the job in the first place.⁶⁰

In this regard government set a good example by allocating R50 million to make government buildings more accessible.⁶¹

In addition, the provision of facilities needs to account for the fact that the burdens suffered by disabled people are often compounded by additional forms of discrimination such as race, gender, class or sexual orientation.

Section 9(b) of Act 4 of 2000 refers to the South African Bureau of Standards' Regulations and Code of Practice in Relation to the Environmental Accessibility of Buildings.⁶² These provide an important source of information about the needs of people with disabilities.

The differential treatment of people with disabilities is not necessarily discriminatory. Indeed, the need to create an enabling environment that addresses the specific needs of disabled persons and corrects past imbalances means that, disabled people will often require some form of differential treatment. To address this point, the Act includes within the meaning of unfair discrimination, the failure to reasonably accommodate disabled persons.⁶³

A failure to accommodate disabled people in terms of section 9(c) include the absence of facilities for interpretation for deaf people in hospitals and clinics or courts.

5.1.2 Enforcement of the Act

Section 16 of Act 4 of 2000 states that:

... every Magistrate's Court and every High Court is an equality court for the area of its jurisdiction; and any magistrate, additional magistrate and judge may be designated by the minister ... as a presiding officer of the equality court or the area ...

Section 31 states that:

Despite section 16(1) no proceedings may be instituted in any court unless a presiding officer and one or more clerks are available.

This section was however substituted in 2002 by the Promotion of Equality and Prevention of Unfair Discrimination Amendment Act 52 of 2002. According to the new provisions, every High Court will be an equality court and the Judge President as a presiding officer of the equality court

60 Albertyn and others 2001:66-67.

61 *Mail and Guardian* 2-8 June 2000.

62 Ref No SABS 0246 (Accessibility of Building to disabled Persons); Ref No SABS 0400 (Application of the National Building Regulation (section s) Facilities for Disabled Persons).

63 Albertyn and others 2001:66-67.

may designate any judge. The Minister will, after consultation, designate one or more magistrate's courts as equality courts for a specific administrative region. Judges and magistrates must complete a training course⁶⁴ before they can act as presiding officer in these courts. The Chief Justice, in consultation with the Judicial Service Commission and the Magistrates Commission, must develop the training course.⁶⁵ This training course must provide social context training for presiding officers and uniform norm, standards and procedures to be observed by the presiding officers.

The Act establishes Equality Courts that are intended to be accessible, informal and participatory institutions. It also sets out a range of complementary and creative remedies that can be used on their own or in combination with each other to address individual and systemic discrimination.

In terms of section 19(1)(e) of the Act, the Equality Court's jurisdiction to hear complaints in terms of the Act follows the ordinary rules of jurisdiction, set out in the Magistrates Courts Act 32 of 1944 and the Supreme Court Act 59 of 1959. However, section 19(3) authorises a Magistrates' Court, sitting as a Equality Court, to make a monetary order that exceeds the jurisdiction of the Magistrates' Court. This order must then be submitted to a judge of the High Court for confirmation. Section 21(2) sets out the range of remedies available to the Equality Court.

Section 20(3) provides that a presiding officer of an Equality Court can refer a matter to another forum for determination. A presiding officer may do this if, in his or her opinion, another:

... appropriate institution, body, court, tribunal or forum ... can deal more appropriately with the matter in terms of that alternative forum's powers and functions.⁶⁶

However the court retains jurisdiction over the matter to the extent that the matter will be referred back to it for adjudication if:

- a) the alternative forum fails to deal with it within a reasonable period;⁶⁷ or
- b) the alternative forum is not able to resolve the matter to the satisfaction of one or both parties, and one or both parties request such a referral.⁶⁸

While the Equality Courts are the main enforcement agencies for complaints in terms of the Act, the Act also recognises the important and different roles of constitutional institutions such as the Human Rights Commission and the Commission on Gender Equality. The Act attempts to establish a flexible working relationship between these institutions that focuses on the particular strengths of each institution.⁶⁹

64 Section 16(2).

65 Section 31(4).

66 Section 20(3)(a).

67 Section 20(8)(a).

68 Section 20(8)(b).

69 *Albertyn and others* 2001:5.

5.1.3 Evaluation of the Act

Although the Act specifically refers to the disabled in section 9, this section is not in operation as yet and therefore not enforceable.

Section 5(3) of this Act states that the Act:

Does not apply to any person to whom and to the extent to which the Employment Equity Act 55 of 1998 applies.

The Employment Equity Act⁷⁰ provides a detailed framework for workplace equality and was passed before this Act.⁷¹ It seems logical that the two Acts operate side by side and apply to different sectors of society.

Section 19(3) authorises a Magistrates' Court, sitting as a Equality Court, to make a monetary order that exceeds the jurisdiction of the Magistrates' Court. This order must then be submitted to a judge of the High Court for confirmation. The extension of the jurisdiction of the Magistrates' Court is a positive development in the Act as it means that complainants can bring their claim in this court without worrying about the monetary award jurisdiction limitation by the Magistrates' Court. It thus improves access by widening the possibilities of using the Magistrates' Courts, which is the more convenient and accessible court for most people. The remedial jurisdiction of the Magistrates' Courts, sitting as Equality Courts, is also extended by the remedies set out in section 21(2) of the Act. For example, a magistrate presiding over an Equality Court will be able to give a declaratory order even if he or she would have no jurisdiction to do so sitting as a ordinary Magistrates' Court.⁷² Indeed, the debate over the jurisdiction of Magistrates' Courts to grant mandatory interdicts and orders for specific performance will not apply to the Magistrate's Courts sitting as Equality Courts. Ultimately therefore, it is only the rules of territorial jurisdiction that section 16 of the Act carries over from Magistrate's Courts to Equality Courts.⁷³

Section 4 sets out the guiding principles in terms of which adjudication of disputes should take place. Greater access to justice through easy access to courts, expanded scope for participation by victims of discrimination, less adherence to technicalities and meaningful remedies to victims are some of the key elements of these principles. The successful enforcement of the Act will depend both upon clear rules emerging from these principles, as well as the extent to which the presiding officers, court officials, legal practitioners and litigants are able to apply the new principles and rules.⁷⁴

To be continued

70 55/1998.

71 See paragraph 6.2.

72 Section 21(2).

73 Albertyn and others 2001:20.

74 Albertyn and others 2001:22.

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