

Disability rights in South Africa: An assessment of government's commitment to provide employment to persons with disability

Mini-Dissertation Submitted in Partial Fulfilment of the Requirements for the
Degree: Master of Philosophy (MPhil) in Multidisciplinary Human Rights

Centre for Human Rights - Faculty of Law

University of Pretoria

By

Mathogonolo Goretetseng Segomotso Tsae

Student Number:

11368111

Supervisor: Prof. Michelo Hansungule

October 2014

DECLARATION

I, Mathogonolo Goretetseng Segomotso Tsae, declare that this mini-dissertation is original. It has not been presented at any other university or institution. Where other people's works have been used or directly cited, due references have been provided. It is in this regard that I declare the mini-dissertation my own original work. It is hereby presented in partial fulfilment of the requirements for the award of MPhil degree in Multidisciplinary Human Rights.

Signature: _____

Mathogonolo Goretetseng SegomotsoTsae

Date: _____

This dissertation is submitted for examination with my approval as University Supervisor

Signature: _____

SUPERVISOR

Prof. Michelo Hansungule

DEDICATION

This mini dissertation is dedicated to my late mother, Mmaphoti Keatlaretse Dinky Tsae and to all people living with disabilities.

ACKNOWLEDGEMENTS

I am forever thankful to God and His mercy upon my life, which sometimes I do not deserve.

To my late mother, I wish you were alive to see the fruits of the seed that you have planted. Indeed your seed fell on fertile soil. In the grave were you rest peacefully; know that you have raised a young strong woman, who can stand on her feet regardless of the storms in life.

There is nothing more important in life than family; they rock the storm with you and believe you in your crazy ideas even when the ideas seem impossible to be implemented. I am grateful for God for blessing me with such supportive, loving, caring family. My heartfelt gratitude goes to my siblings Dichaba, Karabo and Mpopo without whom my life would not be what it is today. The support you give me is just incredible.

To my friends, you are the family members I had the opportunity to choose. There are moments in life when the storms were so heavy and felt like they will wipe me away but you stood by my side and offered a shoulder to cry on. Thank you for being true friends.

My acknowledgement also goes to the incomparable contribution of my Supervisor, Professor Michelo Hansungule of the University of Pretoria, for his patience, advice, guidance, direction and supervision in making this mini-dissertation to be what it is.

To my mentor Carol Chi Ngang, I am forever grateful for our path crossing. You have believed that this dissertation is possible when I was at my lowest and wanting to throw in the towel. You gave me hope that there is always light at the end of the tunnel. Thank you for all your effort in editing and perfecting my work. In my language we say ‘mo ntsamaisa bosigo ke mo leboga bosele’.

I’m grateful to my employer, the Department of Agriculture, Forestry and Fisheries (DAFF) for financing my studies. To my former supervisor, Mr. Lucas Mahlangu for encouraging me to further my studies and to my former Deputy Director, Dr. Gontse Morakile for always reminding me that he wants the Master’s degree in the bag by the end of 2014. Vivian Mosoma, heartfelt gratitude for contributing positively towards my life.

SUMMARY

This study looks at the problem of disability and employment in South Africa, with particular focus on the employment equity target set by the government for people with disabilities in the public service. The study begins by illustrating how people with disabilities continue to face discriminatory practices as a result of negative societal attitudes and the fact that they are not sufficiently protected by domestic legislation. In spite of the constitutional and other legislative provisions that outlaw discrimination on the basis of disability as well as the guarantees of protection provided for by the international instruments that South Africa has ratified, people with disabilities remain marginalised particularly in the area of employment.

In spite of the commitment undertaken by the South African government to provide employment to at least 2 per cent of people with disabilities, the study found that the proportion of people with disabilities who may qualify for employment actually does not amount to the envisaged two per cent. Meanwhile, the total proportion of people with disability who make up about 4.6 per cent of the entire population are largely unemployable because of lack of the appropriate skills and experience needed to qualify for employment. The International Covenant on Economic, Social and Cultural Rights guarantees the right to gainful employment and favourable conditions of work to everyone, including persons with disabilities. This illustrates that the question of employment for people with disabilities is not just a social problem but also a human rights concern, the violation of which has enormous implications on the disability population.

Coupled with the constitutional promise to improve the quality of life and to free the potential of every single South African, this study illustrated that the government of South Africa has the legal obligation to pursue a human rights model in accordance with established international standards in dealing with the question of employment for people with disabilities. The human rights model has the potential to allow every single person with a disability to improve their capabilities. In this way therefore, opportunity is created for increase access to employment for a greater number of people with disabilities rather than focusing on a limited employment equity target that is not even attainable. Addressing the issue of employment for people with disabilities is crucial to bridging the huge inequality gap that continues to threaten South Africa's constitutional democracy.

TABLE OF CONTENTS

DECLARATION	ii
DEDICATION	iii
ACKNOWLEDGEMENTS	iv
SUMMARY	v

Chapter One – Introduction

1. Background	1
2. Problem statement.....	3
3. Assumptions.....	4
4. Research questions.....	5
5. Purpose and significance of the study	6
6. Research method	7
7. Literature review	8
8. Outline of chapters.....	11

Chapter Two – Anatomy of disability and proportion of persons with disabilities in employment

1. Introduction	13
2. Information on disability extracted from statistics.....	14
2.1 Statistical analysis	14
2.1.1 Analysis based on information extracted from previous statistics.....	14
2.1.2 Analysis based on information extracted from current statistics	17
2.1.3 Proportion of people with disabilities in employment.....	18
2.2 Factors that determine employability of persons with disabilities.....	19
2.2.1 Knowledge, skills and aptitude.....	20
2.2.2 Nature of disability.....	20
3. Barriers to the employment of people with disabilities	21
3.1 Prejudicial societal attitude	21
3.2 Workplace environment	22
3.3 Disability policies and legislation	23
4. Conclusion	23

Chapter Three – Conceptual and legal frameworks on disability and employment

1. Introduction.....	25
2. Definition of disability.....	25
3. Disability models	28
3.1 Medical model	28
3.2 Social model.....	29
3.2.1 Affirmative action approach	30
3.2.2 Human rights approach.....	31
4. Legal framework on disability.....	33
4.1 International protection of disability rights.....	33
4.2 Domestic protection of disability rights	34
4.2.1 Constitution of the Republic of South Africa	34
4.2.2 Employment Equity Act 55 of 1998	36
4.2.3 Disability Rights Charter	36
4.3 Other measures on disability and employment in South Africa	37
4.4 Lessons from other countries	37
4.4.1 El Salvador	38
4.4.2 Serbia.....	39
5. Conclusion	40

Chapter Four – United Nations Convention on the Rights of Persons with Disabilities

1. Introduction.....	42
2. Obligations imposed on state parties	43
2.1 Obligation of conduct.....	44
2.2 Obligation of action.....	44
3. Domestication application of the Disability Convention	45
3.1 Interpretation by domestic courts	46
3.2 Domestication into national law.....	47
4. Conclusion	48

Chapter Five –Human rights dimension to disability and employment

1. Introduction.....	49
2. Human rights of persons with disabilities.....	50

2.1	General principles on disability rights	51
2.1.1	Equality and non-discrimination	51
2.1.2	Inalienability.....	51
2.1.3	Participation and inclusion	51
2.1.4	Transparency and accountability.....	52
2.2	Access to employment	53
3.	Misplaced priorities	53
3.1	A step in the wrong direction	53
3.2	Impact on the disability population.....	56
3.3	Social exclusion	56
4.	Conclusion	57
 Chapter Six – Conclusion and recommendations		
1.	Concluding remarks	58
2.	General recommendations	59
 Bibliography		
		62

CHAPTER ONE

Introduction

1. Background

Statistics show that disabled persons comprise more than 600 million people worldwide and that while significant numbers are successfully employed, the collective of disabled people face disproportionate poverty and severe unemployment.¹ It is reported that in South Africa, only 19 per cent of disabled persons were in active employment in 2001, compared to 35 per cent of the total number of employed persons in the entire population.² In the past, people with disabilities were generally seen as objects of charity in need of welfare and medical support, rather than equal members of society entitled to the same rights and privileges as others.³ From time immemorial, people with disability have been disadvantaged, stigmatised and stereotyped. There was a clear neglect of people with disability under the apartheid government. Until recently, they have been considered in stereotypical terms as sick and in constant pain, in need of special attention, deserving pity, dependent on others, incapable of making decisions for themselves and cannot lead a full and productive life.⁴

Julian Walker has stated that while many people with disabilities are able to find the opportunities to work, play, learn and do many other productive things that contribute to their communities, many also face barriers that prevent them from doing so.⁵ Progressively, South African society is beginning to transform and a change of attitude is currently emerging as awareness grows, recognising that people with disabilities are as normal as any other person and that they are capable of functioning or living a normal life if societal barriers are

¹ International Labour Organisation (ILO) 'Employment and disabled persons: Information sheet' available at: www.hpod.org/pdf/employment-disabled.pdf (accessed: 15 May 2014) 1.

² ILO (n 1 above) 1.

³ ILO (n 1 above) 4.

⁴ Disabled Peoples' International 'Common myths and misconceptions about disability' available at: www.togetherwerock.com/sites/default/files/Draper_MythsMisc_Nov1.pdf (accessed: 14 May 2014).

⁵ J Walker 'The United Nations Convention on the Rights of Persons with Disabilities: An overview' (2013) *Library of Parliament – Publication No. 2013-09-E 2*.

removed. The mind-set of people however, did not change overnight. The change of perception about people with disabilities has been influenced more by laws, codified in national and international instruments to protect people living with disabilities and to grant them access to equal opportunities as to every other person considered to be normal.

However, in spite of the numerous legal instruments guaranteeing protection, persons with disabilities continue to face marginalisation and vulnerability in society. They constitute the most economically disadvantaged groups in society because of lack of the opportunity to engage in gainful activities such as employment. A disability survey conducted in South Africa in 1998 revealed that disability constituted the first criterion that is implicated when considering disadvantage, which suggests a very desolate situation for people with disabilities.⁶ In a prejudicial manner, people with disability are seen as a social problem to which society has ‘a responsibility towards the promotion of their quality of life’,⁷ rather than human beings with the agency of independent initiative. The disadvantage that they face is experienced particularly in the area of employment, and therefore has significant repercussions on their psychological, social and economic well-being.⁸ As part of the affirmative action programme to transform South African society from the legacy of entrenched inequalities and divisions, the government in 1995 undertook the commitment to ensure that ‘people with disabilities should comprise 2 per cent of public service personnel’.⁹

This inspired a glimmer of hope, which Schneider and Nkoli have also highlighted based on evidence of increasing levels of employment for people with disabilities as compared to the situation previously.¹⁰ The glimmer of hope has been amplified by the government’s commitment to overcome the legacy of disability discrimination especially in the workplace, in order to give persons with disabilities the opportunity to participate fully in the labour

⁶ M Schneider & MI Nkoli (2007) ‘Affirmative action and disability in South Africa’ 77 *Transformation* 94; (Schneider *et al* 1999)

⁷ Office of the Deputy President, ‘Integrated National Disability Strategy: White Paper of November 1997’ (hereafter referred to as Integrated National Disability Strategy) 1.

⁸ Schneider & Nkoli (n 6 above) 95.

⁹ Ministry for the Public Service and Administration ‘White Paper on the Transformation of the Public Service - Notice 1227 of 1995’ (hereafter referred to as White Paper on Transformation) para 10.6.

¹⁰ Schneider & Nkoli (n 6 above) 94.

market without being unfairly discriminated against.¹¹ However, it is reported that in 2011, Minister for Women, Children and People with Disabilities lamented the failure by both private and public institutions to meet the 2 per cent employment target for people with disabilities.¹² Twenty years after government took the commitment to employ at least 2 per cent of persons with disabilities; official sources reveal that the government has failed to meet the target.¹³ In a communiqué conveying cabinet decision on the employment equity targets, the Minister of Public Service and Administration admits the failure¹⁴ and enjoins Cabinet to retain the 2 per cent target and to extend the timeline to 2015.¹⁵ This raises important concerns which this study aims to examine.

2. Problem statement

People living with disabilities continue to face discrimination in South Africa in spite of the many treaties, legislation, policies and other measures that have been put in place to deal with disability. When the Ministry for Women, Children and People with Disabilities was established in 2009 it brought hope that people with disabilities will be given greater recognition and that the challenges they face would be alleviated. Surprisingly, little has actually changed in terms of the conditions of persons with disabilities. The government has enacted progressive legislation and policies that give clear directions for non-discrimination in the employment of persons with disability, guaranteeing them the right to occupy positions in government as well as managerial positions. This study aims to investigate reasons why the government has failed in its commitment to provide employment to people with

¹¹ MC Marumoagae (2012) 'Disability discrimination and the right of disabled persons to access the labour market' 12:1 *PELJ* 347.

¹² SA News (2011) 'Government, business urged to meet disabled employment targets' available at: www.sanews.gov.za/south-africa/govt-business-urged-meet-disabled-employment-targets (accessed: 16 May 2014)

¹³ Schneider & Nkoli (n 6 above) 90; Department of Government Communications and Information Systems 'Statement on Cabinet meeting of 5 December 2012' available at: www.gcis.gov.za/content/newsroom/media-releases/cabstatements6Dec2012 (accessed: 19 May 2014).

¹⁴ Ministry of Public Service and Administration - Ministerial communiqué addressed to All Executive Authorities and Premiers: Implementation of Cabinet Committee Decisions taken in November 2012 on Employment Equity Targets, March 2013.

¹⁵ Ministry of Public Service and Administration - Ministerial communiqué (n 14 above) para 2.2.

disabilities and therefore will interrogate how it deals with the issue of disability and employment.

3. Assumptions

The analysis and arguments in this study are based on the assumption that the government of South Africa has the governance, institutional as well as resource capacity to fulfil its obligation to provide employment to the 2 per cent employment equity target for people with disability in the public service as it has undertaken the policy commitment to do. It is logical to assume that the progressive constitutional provisions and other enabling legislation as well as policy measures that outlaw disability discrimination in the area of employment would practically translate into reality for the benefit of people with disabilities. On this basis it is also assumed that the government would be able to accomplish its commitment to meet the 2 per cent target in the next one year.¹⁶

As a point of departure this study takes for granted that there is accurate statistical evidence to justify the 2 per cent of persons with disabilities that the government plans to employ by 2015. This assumption derives from official sources, which promise to hold certain members of government accountable should they fail to meet the target by the stipulated time limit.¹⁷ Informed by the South African government's affirmative action policy, there is every reason to believe that the 2 per cent employment equity target would be accomplished.¹⁸

Informed by the recognition to heal the divisions of the past and to establish a society based on democratic values, social justice and fundamental human rights, the preamble to the Constitution makes a radical transformative promise to 'improve the quality of life of all citizens and to free the potential of each person'.¹⁹ This envisaged large-scale social transformation in South African society entails expanding opportunities for every single person, including people with disabilities. This promise is underlined by the constitutional values of human dignity, equality and human rights. On the basis of these guarantees, it is

¹⁶ Ministry of Public Service and Administration - Ministerial communiqué (n 14 above) para 2.2.

¹⁷ Ministry of Public Service and Administration - Ministerial communiqué (n 14 above) para 3.3; White Paper on Transformation (n 9 above) para 10.6

¹⁸ White Paper on Transformation (n 9 above) para 10.6.

¹⁹ Constitution of the Republic of South Africa (the Constitution) 1996 preamble.

assumed that the government is able to live by its commitment to provide employment to persons with disabilities.

This derives from the fact that the promise of employment to persons with disabilities is not just a moral commitment that the government may or may not achieve. The responsibility to provide employment to persons with disabilities is a legal obligation guaranteed by international human rights law as well as a constitutional right guaranteed by the South African Constitution. The study proceeds on the premise that the question of disability and employment is not just a social concern but also a human rights concern, by which the government is legally bound to respect, protect, promote and fulfil the rights of people with disabilities. Thus, persons with disabilities are entitled to employment as a constitutional right protected by domestic law and also as a human right recognised and protected by international human rights law.

The study is also based on the assumption that the manner in which disability is conceptualised, determines the extent to which the question of employment for persons with disabilities is dealt with. A proper conceptualisation of disability in South Africa has the potential to guarantee access to employment opportunities to a larger number of people with disabilities than the limited target set by government. In this regard, the Integrated National Disability Strategy has cautioned that people with disabilities must be seen not as objects of pity but as gifted individuals with the capabilities to contribute enormously to the development of society.²⁰

4. Research questions

The study seeks to investigate the following:

- Why the 2 per cent employment equity target has not been attained since 2005 when the initial deadline was established and whether it is realistic that the target will be met by the 2015 deadline?

²⁰ Office of the Deputy President, 'Integrated National Disability Strategy: White Paper of November 1997 (Integrated National Disability Strategy).

- What is the legal and policy framework that regulates disability in South Africa including international instruments and to what extent do they impose obligations on the government to guarantee equality of opportunity and access to employment?
- How and to what extent does the government incorporate the human rights dimension in dealing with the issue disability and employment?
- What further measures can the government take in order to fulfil its constitutional obligation to guarantee greater opportunity for people with disabilities to access employment?

5. Purpose and significance of the study

It is a legal requirement for the government of South Africa to comply with its obligations to protect its citizens, especially those with disabilities who are among the category of vulnerable persons to whom protection is guaranteed not only by international human rights law but also by domestic law. The study thus aims to establish the obligations that the government has towards persons with disabilities. Discrimination on the basis of disability remains one of the principal social challenges in present day South Africa and therefore a violation of the constitutional right to equality and dignity.²¹ The study also examines to what extent the government's commitment to persons with disability could help in bridging the current inequality gap in the country.

The study outlines and highlights the challenges in meeting the employment equity target for persons with disabilities in the public service. It provides some invaluable recommendations on how the government could redirect its efforts in dealing with the question of disability and employment. The study therefore aims to achieve two objectives. First, to contribute to the academic debate on disability and employment by illustrating how a human rights perspective could help to increase the focus on employment equity and thus increase the proportion of persons with disability in employment. Second, to help in informing and probably cause the government to redirect its policy priorities with regard to disability and employment.

²¹ The Constitution (n 19) sect 1(a) & sect 9.

6. Research method

The research was principally desktop-based with the major source of materials obtained from the library and also from credible internet sources. Information was gathered principally from primary sources such as books, treaty instruments, legislation and policy documents, and also from secondary sources, including journal articles and other academic writings, reports and webpages among others. The study was fundamentally qualitative in nature, resulting in the knowledge contained herein which was compiled through review and analysis of the relevant scholarly materials, which provided the information to establish the theoretical base on the issues of disability and employment.

The study also took an analytical approach in the investigation of international and domestic instruments relating to the rights of persons with disabilities. The analysis focused on the UN Convention on the Rights of People with Disabilities and other international and regional instruments relating to disability, the Constitution of the Republic of South Africa, the Employment Equity Act and other related legislation, case studies, South African government reports on disability as well as the broad range of literature that deals with employment equity in relation to disability.

It was also important to apply a human rights approach in arguing that in South Africa, the right of persons with disability to employment is not only a policy and legislative guarantee but most importantly a constitutional entitlement which imposes a legal obligation for its fulfilment. The need for the human rights approach was necessary in order to establish the causes and consequences of discrimination and the inequality perpetuated in the area of employment against persons with disabilities.

An empirical study would have been necessary in order to draw first hand practical perspectives from the South African public service as well as from people with disabilities to compare the divergent views on the issue of disability and employment. However, because of financial and other logistical constraints such a field study could not be done. The study thus relied exclusively on available primary and secondary material, trusting in their authenticity to produce the objective analysis contained herein.

7. Literature review

Extensive research has been carried out in South African on the question of disability rights and the discriminatory treatment that persons with disability continue to face, particularly relating to equality of opportunity and access to employment.

Clement Marumoagae has explored the question of disability and employment and illustrates that though considerable attention has been given to discrimination relating to race, religion and gender in present day South Africa, not much has been done in relation to disability discrimination in the workplace.²² His paper centres on the employment discrimination experienced by persons with disabilities in the workplace.²³ He observes that in spite of the increased sensitivity of the issue of disability and employment, applicants for work who have a disability generally find themselves to be the victims of employment discrimination due to their disability.²⁴ He argues that persons with disabilities have an important role to play in developing the South African labour market and that their skills should be enhanced and utilised without being unduly discriminated against on the grounds of their perceived disability.²⁵ Marumoagae's analysis of disability rights and access to employment is quite comprehensively. However, his account is narrowly focused solely on the private sector and does not explore the situation of people with disabilities in terms of employment within the public sector.

Information gather from a UN Fact Sheet states that persons with disabilities are frequently not considered potential members of the workforce.²⁶ Schneider & Nkoli have established that a major and consistent disadvantage experienced by people with disabilities all over the world is the high level of underemployment, unemployment or economic inactivity compared to those without disabilities.²⁷ In a paper that looks at the recent decline in the employment of persons with disabilities in South Africa for the period 1998 to 2006 Mitra examines the

²² Marumoagae (n 11 above)345

²³ Marumoagae (n 11 above) 345.

²⁴ Marumoagae (n 11 above) 345.

²⁵ Marumoagae (n 11 above) 345-346.

²⁶ UN Fact Sheet (2007) 'Employing persons with disabilities: Fears and realities' *United Nations Department of Public Information — DPI/2486 5*.

²⁷ Schneider & Nkoli (n 6 above) 93.

trends in the employment of persons with disabilities.²⁸ Her paper investigates the possible causes and provides evidence of the recent decline in employment and labour force participation of persons with disability.²⁹ She points out that disability prevalence in South Africa during the period under study was estimated at 5.9 per cent and that there was a significant decline in the employment and labour force participation rate of persons with disability mainly as a result of the growth of the disability grants programme.³⁰

Employers are obliged by legislation to make provisions for employing persons with disabilities and also to reasonably accommodate them in the workplace.³¹ It is however established that the limitations to the understanding and acceptance of persons with disability in the workplace is characterised by fear, myth and prejudice to the reality that people with disability can effectively work³² and that the cost to accommodate a person with a disability is minimal in comparison to the valued contribution that they can make.³³ It is stated in a UN fact sheet that the real problem with employing persons with disabilities lies with employers, many of whom are still hesitant to take on employees with disabilities.³⁴ The facts sheet further states that employers avoid to recruit people with disabilities because of the fear that they may create problems in the workplace and that recruiting persons with disabilities would incur extra costs to transform the workplace to make the become disability-friendly.³⁵ The ILO has however, established that these fears are unfounded.³⁶

Vuyiswa McClain has pointed out that the inclusion of disability in the equality section of the Constitution is a result of the relentless struggle that people with disabilities waged during the oppressive apartheid regime, as they fought to be heard on issues that affect them.³⁷ She

²⁸ S Mitra (2008) 'the recent decline in the employment of persons with disabilities in South Africa, 1998-2006' *Fordham University, Department of Economics-Discussion Paper No: 2008-12 1-2*.

²⁹ Mitra (n 28 above) 8.

³⁰ Mitra (n 28 above) 2& 8.

³¹ Marumoagae (n 11 above) 345-346.

³² UN Fact Sheet 2 (n 26 above) 5.

³³ UN Fact Sheet 2 (n 26 above) 5 & 8.

³⁴ UN Fact Sheet 2 (n 26 above) 5.

³⁵ UN Fact Sheet 2 (n 26 above) 5.

³⁶ ILO (n 1 above) 3.

³⁷ CV McClain 'Governance and Legislation in South Africa: a contemporary overview' available at: www.disabilityworld.org/01-03_02/gov/southafrica.shtml (accessed: 20 May 2014).

brings to the limelight the Integrated National Disability Strategy which provides a blueprint for integration and inclusion of disability into every aspect of governance and proposes a paradigm shift from the health and welfare models in dealing with disability to a rights-based integrated approach.³⁸ She further highlights that the Integrated National Disability Strategy makes the point that people with disabilities should not be seen as objects of pity, but rather as capable individuals who are capable of immense contribution to the development of society and therefore advocates for the transformation of attitudes, perceptions and behaviour towards people with disabilities.³⁹

In a study to examine the extent to which disability policies and legislation have been implemented in South Africa, Andrew Dube established that there is in effect no separate disability legislation in South Africa but that the government has successfully created an enabling environment for policy development in the area of disability.⁴⁰ He goes further to state that policy formulation and adoption has been effective but implementation remains a challenge for a number of reasons including capacity constraints, inconsistency in implementation at different levels of government and discrepancies in the definition and the classification of people with disabilities.⁴¹ He draws the conclusion that the positive policy environment in South Africa presents unique opportunities for people with disabilities to address among other issues the high levels of unemployment but that implementation of the policies has had negligible impact on the lives of the majority of people with disabilities.⁴²

From the perspective of people living with disabilities, Wilhelm van Deventer identifies that in many instances, people with disabilities and those without disabilities experience similar problems in the South African labour market but that people with disabilities generally experience additional challenges, while individual disabled persons experience unique problems particular to their circumstances.⁴³ He contends that the challenges that people with

³⁸ McClain (n 37 above)

³⁹ McClain (n 37 above)

⁴⁰ AK Dube (2005) 'The role and effectiveness of disability legislation in South Africa' *Samaita Consultancy and Programme Design* 6.

⁴¹ Dube (n 40 above) 7.

⁴² Dube (n 40 above) 9.

⁴³ W van Deventer 'Carefronting disability issues in the south African labour market' www.rampup.co.za/i/pdf/wilhelm%20v%20deventer.pdf (accessed: 30 May 2014) 3.

disabilities face are numerous, which he categorises as caused by lapses in the legislation, the manner in which disability is conceptualised, conflicting statistics, problems of access, mobility, education, training, stereotyping and discrimination.⁴⁴ He argues that relating to minority and vulnerable groups, legislation focuses more on race and on gender than on disability and that the manner in which the term disability is conceptualised, limits the bargaining power of persons with disabilities in the labour market.⁴⁵

This is however, not exhaustive of the literature on disability and employment. The rest of the study is based on the analysis of other relevant materials on the subject. Thus the study involves a continuous review of information from internet sources, reports, journal articles, books and other academic writings.

8. Outline of chapters

This introductory chapter sets the framework for the study. It gives a background on the study of disability particularly relating to employment, it establishes the statement of the problem, the research questions that inform the investigation and the assumptions underlying the enquiry. It further outlines the significance and justification why the study is conducted, the approach used in conducting the research as well as a preliminary review of some relevant literature.

Chapter two explores the issue of disability and employment. It looks at previous as well as current statistic on disability to establish in actual terms the proportion of people with disabilities who are employed and those who are unemployed and on the basis of the analysis, to determine where the government stands in terms of its employment equity target. The chapter goes further to examine the factors that determine employability of persons with disabilities.

Chapter three focuses on the conceptual and legal frameworks on disability and employment aiming to establish the principles that inform the government's commitment to persons with disabilities in terms of employment. The chapter begins by looking at the conceptual nature

⁴⁴ van Deventer (n 43 above) 3.

⁴⁵ van Deventer (n 43 above) 3.

of disability in terms of definition and disability models. It goes on to examine the legal framework on disability by looking at the international as well as domestic protection of disability rights.

Chapter four gives a detail analysis of the UN Convention on the Rights of Persons with Disabilities, which South Africa has signed and ratified but has not yet domesticated into national law. The chapter looks at the obligations imposed on state parties to ensure the full realisation of the rights and freedoms guaranteed to persons with disabilities, which includes the obligations of conduct and of action. The chapter goes further to look at the domestic application of the Disability Convention, which provides two options including through interpretation by domestic courts and also through domestication of the Convention into national law to specifically address disability concerns in South Africa.

Chapter five focuses on the human rights dimension to disability and employment. The chapter explores the general principles that safeguard the human rights of people with disabilities and argues that by failing to pursue the human rights model, the government of South Africa has misplaced its priorities in sufficiently dealing with the issue of employment for persons with disabilities.

The last chapter is highlighted by a concluding remark and some general recommendations on appropriate strategies to enable the government as well as the disability movement of South Africa to deal with the issue of employment for persons with disabilities.

CHAPTER TWO

Anatomy of Disability and Proportion of Persons with Disabilities in Employment

1. Introduction

This chapter looks at the prevalence of disability in South Africa, with the aim to establish the actual proportion of people with disabilities as well as those in effective employment. The analysis proceeds from the starting point that there is accurate statistical evidence to justify the 2 per cent benchmark, which the government in line with its affirmative action policy plans to achieve.⁴⁶ However, in spite of the transformative measures that have been put in place to deal with inequality, South Africa remains one of the most unequal societies in the world.⁴⁷ This inequality does not exclude the way people with disabilities continue to be treated. Thus, the continuous discrimination perpetuated against people with disabilities particularly in the area of employment poses a challenge to the country's constitutional democracy.

The discussion in this chapter is based on the assumption that information extracted from statistics on disability provided by official as well as unofficial sources, especially with regard to the 2 per cent employment equity target for people with disabilities in the public service that is yet to be attained are accurate and reliable. It is supposed therefore that with government's determination to meet the target by the 2015 deadline,⁴⁸ the proportion of people with disabilities will amount to at least 2 per cent by 2015. Thus, the question that the chapter aims to respond to is why the 2 per cent employment equity target for people with disabilities in the public services has not been achieved since 2005 when the initial deadline was established and whether it is realistic that the target will be met by the 2015 deadline. In responding to this question, it would be interesting to revisit the statistical sources in order to

⁴⁶ White Paper on Transformation (n 11 above) para 10.6.

⁴⁷ World Bank 'South Africa overview' available at: www.worldbank.org/en/country/southafrica/overview (accessed: 25 July 2014).

⁴⁸ Ministry of Public Service and Administration – Ministerial communiqué (n 14 above) para 2.2.

determine the actual proportion of people with disabilities that form part of the entire population from which the analysis on the employment of persons with disabilities proceeds.

The chapter is structured as follows: Section 2 is based on analysis of information on disability extracted from statistics. Due to inaccuracies in the statistical figures a comparative analysis is made between information extracted from previous statistics and the most recent census statistics with the aim to determine the proportion of persons with disabilities in employment and those who are unemployed as well as the factors that determine employability of persons with disabilities. Section 3 looks at the barriers to the employment of persons with disabilities with the aim to illustrate why the government has not been able to meet the 2 per cent employment equity target for the public service. The chapter ends with a summary conclusion in section 4.

2. Information on disability extracted from statistics

This section aims to establish from different statistical sources, both official and unofficial to determine the actual number or proportion of persons with disabilities, including those who are employed and those who are not employed. This analysis is intended to determine whether the employment equity target for persons with disabilities envisaged by government is realistic and achievable. In this regard, separate analyses are made, on the one hand of previous statistics and on the other hand, of the most current census statistics released by Statistics South Africa. The reason for the separate analysis is because of the inconsistency in the statistical figures. It is stated that the inconsistency in the figures stems from the criteria applied in determining disability in the collection of the different sets of statistics, which varied considerable and therefore has had significant influence on the figures obtained.⁴⁹

2.1 Statistical analysis

2.1.1 Analysis based on information extracted from previous statistics

Basing on figures from different data collection on disability conducted in previous years, Andrew Dube has observed that information extracted from statistics on the prevalence of

⁴⁹ Statistics South Africa (2012) 'Census 2011 Statistical release – P0301.4' 45-46.

disability in South Africa is not comprehensive or accurate; with estimates ranging widely from 5.9 to 12 per cent.⁵⁰ Similarly, the White Paper on Affirmative Action in the Public Service recognises that figures on disability, which it estimates to be 5 per cent of the population are not very reliable.⁵¹ The Integrated National Disability Strategy puts the number of persons with disability at between 5 to 12 per cent.⁵² The Department of Public Service, in setting a numerical target for employment of persons with disabilities as a strategy to achieve broad representativeness of the South African society, noted that in 1997 the proportion of persons with disabilities who were in active employment stood at 0.02 per cent.⁵³ It thus envisaged a target of 2 per cent to be reached by 2005, which implied a shortfall of 1.98 per cent to be achieved.⁵⁴

Later figures released by Statistics South Africa in 2009 revealed that in absolute numbers persons with disabilities constituted 1.8 million people, representing a proportion of 7.9 per cent of the entire population.⁵⁵ The question is whether the variation in the figures has any incidence on the exact proportion of the number of employed or unemployed persons with disabilities? A related question is whether the government's claim to have not reached the 2 per cent equity target is accurate? It is important to also ask whether the numbers of people with disabilities who are employable actually make up the envisaged 2 per cent and whether they possess the necessary skills and attributes to qualify for employment.

van Staden has identified that the majority of people with disabilities are of working age, ranging between 19 and 69 years.⁵⁶ This implies that everything being equal, they deserve to have access to the equal opportunity for employment. However, the percentage of persons with disabilities is reported to be highest among those without any form of education, which makes up 10.5 per cent, and lowest among those with higher levels of education.⁵⁷ Thus

⁵⁰ Dube (n 40 above) 6.

⁵¹ White Paper on Affirmative Action in the Public Service 1998, para 1.8.

⁵² Integrated National Disability Strategy (n 20 above) 1.

⁵³ White Paper on Affirmative Action (n 51 above) para 1.6

⁵⁴ White Paper on Affirmative Action (n 51 above) para 1.7

⁵⁵ Statistics South Africa Community Survey 2009; Palime (n 85 below) 7.

⁵⁶ AF van Staden (2011) 'A strategy for the employment of persons with disabilities' *unpublished PhD thesis* – *University of Pretoria* 163.

⁵⁷ van Staden (n 56 above) 163.

unemployment is said to be highest among persons with lower or no education, while persons with emotional and intellectual disability are reported to have the lowest rate of employment.⁵⁸ From this analysis, it is evident that a large number of persons with disabilities is unemployable or has very marginal chances of securing employment. It might be that the qualification requirements for employment, which include certification, aptitude, or job necessity, which is evaluated with reference to the ability of the potential employee to perform a certain job may be lacking.⁵⁹ Obviously this would require alternative strategies such as training and capacity building to qualify persons with disabilities for employment.

There is no available statistics to indicate that the envisaged 2 per cent of persons with disabilities to meet the employment equity target actually exist anywhere as people who meet the employability criteria. With the conflicting figures on the actual proportion of persons with disabilities in South Africa, estimation that the rate cannot be less than 5 per cent of the entire population is true.⁶⁰ If the figure of 7.9 per cent provided by Statistics South Africa for 2009 is to be taken seriously, it is possible to argue that in reality the actual proportion of people with disabilities who qualify for employment could be less than the targeted 2 per cent envisaged by government. Van Staden points out that the estimated proportion of employees with disabilities constitutes just 1 per cent of the workforce of large employers, which indicates a serious under-representation of employees with disabilities.⁶¹ If the 12 per cent referred to by the Integrated National Disability Strategy is taken as the highest proportion and 10.5 per cent of people with disabilities are said to fall in the category of those with no form of education, which obviously reduces their chances of getting employment then those who actually may qualify for employment make up just *1.5 per cent*.

⁵⁸ van Staden (n 56 above) 164.

⁵⁹ KH Bamiwola 'Human right and employment discrimination: A comparative examination of equal job opportunities' available at: www.ilo.org/public/english/iira/documents/congresses/regional/lagos2011/3rdparallel/session3a/discrimination.pdf (accessed: 4 June 2014) 19.

⁶⁰ van Staden (n 56 above) 160.

⁶¹ van Staden (n 56 above) 166; Commission for Employment Equity (2004) 'Commission for Employment Equity Annual Report 2003/2004' *Department of Labour* 23.

2.1.2 Analysis based on information extracted from current statistics

In the 2011 census, Statistics South Africa used a more expanded criteria in its data collection, by which it defined disability as ‘difficulties encountered in functioning due to body impairments or activity limitation, with or without the use of assistive devices’.⁶² As a result of this more accommodating definition in measuring the ‘type and degree of difficulty’ instead of ‘impairment’ which most people are not comfortable with, the figures on disability seem more accurate and reliable.⁶³ The types of difficulties and the proportion of people who showed no signs of any difficulty were categorised as follows: Seeing; 88.9 per cent, hearing; 96.4 per cent, communicating; 98.5 per cent, movement; 96.5 per cent, memory; 95.7 per cent and self-care; 96.6 per cent. Thus on average those who reported no difficulty or in other words, those without any form of disability amounted to 95.4 per cent of the entire population.⁶⁴ From this calculation, it can be observed that in average, persons who reported one form of difficulty or another at the time of the census, which can generally be considered as the actual proportion of persons with disabilities constitutes 4.6 per cent.⁶⁵

The Census 2011 result goes further to give a breakdown of the national labour market which reveals a set of figures on the proportion of the population that falls within the bracket of the economically active. The economically active population is defined to include people between the ages of 15 to 64 years who are either employed or unemployed and are seeking employment.⁶⁶ According to the analysis on the labour market, which correlates with the analysis above on people that reported some form of difficulty, the census figures reveal a negative percentage of -4.2 per cent of people that are not economically active.⁶⁷ If the negative (-4.2) percentage of people that are not economically active is deducted from the 4.6 per cent stated above, which represents the actual proportion of persons with disabilities, we get to the same *1.5 per cent* which has earlier been argued to constitute the proportion of persons with disabilities that may effectively qualify for employment.

⁶² Statistics South Africa (n 49 above) 45.

⁶³ Statistics South Africa 2012 (n 49 above) 45.

⁶⁴ Statistics South Africa 2012 (n 49 above) 46.

⁶⁵ Statistics South Africa 2012 (n 9 above) 46.

⁶⁶ Commission for Employment Equity (2013) ‘Commission for Employment Equity Annual Report 2012-2013’ *Department of Labour* 7.

⁶⁷ Statistics South Africa 2012 (n 49 above) 49.

This analysis is of great significance in determining the employment of persons with disabilities.⁶⁸ The inconsistencies in the information on disability drawn from statistics are justified by the fact that definitions of disability vary greatly, different survey techniques are used, negative societal attitudes towards people with disabilities prevail, which combine to impede the collection of data.⁶⁹ This notwithstanding, the negative implication is that the discrepancies in the statistical figures help to misinform the formulation of policies and strategies relating to disability and employment. Besides the inconsistency, the statistical data are also problematic in the sense that they do not disaggregate by sex or race, which means that the envisaged target proportion of people with disabilities may be achieved but the problem of equality and discrimination may continue to pose a challenge.

2.1.3 Proportion of people with disabilities in employment

Census figures provided by Statistics South Africa do not provide any information relating to the actual number or proportion of people with disabilities in employment or seeking employment. The Commission for Employment Equity Annual Report confirms that data provided by Statistics South Africa is devoid of facts pertaining to ‘economically active people’ for people with disabilities.⁷⁰ However, reliable official sources have provided some information in this regard, which can be trusted for its accuracy. The Commission for Employment Equity has indicated a trend for aggregated workforce profile of people with disabilities for all employers in the public service, rising from 1 per cent in 2002 to *1.4 per cent* in 2012.⁷¹ This indicates a shortfall of 0.6 per cent to meet the 2 per cent employment equity target for the public service as set by government. The employment rate for people with disabilities in the private sector is estimated at 0.9 per cent.⁷² Combined with the 1.4 per cent that is said to be currently employed within the public sector gives a total of 2.3 per cent of people with disabilities that are effectively in employment both in the public and in the private sectors. This constitutes half of the total proportion of 4.6 per cent of people with disabilities all over the country.

⁶⁸ van Staden (n 56 above) 164.

⁶⁹ Integrated National Disability Strategy (n 20 above) 6.

⁷⁰ Commission for Employment Equity (n 61 above) 7.

⁷¹ Commission for Employment Equity (n 61 above) 13.

⁷² SA News (n 12 above)

2.2 Factors that determine employability of persons with disabilities

Following the Commission for Employment Equity's 2003-2004 Annual Report, persons with disabilities were reported to be seriously under-represented in the workforce.⁷³ This was due mainly to diverse socio-economic and cultural factors, including low levels of education, discrimination in the labour market and negative societal attitudes.⁷⁴ The Department of Labour holds a similar view that 'in employment, South Africans with disabilities are both under-represented and under-utilised in the workforce'.⁷⁵ It is uncertain to what extent these assertions are accurate, considering that it has largely been stated that the exact number of people with disabilities in South Africa is not known.⁷⁶ The International Labour Organisation estimates that people with disabilities are an untapped resource of skills and talents.⁷⁷ Meanwhile, Schriener has identified that people with disabilities are more likely to be employed in manual or unskilled occupations and less likely to hold professional or management positions.⁷⁸ It calls to question the criteria that are used to determine suitability for employment and how these criteria relate to the situation of persons with disabilities.

The Employment Equity Act enumerates four criteria that determine suitability for a job, which include; formal qualification, prior learning, relevant experience and capacity to acquire within a reasonable period the ability to do the job.⁷⁹ In terms of the Employment Equity Act, an employer is required to take these criteria into consideration in determining whether an employee or an applicant for employment meets the requirements for a job.⁸⁰ The White Paper on Affirmative Action identifies as criteria for selecting persons who qualify for affirmative action programmes to include; differential levels of skills, qualifications and experience and where necessary training.⁸¹ The Integrated National Disability Strategy White

⁷³ Commission for Employment Equity (n 61 above) 23; van Staden (n 56 above) 166.

⁷⁴ van Staden (n 56 above) 166.

⁷⁵ Department of Labour 'Technical assistance guidelines on the employment of people with disabilities' *Department of Labour - Chief Directorate of Communication 2*.

⁷⁶ Department of Labour (n 75 above) 2; van Deventer (n 43 above) 4-5;

⁷⁷ International Labour Organisation (n 1 above) 3.

⁷⁸ van Staden (n 56 above) 167.

⁷⁹ Employment Equity Act No 55 of 1998 art 20(3).

⁸⁰ van Staden (n 56 above) 124.

⁸¹ Department of Public Service and Administration (1998) 'White Paper: Affirmative Action in the Public Service General Notice 564 of 1998 *Government Gazette Vol. 394, No. 18800* para 10(4).

Paper on the other hand, identifies a list of factors that are attributed to the high levels of unemployment among persons with disabilities, which includes among others low skills levels due to inadequate education, discriminatory attitudes of employers; discriminatory and ineffective labour legislation, lack of enabling mechanisms to promote employment opportunities, inaccessible and unsupportive work environments.⁸² From these, can be deduced the factors that determine employability of persons with disabilities, which are discussed in the following sub-sections.

2.2.1 Knowledge, skills and aptitude

Literature on disability shows that while employers were willing to recruit people with disabilities, they failed to do so because applicants with disabilities often do not possess the adequate level of qualification, experience or practical skills necessary for certain jobs.⁸³ One of the most important or priority factors that guarantee employment even among people who are without disabilities is educational qualification. The International Labour Organisation has ascertained that people with disabilities cannot attain decent work if they do not have access to education, training and employment services and other social and development experiences to enable them acquire employability skills.⁸⁴ Benny Palime has identified that there is a serious lack of skills and training among people with disabilities due to many societal and environmental barriers.⁸⁵ The high level of functional illiteracy amongst people with disabilities leads to low skills levels and consequently limited access to employment opportunities.⁸⁶ As a result, those who cannot access formal employment because they lack the required educational qualifications find themselves doing menial jobs, which often do not count as employment in the way the formal economy recognises employment.

2.2.2 Nature of disability

In the case where people with disabilities may have a formal qualification their opportunity to work can be further restricted by the nature of disability in relation to the actual nature of the

⁸² Integrated National Disability Strategy (n 20 above) 7.

⁸³ PA Maja *et al* (2011) 'Employing people with disabilities in South Africa' 41:1 *SAJOT* 25.

⁸⁴ ILO (n 1 above) 2.

⁸⁵ B Palime (2000) 'Characteristics of people with disabilities in South Africa' *6th Africa Symposium on Statistical Development (ASSD) Cairo, Egypt* 17.

⁸⁶ Integrated National Disability Strategy (n 20 above) 7.

job.⁸⁷ Even within the affirmative action model of dealing with disability, it is obvious that employers would want to hire people who are mentally, intellectually and maybe physically fit and capable of meeting performance standards that are usually associated with job requirements or specifications. Concerning prospects of employing persons with disabilities type of disability counts a lot in determining employability.⁸⁸ Notwithstanding the advent of the social model, people with severe mental and intellectual disabilities are generally still regarded as ailing and in need of constant care and therefore, are deprived of opportunities to participate constructively in society to the fullest of their potentials.⁸⁹ This category of persons with disabilities would most often be excluded from employment opportunities on the assumption that they are functionally unproductive. The probability of employment opportunities is most unlikely for persons with multiple-disabilities as society in general and workplaces in particular are unprepared and maybe ill-equipped logistically for their integration.⁹⁰ It is obvious that the type of disability and the nature of a job may also be a barrier, preventing the employment of persons with disabilities.⁹¹

3 Barriers to the employment of people with disabilities

3.1 Prejudicial societal attitudes

Negative societal attitudes constitute one of the major disabling barriers to the employment of people with disabilities. This is largely determined by the way society looks at people with disabilities, which generally is in the sense that they are ‘handicapped’ and only fit to be helped. If the general tendency is to imagine and therefore also cause people with disabilities to imagine themselves as ‘damaged, abnormal, as patients and/or as the dependent objects for a variety of medical or rehabilitative interventions’,⁹² it is unlikely that attitudes relating to the employment of persons with disabilities would be different from the general perception. Maja *et al* have established that such ignorance relating to disability results in discriminatory

⁸⁷ Maja *et al* (n 83 above) 28.

⁸⁸ van Staden (n 56 above) 165.

⁸⁹ Integrated National Disability Strategy (n 20 above) 10.

⁹⁰ Integrated National Disability Strategy (n 20 above) 12.

⁹¹ Maja *et al* (n 83 above) 28.

⁹² B Albert (2004) ‘The social model of disability, human rights and development’ *Disability Knowledge and Research – Briefing Note 2*.

attitudes which consequently affect the employment of people with disabilities.⁹³ Usually, the type of job position and the extent to which reasonable accommodation is provided is determined by such negative and discriminatory societal attitudes.⁹⁴

In spite of its progressive legislations, South Africa remains a deeply divided and unequal society as a result of habits and attitudes that have passed down from the apartheid era. Arguably, this plays enormously on the way people with disabilities continue to be regarded in the post-apartheid era, which undoubtedly also impacts on the considerations they are given when it comes to employment. Perceptions might be changing but the change process is relatively slow, which evidently has translated into the slow progress in meeting the employment equity target set by government for people with disabilities in the public sector.

3.2 Workplace environment

Most work situations, including access and the infrastructure of the workplace are usually not disability friendly, which constitutes a restriction to the employment of people with disabilities.⁹⁵ Notwithstanding the requirements for employers to provide reasonable accommodation, which is considered to be ‘any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have reasonable access to or to participate or advance employment’, the practical reality is that some employers are unable to provide such reasonable accommodation, which therefore restricts the employment of persons with disabilities.⁹⁶ The provision in the legislation which states that accommodating a person with a disability should not result in ‘unjustified hardship’ gives employers the ultimate decision making power to determine what they would consider as constituting justifiable or unjustifiable hardship.⁹⁷

⁹³ Maja *et al* (n 83 above) 27.

⁹⁴ Maja *et al* (n 83 above) 27.

⁹⁵ Maja *et al* (n 83 above) 28.

⁹⁶ Maja *et al* (n 83 above) 28; Employment Equity Act (n 79 above) art 1.

⁹⁷ Employment Equity Act (n 79 above) art 1.

3.3 Disability policies and legislation

Even though examples of good practices in the employment of persons with disabilities are evident in South Africa, the fact is also true that legislation does not sufficiently protect people with disabilities particularly in the area of employment.⁹⁸ To set a policy target that must be attained seems reasonable but it is particularly limiting of the possibilities available to people with disabilities in the open labour market. Government policies and legislation should rather aim to develop capabilities and expand access to opportunities for employment for people with disabilities instead of narrowing them down. Somehow, this limiting factor has been experienced by the government in failing to reach its set target; having attained a minimal 0.36 per cent in 2012 – seventeen years after the policy was made.⁹⁹

4 Conclusion

The chapter examined the prevalence of disability in South Africa in relation to employment. In spite of the initial assumptions, the analysis revealed a confused and not very accurate statistical information relating to disability. However, a rough analysis of the available statistics derived from different sources illustrated that in effect, the proportion of persons with disabilities in South Africa stands at approximately 4.6 per cent of the entire population of the country. Of this number, the percentage that may actually qualify according to the criteria for considering employability might just be 1.5 per cent of the total proportion of people with disabilities, a figure that falls below the 2 per cent target.

The chapter proceeded to look at the factors that determine employability as well as barriers to the employment of people with disabilities. The analysis helped to illustrate the possible reasons why the employment equity target for persons with disabilities envisaged by government for the public sector has not been achieved for almost two decades since the target was first set. It gives reason to interrogate the theoretical and legal frameworks within which disability operates and to what extent these frameworks could inform a more

⁹⁸ Maja *et al* (n 83 above) 25.

⁹⁹ Department of Public Service and Administration ‘Statement on Cabinet meeting of 5 December 2012’ available at: www.gcis.gov.za/content/newsroom/media-releases/cabstatements6Dec2012 (accessed: 26 June 1014).

appropriate approach in dealing with the problem of disability and employment in South Africa. This constitutes the subject that will be discussed in the next chapter.

CHAPTER THREE

Conceptual and Legal Framework on Disability and Employment

1. Introduction

In analysing the statistics on disability and employment in South Africa the previous chapter revealed that more than three quarters of the disability population are unemployed and very unlikely to find employment due to lack of the necessary skills or experience to qualify for employment. The question that the chapter focuses on is whether there is any theoretical or legal framework that regulates disability and employment in South Africa. In responding to this enquiry, the chapter aims to illustrate that the question of disability and employment is not an abstract conception but that it operates within an established theoretical framework and is regulated by law. The rationale for examining the conceptual and legal frameworks on disability and employment is to determine to what extent the government's plan to employ 2 per cent of the disability population is informed by these frameworks. Among the problems that have constrained the employment of persons with disabilities are definitional difficulties, the applicable model and the legislation in force against which policies and programmes aimed at persons with disabilities are formulated.

The rest of the chapter is structured as follows: Section 2 looks at the different definitions on disability, particularly relating to employment. Section 3 deals with the disability models, with in depth focus on the social model which distinguishes the affirmative action and human rights approaches. It goes on to examine in section 4 the legal framework on disability and employment, in which regard it deals with international and domestic protection of disability rights. It then goes further to make a comparative analysis of the legal protection of disability and employment in other countries.

2. Definition of disability

It is worth clarifying that disability has been defined in many different ways but there is no universally recognised definition. The UN Convention on the Rights of Persons with Disabilities (Disability Convention) states that 'disability results from the interaction between

persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others'.¹⁰⁰ According to the World Health Organisation, disability is defined as 'the outcome of the interaction between a person with impairment and the environmental and attitudinal barriers he/she may face'.¹⁰¹ Disability in South Africa is understood from the perspective of the following definition:

Disability is the loss or elimination of opportunities to take part in the life of the community equitably with others that is encountered by persons having physical, sensory, psychological, developmental, learning, neurological or other impairments, which may be permanent, temporary or episodic in nature, thereby causing activity limitations and participation restriction with the mainstream society. These barriers may be due to economic, physical, social, attitudinal and/or cultural factors.¹⁰²

From the above definitions it is established that persons with disabilities are those who have long-term physical, mental, intellectual or sensory difficulties, which in interaction with various societal and attitudinal barriers may hinder their full and effective participation in society on an equal basis with others. This definition is informed by the social model of disability which articulates that activity limitation is a consequence of social organisation rather than individual impairment.¹⁰³

The Employment Equity Act, which is supposed to regulate and protect people with disabilities with regard to employment, defines people with disabilities in terms of the functional limitation approach¹⁰⁴ as 'people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment'.¹⁰⁵ The functional limitation way of looking at disability focuses on limitation

¹⁰⁰ UN Convention on the Rights of People with Disabilities and Optional Protocol (Disability Convention) 2006 preamble para e.

¹⁰¹ WHO (2001) *International Classification of Functioning, Disability, and Health* Geneva: World Health Organisations.

¹⁰² UN Enable 'Compilation of proposed revisions and amendments made by the members of the Ad Hoc Committee to the draft text presented by the Working Group as a basis for negotiations by Member States and Observers in the Ad Hoc Committee' available at: www.un.org/esa/socdev/enable/rights/ahcstata2tscompilation.htm (accessed: 10 June 2014).

¹⁰³ International Disability Rights Monitor (2003) *International Disability Rights Compendium* 10.

¹⁰⁴ International Disability Rights Monitor (n 103 above) 10.

¹⁰⁵ Employment Equity Act (n 79 above) art 1.

at the level of the individual and locates the ‘problem’ of disability within the individual.¹⁰⁶ According to the definition provided by the Employment Equity Act, certain categories of persons with disabilities may technically be knocked-out of employment opportunities because of the nature of their disabilities. As conceptualised by the Employment Equity Act, the context of high unemployment in South Africa means that finding employment is made very difficult for people with disabilities.¹⁰⁷ Meanwhile, the preamble to the South African Constitution makes the radical promise to ‘[i]mprove the quality of life of all citizens and free the potential of each person’ on the basis that ‘every citizen is equally protected by law’.¹⁰⁸ This includes enhancing the human capabilities of all citizens through processes of inclusiveness and social justice.¹⁰⁹

The disadvantages resulting from disability have previously been perceived to be the result of the person’s impairment but today the understanding of disability follows the social model, which recognises that the disadvantages and barriers that people with disabilities face are largely the result of the social and physical environment.¹¹⁰ The International Labour Organisation has made clear that the social model suggests policy approaches based on human rights, social inclusion and anti-discrimination measures, premised on the fact that people with disabilities are entitled to the same rights as other human beings.¹¹¹ Margaret Murugami considers disability in a socio-cultural context to mean a barrier arising from the interaction of people with impairments or chronic illnesses with the ‘discriminatory attitudes, cultures, policies or institutional practices’ established by society which hinder the participation of people with such impairments and illnesses.¹¹² In this regard, it is important to look at the different models by which disability is conceptualised.

¹⁰⁶ International Disability Rights Monitor (n 103 above) 10.

¹⁰⁷ Schneider & Nkoli (n 6 above) 100

¹⁰⁸ The Constitution (n 19 above) preamble.

¹⁰⁹ O Edigheji (2007) ‘Affirmative action and state capacity in a democratic South Africa’ 20:4 *Policy: Issues & Actors – Centre for Policy Studies* 1.

¹¹⁰ ILO (n 1 above) 4.

¹¹¹ ILO (n 1 above) 4.

¹¹² MW Murugami (2009) ‘Disability and identity’ 29:4 *Disability Studies Quarterly* available at: <http://dsq-sds.org/article/view/979/1173> (accessed: 10 June 2014).

It has been observed that the lack of clarity regarding the definition of disability, which allows for a range of interpretations, has implications for the protection of the rights of people with disabilities and for the application of policies.¹¹³ This is true for South Africa with regard to interpreting policies on disability in a manner that expands opportunities for employment to people with disabilities in relation to the way disability is conceptualised by legislation. This leads to the need to examine the different models that inform the way disability is perceived and dealt with in society.

3. Disability models

In this section, I examine the different models by which disability is conceptualised. The intention is to illustrate that the way disability is understood determines the manner in which society responds to it, which in turn determines policy priorities and choices.¹¹⁴ Generally, disability has been known to be dealt with by two principal models, which include the medical and the social models. This study identifies that in South Africa the social model has been collapsed into two separate approaches that are worthy of close examination. In effect, there is the affirmative action approach that has been adopted by the South African government as *modus operandi* and there is also the human rights approach, which surprisingly the government seems to neglect. The study proceeds to examine the two principal disability models to determine their relevance or effectiveness in dealing with the issue of disability and employment.

3.1 Medical model

Until recently, disability has been seen primarily as a health condition that necessitates medical care. This has been referred to as the medical model by which disability is dealt with as a situation of ill health or a condition of not being normal enough to be able to function properly in society.¹¹⁵ According to this model, disability is believed to be concerned with

¹¹³ International Disability Rights Monitor (n 103 above) 10.

¹¹⁴ Albert (n 92 above) 3.

¹¹⁵ Albert (n 92 above) 2.

health problems that limited people's potential.¹¹⁶ This way of looking at disability often focuses on the individual's incapacities, deficiencies, defects or impairment.¹¹⁷ This model projects society more, as a caring community that is concerned about its 'disabled people', to provide them with treatment or to create alternatives to begging or 'hiding away' and that 'disabled people' are not to be hated or feared, but rather to be pitied or helped as part of the 'deserving poor'.¹¹⁸

The medical model creates obstacles to participation on equal terms since an individual who seems to lack certain capacities may not be able to attain the status of an autonomous member of society.¹¹⁹ This study estimates that the drafting of the Employment Equity Act was largely influenced by the medical model, which has shown to be inappropriate in protecting the interest of persons with disabilities in terms of employment. The study moves on to examine the social model, to determine to what extent it guarantees opportunity for people with disabilities to access employment on an equal basis with every other person in society.

3.2 Social model

The social model of looking at disability provides an understanding that is substantially different from the medical model that sees disability essentially in terms of the physical or mental deficit or abnormality.¹²⁰ The social model rather sees the social context, including social norms, behavioural patterns and the physical infrastructure as the hindering factor to disability and therefore assumes that if the environment is adjusted appropriately disability will cease to be a problem. It promotes the idea that people with disabilities should be actors in their own lives, rather than passive recipients of care.¹²¹ According to the social model on disability, it is the way that society is organised to exclude people with impairments that is

¹¹⁶ B Watermeyer (2013) 'Silencing lives of struggle: How Disabled People South Africa has sacrificed the politics of protest' *Daily Maverick* available at: www.dailymaverick.co.za/opinionista/2013-09-19-silencing-lives-of-struggle-how-disabled-people-south-africa-has-sacrifi(accessed: 20 June 2014).

¹¹⁷ Murugami (n 112 above) 1.

¹¹⁸ Integrated National Disability Strategy (n 20 above) 13.

¹¹⁹ D Michailakis (2003) 'The systems theory concept of disability: One is not born a disabled person, one is observed to be one' 18:2 *Disability and Society* 210.

¹²⁰ B Albert and R Hurst 'Disability and a human rights approach to development' *Disability Knowledge and Research Briefing Paper* 2.

¹²¹ Albert (n 92 above) 4.

considered disabling, not the individual impairment, the basis on which organisations of people with disabilities have been pulling together increasingly to fight for their rights.¹²²

The ILO has stated that under the social model people with disabilities are ‘seen as objects of social welfare and not as subjects in their own right, let alone entitled to the full enjoyment of the right to work’.¹²³ Therefore, as a result of their marginalisation resulting in exclusion, people with disabilities do not get to fully enjoy their human rights, including the right to decent work.¹²⁴ Service delivery to people with disabilities becomes the priority instead of empowerment and the expanding of choices and opportunities. From the social model of disability derives the affirmative action approach and the human rights approach, which are examined subsequently.

3.2.1 Affirmative action approach

Affirmative action has been defined in different ways, which all sound quite positive as a transformative measure to redress the injustices created by the apartheid regime with the aim to achieve social justice and equity and to make the state efficient, effective and inclusive.¹²⁵

The White Paper on Transformation defines affirmative action as a proactive approach that combines laws, programmes or activities designed to redress the injustices of the past and to ameliorate the conditions of marginalised persons who have been disadvantaged on the grounds of race, colour, gender or *disability*.¹²⁶ According to Bamiwola, an affirmative action programme is a deliberate effort by an employer to remedy discriminatory practices in training, hiring and promotion of protected categories of persons when a particular category is underrepresented in the employer’s work force.¹²⁷

In Edigheji’s view, affirmative action is defined as corrective measures to ensure representation of all races, genders and people with disabilities in the public service.¹²⁸ The

¹²² Albert (n 92 above) 4.

¹²³ ILO (2004) *Achieving equal employment opportunities for people with disabilities through legislation: Guidelines* Geneva: International Labour Organisation 7.

¹²⁴ ILO 2004 (n 124 above) 7.

¹²⁵ Edigheji (n 109 above) 2.

¹²⁶ White Paper on Transformation (n 9 above) para 10.3.

¹²⁷ Bamiwola (n 59 above) 21.

¹²⁸ Edigheji (n 109 above) 1.

White Paper on Affirmative Action in the Workplace defines affirmative action as ‘the additional corrective steps which must be taken in order that those who have been historically disadvantaged by unfair discrimination are able to derive full benefit from an equitable employment environment’.¹²⁹ Meanwhile, the Employment Equity Act states that affirmative action is the set of ‘measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer’.¹³⁰

The ILO encourages equality of employment opportunity for workers with disabilities and also calls for affirmative action to promote the employment of workers with serious disabilities.¹³¹ This study contends that while the affirmative action approach is important in encouraging the employment of people with disabilities, it cannot solely be relied upon but must be combined with the human rights approach. Affirmative action cannot solely be relied upon in guaranteeing employment to people with disabilities because it is potentially limiting of government’s obligation to develop the capability of every individual to qualify for employment. Taking the definition provided by the Employment Equity Act for instance, the focus is only on persons that are ‘suitably qualified’, which means there is no obligation towards those who do not meet the qualification requirement.

The Act determines suitable qualification for a job to include; formal qualifications, prior learning, relevant experience or the capacity to acquire within a reasonable time, the ability to do a job.¹³² The risk is that employers, in interpreting the criteria for suitable qualification may actually be looking at the physical ability, in which case they would be focusing more on the impairment rather than the capability of a person with a disability to perform a job.

3.2.2 Human rights approach

The human rights approach generally seeks to ensure that every single individual is seen as having an equal right to freedom, dignity, non-discrimination and protection from the state

¹²⁹ White Paper: Affirmative Action in the Public Service (n 81 above) para v; Edigheji (n 109 above) 1.

¹³⁰ Employment Equity Act (n 79 above) sect 15(1); Edigheji (n 109 above) 1.

¹³¹ ILO 2004 (n 123 above) 5.

¹³² Employment Equity Act (n 79 above) sect 20(3).

against rights violations.¹³³ The Department for International Development has stated that: ‘Human rights provide a means of empowering all people to make decisions about their own lives rather than being the passive objects of choices made on their behalf.’¹³⁴ The European Union’s guidance note on disability and development indicates that disabled people’s organisations around the world are increasingly promoting a human rights approach to disability issues, focusing on disabled people’s rights and on the need to change society into a more inclusive community that accommodates everybody.¹³⁵

The ILO has also observed that disability issues, including issues of employment are now increasingly been considered as issues of human rights, regulated by human rights law which emphasises the concept of human dignity and the fact that all people have equal rights.¹³⁶ In respect of the disability philosophy which says ‘nothing about us without us’, the disability rights movement has constantly asserted that disability is a human rights and a development issue.¹³⁷ The human rights approach thus offers the platform for societal transformation and a way for people with disabilities to transform their sense of who they are – from stigmatised objects of care to valued subjects of their own lives.¹³⁸

Access to employment is a universally acknowledged human right.¹³⁹ The human rights approach has the potential to ensure that government does not only focus on proving employment to a determined percentage of people with disabilities. According to the requirement of equality of opportunity, the government is obliged to ensure that every single person with a disability is granted the opportunity through capacity development to become employable. The human rights approach also guarantees that the government can be held accountable for failing to meet its human rights obligations towards people with disabilities.

¹³³ International Disability and Human Rights Network ‘Disability and a human rights approach to development’ available at: <http://www.daa.org.uk/uploads/pdf/Disability,%20Development%20&%20HR.pdf> (accessed: 12 June 2014) 3.

¹³⁴ DFID (2000) *Realising Human Rights for Poor People* Department for International Development 10.

¹³⁵ Guidance note on disability and development for EU delegations and services, EC DEV/RELEX/AIDCO and delegations staff briefing note (2003) available at: www.iddc.org.uk/dis_dev/mainstreaming/guidance_note.pdf (accessed: 8 June 2014); Albert (n 92 above) 2.

¹³⁶ ILO 2004 (n 123 above) v.

¹³⁷ Albert (n 92 above) 4.

¹³⁸ Albert (n 92 above) 4.

¹³⁹ International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966 arts 6 & 7.

Because human rights are usually protected by law, I move on therefore to examine the legal framework that regulates disability and employment.

4. Legal Framework on Disability

4.1 International protection of disability rights

South Africa has ratified a number of international conventions that directly or indirectly make provision for the protection of the rights of people with disabilities. This includes most importantly the International Bill of Human Rights, the Disability Convention which is examined in the next chapter and the UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities which has been instrumental in shaping the disability policy making process in South Africa.¹⁴⁰ It is important to consider these international instruments as part of the legal framework on disability and employment not only because South Africa has ratified them but also because the Constitution imposes an obligation on any court, tribunal or forum, when interpreting the Bill of Rights to consider international law.¹⁴¹

The International Bill of Human Rights consists of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which form the basis of international human rights law. With regard to guaranteeing protection to persons with disabilities in relation to employment, the UDHR stipulates that '[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment'.¹⁴² In effect, everyone is used in the broadest context to include persons with disabilities without any form of discrimination. The right to gainful employment and favourable conditions of work guaranteed to everyone, including persons with disabilities is also endorsed by the ICESCR as a legal obligation that states parties are obliged to fulfil.¹⁴³

¹⁴⁰ McClain (n 37 above)

¹⁴¹ The Constitution (n 19 above) sect 39(1)(b).

¹⁴² Universal Declaration of Human Rights, 1948 art 23(1).

¹⁴³ ICESCR (n 139 above) 6 & 7.

It is worthy to note that South Africa has not ratified the ICESCR and by implication is not bound by it. However, according to constitutional requirement, when it becomes necessary domestic courts are obliged to make reference to the ICESCR in order to interpret the rights enshrined in the South African Bill of Rights.¹⁴⁴ Thus, though the South African Constitution does not explicitly provide for the right to employment, the provisions on the right to employment guaranteed by the UDHR and the ICESCR may be used to justify the right to employment for persons with disability in South Africa.

Interestingly, the discrimination clauses contained in all three human rights instruments do not mention disability as one of the grounds on which a person may not be discriminated against. This may account for the reason why it become necessary to adopt a separate treaty specifically dedicated to the protection of the rights of persons with disabilities. The preamble to the Disability Convention recognises ‘the need for persons with disabilities to be guaranteed their full enjoyment without discrimination’ and also that ‘discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person’.¹⁴⁵ Due to its crucial nature in addressing issues pertaining to disability, the Disability Convention will be discussed in more detail in the next chapter, particularly relating to South Africa’s commitment to domesticate the provisions of the treaty into national law.

4.2 Domestic protection of disability rights

4.2.1 Constitution of the Republic of South Africa

The South African Constitution has generally been qualified as one of the most progressive in the world because of its extensive protection of rights and freedoms pertaining to all categories of persons. Founded on the fundamental values of human dignity, equality, human rights and freedom, the Constitution outlaws among other things, discrimination on the grounds of disability.¹⁴⁶ This is done through the section 9 equality clause which establishes that ‘[e]quality includes the full and equal enjoyment of all rights and freedoms’.¹⁴⁷ This provision protects among others disability rights, implying that people with disabilities have

¹⁴⁴ The Constitution (n 19 above) sect 39(1)(b).

¹⁴⁵ Disability Convention (n 100 above) preamble para c.

¹⁴⁶ The Constitution (n 19 above); McClain (n 37 above).

¹⁴⁷ The Constitution (n 19 above) sect 9(2).

just as much rights as those without a disability.¹⁴⁸ Besides the section 9 clause, there is no other comprehensive provision in the Constitution pertaining specifically to the protection of the rights of people with disabilities but rather a cursory mention of disability as a ground on which discrimination may not be practiced. The equality clause stipulates that:

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, conscious, belief, culture, language and birth (emphasis added).¹⁴⁹

This is the only constitutional provision that protects and prohibits discrimination against any person on the basis of their disability. Francois van Staden has observed that the right to equality does more than simply prohibit discrimination or unequal treatment but also imposes a positive duty on the government to ensure that everyone fully and equally enjoys all rights and freedoms.¹⁵⁰ By implication, therefore, the denial of any right on the basis of disability constitutes a constitutional violation of the rights of the person with a disability. People with disabilities are also guaranteed protection under the preamble of the Constitution, which envisages a South African society established on the pillars of democratic values, social justice and fundamental human rights', where 'every citizen is equally protected by law'.¹⁵¹

In principle, the promise of social justice, fundamental human rights and equal protection under the law provides legal safeguards, which give assurance of formal equality that people with disabilities will be impartially treated within democratic South Africa. Constitutional principles only become meaningful when they are translated into concrete action for the attainment of substantive equality. Van Staden has argued that to achieve substantive equality in the workplace for example, may require positive discrimination in recruitment and promotion in favour of certain groups such as people with disabilities who have historically been disadvantaged.¹⁵² Besides the preambular and constitutional guarantees, there is a range

¹⁴⁸ Disability Rights 'Disability Rights - Taking a Stand for Equal Rights' available at: www.medicallaw.co.za/articles-01-Disability-Rights.html (accessed: 10 June 2014); Integrated National Strategy (n 20 above) 5.

¹⁴⁹ The Constitution (n 19 above) sect 9(3).

¹⁵⁰ van Staden (n 56 above) 116.

¹⁵¹ The Constitution (n 19 above) preamble.

¹⁵² Van Staden (n 56 above) 118.

of other progressive legislation that make provision for the protection of disability rights in relation to employment as will be discussed in the proceeding subsections.

4.2.2 Employment Equity Act 55 of 1998

The Employment Equity Act aims to aims to achieve equity in the workplace by:

- a) Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- b) Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

The Act also determines employment-equity quotas that apply both to the private and public sectors regarding the employment of persons with disabilities.¹⁵³ However, note should be taken of the fact that the legislation says the employment of designated groups, which includes persons with disabilities is as a measure of ensuring *their equitable representation...in the workforce*. The implication is that once such a representation is achieved; the focus may become diverted. Logically, once the 2 per cent employment equity target is achieved, the risk is that the focus on the question of employment for persons with disabilities may be tilted towards other concerns, which of course would become problematic. In such a case, it would not amount to equal opportunity and unfair discrimination.

4.2.3 Disability Rights Charter

The Disability Rights Charter provides in article 5 dedicated to employment that:

- a) All disabled people shall have the right to employment in the open labour market and appropriate measures, such as quota systems and training programmes, shall be implemented by government and employers to ensure that opportunities are created in the workplace which allow for the full enjoyment of this right.
- b) The state shall provide incentives to employers, such as tax concessions, to encourage them to employ disabled people.

¹⁵³ Dube (n 40 above) 7.

- c) State assistance shall be provided to disabled people to encourage them to engage in income generation through workshops and self-help projects.¹⁵⁴

It should be noted that the Charter provision says *all disable people shall have the right to employment in the open labour market*, which means the stage must be set to allow every person with a disability the opportunity to be able to access employment and not just a calculated 2 per cent of disability population. It is certain that the nature of some disabilities may inhibit persons with such disabilities from enjoying the equal opportunity to access employment which however, should be the determinant of the particular circumstances and not the determinant of legislation.

4.3 Other measures on disability and employment in South Africa

It is stated that the Department of Social Development has developed policy guidelines on the management and transformation of special centres for persons with disabilities¹⁵⁵ intended to provide decent work and wages as well as strengthening skills development and improving employability of persons with disabilities in the open labour market.¹⁵⁶ It is one thing to adopt policies and yet another thing to ensure their implementation. It is uncertain if the said policy guidelines have indeed been implemented. If so, then at least the government would have been able through the skills development programme improved the capabilities of people with disabilities to meet the employment equity target for the public services.

4.4 Lessons from other countries

In this section, I attempt a comparison of the way the rights of persons with disabilities with regard to employment is recognised and protected in other countries around the world. The following two countries, including El Salvador and Serbia will be considered.

¹⁵⁴ Disability Rights Charter of South Africa art 5.

¹⁵⁵ I Grobbelaar-du Plessis, C Grobler (2013) 'South Africa' in C Ngwenya et al African Disability Rights Yearbook 337.

¹⁵⁶ Grobbelaar-du Plessis & Grobler (n 155 above) 337.

4.4.1 El Salvador

The disability population in El Salvador is estimated at 10 per cent.¹⁵⁷ Article 37 of the El Salvadoran Constitution explicitly protects the right to employment for people with disabilities. It states that:

Work is a social function, protected by the State, and it is not considered a commodity.

*The State will use all the resources available to provide an employment to the handcraft or intellectual worker and to ensure economic conditions for a dignity living to him/her and his/her family. In the same way, the State will promote the employment and placement of people with limitations or physical, mental, or social incapacities (emphasis added).*¹⁵⁸

The El Salvadoran Law on Equal Opportunities further requires every employer with more than 25 employees to hire one person with a disability for every 25 employees recruited.¹⁵⁹ Though it is stated that this legislative provision has not consistently been enforced,¹⁶⁰ compared to the situation in South Africa, it indicates a positive step and a clearly defined measure by which accountability can easily be accessed. The South African legislation on disability and employment and the policy to employment two per cent of the total number of people with a disability remains very vague and accountability cannot readily be pinned down to any particular person. This might account for the reason why the two per cent target has not been attained over the years.

It is reported that the government of El Salvador, besides the legislative measures that it has taken to ensure the employment of people with disabilities, has also taken other more pragmatic measures, including specially designed training and job placement programmes for people with disabilities financed by the government through the Salvadoran Professional Training Institute.¹⁶¹ The programme is said to be supported and sustained by non-governmental organisations and international governmental organisations such as the Spanish Association for the Blind, which have contributed positively in creating employment for

¹⁵⁷ International Disability Rights Monitor (n 103 above) 15.

¹⁵⁸ Constitución Política de la República de El Salvador de 1983, actualizada hasta reforma introducida por el DL N° 56, del 06.07.2000 article 37. Available at: www.georgetown.edu/pdba/Constitutions/EISal/EISal83.html (accessed: 20 May 2014); International Disability Rights Monitor (n 103 above) 19.

¹⁵⁹ International Disability Rights Monitor (n 103 above) 19.

¹⁶⁰ International Disability Rights Monitor (n 103 above) 19.

¹⁶¹ International Disability Rights Monitor (n 103 above) 19.

people with disabilities in the country.¹⁶² Through the protective legislation and particularly empowering employment and training programme, a large proportion of the disability population is said to have found employment with ease particularly with the clothes-assembly industry, which is the largest employer in the country.¹⁶³

4.4.2 Serbia

Serbia runs a Youth Employment Fund project that has been earmarked as an international best practice approach to disability and employment. The project aims particularly at creating opportunities for employment and also for enabling young people with disabilities to acquire employment skills.¹⁶⁴ By 2010 the rate of youth unemployment in Serbia was reported to stand at 46.6 per cent, a situation that caused the government to embark on special measures for redress.¹⁶⁵ The government of Serbia is said to have adopted the Law on Employment and Professional Rehabilitation of Persons with Disabilities, which introduced a quota system for the employment of people with disabilities.¹⁶⁶ Unlike the quota system established by the government of South Africa, the Serbian law on disability and employment specifies that for every 20 workers hired by a company, at least one must be a person with a disability and another one person for every additional 50 workers.¹⁶⁷ A fine is said to be imposed on any company that fails to comply with the obligation and the amounts generated from the fines are paid into a special fund and used to provide other support services for the employment of persons with disabilities.¹⁶⁸

It is also reported that as a result of the adoption of the law and the establishment of the Youth Employment Project 3,681 people with disabilities found a job in 2010 alone, compared to between 400 and 600 in previous years before the law was passed.¹⁶⁹ Besides enacting the law, it is established that the government went further to take practical measures

¹⁶² International Disability Rights Monitor (n 103 above) 19.

¹⁶³ International Disability Rights Monitor (n 103 above) 19.

¹⁶⁴ UN (2011) *Best Practices for Including Persons with Disabilities in all Aspects of Development Efforts* 72-73.

¹⁶⁵ UN (n 164 above) 73.

¹⁶⁶ UN (n 164 above) 73.

¹⁶⁷ UN (n 164 above) 73.

¹⁶⁸ UN (n 164 above) 73.

¹⁶⁹ UN (n 164 above) 73.

to ensure that the law is put into practice. These measures include, the establishment of ‘social enterprise–based training programmes’ aimed at providing the youth with appropriate skills required by the employers, work training, employment subsidies and work trial programmes as well as self-employment programmes.¹⁷⁰ Accessibility grants are also said to be provided to employers who express the willingness to recruit people with disabilities, to enable them to adjust the work environment appropriately to accommodate the people with disabilities that they employ.¹⁷¹ While another category of grants is said to be allocated to single parents for vocational training.¹⁷²

The Serbian example illustrates that it does not just suffice to adopt legislative or policy measures but to ensure, through taking other appropriate measures that the legislative and policy measures are effectively translated into reality. The South African quota system on the employment of persons with disabilities lacks the kind of specific measures to make it work. The Minister of Public Service and Administration announced to hold Heads of Departments accountable for failing to achieve the employment equity quota for persons with disabilities but does not state precisely what kind of accountability they would be held to.¹⁷³ In Serbia, fines are imposed on defaulters, while subsidies are provided to companies that comply with the legislation. Schedule 1 of the South African Employment Equity Act makes provisions for fines that may be imposed in the event of a contravention of the provisions of the Act. However, there is no clarity as to how such fines would be collected and what they would be used for. There is also no indication on whether this provision has actually been implemented like it is done in Serbia.

5. Conclusion

This chapter dealt with the conceptual and legal frameworks on disability and employment. Despite the lack of a universally acceptable definition on disability, it was necessary, for the purposes of clarity on the discussions in this study to look at a few established definitions in order to situate the category of persons that are being dealt with when we talk about disability

¹⁷⁰ UN (n 164 above) 74.

¹⁷¹ UN (n 164 above) 74.

¹⁷² UN (n 164 above) 74.

¹⁷³ Ministry of Public Service and Administration- Ministerial communiqué (n 14 above) para 3.3.

and employment. A further discussion of the different disability models helped to illustrate how disability is conceptualised as well as set the framework within which the question of disability and employment must be understood. This in turn determined the type of responses and the policy priorities and choices crafted to deal with the employment of persons with disabilities.

The question of disability and employment as a social construct is not only grounded in the disability models that were examined but also is also regulated by a number of international as well as national legal instruments. The analysis revealed an extensive range of legal recognition and protection of persons with disabilities, particularly relating to the right to employment. A comparative analysis on the legal protection of disability and employment in El Salvador and Serbia illustrated how employment for persons with disabilities has been handled in these two countries. These best practice approaches provide some lessons that the government of South Africa could emulate in addressing the question of disability and employment.

The chapter established that the question of disability and employment continues to pose a challenge in South Africa, particularly due to the affirmative action approach that the government has embarked on, which has proved to be ineffective. Meanwhile, it could be more strategic to pursue the human rights model that is becoming an international practice in dealing with issues relating to disability. Thus, the next chapter looks at the human rights dimension to disability and employment.

Chapter Four

United Nations Convention on the Rights of Persons with Disabilities

1. Introduction

This chapter deals specifically with United Nations Convention on the Rights of Persons with Disabilities and Optional Protocol (Disability Convention), which enjoins state parties to the achievement of its primary aim ‘to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity’.¹⁷⁴ Importantly, the Convention outlines key steps and actions that states parties are obligated to take in order to make the human rights of people with disabilities a reality.¹⁷⁵ The Convention further includes a range of guarantees covering areas in which people with disabilities have been discriminated, including employment among others and clarifies the legal obligations of states to respect and ensure the equal enjoyment of all human rights by all persons with disabilities.¹⁷⁶ The Optional Protocol makes provision for access to remedies whereby, individuals or groups may through stated procedures bring a complaint on alleged violations against the state to the Committee on the Rights of People with Disabilities for review.¹⁷⁷ The Committee is empowered to report on the matter and to make recommendations for possible redress.¹⁷⁸

The standard procedures for implementation require the transposition of the Disability Convention into domestic law for effective implementation and enforcement through national mechanisms.¹⁷⁹ South Africa is a state party to the Convention; having signed and ratified the treaty in 2007 without any reservation.¹⁸⁰ Ratification implies that South Africa has legally

¹⁷⁴ Disability Convention (n 100 above) art 1; Walker (n 5 above) 1.

¹⁷⁵ Walker (n 5 above) 1.

¹⁷⁶ C Parker & L Clements (2008) ‘The UN Convention on the Rights of Persons with Disabilities: A new right to independent living?’ 4 *EHRLR* 509.

¹⁷⁷ Walker (n 5 above) 7.

¹⁷⁸ Walker (n 5 above) 7.

¹⁷⁹ S Paulo (2014) ‘International cooperation and development: A conceptual overview’ *German Development Institute* 19.

¹⁸⁰ Grobbelaar-du Plessis & Grobler (n 155 above) 309.

committed itself to ensure that the treaty provisions will become fully integrated into domestic laws. It remains uncertain why after ratification South Africa has not been able to domesticate the Convention to make it an integral part of national law. This chapter thus examines this question by looking at the obligations imposed on state parties in section 2. Section 3 further looks at the domestic application of the Disability Convention. A summary conclusion of the chapter is then made in section 4.

2. Obligations imposed on state parties

The Disability Convention does not only outline that range of rights and freedoms guaranteed to persons with disabilities but also elaborately sets out the obligations and measures to be taken relating to certain specific aspects that are crucial to the livelihood of persons with disabilities such work and employment.¹⁸¹ It provides that:

States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during the course of employment, by taking appropriate steps, including through legislation...¹⁸²

It implies on the one hand that national attitude must be constructed in such a manner as not to prevent persons with disabilities from accessing employment and work opportunities and on the other hand, that the right to access employment opportunities and to work is effectively achieved. The Disability Convention thus imposes obligations of a dual nature on states parties, which includes the obligation of conduct and the obligation of action. These obligations are embodied in the treaty law fundamental principle of *pacta sunt servanda* which stipulates that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.'¹⁸³

¹⁸¹ Disability Convention (n 100 above) art 27.

¹⁸² Disability Convention (n 100 above) art 27(1).

¹⁸³ Vienna Convention on the Law of Treaties 1969, art. 26.

2.1. Obligation of conduct

The Disability Convention imposes an obligation of conduct in the sense that it recommends the attitude that state parties to the treaty must adopt in their perception about people with disabilities. The obligation of conduct generally encompasses restraining or negative duties prohibiting the state from derogating from the fundamental rights and freedoms recognised and protected by the Convention.¹⁸⁴ The Convention gives a concise definition of how persons with disabilities should be perceived to include; ‘those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’.¹⁸⁵ This definition seems most appropriate for application in the South African context in the sense that it conceptualises disability not as a permanent condition but as one that can be corrected by the right societal attitude and mind-set.

If South Africa were to apply good faith, it should have after ratification proceeded with domestication of the treaty provisions into national law. Acting in good faith according to the *pacta sunt servanda* principle means that state parties to the Convention commit to be bound by it without having to be compelled to do so. By ratifying the Convention, South Africa commits to act in good faith in ensuring compliance.¹⁸⁶ The obligation of conduct requires the exercise of good faith on the part of South Africa as a party to the Disability Convention which guarantees that the treaty obligations will not be violated.¹⁸⁷ The Disability Convention imposes a mandatory obligation of conduct stipulating that: ‘States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds’.¹⁸⁸

2.2. Obligation of action

The obligation of action entails a variety of positive duties imposed by the Disability Convention, which state parties must undertake in order to ensure the full realisation of the

¹⁸⁴ Disability Convention (n 100 above) art 4(4).

¹⁸⁵ Disability Convention (n 100 above) art 1.

¹⁸⁶ Disability Convention (n 100 above) art 4.

¹⁸⁷ Disability Convention (n 100 above) art 4(1)(d).

¹⁸⁸ J Allain (2009) ‘Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities’ *Disability Action’s Centre on Human Rights for People with Disabilities* 10; Disability Convention (n 100 above) art 5(2).

rights and freedoms guaranteed to persons with disabilities, including particularly the right to work and employment as provided for by article 27 of the Convention, which forms the core subject of this study. Jean Allain has in summary categorised the obligations imposed on states parties by article 27 to include; the obligations to repeal existing bad legislation and to adopt appropriate national legislation to give effect to disability rights, to mainstream the protection and promotion of disability rights, to provide capacity building and disability specific services and assistance, to modify existing infrastructure in order to facilitate accessibility and reasonable accommodation of persons with disabilities in the workplace and most importantly, to meaningfully engage persons with disabilities in decision-making on issues relating to their well-being.¹⁸⁹

Ratification of the Disability Convention demonstrates good will that the disability population in South Africa is being thought of in good faith but without accompanying concrete action, the good will aspirations will not translate into changing the circumstances of the persons with disabilities locally. Owing to the fact that South African legislation is not protective enough of the right to employment for persons with disabilities,¹⁹⁰ the Disability Convention; because of its extensive recognition and protection of disability rights is not only necessary but indispensable for redressing the defective disability regime in South Africa.

3. Domestic application of the Disability Convention

This section is intended to determine the legal requirements for the application of the Disability Convention in South Africa. This is because; the lapses in the legal framework on the question of disability and employment require South Africa as a state party to the Convention to reconsider its domestic legal regime relating to disability rights.¹⁹¹ This is based on the rationale that the Convention establishes a better standard for the achievement of disability rights than does the disjointed South African legislation and policy framework. In spite of the rights-based standards that the Disability Convention establishes through which

¹⁸⁹ Allain (n 188 above) 13-14.

¹⁹⁰ Maja *et al* (n 83 above) 25.

¹⁹¹ T P van Reenen 'The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 years' *SUR-International Journal on Human Rights* available at: http://www.surjournal.org/eng/conteudos/getArtigo14.php?artigo=14.artigo_07.htm (accessed: 3 January 2015).

disability concerns may be redressed, its international nature complicates straightforward domestic application.

The present South African constitutional dispensation allows for a mixed system of acceptance of international treaties into domestic law that is neither traditionally monist nor dualist. The Constitution mandates that an international treaty, such as the Disability Convention may become national law either through incorporation by an act of parliament or through interpretation South African courts.¹⁹² Effective implementation of the Disability Convention in South Africa is therefore only possible through two options, which include through interpretation of the provisions of the Convention by domestic courts or through domestication into national law as illustrated in the sub-sections that proceed. In examining these two realisation mechanisms attention is drawn to the extent to which each of them is relevant to the South African context.

3.1. Interpretation by domestic courts

Application of the Disability Convention in South Africa may happen through interpretation of the provisions of the Convention by domestic courts, to give effect to disability rights in South Africa. The Constitution allows for such a degree of latitude for direct application of the Disability Convention as constituting part of domestic legislation so long as it is not inconsistent with the Constitution or does not contravene national legislation.¹⁹³ It is a mandatory requirement for courts in South Africa, when interpreting the regime of rights enshrined in the Constitution; including the rights pertaining to persons with disabilities, to consider international law, which in this instance is the Disability Convention.¹⁹⁴ The Constitution further stipulates that when interpreting legislation, every court must prefer any reasonable interpretation of such legislation that is consistent with international law.¹⁹⁵

When a domestic court makes recourse to the Disability Convention to give effect to provisions of national legislation relating to disability or where legislation does not provide

¹⁹² Van Reenen (n 191 above); the Constitution (n 19 above) sects 231-232.

¹⁹³ The Constitution (n 19 above) sect 232-233.

¹⁹⁴ The Constitution (n 19 above) sect 39(1)(b).

¹⁹⁵ The Constitution (n 19 above) sect 233.

for disability rights, it brings the Convention or provisions of it into direct application as domestic law. This is however, yet to become reality as jurisprudence on disability is still to be developed. This notwithstanding, domestic application of the Disability Convention through interpretation by the courts might not be the most appropriate strategy to pursue in advancing disability rights, particularly relating to employment. Case law usually is context and case specific and may not address the generic problem of disability in South Africa the way a disability specific legislation would do, which gives reason to consider domestication of the Disability Convention as the ultimate alternative.

3.2. Domestication into national law

The South African Constitution requires that in some instances, international treaties have to be domesticated before they can become law in the country. Domestication entails translating the Disability Convention into national law, so that the provisions of the treaty become applicable locally to address the specific objectives that the treaty aims to achieve at international level. South Africa has as of date not yet incorporated the Disability Convention into national law in conformity with section 231(4) of the Constitution, which provides that an international treaty becomes domestic law when it has been domesticated through the process of enacting national legislation. Traditionally, because South Africa falls under the dualist legal system in the reception of international law, it is required to formally enact legislation to enable the Disability Convention become national law.¹⁹⁶

The procedure may be arduous but necessary in the sense that it provides opportunity for a national version of the Convention to be adopted to respond directly to the circumstances of persons with disabilities. Domestication is thus most appropriate to pursue because on the one hand, it will enable the adoption of a disability specific legislation to fill the gaps and lapses that currently exist in South Africa. On the other hand, it will create a national culture of acceptance and thus also a rights-based approach in dealing with disability as a human rights concern, according to which persons with disabilities would be seen as possessing capabilities and agency to contribute constructively to society through work and employment.

¹⁹⁶ van Reenen (n 191 above).

4. Conclusion

This chapter dwelled on the UN Convention on the Rights of Persons with Disabilities and its application domestically in addressing the gaps and lapses in legislation relating to the disability regime in South Africa. It established that effective implementation of the Disability Convention in South Africa provides two possible options, including through interpretation of the provisions of the Convention by domestic courts or through domestication into national law as mandated by the Constitution. The former option might provide a leeway for direct and perhaps hassle-free domestic application of the Disability Convention through jurisprudence but as argued, case law is usually context and case specific and therefore may not address the generic problem of disability in South Africa.

The option of domestication of the Disability Convention was then further considered, in which case it was established that domestication constitutes a better alternative to interpretation by the courts. Two reasons were advanced to justify this claim, including on the one hand, the fact that domestication would enable the adoption of a disability-focused legislation specifically related to the South African context. On the other hand, that domestication would create a national culture of acceptance and thus also a rights-based approach in dealing with disability as a human rights concern, according to which perceptions about persons with disabilities would be seen from a human rights point of view.

Chapter Five

Human Rights Dimension to Disability and Employment

1. Introduction

The analysis on the legal framework on disability and employment in the previous chapter highlighted a number of treaty as well as constitutional provisions that guarantee the rights of people with disabilities. This chapter looks at the issue of disability and employment in South Africa from a human rights perspective with the aim to illustrate that disability is more of a human rights issue¹⁹⁷ and therefore the issue of employment for persons with disability need to be approached from a human rights point of view. The discussions are based on the supposition that there is a human rights dimension to disability and employment. This supposition derives from the conviction that to provide employment to persons with disability is not a moral commitment that the government may or may not achieve, rather that it is a legally guaranteed human right, which the government is bound by law to fulfil.

People with disabilities have generally, following the medical or welfare model been seen by the rest of society as objects of charity, in need of help and medical interventions rather than equal members of society entitled to the same rights and privileges as others.¹⁹⁸ Thus, people with disabilities are more likely to be unemployed or out of the labour market and to earn low incomes if employed.¹⁹⁹ Present day understanding of disability is informed by the social model, which recognises that the disadvantages and barriers that disabled people face are largely determined by the social and physical environment rather than the supposed impairment of the individual.²⁰⁰ The social model is human rights-based and premised on the fact that people with disabilities are entitled to the same rights as other human beings and therefore encourage policy approaches that focus on integration, inclusion, universal design and anti-discrimination measures.²⁰¹ However, there is an increasing shift from the social

¹⁹⁷ Albert & Hurst (n 120 above) 3.

¹⁹⁸ ILO (n 1 above) 4.

¹⁹⁹ Walker (n 5 above) 2.

²⁰⁰ ILO (n 1 above) 4.

²⁰¹ ILO (n 1 above) 4.

welfare model to a human rights model, marked by the unprecedented recognition and protection of the rights of people with disabilities in national legislations and statutes as well as in international treaty instruments.²⁰² A rights-based model to disability and employment entails leveling the playing field by removing the physical and social barriers and more importantly focusing on building the capabilities of the human person so that people with disabilities can have equal access employment opportunities.²⁰³ This begs the question to what extent the government of South Africa takes the human rights model seriously in dealing with the issue of disability and employment.

The chapter thus proceeds as follows: Section 2 examines the human rights of persons with disabilities with the aim to show that a human rights model has greater potential to benefit a greater number of people with disabilities than concentrating only on a minimal target that is not even attainable. The general principles safeguarding the rights of people with disabilities are discussed in sub-section 2.1, while sub-section 2.2 focuses on the right to employment for people with disabilities. Section 3 analyses the misplaced priorities in government policy on disability and employment and argues that instead of developing the capabilities and creating opportunities for employment for people with disabilities in general, the government has rather directed its resources in pursuing blind targets, which it has not been able to achieve for close to two decades. The chapter ends with a summary conclusion in section 4.

2. Human rights of persons with disabilities

The human rights approach in dealing with the issue of disability and employment is not only intended to protect and promote the rights of persons with disabilities; it provides opportunity for persons with disabilities to assert their rights and also empowers the duty bearers such as the state with the capacity to fulfil their human rights obligations towards people with disabilities.²⁰⁴ In terms of the human rights approach the situation of people with disabilities would be treated not in terms of human needs but in terms of the obligation to respond to the rights of every person with a disability as an individual.²⁰⁵ People with disabilities are thus

²⁰² ILO (2006) 'Employment of people with disabilities: A human rights approach' *International Labour Organisation* 1.

²⁰³ International Disability and Human Rights Network (n 133 above) 5.

²⁰⁴ Walker (n 5 above) 3.

²⁰⁵ Walker (n 5 above) 4.

entitled by this assurance to demand justice and equitability in opportunities for employment not as charity but as a right, which the state as duty bearer is obligated to fulfil.²⁰⁶

2.1. General principles disability rights

2.1.1. Equality and non-discrimination

In respect of the human rights principle of equality and non-discrimination, all individuals are presumed equal as human beings and endowed with inherent dignity as a human person.²⁰⁷ The Universal Declaration of Human Rights stipulates that '[a]ll human beings are born free and equal in dignity and rights'.²⁰⁸ According to this principle, no human person may be privileged or considered more important than others or granted more opportunity than is granted to others. All human beings are entitled to their human rights without discrimination of any kind, including based on their disability as has been guaranteed by international human rights treaty bodies as well as the South African Constitution.²⁰⁹

2.1.2. Inalienability

Human rights are inalienable, which implies that every single individual is entitled to them.²¹⁰ They cannot voluntarily be given them up by the human person in whom the rights are endowed nor can they be taken away by any other person.²¹¹ Thus, the human rights of persons with disabilities are inalienable and therefore, they cannot be deprived of those rights because of their disabilities.

2.1.3. Participation and inclusion

Human rights entail not only respect, protection and fulfilment by others but essentially the inclusive participation of every person in the exercise and enjoyment of the full range of

²⁰⁶ Walker (n 5 above) 4.

²⁰⁷ UN Agencies (2003) 'The human rights based approach to development cooperation: Towards a common understanding among UN agencies' available at: www.unicef.org/sowc04/files/AnnexB.pdf (accessed: 28 June 2014).

²⁰⁸ UDHR (n 142 above) art 1.

²⁰⁹ UN Agencies (n 207 above) 2.

²¹⁰ UN Agencies (n 207 above) 2.

²¹¹ UN Agencies (n 207 above) 2.

rights and freedoms.²¹² This has been the fundamental idea that has informed the underlying rationale of the disability right strategy, which holds that disability programmes may not be conceptualised and executed without the full involvement of people with disabilities. It also underscores the fact that the people with disabilities are not abstract objects but potential subjects with capabilities like any other person.

Because of historical disadvantage and exclusion from mainstream society, the principle of participation and inclusion require that greater focus be directed towards people with disabilities. The important thing is how the capabilities that remained locked in people with disabilities could be utilised for the sake of promoting their human rights and also how their capabilities could be translated to the benefit of society.

2.1.4. Transparency and accountability

A human rights perspective in dealing with disability and employment means ensuring that people with disabilities could actually be able to hold the government to account for its obligations.²¹³ The Constitution imposes a binding obligation on all organs of state to honour all the rights enshrined in the Bill of Rights by virtue of which the state is obliged to take ‘legislative and other measures designed to protector advance persons, or category of persons, disadvantaged by unfair discrimination’.²¹⁴ Accountability requires that the government must be able to show proof of the legislative and other measures that it has taken to protect the rights of among others, people with disabilities.

It is established that legislative measures alone are not sufficient to change social phenomena such as the attitude of society towards people with disabilities.²¹⁵ Thus, besides taking legislative measures the government is also required by the rule of transparency and accountability to establish evidence of the other measures that it has taken to guarantee the rights of people with disabilities, particularly relating to employment.

²¹² UN Agencies (n 207 above) 2.

²¹³ DFID (n 134 above) 8; Albert (n 92 above) 7.

²¹⁴ The Constitution (n 19 above) sects 8 & 9.

²¹⁵ See *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 93: ‘Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive’.

2.2. Access to employment

The question that may be asked is whether there is an established right to employment guaranteed to people with disabilities in South Africa? In actual fact, the Constitution does not make provision for any such right either to persons with disabilities or to any other able-bodied person. However, the equality clause of the Constitution guarantees equality before the law, which includes the full and equal enjoyment of all rights and freedoms for everyone – not excluding persons with disabilities.²¹⁶ It is assumed that these rights and freedoms include the right of access to employment opportunities, which every citizen of South Africa is entitled to benefit from without any form of discrimination. Thus, the equality provision further stipulates that the ‘state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including ...disability’.²¹⁷ Access to employment can rightly be read into this provision and therefore, constitutes an implicit constitutional right to which people with disabilities are equally entitled as does every other person.

3. Misplaced priorities

3.1. A step in the wrong direction

Like many other international human rights instruments, the Disability Convention imposes an obligation on states parties to take appropriate legislative and other measures to ensure that the provisions of the Convention are given domestic application.²¹⁸ This is an obligation that South Africa as party to the Convention must fulfil. The government may claim to have taken sufficient legislative and other measures to protect and guarantee the rights of persons with disabilities. However, it would seem apparent from the increasing inequality and discrimination as well as the inappropriate treatment of persons with disabilities that the existing measures that have been taken are in fact, steps in the wrong direction because they do not focus sufficiently on the human rights of persons with disabilities.

²¹⁶ The Constitution (n 19 above) sect 9(1)&(2).

²¹⁷ The Constitution (n 19 above) sect 9(3).

²¹⁸ Disability Convention (n 100 above) art 4.

Albert and Hurst have defined human rights as ‘the fundamental, universal and indivisible principles by which every human being can claim justice and equality’.²¹⁹ They go on to illustrate that because disability describes the barriers faced by people with impairments to achieving equality and justice, and because people with disabilities are human beings with the same rights like every other person, it is obvious as they argue that disability is a human rights issue.²²⁰ The Integrated National Disability Strategy document also stipulates that disability and employment should be considered as a human rights issue.²²¹ Taking disability as a human rights issue in the context of this study implies that the opportunity for employment is created for every single individual with a disability and not just focusing on employing a certain proportion of the disability population. This study makes the argument that taking a human rights approach in dealing with the problem of disability and employment would allow the unique circumstance of every single individual with a disability to be given serious consideration, not just those who already qualify for employment.

The human rights dimension to disability and employment requires that effective legislations and programmes are put in place to ensure the training and employment of persons with disabilities.²²² This has not been the practice in South Africa. It has been stated that South African legislation does not focus enough on persons with disabilities and therefore does not provide sufficient support for their employment.²²³ South African legislation to a certain extent may be said to contribute in creating barriers that prevent people with disabilities from accessing equal opportunities.²²⁴ This is in the sense that though there have been attempts to scrap discriminatory laws; many aspects of discrimination can still be found in current legislations, thus failing to meet international human rights standards in respect of the rights of people with disabilities.²²⁵ Murugami has argued rightly that if society was willing to adapt to impairment by removing obstacles and hindrances while making laws that recognise human rights, then the effects of disability would be greatly reduced.²²⁶ As has earlier been

²¹⁹ Albert & Hurst (n 120 above) 3.

²²⁰ Albert & Hurst (n 120 above) 3.

²²¹ Integrated National Disability Strategy (n 20 above) 1.

²²² ILO 2006 (n 202 above) 2.

²²³ Maja *et al* (n 83 above) 25.

²²⁴ Integrated National Disability Strategy (n 20 above) 8.

²²⁵ Integrated National Disability Strategy (n 20 above) 8.

²²⁶ Murugami (n 112 above).

stated, a human rights approach to disability and employment is about equalising opportunities so that every individual with a disability can have equal access employment among other things.²²⁷

Pursuing the human rights model in dealing with the question of disability and employment would have been the right steps in the right direction. However, the government of South Africa has generally pursued the affirmative action approach,²²⁸ which unfortunately has not achieved desired results. The affirmative action approach is advantageous, in the sense that it quantifies targets to be achieved but practically it does not impose any legal obligations. Thus, this study challenges the fact that the issue of disability and employment in South Africa has not progressed in accordance with current international human rights standards relating to disability.

This study argues that adopting the human rights model in dealing with disability and employment rather than the affirmative action approach has greater potential to enable the South African government to open up opportunities for employment to a larger number of people with disabilities than just a target percentage. The rationale is that the human rights model embraces disability within a paradigm of rights,²²⁹ according to which employment for people with disabilities who meet the employability criteria is an entitlement and not a privilege. According to this model, government is obligated to fulfil its constitutional obligation towards people with disability, which requires removing obstacles that inhibit the employment of persons with disabilities.²³⁰ The human rights approach in dealing with disability ensures the equalisation of opportunities for people with disabilities²³¹ failing which; it would constitute a violation of rights for which the government may be held legally responsible.²³² The standard rule set by the Human Rights Council;

recognizes that any violation of the fundamental principle of equality or any discrimination or other negative differential treatment of persons with disabilities inconsistent with the Standard Rules on the

²²⁷ Albert & Hurst (n 120 above) 3.

²²⁸ See Schneider & Nkoli (n 6 above) 90-106.

²²⁹ M Rioux & A Carbert (2003) 'Human rights and disability: The international context' 10:2 *Journal on Developmental Disabilities* 1.

²³⁰ Rioux & Carbert (n 229 above) 4-5.

²³¹ Rioux & Carbert (n 229 above) 7.

²³² Rioux & Carbert (n 229 above) 5.

Equalization of Opportunities for Persons with Disabilities is an infringement of the human rights of persons with disabilities.²³³

3.2. Impact on the disability population

Pursuing the wrong approach in dealing with the issue of employment for persons with disabilities engenders negative consequences on the entire disability population in South Africa. The right to equality and freedom from discrimination is a constitutional right enshrined in the South African Bill of Rights.²³⁴ However, persons with disabilities have not been able to reap sufficient benefits under these constitutional provisions. Employment discrimination, particularly on the basis of disability must therefore, be discouraged not only through legislation but also through efficient enforcement mechanisms.²³⁵ Bamiwola has argued that other constitutional rights will only be of advantage to persons with disabilities when access to employment, which is the main source of sustainability, is guaranteed.²³⁶

3.3. Social exclusion

The post-apartheid constitutional order envisages an all-inclusive South African society that 'belongs to all who live in it'.²³⁷ This aspiration remains an illusion to people with disabilities, a large number of whom are excluded from mainstream society partly because of the inability to access employment, resulting in a cumulative disadvantage in accessing the fundamental constitutional rights and freedoms that are guaranteed to every individual.²³⁸ In essence, an estimated 99 per cent of people with disabilities are said to be systematically excluded from employment on the open labour market, thus subjecting them to social security benefits on which most of them have become dependent for survival instead of exploring their creative potentials.²³⁹ Promoting the rights-based approach and the need for employing people with disabilities are crucial to equalising opportunities and promoting inclusion.²⁴⁰

²³³ UN Standard Rules on the Equalisation of Opportunities for Persons with Disabilities 1993 para 1.

²³⁴ The Constitution (n 19 above) sect 9.

²³⁵ Bamiwola (n 59 above) 21.

²³⁶ Bamiwola (n 59 above) 21.

²³⁷ The Constitution (n 19 above) preamble.

²³⁸ Integrated National Disability Strategy (n 20 above) 6.

²³⁹ Integrated National Disability Strategy (n 20 above) 7.

²⁴⁰ ILO (n 1 above) 3.

4. Conclusion

The analysis in this chapter illustrates that the question of disability and employment in South Africa is still lacking of proper conceptualisation. In spite of the advancement of disability towards the human rights model, South Africa's approach is still largely dependent on the social model and therefore comes short of meeting international standards. National legislation regulating disability is also significantly deficient, especially in terms of guaranteeing the right to employment for persons with disabilities. This notwithstanding, McClain has noted that legislation on its own can neither change mind-sets nor transform social perceptions.²⁴¹ In this regard McClain has posed an important enquiry on how the universally accepted standards on disability contained in the legal instruments that have been examined earlier could be translated into concrete realities for people with disabilities.²⁴²

The chapter helped to established that the affirmative action approach that the government has employed in addressing disability concerns cannot solely be relied upon. Affirmative action is potentially limiting of government's constitutional obligation to free the potential of every person, by expanding opportunities and developing the capability of every individual with a disability to qualify for employment. It is stated in the African Charter for Popular Participation in Development and Transformation that concerted efforts is required to change prevailing attitudes towards people with disabilities so as to integrate and bring them into the mainstream of development.²⁴³ This is important not only for the sake of recognising people with disabilities as having a vital role to play in national development but importantly in tapping into the reservoir of their underutilised skills and aptitudes to promote societal transformation. It is also not only a matter for a handful of people with disabilities that the government intends to recruit into the public service, it concerns the entire disability population in South Africa who need capability development and empowerment to be able to access opportunities for employment.

²⁴¹ McClain (n 37 above).

²⁴² McClain (n 37 above).

²⁴³ African Charter for Popular Participation in Development and Transformation (1990) art 23(3)(e).

Chapter Six

Conclusion and Recommendations

1. Concluding Remarks

This study has aimed principally to examine the question of disability and employment in South Africa, more specifically to interrogate why for almost twenty years the government has not been able to meet the 2 per cent employment equity target for persons with disabilities within the public service. Addressing the issue of discrimination against persons with disabilities constitutes one of the fundamental elements in overcoming the high level of inequality in post-apartheid South Africa, which continues to pose a threat to the established constitutional democracy. The responsibility to achieve this aspiration requires pro-active measures that go beyond merely adopting legislation and policies, which lay down principles but in effect cannot change negative societal attitudes.

In chapter two, the dissertation established that statistical information relating to disability in South Africa is not very accurate and therefore the prevalence of disability in relation to employment remains confused. However, a rough analysis of the available statistics enabled the researcher to come to the conclusion that the proportion of persons with disabilities stands at approximately 4.6 per cent, with just about 1.5 per cent that may actually qualify for employment according to the criteria for considering employability. The conclusion drawn in chapter three is to the effect that the question of disability and employment continues to pose a challenge in South Africa due to the affirmative action approach that the government has embarked on, which has proved to be ineffective. Chapter four concluded that the question of disability and employment in South Africa is still lacking of proper conceptualisation towards the human rights model and therefore comes short of meeting evolving international standards, which emphasis capability development and empowerment for all without distinction based on disability.

Generally, the study found that people with disabilities continue to be disadvantaged and discriminated against in all sectors of South African society, including particularly in the area of employment. This is due mainly to the manner in which disability is conceptualised in

South Africa and also to the fact that legislation neither provides sufficient protection nor explicitly guarantees the right to employment for people with disabilities. In spite of the confused statistics on disability, and contrary to one of the core assumptions made at the beginning of this study, the analysis established that the actual proportion of persons with disabilities that may satisfy the employability criteria and thereby qualify for employment may not amount to the 2 per cent target envisaged by government. This could be said to explain the reason why it has been difficult for the government to meet the target. Meanwhile, a large number of people with disability in remain lacking in the knowledge and skills necessary for accessing employment.

The study argued that the affirmative action approach that the government of South Africa has pursued in dealing with disability and employment has the advantage that it quantifies the employment equity target, which makes for accurate monitoring but practically it does not impose any legal obligations and therefore, unfortunately has not been able to achieve desired results. Thus, the argument was advanced in favour of pursuing a human rights model in conceptualising disability, which has the potential of not only guaranteeing access to employment to a greater number of people with disability but also expanding their capabilities and increasing their opportunities and choices.

2. Recommendations

On the basis of the analysis and the arguments put forth in this study, the following recommendations may serve as interim solutions to tackling the problem of disability and employment which remains a major issue in bridging the inequality gap in South Africa.

As a prime measure, it is important that the government should conduct a special census specifically for people with disabilities in order to establish accurate and reliable statistics, disaggregated by gender, race, geographical location and possibly the capabilities of each and every one of the persons with disabilities. The result of such a census would be instrumental in guiding proper employment equity planning for people with disabilities. The special census should take into account:

- The total number of people with disabilities across the country

- The total number of people with disabilities that are effectively employed
- The total number of people with disabilities that are unemployed
- The total number of people with disabilities that are employable, that is, those who are unemployed but have the qualifications, skills and experiences to qualify for employment

Having ratified the Disability Convention, the government needs to proceed with domestication of the treaty into national law, which we estimate would guide the formulation of the human rights approach in dealing with disability and employment. The government needs to also take cognisance of the fact that though affirmative action is good; it is practically ineffective and inappropriate as a strategy to deal with the issue of disability and employment. The question of disability and employment requires more concrete and practical measures in developing the skills capacity of persons with disabilities to qualify them for employment. It entails that government needs to reconceptualised and develop a disability strategy that focuses on capability development and empowerment in conformity with international standards.

In this regard, government needs to adopt the human rights model in dealing with disability and employment. The right of access to employment is a constitutional right implicitly guaranteed to every South African citizen by virtue of the equality provision and the preamble to the Constitution that promises to improve the quality of life of every single person without discrimination. These constitutional guarantees constitute the basis on which to formulate a human rights approach to disability and employment. The government is obliged by virtue of the Constitution as well as the international treaties that it has ratified to provide due protection to every person with a disability. The human rights approach is important in the sense that it focuses on every individual as a human being with inherent rights rather than on abstract targets that are in effect not realistic. The human rights approach also has the potential to enable the government to focus on developing the capabilities of persons with disabilities and thereby broadening their opportunities for employment.

In this regard, the government needs to adopt a more human rights focused policy that deals particularly with disability and employment. Such a policy should specifically focus on empowering persons with disabilities with the necessary knowledge, skills and aptitudes so

that they may qualify and be prepared for employment in accordance with the preambular promise to ‘free the potential of each person’. Developing capabilities and broadening opportunities would require the government to establish specially designed educational as well as vocational training programmes to address the specific knowledge, skills and job experience needs for people with disabilities. To be able to sustain the educational and vocational training programmes requires adequate financing, which the government must also be able to budgetary allocations for to ensure successful implementation.

The disability rights movement of South Africa as well as other civil society organisations campaigning for the rights of people with disabilities should focus and intensify their advocacy towards pressuring the government to pursue the human rights model in dealing with the issue of disability and employment. Following the disability rights movement watchword, which says ‘nothing for us without us’, the voice of people with disabilities is crucial in determining how government and the rest of society perceives and deals with the issue of disability and employment. Their involvement and participation in formulating policies and programmes to ensure employment for people with disabilities is indispensable.

Bibliography

Books and chapters in books

Department for International Development (2000) *Realising Human Rights for Poor People*
Department for International Development.

Grobbelaar-du Plessis, I. and Grobler, C. (2013) 'South Africa' in C Ngwenya *et al African Disability Rights Yearbook* 307-340.

International Disability Rights Monitor (2003) *International Disability Rights Compendium*
Center for International Rehabilitation: Chicago.

International Labour Organisation (2004) *Achieving equal employment opportunities for people with disabilities through legislation: Guidelines* Geneva: International Labour Organisation.

United Nations (2011) *Best Practices for Including Persons with Disabilities in all Aspects of Development Efforts* United Nations.

World Health Organisations (2001) *International Classification of Functioning, Disability, and Health* Geneva: World Health Organisations.

Journal articles, thesis and conference papers

Allain, J. (2009) 'Treaty interpretation and the United Nations Convention on the Rights of Persons with Disabilities' *Disability Action's Centre on Human Rights for People with Disabilities – Queen's University of Belfast* 1-26.

Albert, B. (2004) 'The social model of disability, human rights and development' *Disability Knowledge and Research – Briefing Note* 1-8.

- Albert, B. and Hurst, R. 'Disability and a human rights approach to development' *Disability Knowledge and Research Briefing Paper* 1-16.
- Bamiwola, K. H. (2011) 'Human right and employment discrimination: A comparative examination of equal job opportunities' University of Lagos 1-22.
- Dube, A. K. (2005) 'The role and effectiveness of disability legislation in South Africa' *Samaita Consultancy and Programme Design* 1-89.
- Edigheji, O. (2007) 'Affirmative Action and State Capacity in a Democratic South Africa' *20:4 Policy: Issues and Actors - Centre for Policy Studies* 1-13.
- German Development Cooperation (2012) 'A human rights-based approach to disability in development: Entry points for development organisations' *German Development Cooperation* 1-44.
- Greve, B. (2009) 'The labour market situation of disabled people in European countries and implementation of employment policies: A summary of evidence from country reports and research studies' *Academic Network of European Disability* 1-46.
- International Disability and Human Rights Network (date unknown) 'Disability and a Human Rights Approach to Development' *International Disability and Human Rights Network* 1-9.
- International Labour Organisation (2006) 'Employment of people with disabilities: A human rights approach' *International Labour Organisation* 1-78.
- International Labour Organisation 'Employment and disabled persons: Information sheet' *International Labour Organisation* 1-6.
- Lawson, A. (date unknown) 'The EU rights based approach to disability some strategies for shaping an inclusive society' *Centre for Disability Studies, University of Leeds* 1-15.
- Lehohla, P. (2005) 'Prevalence of disability in South Africa: Census 2001 Report No. 03-02-44 2001' Statistics South Africa 1-64.

- Maja, P.A. *et al* (2011) 'Employing people with disabilities in South Africa' 41:1 *South African Journal of Occupational Therapy* 24-32.
- Marumoagae, M. C. (2012) 'Disability discrimination and the right of disabled persons to access the labour market' 12:1 *Potchefstroom Electronic Law Journal* 345-365.
- Michailakis, D. (2003) 'The systems theory concept of disability: One is not born a disabled person, one is observed to be one' 18:2 *Disability and Society* 209-229.
- Mitra, S. (2008) 'The recent decline in the employment of persons with disabilities in South Africa, 1998-2006' *Fordham University, Department of Economics - Discussion Paper No: 2008-121-16*.
- Murugami, M. W. (2009) 'Disability and Identity' 29:4 *Disability Studies Quarterly* available at: <http://dsq-sds.org/article/view/979/1173> (accessed: 10 June 2014).
- Palime, B. (2000) 'Characteristics of people with disabilities in South Africa' *6th Africa Symposium on Statistical Development (ASSD) Cairo, Egypt* 1-28.
- Parker, C. and Clements, L. (2008) 'The UN Convention on the Rights of Persons with Disabilities: A new right to independent living?' 4 *European Human Rights Law Review* 508-524.
- Paulo, S. (2014) 'International cooperation and development: A conceptual overview' *German Development Institute – Discussion Paper* 1-31.
- Rioux, M. and Carbert, A. (2003) 'Human rights and disability: The international context' 10:2 *Journal on Developmental Disabilities* 1-14.
- Schneider, M. and Nkoli, M.I. (2007) 'Affirmative action and disability in South Africa' 77 *Transformation* 94.

Walker, J. 'The United Nations Convention on the Rights of Persons with Disabilities: An overview' (2013) *Library of Parliament – Publication No. 2013-09-E* 1-16.

van Staden, A. F. (2011) 'A strategy for the employment of persons with disabilities' *unpublished PhD thesis – University of Pretoria*.

Reports and other official documents

Commission for Employment Equity (2004) 'Commission for Employment Equity Annual Report 2003/2004' *Department of Labour* 1-66.

Commission for Employment Equity (2013) 'Commission for Employment Equity Annual Report 2012-2013' *Department of Labour* 1-62.

Department of Labour 'Technical assistance guidelines on the employment of people with disabilities' *Department of Labour - Chief Directorate of Communication* 1-62.

Department of Public Service and Administration (1998) 'White Paper: Affirmative Action in the Public Service General Notice 564 of 1998' *Government Gazette Vol. 394, No. 18800*.

Ministry for the Public Service and Administration 'White Paper on the Transformation of the Public Service - Notice 1227 of 1995'.

Ministry of Public Service and Administration - Ministerial communiqué addressed to All Executive Authorities and Premiers: Implementation of Cabinet Committee Decisions taken in November 2012 on Employment Equity Targets, March 2013.

Office of the Deputy President, 'Integrated National Disability Strategy: White Paper of November 1997.

Statistics South Africa 'Census 2011 Statistical release – P0301.4 / Statistics South Africa' *Statistics South Africa* 1-82.

Statistics South Africa 'Census 2001: Prevalence of disability in South Africa' *Statistics South Africa* 1-64.

United Nations Fact Sheet (2007) 'Employing persons with disabilities: Fears and realities' *United Nations Department of Public Information — DPI/2486* 1-9.

United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities 1993.

White Paper on Affirmative Action in the Public Service 1998.

Treaties, statutes and legislation

African Charter for Popular Participation in Development and Transformation 1990.

Constitution of the Republic of South Africa, 1996.

Disability Rights Charter of South Africa.

Employment Equity Act, No. 55 of 1998.

International Covenant on Economic, Social and Cultural Rights, 1966.

United Nations Convention on the Rights of People with Disabilities and Optional Protocol, 2006.

Vienna Convention on the Law of Treaties adopted on 22 May 1969.

Case law

Government of the Republic of South Africa v Grootboom 2000 11 BCLR 1169 (CC).

Web sources

Constitución Política de la República de El Salvador de 1983, actualizada hasta reforma introducida por el DL N° 56, del 06.07.2000 available at: www.georgetown.edu/pdba/Constitutions/ElSal/ElSal83.html (accessed: 20 May 2014).

Department of Government Communications and Information Systems ‘Statement on Cabinet meeting of 5 December 2012’ available at: www.gcis.gov.za/content/newsroom/media-releases/cabstatements6Dec2012 (accessed: 19 May 2014).

Department of Public Service and Administration ‘Statement on Cabinet meeting of 5 December 2012’ available at: www.gcis.gov.za/content/newsroom/media-releases/cabstatements6Dec2012 (accessed: 26 June 2014).

Disability Rights ‘Disability Rights - Taking a Stand for Equal Rights’ available at: www.medicallaw.co.za/articles-01-Disability-Rights.html (accessed: 10 June 2014).

Disabled Peoples’ International ‘Common myths and misconceptions about disability’ available at: www.togetherwerock.com/sites/default/files/Draper_MythsMisc_Nov1.pdf (accessed: 14 May 2014).

Guidance note on disability and development for EU delegations and services, EC DEV/RELEX/AIDCO and delegations staff briefing note(2003) available at: www.iddc.org.uk/dis_dev/mainstreaming/guidance_note.pdf (accessed: 8 June 2014).

McClain, C.V. ‘Governance and Legislation in South Africa: a contemporary overview’ available at: www.disabilityworld.org/01-03_02/gov/southafrica.shtml (accessed: 20 May 2014).

Pieter van Reenen, T. ‘The UN Convention on the Rights of Persons with Disabilities in Africa: Progress after 5 years’ *SUR-International Journal on Human Rights* available at:

http://www.surjournal.org/eng/conteudos/getArtigo14.php?artigo=14.artigo_07.htm
(accessed: 3 January 2015).

SA News (2011) 'Government, business urged to meet disabled employment targets' available at: www.sanews.gov.za/south-africa/govt-business-urged-meet-disabled-employment-targets (accessed: 16 May 2014)

The World Bank 'South Africa overview' available at: www.worldbank.org/en/country/southafrica/overview (accessed: 25 July 2014).

United Nations Agencies (2003) 'The human rights based approach to development cooperation: Towards a common understanding among UN agencies' available at: www.unicef.org/sowc04/files/AnnexB.pdf (accessed: 28 June 2014).

United Nations Enable 'Compilation of proposed revisions and amendments made by the members of the Ad Hoc Committee to the draft text presented by the Working Group as a basis for negotiations by Member States and Observers in the Ad Hoc Committee' available at: www.un.org/esa/socdev/enable/rights/ahcstata2tscompilation.htm (accessed: 10 June 2014).

van Deventer, W. 'Carefronting disability issues in the south African labour market' www.rampup.co.za/i/pdf/wilhelm%20v%20deventer.pdf (accessed: 30 May 2014) 3.

Watermeyer, B. (2013) 'Silencing lives of struggle: How Disabled People South Africa has sacrificed the politics of protest' *Daily Maverick* available at: www.dailymaverick.co.za/opinionista/2013-09-19-silencing-lives-of-struggle-how-disabled-people-south-africa-has-sacrifi (accessed: 20 June 2014).