

Transformation in the Judiciary from a Disability Perspective

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Abstract: The South African judiciary has been in the spotlight in recent years due to its slow pace to reflect broadly the racial and gender composition of South Africa as required by section 174(2) of the Constitution of the Republic of South Africa, 1996. While the paucity of women in the judiciary is critical with regard to women's emancipation, issues of disability have taken a backseat. A restrictive interpretation of section 174(2) of the Constitution has the effect of excluding persons with disabilities from representation within the judiciary. Notwithstanding this interpretation, the failure to understand how the Constitution and conventions place a duty to promote and advance persons with disabilities is a serious injustice and contrary to the spirit of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). It is vital that persons with disabilities are properly represented in the judiciary so that their unique perspectives can be properly articulated.

Keywords: Transformation; judiciary; disability; equality; Constitution; discrimination; race, gender, persons with disability;

Background

The discourse on unfair discriminatory practices in South Africa is largely on race, religion and gender not much has been accorded to disability discrimination, particularly in the workplace.³ Persons with disabilities have generally had difficulties in exercising their fundamental social, political and economic rights. Notwithstanding progressive laws and policies in South Africa, persons with disability experience employment discrimination due to their disability.⁴ The genesis of this discrimination is the lack of policies on disability and the implementation of such policies to eliminate barriers for persons with disability in the workplace.

A barrier-free society for persons with disabilities has been a great challenge in many sectors in South Africa including the judiciary. In 2013 the North Gauteng High Court in *Singh v Department of Justice and*

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³ Marumoogae MC "Disability discrimination and the right of disabled persons to access the labour market" 2012 PER / PELJ 345; Du Plessis Meryl Candice *Access to work for disabled persons in South Africa: The intersections of social understandings of disability, substantive equality and access to social security* 2.

⁴ Marumoogae 345.

*others*¹ (hereafter *Singh*) held that the Magistracy will not be diverse nor legitimate if it only represents the racial and composition of the country without proper and proportionate representation of people with disability.² This landmark judgement serves as a guiding yardstick not only to the judiciary but other sectors also to effectively implement the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereafter the PEPUDA)³ as a legislative measure aimed at eliminating discrimination on the basis of disability by any persons and further fulfil South Africa's obligations of the Convention on the Rights of Persons with Disabilities (hereinafter the CRPD).⁴

It is argued in this paper that the judiciary can only reflect broadly the racial and gender composition of South Africa as required by section 174 (2) of the Constitution of the Republic of South Africa, 1996 (The Constitution) if persons with disability are equally represented and barriers to persons with disability have been eliminated.

Statement of the research problem

Following the *Singh* case, it was evident that there was lack of intentional commitments to redress the legacy of discriminating against people with disabilities. The policies and criteria for selecting candidates for judiciary vacancies does not specifically mention disability. This criterion is largely focusing on race and gender. The failure by the judiciary to take into consideration a variety of disabilities and reasonable accommodation of applicants results in unfair discrimination of persons of with disability.

In addition, there is lack of sufficient supportive structures and infrastructures that will entice persons with disability to join the sector. This is a contributing factor to the paucity of persons with disability in the judiciary. This discrimination arguably tramples on the right to dignity of the applicants with disability and deprives the latter to effectively participate in the economy.

Equity and Equality of persons with disability in the judiciary

The Constitution of the Republic of South Africa, 1996.

The Constitution is regarded as one of the progressive Constitutions globally and a beacon for emerging countries.⁵ South Africa's unusual provision of rights for its citizens, binding them to principles such a non-discrimination in the workplace, is one of the features that new democracies might consider. A special feature of the Constitution is that everyone is equal before the eyes of the law and all people enjoy

¹ 2013 (3) SA 66 (EqC).

² *Singh* para 53.

³ PEPUDA was promulgated before the CRPD in 2003.

⁴ The CRPD and the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (2007) were ratified by the South African Government on 3 April and 3 May 2008.

⁵ Steven C and Ntlama N "An overview of South Africa's institutional framework in promoting women's right to development" 2016 *Law, Democracy and Development* 49; Ozoemena R and Hansungule M "Development as a right in Africa: changing attitude for the realization of women's substantive citizenship" 2014 *Law, Democracy and Development* 226. The term "beacon of hope" derived from Ozoemena who described the right to development as a beacon of hope.

equal benefit of the law.¹ Equality in this regard includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.²

The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.³ No person may unfairly discriminate directly or indirectly against anyone on one or more grounds highlighted above. National legislation must be enacted to prevent or prohibit unfair discrimination.⁴ Discrimination on one or more prohibited grounds is unfair unless it is established that the discrimination is fair.⁵

The importance of the right to equality was articulated by Mohamed DP when he stated in *Fraser v Children's Court, Pretoria North*⁶ (hereafter *Fraser*) that:

There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.⁷

According to Mubangizi the importance of the right to equality in the post-apartheid constitutional context cannot be over emphasized.⁸ This right has been included in so many sections of the Constitution.⁹ The reason for equality's paramount and central role is due to its non-existence prior to 1994. Giving the right to equality to all people is perceived as the only way for a society with such diverse peoples to be a truly just society.¹⁰

The equality provision as provided for in section 9(1) is merely a form of formal equality. Formal equality means sameness of treatment: the law must treat individuals in like circumstances alike.¹¹ One must ask if this goes far enough to redress the inequality of the past as the problem with mere formal equality is that economic inequality in the forms of poverty and unemployment are the outcomes of injustice and inequality.¹² Accordingly, by merely having formal equality, a large percentage of South Africans appear to be the victims of inequality.¹³ A purposive approach to constitutional interpretation requires that

¹ Section 9 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

² Section 9(2) of the Constitution.

³ Section 9(3) of the Constitution.

⁴ Section 9(4) of the Constitution.

⁵ Section 9(5) of the Constitution.

⁶ 1997 (2) SA 261 (CC).

⁷ *Fraser* para 20.

⁸ Mubangizi J *The protection of Human Rights in South Africa: Legal and Practical Guide* 72.

⁹ The right to equality appears in the Preamble of the Constitution. It is included also in section 1(a) of the Constitution where it reads:

"The Republic of South Africa is one, sovereign, democratic state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms."

Equality is mentioned in four further provisions. It is mentioned in ss 3 (1) and 7 (1) respectively. It is then mentioned in both ss 36 and 39 (1) (a); Laher I A *Critical Analysis of Employment Equity Measures in South Africa* (LLM-dissertation Rhodes University 2007) 20 (hereafter Laher).

¹⁰ Laher above 20-21.

¹¹ Substantive equality on the other hand requires the law to ensure equality of outcome and is prepared to tolerate disparity of treatment to achieve this goal; Currie and De Waal *The Bill of Rights Handbook* 232.

¹² Laher above 21.

¹³ Laher above 21.

section 9 be read as grounded on a substantive conception of equality.¹ Accordingly the Constitutional Court in *President of the Republic of South Africa v Hugo*² (hereafter *Hugo*) observed that:

we need... to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is in one context may not necessarily be unfair in a different context.³

In principle, the equality clause serves as a constitutional shield towards poverty alleviation and economic growth of South African citizens and more specifically women and persons with disability. In order to achieve an inclusive economic growth and poverty alleviation, it is submitted that the full participation of persons with disability within the South African economy is essential. In 2016, the Commission for Gender Equality explored in its 'Lack of Gender Transformation in the Judiciary Report' whether the failure to appoint female judges was also an infringement of section 9.⁴ It is therefore evident that section 9 of the Constitution is a critical tool that may be invoked in circumstances where one is differentiated unfairly due to their disability to participate in the South African economy despite an equal worth.

The Employment Equity Act 55 of 1998 (hereafter the EEA).

The EEA is one of the legislations which addresses equality and equity in the workplace. It is enacted to try to redress the imbalances of the past created by the apartheid government.⁵ It gives every employer the obligation to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.⁶ The EEA provides that no person may unfairly discriminate against any employee on the basis of the prohibited grounds.⁷ It is not unfair discrimination to take affirmative action measures consistent with the EEA or to distinguish, exclude or prefer any person on the basis of the inherent requirement of the job. Harassment of any employee is a form of unfair discrimination and is prohibited.

According to Erasmus, Loedolff, Mda and Nel the concept "employment equity" has occupied centre stage in world business economic debates for as long as the concept 'workforce' has existed. The

¹ Currie I and De Waal J 233.

² 1997 (4) SA 1 (CC).

³ *Hugo* para 41.

⁴ Commission for Gender Equality 2016 available at <http://www.cge.org.za/wp-content/uploads/2016/12/CGE-Lack-of-Gender-Transformation-in-the-Judiciary-Investigative-Report.pdf>. (Date of Use: 28 February 2019.)

⁵ Devenish A *Commentary on the South African Constitution* 47-50; Cheadle H *Fundamental rights in the new Constitution* 51-121; Gutto S *Equality and non-discrimination in South Africa, the political economy of law making* 1-15.

⁶ Section 5 of the EEA.

⁷ Section 6(1) of the EEA.

ultimate purpose of these debates has been to restore human dignity in the world of work.¹ Nienaber postulates that employment equity is one of the most pressing challenges facing South African managers. Many business organizations underestimate the process of instituting employment equity on different organizational procedures, practices and roles, as well as on organizations' climate and culture.²

Oosthuizen and Naidoo suggests that the demography of the South African work force has changed considerably since the implementation of Employment Equity Act 55 of 1998.³ It is evident that the establishment of the EEA had a positive impact in the workplace however the poverty and underrepresentation of persons with disability in the judiciary necessitates a question as to whether the EEA achieved its objective to eradicate discrimination and entrench equity in the workplace.

In South Africa it has been found that both designated employers are fraught with challenges of implementing the EEA.⁴ The common thread challenge is that disability issues are not high on the priority agenda, as in most cases it is not properly budgeted for by designated employers. It was also found that there are designated employers that operated without proper and effective Employment Equity Plan.⁵

The Employment Equity Plan is a critical tool to promote economic growth and eradicate poverty to persons with disability and their household commitments. It is therefore submitted that at this stage of the South African history, a failure by a designated employer to have an Employment Equity Plan in place is regarded as being so economically irrational as to be fundamentally harmful to the society. Employment Equity Plans provide employers with window opportunities to ensure that persons with disability have access to employment and escalated to decision-making positions. Employment Equity Plans further have an effect of channeling designated employers to be innovative in retaining their employees with disability by creating a sustainable career pathing.

In *Barnad v South African Police Services*⁶ the court correctly noted that:

“Our quest to achieve equality must occur within the discipline of our constitution. Measures that are directed at remedying past discrimination must be formulated with due care not to invade unduly the dignity of all concerned. We must remain vigilant that remedial measures under the Constitution are not an end in themselves. They are not meant to be punitive nor retaliatory. Their goal is to urge us on towards a more equal and fair society that hopefully is non-racial, non-sexist and socially inclusive.”⁷

It is therefore evident that a careful balancing of interests is required to ensure that the employment equity plans align with the EEA and the Constitution.

The Promotion of Equity and Prevention of Unfair Discrimination Act, 4 of 2000 (PEPUDA)

¹ Erasmus *et al* *Managing training and development in South Africa*

² Nienaber, H "Assessing the management status of South Africa" 2007 *European Business Review* 7288.

³ Oosthuizen RM and Naidoo V "Attitudes towards and experience of employment equity" 2010 *South African Journal of Industrial Psychology* 9.

⁴ Commission for Gender Equality 2016 available at <http://www.cge.org.za/wp-content/uploads/2016/12/CGE-Lack-of-Gender-Transformation-in-the-Judiciary-Investigative-Report-.pdf>.

⁵ Commission for Gender Equality above.

⁶ 2014 (6) SA 123 (CC)

⁷ *Barnad v South African Police Services para 30.*

PEPUDA was enacted as a result of section 9(4) of the constitution which requires the State to pass legislation which promote equality and prevent unfair discrimination. Without PEPUDA, the Constitution cannot be celebrated well.¹ PEPUDA binds the State and all persons and does not apply to any person to whom and to the extent to which the EEA applies.

Neither the State nor any person may unfairly discriminate against any person.² Accordingly PEPUDA denotes that no person may unfairly discriminate against anyone on the ground of race, gender, disability, including the failure to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons.³

There are equality courts which have been established to adjudicate on matters relating to equality and these matters are covered by PEPUDA. Every Magistrate Courts and High Courts are equality courts in their area of jurisdiction.⁴

PEPUDA addresses systemic inequalities and unfair discrimination that manifest in the institutions of society and the practices and attitudes of South Africans insofar as these 'undermine the aspirations of our constitutional democracy'.⁵ PEPUDA puts two responsibilities on persons that are operating in the public domain to promote equality⁶ and on the social commitment for all persons to promote equality.⁷ PEPUDA bestows the responsibility on persons operating in the public domain to promote equality even when executing their social commitment. The society that PEPUDA envisages for South Africans is

"a democratic society, united in its diversity, marked by human relations that are caring and compassionate, and guided by the principles of equality, fairness, equity, social progress, justice, human dignity and freedom."⁸

Whilst PEPUDA was enacted to give effect to the constitutional right to equality, it was not meant however to be a re-statement of section 9 of the Constitution.⁹ The provisions of the PEPUDA 'may extend protection beyond what is conferred by section 9. As long as PEPUDA does not decrease the protection

¹ South Africa celebrated 16 years of the Constitution on 10 December 2012.

² Section 6 of the PEPUDA.

³ Sections 7,8 and 9 of the PEPUDA.

⁴ Section 16(1)(a) of PEPUDA.

⁵ Preamble of the PEPUDA.

⁶ Section 26 reads:

It is the responsibility of any person directly or indirectly contracting with the State or exercising public power to promote equality by –

- (a) Adopting appropriate equality plans, codes, regulatory mechanisms and other appropriate measures for the effective promotion of equality in the spheres of their operation;
- (b) enforcing and monitoring the enforcement of the equality plans, codes, regulatory mechanisms developed by them; and
- (c) Making regular reports to the relevant monitoring authorities or institutions as may be provided in regulations, where appropriate.

⁷ Section 27(1) reads:

Pursuant to section 26, all persons, non- governmental organizations, community-based organizations and traditional institutions must promote equality in their relationships with other bodies in their public activities.

⁸ Preamble of the PEPUDA.

⁹ *MEC for Education: Kwazulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 43.

afforded by section 9 or infringe another right, a difference between the PEPUDA and section 9 does not violate the Constitution'.¹

PEPUDA is a progressive piece of legislation that may be relied on to challenge direct or indirect practices that discriminate unfairly on a person due to their disability. The mechanisms for promoting equality for persons with disabilities included the establishment of the Equality Courts to promote access to justice for the bringing of anti-discrimination cases, the prohibition of unfair discrimination based on disability, as well as special measures to promote equality.²

Convention on the Rights of Persons with Disabilities (CRPD)

Hendricks observed that persons with disabilities:

“were predominantly seen as objects of care instead of legal subjects entitled to respect and the full enjoyment of human rights.”³

This thus necessitated the adoption of the CRPD in order to promote the rights of persons with disabilities. The CRPD was then adopted by the United Nations General Assembly on the 13th of December 2006, South Africa ratified the CRPD on 30 November 2007 and it came into force on the 03rd of May 2008.⁴ The purpose of the CRPD is:

“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.”⁵

The preamble to the CRPD recognizes the need “to promote and protect the human rights of all persons with disabilities, including those who require more intensive support” and notes concern about:

“The difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status...Recognizing that woman and girls with disabilities are often at greater risk, both within and outside the home of violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation...”

The CRPD accordingly obliges the state to promote the employment of people with disabilities and not merely eliminate active discrimination against them.⁶

¹ *MEC for Education: Kwazulu-Natal v Pillay* para 43.

² Holness W and Rule S "Barriers to advocacy and litigation in the equality courts for persons with disabilities" 2014 *Potchefstroom Electronic Law Journal* 1914.

³ Hendricks A "UN Convention on the Rights of Persons with Disabilities" 2007 *European Journal of Health Law* 273.

⁴ Kayess R and French P "Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities" 2008 *Human Rights Law Review* 1.

⁵ Article 1 of the CRPD; Hendricks 2007 *European Journal of Health Law* 273.

⁶ Article 27 (h) of the CRPD; *Singh* para 40; General Comment No. 5 of the United Nations Committee on Economic, Social and Cultural Rights, dealing with persons with disabilities. Clause 9 of the general comment states: The obligation of State parties to the Covenant to promote progressive realization of the relevant rights to the maximum of their available resources clearly requires Governments to do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take a positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equality within society for all persons with disabilities. This almost invariably means that

Insights from *Singh v Department of Justice and others*

Facts

The complainant instituted an application on the 8th of September 2011 after the Magistrate Commission released a shortlist of candidates to be interviewed from 10-28 October 2011 for appointments to vacant Magistrates posts, and the complainant was not short-listed for any of the vacant posts.¹ The complainant “has a visual impairment that prevents her from obtaining a driver’s license but same did not affect her work as an acting magistrate”.²

The complainant contended that she was unfairly discriminated against because, firstly, the requirement to possess a driver’s license for the position of Magistrate is unfairly discriminatory against people who are hindered by disabilities to obtain such a license. Secondly,

“the criteria for selection employed by the Commission is rigid and discriminatory in that it excludes candidates from consideration for a range of posts on the basis of inflexible racial and gender based preferences or quotas. The criteria are unfairly discriminatory and it resulted in her application not being considered on its merits”.³

Lastly, the fact that disability is not included as one of the selection criterion poses an unfair discrimination that precludes persons with disabilities from enjoying benefits, opportunities and advantages.⁴

The complainant therefore, based her claim on the following grounds:

- (a) that the respondent discriminated against her based on her disability;
- (b) that the respondents failed to give preference to people with disabilities;
- (c) that the fact that she is an Indian woman constituted a barrier to her short listing.”⁵

The complainant argued that the failure by the Respondent to consider her application on the merits clearly indicates the reluctance in addressing the legacy of discrimination against people with disabilities.⁶ The Respondent mentioned that their failure to mention disability as one of the criterion in the advertisement was guided by section 174(2) of the Constitution.⁷

Legal question

additional resources will need to be made available for this purpose and that a wide- range of specially tailored measures will be required.

¹ *Singh* para 8.

² *Singh* para 17.

³ *Singh* para 8.2.

⁴ *Singh* para 9.

⁵ *Singh* para 10.

⁶ *Singh* para 14.

⁷ Section 174 (2) of the Constitution reflects:

The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed.

- (a) whether the non-mentioning of disability in the policy or criteria is justified by section 174(2) of the Constitution?
- (b) Whether the failure by the Magistrates Commission to select and/or appoint the complainant amounted to unfair discrimination on the ground of disability?

Decisions and reasoning of the Court

The Court observed that race and gender should not be viewed as an exhaustive list of the factors that the judiciary must take into consideration when selecting candidates for posts, however they must be viewed as indicators of diversity. "A restrictive interpretation of section 174(2) which focuses only on race and gender effectively cuts out a significant section of the population served by the judiciary from representation within the judiciary. Disabled people are a clear case in point."¹ Section 174(2) does not suggest that disability should not be considered as one of the criterion since it is recognized under section 9(3) of the Constitution.

The court referred to the *S v Bresier and Another*² where Satchwell J held that :

"Affirmative action is not just about redressing past injustice and creating opportunity for individuals. We live in a difficult society. It is a complex and heterogeneous society. South Africans combine many race groups, ethnic backgrounds, religious affiliations, languages, cultural belief and practices, employment and educational experiences. With that diversity come many difficulties and there is potential for misunderstanding. But there is richness in our differences and we have to learn from and we have to rely on each other. The preamble to our Constitution says 'we are united in our diversity'. It is essential that the magistracy and the Judiciary reflect the diversity and the richness and the challenges of this complex heritage."³

The court indicated that the evidence submitted before it does not show that the applicant was not shortlisted because of her disability but it is clear that her disability was not taken into consideration when shortlisting.⁴

The court interestingly found that:

"it is not enough to put a symbol of a wheelchair on the letterhead and to allege that the Magistrate Commissioner is sensitive to the plight of disabled people."⁵

Lessons learnt

The following key lessons may be drawn from *Singh*

It is evident from *Singh* that Section 174 (2) of the Constitution does not exclude the consideration of disability as a ground to be considered and to be promoted since disability is expressly recognized in section 9 (3) of the Constitution and in the Equality Act.

¹ *Singh* para 30.

² 2002 (4) SA 524 (C).

³ *S v Bresier and Another* 2002 (4) SA 524 (C) 539 B–D.

⁴ *Singh* para 32.

⁵ *Singh* para 33.

It is further evident that it is important for policies and criteria to specifically mention disability. To further compliment this, it is imperative that selection Committees take into account different disabilities when shortlisting candidates.

Diversity improves the outcomes of judicial decisions by increasing the range of perspectives of judicial officers. It is vital that disabled people are properly represented in the Magistracy so that their unique perspectives can be properly articulated.

Conclusion

It is trite that people with disabilities are a minority in the judiciary with attributes different from mainstream society. What is key from this paper is that there are still barriers in the workplace that deprive the integration and inclusion of persons with disability in the workplace, these barriers arguably have the effect of violating the right to equality and the dignity of persons with disabilities. Any practice that results in the exclusion of persons with disability in the magistrates Commission would likely not pass the limitation test.

It is submitted that reasonable accommodation of persons with disability in the judiciary includes the provisions of supportive structures and infrastructures. The emancipation of persons with disability in South Africa therefore requires intentional commitment on the employers to take bold steps to redress the legacy of discriminating against people with disabilities.

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