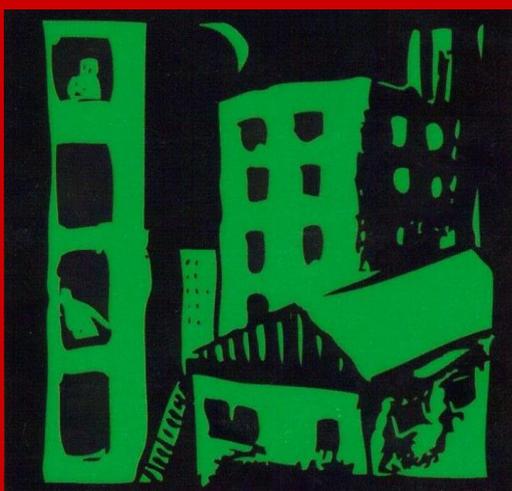


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**Multiple
discrimination
experienced by
women with
disabilities in the
workplace in
South Africa**

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ABSTRACT

Persons with disabilities have historically been members of one of the most marginalised groups in society. Access to employment has been a major barrier to the socio-economic empowerment of those with disabilities. The intersection of gender- and disability-based unfair discrimination is not yet widely recognised, and it may not be as familiar as traditional concepts of discrimination. This intersection is important however, because it may affect the participation of women with disabilities in various aspects of society. There is growing recognition that women with disabilities face greater barriers against full participation in society, since they must overcome unfair discrimination related to both their gender and their disabilities.

The aim of this article is to examine whether the current South African legislative framework relating to women with disabilities in the workplace recognises multiple discrimination and takes steps to eliminate or counter it. To this end, the compounding effect of gender and disability will be explained, and the impact of this multiple discrimination on women with disabilities seeking or currently in employment will be analysed. In addition, socio-economic factors in South Africa will be considered, along with their impact on employment opportunities for women with disabilities.

Keywords: Equality; multiple discrimination; women with disabilities; employment; labour law, disability.

1 INTRODUCTION

Persons with disabilities have historically been one of the most marginalised groups in society.¹ This marginalisation extends to all facets of life, from social and political participation to unfair discrimination on an individual basis. The lingering disadvantage experienced by persons with disabilities is particularly evident in the enjoyment of socio-economic rights.² In particular, access to employment has been a major barrier to the socio-economic empowerment of persons with disabilities.³

Whilst persons with disabilities as a group have been discriminated against systemically in relation to employment,⁴ it must be noted that “persons with disabilities” are not a homogeneous group and that there are sub-groups who experience discrimination based on their disability as well as other compounding factors.⁵ These groups include children with disabilities, persons with psychosocial disabilities, and women with disabilities. For the purposes of this article, the focus will be on the barriers to accessing employment facing women with disabilities.

The recognition that there is an intersection between gender- and disability-based unfair discrimination is not yet widespread. This intersection is nevertheless important as it may affect the participation of women with disabilities in various aspects of society. There is growing recognition that women with disabilities face greater obstacles against full participation in society, since they need to overcome unfair discrimination related to both their gender and their disabilities. This compounded discrimination is called

¹ Grue J “Inclusive marginalisation? A critical analysis of the concept of disability, its framings and their implications in the United Nations Convention on the Rights of Persons with Disabilities” (2019) 37(1) *Nordic Journal of Human Rights* at 4.

² National Planning Commission *National Development Plan 2030: Our future – make it work* (2012) at 24.

³ Persons with disabilities have experienced systemic disadvantage in the sphere of employment, like other marginalised groups in the past. See *Du Preez v Minister of Justice and Constitutional Development* 2006 9 BCLR 1094 (SE) at para 15.

⁴ Basson Y “Selected developments in South Africa labour legislation related to persons with disabilities” (2017) 20 *Potchefstroom Electronic Law Journal* at 10.

⁵ Lawson G “Disability as a cultural identity” (2001) 11(3) *International Studies in Sociology of Education* at 203.

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multiple discrimination. The United Nations Convention on the Rights of Persons with Disabilities (CRPD)⁶ acknowledges multiple discrimination generally in its Preamble and specifically in the context of women with disabilities in Article 6. Article 6(1) provides that “States Parties recognize that women and girls with disabilities are subject to multiple discrimination ...”. The existence of multiple discrimination against women with disabilities is, therefore, expressly recognised in international law.

The aim of this article is to examine whether the current South African legislative framework relating to women with disabilities in the workplace recognises multiple discrimination and takes steps to eliminate or counter it. To this end, the compounding effect of gender and disability will be explained, and the impact of this multiple discrimination on women with disabilities seeking or currently in employment will be analysed. Thereafter, the impact of access to education as a barrier to employment for women with disabilities will be discussed. Most of this article will focus on the Employment Equity Act, which is the primary legislation that provides for the elimination of unfair discrimination in the workplace,⁷ and how this legislation affects the employment of women with disabilities. Finally, recommendations will be made as to measures that could be implemented to increase the employment of women with disabilities in South Africa, with specific reference to employment equity measures.

2 WHAT IS MULTIPLE DISCRIMINATION?

To understand the consequences of multiple discrimination, it is necessary first to consider the scope and content of multiple discrimination and provide examples of it. Multiple discrimination is referred to in several ways, such as compounded discrimination, intersectional discrimination and aggregated discrimination.⁸ According to the European Institute of Gender Equality, multiple discrimination refers to:

“[a]ny combination of forms of discrimination against persons on the grounds of sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, gender identity or other characteristics, and to discrimination suffered by those who have, or who are perceived to have, those characteristics.”⁹

In the context of the CRPD, multiple discrimination is defined as “a situation in which a person experiences discrimination based on two or more grounds, which compounds or aggravates it”.¹⁰ In other words, where there are two or more possible grounds for

⁶ United Nations Convention on the Rights of Persons with Disabilities A/61/611 of 2006.

⁷ Section 2 of the Employment Equity Act 55 of 1998.

⁸ Sheppard C “Multiple discrimination in the world of work” *International Labour Organisation, Global Report on Equality at Work* (2011) at 3.

⁹ European Institute of Gender Equality 2010 available at <https://eige.europa.eu/thesaurus/terms/1297> (accessed 25 January 2022).

¹⁰ Conference of States Parties to the Convention on the Rights of Persons with Disabilities *Addressing the impact of multiple discrimination on persons with disabilities and promoting their participation and multi-stakeholder partnerships for achieving the Sustainable Development Goals in line with the CRPD* available at <https://www.un.org/development/desa/disabilities/conference-of-states-parties-to-the->

discrimination in a particular set of circumstances, the intersection of these grounds must be recognised. Any intensified discrimination based on this intersectionality must also be taken into consideration when making decisions related to a group of persons impacted on by multiple discrimination.¹¹

The definitions of multiple discrimination above are not the only definitions, but the consensus is that multiple discrimination is an umbrella term that refers to situations where an individual is discriminated against based on two or more inherent characteristics, which results in worse treatment than they may otherwise have experienced.¹² This umbrella term would include the aforementioned compounded discrimination, aggregate discrimination and other types of multiple discrimination as well. Since multiple discrimination is the term used in the CRPD, it will be used in this article too.

When it comes to women with disabilities, multiple discrimination consists of unfair discrimination based on gender, together with unfair discrimination based on disability. Unfair discrimination based on gender is a well-researched topic, and many countries have taken measures to address gender-based discrimination.¹³ Examples of this unfair discrimination include sexual harassment, unequal pay for equal work, and discrimination related to childbearing.¹⁴ Gender inequality is still a lived reality for women around the world, and this is even more true for women with disabilities.¹⁵

In addition to experiencing gender-based discrimination, women with disabilities experience unfair discrimination based on disability. Discrimination based on disability can take many forms. These include direct discrimination, indirect discrimination, and discrimination by association.¹⁶ Examples of discrimination based on disability include denying reasonable accommodation, refusing to employ a person with a disability, and refusing to allow a person with a disability time off to receive medical treatment. While

[convention-on-the-rights-of-persons-with-disabilities-2/cosp10.html](https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf) (accessed 25 January 2022); CEDAW *General Recommendation No. 25* 3 available at [https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20\(English\).pdf](https://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf) (accessed 25 January 2022).

¹¹10th session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities (2017) 2.

¹²Chadha E & Mykitiuk R “Article 6 – women with disabilities” in Bantekas I, Anastasiou D & Stein M (eds) *The UN Convention on the Rights of Persons with Disabilities Commentary* Oxford: OUP (2018) at 16.

¹³The United States of America, the United Kingdom, Australia, Canada and the European Union have policy documents or legislation in place with the aim of eliminating unfair discrimination based on gender in various spheres of life.

¹⁴See generally the 64th Session of the United Nations Commission on the Status of Women (2020).

¹⁵Basson Y “Towards equality for women with disabilities: The implementation of Articles 5 and 6 of the Convention on the Rights of Persons with Disabilities” (2021) *African Disability Rights yearbook* at 2.

¹⁶Committee on the Rights of Persons with Disabilities *General Comment No. 6* at 4 available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/6&Lang=en (accessed 25 January 2022).

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direct and indirect discrimination is well known, discrimination by association is perhaps not referred to as commonly. Discrimination by association involves discriminating against a person who is associated with a person with a disability.¹⁷ The caregivers of persons with a disability can therefore be the subject of unfair discrimination relating to disability, despite not having a disability themselves.¹⁸

For women with disabilities, the two types of discrimination explained above combine to create a situation where a woman with a disability must overcome barriers related to both these types of discrimination. This combination of types of discrimination effectively makes it more difficult for a woman with a disability to participate fully in society than a person who experiences discrimination based on one ground.

2.1 Examples of multiple discrimination

It is relatively easy to think of examples of single, direct discrimination against a person. These include refusing to hire someone because of his or her race, or dismissing someone from his or her job because of his or her sexual orientation. Examples of multiple discrimination can be difficult to identify, since the discrimination may ostensibly be on a single ground or look like direct discrimination.¹⁹ Multiple discrimination is essentially a form of indirect discrimination, since the treatment of the person may not initially appear discriminatory but may have a discriminatory effect.²⁰

Examples of multiple discrimination against women with disabilities include not having accessible beds for gynaecological examinations, not providing support services for women with disabilities who are the primary caregivers for members of their households, and not allowing the mother of a child with a disability time off to care for her child.²¹ Unfortunately, it is not possible to give a *numerus clausus* of examples of multiple discrimination against women with disabilities because of the unique and individual nature of disability. Multiple discrimination by association can also take place, such as the mother of a child with a disability being discriminated against because of concerns about the mother's availability as an employee.²²

¹⁷Committee on the Rights of Persons with Disabilities *General Comment No. 6* at 5.

¹⁸Committee on the Rights of Persons with Disabilities *General Comment No. 6* at 5.

¹⁹Committee on the Rights of Persons with Disabilities *General Comment No. 3* at 2 available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en (accessed 25 January 2022).

²⁰Committee on the Rights of Persons with Disabilities *General Comment No. 3* at 2.

²¹Committee on the Rights of Persons with Disabilities *General Comment No. 3* at 2.

²²Committee on the Rights of Persons with Disabilities *General Comment No. 3* at 6.

2.2 Multiple discrimination in the workplace

The Committee has recently published a General Comment on Article 27 of the CRPD, which deals with the rights of persons with disabilities in the workplace.²³ One of the focus areas of the General Comment is the elimination of discriminatory practices in the workplace against women with disabilities, with specific regard paid to multiple discrimination.²⁴ Numerous items in the General Comment address aspects of discrimination against women with disabilities. Inter alia, item 4 of the General Comment recognises that employment barriers are exacerbated for women with disabilities; item 36 recognises that women with disabilities are less likely to be promoted; and item 66 sets out examples of ways in which women with disabilities are disadvantaged by multiple discrimination.

The CRPD therefore requires that multiple discrimination not only be recognised but addressed by state parties. The impact that multiple discrimination has on individuals in the workplace is often difficult to determine.²⁵ What is clear, however, is that multiple discrimination does have a significant impact in general. According to Kotkin, “Despite the common sense notion that the more “different” a worker is, the more likely she will encounter bias, empirical evidence shows that multiple claims ... have even less chance of success than single claims.”²⁶

According to the World Bank, the rate of employment of women with disabilities is 30 per cent less than that of men with disabilities.²⁷ The effect of multiple discrimination is evident from this data. An example of a situation which could lead to multiple discrimination is as follows:²⁸ a woman with a disability is seeking employment. When the hiring party sees her application, they realise that she has a disability, and they assume that she will often be absent because of ill-health. They are also concerned that she may decide to have children in the future, and then also be absent from the workplace. Neither assumption is necessarily accurate, which means that there are two grounds that incorrectly create a negative impression in the mind of the hiring party.

²³Committee on the Rights of Persons with Disabilities *General Comment No. 8* available at <https://www.ohchr.org/en/documents/general-comments-and-recommendations/crpd/cgc8-general-comment-no-8-2022-right-persons> (accessed 20 January 2023).

²⁴Committee on the Rights of Persons with Disabilities *General Comment on Article 27 of the Convention on the Rights of Persons with Disabilities* (2022) Item 21.

²⁵Moodley J & Graham L “The importance of intersectionality in disability and gender studies” (2015) 29(2) *Agenda: Empowering Women for Gender Equity* at 25.

²⁶Kotkin MJ “Diversity and discrimination: A look at complex bias” (2009) 50(5) *William & Mary Law Review* at 1440.

²⁷World Health Organization and World Bank *World Report on Disability* (2011) at 35.

²⁸While there are cases in which women with disabilities have challenged employment practices, the current jurisprudence does not make reference to the heightened disadvantage experienced by women with disabilities in the workplace, hence the use of a hypothetical example rather than a case discussion.

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The intersection of the grounds of gender and disability therefore have a negative impact on her prospects of employment.

3 EMPLOYING WOMEN WITH DISABILITIES IN SOUTH AFRICA

As a group, persons with disabilities experience lower rates of employment than persons without disabilities.²⁹ In addition, persons have historically been excluded from the workplace because of disabilities, through systemic discrimination.³⁰ Existing legislation aimed at improving the employment prospects of persons with disabilities is confined to eliminating discrimination and to providing reasonable accommodation once people have been employed.³¹ There is currently no legislation that aims to eliminate the barriers to employment of persons with disabilities that must be overcome *before* the opportunity for employment arises.³² In the context of employment, the Constitution provides that “everyone” has the following rights: equality before the law;³³ fair labour practices;³⁴ basic education;³⁵ and freedom of trade, occupation and profession.³⁶

In the case of *Khosa and Others v Minister of Social Development and Others*,³⁷ the Constitutional Court considered the meaning of the word “everyone” for purposes of the right of access to social security. The word “everyone” was considered in the context of the founding values of the Constitution, specifically equality.³⁸ The Court found that the restriction of the word “everyone” to citizens did not comply with the guarantee of constitutional rights to “all people in our country” as per section 7(1) of the Bill of Rights. It therefore stands to reason that “everyone” in the Constitution includes women with disabilities. This is particularly important for the rights to equality, fair labour practices, freedom of trade, education, and occupation and profession.

Women with disabilities are entitled to enjoy the rights enshrined in the Bill of Rights on an equal basis with others. Lack of employment opportunities as a result of socio-economic barriers to employment effectively curtails the exercise of these rights; and the reality is that women with disabilities in South Africa experience lower levels of

²⁹Basson (2017) at 10.

³⁰Basson (2017) at 10.

³¹These are the aims of the EEA.

³²Both the EEA and the Labour Relations Act 66 of 1995 apply to situations where a person with a disability is applying for employment or is already employed.

³³Section 9 of the Constitution of the Republic of South Africa of 1996.

³⁴Section 23, Constitution.

³⁵Section 29, Constitution.

³⁶Section 22, Constitution.

³⁷*Khosa v Minister of Social Development, Mahlaule and another v Minister of Social Development* 2004 6 SA 505 (CC).

³⁸*Khosa* (2004) at para 42.

employment than their peers.³⁹ Statistical analyses of women with disabilities are often silent on the compounding effect of disability and gender, and so this information is difficult to find.⁴⁰ There is currently a complete absence of statistical data on the prevalence of disability amongst women from different races in South Africa.⁴¹ This omission makes a proper analysis of the impact of the intersectionality of disability and gender extremely difficult. The statistics provided below are therefore related to women with disabilities as a homogeneous group, which limits the usefulness of this information. These statistics are, however, still helpful in demonstrating the compounding effect of gender and disability on the socio-economic status of women with disabilities. This is a problem that must be addressed in future data collection efforts.

Since education plays a substantial role in the employment prospects of women with disabilities,⁴² the statistics provided illustrate the level(s) of education attained by women with disabilities in South Africa. Thereafter, statistics related to employment will be discussed. The statistics provided below have been reported by reliable sources and can be verified.

3.1 Education of women with disabilities in South Africa

When the reported statistics on the education of women with disabilities are examined, a rather bleak picture emerges. Women with disabilities are under-represented at all levels of education.⁴³ Women with disabilities in South Africa are less likely to have completed Grade 12 than men with disabilities. Approximately 80 per cent of women with disabilities have not completed Grade 12.⁴⁴ In real terms, this equates to about 1.57 million women with disabilities who have not completed the grade.⁴⁵ In comparison, approximately 75 per cent of men with disabilities have not completed Grade 12.⁴⁶ While this percentage seems only slightly lower than that of women with disabilities, the actual number is approximately 930,000. This means that there are about 640,000 more women with disabilities than men who have not completed Grade

³⁹Commission for Employment Equity *Annual Report 2019–2020* at 17 available at https://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2019%20-2020/20thCEE_Report.pdf (accessed 25 January 2022).

⁴⁰Emmett T & Alant E “Women and disability: Exploring the interface of multiple disadvantage” (2006) *Development Southern Africa* 23(4) at 4; Moodley & Graham (2015) at 24.

⁴¹Calculations have been made on the number of women with disabilities of various races based on general information published in census data. See Moodley & Graham (2015) at 24.

⁴²Sheppard C “International Labour Organisation Working Paper No 66 Multiple Discrimination in the World of Work” (2011) *International Labour Organisation* at 12.

⁴³Statistics South Africa *Marginalised Groups Indicator Report* (2019) 97 available at <http://www.statssa.gov.za/publications/03-19-05/03-19-052019.pdf> (accessed 25 January 2022).

⁴⁴Statistics South Africa *Marginalised Groups Indicator Report* (2018) at 95.

⁴⁵This figure was arrived at by applying the percentage of women with disabilities who have little or no schooling to the total number of women with disabilities in South Africa.

⁴⁶Statistics South Africa *Marginalised Groups Indicator Report* (2019) at 97.

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12. This is clearly indicative of the ongoing marginalisation of women with disabilities when compared to their male peers with disabilities.

The figures are similarly dismal when comparing the percentage of women without disabilities who have not completed Grade 12 with the percentage of women with disabilities as mentioned above. The percentage of women without disabilities who have not completed Grade 12 is approximately 54 per cent.⁴⁷ This is substantially less than the 80 per cent of women with disabilities who have not completed the same grade. The proportion of women with disabilities who have not completed Grade 12 is thus substantially higher than the proportion of women without disabilities. Since women with disabilities are more likely to have incomplete schooling than women without disabilities, and than men with disabilities, it is submitted that women with disabilities do not experience substantive equality in basic and secondary education. Women with disabilities are prevented from attending school for a number of reasons, including taking primary responsibility for the care of their families.⁴⁸ Many of these factors cannot be legislated away, since they stem from outmoded beliefs and societal perceptions of women.⁴⁹

These factors must be combatted through more practical measures than legislation and policies.⁵⁰ Stakeholders such as non-profit organisations and human rights institutions must embark on a targeted campaign aimed at empowering women and girls with disabilities and enabling them to attend school. In addition, the societal and attitudinal barriers to women and girls with disabilities attending school must be addressed through awareness campaigns, and perhaps through grassroots interventions to identify communities where women and girls with disabilities live, to provide targeted measures to increase the attendance of school in these communities.⁵¹

3.2 Employment of women with disabilities in South Africa

The lack of substantive equality in basic and secondary education for women with disabilities is a significant barrier to employment. So too is the fact that so many women with disabilities have not completed Grade 12, given that many employers require a minimum of Grade 12 for entry into their workplaces. This in turn has a negative impact on the earning capacity of women with disabilities. A woman with a disability who has not completed matric may be forced to accept employment in the informal sector, such as domestic work, whereas a woman with a disability who has completed Grade 12 will

⁴⁷Statistics South Africa *Marginalised Groups Indicator Report* (2019) at 67.

⁴⁸Statistics South Africa *Marginalised Groups Indicator Report* (2019) at 95.

⁴⁹Committee on the Rights of Persons with Disabilities *General Comment No. 3* at 6 available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en (accessed 25 January 2022).

⁵⁰Committee on the Rights of Persons with Disabilities *General Comment No. 3* at 19.

⁵¹Committee on the Rights of Persons with Disabilities *General Comment No. 3* at 9.

have more opportunities for employment.⁵² The Commission on Employment Equity (CEE) has found that the percentage of persons with disabilities at all levels of employment, from unskilled to top management, hovers around the 1 per cent mark.⁵³

Considering that approximately 5 per cent of South Africans have a disability, this 1 per cent is in no way representative of the country's demographics. In relation to women with disabilities, as the level of skill required decreases, the number of women with disabilities employed increases.⁵⁴ This corresponds with the earlier assertion that incomplete secondary education is a barrier to employment for women with disabilities. This also shows that women with disabilities are more often employed in jobs requiring less skill, with a concomitant decrease in salary or wages. There is no level of employment at which more women with disabilities are employed than men with disabilities.⁵⁵

This is indicative of the continued marginalisation of women with disabilities in the workforce, since women with disabilities are poorly represented at all levels of employment, which hinders their access to income. At top management level in South Africa, 1.5 per cent of employees have a disability; in 2019, only 25 per cent of these were women.⁵⁶ In 2019, at the unskilled level, women with disabilities represented 42.5 per cent of the overall 1.1 per cent of persons with disabilities employed at that level.⁵⁷

Despite the state's declared objective to improve access to education for children with disabilities, the gap between the levels of education of disabled children and non-disabled children remains wide.⁵⁸ In the Department of Education's White Paper on special needs education, no measures are mentioned for boosting education levels specifically for female children with disabilities. This evinces a lack of recognition that additional support measures are needed to close the gap between female children with disabilities and their peers. As previously discussed, women with disabilities experience systemic marginalisation in basic and secondary education.

Once the issue of education has been addressed, one can be hopeful that the issue of employment will see a consequent improvement as well. Entry into the workforce and advancement in the workplace would benefit from the recognition that women with disabilities face the compounded effect of gender and disability when seeking

⁵²Commission for Employment Equity *Annual Report 2019–2020* at 17 available at https://www.labour.gov.za/DocumentCenter/Reports/Annual%20Reports/Employment%20Equity/2019%20-2020/20thCEE_Report_.pdf (accessed 25 January 2022).

⁵³Commission for Employment Equity *Annual Report 2019–2020* at 17.

⁵⁴Commission for Employment Equity *Annual Report 2019–2020* at 22–33.

⁵⁵Commission for Employment Equity *Annual Report 2019–2020* at 22–33.

⁵⁶Commission for Employment Equity *Annual Report 2018–2019* at 22 available at https://www.gov.za/sites/default/files/19th%20CEE-Annual%20Report_.pdf (accessed 4 August 2022).

⁵⁷Commission for Employment Equity *Annual Report 2019–2020* at 44.

⁵⁸Department of Education *White Paper No 6 Special Needs Education* (2001).

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employment opportunities. The current legislative barriers to employment of women with disabilities, resulting from the lack of recognition of multiple discrimination, are discussed below.

4 ADDRESSING MULTIPLE DISCRIMINATION AGAINST WOMEN WITH DISABILITIES IN THE WORKPLACE IN SOUTH AFRICA

From the discussion above, the following is clear: women with disabilities experience multiple discrimination in various facets of life, including the workplace. This raises the question: what is currently being done to counter multiple discrimination against women with disabilities in the workplace in South Africa? To answer the question, the applicable constitutional and legislative framework will be discussed in the following paragraphs.

4.1 The Constitution

Section 9(3) of the Constitution provides 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, conscience, belief, culture, language and birth”.⁵⁹ Disability is expressly included in section 9(3), and a person may therefore not be discriminated against because of their disability.⁶⁰ Similarly, sex and gender are also grounds upon which unfair discrimination may not take place.

The drafters of the Constitution thus clearly recognised that persons with disabilities and women require legislative and other measures to ensure their full and equal participation in society.⁶¹ Women with disabilities are therefore included in the scope of application of section 9 as well. There is also clear recognition that discrimination can be based on “one or more grounds”, which is an implicit acknowledgement of the existence of multiple discrimination. However, no further mention is made in the Constitution of the impact of multiple discrimination, or how to deal with it. It is submitted that multiple discrimination erodes part of the right to equality, and the consequent prohibition against unfair discrimination, and that measures must therefore be taken to negate it in all spheres of the life of women with disabilities, including within the workplace.

Sections 22 and 23 of the Constitution deal specifically with rights relating to employment. Section 22 provides that “every citizen has the right to choose their trade, occupation or profession freely”. For many professions, a certain minimum level of education is required. If a woman with a disability is deprived of her right to education

⁵⁹Emphases added.

⁶⁰Grobbelaar-du Plessis I & Van Eck BPS “Protection of disabled employees in South Africa: An analysis of the Constitution and Labour Legislation” in Grobbelaar-du Plessis I & Van Reenen T (eds) *Aspects of disability law in Africa* (2012) Pretoria: PULP at 232.

⁶¹This is reflected in section 9(2) of the Constitution, which provides for the use of affirmative action measures in respect of these groups of persons.

because of her disability, this may amount to an infringement of her right to choose her trade or occupation. If the education of women with disabilities continues to be sidelined by the state, then this infringement of section 22 will continue.

Section 23 provides that “everyone has the right to fair labour practices”.⁶² As per the *Khosa* case, this right applies to women with disabilities, provided that these women are already employed.⁶³ The right to fair labour practices is not defined and is not considered a precise concept.⁶⁴ However, the opposite of a fair labour practice (namely an unfair labour practice) is prohibited, and there is more information available on what constitutes an unfair labour practice. The prohibition of unfair labour practices is found in the Labour Relations Act (LRA). Section 185 of the LRA provides that “[e]very employee has the right not to be (a) unfairly dismissed; and (b) subjected to unfair labour practice”. The LRA then goes on to provide a list of examples of unfair labour practices.⁶⁵ This list is not a *numerus clausus*,⁶⁶ and a court may find that other behaviour by an employer also constitutes an unfair labour practice against a woman with a disability. The examples of multiple discrimination provided above may very well be considered unfair labour practices, and a lack of recognition or measures to eliminate such multiple discrimination may infringe the rights of a woman with disability to fair labour practices.

4.2 Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)⁶⁷ is national legislation that deals with the issue of unfair discrimination. Section 1(1)(viii) defines discrimination as:

“... any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly

(a) imposes burdens, obligations or disadvantage on; or

(b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds.”

⁶²Section 23(1), Constitution.

⁶³The LRA applies to “employees”, section 1 of the LRA.

⁶⁴*NEWU v CCMA* [2004] 2 BLLR 165 (LC) 2345.

⁶⁵Section 186 of the LRA provides that “unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving: (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

⁶⁶*NEWU v CCMA* [2004] 2 BLLR 165 (LC) 2347.

⁶⁷Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

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The definition of discrimination in section 1 includes the phrase, “on one or more grounds”, which indicates that the legislature recognised multiple discrimination and included it in the scope of application of PEPUDA. There is an unequivocal prohibition of unfair discrimination in section 6, which provides that “[n]either the State nor any person may unfairly discriminate against any person”. The blanket prohibition of unfair discrimination in section 6 of PEPUDA is expanded upon in sections 7–9, where unfair discrimination on specific grounds is emphasised.⁶⁸ Sections 8 and 9 prohibit unfair discrimination on the grounds of gender and disability, respectively. Section 8 prohibits discrimination based on gender, and goes on to list examples of prohibited conduct. Similarly, section 9 prohibits discrimination based on disability and provides examples of prohibited conduct. Neither of the sections gives examples of multiple discrimination, although section 8 provides a more detailed description of which conduct is prohibited. There is also some overlap between the two sections, including that reasonable accommodation should be provided to both women and persons with disabilities.⁶⁹

In relation to employment, section 8(h) prohibits “the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons”. This means that women must not be deprived of opportunities to earn money because of their gender. Whereas section 8 clearly addresses some aspects of employment-related discrimination, section 9 is not quite so clear. The only reference to employment in section 9 is where discrimination is prohibited through “failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such persons”.

The role of PEPUDA is therefore limited to the prohibition of unfair discrimination against women or persons with disabilities in certain circumstances. It can be relied upon by women with disabilities in the workplace when claiming reasonable accommodation once they are employed.⁷⁰ However, PEPUDA is silent on how to address the barriers faced by women with disabilities who are entering the workforce or are seeking employment. Women with disabilities are clearly entitled to the measures outlined in PEPUDA relating to both gender and disability. However, no provision has been made for the occurrence of multiple discrimination in PEPUDA. Even though women with disabilities face multiple barriers in accessing employment, PEPUDA does not address this. PEPUDA is therefore not so useful as a tool for increasing the number of women with disabilities who are employed.

⁶⁸ Section 7 prohibits discrimination on the basis of race.

⁶⁹ Section 8(h) and 9(c).

⁷⁰ Section 8(h) and 9(c) both provide for reasonable accommodation measures.

In a judgment by the North Gauteng High Court sitting as an Equality Court,⁷¹ a woman with a disability had applied for a position as a magistrate but was rejected since she did not possess a valid driver's licence. The applicant was partially sighted. She alleged that the requirement of a valid driver's licence was unfairly discriminatory against persons with disabilities who were physically unable to obtain such. The High Court considered PEPUDA in making its decision, and specifically the history of systemic discrimination and equality based on, inter alia, gender, disability and race.⁷² Based on this and the court's interpretation of other statutes relating to the composition of the magistracy, it was held that the rejection of the candidate was unfairly discriminatory, since it was primarily based on her disability.⁷³ This is an indication of the way in which PEPUDA can be used to eliminate unfair discrimination against women with disabilities who are applying for employment.

4.3 Employment Services Act

The Employment Services Act (ESA)⁷⁴ was passed in 2014 with aim of, inter alia, providing for "the establishment of schemes to promote the employment of young work seekers and other vulnerable persons".⁷⁵ Persons with disabilities are included in the scope of the ESA under the broader category of "vulnerable groups".⁷⁶ The primary way in which the ESA aims to promote work and employment opportunities for persons with disabilities is through the establishment of Supported Employment Enterprises (SEE).⁷⁷ SEE were previously known as Sheltered Employment Factories, and have essentially undergone a renaming and modification process as a result of the ESA.⁷⁸ This was done to bring the SEE into compliance with the Constitution, since the (now defunct) SEF concept was an apartheid construct.⁷⁹ There was also a movement from "sheltered employment" to "supported employment" during this change. Sheltered employment is considered isolating, and was based on the outdated concept that persons with disabilities required protection in the working environment.⁸⁰ In contrast,

⁷¹*Singh v Minister of Justice and Constitutional Development and Another* (5072/05) [2006] ZAKZHC 20 (5 May 2006).

⁷²*Singh v Minister of Justice and Constitutional Development and Another* (5072/05) [2006] ZAKZHC 20 (5 May 2006) at para 15. For a full discussion of the *ratio decidendi* in this case, see Holness W "Employment equity and elimination of discrimination: Where are women with disabilities in the hierarchy?" (2016) 30(1) *Agenda: Empowering Women for Gender Equity*.

⁷³*Singh v Minister of Justice and Constitutional Development and Another* (5072/05) [2006] ZAKZHC 20 (5 May 2006) at para 46.

⁷⁴Employment Services Act 4 of 2014.

⁷⁵Preamble to the ESA.

⁷⁶Chapter 6 of the ESA.

⁷⁷Section 42 of the ESA.

⁷⁸Memorandum to Employment Services Bill of 2010.

⁷⁹Basson (2017) at 8.

⁸⁰See generally Armstrong AJ "Sheltered employment" in Kreutzer JS, DeLuca J & Caplan B (eds) *Encyclopedia of clinical neuropsychology* (2011).

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supported employment aims to provide persons with disabilities with the skills they need to participate in the competitive job market, while earning money.⁸¹

The SEE provide practical skills training to “young workers” and “vulnerable persons”.⁸² For purposes of the SEE, persons with disabilities are considered a “vulnerable group”.⁸³ The SEE system provides training opportunities to persons with disabilities, as well as supported employment and work opportunities.⁸⁴ There is a focus on the provision of practical skills such as metalwork and carpentry. The primary products from the SEE are furniture, textiles and metal products.⁸⁵ These activities aim to foster self-reliance and include persons with disabilities in the workplace. There are currently 13 SEE in eight of the provinces in South Africa.⁸⁶ The total number of persons employed at the existing SEE is 1,250.⁸⁷ There are many advantages to the use of the SEE, including the provision of safe working environments for persons with disabilities, and the provision of opportunities to cultivate friendships. The SEE allows for greater tailoring of the workplace for the needs of the individual with a disability.⁸⁸

Since women with disabilities are less likely to be employed in standard employment than men with disabilities,⁸⁹ the SEE provide an ideal opportunity for the further inclusion of women with disabilities into the workforce. However, the ESA does not make any specific provision for women with disabilities, even though women with disabilities theoretically have equal access to the opportunities provided through the SEE. Since women with disabilities are not expressly included in the scope of the ESA, the SEE do not currently recognise the fact that women with disabilities face additional barriers to employment as a result of multiple discrimination.

The SEE are currently able to employ more persons with disabilities,⁹⁰ and could therefore provide more opportunities for women with disabilities if more funding and

⁸¹Van Niekerk L et al. “Supported employment: Recommendations for implementation in South Africa” (2011) 41(3) *South African Journal of Occupational Therapy* at 85.

⁸²Section 8, ESA.

⁸³Chapter 6, ESA.

⁸⁴Section 43, ESA.

⁸⁵Supported Employment Enterprises (2021) available at [https://www.labour.gov.za/About-Us/Pages/Supported-Employment-Enterprises-\(SEE\).aspx](https://www.labour.gov.za/About-Us/Pages/Supported-Employment-Enterprises-(SEE).aspx) (accessed 4 August 2022).

⁸⁶Supported Employment Enterprises (2021) available at [https://www.labour.gov.za/About-Us/Pages/Supported-Employment-Enterprises-\(SEE\).aspx](https://www.labour.gov.za/About-Us/Pages/Supported-Employment-Enterprises-(SEE).aspx) (accessed 4 August 2022).

⁸⁷Industrial Development Corporation (2020) available at <http://www.thedtic.gov.za/wp-content/uploads/IDC-SEEs.pdf> (accessed 4 August 2022).

⁸⁸Industrial Development Corporation (2020) available at <http://www.thedtic.gov.za/wp-content/uploads/IDC-SEEs.pdf> (accessed 4 August 2022).

⁸⁹Commission for Employment Equity *Annual Report 2019–2020* at 30.

⁹⁰Industrial Development Corporation (2020) available at <http://www.thedtic.gov.za/wp-content/uploads/IDC-SEEs.pdf> (accessed 4 August 2022).

resources were to be made available in expanding the existing SEE system. It is submitted that women with disabilities should be expressly included in the scope of the ESA as a separate “vulnerable group”⁹¹ in order to make specific adjustments to the SEE system and counter the multiple discrimination experienced by women with disabilities who are seeking opportunities for training and employment.

4.4 Employment Equity Act

The most important piece of legislation dealing with equity in the workplace is the Employment Equity Act.⁹² The Employment Equity Act (EEA) was promulgated to achieve equity in the workplace and thereby promote and realise the constitutional right to equality.⁹³ The EEA addresses the legacy of apartheid and discriminatory practices resulting in the systemic exclusion of marginalised groups from the workplace. Under apartheid, unfairly discriminatory practices were often enforced by employers.⁹⁴ The EEA therefore aims to stop these practices.

To this end, the EEA makes provision for measures aimed at promoting the participation in the workplace of “designated groups” of persons,⁹⁵ provided that these persons are suitably qualified for the job.⁹⁶ The EEA defines designated groups as “black people, women and people with disabilities”. Women (of all races, regardless of disability) are thus considered a designated group, as are persons with disabilities. A woman with a disability is then part of two designated groups as per the definition in the EEA, and the provisions of the EEA therefore apply to women with disabilities. Suitably qualified women with disabilities must therefore be given preference when applying for positions or for advancement within the workplace. The EEA is thus a crucial part of the protection of the rights of women with disabilities within the sphere of labour law.

4.4.1 Elimination of unfair discrimination in the EEA

The EEA clearly prohibits unfair discrimination in the workplace. Section 5 of the EEA provides that “every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice”. Furthermore, section 6 provides that:

“[n]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin,

⁹¹While it is acknowledged that the term “vulnerable” is contested in the context of disability studies, the language used here reflects the language used in the ESA.

⁹²Employment Equity Act 55 of 1998.

⁹³Section 2, EEA.

⁹⁴Du Toit D “Protection against unfair discrimination in the workplace: Are the courts getting it right?” (2007) 11(1) *Law, Democracy and Development* at 1.

⁹⁵Section 1, EEA.

⁹⁶Section 20(3) and (4), EEA.

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colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or on any other arbitrary ground.”

Sections 5 and 6 reinforce the commitment to the achievement of equality and non-discrimination in the workplace.⁹⁷ Any employment policy or practice which unfairly discriminates on any of the listed grounds, including disability or any other arbitrary ground, will therefore not be permitted and must be rescinded.⁹⁸ Examples of unfairly discriminatory practices in the workplace which have been eliminated are the dismissal of a female employee who has had an affair with a male superior,⁹⁹ and the dismissal of a group of workers based on their race.¹⁰⁰ This elimination of unfairly discriminatory policies should make access to employment easier for women with disabilities. It is therefore an important tool in eliminating multiple discrimination against them.

4.4.2 Affirmative action measures

The EEA makes provision for the promotion of the rights of designated groups in the workplace through affirmative action.¹⁰¹ The use of affirmative action measures to achieve employment equity is alluded to in section 9(2) of the Constitution, which provides that “legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”. Affirmative action measures are defined as measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational levels in the workforce of a designated employer.¹⁰² Such measures are therefore intended to promote substantive equality in the workplace and to accurately represent the demographics of various groups in the South African population.¹⁰³

4.4.3 Multiple discriminations in the EEA

While section 6 takes cognisance of the possibility of discrimination being based on “one or more grounds”, there is no further indication of the recognition of multiple discrimination in the EEA, nor does the relevant code of good practice mention this. According to the EEA, the Minister of Labour may issue codes of good practice on relevant issues. The *Code of Good Practice: Key Aspects on the Employment of Disabilities*

⁹⁷Ngwena C “Interpreting aspects of the intersection between disability, discrimination and equality: Lessons from the Employment Equity Act from comparative law” (2005) 16(2) *Stellenbosch Law Review* at 210.

⁹⁸*Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

⁹⁹*G v K* (1988) 9 ILJ 314 (IC).

¹⁰⁰*Biyela & Others v Sneller Enterprises (Pty) Ltd* (1985) 6 ILJ 33 (IC).

¹⁰¹Chapter 3, EEA.

¹⁰²Section 15(1), EEA.

¹⁰³*Solidarity and Others v Department of Correctional Services and Others* 2016 (5) SA 594 (CC) at para 30; Mushariwa M “UNISA v Rynhardt [2010] 12 BLLR 1272 (LAC): Does affirmative action have a lifecycle?” (2012) 15(1) *Potchefstroom Electronic Law Journal* at 412.

was consequently issued in 2015, and contains information and guidelines for employers who intend to employ persons with disabilities. The Code does not recognise multiple discrimination, nor does it distinguish between men with disabilities and women with disabilities. The Code is therefore limited in its usefulness in introducing specific measures to improve the employment prospects of women with disabilities.

Employers are not given guidance as to how they should consider a candidate for a position, where that candidate is a woman with a disability and who is part of two designated groups. It is thus submitted that the EEA does not recognise the increased barriers, as a result of multiple discrimination, faced by women with disabilities aiming to enter or to advance in the workplace. There is no reason why a woman with a disability who is suitably qualified for a post should not be given additional preferment or prioritisation in terms of the EEA since they would “qualify” for affirmative action on two bases.

By ensuring that women with disabilities are given preference over other applicants for a position or advancement within the workplace (provided they are suitably qualified for the position), the compounding effect of the discrimination they face will be recognised and remedied. Many companies already make use of an internal grading or points system when interviewing candidates for employment, so the concept of using a grading system is not new. By formalising a grading system to be applied to all candidates for employment, taking into consideration that women with disabilities should score higher within such a system than a person belonging to only one designated group, the EEA would take substantial steps towards eliminating the multiple discrimination women with disabilities experience when seeking employment.

It is therefore submitted that the EEA does not properly recognise the existence of multiple discrimination, nor does it take steps to negate the compounding and negative effect of a suitably qualified candidate being part of more than one designated group. There is no mention of the treatment or prioritisation of candidates who fall into more than one designated group in the EEA itself, nor is there any separate policy for dealing with candidates who fall into more than one designated group. If a member of one designated group is seen as marginalised, then a candidate who is part of more than one designated group must be considered to have faced more severe marginalisation as a result. This is the very essence of multiple discrimination.

4.4.4 Is the Employment Equity Act unfairly discriminatory against women with disabilities?

As the EEA currently reads and applies, women with disabilities are given priority in terms of entry into and advancement in the workplace.¹⁰⁴ While this is theoretically correct, this has not translated into reality. Women with disabilities still experience very low levels of employment when compared to their peers.¹⁰⁵ Moreover, women with

¹⁰⁴ This is because they are categorised as either women *or* as persons with a disability in terms of the EEA.

¹⁰⁵ See paragraph 3 above.

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disabilities experience lower levels of employment with a concomitant rise in skill levels required for the particular work.¹⁰⁶ While the EEA does provide for affirmative action measures to be implemented to advance designated groups in the workplace, there is no provision for overcoming the barriers created by multiple discrimination.

It was previously submitted that the EEA needs to make further provision for women with disabilities because they are simultaneously members of two designated groups. This amendment should provide clear strategies and practical measures to counter the effects of multiple discrimination experienced by women with disabilities.¹⁰⁷ It is also submitted that the EEA needs to be amended or supplemented by guidelines to provide for additional preferential treatment of suitably qualified candidates who are members of more than one designated group. Such recognition of the compounding effect of gender and disability (and race in the case of black women with disabilities) would compensate for the lack of representation of women with disabilities at all levels of employment.

Since multiple discrimination is indirect discrimination on two or more grounds, one must consider whether the lack of provision for increased protection because those discriminated against belong to two designated groups amounts to indirect unfair discrimination. Any law or policy which, even if it appears to be neutral and non-discriminatory, has the effect of unfair discrimination will be considered as indirectly unfairly discriminatory.¹⁰⁸ This principle is well established in South African jurisprudence. In *City Council of Pretoria v Walker*, it was held that:

“[t]he inclusion of both direct and indirect discrimination within the ambit of the prohibition imposed by section 8(2) evinces a concern for the consequences rather than the form of conduct. It recognises that conduct which may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, that it falls within the purview of section 8(2).”¹⁰⁹

A test for determining direct unfair discrimination was subsequently established by the Constitutional Court in *Harksen v Lane*.¹¹⁰ The test requires a threefold enquiry. The first stage of the test involves a determination as to whether differentiation between categories of people has taken place.¹¹¹ If this question is answered in the affirmative,¹¹²

¹⁰⁶ See paragraph 3 above.

¹⁰⁷ These strategies could similarly be implemented for other persons who experience multiple discrimination as well, although those groups are not the focus of this article.

¹⁰⁸ Currie I & De Waal J *Bill of Rights handbook* (2013) Cape Town: Juta at 238.

¹⁰⁹ *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) at para 31.

¹¹⁰ *Harksen v Lane* 1998 (1) SA 300 (CC) at para 53.

¹¹¹ *Harksen v Lane* 1998 (1) SA 300 (CC) at para 53; Basson Y “Relative poverty in female disability grant recipients in South Africa” (2021) 54(1) *De Jure Law Journal* at 355.

¹¹² Garbers C “The prohibition of discrimination in employment” in Malherbe K & Sloth-Nielsen J (eds) *Labour law into the future: Essays in honour of D’Arcy du Toit* (2012) at 23.

the next stage of the test involves a dual investigation. The first aspect is whether the proven differentiation amounts to discrimination, and the next is whether this discrimination (if proven) is unfair.¹¹³ The starting-point of the test is thus an enquiry as to whether some form of differentiation is taking place between groups, and if the answer is “no”, there can be no finding of unfair discrimination. In other words, differentiation is a pre-requisite for a finding of unfair discrimination. In the context of employment equity for women with disabilities, there is no differentiation taking place per se. Women with disabilities are a “designated group”, and as such they are treated the same as any other designated group named in the EEA.¹¹⁴

The *Harksen* test does not take into consideration that unfair discrimination may be based on ostensibly equal treatment resulting in indirect unfair discrimination. Nor does the test take into account that multiple discrimination may exist, thus increasing the likelihood that unfair discrimination may be taking place. In other words, the *Harksen v Lane* test takes a single-axis approach and does not in its present form take into consideration that discrimination may be taking place on more than one ground simultaneously.¹¹⁵ This renders the test for unfair discrimination as established in *Harksen* inappropriate for purposes of the present discussion, since it does not make provision for situations where unfair discrimination may result from ostensible equal treatment instead of differentiation. This is reaffirmed by De Waal and Currie, who state that any law or policy that has the effect of unfair discrimination, even if it appears to be neutral and non-discriminatory, will be considered as being indirectly unfairly discriminatory.¹¹⁶

Women with disabilities are currently prioritised on the same basis as members of other designated groups. This is effectively an application of formal equality via the EEA. The goal, in terms of section 9 of the Constitution, is substantive equality. It is submitted that treating women with disabilities in the same way as members of only one designated group does not satisfy the constitutional imperative of substantive and transformative equality. It is submitted, furthermore, that this failure to recognise multiple discrimination does, in fact, have the effect of unfair discrimination as per *City Council of Pretoria*. This is because the additional obstacles as a result of the intersection of their gender and disability faced by women with disabilities when entering or advancing in the workplace are not counteracted.

5 CONCLUSION AND RECOMMENDATIONS

It is a well-established fact that women with disabilities experience multiple discrimination as a result of the intersection of their gender and disability. Multiple

¹¹³ Currie & De Waal (2013) at 216.

¹¹⁴ Section 1, EEA.

¹¹⁵ The Council of Europe “Intersectionality and multiple discrimination” 2022 available at <https://www.coe.int/en/web/gender-matters/intersectionality-and-multiple-discrimination> (accessed 4 August 2022).

¹¹⁶ Currie & De Waal (2013) at 238.

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discrimination has been recognised, defined and prohibited in terms of two major international treaties, namely CRPD and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). As shown above, multiple discrimination is also recognised and prohibited in South Africa since both the Constitution and PEPUDA recognise the existence of multiple discrimination (even if indirectly). The intersection of gender and disability results in women with disabilities experiencing multiple discrimination related to employment in South Africa. Despite the guaranteed right to equality and the prohibition of unfair discrimination, the recognition of multiple discrimination is yet to be incorporated in any labour legislation. There is hence little practical guidance on how to address this multiple discrimination in practice. This is a clear lacuna in labour legislation, which must be addressed.

The first element to be addressed is the adoption of a clear definition of multiple discrimination. The CRPD and General Comments thereon provide a detailed description of what multiple discrimination is and what its elements are. Since South Africa has signed and ratified the CRPD, it is bound by the terms of the CRPD. This would be a good place to start when adopting a definition of multiple discrimination for use in labour legislation. General Comment 8 specifically provides clear guidance as to the meaning and scope of multiple discrimination.¹¹⁷ The next issue that should be considered is how best to provide clear and practical guidelines relating to the right to equality of women with disabilities in the workplace. While the EEA and its Code of Good Practice already do this for persons with disabilities, an addition to this is needed to put the rights of women with disabilities into context. Women with disabilities do not form part of a homogeneous group of persons with disabilities together with men and children with disabilities, so it is logical to consider the unique barriers to employment experienced by women with disabilities separately from those affecting other persons with disabilities.

Since there is already a Code of Good Practice in place concerning the employment of persons with disabilities, an amendment to the existing Code which relates specifically to women with disabilities who are already employed is a potential solution to the issue. However, the Code of Good Practice does not address the factors leading to low levels of employment amongst women with disabilities in South Africa. In addition, the Code of Good Practice is not binding on employers,¹¹⁸ and can therefore be ignored with no real consequences. An amendment to a Code of Good Practice would thus not address the urgency of the multiple discrimination faced by women with disabilities. Interventions aimed at boosting these numbers need to be more practical, and must be binding on employers.

Another potential solution would be to introduce far-reaching legislation that provides for the rights of women with disabilities. To date, there is no dedicated disability

¹¹⁷ Item 21 of General Comment 8.

¹¹⁸ A code of good practice is considered a policy rather than binding legislation – see Item 3 of the Code of Good Practice on the Employment of Persons with Disabilities.

legislation in South Africa. Considering the levels of marginalisation still experienced by women with disabilities in South Africa generally, such legislation could make a positive impact on improving the socio-economic position of these women. Disability-specific legislation could directly address the multiple discrimination experienced by women with disabilities by defining the concept and by codifying specific examples of multiple discrimination that are prohibited. Such legislation would also provide an opportunity to provide guidance on how multiple discrimination should be addressed, together with the reasonable accommodation of women with disabilities who experience multiple discrimination.

Whichever solution is chosen, it is evident from the discussion above that change is necessary and urgent. Women with disabilities have not received the attention from legislators that they are entitled to, and this is reflected in the low levels of education and employment experienced by women with disabilities. To eliminate this marginalisation, and to eradicate the barriers created by multiple discrimination, clear and decisive action by legislators is needed. This should be undertaken as soon as possible to effect the real change that is required.

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