

A Legal Conundrum - The Duty to Reasonably Accommodate: A Comment on *Legal Aid South Africa v Jansen* 2020 41 ILJ 2580 (LAC)

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Abstract

Persons with disabilities are a historically marginalised minority, but they do possess the capacity to make a valuable contribution in the workplace. Disability in no way dismisses the right of individuals to be employed and to make a contribution to the labour market and the economy at large. Recent case law suggests that the duty to reasonably accommodate disabled respondents remains a conundrum for both respondents and employers in South Africa. In *Legal Aid South Africa v Jansen* 2020 41 ILJ 2580 (LAC) the Labour Appeal Court (LAC) overturned a judgment by the Labour Court that found that Legal Aid unfairly discriminated against a respondent with depression. In 2018, the Labour Court ordered Legal Aid to reinstate Mr Jansen in that it had acted unfairly as his depression was most likely the true cause for his misconduct. On appeal, the LAC emphasised that in order to prove automatic unfair dismissal an applicant must prove both factual and legal causation. The LAC further found that the most dominant reason for Mr Jansen's dismissal was his misconduct and not his depression. Nonetheless, the LAC emphasised that depression is a prevalent illness in the current work environment and that all employers have a duty to deal with depression in a sympathetic manner and were reminded of their obligation to investigate the disability fully, to consider reasonable accommodation and to consider alternatives short of dismissal. Respondents were also reminded of the fact that they need to co-operate with their employers. Whilst South Africa has made significant progress in enacting legislation, codes, and guidelines to lay the foundation for reasonable accommodation, role-players, with specific reference to employers and the judiciary, often overlook these detailed guidelines, especially in cases where the employee suffers from depression. Disability is often used interchangeably with incapacity, which is problematic. This article argues that employers should follow a broad interpretation of the guidelines contained in the Code of Good Practice: Key Aspects on the Employment of People with Disabilities (2002), as well as the Technical Assistance Guidelines. Multi-party consultations and investigations need to be conducted, with the assistance of experts, if needs be. It is further suggested that until South Africa has targeted legislation and policies which make disability management functions mandatory, reasonable accommodation will remain a conundrum.

Keywords

Disability; reasonable accommodation; persons with disabilities; depression; incapacity.

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1 Introduction

The number of persons with disabilities varies significantly from country to country. Several social, economic, and political conditions in a country also influence disability to a large extent. Worldwide the prevalence of disability ranges between 10% and 26%.¹ According to the 2015-2016 Commission for Employment Equity Report, persons with disabilities represented 1.2% of the workforce of designated employers in terms of the *Employment Equity Act 55 of 1988* (the EEA).²

Research findings released in 2016 conducted by the South African Depression and Anxiety Group regarding the impact of depression on the South African workforce stated that at least one in four employees have been diagnosed with depression. Depression was more prevalent between the ages of 25 and 44 years. On average these employees took 18 days off work due to this condition.³ It was also later established that depression increased after lockdown due to Covid-19, which indicates that depression in the workplace might be much more prevalent now than it was back in 2016.⁴

In 2008 South Africa ratified the *Convention on the Rights of Persons with Disabilities*⁵ and the Optional Protocol, thus committing itself to the provisions relating to workplace integration. Article 27 stipulates *inter alia* that states parties shall safeguard and promote the realisation of the right to work, including for those who incur a disability during employment.

Employees are incapacitated if they are unable to perform their functions. On the other hand, an employee with a disability who is suitably qualified is, in most instances, in a position to perform fundamental duties of the job with reasonable accommodation.⁶ Disability is often used interchangeably with incapacity, which is problematic.⁷ Employers often find it difficult to navigate between incapacity, disability or poor work performance, which demonstrates that South Africa requires clearer guidelines in this regard.⁸

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1 WHO and World Bank 2011 https://iris.who.int/bitstream/handle/10665/70670/WHO_NMH_VIP_11.01_eng.pdf.

2 Foreword to the Department of Labour *Technical Assistance Guidelines*.

3 Balaram 2020 *De Rebus* 9.

4 Balaram 2020 *De Rebus* 9.

5 *Convention on the Rights of Persons with Disabilities* (2007) (hereafter the Convention or CRPD).

6 Bassuday and Rycroft 2015 *ILJ* 2516.

7 Garbers *et al New Essential Labour Law Handbook* 265.

8 Ngcobo *Courts' Treatment of Depression* 2.

Lechwano correctly asserts that for employers to prevent discrimination they need to assess their duty to accommodate employees with a disability.⁹ Furthermore, if employers fail to reasonably accommodate employees and abruptly dismiss them, the dismissal will not only be unfair but also automatically unfair.¹⁰ A failure to accommodate a person/employee with disability may amount to discrimination.

In 2020 the Labour Appeal Court (LAC) overturned a judgment by the Labour Court (LC) that found that Legal Aid unfairly discriminated against a respondent with depression. In 2018 the LC ordered Legal Aid to reinstate Mr Jansen in that it had acted unfairly as his depression was most likely the true cause for his misconduct. On appeal the LAC emphasised that to prove automatic unfair dismissal an applicant must prove both factual and legal causation. The LAC further found that the most dominant reason for Mr Jansen's dismissal was his misconduct and not his depression. Nonetheless, the LAC emphasised that depression is a prevalent illness in the current work environment and that all employers have a duty to deal with depression in a sympathetic manner and were reminded of their obligation to investigate the disability fully, to consider reasonable accommodation and to consider alternatives short of dismissal. Employees were also reminded of the fact that they need to co-operate with their employers. Whilst South Africa has made significant progress in enacting legislation, codes and guidelines to lay the foundation for reasonable accommodation, role-players, with specific reference to employers and the judiciary, often overlook these detailed guidelines, especially in cases where the employee suffers from depression. Disability is often used interchangeably with incapacity, which is problematic. This article argues that employers should follow a broad interpretation of the guidelines contained in the Code of Good Practice: Key Aspects on the Employment of People with Disabilities of 2002 as well as the Technical Assistance Guidelines.¹¹ Multi-party consultations and investigations need to be conducted, with the assistance of experts if needs be. It is further suggested that until South Africa has targeted legislation and policies which make disability management functions mandatory, reasonable accommodation will remain a conundrum.

⁹ Lechwano 2012 <http://www.saflii.org/za/journals/DEREBUS/2012/89.html>.

¹⁰ Lechwano 2012 <http://www.saflii.org/za/journals/DEREBUS/2012/89.html>. Also see s 187 of the *Labour Relations Act* 66 of 1995 (hereafter the LRA).

¹¹ *Code of Good Practice: Key Aspects on the Employment of People with Disabilities* (GN 1345 in GG 23702 of 19 August 2002) (hereafter the Code of Good Practice on the Employment of People with Disabilities); Department of Labour *Technical Assistance Guidelines*.

2 Factual background and judgments

2.1 *Facts and background of the case*¹²

The respondent was employed as a paralegal on 2 March 2007. During his employment by the appellant, the respondent received several performance bonuses, and he was further appointed as brand ambassador for the appellant. In 2010 the respondent was diagnosed with major depression. This diagnosis was confirmed in a medical certificate. The certificate stated that the respondent presented symptoms of major depression and had been referred to a hospital for counselling and treatment. The respondent duly informed the appellant of his diagnosis. The respondent further requested to be put on the employer's wellness programme. One of the administration managers at that time, Sait, agreed to the respondent's request, and referred him to a social worker, Ms du Preez. During November 2011 the respondent consulted another medical practitioner, Dr Small, who diagnosed him with depression and high anxiety. The respondent submitted the medical certificate to the appellant and was booked off work for about a week. The respondent was also prescribed anti-depressant medication. The respondent thus submitted medical certificates on a continuous basis.

According to evidence provided in the labour court it appears that the following train of events was the cause of his depression: First, in 2012 the respondent got divorced. In September 2012 the respondent's ex-wife launched domestic violence proceedings against him. The respondent's manager (Mr Terblanche) appeared on behalf of the respondent's ex-wife without prior notification to the respondent, as is stipulated by the employer's policy. The respondent perceived Mr Terblanche's action as constituting a conflict of interest as well as a betrayal. The domestic violence dispute was settled after the respondent had attended four counselling sessions. Further correspondence dating from 2012 revealed that the respondent's struggle with depression was constant and the appellant remained aware thereof. The respondent voluntarily participated in the appellant's employee wellness programme in September 2012 for workplace-related stress. During September and October 2012 the respondent consulted a clinical psychologist, Ms Farre, and attended four counselling sessions with her. Ms Farre issued a report dated 18 October 2012 in which she identified the primary cause of the respondent's condition as being Terblanche's representation of his wife in the domestic violence case. She also recommended that the matter be resolved through a conflict resolution process. She did not expressly indicate that the respondent was suffering

¹² The facts and background to this case are extensive. However, an overview of the factual background was included specifically to demonstrate the different dimensions and lines of communication which may arise as part of reasonable accommodation inquiries.

from major, chronic or ongoing depression. She did, however, express the view that the respondent "carries a lot of frustration and shows symptoms of burnout".¹³ The respondent submitted the report to the appellant, but unfortunately there was no follow-through on the matter.

On the 23rd of October 2012 the respondent wrote a comprehensive letter to the appellant's CEO in which he explained his grievance against Terblanche and the effect it had had on his mental health. The appellant did not act. The appellant however maintained the argument that the respondent's condition was under control since he was using anti-depressant medication and since he was also able to discharge his duties effectively. Prior to September 2013 the respondent was absent from work without leave and without submitting any explanation for his absence. He was issued with a final warning in respect of this category of transgression. The respondent testified that in 2013 he continued to struggle with anxiety and depression. In July 2013 he started to withdraw socially, his dosage of anti-depressants was increased, and he found it difficult to attend work, hence he began not reporting for work. He did inform his line manager, Nicholls, that he was suffering from stress and could not cope.

It was common cause that the respondent failed to report for work for 17 days in the period 30 August 2013 to 5 November 2013. This was in contravention of the appellant's policy, since employees who are unable to report for duty due to illness are required to inform the appellant at the beginning of the workday that they are unable to report for duty and must present a medical certificate substantiating the medical condition which allegedly rendered them unable to work. It was further common cause that the respondent did not contact his line manager on any of the days he was absent from work. Nicholls unsuccessfully tried contacting the respondent telephonically on several of those days.

On 1 October 2013 Terblanche attended the Commission for Conciliation, Mediation and Arbitration (CCMA) at Riversdale, where he unexpectedly came across the respondent and enquired why the respondent had been absent from work without an explanation. The respondent reacted by turning his back on Terblanche, walking away and making a dismissive gesture with his hands. The appellant regarded this conduct as an act of insolence and defiance.

After the above incident the respondent was contacted on 2 and 3 October 2013 by Nicholls and Mr Sait, who is the Administration Manager at George Justice Centre, about why he had failed to report for duty. The respondent responded by informing Nicholls and Sait that he was awaiting a dismissal

¹³ *Jansen v Legal Aid South Africa* 2018 39 ILJ 2024 (LC) (the *Jansen* LC judgment) para 16.

letter as he no longer wished to work for the appellant. The respondent was able to submit one medical certificate which explained his absence for a five-day period. The medical certificate indicated that the respondent had consulted a doctor on 16 October 2013, although the certificate booked him off work from 11 to 18 October 2013¹⁴. On the 7th of November 2013 disciplinary proceedings commenced against the respondent. He was charged on the following four counts:

- (i) absence from work for 17 days in the period of 30 August to 5 November 2013;
- (ii) transgression of the appellant's policies by failing to inform his line manager of his absence from work;
- (iii) insolence relating to the occasion at the CCMA in Riversdale; and
- (iv) refusal to obey a lawful and reasonable instruction from Nicholls to attend to a prisoner at Mossel Bay Prison on 10 October 2013.¹⁵

The respondent participated in the employee wellness programme in October 2013 for the third time. He also consulted Ms Farre again and attended another four counselling sessions in the period 21 November to 12 December 2013. Ms Farre then submitted a report to Nicholls notifying the appellant that the respondent's condition had deteriorated and that he was not coping with the circumstances at work. She specifically mentioned that the respondents was displaying "intense symptoms of a reactive depression" as well as signs of burnout. She described some of his symptoms as follow:

Diminished interest in almost all activities, he has no tolerance re frustration, his mood is greatly affected, his emotional control is limited, he has diminished appetite and diminished sleep. His ability to cope and function is poor and limited. This state of mind paralyses his whole day to day functioning.¹⁶

When Farre drafted the report, she was aware in general terms of the disciplinary charges against the respondent. She further indicated that the respondent's behaviour reflected the state of mind he was in and that he was avoiding all possible stressors "and this accounted for his absence from work". Farre made the following recommendations:

I would strongly recommend that Mr Jansen be granted sick leave for a considered amount of time. He needs to divorce himself from work and try to refocus and prioritize his life. Therapy alone is not enough. His resources for impulse control seems limited therefore he needs timeout. This is a case of great importance. Please take note.¹⁷

¹⁴ It was submitted that the respondent was under a duty to submit the letter to Human Resources immediately after he was booked off and not wait until he was requested to do so during the disciplinary enquiry.

¹⁵ Paragraph 3 of the *Jansen* LC judgment.

¹⁶ Paragraph 29 of the *Jansen* LC judgment.

¹⁷ Paragraph 29 of the *Jansen* LC judgment.

In her testimony before the Labour Court Farre elaborated on her report and testified that the respondent demonstrated intense symptoms of temporary reactive depression which had worsened in 2013 and the respondent was undoubtedly not coping with his work circumstances. She further testified that the respondent showed signs of burnout - "a state of fatigue or frustration brought about by devotion to a cause, way of life or relationship that failed the expected reward."¹⁸ The respondent was no longer able to fulfil his daily obligations due to his being emotionally drained. With reference to the charges of misconduct relating to the act of insolence, Farre testified that the respondent was in a state where he no longer cared and was evading every possible demand. The respondent's lack of rational thought processing resulted in the self-destructive behaviour, and he was no longer able to correct certain behavioural patterns. She expressed the opinion that if the respondent had been given some time off work to resolve his issues, as recommended in her report, it was possible that the misconduct scenario could have been avoided.

Various managers of the appellant were aware of the respondent's condition. When the notice to attend the disciplinary hearing had been served, it had been served by Nicholls on the respondent personally at his home, where the respondent had informed Nicholls that he was unwell and that he was not coping at work. The respondent had handed him a detailed print-out he had received from one medical practitioner explaining the symptoms of reactive depression. Nicholls had read it in the respondent's presence and had handed it back.

The disciplinary hearing took place on 20 to 21 November 2013. The respondent did not dispute the substance of the allegations against him. However, he maintained that he suffered from depression and had acted out of character. He further read a document into a record setting out the symptoms, causes and effects of reactive depression. After all the evidence had been led the hearing stood down until 9 December 2013. By then the respondent had received Farre's second report. Farre sent her report directly to Nicholls on the 4th of December and it was escalated to Human Resources on the 7th. The chairperson of the disciplinary enquiry did not want to accept the report as evidence since the respondent had not called Farre as a witness and allowing the report would amount to hearsay¹⁹ and would be prejudicial to the appellant. The chairperson further rejected the respondent's submissions concerning his psychological state on the basis that there was no expert medical evidence to confirm his claims and concluded that the respondent was guilty on all four counts of misconduct.

¹⁸ Paragraph 18 of *Legal Aid South Africa v Jansen* 2020 41 ILJ 2580 (LAC) (the *Jansen* LAC judgment).

¹⁹ Section 3 of the *Law of Evidence Amendment Act* 45 of 1988.

The respondent's internal appeal was also rejected, and he was accordingly dismissed with effect from 25 February 2014.

2.2 Judgments

2.2.1 Judgment in the Labour Court

The Labour Court found that it was common cause that the respondent had submitted proof of his mental condition and the mere fact that the employer had declined this proof without challenging it was problematic. The Labour Court always maintained the view that the respondent had been suffering from depression which was caused by workplace stress, in particular when Terblanche represented the respondent's wife in the domestic violence matter.²⁰ The appellant was further aware that the respondent was receiving treatment for his depression. The Labour Court found that the respondent had been suffering from a mental condition for which medicine was being taken at the time when the alleged misconduct was committed.²¹ The Labour Court found that the appellant had knowledge of the respondent's disability and was under a duty to reasonably accommodate him. The appellant had failed to perform this duty, since instead of instituting an incapacity inquiry it had dismissed the respondent for misconduct.²² The Labour Court found that, based on the uncontested evidence led by the respondent and Farre, the respondent had succeeded in raising a "credible possibility" that the dominant reason for his dismissal was the mental condition from which he was suffering. If not, the Court found that the appellant's condition played a substantial role in the appellant's decision to dismiss the respondent.²³ The Labour Court ordered the respondent to be reinstated with retrospective effect and ordered payment to him of a *solatium* equivalent to six months' salary as per the rate of remuneration on the date of dismissal for the distress he had suffered caused by the unfair discrimination by the appellant. The appellant was further ordered to pay the respondent's costs as well as those of counsel.

It is unfortunate that the Labour Court did not provide any recommendations on how the appellant could have reasonably accommodated the respondent, nor was any reference made to the applicable Codes and Guidelines imposing such duties.

2.2.2 Judgment in the Labour Appeal Court

The primary argument raised by the appellant was that the respondent was in fact dismissed for misconduct and failed to show that he was dismissed

²⁰ Paragraph 40 of the *Jansen* LC judgment.

²¹ Paragraph 42 of the *Jansen* LC judgment.

²² Paragraph 43 of the *Jansen* LC judgment.

²³ Paragraph 53 of the *Jansen* LC judgment.

because of any medical condition or that there was any causal link between his depression and the misconduct which led to his dismissal. The respondent maintained the argument that all four counts of misconduct committed over a duration of time were caused directly by his depression. He further asserted that his depression influenced his ability to "conduct himself in accordance with an appreciation of the wrongfulness of his misconduct and that he had no self-control."²⁴ He thus argued that had he not been depressed he would not have misconducted himself. The question the LAC had to answer was whether the dominant or proximate reason for his dismissal was his misconduct or his depression.²⁵

In its evaluation of the evidence the LAC emphasised that an applicant seeking to establish an automatic unfair dismissal on the grounds set out in section 187(1) of the *Labour Relations Act* (the LRA) needs to adhere to the requirements of both factual and legal causation.²⁶ The LAC formulated the question in front of the court as follow:

is there a credible possibility that the respondent was subject to differential treatment on the prohibited ground of depression? If that credible possibility is established then the employer, in order to prevail, needs to produce sufficient evidence rebutting that credible possibility or offering fair justification for the differential treatment.²⁷

It was common cause that the respondent had committed the alleged transgressions²⁸ and he did not deny the misconduct with which he was charged. However, the respondent still maintained the view that the alleged misconduct was committed because of his depression.

The LAC commenced its evaluation by reminding us of the fact that depression is common in the workplace, a fact which may be attributed to the stresses and pressures of modern-day life. It may be necessary, from time to time, for an employer to manage the impact of depression on an employee's individual performance.²⁹ The approach to be followed would be determined by the particular circumstances of each individual case.³⁰ The LAC highlighted that depression had to be seen as a form of ill health. Incapacitant depression might thus be a legitimate reason for terminating

²⁴ Paragraph 39 of the *Jansen* LAC judgment.

²⁵ Paragraph 39 of the *Jansen* LAC judgment.

²⁶ Paragraph 35 of the *Jansen* LAC judgment.

²⁷ Paragraph 38 of the *Jansen* LAC judgment.

²⁸ The respondent admitted his absence from work for the 17-day period; transgression of the applicable workplace regulations in failing to inform his manager of his absence from work; acting insolently on the occasion at the CCMA in Riversdale; and refusing to obey a lawful and reasonable instruction regarding the Mossel Bay Prison visit on 10 October 2013 (para 28 of the *Jansen* LAC judgment).

²⁹ Paragraph 41 of the *Jansen* LAC judgment.

³⁰ There are several guidelines on reasonable accommodation, which will be unpacked later in the case note. It was disappointing that neither the LC nor the LAC referred to them. This could have raised awareness of the duty to reasonably accommodate.

an employment relationship, if it were done fairly and in accordance with items 10 and 11 of the Code of Good Practice: Dismissal.³¹ If the employee was temporarily unable to work for a sustained period due to his/her depression, the employer had to investigate and consider alternatives short of dismissal before an employee was dismissed.³² The LAC emphasised this view as follows: "If the depression is likely to impair performance permanently, the employer must attempt first to reasonably accommodate the employee's disability."³³ The dismissal of a depressed employee for incapacity without due regard to these principles as well as its application, would amount to a substantive and/or procedurally unfair dismissal.³⁴

The LAC then focussed on disability in the context of possible misconduct. The LAC acknowledged that depression may also play a role in an employee's misconduct. The LAC explained it as follow:

It is not beyond possibility that depression might, in certain circumstance negate an employee's capacity for wrongdoing. An employee may not be liable for misconduct on account of severe depression impacting on his state of mind (cognitive ability) and his will (conative ability) to the extent that he is unable to appreciate the wrongfulness of his conduct and/or is unable to conduct himself in accordance with an appreciation of wrongfulness.³⁵

If the evidence supports such a finding, the dismissal would be inappropriate and substantively unfair, and the employer would be required to approach "the difficulty from an incapacity or operational requirements perspective". In the alternative, should the evidence demonstrate that the cognitive and conative capacities of an employee have *not*³⁶ been negated by depression, and the employee is able to appreciate the wrongfulness of his conduct and act accordingly, the culpability or blameworthiness may be diminished by reason of his/her depression. The depression will be considered when determining an appropriate sanction. The LAC warned that a "failure to properly take account of depression before dismissal for misconduct could possibly result in substantive unfairness."³⁷

An employee alleging that conative ability was absent/lacking bears the onus of proof of that defence. To hold otherwise would undermine the managerial prerogative of discipline in instances where misconduct is committed by employees who suffer mental difficulties such as depression,

³¹ Item 10 and 11 of the Code of Good Practice: Dismissal, contained in Schedule 8 of the LRA (hereafter the Code of Good Practice on Dismissal).

³² Paragraph 41 of the *Jansen* LAC judgment.

³³ Paragraph 42 of the *Jansen* LAC judgment.

³⁴ Paragraph 42 of the *Jansen* LAC judgment.

³⁵ Paragraph 42 of the *Jansen* LAC judgment.

³⁶ Own emphasis.

³⁷ Paragraph 42 of the *Jansen* LAC judgment.

anxiety, alcoholism, grief and the like. The LAC explained the matter as follows:

the fact that an employee was depressed³⁸, anxious, grieving or drunk at the time of the misconduct (but not entirely incapacitated thereby) is most appropriately viewed as a potential mitigating factor diminishing culpability that may render dismissal for misconduct inappropriate or may require an incapacity investigation before dismissal. That much is trite.³⁹

However, if an employee is to succeed in a claim for automatic unfair dismissal based on depression, one would have a different enquiry. In such an instance the enquiry would not be limited to the question whether the employee was depressed and if his depression influenced his cognitive and conative capacity or lessened his blameworthiness. Rather, one would need to have a narrower determination of whether the reason for his dismissal arose from the employee's depression and whether the employee had been subjected to differential treatment on that basis. The onus of proof once again rested on the employee to establish a credible possibility that the reason for dismissal was differential treatment because of his disability and not because of the alleged misconduct.⁴⁰

Turning to the evidence before it, the LAC asserted that it was uncontested that the respondent was depressed.⁴¹ The nail in the coffin for the respondent's case was the fact that the respondent had failed to lead evidence (medical or otherwise) that the alleged acts of misconduct were caused by his depression or that he was dismissed for being depressed. The LAC referred to the testimony of Ms Farre and pointed out that during her testimony in the LC she could not say whether his depression had caused the specific acts of misconduct leading to the respondent's dismissal. The fact that the respondent had not consulted Ms Farre during approximately one year prior to his committing the misconduct was also problematic since she could not testify as to his mental state or health at the time of each incident of misconduct. Farre did acknowledge that the notice which the respondent received to attend the disciplinary hearing could have triggered or caused his reactive depression which she had observed in the second round of consultations. It was further her expert opinion that the

³⁸ It may be stated respectfully that the submission by the LAC is flawed. Depression may cause an employee to be disabled and may thus require reasonable accommodation. The terms incapacity and disability should not be used interchangeably. An employee can be dismissed for incapacity only once it is demonstrated that he/she will not be able to reasonably be accommodated.

³⁹ Paragraph 44 of the *Jansen* LAC judgment.

⁴⁰ Paragraph 45 of the *Jansen* LAC judgment.

⁴¹ The respondent was taking anti-depression medication; his working life and personal circumstances were tense; and the treating psychologist, Ms Farre's reports, and the evidence confirmed as much.

"respondent appreciated the difference between right and wrong and that he was capable of acting in accordance with such appreciation."⁴²

Further, the Court indicated that even though the respondent has been depressed since 2011 he had not been wholly incapacitated. He had remained reasonably functional and had been able to fulfil his duties through-out most of that period. The Court also referred to the appellant's policy in the judgment. The policy merely stated that in instances where employees were compelled to take sick leave, they had to advise that they would not be reporting for duty. All that was thus expected of the respondent was to send an e-mail or make a telephone call. The evidence did not illustrate that the respondent had been incapacitated to such an extent that he had been unable to do so. The Court also referred to the CCMA incident⁴³ and found that, instead of being antagonistic, the respondent should rather have used the opportunity to explain his illness to Terblanche.⁴⁴

The Court explained that the appellant had a legitimate basis for imposing discipline, the respondent's depression notwithstanding.

The court made the following observation/finding:⁴⁵

The proximate reason for disciplining the respondent was his misconduct and not the fact that he was depressed. He was relatively capable and knowingly conducted himself in contravention of the rules of the workplace. Discipline was justifiably called for. It may well be that but for his depression factually (*conditio sine qua non*) the respondent might not have committed some of the misconduct; but, still, he has not presented a credible possibility that the dominant or proximate cause of the dismissal was his depression. The mere fact that his depression was a contributing factual cause is not sufficient ground upon which to find that there was an adequate causal link between the respondent's depression and his dismissal so as to conclude that depression was the reason for it. The criteria of legal causation, it must be said, are based upon normative value judgments. The overriding consideration in the determination of legal causation is what is fair and just in the given circumstances.

The court explained the matter further by stating that one needed to ask the following questions: What was the most immediate, proximate, decisive or substantial cause of the dismissal. What most immediately brought about the dismissal? The Court found that his depression was at best a contributing or subsidiary causative factor, and the main reasons for his dismissal were the four counts of misconduct.⁴⁶ The respondent had failed to lead reliable evidence and accordingly had failed to prove the following:

⁴² Paragraph 46 of the *Jansen* LAC judgment.

⁴³ Which occurred on 1 October 2013.

⁴⁴ Paragraph 47 of the *Jansen* LAC judgment.

⁴⁵ Paragraph 48 of the *Jansen* LAC judgment.

⁴⁶ Paragraph 49 of the *Jansen* LAC judgment.

- (i) that the treatment he received by the appellant in any way differed from the treatment of other employees;
- (ii) or most importantly, that the reason for such alleged differential treatment was his depression.

The respondent had failed to establish a credible possibility that his dismissal was automatically unfair nor had he been able to prove on a balance of probabilities that it was discrimination on a prohibited ground under the EEA. The more probable reason for his dismissal was his misconduct (which was undisputed in the disciplinary enquiry and recorded as common cause in the pre-trial minutes).⁴⁷

The LAC conclude by emphasising as follow:

As already discussed, but worthy of repeating, that is not to say that the depression of an employee is of insignificant relevance. Depression, sadly, is a prevalent illness in the current environment. Employers have a duty to deal with it sympathetically and should investigate it fully and consider reasonable accommodation and alternatives short of dismissal. In addition, where depression may account in part for an employee's misconduct, depending on the circumstances and the nature of the misconduct, dismissal may not be appropriate. However, for the reasons explained, in this instance, there was no proper claim of substantive unfairness before the Labour Court which is the subject of an appeal or cross-appeal before us. Our jurisdiction in this appeal is constrained by the pleadings.⁴⁸

The Court ultimately found that the LC accordingly erred in finding unfair discrimination and that the dismissal was automatically unfair. The appeal was upheld, and the finding of the LC were set aside. No order for costs were made.

3 Analysis⁴⁹

3.1 Domestic legislative framework and case law on the duty to reasonably accommodate with disabilities: A legal conundrum

The origin of the test for the fairness of a dismissal of an employee is the *Constitution of the Republic of South Africa*.⁵⁰ Section 9(3) of the *Constitution* provides protection against discrimination on the grounds of

⁴⁷ Paragraph 50 of the *Jansen* LAC judgment.

⁴⁸ Paragraph 51 of the *Jansen* LAC judgment.

⁴⁹ It is important to note that this judgment raises many important themes, such as South Africa's constitutional, regional and international obligations related to reasonable accommodation; the blurred line between incapacity and misconduct; automatic unfair dismissals; definitions of disability; models of disability; substantive equality; etc. However, the aim of this article is to discuss the judgments of the LC and the LAC, to emphasise that uncertainty that still exists for both the judiciary and other role-players on what the duty to reasonable accommodation entails. As was illustrated in both the LC and LAC judgments, courts still use the terms "disability" and "incapacity" interchangeably, which leads to even more confusion.

⁵⁰ *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

disability. This right is further given effect to by other labour legislation, codes of good practice⁵¹ and other relative guidelines. Disability is a protected ground in section 6 of the Employment Equity Act⁵² and persons with disabilities are included as a designated group in terms of section 1 of the EEA.⁵³ They are thus protected from unfair discrimination, which includes the right to be reasonably accommodated.⁵⁴

Generally, in terms of the LRA an employer is entitled to dismiss an employee for reasons relating to his or her misconduct, incapacity, and operational requirements. However, such dismissals should be both procedurally and substantively fair.⁵⁵ The dismissal will be automatically unfair if the reason for the dismissal relates to the listed grounds in section 187(1)(e) of the LRA, which include disability.⁵⁶

"Persons with Disabilities" are defined in section 1 of the EEA as follows:

People who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.⁵⁷

The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities⁵⁸ which was published September 2020 also contains important directives.⁵⁹ First of all, it contains a detailed definition of disability.

Disability is an evolving concept, imposed by society when a person with a physical, psychosocial, intellectual, neurological and/or sensory impairment is

⁵¹ Code of Good Practice on the Employment of People with Disabilities; Code of Good Practice on Dismissal.

⁵² The *Employment Equity Act* 55 of 1998 (hereafter the EEA).

⁵³ Collier and Fergus *Labour Law* 448.

⁵⁴ Collier and Fergus *Labour Law* 448.

⁵⁵ See s 188 of the LRA.

⁵⁶ Marumoagae 2012 *PELJ* 355.

⁵⁷ The *Compensation for Occupational Injuries and Diseases Act Amendment Bill* was published for public comment on 17 December 2018 and "Disability" is defined in this draft Bill as follows: "disability means for purposes of rehabilitation in terms of this Act a permanent long term or recurring physical or mental disability which substantially limits the prospects of a person to obtain by virtue of any service, employment or profession the means needed to enable that person to provide for maintenance". Disability is thus defined differently in our labour law legislation, which creates legal uncertainty.

⁵⁸ GN 605 in GG 45328 of 15 October 2021. It is important to note that the framework should be used to guide government reporting on the implementation of the White Article on the Rights of Persons with Disabilities. The courts and tribunals may also use this framework to interpret and apply existing legislation. It is further declared in the Framework that it is anticipated that it will become a regulation over the next three years under the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000. This is worrying, since we then have another set of obligations set out in yet another Act, instead of having one Act to assist with proper role clarification.

⁵⁹ It is disappointing to note that neither the LC nor the LAC referred to either the Technical Assistance Guidelines or this strategic framework.

denied access to full participation in all aspects of life, and when society fails to uphold the rights and specific needs of individuals with impairments.⁶⁰

Persons with Disabilities is also defined as follow:

Persons with Disabilities include those who have perceived and or actual physical, psychosocial, intellectual, neurological and/or sensory impairments which, as a result of various attitudinal, communication, physical and information barriers, are hindered in participating fully and effectively in society on an equal basis with others.⁶¹

The United Nations *Convention on the Rights of Persons with Disabilities* (Convention or CRPD) emphasises the vision that all human rights are indivisible, inter-related and inter-connected. The CRPD further defines disability as being inclusive of but not limited to long-term physical, mental, intellectual or sensory impairment.⁶²

In 2008 South Africa ratified the CRPD as well as the Optional Protocol, thus committing itself to its provisions relating *inter alia* to workplace integration.⁶³

Article 26 of the Convention mandates States Parties to take appropriate and effective measures to allow persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. Article 27(i)-(k) of the CRPD recognises the rights of persons with disabilities to work, and provides as follow:

(i) Ensure that reasonable accommodation is provided to persons with disabilities in the workplace; (j) Promote the acquisition by persons with disabilities of work experience in the open labour market; (k) Promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities.

"Reasonable accommodation" is defined in the section 1 of the EEA as follows:

any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to or participate or advance in employment.

In a recent judgment of *Smith v Kit Kat Group (Pty) Ltd*⁶⁴ the court explained that an employer has a duty to reasonably accommodate an employee

⁶⁰ This proposed definition of disability is thus broader than the definition currently contained in the EEA.

⁶¹ Section 1.2 of the National Strategic Framework on Reasonable Accommodation for Persons with Disabilities (GN 605 in GG 45328 of 15 October 2021).

⁶² Article 1 of the CRPD.

⁶³ UN 2023 https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en.

⁶⁴ *Smith v Kit Kat Group (Pty) Ltd* 2017 38 ILJ 483 (LC) (hereafter the *Smith* case).

when he/she *believed*⁶⁵ that his disability "would impact on his ability to do his normal work".⁶⁶ This is in line with the submission by Ngwenya,⁶⁷ who explains that "reasonable accommodation" entails an examination to weigh up the disability of an employee compared to the duties of his job as well the nature of the employment environment.⁶⁸ An employer is required to consider both the needs of the employee and the circumstances of the employer in the process of reasonable accommodation.⁶⁹

Employers are obliged to take steps to accommodate Persons with Disabilities unless such accommodation results in unjustifiable hardship. "Unjustifiable hardship" is not defined in the EEA, but the Code of Good Practice on the Employment of People with Disabilities in section 6 provides as follows:

Unjustifiable hardship is action that requires significant or considerable difficulty or expense and that would substantially harm the viability of the enterprise. This involves considering the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.⁷⁰

Marumoagae⁷¹ avers that the quest for reasonable accommodation also entails that the employer be required to prove that the person with the disability was unable to perform the essential functions of the job even after reasonable accommodation measures were put in place to accommodate the disability. It is only when employers are unable to reasonably accommodate an employee with a disability that an employee can be dismissed because of incapacity.⁷² In South Africa the duty to accommodate is thus bound to the "inherent requirements" of the position and it is our submission that it should rather entail "genuine and reasonable requirements". It will thus be necessary to look beyond the inherent requirements of the pre-injury position and consider factors such as certain abilities and skills relevant to the duties of the employment, the employment

⁶⁵ Own emphasis.

⁶⁶ Para 66 of the *Smith* case.

⁶⁷ Ngwenya 2005 *Stell LR* 538.

⁶⁸ Behari 2017 *ILJ* 2226.

⁶⁹ Collier and Fergus *Labour Law* 449.

⁷⁰ Also see *Standard Bank of SA v CCMA* 2008 29 *ILJ* 1239 (LC) (hereafter the *Standard Bank* case) para 93, in which the LC defined it as follows: "Unjustifiable hardship means more than mere negligible effort. Just as the notion of reasonable accommodation imports a proportionality test, so too does the concept of unjustifiable hardship. Some hardship is envisaged. A minor interference or inconvenience does not come close to meeting the threshold but a substantial interference with the rights of others does."

⁷¹ Marumoagae 2012 *PELJ* 355.

⁷² Collier and Fergus *Labour Law* 449.

relationship as a whole, including the employment contract, as well as the operational and organisational requirements.⁷³

The LC in the *Jansen* judgment thus erred in its evaluation of the evidence when it stated that incapacity proceedings were required instead of embarking on a disciplinary enquiry for misconduct. It is also disappointing to note that the respondent never raised unjustifiable hardship as a possible defence.

3.1.1 *The Code of Good Practice: Key Aspects on the Employment of People with Disabilities of 2002*

The Code of Good Practice: Key Aspects on the Employment of People with Disabilities⁷⁴ contains important and valuable information relating to the duty to reasonably accommodate persons with disabilities, which is discussed in the paragraphs to follow.

The Code's aim is to guide, educate and inform employers, employees and trade unions on their rights and obligations, and to promote and encourage equal opportunities and the fair treatment of Persons with Disabilities. The Technical Assistance Guidelines on the Employment of Persons with Disabilities⁷⁵ is intended to complement the Code and to assist with the practical implementation of aspects of the EEA concerning the employment of Persons with Disabilities in the workplace.⁷⁶

The Code embraces the social model of disability in that the focus is not on the impairment but rather on the interplay between the disability and the working environment.⁷⁷ Disability is thus viewed in a social context.⁷⁸ I support the submission by Ngwenya and Pretorius that the effective interaction between disability and the workplace environment will lead to a better understanding of the barriers faced by persons with disabilities.⁷⁹ The Code provides a solid foundation for different role-players (for example employers, employees, governmental departments and trade unions) to develop, enhance and implement policies and programmes aimed at safeguarding the rights of Persons with Disabilities, in line with the Constitution.⁸⁰

⁷³ See Gresse *Integration, Rehabilitation and Return-to-Work* 349.

⁷⁴ GN 1345 in GG 23702 of 19 August 2002 (the Code of Good Practice on the Employment of People with Disabilities, or just the Code).

⁷⁵ Department of Labour *Technical Assistance Guidelines*.

⁷⁶ Foreword to the Department of Labour *Technical Assistance Guidelines*.

⁷⁷ Ngwena and Pretorius 2003 *ILJ* 1820.

⁷⁸ Ngwena and Pretorius 2003 *ILJ* 1820.

⁷⁹ Ngwena and Pretorius 2003 *ILJ* 1820.

⁸⁰ Ngwena and Pretorius 2003 *ILJ* 1838

Section 188(2) of the LRA provides as follows:

any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was affected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.

It is thus important for all role-players in a reasonable accommodation or incapacity enquiry to consider the relevant provisions of the Code⁸¹. Item 6 of the Code deals with reasonable accommodation. It states that employers should reasonably accommodate the needs of Persons with Disabilities. The aim of the accommodation is to reduce the impact of the impairment of the person's capacity to fulfil the essential functions of a job.⁸² The employer should be absolved from this burden only if he or she shows that reasonable accommodation in the circumstances would impose an unjustifiable hardship in his or her business.⁸³ Employers must adopt the most cost-effective means which is consistent with effectively removing the barriers to perform the job, and to enjoy equal access to the benefits and opportunities of employment.⁸⁴ The obligation to reasonably accommodate may arise when an applicant or employee voluntarily discloses a disability-related accommodation need or when such a need is reasonably self-evident to the employer.⁸⁵ Employers are further obliged to accommodate employees when work or the work environment changes or the impairment varies, which influences the employee's ability to perform the essential functions of his/her job.⁸⁶

Another very important obligation is set out in item 6.6 of the Code, which requires the employer to consult the employee and, where reasonable and practical, technical experts to establish appropriate mechanisms to accommodate the employee.⁸⁷ The particular accommodation which will be required will differ from case to case since it depends on the individual employee; the degree and nature of impairment as well as its effect on the person, as well as on the job and the working environment.⁸⁸ Reasonable

⁸¹ With reference to the enforceability, item 3 of the Code provides as follow: "The Code is not an authoritative summary of the law, nor does it create additional rights and obligations. Failure to observe the Code does not, by itself, render a person liable in any proceedings. Nevertheless, when the courts and tribunals interpret and apply the Employment Equity Act, they must consider it."

⁸² Item 6.1 of the Code.

⁸³ Marumoagae 2012 *PELJ* 356.

⁸⁴ Item 6.2 of the Code.

⁸⁵ Item 6.4 of the Code.

⁸⁶ Item 6.5 of the Code.

⁸⁷ Item 6.6 of the Code.

⁸⁸ Item 6.7 of the Code.

accommodation may be temporary or permanent depending on the nature and extent of the disability.⁸⁹

Item 6.9 of the Code provides as follow:

Reasonable accommodation includes but is not limited to:

(i) adapting existing facilities to make them accessible; ii) adapting existing equipment or acquiring new equipment including computer hardware and software; iii) re-organizing workstations; iv) changing training and assessment materials and systems; v) restructuring jobs so that non-essential functions are re assigned; vi) adjusting working time and leave; vii) and providing specialized supervision, training and support in the workplace.

An employer need not accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.⁹⁰

Item 11 deals with the retention of employees who become disabled during employment. It provides that where reasonable they should be reintegrated into work. Employers need to minimise the impact of the disability on employees. The employer should consult the employee to assess if the disability can be reasonably accommodated. The employer should maintain contact with the employee and where reasonable encourage an early return to work.⁹¹ This may require vocational rehabilitation, transitional work programmes and if appropriate temporary or permanent flexible working hours. If an employee is frequently absent from work for reasons of illness or injury, the employer should consult the employee to assess if the reason for absence is a disability that requires reasonable accommodation. If reasonable, employers should explore the possibility of offering alternative work, a reduced workload or flexible work placement, so that employees are not compelled or encouraged to terminate their employment.⁹² If the employer is unable to retain the employee, the employment may then be terminated.⁹³

Since our courts have not been consistent in treating depression at some times as a disability and at other times as incapacity, it is also necessary to consider Schedule 8 of the LRA, the Code of Good Practice on Dismissal.

⁸⁹ Item 6.8 of the Code.

⁹⁰ Item 6.11 of the Code. "Unjustifiable hardship" is defined in the Code as follow: "action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business" (item 6.12).

⁹¹ Item 11.3 of the Code.

⁹² Item 11.4 of the Code.

⁹³ Item 12.1 of the Code. The employer is not expected to reasonably accommodate the employee if it will impose an unjustified hardship to its business. In such instance, it is permitted to dismiss an employee on the grounds of incapacity. See Collier and Fergus *Labour Law* 449.

Item 11 of the Code provides as follows:

11. Any person determining whether a dismissal arising from ill health or injury is unfair should consider (a) whether or not the employee is capable of performing the work; (b) if the employee is not capable— (i) the extent to which the employee is able to perform the work; (ii) the extent to which the employee's work circumstances might be adapted to accommodate the disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and (iii) the availability of any suitable alternative work.

Item 10 sets out that incapacity on the grounds of ill health or injury may be either temporary or permanent. In instances where the employee is temporarily unable to work, the employer must investigate the extent of the incapacity or injury. If it is revealed that the employee is likely to be absent for a period that could be "unreasonably long" in the circumstances, the employer must investigate all possible alternatives short of dismissal, including a period of absence or finding a temporary replacement. Other relevant factors to consider are the nature of the job and the extent of the illness or injury. In instances of permanent incapacity, the employer must determine the possibility of securing alternative employment or adapting the employee's duties or work circumstances to accommodate the disability⁹⁴. Throughout this investigation the employee must be allowed the opportunity to state his case and to be assisted by a trade union representative or a colleague. Another aspect to be considered when determining whether dismissal is fair is the degree of and cause of the incapacity,⁹⁵ particularly where an employee was injured or incapacitated in the workplace. The duty to accommodate employees in such instances is more onerous.

3.1.2 Disability versus incapacity

Reading the above two Codes together does create some uncertainty. The terms "disability" and "incapacity" are used interchangeably in the Code. This leads to several uncertainties. For instance, when does one process commence and the other one end? Is it possible to determine when disability ends and incapacity commences? Our courts have also not been consistent in this regard.⁹⁶

⁹⁴ The fact that the code refers to "disability" here adds to the confusion between the reasonable accommodation procedure set out in the Code of Good Practice on the Employment of People with Disabilities and the Code of Good Practice on Dismissal.

⁹⁵ Item 10(3) of the Code.

⁹⁶ For instance, in the case of *Independent Municipal and Allied Trade Unions v Witzenberg Municipality* 2012 33 ILJ 1081 (LAC) the LAC categorised mental illness as an issue of incapacity due to ill health. The same court in the case of *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland (JA 15/2007) [2009] ZALAC 27 (13 August 2009)* considered it as a disability – see Cliffe Dekker Hofmeyr 2020 <https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/Employment/employment-alert-2-march-ohsa-yes-this-includes-mental-health-what-does-the-law-say.html>. Also see Ngcobo *Courts' Treatment of Depression* 109. It is the authors'

Dismissal on the grounds of incapacity may overlap with automatically unfair dismissals. If employment is terminated on the grounds of incapacity, this may fall within the ambit of the provisions relating to automatically unfair dismissals or within the scope of the EEA (as well as the applicable Code) for an infringement on the prohibition of discrimination because of disability. A distinction between disability and incapacity exists.⁹⁷ Employees can thus institute action for automatically unfair dismissal under the LRA for dismissal for disability and incapacity. The authors hereof agree with the submission by Grogan who emphasises that an employee's dismissal will be automatically unfair if the reason for dismissal is related to a disability even in circumstances where the employee was dismissed under the mantle of the LRA for incapacity after counselling and when reasonable alternatives are not present.⁹⁸

In the *Smith* judgment the Court also referred to the case of *Standard Bank*, in which the court also made the following statement:

Disability is not synonymous with incapacity. ... An employee is incapacitated if the employer cannot accommodate her or if she refuses an offer of reasonable accommodation. Dismissing an employee who is incapacitated in those circumstances is fair but dismissing an employee who is disabled but not incapacitated is unfair.⁹⁹

Incapacity and disability are thus two separate concepts under the South African Labour Law. The fact that one is disabled does not necessarily imply that one is incapacitated.¹⁰⁰ Jordaan¹⁰¹ explains it as follow:

Yet, the mere fact that someone is, e.g. permanently wheelchair bound following an accident, does not automatically render them disabled – the emphasis falls on the impact of the impairment on the person's ability to do his or her job, not on the nature of the impairment. The person who becomes wheelchair bound will only be regarded as having a 'disability' if this *substantially* (i.e. in a material way) affects his or her ability to do his or her job. In one case, for example, the Labour Court decided that someone who unsuccessfully tried to become a volunteer fireman because of a disability (diabetes), was not 'disabled' because he could function normally with the aid of the medication he was using at the time. The fact that someone is no longer able to do his or her current job does not mean that he or she is incapable of doing any job, or that the current job cannot be adapted to suit the employee's disability. If we could use the wheelchair example again – if the current job of the person concerned requires her, for example, to climb ladders, she will clearly no longer be able to do that job. However, if the person's position can

submission that until South Africa has uniform disability-specific legislation, a fragmented approach to disability will continue to exist.

⁹⁷ Grogan *Workplace Law* 276.

⁹⁸ Grogan *Workplace Law* 147.

⁹⁹ Paragraph 94 of the *Standard Bank* case.

¹⁰⁰ Marumoagae 2012 *PELJ* 356.

¹⁰¹ Jordaan 2017 <https://www.labourwise.co.za/labour-articles/disability-vs-medical-incapacity>.

be adapted to accommodate her relative immobility, the employer is under an obligation to consider this option.

We agree with the submission of Grogan,¹⁰² who proposes that incapacity suggests "that the employee concerned is incapable of performing his or her duties", while disability suggests that "the person may do so with reasonable accommodation". If an employee faces dismissal and also suffer from disability, it is possible for an overlap to occur.¹⁰³ If that is the case, employers must follow the guidelines as set out in the Code.¹⁰⁴ It is only when accommodating the employee is not feasible that an employer should support the employee to access incapacity benefits and aim to conclude an agreement which will allow the employment relationship to terminate amicably without further recourse. Only if that fails should dismissal procedures as set out in Items 11 and 12 of the Dismissal Code be activated.¹⁰⁵ It is thus important for employers to understand that these two Codes must be read in conjunction with each other. The Dismissal Code thus addresses the dismissal of an employee who is medically unable to work, whereas the Disability Code addresses the employer's responsibilities before that.¹⁰⁶

In *National Education Health and Allied Workers Union obo Lucas and Department of Health (Western Cape)*¹⁰⁷ the arbitrator considered whether the LRA's incapacity provisions included "disability" and it was found that if a person was incapacitated the employer needed to determine whether this would fall within the ambit of the definition of Persons with Disabilities as set out in the EEA. It must be borne in mind that the predominant aim of the Act is to promote procedural and substantive fairness for persons with disabilities and to encourage employers to keep persons with disabilities in employment if they can be reasonably accommodated.¹⁰⁸

In *Wylie and Standard Executors & Trustees*¹⁰⁹ the CCMA agreed with the view of the arbitrator in the case as discussed above and found that had the applicant had a disability the employer would have had the duty to investigate how the employee could reasonably be accommodated. The CCMA further confirmed that the terms "disability" and "incapacity for ill health or injury" should not be used inter-changeably since they differ from

¹⁰² Grogan *Workplace Law* 276.

¹⁰³ Grogan *Workplace Law* 276.

¹⁰⁴ Grogan *Workplace Law* 276.

¹⁰⁵ Jordaan 2017 <https://www.labourwise.co.za/labour-articles/disability-vs-medical-incapacity>.

¹⁰⁶ Jordaan 2017 <https://www.labourwise.co.za/labour-articles/disability-vs-medical-incapacity>.

¹⁰⁷ *National Education Health and Allied Workers Union obo Lucas and Department of Health (Western Cape)* 2004 25 ILJ 2091 (BCA).

¹⁰⁸ *LS v CCMA* 2014 35 ILJ 2205 (LC) para 49.

¹⁰⁹ *Wylie and Standard Executors and Trustees* 2006 27 ILJ 2210 (CCMA).

each other. The difference lies in the fact that "incapacity" implies that the employee is no longer able to perform the essential functions of his/her job, while "disabled" refers to an employee who is suitably qualified, with reasonable accommodation, and can perform the essential functions of his/her position.

To conclude, the term "incapacity for work" refers to circumstance where a person is unable to work due usually due to a medical condition. A person may have a disability and still have the capacity to work. A person who is incapable, on the other hand, might not be disabled. When a person's condition makes it impossible for the person to engage in employment, this is when incapacity occurs. This could imply that a person is currently unable to perform any work or that the person is unable to perform the employment s/he would typically perform.¹¹⁰

3.1.3 *Technical Assistance Guidelines on the Employment of Persons with Disabilities of 2017*¹¹¹ and the *National Strategic Framework on Reasonable Accommodation for Persons with Disabilities*¹¹²

It is also important to consider the Technical Assistance Guidelines on the Employment of Persons with Disabilities as well as the National Strategic Framework on Reasonable Accommodation for Persons with Disabilities. The Technical Assistance Guidelines aim to provide practical guidelines for employees, employers and trade unions to promote diversity, equality and fair treatment to eliminate unfair discrimination. It thus forms part of the broader agenda to promote equality for Persons with Disabilities to receive recognition in the labour market. As with the Code, these guidelines are the foundation for the implementation of the EEA and are used by the courts as a guide when disputes arise.¹¹³ The Guidelines were revised and updated in 2017. Reasonable accommodation is unpacked in Chapter 6 of the Guidelines, which define it as follow:

Reasonable accommodation, which is modifications or alterations to the way a job is normally performed, should make it possible for a suitably qualified person with a disability to perform as everyone else. The type of reasonable accommodation required would depend on the job and its essential functions, the work environment and the person's specific impairment.¹¹⁴

¹¹⁰ Spicker 2003 *International Social Security Review* 35.

¹¹¹ Department of Labour *Technical Assistance Guidelines*.

¹¹² GN 605 in GG 45328 of 15 October 2021.

¹¹³ Cole and Van der Walt 2014 *Obiter* 522. It is very unfortunate to observe that courts seldom refer to the Guidelines, however. Neither the LC or the LAC referred to these recently updates Guidelines. How is it possible to determine if an employer has discharged its duty to reasonable accommodate if there is no reference to and proper discussion of the relevant codes and guidelines?

¹¹⁴ Department of Labour *Technical Assistance Guidelines* 15. This is in line with Art 2 of the CRPD: "'Reasonable accommodation' means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden,

The Guidelines contain examples of what reasonable accommodation may entail.¹¹⁵ Item 6.2 sets out the criteria for reasonable accommodation, which comprise of three inter-related factors. First and foremost, it explains that the reasonable accommodation must remove the barriers to performing the essential functions of the job for a person who is suitably qualified. The employer is obliged to take the necessary steps to alleviate the effect of an individual's disability to allow him/her to optimally participate in the workplace and ultimately achieve his or her full potential. Secondly, it must allow the person with a disability to enjoy equal access to the benefits and opportunities of employment. Thirdly, employers may adopt the most cost-effective means consistent with the above two criteria. Should it happen that an individual cannot perform the essential job functions *with*¹¹⁶ reasonable accommodation, the employer may decide not to employ the person. It concludes by stating that an employer may be required to restructure a job by reallocating non-essential, marginal job functions, but "only if the applicant or employee with a disability can perform the essential functions of the job, with or without reasonable accommodation."

Item 6.3.7 is of direct relevance. It makes provision for the retention of employees. It provides as follow:

The employer is required to ensure through rehabilitation, training or any other appropriate measure the retention of existing staff with disabilities. Where an existing employee becomes disabled, the employer must ensure that the employee remains in their job before considering alternatives, for example, re-deployment. Based on operational requirements, the employer must give objective consideration to requests from employees with disabilities for reduced, part-time or alternative duties. Where an existing employee becomes disabled, the employer should maintain contact with the employee and, where reasonable, encourage early return to work. This may require vocational rehabilitation, adjustment to work arrangements, transitional work programmes and, where appropriate, temporary or permanent flexible working times.

where needed in a particular case, to ensure to Persons with Disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms."

¹¹⁵ The following are examples of reasonable accommodation: workstation modifications; adjustment to work schedules; adjustment to the nature and duration of the duties of the employee at work, either on a temporary or permanent basis; the reallocation of non-essential job tasks and any other modifications to the way the work is normally performed or has been performed in the past; support and reasonable accommodation that may include access to a job coach, more frequent rest periods, considering the side effects of medication for a person with intellectual or emotional disability; possible adjustment of the work hours; management of environmental factors such as noise levels and interruptions; opportunities for Persons with Disabilities who depend on the support of care-givers, particularly in cases of severe disability, to have the care-giver accommodated in the workplace.

¹¹⁶ Own emphasis.

Most importantly, it sets out some of the obligations of employers¹¹⁷ and Persons with Disabilities,¹¹⁸ which assist with role clarification, which is essential in reasonable accommodation, as part of a broader disability management process.

The National Strategic Framework on Reasonable Accommodation for Persons with Disabilities defines reasonable accommodation as follow:

Reasonable accommodation refers to necessary and appropriate modification and adjustments, as well as assistive devices and technology, not imposing a situation, where needed in a particular case, to ensure persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.¹¹⁹

The Framework contains the obligations of several different stakeholders,¹²⁰ which are crucial in contributing to the success of reasonably accommodating the rights of Persons with Disabilities. The Framework applies to both the public and private sector equally, as well as to civil society, irrespective of the size of the operation. The Framework is cognisant of the fact that reasonable accommodation measures may vary depending on the nature of the service offered or provided. However, access to the service must be easily available, right of access must be guaranteed, and reasonable accommodation measures may not be limited to a claim of hardship alone.

¹¹⁷ Item 6.18 of Department of Labour *Technical Assistance Guidelines*. For instance, employers need to familiarise themselves with reasonable accommodation and how it can assist both the employee and employer; must be prepared to respond to requests for reasonable accommodation at any time in an employee's relationship with work; they need to be prepared to listen to and respond to those requests; the person with a disability must be treated as a primary partner in the process of selecting reasonable accommodation - and the employed should consult with experts only when this is needed, and should make sure that the experts are "familiar with best practices in equity based disability employment" etc.

¹¹⁸ Item 6.19 of the Department of Labour *Technical Assistance Guidelines*. For example, they need to familiarise themselves with the term "reasonable accommodation"; they should be in a position to explain in their own words the type of reasonable accommodation they may need with reference to the nature, degree and severity of their disability; they need to take responsibility for asking for reasonable accommodation if they should require any; and they should make the final decision about the type of accommodation they may require, knowing that it should be a "viable" option for both themselves and the employer.

¹¹⁹ Section 1.2 of the National Strategic Framework on Reasonable Accommodation for Persons with Disabilities.

¹²⁰ Chapter 6 contains a list of objectives for several stakeholders such as civil society; governmental departments; public and private institutions and the Research and Development Sector.

3.1.4 Further case law on the employer's duty to reasonably accommodate persons with disabilities

In the *IMATU obo Strydom v Witzenberg Municipality* case, the court emphasised that the determination of an employee's capability (or otherwise) will be finalised only once a proper assessment is conducted. Should it happen that the assessment reveals that the employee is permanently incapacitated, the enquiry does not end there. The employer must then establish whether it cannot adapt the employee's work circumstances "so as to accommodate the incapacity, or adapt the employee's duties, or provide him with alternative work if same is available."¹²¹ The court further confirmed that permanent incapacity arising from illness or injury may be a legitimate reason for terminating an employment relationship if the employee's working circumstances or duties cannot be adapted. A dismissal in such instances will be fair, provided that it was preceded by a proper investigation into the extent of the incapacity, as well as a consideration of alternatives to dismissal.¹²²

In *LS v Commission for Conciliation, Mediation and Arbitration*¹²³ it was held that mental illness is not a wilful denial by the employee to perform but rather an inability or incapacity to perform, and demands an approach of understanding from the employer.¹²⁴ In *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration*¹²⁵ an employee was dismissed after being injured in a car accident. The LC found that the bank failed to accommodate her and did not adhere to the Code of Good Practice on Dismissal. The dismissal was held automatically unfair. This judgment is of the utmost importance since the court reiterated that reasonable accommodation requires consultation since it can be classified as a multi-lateral enquiry. For example, employers need to consult employees or trade union representatives when information relating to medical reports is needed, for example. Disregarding medical advice on whether to accommodate amounts to discrimination.¹²⁶ The court emphasised the following:

The process should be interactive, a dialogue, an investigation of alternatives conducted with a give and take attitude. Outright refusal to accommodate shows a degree of inflexibility contrary to the spirit and purpose of the duty to accommodate.¹²⁷

¹²¹ Paragraph 6 of *IMATU obo Strydom v Witzenberg Municipality* 2012 33 ILJ 1081 (LAC) (hereafter the *Strydom* case).

¹²² Paragraph 7 of the *Strydom* case.

¹²³ *LS v CCMA* 2014 35 ILJ 2205 (LC).

¹²⁴ Balaram 2020 *De Rebus* 9.

¹²⁵ The *Standard Bank* case.

¹²⁶ Paragraph 91 of the *Standard Bank* case.

¹²⁷ Paragraph 91 of the *Standard Bank* case.

The LC made a very important contribution by providing a four-step enquiry¹²⁸ which may be of assistance to role-players. The employer firstly must determine whether the employee with the disability is able to perform his/her work. If this question can be answered in the affirmative, it brings the enquiry to an end and the employee must be restored to his/her former position or one substantially like it. (If possible, it should relate to the employee's own choice as well as his/her individual suitability for the position.) If this is not possible and the employee's injuries are either long-term or permanent, then a three-stage enquiry will commence. The second stage entails an enquiry into the extent to which the employee can perform his/her work. This is a factual analysis, and the assistance of medical or other experts may be required. The third and fourth stages were described by the court as follows:

Stage Three: The employer must enquire into the extent to which it can adapt the employee's work circumstances to accommodate the disability. If it is not possible to adapt the employee's work circumstances, the employer must enquire into the extent to which it can adapt the employee's duties. Adapting the employee's work circumstances takes preference over adapting the employee's duties because the employer should, as far as possible, reinstate the employee. During this stage, the employer must consider alternatives short of dismissal. The employer has to take into account relevant factors including "*the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement*" for the employee. Stage Four: If no adaptation is possible, the employer must enquire if any suitable work is available.¹²⁹

The *Standard Bank* case demonstrates that a fine line exists between "ordinary" dismissals based on incapacity and automatically unfair dismissals and disability. In this case, the Court emphasised that a claim for unfair dismissal based on incapacity "goes further than the LRA may seem to suggest."¹³⁰ Dismissals on the grounds of disability implicate several constitutional rights, such as the right to equality,¹³¹ the right to human dignity,¹³² the right to fair labour practices¹³³ and the right to choose an occupation.¹³⁴

¹²⁸ Paragraphs 70-76 of the *Standard Bank* case.

¹²⁹ Paragraphs 74-76 of the *Standard Bank* case.

¹³⁰ This can be explained by the fact that all employers are obliged in cases of incapacity also to investigate whether the person also may have a disability, as contemplated in the EEA and the relevant codes and guidelines.

¹³¹ Section 9 of the Constitution.

¹³² Section 10 of the Constitution.

¹³³ Section 23(1) of the Constitution.

¹³⁴ Section 22 of the Constitution.

In the case of *National Education Health and Allied Workers Union obo Lucas and Department of Health (Western Cape)*¹³⁵ the arbitrator¹³⁶ stated that at face value it seems as if items 10 and 11 of the Code only relate to dismissal based on incapacity. However, if an employee has an impairment which amounts to a disability, the employee is further entitled to be reasonably accommodated, as set out in the EEA.¹³⁷ The scope of the Code of Good Practice is thus much broader than that of the LRA, since it deals with the entire employment cycle.¹³⁸

In *LS v CCMA*¹³⁹ an employee's performance deteriorated¹⁴⁰ after a series of personal tragedies. She was referred to the staff wellness programme¹⁴¹ and a psychologist recommended "long-term therapeutic intervention". However, her performance remained problematic and she was charged with misconduct. At the CCMA the Commissioner stated that the matter should have been dealt with as a case of incapacity, as mental distress could have influenced her performance. Notwithstanding, it was found that applicant had failed to lead independent evidence to prove her claim that "she was medically unfit to work". She had further failed to lead evidence regarding personal circumstances which could possibly justify the claim of poor work performance. She was found guilty because of breach of contract, gross insubordination and poor work performance and the applicant's dismissal for misconduct was upheld. In the LC the Court found that blurring of the lines between incapacity and misconduct does not exempt the employer from the duty to follow the correct guidelines and procedures, determined by the circumstances of each case. To classify a medically ill employee's behaviour as misconduct renders the protection accorded in terms of the LRA meaningless.¹⁴²

3.1.5 Reflection

It is important to consider all the facts of the Jansen judgment to grasp what reasonable accommodation may entail. Hence the facts were explained in

¹³⁵ *National Education Health and Allied Workers Union obo Lucas and Department of Health (Western Cape)* 2004 25 ILJ 2091 (BCA).

¹³⁶ *National Education Health and Allied Workers Union obo Lucas and Department of Health (Western Cape)* 2004 25 ILJ 2091 (BCA) para 26.

¹³⁷ See s 1 of the EEA, read in conjunction with item 6 in the Code of Good Practice on the Employment of People with Disabilities, as discussed earlier.

¹³⁸ It applies to the following phases: recruitment and selection, induction and placement, training and development, rehabilitation and retention, as well as return to work from illness and injury, and termination.

¹³⁹ *LS v CCMA* 2014 35 ILJ 2205 (LC).

¹⁴⁰ The difference in the *Jansen* case was that the respondent's performance overall remained satisfactory. However, how was this determined?

¹⁴¹ Grogan *Workplace Law* 287.

¹⁴² Grogan *Workplace Law* 289.

detail at the beginning of this article. The authors would like to make the following observations and/or recommendations:¹⁴³

As noted earlier, the LC mistakenly observed that the respondent's disability implied an incapacity enquiry. This raises the question why courts still view disability and incapacity in the same light? This may be attributed to a few causes. One possible explanation for this is the fact that the procedure for incapacity and the procedure for reasonable accommodation are very similar. Secondly, the Code¹⁴⁴ refers to both "incapacity" and "disability" in item 10, And there is no definition of disability in the LRA. Be that as it may, this supports the argument that South Africa needs disability-specific legislation which will remove uncertainties and provide better clarification and guidelines on the procedures and requirements of a reasonable accommodation and incapacity procedure.

If one considers the so-called treatment plan to be found in the Jansen judgment, it is troublesome. We need to bear in mind that Jansen was diagnosed with major depression by a general practitioner in 2010 as well as in 2011, which was confirmed by the production of medical certificates. Farre, the clinical psychologist who consulted Jansen in 2012 and 2013, did not have a similar view, but she did allude to the fact that he showed symptoms of re-active depression (in 2013), burnout, frustration and lack of rational thought. Jansen had also been on anti-depressant medication since November 2011. Was the medication prescribed by one of the general practitioners? If so, had the prescription been renewed since November 2011 or had he been referred to a specialist such as a psychiatrist? We need to further bear in mind that he had also participated in the employee wellness programme three times. No report from the wellness officer emerged in any of the evidence.¹⁴⁵

Jansen's line manager is yet another role-player we need to consider. What role did his manager play besides the referral to the employee wellness programme? Were any adjustments made to Jansen's work environment or job to reasonably accommodate him after his first diagnosis in 2010? In this case there were several role-players without a designated and focussed disability management plan or without any coordinator or case manager to

¹⁴³ The recommendations should not be seen or interpreted as speculation. The aim of the observations and/or recommendations is to provide practical suggestions regarding the duty to reasonably accommodate, especially in cases of depression. The importance of role clarification when disabled employees need to be reasonably accommodated should not be under-estimated.

¹⁴⁴ Code of Good Practice on Dismissal.

¹⁴⁵ It is submitted that employee wellness programmes cannot function in isolation. They are merely one of the components in a reasonable accommodation procedure.

oversee its implementation.¹⁴⁶ One must be careful to not follow a one-size fits all approach, especially when dealing with depression. When Farre recommended conflict resolution in October 2012, this required following up by the employer. Employers need to view depression holistically and in instances where it appears that the line between misconduct and incapacity is blurred, they need to be cautious and acquire the assistance of experts with expertise in the area. Dismissal should always be a last resort, in both incapacity and reasonable accommodation procedures. Psychologists also need to make recommendations as part of a holistic treatment plan, which may include other experts as well. Farre's recommendations for extended sick leave was made after the trust relationship had already been impaired.

With reference to the conduct of the respondent, it is important to note the following recommendations: For instance, when there was no follow through on the conflict resolution, as proposed by Farre, a formal grievance should have been submitted. Writing a letter to a CEO of such a large company as Legal Aid is firstly a fruitless exercise since it is likely to go unnoticed and secondly, it also goes against the policy and procedure for lodging a grievance at Legal Aid. The outcome of his case may perhaps have been different if he had argued substantive unfairness based on unfair dismissal, and not automatic unfair dismissal. It is also important for employees to lead expert testimony during disciplinary hearings, and not merely to rely on documentary evidence which may be interpreted as hearsay and unreliable. Employees should consult experts such as psychologists, psychiatrists and occupational therapists on a continuous basis.¹⁴⁷ If employees are unable to attend work, it is important for them to remain in contact with line managers (except when they are unable to do so, and the inability is confirmed by an expert). It is also important that employers be considerate of the fact that it may be necessary to allow for more flexible work arrangements, as proposed in the relevant codes and guidelines, as earlier discussed. The emphasis here is on the fact that time away from work should be negotiated and discussed. Employees need to co-operate with

¹⁴⁶ See Gresse *Integration, Rehabilitation and Return-to-Work* 377-412 for detailed recommendations and functions for role-players. E.g., employers need to be proactive and conduct formal workplace assessments and put plans in place to make reasonable adjustments; they need to communicate the genuine and reasonable requirements of the position to medical practitioners for them to identify the reasonable adjustments required to accommodate the workers' current capacity. Communication between different role-players is therefore vital, including with trade unions. It may also be necessary for employers to consider reports from vocational rehabilitation service providers. Reasonable accommodation measures need to be attended to on a case-by-case basis.

¹⁴⁷ This can be costly and should be discussed and negotiated before the roll-out of a disability management plan.

other role-players after a disability management plan is agreed upon and drafted.

The authors hereof are not disputing the finding of the LAC, but the Court could have substantiated more with reference to the reasonable accommodation of mentally ill employees in the workplace. The Court did not refer to any of the relevant Technical Assistance Guidelines, except for reference to *one*,¹⁴⁸ the Code of Good Practice. However, it also seems as if the LAC, like the LC, confused "incapacity" with "disability", since the LAC referred only to the Code of Good Practice on Dismissals. Depression was also categorised as "ill health"/incapacity, which is incorrect.¹⁴⁹ This makes it difficult for employees and employers to understand the correct procedure which needs to be embarked upon for incapacity or reasonable accommodation procedures or disputes. It is the authors' respectful submission that if courts struggle to grasp the difference between incapacity and disability, it will not be possible for employees to be able to build a case or for employers be able to defend a case. Lastly, the LAC further stated that employers have a duty to deal with depression "sympathetically and should investigate it fully and consider reasonable accommodation and alternatives short of dismissal".¹⁵⁰ This statement is also problematic. A sympathetic approach is not all that is required. Employers rather need to be pro-active and acquire the assistance of experts if needs be. Disability management requires a hands-on, multi-faceted approach, and not merely sympathy. For the LAC to also state that reasonable accommodation may be *considered*¹⁵¹ is not correct since it requires much more than mere consideration. The Court also refers only to items 10 and 11 of the Code (in a footnote) instead of referring to other important authority as well, such as item 6 of the Code of Good Practice: Key Aspects on the Employment of People with Disabilities of 2002 and the Technical Assistance Guidelines.

4 Conclusion

The article has aimed to demonstrate that many uncertainties still exist regarding the relevant procedures to be followed where an employee suffers from depression. Role-players, including our courts, have not been consistent in their interpretation of the procedures to be followed to reasonably accommodate employees with disabilities. Courts do refer to relevant Codes at times, but item 6 of the Code of Good Practice on the Employment of Persons with Disabilities is often overlooked.

¹⁴⁸ Own emphasis.

¹⁴⁹ The same court categorised mental illness as a disability in the case of *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland (JA 15/2007) [2009] ZALAC 27 (13 August 2009)*.

¹⁵⁰ Paragraph 51 of the *Jansen* LAC judgment.

¹⁵¹ Own emphasis.

Employers and employees need to familiarise themselves with the relevant Codes of Good Practice, the toolkits¹⁵² and the applicable Technical Assistance Guidelines and use them as the foundation when developing their own policies on how to reasonably accommodate disabled employees. It is important to preserve the quality of life of all the citizens of South Africa, which includes the right to work, irrespective of their disability.

Role-clarification is important in any reasonable accommodation enquiry. It would add much value if courts were to start to recommend tangible and practical solutions to reasonably accommodate disability, which may include flexible leave arrangements and practical suggestions on how to position quality disability management in an organisation. When employees are booked off sick (the sickness may include mental illness), organisations need to have an early return-to-work strategy in place to assist with an early but safe transition back to work.¹⁵³ Reasonable accommodation measures for psycho-social disabilities are often also less tangible than those pertaining to physical disabilities.¹⁵⁴ Mr Jansen's case might have played out differently if disability management procedures had been put in place timeously. Several news articles commenting on judgments are often published on various media platforms, and if courts include practical recommendations on reasonable accommodation instead of merely referring to a section of the act or code, more awareness may be created on what this duty entails.

Gresse and Mbaio explained it further as follows:

It must be borne in mind that it may be more difficult to accommodate mental disabilities, and employers need to be innovative when developing their wellness and disability management strategies. Mental illness needs to be destigmatised and the lines of communication need to be open. ... Until we have clear legislative and policy frameworks setting out the duties of role players to manage all types of disability, it is left to our courts to shed light on what such duties entail. One thing is clear, it needs to be a well-coordinated approach, with the buy-in of all stakeholders involved, who all are working towards a common goal: to return employees back to work, by deploying reasonable accommodative measures. Companies should be encouraged to

¹⁵² Such as the Toolkit published by the South African Human Rights Commission – see SAHRC date unknown <https://www.sahrc.org.za/home/21/files/20170524%20SAHRC%20Disability%20Monitoring%20Framework%20and%20guidelines%20Draft%205.pdf>.

¹⁵³ Other practical recommendations may include the following: employee wellness programmes (as part of a holistic agreed-upon disability management plan); and evaluations of the working environment to determine how employees can be reasonably accommodated once they return to work, after being booked off. There needs to be an open dialogue between all role-players, including line managers and co-employees. Designated case managers need to be appointed to oversee the reasonable accommodation as well as the transitional work arrangements. A flow of communication amongst all role players is crucial, and all relevant parties need to have a firm understanding of their duties.

¹⁵⁴ Gresse and Mbaio 2020 *LDD* 128.

develop their own manuals, in accordance with Codes and Guidelines, in order to determine how disability will be managed.¹⁵⁵

Our legislation is further still deficient in relation to the definition of "disability" which, if rectified, may assist employers to follow the correct procedures and provide the right support to employees with mental illness to ensure their full and equal participation in the workplace.¹⁵⁶ It is the submission of the authors that enacting disability-specific legislation will assist vulnerable societies immensely not only to avoid being discriminated against but also to advance in their employment. Proper role clarification is required in a disability management process (for workplaces in both the private and public sector) and until South Africa has a detailed legislative framework, respondents stand the risk of losing employment and becoming dependant on disability grants. Employers, on the other hand, including the State as an employer, stand the risk of costly litigation for possible rights infringements. South Africa has a Constitutional responsibility to conduct a legal audit and to promulgate standalone disability legislation if necessary. This would assist in overcoming many barriers not only in employment but also in society at large.

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List Of Abbreviations

CCMA	Commission for Conciliation, Mediation and Arbitration
CRPD	Convention on the Rights of Persons with Disabilities
EEA	Employment Equity Act 55 of 1998
ILJ	Industrial Law Journal
LAC	Labour Appeal Court
LC	Labour Court
LDD	Law, Democracy and Development
LRA	Labour Relations Act 66 of 1995
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission
Stell LR	Stellenbosch Law Review
UN	United Nations
WHO	World Health Organization