

**Effects of Depression in the workplace and retainability of employees through  
reasonable accommodation in light with Jansen v Legal Aid South Africa (2018)  
ZALCCT 17**

Mini-Dissertation Submitted by:

Pamella Mlonzi

205516903

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Supervisor: Mrs. N. Whitear-Nel

## DECLARATION

I, Pamela Mlonzi, declare this work, unless indicated to the contrary in the text, is my own work. Furthermore, the dissertation has not previously been submitted towards any other academic qualification.

Signed:



Date:

04 May 2022

**Acknowledgement:**

My humble adoration and thanks to the Almighty God, for being an ever-present help in times of need, and for travelling with me on this journey, forever grateful!

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To my three beautiful children, Onako, Onothando and Lubabalo, thank you for being patient with mommy.

To my family & friends, your unceasing prayers and words of encouragement carried me through.

## ABSTRACT

This mini dissertation considers the effects of depression in the workplace, the efficacy of legal protection provided by South African labour laws for people with disabilities and mostly their retainability through reasonable accommodation. The Employment Equity Act<sup>1</sup> (EEA) prohibits unfair discrimination on the ground of disability, but unfortunately provides no definition for disability.<sup>2</sup> The EEA, however, provides a definition of “people with disabilities”<sup>3</sup> and conferred the powers to the Judiciary to interpret the elements provided and decide in accordance as to who qualifies to be classified as such. The courts have done so in cases such as *Standard Bank of South Africa v CCMA* and *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*, but too many obscurities as to who qualifies to receive the status of persons with disability remains present, while the Constitution imposes a duty to promote the protection of human rights of persons with disabilities.<sup>4</sup>

Depression has been declared to be the most leading cause of disability<sup>5</sup> and its substantial impact globally is requiring urgent attention before it reaches its depicted upsurge in 2030. The Labour Court in *Jansen v Legal Aid South Africa*<sup>6</sup>, also missed the opportunity to classify an employee with a “long-term” and “recurring mental impairment”, as “a person with a disability”. The Acting judge, Mthombeni, however, found

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<sup>1</sup> Employment Equity Act, 1995.

<sup>2</sup> C Ngwenya and L Pretorius “Conceiving disability and applying the constitutional test for fairness and justifiability: A commentary on *IMATU v City of Cape Town*” (2007) 28 *Industrial Law Journal* 747 at 754.

<sup>3</sup> Section 1 of EEA defines “people with disabilities” as those “who have a long-term physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment”.

<sup>4</sup> Section 186 of the Constitution of the RSA, 1996.

<sup>5</sup> World Health Organization “Depression and other common mental disorders: Global health estimates” (2017). Available at [https://www.who.int/mental\\_health/management/depression/prevalence\\_global\\_health\\_estimates/en](https://www.who.int/mental_health/management/depression/prevalence_global_health_estimates/en)

<sup>6</sup> (JA121/2014) [2018] ZALCCT 17; (2018) 39 ILJ 2024 (LC) (16 May 2018).



that the employee had been unfairly discriminated against on the ground of his mental condition [which was not referred to as a disability]. The court failed to decide whether Jansen was a person with a disability in terms of the EEA but made an emphasis on the obligation for employers to reasonably accommodate an employee, which is prominently seen as a mechanism for achieving equality for people with disabilities in the workplace.<sup>7</sup>

This case has been appealed and the Labour Appeal Court (LAC) stated that the relevant question to be determined was whether the reason for Jansen's dismissal was his depression and whether he was subjected to differential treatment on that basis. The LAC further stated that in order to prove an automatically unfair dismissal, the first step was to prove factual causation and thereafter determine the legal causation, of whether the depression was the most proximate cause of dismissal. The LAC found that depression was not the dominant reason and upheld the appeal. In my view, the LAC focused on other issues of contention, and its comments relating to depression in the workplace were not comprehensive and will be critically analyzed in this study.

*The critical questions which were left unanswered were:- do employees who suffer from depression belong to the class of people with disabilities? Will they be treated with dignity should they be retained in employment?<sup>8</sup> Are statutory provisions sufficiently protective of their Constitutional rights?*

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<sup>7</sup> C Ngweni "Equality for people with disabilities in the workplace: an overview of the emergence of disability as a human right issue" (2004) 29(2) *Journal for Juridical Science* 167 at 170.

<sup>8</sup> In *Standard Bank of South Africa v CCMA* (2008) 29 ILJ 1239 (LC), an employee who was given an alternative position due to her disability eventually landed into the position of a paper shredder from a position of being a home loan consultant. The employee's employment related to home loan consultation and the demotion to paper shredder as a result of her disability was demeaning and undermining her experience and skills in the profession with the employer. The employee's right to human dignity was infringed by the demotion and the courts ought to handle matters of disability with more sensitivity, aiming to ensure people who suffer from any sort of disability are afforded their constitutionally guaranteed rights such as equality, dignity and fairness.

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## Chapter 1

### Introduction and background

#### 1.1 Introduction

The World Health Organization (WHO) predicts a drastic increase of the global burden of Depression to become the leading cause of disability by 2030.<sup>9</sup> Depression in the workplace is associated with “poor work performance”, “incapacity due to ill-health”, high rate of absenteeism, “presentism”, that is, ongoing physical or mental health conditions preventing employees from being fully productive at work, and possibly affecting work relations.<sup>10</sup> Knapp suggests that by far, depression is the greatest contributor to the loss of productivity in economy.<sup>11</sup> In my view it has become more crucial for South African legal frameworks governing labour laws regarding mental health conditions to be equipped with practical guidance and certainty on how employers ought to handle this prevalence.

The failure to do so may result in courts being flooded with cases dealing with unfair discrimination, unfair treatment, and violation of rights of employees with disabilities, specifically those caused by invisible mental illnesses. I submit that there is a high likelihood that employees who suffer from depression will experience a bout of unfair discrimination, face stigma and be labelled as being “incompetent” and/or “unproductive”, which may consequently lead to unfair dismissals.

South Africa is one of the few countries which have constitutionally engrained the rights of people with disabilities by upholding that legislation is passed to ensure that people with disabilities are treated with dignity and their rights are protected in the workplace.<sup>12</sup>

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<sup>9</sup> DJ Viviers *Mental Health and the world of work: a comparative analysis of the legal frameworks governing categories of mental health conditions* (unpublished LLD thesis, University of Free State, 2016) p 5.

<sup>10</sup> Ibid.

<sup>11</sup> S Evans-Lacko & M Knapp “Global patterns of the workplace productivity for people with depression: absenteeism and presenteeism costs across eight diverse countries” (2016) 51(11) *Psychology Psychiatry Epidemiology* 1527-1537.

<sup>12</sup> M Christianson “Disability discrimination in the workplace” in EML Strydom et al *Essential Employment Discrimination Law* (2004) p 154.

South Africa also became a party to the United Nations Convention on the Rights of Persons with Disabilities [UNCRPD] and the Optional Protocol.<sup>13</sup> Through this affiliation, the South African government is impliedly committed to a radical movement which seeks to protect the rights of persons with all kinds of disabilities, ensuring that their voice is heard and that their autonomy in making their decisions is not restricted.

South Africa is a nation that has committed to upholding the rights of the mentally ill and disabled, it has enacted legislation<sup>14</sup> that safeguard rights and promoting equal treatment of persons with disabilities in the workplace. Ngwena submits that "South Africa's efforts to achieve formal equality should not stand alone, without similar advocacy focused on the achievement of substantive equality for persons with mental disabilities".<sup>15</sup> This could be achieved by simply applying the rule of law with the purpose of achieving the values enshrined in the Constitution.

The Employment Equity Act, as one of the pieces of legislation advocating for protection of persons with disabilities, needs to be interpreted with consideration of international law as envisaged in section 39 of the Constitution. Viviers states that the issue of mental disability is recognized as a matter of "justice, human rights, and equality".<sup>16</sup> It is crucial therefore that human rights-based approach be utilized to reinforce the legal protection for people with mental illnesses in South Africa's workplace.<sup>17</sup>

The Republic of South Africa is founded on the Constitutional values of dignity, equality, protection of human rights and freedom, therefore all other tribunals and courts when interpreting any legislation ought to interpret the law by promoting the spirit, purport and

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<sup>13</sup>Convention on the Rights of Persons with Disabilities, GA Res 61/106, UN Doc A/RES/61/106 (13 December 2006) (CRPD); Optional Protocol to the Convention on the Rights of Persons with Disabilities, GA Res 61/106, UN Doc A/RES/61/106 (13 December 2006). Article 1 states that "CRPD's purpose is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity".

<sup>14</sup> For example, Labour Relations Act, Basic Conditions of Employment Act, Employment Equity Act, PEPUA etc.

<sup>15</sup> Ngwena op cit note 7 above.

<sup>16</sup> Viviers op cit note 9 above, p 292.

<sup>17</sup> Viviers op cit note 9 above, p 292.

objects of the Bill of rights.<sup>18</sup> This approach will not be ignoring the increasing concerns employers have on the economic burden of mental health problems in the workplace. However, it will be promoting a sensitive approach which seeks to balance the needs of both the employer and employee in the workplace.

The issue, therefore, is two-fold, first, whether people with disabilities have rights, and secondly, the content and extent of those rights and how such rights have been limited?<sup>19</sup> This study will examine the South African legal framework enacted for persons with disabilities, specifically the mental health aspect and how courts have interpreted it and its impact in the workplace. This will be done in a comparative study to other international law on their interpretation and understanding of the dealing with disability, looking at countries such as the United State of America (USA), the United Kingdom (UK) and Canada as these countries have adopted a progressive approach towards depression and disability in the workplace in search of a better approach to be adopted and insights which might also benefit South African employees with disabilities to be afforded better protection.

Section 2 of the Constitution of the Republic of South Africa (The Constitution)<sup>20</sup> is the supreme law and any law that is inconsistent with it is invalid. Section 23 deals with labour relations and states that "[e]veryone has the right to fair labour practices".<sup>21</sup> The Constitution further requires equal treatment of all employees and the *equality clause*<sup>22</sup> becomes applicable in this instance. Section 9(1) of the Constitution states that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law". Section 9(3) lists the grounds on which employees cannot be unfairly discriminated upon, and *disability* is one of the listed grounds. Additionally, section 10 states that

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<sup>18</sup> Section 39 of the Constitution of the Republic of South Africa, 1996; the Labour Court in *Standard Bank of South Africa v CCMA* supra at par 60 : Honourable Judge Pillay held that "the origin of the test for fairness of the dismissal of an employee with disabilities is the Constitution".

<sup>19</sup> Christianson op cit note 12 above, p 154.

<sup>20</sup> Constitution of the Republic of South Africa, 1996.

<sup>21</sup> The Constitution, section 23(1).

<sup>22</sup> The Constitution, section 9.

"[e]veryone has inherent dignity and the right to have their dignity respected and protected".

Section 39(3) confers an obligation to the state to implement legislation that is consistent and gives effect to the above-mentioned rights. The legislature has been able to implement these rights through the promulgation of certain statutes<sup>23</sup> and particularly the Labour Relations Act (LRA),<sup>24</sup> which largely governs employment law and *inter alia*, contains the Code of Good Practice in Schedule 8 of LRA. The Code of Good Practice contains the measures and procedures to be taken by the employer to create and facilitate an equal working environment for all employees.

To give effect to section 9 of the Constitution, the EEA<sup>25</sup> was promulgated specifically to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through elimination of unfair discrimination on the ground of disability.<sup>26</sup> The EEA defines 'persons with disability' as "a person who has a long-term or recurring physical or mental impairment which substantially limits his or her prospects of entry into or advancement in employment"<sup>27</sup>. The revised Disability "Code of Good Practice on employment of persons with disabilities"<sup>28</sup>, which is merely a guiding tool, also defined disability as a "person with long-term, physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder his or her full and effective participation in society on an equal basis with others".<sup>29</sup>

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<sup>23</sup> Basic Conditions of Employment Act, Labour Relations Act, Employment Equity Act, COIDA, PEPUDA etc.

<sup>24</sup> Act 66 of 1995.

<sup>25</sup> Act 55 of 1998.

<sup>26</sup> The EEA's objectives are to "overcome the disadvantages that have been endured by historically marginalised groups such as people with disabilities. It seeks to further ensure the implementation of employment equity to redress the effects of discrimination, and to achieve a diverse workforce broadly representative of the people of South Africa".

<sup>27</sup> *Ibid*, section 1.

<sup>28</sup> Code of Good Practice on persons with disability, GN 1085, GG 39383, 9 November 2015.

<sup>29</sup> *Ibid*, Para 5.2, which is the definition adopted by the UN Convention on the Rights of Persons with Disabilities of 2007.

The common association with disability has been linked to and viewed as physical disfigurements within any society. The legal definition of a disability for employment law has been expanded to include mental impairments, thus meaning that a person can be classified as disabled solely on the mental incapacities.<sup>30</sup> Even with the comprehensive and progressive definitions of persons with disabilities, it is my opinion that the South African legal framework remains with a level of uncertainty regarding the classification of depression as a disability.

Depression has been described as a “mood disorder that causes persistent feelings of sadness and loss of interest”.<sup>31</sup> In an employment environment a person diagnosed with depression may experience difficulties in performing normal day-to-day activities and may require long-term treatment.<sup>32</sup> Depression, as a whole, is not a personal weakness and an individual who suffer from it cannot be expected to simply “snap out of it”<sup>33</sup>, and such a mental illness is often labelled as “incapacitating”, and is speedily becoming a widespread disorder moving through all societies.<sup>34</sup>

Depression has become more prevalent in recent years than in the past, and the WHO predicts a further increase in mental health problems in the future.<sup>35</sup> Researcher on the impact of depression in the South African workforce report that “at least one in four employees have been diagnosed with depression, and the working class between the age group of 25–44 year-olds are the most affected”.<sup>36</sup> It is my opinion that these results are indicative that the effects of depression on the working class, more especially the young adults are far-reaching and extend beyond the scope of the employee and it has

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<sup>30</sup> Viviers op cit note 9 above, p 39.

<sup>31</sup> Viviers op cit note 9 above, p xx (glossary of terminology and constructs).

<sup>32</sup> Ibid.

<sup>33</sup> Viviers op cit note 9 above, p xx (glossary of terminology and constructs).

<sup>34</sup> R Carvalheira *Depression, Dismissals and Disability* (2011).

<sup>35</sup> WHO “Mental disorders” (2015). Available at <https://www.who.int/news-room/fact-sheets/detail/mental-disorders> accessed on the 4/23/2020; Carvalheira op cit note 34 above, p 30, where, the author identifies South Africa as one of the countries where depression is increasing at a startling rate.

<sup>36</sup> MP Stander et al “Depression in the South African workplace” (2016) 22(1) *South African Journal of Psychiatry* 814; Carvalheira op cit note 34 above, p 30.



become a demanding and urgent task for the employer to ensure equal treatment and raise awareness amongst other employees in the workplace.

In my view, it is undisputable that depression affects the individual at a personal and socio-economic arena, and particularly in the workplace, where the employee is expected to perform, however there is a negative impact on productivity on account of depression.<sup>37</sup> The WHO further gives an alarming signal that 25% of people across the world will develop one or more mental or behavioral disorders in their lifetime.<sup>38</sup> With these alarming statistics, it has become necessary for the law to be developed and properly classify which persons qualify to be regarded as persons with disabilities to provide some form of protection and certainty in employment law governing mental illnesses or disability at large.

Ngwena shares the same sentiments by raising the question of how courts determine whether a person falls within the protected or preferred class.<sup>39</sup> He further states that:

"The efficacy of law in eliminating disability related discrimination or treating people with disabilities preferentially depends in part on whether courts define and interpret disability status in a manner that is consistent with the underlying purposes of the law at issue"<sup>40</sup>.

People with mental health conditions are also entitled and need employment, and even when their mental impairments gets to be severe they can still be given an opportunity to

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<sup>37</sup> Jong-Min Woo et al "Impact of Depression on work productivity and its improvement after outpatient's treatment with antidepressants" (2011) 14 *Value in Health* 475; Knapp op cit note 11 above; *Jansen v Legal Aid South Africa* (2018) 39 ILJ 2024 (LC), para 13.

<sup>38</sup> WHO op cit note 35 above, p 14.

<sup>39</sup> C Ngwena "Deconstructing the definition of 'disability' under the employment equity act: Social Deconstruction" (2006) 22 *South African Journal on Human Rights*, 613 at 614.

<sup>40</sup> Ibid.

perform some work.<sup>41</sup> Advocate BJ Malatji<sup>42</sup> reiterates this position by sharing that even the South African Human Right Commission [SAHRC] believes “that it is a right of persons with disabilities to have employment opportunities, to enjoy access to personal and career development and to be allowed to participate without discrimination and with dignity”, and contribute to South Africa’s economic development. Therefore, it is crucial for all employers to act in accordance with the duty placed by EEA<sup>43</sup> to reasonable accommodate the needs of persons with disabilities at the workplace.

Based on the above-mentioned legislation, it is evident that the EEA is currently the closest legislation to tackle and address the issue of depression as a whole in the workplace within South Africa’s national labour laws.<sup>44</sup> This places a substantial burden to the judiciary when given an opportunity to adjudicate on the matters pertaining to employees who suffer from unfair discrimination and are unfairly dismissed due to their uncategorized disability illnesses.

In the case of *Jansen v Legal Aid South Africa*,<sup>45</sup> an employee who suffered from depression was dismissed for misconduct, which was mainly found on the behaviour of the employee during the time that he suffered from depression and received treatment from a depression. The employee challenged the dismissal in terms of section 187 (1)(f) of the LRA and section 6 of the EEA. The Labour Court Acting Judge Mthombeni in this

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<sup>41</sup> *Standard Bank of SA v CCMA* supra, para 65, made this emphasis by quoting that: “work is one of the most fundamental aspects in a person’s life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person’s employment is an essential component of his or sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium or psychological, emotional and physical elements of a person’s dignity and self-respect”. WHO op cit note 35 above reports in its findings that “those persons with depression who became unemployed had over twice the risk of increased depressive symptoms and diagnosis of clinical depression than those who remained employed. The incidence and prevalence of depression increased once individuals became unemployed”.

<sup>42</sup> SAHRC “Disability toolkit: A quick reference guide and monitoring framework for employers” (2017) p3.

<sup>43</sup> Section 6 of the Employment Equity Act, 55 of 1998; Ngwena op cit note 7 above, at 170 suggests that the recognition of reasonable accommodation in the workplace for impediments such as disabilities has increased in realizing equality for all employees and encourages new thought patterns towards disabilities in the workplace.

<sup>44</sup> Carvalho op cit note 34 above, at p 6; Ngwena op cit note 7 above, at 189 states that the EEA is the principal parliamentary legislation for protecting and promoting constitutional values in the workplace. Its primary aim is to provide for employment equity.”

<sup>45</sup> *Jansen v Legal Aid South Africa* (2018) 39 ILJ 2024 (LC).

case, found depression not to be consistent with the Employment Equity Act definition of disability,<sup>46</sup> however deemed the employer to have failed to exercise the duty to accommodate an employee reasonably in the workplace.<sup>47</sup> The acting judge, Mthombeni further held that "instead of dismissing the employee for misconduct, the employer had a duty to institute an incapacity enquiry".<sup>48</sup> The dismissal was found to be unfair and reinstatement was ordered but the issue of depression was not fully addressed. This judgement and its implications will be critically analyzed in depth in chapter 4 of the research and the appeal of the judgement to the Labour Appeal Court.

## 1.2 Purpose of the Study

There is expanding evidence of the global impact of depression in the workplace.<sup>49</sup> Challenges relating to or associated with mental health have, over the years, contributed significantly to the rise of depression and disability around the world. Mental health problems are reported to be among the most critical contributors to the burden of disease and disability worldwide.<sup>50</sup> The consequences of mental health problems in the workplace have shown a detrimental impact for the individual and the productivity of the business<sup>51</sup> This requires an urgent review of our legislation and employment policies to be equipped with certain guidelines on how to manage and guard against exclusions and marginalisation of persons with disabilities.

This research seeks to explore the possibility of classifying people with depression as a group befitting to the definition of disability, which could benefit the employees to advance

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<sup>46</sup> Ibid, para 44 [which in my opinion, in the circumstances of this case, deserved to be categorized and consistent with the definition, had the acting judge analysed step by step with the elements of the definition of the EEA definition].

<sup>47</sup> Jansen supra, at para 44.

<sup>48</sup> Ibid, the judge Mthombeni relied on the *Standard Bank of South Africa v CCMA* [2008] 4 BLLR 356 (LC) judgment as the case which laid down the procedure of incapacity inquiry.

<sup>49</sup> WHO op cit note 35 above, p 1.

<sup>50</sup> WHO op cit note 35 above, p 1.

<sup>51</sup> WHO op cit note 35 above, p 1.

in the workplace. An investigation of depression will look at the social model<sup>52</sup>, as opposed to medical model, which potentially prejudices employees with depression from benefiting fully into the laws enacted.

The purpose of the study is to critically analyse the effects of Depression in the workplace and the role of the judiciary in adopting an approach which advocates for the protection of employees in the workplace when interpreting the Employment Equity Act and other legislation when adjudicating on the cases dealing with Depression and disability.

Another objective of this research is to find and achieve resolutions of dealing with employees with Depression and finding means of reducing the negative impact on employment productivity and minimize possible hardships that could be experienced through reasonable accommodation. Lastly the research seeks to equip employers with more knowledge of the impact of depression and better management strategies in the future.

### **1.3 Structure of the study**

To give effect to the purposes of the study, Chapter Two will introduce the concepts of depression and disability generally, and thereafter within the scope of employment law, with reference to the labour law statutes and case law. Furthermore, an evaluation of stigma and discrimination in the workplace of employees suffering with depression will be discussed, with particular attention drawn to the negative impact these two concepts have on the employees, within their personal lives and particularly in their employment field. The opinion and trajectory of the Labour Courts regarding stigma and discrimination will be discussed to support the progressive approach that employers should adopt in favour

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<sup>52</sup> The Disability Code states that "the scope of protection for people with disabilities in employment focuses on the effect of a disability on the person in relation to the working environment, and not on the diagnosis or the impairment" (item 5.1); Ngwena (note 6 above, p 187) also points that the "strategy formulated by the government for dealing with disability is a holistic one. It advocates a social model of disability in which disability is both a developmental and human rights issue". Further in the case of *Standard Bank of SA* supra para 68, the judge held that "defining disability in relation to employment shifts the focus from the diagnosis of the disability to its effect on both the employee's ability to work and to find work". In my opinion, social model is the progressive approach which should be adopted in the democratic era.

of employees diagnosed with depression. And finally, the dismissals of employees as a direct consequence of depression will be addressed on its accuracies and shortfalls that will be indicative of a further development of the concept of depression in the workplace.

Chapter Three will be adopting a pragmatic approach in the uphill battle of recognising the illness of depression as a disability in the workplace. First, it is tantamount that the correct assessment needs to be implemented by the employer in identifying the severity of an employee's depression and productivity. Case law has shown that, more than anything, employers have often chosen to conduct a misconduct enquiry on the depressed employee prior to the dismissal, whereas the courts have been inclined to find that an incapacity enquiry should have been embraced instead. Thus, these two enquiries will be addressed in isolation and advance which one will be appropriate for a depressed employee whose work conduct and productivity has declined.

Secondly, the results of the appropriate enquiry will determine the measures that are to be taken by the employer. Where a dismissal is not appropriate, the employer will be obliged to reasonably accommodate the depressed employee to enable the employee to be productive in his or her field and advance his or her career whilst living with depression. A discussion on the notion of "reasonable accommodation" will be unpacked for a detailed understanding of the employer's role in a depressed employee's career.

Thirdly, the current position of addressing mental illnesses, particularly those emerging in exponential numbers in the current century, and within a constitutional framework, it is unfortunate that South African labour laws are not comprehensively developed to allow employees to exercise their entrenched rights to trade or occupation of choice or be subject to fair labour practices when diagnosed with depression. As a consequence of this underwhelming development, guidance will be gleaned from international law, from countries such as the United States, United Kingdom and Canada, to be adopted in an accommodative manner within the South African legal culture. Lastly, a brief discussion on whether employees with depression can be disciplined by their employer.

In Chapter Four, the 2018 Labour Court case of *Jansen v Legal Aid South Africa* as well as the Labour Appeal Court decision in *Legal Aid South Africa v Jansen* handed down in 2020 will be the study of the concepts elaborated on in previous chapters and whether the findings of the courts have been able to bring clarity on the classification of depression as a disability. In the same chapter other previous court cases will be analysed to examine how courts have interpreted and dealt with disability status.

Chapter Five seeks to address the impact of depressed employees on the employer, that is, financial and otherwise. The necessity of the classification of depression as a disability is largely employee-oriented, however much of the efforts to allow for an employment environment that treats all employees fairly and equally hangs on the shoulders of the employer, and this impact and the hardships the employer faces will be tackled. Additionally, this chapter will comprise of recommendations drawn from the overall study of depression in employment law, the precepts adopted in international countries and the ambiguity that has ensued from the Labour Courts for an unreasonably long time regarding a mental illness that continues to soar in the 21<sup>st</sup> century.

## Chapter 2

### Concepts and definitions

#### 2.1. Depression

Depression is defined as a “whole body illness that displays symptoms of physical, cognitive, and behavioral impairment, presents as feelings of extreme sadness, helplessness, and hopelessness”<sup>53</sup>. People may develop depression from their personal experiences and relationships, which may subsequently affect employment, or may develop depression due to occupational factors.<sup>54</sup> Depression differs from feelings of desolation such as sadness, grief, sorrow and misery in that the former is a medically diagnosed mental condition where a person loses interest in their day-to-day living as a result of the depressive state that has overwhelmed the person. The latter, however, relates to natural emotions that a person may experience at any time of their life generally caused by the surroundings circumstances such as death of a family member, divorce or failing an exam.

These feelings and emotions are generally temporary and will come to pass over the course of time without any medical treatment. Depression, on the other hand, may be temporary or permanent and affects every aspect of a person’s life due to the limited interest in engaging passionately in activities or tasks that a person generally did without the diagnosis of depression. I submit, therefore, that a clear distinction is important to be drawn between emotions of desolation and depression because the impacts are different on a person and depression tends to have a lasting impact on a person that must be continuously attended to.

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<sup>53</sup> Viviers op cit note 9 above, p 26.

<sup>54</sup> Bender and Furman (2003) 74; Viviers op cit note 9 above, p 27; Carvalheira op cit note 34 above, p 29; *New Way Motors & Diesel Engineering (Pty) Ltd v Marsland* (2009) 12 BLLR 1181 (LAC).

Depression in the workplace generally causes employees to become increasingly unproductive, which may contribute to difficulties in employment and such reduced productivity by an employee suffering from depression may result in the employer finding the conduct of the employee akin to *misconduct* being committed as a “manifestation of the symptoms of depression”<sup>55</sup>.

Most importantly, depression has been described as the leading cause of disability worldwide.<sup>56</sup> Five of the ten leading causes of disability globally are mental problems and these are “major depression, schizophrenia, bipolar disorders, alcohol use and obsessive-compulsive disorders”.<sup>57</sup> I submit that revisiting the “disability” definition needs to be prioritised so it can be given a more precise and unambiguous meaning, to achieve adequate protection for employees with depression, especially when considering the rate of its increase and its drastic impacts in the workplace.

It is worth noting that depression, like most psychological disorders, can be treated through medication and psychological consultations with a professional.<sup>58</sup> This treatment possibility has been the main reason why in some South African case law, persons with impairments that are treatable, controllable or lessened like depression were not afforded the “disability status”<sup>59</sup> which in my view, can be perceived to be a narrow approach as depression can present itself in different ways for different individuals, therefore a blanket approach should be avoided when interpreting who is disabled and who is not.

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<sup>55</sup> Carvalheira op cit note 34 above, p 6.

<sup>56</sup> Evans-Lacko & Knapp op cit note 11 above; WHO op cit note 35 above.

<sup>57</sup> WHO op cit note 35 above.

<sup>58</sup> Carvalheira op cit note 34 above, pp 29 and 70. This allows persons diagnosed with depression to be able to carry out ordinary lives, akin to their counterparts who have not been diagnosed with depression with the exception that the former must adopt a minimal lifestyle change. In the American Amended Disability Act, it is provided that “the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as medication, meaning that anti-depressants will not be taken into account when determining whether an employee has a legally recognised disability under the AADA”, which is an area that can be adopted in South African law dealing with employees with disabilities, such as the EEA (*my emphasis*).

<sup>59</sup> For example, in *Imatu v City of Cape Town* (2005) BLLR 1084 (LC) an insulin-dependent employee was found not to be fitting to the definition of persons with disability in accordance to the EEA due to the fact that there was medical evidence that his diabetes could be controlled or lessened.



The WHO upholds that, although numerous affordable interventions are available, it has become necessary to challenge the low priority given to mental health and advocate for better measures to be adopted to curb the stigma around mental ill-health<sup>60</sup>. Research conducted in 2007 in South Africa alone shows that insurance payouts for disability claims amounted to R142 million, and almost 20 per cent of these were apportioned to mental disorders and unremarkably, 80 per cent of which were specifically for depression,<sup>61</sup> and the likelihood is that these statistics are most likely to continue to increase as more and more people struggle with depression.

Depression has been further pronounced as the most predominant and costly mental health problem.<sup>62</sup> According to WHO, “employee performance,<sup>63</sup> rates of illness, absenteeism,<sup>64</sup> accidents,<sup>65</sup> and business revenue are all affected by employees’ mental health status”<sup>66</sup> and must be addressed as indications of illnesses and not as a sign of weakness. This economic aspect may well cause panic for employers and might result in

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<sup>60</sup> WHO op cit note 35 above.

<sup>61</sup> Carvalheira op cit note 34 above, p 30.

<sup>62</sup> RC Kessler and EJ Bromler ‘The epidemiology of depression across cultures’ (2013) 34(1) *Annual Review of Public Health* (2013) p 120; Evans-Lacko & Knapp op cit note 11 above, suggest that by far, the greatest contributor to the overall economic impact of depression is loss in productivity across eight diverse countries such as South Africa, Brazil, Canada, China and the United States.

<sup>63</sup> As evident in the cases of *Jansen, Marsland and Standard Bank*, the performance of most depressed employees drops after they have been diagnosed, therefore, one of the negative impacts of depression is reduced productivity. This means that employers ought to support the employees early in the stages of depression when they notice a dip in productivity in the employee instead of using it as reason to discipline with intent to dismiss the respective employees.

<sup>64</sup> Absenteeism is another serious consequential symptom of depression, as it has been described to cause loss of motivation and commitment for other employees, and thus making it costly for employers. It has also been evident in most cases dealing with mental health conditions in the workplace where the absenteeism was one of the factors considered for the dismissal of the employee, see such cases as *Jansen, Strydom and Marsland*.

<sup>65</sup> In the case of *Automobile Association of SA v Govender* (1999) ILJ 2854 (LC) : an employee who suffered from a severe depression drove recklessly while on duty and was subsequently involved in a collision with a truck. The employee further threatened the other driver with his gun and on the following day could not recall the accident. The employee was dismissed and the court found his dismissal to be unfair. Depression may cause serious harm to employees and employers, and needs to be given serious attention (my emphasis).

<sup>66</sup> WHO, accessed on the 5/5/2020. Grogan (*Workplace Law* (2009): 260-261) states that “it is sometimes difficult to determine whether a case of reduced productivity involves misconduct or incapacity”. Viviers op cit note 9 above at 40, also reports that “in the employment realm, 54% of depressed employees indicated that their productivity had decreased due to the disorder, while each depressive episode required approximately 18 days of sick leave, which can go up to 57 days of sick leave, depending on the severity of the depressive episode”.

prejudicial reactions towards employees who suffer from depression in the interest of protecting the company's economic interests. Increasingly, employers' organisations, trade unions and government policymakers are realising these socio-economic costs of mental health problems in the workplace cannot be disregarded anymore.<sup>67</sup>

### 2.2.1 Depression and Disability

Persons with disabilities have always existed and the differential treatment of differently abled persons has progressed within societies from being undeserving of human dignity<sup>68</sup> to outcasts.<sup>69</sup> Finally, through the application and acceptance of basic human rights across all societies and demographics, people with disabilities have been afforded the same rights and protections as persons who do not have a disability.<sup>70</sup> These developments, however, have mostly been recognisable where there is a physical disability of the person concerned, but the definition of disability is not limited to only a visible boundary but extends beyond the functioning or lack thereof, of physical ligaments.

Particularly with mental illnesses, it is necessary to tread with caution in ensuring that a person with a mental illness is not denied basic human rights due to their incapacity where it is evident that the disabled person is able to function successfully within any environment with his or her limitation. Unlike physical disabilities, acknowledgement of mental disabilities should be fluid in as far as it relates to the nature of mental illness being episodic, either for a short period or in cases where the condition endures. This becomes problematic for employment purposes because an employee with episodic or temporary impairments can be more challenging than one with a physical disability because of the numerous accommodations that an employer may be required to carry out in favour of

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<sup>67</sup> WHO Mental Health and Work *Impact, issues and good practices* (2000) vi.

<sup>68</sup> Disabled people endured abandonment, killings and being labelled as "cursed" due to their disability.

<sup>69</sup> Once people were accepted that the disability is not of their own doing, or in religious circles, as a result of someone's sin, their limited ability to perform certain tasks without assistance led to exclusion from normal societal activities, such as carrying out a trade.

<sup>70</sup> These include the rights of a disabled person to pursue a trade or occupation of his or her choice, and in doing so, the employer is expected create an accommodative environment for the disabled employee.

the mentally disabled employee whilst upholding his or her basic human rights and ensuring that fair labour practices are carried out under the democratic dispensation.

The history of exclusion and marginalisation of disabled persons are features not only found in South Africa but across the world. A quote found in Christianson reiterates this position:

"It is an unfortunate truth that history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions...This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or a flaw. As a result, disabled persons have not been afforded the equal concern, respect, and consideration" that section 15 (1) of the Charter demands. Instead they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms...One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled'<sup>71</sup>.

Disability has become a crucial concept needing to be defined with certainty and yet still a most complex concept in our South African labour law. Defining disability is a complex exercise that has shown to be challenging for the courts.<sup>72</sup> Disability as a situation is broad and imprecise<sup>73</sup> because it includes people with physical, communication, intellectual, and emotional limitations. Disability may result from self-perception or may be caused by other persons, professionals, and institutions.<sup>74</sup> Therefore, it is my opinion that defining disability should not be rigid and incontestable, but rather should depend on the context and particular circumstances of each case.<sup>75</sup> I submit further that a purposive approach

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<sup>71</sup> Christianson op cit note 12 above, p 157, stating at paragraph 56 of the Canadian Supreme Court case *Eldridge v Attorney General of British Columbia* (1997) 151 DLR (4<sup>th</sup>) 577 (SCC) 613.

<sup>72</sup> Ngwenya op cit note 40 above, p 614.

<sup>73</sup> Ngwenya op cit note 40 above, p 617; Christianson op cit note 12 above.

<sup>74</sup> Viviers op cit note 9 above, p 49.

<sup>75</sup> Carvalheira op cit note 34 above, p 618; Viviers op cit note 9 above at p 49 says, "unless the specific criteria for determining disability are supplied, it may become an amorphous concept without any clear identity or boundaries".

needs to be adopted when courts interpret the disability status and decide who ought to be given such status, even if it is short-lived or temporarily given to an individual.

Depression as a growing pandemic that needs to be classified as a disability to afford maximum protection and to reverse the historical bad experiences of persons with disabilities. The South African labour law system needs to be developed to directly provide adequate protection for mentally ill employees in the workplace. By categorising depression as a disability, the employees will be afforded more protection from unfair dismissal,<sup>76</sup> unfair discrimination and further marginalisation in the workplace.

The recognition of the growing problem of depression as a disability has its advocates.<sup>77</sup> Disability is a category of health that has direct protection in terms of both the Labour Relations Act<sup>78</sup> and the Constitution.<sup>79</sup> It has been evident in case law that employers have generally decided to dismiss the employees who presented with absenteeism and reduced productivity on the ground of *misconduct* instead of *incapacity due to illness*. This is so because the statutory provisions have not provided direct security for persons with uncategorised disabilities, like mental impairments that will mostly present by symptomatic behaviors that are unfavorable in the workplace.

Disability as a ground protected against discrimination is only listed but not defined under the Constitution. The EEA defines 'people with disabilities' but does not provide for the list of health conditions<sup>80</sup> that could be regarded as fitting to the definition, leaving most

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<sup>76</sup> Calvalheira op cit note 34 above, p 13. In my view, if the depressed employees were to be afforded the protection under disability ground, the employers would also treat them fairly, if not would be forced to follow the procedures in place when attempting to dismiss them and the confusion of the appropriate grounds for dismissals would be less, as it would definitely fall on incapacity due to poor health. Now most employees have been subjected to disciplinary enquiries instead of incapacity enquiry when their mental health conditions start to affect the productivity at work.

<sup>77</sup> Viviers op cit note 9 above, p 61.

<sup>78</sup> Section 187(1)(f) of the LRA lists disability as a discriminatory ground and dismissal based on it is automatically unfair dismissal.

<sup>79</sup> Section 9(3) of the Constitution.

<sup>80</sup> It is not necessary for the EEA to create a closed list of mental health conditions that qualify as a disability, however, listing a few of such conditions might provide a better guideline to mental disabilities for the courts and employers alike.

of the interpretation in the “hands” of the courts. South African judgments have used different approaches resulting in different outcomes as to the status of disability which, in my opinion, is a result of poor legislative guidance with respect to disability and what it encompasses.

### 2.2.2 Summary of Case Law Dealing with Depression

The case law in South African courts illustrate the *lacunae* and vagueness in the interpretation of what disability is in relation to depression and mental health and who qualifies to be a person with disability in terms of the EEA definition, as seen in the pattern of the following cases.

The court in *Standard Bank of South Africa v CCMA*,<sup>81</sup> even though dealing with physical impairment, laid down some vital principles. It emphasised that defining disability in the employment context should divert the focal point from the diagnosis of the employee’s illness and gravitate towards the employee’s ability to work and to secure employment.<sup>82</sup> This view taken by the court supports the “social model of disability”, which identifies disability as a social and cultural construct instead of an exclusively medical concept<sup>83</sup>. The social model complies to the perspective that limitations created by society and the external factors exacerbate the mental illness itself.<sup>84</sup>

This court impressively dealt with the concept of disability in depth and managed to state with conviction that the employee’s condition indisputably met the definition of “disability”<sup>85</sup>. This is unfortunately not consistently found in all judgments, perhaps

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<sup>81</sup> [2008] 4 BLLR 356 (LC).

<sup>82</sup> *Standard Bank* supra, para 68; Item 5.1 of the Disability code; Christianson op cit note 12 above.

<sup>83</sup> Viviers op cit note 9 above, p 51.

<sup>84</sup> Ibid.

<sup>85</sup> *Standard Bank* supra, par 106 and further in paragraph 121, the court emphasised “that having regard to the employee’s disability, the bank could not rationally or fairly measure her performance on the same standard as other employees”. The significance of defining disability and categorising persons with disability affords them a better protection at the workplace, in terms of expectations and safeguarding them from being labelled as poor performers while in need of support.

because there have been reservations with classifying mental illnesses as a disability in other matters or the visibility of physical impairments that make it easy to classify an impairment as a disability unlike the “invisible” mental state.

In the case of *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*,<sup>86</sup> the Labour Appeal Court failed to decide whether depression suffered by the respondent was a disability.<sup>87</sup> The court, in my view, avoided the issue by diverting the question into the known area of stipulated protection of human dignity, which is safely provided in the Constitution, rather than stepping into an ambiguous zone of developing the legislation. The court acknowledged that depression is a form of mental illness by referring to the *Diagnostic and Statistical Manual of Mental Disorders IV* and held that “depression has the potential to impair the fundamental dignity of the person as a human being or affect him in a comparably serious manner”,<sup>88</sup> but still chose not to address it as a disability or even take that route of testing it against the definition of persons with disability as provided in the EEA.

The court further held that the conduct of the employer violated the dignity of the employee and accordingly fell within the grounds set out in section 187(1)(f) of the LRA. The court’s failure to classify depression as a disability led to the conclusion that defining depression is rather arbitrary and not necessarily seen as a disability, which affords more protection for employees.

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<sup>86</sup> [2009] 12 BLLR 1181 (LAC), in this case an employee, a marketing manager, suffered from depression when his wife left him after 24 years of marriage. After sick leave, he returned to work and was initially treated harmoniously but later he felt excluded from his normal duties and treated grossly by his manager. He was later referred to a disciplinary inquiry facing charges of poor performance, poor time keeping, misuse of company benefits and breaching company rules and regulations. This treatment continued, which made his work environment intolerable, leading him into terminating his employment contract.

<sup>87</sup> *Marsland* supra, para 24. “It is not strictly necessary to decide whether the concept of disability as set out as a ground in section 187(1)(f) describes the condition suffered by the respondent”. This is one way of avoiding the broad definition of disability, which will continue to be undefined in our courts should this view continue to be embraced?

<sup>88</sup> *Ibid.*

In the case of *Wylie and Standard Executors and Trustees*,<sup>89</sup> the employee was living with “multiple sclerosis”, which is a “degenerative neurological disorder”. The Commissioner had to determine whether the employee was a person with a disability.<sup>90</sup> He scrutinised the analysis of people with disabilities from the perspective of “item 5 of the Code of Good Practice” and found that the employee’s “multiple sclerosis constituted a disability for the purposes of the EEA and Disability Code”.<sup>91</sup> The Commissioner stated that it was “inescapable that the applicant’s condition amounted to a disability as envisaged in the EEA and the Disability Code”. The Commissioner could thus insist on the necessary protection afforded to people with disabilities after declaring this position. The Commissioner further stated that LRA protected employees against unfair discrimination on the grounds of disability. It was further ruled that the employer did not treat the employee as a person with a disability, but as a poor performer. The Commissioner found that the applicant was unfairly dismissed.

In the case of *Strydom v Witzenberg Municipality*,<sup>92</sup> the court accepted and held that depression is a disability and that an employer should take steps to ensure that a depressed employee is not unfairly discriminated against and furthermore, provide protection for the employee by conducting an enquiry which will assist in determining the steps that need to be taken for reasonable accommodation.<sup>93</sup> The court further held that accommodating an employee with a disability is the main way of avoiding a dismissal for incapacity. This is another case that considered depression as a disability and therefore the rights of the employee to his protection in the workplace.

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<sup>89</sup> [2006] 27 ILJ 2210 (CCMA): the applicant was a trust officer employed by the respondent. When she could no longer meet the required standards in the trusts division she was transferred the estate division where there was less pressure but she still could not manage. Stress worsened her condition, but a medical panel found that she was not totally and permanently disabled. The panel suggested “that the employer consider either accommodating the employee within her current position or find alternative placement for her. The employer could not afford to keep her for three months after which, if no solution, her employment would be terminated. No suitable positions were available and her employment was terminated at the end of three-month period.

<sup>90</sup> *Supra* at 2218.

<sup>91</sup> *Supra* at 2221.

<sup>92</sup> (2008) 29 ILJ 2947 (LC) (9 May 2008).

<sup>93</sup> *Strydom supra*, pp 3 and 4.

In *Van Zyl v Thebe Employee Benefits Risk Group (Pty) Ltd*,<sup>94</sup> an employee who suffered from Schizophrenia was dismissed for operational requirements. The Commissioner failed to determine whether the mental condition constituted disability, however treated the employee as one who is disabled because the employer admitted her mental condition constituted disability.<sup>95</sup>

In *Automobile Association of SA v Govender*,<sup>96</sup> the employee suffered from severe depression, was ill and had to take medications daily. The employee's condition also threatened his life and those of his co-workers. The employee was subsequently dismissed after accidents due to his mental condition. The court still found that dismissal was unfair. The court sent a clear message that dismissal of employees based on their mental conditions was not tolerated but did not state that mental conditions constituted a disability.

In *Spero v Elvey International (Pty) Ltd*,<sup>97</sup> the applicant subscribed to medical treatment for his depression. Shortly thereafter, the applicant was dismissed for incapacity and he instituted an unfair labour practice dispute against the employer in terms of section 46(9) of the previous LRA<sup>98</sup>. The court stated that "temporary absence from work due to illness or injury is not a valid reason for dismissal"<sup>99</sup>. The court ruled that the dismissal was unfair and ordered reinstatement.

## Conclusion

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<sup>94</sup> [2004] 10 BALR 1298 (CCMA).

<sup>95</sup> Supra at 1305.

<sup>96</sup> (1999) ILJ 2854 (LC).

<sup>97</sup> (1995) ILJ 1210 (LC).

<sup>98</sup> 28 of 1956.

<sup>99</sup> Op cit note 97, para 11.



The South African case law illustrates the gap that needs to be corrected through the development of legislation that deals directly with mental illnesses. The court in *Standard Bank v CCMA* was faced with a physical impairment case and was certainly able to address the issue of disability and successfully dealt with different statutes available for protection of employees with disabilities in the workplace. The principles laid down by the court are also relevant and applicable to cases dealing with mental impairments like depression as the definition in EEA includes mental impairments. Yet the courts still hesitate to classify mental illnesses like depression as a disability.

*Marsland* is one of the earlier cases dealing with depression that came before the Labour Appeal Court, where the premise of the claim was constructive dismissal and unfair labour practice. The court did not see the need to address the issue of whether depression is a disability but sought to protect the dignity of the employee suffering from mental illness. This approach taken by the LAC cannot provide future protection for other employees with certainty as it did not categorise depression as a disability.

In *Wylie*<sup>100</sup> the CCMA as a lower body than the court was able to classify depression as a disability. The *Strydom* case is one of the few Labour Court cases that classified depression as a disability. This case further challenged employers to accommodate employees as a way to avoid dismissal for incapacity. In the *Van Zyl*<sup>101</sup> case, the employer found schizophrenia to be a disability but the CCMA made no determination regarding that notion.

The findings in *Govender* seem to remain the prevailing view of the Labour Court's current views in avoiding classifying depression as a disability. In *Spero*, a case which was decided when the Constitution was new, had no added pressure to classify depression as a disability as depression was not as prevalent then as it is now. The judgment, even though found under the previous LRA, afforded the employee with reasonable protection, and emphasised that dismissal should be the last resort. The court held that employers

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<sup>100</sup> Supra.

<sup>101</sup> Supra.

ought to be understanding towards employees in respect of incapacity for short periods. From these cases it is evident that the Labour Court is still not clear whether depression or any mental illnesses should be classified as a disability and further highlights the deficiencies in statutory frameworks governing mental conditions in labour law.

Item 5.3 of the Code of Good Practice on the employment of persons with disabilities seeks to eliminate the injustices and unfair discrimination of persons with disabilities and promotes equitable representation through the implementation of affirmative action measures to redress discrimination. Therefore, it becomes crucial to ensure that people dealing with depression belong to this class to ensure their full enjoyment and participation in the workplace and afford them full protection as their condition may affect their work performance, their relations with other colleagues and may lead to dismissals if not afforded the same status or protection of people with disabilities.

### **2.3. Statutory Frameworks in South Africa Regarding Protection of People with Disability**

#### **2.3.1. Disability under the Employment Equity Act**

The Employment Equity Act (EEA) defines “people with disabilities as people who have a *long-term or recurring physical or mental impairment which substantially limits* their prospects of entry into or advancement in, employment”<sup>102</sup>. The Disability Code therefore provided guidelines as follows:

- a) “There must be an impairment”<sup>103</sup>

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<sup>102</sup> Section 1 of the Employment Equity Act, 1998.

<sup>103</sup> Item 5.3.1 of the Disability Code.

An impairment may either be “physical or *mental* or a combination of both”<sup>104</sup>. A mental impairment means “a clinically recognised condition or illness that affects a person’s thoughts, processes, judgement, or emotions”<sup>105</sup>.

b) “The impairment must be long-term or recurring”<sup>106</sup>

Long-term means “the impairment has lasted for or is likely to persist for at least twelve months”<sup>107</sup>. Recurring means that “the impairment is one that is likely to happen again and must be substantially limiting”. It includes a constant chronic condition, even if its effects on a person fluctuate<sup>108</sup>.

Progressive conditions are those that are likely to develop or change or recur. It is evident from the extensive definitions above that people living with disabilities are labelled as such once the impairment becomes substantially limiting. Progressive or recurring conditions that have explicit symptoms or which do not substantially limit a person are not regarded as disabilities in terms of the code.

c) “The impairment must be substantially limiting”<sup>109</sup>

Impairment is regarded to be substantially limiting if “in its nature, duration, or effects it substantially limits the person’s ability to perform the essential functions of the job for which they are being considered”<sup>110</sup>. The Code further suggests that “an assessment to determine whether the effects of an impairment are substantially limiting must consider if medical treatment or other devices would control, lessen or correct the impairment so that its adverse effects are prevented or removed”<sup>111</sup>.

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<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Item 5.3.2 of the Disability Code.

<sup>107</sup> Ibid.

<sup>108</sup> Ibid.

<sup>109</sup> Item 5.3.3 of the Disability Code.

<sup>110</sup> Ibid.

<sup>111</sup> Item 5.1.3(iii) of the Disability Code.

According to the Code “when a person uses corrective measures to correct or ameliorate his or her impairment, such a person will not be deemed to have a disability”.<sup>112</sup> If the impairment is not lessened, corrected, or removed with the application of these measures, then person may be considered to have a disability.<sup>113</sup> The American Disability Act holds a different view in that it “prohibits the consideration of mitigation measures in determining whether a person’s impairment substantially limits a major life activity”.<sup>114</sup> The Disability Code further states that “when there is uncertainty about whether an impairment is substantially limiting, an assessment to that effect may be done by a suitably qualified person”.<sup>115</sup>

Ngwena raises a very important point, that “the constitutive elements of this statutory definition require deconstruction by the interpreter before they can be applied”.<sup>116</sup> They further recommend that South Africa would do well to follow the Australian and Canadian jurisdictions<sup>117</sup> which define disability based on the social experience of disability related discrimination.<sup>118</sup>

The Code of Good Practice on the Employment of Persons with Disabilities<sup>119</sup> further defines persons with disabilities as inclusive of “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on equal basis with others.” The aim of the Disability Code is “to guide, educate and inform employers, employees, and trade unions to understand the rights and obligations, to promote and encourage equal opportunities and fair treatment of people with disabilities”<sup>120</sup>.

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<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> ADA Amendment Act: sec 12102 (4)(E)(i); see Viviers op cit note 9 above, p 199.

<sup>115</sup> Item 5.1.3(iv) of the Disability Code.

<sup>116</sup> Viviers op cit note 9 above, p 199.

<sup>117</sup> Australia and Canada define disability to include ‘imputed’ and perceived impairment.

<sup>118</sup> Ngwena & Pretorius “Conceiving disability, and applying the constitutional test for fairness and justifiability: A commentary on *IMATU v City of Cape Town*” (2007) 28 *Industrial Law Journal* at 762.

<sup>119</sup> GN 581 GG 33872, 12 June 2015.

<sup>120</sup> Item 2.2. of the Disability Code.

Section 6 (1) of the EEA provides that “no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds, including *disability*”. Section 9 of the EEA further describes that the complainant of discrimination in the employment context can be classified as an employee or job applicant.

### **2.3.2 Labour Relations Act 66 of 1995 (LRA)**

The primary goal of the LRA is to give effect to the constitutional obligations contained in section 23(1) of the Constitution, which states that “everyone has the right to fair labour practices”. Section 185 of the LRA states that “every employee has the right not to be unfairly dismissed”. Section 188 thereafter sets out grounds which may be considered fair for dismissals, that is, misconduct, incapacity, poor work performance or ill health or injury and operational requirements”. These reasons must be effected in both a procedurally and substantively fair manner<sup>121</sup>.

Section 187(1) states that “a dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for the dismissal is:

(d) that the employee took action or indicated an intention to take action against the employer by:-

- (i) exercising any right conferred by this Act; or
- (ii) participating in any proceedings in terms of this Act.”<sup>122</sup>

Section 187(1)(f) of the LRA describes an automatically unfair dismissal where the reason for the dismissal relates to the unfair discrimination of an employee in a manner that “directly or indirectly, on any arbitrary ground including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, conscience,

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<sup>121</sup> Section 188 of the LRA.

<sup>122</sup> Section 187 (1) (d) of the LRA.

belief, political opinion, culture, language, marital status or family responsibility"<sup>123</sup> discriminates against the employee.

Despite subsection 1(f), the LRA does however provide for the dismissal of an employee on the ground of incapacity, provided that there are fair reasons, and fair procedure is followed<sup>124</sup>. Section 188(1) states that a dismissal is automatically unfair, "if the employer fails to prove -:

- (a) That the reason for the dismissal is a fair reason
  - (i) related to the employee's conduct or capacity; or
  - (ii) based on the employer's operational requirements; and
- (b) That the dismissal was effected in accordance with a fair procedure."<sup>125</sup>

The Code of Good Practice further endorses and promotes the application of section 188 to be followed by employer in relation to dismissal on the grounds of incapacity for poor work performance and ill-health or injury.

Item 10 and 11 of Schedule 8 to the LRA makes provision for an investigation to be held to determine the extent of the employee's incapacity or injury. It lays down the following steps to be followed:

- (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 disability
  - (iii) Availability of any suitable alternative work".

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<sup>123</sup> Section 187 (1) (f) of the LRA.

<sup>124</sup> Section 188 (1)(a)(i) of the LRA.

<sup>125</sup> Section 188 of the LRA.

## 2.4. Depression, Discrimination and Stigma

Discrimination generally refers to the treatment of persons who are different in an unfair, biased or prejudicial manner. According to the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA),<sup>126</sup> “discrimination may be an act, omission, policy, law, rule, practice, condition or situation which imposes burdens, obligations or disadvantages on; or withholds benefits, opportunities or disadvantages from, any person on the grounds of disability (amongst other grounds). It might disadvantage a person, undermine human dignity or adversely affect an individual’s rights and freedoms”<sup>127</sup>.

PEPUDA seeks to provide for, *inter alia*, “measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability”.<sup>128</sup> Further, section 6 of PEPUDA states that “neither the State nor any person may unfairly discriminate against any person”.<sup>129</sup> Section 9 of the PEPUDA further labels “the failure to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities as unfair discrimination”. The purpose of PEPUDA is to eradicate unfair discrimination, with particular recognition of South Africa’s past and the need for redress, and thus, any person in a position of power to uplift another person should do so without tainting the latter’s dignity.<sup>130</sup> Section 5 of PEPUDA states that the Act does not apply where the EEA applies, therefore inference will be drawn from the EEA.

Marumoagae suggests that “discrimination against people with disabilities is one of the worst social stigmas that society has not been able to overcome.”<sup>131</sup> It is important for society at large to understand how discrimination affects the victims from enjoying their

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<sup>126</sup> 4 of 2000.

<sup>127</sup> PEPUDA, Section 1.

<sup>128</sup> Section 2(c).

<sup>129</sup> Section 6.

<sup>130</sup> Carvalheira op cit note 34 above, p 69.

<sup>131</sup> MC Marumoagae “Disability discrimination and the right of disabled persons to access the labour market” (2012) 15(1) *PELJ* 345 at 346.

constitutional rights to equality, freedom and human dignity.<sup>132</sup> Dupper argues that the constitutional right to equality envisages a “two-pronged strategy to achieve the goal of substantive equality- the elimination of existing inequality and the implementation of measures designed to protect and advance those people disadvantaged by past discrimination”.<sup>133</sup>

The United Nations Convention on the Rights of Persons with Disabilities is an international treaty that identifies the rights of disabled people. Article 2 of the UNCRPD, describes discrimination as “differential treatment of a person on the basis of disability”.<sup>134</sup> In South African law, employers are required to treat employees with disabilities equally and fairly and not discriminate against them. Ngwena submits that to render effective anti-discrimination law, “legislation or judicial constructions of disability must be alive to the nexus between stigma and discrimination”.<sup>135</sup> He further states that at an operational level, “stigma is ultimately linked to denial of access to social, economic and political power”.<sup>136</sup>

The denial of access and discrimination was demonstrated in the case of *New Way Motor & Diesel Engineering*<sup>137</sup>, where an employee (senior marketing manager) upon his return to work was subjected to significant exclusion, discrimination and marginalisation. His work conditions drastically changed, he was denied access to part of his designated job and he could no longer make important decisions to which he had been a party prior to his mental health condition.<sup>138</sup>

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<sup>132</sup> Ibid.

<sup>133</sup> Dupper as quoted in Marumoagae, op cit note 123 above, p 348.

<sup>134</sup> Referring to “any distinction, exclusion or restriction on the basis of disability which has the effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, civil or any other field”.

<sup>135</sup> Ngwena op cit note 40 above.

<sup>136</sup> Ngwena op cit note 40 above.

<sup>137</sup> [2009] 12 BLLR 1181 (LAC).

<sup>138</sup> Para 6.



According to his deposition, this treatment “disabled” him from performing a managerial function which was his position at work.<sup>139</sup> Mr. Marsland was purely discriminated against for depression and was subjected to abuse coming from his senior employers which made the workplace intolerable for him, resulting in him terminating his employment contract. The gross victimisation and abusive treatment towards employees with mental conditions cannot be tolerated even if “depression” is not given the status of disability, it would still be considered as a violation of Constitutional rights, therefore unlawful in South Africa.

The case of *Smith v Kit Kat Group (Pty) Ltd*<sup>140</sup> further demonstrates pure discrimination on the ground of disability. The employee in this case attempted suicide by shooting himself in the mouth which left his face disfigured and the injury left him permanently physically disabled. This resulted in him being unable to return to work as his employers found him to be cosmetically unacceptable and that his presence would remind employees of the unfortunate event. He was further advised by the employer to pursue registration for a disability grant, which he refused to do.

The employee submitted medical reports stating that he was fit to return to work but was not allowed to by the employer due to his physical appearance. The employer essentially repudiated the contract of employment because the employee was “cosmetically unacceptable” in the eyes of his employer and this was not directly communicated. The employer did not terminate the contract but simultaneously did not allow the employee to resume his duties. The employee had to stay at home without a salary but was not treated as someone who had taken sick leave. His delay in returning to employment was due to his physical disfigurement which is a gross discrimination on the ground of his disability.

The court in this case, first acknowledged that the applicant was a person with a disability in terms of the EEA.<sup>141</sup> Secondly, the court ordered that the applicant “was unfairly

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<sup>139</sup> Para 6.

<sup>140</sup> (2016) 12 BLLR 1239 (LC).

<sup>141</sup> Para 38.

discriminated against by the respondent based on his disabilities".<sup>142</sup> The court's introductory comments portrayed a picture of the ideal relationship between employers and employees in the modern constitutional era as "akin to marriage relationship, where employers have to ask how would they treat their spouse in cases of personal tragedy, and then act accordingly".<sup>143</sup> This image is unfortunately not a reality in the workplace as seen in the later cases<sup>144</sup> dealing with mental illnesses in the workplace.

Carvalho states that depression like other psychological disorders, "has a negative stigma attached to it, thus depressed persons are hesitant to disclose their disorder to their employees for fear of discrimination and dismissal".<sup>145</sup> The current law requires that the employees who suffer from depression (and other forms of disabilities) have to disclose to their employers their mental conditions and provide the medical reports as evidence in order to receive some form of support and necessary adjustments, which in most cases means more vulnerability and more prone to being stigmatised and discriminated in the process.<sup>146</sup> This means employees who suffer from depression need to disclose, especially when the condition is evidently affecting their performance at work or affecting their relationship with co-workers. Once disclosure has taken place there is a greater duty on the employer to treat the employee with dignity and continue to instil fair labour practices.

Viviers emphasises the need for the recognition and awareness of depression as a disability along with its impacts, symptoms and frequency in the employment spectrum.<sup>147</sup> She further supports the view that such a recognition would safeguard the right to dignity

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<sup>142</sup> Para 86 (1).

<sup>143</sup> Para 1: this is what Judge Snyman envisaged trying to emphasise the importance of support required from employers, the sensitivity expected when dealing with employees who suffer from disabilities.

<sup>144</sup> In *Jansen v Legal Aid*, an employee was subjected to unfair discrimination and further victimisation in the workplace due to mental illness.

<sup>145</sup> Carvalho op cit note 34 above, p 10.

<sup>146</sup> Viviers op cit note 9 above, p 282.

<sup>147</sup> Viviers op cit note 9 above, p 332.

and equality and non-discrimination by breaking down the barriers of stigma and disadvantage.<sup>148</sup>

## **2.5. Depression and Dismissals**

Dismissal takes place when the contract of employment is terminated and requires some communication by the employer to the employee regarding such termination.<sup>149</sup> It may be terminated "with or without the notice".<sup>150</sup> Section 188 of the LRA provides that "a dismissal will only be fair if it is motivated by a fair reason and effected in accordance with a fair procedure"<sup>151</sup>. Section 188(1)(a) of the LRA provides three reasons for which employees may be lawfully dismissed. These are "operational requirements", "misconduct", and "incapacity based on poor work performance or ill health or injury". The Code of Good Practice further endorses the idea that when enforcing workplace discipline, "dismissal should be considered a sanction of last resort".<sup>152</sup>

### **2.5.1. Misconduct**

Misconduct is often described as the most common justification for dismissal in South Africa.<sup>153</sup> In order for this to happen, an employee ought to be in breach of a material term of the employment contract or having conducted himself or herself in such a manner that the employment relationship has been irretrievably broken down in a manner which justifies termination by the employer.<sup>154</sup> Further, an employee must have intentionally disregarded the rules or disciplinary code of the workplace.<sup>155</sup> This requires a willful fault or damage to be established from the side of the employee.

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<sup>148</sup> Viviers op cit note 9 above, p 332.

<sup>149</sup> J Grogan *Workplace Law* 12 ed (2017) p 144.

<sup>150</sup> Section 186(1)(a) LRA.

<sup>151</sup> Section 188 (2) of the LRA; schedule 8 of code of Good Practice: Dismissals further provides that "a dismissal is unfair if it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment. Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty. Whether or not the procedure is fair is determined by referring to the guidelines set out in this LRA".

<sup>152</sup> Grogan *Workplace Law* op cit note 149 above, p 201.

<sup>153</sup> J Grogan *Dismissal* 3<sup>rd</sup> ed. (2017) p 212.

<sup>154</sup> Ibid.

<sup>155</sup> Grogan op cit note 149 above, p 213.

Grogan states that those who fall ill or are injured cannot be blamed for their predicament.<sup>156</sup> Surprisingly, employees suffering from depression have been dismissed on the basis of misconduct. When suffering from depression, the employee lacks the intention required to commit a wrongful act.<sup>157</sup> This is because incapacity defenses encompass mental illness if proven that it was a direct result of misconduct at the time it was committed and emotional distress.<sup>158</sup>

Depressed employees may commonly be absent from work for longer periods, which means the possibility of breaking their contractual obligation to be at work and expectation to be productive might be breached. This may further expose them to disciplinary actions taken against the employee for non-compliance to the work hours even though there might be a justifiable explanation for the absence. The employer may not dismiss at the first incident of absenteeism unless the period is unreasonably long.<sup>159</sup>

Many of the cases of depressed employees that have come before the courts were due to misconduct dismissals and the courts found and suggested that an employer should adopt an incapacity enquiry in order to be accommodative of the employee with the mental health conditions. This was seen in the recent case of *Jansen v Legal Aid South Africa*,<sup>160</sup> where an employee suffering from depression was dismissed for misconduct (charged for gross insolence and insubordination), of which the employer was aware, where the acts of misconduct in the circumstances were inextricably intertwined with the employee's condition. The employee maintained that his depression was the actual reason for his dismissal.

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<sup>156</sup> Ibid.

<sup>157</sup> Grogan op cit note 149 above, p 49.

<sup>158</sup> Carvalheira op cit note 34 above, p 49.

<sup>159</sup> Carvalheira op cit note 34 above, p 49; Schedule 8 of the Code of Good Practice: dismissal further stipulates "that the employer should conduct an investigation to determine whether there are grounds for dismissal". This implies that an opportunity should be given to employees to state the case, otherwise employees with mental illness could be dismissed for symptomatic behavior if no proper investigations are done, and no opportunity is allowed for them to present their medical conditions.

<sup>160</sup> *Jansen v Legal Aid of SA* supra.

It was reported that “his mental condition had worsened to such an extent that he had effectively lost control over himself, was acting erratically and out of character” (no capacity or intention).<sup>161</sup> The Labour Court held that the employer had the duty to reasonably accommodate him and that he failed to comply with its duty in this regard<sup>162</sup>. The court further held that “instead of dismissing the employee for misconduct, the employer had a duty to institute an incapacity enquiry”.<sup>163</sup>

### 2.5.2. Incapacity

Dismissal due to incapacity is separated into two types, “incapacity due to poor work performance and incapacity due to ill health or injury”<sup>164</sup>. An automatically unfair dismissals may sometimes overlap with a dismissal on the ground of incapacity or poor work performance.<sup>165</sup>

The incapacity due to poor work performance becomes appropriate where an employee has not received enough training, ability, skills, knowledge or inadequate resources provided by the employer for the employee to carry out their tasks.<sup>166</sup>

Carvalho suggests that this dismissal is inappropriate for a depressed employee because the employee is most likely to be “no longer motivated to work or have any interest in his or her work”<sup>167</sup>. It is thus obvious that a depressed employee would have been sufficiently trained to carry out their work responsibilities prior to the depression leading to low productivity. A dismissal of an employee for incapacity due to poor performance who suffers from depression would equate to an unfair dismissal on the grounds of unfair discrimination.

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<sup>161</sup> *Jansen v Legal Aid SA* supra, para 26.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Jansen v Legal Aid SA* supra, para 43.

<sup>164</sup> Grogan Workplace Law op cit note 149 above, p 255

<sup>165</sup> *Ibid.*

<sup>166</sup> Carvalho op cit note 34 above, pp 36, 69.

<sup>167</sup> Carvalho op cit note 34 above, p 37. The author also suggests that the depressed employee dismissed on this ground will not have the depression addressed in isolation as the focal point would be on the poor work performance.

The latter requires a more extensive assessment before a dismissal can be effected. Carvalheira suggests that the following factors must be ascertained when implementing it. Item 11 of the Disability Code:

"whether the employee is capable of performing the work for which he was employed; if the employee is unable to work and, then the extent of his inability to perform his duties must be determined; whether the employee's duties can be adapted and the employee accommodated, when reasonable, to continue his duties; and finally if the employee cannot be placed in his former position, the employer must ascertain alternative work, even at a reduced salary, if available"<sup>168</sup>.

This approach affords an employee more protection than a dismissal founded on poor performance because the employer is required to reasonably accommodate an employee and a dismissal becomes appropriate when there are no further reasonable steps that the employer can take.<sup>169</sup> The additional benefit of depression being recognised as a disability safeguards the employee against dismissals under the Constitution<sup>170</sup> and affords more protection in the workplace as employers will have to abide by the laws already in place for the protection of employees classified as "disabled".

In the case of *Standard Bank v CCMA*,<sup>171</sup> an employee was dismissed for incapacity which resulted in "high absenteeism and low productivity".<sup>172</sup> The bank started describing her performance as poor as she could not perform even simple tasks due to her injury.<sup>173</sup> This is the case that portrays the overlap between the incapacity on the ground of poor performance and ill-health. The court first addressed that the employee was to be

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<sup>168</sup> Carvalheira op cit note 34 above, p 39. Item 10 of the Code of Dismissal "further states that if an employee is temporary unable to work due to incapacity caused by ill-health, the employer should investigate the extent of the incapacity or the injury; if the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In the case of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability".

<sup>169</sup> Carvalheira op cit note 34 above, pp 39, 40 and 47.

<sup>170</sup> Carvalheira op cit note 34 above, p 68.

<sup>171</sup> *Standard Bank supra*.

<sup>172</sup> *Standard Bank supra*, para 13.

<sup>173</sup> *Standard Bank supra*, para 12.

regarded as a person with disability with the right to equality, dignity and fairness<sup>174</sup>. The court further examined the steps taken by the employer in dealing with the employee's problem and lastly set out the law regarding dismissal due to incapacity<sup>175</sup>.

The court held that the origin of the test for fairness of the dismissal of an employee with disabilities is the Constitution.<sup>176</sup> The court further outlined the LRA four-staged enquiry to be followed for incapacity as :

- (a) "Whether or not the employee with disability is able to perform her work;
- (b) The extent to which the employee is able to perform her work;
- (c) Extent to which it can adapt the employee's work circumstances to accommodate the disability; and
- (d) Enquire if any suitable work is available."<sup>177</sup>

### **2.5.3. Operational Requirements**

Operational requirements relate to circumstances where an employer, due to economic fortunes or change in business ventures, will review its staffing levels, and may sometimes reduce its staff members to allow changes that will result in the employer increasing profits or saving costs which had become cumbersome and redundant. Section 189 of the LRA permits employers to dismiss employees for operational requirements based on economic, technological, structural or similar needs.<sup>178</sup> It will not be appropriate for an employee with depression to be dismissed for operational requirements unless the employer has done all in his or her power to accommodate the employee and is left with no option but to dismiss based on operational reasons.

It is noteworthy to emphasise the statement by Grogan "that retrenchment is self-evidently unfair if the employer seeks to achieve impermissible ends, such as ridding itself of trade

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<sup>174</sup> *Standard Bank* supra, para 15.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Standard Bank* supra, para 60.

<sup>177</sup> Aligned to item 10 of the Code of Dismissal.

<sup>178</sup> Section 213 of the LRA; Grogan *Workplace Law* op cit note 141 above, p 271.

union members or some other automatically unfair objectives, even if dismissal will, objectively speaking have a favourable economic effect".<sup>179</sup> This means employers cannot use this ground to dismiss an employee because of their mental illness.

## 2.6 Conclusion

Christianson suggests that "part of the problem with tackling the issue of disability at work is that, it is generally and inevitable that disability can, indeed, impair an individual's suitability for employment"<sup>180</sup>.

This chapter highlighted that employers need to follow the stipulated procedures<sup>181</sup> and have fair reasons for dismissing employees, and the reasonableness and fairness of their reasons will be tested against the Constitution and the Code of Good Practice.<sup>182</sup>

It would be unfair for employers to dismiss employees with depression simply because their mental impairments affect the workplace without providing the necessary support and accommodation. The dismissals which were discussed above should be effected upon strictly following the fair procedures and reasons, not as a way to get rid of a depressed employee. It was also stated that dismissal should be a last resort.

The employer can only dismiss a disabled employee when there is no prospect of their recovery in time during which the employer can cope without suffering significant loss because of the employee's absence.<sup>183</sup> Item 10 and 11 of the Dismissal Code have provided the guidelines to be followed before dismissal of an incapacitated employee would be an option. The courts have placed emphasis that the duty is on the employer to accommodate an employee with mental conditions and should be considered as a priority

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<sup>179</sup> Grogan *Workplace Law* op cit note 149 above, p 272.

<sup>180</sup> Christianson op cit note 12 above; L Clarke *Discrimination* 2<sup>nd</sup> ed (1995) p 115.

<sup>181</sup> As guidelines are provided in the LRA and in the Code of Good Practice: Dismissal

<sup>182</sup> Schedule 8 of The Code of Good Practice: dismissal generally deals with the key aspects of dismissal for reasons related to conduct and capacity. It provides that a "dismissal is automatically unfair if the reasons for the dismissal is one that amounts to infringement of the fundamental rights of employees and trade unions, or if the reason one of those listed in section 187 of the LRA".

<sup>183</sup> Carvalheira op cit note 34 above, p 39.



before dismissal.<sup>184</sup> It is further submitted that protection of employees suffering from depression is also dependent on the legislation to fully and clearly stipulate the position of depressed employees as they are not fully protected from dismissals and discrimination as illustrated above.

Depression can cause employees to contravene the rules of their employment contract, which might cause them to be victims of dismissal due to misconduct.<sup>185</sup> It has also been evident that productivity for most depressed employees drops, and employees will be dismissed based on poor performance<sup>186</sup> and or incapacity due to ill-health. The law ought to be developed to grant employees with depression adequate protection to avoid further marginalisation and exclusions of employees who suffer from depression.

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<sup>184</sup> In *Strydom v Witzenberg Municipality*, the court held that accommodating an employee with a disability is the primary way of avoiding a dismissal for incapacity. In *Standard Bank v CCMA* incapacity enquiry was preferred to be used instead of disciplinary enquiry and accommodation was ordered for an employee suffering from disability.

<sup>185</sup> As seen with *Jansen supra*.

<sup>186</sup> As seen in *Standard Bank v CCMA*.

## CHAPTER 3:

### Disciplinary vs Incapacity Enquiry and Reasonable Accommodation

#### 3.1. Introduction

Depression as a mental illness that negatively affects the work relations between employee and employer needs to be better defined, cushioned with strategies and procedures that will assist employers when disciplining or dismissing depressed employees. The lack of guidance in this area creates more problems for both employees and employers. The employer is primarily faced with the dilemma of whether depressed employees can be disciplined and worth retaining in their employ, whilst employees with mental illnesses most likely ponder whether it is worthwhile to continue to be at work when exposed to ongoing victimisation through unfair discrimination as a result of the depression. I submit that most persons with mental illnesses, especially depression, struggle to cope and function within an environment that does not make room for reasonable accommodation of the employee.

The case law mostly reveals that most excellent employees who have been diagnosed with depression will either conduct themselves in the workplace in a manner that leads to the employee's behaviour being associated with misconduct, or perform poorly, leading to dismissals on either the ground of misconduct or incapacity.<sup>187</sup> Most employers have chosen the route of subjecting individuals with depression to a disciplinary enquiry instead of incapacity enquiry. This overlapping confusion will be examined in this chapter to illustrate how courts have advocated for the depressed employee to be correctly assessed and, in the process, to shed light on employers who fail to distinguish the difference between the two. These two procedures will be examined in line with the statutory guidelines provided, looking at the appropriate one for employees with disabilities at large and relating it to employees with mental illnesses like depression.

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<sup>187</sup> *Jansen v Legal Aid SA; LS v CCMA; Wylie v Standard Executors and Trustees; Standard Bank of SA v CCMA*; and *Marsland* case.

### 3.2. The Disciplinary Enquiry vs Incapacity Enquiry

The employees' "duty to obey lies at the heart of the employment relationship"<sup>188</sup>. Grogan further states that "obedience implies discipline, discipline implies rules and rules to be effective, imply the power to impose sanctions on those who break the rules".<sup>189</sup> Employers are entitled to maintain order in the workplace otherwise there would be chaos. Therefore, it is essential for employers to have a clear understanding of these guidelines to ensure their right to maintain order and to discipline employees with depression using the most suitable and reasonable approaches for the circumstances of each case in order to ensure fair labour practices are observed.

#### 3.2.1 Disciplinary Enquiry

One of the enlisted grounds that justify an employer terminating the contract of employment of an employee is misconduct.<sup>190</sup> Employees who commit misconduct can be held accountable for their actions. In the disciplinary context, dismissal is considered to be the most severe sanction rendered by an employer to an employee.<sup>191</sup> Through statutory intervention, employers may no longer rely on their power to terminate employment at any stage as the Code of Good Practice now endorses the concept that dismissal should be considered a sanction of last resort.<sup>192</sup>

The Code of Good Practice has highlighted that disciplinary action occurs "when a rule or standard of conduct set by the employer has been breached and there is evidence that the allegation of misconduct has been proven"<sup>193</sup>. The purpose of discipline in the workplace is to ensure that employees contribute effectively and efficiently to the goals of their employers.<sup>194</sup> It is employees who demonstrate, by their conduct, that they are unwilling to comply with the rules and standards set can be fairly dismissed.<sup>195</sup>

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<sup>188</sup> Grogan *Workplace Law* op cit note 149 above, p 129.

<sup>189</sup> Grogan *Workplace Law* op cit note 149 above.

<sup>190</sup> Grogan *Workplace Law* op cit note 149 above, p 201.

<sup>191</sup> Grogan *Workplace Law* op cit note 149 above, p 201.

<sup>192</sup> Grogan *Workplace Law* op cit note 149 above.

<sup>193</sup> Ibid.

<sup>194</sup> Grogan *Workplace Law* op cit note 149 above, p 130.

<sup>195</sup> Grogan *Workplace Law* op cit note 149 above.

Most depressed employees who have been dismissed<sup>196</sup> have been charged for insubordination,<sup>197</sup> absenteeism<sup>198</sup> and poor performance.<sup>199</sup> Grogan states that "any misconduct that renders the continuation of the employment relationship intolerable is regarded as sufficient to justify dismissal, provided it is serious enough to offset the importance which the courts and arbitrators attach to the work security of employees".<sup>200</sup> The critical role of investigation when assessing misconduct of depressed employees cannot be by-passed as it will assist in choosing the correct procedure to be taken, having identified and weighed up whether the reason for breaking the rules can be found to be reasonable and sufficient enough to justify forfeiting the employee's work security.

It has been emphasised that employees with depression will exhibit behavioural misconduct at some point and will be in breach of their expected duty to refrain from misconduct. This is all due to their mental state which makes them unable to discharge the normal duties imposed upon them contractually. In *French and Compuware Corporation Southern Africa*,<sup>201</sup> a commissioner held that dismissal of a salesperson was unfair because he failed to reach his targets not because he planned to or was unwilling but due to circumstances that were beyond his control. This is clearly one of the reasons why an assessment and the investigation of the misconduct becomes necessary in order

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<sup>196</sup> *Marsland, Jansen, Wylie* cases.

<sup>197</sup> In *CWIU and Another v SA Polymer Holdings (Pty) Ltd t/a Megapack* (1996) the Labour Appeal Court defined insubordination as a "willful and serious refusal to obey the lawful and reasonable command, or conduct by the employee which poses a deliberate and serious challenge to the employers' authority".

<sup>198</sup> Grogan *Dismissal* op cit note 149 above. "Employees are expected to be at their workplace during working hours, unless they have an adequate reason to be absent (p 255)". "Willful absence constitutes a breach of contract and may justify termination of employment contract. Even absence beyond the employee's control may constitute a ground of termination when the period of absence becomes unreasonable. However, absenteeism requires fault and those who are absent because they are seriously ill cannot be said to be at fault" (p 256).

<sup>199</sup> Grogan (Workplace law) states that "poor work performance for which the employee is not to blame may arise from variety of causes, including illnesses, the Code requires a proper investigation before the action is taken against an employee for alleged poor work performance" (p 259). This investigation is important because poor work performance may either be categorized as misconduct or incapacity. "Where employees willfully neglect their duties, they can be held accountable for their conduct, and may be charged with misconduct. However, a charge of misconduct is inappropriate when employees cannot be blamed for their defective performance" (pp 260-261).

<sup>200</sup> Grogan *Workplace Law* op cit note 149 above, p 52.

<sup>201</sup> (2003) 24 ILJ 2011 (CCMA).

for the appropriate sanction to be imposed, in a manner that is substantively and procedurally fair<sup>202</sup>.

In the case of *LS v CCMA*<sup>203</sup> disciplinary action was taken against the employee facing charges of misconduct while the employee was incapacitated due to ill-health.<sup>204</sup> “The employee’s performance deteriorated after she experienced a series of personal tragedies”.<sup>205</sup> She sought help from her employer, and she was referred to the staff wellness programme.<sup>206</sup> In a report to the employer, a psychologist recommended long-term therapeutic intervention.<sup>207</sup>

There was a noticeable change in the employee’s productivity,<sup>208</sup> and she was ultimately charged with misconduct.<sup>209</sup> The employer allowed her to be represented at the inquiry, but the employee did not attend personally because she raised the concerns that the case should have been dealt with in terms of the incapacity process.<sup>210</sup> The presiding officer nonetheless found that “the employee had failed to prove the personal circumstances that she sought to rely on to justify her poor work performance; found her guilty on charges of breach of contract, poor work performance and gross insubordination and dismissed her”.<sup>211</sup>

In this case causes of misconduct were not investigated and the employer was not interested in underlying causes which were beyond the control of the employee, but insisted on conducting a disciplinary enquiry for misconduct, whereas in this case the misconduct was due to ill-health of the employee and the employer ought to have treated it as incapacity and adopted the relevant procedure, which is an incapacity enquiry.

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<sup>202</sup> Section 188 of LRA.

<sup>203</sup> (2014) 35 ILJ 2205 (LC).

<sup>204</sup> *LS v CCMA* supra, at 2214.

<sup>205</sup> *LS v CCMA* supra, at 2209.

<sup>206</sup> *LS v CCMA* supra, at 2209 and 2210.

<sup>207</sup> *LS v CCMA* supra.

<sup>208</sup> That is, the inability by the employee to render services according to the employment contract.

<sup>209</sup> *LS v CCMA* supra, at 2214.

<sup>210</sup> *LS v CCMA* supra, at 2215.

<sup>211</sup> *LS v CCMA* supra, at 2217.

The LRA and Code of Good Practice are employee-oriented when the possibility of a dismissal as a result of misconduct is concerned. In the case of depressed employees, however, both these pieces of legislation fall short of being effective because any symptoms of depression experienced in the workplace by the employee cannot be regarded as an intentional contravention of the employment contract, and thus fails to be substantively fair. As a result, the lack of a substantively fair enquiry causes the procedural element to fall away, thereby placing a depressed employee in a compromised position of facing an unfair dismissal in any event.

### 3.2.2. Incapacity Enquiry

Incapacity arising from ill-health or injury is recognised as a legitimate reason for terminating the employment relationship, provided that it is done fairly.<sup>212</sup> Items 10 and 11 of the Code of Good Practice provide the guidelines to be followed by an employer in relation to the incapacity enquiry. Failure to adopt these guidelines will cost the employer dearly. An investigation has been echoed in both these sections. Grogan states that “employers are obliged to investigate both the extent of an employee’s disability and possible ways of adapting the employee’s work to accommodate the employee”.<sup>213</sup>

Grogan states that “incapacitated employees ought to be given an opportunity to say why they should not be dismissed”<sup>214</sup>. He further states that “a pre-termination hearing into incapacity should not take the form of a disciplinary inquiry”.<sup>215</sup> Where the necessary procedural requirements have been satisfied, it is fair to dismiss a sick or injured employee when there are no prospects for recovery where the business of the employer may continue in the sick or injured employee’s absence without suffering any material loss.

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<sup>212</sup> Grogan *Workplace Law* op cit note 149 above, p 285.

<sup>213</sup> Grogan *Workplace Law* op cit note 149 above, p 286; the LAC in *IMATU obo Strydom v Witzenberg Municipality* (2012) held that the requirements are mandatory.

<sup>214</sup> Grogan *Workplace Law* op cit note 149 above, p 269

<sup>215</sup> *ibid.*

There is an importance of understanding the difference between incapacity and disability. He further states that “incapacity suggests that the employee concerned is incapable of performing his or her duties; *disability* suggests that the person may do so with reasonable accommodation and assistance”.<sup>216</sup> The employers usually treat employees with “*uncategorised disabilities*” as poor performers and would therefore discipline them as such, leaving the aspect of disability unaddressed. It is inescapable to shift this blame to the legislation governing labour laws as failing to protect the employees because the overlapping and thin line between these concepts would be cleared by classifying depression as a disability. This would ensure that employees with depression are not treated as poor performers who are incapable, but as persons with disabilities who might perform better with adjusted work conditions and support from their employers.

The courts have relied on the LRA and EEA to protect persons with disabilities in dealing with unfair dismissals or discriminations of people with illnesses that were treated unfairly in the workplace. Although the courts have chosen not to address the *lacunae*, they have been able to inform the employers of their incorrect perspectives and procedures followed thus leading to unfair labour practices and mentioned in passing the most suitable procedure they ought to have taken after examining the circumstances of each case.<sup>217</sup>

In *LS v CCMA*<sup>218</sup>, the presiding commissioner accepted that severe mental distress had affected the employee’s ability to work, but upheld the applicant’s dismissal for misconduct, because there was no independent evidence to support her claim that she was medically unfit to work.<sup>219</sup> On review, the Labour Court accepted that there may be some overlap between misconduct and poor work performance due to incapacity.<sup>220</sup> But that does not mean that an employer is not obliged to follow the guidelines and

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<sup>216</sup> Grogan *Workplace Law* op cit note 149 above, pp 256; This position was endorsed in the case of *Wylie v Standard Executors & Trustees*.

<sup>217</sup> In *Standard Bank of SA v CCMA* (2008) 29 ILJ (LC), the court stated that the dismissals of people with disabilities involve a number of Constitutional rights, including the right to equality, to human dignity, to choose an occupation and to fair labour practices; see also the *Marsland* case.

<sup>218</sup> (2014) 35 ILJ 2205 (LC).

<sup>219</sup> *LS v CCMA* supra, at 2217.

<sup>220</sup> *LS v CCMA* supra, at 2221.

procedures required by the circumstances of each case. This court placed an emphasis on this obligation to follow the prescribed guidelines when dealing with an employee whose illness is negatively impacting work performances.

The court further stated “that if the employer was able to entirely avoid the obligation to investigate incapacity due to ill-health and with it the duty to consider reasonable accommodation and to explore all alternatives to dismissal, by simply choosing to characterise a medically ill employee’s conduct as misconduct, the protections provided by the LRA would be meaningless”.<sup>221</sup> The view of this court was especially important in highlighting that the legislations enacted to protect a group of designated persons should not be downplayed by employers but be given attention in order to provide sufficient protection for the designated persons despite the gaps in the statutory provisions and in the interpretations thereof. A purposive approach in interpretation becomes necessary to achieve the objectives of such statutes even though developments may still be needed to close those identified shortfalls.

The court found that the employer had pursued misconduct proceedings against the employee while aware of the medical condition and her claim that her mental ill-health was affecting her performance.<sup>222</sup> It is illustrated through this case that employers want production and failure to produce regardless of the causes for that failure would expose an employee to risks of being dismissed for poor performance. This approach becomes problematic when an employee who is qualified and was performing and producing good results becomes ill due to mental illnesses like depression and is still subjected to a disciplinary enquiry. This suggests that there is willful neglect of their duties or they intentionally reduce their performance, which is not the case, and as previously stated, a mental impairment is not an intentional contravention of employment rules in most employees with depression.

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<sup>221</sup> *LS v CCMA* supra, at 2217.

<sup>222</sup> *LS v CCMA* supra.



The above cases portray the difficulties experienced by employees suffering from mental illnesses, where most are being subjected to disciplinary enquiries instead of incapacity enquiries which seek to support them rather than dismiss them. The courts have mostly addressed these disputes accordingly by highlighting the duty to accommodate employees with disabilities instead of choosing to dismiss them. A misconduct enquiry has two possible outcomes, that is, either the employee is guilty and dismissed or not guilty and returns to his or her employment position. An incapacity enquiry creates more room for an employee with depression to continue working whilst managing their depression. It cannot be disputed that the latter enquiry is more appropriate because the employee's mental health is attended to and recognised prior to a reasonable accommodation, and therefore should be carried out initially for a depressed employee.

It is my view that the failure to classify depression as a disability creates an impression that employers can choose to associate its symptoms with misconduct or poor performance of an employee which provides room for the employer to discipline and later dismiss the employer without offering any prior support to the employee. If depression is classified as a disability, employers would have a standard route to follow, that is, to reasonably accommodate the employee unless the employer can show that undue hardship will be experienced or the accommodation will be exercised in futility after efforts to do so. Therefore, this is one way which could provide certainty and standardise procedures to be followed by employers, with the exception of cases where misconduct cannot be interlinked or be seen as symptomatic behaviour related to illness.

### **3.3. Reasonable Accommodation**

The concept of reasonable accommodation for people with disabilities is not only applicable to South Africa.<sup>223</sup> There has been a worldwide acceptance that people with disabilities must be supported in the workplace.<sup>224</sup> Most people with mental health problems experience challenges in finding work or returning to work and retaining a job

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<sup>223</sup> Christianson op cit note 12 above, p 174.

<sup>224</sup> Christianson op cit note 12 above, p 174.

after treatment or diagnosis.<sup>225</sup> Viviers has purported in his writings that “depression is a debilitating illness that affects an individual’s ability to secure and retain employment as well as to perform everyday activities outside of the workplace”.<sup>226</sup> Viviers further suggests “that depression has a more significant impact on work performance than other major health concerns, such as diabetes, arthritis and hypertension”,<sup>227</sup> which explains the need for disability to be considered as disability.

In general, employers have a duty to reasonably accommodate employees with disabilities.<sup>228</sup> Reasonable accommodation has been defined as “any modification or adjustment to a job or the working environment that will enable a person to have access to or participate in employment”<sup>229</sup>. The EEA requires “that affirmative action measures taken by a designated employer must include providing reasonable accommodation for people from the designated groups, and these include people with disabilities, to ensure that such persons enjoy equal opportunities and are equitably represented in the workplace of the designated employer”.<sup>230</sup>

The right to employment is enshrined in the Universal Declaration of Human Rights.<sup>231</sup> The State, as signatory of the UDHR, is under the duty to establish and safeguard that equal opportunities are available for people with disabilities and they are not discriminated

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<sup>225</sup> WHO op cit note 35 above, page 4; MC Du Plessis *Access to Work for Disabled Persons in South Africa* (2017) p 1 also reported the statistics recorded by the Integrated National Disability Strategy White Paper to reflect that 99% of persons with disabilities are excluded from the open labour market in South Africa.

<sup>226</sup> Viviers op cit note 9 above, p 53.

<sup>227</sup> Viviers op cit note 9 above, p 54.

<sup>228</sup> Section 5 of the EEA places the duty of an employer to promote equal opportunity in the workplace by abolishing unfair discrimination in any employment policies or practice. Item 11.1 of the EEA Code states that “employees who become disabled during employment should, where reasonable be re-integrated into work. Employers should seek to minimize the impact of the disability on employees”. Item 11.5 of the EEA Code further state that “if reasonable, employers should explore the possibility of offering alternative work, reduced work, or flexible work placement, so that employees are not compelled or encouraged to terminate their employment”.

<sup>229</sup> Section 1 of the EEA; similar to the CRPD definition: reasonable accommodation means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, 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.

<sup>230</sup> Section 15 (2) (c) of the EEA.

<sup>231</sup> Article 23 of the UDHR.

against on the grounds of disability. Many jurisdictions<sup>232</sup> require employers to utilise and engage reasonable accommodation to achieve substantive equality as a preventative measure against discrimination of people with disabilities.<sup>233</sup> Accommodating disability, as an alternative approach, operates and intends to prevent discrimination flowing from employment rules, procedures or standards.<sup>234</sup>

Employers are therefore obliged to investigate the extent of an employee's disability and possible methods of adapting an employee's work and general work environment as a means to accommodate the employee.<sup>235</sup> The procedure is set out in the case of *Standard Bank of South Africa v CCMA* as adapted from Item 11 of the Code of Good Practice as follows:

- (a) "If the incapacity is temporary, how long will it continue?
- (b) To what extent is the employee unable to do the work?
- (c) To what extent can circumstances in which the employee works be adapted to accommodate the disability or, where this is not possible, to what extent can the duties to be performed by an employee be adapted?
- (d) Are there alternatives short of dismissal?
- (e) If adaptation cannot take place and if there are no alternative jobs available, dismissal will be fair provided that a fair process is followed prior to termination of employment."<sup>236</sup>

Item (c) provides "that the adaptation of the employee's work circumstances takes preference over adapting the employee's duties because the employer should, as far as possible, retain the employee within the employment".<sup>237</sup> Item (d), on the other hand, requires the employer to consider factors such as "the nature of the job, the period of

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<sup>232</sup> France, United States, Australia, Canada, and United Kingdom.

<sup>233</sup> *Standard Bank v CCMA* supra, para 77.

<sup>234</sup> *Standard Bank v CCMA* supra, para 77.

<sup>235</sup> Grogan *Workplace Law* op cit note 149 above, p 291.

<sup>236</sup> *Standard v CCMA* supra, paras 71-76.

<sup>237</sup> *Standard v CCMA* supra, para 74.

absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the employee".<sup>238</sup> Item 6.9 of the Disability Code provides examples measures of reasonable accommodation which may be considered by an employer to include, *inter alia*, adjusting working hours and leave, restructuring jobs, counselling and medical treatment, re-arrangement and facilitating of tasks and certain duties could be given to other employees, providing specialised supervision in the employees tasks and responsibilities and giving support.

The court further stated "that when an employer follows a flawed procedure to dismiss a disabled employee, it is impossible to divorce discrimination from the duty to accommodate".<sup>239</sup> The court emphasised that failure to accommodate an employee with disabilities is not "merely unfair but automatically unfair."<sup>240</sup> The court held "that an employer who unreasonably refuses to make any accommodation that falls short of unjustified hardship or refuses to give reasons for not making an accommodation is irrational".<sup>241</sup> This signifies the importance placed on reasonable accommodation of employees with either physical or mental disabilities, unless the employer has a valid defence to raise "unjustifiable hardship", which is a limitation on an employer's obligation to reasonable accommodate a qualified person with disability.

Duppers and Carvalheira submit that in instances where a disability does impair an individual's suitability for employment, the person will generally not be suitable for the job.<sup>242</sup> The challenge is to ensure that an otherwise qualified individual, despite a possible impairment, can be reasonably accommodated and managed in the workplace. The courts have generally applied this aspect in favour of the employee and have warned against unfair treatment to emphasise this duty to employers.

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<sup>238</sup> *Standard v CCMA* supra, para 75.

<sup>239</sup> *Standard Bank* supra, para 147.

<sup>240</sup> *Standard Bank* supra, para 80.

<sup>241</sup> *Standard Bank* supra.

<sup>242</sup> Christianson op cit note 12 above, p 155; Carvalheira op cit note 34 above, p 73.

Reasonable accommodation is beneficial because it prevents absenteeism and unemployment for the depressed employee<sup>243</sup> and it is a way of ensuring that disabled persons with requisite abilities and qualifications for a job are retained.<sup>244</sup> The purpose is to help a person to function productively in the workplace and become self-supporting.<sup>245</sup> In *Kievits Kroon Country Estate v Mmoledi*,<sup>246</sup> the LAC held that:-

“what is required is reasonable accommodation of each other to ensure harmony and to achieve a united society. A paradigm shift is necessary, and one must appreciate the kind of society we live in. Accommodating one another is nothing else but “botho” or Ubuntu” which is part of our heritage as a society”<sup>247</sup>.

This judgment recognised the long-lived values of Ubuntu which are part and parcel of a South African society and have relevance when applying the duty to reasonably accommodate persons with disabilities. This approach is the preferred approach because it supports the human rights approach, which has been adopted by the South African disability movements, which is consistent with the social model of disability.<sup>248</sup>

In the course of reasonable accommodation, employers are not expected to experience undue hardship, and if the depression is caused by the work itself, it is appropriate for the employer to offer alternative or accommodative employment to the depressed employee.<sup>249</sup> The courts have a role in helping to determine the extent of this obligation and be able to state who qualifies for this reasonable accommodation.

Item 6.8 of the Disability Code stipulates that reasonable accommodation may be temporary or permanent and this will depend upon the nature and extent of the disability.

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<sup>243</sup> *Standard Bank supra*, para 90.

<sup>244</sup> Christianson op cit note 12 above, p 174.

<sup>245</sup> Christianson op cit note 12 above, p 174.

<sup>246</sup> (2012) 11 BLLR 1099 (LAC).

<sup>247</sup> Para 26.

<sup>248</sup> Du Plessis op cit note 222 above, p 31.

<sup>249</sup> *Carvalho* op cit note 34 above, p 40 and 80; *Jansen v Legal Aid South Africa* is an example where the depression of the employee was aggravated by the work environment and reasonable accommodation was required.

Item 6.11 further states that employers have no duty to accommodate in circumstances where this would “impose an unjustifiable hardship” upon the employer’s business. The Disability Code defines unjustifiable hardship as “an action that requires significant or considerable difficulty or expense”<sup>250</sup>. The factors to be determined relate to the size and nature of the employer’s activity regarding whether an accommodation is reasonable in a set of circumstances.

The Disability Code states that reasonable accommodation finds application in the enrolment and assortment procedure, the work environment and the manner in which the reasonable accommodation is conducted once the employee in question has disclosed to the employer his or her disability or it becomes obvious to the employer that reasonable accommodation is required.<sup>251</sup> The requirement of reasonable accommodation is not an absolute requirement, it is only required if it is reasonable for the employer to provide it.<sup>252</sup> Accommodations that impose undue hardships on the employers need not be implemented.<sup>253</sup>

In *MEC for Education, KwaZulu Natal v Pillay*,<sup>254</sup> the Constitutional Court stated that “reasonable accommodation requires that an employer to take positive measures, even if it means incurring additional hardship or expenses to ensure that all employees enjoy their right to equality.”<sup>255</sup> The accommodation must be done in the most cost-effective manner,<sup>256</sup> and the aim of the courts is not to punish or unnecessarily burden an employer but places the interests of a disabled employee at the forefront of the employer’s objectives for their employees. This attitude is at the heart of the Constitution, pushing beyond the boundaries of unjustifiable hardships which might be experienced by employers.

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<sup>250</sup> Item 6.12 of the Disability Code.

<sup>251</sup> Carvalheira op cit note 34 above, p 75. Examples include bringing in an expert, adjusting working time and leave, offering support, offering alternative work.

<sup>252</sup> Christianson op cit note 12 above, p 175; Carvalheira op cit note 34 above, pp 90 and 93.

<sup>253</sup> Christianson op cit note 12 above, p 175.

<sup>254</sup> *MEC for Education, KwaZulu-Natal v Pillay* (2008) 1 SA 474 (CC).

<sup>255</sup> *Pillay* supra, para 98; Carvalheira op cit note 34 above, p 75; Section 6.12 of the EEA.

<sup>256</sup> Carvalheira op cit note 34 above, p 76.

In *Hendricks v Mercantile & General Reinsurance*,<sup>257</sup> the applicant was absent from work on numerous occasions on account of illness and the applicant's illness related to stress and depression<sup>258</sup>. The respondent provided counselling services to the applicant<sup>259</sup>. A hearing was conducted and another position in a different environment was proposed to the applicant, where he would be doing similar work without losing any benefits. The applicant refused to accept this offer and was subsequently dismissed on the ground of incapacity<sup>260</sup>. The court held that the "applicant's refusal to accept the alternative position offered to him was unreasonable and the respondent acted fairly in dismissing the applicant"<sup>261</sup>. The courts acknowledge the efforts made by employers and do not encourage abuse of this obligation by employees.

Reasonable accommodation remains pointless if it yields results that are not anti-discriminatory. In *Marsland*, the employee's responsibilities were removed<sup>262</sup> and as a result he felt useless and more discriminated against and marginalised. The duties of the employee were impliedly passed on to someone else and the employee was micromanaged whilst retaining the same employment position.<sup>263</sup> The employee was subjected to a tremendous violation of his dignity<sup>264</sup> and as a result, the employee alleged constructive dismissal. This is one of the unfortunate circumstances where accommodation would be ineffective when the employee with depression feels that continued employment would be intolerable.<sup>265</sup> The attitudes of the employers during

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<sup>257</sup> (1994) ILJ 304 (LAC).

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> Ibid.

<sup>262</sup> This act described as the court "suggested that there was a deliberate strategy to exclude the employee from the work. Taking work from him without a justifiable reason was seen by court as a form of further marginalization and unfair discrimination on the ground of his mental illness and not as reasonable accommodation".

<sup>263</sup> *Marsland* supra, para 13.

<sup>264</sup> *Marsland* supra, para 14; the employee could not eat lunch during normal hours during which other members of staff took their lunch breaks.

<sup>265</sup> *Marsland* supra, para 48.

reasonable accommodation would determine whether the purpose sought by LRA and EEA would prevail.<sup>266</sup>

Again, in *Standard Bank v CCMA*, the employee had a successful career as a mobile home loan consultant with the bank, but became physically disabled in the course of duty, was retained and was later given an alternative job as a paper shredder; which involved picking up heavy boxes of paper and feeding the shredder with paper. This task was previously done by cleaners. The employee felt useless and felt like she was "worth nothing", which impaired her self-esteem.<sup>267</sup> This means that employers ought to provide reasonable accommodation with the purpose in mind,<sup>268</sup> not just as means to tick the boxes<sup>269</sup> to suggest reasonable accommodation has been undertaken. The court highlighted that the employer must ensure that the employee continues to work and not encourage her to terminate her employment,<sup>270</sup> which was sadly the case.<sup>271</sup>

In light of the correct enquiry carried out and reasonable accommodation being implemented where appropriate, the question that remains is whether depressed employees can be disciplined by their employers. Most case law relating to employees with depression have shown that employers have been inclined to discipline employees whose conduct in the workplace is causally linked to the symptoms and consequences of mental illness, conduct such as absenteeism from work, reduced productivity and insubordination. The concern for employers is mostly the question of whether they can

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<sup>266</sup> American cases, *US Airways, Inc v Barnett* 535 US, the court held that a modification or adjustment is reasonable if it seems reasonable on the face of it.

<sup>267</sup> *Standard Bank v CCMA* supra, para 12.

<sup>268</sup> *Standard Bank of SA v CCMA* supra, para 86. "The most appropriate accommodation is one that most respects the dignity of the individual with a disability, meets individual's needs, best promotes integration and full participation and ensures confidentiality".

<sup>269</sup> Item 6.2 of the Technical Assistance Guidelines states "that reasonable accommodation must enable a person with disability to enter a job for which they are suitably qualified, that it must enable the person to advance in existing employment". This means the reasonable accommodation provided to the person must enable them to advance, and not cause more harm to the person accommodated as seen in this case of Ferreira.

<sup>270</sup> The court echoes the same sentiments of section 11.5 of the EEA code, "if reasonable, employers should explore the possibility of offering alternative work, reduced work or flexible work placement, so that employees are not compelled or encouraged to terminate their employment".

<sup>271</sup> *Standard bank of SA v CCMA* supra, para 113-114. Soon after her return to work, discussions about her early retirement began and her seniors urged her to apply for early retirement while she was still motivated and found to be fit to work by her doctor.



successfully discipline an employee who is mentally ill, and in contravention of the employment policies or in breach of contractual obligations. The American Disability Act overcomes this problem by not expecting an employer "to accommodate an employee diagnosed with a mental disability by accepting behaviour that would normally be punished if it were committed by a non-disabled employee".<sup>272</sup>

In *Strydom v Witzenberg Municipality*,<sup>273</sup> the employee made applications to be medically boarded after claiming to be suffering from depression and having been absent from work from March 2005 to March 2006. The medical board rejected his application on the ground that the employee was fit to work, and the employer requested the employee to return to work. The employee, however, refused to return work due to his displeasure in being embroiled in office politics and insisting that his mental illness caused him to be ineligible to continue working. The employer eventually dismissed the employee because of his refusal to return to work despite being declared fit to work. The employee brought the matter before the Labour Court claiming an unfair dismissal since he was now willing to return to work. The court held that the employer acted justifiably because the employee was insubordinate and used his depression as an excuse to avoid coming to work even though ultimately he was fit to work,<sup>274</sup> based on the findings of the medical board and the employee's willingness to return to work once he had been dismissed.

In the recent Australian case of *Western Union Business Solutions (Australia) Pty Ltd v David Robinson*,<sup>275</sup> Robinson was employed by Western Union Business Solutions as a client executive in February 2013. During the period of 2016, he took sick leave and provided several medical certificates such as being unable to work as a result of a "medical condition", related to occupational stressors, and major depressive disorder

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<sup>272</sup> Ibid, pp 224; this allows the employers a room to discipline employees with disability, and not assume that disability status makes them immune to lawful disciplinary procedures.

<sup>273</sup> (2008) 29 ILJ 2947 (LC).

<sup>274</sup> Carvalheira op cit note 34 above, p 103 supports that an employer is justified in disciplining an employee who refuses to accept reasonable accommodation.

<sup>275</sup> *Western Union Business Solutions (Australia) Pty Ltd v David Robinson* [2019] FCAFC 181.

associated with anxiety<sup>276</sup>. As a consequence of the extensive absenteeism, the company terminated his employment contract, and the letter of termination read:

"You have not attended work for a period of 7 months, with 3 of these months constituting unpaid leave. In that time, you have *refused multiple, reasonable attempts* by (the company) to attend an independent assessment by the company's nominated practitioner. Given that you cannot give any indication as to when you are willing to return to work, your *unreasonable failure to cooperate with the company attempts* to obtain up-to-date, specialist medical advice and in light of the company's serious concerns about your capacity to return to work, the company has decided to terminate your employment"<sup>277</sup>.

In the court of first instance, it was held that the reference to his capacity in the letter of termination "can be nothing other than a concern occasioned (at least in part) by the claimed psychiatric condition". There were no other possible reasons causing his incapacity to return to work other than his mental disability, as claimed, and the court held that reason "could not be severed from that disability"<sup>278</sup>. Therefore, Robinson dismissal was found to closely linked to his mental disability, which breaches the Fair Work Act, 2009 and was awarded \$140 000, 00 in compensation.

The company appealed the decision and the full court critically evaluated and accepted the evidence argued by the company. There was an unanimous finding by the court that the 'serious concerns' mentioned in the termination letter related to Robinson failing to attend work for seven months, refusing to submit himself for independent medical assessments on various occasions and showed no initiative towards returning to work<sup>279</sup> and his refusal to be assessed or supported led the company to doubt that Robinson would return to work in the future.

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<sup>276</sup> C Ni, "Full Federal Court hands down landmark adverse action dismissal decision relating to disability" [www.mst.com.au](http://www.mst.com.au), accessed on 12 June 2020.

<sup>277</sup> Ibid.

<sup>278</sup> Ibid.

<sup>279</sup> Ibid.

The full bench of the court also criticised the findings of the court of first instance by suggesting an inaccurate assumption that "Robinson's incapacity to work was caused by an underlying mental condition and then deviated to reason that the incapacity must be part of the mental condition and the company acted because of the mental condition"<sup>280</sup>.

This case highlights, in my view, despite the fact that legislation mostly protect the employees from disciplinary action that are unfairly executed against an employee suffering from a mental illness, it can be done lawfully & successfully in cases where employees use their illness as an excuse to avoid compliance to work rules.

This case further highlights that even though it may be difficult to discipline employees who suffer from disability or any form of mental illnesses, it is possible to separate their mental disability from their misconduct that is not related to their illness. This may need to be proven and supported by sufficient evidence to convince the courts that dismissal is not on the prohibited ground of disability. In the case above, the employer proved that means to support the employee were rejected by the employee and there was no co-operation from the employee showing interest in retaining the job. This was a consequence which is unique from cases where employees would have submitted medical certificates, informed their employers of the inability to cope due to their mental state but were ignored. The efforts of the employer were considered to be sufficient enough to constitute a lawful dismissal.

In conclusion, a little consideration for employees with mental illnesses proves to benefit the relationship between employees and employers and may prevent arduous court cases. Reasonable accommodation further assists the employees with depression to cope better than those who will experience further deterioration of health in cases where they are excluded and dismissed. The courts have further supported the view that employers ought to reasonably accommodate employees with mental illness as contemplated in section 6 of the Code of Good Practice of the EEA.

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<sup>280</sup> Ibid.

### 3.4. Comparative Law

In the United States, research shows that depression as a mental illness continues to increase and affects at least ten percent of working adults, which results in a loss of roughly 200 million working days per year.<sup>281</sup> The impact on depressed employees also results in early retirement through the acceptance of disability packages by employees, which contributes to the financial loss experienced by the country on a yearly basis.<sup>282</sup> Carvalheira notes that although the number of employees diagnosed with depression in South Africa is not nearly as high as that in the United States, it is however the highest rate in Africa.<sup>283</sup>

In other countries such as the United States, depression is considered a disability even though the mental illness may be temporary, but as an episodic disability, it is likely to resurface multiple times in a person's lifetime,<sup>284</sup> and thus, it becomes imperative for the mental illness to fall within a sphere of collective shortcomings that a person faces instead of remaining uncategorised for the future.

What is commendable about countries such as the United Kingdom and the United States is that legislation has been enacted for disabilities specifically, that must be consulted when faced with inconsistencies or emerging concepts that are novel to the country. The United Kingdom has the Disability Discrimination Act of 1995 (DDA) that provides that any discrimination, direct or indirect, is not allowed against disabled persons on the ground of disability and that an employer must take steps to reasonably accommodate or adjust the work environment for a disabled employee.<sup>285</sup> The DDA defines a disability as "a physical or mental impairment that has a substantial long-term adverse effect on their ability to carry out normal day-to-day activities"<sup>286</sup> and this definition has been confirmed

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<sup>281</sup> Carvalheira op cit note 34 above, p 27.

<sup>282</sup> Carvalheira op cit note 34 above.

<sup>283</sup> Carvalheira op cit note 34 above, p 29.

<sup>284</sup> Carvalheira op cit note 34 above, pp 63, 78 and 82.

<sup>285</sup> Carvalheira op cit note 34 above, p 65.

<sup>286</sup> Carvalheira op cit note 34 above, p 65.

to include depression as held by *English Tribunals in Heathrow Express Operating Company Ltd v Jenkins*<sup>287</sup> case.

The United States' American Disability Act echoes reasonable accommodation for disabled employees.<sup>288</sup> To avoid any definitions with far-reaching consequences that could not have been possibly intended by the legislature, the WHO resolved that depression could be a disability where a person diagnosed with depression continues to suffer from the illness and receive medication or treatment for it for any period starting from six months to over two years, and thereby meeting the "long-term" requirement for a disability.<sup>289</sup>

The ADA defines reasonable accommodation as "making existing facilities used by employees readily accessible to and usable by individuals with disabilities, job restructuring, part time or modified work schedules, reassignment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodation for individuals with disabilities".<sup>290</sup> In totality, the ADA provides protection which both the employer and employee can rely on for guidelines and protection<sup>291</sup> and it can serve as a useful guide for the legislature in developing the EEA or the Disability Code to extend protection to depressed employees.

Viviers advances that employers in the United States have experienced challenges in accommodating mental disabilities, primarily because employees with mental health conditions usually exhibit behaviours that violate the workplace code of conduct.<sup>292</sup> This challenge faces South Africa as well, which might demand more specific legislation to be put in place to address the issue in a manner that fits South Africa's context.

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<sup>287</sup> UKEAT/0497/06/MAA.

<sup>288</sup> Carvalheira op cit note 34 above, pp 75, 84.

<sup>289</sup> Carvalheira op cit note 34 above, pp 65, 88.

<sup>290</sup> ADA, Section 12111(9)(b).

<sup>291</sup> Carvalheira op cit note 34 above, p 95.

<sup>292</sup> Viviers op cit note 9 above, p 223.

Carvalheira notes that the ADA provides examples of what would constitute "reasonable accommodation" whilst the LRA and EEA fall short of this relatively helpful concept,<sup>293</sup> and this development is especially necessary in the South African context because it comes to the aid of employers once the more suitable enquiry has been conducted, and the employer is not left with the burden of creating inventive methods of reasonable accommodation for a depressed employee.

### **3.5. Conclusion**

Comparative law of other countries should be considered for the development of various aspects of the legislation in South Africa towards classifying depression as a disability, especially the ADA as it is the most extensive instrument that deals with disabilities in isolation, and this is an approach that the courts should lean towards for the benefit of depressed employees taking into consideration that the reasonable accommodation is not burdensome to the employer as they are not obliged to accommodate employees where such accommodation would impose an unjustifiable hardship on the business of the employers.

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<sup>293</sup> Carvalheira op cit note 34 above, pp 97, 111.

## **CHAPTER 4**

### **CRITICAL ANALYSIS OF THE LABOUR COURT AND LABOUR APPEAL COURT IN *JANSEN v LEGAL AID SOUTH AFRICA***

#### **4.1 Introduction**

The rising number of people diagnosed with depression has necessitated guidelines on how depression and its impact on work productivity are to be handled in the workplace. As discussed previously, countries such as the United States, Canada and the United Kingdom have taken steps to be accommodative in their respective labour laws of employees suffering from depression. It follows, therefore, that South African employment law also needs a proper classification of depression as a mental illness and the consequences or progressive steps to be taken to support employees medically or clinically recognised as depressed.

In this chapter, there will be an in-depth and comprehensive analysis of whether depression falls within the ambit of a disability through the recent Labour Court judgment in *Jansen v Legal Aid South Africa* and the appeal decision handed down by the Labour Appeal Court.

#### **4.2 Relevant Facts**

Ockert Jansen, herein and thereafter referred to as “Jansen”, was employed as a paralegal by Legal Aid South Africa, herein and thereafter referred to as the “Legal Aid” from 2 March 2007 to 24 February 2014.<sup>294</sup> In early 2010, Jansen was first diagnosed to suffer from depression,<sup>295</sup> and Jansen submitted this information to Legal Aid and he

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<sup>294</sup> (JA121/2014) [2018] ZALCCT 17; (2018) 39 ILJ 2024 (LC) (16 May 2018), Paras 3 and 5.

<sup>295</sup> Para 10.

thereafter requested to be placed on the Legal Aid's wellness programme.<sup>296</sup> Jansen was later diagnosed with major depression and subsequently in 2011 he was diagnosed with depression and high anxiety<sup>297</sup> and later diagnosed with manic depression.<sup>298</sup>

Sometime in 2012, Jansen, in his personal life, was also going through a divorce with his wife. He discovered at the divorce proceedings that she was being represented by his manager, and his manager had failed to disclose this fact to Jansen despite company policy requiring him to do so.<sup>299</sup> According to Jansen, this further aggravated his mental state as he felt betrayed and regarded it as a conflict of interest.<sup>300</sup>

In 2012, Jansen advised his employer of his mental condition and diagnosis by submitting his medical report from his psychologists.<sup>301</sup> Jansen was regularly absent from work including for a period of approximately 17 working days.<sup>302</sup> In light of this absenteeism, Legal Aid served Jansen with a notice for a disciplinary enquiry in late 2013,<sup>303</sup> where he was also charged with erratic and rebellious behaviour towards Legal Aid, as well as insubordination.<sup>304</sup>

Jansen was charged with misconduct and his justification that his behaviour was caused by his mental illness was rejected on the basis that he did not have enough medical evidence corroborating his mental illness as he alleged.<sup>305</sup> At this enquiry, medical reports were disregarded and there was no assessment conducted regarding the capacity of Jansen to carry out his employment duties and responsibilities. On the 24<sup>th</sup> of February 2014, Jansen was dismissed for misconduct. The above-mentioned facts were common cause in the appeal before the Labour Appeal Court.

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<sup>296</sup> Paras 10 and 11.

<sup>297</sup> Para 12.

<sup>298</sup> Para 24.

<sup>299</sup> Para 14.

<sup>300</sup> Para 15.

<sup>301</sup> Para 17.

<sup>302</sup> Paras 3 and 19.

<sup>303</sup> Paras 3 and 25.

<sup>304</sup> Ibid.

<sup>305</sup> Paras 30, 31, 32.



Jansen approached the Labour Court on two claims, namely:

1. "An automatically unfair dismissal claim in terms of section 187(1)(f) of the LRA. The Applicant alleged that the conclusive reasoning for his dismissal was that the Respondent unfairly discriminated against him on the ground of disability and/or an analogous arbitrary ground and;
2. An unfair discrimination claim under section 6 of the EEA. The Applicant alleged that the Respondent unfairly discriminated against him on the ground of disability or on an analogous arbitrary ground".

#### **4.2.1 Findings as Per Mthombeni J in the Labour Court**

The Labour Court found that Jansen's depression was the motivating factor for his dismissal<sup>306</sup> and thus in doing so, Legal Aid unfairly discriminated against Jansen on account of his mental illness which violates both the LRA and the EEA.<sup>307</sup> Legal Aid was aware of the mental state of Jansen and had regarded his depression as a disability.<sup>308</sup> Legal Aid therefore should have taken steps to accommodate him, first, by conducting an incapacity enquiry to determine wherein his responsibilities does he fall short in carrying out his duties<sup>309</sup> and secondly, the measures that Legal Aid could reasonably take to assist Jansen to continue working as he had previously done prior to the disability.<sup>310</sup>

However, in reference to the definition of disability in the EEA, the Labour Court found that the Jansen's condition was inconsistent with the aforesaid definition,<sup>311</sup> even though there was no elaboration on which aspect the inconsistency arose. Mthombeni reasoned that the dissection of Jansen's condition was not required to be followed strictly for the

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<sup>306</sup> Paras 39, 50 and 51.

<sup>307</sup> Para 46.

<sup>308</sup> Para 43.

<sup>309</sup> Ibid.

<sup>310</sup> Para 43.

<sup>311</sup> Para 44

definition of disability where it was evident that the employee suffered from a disability, and this dictum relied upon was advanced from the *Marsland* judgment.<sup>312</sup>

The court found that “because the Applicant’s dismissal was automatically unfair in terms of section 187(1)(f) of the LRA, it would fall within the ambit of an unfair discrimination claim in terms of section 6 of the EEA”<sup>313</sup>. Jansen was successful in both of his claims before the Labour Court and the following order was made:

1. The Applicant is reinstated with retrospective effect.
2. 6 months’ compensation calculated at the rate from the date of dismissal.
3. Costs on a party and party scale.<sup>314</sup>

#### **4.2.2. Findings of the Labour Appeal Court**

In the appeal case of *Legal Aid South Africa v Jansen*<sup>315</sup>, Murphy AJA stated the issue on Appeal was whether Jansen “was in fact dismissed for misconduct and failed to show that he was dismissed as a results of any medical condition or that there was any causal link between his depression and the misconduct which led to the dismissal”.<sup>316</sup> In addition, the court raised the issue of unfair discrimination would be determined by establishing whether there was a credible possibility that Jansen was subjected to differential treatment on the prohibited ground of depression.<sup>317</sup>

The court found that Jansen conceded to the alleged misconduct to which he was charged, however, he argued that the misconduct he committed was a result of the depression which he was suffering and had communicated to Legal Aid on numerous

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<sup>312</sup> Para 45.

<sup>313</sup> Para 59.

<sup>314</sup> Para 68.

<sup>315</sup> [2020]11 BLLR 1103 LAC

<sup>316</sup> *Ibid*, para 2

<sup>317</sup> Para 37

occasions between 2010 and 2013.<sup>318</sup> In light of the justification ground raised by Jansen, the court held that Jansen had the onerous burden of showing a link of causation between the misconduct he committed and the medical condition of depression that he raised as a primary reason for the misconduct.<sup>319</sup>

In the court's analysis of depression, it was held that depression should be viewed as a category of ill-health and the guidelines and directives in relation to dismissals for ill-health as contained in the Code of Good Practice in schedule 8 of the LRA become applicable.<sup>320</sup> The court thereafter described depression that is likely to permanently impair work performance as a disability and noted in passing that an employer that is faced with such an employee should undertake to reasonably accommodate the employee prior to engaging to dismissal proceedings.<sup>321</sup>

In the analysis where depression and misconduct intertwine, the court held that an employee should be assessed whether he was able to appreciate the misconduct committed under the depression or whether the depression overwhelmed the employee to an extent that he was unable to appreciate the misconduct committed in the workplace<sup>322</sup>. Once it is clear whether the depression of the employee significantly impacted the misconduct, the court held that an employer may consider the depression, like all other mental difficulties, as a mitigating factor for the sanction to imposed the employee for the misconduct.<sup>323</sup>

In evaluating the evidence produced, the court found that Jansen was indeed depressed however there was no causal link between the depression he suffered and the misconduct

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<sup>318</sup> Par 38-39

<sup>319</sup> Par 39; para 44

<sup>320</sup> Para 41

<sup>321</sup> *ibid*

<sup>322</sup> Para 42

<sup>323</sup> Para 43

committed and could not be considered as a person who was “wholly incapacitated by the depression.”<sup>324</sup> The court found that the dismissal by Legal Aid was a fair sanction for the misconduct committed by Jansen<sup>325</sup>, the appeal was upheld by the court and concurred by the presiding officers.<sup>326</sup>

#### **4.3. Critical Analysis of the Conduct of the Employee**

Jansen was a typical clinical case of enduring life under the inevitable plight of depression and his conduct at his workplace was indicative of someone who was unable to complete daily functions during the periods that medical professionals had diagnosed him with depression and such conduct could have been deemed to be out of character for Jansen.<sup>327</sup> During his employment with Legal Aid as a paralegal, Jansen was known to be an outstanding employee and was even appointed as the ambassador of Legal Aid. However, from 2010, and when he had brought it to his doctor's attention that he was not feeling well, the doctor probed further into the mental psyche of Jansen and was able to diagnose him with major depression.

Jansen furnished Legal Aid with the medical certificate and requested he be placed on the Legal Aid's wellness programme in an effort to alleviate and manage his depression. Jansen's conduct thus far in my view, is commendable, taking into the account the stigma surrounding the disclosure of a mental illness in the workplace, and depression in its entirety. Jansen disclosed his diagnosis to Legal Aid after early detection, an uncommon action amongst depressed employees, who are usually overwhelmed by the stigma and discrimination associated with depression in the workplace.

Jansen attended Legal Aid's wellness programme with a social worker in order to find ways to manage his depression and be able to carry out his tasks at work, and it is also worth noting that Jansen was also prescribed anti-depressants. It is undisputable that

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<sup>324</sup> Para 45- 56

<sup>325</sup> Para 46 - 48

<sup>326</sup> Para 53.

<sup>327</sup> Carvalheira op cit note 34 above, p 23.

Jansen's escalating depression to the point of dismissal for misconduct stemmed from the Legal Aid's involvement in the Jansen's divorce proceedings in 2012.

Jansen considered the conduct to be a betrayal and conflict of interest since the person concerned failed to disclose his interest in the Jansen's domestic life, as required by the policy of Legal Ai. Jansen continued to see a psychologist who recommended that Legal Aid needed to address the conflict of interest and resolve the matter so that Jansen was provided with a favourable work environment. Upon this recommendation, Jansen made several attempts to meet with Legal Aid<sup>328</sup> but his efforts were futile and Legal Aid did not make any effort towards implementing the psychologist's recommendations.

Jansen continued to see psychologists, but his overall medical state only grew worse, and as a consequence, he became disengaged and lost interest in his work. He found the work environment to be one of the major stressors that aggravated his depression, and he began to be absent from work and locked himself up for a number of days with the intent of managing and reducing the depression that had seemingly clung to his life.

He faced further turmoil in his personal life relating to the financial and general maintenance of his children, and the experience of having to see his children struggle when he was unable to provide for them only added to his depressed state.<sup>329</sup> When Jansen reported back to work after being absent for 17 days and explaining to the Legal Aid that the work environment had caused him to be unable to work, Legal Aid dismissed the mental health of Jansen and proceeded to comment on company policy that the absenteeism would be construed to be unpaid leave.<sup>330</sup>

Shortly thereafter, Hansen received notice for a misconduct enquiry, during which period he was consulting with a psychologist. The psychologist recommended that Jansen be placed on sick leave to help him manage his depression, and this recommendation was forwarded to Legal Aid. Jansen applied for sick leave as recommended but Legal Aid replied that he still had sufficient leave days that he could exercise if he wanted to take

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<sup>328</sup> Specifically, the Applicant's manager who had been involved in the divorce proceedings.

<sup>329</sup> Paras 20, 21 and 23.

<sup>330</sup> Para 23.

leave. At this point in time, Jansen's depression had worsened so much over the years that he was on anti-depressants and took sleeping medication and could not function at all in the workplace to carry out his duties. Legal Aid did not comment or respond to the recommendations but proceeded with the misconduct enquiry that inevitably led to Jansen's dismissal in 2014.

At the time of the current proceedings, Jansen had become homeless and had not been able to secure other employment since the dismissal by Legal Aid.<sup>331</sup> The dismissal also had an impact on his children, and their struggles only made his depression worse.<sup>332</sup> It is clear that the Jansen was a person who did want to get better and continue to advance in his career. Jansen's depression was diagnosed four years prior to his dismissal, and he did not withhold this information from Legal Aid but disclosed it almost immediately so that Legal Aid would offer support and assistance to in ensuring that Jansen's medical condition did not result in lower productivity by him.

Jansen went to great lengths to curb and manage his depression in the hopes that it would not make a noticeable impact on his career and work environment. Despite his efforts, he was subjected to differential treatment from Legal Aid that degraded his human dignity to extreme lengths that were not necessary. Therefore, by disclosing his mental illness and requesting assistance from Legal Aid, Jansen had conducted himself in an acceptable manner in his attempt to deal with the depression, even though it would be Legal Aid who would cause his eventual downfall.

#### **4.4 Critical Analysis of the Conduct of the Employer**

It is the object of the LRA that the act of dismissal may be taken by an employer only as a last resort,<sup>333</sup> and in this case simply Legal Aid gave Jansen notice for a disciplinary enquiry, where his medical certificates were rejected as authentic evidence and he was summarily dismissed. From the facts of the case, there is no evidence that Legal Aid had taken any measures to address the Jansen's conduct and productivity prior to the

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<sup>331</sup> Para 35.

<sup>332</sup> Ibid.

<sup>333</sup> Carvalheira op cit note 34 above, p 37; Schedule 8 of the Code of Good Practice: Dismissals.

dismissal. The facts show instead that he was subject to being privy to Legal Aid his personal turmoil and received a final warning for his absenteeism. The conduct of Legal Aid was not only discriminatory against Jansen, but no attention was given to the LRA or the Code of Good Practice regarding dismissals being the last resort where the employer cannot retain an employee who cannot perform.

The misconduct enquiry conducted against Jansen was for no reason other than to question the Applicant on his absenteeism, which led to his dismissal. His absenteeism cannot be categorised as “unreasonably long”<sup>334</sup> to the extent of Jansen deserving to be dismissed, and thus Legal Aid failed to explore other measures that could have been adapted for him. The paramount requirement for a dismissal for misconduct is that the employee intentionally and deliberately breaches the terms of the employment contract.<sup>335</sup> Legal Aid did not produce any evidence that he breached any employment rules that would warrant a dismissal, and thus the dismissal on its own was an incorrect decision taken by Legal Aid.

The overall conduct of Legal Aid played an intricate role in the deteriorating mental state of Jansen. Legal Aid offered very little support to Jansen despite his disclosing to and updating Legal Aid on his mental health on numerous occasions. Legal Aid failed to consider the recommendations of health professionals when it came to the health and productivity of Jansen. The eventual dismissal of Jansen, when considered in isolation, was conduct that Legal Aid cannot deny had diminished Jansen’s human dignity, even more so since it was founded on Legal Aid’s indignation towards the Jansen’s absenteeism.

Sometime in 2013, Legal Aid gave out performance incentives to employees such as bonuses and salary increases but Jansen was not a recipient because he had received a final written warning the previous year. Legal Aid did not adduce any evidence as to what the written warning was for nor created a causal link between the written warning and the deprivation of the performance bonus and salary increase. The conduct of Legal

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<sup>334</sup> Carvalheira op cit note 34 above, pp 41 and 50.

<sup>335</sup> Carvalheira op cit note 34 above, pp 47, 48 and 51.

Aid for both actions, that is, the deprivation of work incentives and being given a written warning, were both discriminatory in nature towards Legal Aid, which caused his dignity to be categorically violated before his colleagues.

The findings of the court that Legal Aid was unfairly discriminatory towards Jansen in terms of section 6 of the EEA as a result of Jansen's depression were indeed an accurate judgment by the Labour Court. The Labour Appeal Court did not elaborate on the unfair discrimination as the court had found that the dismissal was fair. Legal Aid had wielded its bargaining power against Jansen in such an antagonistic manner that any justification for it would be rendered moot. Furthermore, the Labour Court found "that the dismissal was an automatically unfair one in terms of section 187(1)(f) of the LRA", and it is evident that the Respondent's conduct was in direct contravention of the Code of Good Practice contained in the LRA and EEA respectively.

#### **4.5. Critical Analysis of the Labour Court**

Over the last few years, the Labour Courts have had opportunities to address the issue or impact of depression in the workplace,<sup>336</sup> and the interpretations of these courts however, have been different and in many instances either avoided classifying depression as a disability or accepted that it falls within the definition of the EEA, but failed to make an order alongside the findings that the employee's depression is a disability.<sup>337</sup> Mthombeni likewise, had opportunity to bring clarity and certainty on the issue, especially now as previous case law was decided when the illness of depression was still relatively low. In recent times, depression is so frequent in the workplace that clarity from the courts is more than necessary for its classification for current employment law and going forward.<sup>338</sup> The classification of depression as a disability has been advocated for many reasons, including elimination of socio-economic exclusion of people with disabilities; as the tool to ensure their right to equality is not infringed; to prevent unfair discrimination

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<sup>336</sup> *New Way Motors v Marsland*; *Strydom v Witzenberg Municipality*; *Public Servants Association of SA obo De Bruyn v Minister of Safety and Security*; *Carvalho* op cit note 34 above, p 68.

<sup>337</sup> *Ibid.*

<sup>338</sup> *Carvalho* op cit note 34 above, pp 8 and 31.



and dismissals. Currently in South Africa, people need to await for courts to interpret and determine whether they qualify to fall within the disability status in order to be afforded full protection, and this is more so for those who suffer from mental illnesses like depression, which makes it more crucial for legislation to provide clear guidelines on management of employees with depression in the workplace.

The findings that Mthombeni made chastised the Respondent for failing to conduct an incapacity enquiry about the Applicant and thereby ordered the re-instatement of the Applicant with retrospective effect. The judgment itself is flawed in that the Labour Court once again managed to avoid providing guidelines for an employer, which would later be adopted by the legislature, on dealing with employees suffering from depression<sup>339</sup> and the court order in favour of the Applicant does nothing more than send the Applicant back to the destructive and inattentive work environment that had led to his automatically unfair dismissal in the first place.

One of the issues with the topic of possibly classifying depression as a disability that comes before the Labour Courts is that there is insufficient information regarding the definition of a disability in terms of the EEA and the Disability Code. This issue arose once again before Mthombeni, who found that the Applicant's depression constituted a disability, and this was readily accepted and advanced by the Respondent in justifying the dismissal,<sup>340</sup> but in the same breath when assessing the evidence before him, Mthombeni found that the Applicant's depression did not fit into the definition of a disability in terms of the EEA and thus could not be classified as such. Mthombeni thereafter relied on the *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland* judgment that there is no need for a strict assessment of whether an impairment falls into the definition of a disability where the employee has suffered greatly due to the conduct of the employer. The Labour Court remains unclear as it has been in previous cases, and this lacklustre approach from the courts should not be allowed to continue in this manner.

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<sup>339</sup> Carvalheira op cit note 34 above, pp 31, also supports this view that the issue regarding depression remains ambiguous in our law, the stigma is not addressed.

<sup>340</sup> Paras 43, 57 and 58.

It is unlikely that this case could be appealed by either parties because, first, the Applicant was able to present a successful case of an automatically unfair dismissal, the primary relief sought by the Applicant did not require an interpretation of his depression as a disability, but such an onus rested on the court itself considering the facts of the case and the urgent need for this area in employment law to be transparent and clear for all employers. Secondly, the Respondent was aware that its conduct towards the Applicant fell short of good practice, especially when it had categorised the Applicant's depression as a disability and failed to accommodate the Applicant. Therefore, the Labour Court missed another opportunity to develop the law and perhaps put proverbial meat into the currently skeletal Disability Code regarding depression.

The court found in favour of the Applicant and made an order for the Respondent to reinstate the Applicant with retrospective effect as he had fallen victim to an automatically unfair dismissal. Mthombeni also ordered compensation in favour of the Applicant that would serve as a deterrent to the Respondent in future from the conduct that had taken place in failing to reasonably accommodate the Applicant. This order is problematic in itself because, at the time of proceedings, the Applicant's overall health had deteriorated and the court did not exercise any discretion in obliging the Respondent to reinstate the Applicant. Before doing so, the Respondent should have conducted an incapacity enquiry so that the Respondent could take steps to reasonably accommodate the Applicant. The consequence is that the Applicant was placed in the exact same position that had aggravated his depression prior to his dismissal, and the Respondent was only financially burdened to compensate the Applicant for failure to exercise good practice instead of outlining what is expected of an employer whose employee suffers from depression.

This case is conclusive proof that South Africa still has a long journey to undertake in employment law to accommodate depression as an incoming and fast-approaching impediment in the workplace. No matter the amount of preparation by employers, it cannot be avoided and thus, the clarity that the legislature has not been able to provide should have at least been supplemented by the Labour Courts by this time. Perhaps once

presented with an opportunity to do so, the Labour Courts will seek to close in the gap created by this *lacuna* in the law.

#### **4.6. Critical Analysis of the Labour Appeal Court**

Legal Aid appealed the decision of the Labour Court, thereby giving the courts another opportunity to provide guidance for employers on how to navigate employment hindrances where an employee has been diagnosed with depression and this has been brought to the attention of the employer, either expressly or by conduct.<sup>341</sup> The findings of the Labour Appeal Court were on the basis that the employee had failed to show a direct causal link of the depression suffered as a justification for the counts of misconduct raised against him at the disciplinary proceedings. It is evident from the judgment of the Labour Court that the importance of establishing a causal link where a justification ground was raised was overlooked and the Appeal Court was able to bridge the gap for future misconduct proceedings before any Labour Court.

With regards to addressing the depression of the employee, the Appeal Court made contradictory remarks which have not evolved the impact on depression in the workplace. Initially, Murphy AJA explained that depression in the workplace should be viewed as a form of ill health and the employer may take steps to terminate the employment of the employee who suffers from depression where the depression is of an incapacitating nature provided that the termination of employment is in accordance with Items 10 and 11 of the Code of Good Practice: Dismissal.<sup>342</sup> The court further stated that where the depression is of a temporary nature, the employer may seek other measures short of

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<sup>341</sup> This would be the case in the instance of the present case where the employer disregarded medical certificates and was aware that the conduct of the employee was largely influenced by his struggle with depression.

<sup>342</sup> Para 41.

dismissal, thereby suggesting that an employee suffering or experiencing a wave of depression is a form of breach of employment conditions on its own.<sup>343</sup>

Where the depression has a strong likelihood to permanently affect the employee's work performance, the Appeal Court held that the depression in such an instance amounts to a disability and the employer is required to reasonably accommodate the employee.<sup>344</sup> This reasoning provides that depression does count as a form of disability where the depression affects the work performance of the employee, therefore the courts have suggested that the classification of depression as a disability will depend on the facts of each case.<sup>345</sup>

The court discussed further on the issue of causation that two outcomes may be taken by an employer where an employee has committed misconduct and raise depression as a justification ground. First, the court assessed whether the employee is able to understand and appreciate his misconduct in light of the depression and where the evaluation is concluded in the affirmative, the employer may take action against the employee for reasons relating to incapacity or operational requirements instead of misconduct.<sup>346</sup> Secondly, if the employee is able to appreciate his misconduct and the depression does not negate the misconduct, the court found that an employer may take an appropriate sanction in terms of the misconduct committed.<sup>347</sup>

From the above, the Appeal Court has advanced employer-friendly guidelines providing the various ways that an employer may assess the depression of an employee and suggested that an appropriate response may be short of dismissal or dismissal itself on any of the grounds listed in the Code of Good Practice: Dismissal. The only finding relating

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<sup>343</sup> Ibid.

<sup>344</sup> Para 41

<sup>345</sup> Para 40 and 41.

<sup>346</sup> Para 42

<sup>347</sup> Ibid.

to reasonable accommodation is provided where the depression in isolation may appear to permanently interfere with the employee's work performance, and such depression may be treated as a disability. Therefore, the Labour Appeal Court has provided an underwhelming judgment or views relating to depression and mental health in the workplace despite taking cognisance of the prevalence of the medical condition in the present day.

#### **4.7. Prior Case Law Relating to this Issue**

In the case of *Public Servants Association of SA obo De Bruyn v Minister of Safety and Security*,<sup>348</sup> the employee submitted an application to the employer for incapacity leave due to ill-health after he had been booked off for depression for a period of 180 days between February 2005 and March 2006. The basis of the employee's application was that the depression and post-traumatic stress disorder (PTSD) arising out of the work he had been doing since he began working for the employer had rendered him incapable of performing his duties.<sup>349</sup> The employer rejected the application on the grounds that the depression with PTSD was not an incapacity that impeded him from working.

The evidence of this case shows that the employer correctly conducted an incapacity enquiry on the employee and found that the employee was able to continue his duties without an accommodation required, and despite his unreasonably long absence from work, the employer did not dismiss the employee. The correctness of the decision is not one to be challenged but is indicative that the employer considered the depression of the employee to be a disability, and this was not challenged by the court as it fell outside of the scope of the appeal. It is evident, then, that depression should be categorised as a disability in terms of the EEA to provide guidance for employers everywhere on how to accommodate the mental illness in the workplace.

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<sup>348</sup> (2012) 9 BLLR 888 (LAC).

<sup>349</sup> *Supra*, para 7.

In the case of *Strydom v Witzenberg Municipality*,<sup>350</sup> the employee submitted an application to be medically boarded due to depression as he was unfit to work but the application was rejected and it was found that the employee was indeed fit to work but he failed to return to work and perform his duties. Thereafter, the employer held an incapacity enquiry for the employee and he was accordingly dismissed. Judge Pillay emphasised that dismissal ought to be used as a last resort, even where an employee is found to be unable to work due to an incapacity,<sup>351</sup> and thereafter classified depression as a disability and stated that an employer ought to conduct an incapacity enquiry for an employee such as Strydom as one who has a disability.<sup>352</sup>

The *Strydom* judgment is one of the few early cases that were able to reach the correct conclusion that depression should be treated as a disability in the workplace. However, the recent case of *Jansen* is obvious evidence that this judgment has not been followed even though it supports the changes that the EEA desperately needs to improve upon the disability laws.

In *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*,<sup>353</sup> the Labour Appeal court had yet another opportunity to recognise depression as a disability. However the employer's conduct towards the employee was so grievous and discriminatory that it seemed irrelevant to consider the matter as the employee had suffered extensive discrimination at the hands of the employer that violated his entrenched right to human dignity.

#### 4.7. Conclusion

It cannot be overstated that the case before the Labour Court and the Labour Appeal Court addressed above may have erred in not pursuing the classification of depression as a disability in the workplace at the height of the illness. Although the findings of the

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<sup>350</sup> (2008) 29 ILJ 2947 (LC).

<sup>351</sup> *Strydom* supra, p 3.

<sup>352</sup> *Strydom* supra, p 3.

<sup>353</sup> (2009) 12 BLLR 1181 (LAC).

Appeal Court were correct, a uniform approach to this topic would have been more favourable for all employers to provide guidance in handling the issue of depression in the workplace.

The cases decided prior to the Jansen case discussed above are indicative of the court's progressive approach towards the classification of depression as a disability. However, the courts have not provided clear guidelines thus far and therefore the topic remains a grey area in the law to the detriment of employees who have been subject to discriminatory and otherwise unjustifiable conduct from their employers due to their depression. It is my view, therefore, that the sooner depression gets recognised as a disability in the workplace, the sooner the courts will be able to assist employers around the country in the latter's treatment of employees in the workplace.

## **Chapter 5**

### **Depression and the Employer**

#### **5.1. Introduction**

In the chapters above, emphasis has been placed on an employer's duty not to discriminate unfairly against employees who suffer from depression, and to curb this unacceptable behaviour in the workplace. Much of the obligation to develop policies in the workplace is placed on the employer, and this can be apportioned to the Labour Courts' avoidance of either requiring the EEA to be developed further in a progressive manner or to provide at the very least, skeletal guidelines on how an employer is to accommodate an employee diagnosed with depression.

#### **5.2. Impact on the Employer**

It is no small feat for the employer to produce measures that are both cost-effective and inclusive for employees who are regarded as "having a disability", but these must be done in line with the employees' rights to fair labour practices and the right to dignity. No matter the size of a business, if an employee suffers from a disability, the financial impact falls squarely on the shoulders of the employer, that is, the reduced or interrupted productivity of the employee means the employer has a distorted participation in South Africa's economy<sup>354</sup> even though it is fundamental for the employer to "improve their bottom line"<sup>355</sup>.

Carvalho suggests that depressed employees are much more costly for the employer to maintain, and in terms of productivity, these employees are more likely to take up to a maximum of 3 leave days per 30-day work period, more than other employees who do

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<sup>354</sup> Carvalho op cit note 34 above, p 29. The author also refers to research conducted in 2007 where the South African economy lost an estimated R19 billion a year due to absenteeism.

<sup>355</sup> Carvalho op cit note 34 above, p 30.



not suffer from depression.<sup>356</sup> This places a potential burden on the employers' economic targets and effectiveness in service delivery. Notwithstanding the financial burden, all employers have an obligation to treat employees fairly and with dignity.<sup>357</sup>

An employee in a larger company has more job security than one belonging to a smaller company because the former employer is likely to be in a better position to accommodate an employee suffering from depression.<sup>358</sup> This information is not comforting to a smaller sized company because the employer might be placed in a position of hardship in acquiring the necessary resources and finances to implement a reasonable accommodation, however, the reasonable accommodation of a depressed employee is not intended to be luxurious and sophisticated but merely to provide the employee with a working environment that allows the employee to lead a somewhat "normal life" without having his or her dignity unnecessarily violated. Therefore, employers should strive to make reasonable accommodation available for depressed employees as far as possible.<sup>359</sup>

### 5.3. Recommendations

In my opinion, accepting and treating depression as a disability would be the first recommendation to afford the protection given by labour laws, other legislation and policy frameworks designed to protect all individuals with both physical and mental disability.<sup>360</sup> The EEA definition of disability needs to be expanded to include depression as a disability

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<sup>356</sup> Carvalheira op cit note 34 above, p 30.

<sup>357</sup> WHO stresses that "the necessity of providing continuing support to both the individual and employers, in order to establish a working relationship based on known expectations, cooperation and partnership".

<sup>358</sup> Carvalheira op cit note 34 above, pp 43, 93.

<sup>359</sup> Section 5 of the EEA emphasizes "the duty of an employer to promote equal opportunity in the workplace by abolishing unfair discrimination in any employment policy or practice". Standard Bank case, stated that an employer who refuses to make reasonable accommodation is irrational where there is no unjustifiable hardships experienced.

<sup>360</sup> Viviers op cit note 9 above, p 332 also submits "*that the official recognition of depression as a disability would promote awareness of this mental health condition along with its effects, symptoms and prevalence in the employment realm. It would also safeguard the right to dignity of depressed employees and further their right to equality and non-discrimination, breaking down barriers of stigma and disadvantage.*"

because it would provide a stable and consistent manner of addressing it,<sup>361</sup> and support would not be required from the courts to categorise depression as a disability if it is sufficiently addressed in the EEA.<sup>362</sup>

Ngwena and Pretorius state that disability “needs to be defined for the purpose of non-discrimination in the EEA”<sup>363</sup> because the EEA provides that disability is a ground upon which unfair discrimination is prohibited. Ngwena and Pretorius further qualify this statement by a well-reasoned argument “that the requirement that a long-term or recurring physical or mental impairment be substantially limiting is more at home with the concept of “people with disabilities” than with “disability”<sup>364</sup>. Disabled people have often faced discrimination in the workplace because of their “physical or mental impairments and not because the extent of their disabilities have restricted them from entering or advancing in employment”<sup>365</sup>. Put differently, Ngwena suggests that “people who have disabilities have suffered discrimination in the workplace not because their disabilities were substantially limiting but because they had a disability”.<sup>366</sup>

Other than the LRA and EEA, the Disability Code provides guidance for employers and employees on promoting equal opportunities and fair treatment for persons with disabilities.<sup>367</sup> The problem with the Disability Code is that it is not a binding legal document<sup>368</sup> but serves simply as a guide to supplement the LRA and EEA respectively.

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<sup>361</sup> Carvalheira op cit note 34 above, pp 76, 81, 102; du Plessis op cit note 211 above, comments on the visible uncertainties and inconsistencies created by the grey area of “who qualifies as a disabled person for purposes of protection from discrimination; the ways in which courts, tribunals and other relevant decision makers interpret and apply equality laws; and the underlying principles that shape the conception and implementation of social security laws, which in my opinion would be addressed by a more unambiguous definition of what constitutes disability”, pp 5.

<sup>362</sup> Section 2 of the EEA seeks to “achieve equality in the workplace through the promotion of equal opportunity and fair treatment through the elimination of unfair discrimination; and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce”.

<sup>363</sup> Ngwena and Pretorius op cit note 2 above, at 758; Carvalheira op cit note 34 above, p 61.

<sup>364</sup> Ngwena and Pretorius op cit note 2 above, at 760.

<sup>365</sup> Ngwena and Pretorius op cit note 2 above, 759.

<sup>366</sup> DN Hurling *Disability discrimination and reasonable accommodation in the South African workplace* (LLM, University Western Cape) (2008), p 25.

<sup>367</sup> Marumoagae op cit note 123 above, p 349.

<sup>368</sup> Carvalheira op cit note 34 above, p 103.

It is appropriate to recommend that the Disability Code should be developed further to guide employers in a manner akin to the ADA of the United States, for uniformity in handling depression as a disability in the workplace.

Another way forward is to shift from the medical model of disability<sup>369</sup> to a social model<sup>370</sup> as it approaches disability as a concern importantly related to human rights.<sup>371</sup> This approach is consistent with the constitutional values that require a more transformative approach by the government and private sectors to be accountable for transforming the South African society from “social exclusion or unfair terms of inclusion to one that constantly seeks to recognise and contribute to the realisation of the potential of all people”.<sup>372</sup> Du Plessis further submits that “social barriers prevent people with impairment from participating in society, and these barriers are the only causes of disability”.<sup>373</sup> Therefore, it becomes crucial to adopt an approach that addresses all the barriers erected by society or institutions to ensure the rights and needs of employees with mental impairments are not infringed.<sup>374</sup>

The WHO recommends “that the workplace is an appropriate environment in which to educate individuals about and raise their awareness of mental health problems”.<sup>375</sup> It is my perspective that the workplace should promote good mental health programmes and provide mechanisms for prevention and curbing occupational stressors contributing to mental health problems as well as establishing links with local mental health services for

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<sup>369</sup> Which focuses on the medical diagnosis of the person.

<sup>370</sup> Which focuses on the effects the person’s disability has on the person in the workplace.

<sup>371</sup> du Plessis op cit note 222 states that “social model of disability contributes to the advancement of disabled persons’ labour and social security interests in the context of access to work; it clarifies some normative underpinnings of employment equity and social protection policies for disabled persons and lastly it provides some standards against which we can benchmark the substantive provisions and the implementation of employment equity and social protection laws”, pp 3-4.

<sup>372</sup> Du Plessis op cit note 222 above, pp 13-14; Viviers op cit note 9 above, p 333.

<sup>373</sup> Du Plessis op cit note 222 above, p 26.

<sup>374</sup> Ngweni (2006) op cit note 40 is of the view that both medical and social models are required when disability is interpreted, however he stresses that the society must change to fit the impaired person instead of making the impairment the problem of the disabled; Hurling op cit note 323 above, p 6.

<sup>375</sup> WHO *Mental Health and Work: Impact, Issues and Good Practices* (2000) p 4.

addressing mental illnesses holistically. Ultimately, these efforts will benefit all by reducing the socio-economic burdens of mental health problems.<sup>376</sup>

The WHO further acknowledges the importance of the role played by the occupational health service (OHS). It states that OHS plays an effective role as they render the following services:-(i) identifying work problems caused by mental ill health; (ii) actions taken to improve the health of employees; (iii) assisting employers in modifying the work and work environment; and (iv) through enabling employees to remain at work rather than withdraw<sup>377</sup>.

To create a healthy workplace, one of the fundamental roles that an employer must play is to be part of the early detection of depression in an employee.<sup>378</sup> Having been made aware of the mental disorders in the workplace, the employer is obligated to refer the employee to a health care professional and reassure the employee the illness can be treated and simultaneously conscientise employees on depression and especially how cognitive symptoms can affect work performance.<sup>379</sup>

The employer should be able to encourage the use of any existing employee assistance programmes and support employees suffering from mental health problems and promote a culture of acceptance around mental illnesses and other psychiatric disorders.<sup>380</sup> Therefore, there is no need for stigmatisation of mental illnesses like depression, as previously stated, it is not a sign of weakness.

The need for reasonable accommodation is very crucial<sup>381</sup> when depression falls under the banner of disability because it affords further protection for the employee where there

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<sup>376</sup> Ibid.

<sup>377</sup> WHO op cit note 353 above, p 7; Carvalheira op cit note 34 above, p 37.

<sup>378</sup> Carvalheira op cit note 34 above, pp 33, 105.

<sup>379</sup> Carvalheira op cit note 34 above, p 104.

<sup>380</sup> Carvalheira op cit note 34 above, p 106.

<sup>381</sup> Viviers op cit note 9 above, p 333 states *"that reasonable accommodation is a significant consideration in employing people with mental health conditions and raises that it requires a change of attitudes from employers and co-employers, or the elimination of environmental stressors, which is often more difficult to enforce, than the duty to build a ramp for wheelchair users"*.

are no looming threats of dismissal for substandard performance and productivity because the EEA and LRA have not identified a disability as an incapacity.<sup>382</sup> The employer should try to exhaust all possible avenues available in accommodating the depressed employee in a cost-effective manner.<sup>383</sup>

#### 5.4 Conclusion

The South African legal framework is well-suited to advance and protect the rights of people with mental health conditions in the workplace because of the importance placed on human rights, which are entrenched in the Constitution.<sup>384</sup> The law plays a major role in guaranteeing “fair and equal treatment for all persons with mental health conditions, and in preserving their human dignity and right to equality”.<sup>385</sup> These can be achieved through implementation of statutes designed to address discriminatory and unfair dismissals of employees with mental impairments, without leaving the entire weight in the “hands” of the courts, tribunals and commissioners.

Employers ought to be equipped with knowledge around issues of mental health and legal procedures to be adopted in order to better manage employees with depression. This requires both the private and public sectors to be open to reasonable accommodation which does not yield undue hardship, but which shows commitment towards progressive practices that will successfully improve recruitment, retention and advancement of qualified employees who may be affected with depression. Education of employers has been identified as key to managing fears and uncertainties faced by most employers.<sup>386</sup>

Ngwena suggests that “formal equality would be impervious to the development and implementation of employment policies that recognise the legitimacy of dismantling the

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<sup>382</sup> Carvalheira op cit note 34 above, pp 46, 52, 61, 74, 108.

<sup>383</sup> Carvalheira op cit note 34 above, p 102.

<sup>384</sup> Viviers op cit note 34 above, p 335.

<sup>385</sup> Viviers op cit note 34 above, p 335.

<sup>386</sup> SAHRC op cit note 43 above.

unique barriers that people with disabilities face”.<sup>387</sup> He suggests that a legal approach that recognises that disability is an evolving concept, and that “the creation of an environment in which barriers that stand in the way of the rights to human dignity and equality of people with disabilities are dismantled, is a fundamental objective”.<sup>388</sup> In the same breath, it is my opinion that Employment Equity Act<sup>389</sup> together with its supportive legislations<sup>390</sup> should adopt an approach which seeks to eradicate all environmental barriers which hinder the full and effective participation of people suffering from depression and avoiding undue hardships to employers.

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<sup>387</sup> Ngwena (2004) op cit note 7 above, p 171.

<sup>388</sup> Ngwena (2004) op cit note 7 above, p171.

<sup>389</sup> As the Act which already advocates for the dignity and equal treatment of all persons ought to be interpreted along with its envisaged purpose along with Constitutional values.

<sup>390</sup> Technical Assistance Guidelines; the Code of Good Practice on the Employment of Persons with Disabilities in the workplace.

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UNIVERSITY OF  
KWAZULU-NATAL  
INYUVESI  
YAKWAZULU-NATALI

Miss Pamela Mlonzi (205516903)  
School Of Law  
Pietermaritzburg

Dear Miss Pamela Mlonzi,

**Protocol reference number:** 00011320

**Project title:** Effects of Depression in the workplace and retainability of employees through reasonable accommodation - in light with Jansen v Legal Aid South Africa (2018) ZALCCT 17

### Exemption from Ethics Review

In response to your application received on 17/02/2021, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW**.

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

#### PLEASE NOTE:

Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

Mr Simphiwe Peaceful Phungula  
obo Academic Leader Research  
School Of Law

UKZN Research Ethics Office  
Westville Campus, Govan Mbeki Building  
Postal Address: Private Bag X54001, Durban 4000  
Website: <http://research.ukzn.ac.za/Research-Ethics/>

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