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The employer's duty to 'reasonably accommodate' employees suffering from psychosocial disability in the South African workplace: a comparative perspective

by

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DEDICATION

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LIST OF KEY WORDS

Disability
Discrimination
Incapacity
Labour law
Mental health
Psychosocial disability
Reasonable accommodation
Unfair Dismissal
Undue hardship
Convention on the Rights of Persons with Disabilities
United Kingdom
United States of America

ABSTRACT

While many disabilities are recognisable, and thus are largely acknowledged by employers as requiring accommodation on the job, psychosocial disabilities are not always apparent. In fact, they are referred to as 'the invisible disability'. This research reflects on the barriers faced by people with psychosocial disabilities to access and retain work that is meaningful and their employer's duty to promote an environment that accommodates their requirements to deliver such. It investigates national and international legal frameworks and jurisprudence relating to the rights of persons with psychosocial disabilities in the workplace, and expounds on challenges relating to lack of clarity regarding whether psychosocial disability should be regarded as an incapacity or a disability. Further the requirements of reasonable accommodation and the undue hardship limitation are investigated and I investigate if societal and self-stigmas remain considerable barriers to the equal participation of persons with psychosocial disabilities in South African workplaces.

This research suggests that the South African legislative framework dealing with employment rights should be widened to include psychosocial disability as a disability to meet some of its commitments in terms of the Convention on the Rights of Persons with Disabilities. To conclude, I provide recommendations for the South African employer, as how to provide and promote reasonable accommodations in the workplace for employees suffering from psychosocial disabilities.

I. INTRODUCTION

The world over, people with disabilities are regarded as a minority group who have endured disadvantage, especially within the workplace.[1] In 2017, the World Health Organisation (WHO) approximated that, worldwide, one in five people in the workplace suffer from a mental health condition.[2] Growing evidence illustrates that mental illness is a key factor in the burden of disease and disability.[3] Mental health conditions account for five of the ten main causes of disability worldwide.[4] The WHO has recognised mental health-related challenges as a disability.[5] Unlike physical disabilities, mental health is regarded as an 'invisible disability'.[6]

Mental ill health is a universal condition that cuts across different social and cultural lines. The most common forms of mental health challenges are anxiety and depression. Mental illnesses are wide-ranging and each form of the illness has a degree of severity.[7] The degree of the severity of the mental illness can give rise to a disability.[8] The disability that arises from the mental health issue is called a psychosocial disability.[9] Thus, a psychosocial disability occurs when an individual with a mental illness interacts with a social environment that limits their sense of equality with others.[10]

Article 1 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) includes persons with psychosocial disabilities in its definition of mental impairment.[11] 'Persons with psychosocial disabilities'[12] is preferred over the term 'persons

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[1] Willene Holness 'The invisible employee: reasonable accommodation of psychosocial disability in the South African workplace' (2016) 32 *South African Journal on Human Rights* 510-37.
[2] Shirley Anne Awuor Genga *Legal responses to employment discrimination on the basis of psychosocial disabilities: Kenya's and South Africa's compliance with the convention on the rights of persons with disabilities* (unpublished LLD thesis, University of the Witwatersrand, 2022) 1.
[3] Holness op cit note 1 at 510.
[4] World Health Organisation 'Mental Health Factsheet' available at *https://www.who.int/news-room/fact-sheets/detail/mental-disorders,* accessed on 3 July 2024.
[5] Genga op cit note 2 at 1.
[6] Holness op cit note 1 at 510.
[7] Maple Community Service 'What is mental health' available at *https://maplecommunity.com.au/what-is-mental-health,* accessed on 5 May 2022.
[8] Ibid.
[9] In this research psychosocial refer to both psychosocial and psychological/mental health illnesses.
[10] Maple Community Service op cit note 7.
[11] United Nations Convention on the Rights of Persons with Disabilities UNGA/61/106 2515 UNTS 3.
[12] The CRPD's reference to 'mental' impairment in art 1, includes persons with psychosocial disabilities. The preferred terminology is 'persons with psychosocial disabilities' – in line with the social model of disability and the recognition that disability is an evolving concept (preambular paragraph (e) of the CRPD). Psychosocial disabilities include mood disorders (such as depression and bipolar disorder), anxiety disorders and psychotic disorders (such as schizophrenia and some forms of bipolar disorder).

with mental illnesses'. This aligns with the global shift away from the medical model to the social model of disability. The social model recognises that disability is an evolving concept, and redirects the focus from the individual's disability to the societal stumbling blocks that deter the active participation of people with disabilities in society.[13]

People with psychosocial disabilities often experience physical health conditions and mental illness together, producing a multi-part disability. This is different from those who may only experience either mental illness or physical health concerns.[14] Additionally, many individuals may not meet the medical 'threshold' for mental health conditions but may still find their daily living activities impacted by their mental health symptoms.[15] People with psychosocial disabilities benefit from holistic support to alleviate both their physical and mental illness symptoms, so that they may effectively participate and integrate within society.[16]

Psychosocial disability is one of the main reasons for employee absenteeism, low productivity and financial losses, often borne by the employer.[17] Employees with psychosocial disability regularly display their illness through an inability to concentrate, poor attention span and struggling with problem-solving.[18] The prevalence of psychosocial disabilities, and the negative impact it has on the workplace, places a duty on employers to create an environment that is mindful and open to such disclosures.[19] Often employers do not know how to deal with these matters, resulting in employees with disabilities being misdiagnosed. Employers often treat mental health-related issues as acts of misconduct or incapacity, rather than viewing the mental health issue of the employee as a disability.[20]

Commonly, the employer's misdiagnosis leads to employees not disclosing their conditions for fear of being discriminated against. Some common assumptions of the employer about persons with psychosocial disabilities are that they require more supervision, are untrustworthy, are unable to utilise initiative and in some more serious cases, are incapable of performing their duties.[21] In addition, employers either lack awareness or are hesitant to reasonably accommodate such employees due to the shortage of information available on

[13] Holness op cit note 1 at 510.
[14] Ibid at 511.
[15] Ibid at 511.
[16] In addition, mental health illnesses may affect the cognitive functioning of the affected person.
[17] Holness op cit at 511.
[18] Ibid at 511.
[19] Genga op cit note 2 at 1.
[20] K.G Sekhukhune *The regulation of incapacity based on ill-health or injury under the South African law: emerging trends* (unpublished LLM thesis, University of South Africa, 2019).
[21] Ibid.

psychosocial disabilities and the perception that implementing solutions to accommodate persons with psychosocial disabilities would financially burden their business.[22]

South Africa, like many other countries, aims to empower people with disabilities in the various health, social development and educational service structures, however the existing societal structures often excludes persons with disabilities from actively participating in society.[23] The employer's failure to remove the barriers that limit or restrict the involvement of people with disabilities in the workplace, is directly related to how society and employers view people with disabilities.[24]

Employees are presently protected by the Constitution of the Republic of South Africa, 1996 (The Constitution), and South Africa's labour legislation.[25] Equal participation in the workplace for people with disabilities, including those with psychosocial disabilities, is one of the rights enshrined in section 9 of the Constitution, also known as the equality clause.[26] The Constitution also aims to safeguard an individual's freedom of trade, occupation and profession, as well as the right to fair labour practices.[27] Currently, South Africa's body of labour legislation, the Labour Relations Act 66 of 1995 (LRA) stipulates that the disability of an employee is a prohibited reason for dismissal and affords protection to employees against unfair dismissals and automatically unfair dismissals.[28] The Employment Equity Act 55 of 1998 (EEA) prohibits unfair discrimination on the basis of disability and aims to eliminate unfair discrimination by taking steps to promote equal opportunities.[29] However, due to the lack of clarity around whether psychosocial disability is an incapacity due to ill-health or a disability issue, employers are inexperienced with how to reasonably accommodate psychosocial illness in the workplace.[30]

The LRA's Code of Good Practice: Dismissal (Dismissal Code) differentiates between temporary and permanent incapacity, influencing what reasonable steps must be taken to

[22] S Bismallah and K Gantley 'The impact of stress-related illnesses and psychological issues in the workplace' available *at https://www.golegal.co.za/workplace-stress-impact/*, accessed on 23 November 2022.
[23] MC Marumoagae 'Disability discrimination and the right of disabled persons to access the labour market' (2012) 15 *PELJ* at 345 - 65.
[24] Ibid.
[25] Holness op cit note 1 at 512.
[26] Ibid at 512.
[27] Ibid at 512.
[28] The Labour Relations Act 66 of 1995.
[29] The EEA defines disability as a 'long term or recurring, physical or mental impairment, which substantially limits' the employee's daily activities[29], such as 'caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working.'
[30] Holness op cit note 1 at 512.

accommodate the employee's disability.[31] Further, the Dismissal Code compels the employer to explore all reasonable accommodations in which the employee's employment may be retained such as offering an alternative position or modifying their current job. In instances where an employee is incapacitated, it is considered no fault of the employee.[32]

The Dismissal Code must be read together with the EEA's Code of Good Practice on Key Aspects on the Employment of People with Disabilities (Disability Code).[33] The Disability Code aims to provide possibilities and reasonable accommodations to people with disabilities so that they can contribute valuable skills and abilities to every workplace, and add to the economy of our society.[34] Comparably, the Dismissal Code deals with the dismissal of someone who is medically incapacitated, whilst the Disability Code focuses on the employer's obligations to accommodate the employee.[35] Should the employer not comply with the obligations, any dismissal for permanent incapacity might not only be substantively and or procedurally unfair, but may constitute an automatically unfair dismissal in terms of section 187 of the LRA.[36]

The aim of this research is to discuss the employer's duty to provide reasonable accommodation to employees who suffer from psychosocial disabilities in South African workplaces. Part II defines psychosocial disability and its effects in the workplace. Part III seeks to address whether the current South African legislative framework provides sufficient guidelines to employers to provide reasonable accommodation and protection to employees with psychosocial disabilities in the workplace. In part IV, I will outline South Africa's international obligations under the Convention on the Rights of Persons with Disabilities (CRPD) towards persons with psychosocial disability in the workplace. In Part V, I focus on the comparative study that will serve the purpose of establishing whether South Africa can learn anything from the legal principles in the USA and UK in dealing with the duty of the employer to accommodate employees suffering from psychosocial disabilities.[37] This comparative study will form the basis for Part VI, where I will make recommendations on how South African employers can reasonably accommodate employees with psychosocial disabilities in the workplace.

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[31] Barney Jordaan 'How to deal with disability vs. medical incapacity' available at *https://labourwise.co.za/labour-articles/disability-vs-medical-incapacity,* accessed on 1 February 2025.
[32] Ibid.
[33] Ibid.
[34] Sekhukhune op cit note 20 at 34.
[35] Ibid.
[36] Ibid.
[37] Ibid.

II. THE DEFINITION OF PYSCHOSOCIAL DISABILITY AND PSYCHOSOCIAL DISABILITY IN THE WORKPLACE

This section aims to define psychosocial disability, and how the definition has taken a social model approach rather than a medical approach and discuss psychosocial disability in the workplace.

(a) The medical and social approaches to disability

With regards to the concept disability, there are two schools of thoughts, namely the medical and social approaches. The medical approach centres on the health and welfare of people with disabilities, often treating them as objects of pity and not as independent human beings with human dignity.[38]

The social model, stresses that the disadvantages and unfair discrimination experienced by people with disabilities are not due to their impairment but rather the social environment.[39] The social approach highlights the failings of society to assist and accommodate those with disabilities and further reiterates the notion that an individual's disability does not necessarily mean 'inability'.[40] Unlike the medical approach, the social approach places the responsibility on society to adapt to an individual's impairment.[41] Globally, no country strictly follows the social approach, but have a combination of both the medical and social approaches to disability.[42]

The WHO's International Classification of Functioning, Disability and Health defines disability as an outcome of a relationship between a person's medical condition and the person's personal circumstances, as well as environmental factors.[43] This broad approach indicates society's move towards a social approach to disability, whereas the medical model only considered disability as a consequence of a cognitive, physical or sensory limitation.[44] Individuals with disabilities in the medical model are regarded as more vulnerable, due to their

[38]Bernice Welgemoed *Are employees suffering from depression in the South African workplace protected by the existing disability provisions within employment law?* (unpublished LLM thesis, University of the Western Cape, 2017) 21.
[39] Ibid.
[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] World Health Organisation *Mental health at work* available at https://www.who.int/news-room/fact-sheets/detail/mental-health-at-work, accessed on 12 January 2025.
[44] Kerishnie Delicia November *An assessment of the laws that aim to protect employees against discrimination on the ground of disability: a comparative analysis* (unpublished LLM thesis, University of the Western Cape, 2023).

inability to take care of themselves.[45] Also, it is fundamental to the medical model, that the individual is provided with treatment and the required assistance is available to them, if necessary.[46]

(b) Psychosocial disability in the workplace

Psychosocial disability, also known as the invisible disability, is not only about the diagnosis, but the functional impact and barriers, which may be faced by someone living with a mental health condition.[47] Psychosocial disability may restrict a person's ability to 'be in certain types of environments; concentrate; stamina to complete tasks; cope with time pressures and multiple tasks; interact with others; understand constructive feedback and manage stress.'[48]

Individuals with psychosocial disabilities often face barriers to social inclusion with only one third of employees with psychosocial disabilities retaining employment.[49] Psychosocial illness significantly impacts households through the cost and time spent on being transported to and from health services, loss of income of caregivers and disability grants.[50] However, these costs are difficult to quantify, due to the inconsistent reporting of disability statistics.[51] This shows that employers should put measures in place to support employees with psychosocial illnesses, thereby reducing financial implications.[52]

In addition to the above, the stigma and discrimination concerning persons with psychosocial disabilities remains overlooked by employers, the law and policymakers.[53] The negative perception of people with disabilities creates the impression that employees with psychological disorders could be violent.[54] This leads to employer reluctance to employ these job-seekers, leading to missed promotions, compounded stress and workplace bullying.[55] As such, this stereotype disproves the perception that employees with psychological disorders are violent, but rather are victims of violence.[56] These employees' suffer further psychological deterioration, because suitable safety requirements are not considered thus limiting their re-

[45] Ibid.
[46] Ibid.
[47] Holness op cit note 1 at 513.
[48] Maple Community Services op cit note 7.
[49] Sekhukhune op cit note 20 at 25.
[50] Holness op cit note 1 at 513.
[51] Ibid.
[52] Ibid
[53] F Mahomed & MA Stein 'De-stigmatising Psychosocial Disability in South Africa' (2017) 5 *African Disability Rights Yearbook* 64.-83.
[54] Dawn Nadine Hurling *Disability discrimination and reasonable accommodation in the South African Workplace* (unpublished LLM thesis, University of the Western Cape, 2008).
[55] Ibid.
[56] Holness op cit note 1 at 514.

entry into the workplace after extended periods of absence due to the psychosocial illness.[57] Many employers also overlook the possibility of psychosocial health injuries, also known as 'psycho-toxic conditions', because of poor working conditions.[58] However, the duty of the employer to provide a healthy and safe workplace includes the management of stress, which is crucial in ensuring a healthy environment for all employees, inclusive of those with existing psychosocial illnesses, as well as those who develop psychosocial illnesses, during their employment.[59] Psychosocial hazards can negatively impair the psychosocial and physical health of employees.[60] These factors make it difficult for individuals with psychosocial disabilities to participate in the labour market and maintain a job.[61]

Employers have a common law duty to provide a workplace which is psychologically safe. A workplace that 'permits no harm to employee's mental health where negligent, reckless or intentional.[62] South Africa's legislative framework aims to protect and accommodate people with disabilities, inclusive of psychosocial disability as will be discussed below.

III. SOUTH AFRICAN LEGAL POSITION

This section will analyse whether the current South African legislative framework provides sufficient protection to persons with psychosocial disabilities in the workplace, by specifically focusing on the employer's duty to provide the necessary reasonable accommodation.

(a) The Constitution of the Republic of South Africa, 1996

The Constitution contains the fundamental rights and freedoms of all those present within South Africa's borders. It established constitutional supremacy stating that the Constitution is the 'supreme law of the Republic and that any law or conduct that is inconsistent with it, will be invalid'.[63]

The Constitution has identified various human rights that are worthy of protection in light of the constitutional values of dignity and equality.[64] Section 9 of the Constitution provides that every person is equal before the law and deserving of equal protection and benefit of the

[57] KE Ringland, J Nicholas J, R Kornfield, EG Lattie, DC Mohr DC, M Reddy M 'Understanding Mental Ill-health as Psychosocial Disability: Implications for Assistive Technology. Assets' (2019) *ASSETS 2019 - 21st International ACM SIGACCESS Conference on Computers and Accessibility* 156 -170.
[58] Ibid.
[59] Holness op cit note 1 at 514.
[60] Ibid at 514.
[61] Ibid at 514.
[62] Ibid at 514.
[63] Ibid at 514.
[64] The Constitution op cit note 30.

law.[65] This section further provides that 'the State may not be unfairly discriminated directly or indirectly on of the listed grounds[66] including disability'.

Section 10 of the Constitution provides protection of an individual's fundamental right to dignity. Dignity, as explained in *New Way Motors and Diesel Engineering (Pty) Ltd v Marsland*,[67] lies at the heart of any prohibition of unfair discrimination. Dignity is both a value and a right and is often violated in conjunction with other rights in the Constitution.[68] This right enshrines human beings' intrinsic worth and entitles them to be treated with respect and concern.[69]

The Constitution protects employees right to fair labour practice, however it does not provide detailed guidelines of what constitutes fair labour practices.[70] The LRA was promulgated to give effect to section 23 of the Constitution, whilst the EEA was established to create a framework aimed at achieving equality and prohibiting unfair discrimination in the workplace.[71]

(b) Labour Relations Act 66 of 1995 and the Code of Good Practice: Dismissals

The LRA protects an employee against unfair dismissal or being subjected to unfair labour practices.[72] The LRA does not specifically define what incapacity is, however the Dismissals Code expands on how to deal with employees who are unable to perform their job due to ill-health or injury.[73]

[65] S9(1) of the Constitution.
[66] S9(3) read together with s9(4) and s9(5)of the Constitution: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair'.
[67] *New Way Motors and Diesel Engineering (Pty) Ltd v Marsland* 2009 30 ILJ 2875 (LAC) paras 17 and 26.
[68] Ibid.
[69] Sujata Balaram 'Mental health and the workplace: the role of the employer' available at *https://www.derebus.org.za/mental-health-and-the-workplace-the-role-of-the-employer/* accessed on 23 November 2022.
[70] Welgemoed op cit note 38 at 53.
[71] Sekhukhune op cit note 20 at 10.
[72] Ibid.
[73]Matilda Mbali Ngcobo *Treatment of depression in the workplace: incapacity, poor performance, misconduct and disability* (unpublished LLM thesis, University of KwaZulu-Natal, 2019) 57.

Where an employer dismisses an employee, such dismissal must be in accordance with section 186(1)[74] of the LRA, which provides that the employer must prove that the dismissal was substantively and procedurally fair.[75]

Item 11 of the Dismissals Code states that the procedure employers must follow before dismissing an incapacitated employee based on ill-health or injury.[76] Employers are thus required in terms of the Dismissal Code, to provide reasonable accommodation to those employees suffering with ill-health or injury before dismissing them.[77]

A dismissal based on any of the grounds listed in section 187 of the LRA infringes on the employee's basic human rights, and the employer cannot argue that the dismissal was for a fair reason unless it falls within the two exceptions.[78] The employer has two defences in an automatically unfair dismissal claim, either that the dismissal was based on the inherent requirements of the job, and the second deals that the employee having reached retirement age.[79] Inherent requirements of the job relates to the nature of the work, this being whether an employee can accomplish their duties. Should an employee not be able to do so they do not meet the job requirements.[80] Thus, disability as the reason for dismissal can only be justified if it prevents the individual from fulfilling the inherent job requirements.[81] Where the disability does not affect the requirements of the job, and the employer dismisses the employee on the basis of their disability, without providing reasonable accommodation, the dismissal is regarded as an automatically unfair dismissal under the LRA.[82]

Additionally, employees with psychosocial disability will be protected against unfair dismissals in terms of s 188 of the LRA, should the employer fail to prove that they dismissed the employee on the basis of, incapacity or the inherent requirements of the job.[83] Where an employer dismisses an employee for incapacity due to ill-health, the reason will be considered to be fair provided that it is both substantively and procedurally fair.[84] The court stated in

[74] Section 186 (1) of the LRA gives the following meaning to the term 'dismissal' – An employer has terminated employment with or without notice; An employee employed in terms of a fixed term contract of employment reasonably expected the employer –
[75] Ibid.
[76] Holness op cit note 1 at 516.
[77] Ibid at 516.
[78] Ngcobo op cit note 73 at 7.
[79] Ibid.
[80] E Gresse, & Melvin LM Mbao 'An analysis of the duty to reasonably accommodate disabled employees: a comment on Jansen v Legal Aid South Africa' (2020) 24 *Law, Democracy and Development* 109 - 32.
[81] Ibid.
[82] Ibid.
[83] Labour Relations Act 66 of 1995 s 188(a)(*i*) and (*ii)*.
[84] Ibid.

IMATU obo Strydom v Witzenberg Municipality,[85] (*Strydom* case) that permanent incapacity due to ill-health or injury is regarded as a lawful reason for terminating an employee if the work conditions cannot be altered.[86] The court stated that '[a] dismissal would be equitable under these circumstances, provided it was founded on a thorough investigation of the incapacity and an evaluation of potential alternatives to dismissal.'[87]

The Dismissals Code sets out the requirements of substantive and procedural fairness that need to be complied with when an employer dismisses an employee for incapacity.

(i) The Code of Good Practice: Dismissals

Section 188(2) of the LRA provides that

> '… any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.'[88]

Where a court or tribunal interprets and applies the provisions of the LRA, they must consider the Dismissal Code.[89] The Dismissal Code provides a framework, which employers should abide by when dismissing an employee for incapacity due to ill-health or poor work performance.[90] In *the Strydom* case, the LAC confirmed that the requirements set out in the Dismissal Code are compulsory.

In terms of Item 8 of the Dismissal Code, an employee may not be dismissed for poor work performance without the employer having investigated the reasons for the poor performance.[91] Item 9 of the Dismissal Code provides the guidelines that an employer should follow for a dismissal due to poor work performance to be fair.[92] Item 10 of the Dismissal Code deals with incapacity for ill health or injury and distinguishes between temporary and permanent incapacity and work related injuries.[93] In cases where the employee is temporarily unable to work, the employer must conduct an investigation into the degree of the incapacity or injury.[94] If it is found that the employee is expected to be absent for a an excessively long

[85] *IMATU obo Strydom v Witzenberg Municipality* (2012) 33 ILJ 1081 (LAC).
[86] Ngcobo op cit note 73 at 58.
[87] Ibid at 77.
[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid at 57
[92] Raquel Carvalheira R *Depressions, Dismissals and Disability* (unpublished LLM thesis, University of the Witwatersrand, 2011) 36.
[93] Ibid at 38.
[94] Ibid.

time, the employer must find possible alternatives, short of dismissal.[95] Another component to be considered as part of whether or not dismissal is fair, is the degree of the incapacity.

Item 11 provides for the termination of employment based on incapacity, arising from ill health or injury.[96] Item 11 of the Dismissal Code provides that a dismissal arising from ill health or injury is unfair should consider whether the employee is capable of performing the work. If the employee is not capable, the employer should ascertain the degree to which the employee can perform the work; how the work circumstances might be modified to assist the person with the disability, the prospect of adapting the employee's duties, and the availability of any appropriate, alternative work.[97] The recent case of *Smith v Kit Kat Group (Pty) Ltd* (*Smith case*),[98] the Labour Court set out detailed guidelines on the employers' duty to reasonably accommodate.[99] In the *Smith case*, the court stated that consultation and accommodation are important considerations, when one has to decide whether discrimination based on disability is fair.[100] Thus, the employer is obliged to exhaust all possible alternatives before dismissal, which should be a last resort.[101]

(c) The Employment Equity Act

The EEA was enacted to set out a framework for the achievement of equality and the prohibition of unfair discrimination in the workplace.[102] The purpose of EEA is to enforce section 9 of the Constitution by 'promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination' in the workplace.'[103] It further aims to regulate the 'implementation of affirmative action measures to redress the disadvantages in employment experienced by designated groups.'[104] Included in the designated groups are people with disabilities who may not be unfairly discriminated against. Section 6 of the EEA aims to protect persons with disabilities by including disability as one of the grounds on which

[95] Ibid.
[96] Moksha Naidoo 'Legal Aid South Africa v Jansen (LAC) (unreported case no CA3/2029,21-7-2020) Murphy AJA with Waglay JP and Phatshoane ADJP concurring' available on *https://www.derebus.org.za/employment-law-update-employee-alleges-being-dismissed-on-account-of-his-depression/*, accessed on 4 May 2022.
[97] Jordaan op cit note 31.
[98] *Smith v Kit kat Group (Pty) Ltd* (2017) 38 ILJ 483 (LC).
[99] Jordaan op cit note 31.
[100] Ibid.
[101] Ibid.
[102] November op cit note 44.
[103] Brian Majola & Rubby Dhunpath 'The development of disability-related employment policies in the South African public service' (2016) *Problems and Perspectives in Management* 150-9.
[104] Ibid at 153.

an employee may not be unfairly discriminated.[105] In South Africa, where an employee claims unfair discrimination based on one of the grounds listed,

> 'The employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination firstly, did not take place as alleged. Secondly, that such discrimination is rational and not unfair and otherwise justifiable.'[106]

Once discrimination is established, the onus is on the employer to disprove the claim.

One of the listed grounds in the EEA is mental illness. The EEA defines mental illness as a form of disability and refers to mental illness as a 'mental or psychosocial impairment' and is defined as 'a clinically recognised condition or illness that affects a person's thought processes, judgment or emotions'.[107]

The EEA Amendment Act of 2022 (EEAAA)[108] introduced significant change to the EEA's definition of mental impairment, which now includes 'people with long-term or recurring physical, mental, intellectual, or sensory impairments, which, when interacting with various barriers, may substantially limit their prospects to enter or advance in employment.'[109] Thus, it can be inferred that psychosocial disability qualifies as a disability under the context of EEAAA because of the term 'mental impairment', that may limit the individuals abilities.[110] Psychosocial disability is a condition that could negatively affect an employee's performance. Nevertheless, the EEA and the EEAAA have tried to provide some insight on the concept of mental impairment.

To understand the intention of the legislature in the EEA and EEAAA, the above definition must be broken down. Impairment is defined as being either mental or physical.[111] Mental impairment means 'a clinically recognised condition or illness that affects a person's thought process, judgement or emotions.'[112] It should be noted that mental impairment does not necessarily infer that the impairment amounts to a mental disability.[113] Long-term refers to

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[105] Ibid.
[106] Tanya Mulligan 'Unfair discrimination – What is the burden of proof' available at https://www.chmlegal.co.za/unfair-discrimination-what-is-the-burden-of-proof#:~:text=Section%2011(1)%20of%20the,unfair%20or%20is%20otherwise%20justifiable%E2%80%9D, accessed on 30 December 2024.
[107] Carvalheira op cit note 91at 67.
[108] Employment Equity Amendment Act, 4 of 2022.
[109] K Ainslie 'Commencement of the Employment Equity Amendment Act on 1 January 2025' available at *https://www.financialinstitutionslegalsnapshot.com/2024/12/05/commencement-of-the-employment-equity-amendment-act-on-1-january-2025/* accessed on 30 December 2024.
[110]Welgemoed op cit note 38 at 27.
[111] Ibid.
[112] Carvalheira op cit note 91 at 67.
[113] Ibid.

when the impairment has lasted or is likely to continue for at least 12 months and reoccurring means it likely to happen again and to be substantially limiting.[114] Where the disability substantially limits the employee's ability to perform the required functions of the job it would meet the factor of being substantially limiting.[115] A substantially limiting disability requires medical treatment or other devices that prevent or remove the adverse effects.[116]

Psychosocial illnesses are often cyclic and episodic and the medication required to manage the psychosocial illness does not mean that the person does not suffer from a disability at times, nor does it mean that job modifications may not be needed.[117] The period of time prescribed and the requirement of substantial limitation contradicts the social model of disability, and, aligns more with the definition of the medical model. The court in *IMATU and Another v City of Cape Town*[118] showed the first signs of South Africa's social approach to disability.[119] The court noted that employers must consider the effect of a disability on the person in relation to the working environment and not on the diagnosis or the impairment. The court stated the employer had the onus of proving that its policy of a blanket ban on insulin dependent diabetics was not discriminatory and it had failed to provide such proof. The employer did not manage to convince the court that policy against diabetes sufferers was established on the inherent requirements of the job. This case is important because the court stated that policies that make unsubstantiated generalisations about groups of people are at risk of being ruled unfair. Additionally, if the nature of the alleged unfair discrimination is not one listed in the EEA, the courts jurisdiction to rule on them. This suggests that any act of discrimination, if it is arbitrary, alternatively if it negatively affects the dignity of the employee, may be regarded as unfair.[120]

(i) Code of Good Practice on Employment of Persons with Disabilities

The Disability Code was published in terms of section 54(1) of the EEA.[121] The Disability Code focuses on the effect an employee's impairment has on their working environment, rather than the effect the impairment itself has on the individual.[122] The Disability Code was issued

[114] Ainslie op cit note 109.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] *Imatu and Another v City of Cape Town* (2005) 11 BLLR 1084 (LC).
[119] Ibid para 110.
[120] Ibid para 90.
[121] Welgemoed op cit note 38 at 27.
[122] Ibid.

with the aim of the assisting and educating employers on the role they play in the inclusion of persons with disabilities within the workplace.[123]

The Disability Code provides protection for employees with disabilities against dismissals.[124] Item 6.1 of the Disability Code states that employers should make reasonable accommodations for employees with disabilities in the most cost-effective manner.[125] Further, the Disability Code stipulates that reasonable accommodation also applies throughout the employment process.[126] The accommodation provided by the employer depends on the degree and nature of the disability; the nature of the individual employee's psychosocial disability and lastly consideration of whether the nature of the psychosocial disability is permanent or temporary.[127] Reasonable accommodation may also include adjusting working time and duration of leave, as well as offering holistic support.[128]

The Disability Code mentions that 'the employer need not accommodate a qualified applicant or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer.'[129]

(d) Distinction between disability and incapacity

In South Africa incapacity and disability are not similar terms, rather they are individual matters to be dealt with.[130] To date, South African courts have mostly dealt with psychosocial disability as an incapacity due to ill-health issue and not specifically as disability.[131]

Incapacity due to ill-health occurs when an employee cannot perform essential requirements of their position due to a medical condition, which may or may be related to a disability, whereas an employee with a disability is considered as suitable for the job but requires reasonable accommodation.[132] In instances of incapacity due to ill-health, dismissal must be the last resort after considering reasonable alternatives.[133]

Dismissal due to disability is automatically unfair, however dismissal due to incapacity is not.[134] As such, there are no real difference between reasonable accommodation

[123] Ibid.
[124] Ngcobo op cit note 73 at 4.
[125] Ibid at 35.
[126] Ibid.
[127] Holness op cit note 1 at 533.
[128] Ibid at 533.
[129] Marumoagae op cit note 23 at 351.
[130] Welgemoed op cit note 38 at 29.
[131] Ibid.
[132] Ibid at 30.
[133] Ibid.
[134] Carvalheira op cit note 91at 7.

considerations for an employee with a disability and offering alternatives to dismissal due to incapacity.[135] Instead this is referred to as a 'parallel approach'.[136] It is important to identify whether the cause is incapacity or disability as this determines the legislative approach to be pursued and the relevant authority with jurisdiction.[137]

In addition, an overlap occurs when an employee with a disability is dismissed, as their disability falls under the definition given in the EEA.[138] The courts have held that in such circumstances, the employer should follow the guidelines laid down in the Disability Code.[139] Christianson notes that disabilities are an incapacity for ill health. [140] In the Dismissal Code it suggests that disability and incapacity are used interchangeably. Whilst incapacity refers to ill health or injury, or poor performance, the definition provided in the EEA for disability is far more specific.[141] I believe that Christianson's view is incorrect because being disabled does not mean that one is incapacitated even though it is possible to be both disabled and incapacitated.[142] The performance standard is important in determining any dismissal for incapacity, which might not necessarily be the same with respect to cases concerning disability.[143] This differs to cases where the employee is disabled but has the required skills and competencies to perform in their job, in which case reasonable accommodation might be required.[144]

If an employee is dismissed due to incapacity, it is inferred that the employee is unable to perform the essential functions of the job.[145] However, an employee with a disability who is suitably qualified and can continue performing the essential functions provided that reasonable accommodation is given. [146] Thus, employees with disabilities, who are reasonably accommodated by their employer, can carry out their duties efficiently when they are provided support, which does not impose unnecessary hardships on the business of the employer.[147]

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[135] Ibid.
[136] Ibid.
[137] Ibid.
[138] Ibid.
[139] Ibid.
[140] Marylyn Christianson 'Incapacity and Disability: A Retrospective and Prospective Overview of the Past 25 Years' (2004) 25 *Industrial Law Journal* 879 - 96.
[141] Ibid at 186.
[142] Ibid.
[143] Ibid.
[144] Carvalheira op cit note 91at 77.
[145] Ibid.
[146] Ibid.
[147] Ibid.

(e) Reasonable accommodation and unjustified hardship

(i) Reasonable accommodation

Reasonable accommodation is providing the necessary and appropriate modification to ensure persons with disabilities are able to enjoy and perform their employment duties effectively.[148] In terms of item 9 of the Dismissal Code, an employer can fairly dismiss and employee with disabilities for incapacity if such an employee refuses the employer's offer of assistance to effectively perform their job.[149]

The landmark case of *Standard Bank of South Africa v CCMA* (*Standard Bank* case)[150] deals with the employer duty to provide reasonable accommodation to employees who have a disability.[151] The employee suffered from severe back pain after she a motor accident. Following this, the employee's health deteriorated, and she obtained medical advice for less taxing duties.[152] The employee was relocated to different positions and later dismissed due to incapacity.[153] The employee argued that the employer failed to accommodate her, leading to her dismissal.[154] The employer denied her to use a computer for data capture, instead offering her a switch board operator position.[155] The court ruled that the dismissal of the employee was procedurally unfair, as the employer failed to follow the guidelines in the Dismissals Code and their duty to accommodate the employee, therefore, resulting in the employer discriminating against the employee.[156] The court noted that employers must exhaust all suitable alternatives before dismissing an employee suffering from depression and should consider adapting and assisting them in all possible ways.[157] The court went on to explain what the duty to reasonably accommodate involves, and that the onus rest on the employer to prove that they had tried to accommodate the employee and that the employee refused.[158]

In *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality and Others*,[159] the court found that the employer had not properly investigated

[148] Ibid.
[149] Joseph Rankgale Modise, Marius Potgieter Olivier and Ogutu Miruka 'Reasonable Accommodation for People with Disabilities in the Labour Market' (2014) 5 *Mediterranean Journal of Social Sciences* 578 – 87.
[150] *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 4 BLLR 356 (LC) para 60.
[151] Ibid.
[152] Ibid para 21.
[153] Ibid para 147.
[154] Ibid para 141.
[155] Ibid.
[156] Ibid para 140.
[157] Ibid.
[158] Ibid.
[159] *Independent Municipal and Allied Trade Union obo Strydom v Witzenburg Municipality and Others* [2012] 7 BLLR 660 (LAC) para 13.

alternative working conditions or positions for the employee, so as to accommodate the employee's incapacity (mental illness) nor did the employer proactively implement steps to reduce or remove stressors that impacted the mental impairment of the employee.[160] The dismissal of the mentally ill employee was considered unfair, as the employer did not reasonably accommodated the employee.[161] The outcome of this case was important as it highlighted the need for employers to conduct a thorough investigation regarding the link between an employees mental impairment and their job performance before dismissing the employee.

In *SA Transport & Allied Workers Union v Old Mutual Life Assurance Co SA Ltd* (*SA Transport*),[162] the employee, who suffered from a disability, was successful in proving that they had been treated unfairly by the employer for being a poor performer.[163] The Court held that employers need to make sure that all possible alternatives, other than dismissal, are investigated.[164] As a result of this, employers must in good faith and be open minded throughout the consultation process and earnestly consider all proposals put forward.[165]

In 2021 in *Legal Aid South Africa v Jansen*[166] the LAC held that 'employers have a duty to deal with it sympathetically and should investigate it fully and consider reasonable accommodation and alternatives short of dismissal'.[167]

In the recent case of *Makana People's Centre v Minister of Health and Others,*[168] the Constitutional Court (CC) considered a holistic understanding of mental health, by taking into account relevant statutes and international instruments.[169] The Court noted that mental health

[160] K Bester and Prof N Mabeka 'South African economic trends and workplace mental health: employer-employee responsibilities' available at *https://www.derebus.org.za/south-african-economic-trends-and-workplace-mental-health-employer-employee-responsibilities/*, accessed on 16 June 2024.
[161]Balaram op cit note 71.
[162] *SA Transport & Allied Workers Union v Old Mutual Life Assurance Co SA Ltd* 2005 (26) ILJ 293 (LC) para 79.
[163] L Niekerk & D Casteleijn, A Govindjee & W Holness & J Oberholster, & C Grobler 'Conceptualising disability: Health and legal perspectives related to psychosocial disability and work' (2020) 13 *SA Journal of Bioethics and Law (SAJBL)* 43 -51.
[164] Gresse and Mboa op cit note 82.
[165] Ibid.
[166] *Legal Aid South Africa v Jansen* 2021 (1) SA 245 (LAC).
[167] Jacques van Wyk and Andre van Heerden 'Employers may be ordered to pay up for ignoring mental health issues' available at *https://www.hrfuture.net/strategy/legal/employers-may-be-ordered-to-pay-up-for-ignoring-mental-health-issues/*, accessed on 4 May 2022.
[168] *Makana People's Centre v Minister of Health and Others* 2023 (5) SA 1 (CC) para 108.
[169] Ibid.

issues must be given due consideration and should be more preventative as opposed to curative.[170]

It should be noted that the employer's duty to reasonably accommodate is imperative to the employee's success in the workplace.[171] Reasonable accommodation is thus dependent on the employer being aware of the applicant's or the employee's disability or impairment.[172] As such, an employee with disabilities has a duty to inform the employer about their disabilities, for the employer to consider ways of accommodating them.[173] However making the disclosure of the psychosocial disability, by the employee, is difficult due to the varying degrees of perceptions regarding the disability and the consequences that the employee may face from the employer. The employer's duty to reasonably accommodate does not mean making exceptions for the person in a job or working environment.[174] Reasonable accommodation focuses on practical implementation, and does not require an employer to accommodate an employee if doing so, would impose an unjustifiable hardship on the business.[175]

The EEA and Disability Code regards the employers failure to accommodate an employee or job applicant with a disability as a violation of their right to equality. However, an employer is permitted to make exceptions in limited instances where they can prove that accommodation would cause unjustifiable hardship.[176]

(ii) Unjustified hardship

Where an employer's reasonable accommodation causes them unjustified hardship, they may be dismissed of their duty.[177] The EEA describes unjustifiable hardship 'as action that requires significant or considerable difficulty or expense.' [178] This involves considering the effectiveness of the accommodation and the degree to which it would severely disrupt the operation of the business.[179] Deciding whether reasonable accommodation will not impose an unreasonable burden on the employer provides an opportunity for an individualised

[170] E Gresse, & W Gresse, W (2024) 'A Legal Conundrum - The Duty to Reasonably Accommodate: A Comment on Legal Aid South Africa v Jansen 2020 41 ILJ 2580 (LAC)' (2024) 27 *Potchefstroom Electronic Law Journal (PELJ)* 1-37.
[171] Carvalheira op cit note 91 at 84.
[172] Ibid.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] Holness op cit note 1 at 533.
[178] Ibid at 534.
[179] Lindani Goodman Nxumalo *Disability Discrimination and Undue Hardship Within the Working Environment: A critical analysis* (unpublished LLM thesis, University of South Africa, 2014).

consideration of the nature and cost of accommodation with respect to the employer's financial resources, workplace structures and environmental and business operations.[180]

This means that if the reasonable accommodation creates an undue hardship, it need not be implemented by the employer.[181] However, this is dealt with on a case by case basis and thorough consideration is required in determining whether any particular reassignment would result in an undue hardship to the employer.[182]A balance between reasonable accommodation and undue hardship should always be considered as a factor before an employer claims the latter. [183]

(f) Analysis of South Africa's legal framework

Psychosocial disability is a manageable condition, and it would be constitutionally unfair to dismiss an employee simply due to their treatable psychological disorder in terms of their rights enshrined in sections 9, 22 and 23 of the Constitution.[184]

The South African legislative framework affords employees suffering from psychosocial disability some protection in the workplace. The EEAAA's new and extensive definition of mental impairment in its definition of disability provides a clear and consistent method of addressing psychosocial disability. The Disability Code's purpose is to protect persons with disabilities, as it is regarded as a natural condition and does not devalue the rights of these persons nor their ability to participate in the labour market. The Disability Code further provides that wherever possible, reasonable accommodation be made for the individual to perform their job. Thus, the Disability Code and its classification of incapacity compels the employer to accommodate the employee, by offering alternatives short of dismissal.

The advantage, whilst limited, of mental impairments falling within the ambit of the EEAAA's disabilities definition is that now employees are significantly more protected from unfair dismissals found in s187 of the LRA as protection will come from both the Disabilities Code and the LRA, as well as the Constitution, international and foreign legislation.[185]

[180] Ibid.
[181] Carvalheira op cit note 91at 93.
[182] Ibid.
[183] Ibid.
[184] Ibid.
[185] Discussed below in paragraph IV.

(IV) INTERNATIONAL PERSPECTIVE

South Africa, prior to 1994, saw international law having little application in the development of labour law.[186] Currently, the Constitution obligates South African courts, tribunals and forums to consider applicable international law when interpreting any rights within the Bill of Rights.[187] Section 233 of the Constitution requires that when interpreting any legislation, courts are to prefer any judicious interpretation of the legislation that is consistent with international law over any other alternative interpretation that is contrary to international law.[188]

Section 3 of the LRA requires consideration be afforded to both foreign and international law. [189] The section below examines Article 27 of the CRPD and briefly discusses the CRPD's stance on reasonable accommodation for persons with psychosocial disabilities in the workplace. [190]

(a) Convention on the Rights of Persons with Disabilities (CRPD)

The CRPD was adopted by the United Nations General Assembly in December 2006 and enforced during May 2008.[191] The purpose the CRPD is 'to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.'[192] The CRPD's preamble acknowledges that 'discrimination against any person on the basis of disability is a violation of the inherent dignity and worth of the human person'.[193] South Africa signed and ratified the CRPD, that promotes meaningful work for persons with disability, as well as the Optional Protocol that allows people to seek redress for treaty violations at an international level, should all avenues at a national level be exhausted.[194] As such South Africa and other member states are enjoined under the CRPD to meet their obligations towards persons with disabilities.

Article 27 of the CRPD provides for the rights of persons disabilities, inclusive of psychosocial disabilities, to work with others on an equal basis. [195] The obligations established in article 27(1)(a) to (k) requires member states to either develop equal employment opportunities or establish an open, inclusive and accessible work

[186] Welgemoed op cit note 38 at 29.
[187] Ibid.
[188] Ibid.
[189] Carvalheira op cit note 91at 94.
[190] Ibid.
[191] Ibid.
[192] Ibid.
[193] Holness op cit note 1 at 521.
[194] Ngcobo op cit note 73.
[195]Holness op cit note 1 at 521.

environment.[196] In addition, there is a duty on member states to prohibit all forms of discrimination on the basis of disability in all circumstances regarding employment, inclusive of career advancement; employment continuance and working conditions that are safe and healthy.[197] This includes safeguarding the rights of the disabled to gain a living by working in an accessible, open labour market, as well as work in an open, inclusive and accessible environment to them.[198]

(i)Openness, inclusivity and accessibility

Providing an open labour market for persons with disabilities allows them the opportunity to choose a job that they are most suitable for, thus enabling them to compete on an equal basis with those who do not have disabilities.[199] Inclusivity in the workplace refers to embodying diversity, as well as providing support to grow and improve. Lastly, inclusivity recognises and removes the barriers confronted by particular groups of people.[200] Accessibility in the workplace means an environment that is physically and attitudinally accessible. Attitudinal barriers may include misconceptions of people within the workplace towards those with psychosocial disabilities.[201]

To ensure that the CRPD's notion of an open, inclusive and accessible workplace is attained the CRPD requires member states to implement the steps listed in article 27, inclusive of legislation.[202] These key concepts of openness, inclusivity and accessibility in the work environment for persons with psychosocial disabilities is vital in understanding the duty placed on employers to provide a work environment that is both psychologically safe and able to provide measures which reasonably accommodate persons with disabilities.[203]

(ii) Reasonable accommodation

The CRPD further encourages member states to create equal work opportunities for persons with disabilities by ensuring that reasonable accommodation is provided to persons with

[196] Dianah Msipa 'The right to work and employment in Southern Africa: A commentary on how selected employment lawsfare against article 27 of the CRPD (regional developments)' (2016) 14 *The African Disability Rights Yearbook* 283-301.
[197] Msipa op cit note 195 at 285.
[198] Holness op cit note 1 at 522.
[199] Dr Ratzka Adolf 'What is independent living - a personal definition' available at *https://www.independentliving.org/docs5/SANatlDisStrat6.html#anchorNote1* accessed on 1 June 2022.
[200] Ibid.
[201]Msipa op cit note 195 at 284.
[202] United Nations Convention on the Rights of Persons with Disabilities UNGA/61/106 2515 UNTS 3.
[203] Holness op cit note 1.

disabilities in the workplace.[204] This is due to the CRPD defining disability-discrimination as withholding reasonable accommodations.[205]

Article 5(3) of the CRPD obliges member states to take steps to ensure reasonable accommodation is provided to promote equality and eliminate discrimination.[206] Further, the CRPD, in article 27 expressly requires member states to ensure that people with disabilities are provided with reasonable accommodation in the workplace.[207] This applies to employers and to society at large. Reasonable accommodation is defined in the CRPD as accommodation that is 'necessary and appropriate' meaning that the individual enjoys their right to work by means of using ways to increase their effectiveness.

South Africa as a member state of the CRPD promotes and protects the rights of persons with disability under the Constitution, EEA, LRA, the Dismissals Code and Disability Code.[208] However, psychosocial disability is not adequately addressed under these legislative requirements due to the lack of definite enactments for psychosocial illness or disability. The EEAA's definition now aligns with the definition in the CRPD and broadens the scope to better protect diverse forms of disability, inclusive of psychosocial disability. Further, the enhanced definition accords a broader international understanding of what constitutes psychosocial disabilities. While South African labour law, has made efforts to promote and incorporate disability guidelines in line with CRPD, it falls short of meeting the CRPD's obligations in terms of article 5 and 27.[209] As such, there is a need to promulgate a legislation which could provide an integrated and comprehensive protection for persons with psychosocial disabilities.[210]

(V) COMPARITIVE ANALYSIS OF THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM

This section examines the approaches adopted by USA and UK respectively. The analysis will focus on areas of the international legal frameworks that may provide lessons for the South

[204] S Genga S & M du Plessis 'A critical analysis of the duty to provide reasonable accommodation for employees with psychosocial conditions as an employment anti-discrimination obligation: A case study of Kenya's legal framework' (2022) 10 *African Disability Rights Yearbook* 17 – 40.
[205] Ibid at 18.
[206] Msipa op cit note 195 at 284.
[207] UNCRPD op cit note 201.
[208] Msipa op cit note 195 at 284.
[209] Ibid.
[210] Ibid.

African legal framework in order to recommend potential solutions for the identified shortcomings under the latter's framework.

(a) Legal position in the USA

This section aims to analyse mental health conditions, especially psychosocial disability, as a possible mental disability, a ground of discrimination and a cause for reasonable accommodation under the USA legal framework.

By adopting the recommendations of both the CRPD and ILO, the USA has established a body of legislation, the Americans with Disability Act (ADA), [211] which regulates disabilities in the workplace. The definition of disability in terms of the ADA states that it is 'a physical or mental impairment that substantially limits one or more major life activities of such an individual, a record of such impairment; or being regarded as having such an impairment'.[212] The life activities that the ADA mentions are general life activities like caring for oneself and activities relating to bodily functions, like 'functions of the immune system, bowl, bladder'.[213]

Under the USA labour law, psychosocial disability is treated under the umbrella term of disability.[214] Employers and employees in the USA seek guidance from the ADA when faced with instances of psychosocial disability in their workplace.[215] The aim of the ADA is to exclude discriminatory practices on the basis of disability in all parts of life, inclusive of work-related matters.[216]

Due to conflicting judicial interpretation of ADA on the definition of disability by the USA courts, and the failure of the ADA to sufficiently promote and protect the rights of mentally- ill employees, the Americans with Disabilities Act Amendment Act (ADAAA) was later passed to give clarity and certainty on the definition of disability.[217] The ADAAA introduced adaptable elements for employees who are suffering from psychosocial disability to prove with less difficulty that they are disabled employees suffering from disability.[218] Employers are required to abide by the guidelines from the Acts on matters of psychosocial

[211] Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).
[212] Welgemoed op cit note 38 at 57.
[213] Ibid.
[214]Damien John Viviers *Mental health and the world of work: A comparative analysis of the legals works governing categories of mental health conditions* (unpublished LLD thesis, University of South Africa, 2017).
[215] Nadeema Sonday *An overview of the effectiveness of employment legislation in protecting people with disabilities against discrimination in the South African workplace* (unpublished LLM thesis, University of the Western Cape 2021).
[216] Ibid.
[217] Viviers op cit note 214 at 181.
[218] Ibid.

disability and may not just dismiss an employee with a psychosocial disability, as this could be construed as discrimination on the ground of disability.[219]

The Equal Employment Opportunity Commission (EEOC), was established under the ADA to regulate and implement guidelines in relation to Title 1 of the ADA, as this agency is responsible for enforcing the ADA as well as publishing guidelines and tracking mental disability claims.[220] The EEOC provides guidance to the courts and litigants on equal employment opportunities for individuals with disabilities. The EEOC further is allowed to investigate charges relating to employment discrimination filed against employers.[221] Notably, the Enforcement Guidance addresses the vital principle of reasonable accommodation.[222]

In essence, the ADAAA embodied the broader ideology that the employers must provide a reasonable accommodation to employees with disabilities.[223] The principle of reasonable accommodation existed within the ADA but has been improved by the ADAAA and has since offered a broader oversight of reasonable accommodation of an individual's disability.

(i) The duty to accommodate and reasonable accommodation under the Americans with Disability Act

While the term reasonable accommodation does not appear in the definition of disability, it remains an important component of Title 1 of the ADA.[224] Employers are required to make reasonable accommodation to either the employers' premises or the working conditions of the employee, which supports a user-friendly environment for the employee with disabilities. The ADA further states that a 'qualified individual with a disability' is an individual who, with or without reasonable accommodation, can accomplish the essential functions of the job in which the person is employed or which the person wishes to do.[225]

Reasonable accommodations could include flexible scheduling, modification of equipment, or adjustments to policies and practices to warrant fair treatment and access for employees with psychosocial disabilities.[226] Employers are required to participate in a collaborative process with employees to ascertain suitable accommodations based on

[219] Welgemoed op cite note 38 at 57.
[220] Ibid.
[221] Ibid.
[222] Viviers op cit note 214 at 182.
[223] Ibid.
[224] Welgemoed op cit note 38 at 57.
[225] Ibid.
[226] Scott Burris and Kathryn Moss 'The Employment Discrimination Provisions of the Americans with Disabilities Act: Implementation and Impact' (2007) 25 *Hofstra Labor & Employment Law Journal* 1 - 32.

individual needs and job conditions.[227] The purpose of reasonable accommodation is to identify and remove barriers that may prevent the employee from performing the requirements of the job.[228] Thus, an employee with a disability is awarded an equal chance to enjoy the benefits and privileges of employment that employees without a disability enjoy.[229] The job modifications requires the employer to adapt the employees' functions in a reasonably fair manner, without causing the employer unjustifiable hardship.[230] An unjustifiable hardship, in terms of the ADA, is a measure that involves 'significant difficulty or expense' for the employer, in order to reasonably accommodate the employee with disabilities.[231]

There is a further duty on the employer, under the ADA, to accommodate the employee with the psychosocial disability, within the ambit of reasonableness and not preference. The ADA compels the employer to assess the workplace and approve the employee's accommodation should it be reasonable.[232] The employers duty to accommodate under the ADA extends to authorising and approving the employees leave of absence, where required, however not indefinitely.[233]

(ii) Americans with Disabilities Amendment Act (ADAAA)

The shift of approach from that of the ADA to the ADAA is significant as employees suffering from psychosocial disability are now able to submit evidence of their symptoms and are protected under the ADA. The ADAA further reduces the burden on employees of first having to prove their disability. Despite this shortcoming the protection offered by ADAAA is a major improvement for those who have previously been discriminated against due their impairments.[234]

The enhanced definition of disability under the ADAAA shows that an impairment that substantially limits a major activity qualifies as a disability, even in cases where the extension does not affect other major life activities.[235] As such the definition in the ADAAA shifts the burden of proof from the employee to the employer, and the employer has to show that the

[227] Ibid.
[228] Ibid.
[229] Ibid.
[230] Viviers op cit note 214 at 182.
[231] Welgemoed op cit note 38 at 68.
[232] Viviers op cit note 214 at 182.
[233] Ibid
[234] Ibid.
[235] Ibid.

employee is in not disabled.[236] The ADAAA has widened the interpretation of the definition of disability, however it still provides insufficient protection to persons with disabilities. The ADAAA has also failed to provide incentives to encourage employers to employ individuals suffering from disabilities.[237]

(b) Similarities and differences between USA and South Africa

The USA classifies psychosocial disability as a form of disability, whereas in South Africa psychosocial disability is classified as either incapacity due to ill-health or a disability. The ADA and ADAAA legislation regulates the matters pertaining to psychosocial disability, however, the EEA focuses on achieving equity and equal opportunities with specific guidelines under the Code of Good Practice on incapacity.[238] The EEA, LRA and relevant Code regulate the actions of the South African employers and employees.[239] In comparison, the USA employment law, is regulated by the ADA and ADAAA when matters regarding dismissal are being considered.[240] The South African labour law regulations on incapacity based on ill-health offer limited protection on the ground of disability, in comparison to the sufficient protection of psychosocial disability offered by ADA or the ADAAA . Similarly, the ADAAA places the onus of determining the fairness of the dismissal on the employer.[241] South Africa and the USA similarly recognise that employees experiencing psychosocial disabilities require reasonable accommodation, however such accommodation should not result in undue hardship.[242]

It is my view that by combining the ADA's structured legal protections with the EEA's emphasis on wide-ranging inclusivity, South African employers and policymakers can create more successful systems that ensure fairness and inclusion for employees with psychosocial disabilities, irrespective of cultural or economic circumstances. This approach would not only champion human rights but also improve workplace diversity, productivity, and employee well-being.

[236] Ibid.
[237] Sonday op cit note 215 at 30.
[238] Ibid.
[239] Burris op cit note 240 at 15.
[240] Ibid.
[241] Ibid.
[242] Welgemoed op cit note 38 at 83.

(c) The legal position in the United Kingdom

The rights of employees with psychosocial disabilities are regulated by the Equality Act 2010 (EA) and Health and Safety Act 1974 in the UK[243] The EA prohibits discrimination, harassment and victimisation based on disability and places a duty on employers to provide 'reasonable adjustments' for those employees with disability.[244] In the UK, psychosocial disabilities are recognised as disabilities under the EA provided, they meet certain criteria.[245] The UK, a member state to the CRPD, the EA does not explicitly incorporate the CRPD provisions resulting in gaps in the enforcement and practical application of its provisions. [246]

Prior to the EA, disability was regulated by the Disability Discrimination Act (DDA) of 1995.[247] The focus of the DDA was on prospective employment issues of persons with disabilities and eliminating prejudices suffered by employees.[248] Persons with disabilities had certain rights under the DDA, that were enforceable in tribunals exclusively established to deal with such matters.[249] However persons with disabilities had to satisfy the DDAs definition of disability to have protection under the DDA.

The DDA prohibited unfair discrimination on the grounds of disability and defined disability as a person having a 'physical or mental impairment that has a long-term adverse effect on the person's ability to carry out normal day-to-day' functions.[250] This same definition has been included in the EA.[251] There is an opposing view that this definition has not improved the position of persons with disabilities, nor has it extended protection to those that were excluded from the protection under the DDA.[252] As such, persons with disabilities are in the same position they were in under the DDA are still required to prove a disability before a claim of discrimination is considered.[253]

The EA has introduced some important changes by extending the protection resulting from disability.[254] Discrimination on the basis of disability is disallowed when the person is

[243] Viviers op cit note 214 at 239.
[244] Equality and Human Right Commission 'Employing people: workplace adjustments' available at *https://www.equalityhumanrights.com/guidance/business/employing-people-workplace-adjustments*, accessed on 4 January 2025.
[245] Ibid.
[246] P Almond P, R Horton R, G James G. 'Mental health and wellbeing at work in the UK: current legal approaches' (2022) 42 *Legal Studies* 663-79.
[247] Ibid at 665.
[248] Ibid.
[249] Ibid.
[250] Ibid at 671.
[251] Ibid.
[252] Ibid.
[253] Ibid.
[254] Viviers op cit note 214 at 239.

treated unfavourably based on matters relating to their disability.[255] In terms of the EA, employers may not simply dismiss the employee before providing them with a reasonable adjustment. Thus, employers are encouraged to use caution when confronted with psychosocial disability in the workplace.[256] The obligation to make reasonable adjustments is acknowledged by the EA however, it is only once the psychosocial disability has worsened for the employee, to a degree that it meets the requirements of the EA, that the obligations arises.

(i) Reasonable Adjustment Duty

Reasonable accommodation is a commonly used term in international law dealing with disability. However the EA specifically refers to the term 'reasonable adjustment' to describe the modifications employers must makes to accommodate employees with psychosocial disabilities.[257] Section 20 of the EA compels employers to make reasonable adjustments for employees with disabilities. The EA does not formally make a distinction between reasonable adjustments and reasonable accommodations.[258]

Reasonable adjustment takes various forms, that includes taking steps to remove or reduce any challenge experienced by the employee in performing their duties due to their condition .[259] Should an individual's mental health condition not been classed as a disability within the definition of the EA, it is good practice for an employer to make appropriate changes to their work or working pattern to support them in employment.[260] However, employers should proceed with caution and decide on the merits of a case on an individual basis.[261] In cases where there is a possibility that an employee with a mental health condition is disabled for the purpose of falling within the EA's ambit, medical advice should be obtained, as well as consideration given to reasonable adjustments in order to reduce risk.[262] Additionally, disabled employees are protected against harassment and victimisation.[263] It should be noted that the duty to provide reasonable adjustment is not applicable if the employer is not aware, or could not have been cognisant that the employee is disabled and likely to be subjected to a

[255] Ibid.
[256] Ibid.
[257] J Olsen 'Employers: influencing disabled people's employment through responses to reasonable adjustments' (2022) 39 *Disability & Society* 791–810.
[258] Viviers op cit note 214 at 239.
[259]Sam Weston 'Mental health in the workplace: The UK crisis in eight statistics' available at https://www.mypossibleself.com/blog/mental-health-workplace-uk-crisis-eight-statistics/, accessed on 5 June 2022.
[260] Welgemoed op cit note 38 at 76.
[261] Ibid.
[262] Ibid.
[263] Ibid.

considerable disadvantage.[264] Where employers are subject to this duty, they should take reasonable steps to remove or reduce that employees disadvantage due to their disability. As such the EA acknowledges the duty to reasonably adjust the employment conditions to accommodate the disability of the employee with the purpose of supporting the employee in executing their work duties.

(d) Similarities and differences between the UK and South Africa

In the UK psychosocial disability is classified under the ambit of disability whereas in South Africa, psychosocial disability is regulated by way of incapacity due to ill-health.[265] In the UK, the EA is solely relied upon for regulating disability discrimination and employees who lodge a claim for dismissal arising from disability discrimination seek guidance from the EA.[266] Importantly, the EA offers advanced protection for persons with psychosocial disabilities against discrimination.[267]

A shortcoming in the UK's employment law is the burden of proof. Employees must prove that the employer discriminated against them on the ground of disability whereas under the South African employment context such onus is on the employer.[268] The duty to accommodate a disabled employee is recognised in both South Africa and the UK.[269] Although the terminology used in these countries refers interchangeably to reasonable adjustment and reasonable accommodation, these principles serve to achieve the same purpose.[270]

By addressing psychosocial disabilities, the EA protects and supports employees with psychosocial disabilities. South Africa can benefit from implementing similar provisions, specifically those of proactive duties and detailed guidance provided to employers. The discussion above shows that South Africa can learn from the UK's approach to mental health conditions in the workplace.

[264] Viviers op cit note 214 at 24.
[265] Ibid.
[266] Ibid.
[267] Ibid.
[268] Welgemoed op cit note 38 at 82.
[269] Ibid.
[270] Viviers op cit note 214.

(VI) RECOMMENDATIONS AND CONCLUSION

(a) Recommendations

Adopting the social approach of disability, as mentioned in part II, justifies the approach that people with disabilities are competent and that it is society who needs to adapt and accommodate the needs of these individuals. The primary recommendation is that psychosocial disability be regarded as a disability by employers. This would offer both the awareness of the illness and the required justification against dismissal by the employer. To address their inclusion it is recommended that jobs are created ; appropriate governmental support to establish vocational training and guidance, sheltered employment opportunities; encourage cooperatives by and for disabled persons; eliminating physical and communication obstacles and barriers; non-discrimination and information on effectual instances of integration and research on the various forms of psychosocial disability.[271]

While these measures might seem burdensome, only some will apply to each case, as psychosocial disabilities vary Where the employer has made the reasonable and necessary requirements to accommodate the employee and the employee no longer possess' the inherent requirements of the job, alternatively refuses to accept the offered reasonable accommodation or demands accommodation that leads to undue hardship for the employer, the employer would then be able to dismiss the employee for substantive reasons. The employer's duty to reasonably accommodate in South Africa, places the onus on the employer to prove the employee cannot perform the inherent requirements of the job, similar to the ADA, however, South Africa's requirements are not as wide and specific.

In addition, the EEA's Disabilities Code has been implemented, but it has not been further developed. As such there is currently no body of law available to provide clarity and consistency when addressing psychosocial disability in the workplace. The Disability Code or another body of legislation should be exclusively enacted to provide clarity when addressing psychosocial disabilities in the workplace, such as with the ADA and DDA. Currently the manner in which psychosocial disability is dealt with in the workplace is inadequate, as there is no formal protection to employees suffering from psychosocial disabilities because there is no specific body of law that deals with the issue. The most appropriate solution would be to

[271] Dhevarsha Ramjettan, Nivaani Moodley, Siya Ngcamu and Shane Johnson 'Managing mental health related issues in the workplace' available at *https://www.polity.org.za/article/managing-mental-health-related-issues-in-the-workplace-2021-09-02*, accessed on 5 May 2022.

draft and implement national mental health laws to regulate the rapidly increasing issues of employees suffering from psychosocial illnesses in the workplace. This would require recognising that psychosocial disability falls within the definition of disability within the EEA and enforcing it accordingly. With proper regulations and protection the disclosure of psychosocial disability by employees and early detection by employers would improve how efficiently psychosocial disabilities are addressed.

There is also a need for the government and employers to educate employees on what psychosocial disabilities are. This would combat the stigma and ignorance around what it means to have a psychosocial disability and how to best support the employee with the disability. Efforts to remove the barriers to disclosure should be pursued, thus fostering an open and understanding environment regarding psychosocial illness.

(b) Conclusion

Raising public awareness about psychosocial disability as a form of disability is crucial for employers to detect signs of psychosocial disability and respond appropriately. Employers should also be encouraged to move away from stigmatizing against psychosocial disability and to provide adequate protection for employees.

Employers should provide innovative solutions when providing reasonable accommodation modifications, while also not subjecting themselves to unjustified hardship by way of their policies and actions. The aim of this would be to ultimately improve the relationship between employer and employee, because of the employers' initiatives to promote mental wellness. As a result of these dismantled barriers, the affected employees would realise their own potential and their right to equal participation in the workplace would be guaranteed, through an open, inclusive and accessible workplace for all.

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