

REGIONAL DEVELOPMENTS

THE RIGHT TO WORK AND EMPLOYMENT IN SOUTHERN AFRICA: A COMMENTARY ON HOW SELECTED EMPLOYMENT LAWS FARE AGAINST ARTICLE 27 OF THE CRPD

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1 Introduction

Persons with disabilities have historically been denied the right to employment due to discriminatory barriers and mistaken assumptions about their ability to work. As a result of these misconceptions and attitudes, employers have tended to either deny persons with disabilities employment altogether, or have hired them only for work which does not require much knowledge or skills.¹ Some employers pay their workers with disabilities a comparatively lower salary than their non-disabled counterparts who do the same work because they believe that the cost of providing reasonable accommodation in the workplace is too high.² In extreme cases, persons with disabilities may be forced into exploitative, slave labour-like situations in which they receive no pay at all, or they may be forced to work in unsafe working conditions. Still, other persons with disabilities are denied opportunities to work in the mainstream job market and they may find themselves forced, for lack of better options, into segregated work settings, such as sheltered workshops, where they work in an environment which is separate from the open labour market where non-disabled persons work.³

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1 JE Lord et al *Human rights. YES! Action and advocacy on the rights of persons with disabilities* 139.

2 As above. Some employers actually deny persons with disabilities employment on the basis that it would be too 'expensive' to employ persons with disabilities because they have to be accommodated.

3 As above.

In recognition of the fact that persons with disabilities continue to be denied their rights, including the right to employment, the United Nations (UN) General Assembly adopted the Convention on the Rights of Persons with Disabilities (CRPD) on 13 December 2006.⁴ The CRPD provides for the right to work and employment in article 27. In recognizing the rights of persons with disabilities to earn a living through work that is freely chosen and accepted, the CRPD relies on the principles of equal opportunity, equal treatment and non-discrimination.⁵ Many Southern African countries have signed and ratified the CRPD. In spite of this ratification, persons with disabilities in Southern Africa continue to have their rights to work and employment violated, signifying a lack of adequate implementation as well as the lack of an enabling legal framework. This commentary examines the extent to which domestic legislation in five Southern African countries complies with the standards set in article 27 of the CRPD. Such an examination is important because, in the absence of an enabling legal framework, the implementation of the right to work and employment will be ineffective.

The commentary is divided into two parts. The first part briefly explores the meaning of the right to work and employment as set out in article 27 of the CRPD. The second part examines the legislation governing work and employment in the Southern African countries of Zimbabwe, Angola, South Africa, Botswana and Swaziland, with a view to assessing the extent to which the legislation complies with the standard set in article 27 of the CRPD. Whilst it is acknowledged that the picture of employment in these countries is incomplete without taking account of the relevant policy framework, this commentary does not address the policy framework as this falls outside its scope. Therefore, the commentary will be restricted to an examination of the legislation in these countries.

2 Meaning of the right to work and employment

Article 27 of the CRPD provides for the right of persons with disabilities to work and employment. The right to work and employment has been described as an issue of non-discrimination and accessibility because disability-based discrimination has been 'prominent and persistent' in the field of employment.⁶ This right does not guarantee that everyone with a disability who is of working age will have employment, in much the same

4 Convention on the Rights of Persons with Disabilities GA Res A/RES/61/06, adopted on 13 December 2006, entered into force on 3 May 2008.

5 The Right to Decent Work for Persons with Disabilities, launched by the ILO on the International Day of Disabled Persons, 3 December 2007.

6 M Schulze 'Understanding the UN Convention on the Rights of Persons with Disabilities' <http://www.handicap-international.fr/fileadmin/documents/publications/HICRPDManual.pdf>

way that the right to health, for example, does not guarantee that a person will be healthy.⁷ Rather, the right seeks to guarantee that persons with disabilities have access to work and employment opportunities on an equal basis with others and that such work and employment is carried out in a conducive environment and under favourable conditions. The right to work and employment, therefore, encompasses two elements: first, the right to be afforded the *opportunity* on an equal basis with others ‘to gain a living by work freely chosen or accepted in a labour market’;⁸ and, second, the right to carry on such employment in a ‘work environment that is open, inclusive and accessible to persons with disabilities.’⁹ All the obligations of state parties listed in articles 27(1)(a)-(k) of the CRPD are measures intended to either create equal opportunities for employment or to create an open, inclusive and accessible work environment.

The obligation to prohibit discrimination on the basis of disability in ‘matters concerning all forms of employment ... including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions’¹⁰ falls under the category of the creation of an equal opportunity for employment and the obligation to enable ‘persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training’;¹¹ also concerns the creation of equal opportunities for work. The obligation to ‘ensure that reasonable accommodation is provided to persons with disabilities in the workplace’¹² also falls under the category of the creation of equal opportunities for work. This is because the CRPD defines disability-discrimination as including the denial of reasonable accommodations.¹³ Similarly, the obligations to ‘promote employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment’;¹⁴ the obligation to ‘promote opportunities for self-employment, entrepreneurship, the development of co-operatives and starting one’s own business’;¹⁵ the obligation to ‘employ persons with disabilities in the public sector’;¹⁶ the obligation to ‘promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures’;¹⁷ the obligation to ‘promote the acquisition by persons with disabilities of work experience in the open

7 Lord et al (n 1 above).

8 CRPD, art 27(1).

9 As above.

10 CRPD, art 27(1)(a).

11 CRPD, art 27(1)(d).

12 CRPD, art 27(1)(i).

13 CRPD, art 2.

14 CRPD, art 27(1)(e).

15 CRPD, art 27(1)(f).

16 CRPD, art 27(1)(g).

17 CRPD, art 27(1)(h).

labour market’;¹⁸ and the obligation to ‘promote vocational and professional rehabilitation, job retention and return-to-work programmes for persons with disabilities’¹⁹ all involve the creation of equal opportunities for work for persons with disabilities. In other words, these obligations are effectively ways in which state parties may create equal opportunities for work for persons with disabilities.

The remaining measures go to the creation of an open, inclusive and accessible work environment for persons with disabilities. In other words, states parties may create an open, inclusive and accessible work environment by ‘protect[ing] the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances’;²⁰ ‘ensur[ing] that persons with disabilities are able to exercise their labour and trade union rights on an equal basis with others’;²¹ ‘ensur[ing] that reasonable accommodation is provided to persons with disabilities in the workplace’;²² and by prohibiting slavery or servitude as well as forced or compulsory labour.²³

Together, these measures and obligations are intended to protect the right to work and employment for persons with disabilities. They are in line with some of the principles stated in the CRPD, such as non-discrimination,²⁴ equality of opportunity²⁵ and accessibility.²⁶ It is important to note that achieving equality requires the prohibition of discrimination as well as the taking of positive steps to ensure the right to equality such as affirmative action measures. Article 4(1) of the CRPD sets out the general obligations which state parties must meet. One of the obligations found in article 4(1)(b) is to ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities’. State parties, therefore, have an obligation to ensure that there is an enabling legal framework. The measures and obligations in article 27 of the CRPD provide the standard which state parties should aspire to

18 CRPD, art 27(1)(j).

19 CRPD, art 27(1)(k).

20 CRPD, art 27(1)(b).

21 CRPD, art 27(1)(c).

22 CRPD, art 27(1)(i). The provision of reasonable accommodation falls under both categories: the creation of equal employment opportunities as well as the creation of an open, inclusive and accessible work environment. This is because the denial of reasonable accommodation is now part of the definition of disability discrimination. Therefore, in order to create equality of opportunity, there is a need to provide reasonable accommodation. At the same time, the provision of reasonable accommodation is also necessary to ensure that persons with disabilities can access buildings, information at the workplace and perform effectively in the workplace.

23 CRPD, art 27(2).

24 CRPD, art 3(b).

25 CRPD, art 3(e).

26 CRPD, art 3(f).

when enacting and/or amending such legislation, in order to adequately protect the right of persons with disabilities to work and employment at the domestic level. It is against this standard that the employment laws in five Southern African countries are evaluated.

3 Evaluation of the employment laws in selected Southern African countries²⁷

3.1 Zimbabwe²⁸

3.1.1 *Obligation to create equal work opportunities for persons with disabilities*

Constitution of Zimbabwe

The Constitution of Zimbabwe²⁹ contains provisions which create an obligation to provide work opportunities for persons with disabilities on an equal basis with others. The Zimbabwean Constitution contains a general equality and non-discrimination clause which prohibits discrimination on several grounds, including disability, in all spheres of life.³⁰ Therefore, the conclusion may be drawn that the Zimbabwean Constitution prohibits discrimination on the basis of disability in the employment sector. This conclusion is further supported by the clause in the Zimbabwean Constitution dealing with labour and employment relations, which provides that government must 'adopt reasonable policies and measures, within the limits of the resources available to them, to provide *everyone* with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families'.³¹ That the Constitution of Zimbabwe intends to protect the rights of persons with disabilities to have an opportunity to work is evident in the article requiring the provision of 'vocational guidance and the development of vocational and training programmes, including those for persons with disabilities'³² so that they may access work opportunities. The provision in the Zimbabwean Constitution which is dedicated to the rights of persons with disabilities does not expressly address the right to work and employment for persons with disabilities. It does, however, provide in a rather vague fashion that

27 For purposes of this section, reference is made to disability-specific provisions and general provisions which apply to persons with disabilities by virtue of the use of terms such as 'everyone', 'all', etc. In order to save space and avoid repetition, the author will not explain when dealing with general provisions that they apply to persons with disabilities by virtue of the use of terms such as 'everyone' and 'all'.

28 Zimbabwe ratified the CRPD on 23 September 2013.

29 Constitution of Zimbabwe, 2013.

30 Constitution of Zimbabwe art 56(3).

31 Constitution of Zimbabwe art 24(1).

32 Constitution of Zimbabwe art 24(2)(c).

the state must take measures to enable persons with disabilities to become 'self-reliant'.³³ Although the language is vague, this provision may be construed to mean the rights to work and employment of persons with disabilities.

However, these provisions still fall short of the standard set in article 27 of the CRPD, and this fact becomes apparent when other provisions in the Zimbabwean Constitution, particularly those dealing specifically with persons with disabilities, are examined more closely. For example, article 22 of the Zimbabwean Constitution, which specifically addresses persons with disabilities, requires the government and all government institutions and agencies to 'develop programmes ... especially work programmes' for persons with disabilities.³⁴ However, these work programmes must be '*consistent with their capabilities* and acceptable to them or their legal representatives.'³⁵ The requirement for government to avail work programmes for persons with disabilities which are 'consistent with their capabilities' equates disability with inability and does not seem to encourage persons with disabilities to obtain work on the open market as is required by article 27 of the CRPD. This is consistent with the much-criticised medical model of disability which regards disability as a problem innate in the individual with impairment as opposed to the social model of disability, to which the CRPD espouses, according to which disability is the result of the interaction between a disabling environment and an individual with impairment. Furthermore, this provision requires the development of programmes 'for the welfare of persons with *physical or mental disabilities*.'³⁶ This means that persons with other types of disabilities, such as sensory disabilities, cannot benefit from these work programmes.³⁷ The CRPD safeguards the right to work and employment for all persons with disabilities, not only persons with certain types of disabilities.³⁸ Therefore, by failing to provide for persons with disabilities participating in the open labour market and by failing to include persons with all types of disabilities, the Constitution of Zimbabwe falls short of the standard set in article 27 of the CRPD.

Labour Act (Chapter 28:01)

The Labour Act,³⁹ the principal Act defining the fundamental rights of employees in Zimbabwe, contains provisions which create equal work opportunities for persons with disabilities. The Labour Act contains an equality and non-discrimination clause intended to provide for the creation

33 Constitution of Zimbabwe art 83(a).

34 Constitution of Zimbabwe art 22(3)(a).

35 As above (my emphasis).

36 As above (my emphasis).

37 Art1 of the CRPD lists the different types of disabilities and these include 'physical, mental, intellectual or sensory' disabilities.

38 CRPD, art 27(1).

39 Labour Act [Chapter 28:01].

of opportunities for work and employment of persons with disabilities. This Act prohibits discrimination against employees on several grounds, including disability.⁴⁰ Discrimination is prohibited in relation to various matters of employment, including job advertisement;⁴¹ the recruitment process;⁴² the creation, classification or abolition of jobs or posts;⁴³ the determination of wages and other benefits;⁴⁴ and ‘the choice of persons for posts, training, advancement, apprenticeships, transfer, promotion or retrenchment’.⁴⁵ However, provisions prohibiting non-discrimination alone are not enough to meet the standard set in article 27 of the CRPD. The Labour Act, apart from prohibiting discrimination on the basis of disability in the employment sector, does not require the taking of any other positive steps, such as affirmative action or the provision of reasonable accommodation in order to ensure that persons with disabilities are provided with an opportunity to work on an equal basis with others. Since this is the principal Act dealing with matters of work and employment in Zimbabwe, this is a fundamental failure.

Disabled Persons Act Chapter 17:01

Similarly, although the Disabled Persons Act,⁴⁶ the main Act for persons with disabilities in Zimbabwe, contains provisions intended to create equal work opportunities for persons with disabilities, the Act still falls short of the article 27 standard. The Disabled Persons Act expressly prohibits discrimination against persons with disabilities in employment⁴⁷ in order to provide for equal opportunities to work and employment. The Act prohibits employers from discriminating against persons with disabilities in relation to ‘the advertisement of employment’;⁴⁸ ‘the recruitment for employment’;⁴⁹ ‘the creation, classification or abolition of jobs or posts’;⁵⁰ ‘the determination or allocation of wages, salaries, pensions, accommodation, leave or other such benefits’;⁵¹ ‘the choice of persons for jobs or posts, training, advancement, apprenticeships, transfer, promotion or retrenchment’;⁵² ‘the provision of facilities related to or connected with employment’;⁵³ and ‘any other matter related to employment’.⁵⁴ However, as stated earlier, provisions which simply prohibit

40 Labour Act, sec 5(1).

41 Labour Act, sec 5(1)(a).

42 Labour Act, sec 5(1)(b).

43 Labour Act, sec 5(1)(c).

44 Labour Act, sec 5(1)(d).

45 Labour Act, sec 5(1)(e).

46 Disabled Persons Act [Chapter 17:01].

47 Disabled Persons Act, sec 9.

48 Disabled Persons Act, sec 9(1)(a).

49 Disabled Persons Act, sec 9(1)(b).

50 Disabled Persons Act, sec 9(1)(c).

51 Disabled Persons Act, sec 9(1)(d).

52 Disabled Persons Act, sec 9(1)(e).

53 Disabled Persons Act, sec 9(1)(f).

54 Disabled Persons Act, sec 9(1)(g).

discrimination are not enough to adequately protect the right to work and employment for persons with disabilities as laid out in article 27 of the CRPD. It is necessary to make provision for other positive steps or measures to protect the right to work.

Interestingly, the Disabled Persons Act does not require the provision of reasonable accommodation. Instead, the Act effectively states that, where an employer has not provided reasonable accommodation, they will not be deemed to have discriminated against the person with a disability.⁵⁵ This is contrary to the definition of disability discrimination contained in the CRPD, which defines disability discrimination as including the denial of reasonable accommodation.⁵⁶ This may be attributed to the fact that the Act is outdated, since it was enacted as far back as 1992. Therefore, in failing to make provision for the taking of positive steps to ensure that persons with disabilities have equal opportunities to work and in failing to require the provision of reasonable accommodation, the Disabled Persons Act falls short of the article 27 standard.

3.1.2 Obligation to provide an open, inclusive and accessible work environment

Constitution of Zimbabwe

The Constitution of Zimbabwe contains provisions which create an obligation on employers to provide an open, inclusive and accessible work environment for persons with disabilities. Article 65 of the Zimbabwean Constitution deals with labour rights and requires the provision of measures intended to provide a safe and healthy working environment. Employers are required to ensure that safe labour practices and standards are in place, and it also provides for the right of employees to receive a fair and reasonable wage,⁵⁷ to form and join trade unions and to take part in their activities,⁵⁸ to strike, sit in or withdraw their labour,⁵⁹ and the right to 'just, equitable and satisfactory conditions of work'.⁶⁰ Although this provision does not make specific reference to persons with disabilities, the term 'every person' impliedly includes persons with disabilities.

In line with article 27(2) of the CRPD, the Zimbabwean Constitution provides for freedom from slavery or servitude, providing that '[n]o person may be subjected to slavery or servitude'.⁶¹ The Zimbabwean Constitution also provides for freedom from forced or compulsory labour, stating that

55 Disabled Persons Act, sec 9(2)(c).

56 CRPD, art 2.

57 Constitution of Zimbabwe, art 65(1).

58 Constitution of Zimbabwe, art 65(2).

59 Constitution of Zimbabwe, art 65(3).

60 Constitution of Zimbabwe, art 65(4).

61 Constitution of Zimbabwe, art 54. See n 27 above.

'[n]o persons may be made to perform forced or compulsory labour'.⁶² In this regard, the Constitution of Zimbabwe contains provisions which are in line with the article 27 standard.

3.2 Angola⁶³

3.2.1 *Obligation to provide equal work opportunities for persons with disabilities*

Constitution of Angola

There are provisions in the Constitution of Angola⁶⁴ which create an obligation to provide equal work opportunities for persons with disabilities. However, the Constitution still falls short of the article 27 standard. The Constitution of Angola prohibits discrimination on a number of grounds, including disability and⁶⁵ in a number of spheres, including the sphere of employment. The Angolan Constitution declares that '[w]ork shall be the right and duty of all'.⁶⁶ The Constitution goes on to place an obligation on government to promote the 'implementation of policies to generate work'⁶⁷ and equal 'opportunities in the choice of profession or type of work and conditions which prevent preclusion or limitation due to any form of discrimination'.⁶⁸ Since the Angolan Constitution prohibits discrimination on the ground of disability, it may be concluded that the obligations placed on the government to create opportunities for work also apply to the creation of work opportunities for persons with disabilities.

Article 83 of the Constitution of Angola, which deals specifically with persons with disabilities, requires the state to 'foster and support special education and technical and vocational training for disabled citizens'.⁶⁹

The Constitution, therefore, has a general anti-discrimination provision as well as a general declaration that all persons are entitled to the right to work,⁷⁰ but does not really contain positive measures, such as the quota system⁷⁰ or affirmative action, which may be taken in order to

62 Constitution of Zimbabwe, art 55. See n27 above.

63 Angola ratified the CRPD on 19 May 2014.

64 Constitution of Angola 2010.

65 Constitution of Angola, art 23(2).

66 Constitution of Angola, art 76(1). See n27 above.

67 Constitution of Angola, art 76(3)(a).

68 Constitution of Angola, art 76(3)(b).

69 Constitution of Angola, art 83(4).

70 Making use of the quota system is not a necessity, particularly in light of the fact that there are divergent opinions about whether or not quota systems are desirable. The specifics of this debate are beyond the scope of this commentary. It is included here as an example of a positive step which may be taken in the protection of the right to employment.

ensure that persons with disabilities actually enjoy equal opportunities to the right to work and employment. Furthermore, it does not provide for the provision of reasonable accommodation for persons with disabilities. In this regard, therefore, it falls short of the CRPD standard.

General Labour Law 2000

The General Labour Law of Angola⁷¹ contains a provision which may be taken to be intended for the creation of equal work opportunities for persons with disabilities. In spite of this, the law still falls short of the standard set in article 27 of the CRPD. The Law contains a provision on the right to work and on the prohibition of discrimination in the employment sector on various grounds. However, disability is not mentioned as one of these grounds.⁷² Nevertheless, it may be concluded that disability discrimination is prohibited, particularly in light of the fact that the Constitution, which is the supreme law of the land, prohibits disability discrimination. The Law fails to meet the standard set in article 27 of the CRPD as it fails to provide for the taking of positive measures as well as the provision of reasonable accommodation in order to ensure that persons with disabilities have equal work opportunities.

3.2.2 Obligation to provide an open, inclusive and accessible work environment

Despite containing provisions which create an obligation to provide an open, inclusive and accessible work environment, the Constitution of Angola still fails to meet the article 27 standard. The Constitution provides for the right to 'vocational training, fair pay, rest days, holidays, protection, and workplace health and safety'.⁷³ The Angolan Constitution also creates an obligation for the provision of 'academic training and scientific and technological development, as well as vocational development for workers'.⁷⁴ By failing to provide for the provision of reasonable accommodation, the Constitution does not adequately make provision for the creation of an open, inclusive and accessible work environment for persons with disabilities.

71 General Labour Law 2000.

72 General Labour Law, art 3(1).

73 Constitution of Angola, art 76(2).

74 Constitution of Angola, art 76(3)(c).

3.3 South Africa⁷⁵

3.3.1 *Obligation to provide equal work opportunities for persons with disabilities*

Constitution of the Republic of South Africa, 1996

The Republic of South Africa has laws in place which provide for equal work opportunities for persons with disabilities. The Constitution of South Africa⁷⁶ prohibits direct and indirect discrimination on several grounds, including disability.⁷⁷ The Constitution goes on to state that '[e]very citizen has the right to choose their trade, occupation, or profession freely'.⁷⁸ Article 7(2) of the Constitution provides that the state must 'respect, protect, promote and fulfil' the rights which are contained in the Bill of Rights, including the right to work and employment. This provision may be construed to be impliedly creating a duty to put positive measures in place in line with article 27 of the CRPD.

The Employment Equity Act

The purpose of the Employment Equity Act⁷⁹ is to 'achieve equity in the workplace'.⁸⁰ Such equity is to be achieved by, first, 'promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination'⁸¹ and, second, by 'implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups'.⁸² The Act applies to all employees except members of the National Defence Force, the National Intelligence Agency and the South African Secret Service.⁸³ The Employment Equity Act contains a provision prohibiting unfair discrimination, both direct and indirect, on a number of grounds, including disability.⁸⁴ It places a duty on employers to 'take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice'.⁸⁵ This is in line with article 27 of the CRPD.

75 South Africa ratified the CRPD on 30 November 2007.

76 Constitution of the Republic of South Africa, 1996. See n 27 above.

77 Constitution of South Africa, art 9(3).

78 Constitution of South Africa, art 22.

79 Employment Equity Act, 1998.

80 Employment Equity Act, sec 2.

81 Employment Equity Act, sec 2(a).

82 Employment Equity Act, sec 2(b).

83 Employment Equity Act, sec 4(2).

84 Employment Equity Act, sec 6(1).

85 Employment Equity Act, sec 5.

3.3.2 Obligation to provide an open, inclusive and accessible work environment

Constitution of South Africa

There are provisions in the South African Constitution which create an obligation for employers to provide an open, inclusive and accessible environment. The provision dealing with labour relations in the Constitution protects the right to form and join a trade union⁸⁶ as well as the right to strike.⁸⁷ This is in line with article 27 of the CRPD. Since the Constitution of South Africa prohibits discrimination on the basis of disability,⁸⁸ it is implied that this provision applies to persons with disabilities even though such persons are not expressly referred to in the provision.

In line with article 27 of the CRPD, the Constitution of South Africa states that '[n]o one may be subjected to slavery, servitude or forced labour'.⁸⁹

Employment Equity Act

Part III of the Employment Equity Act addresses the provision of affirmative action measures, which are defined as 'measures designed to ensure that suitably-qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer'.⁹⁰ It is important to note that, according to this Act, persons with disabilities fall under the category of 'designated groups'.⁹¹ The provision of reasonable accommodation is also encapsulated within the provision on affirmative action measures.⁹² Providing for reasonable accommodation is important because, in the absence of a duty to reasonably accommodate persons with disabilities, the creation of an open, inclusive and accessible work environment cannot be achieved. The Act goes on to clarify that the taking of positive measures, such as affirmative action measures, does not constitute unfair discrimination.⁹³ This is in line with the standard in article 27 of the CRPD.

Furthermore, section 54(1)(a) of the Employment Equity Act gives the Minister power to issue codes of good practice which give guidance to

86 Constitution of South Africa, art 23(2)(a).

87 Constitution of South Africa, art 23(2)(c).

88 Constitution of South Africa, art 9(3).

89 Constitution of South Africa, art 13. See n27 above.

90 Employment Equity Act, sec 15(1).

91 Employment Equity Act, sec 1(e).

92 Employment Equity Act, sec 15(2)(c).

93 Employment Equity Act, sec 6(2)(a).

employers on how to implement the Act. Of particular relevance is the Code of Good Practice: Key Aspects on the Employment of People with Disabilities issued in terms of the EEA.⁹⁴ The Code deals with pertinent issues, such as the provision of reasonable accommodation;⁹⁵ recruitment and selection;⁹⁶ training and career advancement;⁹⁷ retaining people with disabilities;⁹⁸ and termination of employment,⁹⁹ amongst other things. Despite the fact that the Code is more of a policy document than a piece of legislation, it remains important as it must be considered when courts and tribunals are interpreting the Employment Equity Act. The matters addressed in the Code, such as the provision of reasonable accommodation, are generally in line with article 27 of the CRPD.

Labour Relations Act 66 of 1995

Further provision is made for the creation of an open, inclusive and accessible working environment in the Labour Relations Act,¹⁰⁰ which provides for several rights, such as joining a trade union.¹⁰¹ The Act uses language such as 'every employee', implying that persons with disabilities are also included within the ambit of the provision. Furthermore, dismissal on the ground of disability is automatically deemed as unfair dismissal.¹⁰² The Act makes reference to the duty to accommodate in relation to situations where employees are injured in the workplace.¹⁰³ Although this is in line with the CRPD, it falls short of the standard set therein, since all persons with disabilities are entitled to have reasonable accommodation made on their behalf in order to enable them to enjoy the right to work and employment on an equal basis with others.

Basic Conditions of Employment Act 75 of 1997

The Basic Conditions of Employment Act¹⁰⁴ deals with matters such as the regulation of working time;¹⁰⁵ leave;¹⁰⁶ remuneration,¹⁰⁷ and

94 Code of Good Practice: Key Aspects on the Employment of People with Disabilities. Sec3(1) of the Code states that the code 'is not an authoritative summary of the law, nor does it create additional rights and obligations. Failure to observe the Code does not, by itself, render a person liable in any proceedings. Nevertheless, when the courts and tribunals interpret and apply the Employment Equity Act, they must consider it.'

95 Code of Good Practice, sec 6.

96 Code of Good Practice, sec 7.

97 Code of Good Practice, sec 10.

98 Code of Good Practice, sec 11.

99 Code of Good Practice, sec 12.

100 Labour Relations Act 66 of 1995.

101 Labour Relations Act, sec 4(1)(b).

102 Labour Relations Act, sec 187(1)(f).

103 Reference is made to the duty to accommodate in secs 10(4), 10(1) & 11(b)(ii) – dealing with cases of dismissal arising from ill health or injury.

104 Basic Conditions of Employment Act 75 of 1997.

105 Basic Conditions of Employment Act, ch 2.

106 Basic Conditions of Employment Act, ch 3.

107 Basic Conditions of Employment Act, ch 4.

termination of employment,¹⁰⁸ amongst others. The Act applies to all employees and employers.¹⁰⁹ By implication, therefore, from the language used, the provisions in the Act also apply to persons with disabilities.

Code of Good Practice on Equal Pay or Remuneration for Work of Equal Value

The Code of Good Practice on Equal Pay or Remuneration for Work of Equal Value¹¹⁰ was issued in terms of the Employment Equity Act. One of the objectives of this Code is to 'provide practical guidance to employers and employees on how to apply the principle of equal pay/remuneration for work of equal value in their workplaces'.¹¹¹ The aim of the Code is to overcome the disadvantages which have been suffered by historically-marginalised groups, including persons with disabilities, in the workplace. The Code states that '[a] difference in pay/remuneration will only be unfair discrimination if the differences are directly or indirectly based on race, sex, gender, disability or any other listed or on any other arbitrary ground'.¹¹² The Code, therefore, protects persons with disabilities from being discriminated against in relation to pay/remuneration. This is in line with article 27 of the CRPD.

In South Africa, therefore, there is no single piece of legislation which alone meets the article 27 standard. Nevertheless, the different pieces of legislation in combination can be said to meet the article 27 standard.

3.4 Botswana¹¹³

3.4.1 Obligation to provide equal work opportunities for persons with disabilities

Constitution of Botswana

The Constitution of Botswana¹¹⁴ falls short of the standard set in article 27 of the CRPD. Although the Constitution does not expressly list disability as one of the grounds upon which discrimination is prohibited, it does contain a clause providing for protection from discrimination on several grounds.¹¹⁵ It is important to note that prohibiting non-discrimination

108 Basic Conditions of Employment Act, ch5.

109 Basic Conditions of Employment Act, sec 3(1). There are, however, some exceptions such as members of the National Defence Force, the National Intelligence Agency, and the South African Secret Service and unpaid volunteers.

110 Code of Good Practice on Equal Pay or Remuneration for Work of Equal Value.

111 Code of Good Practice on Equal Pay, sec 1(1.1).

112 Code of Good Practice on Equal Pay, sec 4(6).

113 Botswana has not yet ratified the CRPD.

114 Constitution of Botswana 1966.

115 Constitution of Botswana, art 15(3).

alone does not ensure that persons with disabilities have equal work opportunities. There is a need to make provision for positive steps, such as affirmative action or the use of the quota system, to ensure that persons with disabilities have equal access to opportunities for work.

3.4.2 Obligation to provide an open, inclusive and accessible work environment

Constitution of Botswana

In line with article 27 of the CRPD, the Constitution of Botswana provides for protection from slavery and forced labour.¹¹⁶

Employment Act Chapter 47:01

The Employment Act¹¹⁷ regulates all matters pertaining to employment, such as forced labour;¹¹⁸ protection of wages;¹¹⁹ rest periods; working hours; holidays; and other conditions of work.¹²⁰ Section 120 deals with ‘regulations in relation to employment of infirm or handicapped persons’. This section gives the Minister the power to ‘make regulations in relation to the employment of persons affected by infirmity or physical handicap and, without prejudice to the generality of the foregoing, such regulations may regulate the conditions under which such persons are employed for the purpose of safeguarding their interests’. This provision suggests that the main provisions of this Act do not equally apply to persons with disabilities. It simply requires the Minister to produce provisions for ‘handicapped persons’. It goes without saying, therefore, that this Act falls short of the article 27 standard in that it fails to put in place measures to ensure that persons with disabilities have an open, inclusive and accessible work environment. Even if the provisions in the Act dealing, for example, with rest periods and working hours, are deemed to also apply to persons with disabilities, the Act would still fall short of the article 27 standard as it fails to include measures necessary for the creation of an open, inclusive and accessible work environment.

There are other Acts dealing with matters of work and employment, including the Trade Unions and Employers’ Organisations Act Chapter 48:01¹²¹ and the Vocational Training Act Chapter 47:04.¹²² However, neither of these Acts makes specific reference to persons with disabilities. This illustrates that Botswana laws do not meet the article 27 standard in

116 Constitution of Botswana, art 6.

117 Employment Act [Chapter 47:01].

118 Employment Act, part VI.

119 Employment Act, part VII.

120 Employment Act, part VIII.

121 Trade Unions and Employers’ Organisations Act ch48:01.

122 Vocational Training Act ch47:04.

as far as they fail to make provision through legislation for the right of persons with disabilities to work and employment.

3.5 Swaziland¹²³

3.5.1 Obligation to provide equal work opportunities for persons with disabilities

Swaziland Constitution 2005

The Constitution of Swaziland¹²⁴ contains provisions relating to work and employment. However, these provisions do not meet the article 27 standard. The Constitution prohibits discrimination on a number of grounds, including disability.¹²⁵ This means that disability discrimination in the employment sector is prohibited by the Swaziland Constitution. The provision in the Constitution dealing with the rights of workers states that '[a] person has the right to practise a profession and to carry on any lawful occupation, trade or business'.¹²⁶ The language used in this provision suggests that it applies to all people, including persons with disabilities. Nevertheless, the standard in article 27 has not been met. As stated earlier, the prohibition of discrimination and a declaration that all people have the right to work are inadequate for the protection of the right to work and employment for persons with disabilities. Some positive measures need to be taken in order to ensure that persons with disabilities actually have equal opportunities for work.

Employment Act 1980

The Employment Act¹²⁷ also fails to meet the standard set in the CRPD. The anti-discrimination clause in the Act lists a number of grounds upon which employers may not discriminate, but disability is not one of these grounds.¹²⁸ Persons with disabilities are not specifically mentioned in this Act. The provision does not contain a 'catch-all' phrase such as 'or other status' under which persons with disabilities might fall. This is an indication that the provisions in the Act are not mindful of persons with disabilities. The Act, therefore, omits to include important measures which are necessary for ensuring equal opportunities for work, such as quota systems and affirmative action. The Act, therefore, falls short of the article 27 standard.

123 Swaziland ratified the CRPD on 24 September 2012.

124 Constitution of Swaziland 2005.

125 Constitution of Swaziland, art 20(2).

126 Constitution of Swaziland, art 32(1).

127 Employment Act 1980.

128 Employment Act, sec 29.

3.5.2 *Obligation to create an open, inclusive and accessible work environment*

Constitution of Swaziland

Article 32 of the Swaziland Constitution deals with the rights of workers. It provides for the right to 'freely form, join or not to join a trade union for the promotion and protection of the economic interests of that worker'¹²⁹ and the right to 'collective bargaining and representation'.¹³⁰ Article 32 also requires the enactment of laws to 'provide for the right of persons to work under satisfactory, safe and healthy conditions',¹³¹ to 'ensure equal payment for equal work without discrimination',¹³² to 'ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay as well as remuneration for public holidays',¹³³ and the protection of employees 'from victimisation and unfair dismissal or treatment'.¹³⁴ In line with article 27 of the CRPD, the Constitution provides for protection from slavery and forced labour.¹³⁵ The language used in the Constitution indicates that the provisions also apply to persons with disabilities. However, the article 27 standard is still not met in the Constitution as important measures, such as the requirement to reasonably accommodate, have not been included and, without these measures, the right to work and employment for persons with disabilities will not be adequately protected.

Industrial Relations Act 2000

The Industrial Relations Act¹³⁶ regards dismissal based on disability discrimination as automatically unfair.¹³⁷ This Act, however, still falls short of the article 27 standard as it does not make provision for conditions during employment of persons with disabilities. The Act also fails to require reasonable accommodation, which may be relevant to the question of unfair dismissal. For example, an employer may terminate the employment of a person with a disability because of claims that the employee is not doing the work satisfactorily, when in fact the lack of reasonable accommodation could be a contributing factor as to why the employee is not performing to the standard required.

129 Constitution of Swaziland, art 32(2)(a).

130 Constitution of Swaziland, art 32(2)(b).

131 Constitution of Swaziland, art 32(4)(a).

132 Constitution of Swaziland, art 32(4)(b).

133 Constitution of Swaziland, art 32(4)(c).

134 Constitution of Swaziland, art 32(4)(d).

135 Constitution of Swaziland, art 17.

136 Industrial Relations Act, 2000.

137 Industrial Relations Act, sec 2(f).

Wages Act 1964

The Wages Act¹³⁸ applies to all workers. Although it does not make specific reference to workers with disabilities, it may be implied that these workers are covered in the section under the term 'all workers'. This Act does not make specific reference to persons with disabilities. This is a missed opportunity, since persons with disabilities have historically been disadvantaged as far as wages are concerned, by being paid less than other workers. The provisions in this Act were, therefore, not crafted with persons with disabilities in mind and fall short of the article 27 standard.

4 Conclusion

All the Southern African countries which have been examined in this commentary have legislation dealing with the right to work and employment. What varies between the different countries is the extent to which their legislation is mindful of the rights of persons with disabilities, particularly the right to work and employment. In some of the countries, the laws contain provisions on the right to work and employment which are specific to persons with disabilities while, in others, the provisions relating to the right to work and employment do not make mention of persons with disabilities at all. All the countries examined, with the exception of South Africa, are similar in that, despite having legislation governing the right to work and employment, they all have room for improvement as far as complying with the article 27 standard is concerned. Much of the legislation omits to make provision for important positive measures, such as the duty to provide reasonable accommodation, affirmative action and the quota system, to mention but a few. In light of the historical marginalisation of persons with disabilities in the employment sphere, such omissions can seriously compromise the ability to protect the right to work and employment for persons with disabilities. Therefore, the legislation in these countries does not meet the standard set in article 27 of the CRPD. The only exception is South Africa, whose employment legislation in combination to a large extent meets the article 27 standard. The other countries examined in this commentary have much work to do in order to comply with their general obligations under article 4(1)(b) to, at the very least, 'take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities'. This, therefore, means, that the legislation in each of these countries needs to be amended in order to bring it in line with the standard set in article 27 of the CRPD. For these countries, such as Zimbabwe, which have disability-specific legislation which was drafted before the coming into force of the CRPD amending such legislation to bring it in line with the

138 Wages Act 1964.

CRPD, should be a matter of priority. Those countries which have no disability-specific legislation should enact such legislation to ensure that it is in line with the standards set in the CRPD. Without taking these legislative steps, it is difficult, if not impossible, to adequately protect the right of persons with disabilities to work and employment.