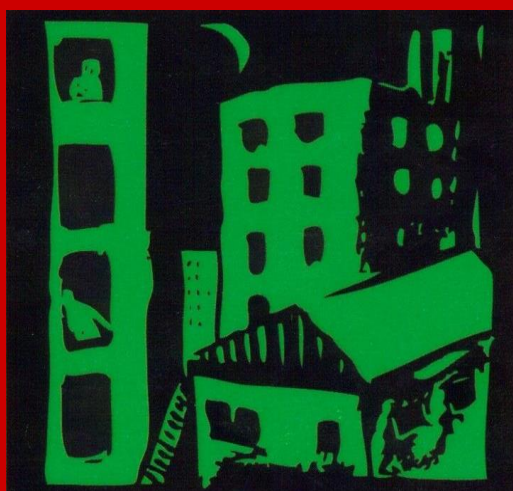
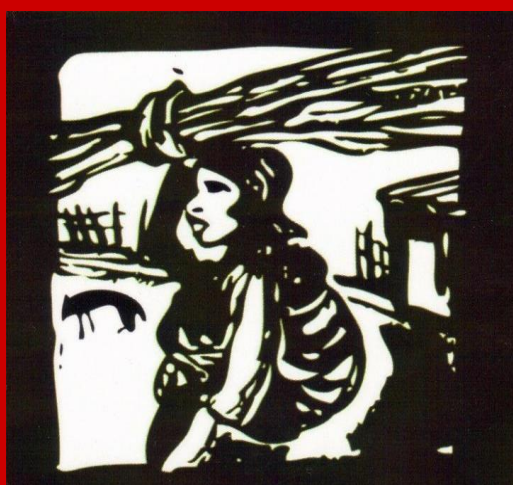


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## **An analysis of the duty to reasonably accommodate disabled employees: a comment on *Jansen v Legal Aid South Africa***

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### **ABSTRACT**

*Persons with disabilities are a historically marginalised minority, who have the capacity to make a valuable contribution in the workplace. Recent case law suggests that the duty to reasonably accommodate disabled employees remains a conundrum for employers in*

*South Africa. In Jansen v Legal Aid South Africa (C678/14) [2018] ZALCCT 17 (16 May 2018) the Labour Appeal Court had an opportunity to make a definitive pronouncement on the meaning and reach of the employer's duty to reasonably accommodate a disabled employee. Even though the duty to reasonably accommodate disabled employees is set out in our legislative and policy frameworks, there is a need to have a more detailed framework. The Constitutional Court is yet to hear a case on the duty of employers to provide reasonable accommodation to employees with disabilities, and until we have such a precedent, more and more employees with disabilities will continue to suffer at the hands of their employers. Both the Code of Good Practice, as well as the Technical Assistance Guidelines, published by the Department of Labour, have gone "relatively unnoticed and unread" in the workplace. This article argues that employers should follow a broad interpretation of the guidelines contained in the Code, as well as in the Technical Assistance Guidelines. Employers need to undertake proper investigations, with the assistance of experts if needs be, to investigate an employee's incapacity.*

**Keywords:** Disability, Reasonable accommodation, Persons with disabilities.

## 1 INTRODUCTION

"Disability is a natural part of the human experience, and in no way diminishes the rights of individuals to belong and contribute to the labour market. When opportunities and reasonable accommodation are provided, Persons with Disabilities can contribute valuable skills and abilities to every workplace, and contribute to the economy of our society."<sup>1</sup>

A 2016 report by Statistics South Africa indicated that 4.2 per cent of South Africans, aged five years and older, were classified as disabled.<sup>2</sup> The employment rate of Persons with Disabilities (PWDs) is usually lower in comparison to that of their non-disabled counterparts; and both income and employment are usually negatively associated with the severity of the disability.<sup>3</sup> Research has shown that the levels of education and literacy of disabled people are likely to be lower than those of the rest of the population.<sup>4</sup> Even though they may have the required training, they are often underemployed, and are less likely to have savings and assets, compared to the non-disabled population.<sup>5</sup> They may frequently work longer hours, with lower compensation and promotion prospects, in poor working conditions.<sup>6</sup>

<sup>1</sup> Foreword to the Code of Good Practice: key aspects on the employment of PWDs at p iii.

<sup>2</sup> Statistics South Africa : General Households Survey (2017) available at <http://www.statssa.gov.za/publications/P0318/P03182017.pdf> (accessed 15 March 2019).

<sup>3</sup> Nhlapo CM, Watermeyer B, & Schneider M "Disability and human rights : The South African Human Rights Commission" in Watermeyer B, Swartz L, Lorenzo T, Schneider M & Priestley M (eds) *Disability and social change: a South African agenda* Pretoria: HSRC Press (2006) 99.

<sup>4</sup> Nhlapo et al (2006) at 212.

<sup>5</sup> Nhlapo et al (2006) at 212.

<sup>6</sup> Nhlapo et al (2006) at 212.

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Ngwenya and Pretorius<sup>7</sup> argue that PWDs are a historically marginalised minority, who have the capacity to make a valuable contribution in the workplace.<sup>8</sup> The Commission for Employment Equity's 2016 report indicated that little progress in the employment of PWDs has been made since employment equity legislation was promulgated in 1998, and that when employed, such individuals are often hired for menial tasks, or appointed at entry level positions.

Disability does not only affect the individual, but also has an adverse effect on households with PWDs.<sup>9</sup> Disability causes additional financial burdens, for example: special medical care; rehabilitative and restorative equipment and services; etc.<sup>10</sup>

In developing countries (like South Africa) PWDs invariably become the responsibility of their families. It is also common for PWDs to face obstacles in the form of inadequate and inappropriate transportation and learning opportunities, which will affect their employment and education, and reduce their role in society.<sup>11</sup> Disability affects society as a whole, and the State has a responsibility to protect itself and PWDs against the disadvantages and possible eventualities caused by impairment.<sup>12</sup>

In 2008, South Africa ratified the Convention on the Rights of Persons with Disabilities (Convention) and the Optional Protocol, thus committing itself to the provisions relating, inter alia, to workplace integration.<sup>13</sup> Article 26 of the Convention mandates States Parties to take effective and appropriate measures to enable PWDs to attain and maintain maximum independence, physical, mental, social and vocational ability, and to ensure their social inclusion. Article 27 stipulates, inter alia, that States Parties shall safeguard and promote the realisation of the right to work, including for those who incur a disability during the course of employment.

Nxumalo<sup>14</sup> argues that in order to truly give effect to the constitutional goal of substantive equality and human dignity for PWDs, South Africa needs to urgently consider enacting disability-specific legislation, due to the complex nature of disability. Employers should also adopt designated policies on disability, psychosocial illness and

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<sup>7</sup> Ngwenya C & Pretorius L "Code of good practice on the employment of persons with disabilities: an appraisal" (2003) 4 *International Law Journal* 1816 at 1838.

<sup>8</sup> Ngwenya & Pretorius (2003) at 1838.

<sup>9</sup> Nhlapo et al (2006) at 213.

<sup>10</sup> Nhlapo et al (2006) at 214.

<sup>11</sup> Nhlapo et al (2006) at 214.

<sup>12</sup> Guthrie et al "The South African federal council on disability social security policy options for persons with disabilities in South Africa: an international and comparative review" (2001) available at [http://www.ci.uct.ac.za/sites/default/files/image\\_tool/images/367/publication/2001/polopt4dis.pdf](http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/publication/2001/polopt4dis.pdf) (accessed 20 March 2019).

<sup>13</sup> United Nations (2019) available at [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-15&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4) (accessed 10 September 2019).

<sup>14</sup> Nxumalo L "Transformation and the duty of care concerning persons with disabilities in the workplace: an analysis of *Smith v Kit Kat Group (Pty) Ltd* (2017) 387 ILJ 483 (LC)" (2017) 38(3) 1523.

incapacity in the workplace. He also calls for training and education, not only on disability management as called for in the Code of Good Practice (Code) and the Technical Assistance Guidelines (TAG), but also training related to mental illness prejudice in instances where they can be reasonably accommodated instead of being dismissed; as well as the need for differentiating between disability and incapacity.<sup>15</sup>

On 16 May 2018, the Labour Court<sup>16</sup> in *Jansen v Legal Aid South Africa (Jansen)* delivered a judgment which sent out a clear message: First, employers can no longer ignore the disability of their employees, and secondly, employers need to conduct incapacity inquiries in order to determine how employees can be reasonably accommodated. Mr Jansen, the applicant, was dismissed for misconduct, instead of the employer undertaking incapacity inquiries.

Notwithstanding the fact that the duty to reasonably accommodate disabled employees is recognised in our legislative and policy frameworks, more and more case law seems to emerge in our courts. The reason for this may be due to the fact that South Africa does not have clear role clarification in this area of the law. It is thus important to comment on cases as they emerge from our courts, in order to not only illustrate how intricate the duty to accommodate disability in the employment context may be, but also to provide some clarity on the important role employers can play in accommodating disabled employees.

Although the judgment deals with various important aspects, such as, the blurred line between incapacity and misconduct, and automatic unfair dismissal, the aim of this article is to discuss the judgment of Mthombeni AJ, in order to highlight the need for detailed legislative provisions, that need to set out what the duty to reasonable accommodation entails, and to make practical suggestion on how employers can accommodate disability in the work place.

## 2 FACTUAL BACKGROUND AND JUDGMENT<sup>17</sup>

The employee commenced his employment with the employer as a paralegal on 2 March 2007. During most of his employment by the employer, the employee received performance bonuses, and he was further appointed as brand ambassador for the employer. During 2010 the employee was diagnosed with major depression. This diagnosis was contained in a medical certificate, which was submitted to the employer. The certificate stated that the employee presented symptoms of major depression and had been referred to a hospital for counselling and treatment. The employee then requested to be put on the employer's wellness programme. The administration manager at that time, Sait, agreed to the request, and referred the employee to FAMSA<sup>18</sup> to consult with one of the social workers, Ms du Preez.

<sup>15</sup> Nxumalo (2017).

<sup>16</sup> (C678/14) 2018 ZALCCT 17.

<sup>17</sup> The facts leading to the complaint are extensive. However, an overview of the factual background was specifically included, to illustrate the different dimensions and lines of communication which may arise as part of incapacity inquiries.

<sup>18</sup> Families South Africa.

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On 17 November 2011, the employee consulted Dr Small, who diagnosed him with depression combined with high anxiety. This was again confirmed through the submission of a medical certificate to the employer. On 29 August 2012, the employee sent an e-mail to Sait to inform him of the personal and work related problems which had led to his being treated for depression. On 3 September 2012, the employee attended the Oudtshoorn Divorce Court, where divorce proceedings between him and his estranged wife were to take place. The employee's manager (Mr Terblanche), appeared on behalf of the employee's wife, without prior notification to the employee, as is stipulated by the employer's policy. Understandably, this worsened the employee's condition, since the employee perceived Mr Terblanche's action as a conflict of interest, as well as a betrayal.

The employee also attended several counselling sessions, for which a report was once again submitted to the employer, which indicated, inter alia, that the employee showed signs of burn-out. The report further stated that the situation between Mr Terblanche and the employee needed to be resolved "as soon as possible to enable the employee to continue working within a positive environment". Once again, it is very important to note that the employee made attempts to meet with the employer to discuss the matter, but to no avail.

On 18 October 2012, the employee sent an e-mail to the National Human Resource Executive, Ms Clark, in which he informed her that the management of the employer had "triggered" his condition, which had resulted in him having to consult a psychologist. A few days later he also addressed a letter to the Chief Executive Officer, Ms Vedalankar, and informed her of the differential treatment by management, and his subsequent depression. Once again, this was to no avail.

At this stage, the Court stated, "the employee's emotional and mental condition had deteriorated to such an extent that he would, as his coping mechanisms, disengage from everything and lock himself up in his room for days".<sup>19</sup>

To add to the already complex situation, after the employee's divorce had been finalised, an emolument order was obtained, which authorised the employer to deduct money from the employee's salary for maintenance payments, as authorised by the Maintenance Court in Oudtshoorn. However, it did not reach his former wife timeously. The Court noted that this had had the effect that his children had been deprived of some necessities, such as, food and clothing. The fact that the employee had always taken good care of his children and could now see them suffer, affected him badly and worsened his condition. Furthermore, the employee was not awarded a performance bonus in August 2013. This, together with grievances relating to overtime payments, as well as the maintenance related problems, aggravated the employee's mental state.<sup>20</sup>

The employee was then away from work for 17 days and upon his return informed his immediate supervisor, Mr Nicholls, that he was no longer able to cope with his

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<sup>19</sup> *Jansen* at para 19.

<sup>20</sup> *Jansen* at paras 22 & 23.

current circumstances. In response hereto, Nicholls merely advised the employee that the 17 days' absence from work would be considered as unpaid leave. The employee's condition worsened even further, which resulted in him being away from work for a further eight days. During this time the employee consulted Dr van Wyk, whose diagnosis indicated that the employee was suffering from "manic depression". On 07 November 2013, Mr Terblanche arrived at the employee's home and served him with a charge sheet. The employee reminded Mr Terblanche that he was aware of the employee's condition, and even fetched and showed him some medicine and a document confirming the employee's condition, but Mr Terblanche merely asked the employee to sign the notice.

The Court observed that at this stage the employee's mental condition "had worsened to such an extent that he had effectively lost control over himself, was acting erratically, and out of character".<sup>21</sup> The Court further observed that his medical condition had contributed to the behaviour for which he was facing disciplinary action, namely, insolent insubordination. At the disciplinary hearing the employee admitted the allegation against him. However, he raised his mental condition as his defence. It must be emphasised that even before the employee had been informed of the disciplinary inquiry, he contacted one of the clinical psychologists at the employer's national office, one Qhungwana, explained what he was going through, and once again requested to be placed on the employer's wellness programme. After arrangements had been made by Qhungwana, the employee attended four sessions with Ms Farre. On 28 November 2013, the employee communicated with his immediate supervisor, Mr Nicholls, (Sait and Terblanche were both copied in the e-mail), advising him that his reason for being absent from work was the fact that he had been attending sessions with Farre.<sup>22</sup>

On 4 December 2013, in accordance with the employer's policy, Farre submitted a report in which she indicated that she was concerned about the employee's psychological state of mind and made certain recommendations to Nicholls. The Court specifically decided to point out some of the most salient aspects of her report. For instance, her report indicated that the employee's condition had worsened since the previous year and that he was not coping with his condition, especially at work. He was also suffering from reactive depression and showed signs of burn-out. She further indicated that the employee had tried to avoid any negative circumstances and that he was on prescribed medication. He was struggling to cope, and was struggling with his appetite and diminished sleep. She then stated that he was close to an emotional breakdown. She explained that he would typically attempt to avoid stressors, which might explain his absence from work. She made the following specific recommendation:<sup>23</sup>

"I would recommend that Mr Jansen be granted sick leave for a considered amount of time. He needs to divorce himself from work and try to refocus and

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<sup>21</sup> *Jansen* at para 26.

<sup>22</sup> *Jansen* at para 28.

<sup>23</sup> *Jansen* at para 29.

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prioritise his life. Therapy alone is not enough. His resources for impulse control seems (sic) limited therefore he needs timeout. This is of great importance. Please take note.”<sup>24</sup>

The Chair of the disciplinary inquiry rejected the employee’s defence and stated that there was no medical evidence which could support his version that he was suffering from reactive depression, and that she was specifically involved in a disciplinary inquiry for misconduct, *not* incapacity. When Farre’s report was forwarded to the Chair on 9 December 2013, after an adjournment on the 21<sup>st</sup>, the Chair refused to consider the report on the basis that it would be prejudicial to the employer to “re-open the matter”.<sup>25</sup>

Before the employee’s dismissal had been confirmed, he submitted Farre’s report (as well as other medical certificates) to Mr Hundemark, the Chief Legal Executive. Surprisingly, Hundemark responded as follow:

“Having regard to the evidence that was led before your disciplinary hearing in totality, there is no concrete evidence before me to conclude that your alleged ill-health has the effect you presented. Accordingly, this defence is dismissed.”<sup>26</sup>

In accordance with the recommendations in Farre’s report, and with the employer’s policy on temporary incapacity, the employee applied for sick leave. His application was refused, even though he had 18 days available from his leave cycle. In January 2014 the employee again consulted Dr van Wyk, due to the fact that he was no longer coping at work. He was diagnosed with major depression and was booked off for 17 days.

The Court observed that, at the time of the court proceedings, the employee was still undergoing treatment for his depression, and that the dismissal had “worsened the employee’s emotional and mental status”.<sup>27</sup> The employee was still unemployed. His personal circumstances had also taken a turn for the worse. He had been evicted from his rental accommodation, his son had to terminate his studies, and his daughter had to undergo counselling.<sup>28</sup>

In its evaluation of the evidence, the Court found that it was common cause that the employee had submitted proof of his mental condition and that the employer had merely declined the proof, without challenging its authenticity.<sup>29</sup> The Court further stated that the employee, at all material times, had been suffering from depression, which had been triggered by workplace stress, as well as, in particular, when the employee’s former wife was represented by Mr Terblanche. The employer was aware of the fact that the employee was undergoing treatment for his condition. When the alleged misconduct was committed, the employee had been suffering from a mental

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<sup>24</sup> *Jansen* at para 29.

<sup>25</sup> *Jansen* at para 31.

<sup>26</sup> *Jansen* at para 32.

<sup>27</sup> *Jansen* at para 34.

<sup>28</sup> *Jansen* at para 35.

<sup>29</sup> *Jansen* at para 39.

condition for which medication was also being taken. The Court found that the employer had knowledge of the employee's disability, and had thus been under a duty to reasonably accommodate him.<sup>30</sup>

Acting Judge Mthombeni found that the employer had failed to comply with its duty in this regard, since, instead of instituting an incapacity inquiry, it had dismissed the employee for misconduct. Since the employer had been made fully aware of the employee's condition and still had decided to dismiss him, were indicative that it did not "have any regard to the circumstances under which the infractions happened" and what the effect of the employer's conduct might have on the employee's condition. The Court did not, however, provide any recommendations on how the employer could have reasonably accommodated Mr Jansen, nor was any reference made to the applicable Codes and Guidelines imposing such duties.

In relation to the employee's disability, Mthombeni AJ was of the view that

"... the conduct of the employer in ignoring the employee's condition and deciding to dismiss him in the circumstances, when viewed subjectively against the employee's depression, had potential to impair the employee's fundamental human dignity and, accordingly, falls within the grounds envisaged by Section 187 (1) (f) of the LRA<sup>31</sup> .

In his judgment, and turning to the facts in the case before him, the Judge found that the employer would not have dismissed the employee if it were not for the employee's condition. The employee had acted in the particular manner due to his mental condition. This conduct was the reason behind the employer's decision to discipline the employee, instead of conducting an incapacity inquiry. The Court stated that, based on the uncontested evidence led by the employee and Farre, it concluded that the employee's medical condition was the probable cause of his dismissal. The employee had made out a prima facie case that the reason for his dismissal was related to his mental condition, and the employer, by failing to provide any evidence, had failed to prove that the dismissal could have been for a permissible reason, as set out in section 191(2) of the Labour Relations Act (LRA).<sup>32</sup>

Thus, with reference to the facts before it, the Court found that the employee had succeeded in raising a "credible possibility" that the dominant reason for his dismissal was the mental condition from which he was suffering. If not, the Court stated that the employee's condition played a significant role in the employer's decision to dismiss the employee.<sup>33</sup>

With reference to the claim of unfair discrimination, Mthombeni AJ stated that, considering the fact that the employee's dismissal was automatically unfair in terms of section 187(1) (f) of the LRA, the test which had been used to prove such a dismissal

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<sup>30</sup> *Jansen* at para 43.

<sup>31</sup> *Jansen* at para 46.

<sup>32</sup> Act 66 of 1995.

<sup>33</sup> *Jansen* at para 53.

ought to be applicable to prove that the employer had unfairly discriminated against the employee, as envisaged by section 6 of the Employment Equity Act (EEA).<sup>34</sup> The Court thus found that the employer had unfairly discriminated against the employee.

The Court ordered the employee to be reinstated with full retrospective effect and also ordered payment to him of a solatium, equivalent to six months' salary, as per the rate of remuneration on the date of dismissal, for the distress<sup>35</sup> he had suffered caused by the unfair discrimination by his employer. The employer was also ordered to pay the employee's costs, as well as those of counsel.

### 3 ANALYSIS

#### 3.1 The duty to reasonably accommodate employees with disabilities

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

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

"Reasonable accommodation" is defined in the same section as follows:

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

Ngwenya explains that "reasonable accommodation" requires an examination to weigh up the disability of an employee against the duties of his job and the nature of the employment environment.<sup>36</sup> One can thus infer that "reasonable accommodation" complements the social construction of disability,<sup>37</sup> and infers alternatives to overcome society's socio-economic barriers against PWDs<sup>38</sup> to enable them to be self-supporting and productive. The accommodation must be tailored according to the essential functions of the job and the capacity of the PWDs. The accommodation can be of a temporary or permanent nature, and involves a fine balance between the employer's duty to reasonably accommodate and the employee's right to employment equity. The employer's defence that such accommodation would constitute an "unjustifiable

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<sup>34</sup> Act 55 of 1998.

<sup>35</sup> The employee was evicted from his property and he and his children suffered because of his financial loss.

<sup>36</sup> Behari A "Disability and workplace discrimination: *Smith v Kit Kat Group Pty Ltd* 2017 38 ILJ 438 (LC)" (2017) ILJ 2226. See also Ngwenya C "Interpreting aspects of the intersection between disability, discrimination and equality: lessons for the Employment Equity Act from comparative law. Part 1, defining disability" (2005) 16 *Stell LR* 210.

<sup>37</sup> Behari (2017) at 2239.

<sup>38</sup> Behari (2017) at 2238.

hardship” must also be addressed.<sup>39</sup> Employers are thus obliged to take steps to accommodate PWDs, unless such accommodation results in an unjustifiable hardship.

“Unjustifiable hardship” is not defined in the EEA, but in the Code of Good Practice: Key aspects on the Employment of People with Disabilities in section 6 as follows:

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

As was noted in *Standard Bank of South Africa v Commission for Conciliation Mediation and Arbitration (Standard Bank)*,<sup>40</sup> the employer bears the onus of proving that he attempted to accommodate the employee, and must consider all options. The employer also has to motivate whatever accommodation is refused or offered. In *SA Transport & Allied Workers Union v Old Mutual Life Assurance Co SA Ltd (SA Transport)*,<sup>41</sup> the Court also emphasised that employers need to make sure that all possible alternatives, other than dismissal, are explored. Further, employers, in good faith, need to have open minds throughout the consultation process and truly consider all proposals put forward.<sup>42</sup>

Employers need to be careful not to treat employees with a disability as poor performers, instead of determining how they could reasonably accommodate the disability. The former was exactly what happened in *SA Transport*.

Both the Code of Good Practice: Key Aspects on the Employment of Persons with Disabilities, as well as the TAG, contain valuable information pertaining to the duty to reasonably accommodate.

### 3.1.1 *The Code of Good Practice on the Employment of Persons with Disabilities*

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

“... any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure *must take into account any relevant code of good practice*<sup>43</sup> issued in terms of this Act.”

The Code was adopted by the Department of Labour in August 2002 and subscribes to “reasonable accommodation” as set out in the EEA.<sup>44</sup> It is not an authoritative summary

<sup>39</sup> Christianson M “Incapacity and disability: a retrospective and prospective overview of the past 25 years” (2004) *ILJ* 879.

<sup>40</sup> [2008] 4 BLLR 356 (LC) at 356-390.

<sup>41</sup> 2005 (26) ILJ 293 (LC) at para 84.

<sup>42</sup> Lechwano A “Incapacity through a new lens: *Samancor* and beyond” (2013) *ILJ* 38 at 50.

<sup>43</sup> Own emphasis.

<sup>44</sup> Codes issued in terms of the LRA are merely guidelines, and do not have the force of law.

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of the law, nor does it create additional rights and obligations. However, it does state that courts and tribunals who interpret and apply the EEA must consider the Code. It is a valuable guideline for employers to develop, implement and improve their disability equity programmes and policies to suit the specific needs of a workplace.<sup>45</sup>

The Code embraces the social model of disability, where the focus is not on the impairment itself, but rather on how the disability may be affected by the working environment, for instance.<sup>46</sup> Disability is thus viewed in a social context.<sup>47</sup> It is important to grasp that effective interaction between the disabled and the workplace environment will lead to a better understanding of the barriers faced by PWDs.<sup>48</sup> The Code provides a solid foundation for the different role players (for instance: employers, employees and representative organisations) to develop, enhance and implement policies and programmes aimed at safeguarding the rights of PWDs, as set out in the Constitution of the Republic of South Africa (Constitution).<sup>49</sup> According to Nxumalo,<sup>50</sup> the requirements, as set out in the Code, are consistent with the right to fair labour practices, as provided by section 23 of the Constitution. Furthermore, they are also in harmony with the preamble of the Constitution, providing for the quality of life and realisation of the potential of all citizens.<sup>51</sup>

It is further important that employers have clear guidance on what their duty to “reasonable accommodation” entails. It is submitted that PWDs will still be confronted by structural barriers, unless clarity is given in this regard.<sup>52</sup>

The Code of Good Practice on the Employment of People with Disabilities sheds some light on what “reasonable accommodation” entails. For instance: re-organising work stations; amending assessment and training materials and systems; adapting facilities and equipment; the assignment of non-essential functions to another; adjustment of leave and working time; etc.<sup>53</sup> The employer does not have to accommodate if it causes an unjustifiable hardship for the business. The Code defines unjustifiable hardship as “an action that requires significant or considerable difficulty or expense and that would substantially harm the viability of the enterprise”.<sup>54</sup> In cases where employees are injured or disabled while on duty, the employer has a more onerous burden to accommodate the employee. Employers need to consult with

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<sup>45</sup> Cole EC & Van der Walt A “The effect of labour legislation in the promotion and integration of persons with disabilities in the labour market” (2014) *Obiter* 506 at 521.

<sup>46</sup> Ngwena & Pretorius (2003) at 1820.

<sup>47</sup> Ngwena & Pretorius (2003) at 1820.

<sup>48</sup> Ngwena & Pretorius (2003) at 1820.

<sup>49</sup> Ngwena & Pretorius (2003) at 1838.

<sup>50</sup> Nxumalo (2017) at 1524.

<sup>51</sup> Nxumalo (2017) at 1524.

<sup>52</sup> Ngwena & Pretorius (2003) at 1832.

<sup>53</sup> See Item 6.11 of the Code.

<sup>54</sup> Marumoagae MC “Disability discrimination and the right of disabled persons to access the labour market” (2012) *PELJ* 346 at 351.

employees to establish ways in which they could be accommodated, and employees need to be open about their disabilities.<sup>55</sup>

Using unjustifiable hardship as a reason for not providing a specific accommodation must involve an objective process. This entails, on the one hand, identifying and determining the effectiveness of the reasonable accommodation, and on the other hand, determining whether the implementation thereof may cause difficulty or expense which might seriously disrupt the operation of the business. This assessment also needs to consider how the provision of reasonable accommodation, or the failure to provide such, might affect the employee. The objectives of the Constitution, as well as of the EEA, should also be considered.<sup>56</sup> In *Jansen* the Labour Court neither referred to nor investigated the unjustifiable hardship qualification. Jansen's employer also failed to investigate whether or not accommodating him would cause an unjustifiable hardship, which is again an indication that the employer never instituted an incapacity inquiry. Jansen needed time away from work, but was refused sick leave, even when he had a positive balance of days he could still take as leave. The employer was given sufficient medical evidence to be guided in the right direction, in order to embark on a meaningful disability management process, but failed to do so.

The termination of employment based on incapacity (arising from ill health or injury) is thus recognised, provided it is handled fairly.<sup>57</sup> The Code of Good Practice: Dismissals: Item 11 provides as follows:

"11. Any person determining whether a dismissal arising from ill health or injury is unfair should consider:

(a) whether or not the employee is capable of performing the work;

(b) if the employee is not capable—

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate the disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work."

The Code thus places a duty on employers to adopt cost-effective measures to remove the barriers for PWDs, in order to enable them to perform their jobs, as well as to have

<sup>55</sup> Marumoagae (2012) at 352.

<sup>56</sup> The Code of Good Practice refers to an unjustifiable hardship as follows: "Item 6.11: The employer need not accommodate a qualified employee or an employee with a disability if this would impose an unjustifiable hardship on the business of the employer; Item 6.12: Unjustifiable hardship is action that requires significant or considerable difficulty or expense and that would substantially harm the viability of the enterprise. This involves considering the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business; Item 6.13: An accommodation that imposes an unjustifiable hardship for one employer at a specific time may not be so for another or for the same employer at a different time."

<sup>57</sup> Grogan J *Workplace law* 12 ed Cape Town: Juta (2017) at 290.

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equal access to the opportunities and benefits of employment.<sup>58</sup> Thus, the Code places a duty upon employers to ensure that they treat PWDs in a fair manner and “do all that is necessary to accommodate them”.<sup>59</sup> In *IMATU obo Strydom v Witzenberg Municipality & others (Strydom)*,<sup>60</sup> the Labour Appeal Court confirmed that the requirements set out in the Code are mandatory.<sup>61</sup>

Item 10 of the Code of Good Practice on Dismissals elaborates further on the matter, and explains that incapacity on the grounds of ill health or injury may be either of a temporary or permanent nature. In instances where the employee is temporarily unable to work, the employer must investigate the extent of the incapacity or injury. If it is revealed that the employee is likely to be absent for a time that is “unreasonably long” in the particular circumstances, the employer must investigate all the possible alternatives, short of dismissal.<sup>62</sup> When these alternatives are considered, there are also factors which may be relevant, such as, the period of absence, the nature of the job, the severity of the illness or injury, and the possibility of finding a temporary replacement for the ill or injured employee. In instances of permanent incapacity, the employer must determine the possibility of securing alternative employment, or adapting the employee’s duties or work circumstances to accommodate the disability.<sup>63</sup> Throughout this process of investigation, the employee must be afforded the opportunity to state his case in response, and also to be assisted by a trade union representative or a co-employee.<sup>64</sup> Another component to be considered as part of whether or not dismissal is fair, is the degree of the incapacity.<sup>65</sup> Grogan also highlights the importance of the procedures listed in items 10 and 11 of the Code as follows:<sup>66</sup>

“Incapacity, arising from any physical impairment must be dealt with in terms of items 10 and 11, irrespective of how the impairment may have been occasioned. Special consideration should be given to work-related sickness or injury,<sup>67</sup> it follows by implication that employees injured off duty, or who contract a sickness unconnected with the workplace, are deserving of less consideration still less where the injury or illness arises from the employee’s negligent or intentional conduct.”

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<sup>58</sup> Item 6.2 of the Code.

<sup>59</sup> Nxumalo (2017) at 1524.

<sup>60</sup> 2012 (33) ILJ 1081 (LAC).

<sup>61</sup> Grogan (2017) at 286.

<sup>62</sup> Item 10.1 of the Code of Good Practice: Dismissals.

<sup>63</sup> All of these duties are set out in Item 10(1) of the Code.

<sup>64</sup> Item 10(2) of the Code.

<sup>65</sup> Item 10(3) of the Code.

<sup>66</sup> Grogan (2017) at 289.

<sup>67</sup> *Free State Consolidated Gold Mines (Operations) Bpk h/a Western Holdings Goudmyn v Labuschagne* 1999 (20) ILJ 2823 (LAC); *E C Lenning Ltd t/a Besaans Du Plessis Foundries v Engelbrecht* 1999 (20) ILJ 2516 (LAC); *Bennett v Mondipak* 2004 (25) ILJ 583 (CCMA).

The employee must further be consulted about how the disability has affected his/her performance, and expert opinion regarding the degree of incapacity may be required.<sup>68</sup> The employer is obliged to exhaust all possible alternatives before dismissal, which should be a last resort.<sup>69</sup> As was noted in *Standard Bank*, the onus is on the employer to prove that he had tried to accommodate the employee. The employer must prove what type of accommodation had been offered and refused. In the case of *SA Transport & Allied Workers Union v Old Mutual Life Assurance Co SA Ltd*,<sup>70</sup> the Court emphasised that employers need to make sure that all possible alternatives to dismissal had been explored.<sup>71</sup>

In the recent case of *Smith v Kit Kat Group (Pty) Ltd (Smith)*,<sup>72</sup> the Labour Court embarked on a journey during which it provided excellent guidelines to all employers on the duty to reasonably accommodate. It was suggested, for instance, that employers need to engage in consultation with their employees to determine the mechanisms which may be necessary to accommodate their disabilities. It may even be necessary to acquire the services of technical experts.<sup>73</sup>

In *Smith* the Court relied on the Code, and stated that the aspects of consultation and accommodation are critical components when one has to decide whether discrimination based on disability is fair.<sup>74</sup>

Furthermore, the Court emphasised that reasonable accommodation entails conducting a multi-party inquiry.<sup>75</sup> For instance, consultation with employees or trade union representatives is needed when employers need information relating to medical reports, for example. Merely disregarding medical advice to accommodate, amounts to discrimination. In *Jansen* this is exactly what transpired. Mr Jansen tendered medical evidence on numerous occasions, and the employer blatantly failed to reasonably accommodate him.

It is submitted that it would have been a good contribution if the Labour Court would have suggested how Jansen's employer could have reasonably accommodated him. In both the *Smith* and *Standard Bank* cases, the Court provided suggestions which contributed towards the body of knowledge regarding what the duty to reasonably accommodate entails. For instance, in *Standard Bank*<sup>76</sup> the Court explained that, when an employer contemplates an incapacity dismissal, a four-step inquiry needs to commence. First, the employer needs to determine whether or not the employee with the disability is able to perform his or her work. If this can be answered in the

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<sup>68</sup> Grogan (2017) at 291.

<sup>69</sup> Lechwano (2013) at 52.

<sup>70</sup> *SA Transport* at para 84.

<sup>71</sup> Lechwano (2013) at 50.

<sup>72</sup> *[JS787/14] [2016] ZALCJHB 362; [2016] 12 BLLR 1239 (LC) 2017 (38) ILJ 483 (LC)*.

<sup>73</sup> *Smith* at para 59.

<sup>74</sup> See *Smith* at para 63.

<sup>75</sup> *Smith* at paras 91-92.

<sup>76</sup> *Standard Bank* at paras 70-76.

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affirmative, it warrants the end of the inquiry, and the employer needs to restore the employee to his or her former position, or to a position substantially similar thereto (if possible, the job should correspond to the employee's own choice, and one needs to consider the employee's individual suitability for the job). If it is not possible for the employee to perform his or her duties and his or her injuries are long-term or permanent, a further three-stage inquiry will commence. The second stage entails an inquiry by the employer into the extent to which the employee is able to perform his or her duties. This is a factual analysis, and the assistance of medical or other experts may be necessary. The third and fourth stages were described by the Court as follows:

"Stage Three: The employer must enquire into the extent to which it can adapt the employee's work circumstances to accommodate the disability. If it is not possible to adapt the employee's work circumstances, the employer must enquire into the extent to which it can adapt the employee's duties. Adapting the employee's work circumstances takes preference over adapting the employee's duties, because the employer should, as far as possible, reinstate the employee. During this stage, the employer must consider alternatives short of dismissal. The employer has to take into account relevant factors including the nature of the job, the period of absence, the seriousness of the illness or injury, and the possibility of securing a temporary replacement for the employee. Stage Four: If no adaptation is possible, the employer must enquire if any suitable work is available."<sup>77</sup>

Even though *Jansen* did not provide suggestions on how the employer could have accommodated the employee,<sup>78</sup> or provide an analysis of the duties imposed by the Code, it still affirms the principle that all the previous case law have supported: that failure to reasonably accommodate employees with disabilities is viewed in a very serious light. It is unfortunate that employees with disabilities are still being stigmatised in the workplace.<sup>79</sup> If one considers the way in which a high-profile organisation has dealt with one of its employees, it is clear that the time has arrived to have a clear,

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<sup>77</sup> It will, however, be necessary for the legislature to provide more clarity in this regard. It will thus be necessary to understand the extent of this obligation, and whether the duty to find suitable work will be time bound or made subject to other limitation or duties, for both the employer and the employee.

<sup>78</sup> It is the authors' submission that one should guard against a rigid prescriptive approach when dealing with reasonable accommodation. Each case should be dealt with on an individual basis; however, we need to at least have better role clarification (not only in the Codes, but also in our core legislation).

<sup>79</sup> For instance, in *National Health Laboratory Service v Yona and others* (PA 12/13) [2015] ZALAC 33; [2015] 10 BLLR 1002 (LAC); (2015) 36 ILJ 2259 (LAC) (12 May 2015) an employee suffering from anxiety and depression was constructively dismissed. The employee was in "dire need of assistance" and yet the employer failed to advise the employee on extended leave benefits.<sup>79</sup> The Labour Court described the employer's conduct as follows: "Instead, her resignation was clearly inspired by the unfair conduct on the part of the appellant (through Mr Abraham) toward her. Whether by his conduct Mr Abraham intended to repudiate the appellant's employment contract with Ms Yona, it is immaterial. Suffice to hold that the appellant's unfair conduct toward Ms Yona rendered her continued employment with the appellant intolerable."

mandatory legislative framework to regulate the duty to reasonably accommodate.<sup>80</sup> Employers need to investigate the employee's incapacity and not embark on a disciplinary process too hastily.

### 3.1.2 *Technical assistance guidelines on the employment of Persons with Disabilities*<sup>81</sup>

The TAG complement the Code and provide practical guidelines for employees, employers and trade unions to promote diversity, equality and fair treatment to eliminate unfair discrimination. The TAG forms part of the broader agenda to promote equality for PWDs to receive recognition in the labour market. As with the Code, the TAG is the basis for the implementation of the EEA and is used by the courts as a guide when disputes arise.<sup>82</sup> The TAG was developed in 2004<sup>83</sup> and aims to assist employers, employees, PWDs and trade unions in understanding the Code of Good Practice on the Employment of PWDs and the EEA. It is emphasised that the re-integration of PWDs in the workplace should not be regarded as an ad hoc activity by management to meet the requirements of the Act; it could also be to the advantage of management.<sup>84</sup> The TAG highlights the fact, yet again, that PWDs can make a skilled contribution to the workplace when reasonable accommodation and opportunities are provided.

The TAG addresses the retention of employees by prescribing that employers need to assist staff with disabilities,<sup>85</sup> by providing them with rehabilitation, training and other appropriate measures, as well as to ensure that they will remain in their current positions. The employer must remain in contact with the employee to encourage an early return to work, if possible. This may require a variety of interventions, such as, vocational rehabilitation, adjustment of work arrangements, transitional work programmes, and temporary or even permanent flexible working hours, if possible. The purpose of reasonable accommodation is to lessen the impact of impairment on an employee's ability to perform adequately. To accommodate reasonably may entail modifications or alterations to the job description, but will depend on the work environment, the impairment, and the type of job. Reasonable accommodation

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<sup>80</sup> In 2013 it was announced that a new chapter will be introduced under the Compensation for Occupational Injuries Act 130 of 1993 (COIDA), dealing with the rehabilitation and return to work of employees, as well as a supporting policy framework; see Department of Labour 2013 available at <http://www.labour.gov.za/DOL/downloads/documents/annual-reports/compensation-fund-strategic-plan/2013-2019/cfstratplan2013.pdf>. Further, once COIDA is amended, its provisions will have to be scrutinised, to acquire an understanding of whether or not the Act contains mandatory obligations, for all employers to support their employees, which includes those who suffer from mental disability, to be reasonably accommodated and returned to work.

<sup>81</sup> The TAG was revised in July 2017.

<sup>82</sup> Cole & Van der Walt (2014) at 522.

<sup>83</sup> Van der Byl C "Twenty year review: South Africa: background paper disability:1994-2014" 1-3 (Date unknown) available at <https://www.dpme.gov.za/publications/20%20Years%20Review/20%20Year%20Review%20Documents/20YR%20Judiciary.pdf> (accessed 15 March 2019).

<sup>84</sup> TAG para 1.6.

<sup>85</sup> TAG para 6.3.7.

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measures may include, inter alia, the following: modification of the workstation; work schedule adjustments; modification to the employee's duties, which can either be of a temporary or more permanent nature, and/or the reassignment of non-essential job tasks.

The TAG further describes that reasonable accommodation consists of three inter-related factors.<sup>86</sup> First, the accommodation should remove barriers that hinder an employee from performing adequately. The employer thus needs to follow steps, where reasonably practical, to lessen the effects the disability may have, and to enable the employee to realise his/her full potential in the workplace. The disabled person must enjoy equal access to the opportunities and benefits of normal employment. In meeting the above criteria, employers must operate cost-effectively. Should an employee become unable to perform the essential functions, notwithstanding reasonable accommodation, the employer is not obligated to create a new job for the employee or to assign essential functions to another employee. What could be required is a restructuring of the job by re-allocating marginal, non-essential functions. The TAG states that employers could enhance compliance with the EEA through "reasonable and flexible" benefits and sick leave management.<sup>87</sup> Effective processing of benefits and leave, will in turn mean that return to work and accommodation efforts will commence as soon as medically feasible.<sup>88</sup>

Employers are not obliged to reasonably accommodate an employee if it causes unjustifiable hardship for their businesses. The TAG encourages employers to accommodate PWDs, especially in the light of the high rate of unemployment in South Africa. The TAG<sup>89</sup> also provides guidance on the definition of unjustifiable hardship, which is described as follows:

"Action that requires significant or considerable difficulty or expense. This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business."

Citing unjustifiable hardship as a ground to not provide specific accommodation will not suffice, since it requires an objective process, which entails the examination of the effectiveness of the reasonable accommodation, and whether its implementation may have caused difficulty or expenditure that disrupted business operations. Such an assessment must take into consideration whether reasonable accommodation, or the failure thereof, may affect the employee, and cause inequality in society. The objectives of the Constitution, as well as the EEA, should be considered.

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<sup>86</sup> TAG para 6.2.

<sup>87</sup> Some important questions arise here. Will small and large companies be under the same obligations to accommodate and return workers to work? Perhaps the compensation fund will need to play a supporting role, especially for small companies.

<sup>88</sup> Once again, some questions arise. Who will bear the responsibility in this regard? How will such a system function? Who will play a leading role in coordinating the whole process?

<sup>89</sup> TAG para 6.12.

Chapter 17 of the TAG deals specifically with the objective of retaining PWDs. When an employee leaves as a result of illness or injury, the real impact manifests itself, not only in medical and replacement expenditure, but also in a loss of skills and a decrease in productivity and efficiency. In certain instances, customer relations may also be affected. Given South Africa's high unemployment rate, employers cannot afford to lose valuable staff members as a result of poor health management and disability.

In *Jansen* the employer did not take any steps to comply with the guidelines, as contained in the Code of Good Practice. The employer did not engage in consultation with Jansen, nor did it investigate alternatives short of dismissal. It is disappointing that the Acting Judge did not make any reference to the relevant Code of Good Practice or the TAG, the latter of which was revised in 2017. The Labour Court had the opportunity to make concrete recommendations on how Jansen could have been reasonably accommodated. For instance, the following recommendations could have been made: the employer had the duty to investigate the possibility of reorganising Jansen's work duties, for instance: by temporarily delegating his non-essential duties, allowing for more flexible leave arrangements and working hours, transferring him to a different branch of the organisation; obtaining the assistance of experts to advise on both a medical, as well as an occupational level; and establishing a fund to assist with the reasonable accommodation of employees.

Furthermore, employers need to realise that employee wellness programmes need to be connected to a larger disability management plan, not only to ensure that workers receive the necessary treatment, but also that the working environment will allow for a faster, healthier transition back to work. The voice of the employee needs to be heard, and as was illustrated in *Jansen*, employers should not use disciplinary inquiries to avoid disability management duties. Employees should be consulted, and be allowed to state their case, with the assistance of either a co-employee or a trade union representative. Employers need to look beyond the employee's mental illness, and rather focus on how the environment is affected by the impairment, and establish what adjustments can be made to the benefit of all stakeholders involved. Employee wellness programmes need to contain components or steps which also make provision for early intervention, and returning employees back to work as soon as practically possible, all as components of a well-coordinated programme. Employers need to remain in communication with all stakeholders involved, which is where the assistance of a case manager is vital, to ensure that workers are returned back to work and remain productive members of society. If experts express an opinion regarding the mental state of an employee, employers need to be supportive and investigate measures to reasonably accommodate their employee.

It must further be remembered that Jansen's condition was triggered by work-related stress, as well as a lack of support by the management of the organisation. During the times that Jansen was booked off, as recommended by a medical expert, the employer should have: investigated ways to adjust his working environment; examined his duties; considered alternative positions or another suitable position in the organisation; and investigated all alternatives short of dismissal. The whole process

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should have been managed more efficiently. The stressors which caused his depression had to be targeted as part of the incapacity inquiry. If all of this had been done, in a harmonised and coordinated manner, it may have been possible for Jansen to successfully return to work and function as normal, after the first time he was diagnosed and received counselling. This case also reminds us that the support and buy-in of management (not only at grassroot level) is vital for the overall wellbeing of workers, and even more so when they are disabled.

Some may argue that placing Jansen on the employee wellness programme and allowing him to attend counselling, discharged the duty to reasonably accommodate. However, the employer had the duty to also look at the interplay between the impairment and the working environment, and to determine how the environment could also be adjusted, alongside the counselling sessions that the employee was attending. Management cannot disregard the opinion of a medical expert, and even more so if it is the opinion of one of the experts they have appointed. In *Jansen* the employer did not once contest the evidence of the medical experts, but still decided to discipline Jansen. Management also needs to support employees involved in the wellness programme, and if the outcomes are not desirable, they need to investigate the matter further. Organisations, especially large companies, should consider having a designated case manager assigned to each case to allow for effective coordination between the different stakeholders involved, such as : employee; employer; occupational therapists; medical experts; trade unions; etc. Employee wellness programmes alone are not sufficient to address mental disability. If employees are undergoing treatment, it is vital for management to incorporate the recommendations made by such experts, instead of embarking on disciplinary action.

### 3.1.3 *Reflection*<sup>90</sup>

It would have been helpful if the Court had unpacked some of the obligations and provisions of the Code and the TAG, in order to provide more clarity on the obligations of employers, and in this instance, large employers, to reasonably accommodate. For instance, employers need to be reminded of the fact that it is not about the impairment itself, but about the effect that the impairment has on the environment, and vice-versa. Employers need to carefully study the Codes of Good Practice and the TAG and use them as the foundation when developing their own policies on how to reasonably accommodate disabled employees. It is important to preserve the quality of life of all the citizens of South Africa, irrespective of their disability. If one considers the provisions of the TAG and the Code, as discussed earlier, it is clear that the employer should have investigated whether the employee was still in a position to continue in his position as

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<sup>90</sup> Even though the case had a positive outcome for the disabled employee, it is still important to reflect on what the Court could have done to provide more certainty in regard to reasonable accommodation. The aim of this part is not to speculate, but rather to emphasise the role courts can play in highlighting the importance of Codes of Good Practice and the importance of role clarification when disabled employees need to be reasonably accommodated.

usual, and if not, it had to determine the extent to which he would be able to fulfil his duties, and made the necessary changes as required.

If needs be, the employer should have investigated whether duties could have been modified or whether other suitable work was available at the time. If one considers the duration of the times Jansen was away from work, one sees that it was not for unreasonably long periods of time. The employer had to investigate all alternatives short of dismissal. Jansen sent medical reports time and time again, and even requested an opportunity to discuss the reports, but to no avail. It would have been possible for the employer, without causing undue hardship, to have afforded him the opportunity to take sick leave, as was recommended by the psychologist. Dismissal should always be a measure of last resort. Perhaps the Court could further have suggested that an employer needs to investigate flexible leave arrangements, considering the interests of both the employee and the employer, whilst investigating how they can deploy quality disability management within their organisation. When employees are booked off sick, organisations need to have an early return to work strategy in place, in order to assist with a safe and early transition back to work. The Court could have highlighted the complexities of disability management, and could have perhaps commented on the need to have more comprehensive legislative and policy arrangements in South Africa. Some commentary on the possible adjustments which could have been made, would perhaps have provided more clarity to other employers about what the duty of reasonable accommodation entails, especially since this case received attention in the media. The Court could have highlighted that large organisations could set the bar and lead by example in the field of disability management.

The Court could have highlighted the advantages of being employed and investigated measures to motivate employers to not only employ PWDs, but also to retain those who become disabled. For instance, incentives can be introduced to assist employers to reasonably accommodate employees. The social responsibility of companies is also an aspect which could have been noted.

It must be borne in mind that it may be more difficult to accommodate mental disabilities, and employers need to be innovative when developing their wellness and disability management strategies. Mental illness needs to be destigmatised and the lines of communication need to be open. Furthermore, the Court could have suggested that the employee could perhaps have been transferred to a different line manager; have been given reduced working hours, which could gradually have been increased; have had non-essential duties assigned to another employee. Until we have clear legislative and policy frameworks setting out the duties of role players to manage all types of disability, it is left to our courts to shed light on what such duties entail. One thing is clear, it needs to be a well-coordinated approach, with the buy-in of all stakeholders involved, who all are working towards a common goal: to return employees back to work, by deploying reasonable accommodative measures. Companies should be encouraged to develop their own manuals, in accordance with Codes and Guidelines, in order to determine how disability will be managed.

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As was illustrated by the *Jansen* judgment, it is not sufficient to merely place employees on a wellness programme, since this is but one of the components to ensure that employees are successfully and reasonably accommodated and returned to work. Even though employee wellness programmes are part of disability management, they need to function as one of the components of a larger disability management programme. For instance, organisations also need to evaluate the working environment to determine how employees can be reasonably accommodated once they transition back to work. Dialogues need to be started also amongst co-employees to avoid the stigmatising of PWDs. Organisations need to consider using their HR officers as coordinators to oversee the reasonable accommodation of PWDs, as well as their transition back to work. There needs to be a flow of communication amongst all role players, and all parties need to understand their duties. If recommendations are made, parties need to discuss them and decide on a concrete plan to map the way forward.

Nxumalo also opines that the current South African legislative framework does not adequately allow for the effective management of mental illness, or other disabilities, in the workplace.<sup>91</sup> Holness also states that there are many challenges with the legislative and policy framework to appropriately address the reasonable accommodation of people suffering from psycho-social disabilities.<sup>92</sup> Even though the TAG provides some examples of how employers can reasonably accommodate their employees, one should keep in mind that reasonable accommodation measures for non-physical disabilities are less tangible, compared to those for a person with physical disabilities.<sup>93</sup> Holness<sup>94</sup> further submits that there is a need for employers, employees and other service providers to have accessible information related to disability discrimination legislation, as well as information pertaining to the selection and implementation of reasonable accommodation measures appropriate to the individual, as well as the workplace. We agree with her further submission that perhaps it may be helpful for employers to have a toolkit, which contains examples of reasonable accommodation measures, specifically for psychosocial illnesses or disabilities, particularly measures which respect the diversity of illnesses, as well as the employers' needs.

Holness however recommends that such examples should preferably be included as part of the country's policy framework, more specifically by way of an amendment to the Code or the TAG, or by the development of management standards. Holness<sup>95</sup> further submits that there needs to be a meticulous effort to remove barriers to disclosure, which requires "destigmatising interventions and educative measures for employers and all employees", in order to cultivate a culture of openness regarding

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<sup>91</sup> Nxumalo (2017) at 1534.

<sup>92</sup> Holness W "The invisible employee: reasonable accommodation of psychosocial disability in the South African workplace" (2016) *South African Journal of Human Rights* 510 at 536.

<sup>93</sup> Holness (2016) at 536.

<sup>94</sup> Holness (2016) at 536.

<sup>95</sup> Holness (2016) at 536.

psycho-social health. Her last recommendation, related to educating employers, is as follows:

“... employers should be educated about the negligible cost of reasonable accommodation and the social benefits thereof – which may mean that the defence of unjustifiable hardship will less likely be relied upon.<sup>96</sup>”

#### 4 CONCLUSION

The Constitutional Court is yet to hear a case on the duty of employers to provide reasonable accommodation to employees with disabilities, and until such a precedent is set by it, more and more employees with disabilities will continue to suffer at the hands of their employers.

Cole and Van der Walt assert that even though the Code, EEA and TAG are very useful, they are not “sufficient to enforce and to effectively integrate persons with disabilities into the labour market”. These legislative and policy documents are “hardly ever used” to assist with disability in the workplace.<sup>97</sup>

Based on the foregoing, we are in complete agreement with Watson’s submission:

“What is absent from jurisprudence around the rights of persons with disabilities are not only key Constitutional Court cases on the duty of employers to provide reasonable accommodation (including limitations on such a duty), but specific guidelines on accommodating persons with particular disabilities.<sup>98</sup>”

Both the Code, as well as the TAG published by the Department of Labour have gone “relatively unnoticed and unread” in the workplace. We agree with the submission by Watson, that the responsibility now is that of employers, employees and other role-players to “bring meaning and clarity” to the term “reasonable accommodation”.<sup>99</sup> Even though *Jansen* sends an important warning to all employers regarding the importance of accommodating PWDs, similar cases will emerge in the future, until employers realise that they need to be pro-active in managing disabilities in their respective workplaces, and should not wait until they are faced with a law suit.

Employers should thus follow a broad interpretation of the guidelines contained in the Code, as well as in the TAG. They should be extremely cautious of treating incapacity under the mantle of misconduct, since this is regarded in a very serious light by our courts. Employers need to perform proper investigations, with the assistance of experts, if needs be, to investigate the employee’s incapacity.

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<sup>96</sup> Holness (2016) at 536.

<sup>97</sup> Cole & Van der Walt (2014) at 538.

<sup>98</sup> Watkins “Technical assistance guidelines on the employment of persons with disabilities - a call to action goes unanswered” (2017) available at <http://www.workinfo.org/index.php/articles/item/1834-technical-assistance-guidelines-on-the-employment-of-persons-with-disabilities-a-call-to-action-goes-unanswered> (accessed 15 March 2019).

<sup>99</sup> Watkins (2017).

## **Individual contributions:**

The article flows from the lead author's LLD. She wrote the majority of the article, with the co-author assisting with supervision, editing, and attending to technical and linguistic issues.

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