CASES / VONNISSE

A STEP FORWARD IN THE FIGHT AGAINST ABLEISM:

Damons v City of Cape Town [2022] ZACC 13

1 Introduction

In *Damons v City of Cape* Town ([2022] ZACC 13) (CC judgment), the Constitutional Court (CC) had to deal with the issue of a person living with a disability who was injured in training. The minority judgment by Pillay AJ takes a socio-legal approach to the issue as it dives deep into how Mr Damons was injured and the responsibility of the employer to ensure that Mr Damons was reasonably accommodated. On the other hand, the decision of the majority by Majiedt J takes a formal legal approach in that it critiques the minority judgment from the perspective of the pleadings. This case note engages in a deep discussion of the matter, spanning the arbitration, Labour Court (LC), Labour Appeal Court (LAC) and both of the judgments of the CC. This case note engages in a discussion of the two judgments of the CC.

2 Facts

Mr Damons was a firefighter employed by the City of Cape Town. He was injured on duty during a fire drill owing to the employer ignoring safety requirements (CC judgment par 1). During the drill, Mr Damons was required to hop onto the back of another trainee, as a result of which he fell from the second floor to the first floor (CC judgment par 2). Mr Damons was injured permanently and now cannot carry anything heavy. Physical fitness is a requirement for firefighters. Mr Damons commenced his employment as a firefighter in 2001 and, but for his permanent injury, he would have been promoted in 2010 (CC judgment par 3). In 2013, Mr Damons was "accommodated" by his employer through alternative employment and was placed in the Fire and Life Safety Section to perform administrative and educational work; he retained his title as firefighter and his salary (CC judgment par 5). Mr Damons then applied for the position of senior firefighter and asked that his employer relax the physical fitness requirement (CC judgment par 6). The employer refused, and Mr Damons has since had no promotion.

Feeling aggrieved, Mr Damons instituted legal proceedings under the Employment Equity Act (55 of 1998) (EEA) (CC judgment par 7). He claimed that he was being unfairly discriminated against as the employer refused to drop the physical fitness requirement and to promote and advance him,

preferably as a firefighter. The employer, on the other hand, raised the defence that physical fitness is an inherent job requirement for firefighters (CC judgment par 8).

3 Arbitration and adjudication

3 1 Arbitration

The arbitrator found as follows:

> "[T]he respondent is of the view that the mere fact that the applicant has been accommodated within the Unit that itself is sufficient. To me this is a misguided notion because there is no favour done to the applicant to accommodate him as that is a legal requirement expected from the respondent to do so. Clearly, it does not bother the respondent as to whether ... the applicant is advanced. I note the attitude displayed here borders on arrogance of the respondent's management and there is no empathy displayed here towards the applicant. It is as if the applicant brought this condition to himself and therefore tough luck to him and must be grateful that he still works for the respondent." (CC judgment par 13; see also *South African Municipal Workers Union* (*SAMWU*) *obo A Damons v City of Cape Town*, SALGBC Arbitration Award, 17 October 2014 par 23)

However, since the City of Cape Town had raised inherent job requirements as a defence, the arbitrator found that the bargaining council had no jurisdiction to deal with the matter. The matter was then referred to the Labour Court (CC judgment par 14; see also s 10(6)(*a*) of the EEA).

3 2 Labour Court

The issues the Labour Court had to deal with were

> "whether the inherent requirement of physical fitness for a firefighter precluded the applicant's advancement or promotion to the position of senior firefighter. Second, regarding discrimination, the parties asked the Labour Court to determine whether the Policy constituted justifiable and fair discrimination in as much as it distinguished between persons on the basis of an inherent requirement of a job; and whether the application of the Policy to the applicant constituted unfair direct, alternatively indirect, discrimination as contemplated by section 6 of the EEA." (CC judgment par 17)

When asked why he did not apply for other positions or jobs, Mr Damons acknowledged that he would not have been successful in applying for any other promotion. As he did not have the necessary skills or qualifications, he applied to be a senior firefighter (CC judgment par 22).

In its decision, the Labour Court was of the view that, since Mr Damons was injured on duty, his employer could not simply apply its policy on the inherent job requirement for advancement in a way that prevented Mr Damons from advancing owing to the disability he lives with; this would be a violation of s 6(1) of the EEA (CC judgment par 25; see also *SAMWU obo Damons v City of Cape Town* (2018) 39 *ILJ* 1812 (LC) (LC judgment)).

The LC, while acknowledging the employer's inherent job requirement defence, was of the view that the discrimination against Mr Damons was

unfair; it was an infringement of the Code of Good Practice on Employment of Persons with Disabilities (GN 1085 in *GG* 39383 of 2015-11-09) that prevented the employment on less favourable terms of people living with disabilities (CC judgment par 25; see also LC judgment par 20–21). The LC went further, stating that since his incapacity was permanent, his work could have been adapted to ensure that he was accommodated while ensuring that he added value to the fire and rescue service (CC judgment par 26; see also LC judgment par 22).

3 3 Labour Appeal Court

The LAC focused on the inherent job requirement defence raised by the City of Cape Town to prevent the advancement of Mr Damons (CC judgment par 27; see also *City of Cape Town v SA Municipal Workers Union obo Damons* (2020) 41 *(ILJ)* 1893 (LAC) (LAC judgment) par 13). The court accepted that physical fitness is indeed an inherent requirement of the firefighter job (CC judgment par 27; see also LAC judgment par 14). The LAC relied on *TDF Network Africa (Pty) Ltd v Faris* ((2019) 40 *ILJ* 326 (LAC); see also *South African Airways (Pty) Ltd v V* (2014) 35 *ILJ* 2774 (LAC)), which held that a job requirement is inherent if it is rationally connected to the performance of the work. The LAC set aside the decision of the LC as it held that it was not possible for Mr Damons to perform the vital activities expected of an active firefighter; furthermore, it was not in the public interest to have firefighters who were not capable of dealing with the outbreak of fires (CC judgment par 31; see also LAC judgment par 18).

4 Issue before the Constitutional Court

The issue before the CC was reduced to a simple question: does the City of Cape Town owe Mr Damons an obligation of reasonable accommodation? (par 9). In the CC, Pillay AJ asked the primary question: was the City of Cape Town discriminating unfairly against Mr Damons on the grounds of his disability? (par 43). The secondary question put by the court was whether, in relation to Mr Damons, the City of Cape Town had a duty of reasonable accommodation; the City of Cape Town denied it had such a duty, raising its defence of the absence of an inherent job requirement (par 43).

4 1 Minority judgment by Pillay AJ

Pillay AJ began with an analysis of the statutory framework. Section 2 of the EEA refers to the purpose of the statute as: (*a*) to promote equal opportunity and fair treatment by eliminating unfair discrimination; (*b*) to implement affirmative action measures to redress the disadvantages of designated groups. Section 3 of the EEA resembles the Preamble: it gives life to the constitutional right of equality as enshrined in section 9 of the Constitution, as well as to the right to fair labour practices (CC judgment par 44). Pillay AJ also engaged in an analysis of international law, which is not relevant for this case note's purpose (par 44; on international law, see s 233 of the Constitution; Lawson "Disability Law as an Academic Discipline: Towards Cohesion and Mainstreaming?" 2020 47 *Journal of Law and Society* 558

559; Ngwena and Albertyn "Special Issue on Disability: Introduction" 2014 30 *SAJHR* 214; UN General Assembly *Declaration on the Rights of Disabled Persons* A/RES/3447 (XXX) (9 December 1975); Nussbaum "Capabilities and Human Rights" 1997 66 *Fordham Law Review* 273 277; Dugard "International Law and the South African Constitution" 1997 8 *European Journal of International Law* 77 92; International Labour Organization *Discrimination (Employment and Occupation) Convention* C111 (1958) EIF: 15/06/1960; *Standard Bank of South Africa v Commission for Conciliation, Mediation and Arbitration* (2008) 29 *ILJ* 1239 (LC); UN General Assembly *International Convention on the Elimination of All Forms of Racial Discrimination* 660 UNTS 195 (1965) Adopted: 21/12/1965. EIF: 04/01/1969; UN General Assembly *Convention on the Elimination of All Forms of Discrimination Against Women* 1249 UNTS 13 (1979) Adopted: 18/12/1979. EIF: 03/09/1981).

Turning to the Code, Pillay AJ noted that it does not create additional rights and obligations regarding disability. Of relevance is item 6 of the Code, which imposes positive duties on employers to accommodate workers reasonably and in the process promote equality and eliminate discrimination (par 62).

Pillay AJ also noted that section 6 of the EEA prohibits unfair discrimination, including on the ground of disability. Using the test set in *Harksen v Lane N.O* (1998 (1) SA 300 (CC)), Pillay AJ noted that the burden of proof rests on an employer to prove that the discrimination is fair, and if it is not fair, that it is at least justifiable.

Pillay AJ noted that once a requirement is declared as being inherent to that work, it is no longer discriminatory in nature. Such a requirement is protected against a claim of discrimination and the employer in such an instance cannot be compelled to set aside that requirement in order to make way for a worker living with a disability (par 67). In this case, it is a settled principle that physical fitness is an inherent requirement for firefighters (par 68; *Imatu v City of Cape Town* 2005 26 *ILJ* 1404 (LC) par 28; *Pharmaco Distribution (Pty) Ltd v EWN* (2017) 38 *ILJ* 2496 (LAC); *Department of Correctional Services v Police and Prisons Civil Rights Union* 2013 (4) SA 176 (SCA)). Mr Damons alleged that his employer applied this requirement to him, but did not apply it to other workers who were promoted as senior firefighters; as such, the other workers were promoted without the need to perform physical tasks (par 69). Pillay AJ noted, however, that Mr Damons failed to provide evidence for this assertion and that, since implementation of the policy on advancement, no firefighter had been promoted without the application of this requirement (par 70).

Pillay AJ accordingly found that application of this inherent job requirement is not unfair discrimination; rather, it gives effect to section 6(2)(*b*) of the EEA (par 71). Pillay AJ also agreed with both the LC and the LAC as regards their finding that physical fitness is an inherent requirement of the job of operational firefighters. Pillay AJ also upheld the decision of the LAC when it set aside the decision of the LC that had held that the application of the advancement policy to Mr Damons amounted to unfair discrimination in terms of section 6(1) of the EEA (par 72–73).

With regard to the issue of reasonable accommodation, Pillay AJ stated that it is not synonymous with affirmative action (par 75). Pillay AJ suggested a broad interpretation of this phrase, meaning any adjustment or modification. Employment cannot be limited to familiar physical requirements; it must include psychological counselling and career training in order to maximise participation of people living with disabilities (par 78). Reasonable accommodation includes not only participation, but also advancement. Reasonable accommodation is about the need to promote substantive equality and eliminate discrimination. Therefore, the failure or refusal by an employer to accommodate reasonably a worker living with a disability would not achieve the objectives of the EEA. The employer has a duty to prevent unfair discrimination; failure to accommodate reasonably the worker then becomes unfair discrimination (par 81–82). Pillay AJ went on further to explain that reasonable accommodation under the EEA is reserved for designated groups; it does not extend to everyone. However, it does extend to people living with a disability (par 81–82).

The concept of *uBuntu* also plays a role in this matter as it solidifies the moral claim of reasonable accommodation (par 84; also see *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) par 37; *S v Makwanyane* 1995 (3) SA 391 (CC) par 308; *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) par 14 and 100; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC)). Treating people living with disabilities as a problem is distasteful to a human rights culture (par 86). Reasonable accommodation must be a genuine effort to remedy disadvantage so as to pave the way for implementation of equality of opportunity and remuneration (par 86; Ngwena "Interpreting Aspects of the Intersection Between Disability, Discrimination and Equality" 2005 16 *Stellenbosch Law Review* 3 5). Employers have a duty to consult with the person in utmost good faith to clarify whether reasonable accommodation would be necessary and, if so, what form that might take. Reasonable accommodation is person specific (par 86; see *Association for Mineworkers and Construction Union v Anglo Gold Ashanti Limited* (2022) 43 *ILJ* 291 (CC)).

The duty to accommodate disability reasonably is not an optional act of charity, compassion and welfare that the employer applies of its own will; rather it is a statutory requirement. Pillay AJ noted that "[i]t cannot be that once an employer successfully raises the defence of the inherent requirement of a job, its obligation to eliminate discrimination automatically ends" (par 90). In Pillay AJ's view, the ultimate aim of accommodation is not about fulfilling the vital functions of the job but "a" job. In the search for reasonable accommodation, an employer is not limited to a particular job. However, once a job is identified, then assessment, access and suitability for "the job" applies. Pillay AJ noted that reasonable accommodation is the appropriate manner to accommodate incapacities, enable capabilities and restore identity and dignity. This is further scrutinised in this matter as the worker was injured on duty and the employer was liable. The permanent injuries of Mr Damons stripped him of some of his dignity as he was no longer the self-sufficient man he had been. Furthermore, the City of Cape Town led no evidence to discharge its obligation to explore ways of accommodating Mr Damons in other lines of employment (par 95).

Pillay AJ found that the appropriate remedy in this case must be for the City of Cape Town to explore what positions Mr Damons could hold and what accommodations could be made for him to enhance his responsibilities so that he could have prospects for advancing his career. If need be, the City of Cape Town should facilitate counselling, reskilling, retraining and reassigning to the applicant functions that he can perform. The City of Cape Town's view of what is doable should, with creativity and imagination, craft a career path that Mr Damons desires. Pillay AJ held:

> "Consequently, the respondent is in breach of sections 5 and 6(1) of the EEA in that its refusal to reasonably accommodate the applicant in a job, with prospects for advancement, for which physical fitness is not required, amounts to unfair and unjustifiable discrimination of the applicant as a person with disabilities." (par 105)

4 2 Majority judgment by Majiedt J

The approach adopted by the minority judgment of Pillay AJ above was treated cautiously by the majority judgment of Majiedt J. According to Majiedt J such an approach invokes feeling of sympathy and not legal reasoning; in this matter, the emotions are based on Mr Damons being permanently injured and such an injury occurring in the workplace and resulting in his living with a permanent disability (par 110). In essence, Majiedt J was of the view that this unfortunate situation of Mr Damons had no role to play in the decision to be made on the objective facts. The majority proceeded to state that the circumstances surrounding Mr Damons's injury were not logically connected to the issue of unfair discrimination before the court (par 111). However, Majiedt J stated clearly that the City of Cape Town was indeed liable for Mr Damons's injury sustained during the ill-conceived fire drill (par 112).

According to Majiedt J, the advancement policy plays a central role to this matter as it deals with active firefighters with practical assessment being the backbone of the promotion to senior firefighter (par 113). Majiedt J proceeded to highlight the pre-trial minute between the parties, which conceded that no firefighter had previously been advanced without the application of this assessment and that Mr Damons was unable to meet this inherent job requirement owing to his disability (par 114). The post of non-operational firefighter did not exist. The City of Cape Town had merged different departments and, in an attempt, to reduce anomalies had adopted the policy in 2009; since then, all firefighters have had to meet all requirements in order to advance (par 115).

Majiedt J proceeded to deal with the issue of pleadings. Citing *Fischer v Ramahlele* (2014 (4) SA 614 (SCA) par 13), *Mtokonya v Minister of Police* (2018 (5) SA 22 (CC) par 77) and *South African Transport and Allied Workers Union v Garvas* (2013 (1) SA 83 (CC) par 114), Majiedt J put forward a general rule that it can only deal with issues brought by the parties on the papers and cannot simply construct issues by itself (par 118). Courts through judicial precedent have adopted this rule to ensure legal certitude (par 119). The judgment of Pillay AJ, in an attempt to undo the wrong done to Mr Damons, evokes pity; it goes further than the issues in the pleadings

and, as a result, prejudices the City of Cape Town. Majiedt J proceeded to state:

> "Mr Damons' case is that the City had discriminated against him unfairly by not waiving the requirement of physical assessment in the Policy and by failing to promote him in terms of the Policy." (par 119)

To simplify it even further, Mr Damons alleges that it was unfair discrimination for the City of Cape Town to refuse to promote him to the rank of senior firefighter by refusing to waive the physical assessment requirement (par 121). His claim was based on the advancement policy and not any other legislation. The court had to adjudicate whether there was unfair discrimination (par 122). The case did not turn on the promotion of Mr Damons to a non-operational role despite the judgment of Pillay AJ suggesting that the applicant's case was that the City of Cape Town had failed to make a policy for the promotion of non-operational firefighters (par 123–124). In his pleadings, Mr Damons simply sought an order striking out the requirements of the physical assessment (par 125). The City of Cape Town, on the other hand, pleaded that the policy in question did not unfairly discriminate against Mr Damons as it found protection in s 6(2)(*b*) of the EEA (par 127). This section provides that it is not unfair discrimination to exclude Mr Damons as the exclusion was based on an inherent job requirement (par 127). The two important conditions for promotion to the role of senior firefighter are the physical assessment requirement and the continuous years of experience requirement (par 128).

Mr Damons had sought to rely on his having kept the title of firefighter after being rotated into a non-operational role owing to his injury; it was alleged that Mr Damons accepted a non-operational role on condition that he would not be prejudiced for future promotions (par 132). Majiedt J was of the view that this logic and reasoning fails on multiple grounds. He stated:

> "First, it is clear from the final outcome of the incapacity enquiry that this "condition" was not included. But even if it were included, it could hardly have been intended that the applicant would be free to advance and be promoted to any position he chose, irrespective of whether he could meet the inherent requirements of the job. Secondly, while it is true that the applicant retained the title of firefighter, he was, as the applicant's counsel accepted, a "firefighter in name only". The alternative positions to which the applicant was transferred were in non-operational divisions, first in the Finance and Billing Section and then in the Fire and Life Safety Education Section. These positions do not require him to do physically demanding work.
>
> Thirdly, in any event, the Policy applies only to operational firefighters and, again, the applicant admitted that he was non-operational. This aspect has been extensively addressed and nothing more need be said about it. In all the circumstances, it could never have been the intention of any party – or policy-maker – to either withdraw the requirement of physical ability and fitness in the Policy or to create an exception to the Policy entitling the applicant to advancement as an operational firefighter. Such circumstances include the permanent nature of the applicant's disability, the core functions of a firefighter, the reasons for and content of the Policy, the record of the incapacity proceedings and the common cause facts recorded in the pre-trial minute." (par 133–135)

Majiedt J proceeded to find that the matter should have ended in the LC as s 6(2)(*b*) was a complete defence against Mr Damons's claim (par 139).

Majiedt J further disagreed with the judgment of Pillay AJ in his application of the principle of reasonable accommodation. The first judgment misconstrued this principle. Reasonable accommodation only applies if the worker in question will be able to meet the inherent job requirements; accommodation beyond this point would be unreasonable as it would place the employer in a position where it hires someone who cannot meet the inherent requirements of the job (par 141). It is common cause that Mr Damons does not meet the inherent job requirements and there is no amount of accommodation on the part of the City of Cape Town that would make him meet them (par 142). In this case, the moment the City of Cape Town raised s 6(2)(*b*), the question of reasonable accommodation fell away (par 142).

5 Discussion

The objective of pleadings in a civil matter is to define the issues in dispute between the parties; they also serve the purpose of informing the presiding officer of the nature of the dispute (Vettoril and De Beer "The Consequences of Pleading a Non-Admission" 2014 46(2) *De Jure* 612). It becomes unfair for a party simply to ambush the other at the hearing without having alleged the issue in the pleadings. In order to ensure balance and fairness, it is not for the court to deal with an issue that it may consider as having importance if it was not pleaded (*Fischer v Ramahlele supra* par 14). This case note concurs with the majority judgment by Majiedt J that the courts in our adversarial system are only empowered to deal with issues as presented to them in the pleadings (*National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) par 15 and 19; *Hart v Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) 469 C–E). This principle ensures fairness to all the parties in the dispute as one cannot be prejudiced when reliance is placed on an issue not appearing in the pleadings (*Phillips v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) par 39).

However, the court is allowed to raise an issue of law that arises during the course of a matter if it is necessary for the decision of the case, even though it was not pleaded. This is subject to no party being prejudiced by the court's approach (*CUSA v Tao Ying Metal Industries* 2009 (2) SA 204 (CC) par 68; *Barkhuizen v Napier* 2007 (5) SA 323 (CC) par 39; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) par 109–114). This case note takes the view that the approach adopted by the minority judgment of Pillay AJ, taking into account the injury of Mr Damons at the hands of the City of Cape Town and the City's failure to promote him through the adoption of a policy that allows for non-operational firefighters, is valid as it shines a light on the much broader issue of ensuring that people living with a disability be protected by policies (*Electricity Supply Commission v Stewarts and Lloyds of SA (Pty) Ltd* 1981 (3) SA 340 (A) 345A–E).

From a socio-political perspective, disability is a matter of political and social construct and not necessarily the problem of an individual (Rocco *From Disability Studies to Critical Race Theory: Working Towards Critical Disability Theory* Paper presented at Adult Education Research Conference, University of Georgia (2005); see also Marumoagae "Disability Discrimination and the Right of Disabled Persons to Access the Labour Market" 2012 1(15) *PELJ* 345–428). Marumoagae states that even though

academics have engaged in a discussion regarding discrimination relating to race, religion and gender, they have not yet sufficiently engaged the issue of disability discrimination in the workplace. Marumoagae argues further that people living with disabilities continuously face difficulties in exercising their basic social, political and economic rights. Discrimination against people living with disabilities is one of the worst social stigmas and our society has not been able to have open and honest discussions in order to overcome the stigma. People living with disabilities are among the most marginalised in all societies and face unique challenges in the enjoyment of their human rights. In order to effectively exterminate employment challenges, the notion of equality advocated for in South Africa with regards to this group of people has to be one of substantive equality. Although previously society considered disability no different from other "miseries" of life, this must not be misunderstood to downplay the various kinds of issues faced by people living with a disability (Rocco paper presented at Adult Education Research Conference*).*

It is submitted, on the one hand, that the court should have engaged in a discussion regarding the stigmatisation of people living with disabilities in the workplace. Owing to employers' desire to maximise profits on the one hand, and the anticipated costs of accommodating people living with disabilities on the other, such persons often face stigma in the workplace. Such stigma is a continuation of eugenics where a certain group is viewed not only as the default "normal", but also as being the evolved and most worthy of human beings (Glass "Racism and Eugenics in International Context" 1993 68(1) *The Quarterly Review of Biology* 61–67). By default, the people regarded as "other" by the "normal" group are stigmatised. People who are considered as "the other" possess an undesired differentness (Glass 1993 *The Quarterly Review of Biology* 9; on stigma, see also Link and Phelan "Conceptualizing Stigma" 2001 *Annual Review of Sociology* 363 375). The other, who bears this kind of differentness (usually a matter of race, gender, class or disability, and in South Africa usually an intersection of these), is reduced in the minds of the default "normal" from being a complete human being to being a tainted and undesired human being (Glass 1993 *The Quarterly Review of Biology* 9). Using Critical Race Theory infused with Critical Disability Theory the paper notes that "the other" in this context takes the shape of the disabled, who are marked by capitalism as inferior and thus stigmatised. The "normal people" take the shape of people who do not live with disabilities.

On the other hand, it is submitted that this judgment, specifically the minority decision by Pillay AJ, is significant and has a positive social impact in that it lays the practical foundation for the fight against the ableism that is enforced by our capitalist society in the workplace. It was during the creation of capitalism in the industrial revolution that people living with disabilities became a form of surplus with diminished capacity to contribute towards the making of profits in the labour sector (Rocco *From Disability Studies to Critical Race Theory*). Pillay AJ's minority judgment seeks to rid the labour sector of employer behaviour that reduces people living with disabilities to a form of surplus; Pillay AJ demands that the employer reasonably accommodate the employee and does not allow the former simply to allege inherent job requirements as a defence without proof. In essence, this addresses the commodification of labour and the reduction of people living

with disabilities to an identity of "the other". Pillay AJ seeks to protect the dignity of the worker and, as proposed by Critical Disability Theory, it paves the way for inclusion into the discrimination triad of race, gender and sexuality of people living with disabilities.

The court, however, should have highlighted CDT briefly. The importance of this theory is that the continued commodification of labour leaves those living with disabilities in a state of poverty and isolation (Rocco paper presented at Adult Education Research Conference; also see item (t) of the Preamble to the UN General Assembly *Convention on the Rights of Persons with Disabilities* (CRPD) A/RES/61/106 (13 December 2006). Published: 24 January 2007; Foreword to the Code of Good Practice on Employment of Persons with Disabilities GN 1085 in *GG* 39383 of 2015-11-09 (Code), as alluded to in s 3(*c*) of the EEA). This principle would also have assisted the court by giving more weight to its reasoning regarding the need for reasonable accommodation as it engaged also in a discussion of work being a form of restoring the dignity and reducing poverty for a person living with a disability (CC judgment par 96). Furthermore, this author agrees with the minority decision of Pillay AJ that people living with disabilities often live in extreme poverty. As such, society has a duty to acknowledge the critical need to address the negative impact of poverty on persons with disabilities; one such form of redress, it is submitted, is reasonably accommodating people living with disabilities and putting this as a priority before the excuse of inherent job requirements (CC judgment par 1). The approach by Pillay AJ must be applauded as it put the spirit of *uBuntu* above the needs of the employer.

The majority judgment by Majiedt J has an incorrect premise. Its disregard for the social aspect of law and decision making is an undesirable approach. Pillay AJ was correct to use the social aspect to take into account the poverty suffered by those living with disabilities, how Mr Damons was injured, and in essence invoking the spirit of *uBuntu*. The common thread is that legal scholars consider the socio-legal approach to use tools drawn from a range of social science disciplines to examine social experience. This is because a proper understanding of legal thought is not possible without subscribing to the sociology of law, as informed by social theory (Cotterell "Law, Culture and Society: Legal Ideas in the Mirror of Society" 2006 *Ashgate, Aldershot* 1). In essence, law should not be viewed as an independent force imposed onto society; rather, it should be understood as a tool sharpened by the lived experiences of people through the context of social, political and economic logic (Blandy "Socio-Legal Approaches to Property Law Research" 2014 3(3) *Property Law Review* 1 11).

6 Conclusion

The case note has engaged in a critical discussion of a matter that started as an arbitration, and went all the way through to the Constitutional Court. Each court decision was highlighted in brief to give context. The case note focused on the decision of both the minority and the majority of the CC.

The case note submits that this matter was appropriately decided by the minority judgment of Pillay AJ. Pillay AJ's decision took into account the critical component of the matter – namely that Mr Damons was injured in the

workplace, on duty and the employer had a duty of reasonable accommodation to Mr Damons. The majority by Majiedt J, on the other hand, took a more legally formalistic approach, which did not have the desirable outcome, as it refused to take into account what the minority considered as being a critical component, as highlighted above.

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