

Disability at the Bar – a frank discussion

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I have been asked as a physically challenged advocate at the Johannesburg Bar to write about my personal experiences and opinions on being in a professional environment such as the Bar. This article serves to highlight the concerns of physically challenged persons in society as a whole and also within a professional environment, and to challenge societal misconceptions and preconceptions of the physically challenged.

There are two main problems facing physically challenged persons in a professional environment such as the Bar. The first and greatest obstacle facing the physically challenged is not their physical handicaps but the mindset of those not so challenged. The second is the physical barriers with which physically challenged persons confront every day and which hinder their right to pursue careers compared to those not so challenged.

Steps are public enemy number one to a physically challenged practising advocate, as is the case with most physically challenged persons. The physical barriers to the attainment of equality in a professional environment cannot be understated. If those at the Johannesburg Bar have ever wondered why they never see me in the two main motion courts (GC and GD) in the high court building on a Tuesday morning (or on any day for that matter), cast your eye along either side of the court and behold the wonderful splendour of steps running down to the Bar. To most if not all "able-bodied" persons, walking down steps is taken for granted; to all physically challenged persons in wheelchairs or on crutches steps are, if you would pardon the expression, the most disabling aspect of being physically challenged and one of the greatest hindrances towards the obtainment of freedom and equality in a professional environment. Although the drafters of our Constitution never intended it to mean this, steps are, in effect, a denial of our right of access to court!

The smaller courts on the ground floor are accessible but most motion matters take place in courts GC and GD. This places me and the poor judge in the invidious position of having to move my matters in chambers. To some counsel this may seem like a bonus (getting shouted at in chambers is never as humiliating as being disembowelled in court before your peers!), but the flip side is that I lose valuable court experience in having to move my applications in open court before my peers, and so lose the opportunity of building up my own confidence; in addition I lose the opportunity of attorneys seeing me in action.

Courts on the second, fourth and sixth floors are equally inaccessible. Courts on the eight floor have an accessible side entrance which is level to the Bar but the gap between the two sets of counsel benches is so narrow that any wheelchair would have to go on a serious diet just to fit in. And even if I did manage to fit in, heaven forbid if you try to get out with me in the way!

Physical barriers

The physical barriers are of course a manifestation of society's prejudices and failures in dealing with physically challenged persons. The physically challenged have, for too long, found themselves at the periphery of human society. In an attempt to redress the injustices of past inequities, government has passed new labour laws that require all companies and institutions employing more than a fixed number of persons to employ a certain number of physically challenged persons. Whereas it is admirable that government is taking an active stance in addressing past imbalances regarding physically challenged persons, I fear that the new laws are only a half-hearted attempt at addressing a far more fundamental problem. The problem with the new labour laws, in my opinion, is that they seek to cure a diseased tree by treating the foliage instead of looking at

the "root" of the problem. Put another way, the new labour laws seek to create a demand for physically challenged persons without considering whether there is enough supply. How many physically challenged persons are there to fill positions at the economically active level? Or are the physically challenged confined to fulfil the quotas of companies and institutions at the level of menial tasks only?

If our education system and specifically our schools are a microcosm of our broader society and a representation of a future ethos, then the question that needs to be asked is how many physically challenged young people attend so-called "normal" schools? By far the greater majority of physically challenged persons either receive no education or are sent to so-called "special" schools. This is the root cause why physically challenged persons are denied equal opportunities in the job market. It is a misconception that all or the majority of physically challenged persons require "specialist" education and need to go to "special" schools.

In my specific instance, what has differentiated me from most other physically challenged persons is that I was fortunate enough to have been given the opportunity to attend a "normal" school and to have the support of many people along the way. It has never been the case that I was more intelligent than other physically challenged persons nor that I was driven more than them. It was a case of being given an opportunity and taking it.

A "normal" school

This is not to say that it is simple or that there will not be hiccups along the way. As a six year old starting out in a small town where there were no "special" schools I was enrolled in first grade at that hideous institution called ("normal") school. The "normal" teacher taught me without complaint for a few months before she decided I needed to leave the school. I was too young to know what was going on. Moving to a bigger town offered my parents an

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opportunity to place me in a “special” school. Things went fine for three months before my parents were called in (yet again!) and asked to take me away and preferably to a “normal” school – evidently I was not special enough for the “special” school! My parents’ patience and determination were resolute and they enrolled me in yet another “normal” school. Going to a third school in less than a year was some feat and I looked forward to breaking new records. And I kid you not . . . Lo and behold that school too kicked me out! Being all of seven years by then, I realised there were problems. My parents, undaunted in their efforts enrolled me in a fourth school, yet another “normal” one. This was the turning point. The school realised that I was a “different” case requiring “differential” (note, not preferential) treatment and that, with patience, perseverance and time, I might well succeed. I have not looked back since. I was made to feel part of everything that was done, from academic classes to sports days to school outings and festivals. “Normal” high school followed and then university. Yes, there were obstacles along the way. But it did not matter how I dealt with the obstacle – be it going around it, over it, under it, through it so long as I *just did it*. And I did it because of the opportunity and support that I was given.

The support of school peers was equally valuable. It was not just that the school made me feel part of everything. It was those fellow youngsters who made me feel like an equal. It is a great testimony to the youth that they are able to adapt to “difference” if given the opportunity and yes, I was different, but differentially equal. That was what those youngsters (male and female, white and black) taught me. If given the opportunity the physically challenged can succeed as equals . . . if given the opportunity the not-so-challenged can realise this. Just as in my case. And this should not be the exception – it should be the rule.

I am fortunate in that I was given the opportunity but unfortunate in that I am an exception. The right to succeed as a physically challenged person should not be dependent on chance nor should it be an exception. The right to succeed as a physically challenged person should be

dependent on the equal treatment of all persons regardless of physical impediments. This cannot happen without a change in the mindset of society and the individual – and it all begins with you, the reader.

A physical defect does not necessarily translate into a mental defect. “Special” schools, through no fault of their own, do not equip their students to enter mainstream society as persons in the job market equal to persons attending “normal” schools. This is not to suggest that “special” schools are not a necessary and desirable element of society. My criticism is that many physically challenged persons are restricted in their potential as active contributing individuals in the job market because such persons are not afforded the same educational opportunities as “able-bodied” persons. Our schooling system needs to be revamped to cater for all young people, be they physically challenged or not. Procedures need to be in place to identify those who require attendance at “special” schools; but to simply lump together all physically challenged persons into “special” schools on the sole basis of physical defect is to ignore every physically challenged person’s need and desire to be equal, to be free, to contribute as meaningfully and equally to society as those not so challenged.

Hand-outs

Millions of rands are paid out to physically challenged persons in the form of grants. Although such grants are necessary in many instances, government and society at large need to re-think the philosophy behind, and the policy of hand-outs to physically challenged persons. These grants are necessary in many cases but if time, money and energy were spent, and there were the requisite desire to treat such persons as potential active contributing and equal citizens in the job market, then much of this grant money would be saved in the long run. This can be achieved only if “normal” schools began accepting physically challenged persons as a matter of course rather than as an exception. Physically challenged persons at our universities and colleges are, as is the case with most schools, the exception rather than part of the rule. Some say that as much as 10% of our society suffers from some disability yet

our educational and professional systems do not reflect such demographics. The bar certainly does not reflect this either.

The attitude of society towards the physically challenged is one of pessimism – that they are confined to the periphery and destined to be ignored. Should they wish to succeed in the “normal” world then they must prove themselves to society. This mindset needs to be replaced with one of optimism, of a fundamental belief that the physically challenged can contribute as meaningfully in the job market as those not so challenged – and not just to fulfil quotas in the form of menial tasks. Instead of believing that the physically challenged must prove their equality, society must alter its stance to a belief that we, challenged and not challenged, all start off as equals and we all deserve equal opportunity of education and success.

The educational and professional systems are not the only manifestations of societal prejudices and misconceptions about the physically challenged. It manifests itself in the form of intra-personal/communication skills too. Being vertically challenged has had a few peculiar consequences for my unvertically challenged brethren and sisters. For some strange reason, and especially when I, for the first time, meet these unchallenged persons in a group, their eyes tend to be too lazy to look down at me but will instead gloss over and maintain contact with other unchallenged persons. Often this glancing over of physically challenged persons in wheelchairs is sub-conscious (damn you if it’s conscious!), but never underestimate the power of eye-contact even if it means putting effort into looking down from time to time. Sub-consciously, physically challenged people want that kind of respect – is it too much to ask? Consciously, we respect those who do it. So much so that those who do maintain some eye contact, for some strange reason, increase in height in our eyes. Do not go to the other extreme and look only at us! Look at everyone to the same extent – that’s equality. The other great benefit of looking at everyone, even those sitting down, is that it exercises the eye wonderfully, giving a

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From the publishers

The Promotion of Administrative Justice Act Benchbook

By Iain Currie and Jonathan Klaaren

Siber Ink (2001)
xiii and 242 pp
Soft cover

This is a truly excellent book. Whether or not it becomes the judicial officer's guide to the implementation of the Promotion of Administrative Justice Act 3 of 2000 (the goal of its conception as a project under the auspices of Justice College), it is a splendid first (and often sufficient) port of call for the practitioner dealing with judicial review of public power in the era of the Act.

If the packaging suggests an absence of scholarly credibility to you, look again (just don't start with the "plain English" Administrator's Guide at the end). The authors, both serious scholars of constitutional and administrative law, know what they are doing, and do it well. "Accessibility," so often a euphemism for over-simplification, with its attendant dangers of serious distortion, is in this case the product of craftsmanship. The very real conceptual and jurisprudential difficulties (particularly in the relationship between the common law, the Constitution and the Act) could easily have justified evasion in the name of pragmatic methodology. This would have left the practitioner with the uneasy feeling of the science student who understands equations of motion only because they assume a world without friction. Conversely, the book could have indulged in explorative polemics and ended up sighing 'so many questions, so few answers'. This book avoids both these pitfalls very skilfully. It manages to grasp nettles whilst always setting a tendentious tone, never forgetting its project of providing meaningful guidance to those who do not have endless time for reflection at their disposal. It does this without being dogmatic, indicating where alternative roads might be taken, and why. It

cannot be criticised as simplistic by the most pedantic and ethereal scholar. Yet it gets on with its job with the minimum degree of fuss.

In a few short pages, the book offers a convincing thesis for the continued relationship between common law, Constitution and Act. If it's administrative action as defined, use the Act. If there's scope in challenging the Act, or if some other Act makes it difficult to use the Act or creates conflict, turn to the Constitution. If you are dealing with the fully private sphere, (try to) use the common law. This avoids the inevitable bypassing of the Act entailed by direct application of section 33 of the Constitution within the sphere of operation of the Act.

The book reminds one that the Act does not regulate the judicial review of public power, but regulates the judicial review only of administrative action as defined. Problems with other acts of public power? Try legitimacy (and cite *Pharmaceutical Manufacturers Association of South Africa: In re: ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC)).

The nature of the Act as a code makes for an easy structure as a commentary. Since the definition of 'administrative action' is the pivot of the application of the Act, it attracts the most urgent attention. The book deals with the definition in addressing its constituent elements, as one would have expected it to do. It leads one on a short and meaningful journey through the concepts of 'decision' (and the use and dangers of free recourse to its source, the Australian Administrative Decisions (Judicial Review) Act of 1977), of 'conduct of an administrative nature', of action taken in terms of an empowering provision, and of the German import of 'direct external legal effect'. It captures the essence (or 'core aspect') of administrative action as the implementation of legislation, while immediately pointing out that use of this core concept as a shibboleth does not always distinguish clearly between executive action and administrative action. It then opts for an overbroad definition as a starting point from which to move inwards – 'decisions of an administrative nature are decisions connected with the daily or ordinary business of government' – since 'it is more useful... to start with a

broad definition and then to narrow that definition down through the constitutional distinctions than to begin with a limited essentialist and overly formalist definition' (page 51).

In dealing with the express exclusions listed under the definition, the book provides amongst other things a very useful table of the executive powers or functions listed as excluded (pages 61 to 63). An example of elegant economy is the few pages devoted to the 'unreasonableness' ground of review (pages 169 to 173). A case for a proportionality assessment is made out almost by a mere hint (page 173), with recognition of the fact that the term is studiously avoided in the Act. The treatment of the very problematic residual review ground 'otherwise unconstitutional or unlawful action' at pages 173 to 174 is a further typical example of the sort of economy that can be achieved only with much knowledge and skill.

The book can be digested, with a bit of effort, in a day. That would be a good way to start preparation of any matter requiring full engagement with the provisions of the Act as well as undergoing a crash course on a piece of legislation very few practitioners will not need to confront one way or another.

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complete work-out for your eye muscles and giving you great eye tone. I am not sure if judicial notice can be taken of that, but I am sure an eye surgeon or optometrist can testify to that.

The purpose of this article, as mentioned at the outset, is to impart my personal experiences and opinions on being at the Bar. The challenge is not just mine – it is all of ours. Like so many things in this wonderful country of ours, we have come so far but still have far to go. But as the saying goes: every voyage began by leaving the shore. A belief that the physically challenged are equally able to succeed in the professional world is no pipe dream – it can be a successful voyage but only if we all, challenged and not challenged, *just do it!* 