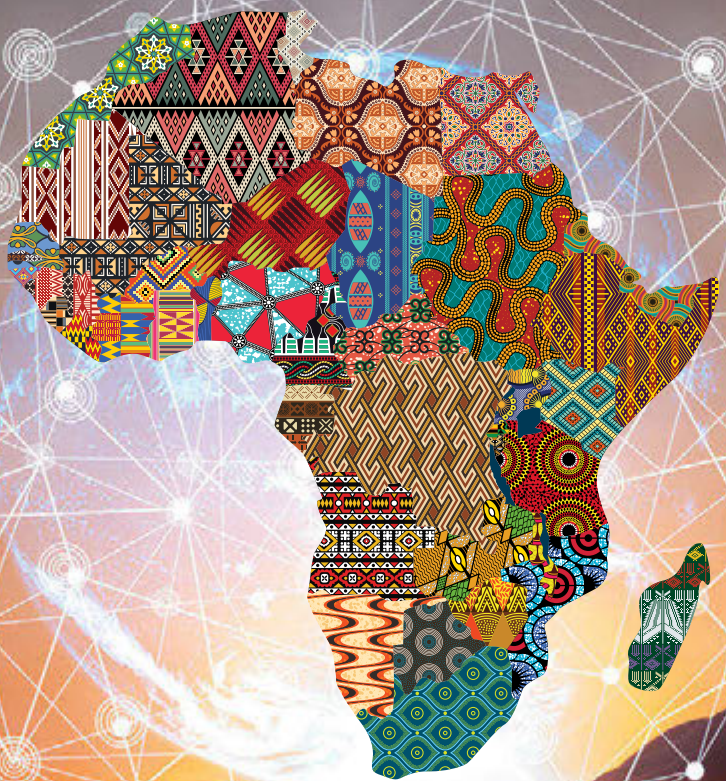
JUTA

Celebrating the ILO 100 Years on

Reflections on

LABOUR LAW

from a Southern African Perspective



EDITORS:

STEFAN VAN ECK

PAMHIDZAI BAMU

CHANDA CHUNGU

COMMISSIONING AND SERIES EDITOR:

EVANCE KALULA

CELEBRATING
the ILO 100 Years on

REFLECTIONS ON LABOUR LAW FROM A SOUTHERN AFRICAN PERSPECTIVE

CELEBRATING
the ILO 100 Years on

REFLECTIONS ON LABOUR LAW FROM A SOUTHERN AFRICAN PERSPECTIVE

Editors:
STEFAN VAN ECK
PAMHIDZAI BAMU
CHANDA CHUNGU

Commissioning and Series Editor:
EVANCE KALULA

First published 2020

First Floor, Sunclare Building, 21 Dreyer Street,
Claremont, 7708, Cape Town
www.jutalaw.co.za

ISBN (print): 978 1 48513 707 8
ISBN (webPDF): 978 1 4851 376 34

Project Manager: Valencia Wyngaard-Arenz
Editor: Leila Samodien
Proofreader: Deidre Du Preez
Indexer: Anita Kleinsmidt
Cover Design: Drag and Drop (Jacques Nel)
Typesetter: Elinye Ithuba

FOREWORD

The conference on 'Freedom of Association and Beyond: Appraising 100 years of ILO Engagement in Southern Africa' was hosted by South African and Southern African universities, with the support of the International Labour Organization Pretoria DWT for Eastern and Southern Africa and Country Office, to honour the centenary anniversary of the ILO. The conference had a distinguished audience of renowned professors, judges, lawyers and labour relations practitioners.

The International Labour Organization (ILO) was founded in 1919 as a specialised agency within the League of Nations under the Treaty of Versailles. While other agencies were dissolved together with the League of Nations after World War II, the ILO survived and became part of the United Nations (UN). One of the critical functions of the ILO is to draft conventions on labour standards with a view to ensuring peace, social justice and the elimination of unfair competition based on exploitative and inhumane conditions of labour and to oversee the development of international labour law. The ILO's decent work agenda is a universal objective that has been included in major human rights declarations as part of the UN system. It has a tripartite structure that brings together governments, employers' associations and trade unions at all levels of its decision-making process.

The ILO has in the past 100 years played a significant role in standard-setting and sustainable development on a global scale. Since its inception, the ILO has adopted some 189 conventions and made some 200 recommendations to give effect to fundamental employment rights such as the prohibition of forced labour, social security, child labour, the right to organise in a trade union, the elimination of discrimination and, most importantly, freedom of association. However, despite the positive effects that international and regional standards have had on policy developments in respect of certain countries of the Southern African region in particular, global tensions and regional labour market difficulties have in the recent past increased. There are a number of deficiencies that are not only limited to the conceptual divide between the protection of labour rights and sustainable development, but also in the content and implementation of regulations.

To supplement the standard-setting function and to address the weaknesses in implementation, the ILO supervises the member states' compliance and provides technical assistance to support implementation. While the adoption of standards is an important first step, it was clear from the very beginning for the ILO founders that without effective implementation of such standards, the objective of decent work would not be achieved. The ILO, therefore, took this as its central concern and progressively developed various supervisory bodies with the aim of jointly ensuring effective implementation of the instruments by member states.

The conference centred on freedom of association in particular, but also combined the important components of standard-setting and decent work in general. The aim of the conference was to critically investigate themes emanating from the role of the ILO in international, regional and local labour standard-setting. A key focus was on the involvement of the ILO in policy reform in Southern African countries pertaining to freedom of association, collective bargaining and the right to strike, effective labour dispute resolution, social dialogue, social security law, minimum wages, equal pay for work of equal value, and vulnerable categories of non-standard employment.

South Africa is a good example of a country that can attest to the role played by the ILO in drafting its new labour legislation during the transitional period. It should be noted that when South Africa joined the ILO in 1994, it adopted a tripartite negotiation forum similar to that of the ILO where government, business and trade unions represented in the National Economic Development and Labour Council (NEDLAC) meet and discuss employment-related matters. NEDLAC, therefore, is the vehicle through which all labour market actors meet to consult and agree on economic, labour and development issues facing the country. It is at this unique forum that employment-related matters are discussed.

The ILO has the capacity to adapt and to realign its objectives to fit the current and future change affecting employment-related issues. This capacity is demonstrated in the vision 'the human-centred approach for the future of work' contained in the ILO Centenary Declaration. In this context, standards-related activities – including supervisory functions such as monitoring compliance with international labour standards and helping member states to meet their international obligations to improve the working lives of women and men – will continue to be a relevant and useful means towards fulfilling that vision.

The ILO's Centenary Conference was an occasion for celebration and commemoration. However, it was also a unique opportunity to take stock of what the ILO has achieved, and to be forward-looking in terms of how the organisation will deliver on its mandate to promote social justice and decent work in its second century of existence.

Joni Musabayana
Director, ILO Decent Work Team for Southern and Eastern Africa

PREFACE

Professor Evance Kalula planted the seed for the holding of an International Labour Organization (ILO) Centenary Conference in Pretoria during 2019. The *raison d'être* for the event was not only to take stock of the achievements and challenges of this pillar of an institution, but also to engage as many young labour law devotees from mother Africa as possible as part of an ongoing project of growing human potential into quality scholars.

What an event it was. The landmark occasion was opened by the Minister of Employment and Labour, Honourable Thembelani Nxesi, and among the speakers were the Judge-President of the Labour and Labour Appeal Courts, Judge Basheer Waglay; the second Deputy-President of COSATU, Ms Louisa Thipe; speakers from the ILO included Mthunzi Mdwaba, Vice-Chairperson of the ILO; Corinne Vargha, Director, International Labour Standards Department at the ILO; Karen Curtis, Chief of the Freedom of Association Branch of the International Labour Organization's International Labour Standards Department; and Joni Musabayana, Director, International Labour Organization Decent Work Team for Southern and Eastern Africa and Country Office, Pretoria. Most importantly, though, the event established a platform for developing academics to speak alongside seasoned specialists in the field of labour law.

The idea has always been to write up the speakers' presentations and to publish a collection of scholarly papers that reflect on and analyse the work of the ILO. All of the contributions were double blind peer-reviewed and accepted before being included in this book.

This compilation consists of four parts. Part 1 consists of opening addresses by Corrine Vargha, Karen Curtis and Judge Waglay. Part 2 covers the topic 'freedom of association and collective labour law themes'. Part 3 traverses the burning issue of 'vulnerable workers and other individual labour law topics', and the book concludes with Part 4, which addresses 'the Fourth Industrial Revolution and its impact on the world of work'.

Stefan van Eck
Pamhidzai Bamu
Chanda Chungu

Pretoria, October 2020

TABLE OF CONTENTS

ABOUT THE CONTRIBUTORS

1. **Pamhidzai Bamu** (LLB LLM PhD) is a labour law scholar, activist and worker education specialist. She has worked extensively on precarious employment, the informal sector, domestic work and labour migration. She is the Law Programme Coordinator for Africa at Women in Informal Employment Globalising and Organising (WIEGO). She is Vice President of the African Labour Law Society.

2. **Chanda Chungu** (LLB, LLM (UCT), MSc (Oxon)) is a lecturer of labour law at the University of Zambia and legal practitioner at Mulenga Mundashi Legal Practitioners.

3. **Karen Curtis** is Chief of the Freedom of Association Branch of the International Labour Organization's International Labour Standards Department.

4. **Elmarie Fourie** is a senior lecturer in labour law at the University of Johannesburg, South Africa. She is the author and co-author of several books and academic articles.

5. **Annelie Gildenhuys** (PhD Industrial Sociology) is a CEDR-accredited commercial and labour mediator, arbitrator and executive coach (2011). She is a director of an employment-relations consulting firm with more than 30 years' experience in employee relations.

6. **Louis Koen** (LLB LLM UJ) is an LLD candidate and law mentor at the University of Johannesburg, South Africa.

7. **Charles Tshepo Malatji** (LLB and LLM in Mercantile Law, UJ) is a candidate legal practitioner in Polokwane. He also obtained a certificate in electronic engineering from the Samsung Engineering Academy in 2014.

8. **Nokuthula Celiwe Mbele** completed her LLB (2019) and LLM (2020) at the University of Johannesburg. She formed part of the research project regarding the Fourth Industrial Revolution in relation to poverty and social protection. She is a Golden Key International Honour Society member.

9. **William Manga Mokofe** (LLB (Ufh) LLM LLD (Unisa)) is a senior lecturer of law at the Pearson Institute of Higher Education, South Africa. He is an admitted advocate of the High Court of South Africa and member of the African Labour Law Society.

10. **Muhammad Moolla** (LLB) is a practising attorney at the law firm Salijee Govender Van der Merwe Attorneys and he specialises in labour law and labour litigation.

11. **Thato Mujaji** (LLB (UZ) LLM Labour Law (Stell)) is employed in the Attorney-General's Chambers of Botswana as Deputy Government Attorney – Civil Litigation Division.

12. **Joni Musabayana** is the Director, International Labour Organization Decent Work Team for Southern and Eastern Africa and Country Office, Pretoria.

13. **Swikani Ncube** (LLB, LLM, LLD) is a senior lecturer in the Faculty of Law at the University of Johannesburg. He lectures social security law to undergraduate students.

14. **Mothepa Ndumo** (BA Law, LLB, LLM, MSocSci, PGDip) is a lecturer of labour law and the law of business associations at the National University of Lesotho, Kingdom of Lesotho. She is the author and co-author of several articles, including an upcoming chapter in a Monograph on Death Benefits in SADC. She is also an industrial sociologist and board-certified executive and leadership coach, and an accredited psychometrics practitioner.

15. **Davy Ramilla** (LLB) is an LLM student in Mercantile Law at the University of Johannesburg LLB.

16. **Simphiwe Shabangu** is a law lecturer at the University of Eswatini and has taught labour law for over 15 years to undergraduate law students.

17. **Dina Maria Smit** is an associate professor of law, specialising in labour law at the University of the Free State. She is the author and co-author of several academic articles in the field of labour law. She is co-author of the book *Vulnerable Employees*. She has presented at several national and international conferences in the field of labour law.

18. **Marika Smuts** (B.Com (Law) LLB LLM) is an associate at Exigent Group Limited, a global legal services provider. She is the co-author of several articles on the topic of workplace stress and is pursuing her interest in commercial, contract and labour law.

19. **Mlungisi Ernest Tenza** (LLB, LLM, LLD (Unisa)) is a senior lecturer at the University of KwaZulu-Natal. He teaches labour law to undergraduate and postgraduate students. He has published several journal articles in the area of labour law.

20. **George van der Merwe** (BLC, LLB, LLM, Cert Advanced Med-Arb and Pension Law) is a practicing attorney with more than 30 years' experience. He practices in the CCMA and the Labour and High Courts and has acted as a judge in the Labour Court.

21. **Stefan van Eck** (BLC, LLB, LLD) is a professor of labour law at the University of Pretoria, South Africa. He is the author and co-author of several books and academic articles on individual as well as collective labour law. Stefan is the Vice President, African Region of the International Society of Labour and Social Security Law, and the President of the African Labour Law Society.

22. **Marthinus van Staden** (LLB, LLM (UJ) LLD (UP)) is senior lecturer at the Faculty of Law, University of Johannesburg.

23. **Corrine Vargha** is the Director, International Labour Standards Department at the International Labour Organization.

24. **Basheer Waglay** is the Judge President of the Labour Court and Labour Appeal Court, South Africa.

ABBREVIATIONS

4th IR	Fourth Industrial Revolution
ABET	Adult Basic Education and Training
ACTRAV	Bureau for Workers' Activities
AGOA	African Growth and Opportunity Act
AMCU	Association of Mineworkers and Construction Union
APA	American Psychological Organisation
AU	African Union
AWB	Australian Workplace Barometer
BCEA	Basic Conditions of Employment Act (South Africa)
BPA	Beijing Platform for Action
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDR	Centre for Effective Dispute Resolution
CEE	Commission for Employment Equity
CEO	Chief Executive Officer
CFA	Committee of Freedom of Association
CCMA	Commission for Conciliation, Mediation and Arbitration (South Africa)
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CEPEJ	European Commission for the Efficiency of Justice
CGE	Commission for Gender Equality
CJEU	Court of Justice of the European Union
CMAC	Conciliation, Mediation and Arbitration Commission (Swaziland)
COIDA	Compensation for Occupational Injuries and Diseases Act (South Africa)
COLETU	Congress of Lesotho Trade Unions
COMESA	Common Market of East and Southern Africa
COSATU	Congress of South African Trade Unions
COVID-19	Coronavirus Disease 2019

DDPR	Directorate for Dispute Prevention and Resolution (Lesotho)
DWCP	Decent Work Country Programme
DWT	Decent Work Technical Support Team
EAP	Employee Assistance Programmes
EEA	Employment Equity Act (South Africa)
EPA	Economic Partnership Agreement
ESC	Essential Services Committee
EU	European Union
EWP	Employee Wellness Programmes
FDI	Foreign Direct Investment
FET	Further Education and Training
FW Act	Fair Work Act (Australia)
FWC	Fair Works Commission (Australia)
HIV/AIDS	Human Immunodeficiency Virus / Acquired Immunodeficiency Syndrome
IC	Industrial Court
ICAA	Industrial Court Amendment Act (South Africa)
ICBT	Informal Cross-Border Trader
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IFC	International Finance Corporation
ILO	International Labour Organization
ILS	International Labour Standards
ILRA	Industrial and Labour Relations Act (Zambia)
ILSSA	Improving Labour Administration Systems in Southern Africa
INM	Imbokodvo National Movement (Swaziland)
ITUC	International Trade Union Confederation
JSC	Judicial Services Commission

LAB	Labour Advisory Board (Swaziland)
LGBTQIA+	Lesbian, Gay, Bisexual, Transgender, Queer or Questioning, Intersex, Asexual or Allied
LNDC	Lesotho National Development Corporation
LRA	Labour Relations Act (South Africa)
LRAA	Labour Relations Amendment Act (South Africa)
LSAC	Labour and Social Affairs Committee
LUTARU	Lesotho University Teachers and Researchers Union
MHSA	Mine Health and Safety Act
MLC 2006	Maritime Labour Convention 2006
MMS	Multimedia Messaging Service
MPRDA	Mineral and Petroleum Resources Development Act (South Africa)
MQA	Mining Qualifications Authority
NAWJ	National Association of Women Judges (United States)
NAWU	Non- Academic Workers Union (Lesotho)
NDP	National Development Plan
NEDLAC	National Economic Development and Labour Council
NNLC	Ngwane National Liberation Congress (Swaziland)
NSA	National Skills Authority
NSF	National Skills Fund
OECD	Organisation for Economic Cooperation and Development
OHSA	Occupational Health and Safety Act (South Africa)
PABASA	Pan-African Bar Association of South Africa
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act (South Africa)
PDA	Protected Disclosures Act
PFHA	Protection from Harassment Act (South Africa)
PSA	Public Service Act (Botswana)
PSESA	Public Service Essential Services Act (Canada)
PTSD	Post-Traumatic Stress Disorder

RGA	Regulation of Gatherings Act (South Africa)
SADC	Southern African Development Community
SADTU	South African Democratic Teachers' Union
SAMWU	South African Municipal Workers' Union
SATAWU	South African Transport and Workers Union
SDA	Skills Development Act (South Africa)
SDG	Sustainable Development Goal
SETA	Sector Education and Training Authority
SFTU	Swaziland Federation of Trade Unions
SLASA	Strengthening Labour Administration in Southern Africa
SMS	Short Messaging Service
Stats SA	Statistics South Africa
STR	Simplified Trade Regime
SRM	Standards Review Mechanism
TDA	Trade Disputes Act (Botswana)
TUCOSWA	Trade Union Congress of Swaziland
TUEOA	Trade Unions and Employers Organisations Act (Botswana)
TWG	Tripartite Working Group
UDHR	Universal Declaration of Human Rights
UN	United Nations
UK	United Kingdom
UK HSE	United Kingdom Health and Safety Executive
USA	United States of America
USDOL	United States Department of Labour
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WIEGO	Women in Informal Employment Globalising and Organising
WTO	World Trade Organisation

Part 1:

OPENING ADDRESSES

CHAPTER 1

The International Labour Organization and its standards-related activities: A century of achievements and challenges

CORINNE VARGHA*

In order to achieve social justice in a global landscape, rules for ensuring economic progress, prosperity and peace for all are necessary. This contribution explores the achievements and challenges of the International Labour Organization (ILO), its standards-related activities and their position in the future. Qualitative methods are used to investigate various challenges and achievements of the ILO. There is evidence of various achievements. However, it also confirms that there is an on-going need for engagements in this regard. The contribution asserts that, in a changing world of work, labour standards must cater for such transformation. It becomes evident that in over a century since the ILO was founded, labour standards have played an important role by ensuring global economic growth for the benefit of all. Moreover, the role is extended to the attainment of social cohesion and economic stability in the world. Therefore, the ILO's supervisory bodies must be vigilant to the challenges tied to effective supervision and implementation of the labour standards in the future. It is also evident that outdated instruments that do not conform to the need and priorities in the current world require revision, not to inevitably adopt new instruments, but to create labour standards that respond to the challenges faced in the world of work, while ensuring their continued relevance.

I INTRODUCTION

Distinguished guests,[1] let me start by expressing my heartfelt thanks to the University of Pretoria for organising this International Labour Organization (ILO) Centenary Conference[2] and for focusing its discussions on the core normative mandate of the ILO. It is an honour for me to address such a distinguished audience of renowned professors, judges, lawyers and labour relations practitioners and it is a delight to be back in South Africa on this occasion. For any institution, to

* Director, International Labour Standards Department at the International Labour Organization.

[1] Professor Stefan van Eck; Judge Basheer Waglay, President of the Labour and Labour Appeal Court; Director of the ILO Office in Pretoria, Mr Joni Musabayana; participants and ILO friends.

[2] The conference was held at the University of Pretoria, Future Africa Campus, in October 2019, under the theme 'Freedom of Association and Beyond: Appraising 100 years of ILO Engagement in Southern Africa'.

be able to commemorate 100 years of existence must be considered an important milestone. This is probably even more the case for an international organisation such as the ILO which was established in a very particular context, on the ashes of World War I, and therefore in a world in which certain realities or conditions no longer exist or differ profoundly from the ones we are facing today.

The ILO's centenary has been the occasion for celebration and commemoration but, more importantly, it has provided our organisation with a unique opportunity to take stock of what it has achieved, including what more should be done, and to be forward-looking in terms of how the organisation will deliver on its mandate to promote social justice and decent work in its second century of existence. My intervention this morning will introduce our discussion on international labour standards around these two questions: what was achieved in the course of the ILO's first centenary and what more should be done? What is our vision for the future?

II ILO ACHIEVEMENTS AND NEXT STEPS WITH RESPECT TO INTERNATIONAL LABOUR STANDARDS

The first achievement of the ILO since 1919 has been the establishment and development of a body of international labour standards aimed at promoting opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and dignity. It is worth reminding ourselves that what is now taken as a given – the development of a set of 'common rules of the game' in the field of labour – was not that long ago seen as a 'wild dream'. Addressing the ILO in November 1941, President F Roosevelt said this in very clear terms:

> I well remember that in those days the ILO was still a dream. To many it was still a wild dream. Who had ever heard of Governments getting together to raise the standards of labour on an international plane? Wilder still was the idea that the people themselves who were directly affected – the workers and the employers of the various countries – should have a hand with Governments in determining standards.

What the ILO's founders recognised in 1919 was that the pursuit of universal social justice needed clear rules in order to ensure that economic progress would go hand-in-hand with human dignity, prosperity and peace for all. This 'wild dream' stood the test of time and despite major global, regional and national transformation in the world of work, international labour standards are still recognised 100 years later as an essential component of the international framework for ensuring that the growth of the global economy provides benefits for all.[3] Labour standards remain a source – sometimes an imperfect or an

[3] FD Roosevelt *Address to the International Labour Organization*. The American Presidency Project, 6 November 1941, accessible at https://www.presidency.ucsb.edu/node/210233 (accessed on 30 Sep-

incomplete one, but a much-needed source – of rules creating a level playing field for the attainment of social cohesion and economic stability at global, regional and national levels, in particular in an era of rapid transformation and changes affecting work.

The history of the ILO provides ample evidence that international labour standards have been and remain an influential means of action of the organisation. This standard-setting function of the organisation has inevitably evolved over time but it remains an active one as illustrated by the steady adoption of instruments, and most recently Convention No 190 on violence and harassment in June 2019.[4] One important evolution that was highlighted by the process leading to the adoption of Convention No 190 is the increasing engagement of this sub-region in the development of international labour standards, under the leadership of South Africa. I want to seize this opportunity to applaud South Africa's contribution to the discussion and the framing of this important convention. I am pleased to see that one workshop of this conference will be devoted to discussing this important subject. I am equally pleased to inform you that one country – Uruguay – has just tabled a Bill for the ratification of Convention No 190. I hope that your country and others in the sub-region will also consider ratifying this convention soon.

So much for standard-setting – the first stage in the story of the ILO's standards. Let me now turn to the other aspects of the normative function of the ILO: the supervision of member states' compliance and office technical assistance to support implementation. While the adoption of standards is an important first step, it was clear from the very beginning for the ILO founders that without effective implementation of such standards, the objective of decent work would not be achieved. As you all well know, the organisation therefore took this as its central concern and progressively developed various supervisory bodies with the aim of jointly ensuring effective implementation of the instruments by member states.

While various monitoring mechanisms exist in the context of international and regional organisations, the ILO's integrated system of promoting compliance with labour standards is regarded as unique and particularly comprehensive at the international level.[5] This system – comprising of regular supervision and complaint-based procedures – has over the years recorded some significant achievements, to which we refer as 'cases of progress', several with regard to the

tember 2019).

[4] Violence and Harassment Convention, 2019 (No 190).

[5] For more information, see https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm (accessed on 30 September 2019).

African continent, including for your own country and this sub-region.[6] Director Musabayana will further develop this aspect in his intervention later today.

We should take stock and reflect on these tangible and measurable achievements. The extent to which people, workers and employers alike, have benefited, often in a lasting manner, from the legal and social changes occurring when the national legislation and/or practices are brought into conformity with international labour standards has been an important contribution to ILO normative action and should be acknowledged and appreciated. It is remarkable also the extent to which communities have benefited from those legal and social changes: expectations of equality, social cohesion and the management of conflict in the workplace have become commonplace. Their regulation operates to build communities. However, this apparent reassurance of the contemporary relevance of international labour law and of its supervision does not warrant complacency. There is unfinished business before us and there will always be.

By their very nature, the ILO's labour standards and supervisory mechanisms cannot be static in their conception nor in their functioning. The effectiveness of ILO normative policy is drawn from the capacity of the organisation to confront the difficulties that arise, adapt and develop new approaches, and draw the greatest advantage from its tripartite nature that is universal in its vocation. So, let me now address some of the current challenges. In proposing to the International Labour Conference in 2013 a package of seven initiatives aimed at preparing the ILO for its second century, the ILO Director-General acknowledged the importance for the organisation to address the criticisms that it is ill-adapted to the rapidly evolving realities.[7] Given that these criticisms extended to fundamental aspects of the ILO, such as its body of international labour standards and the system for their supervision, one of the seven centenary initiatives was designed to address these.

Despite my optimism about the international labour standards and the system that supervises their implementation, the supervisory system was hard hit by a 'crisis' in 2012 generated by a lack of trust in the system as it currently operates.[8]

[6] To date, over 3 000 cases of progress (cases in which the Committee has expressed 'satisfaction') have been noted: https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/the-impact-of-the-regular-supervisory-system/lang--en/index.htm (accessed on 30 September 2019).

[7] The seven centenary initiatives were the future of work initiative, the end to poverty initiative, the women at work initiative, the green initiative, the enterprises initiative, the governance initiative, and the standards initiative.

[8] Outside the ILO, this attracted the attention of academics and other commentators, for example, J Bellace *The ILO and the Right to Strike* (2014); KD Ewing 'Myth and reality of the right to strike as a "fundamental labour right"' in KD Ewing *The Right to Strike* (2013); C La Hovary 'Showdown at the ILO? A historical perspective on the employers group's 2012 challenge to the right to strike' (2013) 42 *Industrial Law Journal* 338; F Maupain 'The ILO regular supervisory system: A model in crisis?' (2013) 10 *International Organisations Law Review* 117; L Swepston 'Crisis in the ILO supervisory system:

Most visibly, no individual cases of violations of standards were examined by the Conference Committee on the Application of Standards in 2012, and important core work was disrupted for the following couple of years. While, as a tripartite organisation, the ILO has a long and inevitable history of frank discussions and strong challenges, this crisis was unprecedented, and the organisation responded with an initiative known as the Standards Initiative. Launched in 2015, the Standards Initiative pursues a twofold objective. First, it aims at consolidating tripartite consensus on an authoritative ILO supervisory system and, second, at enhancing the relevance of international labour standards through a standards review mechanism.[9]

(1) *Component 1: Consolidating tripartite consensus on an authoritative ILO supervisory system*

In international law circles, the ILO monitoring system tends to be praised for having proven to be efficient and influential. However, ILO constituents have expressed much more diverse views on the functioning of the ILO supervisory system and its specific procedures, notably with respect to: the overlap of procedures; the lack of clarity of mandates or of the rules of proceedings; the limited reach of supervisory bodies' recommendations; the increasing reporting burden on government; the absence of systematic follow-up of recommendations at national level; and the absence of legal certainty.[10] To address these issues a work plan on the strengthening of the supervisory system comprised of ten areas of work has been implemented since November 2015.[11]

None of these discussions is an easy one but they are all essential to maintain a credible supervision of how ILO member states comply with their international obligations. At the same time, governments, employers and workers have a shared view on the expected outcome of this component of the Standards Initiative.[12] First, effectiveness and efficiency: an organised and coherent system

Dispute over the right to strike' (2013) 29 *International Journal of Comparative Labour Law and Industrial Relations* 199.

[9] See the standards initiative, accessible at https://www.ilo.org/global/about-the-ilo/history/centenary/WCMS_472742/lang--en/index.htm (accessed on 30 September 2019).

[10] Joint report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association, GB.326/LILS/3/1, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_456451.pdf (accessed on 30 September 2019).

[11] Follow-up to the joint report of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association, GB.329/INS/5(Add)(Rev) Appendix 1: Revised work plan and timetable for Governing Body discussions, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_548153.pdf (accessed on 30 September 2019).

[12] A set of common principles guiding the strengthening of the supervisory system was set out in GB.329/INS/5(Add)(Rev) paras 6–11, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_

of international supervision inspires confidence, while enabling the ILO and its members to be resilient to change. Second, transparency and integrity in the system: due process and procedural fairness should be guaranteed, including through necessary procedural safeguards and the supervisory system must operate based on consistent and impartial practices. Comments, decisions and recommendations that are understood to be the outcome of a balanced, objective and rigorous process are essential to the credibility and authority of the system. Progress in implementing the Standards Initiative is being assessed against these guiding principles.

We have made great progress in introducing new measures to strengthen the ILO supervisory system but some difficult discussions are still ahead of us, among which is the final determination of questions related to interpretation of international labour standards.[13] You have in this room some key South African actors in this important institutional endeavour, and I want to recognise Prof Mthunzi Mdwaba, Employers Vice-Chairperson of the ILO Governing Body; Prof Halton Cheadle, member for 15 years of the Committee of Experts on the Application of Conventions and Recommendations (CEACR); and Prof Evance Kalula, Chairperson of the Committee of Freedom of Association (CFA). I am not going to introduce in any further detail the ten proposals implemented but would certainly be happy to entertain questions. What I wish to convey to you, however, is that the ILO supervisory bodies need to remain vigilant to the challenges to the effective supervision and implementation of international labour standards ahead. Some of these relate to the rapid transformations in the world of work itself and the commensurate attention international supervision will have to pay to the timely valuation of new and complex problems. This brings me to the second component of the Standards Initiative aimed at ensuring that international labour standards remain fit for purpose.

(2) *Component 2: Ensuring a clear, robust and up-to-date body of international labour standards through a Standards Review Mechanism*

So, I will now turn to the large body of ILO instruments and the challenge this represents. Many of the approximately 400 international labour standards – conventions, recommendations and protocols – date back several years. In fact, five of the six conventions adopted at the first conference in 1919 remain in force and, to varying degrees, their implementation in member states is still supervised by the supervisory mechanisms. One of these first conventions – the

norm/---relconf/documents/meetingdocument/wcms_548153.pdf (accessed on 30 September 2019).

[13] Proposals on further steps to ensure legal certainty and information on other action points in the work plan on the strengthening of the supervisory system, GB.338/INS/5, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_737542.pdf (accessed on 30 September 2019).

Unemployment Convention, 1919 (No 2) – is still in force in South Africa and was last the subject of a direct request from the Committee of Experts in 2015. As may be expected, some of these instruments no longer reflect today's needs or priorities. You might know that a Standards Review Mechanism (SRM) is now addressing this issue. It is the fifth such review undertaken by the organisation in its 100 years of existence. This Standards Review Mechanism is integral to the ILO's standards policy and its work is starting to impact on member states in all regions.

The SRM was set up by the Governing Body in November 2011. It became operational later, in 2015, with the establishment of a Tripartite Working Group (SRM TWG) with the objective of ensuring that 'the ILO has a clear, robust and up-to-date body of standards that respond to the changing patterns of the world of work, for the purpose of the protection of workers and taking into account the needs of sustainable enterprises'.[14] The SRM TWG is mandated to review 235 international labour standards[15] with a view to making recommendations to the Governing Body on:[16]

1. the status of the standards examined;
2. the identification of gaps in coverage, including those requiring new standards; and
3. practical and time-bound follow-up action, as appropriate.

You will not be surprised to hear that there are considerable challenges in this task. It is a complex task to assess whether standards are up to date, to identify whether there are gaps, and to creatively determine the follow-up that would ensure impact and sustainability.

However, I am pleased to inform you that the work of the Tripartite Working Group of the SRM is progressing – and progressing constructively. At its fourth session in September 2018, the Working Group completed its in-depth examination of the instruments on occupational safety and health, labour statistics and labour

[14] Terms of reference for the Standards Review Mechanism Tripartite Working Group. Approved by the Governing Body in November 2015 (GB.325/LILS/3), para 8, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_450466.pdf (accessed on 30 September 2019). Further information about the SRM TWG and its successive meetings is available at https://www.ilo.org/global/standards/WCMS_449687/lang--en/index.htm (accessed on 30 September 2019).

[15] ILO Governing Body, 328th session Geneva, 31 October–10 November 2016 EU Statement – LILS/2/1: Report of the second meeting of the Standards Review Mechanism Tripartite Working Group, accessible at https://eeas.europa.eu/delegations/peru/14338/gb328---eu-statement---lils21-report-of-the-second-meeting-of-the-standards-review-mechanism-tripartite-working-group_en (accessed on 30 September 2019).

[16] Terms of reference of the Standards Review Mechanism Tripartite Working Group, GB.325/LILS/3 Appendix, para 9, Governing Body 325th Session, Geneva, 29 October–12 November 2015, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_420260.pdf (accessed on 30 September 2019).

inspection.[17] At its fifth session, in September 2019, the Tripartite Working Group continued its in-depth examination of instruments, this time looking at the instruments concerning employment policy and employment promotion.[18]

In fact, Convention No 2 – as I mentioned earlier, the second instrument ever adopted and still in force in South Africa – was one of the instruments that was reviewed. The Governing Body approved the SRM TWG's recommendations that the instrument was outdated as its content has since been addressed in later, more modern instruments. As the SRM TWG was very clear that the subject matter of unemployment was as relevant now as it was in 1919, it has recommended that countries such as South Africa, which have ratified Convention No 2, should be encouraged to ratify the more up-to-date conventions. We will be in touch with the government and social partners about this in the next months. I should also acknowledge that South Africa was selected by the government group as one of eight advisors at the fifth meeting of the SRM TWG.

The region was further represented by government representatives from Cameroon, Kenya, Namibia and Mali; one of the employers' group representatives was from Lesotho; and the Workers' group included a Ghanaian and a Zimbabwean. The Africa region is contributing to the organisation's efforts to maintain the ILO standards as fit for purpose for the next century across all regions.[19] I started out by stating that the SRM TWG's work was progressing constructively. In practical terms, that means that 'only' 68 of the 235 international labour standards covered by the initial programme of work of the SRM Tripartite Working Group remain to be examined.[20] Of course, as I intimated earlier, the recommendations of the SRM TWG are irrelevant unless they are fully implemented. This has been uppermost in the minds of the SRM TWG members, and the Government Body has requested the organisation – including other ILO bodies, the member states and the Office – to implement the SRM TWG's recommendations as an institutional priority.[21]

[17] Report of the fourth meeting of the Standards Review Mechanism Tripartite Working Group (Geneva, 17–21 September 2018) GB.334/LILS/3, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_648422.pdf (accessed on 30 September 2019).

[18] Report of the fifth meeting of the Standards Review Mechanism Tripartite Working Group (Geneva, 23–27 September 2019) GB.337/LILS/1, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_725135.pdf (accessed on 30 September 2019).

[19] The list of participants is accessible at the webpage of the meeting, https://www.ilo.org/global/standards/international-labour-standards-policy/WCMS_715362/lang--en/index.htm (accessed on 30 September 2019).

[20] ILO Second evaluation of the functioning of the Standards Review Mechanism Tripartite Working Group (GB. GB.338/LILS/3) para 10. Of these 68 instruments, five instruments will be the subject of the SRM TWG's sixth meeting in 2020.

[21] Report of the third meeting of the Standards Review Mechanism Tripartite Working Group, GB.331/LILS/2, para 5(a), accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/-

This is how important the standards are to the ILO. The Office will continue to take measures to support tripartite national plans of action on international labour standards. These aim to ensure that each member state has an up-to-date ratification record, tailored to its national circumstances. Beyond national ratification records, the SRM TWG's recommendations have included proposals for future standard-setting, the abrogation and withdrawal of instruments that are obsolete, and the development of non-normative initiatives to support the tripartite constituents in implementing the ILS on the ground.[22]

III FUTURE STANDARD-SETTING

I turn now to the all-important topic of standard-setting: the creation of new standards to respond to challenges in this always-changing world in which we live. Next to be addressed by the international labour conference is the subject of apprenticeships.[23] The decision to have a standard-setting on apprenticeship stems from the work of the SRM TWG, which identified a gap in protection in this area in 2016.[24] Four other standard-setting proposals derive out of the work of the SRM TWG and concern the topics of biological hazards, ergonomics and manual handling, chemical hazards and guarding of machinery.[25] This will aim at revising existing standards to ensure their continued relevance. A decision has yet to be taken as to when and how these items will be placed on the agenda of future ILO international labour conferences.

--relconf/documents/meetingdocument/wcms_587514.pdf (accessed on 30 September 2019); ILO Report of the fifth meeting of the Standards Review Mechanism Tripartite Working Group (GB.337/LILS/1/) para 5(g).

[22] Second evaluation of the functioning of the Standards Review Mechanism Tripartite Working Group, GB.338/LILS/3, para 16, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_737028.pdf (accessed on 30 September 2019).

[23] A standard-setting item on apprenticeship was placed on the agenda of the International Labour Conference in 2021 and, in the context of the Covid-19 pandemic, subsequently postponed until 2022.

[24] Report of the second meeting of the Standards Review Mechanism Tripartite Working Group, GB.328/LILS/2/1(Rev.) para 5(h), accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_534130.pdf (accessed on 30 September 2019). See further Agenda of the International Labour Conference, Appendix I, Section B, paras 9–31, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_544742.pdf) (accessed on 30 September 2019) and Minutes of the 329th Session of the Governing Body of the International Labour Office, paras 4–15, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_557187.pdf#page=14 (accessed on 30 September 2019).

[25] Report of the third meeting of the Standards Review Mechanism Tripartite Working Group, GB.331/LILS/2, para 5(f)–(g). Governing Body 331st Session, Geneva, 26 October–9 November 2017, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_587514.pdf (accessed on 30 September 2019).

As this conference will also discuss the report of the Global Commission on the Future of Work,[26] I will be interested to hear the participants' views on one of its recommendations in relation to the digitalisation and automation affecting the world of work. The report notes that digital labour platforms provide new sources of income to many workers in different parts of the world, yet the dispersed nature of the work across international jurisdictions makes it difficult to monitor compliance with applicable labour laws. The work is sometimes poorly paid, often below prevailing minimum wages, and no official mechanisms are in place to address unfair treatment. As this form of work is expected to expand in the future, the Global Commission recommended the development of an international governance system for digital labour platforms which sets and requires platforms (and their clients) to respect certain minimum rights and protections.[27] They considered the Maritime Labour Convention 2006, as amended (MLC 2006), which in effect is a global labour code for seafarers, to be a source of inspiration in addressing the challenges of workers, employers, platforms and clients operating in different jurisdictions.[28]

So far, I have talked of innovations in relation to the subject matters of new standards: violence and harassment, apprenticeship and ergonomics. Innovation is also necessary in relation to the design and form of international labour standards. Such innovations aim to make new standards more 'ratifiable', for example, by allowing for flexibility to adapt to national circumstances, allowing for optional acceptance of parts, or being inspired by the MLC 2006, which uniquely includes both binding and non-binding provisions in the same instrument. Other innovations have centred on ensuring that instruments can be kept up to date to adapt to a rapidly changing world of work. Some instruments, for example, allow for the introduction of a simplified amendment process for certain annexes. The MLC 2006 makes use of a 'tacit acceptance' clause that allows future amendments to be assumed to be accepted by ratifying states.

The last tripartite ILO discussions on the design and form of new standards took place in the SRM TWG's fifth meeting in September 2019.[29] These

[26] Global Commission on the Future of Work: Work for a Brighter Future, 22 January 2019, accessible at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_662410.pdf and https://www.ilo.org/global/topics/future-of-work/publications/WCMS_662410/lang--en/index.htm (accessed on 30 September 2019).

[27] Global Commission (n 26) 13 and 44.

[28] Further information about the MLC, 2006 is available at https://www.ilo.org/global/standards/maritime-labour-convention/lang--en/index.htm (accessed on 30 September 2019).

[29] Report of the fifth meeting of the Standards Review Mechanism Tripartite Working Group (Geneva, 23–27 September 2019) GB.337/LILS/1 paras 34–42 and Annex 1, para 9, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_725135.pdf (accessed on 30 September 2019). See further Fifth Meeting of the SRM Tripartite Working Group (23–27 September 2019) Working paper 1: Ensuring coherence and consistency in the standard-setting follow-up to SRM TWG recommendations on OSH, accessible at https://www.

difficult, but important, discussions provide guidance in relation to up-coming standard-setting proposals on the four Occupational Safety and Health (OSH) topics that I mentioned earlier. There was clear guidance on the need for new standards to be designed: to be more appealing to member states considering ratification, they should be easily amended, and revision should not inevitably involve the adoption of a new instrument. In the face of such pivotal questions of standards policy development, the large number of international labour standards remaining to be reviewed by the SRM TWG, and the profound responsibility of the organisation to ensure the strength of its body of standards, it is clear that its review of the standards will continue for the next years.

At each of the annual meetings, the SRM TWG decides the subject matter and date of the following meeting. At this point we can say that the sixth meeting of the SRM TWG, scheduled to take place in September 2020, will review standards on unemployment benefit, comprehensive standards, and sickness and medical care.[30] Watch this space! I will now conclude with a few words about *our vision for the future*. The ILO Centenary Declaration for the Future of Work is the compass for the future of the ILO, and it does recognise the central normative function of the ILO.[31] It states in its Part IV:

> A. The setting, promotion, ratification and supervision of international labour standards is of fundamental importance to the ILO. This requires the Organisation to have and promote a clear, robust, up-to-date body of international labour standards and to further enhance transparency. International labour standards also need to respond to the changing patterns of the world of work, protect workers and take into account the needs of sustainable enterprises, and be subject to authoritative and effective supervision. The ILO will assist its Members in the ratification and effective application of standards.
>
> B. All Members should work towards the ratification and implementation of the ILO fundamental Conventions and periodically consider, in consultation with employers' and workers' organisations, the ratification of other ILO standards.

ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_715395.pdf) (accessed on 30 September 2019) and Fifth Meeting of the SRM Tripartite Working Group (23–27 September 2019) Working paper 2: Addressing the impact of SRM TWG recommendations on the Conference agenda and the Office, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/genericdocument/wcms_715396.pdf) (accessed on 30 September 2019).

[30] The impact of the Covid-19 pandemic on this meeting is yet to be determined. Information on the sixth meeting of the SRM TWG is accessible at https://www.ilo.org/global/standards/WCMS_449687/lang--en/index.htm (accessed on 30 September 2019).

[31] International Labour Conference ILO Centenary Declaration for the Future of Work Adopted by the Conference at its One Hundred And Eighth Session, Geneva, 21 June 2019, accessible at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf (accessed on 30 September 2019).

In concrete terms, what does this mean? It means that the ILO is called to maintain a forward-looking international labour standards policy and to innovate to:

1. continuously develop new standards to be responsive to constant changes in the world of work;
2. ensure the continued relevance of existing ILO standards;
3. actively promote ratification with evidence-based practical policy advice on what actually produces results – since the Centenary Ratification Campaign 'One for All' was launched in January 2019, 78 new ratifications have been registered, 32 of them from the African continent;
4. streamline the reporting obligations of governments;
5. prioritise ILO technical assistance to member states, reaching out to judiciary and academia, to further stimulate a virtuous cycle of continued progress and to increase the impact on the lives of working people around the globe; and
6. take advantage of the 2030 sustainable development agenda, and in particular of those goals linked to specific international labour standards and their review by the supervisory system of how member states comply with those standards.

IV CONCLUDING REMARKS

In conclusion, let me recall that the ILO for a long time was the only international organisation to maintain that the concept of economic development necessarily had to include a social dimension. The first Director-General of the ILO, Albert Thomas, wanted social concerns to prevail over economic interests. The current Director-General, Guy Ryder, has given new impetus to this debate by affirming with force that in today's world, in view of the economic, social, technological and environmental transformations caused by all aspects of globalisation, the ILO's mandate to strive for a better future for all in the world of work requires it to continue to reach out to all, but in particular to the most vulnerable.

This vision has been reflected in 'the human-centred approach for the future of work' contained in the ILO Centenary Declaration. In this context, standards-related activities, including supervisory functions such as monitoring compliance with international labour standards and helping member states meet their international obligations to improve the working lives of women and men, will continue to be a relevant and useful means towards fulfilling that vision. It seems inconceivable that the ILO's quest for social justice could be carried out satisfactorily if the organisation did not continue to reach out to the most vulnerable. It is impossible that this could succeed without the benefit of the rules of the game: the international labour standards. The ILO will rightly be judged by what it does for the weakest and most disadvantaged; for those in poverty; for

those without work, without opportunity, prospects or hope; for those suffering the denial of fundamental rights and freedoms.

Has this remained a 'wild dream'? A quarter of a century ago Nelson Mandela responded to that question when he said:

> We cannot develop at the expense of social justice.
>
> We cannot compete without a floor of basic human standards.
>
> If it is true inside our own society, it is true for the world as a whole.

Thank you for your attention.

CHAPTER 2

Challenges to freedom of association: A global view celebrating the organisation's 100th anniversary

KAREN CURTIS*

In this speech to mark one of many events celebrating the centenary of the ILO, the Chief of the Freedom of Association Branch reflects upon the challenges to the fundamental right of freedom of association, which is so critical to the maintenance of our democracies. Highlighting that the growing tenuousness of the employment relationship has compounded the impact on freedom of association and collective bargaining that other traditionally vulnerable groups of workers have faced, she draws inspiration from the guidance provided by the ILO Constitution and its Centenary Declaration for the Future of Work.

I INTRODUCTION

I have been asked to address the challenges to freedom of association from a global perspective in this twenty-first century.

In the brief time available to me I will highlight areas – some age-old and others new and emerging – which fundamentally challenge the free exercise of trade union rights, a meaningful balancing of power and the development of harmonious labour relations.

II PRECONDITIONS FOR MEANINGFUL FREEDOM OF ASSOCIATION

In thinking about the challenges, one needs to recall those essential prerequisites to freedom of association, which have been so eloquently highlighted over the last day and a half.

* Karen Curtis is Chief of the Freedom of Association Branch in the International Labour Standards Department of the ILO.

> Freedom of association and democracy share the same roots: liberty, independence, pluralism, and a voice in decision-making. These fundamental freedoms cannot be suppressed in one sphere and flourish in another. If there is no democracy at the political level, there will be no right for workers and employers to join freely the organisation of their own choosing and exercise their legitimate activities. If freedom of association is not recognised as a human right, the very foundations of a democratic political system will necessarily be shaken.[1]

The International Labour Organization (ILO) has borne witness to remarkable developments where freely chosen, independent workers' organisations – often representing the only channel for free expression – have become dynamic agents for change in the political, social and economic life of the country. The battles of the Congress of South African Trade Unions (COSATU) and its wise use of the ILO's unique investigative machinery on freedom of association clearly are a case in point.

A global democratic governance structure is thus the first *sine qua non* for building the institutions and beliefs to support freedom of association. It is the enabler to representative legislative action for an industrial relations framework true to the heritage and traditions of the country with effective measures of protection. However, as has also been heard at this conference, it is not only laws that make the difference, and their implementation through sanctions and measures of redress, but also a climate and mindset that cherishes the values underpinning freedom of association. With these several columns of support we can assure inclusive participation that can answer the questions that go beyond the law into the very foundations of the just societies we aim to build. As the nature of work rapidly evolves, we need to reflect upon the innovative tools that can reach beyond traditional models and ensure that the voices of the unorganised are heard.

So with that background, I wish to focus just a moment on a few telling statistics that may help us to grasp the state of urgency relating to freedom of association in the world today and then touch upon the numerous challenges that judges, legislators, policy-makers, the ILO, its tripartite constituents and the working class face today.

Over half of the world population does not enjoy the benefits directly set out in the ILO fundamental freedom of association conventions, given that the main conventions were ratified by an average of 160 of the ILO's 187 member states, while non-ratifiers include China, India and the United States, and Brazil for Convention No 87.[2] Fortunately, the ILO possesses a unique complaints-based mechanism that can receive freedom of association complaints against any ILO

[1] K Curtis 'Democracy, freedom of association and the ILO' in J Javillier and B Gernigon (eds) *Les normes internationales du travail: un patrimoine pour l'avenir: mélanges en l'honneur de Nicolas Valticos* (2004) 91.

[2] Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87).

member state.[3] Even more extraordinary, complaints have been received and given rise to important investigative commissions under the framework of an agreement between the ILO and the UN Economic and Social Council. This was famously the case with South Africa in 1992.

The Committee on Freedom of Association (CFA) has begun to issue an annual report compiling statistics on the complaints before it. It is regrettable to note that in 2018 most complaints concerned attacks on basic trade union rights and their officers' and members' civil liberties. The second-highest number of complaints concerned insufficient protection against acts of anti-union discrimination.

Democracy in retreat: Whether it concerns workers' freedom of association or the broader civil and political freedom, statistics show that democracy is in retreat across the globe[4] and that this has equally undermined freedom of association.

Critical outreach is needed to garner the voice of workers in vulnerable situations: Numerous groups work in circumstances where they are either excluded from the legislative protected framework or their labour rights are very difficult to reach due to the isolation and/or dispersion surrounding their work.

Rural and agricultural workers have been historically difficult to organise, and they experience many challenges in exercising their rights. One of the ILO's earliest standards – Convention 11[5] – aims precisely at ensuring that agricultural workers enjoy equal rights to associate as those guaranteed for industrial workers. Yet setting out a right without necessarily addressing the obstacles particular to the sector were found to be insufficient, with the result that in 1975 the organisation elaborated a promotional standard to encourage steps to ensure that the voices of rural workers were effectively heard.[6]

The CFA has also heard numerous cases concerning the challenges that agricultural workers face in being able to fully exercise their freedom of association rights. These clearly are not only a challenge for developing countries but often touch at the heart of insufficient laws and policies across the developed world, especially as regards their effective capacity to engage in collective bargaining and the right to strike. Moreover, there is a huge need to change the mindset so that once the legislative framework for the freedom of association rights of these workers is in place, the partners to social dialogue are conscious of the benefits for harmonious labour relations.

[3] See the duties of the Committee on Freedom of Association, accessible at https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm (accessed on 09/09/2020).

[4] Freedom in the World 2019 'Democracy in retreat', accessible at https://freedomhouse.org/report/freedom-world/2019/democracy-retreat (accessed on 9 September 2020).

[5] Right of Association (Agriculture) Convention, 1921 (No 11).

[6] 'Giving a voice to rural workers' International Labour Conference, 104th Session, 2015. ILC.104/III/1B.

Migrant workers, workers in the rural and *informal* economy, *domestic* workers, those outside of an *employment relationship* who find themselves outside the full protection of the law, often find themselves excluded from the dialogues that concern them.

These challenges are occasionally met with important breakthroughs. One case in point that can provide inspiration for others concerns domestic workers. Placing the international spotlight on their issues, the discussion formulating the Domestic Workers' Convention[7] in the ILO assisted in the transformation of the International Domestic Workers' *Network* into the International Domestic Workers' *Federation*.[8] This assured not only a representative voice for isolated and difficult-to-reach workers but also built on a global vision to consolidate their force and bring empowerment to an undervalued and invisible area of work, mainly carried out by women and girls, often among the most marginalised, migrants or members of disadvantaged communities.

The fundamental importance of freedom of association as an enabling right, a critical tool for combatting inequality, an intrinsic corollary to democracy, a contributor to development and an alleviator for social tensions, cannot be overemphasised. It therefore is even more necessary that it be guaranteed to all voices in the world of work, regardless of the contractual relationship under which the work is performed. This includes the self-employed and those in the *informal economy*. Herein lies an enormous challenge to the reach of the ILO and national legislative frameworks.

Platform work due to its very nature raises major challenges for freedom of association due to the ease with which it has dissolved traditional notions of employment and eliminated any concept of accountability, rights and responsibilities. Additional impediments to the exercise of workers' trade union rights arise from the lack of clarity on the *locus standi*, especially for those working in cyberspace. Some countries and states are grappling with these issues through their legislatures and their courts, but this does not come without challenges from the business community. I have yet to hear a meaningful answer to the resounding question as to why workers should be denied such a basic democratic right as that of organising and defending their interests. Complicating the challenge, a multitude of approaches have been adopted to determine what, if any, rights platform workers may enjoy, leading to uneven protection merely depending on where they are deemed to work. By definition, this has therefore become a global challenge, hence the recommendation by the Global Commission on the Future of Work for an international governance system for digital labour platforms to ensure respect for basic rights.

[7] Domestic Workers Convention, 2011 (No 189).

[8] This transformation occurred at a founding congress in Montevideo, Uruguay, 26–28 October 2013, accessible at https://www.wiego.org/idwf-domestic-workers-federation-born (accessed on 9 September 2020).

Technology: Beyond the challenges to freedom of association arising from a deterioration in the traditional engagement in employment relationships, another obstacle to organising arises in the diverse forms and uses of technology. Algorithms are increasingly being used to dehumanise the employment relationship where hiring and firing decisions are based on numbers manipulated by machines and without human intervention. This alteration of the world of work yet again diminishes the capacity of the individual worker in his or her defence. Challenging such complex and opaque decisions in court – including in respect of their possible anti-union nature – represents a significant hurdle for workers and encourages the continuing fragmentation of the workforce. The technology that may be the tool for their exploitation, however, can also be used as a convening power, bringing greater force to their collective voice in defence of their common interests. Using technology to reach out to dispersed platform workers represents some of the innovative organising techniques used to fight back. Applications may also be generated to reach other groups of isolated and vulnerable workers.

III REPRESENTATIVE NATURE

All these challenges combine into a major conundrum around representativeness critical to ensuring a meaningful voice. The scene must be set to guarantee *legitimacy* in the exercise of freedom of association rights and to give the assurances that the employers' and workers' organisations themselves, formed thanks to this freedom, provide a *representative* voice for those affected.

The demand for democratic inclusiveness means that existing structures need to be able to reach these critical bases in order to maintain *credibility and legitimacy*, while legislative frameworks may need to adapt in order to create space for innovative forms and structures of organising. If this is not done, current systems will be challenged by the many ignored voices and may become obsolete.

Finally, there can be no freedom of association without measures of protection that are *sufficiently dissuasive* and reparative of the damage incurred both to the individual and the collective by the anti-union act. The question of expediency here is critical as justice delayed indeed is justice denied. What possible reparation can be provided to a dismissed unionist ten years later? What example does this provide to those workers who remained?

IV COLLECTIVE BARGAINING FOR THE IMPROVEMENT OF TERMS AND CONDITIONS OF WORK

Workers join organisations for a reason. They count on the collective representation of their interests through collective bargaining at all levels to bring their concerns to the fore and improve their lot. The non-recognition

of representative organisations for purposes of collective bargaining erodes the representational function of these organisations and their value in the eyes of workers who may find themselves forced to resort to other means to make their demands known. Yet we know that collective agreements at various levels are critical to delivering on inclusive wage policies, expanding labour protection to vulnerable workers and facilitating transition from the informal to the formal economy; all key policy drivers of so many states.

Regrettably, as in the case of union density, we see a declining rate of coverage of collective bargaining agreements over the recent years. This has been due to a variety of reasons including decentralisation and non-coordination of bargaining levels, the dismantling of extension mechanisms, the promotion of bargaining with non-unionised workers, favouring individual contracts, and attacks on the favourability principle by generally allowing bargaining *below* the minimum set by law. Research has shown that the level of bargaining is the single most important predictor in bargaining coverage.[9] The higher the level, the more inclusive. This is what workers ask for when they seek social justice.

New Zealand demonstrates an example of how adjustments to collective bargaining systems through decentralisation and promotion of individual contracts may necessitate extended efforts to return to previous coverage rates. The Employment Contracts Act[10] adopted in the 1990s promoted enterprise bargaining and even allowed bypassing of representative unions at the enterprise level. Coming on the heels of a system of highly coordinated sectoral bargaining, there was no doubt that the intention was to undermine collective negotiations and indeed led to a dramatic decline in coverage, especially for private sector workers.[11] The impact on income inequality was evident. The Organisation for Economic Cooperation and Development (OECD) statistics show that over the last decades the country had the greatest increase in income inequality of all of its member states.[12]

Despite the introduction of the Employment Relations Act[13] in 2000 reinstituting the notions of bargaining in good faith with representative organisations, the decline of collective bargaining coverage has not been redressed. In the absence of any measures of compulsion, it has shown to be nearly impossible to re-engage in higher-level bargaining. The result has been no sectoral bargaining in the private sector and only 10 per cent of enterprises having collective bargaining agreements. The government has recognised the need to encourage a return to

[9] J Visser, S Hayter and R Gammarano 'Trends in collective bargaining coverage: Stability, erosion or decline?' (2017) 1 *Issue Brief* 1.

[10] Employment Contracts Act 1991 (ECA).

[11] Recommendations from the Fair Pay Agreement Working Group, December 2018, 1–3.

[12] B Keeley 'What's happening to income inequality?' in B Keeley *Income Inequality: The Gap Between Rich and Poor* (2015).

[13] Employment Relations Act 24 of 2000.

sectoral agreements (fair pay agreements) especially for those who have no access to collective agreements, are involved in precarious work or subcontracting, are in sectors where there is poor compliance with minimum standards, or where there is high potential for disruption by automation.

V GLOBALISATION

The increasingly globalised economy poses another challenge with encouragements of a race to the bottom for cheap labour in regions where workers have few rights and little voice. The extent of the challenge is glaring. According to the OECD, more than half of the world's manufactured imports are intermediate goods[14] used to produce final products. The International Trade Union Confederation (ITUC) has reported that 60 per cent of global trade in the real economy depends on the supply chains of 50 corporations, employing only 6 per cent of workers directly but relying on a hidden workforce of 116 million people.[15] Reaching down the global supply chain to ensure a level playing field for all workers therefore is critical to the avoidance of a backslide in rights at home.

Finally, let me end on a note on the need for integration at all levels. One challenge in many countries is that the labour ministries have little power and resources and are often lower on the hierarchy totem pole. If we wish to preserve the space for freedom of association and harmonious labour relations, we need the government in all its facets to be committed to the agenda. While this may be rather difficult to achieve at home, it was acknowledged in the United Nations (UN) by the foreign ministries and other government dignitaries when signing on to the 2030 Sustainable Development Agenda and agreeing to the importance of Decent Work as an integral part therein. Freedom of association was recognised as key and the ILO was given the custodianship to map the progress made by all member states using its principles and standards as a baseline. I hope that this transparency will assist in reducing and even eliminating many of the challenges discussed above.

After 100 years of ILO action, the continual struggle to ensure freedom of association and collective bargaining is necessary to give meaning to the reference in the 1944 Declaration of Philadelphia to representatives of workers, employers and governments joining in free discussion and democratic decision-making with a view to the promotion of the common welfare, and decision-making that is responsive, inclusive, participatory and representative.

[14] OECD Interconnected Economies: Benefiting From Global Value Chains – *Synthesis Report* © OECD 2013.

[15] New ITUC report exposes hidden workforce of 116 million in global supply chains of 50 companies, 18 January 2016, accessible at https://www.ituc-csi.org/new-ituc-report-exposes-hidden (accessed on 9 September 2020).

The ILO Centenary Declaration has reaffirmed the critical importance of full, equal and democratic participation in tripartite governance to the achievement of social justice, democracy and the promotion of universal and lasting peace. It recalls that the promotion of workers' rights, with a focus on freedom of association and the effective recognition of the right to collective bargaining, are key elements to the attainment of inclusive and sustainable growth. Collective agreements and national institutions for social dialogue represent one of the cornerstones in the building blocks for a just society.

As rightly noted in the 2019 Report of the Global Commission on the Future of Work, '[t]he Constitution of the ILO remains the most ambitious global social contract in history'.[16] May it be the beacon for a brighter future of work and provide the backbone for dynamic and innovative action to preserve and develop the space for freedom of association throughout this century.

[16] Global Commission on the Future of Work, 2019, 23.

CHAPTER 3

The impact of the International Labour Organization on South African labour law

JUDGE B WAGLAY*

Although the International Labour Organization (ILO) has been criticised for eurocentrism, it has a prevailing influence on labour law in South Africa. This contribution highlights the impact of the ILO on South African industrial relations. The ILO with its unique tripartite structure remains the only United Nations agency in existence today. It has been linked with South Africa from its inception in 1919, until 1966, and was reconnected in 1994 when South Africa became a democratic country. During its time of transition, South Africa aligned itself with the ILO's tripartite structure. Government, organised business and trade unions discuss employment-related policy through the mechanisms of the National Economic Development and Labour Council. Through its conventions and recommendations, the ILO plays a significant role in shaping labour law in South Africa. This contribution covers various legislative frameworks that have been drafted in alignment with the ILO's principles. However, despite the influence of the ILO on the development of South African labour law, there is a need to enthusiastically endorse conventions, recommendations and declarations that cater for and protect all in the changing world of work.

I INTRODUCTION

The International Labour Organization (ILO) was founded in 1919 as a specialised agency within the League of Nations under the Treaty of Versailles.[1] However, and unlike other agencies that were dissolved together with the League of Nations after World War II, the ILO survived. It survived and became part of the United Nations (UN). One of the most crucial tasks of the ILO is to draft conventions on labour standards with a view of ensuring peace, social justice and the elimination of unfair competition based on exploitative and inhumane conditions of labour[2]

* This paper has been constructed from a presentation made at the ILO Centenary Conference on 4 April 2019 by Mr Justice B Waglay, President of the Labour and Labour Appeal Courts of South Africa.

[1] See the history of the International Labour Organization, accessible at https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm (accessed on 11 September 2020).

[2] D du Toit *et al Labour Relations Law: A Comprehensive Guide* (2000). See also the Role of the ILO, accessible at http://www.industriall-union.org/the-role-of-the-ilo (accessed on 11 September 2020) published 18 May 2017.

and to oversee the development of international labour law.[3] It is known for its tripartite structure that brings together governments, employers' associations and trade unions at all levels of its decision-making process.[4]

Since its inception, the ILO has adopted some 189 conventions[5] and made some 200 recommendations[6] to give effect to a host of fundamental employment rights such as the prohibition of forced labour, social security, child labour, the right to organise in a trade union, the elimination of discrimination and, most importantly, freedom of association. The ILO has survived to become an important agency under the UN.[7] It has survived the tensions that took place in the international arena: the Cold War and decolonisation. The ILO was able to continue to exist despite all the social and political turmoil and tragedy in the world, and it still has the capacity to adapt and to realign its objectives to fit the current and future change affecting employment-related issues.

Maupain correctly argues that the striking feature of the ILO is its remarkable resilience, demonstrated through the most chaotic and murderous century in human history and the corresponding radical transformation of its political, economic and technological environment.[8] The ILO's surviving feature is its capacity to effect a radical transformation of its objectives and purposes, thereby adapting to the new socio-economic and political environment.[9] This unique feature is the reason behind its longevity. To this end, the ILO's decent work agenda and south-south triangulation bear testimony of its re-orientation policy.

[3] See International Labour Standards: A Global Approach, 75th anniversary of the Committee of Experts on the Application of Conventions and Recommendations, accessible at https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087692.pdf (accessed on 11 September 2020).

[4] See Tripartite Constituents, accessible at https://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm (accessed on 11 September 2020).

[5] With these Conventions, eight of which are fundamental, accessible at https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (accessed on 11 September 2020).

[6] See Up-to-Date Conventions and Recommendations, accessible at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12020:0::NO:::, (accessed on 11 September 2020).

[7] International Labour Standards (n 3).

[8] F Maupain 'A second century for what? The ILO at a regulatory crossroad' (2019) *International Organizations Law Review* 1.

[9] J van Daele 'The International Labour Organization (ILO) in past and present research' (2008) 53 *International Review of Social History* 485 at 491.

II THE ROLE OF THE INTERNATIONAL LABOUR ORGANIZATION IN SOUTH AFRICAN LABOUR LAW

(1) *The Decent Work Agenda*

The ILO's Decent Work Agenda is a universal objective that has been included in major human rights declarations and, as part of the UN system, realigns its objective to fit within the UN framework of decent work for all. It has developed an agenda for the community of work: looking at job creation, rights at work, social protection and social dialogue, with gender equality as a crosscutting objective.[10] The Decent Work Agenda involves opportunities for work that are productive and deliver a fair income; security in the workplace and social protection for families; better prospects for personal development and social integration; freedom for people to express their concerns, organise and participate in the decisions that affect their lives; and equality of opportunity and treatment for all women and men.[11]

The principal goal of the ILO today is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.[12] The ILO's Decent Work Agenda, in my view, is a balanced and integrated programmatic approach to pursue the objectives of full and productive employment and decent work for all at global, regional, national, sectoral and local levels.

(2) *Shortfalls versus success stories of the International Labour Organization*

(a) Criticism

Notwithstanding the ILO's survival over the last century and its considerable literature to setting labour standards to provide decent living conditions to workers, there is mixed reaction about its achievements. One of the criticisms is that in the ILO literature there is the polarisation of the debate in the north. Arguably, there has in the past been an under-representation of scholars from middle and low-income countries and the unequal treatment of the ILO's tripartite constituents. Much of the existing ILO literature is still dominated by North American and Western European scholars, and the input of employers' representatives has received far less attention than the role played by government and workers' delegates in the history of the ILO.[13] There is therefore a need to make significant changes from its past to address the eurocentrism of the early literature, and I believe that this is continually being addressed.

[10] Accessible at https://www.ilo.org/global/topics/decent-work/lang--en/index.htm (accessed on 11 September 2020).

[11] Ibid.

[12] Report of the Director-General: Decent Work – ILO ILC87, accessible at https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm (accessed on 11 September 2020).

[13] MR García (2008) 'The International Labor Organization: Past and present' (2008) 74 *International Labor and Working-Class History* 226.

(b) South African legal framework: A case study

The above challenges notwithstanding, the ILO through its conventions plays a determining role in setting labour standards worldwide, which is one factor on which the fervent critics of the ILO unconditionally agree. South Africa is a good example of a country that can attest to the role played by the ILO in drafting its new labour legislation during the transitional period. It should be noted that when South Africa joined the ILO in 1994, it adopted a tripartite negotiation forum similar to that of the ILO where government, business and trade unions represented in the National Economic Development and Labour Council (NEDLAC) meet and discuss employment-related matters. NEDLAC, therefore, is the vehicle through which all labour market actors meet to consult and agree on economic, labour and development issues facing the country.[14] It is at this unique forum that employment-related matters are discussed.

I remember that one of the discussions which took place during the negotiation of the present Labour Relations Act 66 of 1995 (LRA) was to align the law on strikes with that of the ILO Convention 87 of 1948, Freedom of Association and the Right to Organise Convention; and Convention 98 of 1949, the Right to Organise and Collective Bargaining Convention. Under the previous labour legislation, the right to strike was curtailed and employees who participated in a strike action were often dismissed.[15] A report by the ILO's Fact Finding and Conciliation Committee, upon an investigation into the old labour legislation of South Africa, requested that workers be given the right to strike in order to promote and defend their socio-economic interests.[16]

In order to give effect to the ILO's request, the preamble to the present labour legislation – the LRA – states that its purpose is to give effect to obligations incurred by South Africa as a member state of the ILO;[17] to provide a framework within which employees and their trade unions, employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and to formulate industrial policy.[18] Although the right to strike is not explicitly mentioned in the two core conventions relating to freedom of association, the Committee on Freedom of Association has indicated that the right of employees to strike is an essential element of the right to freedom of association, and one of the essential elements of trade union rights.[19] The right to strike therefore is implied from articles 3, 8

[14] See more information about NEDLAC at http://nedlac.org.za/ (accessed on 11 September 2020).

[15] MA Chicktay 'Defining the right to strike: A comparative analysis of International Labour Organization standards and South African Law' (2012) 33 *Obiter* 264.

[16] Ibid.

[17] Section 1*(b)* of the Labour Relations Act 66 of 1995.

[18] Section 1*(c)* of the Labour Relations Act 66 of 1995.

[19] E Manamela and M Budeli 'Employees' right to strike and violence in South Africa' (2013) 46 *Comparative and International Law Journal of Southern Africa* 315.

and 10. The LRA also makes provision for the right to collective bargaining in chapter 3 and the right to strike and lockout in chapter 4.

The ILO has accepted that the right to strike is not absolute and could be restricted and that the right to strike may be limited in respect of certain groups or categories of workers, such as certain public officials and workers in essential services.[20] Similarly, the LRA recognises that a strike that does not follow due process could be declared unprotected.[21]

I do not intend to canvass all aspects of our labour law that have aligned themselves with the ILO's Conventions. Suffice to say that ILO experts who assisted in the drafting of the LRA and international standards had influenced several provisions of the LRA. For instance, the right not to be unfairly dismissed resonates in the ILO Convention (No 158), Termination of Employment (1982), which provides that employers must have valid reasons before terminating a contract of employment. The right of a dismissed employee to refer a dispute to either the Commission for Conciliation, Mediation and Arbitration (CCMA) or the Bargaining Council is similar to article 7 of Convention 158 which gives the opportunity for a dismissed employee to defend him or herself.

In a similar vein, the ILO Convention concerning Discrimination in Respect of Employment and Occupation or Discrimination (Employment and Occupation) Convention (ILO Convention No 111) requires member states to enable legislation that prohibits all discrimination and exclusion on any basis including that of race or colour, sex, religion, political opinion, or national or social origin in employment. This Convention is given expression by the adoption of the Employment Equity Act 55 of 1998 (EEA) and section 187 of the LRA. The list is not exhaustive. These few examples demonstrate that the ILO has played and continues to play an important role in shaping the South African labour law landscape. It also is a fact that South African courts rely not only on binding but also on non-binding conventions and take heed of the pronouncements of the expert committees and the contents of ILO Recommendations.[22]

In the matter of *S v Makwanyane*, the Constitutional Court held that binding and non-binding conventions are helpful in the interpretation of the provisions of laws.[23] *In casu* the court further pronounced that 'specialised agencies such as

[20] See Chapter V of the Labour Legislation Guidelines, Substantive Provisions of Labour Legislation: The Right to Strike, accessible at https://www.ilo.org/legacy/english/dialogue/ifpdial/llg/noframes/ch5.htm (accessed on 11 September 2020).

[21] Strike action can lose its protected status because of various factors. See, for example, A Rycroft 'What can be done about strike-related violence?' 10 July 2007, accessible at https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_Rycroft.pdf/eda46151-176d-4091-a689-f1042e03e338 (accessed on 11 September 2020).

[22] T Kujinga and S van Eck 'The right to strike and replacement labour: South African practice viewed from an international law perspective' (2018) 21 *PER/PELJ* 1.

[23] 1995 (3) SA 391 (CC) para 35.

the International Labour Organization may provide guidance as to the correct interpretation of particular provisions'.

Similarly, the Constitutional Court in *Bader Bop* held that a minority trade union could strike in order to gain organisational rights.[24] The court emphasised the fact that the jurisprudence of the ILO's Freedom of Association Committees was an important resource in developing labour rights. This signifies that the courts here not only see themselves as able to apply the ILO's conventions but also look for guidance from the recommendations made by the working groups.

The ILO's conventions and recommendations therefore play an important role in shaping South African labour law jurisprudence. It further evinces the relevance of the ILO and its capacity to maintain its influence here and throughout the globe. The recent ILO Centenary Declaration for the Future of Work adopted by the Conference at its 108th Session in Geneva on 21 June 2019 demonstrates that the ILO maintains its relevance by adopting strategies that address the type of work due to technological innovation. The adoption of such a declaration is vital for a country such as South Africa which is already witnessing the devastating effects of the Fourth Industrial Revolution. In fact, some sectors such as the banking sector have digitalised most of their services. As a result, some 2 000 employees have been retrenched. A top commercial bank, for instance, has closed 104 branches countrywide and retrenched almost 1 200 employees as part of its efforts to digitise its retail and business bank.[25]

The ILO's declaration to promote the acquisition of skills in order to address the anticipated skills gaps is a solution that we may need to consider implementing because the vast majority of job seekers in South Africa are semi-skilled or unskilled. If those in employment are unable to upskill themselves to meet the demands of the technological innovations, they will, if retrenched, increase the growing number of unskilled job seekers, thereby increasing the unemployment line. The ILO's suggestion calling upon members to work individually and collectively, on the basis of tripartism and social dialogue, and with its support to further develop its human-centered approach to the future of work by strengthening the capacities of all people to benefit from the opportunities of a changing world of work, through, *inter alia*, effective lifelong learning and quality education for all, and effective measures to support people through the

[24] *National Union of Metal Workers of South Africa & Others v Bader Bop (Pty) Ltd & Another* [2003] 2 BLLR 103 (CC) para 30.

[25] Staff Writer 'These 104 Standard Bank branches are closing – here's where you should go instead' 4 June 2019, accessible at https://businesstech.co.za/news/banking/321239/these-104-standard-bank-branches-are-closing-heres-where-you-should-go-instead/ (accessed on 11 September 2020). See also Staff Writer 'Standard Bank to cut 1 200 jobs as part of digital shift' 14 March 2019, accessible at https://businesstech.co.za/news/banking/305404/standard-bank-to-cut-1200-jobs-as-part-of-digital-shift/ (accessed on 11 September 2020).

transitions they will face throughout their working lives,[26] is an approach from which the country can benefit if implemented.

Equally important is the adoption at the ILO's 108th Session in Geneva on 21 June 2019 of Convention 190 on Violence and Harassment. The convention provides a broad definition of what violence and harassment in the world of work means and where it can take place, and states that everyone in the world of work has the right to be free from violence and harassment, including gender-based violence. It requires governments to take measures to protect workers from violence and harassment, especially women. This new convention is praised and seen as a historic victory for the battle for gender equality since an estimated 35 per cent, that is, 818 million, of women worldwide have experienced sexual or physical violence at home, in their communities and/or in the workplace.[27]

South Africa has in place a Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, but this code only provides for the procedure on how to deal with sexual harassment cases. The only substantive law on sexual harassment is the Protection from Harassment Act 17 of 2011 which deals with harassment on a general note. There is no current legislation specifically related to sexual harassment in the workplace. Here the ILO's recent Convention on Violence and Harassment could provide some direction to design our law on the subject. The issue is a pressing one if one takes into account that the new convention, as it should, extends sexual harassment to gender-based violence occurring outside the workplace. There rightly is recognition that domestic violence affects employment, productivity and health and safety and that low productivity at work may well be consequent upon domestic violence.

This new convention[28] is adopted at a time when countries, including South Africa, face unprecedented violence mainly against women and children.[29] Hence, President Ramaphosa's call to address gender-based violence by way of mass media campaigns; gender-sensitivity training for law enforcement officials, prosecutors, magistrates and policy-makers; the inclusion of women's rights and gender power in school curricula; the training and placement of prevention activists to all municipalities; strengthening the criminal justice system; enhancing the legal

[26] H Koller 'ILO Centenary Declaration is a roadmap to develop skill sets for today's rapidly changing world of work' 23 August 2019, accessible at https://www.ilo.org/moscow/news/WCMS_716336/lang--en/index.htm (accessed on 11 September 2020).

[27] 'Historic victory in battle for gender equality: ILO Convention to End Violence and Harassment in the Workplace, adopted' 21 June 2019, accessible at https://www.uniglobalunion.org/news/historic-victory-battle-gender-equality-ilo-convention-end-violence-and-harassment-workplace (accessed on 11 September 2020).

[28] ILO Convention 190 on Violence and Harassment.

[29] South Africa is the country with the highest number of cases of violence against women in the world; see https://www.cesvi.eu/what-we-do/protection-of-infancy/south-africa-against-violence-women-and-children/ (accessed on 11 September 2020).

and policy framework; ensuring adequate care, support and healing for victims of violence; and improving the economic power of women.[30] This points to the President's response to the ILO's call that governments, employers' and workers' organisations, and labour market institutions, should take measures to address the impact of domestic violence. Domestic violence is a scourge in any society and should be eliminated at all costs.[31]

Also important is the ILO Convention on Domestic Workers 189 of 2011. This convention recognises that domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights. It recognises that in developing countries with historically scarce opportunities for formal employment, domestic workers constitute a significant proportion of the national workforce, yet remain among the most marginalised. Perhaps it is against this background that we should understand the recent adoption of the National Minimum Wage Act 9 of 2018. The primary motivation behind the adoption of this Act appears to be the need to address the huge income disparities that characterised the South African labour market. The Act determines the hourly rate for vulnerable workers such as domestic workers by providing a fixed hourly rate, thereby seeking to achieve better working conditions for these vulnerable workers.

Finally, on this issue, with the adoption of the various conventions and the subsequent domestication of the ILO conventions in South Africa, what we seek to achieve is a single goal, namely, the attainment of social justice. This is echoed in the ILO's Constitution for the search of social justice in the workplace. As Maupain correctly argues, social justice is a process whereby the values and principles abstractly identified by the ILO preamble should be given specific content and meaning, with due account being taken of relevant circumstances.[32] This process involves the free confrontation and reconciliation of the respective interests of the employers and the workers, with the government ideally acting as an arbitrator and catalyst for the common good.[33]

[30] South African Government News Agency 'Emergency plan to protect women and children' 19 September 2019, accessible at https://www.sanews.gov.za/south-africa/emergency-plan-protect-women-and-children (accessed on 11 September 2020).

[31] See, for example, RY Glasman 'Stamping out the scourge of domestic violence' 25 November 2019, accessible at https://ajn.timesofisrael.com/stamping-out-the-scourge-of-domestic-violence/ (accessed on 11 September 2020).

[32] Maupain (n 8).

[33] Maupain (n 8) 7.

The call for social justice was reiterated by the ILO Declaration on Social Justice for a Fair Globalisation at its 97th session in Geneva on 10 June 2008.[34] It builds on the values and principles embodied in the ILO's Constitution and reinforces these to meet the challenges of the twenty-first century. There is recognition that global economic integration has caused many countries and sectors to face major challenges of income inequality, continuing high levels of unemployment and poverty, the vulnerability of economies to external shocks, and the growth of both unprotected work and the informal economy, which impact on the employment relationship and protection. In order to promote good employment conditions in a globalised world, the declaration reposes four interrelated strategies, which I do not wish to record because of time constraints but once implemented could attempt to address the challenges.

In this era of globalisation, all these objectives require the equitable redistribution of the fruits of the prosperity expected from the open borders among those who have contributed to or have been affected by it within these borders. However, positive results are extremely slow in forthcoming. Dealing specifically with our issues, South Africa has one of the worst unemployment rates worldwide proportionally to the number of people that are seeking employment.[35] While unemployment in the country has always been substantial, one of the reasons for the present state of unemployment may be attributed to the slow-down or the virtual absence of economic growth. It is not only South Africa that is suffering from the slow-down. It is a global phenomenon. It is argued that the slow-down has its genesis in the Wall Street meltdown of 2008.[36] The world is yet to recover from that.

South Africa as part of the global market is no exception in experiencing tough economic times but the near absence of growth in the South African economy may be attributable to, among other things, the drastic reduction in the markets for its manufactured goods. It has been said that when markets slow down, self-adjustments are made with prices rising. This has not happened; markets have shrunk, and so have commodity prices. In the past few years our country has suffered severe droughts, reducing several farms to barren land, and scarce resources have been required to be diverted towards providing water and other necessities to drought-stricken areas and to the people living there.

[34] Accessible at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/genericdocument/wcms_371208.pdf (accessed on 11 September 2020).

[35] By December 2014, South Africa was reported as having the highest unemployment rate worldwide. K Wilkinson 'Factsheet: Unemployment statistics in South Africa explained' 3 December 2014, accessible at https://africacheck.org/factsheets/factsheet-unemployment-statistics-in-south-africa-explained/ (accessed on 11 September 2020). For currents statistics, see Statistics SA 'Unemployment rises slightly in third quarter of 2019', accessible at http://www.statssa.gov.za/?p=12689 (accessed on 11 September 2020).

[36] R Rena and M Msoni 'Global financial crises and its impact on the South African economy: A further update' (2014) 5 *Journal of Economics* 17.

The instability of the ruling party has compounded this problem. If economists are to be believed, we are already in recession. The prognosis is not good. The present state of economic crisis is said to stay with us at least until the end of the current financial year. Also, one had hoped that all the action in the merger and acquisition market would lead to some economic growth. International companies, leading businesses of the world, are finding their way into South Africa, buying our biggest and largest enterprises, but this has not translated into economic development of any substance. The mergers reflect how the world is becoming smaller and smaller and businesses are starting to cannibalise one another. The hope that the conduct of one business seeking to purchase another will lead to a positive impact on employment has not materialised.

I must add that but for the role of the Competition Commission the position would have been life threatening. The greater role played by the Competition Commission using its public interest jurisdiction has at least insulated large-scale job losses in new mergers. Absent the interference in terms of the competition law there would have been a serious negative impact on South African society. The Competition Commission has had an immense impact on restricting job losses and promoting the localisation of the supply chain, thereby creating more jobs. However, as the entities established in terms of the Competition Act bring its influence to bear on fair labour practices and fair trade practices and to promote the localisation of the supply chain, with the amalgamation of big business or business coming into our country, there has not been a significantly positive impact on employment and trade practices.

Besides the constitutionally entrenched imperative of fair labour practice or the public interest grounds entrenched in competition law and the importance of employment, what is most challenging is the concept of decent work, which is the central and defining issue of our time. We need to find a way to create more employment and jobs that are consistent with the norms of our constitutional democracy. It is important that creating jobs and decent work are seen as two sides of the same coin. In fact, every society should demand that jobs and decent work be brought into focus with the aim of forming a single objective. This is crucial not only for South Africa but for the global economy because as the world becomes smaller and businesses become international, one will find worker migration becoming a serious factor. As economies integrate in an ever-evolving global economy and markets open, this may result in poorer countries losing their skilled workforce to developed countries and impoverished economies becoming stranded with the abundance of an unskilled workforce which, it is hoped, does not happen here.

Additionally, there are new forms of the employment relationship that are being created. In such instances, a more nuanced understanding needs to be developed to meet the demands created by the new and sometimes legal but fictitious employment relationships, which is at the centre of so much debate today. We have to deal with challenges of how to balance the rights dispensation

that is inherent in the decent work concept with the economic component because as businesses become more competitive, society will have to face the reality of challenges to one's financial security based on the economy, and that necessity will become more and more prevalent, with one side making demands for more controls and the other trying to make sure that controls are removed so that market forces dictate economic security.

Some will want to argue that the modern issue is no longer economic protection in the form of customs duties and protection of outside competition but managing our industries against the international economic imperatives that prevail. While there can no longer be any question that markets matter, there is recognition that labour is not a commodity to be manipulated by the market forces. There is acceptance in the world today that human values matter. The question is not merely how cheaply we can purchase a garment or a motor vehicle, but whether the worker is treated fairly in the process of producing that garment or motor vehicle. The whole concept of decent work will directly emphasise smart work practices. This, in my view, is beginning to play a significant role in job security and increased production and profit.

The slow-down in global economic growth has also led to substantial anti-establishment sentiments. This continues to fester with long-term effects in both developed and developing countries. Greece is but one example. We are living in a world where there is a rebellion, a rebellion against the *status quo*. Brexit is an example. The rise of Donald Trump is another reaction against the *status quo*. South Africa is not insulated from this world rebellion. The rise of student protests, service delivery protests and the proliferation of new trade unions challenging the established relationships between unions and employer associations bear testimony to this. Against this background, those of us involved in the world of work must accept that where we see the challenges that are faced by the realities of trade and industry and feel unable to influence it, we can still try to nudge it and encourage positive movement by pointing to the right direction. But ultimately it requires the actors in the labour market to step up and forge a labour relations regime that is practically founded on cooperation to create a partnership between business and labour and with the government.

III CONCLUSION

To sum up, the impact of the ILO on South African labour law will remain as long as the ILO is proactive and continues to adopt a pre-emptive approach to changes which affect workers. The ILO's capacity to reinvent itself and to contextualise its approach is the reason why it has been able to survive all the turmoil that has taken place in the international arena. Although the ILO may have faced socio-political tensions in the past, the contemporary challenges are more of a technological nature. The responses to these various challenges have shaped the international labour standards and will no doubt continue to do so.

Part 2:

FREEDOM OF ASSOCIATION AND COLLECTIVE LABOUR LAW THEMES

CHAPTER 4

The legal development of the right to freedom of association in Eswatini

SIMPHIWE SHABANGU*

The right to freedom of association in industrial relations has over the last few decades faced various challenges in the Kingdom of Eswatini. However, through the years there have been attempts to bring the law in line with the country's obligations under the International Labour Organization (ILO) through several pieces of legislation. This paper traverses the legal impediments to the right to freedom of association of employees in Eswatini as well as the changes in the law and their impact on this right for the period beginning in 1968, when the country attained its independence from British colonial rule, until the time of writing the paper.

I INTRODUCTION

The right to freedom of association is a fundamental human right, recognised and declared as such in Article 20 of the Universal Declaration of Human Rights (UDHR). Freedom of association is defined as the right of persons to join together in groups in order to pursue common objectives or interests.[1] It allows the participation of citizens in the formulation of the policies which affect them. Specifically in labour relations, it allows workers and employers to have a voice and affords them representation within industrial relations fora. Such inclusiveness not only facilitates the results of any discussions within the industrial relations environment to be adequately relevant and representative of the needs of all the players involved, but it also promotes ownership by all the stakeholders. In this way, laws and policies are more acceptable to the parties, thus promoting a harmonious industrial relations environment.

Article 22 of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone shall have the right to freedom of association with others, including the right to form and join trade unions. At the regional

* Simphiwe Shabangu is a law lecturer at the University of Eswatini. She holds a BA, LLB from the University of Eswatini and an LLM (General Studies) from the Georgetown University Law Centre. She also holds an LLM (Intellectual Property Law) from Turin University (offered in collaboration with the World Intellectual Property Organization, WIPO).

[1] D Dlamini 'The right to freedom of association in Swaziland: A critique' unpublished LLM thesis, University of Pretoria (2008) 1.

level, Article 10 of the African Charter on Human and Peoples' Rights (African Charter) provides that every individual shall have the right to free association provided that they abide by the law. In this regard, the African Commission on Human and Peoples' Rights (African Commission) adopted a resolution on the right to freedom of association which provides, *inter alia*:

1. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standards;
2. In regulating the use of this right, the competent authorities should not enact provisions which will limit the exercise of this freedom;
3. The regulation of the exercise of the right to freedom of association should be consistent with the state's obligation under the African Charter on Human and Peoples' Rights.

The right to freedom of association and to organise is recognised and accepted in international circles as one of the basic human rights and in many instances is protected as such. However, this right has been and remains somewhat problematic in Eswatini, formerly Swaziland, despite the fact that the fight for independence was primarily fought by trade unions and political parties.

II THE 1968 CONSTITUTION

In the run-down towards independence several political parties were formed. The most important of these parties perhaps was the Ngwane National Liberation Congress (NNLC), the major goal of which was to secure a constitutional monarchy in which the powers of the King would be substantially diminished.[2] The parties also envisaged an elected, constitutional government of Swaziland and championed labour rights.[3] However, in the end a combination of political factors tilted the balance in favour of the monarchy and the traditional supporters. Following the 1967 elections, all seats reserved for Swazis were won by the Imbokodvo National Movement (INM), the royalist party formed shortly before the elections in a stunning victory.[4] This led to the entrenchment of monarchical interests as reflected in the 1968 Independence Constitution, even though under section 28 the King, in discharging his official functions, was subject to the law, including the Swazi law and custom, provided that such rules were not contrary to the provisions of the Constitution.[5]

[2] J Baloro 'The development of Swaziland's Constitution: Monarchical responses to modern challenges'(1994) 38 *Journal of African Law* 19.

[3] Baloro (n 2).

[4] Ibid.

[5] Ibid.

Elections were held in 1972, and these elections put the proverbial spanner in the works. The opposition party, the NNLC, won three seats in Parliament, effectively registering a presence as an opposition to the INM. While the INM still controlled both Parliament and government, the traditionalist establishment was not comfortable with this new political reality; it roused significant hostilities against the Independence Constitution. They (the traditionalists) felt that the authority of the monarch had been challenged and, in response, challenged the right of one of the newly elected NNLC members of Parliament, Mr Bhekindlela Ngwenya, to take his seat on the allegation that he was not a citizen of Swaziland. They went further to enact, under a certificate of urgency, a Bill amending the Immigration Act. The Bill also sought to establish a five-member tribunal to determine the citizenship status of Mr Ngwenya. Mr Ngwenya filed an application with the High Court of Swaziland challenging the constitutionality of the amendment to the Immigration Act and the tribunal established thereunder.[6] The High Court declared the amendment constitutional, allowing the tribunal to sit and decide whether Mr Ngwenya indeed was not a citizen of Swaziland. Upon appeal to the Court of Appeal of Swaziland, which had replaced the Privy Council, the Court of Appeal held that the Immigration Amendment Act was void as it was beyond the powers of Parliament to enact, save in accordance with section 134 of the Constitution.[7]

Shortly thereafter, Parliament passed a resolution declaring the Constitution unworkable, and called upon the King to *resolve the crisis engulfing the nation*.[8] At this point the King presented his Proclamation to the nation.[9]

Following independence from British rule in 1968, the country was governed in accordance with the Independence Constitution of 1968. Chapter II of the 1968 Constitution contained provisions on the protection of fundamental rights and freedoms of the individual. With regard to freedom of association, it stated in section 3:

> Whereas every person in Swaziland is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—
>
> (a) …
>
> (b) Freedom of conscience, of expression and of assembly and association; and
>
> (c) …

[6] *Bhekindlela Thomas Ngwenya v The Deputy Prime Minister and the Chief Immigration Officer* 1970–76 SLR (HC) 119 (*Ngwenya*).

[7] *Ngwenya* (n 6) 123.

[8] Emphasis added.

[9] Proclamation by his Majesty King Sobhuza II, King's Proclamation 12 April 1973.

The effect of this provision was to guarantee to the people of Swaziland, as it was then, constitutional protection of the right to freedom of association in a comprehensive manner, save to ensure that the enjoyment of the protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

III THE 1973 KING'S PROCLAMATION TO THE NATION

This state of affairs persisted until 1973 when King Sobhuza II replaced the 1968 Constitution with the 1973 State of Emergency Decree which, among other things, took away the right of emaSwati to associate and organise. In the 1973 Decree, King Sobhuza II concluded that the 1968 Independence Constitution had not only failed to provide a machinery for good government and peace and order of the people of Swaziland,[10] but also that the Constitution was the cause for growing unrest, insecurity and dissatisfaction with the state of affairs in the country.[11] He further stated that the Constitution had occasioned the importation into Swaziland of highly undesirable political practices alien to, and incompatible with, the way of life of Swazi society and designed to disrupt and destroy the local peaceful and constructive and democratic ways of political activity, engendering hostility, bitterness and unrest within the Kingdom.[12] The King went on to assume to himself, in collaboration with a Council of Ministers, all legislative, executive and judicial power and repealed the Constitution, including Chapter II containing the Bill of Rights.[13]

The 1978 Proclamation also dissolved and prohibited all political parties and similar bodies that cultivated and brought about disturbances and ill feelings within the nation.[14] While this was seen as a political move to suppress any opposition to the reigning monarch, its effects spilled over into the industrial relations arena as trade unions were also caught up in the anti-organisation stance taken at the time. In the view of the authorities, these clearly fell with the 'similar bodies' mentioned in the 1973 Decree and they therefore were viewed with suspicion. It is during this political dispensation that the country became a member of the International Labour Organization (ILO). Over the years, since the country became a member of the ILO, there has been constant and consistent work towards the full realisation of the rights of workers to associate.

[10] Proclamation by His Majesty the King, 12 April 1978, s 2(a).
[11] Section 2(b).
[12] Section 2(c).
[13] Section 3.
[14] Section 11.

IV THE PUBLIC ORDER ACT, 1963

This pre-independence legislation was enacted with the stated objective of providing for the maintenance of public order and for connected purposes. Section 3(3) of this Act requires anyone wishing to hold or organise a public meeting or procession to make an application for a licence to the police officer in charge of the police, that is, the station commander in charge of the district in which the meeting or procession may take place. It is common cause that the right to freedom of association goes hand in hand with the right to hold meetings and to demonstrate. The effect of the provisions of the Public Order Act is to limit the rights of organisations to hold meetings or, alternatively, to grant the police the discretion to bar meetings from taking place. Section 3(20) of the Act states:

> A convenor of a public gathering which is likely to be attended by twenty persons or more and which falls under the definition of public meeting in section 2, shall give details in writing of the gathering, not less than seven days before that date of the gathering, to the police officer in charge of the district in which the gathering is to take place.

A public meeting is defined under section 2 as a public gathering for any purpose in a public place, but does not include a gathering or assembly of members of a trade union registered under the law relating to trade unions, convened and held exclusively for a lawful purpose of that trade union. While this definition might initially seem to exclude trade union meetings from the operation of the Act, if read with section 3(20), it would appear that the police have the power to determine from the details given whether the meeting indeed is being held exclusively for a lawful purpose of the trade union. In this way, this brings the activities of trade unions squarely within the ambit of the Public Order Act and, in fact, it has been used by the state through the police to control union gatherings over the years and to date remains in force.

V ILO MEMBERSHIP

Eswatini became a member of the ILO in 1975 and, since then, has consistently participated in the International Labour Conference (ILC). With the help of the ILO, Eswatini embarked upon a major reform of its labour laws after having become an ILO member. This included ratifying over 30 International Labour Conventions, including ILO Conventions 87[15] and 98.[16] Such reform has not been without challenges for the Kingdom. One by-product of such reform was the reluctant re-introduction of trade union rights in the country by the government through the Industrial Relations Act of 1980. However, there were gaps in the recognition of

[15] This Convention provides for the freedom of employers and employees to form and join unions.
[16] Providing for the right to organise and collective bargaining.

workers' rights to associate and organise and the Industrial Relations Act of 1996 did not ameliorate the situation as there were no significant improvements to the rights of workers as a collective, from those that were obtained under the 1980 Act, as discussed below. Through continued engagement between the government, employers and employees, on the one hand, and the ILO, on the other, there has been gradual improvement brought about by the Industrial Relations Act of 2000 (as amended) as well as the Constitution of the Kingdom of Eswatini which was adopted in 2005 to conform to ILO Conventions No 87 and 98.

Convention No 87 provides that employers and employees, without distinction, shall have the right to establish and to join organisations of their own choosing without previous authorisation.[17] In line with this Convention, section 32(2)(a) of the Constitution gives workers the right to freely form, join or not join a trade union.[18] On the other hand, section 32(2)(b) of the Constitution, in conformity with Convention No 98, provides for the rights of workers to collective bargaining and representation.

VI THE INDUSTRIAL RELATIONS ACT, 1980

As stated above, the ILO membership of Swaziland saw the re-emergence of labour rights in the country. The enactment of the Industrial Relations Act of 1980 in Swaziland came about following a review of local labour legislation in an attempt to bring it into conformity with the country's new obligations under the ILO. The rights to freedom of association and to organise were provided for under Part VIII of the 1980 Act. Section 68 gives employees the right to participate in the formation of any organisation or federation, while section 69 gives employers the same right.

As has been stated, while this was an attempt to conform to the country's obligations as a member of the ILO, there were certain provisions in this legislation which could be considered non-conforming. First, section 20 of the Act required unions to be formed along industry lines. Section 20, entitled 'Organisations to be confined to one industry', essentially provided that trade unions[19] and staff associations[20] could only have as members, or represent, employees who were employed in the industry within which that union is active or who had qualifications for employment in that industry. While it might have been true that the labour force in the country was relatively small, this section of the Act essentially gave the Commissioner of Labour, who is the authority mandated to

[17] Article 2 of ILO Convention 87 of 1948.

[18] The right to be or not to be member of a union is governed by s 30 of the Industrial Relations Act, 2005.

[19] Industrial Relations Act, 1980, s 20(1).

[20] Section 20(2).

register trade unions, the power to refuse the registration of a trade union where a union already existed in that particular industry.

The Labour Commissioner's power in this respect was buttressed by section 23(3) of the 1980 Industrial Relations Act. This section empowered the Labour Commissioner to refuse to register the constitution of an organisation where he was of the opinion that another organisation had already been registered, which other organisation was sufficiently representative of the interests in respect of which the applicants were seeking registration. In the view of the workers, this interfered with their right to freedom of association as enshrined in Convention No 87. This limitation to industry also applied to employer organisations. The effect of this section was to limit the choice of employees to join a trade union of their choice as according to the Act, each industry was allowed only one union, and other unions purporting to register as such after another union had been registered in the same industry would not be registered by the Labour Commissioner.

Organisations were allowed to form, participate in and be affiliated to or to join federations under the 1980 Act.[21] However, the same Act disallowed federations to act in support of a political party in section 33(2), which was interesting as one would have thought that this provision was superfluous as political parties themselves were and remained illegal in the country.

In section 35 the 1980 Industrial Relations Act allowed a member of the organisation and/or the Commissioner of Labour to make an application to the Industrial Court for (a) the suspension of the organisation; (b) the issuance of an order limiting the non-occupational activities of the union; or (c) granting an order for the winding up of the organisation where the court found that during the 12 months immediately preceding the application, the organisation devoted more funds and more time to the campaigning on issues of public policy than to protecting the occupational rights and advancing the occupational interests of its members. This formulation of the law laid down the background for the authorities insisting on a separation of union issues from issues of a political nature, and trying to keep union activities strictly to industrial relations issues. Industrial relations issues certainly do not exist in a vacuum and cannot realistically be completely divorced from issues of public policy.

Essential services are those services that have been designated by a state as not having the legal right to engage or participate in a strike action. Normally, the basis for this is that the interruption of these services would endanger the lives, personal safety or health of the whole or part of the population. The designation of sectors as essential services primarily is determined by the peculiar circumstances prevailing in a particular country. While the right of countries to

[21] Section 33(1).

designate certain sectors as essential services is recognised even at the international level, countries do not necessarily agree on which services are essential. It is indisputable that the designation of services as essential will generally impact on the freedom of association of employees in that sector. The Industrial Relations Act of 1980 listed several sectors as essential services. Most notable among these were teachers[22] and public servants[23] – notable in the sense that there seems to be general agreement that these are not essential services as they do not meet the requirement that their interruption would have endangered the lives, personal safety or health of the population. Health services are excluded from the category of public or civil servants as they are already designated in section 65(6)(a)(iv). While the designation of health services fully conforms to ILO standards, the designation of teachers and public servants clearly was outside the list of essential services under the ILO.

Section 68 of the Act designated the right to freedom of association as a basic right for employees, giving the employee the right to participate in the formation of any organisation or federation,[24] to be a member of such organisation or federation,[25] to hold office[26] and to exercise all rights conferred under the Act.[27] Section 69 gave similar rights to employers.

VII THE INDUSTRIAL RELATIONS ACT OF 1996

Following complaints by worker organisations about several of the provisions of the 1980 Act, including those discussed above, and their non-conformity with ILO standards, the Parliament of the Kingdom passed a new piece of legislation relating to industrial relations meant to correct the errors of the past. This Act repealed and replaced the 1980 Act. The stated aim of the 1996 Act was to provide for the collective negotiation of terms and conditions of employment and for the establishment of an Industrial Court and an Industrial Court of Appeal. This purpose for the most part was similar to that of the 1980 Industrial Relations Act, except for the fact that the prior Act did not mention anything about an Industrial Court of Appeal.

In like manner to section 68 of the 1980 Act, the 1996 Act in section 77 gave protection to the right to freedom of association as a basic right for employees, giving the employee the right to take part in the formation of any organisation or

[22] Section 65(6)(a)(vii).
[23] Section 65(6)(a)(viii).
[24] Section 68(a).
[25] Section 68(b).
[26] Section 68(c).
[27] Section 68(d).

federation,[28] to be a member of such organisation or federation,[29] to hold office[30] and to exercise all rights conferred under the Act.[31] Section 78 gave similar rights to employers.

The 1996 Act maintained the concept of industry union found in the 1980 Act. It confined membership of unions to persons employed in the industry in which that industry union was active. It similarly provided for staff and for employer organisations. The only difference between the provision in the 1980 Act and the 1996 Act was the proviso to section 27(1), which stated that '[p]rovided that members of staff shall not be members of an industry union'.

This proviso was a new addition to the Act, designed to ensure that managerial employees were ineligible to join trade unions, and clarity that they could only form organisations with other managerial employees. Staff, used in this context as a synonym for managerial employees, is defined in the 1996 Act as an employee who has the authority to act on behalf of the employer to hire, fire and discipline other employees, and to deal with their grievances where such action requires independent judgment; or an employee who participates in the formulation of company policy; or an employee who has full knowledge of the financial position of the employer and personal access to the employer's other confidential information; or a combination of the above-mentioned factors.[32]

In the same way as the 1980 Act, the 1996 Act in section 40(1) allowed organisations and employers to form, participate in, be affiliated to or join a federation. Unlike its predecessor, the 1996 Act makes no mention of political parties or deeming it illegal for federations to act in support of such political parties. This represents a significant improvement in the rights of workers as it reduces the instances under which law enforcements will deem their activities illegal for reason of being of a 'political nature'. Instead, section 40(3) of the Act provided as follows:

> A federation or officer thereof which causes or incites the cessation or slowdown of work or economic activity by an organisation or members of such an organisation may be guilty of an offence and upon conviction be liable to a fine not exceeding E5 000 (five thousand emalangeni) or to imprisonment for a period not exceeding 5 years.

This is only one of a number of provisions of the 1996 Act that sought to criminalise certain activities within the industrial relations arena, and perhaps the basis upon which some key players in the country considered it not to be a proper basis for the sound regulation of industrial relations, calling for its radical amendment.[33]

[28] Section 77(a).
[29] Section 77(b).
[30] Section 77(c).
[31] Section 77(d).
[32] Section 2 of the Industrial Relations Act, 1996.
[33] SP Dlamini 'Swaziland's new Industrial Relations Act 200: A legal response' (2000) 21 *ILJ* 2174.

Section 42 of the 1996 Act provided a slight departure from the parallel provision in the 1980 Act. This section in the latter Act provided that unless the contrary is provided in its constitution, and subject to approval in a general meeting, the officer of an organisation or federation was allowed to make statements on behalf of their organisation on matters of public policy and public administration. In a strange twist, and in a manner that may be seen as an equivocation on the foregoing, section 42 proceeded, in a similar way as the 1980 Act, to allow a member of the organisation and/or the Commissioner of Labour to make an application to the Industrial Court for (a) the suspension of the organisation; (b) the issuance of an order limiting the non-occupational activities of the union; or (c) granting an order for the winding-up of the organisation where the court found that during the 12 months immediately preceding the application, the organisation devoted more funds and more time to the campaigning on issues of public policy or public administration than to protecting the occupational rights and advancing the occupational interests of its members.

The provision in the 1996 Act in relation to essential services remained largely the same, except to increase the fines and period of imprisonment to employers instituting a lockout in essential services[34] and employees engaging in a strike in essential services,[35] as well as office holders of organisations or federations or any other person calling for a strike in essential services.[36] In addition, teachers were removed from the list of essential services in the 1996 Act. Such removal was welcomed as it brought the definition of essential services more in line with the ILO definition of essential services.

VIII THE INDUSTRIAL RELATIONS ACT OF 2000

Following a very tumultuous period beginning prior to the enactment of the 1996 Act, which saw the economy of the country being brought to a standstill through mass actions by the labour unions led by the Swaziland Federation of Trade Unions (SFTU), there was a misconception that these stay-away actions were caused by a lack of firm laws.[37] The 1996 Act had been passed in this environment. It had the primary purpose of creating a more peaceful environment by putting in place more stringent laws for the control of industrial action. These laws, however, fell afoul of the country's ILO obligations and were met with criticism from key players in the industrial relations sector within the country and beyond. It was for this reason that it was decided to review the 1996 Industrial Relations Act.

[34] Section 73(3).
[35] Section 73(4).
[36] Section 73(5).
[37] Section 68(c).

For the first time, a clause was included in the Industrial relations Act outlining the purpose and objective of the Act. According to section 4 of the Industrial Relations Act of 2000, its purpose and objective, among other things, was to promote harmonious industrial relations;[38] to promote fairness and equity in labour relations;[39] to promote freedom of association and expression in labour relations;[40] to promote a healthy and legally sound environment for the creation of partnerships between government, labour and capital;[41] and to ensure adherence to international labour standards.[42] Section 4(2) goes on to provide that the Act should be interpreted taking into account and giving meaning to its purpose and objective. This collaborative spirit in the 2000 Act perhaps could be attributable to the fact that it was formulated by the Labour Advisory Board (LAB),[43] a tripartite institution with representatives from labour, business as well as government.

The 2000 Act copied from the Employment Act[44] and excluded members of the defence force, the police force and correctional services from the operation of the Act.[45] At the time, in the absence of constitutional provisions, these classes of person were deprived of the right to form and join trade unions. This effectively meant that, contrary to ILO standards, particularly ILO Convention 87, police, defence personnel and correctional service personnel did not enjoy the right to freedom of association.[46] Section 3 of the Industrial Relations Act is in line with regulation 19 of the Police Regulations promulgated under the Police Act 29 of 1957, which provides that it shall not be lawful for a member of the force to be a member of any political association or of any trade union or of any association having for its objects, or one of its objects, the control of or influence on the pay, pensions or conditions of service of the force. It is also in line with section 18 of the Prisons Act 40 of 1964, which provides that a prison officer who is a member of a trade union, or any other association, the object or one of the objects of which is to control or influence salaries, wages, pensions or conditions of service of prisons or conditions of service of prison officers, or any other class of persons, shall, subject to the laws relating to the public service, be liable, at the discretion of the Minister, to be dismissed from the service and to forfeit any rights to a pension or gratuity.

[38] Section 4(1)(a).
[39] Section 4(1)(b).
[40] Section 4(1)(c).
[41] Section 4(1)(f).
[42] Section 4(1)(j).
[43] Established under section 18 of the Employment Act of 1980.
[44] Section 5.
[45] Section 3 of the Industrial Relations Act 1 of 2000.
[46] Article 2.

In a matter before the High Court, the then Minister responsible for labour stated in an affidavit that both Convention 87 on the Freedom of Association and Protection of the Right to Organise, and Convention 98 on the Right to Organise and Collective Bargaining, give states a wide margin of appreciation in deciding the extent to which the guarantees provided therein shall apply to the armed forces and the police, and that the Committee on Freedom of Association (CFA), which was set up by the ILO to examine complaints about freedom of association, has decided that states that have ratified Conventions 87 and 98 are not required to grant the guarantees therein to members of the armed forces and police. He further stated that the exclusion of members of the Royal Swaziland Police from the application of the Act (Industrial Relations Act 2000) was informed by Conventions 87 and 98 as well as decisions of the Committee on Freedom of Association (CFA).[47]

It is notable that the Minister did not refer to correctional services, and a case for the removal of correctional services from section 3 of the Act has been made by labour representatives for a number of years from as far back as 2005.[48] As yet there has not been an amendment of the law to allow correctional service personnel to form and join trade unions.

The 2000 Act also departed from the prior principle of one industry, one union in terms of which only one union could be recognised in each of the economic sectors within the country.[49] Under the new Act, employees had the right to form and join trade unions of their own choice in line with article 2 of ILO Convention 87. While this in principle gives more choice to workers on which union to join, it guards against the proliferation of unions in that whereas the registration by the Commissioner of Labour of multiple unions is in principle possible in a particular industry, a possible limitation to this right is that the Act provides that in order to be recognised by employers as an employee representative, the employee organisation has to have at least 50 per cent membership.[50] Where the number of fully paid-up members in a union seeking recognition falls below 50 per cent, then recognition is at the discretion of the employer.[51]

Section 32 allows organisations and employers to form, participate in, be affiliated to or join a federation and provides that the federation may have as its principal objects matters including those of public policy and public administration. The inclusion of matters of public policy and public administration is a new addition that did not appear in the previous Acts. It represents a widening of

[47] *Swaziland Police Union & Another v The Commissioner of Police & Others* (341/07) (746/07) [2008] SZHC 114.

[48] Individual Case (CAS) – Discussion 2005 Freedom of Association and Protection of the Right to Organise Convention 1948 (No 87) – Eswatini.

[49] Section 20 of the Industrial Relations Act 1980; s 27 of the Industrial Relations Act 1996.

[50] Section 42(1).

[51] Section 42(2).

sorts to the mandate of federations to matters beyond purely industrial relations matters, and undoubtedly a welcome change for labour. This change in the new Act introduces the concept of socio-economic interests and makes it legal for employees to engage in protest action for the promotion of their socio-economic interests.[52] In essence, this type of action is not directed at the employer, but is directed at a third party, for instance, government. The Act lays down certain prerequisites for a protest action to be lawful. It requires that notice must be given of such protest action to the LAB which must attempt to resolve the dispute within seven days, provided that the issues in contention must not be of a purely political nature.[53] In the event that the LAB fails to resolve the dispute within seven days, the Conciliation, Mediation and Arbitration Commission (CMAC) should conduct a secret ballot within seven days to ascertain whether the majority of workers whom it is proposed should take part in the action are in favour of taking such action.[54] This requirement of a secret ballot has been seen as going against the spirit of ILO standards as it could give rise to a long and onerous process, ultimately making it extremely difficult, if not impossible, to exercise such right in practice.[55]

With regard to essential services, the 2000 Act removed from the list of essential services 'any service in a civil capacity in respect of the Government of Swaziland', meaning civil servants. It further excluded the provisions of the 1996 Act that criminalised strike action in essential services. These provisions in the 2000 Act have the effect of bringing the law more in line with ILO principles as demanded by the workers. Civil servants, with the exception of those in the health sector and firefighters, no longer are classified as essential services.[56]

As in the previous pieces of legislation, section 98 of the 2000 Act continues to give protection of the freedom of association and the right to organise as a basic right for both employers and employees. The new Act expands this right by, in addition, providing that employees may take part in the election of a workplace trade union representative, or a staff association representative, or be a candidate for such election.

There is also an addition of a new section, section 99A, entitled 'Rights of trade unions and employers' organisations'. This section gives every organisation the right, subject to the Provisions of Part IV of the Act, to determine its own

[52] See s 40(1).
[53] Section 40(2).
[54] Section 40(6).
[55] Section 68(c).
[56] According to section 93(9) of the Act, essential services are water services, electricity services, fire services, health services, sanitary services, and telephone and telegraphic services. Among this list only fire and health services are provided by government; sanitary services are provided by municipalities and the rest are provided by parastatals or state-owned enterprises. Municipal workers and employees of state-owned enterprises do not form part of the civil service.

constitution and rules;[57] to hold elections for its office bearers, officials and representatives;[58] to plan and organise its administration and lawful activities;[59] to participate in forming a federation of trade unions or a federation of employers' organisations;[60] to join a federation of trade unions or a federation of employers' organisations subject to its constitution; to participate in its lawful activities;[61] and to affiliate with, and participate in the affairs of, any international workers' organisation or international employers' organisation or the ILO.[62]

From the 1980 Act, there has always been a provision requiring the registration of organisations formed under the Act. In the Act, an organisation is defined as a trade union, staff association or employers' organisation in good standing as the context may require.[63] This definition is the same as that found in the 1980 and 1996 Acts. While the 1980 Act defines a federation as an organisation that is wholly comprised of a combination of employers' associations, industry unions or staff associations, as the case may be, the 1996 Act substituted body for organisation and this was maintained in the 2000 Act. Section 17(1) of Act of 1980 provided for the registration of organisations with the office of the Labour Commissioner. The 1996 provision was more specific and provided that '[s]ubject to section 31, within three months after its formation, an organisation or federation shall prepare and adopt a written constitution which shall be submitted to the Commissioner of Labour for registration immediately after its adoption'.

There initially was no similar provision in the 2000 Act, and therein lies the problem. The Act only made provision for the registration or organisation, and the definition of organisation conspicuously neglected to include federations. It is this state of affairs that gave rise to the Industrial Court case between the Minister of Labour and the Attorney-General, on the one hand, and the Labour Advisory Board and the Trade Union Congress of Swaziland (TUCOSWA),[64] on the other. In this case the applicants were seeking a declaratory order that the second respondent, TUCOSWA, was not a worker's federation under the law. This was on the basis of the failure by the Act of 2000 to provide for the registration of federations. The Industrial Court was reluctant to interpret the word 'organisation' in the Act to include federations. The court opined that to do this would be tantamount to the court usurping the powers of the legislature, and that the proper authority to correct the law in the case was not the court but Parliament. The matter giving rise to this case was seen as yet another affront by

[57] Section 99A(a)(i).
[58] Section 99A(a)(ii).
[59] Section 99A(b).
[60] Section 99A(c).
[61] Section 99A(d).
[62] Section 99A(e).
[63] Section 2 of the 2000 Act.
[64] *The Minister of Labour & Another v The Labour Advisory Board & Another* (IC Case 342/12).

the Kingdom of Swaziland to the freedom of association of workers. In addition it was argued on behalf of the second respondent that the court should not give a narrow interpretation as it would be inconsistent with the spirit, object and purpose of section 4 of the Industrial Relations Act as well as ILO standards. While the Industrial Court agreed with this exposition, it maintained that the inconsistency could only be resolved by the legislature.

The Act was amended in 2014 by adding a new section, 32*bis*, to provide for the registration of employer and worker (including staff or management employees) federations, thus curing the problem that led to the TUCOSWA case.

IX THE CONSTITUTION OF 2005

According to its Preamble, the Constitution is the supreme law of Eswatini. However, it does not purport to repeal the 1973 Proclamation to the Nation. This Proclamation remains valid, as does the Public Order Act of 1963. The Constitution has a Bill of Rights in Chapter III, guaranteeing the protection and promotion of fundamental rights and freedoms. Section 32 of the Bill of Rights gives workers the right to freely join or not to join a trade union for the promotion and protection of the economic interests of the worker. This provision of the Constitution, together with the Industrial Relations Act, should, at least in theory, provide adequate protection of the right to freedom of association, bringing the Kingdom's laws into conformity with its international obligations, especially with Conventions 87 and 98. In practice, however, the progress made by way of the Industrial Relations Act and the Constitution was dampened by the application by government of the Public Order Act and the Suppression of Terrorism Act to frustrate trade union activities, particularly peaceful demonstrations and gatherings.

X CONCLUSIONS

Generally, the journey has not been easy for workers in Eswatini in as far as the enjoyment of the right to freedom of association and protection of the right to organise is concerned. There has been a marked improvement over the years since Eswatini joined the ILO as evinced in the current Industrial Relations Act and Constitutional provisions. Workers are continuing to seek the intervention and help of the ILO in convincing the government to make way for a harmonious industrial relations environment by repealing the Public Order Act and the 1973 Proclamation which present a challenge to the enjoyment of workers' rights; alternatively, amending the Public Order Act to specifically remove from its scope the activities of trade unions, staff associations and employer organisations.

While both the Constitution and the Industrial Relations Act (as amended) have significantly improved the position of the law as it relates to the right

to freedom of association, bringing it in line with ILO standards, these improvements are dampened by the continued existence and implementation by law enforcement officers to frustrate workers in their enjoyment of this right. Under the labour relations law, workers now are able to form and join trade unions of their choosing. They further are able to engage in union activities without the fear of criminal and civil sanctions except in situations where they are in violation of the criminal laws, or engage in activities that cause damage to property and injury to persons. Staff or management employees generally are not that active in the country although they enjoy the same rights as those enjoyed by non-managerial workers and employers.

CHAPTER 5

An appraisal of Lesotho's statutory scheme for organisational rights and collective bargaining in the private sector with an emphasis on trade unions' participation

MOTHEPA NDUMO*

This contribution chronicles the impact of the piecemeal regulation of the collective bargaining process in Lesotho's labour market from a content and implementation perspective. This staggered regulatory approach to the institutionalisation of fundamental workers' rights has contributed to the circumscribing of trade unions' ability to participate in collective bargaining and conclude collective agreements at enterprise level. An added aim is to explore the institutionalisation of collective bargaining from a policy-making perspective considering Lesotho's developmental challenges, including a seemingly ever-contracting economy. The Labour Code Order 24 of 1992, the Labour Code Amendment Act 2 of 2000 and the Codes of Good Practice 3 of 2003 are particularly significant for this study. The relevant laissez faire *labour market regulation features include high representivity thresholds for collective bargaining; the justiciability of the Codes of Good Practice 2003; and the lack of provisions for organisational rights that are left to negotiation between the parties. This effectively constrains trade unions. It is concluded that the passage of the Labour Code (Consolidation) Bill of 2018 will significantly improve prospects for trade unions as it proposes the reduction of representivity thresholds for stop-order facilities to 35 per cent and introduces bargaining councils, among other innovations. In terms of the passage of the Bill, it is observed that some of the collective labour rights terrain remains contested in the social dialogue processes currently underway, and it is not clear which provisions will see the light of day once it is enacted by Parliament.*

I INTRODUCTION AND BACKGROUND

Despite the positive effects that international and regional standards have had on policy developments in respect of certain countries of the Southern African region in particular, global tensions and regional labour market difficulties have increased in the recent past. As mentioned in the ILO Centenary Conference's call for papers, '[t]here are a number of deficiencies that are not only limited to the conceptual divide between the protection of labour rights and sustainable development, but also in the content and implementation of regulations.[1]

* BA Law, LLB, PGDip, LLM, MSocSci. Lecturer, Faculty of Law, National University of Lesotho (Advocate of the High Court of Lesotho) and former Secretary-General of the Lesotho University Teachers and Researchers Union (LUTARU).

[1] ILO Centenary Conference Call for Papers 28 February 2019 (emphasis added).

The aim of this contribution is to evaluate the sufficiency of the collective bargaining regulatory machinery in Lesotho's labour market, primarily from a content and implementation perspective, and the ability of trade unions to effectively participate in collective bargaining processes at the enterprise level in the private sector. Organisational rights and collective bargaining are the primary focus of this paper. Collective bargaining takes place at enterprise level because, apart from minimum wage fixing[2] for vulnerable sectors, there is no provision for centralised bargaining in Lesotho.

The timeframe under consideration begins with the promulgation of the Labour Code Order[3] in the early 1990s to date. It should be noted from the onset that modern[4] labour market regulation in Lesotho has never occurred without the technical assistance of the International Labour Organization (ILO). Indeed, the ILO was instrumental in the production and eventual enactment of the Labour Code Order of 1992, as demonstrated below. Lesotho has ratified both the Freedom of Association and Protection of the Right to Organise Convention[5] and the Right to Organise and Collective Bargaining Convention.[6] It has been a signatory to these Conventions since 31 October 1966.[7] Although Lesotho has not ratified the Collective Bargaining Convention,[8] the basic standards provided for in Conventions 87 and 98 are deemed sufficient for the establishment of a domestic machinery which effectively promotes and safeguards collective bargaining and associated processes. Convention 98 promotes the right of workers to organise[9] and the development of domestic machinery for voluntary negotiation between employers and trade unions.[10]

At the regional level, the Charter on Fundamental Social Rights in SADC,[11] to which Lesotho is a signatory, similarly provides a set of standards in the collective labour law arena, including organisational rights and collective bargaining. The ILO conventions governing freedom of association, the right to organise and collective bargaining are regarded as 'priority conventions' that are instrumental

[2] Minimum wage fixing is provided for under ss 47–60 of the Labour Code Order 1992.

[3] 24 of 1992.

[4] It is the author's view that this modern era would have begun in the early 1990s when the military government sought to overhaul colonial and post-colonial pieces of legislation such as the Trade Unions and Trade Disputes Law 1964 (11 of 1964), the Employment Act 1967 (22 of 1967), the Trade Unions and Trade Disputes (Amendment) Act 1974 (5 of 1974) etc.

[5] 87 of 1948.

[6] 98 of 1949.

[7] NORMLEX Ratifications for Lesotho, accessible at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103188 (accessed on 18 May 2020).

[8] 154 of 1981.

[9] Articles 1, 2 and 3.

[10] Article 4.

[11] SADC is the Southern African Development Community.

in the attainment of the objectives of the SADC Charter.[12] Freedom of association, the right to organise, the right to bargain collectively and the right to strike are all treated as essential elements in the scheme that facilitates the attainment of social justice. In particular, the charter entrenches the right of trade unions and employers to bargain and to conclude collective agreements in accordance with national laws and practice.[13]

Furthermore, the charter outlines the scheme for six organisational rights for representative trade unions as follows:[14]

- the right of access to employer premises for union purposes subject to agreed procedures;
- the right to deduct trade union dues from members' wages;
- the right to elect trade union representatives;
- the right to choose and appoint full-time trade union officials;
- the right of trade union representatives to education and training leave; and
- the right of the trade unions to disclosure of information.

According to Du Toit *et al*, organisational rights should be viewed from the context of their deeper socio-economic policy functions. The authors state that 'organisational rights are regarded as a corollary to a voluntarist collective bargaining regime. This is because employers are generally in a position of relative socio-economic strength, appropriate legal rights should be extended to trade unions as a counter-balance.'[15]

This contribution is divided into two main parts. Part 1 consists of an overview of the framework governing collective labour rights in Lesotho. For purposes of establishing a framework for the evaluation of the sufficiency of Lesotho's collective bargaining machinery, this part begins by providing an overview of the entire ecosystem for collective labour rights, ranging from the freedom of association to the right to strike. The objective of this overview is to set the scene for the subsequent evaluation of organisational rights and collective bargaining rights. We then proceed to narrow the focus of the paper to organisational rights and collective bargaining rights, as it is in respect of these two connected and complementary processes that the system in Lesotho exhibits significant deficiencies.

Part 2 of the paper chronicles the ILO's provision of technical assistance and support for labour law reform in Lesotho, particularly in relation to collective bargaining. To round things off, this part of the paper presents the conclusions

[12] Article 5(a); other priority conventions are those dealing with the abolition of forced labour, the elimination of discrimination in employment, the minimum age of entry into employment and 'other relevant instruments'.

[13] Article 4(c).

[14] Article 4(f).

[15] D du Toit *et al Labour Relations Law: A Comprehensive Guide* (2015) 250.

and recommendations. The Labour Code Order is used interchangeably with the Labour Code and refers to the law promulgated in 1992. Where an amendment has been made to the Act it will be cited as amended.

In terms of research methodology, the author conducted desktop research with an emphasis on primary and secondary sources coupled with qualitative semi-structured interviews with three of the five trade union federations in Lesotho and one of the major trade unions in the textile sector.[16] Discussions[17] were also conducted with the Labour Commissioner,[18] the Registrar of Trade Unions and Employers' Organisations,[19] and a Senior Arbitrator at the Directorate for Dispute Prevention and Resolution (DDPR).[20] These interviews and discussions filled in gaps in the literature on Lesotho and provided current context and a view of some of the issues likely to arise in relation to the Labour Code (Consolidation) Bill 2018 and collective bargaining.

II TRADE UNIONS AND COLLECTIVE BARGAINING IN LESOTHO: BACKGROUND AND POLICY CONTEXT

This brief part relies on an historical analyses of Lesotho's trade union movement and labour market and further gives voice to workers via the interviews[21] conducted with trade union federation leaders and one of the largest trade unions in the textile sector. The history of Lesotho's trade union movement and labour market regulatory efforts in the post-independence era is critical to understanding the piecemeal regulatory approach (and resultant deficits) to giving effect to the right to organise and collective bargaining. The purpose is to contextualise and highlight the issues giving rise to the deficiencies pertaining to the right to organise and collective bargaining apparent in our labour legislation. This establishes the underlying rationale for the piecemeal regulatory approach to organisational rights and collective bargaining in Lesotho which, it is asserted, marginalises an already weakened trade union movement.[22]

[16] President RC Mothepu (Lesotho Trade Union Congress), Secretary-General T Ramochela (Alliance of Progressive Trade Unions), Secretary-General T Tolo (Congress of Lesotho Trade Unions), and Secretary-General S Senooe (United Textile Employees). Three of these interviews were telephonic (President RC Mothepu, SG Ramochela and SG Senooe) while one interview was in-person (SG Tolo).

[17] These discussions were conducted in person with the interviewees and no interview instrument had been prepared. What was solicited from these interviewees was their general perception and experiences of the trade union movement and the state of collective bargaining in Lesotho.

[18] Commissioner Ms M Matsoso.

[19] Ms T Lesia.

[20] Ms B Mokitimi.

[21] Interviews (n 16).

[22] It should be noted that the ILO's *Collective Bargaining: A Policy Guide* (2015) 28 encourages member states to be interventionist in establishing collective bargaining frameworks where the social partners are weak.

Lethobane observes that legislation governing the formation and registration of trade unions in Lesotho in the colonial period was promulgated but not implemented for a decade due to 'the negligible size of the working population at the time'.[23] The legislation at the time was the Trade Unions and Trade Disputes Proclamation.[24] The Morija Typographical Workers' Union and the Basutoland Commercial Distributive Workers' Union were the first trade unions to be registered under the Proclamation in 1952.[25] The reasons for this situation are attributed to several factors, including the nature of Lesotho's labour market, which Southall observes to be essentially that of a labour reservoir for the South African mines.[26] Furthermore, Lesotho's relatively undeveloped economy created few formal employment opportunities and successive governments desperately turned to a policy of '[attracting] manufacturing industry by reference to the low cost, *docility and easy availability of workers*'.[27] In the late 1980s and early 1990s Lesotho saw an increase in foreign direct investment (FDI) in the clothing and apparel sector with the Lesotho National Development Corporation (LNDC)[28] aggressively pursuing a deliberate policy of positioning Lesotho as 'offering even lower minimum wage rates than comparable countries and as offering a highly disciplined labour force'.[29]

Southall describes the post-colonial Lesotho labour market in these jarring terms:

> Cheapness, rightlessness, subservience [were] the principal benefit which the resource poor [country] had to offer industrial investors as an incentive to decentralise. The whole thrust of official policy was precisely to minimise wage levels [to] maximise attraction to industry. Labour protection was both minimal and ignored, and occasional worker protests and strikes were dealt with summarily.[30]

The positioning of Lesotho as a low minimum wage-rated country with a highly disciplined labour force by the LNDC clearly had implications for its trade union movement and the policy frameworks meant to enable the right to organise and bargain collectively. This policy may be gleaned from the piecemeal regulatory approach to organisational rights and collective bargaining evident in

[23] LA Lethobane 'Freedom of association, trade union rights and application of international labour organisation conventions: The case of Lesotho' (1997) 1 *Lesotho Law Journal* 96.

[24] 17 of 1942.

[25] As above.

[26] R Southall 'The labour market and trade unions at the South African periphery: Lesotho and Transkei' (1994) 93 *African Affairs* 565.

[27] Southall (n 26) 566 (emphasis added).

[28] The LNDC is a statutory government agency mandated to promote foreign investments in Lesotho and to implement its industrial development policies. The LNDC was established by the LNDC Act 20 of 1967 as amended by Order 13 of 1990 and Amendment Act 7 of 2000. The LNDC falls under the Ministry of Trade and Industry, Cooperatives and Marketing.

[29] Southall (n 26) 573.

[30] Southall (n 26) 574.

the various iterations of the Labour Code Order 1992 to date. The trite mandate of a trade union is to organise and gain employer recognition which enables it to negotiate for better remuneration and other working conditions for the benefit of its members. The scenario described above by Southall was thus ripe for the trade union movement to organise and seek recognition for collective bargaining purposes. Collective bargaining outcomes have been underwhelming over the years, partly due to a lack of effective collective bargaining provisioning in the labour legislation.

How does an enclave economy, such as Lesotho, with a low rate of industrialisation, a low-skilled workforce, and a high proportion of surplus labour effectively navigate competing interests in its labour market? This question is particularly important in the context of Lesotho's ILO obligations, which include the promotion of the right of workers to organise and to bargain collectively with employers. The inability of the domestic trade union movement to cohere has to a large extent lessened these policy pressures but, as Collier[31] has pointed out, the state has to formulate a labour market policy.[32] In this regard, Southall observed that Lesotho's steadily declining comparative FDI advantage and the likelihood of further decline, 'if the traditional quiescence and low cost of labour is lost', was what had constrained successive governments in terms of labour market policy options.[33] Writing on Lesotho's industrial policy, Makoa observed that the enclave economy, dependence on South Africa, the domestic market size and poverty were all features that dictated industrial policy formulation choices.[34] Makoa further observed that '[t]hese features have elicited pragmatic but often discrete responses from policymakers, rather than coherent and stable instruments and guides to industrial development',[35] and cited the textile industry as an example of how the desperation to create employment via FDI constrained progressive policy formulation. Makoa may as well have been describing the nature of labour market policy formulation in Lesotho, as illustrated below. In any event, industrial policy and labour market policy feed into and inform each other and are branches of the larger macro-economic policy tree, so these synergies would be par for the course.

The public policy options dilemma faced by the government was expressed by the then Prime Minister of Lesotho, Dr Mokhehle, in the case of *Lesotho Union of Public Employees v Speaker of the National Assembly & Others*.[36] In this case the constitutionality of the prohibition against public officers forming trade unions

[31] Prof Collier is the ILO-appointed consultant to the Labour Code (Consolidation) Bill 2018 efforts.

[32] Internal working paper (not for citation).

[33] Southall (n 26) 583.

[34] F Makoa 'Industrial policy in the Kingdom of Lesotho' in *Industrial Policy in the Southern African Customs Union: Past Experiences, Future Plans* (Institute of Global Dialogue 2008).

[35] Ibid.

[36] CIV/APN/341/1995.

and only being allowed to form 'staff associations' with limited rights[37] was tested. In what may very well be one of the few moments where the government has been candid about the narrow room it has to craft labour market policy, Dr Mokhehle's answering affidavit, in part, read as follows:

> In the perception of the Government the philosophy behind the provisions of section 31(2) and 35 is the following: Firstly, the economic conditions prevalent in the country and the resources available to Government have to be considered in any sound management of the nation's economy. It is a trite fact that our resources are extremely limited due to several constraints. Not only that the government has to make provisions for its day-to-day operations, it must also provide for developmental activities without which the country's economic future will become bleak. *It is a notorious fact that the main economic nightmare faced by the government is the growing unemployment. Jobs are simply not available to those who enter the labour market.* The prospect of Basotho miners now profitably employed in the mines in South Africa being retrenched therefrom has created problems of frightening magnitude. The prospects of substantial investment of capital from the international donors is not that rosy. Against this bleak economic scenario, the Government has no option but to limit its wage-bill to manageable proportions. Cutting-down the operational budget of the Government is the ever-present demand of the International Monetary Fund and the World Bank, our main donors. A large deficit triggers spiralling inflation which will distort the economy.[38]

Furthermore, Dr Mokhehle states that since trade unions were historically confrontational in nature, it was necessary to restrict their activities in the public service in order to protect the broader public interests.[39] To this end, according to Dr Mokhehle, '[g]overnment had to balance the needs and interests of the nation as a whole, and to provide for a fine proportionality between the measure passed by Parliament and the object desired to be achieved'.[40] At this time, the government was the largest employer in Lesotho.[41] There certainly has been no comparable public pronouncement made by a highly-ranked government Minister regarding the piecemeal regulatory approach to the institution of organisational and collective bargaining measures in the labour legislation of Lesotho. These statements indicate the prevailing sentiment in policy-making circles regardless of which political party is in power and they tend to cascade down to other sectors.

For instance, Chief Justice Kheola, who presided over the instant case, stated that in his experience as a judge of the High Court and as a former Chairperson

[37] The legislation being sought to be impugned on this score was the Public Service Act 35 of 1995.
[38] Note 36, para 11 (emphasis added).
[39] Note 36, para 13.
[40] Ibid.
[41] Note 36, para 18.

of the Unfair Labour Practices Tribunal, he tended to agree with the view expressed in the Prime Minister's answering affidavit that trade unions were confrontational by nature:

> I have presided over a number of cases involving dismissals based on unlawful strikes. In almost all such cases I found that trade unions were not only confrontational but were also unreasonable. They usually take strike action before they have exhausted the procedure prescribed by law. *The strike action is preceded by long negotiations in an attempt to reach settlement of the trade dispute.* These procedures are set out in sections 225, 226, 227 of the Labour Code Order, 1992 … I am convinced that the fear of the respondents that trade unions are confrontational in nature is not unfounded … *The causes of these strikes were unreasonable demand of drastic upward revision of salaries without taking into account the economic resources of this country.* The tendency of the employees in this country is to compare their salaries with those of similar positions in the Republic of South Africa. This approach is altogether unreasonable because the economy of that country is far advanced as compared to Lesotho's economy.[42]

Similar sentiments were echoed by arbitrator B Mokitimi of the Directorate for Dispute Prevention and Resolution (DDPR) during her interview with the author. According to arbitrator Mokitimi, most of the disputes of interest revolved around wage increments followed by a few with demands such as stop-order facilities, protective clothing, overtime rates and weekly rest rates. This further cements the impression that trade unions' sole *raison d'être* in Lesotho is to demand wage increases.[43] To her recollection, arbitrator Mokitimi had only encountered one demand for medical aid; otherwise, in her experience most trade union proposals revolved around wage increments.[44]

[42] Note 36, para 20 (emphasis added).

[43] Arbitrator Mokitimi narrated a real-life scenario of a dispute of interest that she had attempted to conciliate in early 2019 when Lesotho's economy was contracting even further and in dire straits. Arbitrator Mokitimi gave one example of a dispute of interest that was referred to the DDPR and presided over by her in the environment of the economic implosion that has been unfolding in Lesotho's economy well before the Covid-19 pandemic contracted the economy even further. The employer, a South African company, had lost a significant number of clients and millions in revenue due to the prevailing economic crisis and was contemplating retrenchments or a complete shutdown of its Lesotho operations. The employer had offered the trade union a 5 per cent wage increment. The trade union response was that their members were so insistent on 15 per cent (a figure that it could not substantiate or motivate) that they were willing to be retrenched if their demand was not met. Arbitrator Mokitimi stated that this conciliation process had left her with an impression that some trade unionists were willing to gamble with already scarce jobs because they had the cushion of union jobs.

[44] Arbitrator Mokitimi further expressed concern with trade unions' inability to motivate their wage increment proposals. In her experience as a seasoned arbitrator at the DDPR she stated that the common refrain from trade unionists when asked to motivate wage proposals was '*Li ntho li nyolohile*' which, translated, means 'the cost of living has gone up'. She further observed that even seasoned trade unionists were not exempt from this consistent failure to motivate proposals using objectively verifiable criteria. This constitutes bargaining in bad faith. However, the question of trade union capacities to contend with wage negotiations at that level remains.

President RC Mothepu of the Lesotho Trade Union Congress confirmed this by stating that '[w]orkers are only interested in cold, hard, cash, they are not interested in anything else and this limits us in broadening our mandate'.[45] Indeed, the number of protected strikes is far outweighed by unprotected strikes and it would be prudent for all stakeholders to examine the causes of wildcat strikes in Lesotho to date. Perhaps part of the answer may be ascribed to the weak organisational rights and collective bargaining machinery which tend to frustrate trade unions.

The Labour Commissioner[46] cited a recent African Growth and Opportunity Act (AGOA) report that she had read in which some trade union representatives were quoted as having said that they could only bargain at the Wages Advisory Board. The functions of the Wages Advisory Board are set out in section 50 of the Labour Code Order 1992 and this structure is certainly not established to conduct collective bargaining. Section 50 states clearly that the Wages Advisory Board's main function is to advise the Minister of Labour in terms of the formulation of minimum wages and other terms and conditions of employment in vulnerable sectors of the economy. The perception by trade unions that they can validly use the Wages Advisory Board as a bargaining forum is therefore not viewed as a positive sign by some stakeholders. The Labour Commissioner further observed that trade unions tend not to motivate their demands. The Registrar of Trade Unions and Employers' Organisations[47] observed a general lack of rigour in formulating wage increment proposals.

The Registrar wondered what it is that prevents trade unions from effectively engaging in collective bargaining. The author's answer to that lies in the weak provisioning for organisational rights and collective bargaining. Not only is the relevant statutory scheme weak, but the staggered piecemeal manner in which the Lesotho legislature has reformed the labour legislation stunted the growth of a culture of collective bargaining at the enterprise level. To further buttress this, the Labour Commissioner and the Registrar of Trade Unions bore witness to the fact that trade unions had now resorted to using the Wages Advisory Board to attempt to initiate collective bargaining with employer members. These attempts are evidence of the desperation and lack of bargaining capacity of trade unions and further demonstrate the need for a centralised bargaining mechanism which hopefully will be addressed by the Labour Code (Consolidation) Bill 2018.

The central argument of this paper is that weak provisioning for organisational and collective bargaining rights in the various iterations of the Labour Code

[45] President Mothepu narrated an example of a cash-strapped employer who offered the workers a non-contributory education fund to meet the workers halfway on school fees, which the workers refused, insisting on an 11 per cent wage increment despite the threat of possible retrenchments.

[46] Note 18.

[47] Note 19.

Order 1992 to date contributes to adversarial labour relations and further weakens trade unions.

The notion of 'unreasonable demands for higher wages' which appears in the narratives above[48] points to the need for concerted training in collective bargaining and the couching of demands in a reasonable manner as required by section 27(2)(b) and (c) and section 27(3)(b)(ii) of the Codes of Good Practice.[49] Section 27 of the Codes of Good Practice 2003 flows from section 198A of the Labour Code Amendment Act of 2000 which enjoins parties to bargain in good faith. Where sufficient organisational and collective bargaining machinery exists, the author's theory is that the relational muscle will grow because it is exercised often enough to create a culture of social dialogue and reasonable outcomes which take cognisance of the economic realities of Lesotho.[50]

If Lesotho's comparative FDI advantage has traditionally rested on such shaky ground, what are the implications for organisational rights and collective bargaining if the low cost of labour is the main attraction? The labour legislation to date, including the proposed provisions in the Labour Code Consolidation Bill 2018, reflects this policy tightrope that the Lesotho government must walk between domestic labour and inbound capital. The broad contours of the labour market features described by Southall 26 years ago remain the same in 2020. Our labour movement now is relatively better organised thanks to various interventions by the ILO and other development partners, but the low-cost-of-labour imperative, in this harshly competitive FDI environment, still exists. The impact on labour market policy options and formulation, particularly for comprehensive collective bargaining provisioning, cannot be underestimated.

However, tying trade union rights, recognised by the ILO as being fundamental to the attainment of decent work, to the fluctuating economic fortunes of the country is problematic for several reasons. First, it relieves the government of its mandate to create an enabling environment for economic growth and diversification. Second, very little evidence exists that short-changing workers from accessing a coherent framework for organisational rights and collective bargaining is a boon for domestic economic growth. Foreign investors in the textiles manufacturing sector are notorious for huge capital outflows and successive governments bending over backwards to incentivise them to stay on

[48] Judge Kheola in the *Lesotho Union of Public Employees* case (n 36) and Arbitrator Mokitimi at the DDPR and President Cosmas Mothepu of the Lesotho Trade Union Congress (n 16).

[49] These provisions require that parties (i) prepare for negotiations which include developing proposals or standpoints; (ii) motivating any proposals made; and (iii) refraining from making grossly unreasonable demands.

[50] Arbitrator Mokitimi lamented the lack of a bargaining culture by stating: 'What we see often when attempting to conciliate disputes of interest is positional bargaining. The general trend is that employers motivate their counterproposals, but trade unions use the threat of a looming strike to try and gain concessions from the employers.'

at the expense of Basotho workers. Third, the development of the trade union movement in the collective bargaining sphere is marginalised due to weak institutions facilitating social dialogue.

Hayter aptly observed that, for example, public policies in the American labour market that sought to empower trade unions and collective bargaining during the era of the Great Depression were deliberately crafted in aid of broader socio-economic objectives.[51]

Hayter unequivocally stated that public policies should, *inter alia*, strive to '[transform] weak collective bargaining structures into inclusive collective bargaining institutions'.[52]

Below the author illustrates some of the reasons why it is critical for a country with a socio-economic profile such as that of Lesotho to aim higher in terms of choosing a deliberate public policy trajectory for the development of its labour, investment and capital markets. These choices may be painful at first but in the long term are likely to pay off, not only for trade unions and the collective bargaining system but for the entire economy.

III A CRITICAL EXAMINATION OF THE COLLECTIVE LABOUR RIGHTS REGIME IN LESOTHO

The approach adopted in this contribution is to view collective labour rights as an ecosystem wherein all rights and responsibilities feed into, inform and complement one another for the system to function efficiently. The appraisal of organisational and collective bargaining rights therefore is critical as it is these rights that determine the manner, quality and output of engagement in Lesotho's labour relations system. This appraisal is conducted with the Lesotho socio-economic and labour market historical context in mind as it is these contexts that determine the nature of the labour legislation adopted to serve broader policy imperatives. Within these contexts, the author argues that the ultimate marker of success is the relative ease with which the parties get to the bargaining table from a statutory facilitation perspective, as opposed to what the outcome of negotiations may be. This approach accords with the voluntaristic bent underlying the ILO conventions that promote and facilitate organisational rights and collective bargaining and the regional SADC Charter of Fundamental Social Rights which set the standards that member states must strive to promote.

[51] S Hayter 'Unions and collective bargaining' in J Berg (ed) *Labour Markets, Institutions and Inequality: Building Just Societies in the 21st Century* (2015) 116.

[52] Ibid.

(1) *The Constitution of Lesotho and collective labour rights*

The Constitution of Lesotho[53] contains a justiciable Bill of Rights and a separate section titled Principles of State Policy, which are not justiciable. This separation is significant for collective workers' rights. Freedom of association is expressly included in the Bill of Rights and is couched in generalised terms that not only grant the freedom of workers to establish their associations, but to any group of citizens that may wish to associate to further its lawful interests.[54] There is nothing else in the Bill of Rights that provides for collective workers' rights. On the other hand, it is a principle of state policy to encourage 'the formation of independent trade unions and to promote sound labour relations and fair employment practices'.[55] What amounts to 'appropriate steps' in the context of organisational and collective bargaining rights? It must be recalled that the ILO's Declaration on Fundamental Principles and Rights at Work 1998[56] affirmed collective bargaining as a fundamental human right.[57] The 'effective recognition of the right to collective bargaining' is a principal goal of the ILO mentioned in the Declaration of Philadelphia, which forms part of that organisation's constitution.[58]

Even though the concept of 'sound labour relations' is neither defined nor further elaborated in the Constitution, the discussion below demonstrates that a system promoting 'sound labour relations' must, at a minimum, provide:

- for the freedom of workers to associate and register trade unions in the pursuit of their collective economic interests;
- for the right of these duly registered trade unions to organise;
- for representative trade unions to enjoy clearly stipulated organisational rights;
- for representative trade unions to enjoy the right to bargain collectively with or without formal recognition by the employer;
- for trade unions to resort to industrial action without the threat of dismissal where the parties have reached a deadlock; and
- for independent dispute resolution agencies to intervene and endeavour to settle collective labour disputes.

Even though the principles of state policy are explicitly not justiciable, the Constitution states that their attainment shall be progressively realised via legislation and at a rate that takes into account the 'limits of the economic capacity

[53] 12 of 1993.

[54] Article 16(1) mentions ideological, religious, political, economic, labour, social, cultural, recreational, and other purposes.

[55] Article 31.

[56] ILO Declaration on Fundamental Principles and Rights at Work and Its Follow-Up 1998 (Annex Revised 2010).

[57] Article 2(a).

[58] Article 1(a).

and development of Lesotho'.[59] It is problematic when the Constitution does not clearly define concepts such as 'sound labour relations' because any subsidiary legislation that is promulgated to ostensibly attain the progressive realisation of this policy is not benchmarked against a clearly-articulated legal standard. Even though the principles of state policy are not justiciable, they do provide a constitutional basis for one to evaluate whether indeed subsidiary legislation and labour market policies in general in fact promote 'sound labour relations'.

(2) *The Labour Code Order of 1992 and the regulation of organisational and collective bargaining rights*

(a) The context of the adoption of the Labour Code Order 1992

The Labour Code Order of 1992 as amended is the principal piece of labour legislation regulating the Lesotho labour market. The extent to which the Labour Code Order promotes the attainment of 'sound labour relations' in accordance with the scheme set out in the Constitutional Principles of State Policy is debatable. The adoption of the Labour Code Order 1992 saw the ILO play a very prominent role when it was approached in 1988 by the then military government to render technical assistance in updating and revising labour legislation which was 'rather dispersed and piecemeal'.[60] Two years after the request for technical assistance had been made, the ILO issued a technical memorandum to the government which was basically a draft Labour Code and 'much of what was proposed in the initial draft was retained in the final Labour Code Order, 1992'.[61]

This technical memorandum was entitled 'Mission to Advise on the Reform of Lesotho Labour Law'.[62] Some analysts equate the adoption of the Labour Code Order 1992 to the relatively thorough early 1990s reforms in the South African labour market known as the Wiehahn reforms.[63] After much industrial strife in the Lesotho labour market, the new Labour Code Order 1992 was promoted as 'providing a basis for industrial harmony and for smooth relations between employers, unions and government'.[64] The Labour Code Order not only consolidated previous legislation but established new labour market institutions such as the Wages Advisory Board, which would review minimum wages and employment conditions, and empowered labour officers to enforce higher statutory minimum conditions of employment.[65]

[59] Article 25.

[60] ILO/IFC 'Lesotho Baseline Report: Worker Perspectives from the Factory and Beyond' (August 2012) 3.

[61] Ibid.

[62] Ibid.

[63] Southall (n 26) 581.

[64] Ibid.

[65] Ibid.

However, what the Labour Code Order did not do was to provide for a robust and comprehensive system of organisational and collective bargaining rights, perhaps due to a decision by government not to marginalise FDI attraction efforts for the sake of reducing surplus labour in the country. Southall was of the view that the industrial development strategies adopted by Lesotho in the past, with an emphasis on incentives to attracting manufacturing companies, necessitated despotic labour regimes to minimise labour costs.[66] In this scenario, formal employment could not counter the marginalisation of the domestic population.[67] One of the main arguments of this paper is that this very real scenario aptly described by Southall is ripe for the institution of coherent collective bargaining machinery to bring about more balanced and productive outcomes for labour and capital. Having established the integral role played by the ILO in the process of the adoption of the Labour Code Order and its substance, we examine, in detail, how the issue of organisational rights and collective bargaining was addressed in this initial phase of modern labour market regulation in Lesotho.

(b) The Labour Code Order of 1992 and organisational rights

To begin to bargain with an employer, a trade union needs to have a 'foot in the door',[68] that is, to enjoy what are known as organisational rights as a precursor to occupying the seat opposite that of management at the bargaining table. Du Toit *et al* state that 'organisational rights are aimed at assisting unions to build up sufficient bargaining power to persuade employers to negotiate'.[69] The Labour Code Order 1992 neither mentions nor defends 'organisational rights' anywhere in its text, nor explicitly provides for how these may be enjoyed by trade unions.

Section 198(1), titled Reasonable Facilities for Conferring, provides as follows:

> The employer shall allow any officer of a trade union whose members include some of his or her employees reasonable facilities for conferring with the employer and/or his or her employees on matters affecting the employer and those members. Any person who fails to give such reasonable facilities shall commit an unfair labour practice.

Furthermore, the Labour Code does not define what is meant by 'reasonable facilities' nor is there any indication regarding what they would constitute. Could 'reasonable facilities' allude to a physical space designated for deliberations between trade union representatives and the employer? Furthermore, could 'reasonable facilities' allude to a species of conduct which may be deemed as fulfilling this nebulous obligation? Implicit in the 'reasonable facilities to confer' provision is the right of access to the employer's premises to facilitate

[66] Southall (n 26) 82.
[67] Ibid.
[68] Du Toit (n 15).
[69] Ibid.

the discussions. Even though the Labour Code does not use the word 'access', it states that 'the granting of such facilities shall not impair the efficient operation of the undertaking'.[70]

Furthermore, when it comes to the recruitment of employees for trade union membership, there is no clear-cut right in the Labour Code Order for representative trade unions. The Labour Code simply states that where a trade union official seeks to recruit employees at the workplace during normal working hours, they cannot do so without the permission of the employer and that acting contrary to this will amount to the commission of an unfair labour practice.[71] All in all, providing for 'reasonable facilities to confer' does not constitute a clear collective bargaining right and, in light of best practices regionally,[72] only constituted one cog in the machinery of what are known as 'organisational rights'.

The interpretation of 'reasonable facilities' was to some extent considered in the case of *National Union of Retail and Allied Workers v Sotho Development Corporation*.[73] In this case a dispute arose around an illegal work stoppage which the members of the applicant union effected due to dissatisfaction with the handling of the discipline and dismissal of two workers. The employer issued at least two ultimatums to the workers to return to their work stations and to resume their duties, but these ultimatums went unheeded leading to their mass suspension. A senior trade union official was summoned by management a day or two after these suspensions to confer on the way forward. He insisted on meeting management with all the employees present (the employees were barred from entering the premises even though some of them had forced their way in). Management refused this pre-condition for meeting while the union insisted before the Labour Court that this refusal amounted to a violation of section 198 in that it had been denied reasonable facilities for conferring.[74]

Regarding section 198 in the context of the instant dispute, Judge President Lethobane stated the following:

> It seems to the Court that [the trade union official] has misconstrued Section 198 of the Code, as an axe with which he will intimidate every employer into submission. The section clearly states that an employer shall grant a union official reasonable facilities for conferring … it was not reasonable for [the trade union official] to have not taken into account management's legitimate concern for their safety and the safety of the property of the company when they requested him to clear off the striking workers before the meeting could proceed.[75]

[70] Section 198(2).
[71] Sections 199(1), 199(3).
[72] Charter on Fundamental Social Rights in SADC of 2003.
[73] LC/106/1996.
[74] LC/106/1996, 2.
[75] LC/106/1996, 3.

In the final analysis, the court found that, in fact, the employer had made efforts to facilitate talks with the trade union and had acted in lockstep with section 198. Another question that arises is the significance of the provision stating that a failure by any employer to grant a trade union these 'reasonable facilities' amounts to an unfair labour practice. The Labour Court has the jurisdiction to inquire into and determine cases of alleged unfair labour practices.[76] Where the Labour Court finds that an unfair labour practice has occurred, it has the power to grant orders, including interdicting the acts complained of.[77] The rest of the powers of the Labour Court in instances of unfair labour practices are specific to each type of unfair labour practice and are not applicable to the instance of the denial of reasonable facilities for conferring.[78]

Furthermore, section 199(2) states that '[n]o officer of a trade union or other person shall, without the consent of the employer, confer with an employee on trade union matters while the employee is on the premises of the employer during normal working hours'. The Labour Code further ensures that the granting of these facilities shall not impair the smooth running of the employers' operations.[79] The operational efficiency consideration permeates other trade union organising provisions in the statute as amended.[80]

The critical question that arises in the context of poor provisioning for collective bargaining is: what kind of outcomes would section 198 deliberations be expected to yield? There are approximately five synonyms for the word 'confer', including to talk, discuss, deliberate, consult and converse.[81] None of these occurrences amounts to bargaining collectively with an employer or an employer's organisation with the view to concluding a collective agreement. Gernigon *et al* state that the ILO's interpretation of the term 'negotiation' is 'any form of discussion, formal and informal, that was designed to reach agreement'.[82] The term 'negotiation' is deemed preferable to 'discussion', which does not emphasise the need to endeavour to secure agreement.[83] Indeed, there is nothing in the manner in which section 198 is conceived which would reasonably lead us to infer the creation of a right to negotiate.

[76] Section 201.

[77] Section 202(1).

[78] Sections 202(2), 202(3).

[79] Section 198(2).

[80] For example, s 199 which (i) prohibits trade union recruitment within working hours without the employer's permission and (ii) disallows conferring on trade union matters within working hours on the premises of the employer without permission. The violation of this provision is designated as an unfair labour practice.

[81] MS Word Online Thesaurus.

[82] A Gernigon *et al* 'ILO principles concerning collective bargaining' (2000) 139 *International Labour Review* 36.

[83] Ibid.

Another aspect of section 198 which reinforces an element of vagueness is the reference to 'matters affecting employers and employees', and this begs the question, what matters specifically? There are a plethora of matters affecting employers and employees, arguably, everything under the sun. It does not accord with best practices governing collective bargaining to leave the bargaining agenda open-ended. It makes more sense to set parameters around the bargaining agenda or matters of mutual interest in the applicable statute and provide clear guidance. The Codes of Good Practice[84] define 'matters of mutual interest' and provide clear examples of the kinds of topics such matters would involve,[85] whereas the primary legislation does not.[86] The Labour Code (Amendment) Act 2000 only goes so far as to provide for the settlement of 'disputes of interest'.[87]

With the foregoing in mind, it is the author's contention that, at best, and with necessary modifications, section 198 would constitute a foundational part of a scheme intended to grant the full suite of organisational rights to trade unions if such an amendment were to be introduced. As previously illustrated, the SADC Charter 2003 contains a comprehensive provision regulating organisational rights. Any law reform efforts which do not take the SADC Charter provisions into full account inevitably delay the attainment of social justice in the workplace, particularly in the context of a weak domestic trade union movement. Another weakness of the Labour Code Order when it comes to organisational rights is the lack of a set of provisions that establish thresholds at the enterprise level. The reasonable facilities to confer and the recruitment of employees for trade union membership discussed above are not subject to any statutory representivity thresholds.

The shortcomings in the primary legislation are often addressed, to some extent, by the Codes of Good Practice 2003. However, as far as organisational rights are concerned, even the Codes of Good Practice are virtually silent. The only allusion to organisational rights in the Codes of Good Practice states very clearly that organisational rights are to be negotiated by the parties.[88] Therefore, a trade union that has already achieved representativeness still has to negotiate for organisational rights over and above substantive improvements to the terms and conditions of employment of its members which is its main mandate. As stated above by Du Toit, if organisational rights are 'aimed at assisting unions to

[84] 4 of 2003

[85] Sections 26(2)(3) and (4).

[86] The Labour Code Order 1992 defines a trade dispute but not negotiations over matters of mutual interest. Section 3 defines 'trade dispute' as 'any dispute or difference between employers or their organisations and employees or their organisations, or between employees, and employees, connected with the employment or non-employment, or the terms of the employment, or the conditions of labour, of any person'.

[87] Section 25 amending s 225 (the 2000 Act reworked the 'trade dispute' terminology of the Labour Code Order 1992 by referring to 'disputes of interest').

[88] Section 26(a) clearly designates organisational rights as a 'matter of mutual interest'.

build up sufficient bargaining power to persuade employers to negotiate',[89] then unnecessary hurdles are being placed in the path of *representative* trade unions in Lesotho. Secretary-General T Tolo of the Congress of Lesotho Trade Unions (COLETU) expressed frustration at the lack of provisioning for organisational rights in the labour legislation, stating that '[j]ust to enter these workplaces is a challenge; some progress is evident in the textile sector but it is very thin. We are simply too weak fifty years after independence.' Organisational rights are facilitative and are a precursor to a collective bargaining process; they are a catalyst and what makes it possible to shepherd the parties to the negotiation table, not an end in and of themselves. Already weak and fragmented Lesotho trade unions would benefit from a clearly-stipulated regime of organisational rights which would prime them for collective bargaining. It would not be a free-for-all as the emphasis would still be on representativeness.[90]

(c) The Labour Code Order and collective bargaining

The only allusion to collective bargaining in the definition section is the definition of a collective agreement, which means 'an agreement entered into freely between an employer or a group of employers and a trade union representing *any* employees of that employer or group of employers'.[91] Taking into consideration the fact that it takes a minimum of 10 employees to establish and register a trade union,[92] it stands to reason, therefore, that 10 or more employees belonging to a trade union could theoretically conclude a collective agreement there being no other statutory hurdle to clear. The reality, however, is much more complex as can be seen in the relatively few collective bargaining cases adjudicated by the Labour Court, discussed below.

This definition was replaced by section 2(b) of the Labour Code (Amendment) Act,[93] which stipulates that a collective agreement 'means any written agreement entered into between a registered trade union and an employer or employers' organisation in respect of any matter of mutual interest and includes agreements on recognition, agency shops and grievance, discipline and dispute procedures'. It is not clear why the word 'freely' was removed in the amendment, except perhaps for one to speculate that it goes without saying, in a voluntarist system, that the parties would negotiate freely without any third parties compelling them to do so.

[89] D du Toit (n 15).

[90] The representativeness hurdle currently being 50 per cent + 1 and admittedly steep for any domestic trade union to reach.

[91] Section 3 (emphasis added).

[92] Section 172.

[93] 3 of 2000.

Most significant is the insertion of 'matters of mutual interest' because the 2000 amendment introduced the Directorate for Dispute Prevention and Resolution (DDPR), which employs conciliators and arbitrators to settle disputes of interest and disputes of right. Disputes of interest fall squarely within the collective bargaining sphere and the bargaining parties approach the DDPR for conciliation where their negotiations have reached a deadlock in a bid to delay industrial action. Looking at both the Labour Code Order of 1992 and the Labour Code (Amendment) Act of 2000, it therefore is clear that the Labour Code does not define collective bargaining, only the product of it. This lack of a definition is not accidental and conforms to the *laissez faire* policy approach evident in the Labour Code when it comes to processes facilitating collective bargaining.

However, in section 4 the Labour Code identifies four principles that should be used in its interpretation and administration. Section 4(a) is worth quoting as it was the only provision that alluded to the process of collective bargaining in the entire Labour Code Order for the eight years prior to the enactment of the Labour Code (Amendment) Act of 2000:

> The standards laid down in the Code are the minimum legally obligatory standards and are without prejudice to the right of workers individually and collectively through their trade unions to request, to bargain for and to contract for higher standards, which in turn then become the minimum standards legally applicable to those workers for the duration of the agreement.

Section 4(a) does two things that are significant for collective bargaining. First, it establishes the right of trade unions to bargain collectively on behalf of their members in the pursuit of standards superior to the minima set in the Labour Code. Second, it protects the product of bargaining, that is, a collective agreement, by reiterating its binding nature during its term of operation. However, this is as far as the first iteration of the Labour Code Order goes in terms of collective bargaining.

An interesting question that has come before the Labour Court revolved around the voluntarist nature of Lesotho's collective bargaining system and the misapprehension that the applicant trade union seemed to be labouring under regarding the court's powers to compel the conclusion of a collective agreement. This question came for determination in the case of *FAWU v Sun Textiles (Pty) Ltd*.[94] FAWU lodged a case with the Labour Court requesting the court to, first, make an order compelling the employer to enter into a collective agreement with it and, second, to declare that the refusal by said employer to recognise it was an unfair labour practice. The trade union specifically cited the duty to bargain in good faith regime under section 198A of the Labour Code (Amendment) Act of 2000 as establishing the basis for its claim. During the court proceedings

[94] LC/26/2012.

the employer emphasised its stance that 'no one can be compelled to sign a collective agreement'.[95] Upon this insistence by the employer, the trade union changed its tune and stated that all that it was asking for was an order directing the employer to bargain in good faith.[96] The court reaffirmed the voluntaristic orientation of the Labour Code Order, as amended, specifically citing the definition of a collective agreement under section 3 and declined jurisdiction in the matter.[97] Because the unfair labour practices regime is tightly defined under the Labour Code, the court further stated that it had no jurisdiction to declare the failure or refusal to recognise a trade union as an unfair labour practice and that, in any event, the issue of recognition similarly was one of volition and not compulsion.[98] The court advised the applicant union to utilise the conciliation procedures stipulated under section 225 of the Labour Code Order, as amended, to endeavour to reach a settlement of the dispute.[99] The failure of the conciliation process at the DDPR inevitably leads to industrial action.

The *FAWU* case raises a few questions: why did the applicant trade union entertain the belief that the conclusion of a collective agreement could be compelled by the Labour Court and that the failure by the employer to agree to its proposals and recognition amounted to an unfair labour practice? Could it be that after clearing all these regulatory hurdles – that is, organising and recruiting members, presumably attaining representivity status and kick-starting a negotiation process – the trade union felt that the failure to conclude an agreement effectively nullified all its efforts? Why do trade unions embark on collective bargaining if not to conclude collective agreements without resorting to industrial action? The ILO has made various efforts to train trade unionists in Lesotho on collective bargaining, and other interventions, precisely because research on the ground has shown that there is a need for this type of education and training.[100]

The Labour Code Order initially did not regulate the process of collective bargaining for representative trade unions, nor did it provide for a duty to bargain. The Labour Code (Amendment) Act 2000, however, introduced some

[95] *FAWU* (n 94) para 5.
[96] *FAWU* (n 94) para 9.
[97] *FAWU* (n 94) paras 8 and 9.
[98] *FAWU* (n 94) para 11.
[99] Ibid.
[100] Arbitrator B Mokitimi, whose views were canvassed above, emphasised this point by stating that sustained and institutionalised training for trade unionists indeed was necessary. The arbitrator highlighted the key relevant training needs as being an emphasis on the nature of disputes of interest and training on bargaining on an expanded agenda as opposed to this culture of bargaining for wage increments. Arbitrator Mokitimi stated that the DDPR used to offer in-house training, which was greatly beneficial to trade unionists and other stakeholders, although such training was not solely focused on capacitation in organising and collective bargaining. However, such training is no longer offered by the DDPR.

changes in this regard. First, the 2000 Amendment Act introduced a 50 per cent + 1 representivity threshold for trade unions at enterprise level.[101] The majority of the interviewees raised serious concerns about the 50 per cent + 1 threshold with Secretary-General S Senooe,[102] observing that '[d]ue to the high rate of casualisation and the frequent hiring and firing of workers it is nearly impossible to reach 50 + 1'. Mr Senooe informed the author that they had in fact cleared this representivity threshold in three enterprises and he attributed this to training and capacity-building assistance from the ILO and the union's other international partners. President Cosmas Mothepu[103] explained the failure of most trade unions to meet the 50 per cent + 1 representivity threshold thus: 'Due to proliferation, you will find five trade unions organising in one enterprise and these unions even recruit from each other.' According to Mr Mothepu, proliferation, a lack of cooperation and poaching from one another were due to divisions caused by Lesotho's conflictual partisan politics history. The Secretary-General of the APTU,[104] Mr T Ramochela, added his voice to these sentiments by stating that '[a]chieving 50% + 1 is almost impossible because a trade union will at best have a membership of 5 000–7 000 in a workforce of 40 000'. The 50 per cent +1 threshold, indeed, is quite high seeing that Lesotho has a weak and fragmented trade union movement.

In *LUTARU & NAWU v National University of Lesotho*[105] the first applicant trade union, LUTARU, creatively established the 50 per cent +1 representivity requirement without even breaking a sweat by providing in its constitution that 'all full time and part time teaching research staff of the University shall be regarded as members of LUTARU unless they notify the Secretary in writing of their unwillingness to be so regarded'.[106] The second applicant trade union, NAWU, had an identical provision in clause 15 of its constitution. The Labour Court held that both clauses were valid and since no employees had written such notices to the secretaries, these unions validly represented most, if not all, the employees in the respective bargaining units.[107]

[101] Sections 198A(1)(a), (c).

[102] United Textile Employees (UNITE).

[103] Lesotho Trade Union Congress (LTUC).

[104] Alliance of Progressive Trade Unions (APTU).

[105] LC/02/2006.

[106] Clause 4.1 of the Constitution.

[107] The court stated: 'In paragraph 1.5 of the Originating Application the applicants aver that they represent "the bulk of the employees of the respondent who are members thereof".' The respondent denied this averment and put the applicants to the proof thereof. Clauses 4.1 and 15 of the applicants' constitutions clearly show that they are representing the bulk if not the entire workforce of the respondent in the relevant categories. It seems to us, therefore, that once the applicants have proved representivity as we believe they have, by operation of law viz section 198A the respondent has to deal with them and allow them to negotiate on behalf of their members. Equally the applicants assume the right of representation of those of their members by reason of their having agreed to belong to the

Trade unions that clear the 50 per cent + 1 representivity threshold now have an established right, namely, that employers are enjoined to bargain collectively in good faith with representative trade unions.[108] The inclusion of a duty to bargain in good faith in the 2000 Amendment Act signalled a real shift in policy-making as the content of the duty to bargain, although not explained in detail in 2000, was further explicated three years later via the Codes of Good Practice of 2003.

The duty to bargain in good faith is a mutual duty which obliges both parties to the bargaining process to adhere to its prescripts.[109] Organisational rights, however, are excluded from the purview of this collective bargaining innovation and remain subject to negotiation and the conclusion of a collective agreement governing their enjoyment. This approach does not accord with the standards set in the SADC Charter 2003, which promotes strengthening the machinery for collective bargaining in a manner that seeks to balance the relative socio-economic power of employers and employees. The lack of the provision of a clear set of organisational rights for representative trade unions is bound to exhaust already weakened trade unions. Organisational rights do not compel bargaining outcomes and are in sync with a voluntarist system of collective bargaining.

A layer of protection has been added to the representivity threshold provision in favour of trade unions. For example, where the employer disputes the representativeness of a trade union seeking to exercise the rights accorded to representative trade unions, the 2000 Amendment Act provides for the summary determination of representativeness disputes.[110] Such disputes are subject to arbitration and the award is final and binding.[111] It is to be noted that by selecting to attach the duty to bargain in good faith to representativeness, the 2000 Amendment Act, therefore, excludes minority trade unions aspiring to meet the 50 per cent +1 threshold from protection from any acts of employer recalcitrance aimed at marginalising said unions.

The 2000 Amendment Act does not stipulate what the duty to bargain in good faith actually entails, but the Codes of Good Practice: Collective Bargaining[112] provide a clear demonstration that the duty to bargain in good faith is a fully loaded term containing certain duties with which the parties are expected to

union. There is no proof that they disaffiliated in writing to the General Secretaries as provided in art 4.1 and 15 of their constitutions.

[108] Section 198A(2).

[109] Section 198A(3).

[110] Section 198B.

[111] Arbitration awards may of course be reviewed by the Labour Court on application by either one of the parties.

[112] 4 of 2003.

comply.[113] Where a trade union is recognised by the employer, the Codes of Good Practice, in addition, stipulate the types of conduct that amount to good faith and bad faith respectively.[114]

The main problem with the Codes of Good Practice is their status and justiciability in law.[115] To ensure that the codes are not arbitrarily disregarded, the same preamble provides that decision-makers, including conciliators, arbitrators and employers, must take these into account when discharging their statutory duties. Furthermore, the Code of Good Practice: Collective Bargaining provides that '[t]he guidelines should be followed. They may be departed from only if there is good reason to do so. Anyone who departs from them may have to justify the departure.'[116] Most significantly, section 228D of the Labour Code (Amendment) Act 2000 states that, insofar as DDPR proceedings are concerned, '[t]he arbitrator shall take into account any code of conduct or guideline, published by the Minister in accordance with this Act, that is relevant to a matter being considered in the arbitration proceedings'. Not only do DDPR proceedings mandatorily refer to the Codes of Good Practice 2003, but the Labour Court and the Labour Appeal Court place significant reliance on the codes whenever primary legislation gaps are evident. It is established practice in our jurisdiction for employees or their trade unions, employers or their organisations and the dispute resolution institutions to integrate the codes in making out a case or rendering decisions, respectively.

Lesotho's collective bargaining regime undoubtedly is voluntarist, as demonstrated by the definition of a collective agreement in the Labour Code

[113] Section 23(4) outlines three duties as follows: (i) the duty to bargain itself; (ii) the duty to disclose relevant information; and (iii) the duty of the trade union to fairly represent all employees, including non-members, in certain circumstances. The author submits that subsuming the duty to disclose information under the duty to bargain in good faith regime is a consequence of the lack of provision for organisational rights in the Labour Code Order as amended.

[114] Good faith bargaining conduct demonstrates the parties' desire to reach an agreement and, according to s 27(2)(a)–(f), is constituted by (i) respect for each other; (ii) preparing for negotiations, which includes developing proposals or standpoints and securing mandates for those proposals; (iii) retaining a consistent delegation unless there are good reasons to change the delegation; (iv) attending meetings and on time; (v) motivating any proposals made; and (vi) considering proposals made by the other side and, if not accepted, motivating why they are not accepted. Bad faith bargaining conduct, according to s 27(3)(b) on the other hand includes (i) breaching the provisions of good faith bargaining; (ii) making grossly unreasonable demands; (iii) refusing to make concessions; (iv) refusing to disclose relevant information reasonably required for collective bargaining; (v) being insulting, derogatory or abusive in negotiations; (vi) delaying negotiations without good cause; (vii) imposing unreasonable conditions for negotiations to proceed; (viii) by-passing the trade union; and (ix) engaging in industrial action before negotiations have been exhausted and deadlock has been reached. All such conduct clearly negates the desire to conclude a collective agreement.

[115] The Preamble to the Codes of Good Practice states that '[a] code of good practice is what is called "soft law". This means that the provisions of the code do not impose any obligation on any person. They constitute policy or best practice – in other words what is expected of a person.'

[116] Section 22(4).

Order 1992, which emphasises that it is entered into 'freely' and does not compel any bargaining outcomes. Although this definition was amended by the Act of 2000, the voluntarist bent of the system has not been altered, and rightly so. The 2000 Amendment gave trade unions that met the statutory thresholds a leg to stand on in, at least, claiming a more solid basis for recognition and representativity and to engage in collective bargaining at the enterprise level.

To date, there is no framework for centralised collective bargaining in Lesotho,[117] although the current Labour Code (Consolidation) Bill of 2018 for the first time, contains provisions that institutionalise sectoral bargaining chambers. The Bill further proposes to reduce the 50 per cent + 1 representivity threshold requirement to 35 per cent to enable trade unions to claim the organisational right of stop-order facilities. In other words, the Bill does not disturb the 50 per cent + 1 requirement that enables a trade union to claim collective bargaining rights from the employer, but only facilitates a limited set of organisational rights contrary to the SADC Charter and the ILO Conventions.

The text of the Bill reportedly remains contentious, and it is not clear which provisions will eventually see the light of day. For example, Secretary-General T Tolo[118] during an interview stated:

> The employers are very resistant to the sectoral bargaining chambers proposal[119] but that is what is currently on the table in terms of the Bill. It is possible that the final draft will have these sectoral bargaining provisions elbowed out; the entire Bill itself is under threat to be quite frank.

These views were repeated by Secretary-General T Ramochela,[120] who further lamented the wasted opportunity that was the aborted attempt to review the labour legislation in 2006. The 2006 amendment proposals contained a set of organisational rights but that entire draft never saw the light of day. Furthermore, Mr Ramochela noted that there were no more than three trade unions that entered collective bargaining arrangements in the entire country. Mr Ramochela stated that it often felt as if the domestic trade unions were 'howling at the moon' when trying to seek organisational and collective bargaining rights at the enterprise level. The Secretary-General described a scenario that in his view frequently occurred, namely, that 'where a trade union is fortunate enough to have concluded a recognition agreement, it is not unusual for the employer to empower itself to cancel the recognition agreement'.[121] Mr Ramochela fully

[117] Apart from the minimum wage-fixing machinery for vulnerable sectors, which is centralised and is governed by ss 47–60 of the Labour Code Order 1992.

[118] Congress of Lesotho Trade Unions (COLETU).

[119] The reason advanced by Secretary-General Tolo for this recalcitrance by employers to embrace centralised bargaining is that they are anticipated to be very expensive to institutionalise.

[120] Alliance of Progressive Trade Unions (APTU).

[121] Mr Ramochela noted, however, that there were some progressive employers, particularly in the retail sector, which is dominated by South African companies, which have a union-friendly culture,

endorsed the provisions contained in the Bill that would at least see trade unions qualifying incrementally for certain stipulated rights, starting with a floor of a 35 per cent representivity requirement. If a trade union has at least 35 per cent membership, the Bill, via section 198G, would qualify it for stop-order facilities, and if a trade union has 50 per cent + 1, it would qualify for the full suite of organisational rights.

This amply demonstrates the hesitancy of the social partners, especially policy-makers and employers, to grant Lesotho trade unions the elusive foot in the door referenced by Du Toit above. The collective labour rights proposals in the Bill, however, show that the social partners in Lesotho realise the need for further changes in regard to organisational rights and collective bargaining. The ILO continues to render technical assistance to the current law reform initiative. To this end, it has provided external consultants and organised workshops around the issues that have been identified as requiring reform, or at least extensive tripartite discussion.

IV THE ROLE OF THE ILO IN LESOTHO'S COLLECTIVE BARGAINING ARENA

Lesotho has been a longstanding beneficiary of ILO technical assistance interventions both as a member state and by virtue of its membership of the SADC. Therefore, what substantive gains have been realised from these ILO interventions in terms of trade unions' acquisition of organisational rights and participation in collective bargaining? This part outlines some of these interventions and, where possible, assesses their impact on the statutory regime governing collective bargaining since 1992 to date. ILO technical assistance interventions in Lesotho have resulted from direct requests to the ILO or from collaborations between the ILO and countries such as the United States via its Department of Labour (USDOL).

Specific collaborations had a bearing on technical assistance for the improvement of labour administration systems, collective bargaining and dispute resolution. Included in this category is Strengthening Labour Administration in Southern Africa (SLASA) which was implemented from October 2001 for a period of three years.[122] As previously noted, the ILO had already played a role in rendering technical assistance to the military government of Lesotho in overhauling the fragmented colonial era and post-colonial labour laws and rationalising and consolidating them into the Labour Code Order of 1992.

and he noted that in this sector it was not unusual for collective agreements to govern the relationships between the unions and employers.

[122] C Fenwick 'Improving Labour Administration Systems in Southern Africa: Report of the Final Evaluation' (December 2008) 8.

Following the implementation of SLASA and building upon some of its gains, the ILO, again in partnership with USDOL, implemented a project titled Improving Labour Administration Systems in Southern Africa (ILSSA).[123]

According to the ILSSA final evaluation report, ILO technical assistance has been particularly robust in areas such as freedom of association, collective bargaining, dispute resolution, labour administration and capacity building for trade unions and employers' organisations.[124] With regard to collective bargaining, the ILSSA final evaluation report stated that '[a]ll [project countries including Lesotho] have paid particular attention to the freedom of association and, the need to ensure effective recognition of the right to bargain collectively'.[125]

Furthermore, during the life of the project, '[training was delivered] on collective bargaining and negotiations to representatives of the tripartite partners [in Lesotho]'.[126]

However, 16 years after the implementation starting date of these projects, the challenges are more or less still the same in terms of capacity, which determines and influences the manner in which trade unionists generally acquit themselves in collective bargaining processes. One of the weaknesses identified in the final project evaluation report in terms of the assumptions underlying the project design and implementation of ILSSA was the training-of-trainers approach of which the anticipated multiplier effect did not necessarily materialise in practice.[127] In other words, there was no discernible multiplier effect from those trade union leaders who had been trained in negotiations and dispute resolution during the life of ILSSA and SLASA before it.

One of the reasons advanced for this lack of a multiplier effect on the part of trade unions included the nomination of candidates who may not have been suitable for the training of trainers.[128] Secretary-General Tolo of COLETU decried what he called the 'labour consultant' phenomenon among trade unionists who now were, according to him, behaving very much like ambulance-chasing lawyers. Mr Tolo further observed that '[t]he capacity of unions to engage is found wanting. We have illiterate shop stewards and union officials who are not adequately equipped to deal with people who are so powerful on the other side.'

A multiplier effect was similarly not seen post-intervention with the other tripartite partners. This is because some government employees who had been trained were transferred to other posts or experienced changed prospects in

[123] Fenwick (n 122) 8, 9.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Ibid.
[128] Fenwick (n 122) 16.

their employment, which negated the training gains.[129] In addition, employer nominees subsequently carved out careers as labour consultants, which certainly was not at all an objective of these projects.[130] It was also pointed out that the best way to extract maximum value from the train-the-trainers approach was to engage seasoned negotiators to train on collective bargaining.[131]

For training to yield the desired outcomes it would have to go beyond the life cycles of projects such as SLASA and ILSSA and be institutionalised to build on the gains made during the life of said projects. A twin challenge exacerbating this issue of a lack of sustained training is that of the fragmentation of an already weakened trade union movement. It is fairly easy to establish a trade union in Lesotho, where the minimum requirement for membership is ten subscribers.[132] This has led to the proliferation of trade unions that are not necessarily eager to amalgamate and/or cooperate in meaningful ways. The ILSSA report specifically highlights low trade union federation membership levels and fragmentation as a serious challenge in Lesotho.[133] Ten years after the publication of the ILSSA report, the scenario has not changed much or for the better.

However, during the author's discussions with the Labour Commissioner,[134] she highlighted that in terms of capacity building in the textile manufacturing sector, most especially, the ILO/IFC Betterwork project had made a significant impact. The Registrar of Trade Unions and Employer's Organisations[135] further highlighted the role that the ILO's specialist agency Bureau for Workers' Activities (ACTRAV) plays in capacitating Lesotho trade unions.

That said, the process and results of enterprise-level collective bargaining in Lesotho are so underwhelming that trade unions are now increasingly seeing sectoral bargaining as a panacea for their long-held struggles. All the trade union federations representatives interviewed were of the same sentiments regarding the need to institutionalise centralised collective bargaining in Lesotho's labour market. The latter relate to accessing organisational rights, meeting representivity threshold requirements, gaining recognition as collective bargaining partners and concluding collective agreements to address matters of mutual interest at the workplace. It was only after the ILO/Swiss Project in the early 2000s that the Directorate for Dispute Prevention and Resolution (DDPR) was established. In addition, conciliators and arbitrators were trained and the Labour Code (Amendment) Act of 2000 was enacted to provide for the duty to bargain in good faith and empowered conciliators to work with trade

[129] As above.
[130] Fenwick (n 122) 14.
[131] As above.
[132] Section 172.
[133] Fenwick (n 122) 9.
[134] Interview (n 18).
[135] Interview (n 19).

unions and employers to resolve disputes involving matters of mutual interest. Labour law reform efforts post-1992, sponsored in large part by the ILO and its partners, and Lesotho's commitment to adhere to the ILO Declaration on the Fundamental Principles and Rights at Work of 1998, have seen some activity to bolster collective bargaining over the years. Most significant for collective bargaining, from a regulatory perspective, has been the enactment of the Codes of Good Practice of 2003.

In conclusion, although ILO technical cooperation and commitment have undoubtedly remained sustained in Lesotho, and the SADC region, over many decades, issues such as implementation, enforcement, labour law reform and capacity-building remain vexing issues. Indeed, Lesotho is a least-developed country with various developmental challenges that hamper its economic growth and in turn constrain progress in areas including trade unions and collective bargaining and the options available to policy and law-makers. For instance, a common refrain in public discourse is that the attraction of foreign direct investment for job creation should trump all else. This suggests that labour's demands on issues including job quality, adequate compensation and terms and conditions of employment, may render Lesotho a less desirable investment destination than, say, another SADC member state.

V CONCLUSIONS AND RECOMMENDATIONS

Southall observed 26 years ago that workers in Lesotho and their trade unions were becoming more and more forthright about their determination to share the real gains of economic prosperity in the following specific ways:

- better wages;
- the right to organise; and
- the right to representation and negotiation.[136]

The 'sound labour relations' principle of state policy in Lesotho's Constitution and the Labour Code Order 1992 provisions, ostensibly meant to facilitate the right to organise and collective bargaining to serve these aims, is not quite yet a reality. It is only the Labour Code (Consolidation) Bill 2018 and the nature of the emergent organisational and collective bargaining scheme that will illustrate whether the social partners indeed are committed, in a tangible way, to workers sharing in the spoils of economic prosperity.

This contribution set out to critically examine the sufficiency of the collective bargaining regime in Lesotho's labour market as contained in the Labour Code Order of 1992 as amended. The author did this primarily from the perspective of trade unions as they stand to benefit the most from any enhancements introduced

[136] Southall (n 26) 585.

via labour law reform to the current system. The issue of a need for Lesotho, as any other country, to consider the range of labour market policy options realistically available to it and, in turn, intentionally to choose a policy and legislative direction in line with its developmental objectives has been highlighted by various ILO-sponsored reports.[137] Needless to state, the tensions inherent in policy formulation in a least-developed country context, such as that of Lesotho, and the need for policy-makers to balance competing economic interests always presents any government with various challenges. A coherent and comprehensive statutory scheme for collective bargaining is not possible without a firm foundation of equally coherent and discernible labour market and macro-economic policy. Lesotho currently lacks such a labour market policy due to a number of factors, including political instability,[138] a narrow range of policy formulation options due to its least-developed country status, and tripartite structures that lack the capacity to engage in a productive national conversation around labour market policy formulation. These factors have resulted in a piecemeal approach to labour law reform, which has influenced the content of the Labour Code Order 1992 as amended in the context of organisational rights and collective bargaining and the implementation of existing provisions. It is only if the current Bill is passed that the organisational right involving access to stop-order facilities will for the first time be included in Lesotho's history. However, the question remains, what about the other organisational rights?

The SADC Charter contains a comprehensive list of organisational rights, but the approach in the current dispensation and the Bill is that the majority of organisational rights are subject to negotiation. This is a limitation that requires further intervention and perhaps the final text of the current Bill may adopt the full complement of organisational rights to facilitate collective bargaining. A victory for trade unions in the current Bill is the reduction of the representivity threshold requirement from 50 per cent +1 to 35 per cent. Even though this is limited to accessing stop-order facilities, it signals that there now is a dialogue among the social partners around the validity of the 50 per cent + 1 threshold in a labour market characterised by a trade union movement that is weak and fragmented.

The Bill's proposal for bargaining councils does not displace enterprise-level bargaining. This development is likely to ameliorate some of the trade union participation deficits such as low membership and fragmentation and also reduce employer hostility and recalcitrance. These have been perennial challenges over the last 28 years since the promulgation of the Labour Code Order of 1992. From

[137] Some of these reports (in the current Lesotho labour law reform project) are not for citation. However, similar observations are made elsewhere in relation to the ILO-sponsored SLASA and ILSSA projects from which the author was able to draw significant citable insights for this paper (especially the ILSSA report).

[138] For example, coalition governments that collapse with alarming regularity.

an ILO perspective, there clearly is a need for continued and sustained capacity-building initiatives for the social partners to ensure that all these constituencies[139] are in a position to take full advantage of the innovations being introduced via the amendments to the Labour Code Order. Once the final text of the Bill is passed, further research studies that evaluate the sufficiency of the new framework will be warranted.

The Lesotho legislature and the social partners need to have a sustained and transparent dialogue around this issue and find an accommodation that will serve workers' and employers' interests. This balanced approach will be in line with the ILO principle that workers must equitably share in the wealth that they produce by shoring up collective bargaining provisioning instead of diluting it, and at the same time promote Lesotho as a desirable FDI destination.[140]

[139] Particularly trade unions and employers and their organisations.

[140] S Hayter 'Want to tackle inequality? Shore up collective bargaining' (2015) ILO Work in Progress, accessible at https://iloblog.org/2015/03/03/want-to-tackle-inequality-shore-up-collective-bargaining/ (accessed on 17 April 2020). As appears in the ILO Constitution, various ILO declarations, most notably the Declaration of Philadelphia 1944 and the ILO Declaration on the Fundamental Principles and Rights at Work 1998 and its Follow-Up.

CHAPTER 6

The extension of collective agreements to non-parties: A critical appraisal of the approach in Zambia and South Africa

CHANDA CHUNGU* AND STEFAN VAN ECK**

The Zambian Industrial and Labour Relations Act (ILRA), contained in chapter 269 of the Laws of Zambia, previously made provision for the extension of collective agreements concluded at joint councils. The ILRA was amended and no longer makes provision for the extension of collective agreements to non-union members. Contrary to this, the South African Labour Relations Act 66 of 1995 provides for the extension of collective agreements concluded at bargaining councils to non-parties. In South Africa the justification for such extensions are to ensure that employees in the same industry enjoy the same terms and conditions of service. Arguments for and against the constitutionality of these extensions have been raised in Zambia and South Africa. This contribution seeks to critically analyse the legal position in Zambia and South Africa to determine whether there are any lessons to be gained for the respective jurisdictions. The paper argues that there are no one-shoe-fits-all jurisdictions and that mechanisms making provision for extensions should be evaluated within the broader legislative framework of any particular country.

I INTRODUCTION

Collective bargaining involves a process of negotiation between an employer or one or more employers' organisations, on the one hand, and one or more trade unions, on the other.[1] The desired outcome of this process is a collective agreement that defines terms of employment and that provides for conditions of services such as remuneration, benefits, hours of work and other important components of the employment relationship.[2]

A collective agreement often, but not always, only legally binds the signatory organisations (trade unions and employers' organisations) to the agreement and their members. Such collective agreements usually are negotiated by separate,

* LLB (Cape Town) LLM (Cape Town) MSc (Oxon); Lecturer of Labour Law, University of Zambia; Legal Practitioner, Mulenga Mundashi Legal Practitioners.

** Professor of Labour Law, University of Pretoria; President of the African Labour Law Society.

[1] Article 2 of the Collective Bargaining Convention, 1981 (No 154).

[2] A van Niekerk and N Smit *Law@work* (2019) 417.

independent and representative trade unions and employers' organisations in a particular sector or industry. However, in a number of countries around the world, including South Africa, it is permissible to extend collective agreements to all workers in a particular sector, regardless of whether or not they belong to the majority trade union and whether they are unionised. This used to be the position in Zambia, but the provision has since been repealed.

The International Labour Organization (ILO) is not opposed to the extension of collective agreements to non-parties. The ILO's Committee on Freedom of Association observed that 'such measures are envisaged in several countries' of the world.[3] The Collective Bargaining Recommendation of 1951 (No 91), which supplements the Right to Organise and Collective Bargaining Convention 1949 (No 98), seems to encourage the extension of collective agreements and states:

> 5(1) Where appropriate, having regard to established collective bargaining practice, measures, to be determined by … the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all the employers and workers included within the industrial and territorial scope of the agreement.

Added to this, the reports of the Committee on Freedom of Association, contained in the *Digest of Decisions and Principles of the Freedom of Association*,[4] state that in instances where a country has adopted extension mechanisms in favour of majority trade unions, 'this situation in principle does not contradict the principles of freedom of association, in so far as under the law it is the most representative organization that negotiates on behalf of all workers'.

From the above it is clear that the ILO is not prescriptive regarding the inclusion of, or the prohibition against, provisions regarding the extension of collective agreements to non-parties. The aspects that stand out, though, are that such measures should only be adopted for member countries 'where appropriate' and regard should be had to 'established collective bargaining practice[s]'. Furthermore, in any system where a majoritarian model has been implemented, the inclusion of extension mechanisms does not infringe upon the right to freedom of association of members and non-members of trade unions.

This paper seeks to analyse the arguments that have been raised for and against the benefit of the extension of collective agreements in Zambia and South Africa, and to identify similarities and differences between the two collective bargaining systems. Ultimately, the question is posed whether there are any lessons that may be gained for the respective jurisdictions regarding the extension of collective agreements in the two countries.

[3] ILO Committee of Experts 'General Survey on the Fundamental Conventions Concerning Rights at Work in Light of the ILO Convention on Social Justice for a Fair Globalisation' (2008) Report III [Part 1B] 99 para 245.

[4] *Digest of Decisions and Principles of the Freedom of Association* (2006) paras 1052–1053.

II ZAMBIA

(1) *The legislative framework*

Under the heading 'Protection of freedom of assembly and association' article 21(1) of the Constitution of Zambia, 1996, among others, provides that 'no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to … form or belong to any … trade union or other association for the protection of his interests'.

The registration of trade unions and employers' organisations as well as the establishment of a 'joint council' is regulated in terms of the Zambian ILRA. Section 3 of the ILRA defines collective bargaining as 'the carrying on of negotiations by an appropriate bargaining unit for the purposes of concluding a collective agreement'.

Collective bargaining, therefore, is the process of joint or co-determination of conditions or terms of employment by the bargaining unit through negotiation. Collective bargaining as a process invariably results in a collective agreement. In terms of the ILRA, negotiations between the employers' organisation or management of an undertaking and the trade union are meant to occur through the appropriate bargaining unit, the end product being a collective agreement.

It is important to note that only a trade union and the management of the undertaking or an employer organisation can enter into collective bargaining. In *Medical Stores Limited v Bright M Kanyembe & 129 Others*,[5] a company that employed several workers had entered into a collective agreement with them that included a clause on their retrenchment packages. However, the company soon realised that they would not be able to meet their obligations and sought to reduce the agreed-upon packages. The amended collective agreement was signed by the board of directors.

The Supreme Court held that the power and duty to enter into collective bargaining is a power conferred on the management of an employer as required by the ILRA. Therefore, the fact that the board of directors and not management signed the collective agreement was contrary to the law.

When the IRLA was amended in 1997, the Act provided that collective bargaining was to take place in bargaining units. The 2008 amendment to the ILRA provided the following definition of a bargaining unit:

> 'Bargaining unit' means—
>
> (a) the management of the undertaking and the most representative trade union representing employees in the undertaking where collective bargaining is at the level of an undertaking, other than an industry; or

[5] SCZ Appeal No 138/2007.

(b) the negotiating team representing the employers' organisation and the negotiating team representing the most representative trade union in the industry concerned where collective bargaining is at the level of an undertaking or industry.

Therefore, the position today is that collective bargaining is conducted by management and the most representative union or, if at industry level, by the negotiating team representing the employers' organisation and the negotiating team representing the most representative trade union. Section 3 of the Industrial and Labour Relations Act defines, most representative, as follows:

'Most representative' in relation to an organisation means—

(a) a national centre with the most number of affiliates; or

(b) at sector, trade, undertaking, establishment or industry level, a body with the majority of members:

provided that where in the sector, trade, undertaking, establishment or industry, there are employees who offer specialised services requiring specific representation, the most representative body shall be considered to be between the competing representation.

There are certain privileges of trade unions that are reserved for the most representative trade unions. In a situation where there is a multiplicity of trade unions, employers should only negotiate with the most representative unions. It has been noted that this is necessary to curb a multiplicity of trade unions, which has in the past weakened the trade union movement.

Section 71(3)(c) of the ILRA makes it clear that if the Minister approves the collective agreement and instructs the Labour Commissioner to register the agreement, it becomes a legally binding document and automatically forms part of the contract of employment. It is important to note that before 1997, a collective agreement had to be gazetted to have legal effect;[6] but this no longer is the case. When the ILRA was amended in 1997, the only requirement left was that the Minister comments on the collective agreement and once he or she grants approval, instructs the Labour Commissioner to register it.

The Supreme Court in *Council of the University of Zambia & Another v University of Zambia and Allied Workers Union*[7] confirmed that if a collective agreement has not been registered, it has no legal effect and no obligations flow from the non-registered collective agreement.

According to section 71(3)(c) of the ILRA, all collective agreements that have been approved by the Minister are binding on the employer and employees who are represented by the trade union. When a collective agreement is registered

[6] *Pamodzi Hotel v Godwin Mbewe* (1987) ZR 56 (SC).

[7] (2003) ZR 24 (SC).

and incorporated into the terms of the contract of employment, it is binding on the parties.

The case of *Cosmas Phiri & 85 Others v Lusaka Engineering Company Limited (in liquidation)*[8] informs us emphatically that trade unions that enter into collective agreements have the power to bind the employees they represent to the terms of the agreement. The Supreme Court held:

> In our view, it could not be seriously argued that the union did not sign on behalf of the plaintiffs. In any event, in their own pleadings, the plaintiffs admitted being represented by the union, the union that went back and negotiated the Terminal Benefits Payment Agreement (on behalf of the other employees).

A collective agreement is a legally binding contract between the parties and anything done outside these contractual agreements is of no legal effect.[9] As confirmed by the court in *Pamodzi Hotel v Godwin Mbewe*,[10] the terms of collective agreements are incorporated into the terms of employment that bind both parties. Where there is a collective agreement which has been properly registered with the Minister, its terms form part of the employee's contract of employment. Hence, a trade union that enters into a collective agreement on behalf of employees has the power to bind those employees to the agreed terms and conditions.[11]

Previously, if a trade union agreed to terms, conditions and benefits less favourable than those in the statutory instruments, the employees would still be bound to those terms. In *Jennifer Nawa v Standard Chartered Bank Zambia Plc*[12] the Supreme Court dealt with a matter where an employee applied for early retirement but wanted her terminal benefits calculated in terms of a statutory instrument made in terms of the Minimum Wages and Conditions of Employment Act rather than her employer's pension scheme, which offered less favourable benefits. The court held that because the employee was protected and represented by a trade union, the more favourable benefits in the statutory instrument did not apply.

The court was of the view that where a trade union represents workers, they are protected, and the workers would be bound to the agreement (or, in the *Jennifer Nawa* case, a pension scheme) to which the union entered on behalf of the employees. The statutory instrument referred to in this case would only apply to non-unionised workers who were not as protected and needed to have guaranteed favourable terms.

The authors are of the view that the reasoning of the Supreme Court in the *Jennifer Nawa* case was sound considering that the Ministerial Orders made in terms

[8] SCZ Judgment No 1/2007.
[9] *Contract Haulage Limited v Mumbuwa Kamayoyo* (1982) ZR 13.
[10] (1987) ZR 56 (SC).
[11] See *Cosmas Phiri & 85 Others v Lusaka Engineering Company Limited* SCZ Judgment No 1 of 2007.
[12] SCZ Judgment No 1 of 2011.

of the now repealed Minimum Wages and Conditions of Employment Act did not apply to employees whose terms and conditions were regulated by collective bargaining. Where employees are represented by a trade union and can negotiate through collective bargaining, these employees are generally understood to have more protection than non-unionised employees.

As of 2019 the position has changed because of the introduction of section 127 of the Employment Code Act which provides:

> Where a contract of employment, collective agreement or other written law provides conditions more favourable to the employee, the contract, agreement or other written law shall prevail to the extent of the favourable conditions.

This new provision remedies the problem that existed before and ensures that where more favourable terms exists elsewhere, those will prevail.

(2) *Freedom of association*

Apart from employees who have been expressly excluded from the scope and application of the Industrial and Labour Relations Act, namely, management employees, members of the defence force, the police force, prison services, the Security Intelligence Service and judges and officers of the court, all employees are eligible to be members of the trade union.[13]

The right to join any trade union of the employee's choice also includes the right not to be a member of a trade union or be required to relinquish trade union membership as the employee wishes.[14] Section 5(f) of the ILRA provides that an employee has the right not to be a member of a trade union. It also provides that an employee should not be forced to relinquish membership, and if they chose to join or not join a union, this decision must be voluntary. Employees are also protected from victimisation[15] for exercising or for the anticipated exercising of the right not to join a trade union.

Prior to the enactment of the ILRA Amendment Act of 2008 (Amendment Act of 2008), a worker had the right to be a member of a trade union of their choice.[16] The Amendment Act of 2008 changed section 5(b) of the principal Act and now limits the right of workers to form and join a trade union within the sector, trade, undertaking, establishment or industry in which that employee is engaged.[17]

Whereas as a general rule all employees (excluding the excluded employees) are eligible to join a trade union, no employee may be forced to join or leave a trade union. In *Edward Kapapula & 2 Others v Zambia Telecommunications Company*

[13] Section 2(1) of the Industrial and Labour Relations Act.
[14] Section 5(1)(f) 2(1) of the Industrial and Labour Relations Act.
[15] Section 5(1)(g) 2(1) of the Industrial and Labour Relations Act.
[16] Section 5(b) of the Industrial and Labour Relations Act.
[17] Section 5(b) of the Industrial and Labour Relations Act.

Limited[18] the Zambian Supreme Court emphasised the fact that the right to join or leave a trade union should be made voluntarily. Musonda JS held:

> [B]oth article 21(1) of the Zambian Constitution, as amended, and section 5 of the Industrial and Labour Relations Act, CAP. 269, being a member of or belonging to a trade union is a right which is exercised or enjoyed voluntarily. This means that an employee can choose whether or not to join or belong to a trade union. However, the Industrial and Labour Relations Act, CAP 269 does provide, in section 5(f), that an employee can be required to relinquish their union membership under certain prescribed circumstances.

It therefore follows that no employee can be coerced to join or leave a trade union. The employee must make this decision freely and voluntarily. Once they choose to be a member of the trade union, the rights and privileges of the trade union membership will apply to them.

Membership of a trade union is not perpetual. In *Daniel Peyala v Zambia Consolidated Copper Mines*[19] the Supreme Court confirmed that if an employee leaves employment, he also vacates membership of the trade union of which he was a member.

A member can also decide to withdraw from a trade union before his employment terminates. In *Luciano Mutale and Jackson Chomba v Newstead Zimba*[20] the Supreme Court was of the view that the issue of withdrawal of membership from a trade union is between the member employee and the union itself. In both *Edward Kapapula* and *Daniel Peyala* the Supreme Court confirmed that where an employee resigns from a trade union, they cannot benefit from subsequent collective agreements entered into with the trade union relating to conditions of service.

In Zambian law, when an employee withdraws, he must send a notice of withdrawal in line with the trade union's constitution and rules. Although the court in *Luciano Mutale* held that the withdrawal of membership from a trade union is between the member employee and the union itself, the Supreme Court in *United National Union of Private Security Employees, Sailas Kunda & Others v Panorama Security and Zambia Union of Security Officers and Allied Workers*[21] held:

> In this case, the 2nd appellants did send notices to both respondents of their withdrawal from the 2nd respondent union. However, the notices were composite ones; where on one notice the names of employees giving that notice together with their signatures were indicated. In our view that notice was in writing and the signatures of the employees named thereon signified that they had adopted the notice in their individual capacity. Certainly, the 2nd respondent was left

[18] SCZ Appeal No 47/2014.
[19] SCZ Appeal No 81/2002.
[20] (1988–1989) ZR 64 (SC).
[21] SCZ Appeal No 96 of 2013.

> in no doubt that those employees had decided to withdraw their membership. When we read Section 22, we do not see the provision that stipulates that each employee who intends to withdraw must write his own letter. Neither do we see any provision which bars employees from writing a composite notice.

The court thereby held that several employees can use one notice of withdrawal to collectively withdraw from the union. Section 22(1) of the ILRA Industrial provides that '[a]n employer may, by agreement with an eligible employee, deduct the amount of subscription prescribed by the constitution of the trade union from the wages of such eligible employee if the employee is a member of such trade union'.

When an employee becomes a member of a trade union, they agree to pay subscriptions to the trade union. The subscriptions are paid to the trade union to help the trade union manage its affairs.

(3) *The extension of collective agreements*

As alluded to above, in the Zambian context a collective agreement may be defined as an agreement negotiated by an appropriate bargaining unit between a trade union and the employer or employer organisation where the terms and conditions affecting the employment and remuneration of employees are negotiated and laid down. Section 3 defines a collective agreement as an agreement negotiated by an appropriate bargaining unit between a trade union and the employer or employer organisation where the terms and conditions affecting the employment and remuneration of employees are negotiated. A collective agreement is the culmination of the process of collective bargaining whereby negotiations take place to conclude the agreements.

Previously, section 71(3)(c) of the ILRA provided that '[e]very collective agreement which has been approved by the Minister shall be binding on the parties to it, or in the case of a joint council, it shall bind every employer and employee engaged in the industry'. Further, section 74 of the ILRA provided:

> A collective agreement concluded by a joint council shall bind every employer and employee engaged in the industry concerned notwithstanding that the employer or employee is not a member of the association or of the trade union concerned, or was not a party to the collective agreement:
>
> > Provided that nothing in this Section shall preclude an employer from concluding a collective agreement directly with the appropriate trade union on terms and conditions which are not less favourable than those contained in the collective agreement concluded by the joint council.

Sections 71(3)(c) and 74 of the ILRA, which have since been repealed, respectively were premised on the fact that a collective agreement was binding on all employees in the industry concerned, regardless of whether or not they were parties to the collective agreement. The justification for such provisions was to

ensure that employees in the same industry or type of business enjoyed the same terms and conditions of service.

In a long-standing judgment in *Printing and Numerical Registering Company v Sampson*[22] Sir George Jessel stated the following:

> [I]f there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contract, when entered into freely and voluntarily, shall be held sacred and shall be enforced.

Meanwhile, on the other hand, other scholars have argued that labour law principles, and those relating to collective labour law, in particular, have developed due to the inadequacy of the general principles of the law of contract. As stated by Brassey *et al*:

> The common law, traditionally concerned with the rights and obligations of individuals, has little of the wherewithal to deal with this new phenomenon … [I]t has no means to regulate the problems created by strikes, and lock-outs, by go-slows, overtime bans, sit-ins and work-ins, by primary, secondary and tertiary picketing, and by blacklisting and boycotting.[23]

Then again, based on the mentioned principle of freedom of contract, an employee who is not a member of a trade union ought not to be bound to a collective agreement when he or she voluntarily chooses to not be a member of the trade union. Section 5(1)(f) of the current ILRA provides:

> Notwithstanding anything to the contrary contained in any other written law and subject only to the provisions of the Constitution and this Act, every employee shall have the following rights:
>
> (a) the right of any employee not to be a member of a trade union or to be required to relinquish membership.

Those who argue that the law of contract is not sufficient to regulate modern labour law, as well as the ILO's committee of experts, on the other hand would argue that the existence of collective agreements as well as the extension thereof do not detract from the right to freedom of association. Employees may still choose whether they want to join a trade union irrespective of whether or not the industry's collective agreements are applicable to them. In the absence of closed-shop agreements, the existence or otherwise of a collective agreement regulating conditions of service is not connected to an employee either electing to join a trade union or not.

It is clear that the Zambian Supreme Court will always jealously protect the right to freedom of association. In *Edward Kapapula*[24] the Supreme Court held

[22] (1875) 2 Burr 1005.

[23] M Brassey *et al The New Labour Law* (1987) 6–7.

[24] *Edward Kapapula* (n 18).

that 'being a member of or belonging to a trade union is a right which is exercised or enjoyed voluntarily. This means that an employee can choose whether or not to join or belong to a trade union.'

Some would argue that what the above statement from the *Edward Kapapula* case indicates is that should an employee have the choice to voluntarily join or leave a trade union, the same principle should apply to collective agreements between any trade union and the employer. The employee should have the choice of being bound or not. This would entail that if an employee resigns his or her membership, such a person should have the right to elect either to be bound by the collective agreement or not. If, for example, the collective agreement is to the benefit of the employee, he or she could choose to resign from the trade union but still receive the latest wage increases agreed upon during collective bargaining. However, if the collective agreement is to the disadvantage of the person who resigned, the employee may elect not to be bound by the trade union's collective agreement.

The Supreme Court on three occasions has quite correctly highlighted that an employee who is not a member of a trade union is not bound to the collective agreements concluded by the trade union. First, in *Daniel Peyala v Zambia Consolidated Copper Mines*[25] the Supreme Court held that where an employee withdraws from a trade union, he cannot benefit from subsequent collective agreements entered into with the trade union relating to conditions of service.

Second, in *Lusaka Engineering Company (in Liquidation) v Saiton Kamanga & 84 Others*[26] the employees claimed termination benefits upon termination of their employment when the employer was privatised. In that case there was a collective agreement, but because the employees were not unionised, the court held that their termination benefits should be calculated in accordance with their employer's conditions of service and not the collective agreement that applied to the unionised workers.

Third, in *Edward Kapapula*[27] referred to above, the court held that the redundant employees who chose to leave the trade union could not benefit from the collective agreement which provided for redundancy payments.

The authors submit that members of a trade union have subscription fees deducted from their wages so that their respective union can negotiate terms and conditions of service on their behalf. In the absence of an agency shop agreement, such as those that apply in South Africa, it would be unfair for a non-unionised worker who does not pay subscription fees to benefit from the hard work and negotiations of a trade union that they voluntarily chose not to join.

[25] SCZ Appeal No 81/2002.
[26] SCZ/8/37/2010.
[27] *Edward Kapapula* (n 18).

Further, trade union membership would surely decrease if employees knew they did not have to be a member of a trade union to benefit from a collective agreement that was negotiated with management.

On the one hand, section 74 (which has since been repealed) sought to protect non-unionised workers and extend advantages of collective agreements to them. However, on the other hand, an employee who chooses not to be a member of a collective agreement, among other reasons, seemingly indicates their intention to not be represented by a union and negotiate their own terms and conditions of service. Such an employee should not be deprived of the opportunity to negotiate on his or her own. In *Daniel Peyala* and *Edward Kapapula* the court emphasised that an employee could not benefit from a collective agreement that did not apply to him or her because he or she was not a member of the union. It is submitted that the Supreme Court in *Cosmas Phiri*, *Daniel Peyala* and *Edward Kapapula* were correct in interpreting the ILRA in the way it did after the amendments by not keeping non-union members bound to collective agreements. In the context of the Zambian legal framework this situation is more tenable than the position before the amendments to the Act.

Having considered the above, it should be noted that section 71(3)(c) of the ILRA was amended in 1997 and now provides that the collective agreement only applies to and binds the parties to it. Section 74 of the Industrial and Labour Relations Act has since been repealed in its entirety. Therefore, the law in Zambia is set out in the amended ILRA and the authorities of *Daniel Peyala* and *Edward Kapapula* correctly interpreted it to say that non-unionised employees cannot benefit from any collective agreement. This can only occur if the collective agreement has been expressly incorporated into the non-unionised worker's contract of employment by the employer and the consent of the employee.

It is to be noted that it is a common practice for trade unions in Zambia to negotiate individual collective agreements with individual employers. Consequently, employees employed in the same sector or industry often have different terms and conditions, notwithstanding that the trade union represents employees at different employers in the same sector.

In the context of the cases alluded to above, the authors would support legislative amendments in terms of which section 71(3)(c) of the ILRA is amended to allow only unionised workers to benefit from collective agreements entered into with different employers in the same industry.

Further, permitting the extension of collective agreements to all unionised employees would actually enhance protection for a wider range of employees. One could also argue that because trade unions are aware that collective agreements will be extended to non-parties, they would have more bargaining power in negotiating terms of service because they are essentially a broader group of workers in a particular industry. Therefore, the ability to extend

these agreements boosts the chances of ensuring decent work for all, rather than for some.

Extension to all unionised employees would allow trade unions and employer organisations to negotiate collective agreements that apply equally and fairly to all unionised workers in the same industry. It would also encourage employees to retain their trade union membership and to pay their trade union dues. This view is further supported by section 5(4) of the Employment Code Act, which provides for equal pay for work of equal value. However, the authors note that extending equal terms to all employees in an industry or sector could prove difficult for some smaller entities that are more constrained financially compared to larger employers.

Although this may seem to clash with the principles endorsed in terms of the ILO's Collective Bargaining Recommendation of 1951 (No 91), which does not limit the applicability of collective agreements to members of the union, this would be better aligned to the collective bargaining framework of Zambia and as it has been endorsed by the Supreme Court.

III SOUTH AFRICA

(1) *The legislative framework*

The Constitution of the Republic of South Africa, 1996 enshrines a number of employee rights. The Bill of Rights protects everyone's right to fair labour practices,[28] every worker's right to strike,[29] and everyone's right to freedom of association.[30] In addition, section 23(5) of the Constitution provides that '[e]very trade union, employers' organisation and employer has the right to engage in collective bargaining'.

The Labour Relations Act 66 of 1995 (LRA) gives effect to these constitutional principles. Sections 1*(d)*(i)–(ii) of the LRA list as one of its primary objects and purposes the goal of promoting 'orderly collective bargaining' at 'sectoral level'. Some would argue that the extension of collective agreements would be giving effect to these goals. As mentioned by Du Toit *et al*, collective agreements and their extension to non-parties assist 'in the aim of avoiding competition based on undercutting conditions of employment, or a race to the bottom, and thereby promoting the constitutional right to fair labour practices'.[31]

[28] Section 23(1).
[29] Section 23(2)(c).
[30] Sections 18 and 23(2).
[31] D du Toit *et al Labour Relations Law: A Comprehensive Guide* (2015) 320.

The LRA makes provision for the registration of trade unions and employers' organisations as well as for the conclusion of collective agreements.[32] The LRA has a wide scope of application and covers all employers and all employees, except members of the defence force and the state security agency.[33] Since 2014, attempts have also been made to protect the interests of vulnerable groups of atypical workers such as labour-broker employees, fixed-term employees and part-time employees.[34]

The LRA gives effect to the policy choice of majoritarianism. This entails that trade unions that represent the majority of workers in a workplace or, in some instances, an industry or sector, gain more rights than trade unions that do not represent the majority of workers.[35] For example, majority trade unions gain all of the organisational rights in a workplace and such unions are also at liberty to conclude a closed-shop and agency-shop agreement at the workplace.[36]

Collective bargaining could occur either directly between employers and trade unions at workplace level, or it can take place at a bargaining council established for a particular sector.[37] A bargaining council consists of representatives of employers' organisations and trade unions involved in the particular sector and area of the bargaining council.[38]

It is the LRA's starting point that collective agreements bind the parties to the collective agreement, namely, the trade union or trade unions and the employers' organisation or organisations, as well as their respective members. However, as discussed below, in respect of both collective agreements concluded at workplace level, and at bargaining council level, provision is made for the extension of collective agreements to the members of trade unions that do not constitute the majority of employees at the workplace or bargaining council as well as to non-union members.[39]

(2) *Freedom of association*

Chapter II of the LRA gives effect to the constitutional right to freedom of association. The LRA makes it clear that every employee has the right to join a

[32] See ch III of the LRA.

[33] Section 2.

[34] The Labour Relations Amendment Act 6 of 2014 introduced ss 198A–C to the LRA. See also C Aletter and S van Eck 'Employment agencies: Are South Africa's recent legislative amendments compliant with the International Labour Organization's standards?' (2016) 28 *SA Merc LJ* 285.

[35] S van Eck 'In the name of "workplace and majoritarianism": Thou shalt not strike – *Association of Mineworkers & Construction Union v Chamber of Mines* (2017) 38 *ILJ* 831 (CC) and *National Union of Metalworkers of SA & Others v Bader Bop (Pty) Ltd & Another* (2003) 24 *ILJ* 305 (CC)' (2017) 38 *ILJ* 1496.

[36] See the discussion that follows.

[37] Van Niekerk and Smit (n 2) ch 15.

[38] Section 27 of the LRA.

[39] Sections 23 and 32 of the LRA.

trade union subject to its constitution and every such member has the right to stand for election, to vote and to participate in the activities of the trade union.[40] No person may discriminate against a person for joining a trade union and no employer may coerce an employee to either join or to resign from a trade union.[41]

The LRA is silent on the position of senior or managerial employees and places no limits on such employees from electing to join a trade union or not. In *IMATU & Others v Rustenburg Transitional Council*[42] the Labour Court confirmed that senior managers have the right to join and hold office in trade unions, but are still bound to perform their duties for their employers. Managers who breach their duty of fidelity towards employers in the course of their trade union activities may still be disciplined, but not for holding union office *per se*.

Despite the LRA's clear endorsement of the right to freedom of association, there arguably are two exceptions to the principle of freedom of association that can be found in the statute regarding closed-shop agreements and agency-shop agreements.[43] A closed-shop agreement is a collective agreement concluded between a majority trade union and an employer or employers' organisation, which requires all employees of the employer to become members of the trade union.[44] The LRA makes it clear that it is not unfair for an employer to dismiss an employee for refusing to join such a majority trade union.[45] Agency-shop agreements that are also concluded with majority trade unions do not compel all employees to become members of the trade union. However, it compels as a condition of employment all employees to pay an agency fee to the majority trade union.[46]

Although the provisions regulating these collective agreements are contentious against the background of the right to freedom of association, the closed-shop and agency fee agreements have not yet been subjected to constitutional attack.[47] However, as argued by Van Niekerk and Smit:

> [B]oth the Constitution and the LRA place the promotion of collective bargaining high on the agenda and for this reason it may be, if ever challenged, that the limitation of freedom of association imposed by section 26 of the LRA would be considered reasonable and justifiable for public policy reasons. In addition, section 26 of the LRA contains several 'checks and balances' to safeguard the arrangements against constitutional attack.[48]

[40] Section 4(b) of the LRA.
[41] Section 5 of the LRA.
[42] [1999] 12 BLLR 1299 (LC).
[43] Van Niekerk and Smit (n 2) 400.
[44] Section 26(1).
[45] Section 26(6).
[46] Section 25.
[47] Du Toit *et al* (n 31) 227.
[48] Van Niekerk and Smit (n 2) 402.

It should also be noted that section 23(5) of the Constitution makes provision that '[n]ational legislation may recognise union security arrangements contained in collective agreements'. It is against this background that these collective agreements will probably not be held to be unconstitutional. Especially the agency-shop agreement does hold the benefit of imposing a duty on a non-union member, as well as the members of minority unions, to pay an agency-shop fee. This entails that employees will not benefit as free riders from the negotiations conducted by majority unions in the conclusion of collective agreements that most often improve their conditions of employment above those set by the Basic Conditions of Employment Act[49] and other sectoral determinations.

(3) *The extension of collective agreements*

Collective agreements should not be confused with normal common law contracts. In South Africa collective agreements derive their binding force through statutory provisions. According to Du Toit *et al*:

> In terms of the common law the rights and obligations between employers and employees are derived from the contract of employment and collective agreements can only be effective to the extent that their provisions are incorporated into the employment contracts … either expressly or by implication.[50]

From a common law perspective, it becomes an insurmountable question whether a union derives its authority to conclude a collective agreement with an employer on behalf of its members through contract, membership or agency.[51] Trade unions hardly ever receive detailed instructions or a mandate about all the conditions of service that they negotiate on behalf of each one of their members. The LRA has resolved these problems by giving statutory force to collective agreements. In terms of section 213 of the LRA a collective agreement is defined as a written agreement that covers terms and conditions of employment and that is concluded by one or more registered trade unions, on the one hand, and, on the other, one or more employers or one or more registered employers' organisations.

The LRA recognises that collective agreements can be extended to the members of minority unions as well as to non-union members. It is the authors' point of view that the extension of collective agreements afford protection to employees who might otherwise be exploited by employers. Without the extension of collective agreements employers would be able to employ non-unionised workers and pay them at lower rates, thus pushing unionised workers out of employment. The extension of collective agreements to non-unionised

[49] Act 75 of 1997.
[50] Du Toit *et al* (n 31) 321.
[51] Van Niekerk and Smit (n 2) 432.

employees extends the advantages of collective agreements beyond the scope of those trade unions that concluded any particular collective agreement.

In terms of the LRA, collective agreements may be concluded at one of two levels, namely, at workplace level and at the level of bargaining councils.[52] In both instances, the principle of majoritarianism plays a significant role in the extension of collective agreements.

Section 23(1)*(a)–(c)* of the LRA regulates the binding effect of collective agreements concluded at workplace level. A collective agreement is binding on the parties thereto, and to the members of registered trade unions and employers who are members of registered employers' organisations that are party to the collective agreement. Of importance to this discussion is the fact that section 23(1)*(d)* continues and sets out the principle that any collective agreement also binds employees who are not members to the trade union party of the collective agreement if the employees are identified in the agreement and if the trade union party or parties that concluded the collective agreement have as members the majority of employees in the workplace.

From this it is clear that such extension of a collective agreement at workplace level occurs automatically without the intervention of the Minister of Labour or anyone else as long as the collective agreement has been concluded by a majority trade union at the workplace and as long as the non-parties to be covered by the collective agreement have been mentioned in the agreement. This could include non-union members as well as the members of minority trade unions who are not parties to the collective agreement.

The constitutionality of this extension of collective agreements at workplace level has been challenged in *Association of Mineworkers and Construction Union v Chamber of Mines*.[53] In this instance a number of mines concluded a collective agreement with three trade unions bargaining in an alliance. The three trade unions represented the majority of workers counted across all of the employers' mines. The collective agreement covering wage increases contained a 'no-strike clause' and this agreement was extended to the Association of Mineworkers and Construction Union (AMCU). AMCU represented the majority of workers at some of the mines, but not when counted together across all the mines.

AMCU gave notice to strike but the Labour Court granted an interdict against this planned strike.[54] It is against this decision that an appeal was lodged to the

[52] M Kriek and S Van Eck 'The extension of bargaining council agreements: What guidelines can South Africa gain from the International Labour Organization?' (2020) 41 *ILJ* 71.

[53] (2017) 38 *ILJ* 831 (CC).

[54] The interim order was published in *Chamber of Mines of SA Acting in its Own Name and on Behalf of Harmony Gold Mining Company Ltd & Others v Association of Mineworkers and Construction Union & Others* (2014) 35 *ILJ* 1243 (LC) and was confirmed on the return date in *Chamber of Mines of SA Acting in its Own Name and on Behalf of Harmony Gold Mining Company Ltd & Others v Association of Mineworkers and*

Constitutional Court. Central to the dispute was the question whether AMCU's right to strike was legitimately restricted by the collective agreement that had been concluded with the majority trade unions and to which AMCU was not a party. Section 23(1) of the LRA does not contain an expansion mechanism coupled with safeguards, as is the case with the extension of bargaining council agreements discussed below.

The court accepted that each of the individual mining houses shared the same financial, information technology and human resources systems and consequently operated in an integral fashion, thereby constituting a single workplace.[55] It followed that AMCU was bound by the agreement that contained a no-strike clause. AMCU raised the point that section 23(1)*(d)* was constitutionally invalid in so far as it infringes every worker's right to strike.[56] The Constitutional Court rejected AMCU's argument and held that even though section 23 has the effect of limiting the fundamental right to strike, such limitation is justifiable. The court held:

> AMCU is right that the codification of majoritarianism in section 23(1)*(d)* limits the right to strike. The key question is whether the principle provides sufficient justification for that limitation ... In short, the best justification for the limitation the principle imposes is that majoritarianism, in this context, benefits orderly collective bargaining.[57]

The court accepted that it was internationally recognised that 'majoritarianism is functional to enhanced collective bargaining'.[58] *Chamber of Mines* also rejected AMCU's contention that the extension of the agreement should not have occurred under section 23(1)*(d)* but under section 32 with its sectoral nature and safeguards. The court rejected the argument that section 23(1)*(d)* is without safeguards. This is because an agreement concluded at workplace level is subject to judicial scrutiny, by way of a review under the principle of legality.[59] *Chamber of Mines* concluded that the interdict against AMCU was binding and that the order's restriction on the right to strike was reasonable and justifiable within the collective bargaining framework established by the LRA.

Construction Union & Others (2014) 35 *ILJ* 3111 (LC). This decision was taken on appeal and reported in *Association of Mineworkers and Construction Union & Others v Chamber of Mines of SA Acting in its Own Name and on behalf of Harmony Gold Mining Co (Pty) Ltd & Others* (2016) 37 *ILJ* 1333 (LAC).

[55] *Chamber of Mines of SA* (n 54) para 31. Section 213 of the LRA defines a workplace as 'the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are *independent* of one another by reason of their *size, function or organisation*, the place or places where employees work in connection with each independent operation constitute the workplace for that operation.' See also Van Eck (n 35) 1496.

[56] *Chamber of Mines of SA* (n 54) paras 12–14.

[57] *Chamber of Mines of SA* (n 54) para 50.

[58] *Chamber of Mines of SA* (n 54) para 56.

[59] *Chamber of Mines of SA* (n 54) para 84.

Also, sections 31 and 32 regulate collective agreements concluded at the level of bargaining councils. Section 31 of the LRA is not dissimilar to section 23, but it makes provision for the composition of bargaining councils. Individual employers may not be members of bargaining councils and bargaining council agreements are concluded between one or more employers' organisations and one or more registered trade unions. Section 32 of LRA provides for the extension of collective agreements concluded in bargaining councils to non-parties to the collective agreements.

There are two avenues regarding the extension of collective agreements. The first applies where the voting parties represent the majority of workers in the sector. Here, the Minister has no discretion and he or she *must* extend the agreement. The second applies in instances where the voting parties do not represent the majority of workers and, in this instance, the Minister has a discretion to extend the agreement.[60] A bargaining council requests the Minister in writing to extend a collective agreement subject to the following requirements.

First, the members of the trade unions voting in favour of the extension must constitute the majority of the members of the trade unions that are party to the bargaining council[61] and, second, the employers' organisations voting in favour of the resolution must employ the 'majority of the employees employed' by the employers' organisations party to the council.[62] It could be argued that this could potentially pose problems for smaller employers who have only recently started doing business and who may find it difficult to compete with larger employers who already have commercial relations with clients in the particular industry.

This obligatory extension mechanism has been challenged in the courts.[63] In *Valuline CC & Others v Minister of Labour & Others*[64] the extension of a bargaining council agreement was set aside on the basis that the Minister had relied on a factually incorrect annual determination contained in the Registrar of Labour Relation's report.[65]

In response to the decision, the LRA was amended in 2018 to include the provision that the Minister must be satisfied that the majority of employees

[60] Section 32(1) of the LRA.

[61] Section 32(1)*(a)* of the LRA.

[62] Section 32(1)*(b)* of the LRA.

[63] When so requested, the Minister must extend the agreement within 60 days provided he or she is satisfied about the majority membership requirement.

[64] (2013) 34 *ILJ* 1404 (KZP).

[65] See also the unreported decisions *National Employers Association of SA & Others v Minister of Labour & Others* (JR860/13) (2014) ZALCJHB 524 (12 December 2014); and *National Employers' Association of South Africa & Another v Minister of Labour & Others* (J1475/15) (2018) ZALCJHB 55 (15 February 2018). In both instances the Labour Court set aside the decision of the Minister to extend the terms of the collective agreement to non-parties as the Minister had failed to ensure that the requirements for the extensions were satisfied.

covered by the bargaining council are members of the trade union parties and additionally the Registrar of Labour Relations must have determined that the majority of all employees who will fall within the scope of the agreement are members of the trade unions that are parties to the bargaining council.[66] The amendment further states that any determination by the Registrar in terms of representation is sufficient proof that the members of the parties to the collective agreement are sufficiently representative within the registered scope of the bargaining council.[67]

From this it is clear that the amendment was merely included to prevent challenges similar to the one lodged in *Valuline CC*. The idea was not to deviate from the principles of majoritarianism or the extension of collective agreements.

Apart from the requirement of majority membership, the Minister must also be satisfied about other safety measure requirements.[68] Each bargaining council must have a procedure to consider applications for exemption by non-parties.[69] If a non-party's application for exemption is turned down by a bargaining council, the collective agreement must provide for an independent appeal body to consider any appeals.[70]

Du Toit *et al* quite correctly point out that these numerical and substantive requirements are built into the extension provisions to find a balance between the statutory purpose of promoting sectoral bargaining and fairness to non-parties.[71] Sectoral collective bargaining is based on the premise that competition should be avoided by undercutting conditions of employment that could lead to a race to the bottom.

The Minister's exercises of this non-discretionary function when extending a collective agreement have also been challenged on constitutional grounds in the Labour Court. In *Confederation of Associations in the Private Employment Sector & Others v Motor Industry Bargaining Council & Others*[72] the High Court rejected the argument that section 32(5) was in breach of the constitutional right to freely exercise a trade or profession. The court held that the Minister does not have unrestricted delegated powers, but that certain requirements and mechanisms must be in place before the Minister can extend the collective agreement.

In another matter, *Free Market Foundation v The Minister of Labour & Others*,[73] the applicant sought to declare the extension mechanism in terms of the LRA

[66] Section 32(3)*(b)*(i) of the LRA. This also applies in respect of employers. See in this regard s 32(3)*(b)*(ii).

[67] Section 49(4A) of the LRA.

[68] Du Toit *et al* (n 31) 323.

[69] Section 32(3)*(d)*(A) of the LRA.

[70] Section 32(3)*(e)* of the LRA.

[71] Du Toit *et al* (n 31) 319.

[72] (46476/2011) 2011 ZAGPPHC (27 November 2013).

[73] (2016) 37 *ILJ* 1638 (GP).

unconstitutional because it *inter alia* constituted a limitation to the market growth of small businesses and it ostensibly also infringes their constitutional right to fair administrative justice.[74] The main argument was that there is inadequate judicial supervision of the decision-making involved in the extension of collective agreements to non-parties.[75] The applicant argued that section 32(2) of the LRA makes provision for the extension of collective agreements in a 'mechanical way', without the necessary judicial supervision by the courts being present.[76]

The court held that the extension mechanism is an essential tool in the LRA's majoritarian framework, and that where a majority requirement is present the legislature considers it appropriate to lower the level of ministerial and judicial scrutiny.[77] The court found that Parliament had intentionally refrained from giving the Minister a wide discretion.[78] Had the Minister been given a wide discretion, it would have weakened the effectiveness of the majoritarian system.[79]

It is significant to note that the court paid particular attention to majoritarianism in collective bargaining measured against international law principles. The court confirmed that the Constitution provides that when interpreting legislation the courts must consider international law.[80] *Free Market Foundation* observed that a number of ILO instruments endorse the principle that a collective bargaining system that extends exclusive rights to the most representative trade unions is compatible with the principles of freedom of association and the extension of collective agreements.[81]

A different scenario applies in respect of applications for the extension of collective agreements where the parties requesting the extension do not represent the majority of employees. Under these circumstances, the Minister has a discretion to extend the collective agreement should a number of requirements be met. The requirements for discretionary extensions include that the Registrar must have determined that the parties to the bargaining council are 'sufficiently representative' within the registered scope of the bargaining council[82] and the Minister must be satisfied that the failure to extend the collective agreement will not undermine collective bargaining at sectoral level.[83] The Minister must also publish a notice in the *Government Gazette*, inviting comment within a period

[74] D du Toit 'The extension of bargaining council agreements: Do the amendments address the constitutional challenge?' (2014) 35 *ILJ* 2653.

[75] *Free Market Foundation* (n 73) para 57.

[76] *Free Market Foundation* (n 73) para 9.

[77] *Free Market Foundation* (n 73) para 21.

[78] *Free Market Foundation* (n 73) para 29.

[79] Ibid.

[80] Section 39 of the Constitution 1996.

[81] *Free Market Foundation* (n 73) para 112.

[82] Section 32(5)*(a)* of the LRA. Previously, it was within the discretion of the Minister to determine representativeness. The 2018 amendments transferred this function to the registrar.

[83] Section 35(5)*(b)* of the LRA.

of no less than 21 days from the date of publication of the notice.[84] The last requirement should be viewed in a positive light in as far as it provides a way for non-party members to respond to an application for extension and establishes an opportunity for them to present arguments on why they would be unable to comply with the minimum requirements set out in the collective agreement.

Finally, when the registrar determines whether the parties to the bargaining council are sufficiently representative, he or she may take into account the composition of the workforce in the sector by considering the extent to which there are employees of labour brokers, and employees employed on fixed-term contracts or as part-time employees.[85] This, it is argued, is also an improvement. In instances where trade unions find it difficult to gain majority support in a sector due to the extensive reliance on non-standard workers, this could undeniably have an undermining effect on any framework of sectoral collective bargaining.

In instances where trade unions do not represent the majority of members, the impact of extension on minority non-parties arguably raises concerns. Although some safety measures have been included in the LRA, it could be argued that these are not sufficient. As mentioned by Du Toit *et al*, criteria to determine whether in fact exemptions should be granted are not defined in the LRA.[86] The only requirement for an exemption application in the LRA is that there must be fair criteria captured in the collective agreement concerned that promote the objects of the LRA.[87] Similarly, the LRA does not provide guidelines to determine when parties would be deemed to be 'sufficiently representative' for the purposes of the extension of the agreement. It could be asked why the provisions provided for in respect of the granting of organisational rights in terms of section 21(8) of the LRA were not also made applicable in respect of the extension of bargaining council agreements.[88]

Despite these concerns, it is clear that the constitutional challenges that have been launched against the extension of collective agreements at both workplace (section 23) and bargaining council levels (section 32) have been unsuccessful. Based on the principle that the collective bargaining framework in South Africa is based on majoritarianism, and the fact that the ILO has endorsed the principle that this policy choice does not infringe on the principle of freedom of association, the courts have consistently dismissed the attacks on the extension mechanisms.

It is especially the Minister's obligation to extend collective agreements that has attracted discontent. However, in support of the approach adopted by the courts it should be stressed that section 23(1) of the Constitution states that everyone has

[84] Section 35(5)*(c)* of the LRA.
[85] Section 32(5A) of the LRA.
[86] Du Toit *et al* (n 31) 322.
[87] Section 32(3)*(f)* of the LRA.
[88] See s 21(8) of the LRA.

the right to fair labour practices. By removing the Minister's discretion in instances where the trade union or trade unions concluding the collective agreement represent the majority of employees, it ensures that the benefits of collective bargaining are extended to all employees and it ensures that especially non-unionised employees are not being exploited. This is also aligned to section 23(5) of the Constitution, which promotes the institution of collective bargaining, and section 1*(d)* of the LRA, which promotes orderly collective bargaining at sectoral level.

The extension of collective agreements at both workplace and bargaining council levels contains significant safeguards. At workplace level the extension of a collective agreement constitutes administrative action that that could be subjected to judicial review. At the level of bargaining councils, minority trade unions or non-parties can apply for an exemption. Section 32(3)*(e)* ensures that the extension of collective agreements do not apply unfairly to small employers, thus making the section constitutional as it caters for everyone.

Although the Constitutional Court in *Chamber of Mines* held that the extension of collective agreements has the potential of limiting the right to strike, it was held that such limitation was justifiable. Section 36 of the Constitution involves an inquiry as to the extent to which a limitation is reasonable and justifiable in an open and democratic society. The fact that collective bargaining is a primary purpose of the LRA coupled with the constitutional right to fair labour practices leans towards showing that the constitutional right to equality or any challenge to section 32 may be justifiably limited.

In addition, article 5 of the Collective Bargaining Recommendation of 1951 (No 91) ILO Recommendation of 1951 endorses the extension of collective agreements. It is submitted that sections 23 and 32 not only provide clarity, but also efficiency in collective bargaining. If not for these sections of the LRA, unscrupulous employers would be able to offer less favourable terms and conditions to workers by virtue of not being members of the majority trade union. These sections ensure that whether or not employees are unionised, they have fair labour practices. This is because they will be able to enjoy the same benefits as the employees whose employers are parties to a bargaining council.

As alluded to, section 1*(d)*(ii) of the LRA endorses the objective of orderly collective bargaining. If one were to attack sections 23 and 32 of the LRA, an attack would also have to be launched against the constitutionality of section 1*(d)* (ii) because section 32 gives effect to the objects of the LRA. Du Toit argues that challenging the constitutionality of both section 1*(d)*(ii) and section 32 would be 'a bridge too far'.[89] These sections aim at guaranteeing uniform conditions of employment throughout a particular sector but provide for exemption procedures.[90]

[89] Du Toit (n 74) 2653.
[90] J Grogan *Workplace Law* (2014) 401.

IV COMPARISON BETWEEN ZAMBIA AND SOUTH AFRICA

As recommended by the ILO, the extension of collective agreements should only be adopted if it fits in with the collective bargaining framework of a particular country. This contribution has illustrated that there are significant differences between the labour law models that have been implemented in the two countries. The main resemblances and differences between the two countries are as follows.

On the side of similarities, it is clear that both Zambia and South Africa adopt and endorse the principle of freedom of association. The Zambian courts have made it clear that employees cannot be forced to join or resign from trade unions. This has resulted in the courts concluding that once an employee resigns from a trade union, such an employee no longer is entitled to the protection and benefits extended by the collective agreement. The South African Constitution as well as the LRA also jealously protect every worker's right to freedom of association.

Second, both Zambia and South Africa have sectoral bargaining fora, in the form of joint councils and bargaining councils where collective agreements may be concluded.

However, there are more differences than similarities between the two countries' collective bargaining models. First, the South African LRA places no limitations, similar to those contained in the ILRA in Zambia, on the rights of several groups of government and managerial employees to join trade unions. The South African Labour Court has, however, confirmed that managerial employees should be careful not to breach their fiduciary duties at the workplace during the performance of their trade union functions.

Second, the South African LRA makes provision for the conclusion of closed-shop agreements and agency-shop agreements. This is not permitted in Zambia. Although the constitutionality of these agreements have not been tested in South Africa, it is clear that there are several checks and balances before these agreements can be concluded. These are closely linked to South Africa's majoritarian system.

Third and, arguably, the most significant of the differences, is the fact that the South African collective bargaining model is closely linked to a majoritarian model in terms of which majority trade unions are permitted to dominate the collective bargaining scene. Majority trade unions may conclude and extend collective agreements to minority trade unions as well as to non-trade union members. Zambia's ILRA has not been designed on a majoritarian model and, therefore, this country has moved away from, rather than closer to, the inclusion of provisions that make provision for the extension of collective agreements.

Fourth, several constitutional attacks have been launched against the extension of collective agreements in South Africa, whereas the same cannot be said of Zambia. South Africa, however, has included a number of carefully-crafted safeguards that apply when collective agreements are extended. In

the absence of a majoritarian system in Zambia, and the move away from the extension of collective agreements in Zambia, similar safety measures have not been introduced into the Zambian model. Had Zambia adopted a majoritarian model, which also included the extension of collective agreements, it may also have been necessary to include similar checks and balances in Zambia.

V CONCLUSION

As alluded to under the introduction of the contribution, article 5(1) of ILO Recommendation 1951 provides that:-

> Where appropriate, having regard to established collective bargaining practice, measures to be determined by national laws or regulations and suited to the conditions of each country, should be taken to extend the application of all or certain stipulations of a collective agreement to all employers and workers included within the industrial and territorial scope of the agreement.

This is important because employees in the same industry should be able to demand equality and uniformity in wages and other terms and conditions of service. This ensures stability, protection and fairness for all employees. This is the approach and intention of the South African LRA.

Nonetheless, Zambia has adopted a different collective bargaining model. Although it may be argued that it would be preferable for Zambia to adopt a similar approach in terms of which an appropriate balance between freedom of association and enjoyment of equal rights should be struck, it would in all probability not be possible to introduce it to Zambia in the absence of a remodelling of the collective bargaining framework in its totality.

This would entail adopting a majoritarian model which also includes safeguards for minority unions and for non-union members. Without revamping the collective bargaining system as a whole, such amendments would not fit into the broader scheme of things.

The most significant conclusion of this comparative study is that it cannot be said that there is one best solution that suits all jurisdictions. An approach of cutting and pasting small portions of a broader framework and transporting it into another would not be feasible. The established collective bargaining practices in Zambia differ significantly from the South African model and it is argued that the mere tweaking of provisions would not be appropriate without taking account of local trends and developments in case law as well as what is transpiring at ground level.

CHAPTER 7

Dealing with strike-related violence: Lessons from the ILO and abroad?

MLUNGISI TENZA*

The right to freedom of association can be translated to mean a right to get together for a common cause or purpose without any unlawful interference. The right to strike, on the other hand, is a tool used by workers when they seek to resolve disputes with their employers. Due to the fact that the right to strike is most effectively exercised when workers in a concerted effort withhold their labour in order to remedy a dispute of common cause, it is essential that their associations should be protected by law. Hence, workers' rights to freedom of association form one of the foundations of collective labour law. Both these rights are sourced from the provisions of the International Labour Organization (ILO) and are most often given effect to in domestic legislation. For example, in South Africa the right to freedom of association and the right to strike are entrenched in the Constitution of the Republic of South Africa, 1996 and regulated in more detail in the Labour Relations Act 66 of 1995. Freedom of association serves as the foundation for the exercising of the right to strike. However, in South Africa the right to strike in recent years has been exercised in a manner that is often associated with violence, destruction of property and assaults on non-striking workers. The Labour Court and the legislature have responded to these unruly actions and the verdict is still out whether these measures will bear any fruit. However, the question remains as to the extent to which guidance can be expected from the ILO and from other jurisdictions. Can lessons from the ILO and labour law principles from other countries help South Africa to refashion our domestic law to address strike-related violence?

I INTRODUCTION

The International Labour Organization (ILO) is responsible for establishing labour standards that will apply to the domestic law of member states. Despite the fact that international law is not binding, member states are mandated to enact laws that reflect the position of international law principles.[1] South Africa is a signatory to the ILO's conventions relating to all workers' rights to freedom of association and the right to strike. The right to freedom of association and the right to strike ought ideally to be exercised peacefully.[2] However, it is a matter

* LLB, LLM, LLD Unisa: Senior lecturer, University of KwaZulu-Natal.

[1] A van Niekerk and N Smit *Law@work* (2019) Chapter 2.

[2] See the discussion in para II below.

of concern that the right to strike and associated actions such as pickets are often accompanied by violence in South Africa which results in damage to property and injury to non-striking workers and other innocent bystanders.[3] Several incidents of violent strikes have been reported and cases opened, but unions (despite evidence showing that it was their members) often deny liability and eventually no one is held liable. In South Africa, the issue of strikes that do not conform to legal principles has become the norm whenever workers embark on a strike.[4] The effects of violent strikes tend to shift the focus from the real issues affecting workers, such as demands for an increase in wages, to measures that may be used to curb these actions. A number of academics and the South African Labour Court have suggested that violent strikes should lose their protected status on grounds that such action becomes dysfunctional.[5] The Labour Relations Act has also been amended in 2019 to address some of these concerns.[6] These changes will briefly be discussed and commented on later in this contribution. However, the main question that will be addressed is the extent to which guidance can be expected from the ILO and its expert committees to address strike violence.

II THE ILO AS A SOURCE OF LABOUR RIGHTS

The basis for international labour law is the ILO conventions and recommendations conceived by the ILO.[7] South Africa has been a member of the ILO since its inception in 1919. The ILO's conventions form the basis of international labour law and provide guidance to member states in the formulation of their respective domestic labour relations systems.[8] The most important conventions in this regard are the Freedom of Association and Protection of the Right to Organise Convention,[9] and the Right to Organise and Collective Bargaining Convention.[10] These two conventions serve as the foundation upon which collective labour law has to operate. It is expected that member and non-member states will comply with these ILO conventions. Both the Constitution of South Africa[11] and the

[3] See the discussion that follows under para III below.

[4] Ibid.

[5] Ibid.

[6] The amendments were brought about by the Labour Relations Amendment Act 8 of 2018. Also see the discussion in para IV below.

[7] The ILO was established in 1919 after World War I as a United Nations Specialised Agency to deal with workers' rights in general. M Budeli 'Freedom of association and trade unionism in South Africa: From apartheid to the democratic constitutional order' unpublished LLD thesis, University of Cape Town (2007) 200.

[8] International law may be defined as a body of rules and principles that are binding upon states in their relations with one another. JL Brierly *The Law of Nations* (1963) 1. See, further, G Simpson (ed) *The Nature of International Law* (2001).

[9] 87 of 1948.

[10] 98 of 1949.

[11] Constitution of the Republic of South Africa, 1996.

Labour Relations Act[12] (LRA) place a high value on international and foreign law. Section 233 of the Constitution provides that when interpreting any legislation a court must prefer any reasonable interpretation of the legislation that is consistent with international law over any other interpretation that is inconsistent with international law. Similarly, section 39(1) of the Constitution provides that, when interpreting the Bill of Rights and, by implication, legislation giving effect to the rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law. Section 232 of the Constitution further provides that customary international law is law in the Republic, unless it is inconsistent with the Constitution. These constitutional provisions must be read with the statutory mandate in section 3(b) of the LRA, which provides that the LRA must be interpreted in compliance with the public international obligations of South Africa – referring to international instruments ratified by South Africa.

(1) *The ILO and the right to freedom of association*

All ILO member states should respect the right to freedom of association. ILO Convention 87 of 1948 provides that 'workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join the organisation of their own choosing without previous authorisation'.[13] The convention further states that 'everyone has the right to freedom of peaceful assembly and association and no one may be compelled to belong to an association'.[14] The ILO Declaration on Fundamental Principles and Rights at Work, adopted by the International Labour Conference in 1998, declared that all members, even if they have not ratified the convention in question, have an obligation – arising from the very fact of membership in the ILO – to respect, promote and to realise in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which include freedom of association.

This emphasises the importance of the right to freedom of association. In this regard, De Vos and Freedman have noted that the right to freedom of association is the foundational right for any flourishing democracy.[15] Freedom of association supports and underpins many fundamental rights such as the right to strike, the right to assembly, and the right to peaceful picketing. At the heart of the right to freedom of association is the recognition of the communal nature of people and the need to exercise their rights in association with others of like disposition – for

[12] Act 66 of 1995.
[13] Article 2 of the 1948 Convention.
[14] Arts 20(1) and (2) of the 1948 Convention.
[15] P de Vos and W Freedman (eds) *South Africa Constitutional Law in Context* (2014) 469.

example in relation to the right to strike.[16] In the absence of the right to freedom of association, the right to strike only exists on paper.

At the heart of the right to freedom of association is the fact that a human being does not live on an island, but in association with other people. This rings true in the often expressed Zulu phrase *umuntu umuntu ngabantu*, which literally means that a person is a person because of support from others. This phrase emphasises the communality and interdependence of the members of a community and it relates to the notion that every individual is an extension of others.[17] In addition, the phrase teaches people that in certain instances, there is strength in unity – for example through the formation of unions in the labour relations environment.

The right to freedom of association seeks to safeguard social justice. In South Africa the right to freedom of association is entrenched in section 18 of the Constitution, and more content and meaning is given to this right in the context of the working environment in terms of sections 4 to 10 of the LRA.

The right to freedom of association in the employment context entails that employees are given the freedom to choose who they want to associate themselves with in the form of a trade union.[18] This right is also available to employers as they are at liberty to join employers' organisations.[19] The right to freedom of association is not limited to joining or not joining a union of one's choice. It has a broader meaning. It includes employees' liberty to participate in lawful activities of their union; to elect union representatives, office-bearers and officials; and to stand for election and to discharge the functions attached to these positions.[20]

In the workplace, the right to freedom of association is essentially an 'enabling' right, which entitles workers to form and join workers' organisations of their own choice in order to promote common organisational interests. For workers, freedom of association is a means of facilitating the realisation of further rights, rather than just being a right in itself.[21] It is considered a single essential right for workers from which other workers' rights flow, and without which other rights are illusory.[22] Allowing workers to deal with issues affecting them collectively enables them to establish a more equal balance with their employer, while

[16] *In Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* [1997] 1 BLLR 1.

[17] See *MEC for Education: KwaZulu-Natal & Others v Pillay* 2008 (1) SA 474 (CC) 524E.

[18] Section 4 of the LRA.

[19] Section 6 of the LRA.

[20] Sections 4(2)*(a)–(d)* of the LRA.

[21] M Budeli 'Workers' rights to freedom of association and trade unionism in South Africa: An historical perspective' (2009) 15 *Fundamina* 57.

[22] For example, the right to organise, the right to bargain collectively, and the right to strike. All these rights need one common foundation: 'a liberty to be part of or join the collective of their choice without any fear'.

disallowing them the right of freedom of association will result in employees being isolated or fragmented and becoming powerless. The right to freedom of association plays an important role in making workers' voices heard. In *SA National Defence Union v Minister of Defence & Another*[23] the Constitutional Court held that a provision of the Defence Act[24] prohibiting members of the armed forces from participating in public protest action and from joining trade unions, violated the members' right to freedom of expression and their right to form and join a trade union. The court also rejected the Minister's argument that such infringement was justified.

It follows as a logical consequence that if South Africa has a law that recognises the right to freedom of association as a result of which an organisation is formed, such an organisation, its members and their legal activities performed in the name of the organisation (for example, in the name of a trade union) shall be protected by law.

(2) *The ILO and the right to strike*

The ILO conventions do not provide for an explicit right to strike. However, a liberal interpretation of the provisions of the ILO conventions entails that the right to strike may be drawn from these conventions. Article 3 of the Freedom of Association and Protection of the Right to Organise Convention[25] states:

> 3(1) Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmers.
>
> 3(2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4 of the Right to Organise and Collective Bargaining Convention[26] further provides:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

Although the employer lobby during 2012 challenged the ILO jurisprudence on the right to strike, it became clear that their efforts were futile.[27] In February

[23] 1999 (4) SA 469 (CC).

[24] Section 126 of Act 44 of 1957.

[25] 87 of 1948.

[26] 98 of 1949.

[27] T Novitz 'The International and regional framework' in B Hepple, R Le Roux and S Sciarra *Laws Against Strikes* (2015) 46.

2015, at an ILO tripartite meeting, the Workers' and Employers' Groups issued a joint statement stating that the 'right to take industrial action by workers and employees in support of their legitimate industrial interests is recognised by the constituents of the ILO'.[28]

It is well known that ILO conventions serve as international treaties that are binding on member states provided that such treaties or their provisions have been adopted and made law in domestic parliaments of member states. As stated above, one of the main functions of the ILO is to establish labour standards.[29] Article 8 of Convention 87 states that workers and their associations have an obligation to respect the law of the land. The law of the land must, however, not unreasonably impair the rights of workers to freedom of association.[30] However, the ILO has weak enforcement mechanisms and, as such, it does not have an established international labour parliament with the power to bind sovereign states.[31] The ILO trusts that member states will in their domestic laws adopt provisions that will comply with their wishes and give effect to international labour standards.[32]

South Africa has committed itself to comply with these standards and recommendations and, as a result, the Constitution confirms the importance of international law in South African law.[33] In addition, South Africa supports the principle that customary international law may be applied directly as part of the common law.[34] In *Republic of Angola v Springbok Investments (Pty) Ltd*[35] Kirby J stated that South Africa 'embraced the doctrine of incorporation, which holds that the rules of international law, or the *ius gentium* … are considered to be part of the law unless they conflict with statutes or the common law'.

In addition, the LRA – the principal statute on matters affecting labour – states that one of its purposes is 'to give effect to obligations incurred by the Republic as a member state' of the ILO.[36] Reading from the language of the Constitution and the LRA, it demonstrates South Africa's commitment to compliance with international law. However, as discussed below and contrary to this commitment, in recent years South Africa has been experiencing many violent strikes.[37]

[28] Novitz (n 27) 55.

[29] Since its establishment, the ILO has adopted numerous conventions and recommendations regulating workers' rights – for example, Convention and Recommendation Concerning Discrimination in Respect of Employment and Occupation 111; the Convention Concerning Equal Remuneration for Men and Women for Work of Equal Value 100.

[30] T Kujinga and S van Eck 'The right to strike and replacement labour: South African practice viewed from an international law perspective' (2018) 21 *PER/PELJ* 8.

[31] Van Niekerk and Smit (n 1) 23–34.

[32] Ibid.

[33] Section 39(1)*(b)* of the Constitution.

[34] E Gericke 'The interplay between international law and labour laws in South Africa: Piercing the diplomatic immunity veil' (2014) 17 *PER/PELJ* 2601, 2604.

[35] (2005) 2 BLR 159 (HC) 162.

[36] Section 1*(b)* of the LRA.

[37] See the discussion in para III below.

In 2019 the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) discussed and noted its concerns against incidents of violence during strikes and the retaliation against such striking workers by the South African government in 2019.[38] This followed the release of the Judicial Commission of Inquiry into the events at Marikana Mine in Rustenburg in South Africa, which followed the death of numerous workers during a strike in August 2012. The CEACR requested the South African government to provide it with more information on the action taken to implement the recommendations of the Commission.

Gernigon *et al* point out that the Committee on Freedom of Association (CFA) recognises the principle that non-striking employees should have the freedom to continue working in the face of strike action.[39] In connection with picketing, the CFA accepts that such action should be peaceful and should not lead to acts of violence against other persons.[40]

However, it is argued that it becomes problematic in South Africa when there is an abuse of the right to strike. The right to strike is not an absolute right and its exercise should not clash with the other fundamental rights of citizens such as the right to dignity, and the right to be free from all forms of violence.

It is submitted that the ILO's principles mostly relate to requirements for strikes carried out in compliance with national legislation.[41] This means that they address conditions that have to be fulfilled under the law in order to render a strike lawful. The ILO stresses that such conditions should not be unreasonable to the extent that it places an unreasonable limitation on trade union activities.[42]

The ILO's Committee on Freedom of Association (CFA) further endorses the principle that picketing should not be permitted to the extent that it disturbs public order and threatens workers who continue with their duties.[43] It is the view of the CFA that

> [t]aking part in picketing and firmly but peacefully inciting other workers to keep away from their workplace cannot be considered unlawful. The case is different, however, when picketing is accompanied by violence or coercion of non-strikers in an attempt to interfere with their freedom to work; such acts constitute criminal offences.[44]

[38] Observation (CEACR) – adopted 2019, published 109th ILC session (2021), accessible at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13101:0::NO::P13101_COMMENT_ID:2281608 (accessed on 19 September 2020).

[39] B Gernigon, A Odero and H Guido 'ILO principles concerning the right to strike' International Labour Office (1998) 30.

[40] Ibid.

[41] In South Africa, this will mean compliance with ss 64(1) and 65(1) of the LRA.

[42] Gernigon, Odero and Guido (n 39) 43

[43] Ibid.

[44] CFA *The Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (1996) paras 583–587.

Ben-Israel quite correctly states that common sense dictates that the removal of the right to strike would be inconsistent with other internationally recognised principles, such as the proscription of slavery and the abolition of forced labour.[45] Most member states also have national legislation that places restrictions on the right to strike in instances of lawlessness and such jurisdictions also often contain clauses providing for sanctions against workers and trade unions that infringe these provisions. This is also the case in South Africa. If a strike is unprotected, there are various remedies available to the employer or an affected person to stop such a strike or to claim compensation for loss suffered.[46] However, this does not seem to be sufficient to curb strike-related violence in South Africa.

It is clear that employees' right to strike forms an essential component of freedom of association and one of the permissible weapons that can be wielded by trade unions when collective bargaining fails.[47] Without the right to freedom of association, it would be difficult for employees to join or form a trade union, to bargain collectively and to strike.[48] Ben-Israel states the following regarding the freedom to strike:

> The freedom to associate and to bargain collectively must be supplemented by additional freedom, which is the freedom to strike. Hence, freedom to strike is complementary freedom of the freedom of association since both are means to help in achieving a common goal which is to place the employer-employee relationship on an equal basis.[49]

However, it is argued that the ILO does not provide sufficient guidance regarding if, and how, the right to strike and associated rights should be curtailed if workers do not exercise these rights peacefully. This contribution questions whether the ILO should not provide clearer and more detailed guidance to member countries in instances where domestic laws do not adequately address strike violence. Stated differently, how can the ILO assist member states to refashion their domestic law to cater for and address strike-related violence in their jurisdictions?

[45] R Ben-Israel *International Labour Standards: The Case of Freedom to Strike* (1998) 23. It is submitted that the right to withhold work is the direct opposite of forced labour.

[46] Section 68(1) of the LRA.

[47] M Budeli 'Understanding the right to freedom of association at the workplace: Its components and scope' (2010) 31 *Obiter* 27; E Manamela and M Budeli 'Employees' right to strike and violence in South Africa' (2013) 46 *CILSA* 308.

[48] A Sachs 'The Bill of Rights and worker rights: An ANC perspective' in E Patel (ed) *Workers Rights: From Apartheid to Democracy – What Role for Organised Labour* (1994) 47.

[49] Ben-Israel (n 45) 93.

III THE RIGHT TO STRIKE AND STRIKE VIOLENCE IN SOUTH AFRICA

The right to strike is entrenched in section 23(1)*(c)* of the Constitution[50] and is regulated in more detail in sections 64 to 68 of the LRA.[51] The LRA, which is the principal legislation pertaining to matters affecting collective labour law issues, recognises protected and unprotected strikes.[52] A strike will be protected if there was compliance with sections 64(1) and 65(1) of the LRA that relate to compulsory conciliation and the provision of the appropriate notification period.[53]

The advantages of compliance with these two sections include that employees enjoy immunity from civil action against employers who may want to take action against them for breach of contract of employment and for damages that may have been caused by the strike.[54] However, this immunity does not apply in favour of employees who may have committed offences or misconduct during a strike.[55] The immunity also is not available to employees if they participate in an unprotected strike.[56] Participation in an unprotected strike entitles the employer, or any affected person, to claim compensation for losses suffered and they can also approach the Labour Court for an interdict.[57] Employers can also dismiss such employees, provided the dismissal is substantively and procedurally fair.[58]

The Constitution accords everyone the right to assemble, to demonstrate, to picket and to present petitions.[59] These rights must be exercised peacefully and participants must be unarmed.[60] The constitutional right to strike does not include the requirements that such action must be peaceful and unarmed. However, regardless of whether the strikes have constitutional protection, unprotected strikes could still attract legal consequences.[61]

[50] Section 23(2)*(c)* of the Constitution provides that '[e]very worker has the right to strike'.

[51] Section 64 of the LRA provides that '[e]very employee has the right to strike and every employer has a recourse to lock-out'.

[52] A strike will be protected if there is compliance with ss 64(1) and 65(1) of the LRA.

[53] The dispute must be considered by the CCMA of bargaining council and 48 hour's written must be given in the private sector and seven days in the public sector. There are no requirements regarding secret ballots in relation to protected strikes. See the discussion of *National Union of Metalworkers of South Africa & Others v Mahle Behr SA (Pty) Ltd* Unreported case number DA09/2019, 8 July 2020 below. In a seeming contradiction, s 76 of the LRA permits employers to engage replacement labour during protected strikes. Elsewhere, it has been suggested that this perpetuates strike-related violence. However, this aspect falls beyond the scope of this discussion. See M Tenza 'The link between the use of replacement labour and the eruption of violence during a strike' (2016) *Obiter* 106, 110 in this regard.

[54] Section 67(6) of the LRA.

[55] Section 67(8).

[56] Section 68.

[57] Section 68(1)*(a)*.

[58] Section 68(5).

[59] Section 17 of the Constitution.

[60] Section 17 of the Constitution.

[61] Section 68 of the LRA.

Despite this seemingly neatly-regulated framework for protected and unprotected strikes, the labour relations landscape in South Africa has been marred by unacceptably high levels of violence during collective bargaining. A media report by the South African Institute of Race Relations has pointed out that between the years 1999 and 2012 there were 181 strike-related deaths, 313 injuries and 3 058 people were arrested for public violence associated with strikes.[62]

To mention only a few examples, the following incidents have been considered and reported on by the courts. In *Security Services Employers Organisation & Others v SA Transport & Allied Workers Union & Others (SATAWU)*,[63] approximately 20 security guards who were not on strike were targeted by their striking colleagues and were thrown off moving trains. Two of these were killed, while others were admitted to hospital with serious injuries.[64] This conduct was condemned by the court.[65] In *Tsogo Sun Casino (Pty) Ltd t/a Montecasino v Future of South Africa Workers Union & Others*[66] striking employees who were engaged in a picket damaged property and assaulted persons in the proximity of their employer's premises. In *South African Trade & Allied Workers Union (SATAWU) v Garvas & Others*[67] a gathering (pursuant to a strike) was held in Cape Town during which the strike descended into chaos with extensive damage occurring to vehicles and shops. Several people were injured. In *Kapesi & Others v Premier Foods Ltd t/a Blue Ribbon Salt River*[68] several incidents of violence were committed during a strike and one female non-striker was dragged from her home at night and assaulted with pangas and sjamboks.

A worrying trend has also developed in as far as trade unions often do not heed court orders. In *Pikitup Johannesburg (Pty) Ltd (Pikitup) v South African Municipal Workers Union (SAMWU) & Others*[69] trade union members who were involved in an unprotected strike prevented non-striking workers from discharging their duties and assaulted them. An interdict prohibiting the strike was issued by

[62] SAIRR 2013, accessible at http://irr.org.za/reports-and-publications/media-releases/Strike%20violence.pdf/ (accessed on 7 September 2019).

[63] *Security Services Employers Organisation & Others v SA Transport and Allied Workers Union & Others* (2012) 35 *ILJ* 1693 (CC).

[64] *SABC News* (25 May 2006). In *SACCAWU v Check One (Pty) Ltd* (2012) 33 *ILJ* 1922 (LC) one of the striking employees, Mr Nqoko, allegedly threatened to cut the throats of those employees who had been brought from other branches of the employer's business to assist the employer where there was a strike.

[65] *SACCAWU* (n 64) 1933A.

[66] (2012) 33 *ILJ* 998 (LC). In *Xstrata South Africa v Association of Mineworkers and Construction Union & Others* [2014] *ZALCJHB* 58 (LC) the employer obtained an interdict to prevent the union and its members who were dismissed following their participation in an unprotected strike. The workers ignored the interdict and continued with their violent actions despite the court order.

[67] *SATAWU v Garvas & Others* (2012) 33 *ILJ* 1593 (CC).

[68] (2012) 33 *ILJ* 1779 (LAC).

[69] (2016) 37 *ILJ* 1710 (LC).

the Labour Court. The order prohibited employees from participating in the unprotected strike and committing various unlawful acts aimed at interfering with Pikitup's waste-collection business. However, the interdict was not heeded and the employees continued with their strike.

These examples illustrate the commonality of violence during strikes and the question needs to be answered whether the right to strike should be protected to the same extent in member countries where trade unions and their members tend to resort to unacceptable levels of violence.

According to Manamela and Budeli violent strikes are not functional to collective bargaining as they are not conducive to bargaining in good faith.[70] Fergus also alludes to the fact that some South African commentators are arguing that violent and protracted strikes in South Africa have revived the notion that otherwise lawful strikes must also be 'functional to collective bargaining' to qualify for legal protection.[71] So, for example, Rycroft states that a strike marred by violence should lose protection if participants behave 'unreasonably'.[72] He argues that a strike marred by misconduct should lose its protected status, resulting in employees losing their immunity against dismissal.[73]

However, the degree or extent of violence required to convince any court about the dysfunctionality of a strike remains unclear. In *National Union of Food Beverage Wine Spirits & Allied Workers v Universal Product Network (Pty) Ltd: In re Universal Product Network (Pty) Ltd v NUFBWSAW*[74] the Labour Court held that courts should weigh the degree of violence committed by striking workers

[70] Manamela and Budeli (n 47) 323.

[71] E Fergus 'Reflections on the (dys)functionality of strikes to collective bargaining: Recent developments' (2016) 37 *ILJ* 1537. This principle was first emphasised in the case of *Black Allied Workers Union & Others v Prestige Hotels CC t/a Blue Waters Hotel* (1993) 14 *ILJ* 963 (LAC) 972A–D. In this instance the former Labour Appeal Court held that the 'right to strike is important and necessary to a system of collective bargaining. It underpins the system – it obliges the parties to engage thoroughly and seriously with each other. … If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no purpose. … The strike would cease to be functional to collective bargaining and instead it would be an opportunity for the employer to take punitive action against the employees concerned.'

[72] A Rycroft 'What can be done about strike related violence', accessible at https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_Rycroft.pdf/eda46151-176d-4091-a689-f1042e03e338 (accessed on 8 October 2019).

[73] Compare S van Eck and T Kujinga 'The role of the Labour Court in collective bargaining: Altering the protected status of strikes on grounds of violence *National Union of Food Beverage Wine Spirits & Allied Workers Union v Universal Product Network (Pty) Ltd* (2016) 37 *ILJ* 476 (LC)' 2017 *PER/PELJ* 1 where a different approach has been adopted.

[74] (2016) 37 *ILJ* 476 (LC). See also *Shoprite Checkers (Pty) Ltd v CCMA* (2006) 27 *ILJ* 2681 (LC) 2689J where the court held that 'if a picket exceeds the bounds of peaceful persuasion or incitement to support the strike, to become coercive and disruptive of the business of third parties, the picket ceases to be reasonable and lawful'.

against the attempts of the union (if any) to prevent or reduce the violence.[75] The court accepted the reasoning of Rycroft in as far as the author argues that the question must be posed whether 'misconduct [has] taken place to the extent that the strike no longer promotes functional collective bargaining … In answering this question the court would have to weigh the levels of violence and efforts by the union concerned to curb it.'[76]

It is submitted that the approach adopted regarding violent strikes losing their protected status should be supported. Under such circumstances, the employer should be in a position to dismiss striking employees, and to apply for an interdict to stop them from continuing with their violent strike action.[77] The LRA is also clear on the issue of misconduct during a strike. It states that if any action by employees constitutes an offence, the protection associated with protected strikes does not apply.[78]

The prevalence of violent strikes in South Africa has called into question the value of strike action as the deadlock breaking mechanism where workers and employers have a stalemate on matters of mutual interest. The ILO conventions and national laws of member states do not contemplate that unlawful and violent conduct should form part of the right to strike. Such behaviour deserves no protection, and more effective measures should be put in place to reduce the levels of violence associated with strikes in South Africa.[79] This contribution argues that the ILO should encourage member states to come up with measures to minimise violent strikes where this is a problem. The ILO could also potentially play a useful role in developing guidance pertaining to the reduction of such unlawful industrial action.

IV MEASURES TO CURB VIOLENT AND PROTACTED STRIKES

Godfrey, Du Toit and Jacobs made the following comments regarding the need for amendments to the LRA to rectify the situation regarding violent and protracted strikes:

> The strike and killings at Marikana, followed by the large strike by the Association of Mineworkers and Construction Union (AMCU) in the platinum sector early in 2014, led to the widespread perception that something was amiss with the labour relations system. There was a sense that changes needed to be made to 'contain the damage that strikes, often violent, were causing the economy.[80]

[75] *Universal Product Network* 488–489.

[76] Rycroft (n 72) 827.

[77] Sections 68(1) and (2) of the LRA.

[78] Section 67(8).

[79] *KPMG Road and Earthworks (Pty) Ltd v Association of Mineworkers and Construction Union & Others* *LC* September 2017 Case J1520/2016 (unreported) para 1.

[80] S Godfrey, D du Toit and M Jacobs 'The new labour bills: An overview' (2018) 38 *ILJ* 2162.

Subsequent to these comments having been made, the Labour Relations Amendment Act[81] came into effect in January 2019. This instrument at long last included a number of measures to curb violent strikes that may have become dysfunctional in nature. Three measures were introduced.

First, a process of advisory arbitration was introduced in instances of violent strikes or those that are capable of causing a local or national crisis.[82] However, this was done with extreme caution, which seeks to remain within the limits of avoiding any constitutional challenges on the right to strike. This process can briefly be described as follows:

- The director of the Commission for Conciliation, Mediation and Arbitration (CCMA) can after consultation with the parties appoint an advisory panel in any dispute 'in the public interest' to 'facilitate' the process.[83]
- The director must appoint an arbitration panel when directed to do so by the Minister of Labour, or on application of any party to the dispute if there are reasonable grounds to believe that the strike no longer is 'functional to collective bargaining' or if there is an 'imminent threat' to another constitutional right or can cause a local crisis.[84]
- The panel, consisting of a senior CCMA commissioner and two assessors appointed by the employer and trade union respectively must consider the matter and deliver an award within seven days.[85]
- The panel must make recommendations regarding the resolution of the dispute and the parties have seven days to accept or reject them.
- The Minister must publish the award for public dissemination and the parties have to accept or reject the award.[86]
- If any of the parties ignore the award it becomes binding as a collective agreement.
- Subsequent to the award gaining binding effect, trade unions are precluded from engaging in a strike about the issue in dispute.[87]

Second, more stringent regulations regarding picketing have been introduced with the view to attaining more orderly conduct during pickets.[88] Parties must reach agreement on picket rules before the picket commences. Thus, the CCMA commissioner must attempt to secure picketing rules before a certificate is

[81] Act 8 of 2018.
[82] Godfrey, Du Toit and Jacobs (n 80) 2173.
[83] Section 150A(1) of the LRA.
[84] Section 150A(3) of the LRA.
[85] Section 150B(6) of the LRA.
[86] Section 150C(5) of the LRA.
[87] Section 150D(2) of the LRA.
[88] Godfrey, Du Toit and Jacobs (n 80) 2173.

issued about the non-resolution of a strike; failing to secure an agreement, the commissioner must, after hearing the parties, determine the picketing rules and issue them with the certificate of outcome of the conciliation of the strike; and no picket is allowed unless rules are in place in terms of a collective agreement or determination by the commissioner.[89] Added to these provisions, a Code of Good Practice: Collective Bargaining has been published. This set of guidelines spells out what in effect is good faith collective bargaining. The only seemingly stringent provision that has been included regarding picketing gives the Labour Court the right to order compliance, or to suspend the picket.[90] This has the effect of changing the status of a protected picket into an unprotected picket in instances where the rules have not been met. Even though speculative, Du Toit, Godfrey and Jacobs contend that such suspension could possibly be ordered when a trade union is unable to control its members during a picket.[91]

Third, an attempt was seemingly made to reintroduce a secret strike ballot prior to the commencement of strikes. During South Africa's pre-democratic era, the LRA 28 of 1956 required a secret ballot before a 'legal' strike could take place.[92] With the dawn of a democratic South Africa in 1994, the current LRA excluded the requirement of a secret strike ballot to determine the protected status of a strike. However, the LRA has always required that before a trade union may be registered by the Registrar of Labour, the trade union must adopt a constitution which requires that members must vote before the trade union would call out a strike.[93] However, this requirement had never been enforced and a number of well-known trade unions never included such a requirement in their constitutions.[94] In order to rectify this situation, section 19 of the LRA Amendment Act included the following provision:

> (1) The registrar must, within 180 days of the commencement of this Act, in respect of registered trade unions and employers' organisations that do not provide for a recorded and secret ballot in their constitutions—
>
> *(a)* consult with the national office bearers of those unions or employers' organisations …; and
>
> *(b)* issue a directive to those unions and employers' organisations as to the period within which the amendment to their constitution is to be effected …

[89] Section 89(12)*(c)*.
[90] Godfrey, Du Toit and Jacobs (n 80) 2171.
[91] Ibid.
[92] JF Myburgh '100 years of strike law' (2004) 25 *Industrial Law Journal* 296.
[93] Section 95 of the LRA.
[94] See the discussion of the cases below.

(2) Until a registered trade union or employers' organisation complies with the directive made in terms of subsection (1)*(b)* … the trade union or employer organisation, before engaging in a strike or lockout, *must conduct a secret ballot* of members (emphasis added).

Subsequent to this amendment, a measure of uncertainty existed regarding the question of whether a secret strike ballot had been elevated as a requirement of protected strikes.[95] The Labour Court issued interdicts against trade unions in a number of cases on the ground that they had not conducted a secret ballot.[96] However, in *National Union of Metalworkers of South Africa & Others v Mahle Behr SA (Pty) Ltd*[97] the Labour Appeal Court overturned these decisions and held that this amendment did not change the requirements for protected strikes. The LRA was merely amended to encourage trade unions to amend their constitutions. Furthermore, the issue of a ballot was, and since 1995 has always been, an issue between a trade union and its members and it has no effect on the status of a strike and the remedies accorded to employers or any other third parties.

To summarise, South African policy-makers have responded to the problematic phenomenon of violent strikes in South Africa. However, there is no evidence that the architects of the amendments drew their inspiration from ILO conventions or recommendations. Nonetheless, it remains to be seen whether these amendments will have any positive effect on the country's unstable labour relations system. Almost two years have passed without any matters having been referred to advisory arbitration. Added to this, subsequent to the decision of the Labour Appeal Court in *Mahle Behr SA*, it seems that the attempts to make the provisions more stringent regarding secret ballots in all likelihood will have no effect on the protected or unprotected status of strikes, and the remedies that accompany it. Although the amendments are welcomed, it is still early days and there are no indications yet that these measures will have any positive impact on the reduction of violence during strikes.

V LESSONS FROM OTHER JURISDICTIONS

What lessons can be gained from other countries regarding interest arbitrations? Although not exactly the same as advisory arbitration, interest arbitration is implemented in Canada. If a strike continues longer than expected with no solution forthcoming, Canadian law provides certain mechanisms for ending

[95] E Fergus and M Jacobs 'The contested terrain of secret ballots' (2020) 41 *ILJ* 757–778.

[96] See *Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of South Africa & Others* (2019) 40 *ILJ* 1814 (LC); *Air Chefs (SOC) Ltd v National Union of Metalworkers of SA & Others* (2020) 41 *ILJ* 428 (LC); and *Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal & Allied Workers Union & Another* [2019] 12 BLLR 1335 (LC).

[97] Unreported case DA09/2019, 8 July 2020.

the dispute and eventually the strike or industrial action.[98] The Canadian Labour Code confers powers on elected officials to intervene, where there is a compelling public interest to do so.[99] The parties to a dispute have to first agree on an arbitrator and if they fail to do so, the Minister of Labour will appoint an arbitrator in terms of legislation.[100] The Minister has the discretion to refer the matter regarding the maintenance of industrial peace to either the Canadian Industrial Relations Board or to direct the Board to do what he or she deems necessary as authorised by the Canadian Labour Code.[101] The Minister is also empowered to do what he or she deems expedient to maintain industrial peace and promote conditions favourable to the settlement of industrial disputes.[102]

Interest arbitration entails a process during which the issues that are not resolved in the negotiations between the employer and labour unions may be taken forward to an impartial arbitrator for final resolution. This makes it different from the advisory arbitration that was introduced for South Africa. In Canada, interest arbitration is used as a remedy in periods of prolonged strikes, particularly where a work stoppage can interfere with 'public safety, public health or the general economic health of the nation'.[103] It is a mechanism used to resolve disputes in a collective bargaining process; and a method of resolving disputes over new terms and conditions of employment. The purpose of interest arbitration is to repair a breakdown in negotiations and to impose a contract in a timely fashion in an attempt to avoid irreparable harm to the bargaining relationship.[104]

Interest arbitration differs from rights arbitration in that the interest arbitrator is neither a court of justice nor a quasi-judicial body, but simply a labour relations device. The dispute to be arbitrated does not arise from a collective agreement. In this regard, interest arbitration should be used as a last resort after all applicable resources have been exhausted.[105] However, it offers an alternative mechanism for breaking deadlocks between the parties involved in collective bargaining.

The introduction of interest arbitration in South African labour law will not be easy and will face challenges. The main challenge will be its compatibility with the Constitution. Will the introduction and implementation of interest arbitration be constitutional? The answer to this question is to be found in

[98] The Canadian Labour Code and the Labour Relations Codes or Acts of various provinces and territories require collective agreements to make provision for the settlement of disagreements such as grievances and disputes.

[99] Section 80 of the Canadian Labour Code of 1985.

[100] Section 107 of the Canadian Labour Code of 1985.

[101] Ibid.

[102] Ibid.

[103] Ibid.

[104] *Yarrow Lodge Ltd v Hospital Employees Union* (1993) 21 CLRBR (2d) 1 (BC).

[105] C Paul *Reconcilable Differences* (1980) 53.

section 36(1) of the Constitution.[106] To force the parties to abandon their right to strike for arbitration will require compliance with section 36(1), which provides that 'any limitation of the right in the Bill of Rights must be … reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.

The factors listed in sections 36(1)*(a)–(e)* will have to be taken into account. These factors allow the person or institution that intends to limit the right protected in the Constitution to weigh the advantages and disadvantages of limiting the right. In weighing the advantages and disadvantages of limiting the right to strike, it can be taken into account that it would constitute less restrictive means to achieve the purpose of orderly collective bargaining and it could potentially avoid the adverse effects of protracted and violent industrial action.[107] In this regard, such a limitation on the right to strike will save many jobs compared to allowing violent and protracted strikes.

The second difficulty with the implementation of interest arbitration could be that it might be contrary to ILO recommendations. The ILO provides that where compulsory arbitration prevents strike action, it is contrary to the right of trade unions to freely organise their activities and could only be justified in the public service or in essential services.[108] However, this may be justified on the grounds of social justice and economic needs, including the need to avert the loss of jobs.

Despite these challenges, it is argued that the introduction of interest arbitration in the long run will not only serve the interests of the business or the employer, as well as the economy, but may also save employees from the negative impact that may result from a violent strike.

South Africa should also consider empowering the labour court to curtail violent strikes. It may be worth the while to consider the situation in Australia. It is a common problem to identify the actual wrongdoer when an offence has been committed by a group of people during industrial action. To overcome this problem, Australia has included in the Fair Works Act[109] (FW Act) measures to prevent industrial action from becoming violent. The FW Act empowers the Fair Works Commission (FWC), a body tasked with enforcing these measures, to issue an order to suspend or prevent industrial action that is 'happening, or is threatening, impending or probable' in the course of an industrial dispute.[110] The FWC is also empowered to terminate a bargaining period involving a protected

[106] Section 36(1) of the Constitution.
[107] Ibid.
[108] *ILO Digest* (1996) paras 518–521.
[109] 28 of 2009.
[110] Section 423 of the FW Act.

action on the grounds of significant harm.[111] A bargaining period entails a period during which the application to negotiate terms of employment is lodged with the FWC in terms of the law.[112]

The factors that the FWC has to take into account to decide whether to terminate the industrial action are the extent to which the protected industrial action threatens to damage the ongoing viability of a business carried on by the person; the disruption in the supply of goods or services to an enterprise or business; and the failure of the employees to fulfil their contractual duties in terms of the contract of employment with the employer, which results in economic loss.[113]

As discussed in the previous part, South Africa has implemented the measure to withdraw the protected status of a picket when trade unions may have lost control over their members during a strike. Although this is a step in the right direction, it may not be enough. It is suggested that the retraction of the protected status of strikes, as suggested by Rycroft and the Labour Court in *Universal Paint*, should be reconsidered as alternatives to curb violent strikes in South Africa. However, it is accepted that such restrictions will have to be developed to be aligned with constitutional values as well as the principles established by the ILO.

VI ACCOUNTABILITY OF TRADE UNIONS

In South Africa the courts have held unions liable for the unlawful conduct of their members committed during public protest action. In *SATAWU v Garvas & Others*[114] a public gathering was held pursuant to a strike. The gathering descended into chaos with extensive damage to vehicles and shops along the route. Several people were also injured. The total damage caused to private property was estimated at R1,5 million. Consequently, claims for damages were instituted against SATAWU in terms of section 11(1) of the Regulation of Gatherings Act (RGA).[115] The court confirmed the ruling of the Supreme Court of Appeal, which had held the convening union, SATAWU, liable for the damage caused to vendors by demonstrators.[116]

Section 68(1)*(b)* of the LRA also makes provision for the institution of claims for reasonable compensation against trade unions in respect of damages caused during unprotected strikes. Employers have succeeded with such claims in a number of instances. However, the courts have often significantly reduced the awarded amount of compensation. The following two cases illustrate the point.

[111] Section 423(2).
[112] Section 229.
[113] Section 423(1) of the FW Act.
[114] *SATAWU v Garvas & Others* [2012] 10 959 (CC).
[115] 205 of 1993.
[116] *SATAWU* (n 114) 1633F.

In *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union*[117] the employer claimed an amount of R15 million from the union for losses suffered as a result of a strike convened by the union. The Labour Court awarded the amount of R100 000.[118] During the course of the court proceedings, three things were held to be prerequisites for section 68(1)*(b)* to apply. First, the strike or lock-out or conduct in support of a strike must be unprotected. Second, the applicant seeking to use this section must have suffered loss as a result of the strike or lock-out or conduct in furtherance of a strike. Third, the party against whom the claim is made must have participated in the strike or committed acts while furthering the strike.[119] The union was ordered to pay the said amount in monthly instalments of R5 000.[120]

In *Algoa Bus Company v SATAWU & Others*[121] the employer quantified the loss caused by an unprotected strike as well as the resultant damages to property at R1,4 million. The court found the strike to be unprocedural and premeditated and confirmed that the strike caused the losses to the applicant.[122] However, the Labour Court concluded that the 'just and equitable' compensation of R1,4 million was payable in monthly instalments of R5 280 (payable by the union) and R214,50 (payable by every member by way of a salary deduction).[123]

In *In2Food (Pty) Ltd v Food & Allied Workers Union & Others*[124] the court argued as follows:

> The time has come in our labour relations history that trade unions should be held accountable for the actions of their members. For too long trade unions have glibly washed their hands of the violent actions of their members … These actions undermine the very essence of disciplined collective bargaining and the very substructure of our labour relations regime.[125]

In light of the above, it is clear that trade unions can be held liable for violent conduct during strike action in South Africa. Taking into account the high levels of violent strikes in South Africa, the effective application by our courts of such a liability is necessary. This necessity is further corroborated by the negative impact that violent strikes have on the international image and on the economy of South Africa, as investors may be hesitant to do business in the country.[126]

[117] *Rustenburg Platinum Mines Ltd v Mouthpiece Workers Union* (2001) 22 *ILJ* 2035 (LC).

[118] *Rustenburg Platinum Mines* (n 117) 2045I.

[119] *Rustenburg Platinum Mines* (n 117) 2042G–H.

[120] *Rustenburg Platinum Mines* (n 117) 2046A.

[121] (2015) 36 *ILJ* 2292 (LC).

[122] *Algoa Bus Company* (n 121) 2295C.

[123] *Algoa Bus Company* 2296J–2297A.

[124] (2013) 34 *ILJ* 2589 (LC).

[125] *In2Food* (n 125) 2591H–I. See, also, *Security Services Employers' Organisation & Others v SATAWU & Others* (2007) 28 *ILJ* 1134 (LC).

[126] See 'Warning on the effect of violent strikes to the economy', accessible at http://bit.li/2hi0xxp (accessed on 15 August 2019); 'Worsen South Africa's economic situation – Aveng CEO', accessible at http://bit.ly/2hsVo3J (accessed on 15 August 2019).

It is argued that the Labour Court should be firm and consistent in holding unions liable for the conduct of members. This will compel unions to monitor the conduct of members and ensure that no damage to property or harm to individuals occur as this leads to union liability.

VII CONCLUSION

Violence during strike action poses a problem in a country where the rule of law is applied. It is not suggested that the constitutional right to strike should be removed. However, it would have been helpful for a country such as South Africa, where violent strikes have become problematic, to receive some guidance from the ILO regarding ways to curb such lawless actions. It is suggested that there may be merit in considering interest arbitration, rather than mere advisory arbitration, as an alternative to restrict violent strikes. Lessons may be learned from other countries such as Canada and Australia where this practice is in place. It is further suggested that trade unions should be held liable if no one can be identified as the real wrongdoers. Trade unions should not be in a position to wash their hands in innocence if the conduct by their members causes damage to property and harm to other people. It is suggested that legislative provisions should be considered again to give labour courts the power to suspend industrial action that has become violent. This could assist in reducing the number of violent strikes in South Africa and limit the negative impact that such action has on the country.

CHAPTER 8

Inclusion of the education sector as an essential service in Botswana

THATO MUJADJI*

One of the consequential changes resulting from the 2011 country-wide public service strike in Botswana was the amendment of the Trade Disputes Act Chapter 48:02 (TDA) which led to the addition of services to the list of essential services in terms of the Act. This included the education sector, which is not considered as essential services by the International Labour Organization. This contribution examines Minister of Labour & Home Affairs & Attorney-General v Botswana Public Employees Union *and its implications after the inclusion of the educational sector and other services as essential services. As a result of this court action, the TDA was again amended in 2019 with the educational sector being removed from the list of essential services to bring the list of essential services back in line with international standards.*

I INTRODUCTION

Labour relations in the public sector in Botswana became exceptionally volatile during the years following the 2011 public sector strike. This was the largest strike the public sector had ever experienced, lasting over six weeks, with civil servants demanding a salary increase of 13,8 per cent inflationary adjustment and an immediate 2 per cent rise in salary.[1] They eventually accepted 3 per cent. This strike brought the government to its knees as it suffered unprecedented losses in terms of productivity and reputation as service delivery was not forthcoming.

Since the 2011 strike, public sector unions have continuously instituted legal proceedings against the government over employees' rights and the government's alleged failure to bargain with employees in good faith. These cases involved the executive's unilateral imposition of salary increments while collective bargaining was ongoing and ultimately reached the Court of Appeal of Botswana.

In 2014 the government took a unilateral decision to award public officers a 4 per cent salary increase. The following year, the High Court declared this decision a violation of the government's duty to bargain in good faith. Less than a

* LLB (UZ) LLM (Stell); Attorney.

[1] Botswana Land Boards v Director of Public Service [2013] 1 BLR 373, 381.

year later, the government again imposed a salary increase of 3 per cent, resulting in the unions approaching the courts for relief yet again.[2]

It was during these court battles that the government proposed some amendments to the Trade Disputes Act Chapter 48:02 (TDA), leading to the enactment of the Trade Disputes Act of 2016 (2016 TDA), which became law in November 2017. The major change that the Act introduced was the expansion of the definition of essential services to include teaching and diamond cutting and polishing services as essential services.

The overarching question that this chapter addresses is whether the decision taken to include the teaching services sector as an essential service was constitutional and, therefore, a justifiable limitation on teachers' right to strike. The chapter will also examine the advantages and disadvantages of defining the teaching service as an essential service. Importantly, it will seek to consider whether a balance can be struck between the rights of the child to education, on the one hand, and the right of the teachers to strike, on the other, as well as the effect on the education sector as a whole.

The chapter concludes with recommendations to address Botswana's stance in 2016 to categorise the educational sector as an essential service in the light of the position of the International Labour Organization (ILO) as regards this sector.

It should be noted, however, that Botswana has since reversed its decision to include the teaching services as an essential service. The chapter, therefore, concludes with brief comments on this and a comparison with other jurisdictions, such as those of South Africa and Canada, to determine whether or not education is (or should be) an essential service.

II THE RIGHT TO EDUCATION IN BOTSWANA

The Constitution of Botswana, 1966 (Constitution of Botswana) only goes as far as protecting the right of an individual to life, whereas the Constitution of the Republic of South Africa, 1996 (the Constitution) in sections 28 and 29 provides specifically for different forms of protection for everyone's right to education.

Education is neither compulsory nor a right in Botswana. Consequently, it is not included as a right in the Constitution of Botswana, although education is almost free for citizens in government schools.

Section 4 of the Constitution of Botswana provides that '[n]o person shall be deprived of his or her life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he or she has been convicted'.

[2] GO Ifezue 'Bargaining in bad faith in the Botswana public service – A review of the *Bofepusu* and *Bllahwu* judgments' (2016) 22 *University of Botswana Law Journal* 219.

This is the extent of the protection of every person's life in terms of the Botswana Constitution. Nevertheless, the Children's Act 8 of 2009 provides that every child in Botswana shall have the right to free basic education[3] and that the best interests of the child are of paramount importance.[4]

The right to free basic education does not include the right to quality education. Ditshwanelo, a non-governmental organisation in Botswana, observed that

> [t]he quality of teaching could be improved, as in any country, with press reporting of poor morale among teachers. It has also been reported that there is a chasm between primary and secondary education standards. Teacher unions claim that the government's increase without consultation, in the number of students in senior secondary classes in 2006 from 35 to 40 students, was designed to allow more students into senior school yet will reduce the quality of teaching and individual student support that teachers can provide.[5]

III THE ILO'S POSITION ON ESSENTIAL SERVICES AND THE RIGHT TO STRIKE

The two ILO conventions relating to this chapter are ILO Convention 87 of 1948 and Convention 98 of 1949. Convention 87 concerns Freedom of Association and Protection of the Right to Organise and collective bargaining, which aims at safeguarding the free right by workers and employees of the right to organise for furthering and/or defending their interests.

Convention 98 concerns the Right to Organise and Collective Bargaining, which further elaborates the rights pronounced in Convention 87. This right aims to protect workers exercising the right to organise, prevent interference in workers' and employers' organisations, and promote voluntary collective bargaining.[6] In 1997, Botswana ratified both ILO Conventions 87 and 98. By ratifying these Conventions, Botswana committed to upholding, among others, the rights of workers to organise into trade unions, with the right to strike as an essential 'intrinsic corollary'.[7]

The two Conventions do not specifically mention the right to strike, but the ILO's Committee of Experts deems the right to strike to be an inherent part of freedom of association, the right to organise, and the right to collective

[3] Section 18 of the Children's Act 8 of 2009.

[4] Sections 5 and 6 of the Children's Act.

[5] Ditshwanelo 'Education is not a right in Botswana' *The Botswana Centre for Human Rights – Human Rights not Human Wrongs*, accessible at http://www.ditshwanelo.org.bw (accessed on 25 June 2020).

[6] NA Morima 'Teaching is essential but is not an essential service' *Weekend Post* (11 July 2016), accessible at http://www.weekendpost.co.bw (accessed on 25 June 2020).

[7] International Labour Office *Digest of Decision and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (2006) 253.

bargaining.[8] This right is only limited where the workers concerned participate in an essential service. The definition used by the ILO's Committee of Experts perform an essential service as those services 'whose interruption would endanger the life, personal safety or health of the whole or part of the population'.[9]

The prohibition of the right to strike in essential services reflects an acceptance that the right to strike, even though fundamental, should not be extended to employees whose work is of such a nature that its disruption would endanger the public or create major social dislocation.[10]

It also provides that inasmuch as the restriction on the right to strike may depend on the particular circumstances of each country, even a legal strike over a protracted period could become restrictive and an issue impacting life and safety.[11]

The ILO has provided certain categories that should not be considered 'essential'. These include, *inter alia*, agricultural activities, the education sector, transport generally, banking and mining, postal services, and construction.[12] Teachers therefore are excluded by the ILO from categories of public officials who exercise authority on behalf of the state and their right to strike thus cannot be limited on this ground.

The Committee on Freedom of Association, therefore, recommended that particularly where member states tend to use discretionary powers to prohibit strikes in essential services, such must be restricted in terms of the ILO's minimum service recommendations only.[13]

As an alternative and realising that not everybody working in an essential service (in the strict sense) necessarily is rendering an *essential* service, the ILO supervisory bodies have endorsed negotiated minimum standards instead of total prohibition of strike action in that service. This implies that the strike can continue, provided that the minimum service is maintained. This essentially is the model endorsed in South African labour legislation.[14] Botswana has a similar provision dealing with

[8] K Calitz and R Conradie 'Should teachers have the right to strike, the experience of declaring the education sector an essential service' (2013) 24 *Stellenbosch Law Review* 124, 126.

[9] International Labour Office *Geneva Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (2006) 124 para 606.

[10] J Grogan *Collective Labour Law* (2014) 256.

[11] International Labour Office (n 7) para 545.

[12] International Labour Office (n 7) paras 159, 160.

[13] E Kodzo and B Ntumy 'Emerging trends in employment relations: The case of essential services in the Botswana public sector' (2015) 15 *Global Journal of Human-Social: F Political Science* 6.

[14] R le Roux and T Cohen 'Understanding the limitations to the right to strike in essential and public services in the SADC region' (2016) 19 *PER/PELJ* 5.

minimum services under section 43 of the TDA but, unlike South Africa, it is yet to establish an Essential Services Committee (ESC).[15]

Furthermore, the ILO has also recognised a prohibition of strike action when a minimum service is agreed to in respect of:

1. a service that is not essential in the strict sense, but the cessation of which could nonetheless result in an 'acute national crisis endangering the normal living conditions of the population'; and
2. public services of fundamental importance.[16]

Examples of the latter include a ferry service to an island, basic transport services, postal services, refuse collection, and the continuation of examinations when teachers go on strike.[17] These services are not essential in the strict sense, but the inconvenience to or longer-term impact on the public when these services are not available or disrupted is considered by the ILO as justification for a limitation of the right to strike.[18]

The implication for Botswana, therefore, is that since it has ratified these conventions, it must undertake to allow workers the right to freely associate and organise as well as to engage in collective employment action except for the restrictions as provided. The question that this chapter answers is whether these rights should be restricted by including education as an essential service.

IV THE BOTSWANA CONSTITUTION, COLLECTIVE BARGAINING AND THE RIGHT TO STRIKE

Section 13(1) of the Constitution of Botswana provides that 'no person shall be hindered in the enjoyment of his or her freedom of assembly and association, that is to say, his or her right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his or her own interests'.[19]

In addition to granting workers the right to form or belong to a trade union in terms of section 13(1), the Constitution restricts such joining or forming of such trade unions or other associations under section 13(2). The latter provision restricts people from forming or joining a trade union if it is deemed to be against public safety, public order, public morality and public health. It also restricts certain categories of workers from joining or forming trade unions or

[15] Section 43(1): 'A mediator assigned in terms of section 6(5)(a) to mediate a dispute of interest shall, if the dispute of interest cannot be resolved before the expiry of the 30 days period, try to reach an agreement on— (a) … (b) the provision of a minimum service.'

[16] International Labour Office (n 7) para 558.

[17] International Labour Office (n 7) paras 615–626.

[18] Le Roux and Cohen (n 14) 5.

[19] Section 13(1) of the Constitution of Botswana.

associations – for instance, public officers, employees of local government bodies and teachers.

The passage from the 2004 TDA, which replaced the earlier Act, introduced a new section 39(1) confirming the right to strike. The Trade Unions and Employers Organisations Act (Cap 48:01) was similarly amended in 2004, giving public officers the right to unionise. Subsequently, in 2016, the teaching service was included in the definition of an essential service.[20]

V COLLECTIVE BARGAINING AND THE RIGHT TO STRIKE IN BOTSWANA

From December 2008 to date, the following pieces of labour legislation have been adopted in Botswana: the Employment Act Chapter 47:01, the Employment of Non-Citizens Act Chapter 47:02, the Factories Act Chapter 44:01, the TDA and 2016 TDA, the Trade Unions and Employers Organisations Act Chapter 48:01 (TUEOA), the Industrial Relations Code, the Workers Compensation Act Chapter 47:03, and the Public Service Act 30 of 2008 (PSA).[21]

According to the PSA[22] every public officer is entitled to join a trade union and is also permitted to strike.[23] The Act also provides exceptions as to which public officers are entitled to belong to a trade union and are entitled to strike.[24] Not only members of management but also soldiers, police and prison officials are excluded from the ambit of the PSA.[25] This means that they are not entitled to engage in collective bargaining or strike action. This is in sharp contrast to the position in South Africa where soldiers, the police and the prison service are permitted to form and join trade unions.

In 2013, the Botswana government embarked on a process to review the TDA, which saw amendments to the definition of employee and the expansion of the list of essential services. The PSA must, therefore, be read in conjunction with the 2016 TDA, which further expanded the categories of officers who are not entitled to engage in collective bargaining and strikes to include members of the

[20] *Botswana Landboards and Local Authorities Workers' Union & Others v Director of Public Service Management & Another* [2013] 1BLR 373, 375.

[21] Kodzo and Ntumy (n 13) 8.

[22] Section 45(1) states that every public officer shall have the right to belong to a trade union of his or her choice for the purposes of collective bargaining.

[23] Section 48(1) states that an employee who takes part in a strike or lockout in compliance with the provisions of this part does not commit a delict or a breach of contract.

[24] Section 47 states that notwithstanding the provisions of s 48(1), a person in senior management of the public service shall not engage in a strike or action short of a strike.

[25] Section 3: 'The provisions of this Act shall not apply to members of the— (a) Botswana Defence Force; (b) Botswana Police Service; (c) Local Police Service; and (d) Prison Service.'

Directorate of Intelligence and Security and the Directorate on Corruption and Economic Crime, as they are not considered employees for purposes of the TDA.[26]

Furthermore, the 2016 TDA broadened the definition of essential services to include[27] teaching services; veterinary services in the public service; government broadcasting services; and immigration and customs services. The Act specifically states that no employee in an essential service shall take part in a strike and furthermore that no employer in an essential service shall take part in a lockout.[28]

Part VI of the TDA provides for the right to strike and the regulation of strikes and lockouts. It has been noted that it has taken the Botswana legislature almost four decades after independence to include all public sector workers, traditional administration staff and teachers within the ambit of 'employee' to enable them to form and join unions.[29] Prior thereto, they were prohibited from doing so. The 2016 TDA broadened the definition of essential workers to include the teaching service, resulting in a shift from the ILO definition of essential services.

VI LIMITATIONS ON THE RIGHT TO STRIKE IN BOTSWANA

It is important to reiterate that although the Constitution of Botswana guarantees freedom of association in section 13(2)*(a)* and *(c)*,[30] it specifically restricts freedom of association for certain categories of government employees. In 2016, the scope of the TDA was broadened to include teachers among other public officers.

The freedom to strike in Botswana is viewed as a positive right that extends to both public and private sector employees, with the exception of workers who perform essential services and members of senior management.[31]

The old TDA,[32] enacted in 2004, provided that every party to a dispute of interest has the right to strike or lockout where the procedure (stipulated in the Act) for a lawful strike has been followed.[33] By defining an employee as 'any person who has entered into a contract of employment for the hire of his labour',

[26] Section 2 of the 2016 TDA.

[27] Section 46(1) of the 2016 TDA.

[28] Section 47 of the 2016 TDA.

[29] Kodzo and Ntumy (n 13) 9.

[30] '(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision— (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; (b) …(c) that imposes restrictions upon public officers, employees of local government bodies, or teachers; and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.'

[31] T Cohen and L Matee 'Public servants' right to strike in Lesotho, Botswana and South Africa – A comparative study' (2014) 17 *PER/PELJ* 1649.

[32] Trade Dispute Act 15 of 2004 (2004 TDA).

[33] Section 39 of the 2004 TDA; *Botswana Land Board and Local Authorities Workers Union v Attorney-General* unreported Case MAHLB-000631-11 (20 March 2013) para 10. Cohen and Matee (n 31) 1647.

excluding members of the 'disciplined forces' and 'prison services', public officers were included within the scope of the Act.[34] This, therefore, meant that teachers could also strike.

In *Attorney-General obo Director of Public Service Management v Botswana Land Boards and Local Authorities Workers' Union*[35] the court noted that, following Botswana's ratification of Conventions 87 and 98 in 1997, public officers in Botswana for the first time were accorded the right to strike.[36] This excluded public officers who were deemed to fall under the category of 'essential services'. The 2004 TDA defined essential services as 'any of the services contained in the Schedule' which listed essential services as:

1. air traffic control services;
2. vaccine laboratory;
3. fire services;
4. Bank of Botswana;
5. health services;
6. railways operations and maintenance services;
7. sewerage services; and
8. transport and communication services necessary to the operation of the water services.

In terms of section 46 of the TDA of 2016, which came into effect in November 2017, the definition of essential services was widened to include the following:

1. veterinary services;
2. teaching services;
3. transport services;
4. telecommunication services; and
5. diamond sorting, cutting and selling services and all services in connection therewith.

This amendment ensured that those employees engaged in services, regarded as anchors to the economy, do not engage in strike action.[37]

The ILO Committee of Experts on Application of Conventions and Recommendations responded to the re-enactment as follows:

> The Committee once again recalls that essential services are only those the interruption of which would endanger the life, personal safety or health of the whole or part of the population (see General Survey of 1994 on freedom of association and collective bargaining, paragraph 159). The Committee considers

[34] Cohen and Matee (n 31) 1646.
[35] [2013] 6 BLLR 533 (BWCA) 544; Cohen and Matee (n 31) 1646.
[36] Cohen and Matee (n 31) 1646.
[37] Cohen and Matee (n 31) 1647.

> that the new categories added to the Schedule do not constitute essential services in the strict sense of the term and therefore requests the Government to amend the Schedule accordingly.

Before the Act was passed, the unions[38] challenged the legality of the Bill in the High Court.[39] This decision will next be discussed.

(1) *Botswana Public Employees' Union & Others v Attorney-General of Botswana*[40]

The applicants argued that the amendment was promulgated by the Minister, purportedly exercising his powers conferred by section 49 of the TDA, but that the section itself was *ultra vires* section 86 of the Constitution of Botswana.[41] The applicants further argued that the amendment was *ultra vires* as the Minister had failed to consult with the Labour Advisory Board prior to its enactment. The main argument was that section 49 of the TDA does not allow the Minister to issue an order incompatible with Botswana's ILO obligations. A further issue concerned the fact that a limitation on the workers' right to strike is not justifiable in a democratic society and that, therefore, the amendment was *ultra vires* section 13 of the Constitution. The last argument was that Botswana's ILO membership and its ratification of the ILO conventions gave rise to a legitimate expectation on the part of the applicants that the Minister would not include as 'essential' services those services that did not meet ILO standards.[42]

The court noted that Botswana was bound as a member of the ILO to its Constitution and as Statutory Instrument 57 introduced restrictions to workers' rights that were incompatible with Convention 87, it was invalid. The Attorney-General then appealed the decision, which appeal will now be discussed.

(2) *Minister of Labour and Home Affairs and Attorney-General v Botswana Public Employees' Union*[43]

The Court of Appeal held that the decision as to which services or categories of services should be classified as essential services is an important policy matter that should be properly debated in Parliament and subjected to public scrutiny. The High Court judgment, therefore, was upheld.

[38] *Botswana Public Employees Union v The Minister of Labour and Home Affairs* MAHLB-000674-11 (HC).

[39] B Maripe 'Giving effect to international human rights law in the domestic context of Botswana: Dissonance and incongruity in judicial interpretation' (2014) 14 *Oxford University Commonwealth Law Journal* 251, 280.

[40] MAHLB-674-11 (HC).

[41] Subject to the provisions of this Constitution, Parliament shall have power to make laws for the peace, good order, and good governance of Botswana.

[42] Cohen and Matee (n 31) 1648.

[43] CACGB-083-12 (Court of Appeal).

Notwithstanding this judgment, the Bill was passed and the TDA came into operation in November 2016. The definition of essential services was broadened to include 'teaching services' as an 'essential service' with section 47 specifically reiterating that '[n]o employee in essential services shall take part in a strike; and no employer in essential services shall take part in a lockout'.

VII THE TRADE DISPUTES ACT CHAPTER 48:02

By virtue of its membership to the ILO, Botswana is obliged to adhere to its statutes and principles and lead by example and ensure that the principles of the organisation are respected. The definition of essential services as adopted by member states is binding on the country. By moving away from this definition, Botswana violated the principles it has adopted.

By declaring workers who ordinarily do not fall under the purview of essential services as essential, the Botswana government violated Convention 87 of the ILO on Freedom of Association and the Right to Organise. The right to strike is a fundamental right of workers and can be limited only under exceptional circumstances such as those contemplated by the ILO definition of essential services. Violating workers' right to strike fundamentally weakens their bargaining power.

It has been argued that an unhappy teacher cannot deliver quality education to children, hence allowing them to strike would ensure that standards are maintained, if not improved.[44]

The list of essential services was increased by five services, which are a substantive addition to the already-existing ten services. This resulted in almost the entire public service being deemed essential. Regarding teaching services, the question is whether the interruption of teaching can endanger the lives, personal safety or health of the whole or any part of the population.[45]

In his proposition to the Labour Appeal Board, which information was also placed before the court in the *Minister of Labour* case,[46] the Minister stated:

> The teaching service has an impact on the lives of individuals. It provides a foundation for the lives of each and every Motswana. Without the teaching service there would be no education, and the lives of most Botswana would be forever altered. People without education are readily exposed to poverty and all the health hazards that emanate from poverty.

Those that argue for the teaching services to be included as an essential service agree with the then Minister of Labour's arguments.

[44] Morima (n 6).
[45] Morima (n 6) 5.
[46] *Minister of Labour and Attorney-General v Botswana Public Employees Union & Others* CACGB-083-12, 6.

It has also been suggested that the meaning of essential services might be lost if it was applied to services that do not endanger the lives, personal safety or health of the population, as has been done in section 46 of the TDA.[47]

VIII TRADE DISPUTES (AMENDMENT) ACT OF 2019

In 2019 the Botswana government, under the new dispensation, moved to repeal the TDA that had increased the number of services deemed to be essential, including the teaching services. The Trade Disputes (Amendment) Act of 2019 was passed by Parliament in August 2019 and came into operation on 4 September 2019. This Act removed the following services: veterinary services, the Bank of Botswana, diamond sorting, cutting and selling services, railway operations, sewerage services, vaccine laboratory services, customs services and immigration, broadcasting services, and teaching services.

The new TDA now includes the following services as essential services: air traffic control services, health services, fire services, water and sanitation services, electrical services (electricity teams for generation, transmission and distribution), the provision of food for pupils of school age and cleaning of schools, and any transport and telecommunication services required to provide for any of the foregoing services. Unlike the 2016 TDA that listed 15 services as essential services, the 2019 amendment has reduced the list of essential services by more than half, to only seven.

According to the Minister of Employment, Labour Productivity and Skills Development, the object of the Bill was to bring section 46(1) of the TDA into conformity with the ILO definition of 'essential services'.

It also seeks to ensure that professions or occupational groups that currently are deemed essential services did not continue to suffer prejudice to their right to freedom of association, in particular, the right to strike.[48]

IX EDUCATION AS AN ESSENTIAL SERVICE IN OTHER JURISDICTIONS

(1) *South Africa*

South Africa is used as a comparative as it is a country neighbouring Botswana and the teaching service in South Africa is not considered an essential service. In this regard, South Africa's definition of essential services is in line with the ILO definition of essential services, except for the inclusion of parliamentary services

[47] Morima (n 6).

[48] K More 'Trade Disputes Amendment Bill reviews essential services' *The Daily News* (6 August 2019), accessible at http://www.dailynews.gov.bw (accessed on 25 June 2020).

as an essential service, which is not part of the ILO definition of essential services. Furthermore, South Africa has an ESC which determines essential services while in Botswana it is the Minister of Labour who has the power to designate a service as essential.[49]

The South African Constitution protects both teachers' right to strike and the child's right to a basic education.[50] These two rights sometimes are in conflict, despite the fact that section 28(2) of the Constitution explicitly states that '[a] child's best interests are of paramount importance in every matter concerning the child'.[51]

Public officers (inclusive of teachers) in South Africa enjoy the right to strike, provided that the provisions of the Labour Relations Act 66 of 1995 (LRA) have been complied with and provided that they do not constitute an essential service.[52] This is in keeping with the ILO definition of essential services, which does not include teachers.

Section 213 of the LRA defines essential service as:

1. a service, the interruption of which endangers the life, personal safety or health of the whole or any part of the population;
2. the parliamentary service; and
3. the South African Police Service.

Apart from the two services specifically designated as essential services in the LRA, the determination of essential services in South Africa is decided by the ESC.[53] The ESC, guided by the legislative definition of essential services, considers the specific service rendered by the employees, regardless of whether such employees emanate from the public or private sector.

On 6 June 2012, a ministerial review committee appointed by the Minister of Science and Technology also proposed in vain to Parliament that teaching be declared an essential service.[54] In 2013, the then President of South Africa,[55] President Jacob Zuma, suggested the possibility of declaring the education sector

[49] Section 46(2) of the TDA.

[50] Section 29 of the Constitution.

[51] HJ Deacon 'The balancing act between the constitutional right to strike and the constitutional right to education' (2014) 34 *South African Journal of Education* 816.

[52] Cohen and Matee (n 31) 1644.

[53] Cohen and Matee (n 31) 1643.

[54] Deacon (n 51) 2. M O'Connor 'Nuwe versoek teen stakings in onderwys' *Die Burger* (7 Junie 2012); C Paton 'No chance of ban on teachers' strikes' *Business Day* (7 February 2013), accessible at http://www.bdlive.co.za/national/education/2013/02/07/no-chance-of-ban-on-teachers-strikes (accessed on 25 June 2020).

[55] P Rezandt 'Collective bargaining in the education sector in South Africa: Should this sector be classified as an essential service?' unpublished MPhil thesis, University of Cape Town (2015) 57.

an essential service to improve such conditions, but this has not been so. Perhaps, as Rezandt[56] put it, because:

> [t]he majority of academic opinions argue that the International Labour Convention, Constitution of the Republic of South Africa and the LRA interpretation of freedom to associate, does not support limiting the right to strike for basic education as essential service. For example, Budlender does propose a more defined definition of freedom of association by including what constitutes minimum services for educators. She, nevertheless, recognises the strategic use of strike in the negotiation process by saying minimum service should not render ineffective strike action but should be performed while other educators continue with negotiation to resolve a dispute. With the persuasive argument for the importance of education, she admits that the law does not recognise education as essential service.[57]

As South African Democratic Teachers' Union (SADTU) general secretary Mugwena Maluleke stated on the issue of making education an essential service in South Africa, '[t]he strikes is the only weapon that workers have. It would make no sense to agree to limitations on that.'[58] It seems that in South Africa, the education sector will retain the right to strike, and any attempt to declare education an essential service would be met with much resistance. Instead of a total prohibition on strikes in essential services, the LRA provides for minimum services where, instead of a whole service going on strike, some essential service employees remain at work providing continued delivery of services during a strike.

The South African case of *South African Police Service v Police and Prisons Civil Rights Union & Another* (*POPCRU*)[59] provided guidance on the approach that governments should take and recommended that not all employees of the South African Police Service (SAPS) are rendering essential services, but only those who are members (uniformed workers) of the SAPS and thus only these members' right to strike could be limited. Botswana can go even further and introduce the concept of minimum service agreements.

By concluding a collective agreement, both employee and employer can agree that only a part of the designated essential service is in fact essential and that only this minimum service should be regarded as the essential service.[60]

Even though some commentators have argued that the *POPCRU* judgment does not essentially provide guidance on what criteria[61] parties should follow in deciding what should and should not be considered essential services in order to provide minimum service during a strike in the education sector, this would

[56] Rezandt (n 55) 58.
[57] Ibid.
[58] Deacon (n 51) 2.
[59] (2011) 32 *ILJ* 1603 (CC) (*POPCRU*).
[60] *POPCRU* (n 59) 130.
[61] *POPCRU* (n 59) 129.

form part of the negotiation between the relevant ministry and the unions. The ministry and union would be part of the ESC as in the South African scenario as they know their services better than the courts do and this could be brought to the ESC's table. The Canadian law is also instructive in this regard.

(2) *Canada*

Canada is used as a comparative jurisdiction as it is another country that protects the right to strike and uses the minimum services concept to ensure continued delivery of services during a strike. On 30 January 2015 the Supreme Court of Canada issued a landmark decision, holding that the right to strike is constitutionally protected. In *Saskatchewan Federation of Labour v Saskatchewan*[62] the Supreme Court found that the Public Service Essential Services Act (PSESA),[63] which created an absolute ban on the right to strike for unilaterally designated 'essential service employees', infringed on rights protected under the Canadian Charter of Rights and Freedoms (Canadian Charter).[64]

As a result, the government of Saskatchewan moved to amend the PSESA and introduced chapter 27 of the Statutes of Saskatchewan, 2014, which became effective on 1 January 2016.

The key changes to the PSESA are listed below.

1. The definition of essential services was changed to include only those services that are a danger to life, health or safety; the destruction or serious deterioration of machinery, equipment or premises; serious environmental damage; or disruption of any of the courts of Saskatchewan; other than that parties will determine which services are essential for their respective organisations.
2. In terms of section 6 of the Act, 'every employee who is covered by an essential services agreement is deemed to be an essential services employee'.
3. Section 7(1) of the Act[65] also provides for the content of an essential services agreement, which should include provisions that identify the essential services that are to be maintained.
4. Provisions that set out the classifications of employees who must continue to work during the work stoppage to maintain essential services.
5. Provisions that set out the number of employees in each classification who must work during the work stoppage to maintain essential services.

[62] 2015 SCC 4.

[63] Chapter 27 of the Statutes of Saskatchewan 2014 (effective 1 January 2016).

[64] BL Gervais 'Supreme Court of Canada decision on the right to strike could have an impact on the education sector' (4 March 2015), accessible at http://blg.com/en/News-And-Publications/Publication_4023 (accessed on 25 June 2020).

[65] The Public Service Essential Services Act, ch 27 of the Statutes of Saskatchewan 2014.

The changes to Saskatchewan law demonstrate that there is a continuous move towards permitting strikes in the public sector, including the teaching services, and that the idea is to allow for strike action but at the same time ensuring that service continues to be provided as in South Africa.

(3) *British Columbia (a province of Canada)*

Section 72(1)(a)(ii) of the Labour Relations Code, RSBC 1996, c 244 (LRC) provides that the provision of educational programmes to students and eligible children under the School Act may be deemed essential if the interruption of that service poses a threat to the welfare of residents.

Although British Columbian law does not provide for an ESC to decide on minimum services, it provides that if the Minister considers a dispute to pose a threat to the provision of educational programmes to students and eligible children under the School Act, he will direct the Labour Relations Board to designate certain programmes and facilities as essential and, furthermore, under section 73 of the Act a direction may be issued for teachers to return to work.

Although teachers in British Columbia still do not enjoy a right to strike, strikes nevertheless often take place. The Labour Relations Board did not regard the strike by teachers on a wage dispute in March 2012 as a threat to educational programmes in terms of the LRC and teachers were allowed to strike for a few days.[66]

Furthermore, with the Canadian case of *Saskatchewan Federation of Labour v Saskatchewan*,[67] which has held that the right to strike is constitutionally protected, this may have an impact on British Columbia to also relax its laws on teachers. This is because both Saskatchewan and British Columbia are Canadian provinces.

The Saskatchewan case was decided in the Supreme Court of Canada, which exercises an appellate, civil and criminal jurisdiction within and throughout Canada.[68] It has ultimate jurisdiction over all provincial and federal courts in Canada and only an Act of Parliament or the Act of a provincial legislative assembly pursuant to section 33 of the Canadian Charter can override its decisions.[69]

Clearly, the approach taken by Botswana in the TDA of 2016 was not in line with international standards. The right to strike should be protected as is the case in both South Africa and Canada where the public interest is protected through the introduction of minimum services to ensure continued delivery of services during a strike.

[66] Calitz and Conradie (n 8) 133.

[67] 2015 SCC 4.

[68] PW Hogg 'Jurisdiction of the court – The Supreme Court of Canada' (1980) 3 *United States Law Journal* 8.

[69] Supreme Court of Canada, accessible at https://www.scc-csc.ca/court-cour/role-eng.aspx (accessed on 5 October 2019).

X CONCLUSION

It is recommended that the teaching service in Botswana should not be declared an essential service. The decision to revert to the position pre-2016 TDA is recommended. An education system can only improve if people are allowed to freely express their opinions. Strike action is one of the ways in which the country at large can express their concern if there is a problem in a particular sector. As noted by Calitz and Conradie:[70]

> A prohibition on participation in a strike also does not prevent teachers from striking. In South Africa such a prohibition will almost certainly not keep teachers from striking as there is a culture in which essential service workers in the public service continue to strike despite the prohibition, as was seen during the public servant strike in 2010.[71]

Even though some commentators have argued that the *POPCRU* judgment does not essentially provide guidance on what criteria[72] parties should follow in deciding what should and should not be considered essential services in order to provide minimum service during a strike in the education sector, this would form part of the negotiation between the relevant ministry and the unions. The ministry and unions would be part of the ESC as in the South African scenario. The Canadian law is also instructive on this.

It is recommended that Botswana considers establishing a body similar to the South African ESC, which will determine minimum services. Although section 43 of the TDA provides for minimum services, there is a need for a committee that will determine, among other issues, which employees should continue to provide a service during a strike. This will avoid a repeat of the 2011 strike where a dispute arose as to whether 30 per cent minimum service 'referred to individual stations or percentages countrywide' due to a concern over the turnout at hospitals and clinics.[73]

In conclusion, the 2016 TDA, which declared the entire education sector an essential service, was overbroad and an unjustifiable infringement of the right of teachers to strike.[74]

The South African LRA in this regard provides that one of the objectives of the ESC[75] is '[t]o decide, on its own initiative or at the reasonable request of any interested party, whether to investigate as to whether or not the whole or a part of any service is an essential service'.[76]

[70] Calitz and Conradie (n 8) 129.
[71] Calitz and Conradie (n 8) 135.
[72] *POPCRU* (n 59) 129.
[73] *Botswana Land Bards v Director of Public Service* [2013] 1 BLR 373, 385.
[74] *POPCRU* (n 59) 129.
[75] Section 70 of the LRA.
[76] Section 70B(1)*(d)* of the LRA.

Part 3:

VULNERABLE WORKERS AND OTHER INDIVIDUAL LABOUR LAW TOPICS

CHAPTER 9

The role of international and regional instruments with reference to the labour and social protection of women workers in the informal economy

LOUIS KOEN* AND ELMARIE FOURIE**

International and regional instruments can play an important role in the labour and social protection of women workers in the informal economy. The ILO extends coverage to non-standard workers through specific conventions for the general acceptance, promotion and extension of protection to these workers. The effectiveness of the ILO depends on the implementation of standards into domestic legislation. This enables the progressive move from soft law and merely prescriptive regulations to binding provisions. The incorporation of international standards into binding provisions also promotes and strengthens the enforcement of these standards. Without this legislative base, the ILO relies solely on soft law, prescriptive regulations and codes. The ILO in its quest for decent work for all must adapt to the changes in labour structures and this means that trade unions and employers' organisations that currently represent big enterprises can no longer suffice to the exclusion of other groups such as homemakers, domestic workers and the self-employed, specifically those in the informal economy. Regional instruments also have an important role to play in this respect. Both AU and SADC instruments contain a number of important provisions for women workers in the informal economy, such as the promotion of gender equality in all legislative provisions, programmes and policies; the recognition of fundamental human rights; the eradication of poverty; and decent work for all. Regional instruments do not function in isolation and highlight the importance of international standards. The empowerment of women is a key theme in most regional instruments and they generally support an integrated approach to the provision of labour and social protection for these vulnerable women workers. Specific vulnerable groups and challenges have been identified by both international and regional regulators and must now be addressed to ensure that 'those who work have rights at work'. This contribution recommends that international and regional standards must not become mere symbolic instruments with no reflection or enforcement in national legislation, policies and programmes. The success of international and regional institutions and instruments also depend on the cooperation and support of all role players to end poverty and to ensure prosperity for all.

* LLB LLM (UJ); University of Johannesburg.

** LLM (UJ) LLD (NWU); Head of Department, Public Law, Senior Lecturer, University of Johannesburg.

I INTRODUCTION

Informal employment now has become a reality and a there is growing acknowledgment of its existence and pervasiveness.[1] In South Africa as well as in other developing countries, informal economy workers do not enjoy sufficient protection in terms of labour and social protection measures.[2] These workers are not recognised, regulated or protected by labour legislation or social protection measures and can be characterised by varying degrees of dependency and vulnerability.[3] It is of the utmost importance that international and regional regulation provides for this, including work in the informal economy. The decidedly female face of the informal economy in sub-Saharan Africa, where 74 per cent of women outside of the agricultural sector work in the informal economy,[4] stresses the need to ensure adequate labour law and social protection for these women. The need for adequate labour and social protection for women workers in the informal economy is further underscored by the significant challenges they face, including unsafe working environments,[5] a lack of adequate participation in policies influencing their livelihoods, and a lack of job security and social benefits.[6] Additionally, within the informal economy women tend to be employed in or occupy the most vulnerable and the lowest-paid jobs.[7]

[1] A number of factors contributed to an increased recognition of the reality of informal employment, such as the availability of improved statistics, the ILO Decent Work Agenda, the establishment of international and national networks for these workers, a realisation that the majority of informal workers are not there by choice, and an emphasis on the important role of social protection in the reduction of poverty and vulnerability of these workers. See also the ILO Social Protection Floors Recommendation of 2012; F Lund 'Extending social protection to informal workers: Pathways to inclusive practices' Paper presented at XVIIth Congress ILLERA, Cape Town (September 2015).

[2] In 2002 the Taylor Committee stated the following: 'Moreover, the development paths of African economies and developing countries require a fresh look at social protection systems more appropriate to their environment and needs. The reality is that in the developing world, formal sector employment may never become the norm it is in Europe … The European concept, primarily that of contributory social insurance, took its basic assumption that social security would develop around formal sector employment. As a result, social security is often described as measures to protect against "loss of (formal wage) income".' Such a conception therefore is of limited relevance to Africa and the developing world, where the risk of 'insufficient' income (formal or informal) is invariably more prevalent than 'loss' of income (Committee of Inquiry into a Comprehensive System of Social Security in South Africa *Transforming the Present – Protecting the Future* 101). For purposes of this study social protection is used as the wider concept and must be distinguished from social security. Social protection can be seen as a system of social support, not linked to the regular employment relationship. The wider notion is particularly important to workers in the informal economy where a regular employment relationship is absent. The term refers to a system of general welfare support and protection (M Olivier 'The concept of social security' in M Olivier, N Smit and E Kalula (eds) *Social Security: A Legal Analysis* (2003) 26).

[3] ILO Resolution Concerning Decent Work and the Informal Economy 2002, Conclusion 9.

[4] UN Women *Progress of the World's Women 2015–2016* (UN Women 2016) 71.

[5] ILO *The Informal Economy and Decent Work: A Policy Resource Guide* (ILO 2013) 3.

[6] E Fourie 'Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy' unpublished LLD thesis, North West University (2018) 5.

[7] ILO *Empowering women working in the informal economy* (ILO 2018) 1.

In 2004, the following key assumptions were published in respect of the linkage between informality, gender and poverty, namely, that the poor are more likely to work in the informal economy; more poor women than non-poor women work in the informal economy; and that there is a gender gap in earnings in the informal economy as women were earning less than their male counterparts and were less likely to be organised and have social protection.[8] According to Women in Informal Employment: Globalising and Organising (WIEGO), women often are disadvantaged due to market relationships within the informal economy, as members of groups defined by race, class, ethnicity or caste and as women due to gender norms in their societies.[9] International and regional institutions are playing an increasingly important role in the empowerment of women, the promotion of equality and decent work for all women, and in providing countries with technical assistance to achieve these goals.

This contribution therefore examines certain international and regional instruments in order to determine the extent to which they could enhance the labour and social protection of women workers in the informal economy.[10] The extent to which emerging sources of international labour law, such as international trade agreements, can contribute towards the domestic implementation and respect for international labour standards (ILS) will also be considered. This analysis will further support the recommendation that international and regional standards must not become mere symbolic instruments with no reflection or enforcement in national legislation, policies and programmes.

II THE ILO AND WOMEN WORKERS IN THE INFORMAL ECONOMY

The International Labour Organization (ILO), although not the only international organisation involved in the setting of standards that impact on the world of work, has been the principal international organisation on the setting

[8] MA Chen, J Vanek and M Carr *Mainstreaming Informal Employment and Gender in Poverty Reduction: A Handbook for Policy-makers and Other Stakeholders* (2004) 30.

[9] WIEGO (date unknown), accessible at http://www.wiego.org/informal-economy/occupational-groups/domestic-workers (accessed on 20 July 2020).

[10] For purposes of this paper the term 'informal economy' shall bear the meaning assigned thereto in the ILO Recommendation Concerning the Transition from the Informal to the Formal Economy 204 of 2015 and therefore '(a) refers to all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements; and (b) does not cover illicit activities, in particular the provision of services or the production, sale, possession or use of goods forbidden by law, including the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in firearms, trafficking in persons, and money laundering, as defined in the relevant international treaties'.

of international labour standards since its founding in 1919.[11] Its primary purpose is the adoption of international standards to address both labour and social problems. Initially it was assumed during the 1950s and 1960s, based on W Arthur Lewis's predictions, that through economic development enough work would be created in developing countries to absorb the low-income traditional economies and 'transform them into dynamic modern economies'.[12] This turning point when wages would rise above subsistence levels generally is referred to as the 'Lewis Turning Point'.[13] During the 1960s in developing countries high levels of continuing unemployment discredited Lewis's theory as there was no indication of the 'Lewis Turning Point' approaching in developing countries. In 1970 Hans Singer, in contrast with Lewis's prediction, predicted the following in respect of developing countries: 'a persistent "dangerous" dualism in labour markets with high levels of casual and intermittent employment, as well as disguised or open unemployment'.[14]

A concerned ILO reacted to this prediction by initiating a number of 'employment missions' to developing countries as part of the ILO World Employment Programme.[15] Reports highlighted the potential of the informal sector[16] to create employment and reduce poverty.[17] Currently the renewed interest in the informal economy may be attributed to the fact that the informal economy is closely linked to the formal economy and contributes to the economy.[18] During the 1970s, the term 'informal sector' was used by the ILO to identify activities of the working poor who were not recognised, recorded or protected by public authorities.[19] This term has been replaced by the wider term 'informal economy' to extend coverage to a very diverse group of workers not limited to workers in a specific sector. The informal economy refers to all economic activities by workers and economic units not covered or inadequately covered by formal arrangements. For the purposes of this study, the term 'informal economy' refers to the following:

[11] S Hughes and N Haworth *International Labour Organization (ILO): Coming In From the Cold* (ILO 2013) 5.

[12] MA Chen *The Informal Economy: Definitions, Theories and Policies* (WIEGO 2012).

[13] Ibid.

[14] H Singer 'Dualism revisited: A new approach to the problems of dual society in developing countries' (1970) *JDS* 60, 75.

[15] ILO *Employment, Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya* (1972).

[16] The term 'informal sector' was used by Hart in 1971 in his study of low-income activities in Accra, Ghana (K Hart 'Informal income opportunities and urban employment in Ghana' (1973) 11 *JMAS* 61). This term was also used by the Kenya mission, one of the employment missions initiated by the ILO during the 1970s. The Kenya mission found that the informal sector consisted of marginal activities and included 'profitable and efficient enterprises'. ILO *Employment, Incomes and Equality: A Strategy for Increasing Productive Employment in Kenya*.

[17] ILO (n 15).

[18] WIEGO *Statistics on the Informal Economy: Definitions, Regional Estimates and Challenges* 3.

[19] ILO (n 15).

1. It includes all economic activities by workers and economic units[20] that are in law or in practice not covered or insufficiently covered by formal arrangements.
2. The term does not cover illicit activities, in particular the provision of services or the production, sale, possession or use of goods forbidden by law, including the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in firearms, trafficking in persons and money laundering as defined in relevant international treaties.[21]

The extension of fundamental rights and social protection to workers in the informal economy in recent years has been a major concern for the ILO.[22] Several ILO conventions and recommendations have been interpreted to apply to informal workers. Already in its 1919 constitution, the ILO identified the necessity of protecting women as a vulnerable group. However, the protection was initially limited and included only regulations around night work and maternity protection.[23] In the beginning the regulatory framework for women workers took the form of recommendations, obviously lacking the legitimacy of conventions.[24]

The challenges that persist include the implementation of these standards by member states in national legislation, policies and the enforcement of these standards to ensure adequate protection of these workers. Although these workers are included within the definitional scope of these instruments, general application often disregards the diverse nature of work in the informal economy; moreover, instruments often are not designed to address the specific challenges experienced by categories of these women workers.

[20] ILO Recommendation 204 of 2015 refers to economic activities as 'units that employ hired labour; units that are owned by individuals working on their own account, either alone or with the help of contributing family workers; and cooperatives and social and solidarity economic units'.

[21] ILO Recommendation Concerning the Transition from the Informal Economy to the Formal Economy 204 of 2015.

[22] BO Alli *Fundamental Principles of Occupational Health and Safety* (2008) 7.

[23] See the Maternity Protection Convention 3 of 1919 and the Night Work (Women) Convention 4 (1919) that was ratified by 58 countries (ILO 2017, accessible at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO::: (accessed on 30 November 2019)). The ILO Constitution also provided that when issues affecting women are discussed one of the advisors should be a woman. The Night Work Convention was revised and adopted in 1949 to promote equal treatment, together with the Protocol of 1990 to the Night Work (Women) Convention, and 67 countries have ratified the revised Convention. The protocol in art 2 provides protection to women workers before and after childbirth and extends protection against dismissal for reasons related to pregnancy and childbirth. Article 2(3) provides that the income of the women worker shall be maintained at a level sufficient for the upkeep of herself and her child. The 1985 Resolution on Equal Opportunities and Equal Treatment for Men and Women in Employment emphasises the importance of extending maternity protection to vulnerable women workers and the importance of strengthening existing social security measures in respect of maternity protection.

[24] G Rodgers *et al The International Labour Organization and the Quest for Social Justice, 1919–2009* (2009).

The ILO has developed an agenda and a movement towards 'decent work' where the main goal is not merely the creation of jobs but jobs of acceptable quality.[25] The ILO Decent Work Agenda reaffirms the ILO's long-held view that all those who work have rights at work, irrespective of where they work.[26] It is against this framework that certain ILO instruments and their impact on women workers in the informal economy will be assessed.

(1) *The Declaration on Fundamental Principles and Rights at Work of 1998*

The aim of the Declaration on Fundamental Principles and Rights at Work is to emphasise an integrated approach, highlighting not only the need for economic progress but also the importance of social progress taking account of the diversity of member states.[27] The Declaration commits member states to the principles and rights in respect of freedom of association, the effective recognition of the right to collective bargaining,[28] the elimination of forced labour[29] and the elimination of discrimination in employment and occupation.[30] The recognition in the Declaration that these rights are universal and applicable to all states, including developing countries, makes it clear that a blanket exclusion of workers in the informal economy is unacceptable.[31] The flexibility and exemption clauses contained in many ILO instruments, however, continue to permit states to exclude certain groups from the scope of application as a result of national circumstances.

(2) *The Recommendation Concerning the Transition from the Informal to the Formal Economy 204 (2015)*

The Recommendation Concerning the Transition from the Informal to the Formal Economy constitutes one of the ILO's most significant instruments towards enhancing protection for workers in the informal economy to date.[32] It acknowledges that the majority of workers engaged in informal employment do not do so by choice but rather as a result of 'a lack of opportunities in the formal economy and in the absence of other means of livelihood'.[33] The Recommendation calls for an integrated legal and policy framework that addresses, amongst others:

[25] C Thompson 'The changing nature of employment' (2003) *ILJ* 1794.
[26] ILO *The Regulatory Framework and the Informal Economy* (2005) 2.
[27] Fourie (n 6) 112.
[28] Paragraph 2(a) of the ILO Declaration on Fundamental Principles and Rights at Work of 1998.
[29] Paragraph 2(b) of the ILO Declaration on Fundamental Principles and Rights at Work of 1998.
[30] Paragraph 2(d) of the ILO Declaration on Fundamental Principles and Rights at Work of 1998.
[31] Fourie (n 6) 112.
[32] ILO *Decent Work for Sustainability* (ILO 2017) 8.
[33] Pre-ambular para of the ILO Recommendation Concerning the Transition from the Informal to the Formal Economy 204 (2015).

1. the promotion of strategies for sustainable development, poverty eradication and inclusive growth, and the generation of decent jobs in the formal economy;
2. the establishment of an appropriate legislative and regulatory framework;
3. the promotion of a conducive business and investment environment;
4. respect for and promotion and realisation of the fundamental principles and rights at work;
5. the organisation and representation of employers and workers to promote social dialogue;
6. the promotion of equality and the elimination of all forms of discrimination and violence, including gender-based violence, at the workplace;
7. the promotion of entrepreneurship, micro, small and medium-sized enterprises, and other forms of business models and economic units, such as cooperatives and other social and solidarity economy units;
8. the establishment of social protection floors, where they do not exist, and the extension of social security coverage;
9. the promotion of local development strategies, both rural and urban, including regulated access for use of public space and regulated access to public natural resources for subsistence livelihoods; and
10. effective occupational safety and health policies.[34]

This integrated legal and policy framework, if implemented by member states, could holistically address the labour as well as social and economic concerns of women workers in the informal economy. Recommendation 204 can also be said to highlight the diversity of characteristics of workers in the informal economy and the necessity to address this diversity through tailor-made approaches.[35] Any international instrument aimed at addressing the labour and social protection of these workers needs to be sufficiently broad in its scope of application to provide for the different categories of workers in the informal economy. In this respect the Recommendation 204 scope of application is wide and extends to own-account workers, members of cooperatives and of social and solidarity economy units, contributing family members, and employees in informal employment in or for formal enterprises.[36]

The implementation of the recommendation in southern Africa remains somewhat imperfect. However, the establishment of a National Task Team on the implementation of R204 in South Africa is an example of an important step

[34] Paragraph 11 of the ILO Recommendation Concerning the Transition from the Informal to the Formal Economy 204 (2015).

[35] Fourie (n 6) 123.

[36] Paragraph 4 of the ILO Recommendation Concerning the Transition from the Informal to the Formal Economy 204 (2015).

towards involving workers and their representatives in a dialogue with the state on critical law reforms needed to protect workers in the informal economy.[37] This task team, which was established in 2015 shortly after the adoption of the Recommendation 204 (R204), initially met without representatives of workers in the informal economy being given the opportunity to participate.[38] Upon its revival in 2017, this position was altered and representatives of workers in the informal economy are included in the community constituency.[39]

The task team additionally developed a plan of action for the implementation of R204 at the municipal level.[40] Implementation at the municipal level is particularly important as workers in the informal economy are impacted most directly by interaction with local government including the regulation of access to landfill sites by waste pickers.[41] In the promotion of the municipal plan of action, two municipalities introduced pilot projects that create a forum where informal economy workers can bargain collectively with the municipality in respect of certain matters.[42] This is an important step towards improving the voice and representation of those working in the informal economy and, if successful, potentially can be emulated in other municipalities across the country and in some instances even in other countries within the Southern African Development Community (SADC). It is a means of acknowledging that there need not be an employer-employee relationship in order for collective bargaining to take place.

(3) *The Human Resources Development Recommendation 195 (2004)*

The ILO Human Resources Development Recommendation aims to promote the optimal development of human resources by encouraging States parties to actively promote skills development and lifelong learning.[43] Importantly for workers in the informal economy, the Human Resources Development Recommendation calls upon member states to:

[37] WIEGO 'How South Africa could become a model for formalising the informal economy', accessible at https://www.wiego.org/blog/interview-how-south-africa-could-become-model-formalizing-informal-economy (accessed on 30 November 2019).

[38] StreetNet 'Implementation of ILO recommendation 204 in South Africa', accessible at https://streetnet.org.za/2018/08/10/implementation-of-ilo-recommendation-204-in-south-africa/ (accessed on 30 November 2019).

[39] ILO 'National workshop on implementation of recommendation 204 in South Africa' 2017, accessible at https://www.ilo.org/global/docs/WCMS_557138/lang--en/index.htm (accessed on 30 November 2019).

[40] WIEGO (n 37).

[41] Although landfill permits are granted by the provincial government, municipal governments continue to own and operate the majority of the landfills in South Africa.

[42] WIEGO (n 37).

[43] Preambular para of the ILO *Human Resources Development Recommendation* 195 (2004).

> address the challenge of transforming activities in the informal economy into decent work fully integrated into mainstream economic life; policies and programmes should be developed with the aim of creating decent jobs and opportunities for education and training, as well as validating prior learning and skills gained to assist workers and employers to move into the formal economy.[44]

Therefore, states should not only actively promote skills development for persons in formal employment but also implement policies that would promote skills development for workers in the informal economy. The promotion of appropriate skills development and reskilling programmes could very well play an important role in turning the Fourth Industrial Age into an age of opportunity for workers in the informal economy rather than a threat to their livelihoods.[45]

(4) *The Convention Concerning the Elimination of Violence and Harassment in the World of Work*

The newly adopted ILO Convention Concerning the Elimination of Violence and Harassment in the World of Work[46] has been described as a revolutionary instrument towards the protection of women against violence and harassment in the workplace.[47] The Convention was adopted to provide protection to the 500 million working-age women living in countries with no legal protection against sexual harassment in the workplace.[48] The Convention in article 2 specifically extends protection to workers in the informal economy. In the South African context, these women workers are excluded from the protective scope of the Employment Equity Act[49] (EEA) and must rely on the Promotion of Equality and Prevention of Unfair Discrimination Act[50] (PEPUDA). They may also in some instances rely upon the Protection from Harassment Act[51] in order to obtain a protection order.

A key feature of the Convention 190 is to be found in its wide definition of violence and harassment in the world of work, which is defined as 'a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence

[44] Paragraph 3(d) of the ILO *Human Resources Development Recommendation* 195 (2004).

[45] WEF *Accelerating Workforce Reskilling for the Fourth Industrial Revolution: An Agenda for Leaders to Shape the Future of Education, Gender and Work* (2017) 2.

[46] ILO Convention Concerning the Elimination of Violence and Harassment in the World of Work No 190 (2019) (ILO Harassment Convention). See also the Violence and Harassment Recommendation No 206 (2019). This convention has not yet been ratified by any member states.

[47] D Desierto 'The ESCR revolution continues: ILO Convention No 190 on the Elimination of Violence and Harassment in the World of Work' 28 June 2019 *EJIL Talk*, accessible at https://www.ejiltalk.org/the-new-ilo-convention-no-190-on-the-elimination-of-violence-and-harassment-in-the-world-of-work/ (accessed on 27 September 2019).

[48] As above.

[49] Act 58 of 1998.

[50] Act 4 of 2000.

[51] Act 17 of 2011.

or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment'.[52]

This definition of harassment importantly recognises that the mere fact that the conduct in question occurred only once does not mean that it does not constitute harassment. This approach is in line with the recognition by the Labour Appeal Court (LAC)[53] and the 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace in South Africa, that a single incident can constitute sexual harassment.[54] The definition of harassment in PEPUDA in turn is premised upon the unwanted conduct being 'persistent or serious'.[55] Single incidents, therefore, could ostensibly only amount to harassment under PEPUDA in serious cases.

The Convention's definition of gender-based violence further includes sexual harassment.[56] According to article 1(b), gender-based violence and harassment 'means violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment'. Gender-based violence has been recognised as one of the most pressing issues to confront South African society.[57] This societal background further highlights the need to ensure adequate protection for vulnerable women workers in the informal economy against violence and harassment.

Importantly, the Convention 190 calls upon States parties to recognise the important role of public authorities in the case of informal economy workers.[58] The harassment of workers in the informal economy, such as street vendors and waste pickers, by public officials or authorities has long been recognised as a key challenge to the achievement of decent work for those in the informal economy.[59] The Convention's broad concept of what the 'world of work' entails further supports the expansion of laws that aim to combat harassment in the workplace. Ideally, South Africa should ratify the Convention and amend the EEA to extend coverage to workers in the informal economy or implement tailor-made legislation to address the specific challenges faced by workers in the informal economy.

[52] Article 1 of the ILO Harassment Convention.

[53] *Campbell Scientific Africa (Pty) Ltd v Simmers & Others* 2015 JOL 34906 (LAC) para 33.

[54] 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace GN 1357 of 2005 issued by the Minister of Labour in terms of s 54(1)*(b)* of the EEA (4 August 2005).

[55] PEPUDA defines harassment as 'unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to sex, gender or sexual orientation; or *(b)* a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group'.

[56] See art 1(b).

[57] South African Human Rights Commission 'Research brief: Unpacking the gaps and challenges in addressing gender-based violence in South Africa'.

[58] Article 8(a) of the ILO Harassment Convention.

[59] Conclusion 11 of the ILO Resolution Concerning Decent Work and the Informal Economy.

III THE ROLE OF THE RIGHT TO DEVELOPMENT IN PROMOTING LABOUR AND SOCIAL PROTECTION FOR WOMEN IN THE INFORMAL ECONOMY

The labour and social protection standards set by the ILO are not the only instruments applicable to women workers in the informal economy. An integrated approach to ensure adequate labour and social protection for workers in the informal economy is required where other fundamental rights, such as the right to development, are seen as mutually reinforcing with the traditional labour and social protection provided to these workers. The notion of a right to development can be seen as a concept with deep African roots, having been first introduced by Senegalese Judge Kéba M'Baye in a lecture delivered in 1972, when he proposed that development be defined as a human right.[60]

However, there does not appear to be a universally accepted definition of what the right to development entails.[61] Scholars have argued that such definition is not possible and pragmatically not necessary, having regard to the fact that the conceptual and practical dimensions of development are inherently context-specific.[62] It nevertheless is clear and indisputable that the ultimate aim of the right to development is the achievement of improved human well-being and better living standards.[63] It has been said that the right to development is the most important human right and a 'necessary condition for the achievement of all other human rights',[64] and a right enabling the realisation of a multitude of other rights.[65]

Notwithstanding the positive reflections on the right to development, it has remained one of the most controversial rights in the corpus of international human rights law.[66] It has been widely argued that the right to development does not represent a binding legal obligation upon states under international law and, to the extent that it might, 'the precise meaning and status of the right is still in flux'.[67] While it can therefore be argued that globally the right to development amounts to mere 'soft law', this cannot similarly be said of the African human

[60] S Marks and R Malhotra *The Future of the Right to Development* (2014) 2.

[61] C Ngang, SD Kamga and V Gumede 'Introduction: The right to development in broad perspective' in C Ngang, SD Kamga and V Gumede (eds) *Perspectives on the Right to Development* (2018) 3.

[62] C Ngang 'The right to development in Africa and the requirement of development cooperation for its realisation' LLD thesis, University of Pretoria (2018) 50.

[63] Ngang, Kamga and Gumede (n 61) 3.

[64] SD Kamga 'The right to development in the African human rights system: The *Endorois* case' 2011 *De Jure* 383.

[65] ME Salomon 'Legal cosmopolitanism and the normative contribution of the right to development' in SP Marks (ed) *Implementing the Right to Development: The Role of International Law* (2008) 17.

[66] Ngang, Kamga and Gumede (n 61) 383.

[67] A Rosas 'The right to development' in A Eide, C Krausus and A Rosas (eds) *Economic, Social and Cultural Rights* (2001) 25; Kamga (n 64) 384.

rights system.[68] This clearly is reflected by the fact that at the African regional level and, in a number of domestic jurisdictions, the right to development has not only gained recognition and protection, but has also successfully been enforced through litigation.[69]

(1) *International and regional efforts towards the realisation of the right to development*

The adoption of the Millennium Declaration by the United Nations (UN) General Assembly in 2000 evidenced a commitment by world leaders to take measures to ensure the realisation of the right to development for all. The Millennium Development Goals have since been followed up by the UN Sustainable Development Goals, with Goal 8 aimed at the promotion of decent work and economic growth. In accordance with these goals states are to '[p]romote development-oriented policies that support productive activities, decent job creation, entrepreneurship, creativity and innovation, and encourage formalisation and growth of micro, small and medium-sized enterprises, including through access to financial services'.[70] States must still do significant work to translate these goals into practical realities for the most vulnerable members of society. Nevertheless, these goals represent an important recognition of the value that can be obtained from improving access to finance for entities such as cooperatives in which women in the informal economy often operate.[71]

In 2004, the Labour and Social Affairs Committee (LSAC) of the AU adopted the Ouagadougou Plan of Action on Employment Promotion and Poverty Alleviation recognising the inextricable link between labour, social protection and human development.[72] The Ouagadougou Plan committed states to women and youth empowerment through methods such as cooperative development,[73] and the extension and increased cover of social protection to workers in the informal economy.[74] In its 2015 assessment on the success of the implementation of the Ouagadougou Plan, the LSAC noted that in order to enhance the success of implementation, a degree of policy coherence is required in the development and implementation of pro-employment macro-economic and sectoral development

[68] Ngang, Kamga and Gumede (n 61) 3.

[69] See *inter alia African Commission on Human and Peoples' Rights (Ogiek Community) v Republic of Kenya* Appl 6/2017 (ACtHR) paras 201-217; Ngang, Kamga and Gumede (n 61) 2; art 19 of the Maputo Protocol.

[70] UN *The Sustainable Development Goals Report 2018* (2018) 5.

[71] Fourie (n 6) 112.

[72] African Union 8th session of the Labour and Social Affairs Commission of the African Union 11–15 April, Yaounde, Cameroon LSC/EXP/5(VIII) (Ouagadougou Plan of Action).

[73] Principle 5 of the Ouagadougou Plan of Action.

[74] Principle 10 of the Ouagadougou Plan of Action.

policies.[75] It further encourages states to structure employment and labour market policies in a manner that promotes 'broad based inclusive growth and poverty eradication' that enhances employment and productivity-growth outcomes.[76]

Through these resolutions and commitments made by states on the international and regional plane, it becomes apparent that states increasingly recognise that labour law, social protection and sustainable development are mutually reinforcing and that an integrated approach to addressing these challenges is the most prudent course of action. It is submitted that although these instruments and declarations are largely soft law instruments, they may – at least in the African regional context – become important instruments in the interpretation of a binding obligation such as, for example, women's rights to sustainable development in article 19 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol).[77]

(2) *Women's rights to sustainable development under the Maputo Protocol*

The Maputo Protocol may be seen as one of the most comprehensive agreements on the promotion of women's rights.[78] It provides for a detailed right to development that requires states to take appropriate measures to:

1. introduce the gender perspective in the national development planning procedures;
2. ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes;
3. promote women's access to and control over productive resources such as land and guarantee their right to property;
4. promote women's access to credit, training, skills development and extension services at rural and urban levels in order to provide women with a higher quality of life and reduce the level of poverty among women;
5. take into account indicators of human development specifically relating to women in the elaboration of development policies and programmes; and
6. ensure that the negative effects of globalisation and any adverse effects of the implementation of trade and economic policies and programmes are reduced to the minimum for women.

[75] 24th Session of the African Union 30–31 January, Addis Ababa, Ethiopia, Report on the follow-up on the Ouagadougou Summit: Employment, poverty eradication and inclusive development in Africa Assembly/AU/20(XXIV).

[76] 24th session of the African Union (n 75) para 13.

[77] Article 19 of the Maputo Protocol provides that '[w]omen shall have the right to fully enjoy their *right to sustainable development*'.

[78] Womankind.org, accessible at https://www.womankind.org.uk/blog/detail/our-blog/2017/11/13/international-agreements-on-women-s-rights-a-framework-for-action (accessed on 30 November 2019).

This agreement, therefore, similar to the ILO, recognises that skills development is a core component of sustainable development. It further emphasises the link between trade and sustainable development for women. The Maputo Protocol, therefore, should serve as a basis to provide women in the informal economy with greater voice and representation in the formulation of economic and trade policies. These provisions also serve as an important backdrop throughout this paper's discussion on the role of trade agreements in the promotion of ILS and sustainable development in Africa.

The right to development is also a justiciable right within the African human rights system as was clearly confirmed by the African Commission on Human and Peoples' Rights (African Commission) in the case of *Centre for Minority Rights (on behalf of the Endorois Community) v Kenya*.[79] Importantly, the African Commission in the *Endorois* case held that where a state has facilitated the right to development as envisaged in the African Charter on Human and Peoples' Rights (African Charter), community members' ability to benefit economically would increase.[80]

This aspect of the right to development is of particular importance with increased globalisation, as it makes it clear that state parties cannot simply allow the indiscriminate adoption of trade liberalisation measures while the potential of its people to benefit economically declines substantially.[81] In instances where the large-scale violation of human rights and ILS occurs at the hands of private parties rather than the state, the right to development remains applicable. This as international law has long recognised that states have a duty to exercise due diligence in the regulation of the conduct of private parties in order to avoid the large-scale violation of human rights by non-state actors.[82] To an extent the right to development, therefore, represents a binding legal obligation on states to strike an adequate balance between economic growth and social development.

[79] *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

[80] *Endorois* case (n 79) para 279.

[81] In calls for sustainable development, the WEF has similarly indicated that in the Fourth Industrial Revolution a 'people centred approach' will be required in the adoption of new technologies. See in this regard WEF (n 45) 9.

[82] See in this regard *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) wherein the doctrine of due diligence was incorporated into the African regional human rights system.

IV THE RISE OF TRADE AGREEMENTS AS A SOURCE FOR THE ENFORCEMENT OF ILS

The ILO has noted that international and regional trade agreements are increasingly incorporating ILS as part thereof.[83] Trade agreements making reference to or creating new labour standards, however, are still in the minority. This is despite the increase from only four such agreements to 21 by 2005, and to 71 by 2016.[84] International and regional trade agreements additionally often include gender references.[85] These gender references form part of a variety of policy options designed to address gender-based inequalities.[86] Approximately one in four trade agreements in force now include such references.[87] With more than 80 per cent of preferential trade agreements that have come into force since 2013 containing references to ILS, it becomes apparent that it is of intrinsic political and analytical importance to better understand their role as an emerging form of international labour law.[88]

This contribution considers the extent to which these trade agreements have the potential to enhance the enforcement and compliance with ILS,[89] and the promotion of gender empowerment. It is further suggested that these agreements could serve to promote cooperation between the ILO and regional organisations responsible for the monitoring and implementation of these agreements. There are, however, several challenges that are presented by the formal linkage between international trade law and ILS, such as the maintenance of a degree of coherence in the interpretation of ILS by the treaty bodies established in terms of these agreements.

(1) *Challenges presented by trade agreements as a source of ILS*

Scholars have critiqued the inclusion of labour and social clauses in international and regional trade agreements.[90] They argue that the process of globalisation has an impact on many social issues 'so that linking each of them to free trade is like hanging too many ornaments on a Christmas tree' which could bring about the

[83] J Agustí-Panareda 'Labour provisions in free trade agreements: Fostering their consistency with the ILO standards system' 2014 *ILO Background Paper – Social Dimensions of Free Trade Agreements* 5.

[84] Ibid.

[85] ILO *Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements* (ILO 2017) 101.

[86] Ibid.

[87] Ibid.

[88] M Barbu 'The trade labour nexus: Global value chains and labour provisions in European Union free trade agreements' 2018 *Global Labour Journal* 259.

[89] A Marx, N Brando and B Lein 'Strengthening labour rights provisions in bilateral trade agreements: Making the case for voluntary sustainability standards' (2017) 8 *Global Policy* 80.

[90] T Leeg *When Do Paper Tigers Get Teeth? Social Standards in US and EU Preferential Trade Agreements* (2019) 32.

collapse of the system of international trade agreements.[91] Furthermore, advocates of economic liberalism[92] express support for the view that open markets lead to accelerated economic growth in developing countries and that this will in the end lead to improved conditions for labour.[93]

However, the significant body of literature indicating the negative consequences of financial globalisation for labour standards seemingly indicate that these improved conditions of labour have rarely materialised despite economic progress.[94] Several studies have also indicated that in many instances their adverse effects have impacted most significantly on 'small-scale farmers, informal traders, the self-employed and those working on daily contracts'.[95] The notion that the international-legal regulation of trade relations under the World Trade Organisation (WTO) is unrelated to labour relations, therefore, does not correspond to reality.[96] It has also recently been noted in a joint study by the ILO and the Secretariat of the WTO that a more forceful recognition of interactions between trade and decent work is required.[97] Proponents of a social clause within the WTO framework have therefore argued that 'the most important way to compel governments to respect ILS is the prospect of economic pressure, not the "toothless" mechanisms of the ILO and other international organisations'.[98]

Although this contribution generally considers trade and sustainable development chapters as a positive development, it is submitted that caution should be exercised so as not to view international trade agreements as the solution to all existing challenges in the implementation of ILS. The increased participation of workers in the informal economy in the negotiation of labour and social clauses in trade agreements is of paramount importance. The Director-General of the ILO, Guy Rider, has highlighted that more comprehensive involvement of the social partners in the negotiation and functioning of international trade

[91] N Lyutov 'Traditional international labour law and the new "global" kind: Is there a way to make them work together?' 2017 *Zbornik PFZ* 35.

[92] The concept of economic liberalism refers to the theory that economic growth is the key to national wealth. Economic liberalism posits that free trade is essential to economic growth. Political leaders should therefore avoid putting in place barriers to trade that will weaken the deepening of economic ties between states.

[93] Lyutov (n 91) 35.

[94] See *inter alia* Lyutov (n 91) 39; T Boerie and J Jimeno 'The effects of employment protection: Learning from variable enforcement' (2005) 49 *European Economic Review* 2077.

[95] J Harrison *et al* 'Governing labour standards through free trade agreements: Limits of the European Union's trade and sustainable development chapters' (2019) *Journal of Common Market Studies* 270.

[96] Lyutov (n 91) 36.

[97] JB Bacchetta, E Ernst and J BustamanteJ *Globalization and Informal Jobs in Developing Countries* (2009) 19.

[98] See in this respect Lyutov (n 91) 36 and n 25 as well as the authorities cited therein. It is important to note that the full debate regarding the value of social clauses within the WTO framework falls beyond the scope of this paper. This paper will instead focus on regional FTA's that are exempt from the GATT under art XXIV.

agreements 'makes sound economic, social and political sense at this time when public faith in globalisation is extremely low'.[99] Despite increased participation of a broader range of role players in the negotiation of trade agreements, inputs from trade unions have been preferred rather than informal workers and the organisations representing their interests.[100]

The inclusive consultation processes undertaken by the ILO in respect of a range of instruments, including the recently-adopted Convention Concerning the Elimination of Violence and Harassment in the World of Work[101] and the R204, could serve as a model for international and regional organisations across the globe in as far as the negotiation of labour and social clauses are concerned. This broad consultation process included a dialogue with organisations representing workers in the informal economy as well as other organisations advancing the interests of women workers in the informal economy such as WIEGO.[102]

(2) *Trade agreements as an avenue for the enforcement of ILS*

It has been noted that the inclusion of these labour clauses in international trade agreements has had no material impact on the implementation of these standards domestically.[103] These criticisms raised in relation to the Republic of Korea-EU Free Trade Agreement (FTA) have thus far certainly proven to be largely valid. In eight years since the adoption of the Korea-EU FTA, Korea has made no meaningful progress towards ensuring the ratification of all ILO fundamental conventions as required by the agreement. However, this seems to be changing as the European Union (EU) is showing an increased willingness to rely on the enforcement measures contained in the agreement in cases of perceived pervasive non-compliance.

The EU has entered into 'consultation' with Korea in respect of its progress towards the ratification of all ILO fundamental conventions.[104] The EU additionally has triggered the second phase of the dispute settlement mechanism

[99] Statement by Mr Guy Ryder, ILO Director-General, to the International Monetary and Financial Committee (12 October 2018) para 17.

[100] Harrison *et al* (n 95) 265.

[101] ILO Convention Concerning the Elimination of Violence and Harassment in the World of Work No 190 (2019).

[102] WIEGO 'Violence and informal work' briefing note to the 2018 ILO International Labour Conference.

[103] T Bodson 'How do EU free trade agreements protect workers?' (2019) *Green European Journal* 2.

[104] The process of entering into consultation is a well-known procedure under WTO law that is required as an important first step in the enforcement process. This process is similarly provided for in the Korea-EU FTA and therefore does not represent a mere symbolic diplomatic discussion. See in this respect X Phillipe 'The dispute resolution mechanism of the World Trade Organisation five years after its implementation' (1999) *Law, Democracy and Development* 72.

under the agreement.[105] This phase involves the convening of a panel of experts to assess Korea's compliance with the agreement and in particular whether Korea has breached its obligation by failing to take meaningful steps towards ensuring the ratification and implementation of all fundamental conventions. The panel of experts' terms of reference also require them to assess whether certain provisions in the Korean Labour Code, including the restrictive interpretation of the term 'worker' for purposes of collective bargaining, violates article 13.4 paragraph 3 of the EU-Korea FTA.[106]

The aspect of the proceedings in relation to the restrictive interpretation of the term 'worker' could prove particularly valuable to workers in the informal economy. These proceedings could potentially place pressure upon states to better align the scope of application of their freedom of association measures and recognition of the right to collective bargaining with the approach taken by the ILO, in particular, the ILO's long-standing recognition that:

> [t]he criterion for determining the persons covered by [the right to freedom of association], therefore, is not based on the existence of an employment relationship, which is often non-existent, for example, in the case of agricultural workers, self-employed workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organise.

A lack of representation is a key contributor to women in the informal economy being trapped in poverty and their inability to fight for decent work and living conditions.[107] It has been indicated that '[t]he first step out of poverty is organisation. Organising allows us to become social actors because through it we can engage in stable transactions, build convergence of interests and access social protection.'[108] Increased recognition of women's rights to organise in the informal economy, therefore, has the potential to introduce the change that is required to provide them with protection.[109]

It is worth noting that in response to these proceedings, the Korean Ministry of Employment and Labour has indicated that three of the four fundamental ILO conventions that it has not yet ratified will be submitted to Parliament for approval in mid- to late 2019.[110] Together with the submission of these conventions for

[105] Bodson (n 103) 2.

[106] This provision in the agreement provides that '[t]he Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely: (a) freedom of association and the effective recognition of the right to collective bargaining …'.

[107] E Fourie 'Voice, representation and women workers in the informal economy' (2019) 40 *ILJ* 1402.

[108] Ibid.

[109] Fourie (n 107) 1403.

[110] Korean Ministry of Employment and Labour 'Announcement on ratification of the ILO fundamental conventions' 22 May 2019.

ratification, the Ministry of Employment and Labour will propose amendments to the Korean Labour Code in order to better align it with the ILO's fundamental conventions.[111] While this process remains incomplete, it remains an important first step in encouraging the ratification and implementation of the fundamental ILO conventions. This would likely not have occurred without the risk of enforcement measures under the trade agreement.

Invoking enforcement measures against one country also has the indirect effect of encouraging other states to assess their own compliance. The EU recently entered into a similar agreement with Vietnam. Vietnam promptly ratified one of the three ILO fundamental conventions that at the time it had not yet ratified.[112] The ILO's regional office had also been engaged on an ongoing basis and welcomed the conclusion of this FTA as:

> an excellent example of how free trade agreements and sustainable development can be balanced through mutual commitment to respecting and implementing principles under the ILO's 1998 Declaration on Fundamental Principles and Rights at Work for ensuring decent work for all.[113]

Vietnam has further indicated a commitment to taking steps towards the ratification of the two remaining core conventions – Convention 105 on Forced Labour and Convention 87 on Freedom of Association – by 2020 and 2023 respectively.[114] It is submitted that these developments indicate that, although trade agreements are not the only solution to the challenges underlying the implementation of ILS, they do have the ability to place pressure upon states to improve implementation and compliance with ILS.

(3) *The need for consistency in the interpretation of ILS*

In addition to the aforementioned challenges, several substantive legal issues arise in respect of a formal linkage between core labour standards and international trade under international law.[115] In particular, the linkage within these different fora of international law is likely to encounter the challenge of coherence and content of the different legal courses of adjudication.[116] Responsibility for the implementation and monitoring of compliance with the core labour standards generally is the sole responsibility of the ILO, whereas trade disputes are resolved

[111] K Hyun-Bin 'Gov't aims to ratify 3 key ILO conventions within this year' 13 June 2019 *The Korea Times*, accessible at https://www.koreatimes.co.kr/www/nation/2019/06/371_270584.html (accessed on 30 September 2019).

[112] ILO 'ILO congratulates Viet Nam, EU on signing free trade deal' 30 June 2019, accessible at https://www.ilo.org/hanoi/Informationresources/Publicinformation/newsitems/WCMS_711973/lang--en/index.htm (accessed on 30 September 2019)

[113] Ibid.

[114] Ibid.

[115] K Addo *Core Labour Standards and International Trade* (2015) 12.

[116] Ibid.

in other fora set up for this purpose, such as the WTO and the International Centre for the Settlement of Investment Disputes (ICSID).[117] In order to ensure that these dispute settlement mechanisms enhance, rather than detract from, the implementation of these standards, a certain degree of coherence in the interpretation of ILS will be required.

Cooperation between the ILO and regional organisations and other dispute resolution bodies, therefore, will be essential if the trend whereby such bodies acquire the competence to adjudge compliance with ILS in the context of trade agreements continues. These challenges are not insurmountable, particularly considering that the implementation of ratified ILO conventions is subject to continuous supervision by the ILO supervisory mechanisms. These bodies have issued and published comprehensive and detailed comments concerning the conventions' provisions.[118] Were these bodies tasked with the enforcement of labour standards in international trade agreements to duly consider the comments by the ILO supervisory bodies, they could provide an effective additional avenue for the enforcement of international labour standards.

In international law, it is also common for one international tribunal or court to refer to the interpretations by other similar bodies for guidance. The International Court of Justice (ICJ), for example, when called upon to interpret certain provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR), on which the ESCR Committee has provided interpretive guidance, held:

> Although the Court is in no way obliged, in the exercise of its judicial functions, to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty.[119]

This principle finds broad support in international law.[120] The interpretation given by the ILO supervisory body that was established to monitor compliance with a particular convention, therefore, will generally be the most persuasive source in respect of the interpretation of that Convention. Therefore, there

[117] Ibid.

[118] Agustí-PanaredaJ (n 83) 15.

[119] *Ahmadou Sadio Diallo (Guinea v Democratic Republic of the Congo)* Merits, Judgment ICJ Reports 2010 664 para 66.

[120] The Court of Justice of the European Union (CJEU) has for example taken a similar stance. The CJEU, however, seemingly implies that a departure from the interpretation given by the body tasked with the interpretation of the specific convention would generally be impermissible. This approach may be the most appropriate in the context of international trade agreements as a source of ILS in order to avoid any accusations that ILS is being abused in trade agreements for protectionist purposes. See Opinion 2/15 of 16 May 2017 of the Court of Justice of the European Union (CJEU) RE EU-Singapore FTA para 154.

should in principle be few challenges in ensuring a degree of coherence in the interpretation of the obligation arising from the ILS between the ILO and these other fora.

V LABOUR AND GENDER EMPOWERMENT CLAUSES IN AFRICAN REGIONAL TRADE AGREEMENTS

Regional organisations often are better positioned to adopt instruments and standards that provide for the unique challenges affecting the region, than international organisations. In Africa, around 290 million people are engaged in vulnerable forms of employment, the highest number in the world.[121] It would therefore be remiss for African regional organisations not to take this into account when including gender and labour standard clauses in their trade agreements. It is also apparent that merely reiterating a commitment to the fundamental ILO conventions would be insufficient to enhance the labour and social protection of women workers in the informal economy within the continent.[122]

(1) *The EU-SADC Economic Partnership Agreement*

The EU has been a key role player in the promotion of labour and social clauses in trade agreements.[123] The EU-SADC Economic Partnership Agreement (EU-SADC EPA) furthers this trend and includes a relatively comprehensive labour and social chapter.[124] It must nevertheless be noted that the labour and social chapter, apart from article 7, is excluded from the dispute resolution mechanisms contained in part III of the agreement.[125] The labour and social chapter in this agreement therefore largely follows the EU's traditional best-endeavours approach to labour standards in international trade agreements.[126]

Article 7, which remains subject to the dispute resolution mechanisms of the agreement, provides:

[121] ILO *World Employment and Social Outlook: Trends 2018* (2018) 11.

[122] PT Stoll, H Gött and P Abel 'A model labour chapter for future EU trade agreements' in H Gött (ed) *Labour Standards in International Economic Law* (2018) 382.

[123] C Portella and J Orbie 'Sanctions under the EU Generalized System of Preferences and foreign policy: Coherence by accident?' (2014) 20 *Contemporary Politics* 63, 68.

[124] It should be noted that this trade agreement does not apply to all SADC members. The agreement extends to Botswana, Lesotho, Mozambique, Namibia, South Africa and Eswatini (formerly Swaziland). Angola has an option to join the agreement in future. These states are collectively referred to as the SADC EP States. The six other SADC members are in the process of negotiating trade agreements with the EU as part of other regional organisations.

[125] Article 6(3) of the EU-SADC EPA.

[126] The best endeavours approach provided little enforcement measures for failure to comply with ILS and merely required that state parties 'strive to ensure' that the labour principles extending from the parties' obligations as ILO members and their commitments under the 1998 Declaration 'are recognised and protected by domestic law'.

1. The Parties reaffirm that the objective of sustainable development is to be applied and integrated at every level of their economic partnership, in fulfilment of the overriding commitments set out in Articles 1, 2 and 9 of the Cotonou Agreement, and especially the general commitment to reducing and eventually eradicating poverty in a way that is consistent with the objectives of sustainable development.
2. The Parties understand this objective to apply in the case of this Agreement as a commitment that:
   (a) the application of this Agreement shall fully take into account the human, cultural, economic, social, health and environmental best interests of their respective populations and of future generations; and
   (b) the decision-making methods embrace the fundamental principles of ownership, participation and dialogue.
3. As a result, the Parties agree to work cooperatively towards the achievement of people-centred sustainable development.

Article 7 of this agreement therefore furthers certain fundamental principles of the right to development as it exists in the African human rights system. The commitment by state parties to ensure that decision-making embraces the principles of 'ownership, participation and dialogue' could see an increased role for workers in the informal economy and/or the organisations representing their interests in shaping the policies affecting their livelihoods.

Article 8(2) of the EU-SADC EPA reaffirms the state party's commitment to article 50 of the Cotonou Agreement. Article 50 of the Cotonou Agreement in turn affirms states' commitment to respect core labour standards, as defined by the relevant ILO conventions, and in particular 'freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of worst forms of child labour and non-discrimination in respect to employment'. The SADC EPA members therefore are under a similar obligation to Korea to effectively ensure compliance with the principles underlying the fundamental conventions. However, unlike the EU-Korea FTA, these provisions are not subject to enforcement and do not contain a binding obligation on SADC partners to ratify the fundamental conventions. However, excluding the obligation to ratify all fundamental conventions makes logical sense in the context of the EU-SADC EPA given that all SADC members have ratified all the fundamental conventions.[127]

The obligations brought about by article 7, in furtherance of article 9 of the Cotonou Agreement, essentially require state parties to promote and protect fundamental freedoms and human rights. A dispute could therefore ostensibly be lodged in respect of a systemic failure by any of the parties to adhere to their human rights obligations. It is not clear which human rights and fundamental

[127] SADC *Promoting Decent Work for All in the SADC Region* (2013) 16.

freedoms are covered by article 9 of the Cotonou Agreement, but a parsing of the text shows that these terms are to be construed broadly.[128] Labour rights could therefore potentially be covered by the dispute resolution procedures under the EU-SADC EPA.

There nevertheless remains an argument that had the drafters of the agreement intended this, they would not have excluded the more substantive ILS provisions in article 8 of the EU-SADC EPA from the dispute resolution process. The Joint Council of the EU-SADC EPA, which held its inaugural meeting in Cape Town, South Africa, in 2019, could well provide clarity on some of these matters in the near future. The EU has demonstrated a history of using joint councils to enter into a dialogue well before resorting to enforcement measures.[129]

Article 10 of the EU-SADC EPA also makes it clear that a party 'may request, through the Trade and Development Committee, consultations with the other Party regarding any matter arising' from the labour and sustainable development chapter of the agreement.[130]

The EU-Singapore FTA similarly only provides for consultations. The CJEU in respect of that agreement nevertheless adopted the stance that where there is non-compliance with the trade and sustainable development chapter, the innocent party would be entitled to suspend the agreement.[131] If the position of the CJEU is correct,[132] seeking consultation should not be regarded as a mere symbolic step and ought to encourage states to comply with their obligations.

In respect of that FTA, the CJEU also found that the purpose of excluding the labour and sustainable development chapter from the agreement's enforcement measures was meant to ensure that deference is shown to the international bodies

[128] This is evidenced by art 9(2) of the Cotonou Agreement which makes it clear that the obligation applies irrespective thereof if the human right/s in question is civil and political, or economic, social and cultural.

[129] This can be seen, for example, in the case of the EU-Korea FTA by reading the Summary of Discussions of the 6th Committee on Trade and Sustainable Development Under the Korea-EU FTA, 13 April 2018.

[130] Art 10(2) of the EU-SADC EPA.

[131] CJEU (n 120) para 154.

[132] The question is settled to a degree under EU law although it remains unclear if this position is correct under international law. The controversy arises therefrom that under customary international law an agreement can only be suspended if there is a material breach of the agreement. Several scholars have argued that the labour and sustainable development chapter of an FTA is insufficiently linked to trade to constitute a material breach. The Advocate-General adopted this same stance before the CJEU. The CJEU rejected this argument finding that the labour and sustainable development chapter has 'direct and immediate effects on trade between the European Union and the Republic of Singapore since they reduce the risk of major disparities between the costs of producing goods and supplying services in the European Union, on the one hand, and Singapore, on the other, and thus contribute to the participation of EU entrepreneurs and entrepreneurs of the Republic of Singapore in free trade on an equal footing'.

responsible for the supervision of those agreements.[133] This then ensures that the scope of the obligations stemming from the international agreements referred to remains subject to 'the interpretation, mediation and dispute settlement mechanisms that are in force for those international agreements'.[134]

The CJEU therefore essentially held that the ILO would first have to find a breach of the relevant standards before the EU can take any action in respect of that alleged breach. Should this be adhered to, it could shield the agreement from allegations of using labour provisions for protectionist purposes. Additionally, this approach could ideally see the EU-SADC EPA Trade and Development Committee being used to follow up on the implementation of the recommendations by the ILO supervisory bodies.

(2) *African regional trade agreements and informal cross-border traders*

International trade laws' ability to create opportunities for women workers in the informal economy perhaps is more aptly demonstrated with respect to its impact on informal cross-border traders (ICBTs).[135] In SADC, it is estimated that up to 40 per cent of total intra-SADC trade is conducted by ICBTs.[136] In the region approximately 70 per cent of ICBTs are women.[137] These traders have traditionally faced a unique series of challenges, including onerous documentary requirements and delays at border posts.[138] Women ICBTs have also faced a range of gender-specific challenges including numerous instances of sexual harassment by border officials.[139] In recent years African regional trade blocs have increasingly been working towards solving some of these challenges and aid these traders to transition to the formal economy.[140]

The Common Market of East and Southern Africa (COMESA) presents a clear case study on best practices for other regional blocs such as SADC on

[133] CJEU (n 120) para 154.

[134] Ibid.

[135] There is no precise agreed upon definition of an ICBT. Depending on how one defines an ICBT these workers can either be covered by Recommendation 204 or fall outside of its scope. This is so as considerable debate exists on the extent to which these workers may be engaged in 'illegal' activities. However, it is generally agreed that the products in which these traders trade exclude illicit products and that the extent to which their activities are potentially impacted by illegality is more closely related to laws relating to formal processes such as standards regulations, business registration or operational licence. For purposes of this contribution it will thus be presupposed that these workers are covered by Recommendation 204.

[136] S Koroma *et al Formalisation of Informal Trade in Africa: Trends, Experiences and Socio-Economic Impacts* (2017) vi.

[137] Ibid.

[138] MW Kahariri 'The implication of simplified trade regime on informal cross-border trade among small scale traders in Namanga' unpublished MA dissertation, University of Nairobi (2018) 1.

[139] Ibid.

[140] Koroma *et al* (n 136) vi.

addressing the unique challenges facing women ICBTs. COMESA has long called upon its members to recognise that most small-scale traders in the region would not be able to comply with traditional customs procedures.[141] In 2010, COMESA member states agreed upon a simplified trade regime (STR) with respect to goods appearing on a negotiated common list for goods that have been wholly grown or produced within the region.[142] Provided that the consignment is valued at less than US $1 000, traders can trade on a duty-free basis without the need for a certificate of origin.[143]

The COMESA STR has unarguably brought about a range of benefits to workers in the informal economy and women in particular. It has benefited all ICBTs in the region by reducing the length of time it takes these workers to clear customs while also reducing the scope for corruption by border officials.[144] The clearest, and perhaps one of the most important, benefits it has brought about for women ICBTs is a marked decline in instances of sexual harassment of these women at border posts.[145] The STR has also seen up to 10 per cent of ICBTs in the COMESA region formalise their activities to an extent.[146] It is submitted that this type of formalisation, although still somewhat limited, represents a positive step towards the attainment of sustainable development and the implementation of Recommendation 204.

VI CONCLUSION

From this contribution, it is apparent that the ILO has taken significant steps towards the promotion of labour law and social protection for workers in the informal economy. However, the ratification of instruments providing protection to precarious workers has been extremely poor. There have been increased calls for the ILO to 'prioritise a campaign focusing on ratification related to the protection of non-standard workers'.[147]

In respect of poor compliance by member states with their reporting obligations, the ILO would perhaps find value in interacting with trade and

[141] COMESA *COMESA Simplified Trade Regime Handbook* (2016).

[142] Kahariri (n 138) 8.

[143] Ibid. The exemption from requiring a certificate of origin is particularly important as traders could not traditionally rely upon the benefits brought about by a RTA without this certificate. Obtaining these certificates has traditionally proven too onerous for informal traders, thereby, in practice, excluding them from obtaining any direct benefits brought about by regional integration efforts.

[144] Koroma *et al* (n 136) 17.

[145] Ibid.

[146] The exact figure remains unclear and COMESA estimates vary from as low as 3.5 per cent up to 10 per cent.

[147] Fourie (n 6) 173.

sustainable development committees to exert pressure upon states to meet their obligations through these fora.

Despite compliance with the ILO's instruments, particularly those aimed at protecting workers in the informal economy generally being poor, positive developments should not be ignored. The establishment of fora for informal economy workers to engage in collective bargaining with municipalities could enhance the opportunities for the voice and representation for these workers to be more salient.[148]

The pilot forum in the City of Johannesburg, for example, currently does not extend to all workers in the informal economy.[149] It could potentially be extended should it prove successful in respect of the workers currently covered.[150] The meetings of the national task team on the implementation of Recommendation 204 could be used more effectively to lobby for the integrated legal and policy framework called for by the recommendation.

Trade agreements offer limited scope for the protection of women in the informal economy as an independent source of ILS. The ability of trade agreements to create an option for economic pressure is of particular value. From the foregoing analysis, it is apparent that for the time being trade and sustainable development chapters have not been used as effectively as possible to promote the interest of workers in the informal economy.

The EU's new push for the effective recognition of the rights to freedom of association of all workers, including those in the informal economy, could see trade pressure increasingly being used to secure compliance by states within this area.[151] This prioritisation by the EU highlights the importance of these agreements for states to align their domestic law on freedom of association measures with the ILO's recognition that this right also extends to workers in the informal economy.

[148] See para 2.2 of this contribution for a discussion of these fora that were established by municipalities jointly with the task team on the implementation of ILO Recommendation 204. These fora represent an important initiative undertaken pursuant to the obligations arising from the recommendation.

[149] WIEGO (n 9).

[150] Ibid.

[151] This increased push for the recognition of freedom of association for all is evidenced among others by the trade dispute lodged against Korea. This is the first instance where a panel of experts within a trade dispute is called upon to decide whether a state's domestic labour law is too restrictive in its scope of application for excluding own account workers.

CHAPTER 10

The role of the International Labour Organization in shaping South Africa's policy on sexual harassment

MUHAMMAD MOOLLA,* ANNELIE GILDENHUYS** AND GEORGE VAN DER MERWE***

In the world of work, reports of and resistance against sexual harassment have increasingly become prevalent in the most recent years. The International Labour Organization (ILO) has historically influenced the development of South Africa's sexual harassment law and practice. Most recently, the ILO adopted the Violence and Harassment Convention, 2019 (No 190) (Convention 190) on 21 June 2019. The growing concerns to address all forms of violence and harassment in South Africa necessitates investigating contemporary interpretation and application of workplace sexual harassment law and practice in the country. This paper aims to analyse the current legislative framework in relation to sexual harassment in South Africa, evaluated against the salient points of Convention 190. The current Code of Good Practice on Handling Sexual Harassment Cases in the Workplace of 2005 and the associated legal frameworks are evaluated to determine the need for policy augmentation, amendments, and integration to align to Convention 190. The contribution highlights key elements of ambiguity, apparent contradictions and lacunas around the practical interpretation and application of sexual harassment in South Africa. The article concludes with key elements and recommendations and notes that the draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment has been published for public comment by 20 August 2020.

I INTRODUCTION AND BACKGROUND

The International Labour Organization (ILO) was established in order to advance social justice and decent work for all by the adoption of binding conventions and non-binding recommendations.[1] Adopting its principles, the Violence and Harassment Convention, 2019 (No 190) (Convention 190) was recently

* LLB; Attorney, Salijee Govender Van der Merwe Attorneys.
** PhD Industrial Sociology; Director, Aequitas Consultants.
*** BLC LLB LLM (UNISA); Director, Salijee Govender Van der Merwe Attorneys.

[1] Preamble to the ILO Constitution.

adopted in Geneva at the 108th session of the International Labour Conference on 21 June 2019.

The aim of this chapter is to reflect on the role of the ILO in promoting equal opportunity and decent work through the elimination of all forms of discrimination and human rights violations or abuse, in the development of South Africa's sexual harassment jurisprudence. The development of specific sexual harassment policies and procedures is explored to understand contemporary interpretation and application of workplace sexual harassment law and its inadequacies. The salient points of Convention 190 are discussed and the paper addresses how South Africa's current Codes of Good Practice: Sexual Harassment and legal framework policy may be augmented and integrated to align to Convention 190.

II THE ILO'S COMMITMENT TO EQUAL OPPORTUNITY AND DECENT WORK

The Discrimination (Employment and Occupation) Convention 111 of 1958 (Convention 111) is regarded as one of the eight core conventions of the ILO. This Convention gives effect to the right of equality and non-discrimination in employment and occupation.

The primary aim of Convention 111 is to promote equal opportunity and treatment in the workplace by eliminating all forms of unfair discrimination. The ILO Recommendation concerning Discrimination (Employment and Occupation) (No. 111) is instrumental in achieving its primary goal.[2]

The Committee of Experts on the Applications of Conventions and Recommendations (CEACR) in 1996 clarified the basis of sex discrimination, a year before South Africa ratified Convention 111. The Convention states that sex discrimination involves distinctions that use the biological characteristics and functions that differentiate men from women, either explicitly or implicitly, to the disadvantage of one sex or the other.[3]

The CEACR places sexual harassment in the realm of sex discrimination and indicates:

> 39 The terms 'sexual harassment' or 'unsolicited sexual attention' include any insult or inappropriate remark, joke, insinuation, and comment on a person's dress, physique, age, family situation, etc; a condescending or paternalistic attitude with sexual implications undermining dignity; any unwelcome invitation or request, implicit or explicit, whether or not accompanied by threats; any lascivious look or other gesture associated with sexuality; and any unnecessary physical contact such as touching, caresses, pinching or

[2] Discrimination (Employment and Occupation) Recommendation, 1958 (No 111).

[3] ILO 'Equality in Employment and Occupation', Special Survey on Equality in Employment and Occupation in respect of Convention 111, report 111 (Part 4B), 83rd session 1996, Geneva para 35.

assault. In order to constitute sexual harassment in employment, an act of this type must, in addition, be justly perceived as a condition of employment or precondition for employment, or influence decisions taken in this field, and/or affect job performance. Sexual harassment may also arise from situations which are generally hostile to one sex or the other.

40 Sexual harassment undermines equality at the workplace by calling into question individual integrity and the wellbeing of workers.[4]

The CEACR in 2003 reaffirmed that sexual harassment is a form of discrimination.[5] The CEACR noted key elements arising from various national legislative and policy approaches, judicial decisions and collective agreements in defining sexual harassment as follows:

(1) *(quid pro quo)*: any physical, verbal or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable, and offensive to the recipient; and a person's rejection of, or submission to, such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job; or

(2) *(hostile work environment)*: conduct that creates an intimidating, hostile or humiliating working environment for the recipient.[6]

III THE REGULATION OF SEXUAL HARASSMENT IN SOUTH AFRICA

(1) *Introduction*

South Africa realised its obligations in terms of equality and non-discrimination only after its democratic elections in 1994, and after it re-joined the ILO, having withdrawn from it in 1964.[7] South Africa ratified Convention 111 on 5 March 1997 and shortly thereafter enacted the Employment Equity Act[8] (EEA) in 1998. The purpose of the EEA is to achieve equity in the workplace by promoting equal opportunity and fair treatment through the elimination of unfair discrimination and by implementing affirmative action measures to redress the disadvantages in employment experienced by specific groups, in order to ensure equitable representation in all occupational levels in the workplace. The EEA explicitly stipulates that harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination as listed in its anti-discriminatory provisions.[9]

[4] ILO (n 3) paras 39 and 40.

[5] CEACR *Report of the Committee of Experts on the Application of Conventions and Recommendations Concerning Convention No 111*, published at the 91st ILC session (2003) 463.

[6] As above.

[7] R Grawitzky 'ILO History Project – The role of the ILO during and ending apartheid' (2013) para 1.

[8] 55 of 1998.

[9] Section 6(1) of the EEA.

South Africa followed closely what was articulated as sex discrimination by the CEACR, by promulgating a Code of Good Practice on the Handling of Sexual Harassment Cases[10] (the Sexual Harassment Code of 1998).

A second code was later published in 2005, known as the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace[11] (the Sexual Harassment Code of 2005). The 1998 Code was repealed on 19 December 2018.

Both these codes adopted wording similar to the description of the CEACR.[12] The CEACR observation (2003) moreover clarifies that sexual harassment could constitute physical, verbal and non-verbal conduct. These forms of sexual harassment were accordingly included in the South African Sexual Harassment Code of 2005. The Sexual Harassment Code of 2005 further incorporated the notion of '*quid pro quo* harassment' in its definition, as outlined by the CEACR. It thus is apparent that South Africa's policy development on sexual harassment has largely been influenced by the ILO and the CEACR.

It is expected that Convention 190 and its Recommendation concerning the Elimination and Prevention of Violence and Harassment in the Workplace (Recommendation 206) will further influence the further evolvement of the South African harassment policy framework. It is anticipated that South Africa will formally ratify Convention 190 and will accordingly align its legislation and relevant codes of good practice to address the broader concept of violence and harassment in the world of work. This alignment is expected to include gender-based violence and other forms of harassment, such as workplace bullying, racial harassment, harassment related to gender, and harassment related to family responsibility and pregnancy. The development of, amendment to and alignment to Convention 190 in the codes of good practice, therefore, requires an in-depth analysis of South Africa's current policy on sexual harassment.

(2) *The Sexual Harassment Code of 2005*

The Sexual Harassment Code of 2005 was issued in terms of section 54(1)*(b)* of the EEA. Section 3 of the EEA stipulates that when interpreting the Act, any relevant code of good practice must be considered. The result of this provision is that the Sexual Harassment Code of 2005 as well as the Code of Good Practice on the Integration of Employment Equity into Human Resources Policies and Practices (the Human Resources Code of Good Practice) have been published.

[10] GenN 1367 in *GG* 19049 of 17 July 1998.

[11] Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, 2005, published under GN 1357 in *GG* 27865 of 4 August 2005.

[12] CEACR (n 5) 463. The use of the words 'unwelcome', 'undermines equality in the workplace', 'undermining dignity' is mimicked in the test for sexual harassment in the Sexual Harassment Code of 2005.

This has the effect that there is a statutory duty to interpret the EEA together with both the Sexual Harassment Code of 2005 as well as the Human Resources Code of Good Practice.[13]

The decisions related to sexual harassment by the South African labour courts have made it clear that the failure to properly apply the Sexual Harassment Code of 2005 results in unreasonable findings or decisions that ultimately are overturned.[14] The court decisions have made it imperative for any tribunal or forum tasked with adjudicating any matter pertaining to alleged sexual harassment to do so with due consideration of the provisions of the Sexual Harassment Code of 2005.[15]

The interpretation and definition of the concept 'sexual harassment', however, has proven to be far more complex in law in the application of legal principles and practice.

Under the heading 'Test for sexual harassment', item 4 of the Sexual Harassment Code of 2005 states:

> Sexual harassment is *unwelcome conduct* of a *sexual nature* that *violates the rights* of an employee and *constitutes a barrier to equity* in the workplace, considering all of the following factors:
>
> 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
>
> 4.2 whether the sexual conduct was unwelcome;
>
> 4.3 the nature and extent of the sexual conduct;
>
> 4.4 the impact of the sexual conduct on the employee.[16]

Each of these emphasised aspects must be considered separately and as a whole.

(a) Unwelcome conduct

Unwelcome conduct is one of the defining features in establishing whether conduct amounts to sexual harassment. The use of the word 'unwelcome' inherently indicates a subjective element.[17] The specific use of this language is of importance. The word 'unwelcome' denotes a distinction between conduct that is consensual against that which is unacceptable and offensive.[18] In

[13] Section 54 read with s 3 of the EEA.

[14] *Rustenburg Platinum Mines Limited v UASA obo Pietersen & Others* (2018) 39 *ILJ* 1330 (LC); *SA Metal Group (PTY) LTD and Commission for Conciliation Mediation and Arbitration* (2014) 35 *ILJ* 2848 (LC).

[15] It is pertinent to note that as at December 2018, the 1998 Code of Good Practice on Handling Sexual Harassment was repealed, leaving only the Sexual Harassment Code of 2005, which is the current applicable and relevant code to apply, thus leaving no room for uncertainty.

[16] Emphasis added.

[17] R le Roux, A Rycroft and T Orleyn *Harassment in the Workplace: Law, Policies and Processes* (2010) 27.

[18] D McCann 'Sexual harassment at work: National and international responses' (2005) *Conditions of Work and Employment Series* 2, Geneva 3.

addition, only a complainant will be in a position to indicate either verbally or through action whether the conduct is unwelcome. This enters the notion of a subjective perception which must be measured against the objective standard of reasonableness.[19] The unwelcomeness of the conduct is a question of fact, which must be determined based on how the complainant reacted at the time when the alleged harassment occurred.[20]

The test to be adopted requires regard to managing workplace diversity and being cognisant of as many various aspects of an employee's identity as is reasonably possible, particularly in seeking to establish whether the conduct is unwelcome and of a sexual nature. Conduct that may be condoned by some may be offensive to others.

The Sexual Harassment Code of 2005 specifically indicates that there are several ways in which an employee could indicate that the conduct is unwelcome. Although an ideal response to conduct that is unwelcome would be an overt indication that the conduct is not welcome and offensive, it is accepted that various forms of non-responsiveness could also be indicative that the conduct is not welcomed. This clearly is articulated in the Sexual Harassment Code of 2005, which includes the circumstances in which unwelcomeness may be indicated through non-verbal action such as walking away or not responding to the perpetrator.[21]

It is often argued by an alleged perpetrator of sexual harassment that the recipient of the conduct did nothing to indicate that the conduct was unwelcome or that the perpetrator was not aware or could not have been aware that the conduct was unwelcome. In *Rustenburg Platinum Mines Limited v UASA obo Pietersen & Others*,[22] in determining the unwelcome conduct, the Labour Court held:

> In this case, the Commissioner failed to appreciate that in the seven years that the sexual advances had persisted, not once had the complainant reciprocated Pietersen's advances, and how that reaction or non-reaction could have been interpreted as being docile and inviting is beyond comprehension.[23]

What the court in *Rustenburg Platinum Mines Limited* emphasised is the fact that in the absence of reciprocation, one cannot lay claim that the conduct complained of was welcomed.[24]

In instances where the harassment consists of a single incident, the appropriate test to apply in the circumstances would be whether the conduct was serious and

[19] *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC).
[20] Le Roux, Rycroft and Orleyn (n 17) 28.
[21] Item 5.2.1 of the Sexual Harassment Code of 2005.
[22] (2018) 39 *ILJ* 1330 (LC).
[23] *Rustenburg Platinum Mines* (n 22) para 45.
[24] *Rustenburg Platinum Mines* (n 22) para 44.

whether the perpetrator reasonably ought to have known that the conduct would be unwelcomed.[25]

The Sexual Harassment Code of 2005 also states that previous consensual participation in sexual conduct does not preclude unwelcomeness.[26]

The Sexual Harassment Code of 2005 envisages circumstances where a complainant of sexual harassment has difficulty in expressing to an alleged perpetrator that the conduct is unwelcome. It allows for the complainant to seek the assistance of a co-worker, superior, counsellor, human resource official, family member or friend.[27]

Some complainants may elect to adopt a more private coping strategy to deal with sexual harassment and will not seek third party intervention.[28] The latitude given to complainants in this regard implies that usual workplace principles restricting representation in internal grievance and disciplinary procedures to internal parties to the employment relationship would have to be adopted to allow for representation by persons who are not employees of the employer.

In *Motsamai v Everite Building Products (Pty) Ltd*[29] the Labour Appeal Court (LAC) added an objective element to the test and held that 'sexual harassment goes to the root of one's being and *must* therefore be viewed from the *point of view of a victim*: how does he/she perceive it, and *whether or not the perception is reasonable*'.[30]

The subjective notion of sexual harassment articulated by the ILO[31] can be noted in the judgment of the LAC in *Campbell Scientific Africa (Pty) Ltd v Simmers & Others*,[32] where the court seemed to have focused on the impact of the conduct on the victim and how the conduct affected her state of mind. This is particularly noted in the remarks by the court where it stated that 'it intruded upon Ms Markides' dignity and integrity; and has caused her to feel insulted and concerned for her personal safety'.[33]

The Labour Court in *Rustenburg Platinum Mines*, however, appears to have expressed the view that the protested conduct must be assessed objectively.[34] In our view, this is not without its challenges as it does not take into account how the conduct in question affected the complainant, a factor that the Sexual Harassment Code of 2005 urges one to consider.[35]

[25] Le Roux, Rycroft and Orleyn (n 17) 27.
[26] Item 4.2 of the Sexual Harassment Code of 2005.
[27] Item 5 of the Sexual Harassment Code of 2005.
[28] Le Roux, Rycroft and Orleyn (n 17) 27, see also *Rustenburg Platinum Mines* (n 22) para 49.
[29] [2011] 2 BLLR 144 (LAC).
[30] Emphasis added.
[31] Le Roux, Rycroft and Orleyn (n 17) 18.
[32] (2016) 37 *ILJ* 116 (LAC)
[33] *Campbell* (n 32) par 32.
[34] *Rustenburg Platinum Mines* (n 22) para 37.
[35] Item 5.4 of the Sexual Harassment Code of 2005.

It is evident from the above that different decision-makers approach the enquiry into sexual harassment differently. There is no clear uniform way in which the test – as postulated in the Sexual Harassment Code of 2005 – is applied. The view of that in *Motsamai* appears to create a balance into the sexual harassment enquiry, by placing an objective standard to the complainant's point of view by determining whether a complainant's perception is reasonable or not.

(b) Conduct of a sexual nature

In a positive development, the Sexual Harassment Code of 2005 codified that sexual conduct could be comprised of physical, verbal or non-verbal conduct and provides specific examples of conduct that would be sexual in nature.[36]

The Sexual Harassment Code of 2005 states that 'physical conduct of a sexual nature includes *all* unwelcome physical contact'.[37] In addition, the Sexual Harassment Code of 2005 questions the impact of the conduct on the complainant while considering the 'circumstances of the employee' as well as the 'respective positions of the employee and the perpetrator in the workplace'.[38]

Shaking hands, hugging or a peck on the cheek or lips often is regarded as the most innocuous form of physical touch in the workplace. This may often be regarded as non-sexual forms of greeting in certain workplace and socio-cultural environments.[39] However, what must be considered in such environments is whether such a form of touch would reasonably constitute conduct of a sexual nature and whether it is experienced as unwelcome, particularly in instances where a recipient's personal customs and values do not conform to the practice norms and culture of such workplace environments.

Physical touching of the sexual parts of the body patently constitutes conduct of a sexual nature. A contemporary academic study into cross-sexual relationships between co-employees into the experience of nine different types of touch between co-workers in cross-sex relationships found that a soft touch on the cheek area of the face was mostly regarded as signalling more affection, attraction, flirtation and love than any of the other types of touch. A prolonged touch to the face was perceived as the most inappropriate and sexually harassing form of touch from amongst the nine different forms of touch examined in this study. An arm placed around the waist of another was equally rated as high in indicating levels of attraction and flirtation and considered an inappropriate form of harassment. It appeared as though no touch and shaking of hands were more positively considered.[40]

[36] Item 3.1 of the Sexual Harassment Code of 2005.

[37] Item 5.3.1.1 of the Sexual Harassment Code of 2005.

[38] *Campbell* (n 32).

[39] Le Roux, Rycroft and Orleyn (n 17) 29.

[40] JW Lee and LK Guerrero 'Types of touch in cross-sex relationships between co-workers: Perceptions of relational and emotional messages, inappropriateness, and sexual harassment' (2001) 29 *Journal of Applied Communication Research* 197, DOI: 10.1080/00909880128110 (accessed on 22 August 2019).

An analysis of how physical conduct is experienced brings into question the reasonableness or otherwise of the perception or experience of the complainant, as 'reasonable complainant test' as the court did in *Motsamai*.

It is suggested that the subjective element of the test finds application in determining whether the conduct was unwelcome and of a sexual nature. This of course is subject to an objective standard of whether the complainant's perception is reasonable.

(c) Violates the rights of an employee

The rights of an employee that are likely to be affected by sexual harassment include the right not to be discriminated against on the basis of sex, gender or sexual orientation; to dignity; to privacy; to equity in the workplace; to a safe working environment; to freedom and security of the person; and fair labour practices.[41]

The Sexual Harassment Code of 2005 explicitly states that sexual harassment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation.[42] Sex discrimination differentiates between men and women based on their biological and physical differences.[43] Gender, however, refers to the social and cultural attributes associated with general (normative) male and female roles.[44] Sexual orientation is defined as an individual's sexual attraction to members of the opposite sex and to members of the same sex.[45] Sexual orientation further finds application in respect of persons who are lesbian, gay, bi-sexual, transsexual,[46] inter-gender and queer.

The right to dignity entails the acknowledgment of the value and worth of all members of society and is inherent in the Bill of Rights.[47] Any infringement of the right to freedom and security of person includes the right to be free from all forms sexual harassment and treatment that is degrading or is an invasion on ones bodily or physiological integrity.[48]

In the world of work, privacy entails unsolicited intrusion into one's personal space by words or by conduct. By way of a simplistic example, any question related to the colour of one's undergarments or romantic life could be an invasion of privacy and dignity.

[41] Item 1.2 of the Sexual Harassment Code of 2005; see also Le Roux, Rycroft and Orleyn (n 17) 32.

[42] Item 3 of the Sexual Harassment Code of 2005.

[43] I Currie and J de Waal *The Bill of Rights Handbook* (2016) 227.

[44] Ibid.

[45] Currie and De Waal (n 43) 228.

[46] *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 (CC) para 21.

[47] *National Coalition* (n 46) para 27.

[48] Currie and De Waal (n 43) 286.

The Occupational Safety and Health Convention, 1981, No 155 (Convention 155) relating to occupational health and safety was ratified by South Africa in February 2003. Inherent in Convention 151 is the right to a safe working environment which includes physical and mental health.

In *Media 24 Limited & Another v Grobler*[49] the Supreme Court of Appeal held that it is well settled that an employer owes a common-law duty to its employees to take reasonable care for their safety. This duty cannot be confined to an obligation to take reasonable steps to protect them from physical harm caused by what may be called physical hazards. It must also in appropriate circumstances include a duty to protect employees from psychological harm caused, for example, by sexual harassment by co-employees.

The Occupational Health and Safety Act Act 85 of 1993 (OHSA) similarly provides that every employer should, as far as is reasonably practicable, provide a working environment that is safe and without risk to health and, further, a duty to provide such information, instructions and training as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of the employees.[50]

Fair labour practices in terms of section 23(1) of the Bill of Rights and equity in the workplace are regulated and codified in the EEA and the Sexual Harassment Code of 2005.

(d) Constitutes a barrier to equity in the workplace

An equity barrier refers to hindrance of engagement on an equal basis in the workplace.

Quid pro quo harassment, sexual favouritism and victimisation inhibit the access to equal opportunities and fair treatment. *Quid pro quo* and sexual favouritism in certain circumstances may result in the equity barrier being overcome rather than created.[51] This is evident in instances where willing participants in the *quid pro quo* or sexual favouritism scheme see better growth in an organisation and may be treated more favourably than those who are not. It must be noted that these forms, while overcoming barriers for certain individuals, in effect creates a barrier to equal opportunity for others.

Victimisation and other forms of sexual harassment other than the foregoing, such as a hostile working environment, impairs the overall wellbeing, workplace productivity and career aspirations of the complainant, which by implication creates a barrier to equity in the workplace.

[49] *Media 24 Limited & Another v Grobler* [2005] 3 All SA 297 (SCA) paras 65–68.
[50] OHSA ss 8(1) and (8(2)*(e)*.
[51] Le Roux, Rycroft and Orleyn (n 17) 35.

IV CHALLENGES OF THE 2005 CODE

(1) *Subjective versus objective test*

It becomes evident from the analysis of the Sexual Harassment Code of 2005 and existing case law in South Africa that the current test includes both subjective and objective elements. It is apparent that further vigorous debate as to what the appropriate test is, and whether a subjective test is appropriate, is required towards establishing clarity in law. Moreover, it is suggested that requiring that sexual harassment must constitute a barrier to equity in the workplace and that it has to take account of whether the harassment is on prohibited ground, adds unnecessary requirements.

Consequently, it is argued that the appropriate test should be clarified and augmented to include both a subjective element, to preserve individual autonomy, as well an objective element based on objective reasonableness.

As such, it is argued that a reasonable complainant/victim enquiry would introduce an assessment of whether a reasonable person with the same sex, gender and/or sexual orientation and in circumstances akin to the complainant, would perceive the conduct as unwanted conduct of a sexual nature. In addition, the enquiry would entail establishing whether the perpetrator knew or ought to reasonably have known that the conduct complained of was unwelcome sexual conduct.

This approach introduces an equilibrium in that it seeks to preserve individual autonomy on the one hand and may serve to prevent *mala fide* claims on the other.

This is not to suggest that a double test should be applied to all the definitional elements. The subjective notions of the applicant, in our view, only find application in determining whether the conduct was unwelcome and of a sexual nature.

(2) *Grievance versus complaint*

The word 'grievance' is used throughout the Sexual Harassment Code of 2005. It is argued that the use of this word creates confusion in that reference to a 'grievance' implies that the grievance procedure contained in the company grievance policy should be followed. A grievance procedure is usually based on a hierarchical progression of reporting levels whereby the aggrieved employee follows the line of command when bringing a grievance to the attention of the employer. The normal grievance process does not distinguish between a formal and an informal process. It ordinarily requires the employee to submit a complaint in writing. This marks stage one of the formal grievance process. The normal grievance procedure appears at odds with the complaint procedure stipulated in the Sexual Harassment Code of 2005, which makes provision for a complainant to elect whether to follow an informal process or formal process throughout and to seek counselling and advice from the employer.

Grievance procedures normally allow the employer to attempt to resolve the grievance within a stipulated time period at each stage and it often takes quite some time before a grievance is escalated to the final grievance hearing for resolution.

The grievance procedure and final hearing allow for discretion in how the employer resolves the internal grievance. Section 60 of EEA, however, appears far more directive in that it places an obligation on an employer to 'consult with all relevant stakeholders' and it directs the process to be adopted in addressing a complaint of harassment.

Other than the practical confusion in the application of a grievance process and the direction to 'consult', it is further submitted that the word 'grievance' might be inappropriate in the context of a sexual harassment complaint, which could be made verbally before a formal grievance is filed. A complaint of sexual harassment should be reported immediately and addressed as soon as is reasonably possible, with the relevant accountable person rather than through the hierarchical line of management. Submitting a sexual harassment complaint may very well require a more direct and immediate process aligned with the complaint procedure foreseen in the EEA. The use of the word 'complaint' may furthermore assist in establishing a clear distinction between an ordinary grievance process and bringing a claim of harassment to the attention of the employer.

(3) *Limited confidentiality*

The Sexual Harassment Code of 2005 stresses the importance of confidentiality. Item 9 of the 2005 Sexual Harassment Code states that employers and employees must ensure that grievances about sexual harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential. The notion of confidentiality presents further tension in the practical application of the Sexual Harassment Code of 2005 when complying with the section 60(2) EEA obligation to consult all relevant parties. This tension manifests in the difference between the interpretation associated with the introduction of confidentiality and anonymity. Furthermore, an employer's duty to consult all relevant parties would naturally include that the alleged perpetrator be consulted and interviewed. The name of the complainant would invariably have to be disclosed for the alleged harasser to contextualise the complaint and to have a fair opportunity to respond to the allegations. Reference to all relevant parties in section 60(2) also implies that potential witnesses should equally be 'consulted'. This presents a further challenge to the anonymity of the complainant and alleged perpetrator.

It thus becomes reasonably impractical to provide an undertaking to a complainant of complete confidentiality or anonymity under the circumstances.

In terms of section 60 read with item 8.7.2 of the Sexual Harassment Code of 2005 an employer is required to conduct a risk analysis to others in the workplace. This may well entail that the employer be obligated to initiate formal disciplinary proceedings against the alleged perpetrator.

A complainant relying on confidentiality or having elected the informal procedure as provided for in the Sexual Harassment Code of 2005 may not be prepared to provide evidence in such a formal procedure instituted by the employer.

This paradox pragmatically implies that the undertaking of confidentiality should be qualified to the extent that discussions around the complaint would only be disclosed to persons 'on a need to know basis and only in order to substantiate the complaint'.[52] Similarly, it is suggested that an alleged perpetrator should enjoy the same qualified rights to confidentiality in what is disclosed during an investigation into complaints of harassment. There is a need for clarity in the code as to how specifically to address the issue of confidentiality.

(4) *The duty to report 'immediately'*

The use of the word 'immediately' in section 60 is mirrored in the Sexual Harassment Code of 2005. The Sexual Harassment Code of 2005, however, goes further to direct that 'immediately' shall mean 'as soon as reasonably possible and without undue delay taking into account the nature of the harassment, the fact that it is a sensitive issue, the fear of reprisals and the positions of the complainant and alleged perpetrator'.[53]

In practical terms, the duty to report, immediately or as soon as is reasonably possible, has two significant outcomes: first, in terms of section 60, for an employee to seek to hold an employer directly liable there is a duty to report the matter immediately. 'Immediately' is interpreted to mean as soon as is reasonably possible and without undue delay, taking into account the nature of the sexual harassment, its sensitivity, and fear of reprisals considering the respective positions of the complainant and the alleged perpetrator. There is no guideline in terms of a reasonable timeline in assessing whether any delay in reporting would be unreasonable for purposes of section 60.

Clarity is required in the wording adopted by the code in considering a reasonable benchmark for what is deemed to be an 'immediate' response, that is, in determining whether the employer had taken immediate action upon being made aware of allegations of harassment.

[52] Le Roux, Rycroft and Orleyn (n 17) 105.
[53] Item 8.1 of the Sexual Harassment Code of 2005.

The lapse in time between the occurrence of the incident and reporting thereof may call into question the credibility of the complainant, and unwelcomeness or otherwise of the conduct.[54] The court in *Rustenburg Platinum Mines,* however, pronounced on these issues of delay in juxtaposition to the credibility of the complainant and the unwelcomeness of the conduct concerned.[55] The court in this matter held that human beings react in different ways to the same or similar set of circumstances. In an ideal scenario a complaint of sexual harassment will be reported 'immediately'. The failure to report the incident timeously was not indicative that the complainant had encouraged and inspired the perpetrator to conclude that the conduct was welcome.[56] The nature of harassment in itself may involve conduct over a period of time and may not be isolated to a once-off incident.

While section 60 of the EEA may regulate employer liability to claims of harassment on a broad level, it is apparent that the Sexual Harassment Code of 2005 is sexual harassment-specific and provides little assistance in the management of broader forms of harassment.

South Africa has a raft of harassment-specific legislation that deal with violence and harassment and seem to address many aspects covered in Convention 190.

V EXISTING AND COMPETING LEGISLATIVE FRAMEWORKS

Apart from the Sexual Harassment Code of 2005 discussed above, South Africa has developed a rich national legislative framework addressing different forms and jurisdictions of violence and harassment.

Item 19 of the Human Resources Code of Good Practice deals with the elimination of harassment in the workplace and defines harassment as unwanted, unsolicited attention based on one or more of the prohibited grounds. It involves conduct that is unwanted by the person to whom it is directed and who experiences the negative consequences of the conduct. The conduct may be physical, verbal or non-verbal. It affects the dignity of the affected person or

[54] *Rustenburg Platinum Mines* (n 22) para 48, where the court quotes the commissioner wherein he finds that 'in order to maintain credibility, the purported victim ought to act within a reasonable time period'. The court held that 'a bit of appreciation of the human mind dictates that one must look deeper and objectively into the reasons incidents of sexual harassment are not immediately reported', suggesting that each case should be decided on its own merits and that human beings act differently to the same or similar set of circumstances; see also para 57, where the court held that in the present case the commissioner was incorrect in his finding that failure to report the incident timeously was an indication that the complainant had encouraged and *inspired* Pietersen to conclude that she was not averse to his conduct.

[55] *Rustenburg Platinum Mines* (n 22) para 4. The first incident occurred in or around 2007 and the employer only had cause to investigate in or around 2015, some eight years later.

[56] *Rustenburg Platinum Mines* (n 22) paras 48 and 57.

creates a hostile working environment and often contains an element of coercion or abuse of power by the harasser.

The Promotion of Equality and Prevention of Unfair Discrimination Act[57] (PEPUDA) is also a particularly important piece of legislation dealing with harassment. Its definition covers harassment on a broader level and is defined as unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences.

An important aspect to note is that the application of PEPUDA specifically excludes persons covered by the EEA, which has the effect that harassment claims by or perpetrated against customers, suppliers, independent contractors and others having dealings with the business need to be prosecuted through PEPUDA and/or through the civil courts.[58] The Sexual Harassment Code of 2005, however, at the same time includes this broader list of stakeholders.

The Protection from Harassment Act 17 of 2011 (PFHA) also protects persons who may be victims of harassment. The PFHA applies regardless of the context. However, the remedy for a complainant is in the form of a protection order against the perpetrator.

The definition of harassment in the PFHA, like its counterpart in PEPUDA, is drafted to cover the wider forms of harassment including, but not limited to, sexual harassment, racial harassment, bullying, victimisation and stalking.

Harassment is defined in the PFHA as directly or indirectly engaging in conduct that the respondent knows or ought to know:

(a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably—

(i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be;

(ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or

(iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person; or

(b) amounts to sexual harassment of the complainant or related person.

[57] 4 of 2000.

[58] Le Roux, Rycroft and Orleyn (n 22) 152.

The nexus between the jurisdiction of this legislation and role of the employer is found in the extent to which the employer aids in enforcing such protection orders in the workplace. Pragmatically it is in the interests of any employer to address a harassment complaint before it manifests itself in the complainant obtaining a protection order against a fellow employee.

Section 51 of EEA, as well as the Protected Disclosures Act 23 of 2000 (PDA), provides protection for employees against victimisation, retaliation, or those who suffer an occupational detriment as a result of exercising a right in terms of the EEA or the PDA.

Remedies available to complainants of violence and harassment are covered both by the EEA in section 48 and 50, PEPUDA section 21(2), the common law of delict and by criminal law.

The EEA does not define sexual harassment, but in terms of section 5 places a duty on employers to eliminate unfair discrimination. Section (6)(3) of the EEA provides that harassment is a form of unfair discrimination, prohibited on any or a combination of grounds listed in section 6(1).

It is argued that the different definitions employed in the Sexual Harassment Code of 2005, the Human Resources Code of Good Practice, PEPUDA and the PFHA contribute to the level of confusion, inherent to the existing complexities, legal issues, tests and practical interpretations in dealing with the management and prevention of sexual harassment.

The existing legal framework offers little assistance in defining and addressing violence and other forms of harassment such as: gender-based violence, workplace bullying, racial harassment, harassment related to gender, harassment related to family responsibility and pregnancy.

Bullying and other forms of harassment, while sufficiently pervasive in South Africa, is not defined in law. The prevailing law pertaining to bullying is that when an allegation of bullying is made on an unlisted ground, a complainant must prove that the conduct complained of is harassment and that such harassment amounts to discrimination and that the discrimination is unfair.[59] It is submitted that the onus placed on the complainant in proving bullying as a form of harassment is a troublesome one in light of the fact that the complainant may not know the reason for the bullying.

A further complexity lies in the fact that many managers motivated by a high need for achievement and personal power, such as is associated with heroic autocratic leadership styles, may tend to display low levels of cognitive complexity (emotional intelligence) and engaging leadership, and consequently subordinates may subjectively experience such interaction as arising from the disempowering

[59] *Shoprite Checkers (Pty) Ltd v Samka & Others* (2018) 39 *ILJ* 2347 (LC), reportable.

manner of interaction.[60] Other than the reference to occupational detriment, there is no definition in South Africa. Any code of good practice addressing this aspect of harassment would need to define and clarify the context of harassment to address the difficulty in distinguishing what constitutes poor managerial style from conduct that constitutes bullying. It is suggested that the stringent test associated with the 'intolerability' in the case of constructive dismissal would have to be applied in assessing workplace bullying.

VI ILO CONVENTION 190

(1) *Introduction*

On 21 June 2019, at its 108th session in Geneva, the International Labour Conference adopted Convention 190 dealing with the elimination of violence and harassment in the world of work. Convention 190 is instructive. It places firm obligations on members to eliminate and prevent violence and harassment in the world of work. To realise the rights and obligations contained in Convention 190 and for the South African legislative framework to align to Convention 190, the existing Sexual Harassment Code of 2005 would need to be augmented and amended.

(2) *Scope of application*

Convention 190 refers to the concept of 'violence and harassment' as a continuum of unacceptable behaviour and practices, or threats thereof, whether single occurrence or repeated, that aim at, result in or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.[61]

The Gender, Equality and Diversity branch of the ILO describes violence and harassment as a range of unacceptable behaviours that 'aim at, result in or likely to result in physical, psychological, sexual or economic harm'. It is meant to include acts such as physical abuse, verbal abuse, bullying and mobbing, sexual harassment, threats and stalking.[62] It is recognised that harassment is contextual, driven by the dynamics within the world of work as a sample of the greater society, including power relations, gender norms, cultural and social norms, discrimination and economic inequalities. Moreover, it is noted that the broader conceptualisation of sexual harassment includes a range of sexist, demeaning behaviours aimed at women and others who do not conform to gender norms and that sexualised behaviour is often regarded as the tool of harassment.[63]

[60] H Mintzberg *Managers Not MBAs* (2004).

[61] Article 1 of Convention 190.

[62] See https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_711891/lang--en/index.htm (accessed on 15 September 2019).

[63] V Schultz 'Reconceptualizing sexual harassment, again' (2018) 22 *Yale LJF* 46.

(3) *Scope of protection*

Convention 190 seems to have adopted a broader approach to the protection of workers as it includes a broader definition of persons in the world of work. The broader protection employed in Convention 190 includes employees as defined by members' national law and practice as well as persons working irrespective of their contractual status. Such persons would include persons in training, including interns and apprentices, workers whose employment has terminated, volunteers, job seekers and job applicants and individuals exercising authority, duties, or responsibilities of an employer.[64]

The Sexual Harassment Code of 2005 appears to be aligned to some extent to article 2 of Convention 190. However, through equality and non-discrimination laws, policies and regulations, persons or groups in situations of vulnerability will be afforded protection in so far as there may be no protection,[65] that is, those in sectors, occupations and work arrangements that are more exposed to violence and harassment, including informal economy workers.

The protection of workers whose employment has been terminated as contemplated in article 2 of Convention 190 has been addressed by the Labour Court in *Malope Mathews v Crest Chemicals (Pty) Ltd*.[66] The court held that confining the unfair discrimination provisions to current employees by virtue of a literal interpretation of the term 'employee' 'is at variance with an interpretation that promotes constitutional values and in particular, the right to equality in employment and the right to fair labour practices'.[67]

The term 'world of work' employed in Convention 190 extends its protection beyond the physical workplace.[68] This indicates the ILO's foresight in considering the evolving nature, place and space of work, including the manifestation of violence and harassment in the world of work. This broader concept of the workplace is consistent with existing ILO instruments.[69] The standard-setting committee on violence and harassment in the world of work (the committee) deliberated on the concerns raised being that the broader concept of the world of work places an undue burden on employers. The committee concluded that the obligations and responsibilities of each role player, that is, governments, employers and employer organisations and workers and trade unions, vary to

[64] Article 2 of Convention 190.

[65] ILO *Ending Violence and Harassment in the World of Work* Report V(1), International Labour Conference, 108th session, Geneva, 2019 8.

[66] *Malope* 27 February 2017 Case JS286-15 (unreported).

[67] *Malope* (n 65) para 6.

[68] ILO (n 65) 5.

[69] Convention 151; Occupational Safety and Health, the HIV and AIDS Recommendation, 2010 (No 200); Employment Policy (Supplementary Provisions) Recommendation, 1984 (No 169); Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No 205).

the extent that it may be applicable. Furthermore, article 3 is not intended to be applicable to each role player and in every circumstance.[70]

Providing substance to article 3, article 4 of Convention 190 recognises that the courses of action adopted by the different role players could address different situations in order to attain the coveted protection.[71] Read with article 5, it is evident that the partnerships between the respective role players will assist in policy development, disseminating the contents of the policy to the workforce, administering the complaints procedure and conducting training and monitoring.[72]

(4) *Enacted laws*

Equality and non-discrimination law within the employment context is regulated by the EEA.

Articles 7 and 12 of Convention 190 must be read conjunctively. These provisions require member countries to define and prohibit; in law or through other measures consistent with national practice, violence and harassment in the world of work, including gender-based violence and harassment.[73] Where existing law and regulations already give full effect to the provisions of Convention 190, member states would be compliant. Where the converse applies, this would necessitate the amendment or adoption of new laws and regulations in order to stand compliance.[74] While the EEA, together with the Sexual Harassment Code of 2005, may prohibit sexual harassment on the basis of sex, gender and/or sexual orientation, a broader description of gender identity and those not conforming to traditional gender norms, however, might require more explicit definition and regulation.

Convention 190 prescribes that members shall take appropriate measures to prevent violence and harassment. Reference to appropriate measures appear to be both those that are proactive as well as reactive.

Proactive measures would include *inter alia* requiring by law, and in so far as is reasonably practicable, that employers take steps to prevent violence and harassment by the introduction of documented standards of acceptable conduct, mandatory training and awareness initiatives and encouraging continuous awareness and dialogue sessions.

Reactive steps would seek to address complaints after they have occurred and would entail having clear and appropriate complaint and reporting mechanisms

[70] ILO (n 65) 6.
[71] Article 4 of Convention 190; see also ILO (n 65) 7.
[72] Article 5 of Convention 190.
[73] Article 7 read with art 12 of Convention 190.
[74] ILO (n 65) 8.

and procedures; ensuring that persons have a practical understanding of how such complaint should be addressed; prompt investigation; and the offering of counselling services, assistance and advice.

(5) *Socio-psychological work risk factors*

The psychological risks associated with violence and harassment include depression, stress, anxiety, post-traumatic stress disorder (PTSD) and low self-esteem.[75]

The World Health Organization opines that the greatest risk associated with mental health issues are 'interactions between types of work, the organisational or managerial environment, the skills and competencies of employees and the support available to employees to carry out their work'.[76]

Circumstances and conditions that impact the risk to violence and harassment in the world of work include working in contact with the public, informal economy workers that have little or no protection of labour laws, unsocial working hours, working alone or in relative isolation or in remote locations, and providing public and emergency medical services.[77]

Preventative control measures may be categorised into three main groups, namely, engineering controls, administrative controls and personal controls.

Engineering controls would entail the incorporation of digitalised and mobile security mechanisms, having controlled access to premises, the installation of video surveillance tools and alarm systems, altering work area design, and the inclusion of mirrors.[78]

Administrative measures would include measures such as having appropriate company policies, procedures and training; allowing for escorting to and from commuting stations and parking lots; liaison with law enforcement agencies; and providing adequate security which can also provide employee identification mechanisms.[79]

Personal controls would entail employees taking initiative and empowering themselves. This would include adopting a holistic personal empowerment and wellness management programme and increasing social support networks. Making informed commuting plans, assertiveness training, separation of work-life activities and having access to wellbeing and counselling are further examples of ways in which any employee can exercise preventative measures.[80]

[75] Psychological hazards and controls for rehabilitated professionals; 'Mental health in the workplace: Information sheet' May 2019; accessible at www.who.int/mental_health/in_the_workplace/en/. (WHO information sheet) (accessed on 9 September 2019).

[76] WHO information sheet (n 75).

[77] Ibid.

[78] Ibid.

[79] Ibid.

[80] Ibid.

(6) *Enforcement and remedies*

Article 10 of Convention 190 is concerned with the monitoring and enforcement of the laws and regulations in order to give effect to the provisions of Convention 190. It also seeks to provide complainants, who in some instances may not necessarily be the 'victim', protection against victimisation or retaliation, including access to medical, social, administrative and legal support measures.

The Commission for Employment Equity, the Human Rights Commission, the Department of Labour and the Commission for Gender Equality are all bodies that may contribute to the monitoring of and enforcement of the laws enacted to give effect to Convention 190 and its recommendations.

Further efforts in the collection of data from dispute resolution bodies such as the Commission for Conciliation, Mediation and Arbitration; court records; police records; hospital records; university studies and surveys at awareness-raising campaigns; and at the workplace may prove to be useful.

(7) *Training and guidance*

Educating South Africa, young and old, on violence and harassment is critical if we are to enjoy a world of work free from violence and harassment. Convention 190 recognises the importance of collective effort of members together with employers' and workers' organisations.

In terms of its obligations employers must be required by laws and regulations to take appropriate steps to prevent violence and harassment and in particular, so far as reasonably practicable to adopt workplace policies, identify hazards and risks and provide workers with training in an accessible format.[81]

Member states should also be required to fund, develop, implement as well as disseminate protocols at various levels in society regarding violence and harassment, including gender-based violence. Programmes on factors that act as a catalyst to violence and harassment should be codified and adequate training be provided to various role players in society including, but not limited to, media personnel, police officials, teachers, public officials and judges.

Public awareness campaigns to address discriminatory attitudes and stigmatisation of complainants, witnesses and whistle-blowers in all languages, including those of migrant workers resident in the Republic, need to be implemented.[82]

[81] Article 9 of Convention 190.

[82] Recommendation 206 of Convention 190, 10.

VII RECOMMENDATIONS AND CONCLUSION

A reading of item 11.2 of the Sexual Harassment Code of 2005 indicates that it does not seem that the legislature envisaged training to be an explicit peremptory requirement. Had this been the case, it would have opted for the use of the word 'must' instead of 'should' in referring to training in respect of information and education.

The pervasive surfacing of violence and harassment in the world of work calls for this workplace phenomenon to be approached as a form of continuous compliance training. It is suggested that the use of digitalised learning, that is, e-learning and mobile-learning content, should be employed to support the overarching employment obligations of employers. There can be no plausible reason why employers in South Africa should be allowed to hide behind the guise of training not being 'reasonably practicable' and not be under an obligation to train its employees on the applicable and relevant code on handling sexual violence and harassment in the world of work, given the cost-effective availability of digitalised mobile-learning platforms accessible to all employers regardless of size.[83]

It is posited that the Sexual Harassment Code of 2005 as well as the Human Resources Code of Good Practice should expand its scope to include the elimination of violence and harassment in the world of work in its various forms. The aspects of the ILO Convention 190 as well as its Recommendation 206 would require the augmentation of the existing codes and calls for explicit alignment and integration of existing legislation.

The areas where the existing code would need to be augmented relate to assisting complainants of gender-based violence with support and to implement measures to mitigate against domestic violence in terms of Recommendation 206 to Convention 190. In addition, and specific to the sexual harassment policy, it is recommended that the test be augmented to include an objective qualifier.

The existing South African legislative framework already provides for remedies that are afforded to complainants, victims, witnesses and whistle-blowers in terms of Convention 190. In this regard South Africa can be seen to be compliant.

Convention 190 and its Recommendation 206 present an opportunity for South Africa to address the practical contemporary challenges and shortcomings

[83] The need for specific training in the South African content is best illustrated by the facts relating to the torture, rape and murder of Uyinene Mrwetyana, a student of the University of Cape Town, by an employee of the South African Post Office on 24 August 2019 in Claremont, Cape Town. The question posed by this much-publicised case is whether the Post Office could have saved the life of Uyinene Mrwntyana, had it, as a South African employer, been obliged to train all its employees in the understanding and reporting of sexual harassment. It is opined that the answer has to be in the affirmative.

of its legal policy framework towards creating a model of clarity and, to augment it, to address the broader forms of violence and harassment in the world of work.

The opportunity to address the challenges and shortcomings of the legal policy framework in South Africa has been accepted, through a proposal of a new Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work, gazetted for public comment on 20 August 2020.[84] This draft code has been guided by ILO Convention 190 and its Recommendation on Eliminating and Preventing Violence and Harassment in the World of Work 2019; the Discrimination (Employment and Occupation) Convention 111 of 1958; and ILO Convention 151, relating to occupational health and safety.

The draft code attempts to align to Convention 190 by including various forms of violence and harassment in the word of work. It aims to clarify interpretation and applicable tests to be adopted while integrating and cross-referencing the legal framework, guiding practical actions to be implemented.

The draft code introduces 'violence and harassment' as a single concept, including sexual harassment, gender-based violence, racial violence, harassment and bullying. It defines various forms of violence and harassment and acknowledges that violence and harassment may include physical abuse, psychological abuse, emotional abuse and sexual abuse. The draft code explicitly acknowledges violence and harassment against women and men and expands on the interpretation of sexual orientation in defining LGBTQIA+ persons in the world of work.[85]

The code attempts to overcome the ambiguity around the interpretation of workplace bullying in the wording of section 6(3) of the EEA, which states that '[h]arassment of an employee is a form of unfair discrimination and is prohibited on any one or a combination of grounds of unfair discrimination listed in subsection 6(1) of the EEA', in that the code includes bullying as a form of workplace violence and harassment in view of the general prohibition of unfair discrimination as per section 9(3) of the Constitution.[86] The draft code references the definition of section 186(2) of the LRA as well as section 8 of the OHSA, which requires employers, as far as is reasonably practicable, to provide and maintain a safe working environment without risk to the health of employees.

[84] The Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World or Work (for public comment), 20 August 2020 *GG* 43630, Notice No 896.

[85] 20th Commission for Employment Equity 2018–2019 (CEE) Department of Employment and Labour Annual Report, accessible at http://www.labour.gov.za/DoucmentCentre/Reports/Annual%20Reports (accessed on 2 June 2020). The definition includes the following 'Lesbian, Gay, Bisexual, Transgender, Intersex, Queer, Questioning, Asexual plus all other sexualities, sexes and genders not included under LGBTQIA + persons'.

[86] Constitution of the Republic of South Africa, 1996 (referred to as the Bill of Rights).

The Commission of Employment Equity announced that it has recommended that South Africa ratifies Convention 190 as part of its commitment to address the broader forms of violence and harassment and gender-based violence in the world of work,[87] in its quest to address both a legal and practical institutionalised phenomenon. If the draft code is adopted, it is believed that it will assist in addressing the legal and practical challenges highlighted in this contribution.

[87] 20th Commission for Employment Equity 2018–2019 (CEE) Department of Employment and Labour Annual Report, accessible at http://www.labour.gov.za/DoucmentCentre/Reports/Annual%20Reports (accessed on 2 June 2020).

CHAPTER 11

Excessive stress and eliminating barriers to decent work

MARYKE SMUTS* AND DENINE SMIT**

The world of work has changed dramatically across the globe. Increasing demands in the workplace, the emergence of new methods of arranging work and the development of new technologies have brought about an escalation in the prevalence of excessive stress and, thus, both physical and mental illness in the workplace. This is exacerbated by rising global economic instability, unemployment and political turbulence. In South Africa, employers are under a legal obligation to take reasonable care of their employees and to safeguard their health and safety in the workplace. This duty extends to employees' right to a workplace which, as far as is reasonably practicable, is free from any hazards and risks that may affect their physical and mental health. Accordingly, employers have a duty to protect employees from the harmful consequences of excessive stress in the workplace. Against a background on the prevalence of excessive stress and its impact on employees, employers and society, this chapter investigates various ways in which to mitigate the adverse effects of psychosocial hazards or risks in the workplace as a contributor to the occurrence of excessive workplace stress. Attention is given to the influence of ILO Standards on Occupational Safety and Health, and the ILO's goal towards decent work and sustainable development.

I INTRODUCTION

Being a universal condition, stress affects us all, irrespective of race, culture, income bracket or occupation,[1] and has become an inextricable element of everyday life,[2] including our working lives. Since 'the very nature of work carries with it an inherent amount of stress',[3] it must be accepted that a degree of stress in the workplace is inevitable.[4] Without stress to spur us into action, we would

* B.Com (Law), LLB, LLM; Master of Laws (LLM) Graduate, University of the Free State.

** BIur, LLB, LLM, LLD; Associate Professor of Mercantile Law, University of the Free State.

[1] M du Plessis 'Mental stress claims in South African workers' compensation' (2009) 30 *ILJ* 1476.

[2] E Grady and E Neunlist 'Stress in the workplace: Causes and solutions' (2005) 53 *United States Attorneys' Bulletin* 20.

[3] JC de Carteret 'Occupational stress claims: Effects on workers' compensation' (1994) 42 *American Association of Occupational Health Nurses Journal* 495.

[4] S Leka, A Griffiths and T Cox *Work Organisation and Stress: Systematic Problem Approaches for Employers, Managers and Trade Union Representatives* (2004) 3.

lack sufficient motivation to perform at work.[5] Therefore, an entirely stress-free workplace would be inefficient and ineffective.[6] Yet, when stress reaches levels beyond those considered beneficial for productivity, it starts to pose a host of psychosocial hazards or risks to employees' mental health.[7]

What makes stress at work distinctive is the particular context in which it occurs, most typically arising from an imbalance between the demands on the employee, and the employee's capacity to meet them.[8] In its severe, excessive form,[9] workplace stress is recognised as a health, safety and welfare issue[10] with detrimental effects not only on the employee's physical and psychological health,[11] but also more broadly on the workplace, the well-being and effectiveness of the organisation, the employee's family as well as society at large.[12]

In many jurisdictions, including that of South Africa, employers have a legal duty to take reasonable care of their employees and to safeguard their workforce's health and safety.[13] Sadly, many organisations, particularly also in South Africa, lose sight of the fact that people's experience at the workplace is a pivotal determinant of general well-being[14] and that excessive stress more often than not has adverse effects on a workforce.[15] As a result, programmes and strategies to develop employees' ability to manage excessive stress are not regarded as a priority.[16]

As a contribution to remedy this lack of urgency in safeguarding South African employees against the health and safety risks posed by excessive work stress, this contribution explores ways in which to mitigate the adverse effect of psychosocial workplace hazards or risks. In particular, the discussion will be informed by the International Labour Standards on Occupational Safety and Health of the International Labour Organization (ILO), the ILO conventions

[5] Grady and Neunlist (n 2) 20; L Levi *Stress in Industry: Causes, Effects and Prevention* (1984) 2.

[6] F Luthans *Organisational Behaviour: An Evidence-Based Approach* (2010) 279.

[7] K Nieuwenhuijsen, D Bruinvels and M Frings-Dresen 'Psychosocial work environment and stress-related disorders: A systematic review' (2010) 60 *Occupational Medicine* 277.

[8] Grady and Neunlist (n 2) 21.

[9] Grady and Neunlist (n 2) 24.

[10] CJ MacKay *et al* '"Management standards" and work-related stress in the UK: Policy background and science' (2004) 18 *Work and Stress* 92.

[11] MF Dollard, AH Winefield and HR Winefield *Occupational Stress in the Service Profession* (2003) 4–5; S Béjean and H Sultan-Taïeb 'Modelling the economic burden of diseases imputed to stress at work' (2005) 50 *European Journal of Health Economics* 16; Leka, Griffiths and Cox (n 4) 8.

[12] Dollard, Winefield and Winefield (n 11) 4–5; Béjean and Sultan-Taïeb (n 11) 16, 19; Leka, Griffiths and Cox (n 4) 8; L Levi *et al Guidance on Work-Related Stress – Spice of Life or Kiss of Death?* (2000) vi; Grady and Neunlist (n 2) 24.

[13] *Van Deventer v Workman's Compensation Commissioner* 1962 (4) SA 28 (T) 31B–C.

[14] WHO 'Mental health in the workplace', accessible at https://www.who.int/mental_health/world-mental-health-day/2017/en/ (accessed on 15 October 2017).

[15] E van Zyl 'The measurement of work stress within South African companies: A luxury or necessity?' (2002) 28 *South African Journal of Industrial Psychology* 27.

[16] Ibid.

ratified by South Africa, as well as the ILO's goals of decent work and sustainable development. The provisions of the Constitution of the Republic of South Africa, 1996 and the Occupational Health and Safety Act (OHSA) 85 of 1993, as well as interventions at the organisational level, will also be addressed. First, however, the definition for and prevalence of excessive workplace stress globally and in South Africa, as well as its impact on employees, employers and society, are examined as a study backdrop.

II DEFINING AND SCOPING THE PROBLEM

(1) *Definition*

While a single, unified definition of excessive stress is yet to be agreed upon,[17] some consensus is developing around the psychological approach to the definition of stress, which largely is consistent with the ILO's definition of psychosocial hazards.[18] Therefore, the ILO's definitions of excessive stress and workplace stress are used here.

Stress, or excessive stress for purposes of this research, is defined as 'the harmful physical and emotional response caused by an imbalance between the perceived demands and the perceived resources and abilities of individuals to cope with those demands'.[19]

Excessive workplace stress is:

> determined by work organisation, work design and labour relations and occurs when the demands of the job do not match or exceed the capabilities, resources, or needs of the worker, or when the knowledge or abilities of an individual worker or group to cope are not matched with the expectations of the organisational culture of an enterprise.[20]

(2) *How big the problem is*

The prevalence of excessive stress and stress-related psychological illness[21] emanating from the workplace has become a societal concern. As alarming statistics are revealed across the globe, focus on the issue intensifies.[22]

[17] C Wood 'What is a stress-related injury?' (2008) 1 *Journal of Personal Injury Law* 28.

[18] T Cox, A Griffiths and E Rial-Gonzalez *Research on Work-Related Stress. European Agency for Safety and Health at Work* (2000) 11.

[19] ILO *Workplace Stress: A Collective Challenge* (2016) 2.

[20] Ibid.

[21] In much of the literature the terms 'psychiatric', 'psychological' and 'mental' harm, injury or illness are used interchangeably and indiscriminately.

[22] A Landman and M Ndou 'Some thoughts on developments regarding the recovery of damages for pure psychiatric or psychological injury sustained in the workplace' (2015) 36 *ILJ* 2460; N Arshadi and H Damiri 'The relationship of job stress with turnover intention and job performance: Moderating

In 2016 the ILO dedicated its World Day for Safety and Health at Work to workplace stress. To underscore the extent of the problem, it released a report on global trends, the effects of workplace stress, and methods for preventing and managing hazards or risks.[23] The numbers are staggering. Worldwide, some 2,78 million people die from occupational accidents or work-related illnesses every year, and 36,1 per cent of the global workforce work excessive hours (more than 48 hours per week).[24]

In Australia, Safe Work Australia[25] reported that each year between 2012/13 and 2016/17 an average of 7 140 Australians were compensated for work-related mental health conditions; 6 per cent of all serious workers' compensation claims were for work-related mental health conditions, and 92 per cent of serious work-related mental health condition claims were attributed to mental stress.[26] The types of mental health conditions for which workers received compensation included a reaction to stressors (37 per cent), anxiety or stress disorder (31 per cent), post-traumatic stress disorder (12 per cent), a combination of anxiety and depression (11 per cent), and depression alone (4 per cent).[27] The main causes of serious mental health condition claims were work pressure (21 per cent), work-related harassment or bullying (20 per cent), and exposure to workplace or occupational violence (10 per cent).[28] The Australian Workplace Barometer (AWB) project revealed that depression caused by job strain and bullying cost organisations approximately AU $693 million per year due to presenteeism (where employees are at work, but do not perform properly) and sickness absenteeism.[29]

A labour force survey conducted by the United Kingdom (UK) Health and Safety Executive (HSE)[30] revealed that 1,4 million employees suffered from a work-related illness (both new and longstanding cases) in 2017/18,[31] of whom

role of OBSE' (2013) 84 *Procedia – Social and Behavioural Sciences* 706; Nieuwenhuijsen, Bruinvels and Frings-Dresen (n 7) 277; Béjean and Sultan-Taïeb (n 11) 16.

[23] ILO (n 19) 2.

[24] ILO *Work for a Brighter Future: Global Commission on the Future of Work* (2019) 20.

[25] Established as a statutory government body to develop national policy on work health and safety as well as workers' compensation. Safe Work Australia 'About us', accessible at https://www.safeworkaustralia.gov.au/about-us (accessed on 6 August 2019).

[26] Safe Work Australia 'Infographic: Workplace mental health', accessible at https://www.safeworkaustralia.gov.au/doc/infographic-workplace-mental-health (accessed on 6 August 2019). Interestingly, 42 per cent of serious work-related mental health condition claims were made by males and 58 per cent by females.

[27] Ibid.

[28] Ibid.

[29] MF Dollard and TS Bailey *The Australian Workplace Barometer: Psychosocial Safety Climate and Working Conditions in Australia* (2014) 5.

[30] The government agency responsible for the regulation and enforcement of workplace health, safety and welfare.

[31] Health and Safety Executive 'Work-related ill health and occupational disease in Great Britain', accessible at http://www.hse.gov.uk/statistics/causdis/index.htm (accessed on 18 November 2018).

595 000 presented with work-related stress, anxiety or depression, resulting in a prevalence rate of 1 800 per 100 000 employees.[32] Work-related stress, anxiety or depression accounted for the loss of 15,4 million working days.[33] Percentage-wise, therefore, stress, depression or anxiety accounted for 44 per cent of all work-related ill-health cases, and 57 per cent of all working days lost due to ill health.[34] These statistics, the HSE said, were not significantly different from those of 2016/17,[35] when the cost for workplace ill-health amounted to approximately £9,7 billion.[36]

In the United States of America (USA), in turn, job stress is estimated to cost the economy over $300 billion annually[37] in diminished productivity, accidents, employee absenteeism, staff turnover, medical, legal and insurance costs, workers' compensation awards and judgments.[38] According to the American Psychological Association (APA), 65 per cent of employees cite work as a serious source of stress, and more than a third report experiencing chronic work stress.[39] Alarmingly, studies show that six of the top ten leading causes of death in the USA are connected to excessive stress.[40]

In these and other developed nations, policy-makers, tripartite agencies, governments, employers and employees, as well as academics have paid significant attention to issues of employee mental health and well-being.[41] These foreign jurisdictions have for some time been addressing the problem with legislation and other methods.[42]

Turning to South Africa, a 2016 report indicated that workplace stress and depression, anxiety disorders and burnout cost the national economy some R40,6 billion per year, or 2,2 per cent of gross domestic product (GDP).[43] Reasons for high stress levels among South Africans abound, but include increased demands experienced both in and outside the workplace, and an inability to deal with

[32] Ibid.
[33] Ibid.
[34] Ibid.
[35] Ibid.
[36] Ibid.
[37] G Fink (ed) *Stress: Concepts, Cognition, Emotion and Behaviour. Handbook of Stress: Volume 1* (2016) 3.
[38] American Institute of Stress 'Workplace stress', accessible at https://www.stress.org/workplace-stress/ (accessed on 19 November 2018).
[39] American Psychological Association 'Work stress', accessible at http://www.apaexcellence.org/resources/special-topics/work-stress (accessed on 19 November 2018).
[40] NA Piotrowski and DW Hollar *Magill's Medical Guide* (2017) 4.
[41] M Dollard and D Neser 'The work stress conundrum', accessible at https://www.ilo.org/safework/events/safeday/33thinkpieces/WCMS_681594/lang--en/index.htm (accessed on 4 August 2019).
[42] S Leka, W van Wassenhove and A Jain 'Is psychosocial risk prevention possible? Deconstructing common presumptions' (2015) 71 *Safety Science* 62.
[43] IOL News 'Work stress costs SA R40bn', accessible at https://www.iol.co.za/business-report/economy/work-stress-costs-sa-r40bn-2077997 (accessed on 23 March 2016).

these.[44] South African jurisprudence is following in the footsteps of that of the developed jurisdictions above, particularly as more cases of excessive stress in the workplace emerge. In this regard, Landman argues that claims for mental or psychological harm or injury in the South African workplace may intensify in time, as has been seen in other jurisdictions.[45]

(3) *Confounding factors*

Certain confounding factors complicate efforts to pin down the extent of the problem of excessive stress and mental illness at work. These include a gap between actual and treated prevalence due to poor knowledge of the signs of mental illness and of ways to access treatment, as well as prejudice, discrimination and stigmatisation in relation to those who suffer from mental illness.[46]

Moreover, mental health status and disorders closely correlate with social, economic and physical settings, with individuals lower down on the socio-economic scale being disproportionately affected.[47]

Despite the difficulties in determining the true scope of the problem, though, the need for solutions is urgent. Research indicates that over the next 30 years the world will see a six-fold increase in the economic costs associated with mental illness.[48] In developing nations, in particular, the health impact of excessive workplace stress and psychosocial hazards or risk is substantial and may in fact be regarded as a threat to public health.[49]

[44] E van Zyl 'Die verband tussen stres en organisasieklimaat by 'n groep middelvlak-bestuurders in die finansiële sektor' (1997) 37 *Tydskrif vir die Suid-Afrikaanse Reg* 138.

[45] Landman and Ndou (n 22) 2473.

[46] SE Hanisch *et al* 'The effectiveness of interventions targeting the stigma of mental illness at the workplace: A systematic review' (2016) 16 *BMC Psychiatry* 1.

[47] M Hodgins, P Fleming and J Griffiths *Promoting Health and Well-Being in the Workplace* (2016) 13.

[48] CM Doran and I Kinchin 'A review of the economic impact of mental illness' (2019) 43 *Australian Health Review* 47.

[49] E Kortum, S Leka and T Cox 'Psychosocial risks and work-related stress in developing countries: Health impact, priorities, barriers and solutions' (2010) 23 *International Journal of Occupational Medicine and Environmental Health* 233.

III GOOD STRESS, BAD STRESS AND THE RATE OF WEAR AND TEAR

(1) *Eustress and distress*

Although viewed mostly negatively,[50] stress is not inherently bad[51] and does not necessarily have detrimental effects.[52] Good stress, or 'eustress'[53] (with the Greek prefix *eu* meaning 'well' or 'good')[54] is the type of stress people need to function properly in life, both physically and psychologically.[55] In the workplace, eustress is at play when an employee's spirit is being raised through praise or promotion,[56] motivating the staffer to perform a task that he or she dislikes or providing the necessary adrenalin to negotiate a deal or meet a deadline.[57] In these instances, the task is perceived as manageable, and the body responds predictably[58] and appropriately. In a typical response, a person's breathing picks up, the heart starts beating faster,[59] emotions peak and adrenaline levels rise[60] so as to adapt to the changes, influences and demands to which the body is exposed.[61] This leaves the employee alert instead of alarmed,[62] and generally is not experienced as stress.[63]

The converse of eustress, however, is distress[64] (with the Latin prefix *dis* meaning 'bad').[65] Known to produce extreme discomfort,[66] this undesirable form of stress may be triggered when employees experience work demands as excessive and unmanageable,[67] beyond their knowledge and capacity, and exceeding their perceived ability to cope.[68] Other triggers may include being reprimanded

[50] Luthans (n 6) 278; A Ünal 'Labour law and human resources management dimensions of stress in working life' (2013) 9 *Paradoks Economics, Sociology and Policy Journal* 30; MAJ Oliver and DJL Venter 'The extent and causes of stress in teachers in the George region' (2003) 23 *South African Journal of Education* 187.

[51] JC Quick and DL Nelson *Principles of Organisational Behaviour: Realities and Challenges* (2011) 215.

[52] Cox, Griffiths and Rial-Gonzalez (n 18) 16.

[53] MJ Halter and EM Varcarolis *Varcarolis' Foundations of Psychiatric Mental Health Nursing: A Clinical Approach* (2017) 159; Luthans (n 6) 278; Grady and Neunlist (n 2) 20.

[54] Luthans (n 6) 278.

[55] Grady and Neunlist (n 2) 20.

[56] Luthans (n 6) 278.

[57] Grady and Neunlist (n 2) 20; Levi (n 5) 6.

[58] Grady and Neunlist (n 2) 21.

[59] Levi (n 5) 3.

[60] Grady and Neunlist (n 2) 20; Levi (n 5) 9.

[61] Levi (n 5) 1.

[62] Grady and Neunlist (n 2) 20.

[63] Ibid.

[64] J Hamilton *Work-Related Stress: What the Law Says* (2010) 2.

[65] H Selye *Stress of Life* (1978) 75.

[66] Quick and Nelson (n 51) 278; Grady and Neunlist (n 2) 21.

[67] WHO (n 14).

[68] Fink (n 37) 3; S Kushwaha 'Stress management at workplace' (2014) 6 *Global Journal of Finance and Management* 470; Grady and Neunlist (n 2) 21; Oliver and Venter (n 50) 187.

for poor performance[69] or errors at work.[70] In this instance, the human body responds as if being attacked by a sabre-toothed tiger[71] by switching to fight-or-flight mode, which is inappropriate for modern work circumstances.[72]

Generally, these stress responses are nominal and temporary, and cannot in themselves be seen as actual signs of, or even precursors to, illness.[73] Stress effects need not be so severe as to contribute to physical or psychological illness or disability.[74] The problem is not that the human body responds to stress; the difficulty lies in the frequency or level of stress – essentially, the rate of wear and tear – to which the body is subjected.[75] As Levi states, '[a] high stress level means a high rate of wear and tear in the body, which in turn augments ill health and infirmity'.[76] When stress responses persist or are substantial, illness and disability can and do result,[77] and detract from a person's general quality of life and sense of well-being.[78] When excessive stress endures not for a few minutes, but for hours, days, weeks, months and years,[79] the 'prolonged activation of the stress response, mismanagement of the energy induced by the response, or unique vulnerabilities in a person'[80] cause the rate of wear and tear in the body to spike,[81] eventually resulting in physical and mental illness.[82]

On the matter of the duration of stress exposure, the court in *Grobler v Naspers Bpk & 'n Ander*,[83] held that the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) would not apply to cases where the harm took place over a period of time, and could not be attributed to a specific occurrence or accident.[84] It may be argued that the court was misguided. Although not stated expressly, the sense was that the 'anxiety and worry should be neatly crammed into a very short period of time' to qualify for protection under the law.[85]

[69] Luthans (n 6) 278.

[70] Grady and Neunlist (n 2) 21.

[71] Luthans (n 6) 278.

[72] Grady and Neunlist (n 2) 21; Fink (n 37) 3–4; Quick and Nelson (n 51) 3.

[73] Levi (n 5) 9.

[74] Cox, Griffiths and Rial-Gonzalez (n 18) 16.

[75] Levi (n 5) 2. The degree of stress will vary from one moment to the next, and depends in part on the body's properties as well as the external demands and influences to which the body is exposed. See Health and Safety Executive.

[76] Levi (n 5) 11.

[77] Levi (n 5) 9.

[78] Cox, Griffiths and Rial-Gonzalez (n 18) 16.

[79] Piotrowski and Hollar (n 40) 4; J Leigh *et al* 'Global burden of disease and injury due to occupational factors' (1999) 10 *Epidemiology* 626.

[80] Quick and Nelson (n 51) 215.

[81] Levi (n 5) 2.

[82] Grady and Neunlist (n 2) 24.

[83] 2004 (4) SA 220 (C); (2004) 25 *ILJ* 439 (C), as cited in Landman and Ndou (n 22) 2463.

[84] *Grobler v Naspers Bpk en 'n Ander* 2004 (4) SA 220 (C) 299H–I.

[85] A Larson 'Mental and nervous injury in workmen's compensation' (1970) 23 *Vanderbilt Law Review* 1247.

Fortunately, South Africa's worker's compensation law has since developed:[86] in *Urquhart v Compensation Commissioner* it was decided that the cumulative effect of a series of stressful events suffered in the course of employment and resulting in post-traumatic stress disorder (PTSD) was deserving of compensation.[87]

(2) *Wear-and-tear variables*

Individuals move between experiencing eustress and distress under different conditions and at different levels,[88] which means stress wear and tear has many variables.

Not only do different occupations have different fundamental stressors,[89] but employees in the same occupation may also experience different levels of stress due to their personality types and the support mechanisms available to them.[90] Some occupations may introduce stressors such as the threat of violence, lack of control over work decisions, or long working hours.[91] While some employees cope and remain healthy under these conditions, having learned to live with the stressors,[92] others may struggle. Ultimately, therefore, the same conditions can differ considerably in their stress-producing effects on different individuals, and even on the same individual at different times.[93]

Moreover, an employee who performs well under stress at a low level may experience complications when facing stress at a higher level.[94] On the other hand, a staffer who performs only moderately at a low level of stress may flourish under extreme pressure.[95] In essence, certain employees might operate very

[86] Ibid.

[87] 2006 (1) SA 75 (E) 84B–D. Conversely, in *Odayar v Compensation Commissioner* 2006 (6) SA 202 (N) 206D–208B, the judge argued that the tribunal had made a decision on a misinterpretation of COIDA, and that the employee's disease (namely PTSD) was not an occupational injury in terms of s 22, but rather an occupational disease that 'arose as a result of and in the course and scope of his employment' in terms of s 65(1)*(b)*.

[88] Grady and Neunlist (n 2) 24.

[89] S Johnson et al 'The experience of work-related stress across occupations' (2005) 20 *Journal of Managerial Psychology* 179; JJ van der Colff and S Rothmann 'Occupational stress, sense of coherence, coping, burnout and work engagement of registered nurses in South Africa' (2009) 35 *South African Journal of Industrial Psychology* 1; P Bowen, P Edwards and H Lingard 'Workplace stress experienced by construction professionals in South Africa' (2013) 139 *Journal of Construction Engineering and Management* 393; N Barkhuizen and S Rothman 'Occupational stress of academic staff in South African higher education institutions' (2008) 38 *South African Journal of Psychology* 321; Oliver and Venter (n 50) 186, 188–189.

[90] Johnson *et al* (n 89) 180.

[91] Johnson *et al* (n 89) 179; Van der Colff and Rothmann (n 89) 1–10; Bowen, Edwards and Lingard (n 89) 393–403; Barkhuizen and Rothman (n 89) 321–336; Oliver and Venter (n 50) 186, 188–189.

[92] J Oosthuizen and B van Lil 'Coping with stress in the workplace' (2008) 34 *South African Journal of Industrial Psychology* 65.

[93] Levi (n 5) 5–6.

[94] Grady and Neunlist (n 2) 23–24.

[95] Grady and Neunlist (n 2) 24.

effectively at a level of stress that would leave some of their colleagues bored, and others broken down.[96]

Apart from exposure to different forms and levels of stress, another variable is individuals' vulnerabilities.[97] These include employees' general state of health, as well as hereditary and medical history.[98] Many employees may manage complex and demanding circumstances without being negatively affected,[99] as their response to the stress experience falls comfortably within their bodies' homeostatic limits and, therefore, does not cause lasting damage.[100]

IV CAUSES AND EFFECTS OF EXCESSIVE STRESS IN THE WORKPLACE

(1) *Workplace and non-workplace causes*

Further complicating the phenomenon of excessive workplace stress is that the causes often are elusive and a combination of multiple factors[101] both in and outside the workplace.[102] These factors are 'psychosocial', being:

> interactions between and among work environment, job content, organisational conditions and workers' capacities, needs, culture, personal extra-job considerations that may, through perceptions and experience, influence health, work performance and job satisfaction.[103]

Therefore, the degree of stress experienced by an employee at any given point in time is determined by the interplay between a few variables, including the person's type of work, the presence of workplace stressors, the support he or she receives at work and at home, and his or her coping mechanisms to manage stress.[104]

There are factors surrounding and outside the workplace, many of which are not within an employer's control or scope of responsibility. Examples include:

- political and economic uncertainty;[105]
- rising unemployment;[106]
- continually changing economies;[107]

[96] Grady and Neunlist (n 2) 23; Oliver and Venter (n 50) 186.
[97] Fink (n 37) 3; Levi (n 5) 5; Grady and Neunlist (n 2) 23.
[98] Luthans (n 6) 295.
[99] Oosthuizen and Van Lil (n 92) 65.
[100] Cox, Griffiths and Rial-Gonzalez (n 18) 16.
[101] Levi (n 5); De Carteret (n 3) 497.
[102] Oosthuizen and Van Lil (n 92) 68; Kortum, Leka and Cox (n 49) 229.
[103] ILO *Psychosocial Factors at Work: Recognition and Control* (1986) 3. Stress has also been incorrectly defined as a psychosocial hazard, as opposed to a consequence thereof.
[104] Johnson *et al* (n 89) 179.
[105] Oosthuizen and Van Lil (n 92) 68; Kortum, Leka and Cox (n 49) 229.
[106] Kortum, Leka and Cox (n 49) 229.
[107] Luthans (n 6) 278; Kortum, Leka and Cox (n 49) 229.

- global competition;[108]
- rapid technological change,[109] with 24/7 technology resulting in longer working hours;[110]
- the risk of violence,[111] threats or bullying;[112]
- affirmative action and empowerment deals;[113]
- vulnerability to prejudice because of age, gender, race or religion;[114] and
- the prevalence of HIV and Aids.[115]

The factors that are matters of and inside the workplace and, therefore, normally within employers' and trade unions' control are perhaps best described by Cox *et al* by their distinction between hazards or risks relating to content-of-work and context-of-work.[116]

Content of work includes:

- the work environment and work equipment, such as problems relating to the availability, reliability, and maintenance of equipment and facilities;[117]
- job content, including the lack of variety or short work cycles, fragmented or meaningless work, underuse of skills, and high uncertainty;[118]
- workload or work pace, being work overload or underload, lack of control over work pace and high levels of time pressure;[119] and
- work schedule, including shift work, inflexible schedules, unpredictable hours, and long or unsocial hours.[120]

Context of work includes:

- organisational culture and function, such as poor communication, low levels of support, and lack of clear organisational objectives;[121]
- roles in the organisation, being role ambiguity and role conflict, and lack of responsibility for people;[122]

[108] Ibid.

[109] C van Stolk *et al Management of Psychosocial Risks at Work: An Analysis of the Findings of the European Survey of Enterprises on New and Emerging Risks (ESENER)* (2012) 14.

[110] Luthans (n 6) 278; Johnson *et al* (n 89) 180.

[111] Johnson *et al* (n 89) 179–180.

[112] Levi *et al* (n 12) iv.

[113] Oosthuizen and Van Lil (n 92) 68.

[114] Levi *et al* (n 12) iv; Kortum, Leka and Cox (n 49) 229.

[115] Kortum, Leka and Cox (n 49) 229.

[116] Cox, Griffiths and Rial-Gonzalez (n 18) 68; Kortum, Leka and Cox (n 49) 229.

[117] Cox, Griffiths and Rial-Gonzalez (n 18) 68.

[118] Ibid.

[119] Ibid.

[120] Ibid.

[121] Ibid.

[122] Ibid.

- career development, being poor pay, job insecurity, career uncertainty and stagnation, underpromotion or overpromotion, and low social value of work;[123]
- decision freedom or restriction, including lack of control over work and low participation in decision-making;[124]
- interpersonal relationships at work, such as poor relationships with superiors, interpersonal conflict and lack of social support, and social or physical isolation;[125] and
- home-work interface, including conflicting demands of work and home, dual career issues, and little support at home.[126]

These factors often lead to more challenges. Fearing a salary cut or retrenchment, employees may for instance take on tasks without fully understanding what is required, or feel obliged to shoulder a heavier workload.[127] In fact, it has been shown that employees frequently overload themselves and work up to 90 hours per week on an ongoing basis to achieve individual or organisational objectives.[128]

As the factors giving rise to excessive workplace stress are predominantly psychosocial as opposed to physical, they have proven challenging for most occupational health and safety professionals to identify, and even more difficult to regulate by way of legislation or other measures.[129] In *Urquhart* the court, however, noted that when it comes to compensation for damages, the law has long recognised that a psychiatric disorder or psychological trauma is as much a personal injury as a cracked skull.[130]

(2) *Effects of excessive workplace stress on employees*

Excessive stress in the workplace is said to cause numerous physical and psychological ailments and illnesses in employees.[131]

Typical physical problems are:

- headaches;[132]

[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Johnson *et al* (n 89) 179–181; Van Zyl (n 15) 26.
[128] Van Zyl (n 15) 26. The average employee in South Africa has a 49-hour work week, which is high compared to other countries.
[129] E Kortum and S Leka 'Tackling psychosocial risks and work-related stress in developing countries: The need for a multilevel intervention framework' (2014) 21 *International Journal of Stress Management* 10.
[130] *Urquhart v Compensation Commissioner* 2006 (1) SA 75 (E) 81H.
[131] Béjean and Sultan-Taïeb (n 11) 16–21.
[132] Quick and Nelson (n 51) 216.

- allergies and asthma;[133]
- ulcers;[134]
- chronic fatigue;[135]
- chronic pain;[136]
- immune system and cardiovascular disorders;[137]
- stroke;[138]
- cancer;[139]
- respiratory disease;[140]
- musculoskeletal problems;[141]
- gastrointestinal disorders;[142] and
- proneness to injury.[143]

While not receiving as much attention, excessive stress results in various psychological problems as well.[144] These include:

- depression;[145]
- anxiety;[146]
- other forms of mental illness;[147]
- aggression;[148]
- chronic frustration;[149]
- interpersonal problems (with co-workers, friends and family);[150]
- diminishing performance;[151]

[133] Piotrowski and Hollar (n 40) 4.
[134] Grady and Neunlist (n 2) 21; Quick and Nelson (n 51) 216; Piotrowski and Hollar (n 40) 4; Levi (n 5) 11.
[135] Grady and Neunlist (n 2) 21; Piotrowski and Hollar (n 40) 4.
[136] Piotrowski and Hollar (n 40) 4.
[137] Such as high blood pressure and heart disease. Fink (n 37) 3; Quick and Nelson (n 51) 216; Grady and Neunlist (n 2) 21; Luthans (n 6) 295; Levi (n 5) 12.
[138] Grady and Neunlist (n 2) 21; Quick and Nelson (n 51) 216; Piotrowski and Hollar (n 40) 4.
[139] Piotrowski and Hollar (n 40) 4.
[140] Ibid.
[141] Such as back pain and tension headaches. Grady and Neunlist (n 2) 21; Luthans (n 6) 295.
[142] Such as diarrhoea and constipation.
[143] Piotrowski and Hollar (n 40) 4.
[144] Luthans (n 6) 295.
[145] Fink (n 37) 3; Quick and Nelson (n 51) 216; Grady and Neunlist (n 2) 21; Piotrowski and Hollar (n 40) 4.
[146] Fink (n 37) 3; Piotrowski and Hollar (n 40) 4.
[147] Piotrowski and Hollar (n 40) 4.
[148] Quick and Nelson (n 51) 217; Grady and Neunlist (n 2) 21.
[149] Grady and Neunlist (n 2) 21.
[150] Grady and Neunlist (n 2) 21; Van Zyl (n 15) 26.
[151] Grady and Neunlist (n 2) 21.

- substance abuse and addiction;[152]
- feelings of meaninglessness;[153]
- deviant behaviour, even suicide;[154]
- burnout;[155] and
- psychosomatic disorders.[156]

Alarmingly, the World Health Organization (WHO) reckons that by 2030 depression will account for most of the disease burden globally.[157]

(3) *Effects of excessive workplace stress on employers*

However, in workplaces with excessive stress, employees are not the only ones suffering. Although challenging to measure,[158] the cost to employers is equally substantial. Among the direct costs to the employer include:

- increasing absenteeism, unscheduled absences and higher staff turnover;[159]
- strikes and go-slows;[160]
- increased demands on human resource management;[161]
- inaccurate administration;[162]
- inferior product quality and high reject rates;[163]
- risk of error and impaired efficiency;[164]
- decreased productivity;[165]
- a less safe workplace;[166] and
- dissatisfied customers taking their business elsewhere.[167]

[152] Quick and Nelson (n 51) 217; Grady and Neunlist (n 2) 21; Fink (n 37) 3.
[153] Grady and Neunlist (n 2) 21.
[154] Piotrowski and Hollar (n 40) 4.
[155] Quick and Nelson (n 51) 216; Béjean and Sultan-Taïeb (n 11) 16–21.
[156] Quick and Nelson (n 51) 216.
[157] WHO *Global Burden of Mental Disorders and the Need for a Comprehensive, Coordinated Response from Health and Social Sectors at the Country Level* (2012) 1.
[158] C Lund *et al* 'Mental illness and lost income among adult South Africans' (2013) 48 *Social Psychiatry and Psychiatric Epidemiology* 845.
[159] Van Zyl (n 15) 27; Arshadi and Damiri (n 22) 707.
[160] Van Zyl (n 15) 27.
[161] M Bell 'Mental health at work and the duty to make reasonable adjustments' (2015) 44 *ILJ* 194.
[162] B Jordaan and U Stander *Effective Workplace Solutions: Employment Law from a Business Perspective* (2016) 29.
[163] Ibid.
[164] MacKay *et al* (n 10) 96.
[165] Ünal (n 50) 30.
[166] Leka *et al* (n 4) 9.
[167] Jordaan and Stander (n 162) 29.

According to research, these adverse effects are on the increase in the modern workplace.[168]

Some indirect costs to the employer associated with excessive stress relate to lost opportunities, as research shows that employees who suffer from excessive stress are 'less creative, less effective decision makers and inadequate communicators'.[169] Other indirect costs include employees' lack of confidence in management and colleagues, poor labour relations and a low staff morale.[170]

It is acknowledged that some aspects resulting in excessive workplace stress are beyond employers' control, such as personal and societal factors. Given the high and increasing costs associated with this problem, however, it would be in employers' interest to address those workplace stressors over which they do have a say. Taking steps in this regard stand to benefit the entire organisation by lowering the cost of absenteeism (sick pay, sickness cover, overtime and recruitment); increasing productivity through employee satisfaction (better workplace morale and improved working relationships); boosting the organisation's reputation; and reducing the likelihood of legal action.[171]

V KEY CONSIDERATIONS IN THE SEARCH FOR POTENTIAL WORKPLACE SOLUTIONS: ILO'S PERSPECTIVES ON DECENT WORK AND SUSTAINABLE DEVELOPMENT

Maintaining that productive employment and socio-economic development are seriously curtailed when occupational health and safety is threatened,[172] occupational health and safety is an integral part of the ILO's Decent Work Agenda.[173] Decent work is defined as the 'right to productive work in conditions of freedom, equity, security and human dignity'.[174] It is considered crucial in efforts to reduce poverty, achieve equitable, inclusive and sustainable development in both developed and developing countries globally[175] and to contribute to sustainable development.[176] For work to be decent, it must naturally be safe and healthy.[177]

The modern working environment is characterised by an ongoing tug of war between employers' focus on profits and productivity, and employees' demand

[168] Dollard, Winefield and Winefield (n 11) 4.
[169] Van Zyl (n 15) 27.
[170] Ibid.
[171] Hamilton (n 64) 3.
[172] ILO (n 19) 2.
[173] ILO *Improving Health in the Workplace: ILO's Framework for Action* (2014) 1.
[174] Ibid.
[175] ILO *Toolkit for Mainstreaming Employment and Decent Work: Country Level Application* (2008) vii.
[176] ILO *Safety and Health at the Heart of the Future of Work: Building on 100 Years of Experience* (2019) 1.
[177] ILO (n 173) 1.

for decent, meaningful and well-paid work.[178] This has led the ILO, in its report by the Global Commission on the Future of Work, to propose a human-centred agenda to achieve a better future of work for all.[179] Such an agenda acknowledges the importance of work to people's sense of well-being, paving the way for broader economic and social development, and strengthening individuals, their families and society.[180] It also strengthens the social contract by placing employees and the work they perform at the centre of economic and social policy as well as business practice.[181]

The ILO's human-centred agenda rests on three pillars of action to create decent work.[182] The first is to invest in individual's capabilities, enabling them to get skilled, re-skilled and upskilled.[183] The second is to invest in organisations to secure a future of work with freedom, dignity, economic security and equality.[184] The third pillar is to invest in work that is decent and sustainable, and to shape incentives and rules so as to align social and economic policy and business practice with this agenda.[185]

Occupational safety and health practice in recent times has grown beyond its traditional scope, and now also includes psychological and social well-being and the ability to have a socially and economically productive life.[186] For instance, employers have started making adjustments to the organisation of their workplaces to guard against mental health issues among staff, such as allowing for greater flexibility in work schedules, or restructuring open-plan workspaces to be more quiet.[187] The ILO has also called for greater attention to the role of technology in advancing decent work.[188] In the same way as technology can free employees from arduous, dangerous and menial work, it can be used to reduce excessive workplace stress.[189]

Interestingly, the ILO has also recommended the establishment of a 'Universal Labour Guarantee', safeguarding employees' fundamental rights as workers, their right to an adequate living wage, maximum limits on working hours, and the protection of health and safety in the workplace.[190]

[178] Dollard and Neser (n 41).
[179] ILO (n 24) 11, 24.
[180] ILO (n 175) vi.
[181] ILO (n 24) 11, 24.
[182] Ibid.
[183] Ibid.
[184] ILO (n 24) 12, 24.
[185] ILO (n 24) 13, 24.
[186] ILO (n 173) 2.
[187] Bell (n 161) 200.
[188] ILO (n 24) 43.
[189] Ibid.
[190] ILO (n 24) 12.

Therefore, in exploring strategies for addressing the causes and effects of excessive workplace stress in South African organisations, the country's employers, human resource practitioners and researchers as well as lawmakers would be well advised to consult and comply with ILO conventions, standards and recommendations.[191]

VI STRATEGIES TO PREVENT PSYCHOSOCIAL HAZARDS AND PROMOTE MENTAL HEALTH IN THE WORKPLACE

The prevention of psychosocial hazards and the protection of employees' safety and health, particularly their mental health, may be approached through binding and non-binding instruments. The former includes ILO standards, conventions and other legal instruments setting out basic principles and rights at work, and national occupational health and safety as well as labour laws, regulations, statutory codes of practice and collective agreements.[192] Non-binding instruments include ILO recommendations and declarations, national and organisational standards and tools aimed at promoting harmonised action in the prevention and control of psychosocial hazards and workplace stress (such as codes of conduct, technical standards, guidelines, protocols, intervention tools and training materials).[193] Some of the legal instruments and guidelines applicable to South African employers are discussed in the paragraphs below.

(1) *International labour standards on occupational safety and health*

All ILO standards and policies on occupational safety and health reflect three core values. These are that work should take place in an environment that is safe and healthy; that working conditions should be consistent with employees' human dignity and well-being; and that work should offer real possibilities for self-fulfilment, personal achievement and service to society.[194] Clearly, therefore, this would include ensuring a workplace free from psychosocial hazards and excessive stress.

The South African Constitutional Court has confirmed that the primary source of public international law in the labour realm is the ILO's conventions

[191] ILO (n 173) 2.

[192] ILO 'Conventions and Recommendations', accessible at https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (accessed on 4 June 2020). Conventions must be implemented by ratifying countries. The related recommendation that supplements the convention provides more detailed guidelines on its implementation.

[193] ILO (n 19) 2.

[194] ILO (n 173) 2.

and recommendations,[195] and that any ILO conventions ratified by South Africa amount to binding obligations.[196]

A prime example is the Occupational Safety and Health Convention, 1981 (No 155), which South Africa ratified in 2003. The convention is accompanied by the Occupational Safety and Health Recommendation (No 164). The convention provides for the adoption, implementation and review of a coherent national policy on occupational health and safety, mechanisms for consultation and participation of employers, employees and their organisations, and measures for its implementation at enterprise and national level.[197] In terms of the convention, 'health' is 'not merely the absence of disease or infirmity; it also includes the physical and mental elements affecting health'.[198] The convention proceeds to call for the adoption and application of an occupational health and safety policy focused on protecting employees' physical and mental health by adapting machinery, equipment as well as work time, organisation and processes to staff's physical and mental abilities.[199]

South Africa's ratification of the convention would suggest that government realises the importance of the measures the convention calls for. Yet not all of these measures have been expressly incorporated into South Africa's health and safety legislation.[200]

The ILO's holistic view of health and safety at work was bolstered by the adoption of the Occupational Health Services Convention, 1985 (No 161) and its associated Recommendation (No 171).[201] South Africa has not ratified this convention, which provides for the implementation of occupational health and safety policies, and preventative and control measures.[202] The convention entrusts the occupational health services with advisory functions and the responsibility to help employers, employees and their representatives establish and maintain a safe and healthy working environment, including adapting work to employees' abilities to ensure optimal physical and mental health at work.[203] The phrasing of the convention displays an appreciation for the effect of restructuring and reorganisation of work on both the physical and mental health of employees.[204]

[195] P Benjamin 'An accident of history: Who is (and who should be) an employee under South African labour law' (2004) 25 *ILJ* 800.

[196] Ibid.

[197] ILO (n 173) 1.

[198] Article 3.

[199] Article 5.

[200] As is evident from the discussion of s 8 of OHSA below.

[201] ILO (n 176) 20.

[202] Ibid.

[203] ILO (n 173) 1.

[204] ILO (n 176) 20.

Another ILO convention not ratified by South Africa is the Promotional Framework for Occupational Safety and Health Convention (No 187). This convention is accompanied by Recommendation No 197. This convention incorporates the central principles from the International Labour Standards on Occupational Safety and Health, and provides guidelines for a coherent and effective national management system.[205]

Ratifying both the Occupational Health Services and the Promotional Framework for Occupational Safety and Health Conventions may help government to better address issues of psychosocial hazards and excessive stress in the workplace. This could pave the way for the promulgation of legislation that specifically provides for the prevention of these issues, and the protection of employees' mental health and well-being. Such legislation, for instance, may:

- clearly define 'health', 'disease' and 'injury' at work;
- articulate the aims of occupational health or medicine, and the functions of occupational health and safety services (including surveillance of employees' health);
- include specific regulations on psychosocial risks in the workplace;
- more clearly define employers' duties and employees' rights;
- address risk assessment and management;
- provide training guidelines;
- include specific regulations on measures against workplace violence, harassment and bullying;[206] and
- include stress-related disorders in the list of recognised occupational diseases.[207]

(2) *Employers' legal duty of care towards employees*

The Constitution and various subsequent enactments have codified the rights and duties of the parties to the employment relationship[208] and specify the employment conditions for which employers should make provision.[209]

The Bill of Rights plays a central part in South Africa's labour law by guaranteeing protection against discrimination; the right to equality; the right to earn a living through an occupation of their choosing; and the right to protection against work that is hazardous and has an adverse effect on a person's well-being.[210] Section 23(1) of the Constitution specifically guarantees the right to fair

[205] ILO (n 173) 1.
[206] ILO (n 19) 2.
[207] Ibid.
[208] J Grogan *Workplace Law* (2017) 4–5.
[209] Hamilton (n 64) 2.
[210] Sections 9, 10, 22, 23 and 24.

labour practices.[211] In terms of OHSA, an employer's duties towards employees vary from general duties to the development of a health and safety policy for the workplace.[212] OHSA is aimed at ensuring that every necessary precaution is taken to safeguard all employees' health and safety.[213]

As part of its contribution to the field of occupational health and safety, the ILO/WHO Joint Committee on Occupational Health set out the aim of occupational safety and health[214] as being '[t]he promotion and maintenance of the highest degree of physical, mental and social well-being of workers in all occupations'.[215] This sets the bar fairly high. In South Africa, legislation thus far has amplified employers' common-law duty to take reasonable steps to ensure a healthy and safe work environment for their employees.[216] This duty is described in section 8 of OHSA, imposing a legal obligation on employers[217] to protect their employees as far as is reasonably possible and to ensure their health and safety in the course of their employment.[218] In *Media 24 Ltd & Another v Grobler*[219] it was established that this duty includes not only the physical, but extends to the psychological as well. This may be taken a step further by arguing that employers' duties should also include protecting employees against excessive workplace stress and stress-related hazards, and their mental and physical health effects.[220]

Section 8(1) of OHSA describes the employer's duty to provide and maintain a safe and healthy workplace for all employees in broad, all-encompassing terms, stating that '[e]very employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees'.

In addition, specific duties required from the employer in terms of section 8(2) are:

(a) the provision and maintenance of systems of work, plant and machinery that, as far as is reasonably practicable; are safe and without risks to health;

(b) taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, before resorting to personal protective equipment;

[211] Grogan (n 208).

[212] S Bendix *Labour Relations in Practice: An Outcomes-Based Approach* (2010) 144.

[213] Ibid.

[214] ILO (n 173) 2.

[215] Ibid.

[216] Bendix (n 212) 143.

[217] In s 1 of OHSA 'employer' is defined as any person who employs or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him, but excludes a labour broker.

[218] J Grogan *Workplace Law* (2014) 61.

[219] [2005] 3 All SA 297 (SCA) 349E.

[220] Leka, Van Wassenhove and Jain (n 42) 62; Leka, Griffiths and Cox (n 4) 8.

(c) making arrangements for ensuring, as far as is reasonably practicable, the safety and absence of risks to health in connection with the production, processing, use, handling, storage or transport of articles or substances;

(d) establishing, as far as is reasonably practicable, what hazards to the health or safety of persons are attached to any work which is performed, any article or substance which is produced, processed, used, handled, stored or transported and any plant or machinery which is used in his business, and he shall, as far as is reasonably practicable, further establish what precautionary measures should be taken with respect to such work, article, substance, plant or machinery in order to protect the health and safety of persons, and he shall provide the necessary means to apply such precautionary measures;

(e) providing such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of his employees;

(f) as far as is reasonably practicable, not permitting any employee to do any work or to produce, process, use, handle, store or transport any article or substance or to operate any plant or machinery, unless the precautionary measures contemplated in paragraphs *(b)* and *(d)*, or any other precautionary measures which may be prescribed, have been taken;

(g) taking all necessary measures to ensure that the requirements of this Act are complied with by every person in his employment or on premises under his control where plant or machinery is used;

(h) enforcing such measures as may be necessary in the interest of health and safety;

(i) ensuring that work is performed and that plant or machinery is used under the general supervision of a person trained to understand the hazards associated with it and who have the authority to ensure that precautionary measures taken by the employer are implemented; and

(j) causing all employees to be informed regarding the scope of their authority as contemplated in section 37(1)*(b)*. [Section 37(1)*(b)* refers to acts or omissions by an employee for which the employer is liable.]

This provision clearly seems to concentrate more on the physical aspects of employee health and safety in line with the ILO's Occupational Safety and Health Convention. Yet, the convention unequivocally includes both 'the physical *and mental* elements affecting health' in its interpretation of occupational health, and requires work adaptations to suit 'the physical *and mental* capacities of the workers'.[221] After all, as discussed earlier, psychosocial hazards in the workplace can create an unsafe work environment and are known to cause excessive stress, which can potentially be harmful to staffers' mental health. Therefore, employers ideally must also take steps to eliminate or mitigate both actual and potential psychosocial hazards as far as this is reasonably practicable, determine

[221] Articles 3 and 5 (emphasis added).

what psychosocial hazards are attached to the work performed and, importantly, implement precautionary measures to protect employees against such hazards.

Key in this regard is the meaning to be attached to the phrase 'reasonably practicable' which, according to OHSA,[222] means the following:

> Practicable having regard to—
>
> *(a)* the severity and scope of the hazard or risk concerned;
>
> *(b)* the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
>
> *(c)* the availability and suitability of means to remove or mitigate that hazard or risk; and
>
> *(d)* the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom.

The law, therefore, does not require employers to eliminate all risks in the workplace, but to protect employees in so far as this is 'reasonably practicable' in the circumstances.[223] In practical terms, this would mean weighing up a particular risk or hazard against the effort, time and financial means required to manage or eliminate it in the workplace.[224] By law, employers must impose measures to reduce workplace risk, except where this would require enormously disproportionate sacrifices.[225] That being said, employers increasingly understand that they themselves stand to benefit from a workplace that is healthy and free from excessive stress.[226] This has seen the more progressive organisations introducing additional measures such as employees' wellness programmes, going beyond pure compliance with labour laws and regulations.[227]

In addition to the duties above, employers have a general duty to inform their employees and health and safety representatives of hazards, inspections, investigations, incidents causing illness or death, or other incidents in the workplace.[228] More specifically, every employer is obliged to:

> *(a)* as far as is reasonably practicable, cause every employee to be made conversant with the hazards to his health and safety attached to any work which he has to perform, any article or substance which he has to produce, process, use, handle, store or transport and any plant or machinery which he is required or permitted to use, as well as with the precautionary measures which should be taken and observed with respect to those hazards;

[222] Section 1.
[223] Hamilton (n 64) 6.
[224] Ibid.
[225] Ibid.
[226] Bendix (n 212) 143.
[227] Ibid.
[228] OHSA s 13.

> *(b)* inform the health and safety representatives concerned beforehand of inspections, investigations or formal inquiries of which he [the employer] has been notified by an inspector …; and
>
> *(c)* inform a health and safety representative as soon as reasonably practicable of the occurrence of an incident in the workplace or section of the workplace for which such representative has been designated.

Admittedly, although employers have a general duty to protect their employees from psychological illness or harm, it is not mandatory in all circumstances.[229] It would, therefore, be imperative to determine whether a legal duty exists based on the specific circumstances of each case.[230]

What is clear, however, is that, just as employers are required by law to actively manage the workplace so as to prevent ill-health and accidents before they occur, they have a duty to monitor and regulate possible causes of excessive stress in the workplace.[231] This was established in the United Kingdom (UK), where the court in *Walker v Northumberland Country Council* held that 'there is no longer reason why risk of psychiatric damage should be excluded from the scope of an employer's duty of care'.[232] Not surprisingly, the UK's legal principles have since been developed to include the employer's duty to ensure employees' health and safety and prevent injury due to workplace stress – being a workplace hazard or risk – as well as the employer's duty to regulate the employee's working time by restricting hours of work and providing annual leave and regular rest periods.[233]

(3) *Employee wellness and assistance programmes*

Despite vast differences in the way in which workplace hazards or risks are experienced, there is a common understanding as to how their harmful effects may be controlled and prevented.[234] It is now widely recognised that important occupational health and safety benefits can be derived from improving and sharing knowledge and experiences concerning the extent, causes and prevention of

[229] Landman and Ndou (n 22) 2461.

[230] Ibid; *Media 24 Ltd* [2005] 3 All SA 297 (SCA) 66; *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) 597A–C.

[231] Hamilton (n 64) 6.

[232] [1995] IRLR 35 41. It is important to note that this case established the legal precedent in the UK that an employer can be held liable by an employee for mental injury caused by work-related stress. It has since been cited in numerous judgments, including *Barber v Somerset CC* [2004] UKHL 13; *Chapman v Lord Advocate* [2006] SLT 186; *Koehler v Cerebos (Australia) Ltd* [2005] 214 CLR 335; *Johnson v Unisys Ltd* [2001] UKHL 13; *Dickson v Creevey* [2002] QCA 195; *Alexander v Midland Bank Plc* [1999] IRLR 723; *Garrod v North Devon NHS Primary Care Trust* [2006] EWHC 850; *Holdich v Lothian Health Board* [2013] CSOH 197; and *Hartman v South Essex Mental Health and Community Care NHS Trust* [2005] EWCA Civ 6. English law has historical significance in South Africa and has influenced various aspects of South African labour law.

[233] Hamilton (n 64) 6.

[234] ILO (n 176) 1.

psychological harm arising in the workplace, and how employee health and well-being can be better supported.[235] Being more knowledgeable about mental health problems has also proven helpful in recognising symptoms of mental illness in the workplace.[236] Particularly at an organisational level, there have been positive developments, with many organisations having implemented programmes – particularly employee assistance programmes (EAPs) and employee wellness programmes (EWPs) – directed at keeping their employees healthy.[237]

In many instances, these programmes are based on both internal and external research as well as established best practice.[238] EAPs and EWPs are considered intervention strategies that can promote good health and well-being for employees in the workplace, and may be both preventative and curative.[239] For instance, they may focus on building employees' resilience in preparing for situations that may be very stressful and beyond anyone's control.[240] The aim of introducing these programmes is to generate awareness of health and wellness issues, facilitate personal change and health management, and foster a supportive and healthy workplace.[241]

In most instances, the implementation of EAPs and EWPs is regarded as an investment for the longer term, ultimately reducing future labour costs.[242] However, in the short term, awareness of the cost to an organisation of an excessively stressful and psychologically hazardous workplace may prompt the organisation to take ameliorative steps sooner,[243] and thus benefit from employees that are healthy, happier and more productive at work.[244] This may even have a further ripple effect in that a highly-engaged workforce can give the organisation a competitive edge over its competitors.[245]

However, the introduction of these programmes has not been without its challenges.[246] For instance, employees may be hesitant to access the services offered by wellness programmes for fear of being stigmatised for having mental health problems.[247] In the same vein, employees may be concerned that their

[235] Ibid.

[236] Hanisch *et al* (n 46) 1–2.

[237] J Glynn and N Cheng 'The future evolution of employee wellness' (2011) 15 *American College of Sports Medicine Health and Fitness Journal* 45; C Sieberhagen, J Pienaar and C Els 'Management of employee wellness in South Africa: Employer, service provider and union perspectives' (2011) 9 *SA Journal of Human Resource Management* 2.

[238] Glynn and Cheng (n 237) 45.

[239] Sieberhagen, Pienaar and Els (n 237) 2.

[240] Grady and Neunlist (n 2) 24.

[241] Sieberhagen, Pienaar and Els (n 237) 2.

[242] Glynn and Cheng (n 237) 45.

[243] Van Zyl (n 15) 26.

[244] Glynn and Cheng (n 237) 45.

[245] Ibid.

[246] Ibid.

[247] Hanisch (n 46) 2.

managers would think less of them if the managers were aware that they were using mental health services. Thus, staffers may be reluctant to make use of counselling services at work if they believe it would negatively affect their chances of career advancement.[248] However, as a counter-measure in South Africa, section 6(1) of the Employment Equity Act (EEA) 55 of 1998 prohibits unfair discrimination against an employee, which provides as follows:

> *No person may unfairly discriminate, directly or indirectly*, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, *disability*, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on *any other arbitrary ground*.[249]

Depending on the circumstances, an employee discriminated against for suffering from mental illness, which in turn resulted from excessive workplace stress, might fall within the ambit of the provision above, as unfair discrimination may be alleged on the grounds of disability or any other arbitrary ground.[250] Furthermore, if the claim on the ground of disability succeeds, an employer might have an additional obligation towards such employee to consider reasonable accommodation.[251]

Despite this legal remedy, however, the effectiveness of efforts to promote mental health awareness and prevent mental health problems in the workplace may be hampered if stigma is not removed and a supportive work environment is not created.[252] This requires the implementation of strategies to reduce the stigma associated with mental illness and increase help-seeking behaviour at work.[253] Studies on the improvement of existing targeted workplace anti-stigma interventions are sadly lacking at present, but could offer a strong incentive for organisations to invest in stigma reduction programmes, while at the same time providing guidance for the development of future interventions.[254]

[248] Ibid.

[249] As amended by the Employment Equity Amendment Act 47 of 2013 (emphasis added). Section 1 of the EEA defines persons with disabilities as people who have long-term or recurring physical or mental impairment that substantially limits their prospects of entry into, or advancement in, employment. In terms of s 5.3.1(b) of the Code of Good Practice on Employment of Persons with Disabilities, a 'mental impairment' means a clinically recognised condition or illness that affects a person's thought process, judgment or emotions.

[250] *New Way Motor and Diesel Engineering v Marsland* [2009] 12 BLLR 1181 (LAC) 2881D–F, 2882G–2883B; Hamilton (n 64) 2.

[251] In these circumstances, the employer must consider whether the employee's mental illness has a substantial and adverse impact on his/her ability to carry out usual duties, whether it is probable that it will endure for more than 12 months, and whether it could reoccur.

[252] Hanisch *et al* (n 46) 2.

[253] Ibid.

[254] Ibid.

VII CONCLUSION

The world of work has changed dramatically across the globe. Although stress in the workplace is not necessarily a new phenomenon, managing complex interpersonal work relationships, increasing demands in the workplace, the emergence of new methods of arranging work and the development of new technologies have brought a sharp escalation in the prevalence of excessive stress and, thus, both physical and mental illness in the workplace. This is exacerbated by the more demanding broader context within which work occurs, including rising global economic instability, unemployment and political turbulence. As a result, in more recent years the law has been called on to address this issue.

Excessive workplace stress has detrimental effects on employees, the employer as well as society at large. Studies show that the mental illness arising from overly stressful workplaces not only causes high government expenditure, but also places a significant financial burden on organisations and families in the form of out-of-pocket expenses and the costs associated with productivity losses. As such, excessive stress and psychosocial hazards at work should be considered a threat to public health, productive employment and socio-economic development.

Many hold the view that the problem of excessive stress in the workplace can only be effectively controlled when it is pertinently addressed by the individual, the organisation and relevant higher levels of authority.[255] Generally speaking, employees are less likely to experience excessive stress in the workplace when:

- work pressures and demands match their knowledge and abilities;
- they have a choice and control over their work and work processes;
- they enjoy support from colleagues, supervisors and management; and
- they are able to participate in decisions concerning their job.[256]

Indeed, these are some of the steps individuals and organisations can take towards addressing the problem.

Based on this research, a few additional recommendations seem appropriate. First, while government has done well in ratifying the ILO's Occupational Safety and Health Convention, it has failed to ratify the Occupational Health Services and the Promotional Framework for Occupational Safety and Health Conventions. It is recommended that ratifying these may assist government in addressing issues of psychosocial hazards and excessive stress in the workplace, and in crafting legislation that specifically provides for the prevention of these issues.

Second, South African employers are urged to interpret their duty of care towards employees as provided for in section 8 of OHSA to include both physical and mental aspects that may affect employees' health. This would be in line

[255] Du Plessis (n 1) 1478, 1492–4.
[256] WHO 'Mental health' (n 14).

with the provisions of the Occupational Safety and Health Convention, which government ratified.

Finally, organisations would be well-advised to introduce, or further improve on, their own employee wellness programmes. These should be accompanied by strategies aimed at doing away with the stigma associated with mental illness and encouraging a higher rate of uptake of the services on offer.

CHAPTER 12

An appraisal of South Africa's maternity protection framework through the lens of the ILO normative standards on social protection

NOKUTHULA MBELE* AND SWIKANI NCUBE**

This paper provides a critical appraisal of South Africa's normative framework for the protection of expecting and nursing women in the workplace. In undertaking this inquiry, the paper adopts the ideals set out in ILO instruments on maternity protection as acceptable thresholds for benchmarking and reform. The Social Security (Minimum Standards) Convention of 1957 lists pregnancy as one of the nine classical risks that warrant state intervention. Indeed, since their entry onto the formal labour market in the early nineteenth century, women have been confronted by various threats in their attempt to compete with their male counterparts for equal treatment and remuneration. Chief among these threats is the inability to work owing to pregnancy and childbirth. A woman contemplating starting a family is invariably confronted by numerous questions and uncertainties pertaining to her financial security during and immediately after pregnancy. In South Africa, the Labour Relations Act, the Basic Conditions of Employment Act, the Employment Equity Act and the Unemployment Insurance Act are some of the legal instruments that are applicable in the safeguarding of the welfare of female employees in the workplace. However, despite the obvious progress that may be attributed to these instruments, glaring lacunae remain. For example, protection is only extended to women in formal employment, a position which automatically exposes millions of self-employed women to risks. In addition, there is no entitlement to paid maternity leave and cover is provided through the Unemployment Insurance Act. Can these shortfalls be remedied, and does the answer lie somewhere in the ILO normative framework? While the ILO recognises the importance of safeguarding the welfare of expectant women as a means of promoting equality, a similar interpretation may be drawn from the Constitution. For this reason, the overarching question therefore is whether the state has discharged its constitutional mandate to ensure the protection of expectant and nursing women. In responding to this question, the paper also addresses a secondary question, namely, whether the country would benefit from ratifying ILO Convention 183 on Maternity.

* Nokuthula Mbele (LLB) is a LLM in labour law candidate at the University of Johannesburg.

** Swikani Ncube (LLB, LLM, LLD) is a Senior Lecturer in the Faculty of Law at the University of Johannesburg. He lectures Social Security Law to undergraduate students.

I THE ILO MATERNITY PROTECTION FRAMEWORK

(1) *Introduction*

Over the past decades women's participation in the labour market has increased across the world. It has become more pertinent to have policies in place and create legislation to accommodate women's needs, especially as far as pregnancy is concerned. The need for international treaties to shield against unfair competition, harsh working conditions, women's suffrage, slavery and the exploitation of women and children was recognised.[1] Maternity is classified as a social risk in terms of the International Labour Organization (ILO) Social Security (Minimum Standards) Convention 102 of 1952. Maternity benefits should be provided for in a comprehensive social security system.[2] In 1975 a Declaration on Equality of Opportunity and Treatment for Women Workers was adopted by member states of the ILO.[3] The declaration linked the right to employment protection during pregnancy and maternity leave to the prohibition of discrimination against women on the grounds of pregnancy and childbirth.[4] With this declaration member states identified a number of measures to show their belief in equality of opportunity and treatment of women workers.[5] These measures include:

- the right to maternity leave;
- the right to cash benefits to replace wages lost during the leave period;
- the right of the mother and child health protection;
- the elimination of maternity as a source of discrimination;
- the right to employment security; and
- breastfeeding arrangements at work.[6]

These measures generally are covered in the labour and social security legislation.[7] As is the case with other social risks identified by the ILO, the scope of protection is exclusive to women who are or have been formally employed. Accordingly, many forms of labour in which women dominate do not create the necessary conditions for the operation of the right.[8]

[1] ILO 'Women's empowerment 90 years of ILO in action' 1.

[2] MP Olivier *et al Introduction to Social Security* (2004) 367.

[3] OC Dupper 'Maternity protection is South Africa: An international and comparative analysis (Part one)' 2001 *Stellenbosch Law Review* 421, 422.

[4] Dupper (n 3) 422.

[5] O Dupper *et al* 'The case for increase reform of South African family and maternity benefits' (2000) 4 *Law, Democracy and Development* 27, 28.

[6] EML Strydom *et al Essential Social Security Law* (2005) 155.

[7] Olivier *et al* (n 2) 386.

[8] B Goldblatt *Developing the Right to Social Security: A Gender Perspective* (2016) 32.

The ILO has adopted three conventions on maternity protection:

1. the Maternity Protection Convention, 1919 (No 3);
2. the Maternity Protection Convention (Revised), 1952 (No 103); and
3. the Maternity Protection Convention, 2000 (No 183).[9]

The Maternity Protection Convention, 2000 (No 183) (the Maternity Protection Convention) revised the previous conventions to make further provisions in promoting equality of all women in the workforce and the health and safety of mother and child. These provisions were enacted to recognise the diversity in economic and social development of member states, as well as the diversity of enterprises, and the development of the protection of maternity in national law and practice.[10] The main purpose of maternity protection is to reconcile women's procreative role with the demands of employment.[11] The treatment of pregnant and nursing women should not be regarded as discriminatory but rather this treatment is given to them because women are performing a biological function that only they can perform.[12] In support of this, Seguret argues that maternity protection is part of an 'important component of strategies aimed at the promotion of equality of opportunity and treatment between men and women workers in employment'.[13]

(2) *Maternity leave*

Maternity leave is described as a 'woman's right to a period of rest from work in relation to pregnancy, childbirth and the postnatal period'.[14] Article 4 of the Maternity Protection Convention prescribes maternity leave for a period of not less than 14 weeks.[15] The convention makes provision for compulsory maternity leave six weeks after childbirth for the health of both the mother and the child.[16] This is for purposes of protecting women from being pressured to return to work immediately after giving birth, which could be detrimental to her health and that of her child.[17] The convention also provides for leave before or after the

[9] See https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C183 (accessed on 26 August 2020).

[10] Maternity Protection Convention, 200 (No 183).

[11] MP Olivier *et al Social Security Law – General Principles* (1999) 267.

[12] CR Matthias 'Neglected terrain: Maternity legislation and the protection of the dual role of worker and parent in South Africa' (1994) *ILJ* 20, 21.

[13] Matthias (n 12) 21.

[14] 'Maternity Resource Package: From Aspiration to Reality for All: Module 1: Maternity Protection at Work: What is it?' International Labour Office, Conditions of Work and Employment Programme (TRAVAIL)-Geneva: ILO, 2012 1, accessible at http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_193968/lang--en/index.htm (accessed on 26 August 2020).

[15] Maternity Protection Convention (n 10).

[16] Maternity Protection Convention (n 10) art 4(4).

[17] ILO (n 14) 1, 3.

maternity leave in case of illness, complications or risk of complications arising out of pregnancy or childbirth.[18]

(3) *Cash benefits*

According to the Maternity Protection Convention, cash benefits are to be provided in accordance with national laws and regulations, or in any other manner consistent with national practice, to women who are absent from work on maternity leave.[19] It further provides that cash benefits should be at a level that ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.[20]

Cash benefits paid are based on previous earnings, and the amount of such benefits should not be less than two-thirds of the women's previous earnings or of such of those earnings as are taken into account for the purpose of computing benefits.[21] To protect women in the labour market in respect of maternity leave, benefits shall be provided through compulsory social insurance or public funds, or in a manner determined by national law and practice.[22] Women who do not qualify for cash benefits are entitled to adequate benefits out of social assistance funds, subject to the means test required for that assistance.[23]

(4) *Mother and health protection*

For the first time the Maternity Protection Convention recognises that member states should adopt appropriate measures to ensure that pregnant or breastfeeding women are not obliged to perform work that may be prejudicial to the health of the mother and of the child or where an assessment has established a significant risk to the mother's health or that of the child.[24] If a significant risk is identified, measures should be taken to provide, on the basis of a medical certificate, an alternative to such work in the form of eliminating the risk, adapting the conditions of employment, or transferring the employee to another post, without loss of remuneration. When such adaptation is not feasible, there should be paid leave, in accordance with national laws, regulations or practice when such a transfer is not feasible.[25]

[18] Maternity Protection Convention (n 10) art 5.
[19] Maternity Protection Convention (n 10) art 6(1).
[20] Maternity Protection Convention (n 10) art 6(2).
[21] Maternity Protection Convention (n 10) art 6(3).
[22] Maternity Protection Convention (n 10) art 6(8).
[23] Maternity Protection Convention (n 10) art 6(6).
[24] Maternity Protection Convention (n 10) art 3.
[25] Maternity Protection Recommendation 2000 (No 191) art 6(2).

(5) *Employment security*

A woman's pregnancy or maternity leave should not have a negative impact on her employment or on her entitlement under an employment contract.[26] Article 8 of the Convention states that it is unlawful for an employer to terminate the employment of a woman during her pregnancy or absence of leave or during a period following her return to work to be prescribed by national laws, except on grounds unrelated to the pregnancy or the birth of the child and its consequences or nursing.[27] It goes on to say that the burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing rests with the employer.[28] A woman is guaranteed to return to the same position or an equivalent position where she will be paid the same rate at the end of her maternity leave.[29]

(6) *Non-discrimination*

Article 9 of the Convention provides for an obligation that appropriate measures are to be adopted to ensure that maternity does not constitute a source of discrimination.[30] Domestic workers have little protection regarding cash benefits when pregnant while on leave.[31] This is irrespective of Convention No 183 providing maternity protection to all women. Article 14(1) of the Decent Work for Domestic Workers Convention 2011 (No 189) states that members must take appropriate measures to ensure that domestic workers enjoy conditions not less favourable than those generally applicable to workers in respect to social security protection, including maternity benefits.[32]

(7) *Breastfeeding arrangements at work*

Breastfeeding is beneficial to both the mother and the child. Breastfeeding is a right recognised in article 10 of the Maternity Protection Convention as follows:

1 A woman shall be provided with the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child.

[26] ILO (n 14) 4.

[27] Maternity Protection Convention (n 10) art 8(1).

[28] Ibid.

[29] Maternity Protection Convention (n 10) art 8(2).

[30] Maternity Protection Convention (n 10) art 9.

[31] A Cruz 'Good practices and challenges on the Maternity Protection Convention, 2000 (No 183) and the Workers with Family Responsibilities Convention, 1981 (No 156): A comparative study' Working Paper 2/2012.

[32] Decent Work for Domestic Workers Convention, 2011 (No 189).

> 2 The period during which nursing breaks or the reduction of daily hours of work are allowed, their number, the duration of nursing breaks and the procedures for the reduction of daily hours of work shall be determined by national law and practice. These breaks or the reduction of daily hours of work shall be counted as working time and remunerated accordingly.[33]

If a woman has no breaks to either breastfeed or express milk, her milk supply will be reduced and she may no longer be able to produce enough milk required for her baby.[34] The international labour standards recognise that supporting breastfeeding is crucial for maternity protection measures and set out rights and guidance for assisting mothers to continue breastfeeding upon returning to work.[35] Promoting breastfeeding and creating supportive structures at work also ensures that women return to work, reducing recruitment and training costs.[36]

II MATERNITY PROTECTION IN SOUTH AFRICA

(1) *Introduction*

'When women have access to maternity protection, they are able to combine their productive and reproductive roles, enabling them to compete in the productive sphere on an equal footing.'[37] The South African Constitution guarantees the right to human dignity,[38] the achievement of equality and prohibits unfair discrimination.[39] These are some of the founding values of our country. The Constitution also entrenches socio-economic rights, such as the right to access healthcare, social security and reproductive health.[40] Such rights play an

[33] Maternity Protection Convention (n 10).

[34] L Addati, N Cassirer and K Gilchrist *Maternity and Paternity at Work: Law and Practice across the World* (2014) 102.

[35] Ibid.

[36] Ibid.

[37] See http://www.lrs.org.za/articles/Lessons-and-Insights-from-the-Struggle-for-Maternity-Protection (accessed on 18 August 2019).

[38] Section 10 of the Constitution of the Republic of South Africa, 1996: 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

[39] Section 9 of the Constitution of the Republic of South Africa, 1996: '(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[40] Section 27(1) of the Constitution of the Republic of South Africa, 1996 '(1) Everyone has the right to have access to *(a)* health care services, including reproductive healthcare; *(b)* sufficient food and

important role in maternity protection, affording women equal opportunities at work. Maternity protection is both a human right and a gender issue.[41] South Africa has adopted most treaties, programmes and policies, yet still lags behind the international standard for maternity protection. Legislation that governs maternity benefits and protection is the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Unemployment Insurance Act 63 of 2001 and the Employment Equity Act 55 of 1998.

(2) *Maternity leave*

The Basic Conditions of Employment Act governs the length of time for which maternity leave may be taken.[42] Section 25(1) of the Basic Conditions of Employment Act provides that an employee is entitled to at least four consecutive months of maternity leave.[43] This period is in line with the standard adopted by many developing and industrialised countries.[44] The employee may commence maternity leave at any time from four weeks prior to the expected date of birth, unless otherwise agreed, or on a date from which a medical practitioner certifies that it is in the best interests of the employee's health or that of the unborn child.[45] There are other exceptions to this rule for some categories of work, which include emergency work, workers in senior management and those who work less than 24 hours a month.[46] The employee may not resume work for six weeks after the birth of her child unless certified by a medical practitioner or a midwife that she is fit to work.[47] Although the standard is four months, what one has to consider is that it takes 40 weeks for women to carry a child full-term. Giving birth spans beyond the delivery room and the effects are debilitating for most women. Although pregnancy is a natural process, a woman needs to safeguard her health and that of her child after giving birth and should not be pressured into returning to work. The current maternity period places women in a disadvantageous position as her return to work can only occur once she has fully recovered psychologically, physically and emotionally. A woman's health is crucial to job progression once she has returned to work provided that adequate time to recuperate is given. As such, women should have a longer maternity

water; and *(c)* social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.'

[41] See http://www.lrs.org.za/articles/Lessons-and-Insights-from-the-Struggle-for-Maternity-Protection (accessed on 18 August 2019).

[42] CR Matthias 'Achieving effective maternity rights in a post-apartheid South Africa: Is the new constitution adequate' (1995) 1 *Comp and Int'l LJ* 247, 250.

[43] Act 75 of 1997.

[44] Dupper (n 3) 424.

[45] Section 25 (2) of Act 75 of 1997.

[46] Labour Research Service 'Bargaining Indicators' 2017 65.

[47] Section 25(3) of Act 75 of 1997.

period than the prescribed four months. The objective of maternity leave is the health of the woman and child after birth and the provision of a bonding period which is necessary between the mother and child.[48] Dancaster and Cohen put forward that an inadequacy of statutory maternity leave exists in South Africa, in terms of duration, which requires reassessment in the context of improved international maternity leave provisions.[49]

(3) *Cash benefits*

If women were to entirely forfeit their income during maternity leave, many women would feel the need to resume work before their entitled leave was exhausted and, in some cases, before it was medically advisable to do so.[50] Receiving an income during maternity leave is imperative for expectant women as many families depend on it as well as to maintain their standard of living. Therefore, cash benefits give substance to the right to maternity leave.[51] Cash benefits are prescribed in the Unemployment Insurance Act 63 of 2001. Section 24 of the Act stipulates that a contributor who is pregnant is entitled to maternity benefits for any period of pregnancy or delivery and the period thereafter.[52] It also stipulates that the maternity benefit may not be more than the remuneration the contributor would have received if the contributor had not been on maternity leave when taking into account any maternity leave paid to the contributor in terms of any other law or any collective agreement or contract of employment.[53] The contributor is eligible for a maternity benefit between a maximum rate of 60 per cent of remuneration for lower-income contributors and a lower rate of remuneration for higher-income contributors as will be determined by threshold set out in the Act.[54] It must also be borne in mind that the employer has no statutory duty to provide paid maternity leave as this is dealt with in collective agreements in South Africa.[55]

The entitlement to the payment of maternity benefits is invoked by the Unemployment Insurance Act[56]. South Africa first enacted a compulsory

[48] 'Maternity Resource Package: From Aspiration to Reality for All: Module 1: Maternity Protection at Work: What is it?' International Labour Office, Conditions of Work and Employment Programme (TRAVAIL)-Geneva: ILO, 2012, 1 accessible at http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_193968/lang--en/index.htm, (accessed on 26 August 2020).

[49] L Dancaster and T Cohen 'Workers with family responsibilities: A comparative analysis to advocate for the legal right to request flexible working arrangements in South Africa' (2010) 34 *South African Journal of Labour Relations* 31, 34.

[50] Dupper (n 3) 425.

[51] Dupper (n 3) 426.

[52] Unemployment Insurance Act 63 of 2001.

[53] Section 3 of Act 63 of 2001.

[54] Section 12(3)*(b)* of Act 63 of 2001.

[55] Olivier *et al* (n 2) 371.

[56] 63 of 2001.

unemployment insurance scheme in 1937.[57] The system in South Africa is based on the principle of insurance and not assistance by which only persons who contribute to the fund before becoming unemployed may claim the benefits from the fund.[58] Unemployment insurance is now governed by the Unemployment Insurance Act 63 of 2001 and the Unemployment Insurance Contributions Act 4 of 2002, which replaced the Unemployment Insurance Act 30 of 1966. Both statutes apply to all employers and employees unless they are specifically excluded, otherwise participation in the unemployment insurance scheme is compulsory.[59] It is widely accepted that the employer cannot be solely responsible for the payments of maternity protection.[60] Cash benefits ought to be paid out of public funds or through a social insurance scheme which is funded by the employees and government subsidies.[61] The South African social insurance scheme accommodates those employed in the formal sector alone despite many South Africans being in the informal sector, which means that the coverage is exclusionary and limited in nature. This feature is attributable to the fact that most social insurance schemes link the concept of 'contributor' to that of 'employee'.[62] Placing the burden of payments solely on the employer could lead to discrimination against women employees as it discourages the employer from recruiting, promoting and retaining women.[63]

(4) *Mother and child health protection*

International statistics reveal that despite the many pledges to health protection of mother and child, the health status of mothers and children remain poor in most developing countries.[64] The same is true for South Africa irrespective of it being classified as a middle-income country. As such, 'inadequate nutrition during pregnancy results in adverse birth outcomes, suboptimal neonatal growth and development, and impaired cognitive development later in life'.[65] Health

[57] Olivier *et al* (n 2) 299.

[58] Ibid.

[59] O Dupper, M Olivier and Govindjee 'Extending coverage of the unemployment insurance-system in South Africa' (2010) *Stellenbosch Law Review* 438.

[60] Dupper *et al* (n 5) 27, 33. See also N Kabeer 'Paid work, women's employment and inclusive growth: Transforming the structures of constraint' (2013) *UN Women* 1, 10.

[61] Ibid.

[62] N Smit and LG Mpedi 'Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?' (2010) 14 *Law, Democracy and Development* 1.

[63] A Behari 'The reconciliation of work and care – A comparative analysis of South African labour laws aimed at providing working parents with time off to care' PhD thesis, University of KwaZulu-Natal (2017) 46.

[64] MS King, RE Mhlanga and H de Pinho 'The context of maternal and child health: Maternal, child and women's health' (2006) 1 *South African Health Review* 107.

[65] MF Chersich *et al* 'Safeguarding maternal and child health in South Africa by starting the child support grant before birth: Design lessons from pregnancy support programmes in 27 countries' (2016) 106 *SAMJ* 1192.

protection has two parts: first, being given time off for ante- and post-natal visits to clinics and, second, health insurance cover to meet pregnancy and birth-related costs.[66] Section 26 of the Basic Conditions of Employment Act provides:

> (1) No employer may require or permit a pregnant employee or an employee who is nursing her child to perform work that is hazardous to her health or the health of her child.
>
> (2) During an employee's pregnancy, and for a period of six months after the birth of her child, her employer must offer her suitable, alternative employment on terms and conditions that are no less favourable than her ordinary terms and conditions of employment, if—
>
> *(a)* the employee is required to perform night work, as defined in section 17(1) or her work poses a danger to her health or safety or that of her child; and
>
> *(b)* it is practicable for the employer to do so.[67]

The Code of Good Practice on the Protection of Employees During and After the Birth of a Child is a guide for employers and employees to interpret and apply the Basic Conditions of Employment Act.[68] The Constitution recognises the right to healthcare services, including reproductive healthcare,[69] as well as the right to bodily and psychological integrity.[70] The Constitution also places an emphasis on the best interests of the child as of paramount importance in issues concerning the child.[71] Employers are required to provide and maintain a work environment that is safe and without risk to the health of employees, including risks to the reproductive health of employees.[72]

There is an inextricable link between the health of mothers and children that continues beyond the perinatal period as the impact of the health and well-being of women on the health and well-being of the children they care for is crucial.[73] South African legislation to some extent complies with international standards regarding maternity protection. There are no fewer than six pieces of legislation in South Africa that ensure that the health and safety of women and their children are maintained. What tends to be a challenge regarding women's health is not legislation. However, company policies and programmes often depart from the standard set by national legislation.

[66] Matthias (n 42) 255.

[67] Section 17(1) of the BCEA 75 of 1997 provides that '[i]n this section, "night work" means work performed after 18:00 and before 06:00 the next day'.

[68] Olivier *et al* (n 2) 252.

[69] Section 27(1)*(a)*.

[70] Section 12(2).

[71] Section 28(2).

[72] The Code of Good Practice on the Protection of Employees during and After the Birth of a Child.

[73] King, Mhlanga and De Pinho (n 63) 108.

(5) *Employment security*

Female employees should be guaranteed against the loss of employment upon returning to work after maternity leave or for any reasons related to pregnancy. In terms of section 18 of the Factories Act of 1918 and later section 23 of the Factories, Machinery and Building Works Act of 1941, pregnant women were not employed in a factory in the four-week period prior to confinement and the eight-week period after the date of confinement.[74] These pieces of legislation did not cater for compulsory reinstatement after this period, leaving women vulnerable to dismissal. This no longer is the case as the Labour Relations Act, the Employment Equity Act as well as the Basic Conditions of Employment Act provide otherwise, providing women with job protection in the event of pregnancy. The Labour Relations Act 66 of 1995 considers a dismissal automatically unfair if the employer dismisses the employee because she is pregnant, intends on pregnancy or any other reasons related to pregnancy.[75] A dismissal in this context is defined as 'an employer refus[ing] to allow an employee to resume work after she took maternity leave in terms of any law, collective agreement or her contact of employment'.[76]

Pregnancy is natural and occurs daily among women all over the world. Pregnancy warrants employment protection to ensure that discrimination based on pregnancy does not occur, exacerbating inequality. Employment protection refers to the right of a female worker not to lose her employment during pregnancy or maternity leave, including a period following her return to work.[77] Employment protection further gives women the right, after maternity leave, to return to the same position or a position equivalent to the one she held prior to maternity leave and to be paid at the same rate upon return to work.[78] Section 6(4) of the Employment Equity Amendment Act provides that '[a] difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any or more of the grounds listed in subsection 1, is unfair discrimination'.[79] This is justified as women returning to work will be performing the same work, substantially the same work or work of equal value.[80] Women perform a biological function and, therefore, should be afforded

[74] Matthias (n 42) 248.

[75] Section 187(1)*(e)*.

[76] Section 186*(e)* of the Labour Relations Act 66 of 1995.

[77] ILO 'Maternity and paternity at work: Law and practice across the world' (2014) 1, 73.

[78] Ibid.

[79] Section 3 of Act 47 of 2013. Section 6(1) of Act 55 of 1998 provides that '[n]o person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground'.

[80] S Ebrahim 'Equal pay in terms of the Employment Equity Act: The role of seniority, collective agreements and good industrial relations: *Pioneer Foods (Pty) Ltd v Workers against Regression* 2016 ZALCCT 14' (2017) *PER/PELJ* 4.

mechanisms that will enable them better transitioning upon returning to work. This can be done to ensure that women are integrated back to work in a way that does not hinder job progression.

(6) *Non-discrimination*

There are a number of statutes that provide for non-discrimination. The Constitution of the Republic of South Africa, 1996 prohibits direct or indirect discrimination, listing pregnancy as one of the grounds.[81] The same provision is more or less found in the Employment Equity Act, which also prohibits discrimination on the ground of pregnancy.[82] The Promotion of Equality and Prevention of Unfair Discrimination Act[83] also prohibits discrimination based on gender, including pregnancy.[84]

The Employment Equity Act prohibits unfair discrimination against employees on the ground of pregnancy, which is also extended to job applicants.[85] Once a pregnant employee or job applicant presents *prima facie* discrimination as a result of the employee/job seeker being pregnant, such discrimination is deemed to be unfair and the employer must prove otherwise.[86] The effect of both the Labour Relations Act as well as the Employment Equity Act is that 'the employer may not prevent a pregnant woman from entering the labour market, may not disadvantage her during the existence of the employment relationship and may not prematurely terminate her employment owing to her pregnancy and/or family responsibilities'.[87]

In the case of *De Beer v SA Export Connection cc t/a Global Paws*[88] the applicant fell pregnant and agreed with the respondent to return to work after she had given birth. She gave birth to twins who were ill. A few days before she was to return to work, she requested that she be given another month to take care of her children. The respondent was only prepared to grant her two weeks, which the applicant refused to accept. As a result, her services were terminated. She approached the Commission for Conciliation, Mediation and Arbitration (CCMA) to contend that her dismissal was automatically unfair in terms of section 187(1)*(e)* of the

[81] Section 9 of the Constitution of the Republic of South Africa, 1996.

[82] Section 6(1) provides that '[n]o one may discriminate, directly or indirectly, against any employee in any employment policy or practice in one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth'.

[83] 8 of 2000.

[84] Section 8*(f)* of Act 4 of 2000.

[85] Olivier *et al* (n 2) 369.

[86] Ibid.

[87] Ibid.

[88] [2008] 1 BLLR 36 (LC).

Labour Relations Act.[89] The CCMA held that the phrase in the LRA 'reasons relating to pregnancy' refers not only to the mother herself, but also to the newly born children and to the mother's right to nurture them.[90] The CCMA also held that the agreement entered into by the parties limiting the maternity leave to one month was null and void.[91] The dismissal was automatically unfair as the health of the children related to pregnancy.

Occupational Health South Africa provides guidelines for employers regarding pregnant women. 'Treat your pregnant employees no differently than you would any other employee.'

- Employers may not fire, or refuse to hire or promote due to an employee's pregnancy.
- The same benefits have to be provided, but additional benefits do not.
- Employers may not discriminate or forbid her to continue to work if she wants to and is physically capable of doing so.
- They should not reassign employees to lower-paying positions or change a worker's job description and then eliminate the new job via reorganisation.
- Employers may not discriminate against men whose wives or partners are pregnant.[92]

The previous Unemployment Insurance Act excluded certain employees, such as migrant workers and domestic workers, from protection.[93] The new Unemployment Insurance Act covers a wider scope of employees.

(7) *Breastfeeding arrangements at work*

The Code of Good Practice on the Protection of Employees During and After the Birth of a Child acts as a guideline for prohibiting employers from requiring a pregnant employee or an employee who is breast-feeding to perform work that is hazardous to the health of the employee or the health of her child.[94] The Code makes provision for arrangements to be made for employees who are breast-feeding to have breaks of 30 minutes twice per day for breast-feeding or expressing milk for the first six months of the child's life.[95] According to

[89] Section 187(1)*(e)* of Act 66 of 1995 provides that '[a] dismissal is automatically unfair if the employer, in dismissing the employee … if the reason for the dismissal is the employee's pregnancy, intended pregnancy or any reason related to her pregnancy'.

[90] *De Beer v SA Export Connection CC t/a Global Paws* [2008] 1 BLLR 36 (LC) para 23.

[91] Ibid.

[92] Occupational Health of South Africa 'Pregnancy and work women account for nearly half of the world's workforce', accessible at http://www.occhealth.co.za (accessed on 26 August 2020).

[93] Olivier *et al* (n 2) 372.

[94] Item 5.3 of the Code of Good Practice on the Protection of Employees during and After the Birth of a Child.

[95] Item 5.13 of the Code.

West *et al* 'breastfeeding provides infants with important nutrients and antibodies, and is associated with lower risk of malnutrition and diarrheal illnesses, which are among the leading causes of infant mortality in low and middle income countries'.[96] These guidelines should be adopted into legislation providing employees with a statutory right to such breaks. [97]

(8) *South Africa's shortcomings*

South Africa has made great strides to better maternity protection legislation in order afford women fair and equal treatment in the workplace in case of pregnancy. However, more can be done to ensure that women play productive and reproductive roles.

- Maternity protection is limited to the formal sector whereas the informal sector is not accommodated which can amount to unfair discrimination. The limitation of the scope of coverage exacerbates the plight of poverty and inequality that exists in South Africa. All employees should be eligible for maternity protection.
- There is a lack of access to information to maternity benefits, resulting in less women claiming such rights. This is especially true for women living in the remote areas of the country.
- The current quality of healthcare in South Africa is poor, lower than the average upper-middle-income country.[98] As previously mentioned, the Constitution provides for the right to healthcare, including reproductive healthcare. The limitations faced in providing quality healthcare services remain a challenge, especially in the public health sector where resources are scarce, healthcare facilities are short-staffed, there is poor administration and there is a lack of funding. Improving the healthcare system will contribute to the mother and child's nutrition and overall wellbeing.
- South Africa has not yet ratified the Maternity Protection Convention No 183. This may be interpreted as a lack of responsibility and obligation to align and adopt maternity protection into domestic legislation.
- Depending on the industry and employment, some women are not privy to cash benefits. Women working in vulnerable sectors, such as domestic and farm workers, are at a disadvantage as cash benefits are usually commensurate with one's earnings.

[96] NS West *et al* 'Infant feeding by South African mothers living with HIV: Implications for future training of health care workers and the need for consistent counselling' (2019) 14 *International Breastfeeding Journal* 1, 2.

[97] Behari (n 62) 305.

[98] RV Passchier 'Exploring the barriers to implementing National Health Insurance in South Africa: The people's perspective' (2017) *SAMJ* 836.

III CONCLUSION

Ever since the dawn of democracy, South Africa has made consistent efforts to fulfil its obligation contained in the Constitution to empower women. Gender equality, women's empowerment and the elimination of all forms of discrimination against women is a constitutional imperative ensuring that women are not disadvantaged as they traditionally have been.[99]

Maternity protection stands at the centre of gender equality. This is why the government has to ensure that women exercise their legislative rights as far as maternity protection is concerned. South Africa has various international obligations to adopt measures that provide better maternity protection. This obligation is envisaged in sections 39(1) and 233 of the Constitution in that international law must be considered when interpreting the law.[100]

The South African Constitution, domestic legislation as well as the various international instruments should ensure that women are able to compete equally in the workplace, whether one is in the formal or informal economy, eliminating the discrimination currently existing. Women, as child-bearing members of the human race, should be afforded the necessary tools to fulfil their productive and reproductive roles successfully in a way that is not prejudicial to their economic, social and overall wellbeing.

[99] South African Law Reform Commission.

[100] Section 39(1) of the Constitution states that '[w]hen interpreting the Bill of Rights, a court, tribunal or forum— *(a)* must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; *(b)* must consider international law; and *(c)* may consider foreign law.' Section 233 provides: '(1) The negotiating and signing of all international agreements is the responsibility of the national executive. (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3). (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.'

CHAPTER 13

Joining the 'old boys' club': Equality for women in the South African judiciary and other male-dominated workplaces

DENINE SMIT*

Decent work in a world buffeted by 'change and inequality' lies at the heart of the ILO's Development Goal 8. The South African National Development Plan, with its 2030 goals, also directs attention to transforming South African workplaces in which women still suffer the after-effects not only of a racially divided country but also of patriarchy and other lesser-known barriers to entry and advancement. Despite section 174 of the South African Constitution, which calls for the appointment of judicial officers to reflect broadly the racial and gender composition of our county, gender equality in the judiciary still seems to be a distant dream given the continuing underrepresentation of women in that sector. Although white women were permitted to join the judiciary in 1923 and the first appointment of a black female attorney occurred in 1967, the judiciary still fails to reflect the statistical representation of women in the population. Even in 2019, the government failed to use the opportunity to appoint women to the high-profile, state-capture cases currently under investigation. This persistence of an 'old boys' club' approach to the appointment of women in the judiciary calls for further investigation and real solutions.

I INTRODUCTION

> You can tell the condition of a nation by looking at the status of its women.
>
> Jawaharlal Nehru[1]

On the face of it, women's quest for equality in South Africa has come a long way. Spurred by women's movements, government institutions, trade unions and civil society organisations, much energy has been invested in overcoming gender inequalities.[2] Today, over 60 years since the adoption of the 1954 Women's Charter, which called for voting rights, equal opportunities and equal

* BIur, LLB, LLM, LLD; Associate Professor of Mercantile Law, University of the Free State. This contribution has been published in the *ILJ* under the reference 'Joining the "Old Boys" club': Equality for women in the South African judiciary and other male-dominated workplaces' (2020) 41 *ILJ* 48.

[1] R Singh 'Role of judiciary in strengthening the criminal laws relating to women' 2018 *International Journal of Recent Research Aspects* 226.

[2] L Wirth *Breaking Through the Glass Ceiling* (2001) v.

pay for women,[3] laws and customs that denied women equal rights have long been addressed,[4] and the feminisation of the South African workplace continues. Authorities are quick to broadcast successes. Achievements in gender parity were referred to in the 2014 Organisation for Economic Cooperation and Development (OECD) Social Institutions and Gender Index, where mention was made of the country having been ranked one hundred and twenty-first out of 187 countries on the 2012 Human Development Index.[5] The foreword to Statistics SA's Gender Statistics in South Africa report of 2011, in turn, referred to the country's good showing against the indicators of Millennium Development Goal 3, which deals with gender equality and women's empowerment.[6] According to 2019 statistics, South Africa now scores 22,4 on the index, placing it in fifteenth position on the list of non-OECD economies, with a lower score pointing to lower levels of discrimination in social institution.[7]

Yet, upon investigation, the reality is much more sombre, with gender stereotypes continuing to inform the South African workplace.[8] In fact, a report by the United Nations (UN) in 2018 confirmed that women on average did 2,6 times the amount of unpaid care and domestic work than men.[9] This is in line with the earlier 2011 Stats SA report,[10] which acknowledged that women were still more likely than men to perform unpaid economic work. Furthermore, in 2019 female gender representation was still below the 50 per cent mark for influential positions, with politics one of the very few areas where women seem to advance at a rapid pace.[11] This poor performance in terms of gender parity is also reflected in recent developments in the legal system. In October 2019 the Pan-African Bar Association of South Africa (PABASA) joined a number

[3] SA History Online 'The Women's Charter', accessible at https://www.sahistory.org.za/article/womens-charter (accessed on 24 June 2020).

[4] *Inter alia* through s 9(3) and (4) of the Constitution of the Republic of South Africa, 1996, which guarantees the right to equality.

[5] Social Institutions and Gender Index 'South Africa – 2014 results', accessible at https://www.genderindex.org/country/south-africa-2014-results/ (accessed on 15 October 2019). On the Gender Inequality Index, South Africa was 90th out of 148 countries. Also see P Oliphant 'South Africa falling short in gender equality standards' *Mail and Guardian* (4 May 2015).

[6] Stats SA *Gender Statistics in South Africa, 2011* (2011) vi.

[7] OECD.Stat 'Social Institutions and Gender Index 2019', accessible at https://stats.oecd.org/Index.aspx?DataSetCode =SIGI2019# (accessed on 15 October 2019).

[8] Stats SA (n 6) vi.

[9] UN Women *Summary: Turning Promises into Action: Gender Equality in the 2030 Agenda for Sustainable Development* (2018) 2, accessible at http://www.onumulheres.org.br/wp-content/uploads/2018/02/SDG-report-Gender-equality-in-the-2030-Agenda-for-Sustainable-Development-2018-en.pdf (accessed on 24 June 2020).

[10] Stats SA (n 6).

[11] Stats SA 'Women in power: What do the statistics say?', accessible at http://www.statssa.gov.za/?p=10325 (accessed on 15 October 2019); Genderlinks 'South Africa: Gender and elections', accessible at https://genderlinks.org.za/what-we-do/governance/advocacy/south-africa-gender-and-elections/ (accessed on 14 October 2019).

of others in the legal community to condemn the ongoing gender disparity in the legal profession. Among others, they criticised the appointment of an all-male legal team to assist the National Prosecuting Authority to investigate and prosecute alleged 'state capture' crimes.[12] Clearly, therefore, much more needs to be done to ensure true gender parity in the justice system.

Of course, gender inequality at work in no way is limited to South Africa. Already in 2001, the International Labour Organization (ILO) noted that while most men globally held permanent, often senior, employment positions, women frequently had to make do with junior, part-time and temporary jobs.[13] Occupational segregation by sex, the ILO argued, remained problematic,[14] and the earnings gap between men and women with university degrees remained substantial.[15] Concern was also expressed at the patterns of 'attitudinal and institutional discrimination' in certain professions, which not only hampered women's entry into traditionally male-dominated jobs, but also hindered their advancement.[16] Concepts such as the 'glass ceiling' and 'sticky floor' were identified[17] with reference to women's struggle to advance in the workplace. Women's inequality persisted through the years on a global scale and the global gender pay gap is estimated at 23 per cent and will take approximately another 68 years globally to eradicate, according to a 2019 report.[18]

This contribution first aims at exploring the extent to which legislative interventions and advances in South Africa have translated into a more gender-balanced workplace. Second, the objective is to look beyond legislation to establish the historical and traditional barriers as well as the more recent ceilings created for women's entry and advancement. While particular attention will be paid to the state of gender equality in the judiciary, women's employment, the pay gap and the lack of transformation in more senior positions more broadly will also be addressed.

In terms of structure, the current position and statistics on women in employment, both generally and in the judiciary, will be assessed. This will be followed by a discussion of the legal framework intended to support gender transformation in the South African workplace, which in large part has been

[12] E Naki 'Another bar backs legal women's bid' *The Citizen* (26 October 2019).
[13] Wirth (n 2) 4.
[14] Wirth (n 2) 3.
[15] Wirth (n 2) 16.
[16] Wirth (n 2) 3.
[17] Ibid.
[18] UN Sustainable Development Goals '8 Decent Work and Economic Growth', accessible at https://www.un.org/sustainabledevelopment/economic-growth/ (accessed on 19 January 2020). In 2019, men in South Africa still earned 23–35 per cent more than women for 'workers at the median of the earnings distribution'. See J Mosomi 'Distributional changes in the gender wage gap in post-apartheid South African labour market', accessible at http://sa-tied.wider.unu.edu/node/1455 (accessed on 22 October 2019). Also see UN Women (n 9) 2.

inspired and shaped by the authoritative legal instruments of the ILO. The focus then shifts to an assessment of the historical and more recent barriers suffered by women at work. After a brief reflection on the importance of having women in the judiciary, in particular, the contribution ends with final thoughts and brief recommendations regarding the way forward.

II BACKGROUND

Given South Africa's specific history of oppression, hard-won democracy and carefully crafted legal framework, the country's slow progress towards gender equality in the workplace, 25 years into its democratic dispensation, is particularly striking. The Women's Charter, adopted at the founding conference of the Federation of South African Women in 1954, states the following: [19]

> We, the women of South Africa, wives and mothers, working women and housewives, African, Indians, European and Coloured … declare our aim of striving for the removal of all laws, regulations, conventions and customs that discriminate against us as women, and that deprive us in any way of our inherent right to the advantages, responsibilities and opportunities that society offers to any one section of the population.[20]

The above charter called for equal rights and equal pay for all women, and the recognition of a single society, in which women would work side by side with, instead of in servitude to, men.[21] This substantive equality sought by South African women in the 1950s eventually made its way into the country's supreme law, the Constitution of the Republic of South Africa, 1996[22] – lauded worldwide for its progressiveness – as well as other equality-centred laws. Moreover, government's National Development Plan (NDP) of 2012 is aimed at eliminating poverty and reducing inequality, including gender inequality, by 2030.[23] Being a plan for the whole country, all sectors are to contribute to its implementation and identify obstacles in reaching its aims. South Africa's obligation to ensure gender equality in the workplace further stems from its membership of the UN and the ILO. The UN's Sustainable Development Goal (SDG) 8 refers to decent work and economic growth,[24] and the ILO includes in its Decent Work Agenda four pillars, namely, standards and rights at work, employment creation and enterprise development, social protection, and social dialogue.[25]

[19] Women's Charter (n 3).
[20] Women's Charter (n 3) Preamble.
[21] Women's Charter (n 3).
[22] Particularly s 9, the equality section.
[23] National Planning Commission *National Development Plan 2030 Our Future – Make It Work* (2012) 1.
[24] UN SDGs (n 18).
[25] ILO *Decent Work and the 2030 Agenda for Sustainable Development* (2017) 2.

In line with the NDP, the UN's SDG 8, the ILO's decent work agenda goals, as well as South Africa's progressive Constitution, much more could have been done to ensure substantive equality for women, especially in positions of power, such as in the judiciary.

III CURRENT STATISTICS ON WOMEN IN EMPLOYMENT IN GENERAL AND IN THE JUDICIARY[26]

(1) *Employment of women in general*

Although women certainly are entering the workforce at a higher rate than before, an ILO report in 2018 indicated that 60 to 90 per cent of women did so in part-time positions and, in developing countries, many women worked in the informal sector or at home.[27] Moreover, it has been shown that they have limited access to jobs, more skilled in nature, and fewer opportunities for career development.[28] This results from a long-standing belief that men primarily are responsible for providing for society's financial needs, while women have a duty to attend to the family.[29]

In limited respects, South Africa has made good progress in rooting out sexism, with Parliament being a prime example. According to 2017 figures of the Inter-Parliamentary Union, South Africa was ranked tenth in the world for its female representation on the benches of Parliament, with 41 per cent of members of Parliament being women.[30] Furthermore, in 2019 the country had more female than male registered voters.[31]

[26] While the Commission for Gender Equality Discussion Document on Gender Transformation in the Judiciary and Legal Sector (RSA 2018) and RSA Judiciary Annual Report 2017/18 (2018) cover the same year period, statistical discrepancies are noted. These could be attributed to different reporting dates and appointments having been made/vacancies having arisen in the course of the year. The discrepancies will be referred to in the footnotes.

[27] Wirth (n 2) 6. Also see ILO 'Empowering women working in the informal economy', accessible at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---cabinet/documents/publication/wcms_618166.pdf (accessed on 12 December 2019). Women are said to be more likely to take on low-quality employment in the informal sector to be able to fulfil their care responsibilities.

[28] Wirth (n 2) 6, although this could also be blamed on labour market policies and regulation.

[29] VK Gupta, AM Wieland and DB Turban 'Gender characterisations in entrepreneurship: A multi-level investigation of sex-role stereotypes about high-growth, commercial, and social entrepreneurs' (2019) 57 *Journal of Small Business Management* 132.

[30] As opposed to 15,8 per cent in Botswana; 24,1 per cent in Australia; 30,8 per cent in the UK; and 12 per cent in both Ghana and Nigeria. See Stats SA (n 11); Institute of Race Relations 'The status of women in South Africa: A mixed bag of success and failure', accessible at https://irr.org.za/media/media-releases/the-status-of-women-in-south-africa-a-mixed-bag-of-success-and-failure/view (accessed on 20 June 2020).

[31] Institute of Race Relations (n 30). Also see M Tawfeeq, B Adebayo and AJ Davis 'South Africa makes history as women make up half of cabinet for first time', accessible at https://edition.cnn.

Nevertheless, the overall picture in the South African labour market indicates that discrimination against women is significant. This was confirmed by a Stats SA report in 2018, which revealed that the South African labour market remained more favourable to men, who were also likely to be paid more.[32] In the second quarter of 2018, official unemployment among women was 29,5 per cent, compared with 25,3 per cent among men. The expanded unemployment rate for women was a staggering 41,2 per cent – 7,5 per cent higher than for men (33,7 per cent).[33] In 2016, women made up over 51 per cent of the country's population aged 20 and above who had completed grade 12, and 52,9 per cent of those who had completed post-school training,[34] yet in the second quarter of 2018, female involvement in the general South African labour market was only 43,8 per cent.[35]

Statistics for 2018 indicate, moreover, that the higher the job level, the further female employment figures drop, with female representation still well below the 50 per cent mark for positions associated with significant power and influence. Of the top 40 Johannesburg Stock Exchange-listed companies in 2014, only one had a female chief executive officer (CEO).[36] Female employment in top management positions in South Africa in 2018 was estimated at 32 per cent,[37] with the 'think manager, think male'[38] principle evidently still alive and well. This appears to apply to the public sector as well. In 2017 only 30 per cent of ambassadors and 24 per cent of heads of state-owned enterprises were women.[39]

Women are also more likely than men to be involved in unpaid work; about 55,2 per cent of those involved in non-market activities in the second quarter of 2018 were women.[40] In 2016/17, the gender-disaggregated labour force saw women in South Africa being paid 27 per cent less than their male counterparts.[41]

com/2019/05/30/africa/ south-africa-gender-balanced-cabinent-intl/index.html (accessed on 19 September 2019).

[32] Stats SA 'How do women fare in the South African labour market?', accessible at http://www.statssa.gov.za/?p=11375 (accessed on 20 November 2019).

[33] Ibid. Official unemployment refers to those available to work and who are actively seeking a job, while expanded unemployment includes discouraged job seekers and those with other reasons for not working.

[34] Institute of Race Relations (n 30); H van Broekhuizen and N Spaull *The 'Martha Effect': The Confounding Female Advantage in South African Higher Education* (Economic Working Paper 14, Stellenbosch University 2017) 24; Department of Higher Education and Training *Statistics on Post-School Education and Training in South Africa: 2016* (2018).

[35] Stats SA (n 32).

[36] Stats SA (n 11).

[37] Stats SA (n 32).

[38] VE Schein *et al* 'Think manager – think male: A global phenomenon?' (1996) 17 *Journal of Organisational Behaviour* 33.

[39] Stats SA (n 11).

[40] Stats SA (n 32).

[41] Commission for Employment Equity *Annual Report 2016/17* (RSA 2017) 27–8 (CEE *Annual Report 2016/17*). This is in line with the ILO's 2001 findings – see Wirth (n 2) 13. Also see Stats SA *Gender Statistics* vi, where it is stated that women are more likely than men to be doing unpaid work.

During the same period, women with a tertiary education in South Africa earned approximately 82 per cent of their male counterparts' earnings, and although more women completed their degrees, the female graduate employment rate was 10 per cent less than for males with the same level of education.[42]

Despite these damning figures, a formal plan to address gender equality in the workplace seems a long way off.[43]

(2) *Women in the judiciary*

Even though compared to other employment sectors in the country the judiciary may arguably be regarded as one of the more progressive sectors in terms of admitting women, the general trends indicated above are apparent there as well.[44] The low percentage of women in the judiciary, generally, and in the more senior positions, specifically, has its genesis in the justice system more broadly. The lack of female representation already starts with practising lawyers and advocates, who are considered the pipeline for the judiciary. Gender and race cannot be divorced from each other against the backdrop of unfair discrimination and disadvantage and thus puts black women at an even greater disadvantage than white women. Strikingly, while white women had been appointed as lawyers since 1923, the first black female attorney was only admitted in 1967.[45]

According to Stromquist, black women in South Africa suffer a triple oppression in terms of gender, race and class position and this intersectionality between race and gender makes it especially difficult for black women to succeed.[46] More recent statistics reveal that white males continue to dominate top law firms. In its 2016 investigative report on gender transformation in the judiciary, the Commission for Gender Equality (CGE) revealed that at the 12 largest firms in

[42] CEE *Annual Report* (n 41) 27–28.

[43] The Women Empowerment and Gender Equality Bill of 2013 has not been signed into law; the CGE's 2016 investigative report on the lack of gender transformation in the judiciary failed to set out a firm plan to address female underrepresentation, and – as will be argued in this contribution – many of the soft law reasons for the problem have yet to be researched and addressed to effect an entire culture change. Also see CGE *Lack of Gender Transformation in the Judiciary Investigative Report* 2016 (RSA 2016) 42 (CGE *Investigative Report*). There it is acknowledged that even the targets set to ensure a more equal split between men and women in terms of briefing patterns were not achieved. These were eventually reached in 2019, as confirmed in Department of Justice and Constitutional Development *Annual Report 2018/19* (RSA 2019) 87 (DOJandCD *Annual Report 2018/19*).

[44] CareerJunction 'SA still has a long way to go when it comes to gender equality in the workplace – Survey reveals' https://www.careerjunction.co.za/blog/sa-still-has-a-long-way-to-go-when-it-comes-to-gender-equality-in-the-workplace-survey-reveals/. (accessed on 6 July 2020).

[45] SA History Online 'Yvonne Mokgoro', accessible at https://www.sahistory.org/za/people/yvonne-mokgoro (accessed on 20 December 2020).

[46] See TJ Mudau and OS Obadire 'The role of patriarchy in family settings and its implications to girls and women in South Africa' (2017) 58 *Journal of Human Ecology* 67, 72 where the authors refer to Stromquist (2014).

the country, white men accounted for 80 per cent of chief executives and 72 per cent of managing partners.[47]

Despite an undertaking by government to prioritise briefing patterns in an effort to ensure that more women were briefed as attorneys and advocates, the set targets were not achieved[48] before 2019.[49] The 2018 CGE discussion document on gender transformation in the judiciary[50] also refers to the lack of financial resources in support of further judicial training. Such training is offered only to those already employed in the judiciary and upon recommendation of the judge president, which limits access to judicial skills training.[51]

Both the CGE 2016 investigative report and 2018 discussion document on gender transformation in the judiciary and the legal sector confirm the slow pace of gender transformation in the judiciary,[52] not only in terms of permanent posts, but even in the appointment of acting judges. It found that barriers to women's advancement in the judicial sphere were 'often caused by rules, practices and attitudes about women that are stereotypical and hurtful, [and] occur throughout the lifespan of the legal career'.[53]

Although progress has been made since 1994 – when 160 of the 165 judges were white males, two were white females and there were no black females on the bench – the 2013 figures remained poor, with 74 female judges against 173 males.[54] This parlous state of affairs is further reflected in 2016 statistics, which indicated that as at December 2016 a mere 35 per cent of all judges in South Africa were women.[55] In 2018/19, 46 per cent of the magistracy was female.[56] The lack of female representation, however, is more visible the more senior the position becomes. In an article by Michelle Toxopeus[57] from the Helen Suzman Foundation, it was noted that 75 per cent of the leadership positions held in superior courts were still held by men.[58]

More recent figures show little improvement since the CGE 2016 investigative report. The judiciary's annual report for 2017/18 put female representation in the country's superior courts at approximately 36,7 per cent, with women occupying

[47] CGE *Investigative Report* (n 43) 28.
[48] CGE *Investigative Report* (n 43) 42–44.
[49] DOJandCD *Annual Report 2018/19* (n 43).
[50] CGE *Discussion Document* 24.
[51] Ibid.
[52] CGE *Investigative Report* (n 43) 6, 45; CGE *Discussion Document* 18.
[53] CGE *Investigative Report* (n 43) 59.
[54] CGE *Investigative Report* (n 43) 29–30.
[55] CGE *Discussion Document* 13.
[56] DOJandCD *Annual Report 2018/19* (n 43) 15; RSA Judiciary *Judiciary Annual Report 2018/19* (RSA 2019) 51–2 (*Judiciary Annual Report*).
[57] M Toxopeus 'Women in the judiciary', accessible at https://hsf.org.za/publications/hsf-briefs/women-in-the-judiciary (accessed on 20 December 2019).
[58] CGE *Discussion Document* 16; Toxopeus (n 57).

only 93 of the 253 positions, while female magistrates was at 42 per cent for the same period.[59] The judiciary's 2018/19 annual report notes[60] an increase in gender transformation, but refers to the slow progress seen in the appointment of women to the bench, with 38 per cent of judges in the superior courts being women.[61] Moreover, 46,9 per cent of magistrates appointed were female. Leadership positions still are predominantly male-occupied.[62]

Alarmingly, there has been little progress in the transformation of the apex Constitutional Court. As stated in the 2016 CGE investigative report, '[o]ver the past 20 years the number of women on the Constitutional Court has remained unchanged: two in 1994 and two in 2014'.[63] Progress since then has been minimal. In 2017/18, three of the nine seats were occupied by women,[64] again dropping to two out of nine in 2018/19.[65]

Therefore, despite the fact that the Employment Equity Act 55 of 1998 (EEA)[66] specifically acknowledges women as a category of previously disadvantaged employees deserving of being employed, trained[67] and retained, the very institution tasked with upholding and applying the law seems to be letting women down. This is compounded by the fact that section 174 of the Constitution calls for the appointment of judicial officers to reflect the broader racial and gender composition of the country. Women judges who manage to make it into the 'old boys' club' have reported feeling 'resented, invisible and excluded by male judges and lawyers'.[68]

Notwithstanding calls to break down patriarchal barriers and stereotypes, there appears to be no substantive remedies for the lack of female representation in the South African judiciary to date.[69] The stubborn persistence of sexism and a lack of gender sensitivity was underscored by the outcry of a group of senior women lawyers in October 2019, who requested an urgent dialogue with

[59] *Judiciary Annual Report* (n 56) 63.

[60] *Judiciary Annual Report* (n 56).

[61] *Judiciary Annual Report* (n 56) 51. Also see CGE *Discussion Document* 11, where it is stated that as at December 2016, 35 per cent of superior court judges appointed were female.

[62] Women occupy four of the nine seats as regional court presidents, thus 44 per cent. For more information, see *Judiciary Annual Report* (n 56) 52.

[63] CGE *Investigative Report* (n 43) 29.

[64] *Judiciary Annual Report* (n 56) 63. Note that there are 11 seats on the Constitutional Court, with two vacancies being reflected in both the 2017/18 and 2018/19 Judiciary Annual Reports.

[65] *Judiciary Annual Report* (n 56) 51.

[66] Also see the purpose of this Act, which refers not only to the removal of barriers, but also to the implementation of affirmative action to achieve equity in the workplace.

[67] See Stats SA *Gender Statistics* (n 6) for more on the educational achievement of women as compared to men.

[68] CGE *Investigative Report* (n 43) 32.

[69] Ibid. Constituting a violation of art 9(2) of the Protocol on the Rights of Women – CGE *Investigative Report* (n 43) 11.

President Cyril Ramaphosa and the Minister of Justice on the lack of female appointments to the team investigating state capture.[70]

The number of women in the judiciary in other countries reveals a similarly negative picture. It is interesting to note that in countries such as Greece, Hungary and Romania the majority of judicial seats are occupied by women,[71] but female representation in the judiciaries of jurisdictions such as the United States of America (USA), Australia, Turkey and the United Kingdom (UK) is towards the lower end of the scale.

In 2018, 33 per cent of all judges in the USA's state courts were women,[72] and women constituted only 36 per cent of all judges in federal courts. In Australia, female representation in the judiciary is as low as 24 per cent in Tasmania and 31 per cent in South Australia.[73] After a concerted effort by the Turkish government to improve its proportion of female judiciary members of 22,8 per cent from 2010, the figure rose to 36 per cent in 2019,[74] while women court judges in the UK are at a low 29 per cent.[75] While the European Commission for the Efficiency of Justice (CEPEJ) places its female representation at 51 per cent, further analysis reveals that only 36 per cent of high court seats were occupied by women in 2016.[76] These figures warrant two important comments.

First, considering that poor female representation in the judiciary seems to be a global phenomenon, the search for the reasons for – and solutions to – this problem requires a 'global' approach. This means looking beyond the (in) effectiveness of national laws and legal frameworks to social factors and barriers present in societies across the globe. To borrow from Powell, we should not be beguiled by 'the myth of equity: the unfounded belief that stereotyping and discrimination are things of the past'.[77] Thus, any investigation into the low numbers of women in the judiciary would be incomplete if it fails to take into account deep-seated and persistent social systems such as patriarchy, suppression, gender bias, stereotyping and discrimination, and their considerable impact on

[70] F Rabkin 'Women lawyers: "We are not respected"' *Mail and Guardian* (25 October 2019).

[71] European Commission for the Efficiency of Justice (CEPEJ) *European Judicial Systems: Efficiency and Quality of Justice* (Council of Europe 2016) 21.

[72] National Association of Women Judges (NAWJ) '2018 US State Court women judges', accessible at https://www.nawj.org/statistics/2018-us-state-court-women-judges (accessed on 16 December 2019). The NAWJ was at the forefront in establishing and implementing gender bias task forces in courts in America.

[73] The Australasian Institute of Judicial Administration 'Judicial gender statistics – Judges and magistrates (31 per cent of women) March 2019', accessible at https://aija.org.au/wp-content/uploads/2018/03/JudgesMagistrates.pdf/ (accessed on 24 June 2020).

[74] O Armutçu 'Number of female judges and prosecutors in Turkey at its highest' *Hurriyet Daily News* (5 June 2019).

[75] D Taylor 'Lady Hale: At least half of UK judiciary should be female' *The Guardian* (24 March 2019).

[76] Toxopeus (n 57).

[77] GN Powell *Women and Men in Management* (2011) 18. This refers to the period 2010 to 2011.

representation in the workplace.[78] The 'queen bee' phenomenon, while lesser known and discussed, also warrants investigation as an added invisible barrier to women's advancement in this male-dominated field.

Second, as Toxopeus puts it:

> the fact that this is not simply a South African concern, or even a concern of the 'developing nations' alone, should not detract from the fact that women are severely under-represented in our Judiciary. The current state of gender representation in courts globally should not be normative for us. Ours is a Constitution that embraces transformation, founded on the values of human dignity and equality and the advancement of human rights and freedoms.[79]

Authors such as Theron[80] use 1994 as a baseline to conclude that the judiciary has been 'totally transformed' in terms of both race and gender, and thus serves as an example to other sectors. On the contrary, it is argued here that while progress has been made, much work remains to be done for the judiciary to be held up as a benchmark for female representation in positions of power.

IV THE SOUTH AFRICAN LEGAL FRAMEWORK FOR GENDER EQUALITY AT WORK: AN ILO-INSPIRED MOSAIC

For decades, the ILO has helped shape South Africa's legislation and views, including on gender equality in the workplace. Among other things, the country has ratified two of the ILO's four key gender equality conventions, namely, the Equal Remuneration Convention 100 of 1951 and the Discrimination (Employment and Occupation) Convention 111 of 1958. As an ILO member state, South Africa, in addition to the above, is bound by the ILO Declaration on Fundamental Principles and Rights at Work of 1998, which commits all member states to respect freedom of association and the right to collective bargaining, eliminate forced or compulsory labour, abolish child labour and eliminate discrimination in respect of employment and occupation. Moreover, the country is in its second ILO Decent Work Country Programme (DWCP) cycle, which covers the period 2018–2023. Yet, the ILO remarked:

> While South Africa has ratified C111 Discrimination (Employment and Occupation) … women are still the predominant face of poverty and inequality in the country. And therefore, the CEACR [Committee of Experts on the Application of Conventions and Recommendations] has requested Government to share information on measures taken … to address gender occupational segregation and to increase the participation of women … in the labour market including in those occupations mainly occupied by men, and at the senior and top management levels.[81]

[78] S Vettori 'New life for gender pay discrimination in South Africa' (2014) 26 *SA Merc LJ* 476 n 1.

[79] Toxopeus (n 57).

[80] LV Theron 'Leadership, social justice and transformation – Inspire a leader' (2018) 21 *Potchefstroom Electronic Law Journal* 8.

[81] ILO *Republic of South Africa Decent Work Country Programme 2018–2023* (2018) 17.

As a member state of the ILO, the South African authorities should take note of the recent 2019 ILO Recommendation concerning the Elimination of Violence and Harassment in the World of Work,[82] Convention 190 (commonly referred to as the Violence and Harassment Convention)[83] as well as the 2018 ILO report on 'Ending of Violence and Harassment against Women and Men in the World of Work'.[84]

Staying in the international arena, South Africa also ratified the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 15 December 1998, and is a state party to CEDAW.[85] Article 7 of CEDAW specifically calls for reform regarding discrimination against females in political and public life, which – for purposes of this contribution – would include the judiciary.[86] Other relevant international instruments signed by South Africa include the Universal Declaration of Human Rights (UDHR) of 1948,[87] the Vienna Declaration of 1993,[88] the Beijing Platform for Action (BPA), and the UN's 2030 Agenda and Sustainable Development Goals.[89]

Several regional instruments aimed at equality have also been adopted. These include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, June 1995 (Maputo Protocol),[90] in which article 2 addresses the elimination of discrimination against women, and article 9 commits member states to uphold women's rights to participate in the political and decision-making process. Moreover, South Africa is a signatory to the Southern African Development Community (SADC) Protocol on Gender and Development, 2008,[91] article 7 of which specifically refers to women's rights to

[82] Recommendation 206 of 2019, adopted by the International Labour Conference at its 108th session (Geneva 21 June 2019).

[83] C190 Violence and Harassment Convention, 2019 (No 190) adopted on 21 June 2019.

[84] Tabled at the International Labour Conference at its 107th session (Geneva 28 May–8 June 2018).

[85] Department of International Relations and Cooperation 'Convention on the Elimination of All Forms of Discrimination against Women', accessible at http://www.dirco.gov.za/foreign/Multilateral/inter/ treaties/discrim.htm (accessed on 15 October 2019). CEDAW took effect on 3 September 1981.

[86] CGE *Investigative Report* (n 43) 13.

[87] The UDHR forms the foundation of international human rights law. While it is not a treaty to which member states can become party, it is regarded as a statement on the minimum standards of state practice and an articulation of states' 'human rights obligations as parties to the Charter of the United Nations'. See Human Rights Watch 'South Africa's obligations under international and domestic law', accessible at https://www.hrw.org/legacy/reports98/sareport/App1a.htm (accessed on 14 October 2019).

[88] Adopted by the World Conference on Human Rights in Vienna on 25 June 1993. In adopting this Declaration, UN member states solemnly pledged to respect human rights and fundamental freedoms, and to take individual and collective action to ensure the enjoyment of human rights.

[89] UN *Transforming Our World: The 2030 Agenda for Sustainable Development* (2015) 1.

[90] Accessible at https://www.un.org/en/africa/osaa/pdf/au/protocol_rights_women_africa_2003.pdf (accessed on 3 January 2020).

[91] Accessible at https://www.sadc.int/issues/gender/ (accessed on 2 February 2020).

'equitable representation on and participation in all courts, traditional courts, alternative dispute resolution mechanisms and local community courts'.[92]

Therefore, having established that South Africa has committed itself to an abundance of international and regional instruments aimed at ensuring true equality for women in the workplace, including the judiciary, the next question to determine is whether these have been translated into the country's national legislative framework.

The demise of apartheid and the dawn of a new democratic dispensation offered South Africa an opportunity to entrench the ideal of a democratic, non-racist, non-sexist society firmly in its statutory landscape.[93] The Constitution, the supreme law of the country, not only commits all South Africans to the advancement of equality through section 9,[94] but also embeds the achievement of equality as well as non-racialism and non-sexism as the country's values in section 1*(a)* and *(b)*. Section 10 guarantees everyone's dignity, while section 23 specifically guarantees fair labour practices for all.[95]

Section 6(1) of the EEA echoes the section 9 constitutional provision, prohibiting unfair discrimination based on, among other things, gender and race, and providing for unfair policies and practices in the workplace to be identified and removed. The Act also makes provision for affirmative action, specifically mentioning black people, women and people with disabilities as 'designated groups' who had in the past been disadvantaged.

The Women Empowerment and Gender Equality Bill of 2013[96] strives to:

> give effect to section 9 of the Constitution of the Republic of South Africa, 1996, in so far as the empowerment of women and gender equality is concerned; to establish a legislative framework for the empowerment of women; to align all aspects of laws and implementation of laws relating to women empowerment, and the appointment and representation of women in decision making positions and structures.

The Preamble to the Bill states that the Bill arose from the country's constitutional and international commitments in the field of human rights. This includes 'the promotion of gender equality and the prohibition of unfair discrimination against women and the elimination of gender-based violence', and the imperative to address discrimination against women so as to transform gender relations in South Africa. Regrettably, however, although approved by Cabinet in 2012 and adopted by Parliament in 2014, the Bill has not been signed into law.

[92] CGE *Investigative Report* (n 43) 16.

[93] Vettori (n 78) 476 n 2.

[94] The Preamble to the Constitution also acknowledges the injustices of the past and stands for a united democratic society, social justice and fundamental human rights.

[95] Whether judicial appointments indeed fall under employment is outside the ambit of this research.

[96] Accessible at http://www.mpuleg.gov.za/assets/bill-50b---2013.pdf (accessed on 3 December 2019).

That being said, even if this and other legislation should take effect, statutes are no guarantee that human behaviour and long-standing beliefs and attitudes will change. A case in point is the State Attorney Amendment Act 13 of 2014, which was promulgated in an attempt to change attorney and advocate briefing patterns so that instructions may be shared more equitably among all practitioners. Since black and female practitioners were identified as the worst affected by imbalanced briefing patterns, the Minister of Justice set a target of 76 per cent of briefs to be given to black and female practitioners, thus earmarked for black female practitioners. The Act did not seem to make any real difference, however, and the targets were not achieved. In the 2014/15 financial year, after the promulgation of the Act, briefs given to female counsel totalled R13 943 666, compared to R515 296 783 that were given to male counsel.[97] Women thus earned a mere 2,6 per cent of the total value of briefs.

It appears that targets set in terms of the transformation of state legal services (strategic objective 10) were finally achieved in 2019. The target in respect of both the value of briefs as well as the percentage of briefs allocated to females for the financial year 2018/19 were exceeded by 1 per cent. Of the 5 171 briefs allocated to counsel, 2 109 were allocated to female counsel.[98]

Other related interventions to improve female representation on the bench included ongoing monitoring by the Commission for Employment Equity (CEE)[99] and the CGE,[100] and the Judicial Services Commission (JSC) encouraging women in academia and private practice to make themselves available for service in the judiciary. As the statistics show, none of these efforts have managed to make the South African judiciary more gender-balanced.

Considering the fact that equal rights for women at work are firmly entrenched in South Africa's legal framework, including international, regional and national instruments, the persistence of male-dominated workplaces, including the judiciary, would suggest that the search for solutions should go beyond legislative interventions. A good starting point might be to identify and to understand fully the traditional, historical and more recent barriers to women's advancement in the world of work. This could then serve as the basis for a mentoring and training programme aimed at changing mindsets so as to facilitate true, substantive equality instead of mere formal equality.

[97] CGE *Investigative Report* (n 43) 42.
[98] DOJandCD *Annual Report 2018/19* (n 43) 87.
[99] CEE *Annual Report* (n 41).
[100] CGE *Investigative Report* (n 43).

V TRADITIONAL, HISTORICAL AND MORE RECENT BARRIERS TO WOMEN IN GENERAL EMPLOYMENT, AND IN THE JUDICIARY

(1) *Patriarchy*

Patriarchy[101] is defined as a social system in which men hold the power, and women are largely excluded. As such, it enforces traditional gender roles, causing women to remain inferior to their male counterparts, dependent on them for resources and status,[102] and in most instances, relegated to child-rearing.[103] As a persistent and permanent underlying force in South Africa, patriarchy has been said to 'hinder … the implementation of policies and acts … [and] the carrying out of court orders such as eviction and protection orders'.[104]

The pervasive nature of patriarchy, working across all races and cultures, is also acknowledged by the Commission of Gender Equality, which stated:[105]

> It is a sad fact that one of the few profoundly non-racial institutions in South Africa is patriarchy ... indeed, it is so firmly rooted that it is given a cultural halo and identified with customs and personalities of different communities ... [P]atriarchy brutalises men and neutralises women across the colour line.

Apart from the more overt manifestations of patriarchy, such as the deliberate exclusion of women from professions purely based on their gender, a more covert element of patriarchy is that it often deprives women of an education and, in addition, men do not have a need for university-educated women as men need women to depend on them.[106] This, in turn, acts as a barrier for entry and advancement in skilled professions, including the judiciary.

(2) *Women's status in employment*

In a nutshell, the majority of women's employment status is either 'informal or unpaid' or 'formal and paid, but junior'. This is despite the fact that more women than men enter and complete university studies,[107] and that in 2018, 61 per cent of all bachelor's degrees were awarded to female graduates.[108]

[101] See https://www.lexico.com/en/definition/patriarchy (accessed on 2 July 2020).

[102] C Albertyn '"The stubborn persistence of patriarchy"? Gender equality and cultural diversity in South Africa' (2009) 2 *Constitutional Court Review* 171.

[103] W Amien and M Paleker 'Women's rights' (1997) 8 *South African Human Rights Yearbook* 374.

[104] MT Noge 'Evaluating patriarchy and gender inequality in an era of democracy: Case of South Africa (1994–2012)' unpublished LLM thesis, North-West University (2014) 14.

[105] CGE *Annual Report* (n 41) 10.

[106] TJ Mudau and OS Obadire 'The role of patriarchy in family settings and its implications to girls and women in South Africa' (2017) 58 *Journal of Human Ecology* 67, 70.

[107] Van Broekhuizen and Spaull (n 34) 10–11.

[108] Van Broekhuizen and Spaull (n 34) 2.

As stated earlier, the patriarchal notion of men as the providers and women as child-bearers has seen many women opting for work in the informal sector or at home,[109] or being involved in unpaid work.[110] In developing countries, it was found that two-thirds of women's total hours of work in 2018 were unpaid, while men spent a mere quarter of their time doing unpaid work.[111]

According to a Stats SA report, in 2018, the informal sector, which accounts for 17,4 per cent of total employment, consisted of more females than men (47,5 per cent of women compared to 30,6 per cent of men).[112] Rogan has pointed out that in 2017, women in the informal economy were concentrated in the categories of 'unpaid family contributors' and 'household and domestic workers',[113] which constitute the lowest-paid categories. At this bottom end of the scale, where earnings are the lowest and poverty risks are the highest, men make up only a small percentage.[114] Women on average earn a lower hourly rate than men[115] and, in 2014, the gender pay gap within occupations was 15,3 per cent according to a 2017 research report on the gender pay gap by the Equality and Human Rights Commission.[116]

Of those women who do manage to enter formal employment, the majority do so in junior, if not temporary, positions. According to the CEE's 2018/19 annual report,[117] 66,5 per cent of top management positions were held by whites and 15,1 per cent by Africans. The rest were made up by foreign-national, Indian and coloured employees. Females occupied a mere 23,5 per cent of top management positions in 2018.[118] Over the same period, senior managerial positions were mostly occupied by men, and females constituted 34,5 per cent of all employers.[119]

(3) *The pay gap*

Despite the ILO's Equal Remuneration Convention 100 of 1951 having one of the highest ratification rates, equal remuneration remains one of the most prevalent forms of gender discrimination in labour on a global scale.[120] Women's economic status remains considerably lower than that of men, as indicated above, and the

[109] Wirth (n 2) 6.
[110] Stats SA (n 32).
[111] Wirth (n 2) 16.
[112] Stats SA (n 32).
[113] M Rogan 'Informal economies are diverse: South African policies need to recognise this', accessible at https://theconversation.com/informal-economies-are-diverse-south-african-policies-need-to-recognise-this-104586 (accessed on 24 June 2020).
[114] Ibid.
[115] G Wills *South Africa's Informal Economy: A Statistical Profile* (2009) 2.
[116] M Brynin *The Gender Pay Gap* (2017) 7.
[117] CEE *Annual Report* (n 41).
[118] CEE *Annual Report* (n 41) 21.
[119] CEE *Annual Report* (n 41) 25.
[120] Wirth (n 2) 14.

average full-time woman worker continues to be paid less than her male counterpart. While this may in part be ascribed to lower wages in so-called 'female-intensive occupations', evidence from the UK in 2018 indicated that women also earn less than men 'in the same occupation and often in the same job'.[121]

The 2018 UK gender pay gap report[122] confirmed that full-time female employees were earning 8,6 per cent less than men. In a similar vein, Powell states that 'the ratio of female-to-male wages for similar work is below 100 per cent in all nations for which the World Economic Forum reports data'.[123] For lawyers, specifically, the Women's Bureau in the United States Department of Labour indicated that in 2017, women earned only 76,2 per cent of their male counterparts' salaries.[124]

South Africa is no exception. According to the ILO Global Wage Report 2018/19, permanently employed women in the country earn 22,7 per cent less than similarly positioned men, while women who work part-time earn 39 per cent less than their male counterparts. In fact, in terms of the pay gap for part-time work, South Africa came in as the second worst country, topped only by Pakistan.[125] This pattern is also evident among lawyers, which is the pipeline for the judiciary.[126]

This is despite the country's constitutional provisions[127] that guarantee equality, and the EEA not only advocating equality for women in employment,[128] but also requiring pay differentials to be reported on. Fringe benefits and bonus payments could be regarded as further aiding the disparity in pay, as the EEA reporting requirements[129] do not include these. The possible inclusion of fringe benefits and bonuses in reporting warrants investigation as a means to ensure pay parity, especially where remuneration is not regulated by the National Minimum Wage Act 9 of 2018, and in smaller business enterprises where reporting is not mandatory.

[121] Powell (n 77) 24. Also see Brynin (n 116) 6–8.

[122] F McGuiness and D Pyper *The Gender Pay Gap* (2018) 3.

[123] Powell (n 77) 24.

[124] US Department of Labour 'Employment and earnings by occupation', accessible at https://www.dol.gov/agencies/wb/data/occupations (accessed on 20 December 2020).

[125] V Dantjie 'Can we explain the pay inequality in South Africa?' *City Press* (2 May 2019).

[126] Wirth (n 2) 14.

[127] Sections 9, 23 and 11.

[128] Women may be treated preferentially in an effort to attain equality, but no quotas are permitted – see EEA s 15(3).

[129] Only designated employers are compelled to report on affirmative action plans. Designated employers are defined in s 1 of the EEA, while s 15 sets out the measures and methods to be used. Smaller enterprises, unless voluntarily complying, are excluded from reporting. Most businesses in South Africa are smaller, or employees work part-time. See South African Market Insights 'South Africa's formal business sector', accessible at https://www.southafricanmi.com/south-africas-formal-business-sector.html, updated 21 April 2020 (accessed on 24 June 2020).

(4) *Beliefs of ineptitude and incompetence*[130]

Another barrier to true gender equality in the workplace is the belief held not only by male employees, but also by women themselves, that leadership is a masculine notion, incongruent with the role of women,[131] and that a woman promoted to a leadership role is doomed to fail.[132]

Netshitangani argues that the origins of this mindset might be traced back hundreds of years to the era of colonisation. In Africa, in particular, where women were once believed to have the power to unite society, it is said that colonialism played a key part in demeaning women's role in society.[133] As Connell puts it:

> Colonisation itself was a gendered act, carried out by imperial workforces, overwhelmingly men, drawn from masculinised occupations such as soldiering and long-distance trade … The colonial state was built as a power structure operated by men, based on continuing force. Brutality was built in to colonial societies.[134]

According to Netshitangani, colonised African society became gender-insensitive and biased against women.[135]

(5) *Stereotyping of women*[136]

Gender stereotyping represents another glass ceiling,[137] or invisible barrier, to female entry and advancement in the workplace. Gender stereotypes affect one's perception of an individual purely on the grounds of their gender, even in circumstances where gender is completely irrelevant,[138] such as the gender of a judge. It has its roots in a societal perspective[139] of the roles and behaviours typically assigned to women and men.

What makes gender stereotyping particularly problematic is that it not only influences decisions on real performance, but also on potential.[140] A 2000 study in the Netherlands and Italy on the impact of gender on the review of job

[130] CJ Morrison 'Gender discrimination versus equality in the police' (2005) 18 *Acta Criminologica* 21.

[131] R Garci-Retamero and E Lopez-Zafra 'Prejudice against women in male-congenial environments: Perceptions of gender role congruity in leadership' (2006) 55 *Sex Roles* 52.

[132] Garci-Retamero and Lopez-Zafra (n 131) 59.

[133] T Netshitangani 'Queen bee syndrome: Examining *ubuntu* philosophy in women's leadership' (2019) 8 *Ubuntu: Journal of Conflict and Social Transformation* 197.

[134] R Connell 'The sociology of gender in Southern perspective' (2014) 62 *Current Sociology* 556.

[135] Netshitangani (n 133) 198.

[136] Morrison (n 130) 22.

[137] A metaphorical term for mostly female advancement in employment. See DM Smit 'Labour law, the queen bee syndrome and workplace bullying: A contribution to the shattering of at least one glass ceiling for female employees' (2016) 37 *ILJ* 779.

[138] N Ellemers *et al* 'The underrepresentation of women in science: Differential commitment or the queen bee syndrome?' (2004) 43 *British Journal of Social Psychology* 318.

[139] Wirth (n 2) 1.

[140] Ellemers *et al* (n 38) 318.

applicants' *curricula vitae*[141] revealed that both male and female judges preferred male over female candidates, even though the job applicants had the very same academic records.

Further adding to the complexity of the phenomenon is that men and women often stereotype themselves. For instance, women have been found to tend to show greater bias against other women, sharing men's belief that a woman promoted to a higher position will necessarily perform worse than a man.[142] This shared belief that women inherently are the weaker sex[143] subconsciously plants the notion that men are active doers, making them better suited to managerial positions, while women are more suited to a supporting role.[144] What follows is 'vertical segregation',[145] where women are excluded from jobs above a particular rank purely based on their gender.

(6) *Female choice and differential commitment to work*

Research also refers to women's employment choices as hurdles to their advancement in the workplace. As women fear social disapproval, penalty or exclusion, they often make choices that prevent them from advancing professionally at the same rate as men.[146] This aspect, while not adequately researched in the context of the judiciary, has been identified to be a reason for the apparent lack or slow pace of gender transformation in science.[147]

Key in this regard seems to be women's choice to reproduce, and their resulting preference for flexible working hours.[148] This often stems from firmly-entrenched social roles that predominantly depict men as the providers of family income, while women primarily are responsible for rearing the family.[149] In many instances, commitment to professional advancement and the choice to have a family still seem to be mutually exclusive: where women demonstrate the same commitment as men, they often are single and childless – a phenomenon

[141] As above, with reference to R E Steinpress *et al* 'The impact of gender on the review of *curricula vitae* of job applicants and tenure candidates: A national empirical study' (1999) 41 *Sex Roles* 509. Although the article by Ellemers and colleagues refers to a study done in 2009, there is no reason why the causes of underrepresentation should differ in the judicial workplace of today.

[142] Garci-Retamero and Lopez-Zafra (n 131) 59.

[143] L Leo *et al* 'The inferences of gender in workplace bullying: A conceptual analysis' (2014) 12 *Gender and Behaviour* 6059.

[144] Leo *et al* (n 143) 6063.

[145] Morrison (n 130) 21.

[146] S de Klerk and M Verreynne 'The networking practices of women managers in an emerging economy setting: Negotiating institutional and social barriers' (2017) 27 *Human Resource Management Journal* 481.

[147] Ellemers *et al* (n 138) 315.

[148] E Bonthuys and C Albertyn (eds) *Gender, Law and Justice* (2007) 248.

[149] Ellemers *et al* (n 138) 317.

confirmed in a study of Dutch scientists.[150] In addition, it has been shown that the pay gap widens substantially after the birth of a first child.[151]

This issue does not appear to have been studied in the context of the South African judiciary to date, nor was it addressed in the CGE's 2016 investigative report. Until such studies occur, suffice it to say that the predominantly white, male pool from which judges are selected might in part be ascribed to women dropping out to care for families. Also, the four months' maternity leave provided for by the Basic Conditions of Employment Act 75 of 1997 (BCEA) might be contrary to the inherent requirements of court terms.

(7) *An alpha-biased, gendered*[152] *and intimidating workplace for women*[153]

Many workplaces, including the judiciary, have a tendency towards an institutionalised culture of 'alpha bias'.[154] An alpha-biased workplace assumes from the outset that men and women are profoundly different, and that these enduring differences must always inform the way in which these groups are understood and treated in employment. As a result, the differences between men and women are exaggerated instead of focusing on their capability to do the job, irrespective of gender. An alpha-biased workplace may, for instance, use so-called male criteria in their hiring practices and policies, and have workplace structures and human resources programmes that favour men.[155] It often is also characterised by notable gender segregation of work, with senior positions being male-dominated[156] and the majority of supporting roles filled by women. This, in turn, creates a gendered workplace, which serves to perpetuate gender inequalities even further.[157]

Moreover, in such a gendered, alpha-biased workplace, women are more frequently exposed to intimidation and bullying[158] and tend to experience more severe isolation and professional discredit[159] than their male counterparts. Even the few women who manage to advance to senior roles have reported experiencing more bullying from supervisors, colleagues and subordinates than

[150] Ibid.
[151] McGuiness and Pyper (n 122) 4.
[152] Leo *et al* (n 143) 6063.
[153] Morrison (n 130) 22.
[154] Powell (n 77) 31.
[155] De Klerk and Verreynne (n 146).
[156] Leo *et al* (n 143) 6063, with reference to J Hutchinson and J Eveline 'Workplace bullying policy in the Australian public sector: Why has gender been ignored' (2010) 69 *Australian Journal of Public Administration* 47.
[157] Ibid.
[158] D Salin and H Hoel 'Workplace bullying as a gendered phenomenon' (2013) 28 *Journal of Managerial Psychology* 235.
[159] Leo *et al* (n 143) 6064.

men at a similar job level.[160] Further contributors to an intimidating workplace for women include language use,[161] sexual harassment[162] and the perception that to make it professionally, one needs to be tough and 'macho'. All of these might serve as potential barriers for improved female representation in the judiciary as well and warrant further investigation.

(8) *The queen bee phenomenon*

A final, lesser-known barrier to female advancement in employment is the phenomenon of the 'queen bee' – the female in a senior job who zealously guards her position by holding back other aspiring female high-flyers, or by effectively blocking their advancement through the ranks.[163]

Like other forms of workplace bullying, the queen bee phenomenon incorporates elements of both overt and covert aggression,[164] and constitutes a continuous pattern of negative behaviour that ultimately leads to physical and psychological harm.[165] Judging by research findings in 2014 in South Africa, in which it was confirmed that female bullies at work tended to bully fellow females 80 per cent of the time, and that most bullying was perpetrated by supervisors against subordinates,[166] the existence of queen bees is not as far-fetched as some might think.

These senior women in predominantly male-dominated environments are likely to oppose the upward movement of other women so as to maintain the *status quo* in the working environment, and often withhold support for policy changes that would open doors for other women to advance at work.[167] Women in senior management also face a choice between being marginalised, or conforming to the ideology of 'heroic masculinism' – 'the traditional and hierarchical form of management which depicts executives as solitary (male) heroes engaged in unending trials of endurance'. [168] Desperate to hold on to their hard-earned seniority, this sees these women adopting masculine traits and suppressing aspects of their femininity which presents a perfect breeding ground for the queen bee to emerge.

[160] Hutchinson and Eveline (n 156) 52; Salin and Hoel (n 158) 249.

[161] Morrison (n 130) 22.

[162] Morrison (n 130) 23.

[163] PR Arvatea, GW Galileab and I Todescatc 'The queen bee: A myth? The effect of top-level female leadership on subordinate females' (2018) 29 *The Leadership Quarterly* 534.

[164] Leo *et al* (n 143) 6059.

[165] C van der Bijl 'Corporate "assault": Bullying and the aegis of criminal law' 2014 *TSAR* 483.

[166] Leo *et al* (n 143) 6060.

[167] Ellemers *et al* (n 138) 325.

[168] S Mavin 'Queen bees, wannabees and afraid to bees: No more "best enemies" for women in management?' (2008) 19 *British Journal of Management* 76.

An additional factor in this phenomenon may be that older women are more likely to differentiate themselves from younger entrants into the labour market[169] on the grounds of having had to battle gender and racial discrimination in a pre-constitutional era. In this way, the older generation's own 'mobility experiences' in effect determine the way they view others: since they possibly experienced severe barriers in achieving professional success, they are likely to 'replicate the pattern of discrimination' against other, younger women wanting to advance.[170]

In addition, De Klerk and Verreynne[171] make an interesting connection between the queen bee phenomenon and patriarchal culture, a traditional barrier discussed earlier. The authors argue that since patriarchy in emerging-economy settings in particular (such as South Africa) supports stereotypical gender roles, women are left 'conflicted between competition and mutual support, thus redefining the so-called Queen Bee phenomenon'. This underlines the importance of not viewing any one barrier for female professional advancement in isolation. Instead, the various factors hampering gender transformation in traditionally male-dominated workplaces are intricately intertwined.

To date, the queen bee phenomenon as a form of gender bullying has not – one might argue, wrongly – received much attention in research on the lack of gender transformation in traditionally male professions such as the judiciary. Moreover, no thought was given to it in the 2016 CGE investigative report on female representation in the judiciary.

VI WHY WE NEED WOMEN IN THE JUDICIARY

Already in 2001 the ILO reported that evidence pointed to better productivity, increased economic growth and improved welfare of families where gender equality was present.[172] All organisations and firms, the ILO stated, needed both 'masculine' and 'feminine' attributes.[173] It is argued here that the judiciary is no different. Women are said to bring a participatory leadership style to the table, as well as empathy, which makes them better suited to understand the plight of the people they lead and serve.[174] Women also possess qualities that lead to better relationship-building, the facilitation of teamwork[175] and enhanced motivation among lower-level employees.[176]

[169] Ellemers *et al* (n 138) 327.
[170] Ibid.
[171] De Klerk and Verreynne (n 146) 4.
[172] Wirth (n 2) v.
[173] Ibid.
[174] Netshitangani (n 133) 199.
[175] Netshitangani (n 133) 198.
[176] Netshitangani (n 133) 199.

Further reported benefits of gender equality in the workplace include increased organisational performance, enhanced organisational reputation,[177] and an enhanced ability to attract and retain talent. Moreover, as confirmed by the Global Leadership Forecast 2014–2015, gender diversity leads to greater diversity in thought and improved problem-solving.[178] These are all benefits that would stand the judiciary in good stead, considering the fact that it has recently come under fire for a perceived lack of institutional independence, extended delays in the finalisation of cases, and misconduct among judicial officers.[179]

Having a fair representation, particularly of black women, in the judiciary will also go a long way towards countering the country's legacy of oppression and eliminating the effects of the double dose of unfair discrimination to which this section of society has been exposed[180] – discrimination against the female gender based on socio-cultural notions and beliefs, as well as racial discrimination under apartheid.[181] As the guardian of the Constitution and provider of justice to the people, there can hardly be a more appropriate institution than the judiciary to take the lead in this respect.

In addition, achieving a greater male-female balance in our judiciary would serve as a key step in the country's pursuit of true, substantive equality in all sectors of society, enabling people to access and enjoy the same rewards, resources and opportunities, irrespective of their gender, race, age or any other, similar ground.[182]

VII CONCLUSION AND RECOMMENDATIONS

A quarter of a century into its democratic dispensation, South Africa has long removed the legislated barriers that for decades prevented women from entering, advancing and taking up their rightful place in the workplace, including in the judiciary. Nevertheless, the gender imbalance in our judiciary persists, particularly in more senior, powerful positions, as the statistics cited in this contribution indicate. The 'old boys' club' has to a large extent remained just that.

Clearly, therefore, the ratification of international and regional instruments and the promulgation of equality-oriented legislation are not enough to effectively

[177] Australian Workplace Gender Equality Agency 'About workplace gender equality', accessible at https://www.wgea.gov.au/learn/about-workplace-gender-equality (accessed on 24 June 2020).

[178] theBoardlist '5 reasons why having women in leadership benefits your entire company', accessible at https://medium.com/@theBoardlist/5-reasons-why-having-women-in-leadership-benefits-your-entire-company-labor-day-2016-a3e46162a7a0 (accessed on 15 September 2019).

[179] MR Makhari 'Reflections on the prospects and challenges of the South African judiciary in achieving its constitutional objective' unpublished LLM thesis, North-West University (2015) 2.

[180] Wirth (n 2) v.

[181] Vettori (n 78) 476. For more information, see n 47 (Vettori) in this regard.

[182] Australian Workplace Gender Equality (n 177).

transform the gender composition of the judiciary. In our search for solutions to facilitate faster and more effective transformation, our focus needs to shift to the historical, traditional and more recent barriers to female representation in male-dominated workplaces. True substantive gender equality on the bench and in leadership positions in the judiciary will be ours only once those lesser discussed, invisible barriers and glass ceilings are identified, defined and addressed. These include, as discussed above, a persistent patriarchal culture; women's general status in employment; the pay gap; deep-seated beliefs of incompetence; the stereotyping of women; the apparent mutual exclusivity of female professional commitment and the choice to have a family; alpha-biased, gendered and intimidating workplaces; and the queen bee phenomenon.

It is proposed that these barriers to gender equality be comprehensively studied as they relate to the judiciary. Gender equality cannot be effected in isolation, because ingrained discrimination against women form part of a greater societal problem. Care should be taken to not only 'sanitise' the pipeline, but to see this as part of a broader project in addressing ingrained gender inequality to bring about societal change. The findings should be used to design customised mentoring and training programmes to facilitate a fundamental mind shift in those directly involved in the recruitment and appointment of members of the judiciary, and also across the entire pipeline feeding into the judiciary.

In searching for the reasons for the limited pool of available women judges, soft law questions need to be explored, such as investigating whether the Judicial Service Commission has indeed created an environment conducive to women making themselves available to serve on the judiciary, and establishing how women could be accommodated[183] to effect true or substantive equality in what remains a male-dominated environment. In this regard, special attention should be paid to measures that would make it easier for women to succeed professionally without having to sacrifice their femininity and distance themselves from their own gender.[184]

We could also follow the example of the US-based National Association of Women Judges (NAWJ), the organisation that founded the International Association of Women Judges,[185] and spend time drafting realistic strategies for developing the judiciary pipeline, with a particular focus on increasing the number of women judges. Such strategies should keep pace with new, emerging trends, including technology and shifts in law education, and could include collaborating with law schools on initiatives[186] to unlock the judiciary as a career option for women to the same extent as for men.

[183] CGE *Investigative Report* (n 43) 43.
[184] Ellemers *et al* (n 138) 328.
[185] NAWJ 'About NAWJ', accessible at https://www.nawj.org/about-nawj (accessed on 15 October 2019).
[186] Ibid.

Finally, in an effort to establish a new leadership style in the judiciary that is not gender-bound, but draws on collective wisdom, collective well-being, collective power and collective leadership,[187] Netshitangani's call for the application of the *ubuntu*-as-unity philosophy could be of value.[188]

True, substantive gender equality cannot, as argued above, be achieved by legislation alone – neither in employment in general, nor in the judiciary in particular. True equality requires a real level playing field, without invisible social barriers impeding the advancement of some. By government's own admission in the text of the 2012 Women Empowerment and Gender Equality Draft Bill, mainstreaming gender equality:

> involves neither the assimilation of women into men's ways, nor the maintenance of dualism between women and men, but establishing a new and positive form which becomes the mainstream and in which both men and women … have an important role to play. Thus a change in the traditional role of men, as well as the role of women in society and in the family, is needed to achieve complete equality between men and women, and … should be an integral part of the moral fibre of society.[189]

[187] Netshitangani (n 133) 199.
[188] Netshitangani (n 133) 208.
[189] See https://www.gov.za/sites/default/files/35637_gen701_0.pdf (accessed on 1 August 2019).

CHAPTER 14

Is the interpretation question over? Unravelling the reasonableness of fixed-term employment contract renewals and the protection afforded to non-standard workers by the South African Constitution

WILLIAM MANGA MOKOFE*

This article analyses the employer's failure to renew a fixed-term contract of employment in South Africa when there is a reasonable expectation of renewal, and the remedies available for the failure to renew. The employment of workers using fixed-term contracts is one of the dominant means of informalising work and is characterised by uncertainty. It therefore is essential that alternative ways of regulating and addressing the concerns of these vulnerable workers are found. Regulating non-standard work and protecting vulnerable workers cannot be left entirely up to collective bargaining and trade unions to resolve. The South African Constitution, the doctrine of legitimate expectation and other legislative instruments are all relevant in ensuring that informal workers are protected. The article specifically examines the relevant provisions of the South African Constitution that may be used to protect non-standard workers: section 9 (the right to equality); section 23 (the right to fair labour practices); and section 39 (the interpretation of the Bill of Rights).

I FIXED-TERM EMPLOYMENT RELATIONSHIPS

A fixed-term contract of employment entered into between an employer and a worker is linked to a determinable period or to the completion of a particular job that will bring the contract to an end.[1] Ideally, both parties must initially have agreed that the duration of the contract will be limited.

Under common law, the termination of a fixed-term contract of employment generally is not unfair if the reason for which the worker was employed no longer exists.[2] Where the parties have agreed that the contract will terminate upon the occurrence of a particular event or upon the completion of a particular task, the

* LLB (UFH) LLM (Unisa) LLD (Unisa); Senior lecturer, Pearson Institute of Higher Education.

[1] J Grogan *Workplace Law* (2019) 41.

[2] Grogan (n 1) 41.

onus is on the employer to prove that the event has occurred or that the task has in fact been completed.[3] This definition of a fixed-term contract of employment has been expanded by the Labour Relations Amendment Act 6 of 2014 (LRAA) in order to improve the protection afforded non-standard workers. In terms of section 198B(1) of the Labour Relations Act (LRA) a fixed-term contract of employment is defined as a contract that terminates on:

(a) the occurrence of a specified event;
(b) the completion of a specified task or project; or
(c) a fixed date other than the employee's normal or agreed retirement age, subject to sub-section (3).

However, policy-makers have ensured that this section does not apply to workers employed in terms of a statute, a sectoral determination, or a collective agreement[4] which permits the conclusion of a fixed-term contract. To accommodate new and small businesses, the section also does not apply to an employer who employs fewer than ten employees, or an employer who employs between ten and 50 employees and who has been in business for less than two years, unless the employer conducts more than one business, or the business was formed by the division or the cessation of an existing enterprise.

Workers hired under fixed-term contracts in South Africa form a group of non-standard workers, distinct from conventional South African employees. In labour law the relationship between an employer and employee is one of inherent inequality in terms of bargaining, with the employee generally in the weaker position.[5] Accordingly, the legal protection of workers is paramount on the labour law agenda. Fixed-term workers, as in the case of all non-standard workers, are especially weak bargaining parties in the employment relationship and are treated differently to those in indefinite employment. Non-standard employment relationships generally are characterised by poor wages, job insecurity, the denial of status, and the withholding of benefits. Moreover, fixed-term workers, particularly the unskilled, often are exposed to exploitation.[6] Some of these concerns have been addressed by the LRAA.

In addition, fixed-term workers as a rule are not included in collective bargaining agreements and are not protected by trade unions. Consequently, fixed-term employees rely on statutory protection to ensure that fundamental employment conditions and rights are observed. While fixed-term workers and

[3] *Bottger v Ben Nomoyi Film and Co Video CC* (1997) 2 LLD 102 (CCMA).
[4] Section 198B(2) of the LRA. The threshold amount currently stands at R205 433,30.
[5] O Kahn-Freund *Labour and the Law* (1972) 8.
[6] Department of Labour *Green Paper: Policy Proposal for a New Employment Statute* (*GN* 804 of 23 February 1996).

indefinitely employed employees enjoy equal statutory protection, the situation of fixed-term workers renders the implementation of their rights onerous.[7]

Section 186(1)*(b)* of the LRA applies where an employer fails to renew a fixed-term contract of employment while the employee reasonably expected that it would be renewed on the same or similar terms. The employer, on the other hand, is only prepared to offer the employee a renewal on less favourable terms, or with no contract at all. In *Biggs v Rand Water*[8] the Labour Court held that the aim of section 186(1)*(b)* of the LRA is to prevent unfair labour practices by employers who keep an employee on a temporary basis, without employment security and benefits. It is this type of dismissal that the legislature seeks to target: it aims at preventing unscrupulous employers from circumventing the LRA by keeping all their employees permanently on fixed-term contracts and terminating these contracts at will without reason or following fair procedure.

Moreover, Vettori[9] is of the view that:

> [a] fixed-term contract is usually synonymous with the employment of an employee to complete a certain task or to act as a stand-in for another employee in his or her absence. Once that task has been completed or the employee is back, the employer will have no use for the employee who was employed in order to complete that task or to act as a stand-in.

Most significantly, such a worker has very little security because a fixed-term contract automatically expires when the contract period ends if there is no tacit term or legitimate expectation to the contrary.[10]

However, as far as workers in fixed-term employment (direct employment) are concerned, probably the most important amendment to an existing provision in the LRA concerned the grounds on which an employee can pursue a claim for dismissal. The only basis on which he or she could contend otherwise was if he or she 'reasonably expected' the contract to be renewed on the same or similar terms.

However, the amendment introduces a new ground for challenging the termination of a contract: where the worker reasonably expects the employer to retain him or her 'on an indefinite basis on the same or similar terms as the fixed-term contract'.[11] Theron is of the view that, in theory, any worker on a fixed-term contract can bring a claim for unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA). Arguably, highly paid employees are likely to benefit most from this provision as their contracts

[7] Ibid.

[8] *Biggs v Rand Water* (2003) 24 *ILJ* 1957 (LC).

[9] S Vettori 'Fixed-term contracts: A comparative analysis of the Mozambican and South African legislation' 2008 *De Jure* 371.

[10] Vettori (n 9) 372.

[11] Section 186*(b)*(ii) of the LRA.

generally are of longer duration, and it will be easier to prove such an expectation in the circumstances. The likely outcome will thus be an increased use of the CCMA by highly-paid employees.

On the other hand, it is debatable whether less well-paid employees will benefit to any great extent from the provision. The worker provided by a labour broker is employed on a fixed-term contract, which is typically defined in terms of a specified task. Although in theory he or she could bring such a claim, in this case the expectation of indefinite employment would be with the client. It is difficult to see how a claim against a client could succeed.[12] The worker provided by a service provider would face a similar difficulty. With regard to temporary workers who are directly employed and who earn below the threshold, the new section on fixed-term contracts introduces so restrictive an approach to the conclusion and renewal of fixed-term contracts that it seems implausible that an expectation of indefinite employment could arise.[13]

Accordingly, an employer who offers to employ a worker on a fixed-term contract (or to renew a fixed-term contract) must do so in writing, stating why the employer considers it justifiable to do so and in the event of a dispute being referred to the CCMA, must prove that the reason was justifiable.[14] Unless an employer has a justifiable reason for using fixed-term contracts, he or she may not employ workers on fixed-term contracts for longer than three months.[15] If the CCMA finds that the reason cannot be justified, the worker concerned will be deemed to be indefinitely employed.[16] This is a significant deterrent to employers who employ temporary workers directly.

II WHAT IS REASONABLE EXPECTATION?

The concept of reasonable or legitimate expectation[17] originated in administrative law and natural justice. The doctrine is relatively new and was crafted by the English courts for the review of administrative action in England,[18] and subsequently adopted in South African law.[19] The concept gained standing after

[12] J Theron 'Non-standard employment and labour legislation: The outlines of a strategy' Monograph 1/2014, Development and Labour Law Monograph Series, Institute of Development and Labour Law, University of Cape Town (2014) 16.

[13] Ibid.

[14] Sections 198B(6) and (7) of the LRA.

[15] Sections 198B(3) of the LRA.

[16] Section 198B(5) of the LRA

[17] In *Council of Civil Service Unions* [1984] 3 All ER 935 954G, Lord Roskill indicated that the phrases 'reasonable expectation' and 'legitimate expectation' have the same meaning (*Civil Service Unions*).

[18] *Schmidt & Another v Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA) 909C and 909F (*Schmidt*).

[19] *Administrator Transvaal & Others v Traub & Others* 1989 (4) SA 731 (A) 756G.

it was introduced by Lord Denning in *Schmidt v Secretary of Home Affairs*,[20] where he stated *obiter*:

> The speeches in *Ridge v Baldwin*[21] show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.

In *Breen v Amalgamated Engineering Union*[22] Lord Denning expanded on the concept, stating:

> Seeing he had been elected to this office by a democratic process, he had, I think, a legitimate expectation that he would be approved by the district committee, unless there were good reasons against him. If they had something against him, they ought to tell him and to give him the chance of answering it before turning him down.

The doctrine of legitimate expectation is similar to the German public law concept of *Vertrauensschutz* – 'protection of legitimate confidence'.[23] Legitimate expectation is significant in that it provides that an interest less than a legal right may warrant protection under the rules of natural justice. Where a legitimate expectation can be shown, a decision-maker may not act to defeat that benefit without the requirements of procedural fairness being met.[24] Whether workers on fixed-term contracts can claim to have been dismissed if they reasonably expected permanent employment has long been controversial with judges holding different views in a range of cases.

In South Africa legitimate expectation is not defined in the LRA or in any other legislation. However, in a general sense, legitimate means reasonable.[25] Furthermore, it has been held that a 'reasonable expectation' should be equated with a 'legitimate expectation'.[26] The doctrine of legitimate expectation addresses fairness.[27] It has been recognised as 'a principle of equity falling short of a right'.[28]

[20] *Schmidt* (n 18) 909C and 909F.

[21] *Ridge v Baldwin* [1963] UKHL 2 (1964) AC 40.

[22] *Breen v Amalgamated Engineering Union* (1971) 2 QB 175 191.

[23] Section 48(2) of the German Administrative Procedure Act 1976 states: 'An unlawful administrative decision granting a pecuniary benefit may not be revoked in so far as the beneficiary has relied upon the decision and his expectation, weighed against the public interest in revoking the decision, merits protection.'

[24] *Haoucher v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 648 659, per Dawson J.

[25] *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629, 2 All ER 346 (PC).

[26] *Civil Service Unions* (n 17) 944A–E.

[27] *Gemi v Minister of Justice, Transkei* 1993 (2) SA 276 (Tk) 288–290.

[28] *Dierks v University of South Africa* (1999) 20 *ILJ* 1227 (LC) 1247I (*Dierks*); M Olivier 'Legal constraints on the termination of fixed-term contracts of employment: An enquiry into recent developments' (1996) 17 *ILJ* 1023. See also *Traub* (n 19) 840A–J.

In *Foster v Stewart Scott Inc*[29] Froneman J described reasonable expectation as the best and most flexible measure that could be formulated to serve the unfair labour practice jurisdiction given the array of possible factual circumstances that may exist.

In terms of the doctrine, the rules of natural justice are extended to cases where the affected party has no vested right but does have a potential right or expectation.[30] The first South African case to address the doctrine was *Evette v Minister of the Interior.*[31] The court found that a person who has been granted a temporary residence permit cannot expect to remain in the country for longer than the stipulated period. However, if that person has been granted entry and residence for a specific period, and is then instructed to leave before the expiry of that period, he or she has acquired a 'right' consisting of a legitimate expectation of being allowed to stay for the permitted time. This concept was fully recognised by the Appeal Court in *Administrator of the Transvaal v Traub.*[32] The legal question was whether the application of the rules of natural justice (or the *audi* principle) is restricted to cases where the finding 'affects the liberty, property, or existing rights of the individual concerned, or whether the impact is wider than this'.[33] Corbett J held:

> [T]he legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.[34]

Furthermore, it has been suggested that legitimate expectations may include expectations that go beyond enforceable legal rights, provided they have some reasonable basis.[35] The doctrine is 'construed broadly to protect both substantive and procedural expectations'.[36] For example, in *Eskom v Marshall & Others*[37] Landman J held: 'I find support for the view that a legitimate expectation to a benefit or advantage is sufficient to constitute a residual unfair labour practice (if unfairly refused) in the unfair labour practice relating to promotion.'

[29] *Foster v Stewart Scott Inc* (1997) 18 *ILJ* 367 (LAC) (*Foster*).
[30] Ibid.
[31] *Evette v Minister of Interior* 1981 (2) SA 453 (C).
[32] *Traub* (n 19).
[33] *Traub* (n 19) 748.
[34] Ibid.
[35] YM Burns and M Beukes *Administrative Law under the 1996 Constitution* (1996) 218.
[36] Ibid.
[37] *Eskom v Marshall & Others* (2002) 23 *ILJ* 2251 (LC).

With the birth of democracy, the South African interim Constitution[38] introduced 'legitimate expectation' in section 24, which states: 'Every person shall have the right to … *(b)* procedurally fair administrative action.' This may include cases where the rights of individual or legitimate expectations are affected or threatened.

(1) *Failure to renew a fixed-term contract when a reasonable expectation exists*

Section 186(1)*(b)* of the LRA clearly attempts to address the situation where an employer fails to renew a fixed-term employment contract when there is a reasonable expectation that it would be renewed. This means that an employee reasonably expected the employer to:

1. renew a fixed-term employment on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it; or
2. retain the employee in employment on an indefinite basis, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.[39]

The definition makes it clear that not every termination of a fixed-term contract constitutes a dismissal. The employee must be able to establish that there was a reasonable expectation of renewal of the contract or of retention on an indefinite basis, and that the employer refused to renew the contract or to retain the employee on an indefinite basis, or that there was an offer of renewal or retention on an indefinite basis but on less favourable terms.

This provision was included in the LRA to prevent employers from circumventing unfair dismissal laws by entering into a series of fixed-term contracts, and then relying on the termination of one of them as an automatic termination of the contract consequent on the effluxion of time, rather than termination on the initiative of the employer (that is, statutory dismissal). Different jurisdictions have adopted different methods to protect work security in these circumstances. Some have permitted the contract to be 'rolled over' a limited number of times before unfair dismissal law applies. In South Africa, the test for a reasonable expectation of renewal appears to have its roots in the jurisprudence of the Industrial Court which, in terms of the 1956 LRA, extended protection to workers who had a 'legitimate expectation' of the renewal of a fixed-term contract.

[38] Interim South African Constitution Act 200 of 1993.

[39] Previously this provision stipulated that a dismissal meant that an employee had reasonably expected the renewal of a fixed-term contract on the same or similar terms, but that the employer had offered to renew the contract on less favourable terms or did not renew it. See Olivier (n 28) 1001.

This notwithstanding, there is no single factor that defines what is reasonable in every case. Although the wording clearly refers to an expectation on the part of a worker who is party to the contract, the test applied to determine the existence of a reasonable expectation is an objective one and requires an examination of all relevant factors. The wording of the contract obviously is of paramount importance, with the qualification that standard form disavowals of expectation of renewal obviously lose credibility with each renewal of the contract in which they are contained. Other factors external to the terms of the contract can also be taken into account in determining the existence or otherwise of a reasonable expectation of renewal.[40] In determining whether or not such a reasonable expectation exists, both the courts and the CCMA have applied the principles of fairness or reasonableness. Vettori[41] states that:

> factors that were considered in deciding whether such a reasonable expectation is present include the fact that the work is necessary, that the money is available, that the fixed-term employees had performed their duties in terms of the fixed-term contract well, the renewal of the fixed-term contracts in the past and representations made by the employer or its agents.

She also notes that 'this list is not a *numerus clausus* and ultimately the existence or otherwise of a reasonable expectation requires a value judgement in the light of the surrounding circumstances'.[42] Vettori argues that this value judgment is a reasonable test, and requires the judge or arbiter to decide whether a reasonable person in the worker's circumstances would harbour a reasonable expectation of renewal, and that the enquiry required under section 186(1)*(b)* of the LRA is an objective one.

In *King Sabata Dalindyebo Municipality v CCMA & Others*[43] the Labour Court upheld the CCMA's decision that the renewal of the fixed-term contracts had created reasonable expectations that the workers' contracts would be renewed, as the money was available and the work was necessary.

Where there is a reasonable expectation of renewal by an employer and the employer fails to renew, this constitutes a dismissal. The onus of proving a reasonable expectation vests in the employee who alleges it, as stated in *Ferrant v Key Delta*.[44]

A further question is whether the test to determine if an employee had a reasonable expectation is objective or subjective. In *Fedlife Assurance Ltd v*

[40] In *Joseph v The University of Limpopo & Others* (2011) 32 *ILJ* 2085 (LAC) the court held that s 19(2) of the Immigration Act 13 of 2002 did not prevent the employee from having a legitimate expectation.

[41] Vettori (n 9) 373.

[42] Ibid.

[43] *King Sabata Dalindyebo Municipality v CCMA & Others* (2005) 26 *ILJ* 474 (LC).

[44] *Ferrant v Key Delta* (1993) 14 *ILJ* 464 (IC).

Wolfaardt[45] the court favoured an objective test. The court must find that the employer created an impression that the contract of employment would be renewed. The terms of the contract were held not to be decisive: the court stated that a reasonable expectation of renewal could exist even where a written contract expressly stipulates that the employee acknowledges that there is no expectation of renewal.[46] The Labour Appeal Court, however, held that because the terms of the contract are clear, the onus on the employee will be heavier to provide objective evidence that gives rise to the alleged expectation.[47] On the facts, none of the employees could do so.

In addition, where there is an express term in a fixed-term contract of employment to the effect that the worker entertains no expectation of renewal, this does not guarantee that no legitimate expectation in terms of section 186(1) *(b)* can be found to exist.[48] In *Yebe v University of KwaZulu-Natal*[49] a worker's fixed-term contract was renewed 20 times over a period of approximately four-and-a-half years, using 28 fixed-term employment contracts, while the permanent post that he could have filled remained vacant for five years. The worker rendered the same services as two permanent employees on the same campus would have done during that period. During this period the worker also successfully upgraded his skills by completing various courses at the University of KwaZulu-Natal. The court held that this was a clear example of the series of renewals creating a reasonable expectation that the employment relationship would be renewed. Consequently, the court found that the employer's failure to renew the employment relationship was an unfair dismissal.

Vettori is also of the view that the phrase 'on the same or similar terms' was given a literal interpretation in *Dierks v University of South Africa*,[50] with the result that a reasonable expectation in terms of section 186(1)*(b)* of the LRA could never include an 'expectation of permanent employment'.[51] The court held that an entitlement to permanent employment cannot be based simply on the reasonable expectation in terms of section 186(1)*(b)*. An applicant cannot rely on an interpretation by implication or 'common sense'. This would need a specific statutory provision to that effect.[52]

[45] *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA).

[46] *NUMSA v Buthelezi & Others v LTR Appointment CC* (2005) 9 BALR 919 (MEIBC); *Brown v Reid Educational Trust* (2006) BALR 605 (CCMA).

[47] *SA Rugby Players' Associations (SARPAR) & Others v SA Rugby (Pty) Ltd & Others*; *SA Rugby (Pty) Ltd v SARPU & Another* [2008] 9 BLLR 845 (LAC) para 46 (*SARPAR*).

[48] *NUMSA v Buthelezi & Others v LTR Appointment* CC (2005) 9 BALR 919 (MEIBC); *Brown v Reid Educational Trust* (2006) BALR 605 (CCMA); *Yebe v University of KwaZulu-Natal* (2007) 28 *ILJ* 490 (CCMA) (*Yebe*).

[49] *Yebe* (n 48).

[50] *Dierks* (n 28).

[51] Ibid.

[52] Ibid.

However, the relevant principles were summarised by an arbitrator in a dispute involving members of the South African rugby squad. In *SA Rugby (Pty) Ltd & Others v CCMA*[53] three members of the squad claimed unfair dismissal after having been told that their fixed-term contracts would not be renewed. The arbitrator confirmed that the existence of any reasonable expectation had to be objectively determined. In this case the coach engaged the players in discussions regarding their future, and the players argued that they were entitled to rely on the expectation he had created. South African Rugby argued that the contractual terms were definitive – in this case it was specifically stated that the contract was for a fixed term and that there should be no expectation of renewal.

The Labour Court in *SA Rugby* held that for an employee to establish a reasonable expectation of renewal of a contract for the purposes of section 186(1) *(b)*, the employee is required to establish at least the following:

1. a subjective expectation that the employer would renew the fixed-term contract on the same or similar terms;
2. that the expectation was reasonable; and
3. that the employer did not renew the contract or offered to renew it on less favourable terms.[54]

The following objective factors are relevant to the reasonableness of the expectation:

1. the terms of the contract;
2. any past practice of renewal;
3. the nature of the employment and the reason for concluding the contract for a fixed term;
4. any assurance that the contract would be renewed (in other words, any undertakings given by the employer); and
5. any failure to give reasonable notice of non-renewal of the contract.[55]

There was debate as to whether an expectation of renewal extends to an expectation of permanent employment. In other words, must an employee's expectation be based on the further renewal of a fixed-term contract, or is it sufficient that there is an expectation of appointment to a permanent position with the same employer? Does the refusal of permanent employment constitute a dismissal? In *Dierks v University of South Africa*[56] a university lecturer engaged under a series of fixed-term contracts argued that he had a reasonable expectation of appointment to a permanent post when a vacancy became available. The Labour Court held that an employee could not rely on section 186(1)*(b)* in these circumstances.

[53] *SA Rugby (Pty) Ltd & Others v CCMA* [2006] 1 BLLR 27 (LC) (*SA Rugby*).
[54] Ibid.
[55] Ibid.
[56] *Dierks* (n 28).

Oosthuizen J held that 'reasonable expectation' as expressed in section 186(1)*(b)* is not defined by the Act but its meaning includes the following considerations:

> It essentially is an equity criterion, ensuring relief to a party on the basis of fairness in circumstances where the strict principles of the law would not foresee a remedy. The expectation is essentially of a substantive nature, vesting in the person of the employee. It is not required that the expectation has to be shared by the employer.[57]

However, counsel for the respondent contended that the courts had to apply an objective test as to whether the applicant's employment had indeed become permanent, and whether he could reasonably expect continued employment.[58] The Labour Court reached a different conclusion in *McInnes v Technikon Natal*[59] where a lecturer was found to have had a reasonable expectation of permanent employment. In this matter, the Labour Court held that the ruling in the *Dierks* case was clearly wrong,[60] and disagreed with the literal interpretation applied in the case. The court held that an expectation in terms of section 186(1)*(b)* can lead to an expectation of permanent employment. It was of the view that section 186(1)*(b)* clearly seeks to deal with the circumstances where an employer has failed to renew a fixed-term employment contract when it was reasonably expected that it would be renewed. Further, the employer created this expectation which now gave the worker the protection afforded by this section.[61]

In *Auf der Heyde v University of Cape Town*[62] the meaning of a reasonable expectation was confirmed. In this case the court addressed the issue of a dismissal in terms of section 186(1)*(b)* based on the employer's refusal to renew the applicant's fixed-term contract or to appoint him to an indefinite position for which he had applied. The court incorrectly adopted the approach followed in *Dierks*, stating that the applicant had a reasonable expectation that his contract would be renewed (albeit not through a series of fixed-term contracts between the same employee and employer) and, therefore, held that the applicant had been dismissed.

These conflicting approaches have now been resolved following the 2014 amendment to section 186 in terms of which the refusal to retain an employee on an indefinite basis, or an offer to retain him or her on less favourable terms, both

[57] Ibid.

[58] Ibid.

[59] *McInnes v Technikon Natal* (2000) 21 *ILJ* 1138 (LC) 1143B–F.

[60] The Labour Appeal Court passed up an opportunity to decide the point in *University of Cape Town v Auf v der Heyde* [2001] 12 BLLR 1316 (LAC), where the judgment on appeal had upheld the ruling in *Dierks* (n 28). In *Yebe* (n 48) the arbitrator followed the approach adopted in the *Technikon Natal* (n 59) decision.

[61] *McInnes v Technikon Natal* (2000) 21 *ILJ* 1138 (LC) 1143B–F.

[62] *Auf der Heyde v University of Cape Town* (2000) 21 *ILJ* 1758 (LC).

constitute a dismissal. In *Seforo v Brinant Security Services*[63] it was held that where the employee continued working after the expiry of the fixed-term contract, this would be assumed to constitute a tacit renewal of the contract of employment on a permanent basis.

Previously, in cases where an employee continued to offer services after the termination of a fixed-term contract of employment, the contract sometimes was deemed to have been tacitly renewed, and such renewal was generally accepted to be on the same terms but for an indefinite period.[64] However, this is not an absolute principle. In some instances the facts of the particular matter may indicate that no such tacit agreement existed.[65]

Cheadle states that 'rather than intensifying regulation in favour of those who least need it, labour law should be setting its sights on the extension of protection to those who most need it'.[66] The LRAA has clarified, to some extent, whether workers on fixed-term contracts can claim to have been dismissed if they reasonably expected permanent employment.

Furthermore, with regard to the definition of 'dismissal', the LRA has been broadened to include a situation where a worker employed under a fixed-term contract of employment reasonably expects to be retained on an indefinite or permanent contract of employment, but the employer fails to offer such employment.[67] Before the 2014 amendments, the most that a worker could hope for was a renewal of the fixed-term contract on the same or similar terms. Where the employee is able to prove a reasonable expectation of renewal on a permanent or indefinite basis, the employee may now be appointed permanently. There must be an expectation that is reasonable before a right to renewal or indefinite employment will be created. The amendment, therefore, introduces an expectation of permanent or indefinite employment – something that was missing in the 1995 LRA. This undoubtedly will also be a notable deterrent to those employers who employ temporary workers directly.

[63] *Seforo v Brinant Security Services (*2006) 27 *ILJ* 855 (CCMA).

[64] *National Education Health and Allied Workers Union obo Tati and SA Local Government Association* (2008) 29 *ILJ* 1777 (CCMA).

[65] *Owen & Others v Department of Health, Kwazulu-Natal* (2009) 30 *ILJ* 2461 (LC) 2466: 'The approach … ie that a tacit renewal of the contract on the same terms but for an employment relationship of indefinite duration, is commendable at the level of principles but each case is fact and context specific and the application of principle must account for this … This is a factual inquiry to be determined on the evidence before the court.'

[66] H Cheadle 'Regulated flexibility: Revisiting the LRA and the BCEA' *(*2006) 27 ILJ 663.

[67] Section 186 of the LRA.

(2) *Remedies for failure to renew a fixed-term contract*

When one deals with remedies, regard must be had to sections 193 and 194 of the LRA. In terms of section 193(1), if a judge or an arbitrator finds a dismissal to be unfair, the judge or an arbitrator may order the employer to (a) reinstate the employee, or (b) re-employ the employee, or (c) pay the employee compensation. In terms of section 194 of the LRA, the award for compensation cannot exceed 12 months' salary unless the dismissal is automatically unfair.

(3) *Global recommendation on the employment relationship*

The ILO has adopted the Employment Relations Recommendation,[68] which seeks to provide member states with guidance on how to establish the existence of the employment relationship. The recommendation deals particularly with what it terms 'disguised employment', or agreements that are cast in terms that, on the face of it, establish a relationship other than employment.

Recommendation 197 provides that member states should clearly define in their national law and practice which workers are to be covered and protected by labour laws.[69] It encourages members to define the concept of an employment relationship rather than the contract of employment.[70]

Recommendation 197 also suggests that member states should consider adopting specific indicators of the existence of an employment relationship, and should ideally provide in their domestic legislation for a statutory presumption that an employment relationship exists when one or more of the following indicators is present: the work is carried out under the instruction and control of another party; the worker is integrated into the organisation of the enterprise; the work is to be done mainly for the benefit of the other party; the work is carried out personally by the worker; the work is performed within specified working hours; and the work requires the provision of materials, machinery, and tools by the party who requests the work to be done.[71] It will become apparent that South African labour legislation to a large extent has incorporated the provisions of Recommendation 197.

(4) *The South African Constitution and non-standard employment*

The Constitution of the Republic of South Africa, 1996 created a society where 'everyone' is equally protected by the law, and the Constitution was adopted

[68] Employment Relations Recommendation 198 of 2006.
[69] Article 1 of Recommendation 198 of 2006.
[70] C Bosch and R Christie 'Are sex workers employees?' (2007) 28 *ILJ* 804.
[71] Article 9 of Recommendation 197 of 2006.

to improve the quality of life of all citizens, among other objectives.[72] The aim of the Constitution is to transform our society by healing the divisions of the past and establishing a future society based on democratic values, social justice, and fundamental rights.[73] As Klare states, the South African Constitution is a 'transformative constitution'.[74] Klare described this as:

> a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.

Labour developments in South Africa have been characterised by strikes, battles for wage increases, racism, discrimination, unionisation, representation issues, and social security concerns for workers. In 1994 one of the first legislative initiatives approved by Cabinet after the election was the revision of the 1956 Act. Cheadle was appointed chairperson of a task team to provide the blueprint for a new Act. This transition led to the inclusion of labour rights in the Constitution.

This ultimately led to a solid base for any debate concerning the role of labour law in an increasingly changing world of work. This has taken into consideration the ILO's goal of ensuring decent work for every worker irrespective of his or her status. Nevertheless, whether labour law still has the ability to achieve this in the midst of remarkable challenges, such as the growing levels of non-standard employment, is a different discussion. Remarkably, the main aim of labour law echoes South Africa's transformative constitutionalism agenda. According to Kahn-Freund, labour law is traditionally concerned with social power and, therefore, it is destined to serve as 'a countervailing force' to address the skewed and ever-skewing power relations between employers and employees.[75] Thus, labour law functions as an intervening instrument in markets to attain justice that would otherwise be unattainable were the labour markets to remain unregulated.[76]

[72] The Preamble to the Constitution of the Republic of South Africa, 1996, provides: 'We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to ... Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law … Improve the quality of life of all citizens.'

[73] See the Preamble to the Constitution.

[74] See K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *SAJHR* 150; P Langa 'Transformative constitutionalism' (2006) 17 *Stell LR* 351; AJ van der Walt 'A South African reading of Frank Michelman's theory of social justice' (2004) 19 *SA Public Law* 253.

[75] Kahn-Freund (n 5) 8.

[76] A Hyde 'What is labour law?' in G Davidov and B Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) 37–61; E Kalula 'Beyond borrowing and bending: Labour market regulation and the future

A discussion of the labour relations context in South Africa will not be complete without underscoring the watershed constitutional changes that gave effect to the recognition of labour rights, their protection and their implementation.

(5) *The constitutional right to a fair labour practice*

While there is no definition of 'labour practice' in the LRA, it is required, at least, that the practice must emerge within the employment relationship. Accordingly, protection does not extend to independent contractors. A labour practice relates to unfair conduct – either act or omission. The fact that there must be an act or omission further suggests that the conduct must have actually happened (either as an act or an omission) and not merely be expected in the future.[77] Importantly, the labour practice must in some way refer to the specific types of conduct that the Act has designated as unfair labour practices in section 186(2) of the LRA.

III LIMITS AND CONTENT OF SECTION 186(2) OF THE LRA

The definition in section 186(2) of the LRA requires the existence of a labour practice between an employer and an employee, and that the conduct (act or omission) is unfair. The particular unfair labour practices in subparagraphs *(a)* to *(d)* of section 186(2) must take place throughout the currency of employment.[78] Unlike in the Employment Equity Act 55 of 1998 (EEA), the definition of 'employee' does not extend to applicants for employment.[79] When an employee is applying for a job, usually when seeking promotion with the existing employer, the circumstances may be more complicated.

However, the South African Constitution has a safety net which is broad enough to cover non-standard workers as will be shown by examining certain constitutional provisions. Section 23(1) of the Constitution of the Republic of South Africa, 1996 provides that 'everyone' has a right to fair labour practices. Although some non-standard workers enjoy protection in terms of labour legislation, many of these non-standard employees may still not qualify as employees in terms of the legislation and, therefore, fall beyond the net of protection. These non-standard workers can conceivably turn to the constitutional right to fair labour practices.

To begin with, section 23 of the Constitution provides an inclusive framework for the protection of employees' labour rights. It guarantees every

of labour law in Southern Africa' in C Barnard, S Deakin and G Morris (eds) *The Future of Labour Law* (2004) 275–289; B Hepple 'The future of labour law' (1995) 24 *Industrial Law Journal* 303.

[77] A van Niekerk *et al Law@Work* (n 26) 200–201.

[78] Former employees are covered for the purpose of that paragraph as indicated in s 186(2)*(c)* of the LRA.

[79] Section 9 of the EEA.

employee protection against unfair labour practices. It is important to examine the meaning of 'everyone' as this has given rise to a discussion as to whether it has extended the scope of the right beyond the employment relationship. Cheadle argues that the emphasis ought to be placed on the words 'labour practices' rather than 'everyone':

> Although the right to fair labour practices in subsection (1) appears to be accorded to everyone, the boundaries of the right are circumscribed by the reference in sub-section (1) to 'labour practices'. The focus of enquiry into its ambit should not be on the use of 'everyone' but on the reference 'labour practices'. Labour practices are the practices that arise from the relationship between workers, employers and their respective organisations. Accordingly, the right to fair labour practices ought to be read as extending the class of persons beyond those classes envisaged by the section as a whole.[80]

The reference to 'everyone' extends to employers. In *NEHAWU v University of Cape Town & Others*[81] the Constitutional Court held that fairness must be applied to both employees and employers. Ngcobo J held:

> Where the rights in the section are guaranteed to workers or employers or trade unions or employers' organisations, as the case may be, the Constitution says so explicitly. If the rights in section 23(1) were to be guaranteed to workers only the Constitution should have said so. The basic flaw in the applicant's submission is that it assumes that all employers are juristic persons. That is not so. In addition, section 23(1) must apply to all employees or none.

This section gives an employee an inalienable right to fair labour practices and is increasingly important in labour legislation.[82] While the exact content of this right has not been accurately defined,[83] it can be used broadly and applies to both standard and non-standard workers in order to protect their legitimate concerns.[84]

The changing world of work has resulted in an increasing number of 'non-standard workers'.[85] The high levels of unemployment and poverty in South Africa have led ordinary South Africans to engage in all types of unprotected employment that fall outside the orthodox forms of employment. These workers need some form of protection.

[80] H Cheadle 'Labour relations' in H Cheadle, D Davis and N Haysom *South African Constitutional Law: The Bill of Rights* (2005) 18-3.

[81] *National Union of Health and Allied Workers v University of Cape Town & Others* (2003) 24 *ILJ* 95 (CC) (*NEHAWU v UCT*).

[82] R le Roux 'The new unfair labour practice: The High Court revives the possibility of a wide concept of unfair labour practice' (2002) *Contemporary Labour Law* 91.

[83] *NEHAWU v UCT* (n 81).

[84] In fact, this right can even be used to protect employer interests. See *NEHAWU v UCT* (n 81).

[85] C Thompson 'The changing nature of employment' (2003) 24 *ILJ* 1793; E Webster 'Making a living, earning a living: Work and employment in Southern Africa' (2005) 26 *International Political Review* 55.

The Department of Labour and the legislature are conscious of this fact.[86] This recognition led to the 2002 amendments to the LRA, which stated that a person will be presumed to be an employee if one of the conditions in section 200A is met.[87] This amendment is also included in the BCEA.[88] The Minister of Labour may broaden the provisions of BCEA to cover persons who do not meet the requirements of the definition of employees in terms of the legislation.[89]

Nevertheless, the legislature's attempt to broaden the safety net of protection to non-standard workers has not been entirely effective. The administrative power of the Minister of Labour to widen the safety net of protection provided for in terms of the BCEA has never been used, and this has been ascribed to a 'lack of capacity within the Department of Labour'.[90] Furthermore, the courts' orthodox approach to defining an employee has also been described as 'unimaginative' with the result that there is a certain degree of lack of protection for a 'significant proportion of the workforce'.[91]

The criteria that are depended upon to arrive at the presumption that someone is an employee are premised on the 'traditional tests' applied by the courts. In light of this, the criticism[92] of the courts' approach to determining who qualifies as an employee also applies to the 2002 amendments to the LRA.[93] In a nutshell, therefore, some non-standard workers find themselves in circumstances that make it difficult to benefit from the protection afforded in terms of the LRA, the BCEA and other labour legislation in South Africa. After collecting and examining all the data available in South Africa, Theron[94] concludes:

> The extent and effects of the processes of casualisation, externalisation and informalisation cannot be measured quantitatively at this stage, nor is it realistic to expect to be able to do so. Yet the quantitative indicators are consistent with what is described in qualitative studies and trends that are well established in both developed and developing countries. It does not seem that there is any basis to argue that South Africa is an exception to these trends.

[86] In the Department of Labour *Green Paper: Policy Proposals for a New Employment Statute* (n 6) the legislature expressed itself as follows: 'The current labour market has many forms of employment relationships that differ from full-time employment. These include part-time employees, temporary employees, employees supplied by employment agencies, casual employees, home workers and workers engaged under a range of contracting relationships. They are usually described as non-standard or atypical. Most of these employees are particularly vulnerable to exploitation because they are unskilled or work in sectors with little or no trade union organisation or little or no coverage by collective bargaining.'

[87] Section 200A. This presumption will operate only where an employee earns less than approximately R205 433,30 per annum.

[88] Section 83A of the LRA

[89] Section 83(1) of the LRA.

[90] P Benjamin 'Who needs labour law? Defining the scope of labour protection' in J Conaghan, RM Fishl and K Klare (eds) *Labour Law in an Era of Globalisation* (2000) 91.

[91] Ibid.

[92] M Brassey 'The nature of employment' (1990) 11 *ILJ* 528.

[93] Section 200A of the LRA.

[94] Ibid.

Even though numerous non-standard workers benefit from the protection afforded in terms of labour legislation,[95] some of them may still not meet the requirements of the definition of employees in the legislation. As a result, they do not enjoy protection in terms of these Acts. These non-standard workers can perhaps turn to section 23(1) of the Constitution for protection against unscrupulous employers. Non-standard workers who are specifically denied access to the legislation[96] may also possibly turn to section 23(1) of the Constitution for relief.

Section 23 of the Constitution was crafted to safeguard the dignity of all employees and to advance the principles of social justice, fairness, and respect for all,[97] including non-standard workers. Section 23(1) of the Constitution provides that 'everyone has the right to fair labour practices'. The word 'everyone' follows the wording of section 7(1) of the Constitution, which stipulates that the Bill of Rights enshrines the rights of all people in the country. This argues in favour of wide application.[98] There are no internal restrictions to section 23 of the Constitution, save that it applies to an employment relationship or a relationship seen as 'akin to an employment relationship'.[99] Accordingly, the right to fair labour practices applies even in the absence of a contract of employment.[100] Even if the work that an employee does is illegal, he or she has the right to fair labour practices.[101] As a result, this fundamental right applies to fixed-term workers who form part of the vulnerable group of non-standard workers.

It is worth noting that the phrase 'unfair labour practice' is also not defined in the Constitution.[102] In the words of Vettori, unfairness implies a failure to meet an objective standard.[103] It may be considered to include arbitrary, capricious or inconsistent conduct, whether negligent or deliberate.[104] In *NEWU v CCMA*[105] the Labour Court reflected on the scope of 'fair labour practices' as viewed in section 23 of the Constitution, and found that labour practices should be both lawful and fair. However, 'lawful' and 'fair' are also undefined concepts. In the

[95] Section 200A of the LRA and s 83A of the BCEA.

[96] Section 2 of the LRA provides that it is not applicable to members of the National Defence Force, the National Intelligence Agency and the South African Secret Service.

[97] *NEHAWU v UCT* (n 81) paras 33–40.

[98] R le Roux 'The meaning of "worker" and the road towards diversification: Reflecting on *Discovery*, *SITA* and "*Kylie*"' (2009) 30 *ILJ* 49. See also *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 111 and *'Kylie' v CCMA & Others* (2010) 31 *ILJ* 1600 (LAC) paras 16 and 22.

[99] S Vettori *The Employment Contract and the Changed World of Work* (2007) 162; Cheadle (n 66) 663–704 and *SANDU v Minister of Defence* 1999 (20) *ILJ* 2265 (CC) paras 28–30.

[100] *Discovery Health v CCMA* (2008) 29 *ILJ* 1480 (LC) 1489. See also *Rumbles v Kwa-Bat Marketing* (2003) 24 *ILJ* 1587 (LC) and *'Kylie' v CCMA & Others* (2010) 31 *ILJ* 1600 (LAC) para 22.

[101] Le Roux (n 98) 49, 58.

[102] *NEHAWU v UCT* (n 81) 19. See also *Komane v Fedsure Life* [1998] 2 BLLR 215 (CCMA) 219. The word 'fair' is defined in the *Concise Oxford Dictionary* as 'just, unbiased, equitable'.

[103] S Vettori *The Extension of Labour Law Protection to Atypical Employees in South Africa and the UK* (2007).

[104] D du Toit *et al* (eds) *The Labour Relations Act of 1995: A Comprehensive Guide* (2003) 443.

[105] *NEWU v CCMA & Others* [2004] 2 BLLR 165 (LC) 167 (*NEWU v CCMA*).

court's view, the flexibility conferred by the term was intentional in order to guarantee equitable protection to both employers and employees.[106]

In *Nakin v MEC, Department of Education, Eastern Cape Province & Another*[107] the court held that the coherence of labour law jurisprudence is determined by the degree to which it expresses the constitutional right to fair labour practices. Therefore, social justice must remain a precondition for creating a resilient economy. The regulatory framework should provide legal certainty. It should also abolish inequitable practices that are contrary to the constitutional mandate. The interpretation and application of legislation that protects the right to fair labour practices, which encapsulates the right not to be unfairly dismissed, is a constitutional matter.[108] It is the court's duty to safeguard employees who are particularly vulnerable to exploitation because they are inherently economically and socially weaker than their employers.[109]

Furthermore, in *NEHAWU v University of Cape Town*[110] the Constitutional Court noted that the content of the term 'fair labour practice' depends upon the circumstances of a particular case, and essentially involves making a value judgment. The legislature intended the term to gain meaning through decisions of the Labour Court and the Labour Appeal Court. The Constitutional Court emphasised that section 23(1) of the Constitution is primarily aimed at securing the continuation of the employment relationship on terms that are fair to both the employer and the employee.[111] Herein rests the right of the employer to exercise business prerogative.[112]

Employers enjoy the right to organise their work operations in a way that they find most suitable to achieve their operational objectives.[113] Employers are permitted to decide what posts to create and who should be appointed or promoted.[114] Since the Bill of Rights is capable of horizontal application,[115] it necessitates a weighing up of rights by the courts. A balance needs to be struck between protecting the personal interests of employees, and the right of

[106] *NEWU v CCMA* (n 105) See also M Brassey 'Labour relations' in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1999) 30–3.

[107] *Nakin v MEC, Department of Education, Eastern Cape Province & Another* [2008] 2 All SA 559 (Ck) para 30.

[108] H Bhorat and H Cheadle *Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions* (2009) 9.

[109] *'Kylie' v CCMA* (n 98) paras 29, 41, 43 and 52.

[110] *NEHAWU v UCT* (n 81).

[111] *NEHAWU v UCT* (n 81) para 40. See also *'Kylie' v CCMA & Others* (2010) 31 *ILJ* 1600 (LAC) para 21.

[112] *Wood v Nestlé SA (Pty) Ltd* (1996) 17 *ILJ* 184 (IC) 185F–I, 189D–F, 190I–191B and 191D.

[113] EML Strydom 'The origin, nature and ambit of employer prerogative (Part 1)' (1998) 11 *SA Merc LJ* 40; *George v Liberty Life Association of Africa* (1996) 17 *ILJ* 571 (IC).

[114] J Grogan *Employment Rights* (2010) 107.

[115] *NEWU v CCMA & Others* [2004] 2 BLLR 165 (LC) 2339.

employers to exercise their business prerogative without judicial interference.[116] Currently there is no legislative provision specifically subjecting an employer's hiring and promotion decisions to judicial scrutiny. This prerogative is restricted only by the prohibition against unfair discrimination and by the fundamental right to labour practices.[117]

Because the right to fair labour practices in the Constitution does not apply to employees alone, it is necessary to weigh up the rights of employers against the rights of employees. A balance must be struck between the rights of fixed-term workers and employers' rights to autonomy and business prerogative.[118]

Job security and income security ensure that workers and their dependants have greater certainty and security. The protection of job security, however, is not absolute. Employers should be able to terminate the employment relationship under certain circumstances, while workers should be provided with protection against arbitrary dismissal.[119] Presiding officers appear to accept that employers should have the freedom to establish workplace rules. An enquiry into the fairness of employer conduct rarely interferes with employers' prerogative.[120] Labour forums will not interfere in management's decisions unless it is proven that an employer acted unreasonably or unfairly.[121] The intention was that the legislature could, in terms of the unfair labour practice provision, regulate employer conduct by superimposing a duty of fairness. The mere existence of discretion does not in itself deprive the CCMA of jurisdiction to scrutinise employer conduct.[122]

What must be assessed in such a case is whether or not the court should exercise its discretion in favour of the employee in the particular circumstances based on how the employer exercised its business prerogative.[123] Presiding officers should

[116] Achieving fairness in labour relations means balancing the respective interests of employers and employees. See S Vettori 'Constructive dismissal and repudiation of contract: What must be proved?' (2011) 22 *Stell LR* 173, 174; *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (2006) 27 *ILJ* 1644 (LC) 1646.

[117] Sections 9(4) and 7(2), read with ss 9(1) and (2) of the Constitution. See also s 195 of the LRA, and ss 42–45 read with s 50(1)*(g)* and Schedule 1 of the EEA.

[118] P Benjamin and C Gruen *The Regulatory Efficiency of the CCMA: A Statistical Analysis* 6, accessible at https://open.uct.ac.za/bitstream/handle/11427/7351/DPRU_WP06-110.pdf?sequence=1&isAllowed=y (accessed on 16 November 2020); *NEHAWU v UCT* (n 81) paras 40–41.

[119] E Yemin *The Protection of Security of Employment – An International Perspective in Collective Bargaining and Security of Employment in Africa: English Speaking Countries* (1993) 114–115.

[120] *Goliath v Medscheme (Pty) Ltd* [1996] 5 BLLR 603 (IC) para 4.2. See also the dissenting judgment by Conradie J in *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon* [2000] 1 BLLR 1 (LAC) para 71 and Zondo JP's remarks in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & Others* [2001] 9 BLLR 1011, 1024 and 1029A.

[121] *Woolworths (Pty) Ltd v Whitehead* (2000) 21 *ILJ* (LAC) paras 23–24.

[122] *Apollo Tyres South Africa (Pty) Ltd v CCMA & Others* [2013] 5 BLLR 434 (LAC) para 45.

[123] Cheadle (n 66) 663–704.

not have an unfettered discretion to rule that employers' actions are unfair, as this would result in excessive intrusion into the business prerogative.[124]

The courts will scrutinise the process by which employers reach their decisions. Failure to follow policies and procedure could result in the procedure being declared unfair.[125] The scope of the duty to act fairly depends on several factors, including the nature of the decision, the relationship between the persons involved, and established procedures and practices.[126]

The scope of the constitutional right to fair labour practices is wide enough to include the right of fixed-term workers to basic minimum conditions outside the auspices of the legislative protection against unfair labour practices. The right to fair labour practices as set out in section 23 of the Constitution also encompasses the right not to be unfairly dismissed.[127]

Fixed-term workers enjoy the right to fair labour practices and the right not to be unfairly dismissed. However, there is a difference between fixed-term workers and indefinite employees insofar as the unfair dismissal mechanism is concerned. This difference makes it more difficult for fixed-term workers to enforce their right to fair labour practices. Accordingly, it is suggested that this clearly is a constitutional predicament which must be addressed.

Further, section 23(1) may arguably also be used for assistance where the alleged unfair labour practice does not fall within the definition of an unfair labour practice under section 186(2) of the LRA. Section 23(1) will also have an effect on how individual contracts of employment are interpreted by the South African courts. Contracts or provisions in contracts that are against the spirit of the Constitution or that hinder or constrain fundamental rights guaranteed in the Constitution, may be nullified.[128] Taking into consideration the global trend towards the individualisation of employment contracts, section 23 can play a very significant role in redressing the imbalance of power between employers and employees.[129] Section 23(1) is available to all employees, including fixed-term workers and permanent employees.[130]

In some sectors of the economy non-standard workers are predominantly female, black, and unskilled,[131] and by denying them access to labour law protection, a

[124] *Grogan* (n 114) 97.

[125] For instance, *Gordon v Department of Health: KwaZulu-Natal* (2008) 29 *ILJ* 2535 (SCA) paras 22–23 and 29.

[126] *Lloyd & Others v McMahon* [1987] 1 All ER 1118 (HL) 1170F–G.

[127] In *NEHAWU v UCT* (n 81) paras 41–43 it was held that the right to be protected against unfair dismissal is firmly entrenched in the right to fair labour practices.

[128] AC Basson 'Labour law and the Constitution' 1994 *THRHR* 502.

[129] Kahn-Freund (n 5) 6.

[130] Cheadle (n 66) 663–704.

[131] See, eg, homeworkers in the retail sector.

certain category of people is adversely affected. Non-standard workers who are denied labour law protection can turn to the Constitution for protection.

The Constitution demands the application of international law when interpreting South African legislation and, in particular, the Bill of Rights. Section 233 of the Constitution regulates the application of international law, stating that '[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'.

Ultimately, the Bill of Rights must be interpreted in accordance with the particular injunction contained in section 39(1) of the Constitution, which places an obvious premium on the value of international law in relation to the interpretation of the Bill of Rights: a court may have regard to comparable foreign case law, but must have regard to public international law.[132] The Constitutional Court has affirmed that section 39(1) requires that both instruments that are binding on South Africa and those to which South Africa is not a party should be used as tools of interpretation. In *S v Makwanyane*[133] the ILO reports were specifically recognised as important sources of international law for purposes of section 39(1).

Furthermore, section 39(2) of the Constitution reflects on the courts' obligation to develop common law principles and promote the spirit and objectives of the Bill of Rights in the interpretation of legislation. In addition, the broad terms used in section 23(1) of the Constitution in describing not only the rights accorded, but also the beneficiaries of the right to fair labour practices (namely 'everyone' and 'workers') have prompted the suggestion that a wide interpretation of the definition of these words is possible. Furthermore, if such an extensive interpretation were to be accepted, it would lay the foundation for the possibility of the Constitutional Court finding the exclusion of some employees from labour legislation to be unconstitutional.[134] With regard to the interpretation of the Bill of Rights, section 39(1)*(a)* provides that when interpreting the Bill of Rights, a court, tribunal or forum 'must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.[135] Section 39 of the Constitution, therefore, is very relevant to the protection of non-standard employees. Section 39(2) states further that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

[132] For a discussion of the statutory interpretation with reference to human rights, see J Dugard *International Law: A South African Perspective* (2005) 454–495.

[133] *S v Makwanyane* 1995 (3) SA 391 (CC).

[134] J Conaghan, RM Fischl and K Klare (eds) *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* (2000) 79–80.

[135] Ibid.

Given the large number of non-standard workers who are excluded from labour protection, a broad interpretation of the word 'everyone' in section 23(1) of the Constitution may be necessary to cover a broad range of non-standard workers. Furthermore, a wide interpretation of section 23(1) of the Constitution will also promote human dignity, equality, freedom, and the spirit, purport and objects of the Bill of Rights, as required by section 39(1) and (2) of the Constitution.

In the first case,[136] in which a constitutional challenge was brought in terms of section 23 of the Constitution,[137] the Constitutional Court referred to ILO standards. At issue was the constitutionality of a provision of the Defence Act[138] which prohibited members of the permanent military force from forming and joining trade unions. It was argued by the defence force that members of the military enlist in the armed forces and that, in the absence of a contract of employment as ordinarily understood between them and the defence force, they were not 'workers' for the purpose of section 23 of the Constitution.

In its consideration of the meaning of 'worker' in section 23(2) of the Constitution, the court specifically referred to article 2 of Convention 87 and, in particular, to its provision that workers and employers, without distinction, have the right to establish and join organisations of their choosing without previous authorisation. The court also referred to article 9 of the convention, which extends these guarantees to the armed forces and the police to the extent determined by national laws and regulations. On this basis, and having regard to the parallel provisions of Convention 98, the court concluded that the convention included armed forces within its scope, and that the ILO therefore had specifically considered members of the armed forces to be workers for the purposes of the convention. Although members of the armed forces did not in the strict sense have an employment relationship with the defence force, they nevertheless qualified as workers. The court struck down the statutory prohibition on union activity and membership in the defence force as unconstitutional. This demonstrates that non-standard workers indeed can use the broad constitutional protection provided by section 39 of the Constitution.

Cheadle notes that the concept of regulated flexibility may be put to good use in extending protection to those who most need it.[139] In addition, equity in the workplace optimises equal access to employment opportunities for every worker.

[136] *SA National Union v Minister of Defence & Another* (1999) 20 *ILJ* 2265 (CC).
[137] Section 23 of the Constitution establishes labour rights as fundamental rights.
[138] Defence Act 44 of 1957.
[139] Cheadle (n 66) 663–704.

All employers must act in accordance with section 5 of the EEA to ensure equal opportunities for every worker.[140]

The fact that recent South African case law[141] emphasises the employment relationship as opposed to the existence of a valid contract of employment provides some room for optimism about the extension of the concept of statutory employees. The scope of the broadly-worded right to fair labour practices that is available to 'everyone' in the Constitution has the potential to be of great relevance not only in the development of rights for employers and employees, but also for the development of rights applicable to certain non-standard workers.

IV CONCLUSION

The preceding discussion has presented a holistic perspective of the interpretation of section 186(1)*(b)* of the LRA and, in particular, the different positions taken by the courts before the LRA was amended. The article viewed developments in context and explained the underlying purpose of the drafters of the LRA with regard to section 186(1)*(b)* of the LRA.

South Africa has been a very unequal society from colonialism to apartheid. The legislators continue to take meaningful steps to undo the inequalities and prevent unscrupulous employers from keeping all their workers permanently on fixed-term contracts and terminating these contracts at will without following fair procedure and providing adequate reasons. Thus, the amendment of the LRA, which introduces a new ground in terms of which a worker may challenge the termination of a contract of employment where he or she reasonably expects the employer to retain him or her 'on an indefinite basis on the same or similar terms as the fixed-term contract', has brought some certainty to the interpretation of section 186(1)*(b)* of the LRA.

The concept of legitimate expectation or reasonable expectation was explained in this article – its origins in England, the application of natural justice, and how it was adopted in South Africa's administrative law.

Furthermore, this article also acknowledges the international standards and the substantive notion of equality which has been built into the Constitution, and which prohibits inequality in the workplace. With the 2014 amendment to the LRA, South African workers, particularly non-standard workers, are now protected by legislation that confirms the transformative vision that lies at the heart of the South African Bill of Rights, as well as the decent work agenda of the ILO. Non-standard workers may also turn to section 9 of the

[140] SB Gericke 'A new look at the old problem of a reasonable expectation: The reasonableness of repeated renewals of fixed-term contracts of employment' (2011) 14 *PER/PEL* 234.

[141] *Rumbles v Kwa-Bat Marketing* (2003) 24 *ILJ* 1587 (LC); *SABC v McKenzie* [1999] 1 BLLR 1 (LAC).

Constitution (the right to equality), section 23 of the Constitution (the right to fair labour practices) and section 39(2) of the Constitution, which states that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

An investigation of non-standard workers in South Africa illustrates that most of them are those who suffered under the apartheid regime: women, black Africans and unskilled workers.[142] The denial of labour and social protection to these workers may be regarded as a form of discrimination. The Constitution grants everyone the right to equality[143] and the right to inherent dignity and respect.[144] Therefore, it is crucial that further solutions be found to assist vulnerable non-standard workers.

[142] See ES Fourie 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 11 *PER/PELJ* 1.

[143] Section 9 of the Constitution.

[144] Section 10 of the Constitution.

CHAPTER 15

'No-fault' dismissal: An appraisal of the historical role of the International Labour Organization in reforming South African law

DAVY RAMMILA* AND MARIUS VAN STADEN**

South African labour legislation provides a wide range of legal protection to employees who are subject to dismissal, requiring that certain thresholds of fairness be met. Prior to the current legislative scheme, however, employees were employed on terms contained in their contracts of employment in accordance with which they could be dismissed for any reason, including instances where they were not at fault (so-called 'no-fault' dismissals). The law neither provided safeguards nor stipulated procedures to be followed for such dismissals. In some cases, the threat of dismissal of this kind could even be used as a tool to coerce employees to accept amended and often worse conditions of employment. However, in the early 1980s the Industrial Court, relying on its newly enacted unfair labour practice jurisdiction, forged a new labour jurisprudence which was a departure from the employer-biased, contract-centric approach under the common law, to a scheme that eventually would require justifications to be tendered and fair procedures followed in order for dismissals to be fair. Central to these developments were various International Labour Organization labour standards on termination of employment which influenced the courts' rationalisation of the dismissal, culminating in the codification of these considerations in the Labour Relations Act 66 of 1995. This chapter posits that the Industrial Court's regard for said standards resulted in the once-autocratic employer being brought to heel in order to rationalise its decisions and to engage employees before making a final determination regarding their employment, thus democratising the process. Equally, it is further argued that the reform of this dismissal regime would not have materialised had the Industrial Court not had regard for international law, in general, and ILO international labour standards, in particular.

* LLB LLM (UJ). This chapter is partially based on the Master's dissertation of the first author entitled 'Dismissal for operational requirements in South Africa: Redesigning the current legislative framework for the fourth industrial age' completed under the supervision of the second author at the University of Johannesburg.

** LLB LLM (UJ) LLD (UP); Senior Lecturer, University of Johannesburg.

I INTRODUCTION

Employers have always had a right to bring the employment relationship to an end.[1] It is this right that allows employers to exercise and maintain control over their workplaces,[2] ensuring that their employees are productive for the good of the employees' job security and the welfare of the business. In addition to terminating the employment relationship due to an employee's conduct or incapacity, employers have the power to terminate the employment relationship if doing so was likely to safeguard the continued survival of the business or achieve a valid economic goal.[3]

However, this right is not always properly exercised. Permitted and understood within a common law legal environment, many employers abused it. It was not unheard of for employers who were motivated by factors other than economic concerns to dismiss an employee on the basis of economic reasons.[4] The exercise of this power by employers, therefore, has often conflicted with concepts of fairness or rationality, which are now tenets of modern dismissal law.[5] However, developments in international human rights have necessitated that changes take place in general employment regulation across the world.[6]

In South Africa, such a change materialised when the government appointed the Commission of Inquiry into Labour Legislation (Wiehahn Commission), which set in motion a series of changes that would transform the employment regulatory environment. Following the first report of the Wiehahn Commission,[7] the legislature adopted statutory amendments which introduced an unfair labour practice jurisprudence into South African labour law.[8] This concept resulted in the departure of labour-management relations from the biased common-law understanding that had characterised much of its existence.

This chapter investigates how the International Labour Organization (ILO) influenced and fashioned this unfair labour practice jurisprudence in South Africa.

[1] See JC Kanamugire 'The concept of managerial prerogative in South African labour law' (2014) 5 *Mediterranean Journal of Social Sciences* 425 where this right, known as the managerial prerogative, is said to denote the employer's ability to control the activities of his employees; EML Strydom 'The origin, nature and ambit of employer prerogative (Part 1)' (1999) 11 *South African Mercantile Law Journal* 42.

[2] Kanamugire (n 1) 42.

[3] See H Cheadle 'Retrenchment' in M Brassey *et al The New Labour Law* (1987) 279; see also *General Food Industries v Food & Allied Workers Union* (2004) 25 *ILJ* 1260 (LAC) para 1277I–J.

[4] While dismissals grounded on these reasons are not necessarily proscribed and, indeed, have been recognised by the labour courts, they may open up the possibility of gross abuse by unscrupulous employers; see in general *Erasmus v BB Bread* (1987) 8 *ILJ* 537 (IC) 544.

[5] Section 23 of the Constitution of the Republic of South Africa, 1996 states that everyone has a right to fair labour practices; see in general ss 185 and 186 of Labour Relations Act 66 of 1995.

[6] International Labour Office *Fundamental Rights at Work and International Labour Standards* (2003) 2.

[7] Commission of Inquiry into Labour Legislation *The Complete Wiehahn Report with Notes by NE Wiehahn* (1982).

[8] Industrial Conciliation Amendment Act 94 of 1979 (ICAA).

It seeks to do so by exploring the contributions of the ILO in the development of the operational requirements of dismissal law. The chapter also highlights recent developments in the labour market that may necessitate further changes to be made and the role that the organisation can play in future.

II LABOUR-MANAGEMENT RELATIONS UNDER CONTRACT OF EMPLOYMENT

The regulation of the employment relationship in South Africa has largely been codified in multiple statutes aimed at giving effect to the constitutional right to fair labour practices.[9] Prior to statutory intrusions that now characterise the modern labour management landscape, employment relations were mostly regulated by the common law.[10] The employer and the (prospective) employee agreed to and were bound by a contract of employment in terms of which their relationship would be regulated.[11] The contract of employment was an agreement where one party agreed to let their services out to another (the lessor) in exchange for compensation.[12] As in the case of most contractual transactions, the contract allowed employees and employers to determine the terms and conditions of their relationship, thereby, to a large extent, to be regulated. Hopley J in *Boyd v Stuttaford* described this contract as follows:

> [I]n contracts of hire of services, the employee is the lessor of such services, and the employer the lessee, and by our law … there is … no difference between the letting of services and the letting of lands or any other thing capable of being hired and leased. [T]he principle underlying the contract is undoubtedly a mutual rendering of the benefits stipulated for, viz, 'work for reward, and reward for work'.[13]

Essentially, this meant that when the parties concluded a contract of employment, the worker was bound to perform the task required by the employer and the employer had to compensate him therefor.[14]

The contract of employment was flawed in three aspects. First, it was designed in such a way that it depersonalised the employment relationship, essentially rendering it an economic transaction.[15] This was achieved by the incorporation of

[9] These statutes include the LRA, Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 55 of 1998 and the Skills Development Act 97 of 1998; see also J Grogan *Workplace Law* (2017) 5.

[10] See Grogan (n 9) 2; see also AC Basson *et al The New Essential Labour Law Handbook* (2017) 8.

[11] Whereas the South African law of contract indeed has a long history, the extensive exploration thereof falls well outside the scope of this paper. Suffice to say, however, that the modern contract of employment originates from the Roman law *locatio conductio operarum*, which regulated the leasing of services by one person to another in return for compensation; see Grogan (n 9) 2.

[12] Basson *et al* (n 10).

[13] *Boyd v Stuttaford* 1910 AD 101, 104.

[14] *Boyd v Stuttaford* (n 13) 122.

[15] See discussion in II(1) below.

certain principles of the common law of contract into the employment contract.[16] Second, the contract entrenched the power disparities inherent between the parties which, given the nature thereof, were not favourable to the employee.[17] Third, the contract of employment neglected a basic need of employees, namely, employment security.[18] It ensured that the right of both parties to terminate the employment relationship was unhindered.[19] While neither one of these common law issues was unusual, they did not accord with the developments of the last half of the twentieth century. Importantly, these aspects of common-law regulation of employment were inconsonant with international labour standards espoused by the ILO.[20]

(1) Pacta sunt servanda *and employment as commodity*

In regulating employment relations in terms of the common law, disputes over fairness of a contractual term were unlikely to affect labour management interactions.[21] Because the employment contract was viewed through the lens of the law of contract, various considerations applicable to ordinary commercial contracts were implied therein.[22] The courts inevitably found themselves in a position where they had to interfere with valid commercial transactions.[23] Were they to interfere, they would have negated the consensus arrived at by two, supposedly, free and competent parties. This intrusion would not accord with the key principle of the law of contract that agreements freely entered into by competent persons have to be honoured.[24] The Constitutional Court described this principle, *pacta sunt servanda,* as a 'profoundly moral principle [upon] which [certainty in our society depends]'.[25]

The contract of employment was nothing more than a disguised ordinary contract,[26] which Veneziani describes as a means of exchange of commodities

[16] Ibid.

[17] See discussion in II(2) below.

[18] See discussion in II(3) below.

[19] See R le Roux *Retrenchment Law in South Africa* (2016).

[20] See discussion in III(5) below.

[21] See M Brassey 'The Industrial Court' in Brassey *et al* (n 3) 2.

[22] Ibid.

[23] Brassey (n 21) 3 notes that the court in such circumstances would be empowered to invalidate the contract for its illegal or immoral terms or if a term therein offends public policy.

[24] See Brassey (n 21) 2 where the author refers to the judgment of Jessel MR in *Printing & Numerical Registering Co v Sampson* 1875 LR 19 Eq 462; C Visser 'The principle *pacta sunt servanda* in Roman and Roman-Dutch law, with specific reference to contracts in restraint of trade' (1984) 101 *South African Law Journal* 654.

[25] *Barkhuizen v Napier* 2007 (5) SA 323 para 87I.

[26] See Brassey (n 21) 2.

which '[is] not aimed at bringing about substantive justice'.[27] He notes further that it is '[merely] the expression of individual dominion [and] realisation of a person's will, with which … justice [is] identified'.[28]

It comes as no surprise that those in commerce or on the side of business who supported the common-law regulation suggested that the common-law regulation was essential in the field of commerce.[29] They argued that legislative intervention or intervention by third parties would prove detrimental for fair and uninterrupted commerce.[30] In fact, intervention by third parties may potentially aggravate employment disputes. It would make it difficult for the parties who are privy to the complexities and nuances of the disagreements to come together and thaw out issues of mutual interest and concern.[31] Interventions, in fact, would raise 'suspicion and acrimony' where 'conciliation and compromise [should prevail]'.[32] These supporters of the common-law position also posited that the courts were in no position to give a satisfactory or commercially efficient alternative that is acceptable to both parties.[33] Instead, it was likely to impose results to which neither would have arrived without such 'interference'.[34]

Motivated by these beliefs the courts, prior to the changes introduced after the Wiehahn Commission, continued to enforce contracts of employment without consideration of fairness.[35] They adopted a stance that negated any prospect of an employee successfully arguing that certain terms in a contract were unfair, whether or not such a claim had any merit. This judicial deference towards the contract (which, if anything, was deference towards employers) is best exemplified by the opinion delivered by De Villiers AJ in *Paiges v Van Ryn Gold Mines Estates*. The Appellate Division had been called upon to decide if a term in a contract of employment which required an employee to acquire the employer's consent before ceding his wages was against public policy. The court held:

> The conclusive answer to the [view that a cession] is contrary to public policy is to be found in the [fact that even if such stipulation were to be proven oppressive] to the workman … it would not … be sufficient to justify the Court in declaring the agreement freely entered into by the parties [to be] *contra bonos mores*.[36]

[27] B Veneziani 'The employment relationship' in B Hepple and B Veneziani *The Transformation of Labour Law in Europe* (2009) 100.

[28] Ibid.

[29] See Brassey (n 21) 2.

[30] Ibid.

[31] Ibid.

[32] Brassey (n 21) 1.

[33] Brassey (n 21) 2.

[34] Ibid.

[35] Courts, for example, have refused to allow the reinstatement of employees who would have had their employment terminated in breach of the contract of employment (see Grogan (n 9) 4); Brassey (n 21) 4).

[36] *Paiges v Van Ryn Gold Mines Estates* 1920 AD 600, 616.

Effectively, the courts withdrew from having to engage with matters that departed from the commercialised nature that typified the usual contract and the features of which had been imported into the contract of employment. The view they adopted was that interference with employment contracts in favour of non-commercial, perhaps even 'foreign', concepts such as 'fairness' was tantamount to subverting not only properly concluded agreements but the principle of *pacta sunt servanda*. As a result, the prospect of judicial intervention to bring oppressive terms in employment contracts to heel was abandoned.

(2) *Equality of the parties*

In addition to the primacy afforded the sanctity of the employment contract, the common law is premised on the assumption that parties to a contract of employment are equal.[37] While parties to a contract may be equal in ordinary contracts, this is not true for matters of employment.[38] The employment contract is different from other contracts, particularly because the parties naturally occupy different positions of influence and wield varying degrees of power. Both the employer and employee's respective influence is important in the bargaining process, but neither carries the same weight as the other. The employee possesses the 'power of his labour' whereas the employer has what can best be described as the power to choose. Coupled with the influence that he possesses by virtue of being the owner of the means of production,[39] the employer inevitably is the dominant party in any negotiation.[40] In these situations, as Jordaan notes, it is the employee who needs the employer most and not the other way around.[41]

An employer has the power to force the hand of the employee.[42] An employee, on the other hand, needs the employer to secure his socio-economic well-being.[43] With the power to choose, an employer may overlook an employee's offer of service. Even more so is the fact that the outcomes of resisting an employer's influence tend to be harsher against the employee than they are to the employer.[44] Haysom and Thompson state that the assumption of the contract, being an agreement between

[37] See N Haysom and C Thompson 'Labouring under the law: South Africa's farmworkers' (1986) 7 *ILJ* 221; B Jordaan 'The law of contract and the individual employment relationship' (1990) *Acta Juridica* 77; Grogan (n 9) 3.

[38] Ibid.

[39] In *Mohlaka v Minister of Finance* (2009) 30 *ILJ* 622 (LC) 630 Pillay J held that '[n]either the Constitution nor the legislature takes away or diminishes rights, especially not of the weak and vulnerable. In relation to employers as the owners of the workplace and the means of production, employees are weak and vulnerable'; Basson *et al* (n 10) 8; Kanamugire (n 1) 2.

[40] Jordaan (n 37) 77.

[41] Ibid.

[42] Jordaan (n 37) 76.

[43] Ibid.

[44] Haysom and Thompson (n 37).

two equal parties, is inappropriate in employment relations.[45] They note that the contract of employment ignores the social and economic powers of the parties.[46] They further posit that the contract conceals the agreement's inherent need for the subordination by the employee to the whims of the employer.[47] In many cases, the employee is unaware of the working conditions under which he is expected to function and the risks such conditions may pose.[48] The contract grants the employer the sole discretion to determine working conditions and, given its interpretation and understanding, it also shields the terms of the contract from judicial scrutiny by removing it from considerations of public policy.[49]

Such a relationship does not accord with the idea that both parties are on equal footing. If anything, it misrepresents reality. In principle, this very presentation of equality between the parties was likely to have galvanised the voices of those proponents of the common law. After all, what, if not a breach, would be unfair to equal parties in an agreement?

(3) *Termination of employment*

While these considerations are sufficient to justify a departure from the contract of employment, the issue of termination of employment is more concerning. Nothing about the termination of employment, of itself, is strange nor should it be. It makes little sense to unreasonably stand in the way of an employee who wishes to discontinue his employment under an employer, neither should it be the case for an employer to be unreasonably deprived of the ability to terminate the employment relationship with his employee.

In a society that adheres to and encourages freedom of enterprise,[50] such a position would be incongruous with the tenets thereof. For this reason, the common-law contract of employment granted both employer and employee the right to terminate their relationship. Nevertheless, it is this right that was problematic, bearing in mind the international environment within which this right was operating.

When either party contemplated termination under the common law, they could do so with the utmost degree of freedom. Apart from the requirement to give reasonable notice to the other party, the common law required no reason to

[45] Ibid.
[46] Ibid.
[47] Haysom and Thompson (n 37) 222.
[48] Ibid.
[49] Ibid.
[50] South Africa fairly adheres to the economic doctrine of free enterprise (see M Brassey 'Fairness: Commercial rationale' in Brassey *et al* (n 3) 65. The Constitution also grants the right to freedom of trade and occupation (see also s 22 of the Constitution).

be tendered.[51] By merely giving notice, the party terminating the employment relationship would have dispensed with all formalities for termination of employment. Because employment relationships are conceived as contractual agreements, the same understanding and assumptions applicable to commercial contracts sometimes were imported into contractual relationships in employment. As a result, the release of an employee by an employer would have amounted to nothing more than the termination of his letter of appointment. In cases where an employee had lost his job, he could not take the employer before an impartial tribunal or court and claim that he had been unfairly dismissed. As Grogan notes, the common law had no concept of dismissal, let alone an unfair one.[52] If anything, giving reasonable notice rendered the termination lawful.

Similarly, termination of employment based on the employer's operational requirements was not treated differently from any other possible motivations. The prescripts of the common law applicable to other dismissals applied equally to dismissals for operational requirements. From a business perspective, the rationale for operational requirement dismissals is found in the belief that an employer has a right to control his employees and to safeguard the welfare of the business.[53] Therefore, the employer is entitled to increase and decrease the size of his workforce in response to the economic needs of the business or to cyclical economic changes and changes in production.[54]

The common-law perspective on dismissal did not enhance this. This is because neither party was required to give reasons for terminating the contractual relationship. Consequently, whether the termination was occasioned by the employer's economic realities or the employee's conduct (or any reason whatsoever), at most, was irrelevant. The employer was able to terminate all employment contracts provided that reasonable and sufficient notice had been given.

Under the common law an employer who contemplated termination of employment in response to operational changes was not enjoined to consult with employees.[55] Up to 1979 the courts had not recognised an employee's right to be consulted before a dismissal.[56] It would not make sense to require prior consultation, however, given the fact that reasons were not required to justify any dismissal. In addition, it was never a requirement for the employer to

[51] See Le Roux (n 19) 4; R Zondo 'Redundancy and retrenchment' 1990 *ILJ* 340; Grogan (n 9) 2.

[52] Grogan (n 9) 14.

[53] S Bendix *Labour Relations: A South African Perspective* (2019) 336.

[54] Ibid.

[55] Zondo (n 51).

[56] In *Mustapha & Another v Receiver of Revenue, Lichtenburg & Others* [1958] 3 All SA 303 (A) 314 the court commented: 'I am not aware of any authority which has applied the rule of *Rex v Abdurahman* to the field of contract, and in all the circumstances there is, in my judgment, no sufficient warrant for holding in the present case.' The principle referred to in *Rex v Abdurahman* is the *audi alteram partem* principle which the *Mustapha* court found no authority to apply to the employment issue before it.

provide any severance pay for termination of employment resulting from his operational requirements.[57]

However, it would be disingenuous to create the impression that an aggrieved employee could do nothing about the loss of his job. In some exceptional circumstances, he had recourse against the employer. For example, in the event that an employer fails to give reasonable notice, the employee would have had legal recourse for breach of contract.[58] This similarly applied to a failure to comply with a term in the contract. Important as this is, it was little consolation for an employee who would have lost more than what he would be able to regain. The courts were unwilling to allow an employee to succeed even in a claim for specific performance under the contract of employment, which was a strange position for them to adopt, given their readiness to import many other aspects of the law of contract that cemented the despotic powers of the employer to hire and fire at will.[59]

Grogan observes that although an employee would theoretically have been entitled to reinstatement in the event of a breach, 'the most he would in all likelihood have obtained [would have been] no more than a sum of money equivalent to the wages he would have received that he would be entitled to during the period of notice'.[60] In cases of disputes about dismissals for operational requirements, Le Roux's observation suggests that there was no deviation from the standard applied to the other reasons.[61]

What is clear, however, is that the interpretation of the employment contract, as if it were an ordinary commercial transaction, was always going to mute matters of fairness. After all, the contract of employment was designed to '[allow] the employer the power of a private despot' and to be an 'instrument for entering into legally unsupervised relations,' the consequences of which were unfair to the employee.[62] Put simply, it rendered the employment relationship one-sided and autocratic.

[57] Zondo (n 51).

[58] Grogan (n 9) 4.

[59] N Cassim 'The changing contours of labour law' (1984) 17 *Comparative and International Law Journal of South Africa* 341.

[60] Grogan (n 9) 4.

[61] Le Roux writes that '[i]n the absence of the notice, an employee's only remedy was damages equal to the required notice pay' (see Le Roux (n 19)).

[62] Haysom and Thompson (n 37) 222–223.

III NEGOTIATING THE RULES CONCERNING NO-FAULT DISMISSAL

(1) *The Wiehahn Commission: Negotiating change*

In spite of all the problems identified above, the flaws immanent in the common law in fact had been identified decades earlier by the former Appellate Division in *Paiges*.[63] In its opinion regarding the disputed contractual term, the court acknowledged *obiter* that undoubtedly the power possessed by employers may be abused to coerce employees to accept unfavourable terms.[64] The court, however, found it apposite to leave the matter to the decision of the legislature.[65]

Beginning in the late 1970s, the South African government initiated a shift from the autocratic employment regime that had been in place.[66] Following the first report of the Wiehahn Commission, various legislative measures were introduced.[67] These measures had a transformative impact on the judicial attitude towards many aspects of labour-management relations in the country. The issue of termination of employment was one such aspect.

Appointed in 1977 to survey the existing labour legislation,[68] due in part to South Africa's isolated status in the international order and in response to labour unrest and the growing militant black trade union movement,[69] the Wiehahn Commission made recommendations which, upon adoption by the government, revolutionised labour regulation in South Africa. Subsequent to the acceptance of the first report by the previous National Party government, the Industrial Conciliation Amendment Act of 1979[70] (which amended the Industrial Conciliation Act (ICAA))[71] was passed. Section 19 of the 1979 amendment established an Industrial Court (IC) to replace the existing Industrial Tribunal.[72]

[63] See *Paiges* (n 36).

[64] apposite.

[65] apposite.

[66] It should be noted that the contract of employment was not the sole regulatory instrument for employment relations. Other legislative measures regulated employment relations such as farmworkers by the Master and Servants Act and, to a certain extent, the 1956 LRA (see Haysom and Thompson (n 37) 225). Nevertheless, the dismissal regime was very much a common-law matter; see also Commission of Inquiry into Labour Legislation *Wiehahn Report* (n 7) xxxii.

[67] See in general *Wiehahn Report* (n 7) 125–149.

[68] *Wiehahn Report* (n 7) xxxii.

[69] J Roos 'Labour law in South Africa: 1976–1986: The birth of a legal discipline' (1987) *Acta Juridica* 116; see also D Woolfrey 'The application of international labour norms to South African law' (1986) 12 *South African Yearbook of International Law* 135.

[70] ICAA (n 8).

[71] Labour Relations Act 28 of 1956.

[72] Section 19 substitution of 'tribunal', and references elsewhere to 'industrial tribunal'. '(1) The principal Act is hereby amended by the substitution for the word "tribunal" wherever it occurs of the words "industrial court". (2) Any reference in any law or elsewhere to "industrial tribunal" shall be deemed to be a reference to "industrial court" as defined in the principal Act as amended by this Act.'

The establishment of the IC took labour management disputes from the shop floor and brought them within the reach of the judiciary.[73] The 1979 amendment, importantly, introduced an unfair labour practice jurisprudence into the 1956 Industrial Conciliation Act (later renamed the Labour Relations Act (LRA)).[74] Under the 1956 LRA, the IC was entrusted with broad powers to determine the fate and future of labour management relations. According to Reichman and Mureinik, however, the ICAA introduced changes that were 'enigmatic', enjoining the court to 'define the … practices that would offend [the new unfair labour practice] jurisprudence'.[75] However, the provision did not clarify 'the extent of the court's power to remedy [said practices]'.[76] Similarly, Kooy *et al* note that the amendment Bill '[had] provided a very wide definition of unfair labour practice'.[77]

The Bill defined an unfair labour practice as any labour practice that is unfair in the opinion of the IC.[78] Because the definition was broad, criticism was directed at the fact that it did not define the limits of the court's powers in making determinations of what constituted an unfair labour practice. Essentially, the court was granted *carte blanche* to decide for itself what amounted to an unfair labour practice and what did not. Some authors characterised this freedom granted to the court as a legislative power or function.[79] In contrast, the 1982 amendment of the same Act, to a certain extent, attempted to rigorously define the term, but it nevertheless remained vague.[80]

(2) *The unfair labour practice: Negotiating progress*

An important victory that the unfair labour practice jurisdiction delivered to employees was the emasculation of the doctrine of freedom of contract.[81] From its establishment, the IC showed a preference for rules that enhanced job security over respect for the common-law powers of either party.[82] Where the employer was able to lawfully terminate the employment relationship under the common law, the court used its power to overrule the decision in favour of the employee.[83] Through its *status quo* powers, the court was also able to set aside decisions of the

[73] Roos (n 69) 98.

[74] A Reichman and E Mureinik 'Unfair labour practices' (1980) 1 *ILJ* 1, 1.

[75] apposite.

[76] apposite.

[77] A Kooy *et al The Wiehahn Commission: A Summary* (1979) 27.

[78] Section 1(1) of the Industrial Conciliation Amendment Act 94 of 1979.

[79] According to Reichman and Mureinik (n 74) 23, the empowerment by the 1956 LRA of the Industrial Court to define unfair labour practices amounts to making rules, a function which, according to the writers, is legislative in nature.

[80] J Brand and M Brassey 'The representations' (1981) 2 *ILJ* 122.

[81] Cassim (n 59) 341.

[82] apposite.

[83] apposite.

employer to terminate the employment relationship, until the reasons for doing so were upheld in conciliation proceedings.[84] In instances where the employer unilaterally brought the relationship to an end, the court was also empowered to set that decision aside until the matter had been ventilated before it.[85]

What is notable about the unfair labour practice provisions of the 1956 LRA is that no reference to termination of employment is made in the statute.[86] The initial provision injecting the unfair labour practice regime into the labour law gave the court something of a blank cheque.[87] It only stated that the court had the power to determine whether an impugned labour practice of the employer, in its opinion, was tantamount to an unfair labour practice and, if so, the court was empowered to grant appropriate relief.[88] No mention is made of termination of employment in the 1982 amendment. The unfair labour practice is simply defined to mean:

> *(a)* any labour practice or any change in any labour practice, other than a strike or a lock-out, which has or may have the effect that—
>
> (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardised thereby;
>
> (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
>
> (iii) labour unrest is or may be created or promoted thereby;
>
> (iv) the relationship between employer and employee is or may be detrimentally affected thereby; or
>
> *(b)* any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph *(a)*.[89]

The strangeness of the powers granted to the IC is highlighted by the fact that the IC was a creature of statute,[90] and thus had no jurisdiction beyond that conferred to it by the 1956 LRA.[91] It could not lay claim to authority over any other matter beyond that to which it was conferred.[92] However, it had wide powers to determine

[84] See N Cassim 'Unfair dismissal' (1984) 2 *ILJ* 293; Cassim (n 59) 341; Roos (n 69) 100.

[85] Cassim (n 59) 341.

[86] Until the amendments to the 1956 LRA by the Labour Relations Amendment Act 83 of 1988, the Act made no reference to an unfair dismissal (see PAK le Roux and A van Niekerk *The South African Law of Unfair Dismissal* (1994) 1).

[87] Le Roux and Van Niekerk (n 86) 19.

[88] Le Roux and Van Niekerk (n 86) 18.

[89] Labour Relations Amendment Act 51 of 1982.

[90] With its constituent provision being s 17 of the 1956 LRA; see also *Transvaal Pressed Nuts, Bolts & Rivets (Pty) Ltd v President, Industrial Court & Others* (1990) 11 *ILJ* 1237 (N) 1247B–E.

[91] apposite.

[92] apposite.

labour management disputes under its unfair labour practice jurisdiction.[93] This, it came to be accepted, also included disputes over dismissals.[94]

Perhaps the most significant impact of the injection of the unfair labour practice jurisprudence into our labour legislation was the formation for a basis upon which the court could develop guidelines for terminations caused by the operational requirements of the employer. Employers have always had the right to dismiss employees as a result of changes in the operation of their business or to increase their profitability. However, the position prior to the ICAA did not consider the social impact of dismissals nor the possibility of unscrupulous conduct by employers. Significantly, the South African position with regard to dismissals informed by operational requirements was a polar opposite of what was deemed standard and acceptable to much of the rest of the world.[95] The development of this area of law, inspired by the IC's renunciation of the shibboleth of the common law, helped fashion an important corpus of labour regulations in dismissal and especially retrenchment law.[96]

(3) *The International Labour Organization: Negotiating compliance*

The changes made by the IC were largely influenced by international law, particularly ILO Recommendation 119. However, to a supporter of the former nationalist government, the ILO was problematic. The ILO features prominently on the list of international organisations who condemn and criticise the political regime for its policy of apartheid.[97]

Despite this, the Wiehahn Commission saw in the ILO a standard-setting organisation in accordance with which the global labour market was set. Although South Africa was not a member of the ILO in 1979, having left the organisation over a decade earlier and only having ratified a handful of conventions,[98] the Commission recommended that the country's regulatory framework attempt to conform to the standards recommended by the organisation.[99]

[93] *United African Motor and Allied Workers Union v Fodens (SA) (Pty) Ltd* (1983) 4 *ILJ* 212 (IC) 224F–G.

[94] Ibid; see also C Bennett *A Guide to the Law of Unfair Dismissal in South Africa* (1992) 5.

[95] The international standards for termination of employment in 1979 were contained in the non-binding ILO Termination of Employment Recommendation, 1963 (No 119).

[96] A Rycroft 'Is there still a right to terminate employment on notice without reasons?' (1989) 106 *SALJ* 270.

[97] E Alcock *The History of the International Organisation* (1974) 319.

[98] South Africa had only ratified 11 ILO conventions (see *Wiehahn Report* (n 7) 441).

[99] The Commission recommended that 'South Africa, with due regard to its inherent right to take local circumstances and the varying stages of social and economic development within its society into account, seek to align its labour and industrial relations law and practice to the fullest possible extent with international instruments' (see *Wiehahn Report* (n 7) 445).

According to the Commission, the ILO's instruments represented acceptable international standards.[100] Because of its tripartite nature, the organisation ensures that its instruments are not forced upon member states.[101] They are ventilated by and between representatives of government, employers and employees before adoption.[102] Preceding their adoption, ILO instruments are carefully and extensively researched and tend to reflect the standards that are prevalent in many countries.[103] Brassey describes the value of the ILO's conventions in this regard and writes:

> Using them as a guide is sometimes criticised. The critics argue that they cannot be applied to a society as peculiar as [South Africa]. One's response to this naturally depends upon whether one sees the peculiarity as good or bad and whether one intends to perpetuate it or not. What is clear, however, is that it is their universality that makes them proof against the parochial and aberrant.[104]

Accordingly, the Commission was of the view – although the ILO had taken a stance against the policy of apartheid, it nevertheless occupied an important position in the international order – that compliance with its instruments would be of benefit to South Africa.[105]

The ILO occupies an important position in the global legal order. It is the international community's organ for setting minimum-acceptable standards and practices for national employment laws across the world. The ILO's standards for the termination of employment are found in the Termination of Employment Convention 158, 1982 (Convention 158) and its accompanying Recommendation 166, 1982 and, previously, in Recommendation 119.

These documents set out the principles that have come to be accepted as standard practice in many member states. However, when the legislature enacted the ICAA in 1979, the ILO instrument that addressed issues of termination was only a recommendation.[106] Recommendations, in general, are not binding but often serve as useful guidelines to understanding and implementing the ILO conventions which they often accompany.[107] As South Africa was not a member of the ILO, however, nothing in the law obliged the IC to incorporate, let alone

[100] *Wiehahn Report* (n 7) 432; see also M Brassey 'Fairness: Legitimacy' in Brassey *et al* (n 3) 169.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Brassey (n 100) 171.
[105] Paragraph 3.12.1. The Commission noted that the 'international labour standards formulated by the ILO constitute guidelines in the development and updating of domestic labour and industrial relations legislation'. Further, at paras 3.12.4 the Commission found that South Africa's withdrawal from the ILO had deprived it of the ability to perceive the true state of affairs of its labour practices and that it would be the country's advantage to regain ILO membership' (see *Wiehahn Report* (n 7) 445).
[106] See Alcock (n 97).
[107] Brassey (n 100) 170.

consider, the contents of this recommendation. Nevertheless, the IC in some of its early decisions relied extensively on this recommendation.

For example, when called upon to take cognisance of paragraphs 2(1) and 5(2) of Recommendation 119, the IC in *Gumede & Others v Richdens (Pty) Ltd* took the liberty to consider a further paragraph of the document, stating that '[a]lthough not referred to, but apparently applicable to the present matter, could be para 4 of the Recommendation'.[108]

Gumede is only one of a multitude of the court's decisions that relied on the 1963 Recommendation. This is not surprising. The contents of Recommendation 119 could not have been any more different from the prevailing regulation in South Africa prior to 1979. As indicated above, South African labour relations law was bereft of the legislative avenues and legal obligations comparable to the prevailing international standards.[109] There was no requirement for a reason to be tendered when employers opted to terminate the employment relationship.[110] Simply giving notice or payment in lieu thereof was adequate to do away with possible liability for unlawful termination.[111]

Despite the non-binding nature of the recommendation, the document provided some general principles that were deemed to have been standard and acceptable practice as regards termination of employment. Recommendation 119 provided a suggestion which indicated that effect thereto may be given through 'national laws or regulations works rules, arbitration awards, or court decisions or in such other manner consistent with national practice as may be appropriate under national conditions'.[112] In South Africa this effect was given through decisions of the IC, which took advantage of the amorphous unfair labour practice jurisdiction it enjoyed under the 1956 LRA.

Some of the key guiding principles on termination of employment under the recommendation include the following: first, paragraph 2(1) of the 1963 Recommendation provided that '[t]ermination of employment should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service'.[113] Second, paragraph 3 identified grounds that could not justify termination under any circumstances and included membership, and participation in the activities, of a union, absence as a consequence of maternity leave or termination justified on the basis of various

[108] *Gumede & Others v Richdens (Pty) Ltd* (1984) 5 *ILJ* 84, 93C.

[109] Recommendation 119 has various requirements to be considered before termination of employment may be effected (see in general paras 2, 3, 4, 11, 12 and 13 of Recommendation 119 (n 94)).

[110] See the discussion in II(3) above.

[111] Grogan (n 9) 4.

[112] Paragraph 1 Recommendation 119 (n 95).

[113] Paragraph 2(1) Recommendation 119 (n 95).

grounds such as race, sex, marital status and religion, among others.[114] Third, paragraph 4 stated that a worker whose employment was terminated should be entitled to appeal such termination to a neutral body such as a court or a body established under the terms of a collective agreement, unless the dismissal had been satisfactorily determined through workplace procedures.[115] None of these principles, which advance the basic interests of the worker, existed in South African dismissal law. This was no different with respect to provisions dealing with retrenchment.

(4) *The Industrial Court: Negotiating standards*

The lack of an obligation to give reasons meant that there was no need to justify a retrenchment. It was an unavailing, even illogical thing to demand. What would be the point of requiring justification for a decision to dismiss an employee if the reasons for such decision were irrelevant? The employee could neither challenge the fairness or propriety of the termination,[116] nor could he appeal to the employer or an impartial tribunal to plead his case and allege unfairness in the termination of his employment.[117] In the event of termination occasioned by difficulties faced by the employer's business or as a result of changes introduced in the workplace (which may have altered the working conditions or eliminated certain occupations), there was no need to discuss the decision with affected employees.[118]

From the outset, one should reflect on the contrast between the pre-1979 position and the minimum acceptable international labour standards then. According to the recommendation, before a termination of employment can be affected, the employer ought to have had a reason (or reasons) informing and justifying such termination. The reason must also have been communicated to the employee.[119] The international position indicated that employers ought not to be given the liberty to do as they please as regards the continuation of the relationship between them and their employees. If employers wished to end the relationship, their decision ought to have been based on a valid reason and that reason should relate to the employee's conduct or incapacity or based on the business's operational requirements.[120]

[114] Paragraph 3 Recommendation 119 (n 95).
[115] Paragraph 4 Recommendation 119 (n 95).
[116] Grogan (n 9) 14.
[117] Le Roux notes that 'the unfairness of the reason for termination could not form the basis of any action' (see Le Roux (n 19) 4).
[118] Ibid.
[119] Ibid.
[120] Ibid.

In one of its earliest decisions, the IC was asked to determine whether retrenchment by an employer without following generally accepted principles amounted to an unfair labour practice.[121] Answering the question of what its unfair labour practice jurisdiction entailed, Ehlers DP in *Fodens* noted:

> In view of the above it [appears] … the legislature by defining the concept in such wide terms … intended that this court by its decisions should lay down guidelines as to what are to be considered unfair labour practices. Particularly the latest amendment to s 67 of the Act referred to above seems to be aimed at specifically achieving that object.[122]

Turning to the question of retrenchment, the IC noted that it would appear, with regard to dismissals on the basis of retrenchment, that the onus rests on the employer to establish that the termination of employment was justified on good grounds.[123] The interests of the employee previously played no role in the termination of employment. However, the introduction of the IC's unfair labour practice jurisdiction permitted the court to establish guidelines as to what ought to be considered unfair labour practices. Although ultimately relying on the common law to formulate justifications for its unfair labour practice jurisprudence,[124] the IC in *Fodens* determined that the tender of reasons was a requirement before termination. Subsequent decisions of the court would expand on this basic guideline requiring that termination be based on some ground, albeit valid.

(5) *Effect of the unfair labour practice jurisprudence on retrenchment: Negotiating the past*

Taking into consideration the common-law position, it was significant to require that an employer have grounds for retrenchment. Even without paying attention to decisions that followed after the *Fodens* case, this decision may be said to have been monumental. Not only did the court curtail the right to terminate employment on notice or payment in lieu thereof, but effectively nullified this aspect of freedom of contract in employment matters. Although it may appear to be insignificant among many other ground-breaking developments laid down under the court's unfair labour practice jurisdiction, the imposition of a general obligation for employers to provide reasons for termination remedied aberrant practices that prevailed under the common law. The effect of this decision was to open the door for other considerations that would otherwise have appeared foreign to be incorporated into the domestic dismissal laws.[125] Further, these

[121] *Fodens* (n 93) 215.

[122] *Fodens* (n 93) 224F–G.

[123] *Fodens* (n 93) 229G–H.

[124] The IC instead relied on the Natal Provincial Division's decision in *Sigwebela v Hulets Refineries Ltd* (1980) 1 *ILJ* 51 (N) and held that termination must be justified and not that it is unfair.

[125] Including but not limited to concepts such as 'unfair dismissal'.

developments were modelled against the standards set by the ILO. This was especially the case with regard to retrenchment.

Paragraph 12 of the recommendation provided that positive steps should be taken by the parties involved in order to avoid or minimise retrenchments without jeopardising the efficient operation of the business.[126] Furthermore, paragraph 13 was also instructive, providing in subparagraph (1) that consultation with representatives of workers ought to take place as early as possible on all appropriate questions.[127] It stated further that the said questions:

> [o]n which consultation should take place might include measures to avoid the reduction of the work force, restriction of overtime, training and retraining, transfers between departments, spreading termination of employment over a certain period, measures for minimising the effects of the reduction on the workers concerned, and the selection of workers to be affected by the reduction.[128]

With respect to the selection of employees to be retrenched, paragraph 15(1) provided that such selection should be done in accordance with precise criteria, which it is desirable should be established in advance, and which should also give due weight to the interests of the employer and to the interests of the workers.[129] Paragraph 15(2) listed criteria that may be used in such a selection mechanism, including service length, age, considerations of the need for operational efficiency as well as skills, experience and qualifications.[130]Another novel aspect (at least insofar as South Africa law was concerned) was the worker's entitlement to severance pay stipulated under paragraph 9 of the recommendation 'or other type of separation benefits paid for by the employer, or a combination of benefits, depending upon national laws or regulations, collective agreements and the personnel policy of the employer'.[131]

To the extent that *Fodens* developed the retrenchment guidelines,[132] those in *Shezi v Consolidated Frame Cotton Corporation*[133] were much more comprehensive and came to be accepted in later cases. Drawing from decisions of the English

[126] Recommendation 119 (n 95).

[127] Ibid.

[128] Ibid.

[129] Ibid.

[130] Ibid.

[131] Paragraph 9 Recommendation 119 (n 95).

[132] The court listed the more important principles as being 'proper prior warning of proposed retrenchments; fair application of agreed retrenchment selection criteria; prior consultation with representative trade union; adequate steps to look for alternative employment; and first in last out' (see *Fodens* (n 93) 230C–E).

[133] *Shezi & Others v Consolidated Frame Cotton Corporation Ltd (1); Nxumalo & Others v Consolidated Frame Cotton Corporation Ltd (2); Zuke & Others v Consolidated Frame Cotton Corporation Ltd* 3 (1984) 5 *ILJ* 3 (IC).

courts[134] and practices of some more progressive employers' organisations,[135] the IC enumerated general principles that it deemed applicable in retrenchments. One must pay attention to the striking similarities between these guidelines and the provisions of Recommendation 119 above.

Among the considerations advanced by the IC in *Shezi* was the requirement for the employer to consider ways to avoid retrenchments, providing sufficient prior warning of possible retrenchments to the affected employees and their representatives, consultation with employees to be retrenched as well as with employee representatives on the criteria to be applied when selecting which employees to retrench.[136] It held further that such criteria ought to be fair and objectively checkable (independent of the subjective determinations of the person making the selections).[137]

In *Barsky v SABC*[138] and *Meyi v Ovcon*,[139] however, the IC expressed the view that the said guidelines were not rules of law but served a purpose of '[ensuring] that the employer does not act arbitrarily and with an improper motive' when coming to a decision to retrench.[140] However, complying with the guidelines would in principle be indicative of a *bona fide* reason to retrench.[141] De Klerk J expressed a similar view, holding that 'the guidelines are not hard and fast rules but nevertheless … should be followed unless there are good reasons why they cannot be adhered to'.[142]

In the reasons to be tendered in justification of retrenchment, the employer was required to have a commercially justifiable reason for retrenching.[143] The employer could no longer, for example, claim that the termination of an employee's employment was to help reduce costs without illustrating how this was to be achieved (or was achieved).[144] While the court was reluctant to interfere

[134] The IC was referred to and relied on the English authorities in *Williams v Compare Maxam* [1982] IRLR 83 and *Freud v Bentalls* [1983] ICR 77 (see *Shezi* (n 133) 11G–13A).

[135] Such as the Steel and Engineering Industries Federation of South Africa and the Transvaal Chamber of Industries (see *Shezi* (n 133) 11B–E).

[136] *Shezi* (n 133) 12G–13A.

[137] Ibid.

[138] *Barsky v South African Broadcasting Corporation* (1988) 9 *ILJ* 293 (IC).

[139] *Meyi & Others v Ovcon (Pty) Ltd* (1988) 9 *ILJ* 672 (IC).

[140] *Barsky* (n 138) 673D; see also *Meyi* (n 139) 673D–E.

[141] Ibid.

[142] *Seven Abel CC t/a The Crest Hotel v Hotel & Restaurant Workers Union & Others* (1990) 11 *ILJ* 504 (LAC) 507H–I.

[143] *Mkhize & Others v Kingsleigh Lodge* (1989) 10 *ILJ* 944 (IC) 946A.

[144] This can be seen from the decision in *Mkhize* wherein De Kock M held: 'In this case, the respondent has not endeavoured to set out that there was any necessity, never mind a dire necessity, to save the amount of R282,95 per month. It seems from the papers that they are merely following the advice of their efficiency experts' (*Mkhize* (n 143) 946B).

with the right of the employer to make decisions regarding its enterprise, it was circumspect to accepting the say-so of the employer.[145]

The general impression emanating from the cases traced is that, although the guidelines were not themselves automatically applicable and compliance therewith was not a necessary requirement, following the guidelines would indicate whether good grounds existed for retrenchment.[146] In addition, an employer who dismissed for any reason other than the reason purported would commit an unfair labour practice.[147]

The guidelines, therefore, can be seen as safeguarding against the arbitrary exercise of the employer's prerogative by way of limiting of the employer's common law rights. They ensured that in instances where a decision to retrench was considered, proper procedures were followed, and that the issue was properly ventilated between the parties before a final decision was taken. In addition, employers could no longer dismiss on the mere charge that it would be financially beneficial to the enterprise without establishing the basis for such an assertion. It should be emphasised that, contrary to the common law position before 1979, the IC used its unfair labour practice to develop the law, requiring that employers justify their decision to retrench. The decisions were consistent with paragraphs 2(1), 3, 12, 13 and 15 of Recommendation 119 listed above.

Although the IC in both *Fodens* and *Shezi* made no express reference to the ILO's recommendation, the general impression that the recommendation influenced the court is inevitable. The similarities between the international labour standards and the court's decisions are equally striking. Moreover, what informs this interpretation is the consideration that, even before these two matters were brought before the court, the IC was increasingly open to develop its unfair labour practice jurisprudence, relying not only on the common law, but also on comparative labour law and international labour standards.

While not concerned with the issue of retrenchment, *Van Zyl v O'Okiep Copper Co Ltd*[148] illustrates this very fact. In this case the IC was called upon to determine whether the employer's decision to summarily terminate the employment contract due to negligence on the part of the employee amounted to an unfair labour practice. The court reinstated the employee with retrospective effect on the basis that the employer had failed to comply with paragraph 11(5) of the recommendation. Paragraph 11(5) provided that '[b]efore a decision to dismiss a worker for serious misconduct becomes finally effective, the worker should be given an opportunity to state his case promptly, with the

[145] *Mkhize* (n 143) 945I–J, 946B.
[146] *Seven Abel* (n 142) 507H–I.
[147] Both *Barsky* (n 138) and *Meyi* (n 139) deal with this particular issue.
[148] *Van Zyl v O'Okiep Copper Co Ltd* (1983) 4 *ILJ* 125 (IC).

assistance where appropriate of a person representing him'.[149] In this respect, Ehlers DP noted:

> Geen rede is namens respondent aangevoer waarom daar nie van die riglyne in die voorgaande aanhaling kennis geneem behoort te word nie. Dit blyk derhalwe nie onvanpas te wees nie dat in die onderhawige aansoek die hof ook daarvan kennis neem by gebrek aan toepaslike plaaslike gesag.[150]

The court continued to state that '[i]n die lig van die … feit dat daar nie ooreenkomstig die IAO se aanbeveling 'n behoorlike ondersoek na die diensbeindiging was nie kom dit voor asof applikant 'n reg het'.[151]

Despite the fact that the court was not legally bound to apply the recommendation, it nevertheless found the employer's conduct wanting based thereupon.[152] In this case, the IC showed a preference for international standards over the common law which had initially been adopted by it in previous decisions. That the IC was willing to jettison the virtues of the common law is also supported by the fact that it was not without a precedent of its own making on which it could have relied.[153]

A further illustration of the court's departure away from common-law aphorisms is found in the following Cape Provincial Division statement by Conradie AJ in *Towels, Edgar Jacobs Ltd v the President of the Industrial Court & Others*.[154] In this case the learned judge held that '[t]he allegations are that the applicant acted unfairly in doing something which, *had it not been for s 43(1)*(c) *of the LRA, it would have been lawfully entitled to do*, namely to retrench employees by simply giving them the required notice of termination of their service contracts'.[155] What the court was stating was that, under the unfair labour practice jurisprudence, compliance with the common-law requirements for termination of employment (giving notice or payments in lieu of notice) was no longer adequate. An employer who retrenched after having fully complied only with the common law would be committing an unfair labour practice.

Van Zyl and *Edgar Jacobs* represent the 'emasculation of the freedom of contract' in employment matters.[156] Subsequent retrenchment decisions benefited from the developments stemming from the abandonment of the shackles of the

[149] Recommendation 119 (n 95).

[150] *Van Zyl* (n 148) 135G.

[151] Ibid at 135H.

[152] Ibid; see also Brassey (n 100) 170.

[153] It would seem that the court found it apposite to rely on the recommendation despite the fact that it could have also relied on the *Fodens* (n 93) and *Metal and Allied Workers Union & Others v Stobar Reinforcing (Pty) Ltd & Another* (1983) 4 *ILJ* 84 (IC) decision, both of which advanced the common law 'justified termination' (in contrast to unfairness) derived from *Sigwebela* (n 124).

[154] (1985) 7 *ILJ* 496 (C).

[155] *Edgar Jacobs* (n 154) 504I–J (emphasis added).

[156] Cassim (n 59) 341.

common law, establishing far-reaching labour reforms that may not even have been envisioned by the legislature when the unfair labour practice jurisprudence was introduced. Resulting from these shifts were other principles: In *Hadebe*, Bulbulia M emphasised the need for a consultation process that was extensive and not merely a sham, stating that 'it [was] of crucial importance that any discussions on the subject of proposed retrenchments should be as exhaustive as possible and not be sporadic or superficial'.[157] While the IC came short of imposing something akin to an obligation to pay severance benefits, it nevertheless in *Masondo* noted the likely beneficial impact of affording an employee a severance allowance, adding that '[o]ne week's notice pay was paid to those retrenched but there was no severance pay given – not that that is a requirement though it must obviously have the effect of sweetening the bitter pill of retrenchment'.[158] The remark was also consistent with paragraph 9 of the recommendation. The IC also imposed even greater responsibility on employers who retrenched due to redundancies. In *Hlongwane* the IC noted that in terminations emanating from redundancies, the employer proactively engages in the creation of the reason for the redundancies, either by restructuring his enterprise, buying new machinery or introducing new technology.[159] Throughout this process the employer has control over the situation and does not suffer the urgency, immanent in retrenchments, to make decisions in haste.[160] The IC held that, therefore, a greater obligation should be placed on such an employer.[161]

These IC developments continue to find application under the new LRA.

(6) *The 1995 Labour Relations Act: A negotiated settlement*

Under the 1995 LRA, the employer may only retrench for economic, structural, technological or similar needs and the duty to consult properly has also been codified under section 189.[162] Importantly, section 189(2)*(c)* of the LRA read together with section 41 of the BCEA now imposes an obligation to tender severance benefits to employees subject to retrenchments, which is quite the journey for provisions that were novel, if not non-existent, in our dismissal law.[163]

Despite the enactment of the heavily criticised 1988 amendment to the LRA, which codified certain aspects of dismissal procedures,[164] the IC emphasised that the retrenchment guidelines it had developed under its unfair labour practice

[157] *Hadebe & Others v Romatex Industrials Ltd* (1986) 7 *ILJ* 726 (IC) 737A.
[158] *Masondo & Others v Bestform (SA) (Pty) Ltd* (1986) 7 *ILJ* 448 (IC) 450D–E.
[159] *Hlongwane & Others v Plastix (Pty) Ltd* (1990) 11 *ILJ* 171 (IC) 176A–C.
[160] *Hlongwane* (n 159) 176C–D.
[161] *Hlongwane* (n 159) 176B.
[162] Section 189 of the LRA (n 5).
[163] Section 189(2)*(c)* of the LRA (n 5).
[164] P Benjamin and H Cheadle *Annual Survey of South African Law* (1988) 359, 361.

jurisdiction remained effective.[165] By the time the controversial amendments were done away with, the corpus of South African labour regulation developed in the decade prior was at par with international labour standards that were now espoused in Convention 158, 1982,[166] and its attendant recommendation.[167] The concept of unfair labour practice has since been subsumed under the final Constitution with the right to fair labour practice,[168] and now finds expression under the LRA of 1995.[169]

That the codified retrenchment provisions of the 1995 LRA adopted under the new democratic enterprise are so similar to those developed by the IC and now contained in Convention 158 by no means is an accident.[170] In our opinion it is a sign of the role that international law, in general, and the ILO, in particular, have played and continue to play in fashioning this now essential part of South African employment law. It is also evidence of South Africa's commitment to comply with international law and, by extension, international labour standards. The Act indeed provides that one of its primary objectives towards achieving its purpose is 'to give effect to obligations incurred by the Republic as a member state of the International Labour Organization'.[171]

IV NEGOTIATING THE RULES FOR THE FUTURE

Be that as it may, the environment within which these developments function is now beginning to change. Technology is fast becoming a problem for the labour market. Rapid, unrestricted advances in artificial intelligence, automation, digitalisation and robotics, among many other technologies, have resulted in the development of machines and software capable of replacing human labour.[172] In South Africa, these changes are already taking shape. At the time of writing, the country's largest bank had announced plans to retrench over one thousand

[165] *Commercial Catering and Allied Workers Union of SA & Others v Status Hotel* (1990) 11 *ILJ* 167 (IC) 169H–I.

[166] Convention Concerning Termination of Employment at the Initiative of the Employer (No 158) 1982.

[167] Recommendation Concerning Termination of Employment at the Initiative of the Employer (No 166) 1982.

[168] The final Constitution entrenches a right to fair labour practices under its labour relations clause (see s 23 of the Constitution).

[169] See s 1*(a)* of the Constitution.

[170] Both Convention 158, Recommendation 166 and the 1995 LRA share extensive similarities, such as in defining operational requirements and the procedures to be followed in instances of termination of employment based on operational requirements of the employer (see art 13(1) Convention 158 (n 166); see also in general section III of Recommendation 166 (n 167) and ss 213, 188–189A of the 1995 LRA (n 5)).

[171] See s 1*(a)* of 1995 LRA.

[172] D Visser 'The fourth industrial revolution – It's happening but what does it mean?' (2018) 13 *CSIR Science Scope* 54.

employees. Standard Bank stated that it would be closing various branches across South Africa by June 2019 as the jobs 'currently being performed in [its] branches' had changed.[173]

In explaining its decision, the bank reasoned that the decision to retrench was driven by its customers' 'rapid adoption of digital banking products and services'.[174] Similar reasons have also been advanced by subscription-based television operator MultiChoice, which in 2018 announced that it might have to close its call centres. It cited its customers' abandonment of 'call centres and traditional contact centres for digital services' as the primary motivator.[175] In both these developments, the primary drivers of the expected job losses are linked to changes brought about by the Fourth Industrial Revolution.

In considering these events, it is important that one accepts that retrenchment laws do not exist in a vacuum and should not be understood to be so. The Fourth Industrial Revolution is expected to have a serious, even negative and lasting impact on the South African labour market which, inevitably, will affect employment relations. According to some estimates, close to three million South Africans today occupy jobs that are at risk of automation in the foreseeable future.[176]

A question that immediately arises is whether our employment laws are appropriately equipped to deal with these impending issues. South Africa and the ILO promote a dismissal regime that permits employees to be dismissed based on the operational requirements of an employer. These operational requirements are broad and wide-ranging. Similarly, the breadth of their reach and attendant effect on employees are likely to be magnified by the emergence of technology capable of replacing traditional labour. In view of the above, it is further posited that such a regime, if not immediately adjusted, may end up facilitating the unintended and systematic creation of new, while perpetuating old, inequalities in our society.

Issues that are apparent on consideration of the operational dismissal law today relate to the responsibilities placed on the employer by the 1995 LRA and chapter II of Convention 158. Under this dismissal for operational requirements

[173] 'Standard Bank South Africa implements a new banking delivery model' *Standard Bank* 2019, accessible at https://allafrica.com/stories/201903150118.html (accessed on 8 July 2019).

[174] Ibid.

[175] 'Why MultiChoice will be cutting jobs' *Eyewitness News* 2019, accessible at https://ewn.co.za/2019/06/22/why-multichoice-will-be-cutting-jobs (accessed on 8 July 2019).

[176] Le Roux estimates that 3,6 million of all jobs in South Africa are 'highly susceptible to computerisation due to developments in AI and robotics' (D le Roux 'Automation and employment: The case for South Africa' (2018) 10 *African Journal of Science, Technology, Innovation and Development* 515). Others have estimated the number to be upwards of five million (see 'South Africa has a high risk of losing jobs to automation' *Business Report* 2018, accessible at https://www.iol.co.za/business-report/economy/south-africa-has-a-high-risk-of-losing-jobs-to-automation-14491745 (accessed on 14 July 2019)).

rules, an employer who contemplates a dismissal on this ground does not bear the burden of safeguarding employment, as such. The only duties imposed on an employer by the 1995 LRA (in terms of section 189 and section 189A) may even be said to have the semblance of mere formalities that would, in spite of their intended purpose, result in retrenchments should an employer choose to automate the occupations within its business.[177] In a context where a new technology is adopted or would be adoptable, neither the LRA nor the labour courts shield employees from technology-induced retrenchments, even in instances where the need to automate may not be of critical, economic import.

In addition, the prerequisite actions required on the employer's part before a no-fault dismissal is effected may be equally insufficient and probably harsh (if not unfair), given the fact that such dismissals are not a result of any act or omission on the part of the employee.[178] Indeed, apart from the so-called 'meaningful joint problem solving exercise',[179] with employees likely to be retrenched, and which may be argued to provide some safeguards, in addition to a meagre severance pay,[180] there is no responsibility placed on the part of the retrenching employer to take substantial steps towards preventing retrenchments of employees nor any further steps thereafter.

The nature of technological developments in the Fourth Industrial Revolution has the potential of increasing the frequency of faultless dismissals and to affect a wider group of employees than ever before. In its current form, the ground for dismissal based on operational requirements of the employer leaves much to be desired and may be prime for exploitation. As a matter of fact, the various decisions by the labour courts make the assumption that such exploitation would be in favour of private capital and not of the welfare of employees inevitable.[181]

V CONCLUSIONS

The dominance of the common law in labour management relations has long characterised the nature of labour management relationships in South Africa. Because of the incorporation of tenets of the law of contract into the employment contract, it resulted in the treatment of these relationships as pure economic

[177] An employer is entitled, for its survival, to keep abreast of technological developments and can adopt new technologies that may render jobs redundant (see *Singh & Others v Mondi Paper* (2000) 21 *ILJ* 966 (LC) para 30; see also *Wolfaardt & Another v Industrial Development Corporation of South Africa Ltd* (2002) 23 *ILJ* 1610 (LC) para 23 and *South African Chemical Workers Union & Others v Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC) para 36.

[178] See *Grieg v Afrox Ltd* (2001) 22 *ILJ* 2102 (ARB) 2109A.

[179] See ss 84(1)*(e)*, 189(2) and 189A(2)*(a)* of 1995 LRA (n 5).

[180] See how severance pay is calculated under the Basic Conditions of Employment Act 75 of 1997.

[181] See *General Food Industries* (n 3); see also *Fry's Metals (Pty) Ltd v National Union of Metalworkers of SA & Others* (2003) 24 *ILJ* 133 (LAC) 148D–E.

transactions. The result of this regime was the exposure of employees to the risk of arbitrary practices by employers as well as an almost complete lack of job security. However, the establishment of the Industrial Court and introduction of its unfair labour practice jurisdiction, following recommendations of the Wiehahn Commission, changed the course of South African employment law from one steeped in parochial and aberrant practices to a democratic and fair dismissal process. For a somewhat vague concept that emerged from a laboured response to calm unrest in industry by the government, the unfair labour practice proved itself an irresistible opportunity for the courts to rationalise the then archaic laws that had governed the general South African labour market.

The development of the unfair labour practice jurisprudence by the courts allowed for the domestic employment laws to be reframed with references to international labour standards set by the ILO and other jurisdictions. These ground-breaking developments have since been incorporated into the Labour Relations Act of 1995 and now are fully consistent with, if not even better than, the international labour standards that informed their very foundations. These important developments may be facing a challenge they have not yet had to face. It is a change that will fundamentally uproot the very character of the labour market. The solution to the problem posed by new technology in the workplace is not yet lost to us. However, it is an issue that will require both open-mindedness in approaching same as well as legal and political will from all stakeholders, whether on the side of the employer, the worker or government. Importantly, the ILO as the global reference point, has a fundamental role to play.

Part 4:

THE FOURTH INDUSTRIAL REVOLUTION AND ITS IMPACT ON THE WORLD OF WORK

CHAPTER 16

Lessons from the ILO's Global Commission on the Future of Work Report for South Africa

FAHEEMAH KAROLIA-HUSSAIN* AND KGOMOTSO MOKOENA**

Work is a fundamental aspect of one's life. It helps individuals to meet their needs, live decent lives and can provide a sense of purpose. Primarily external factors relating to the onset of what has been dubbed the Fourth Industrial Revolution (4th IR), such as automation and globalisation, have led to the world of work evolving at a rapid rate. Despite it being able to create new job opportunities for some, job losses are likely to occur. This has the potential to widen the socio-economic divide between workers in different sectors of the population. The International Labour Organization has sponsored the Global Commission on the Future of Work Report (Future of Work Report) to consider matters pertaining to these changes as well as to find a framework that governments can use to ready themselves and their labour market for the impact of the 4th IR on the world of work. The report calls for a 'human-centred agenda for the future of work'. It focuses on three pillars: investing in workers' capabilities, investing in the institutions of work, and investing in decent and sustainable work. The technological advances associated with the 4th IR have the potential to considerably affect African countries and their labour force on a large scale. This is especially evident in the mining sector of South Africa as a result of an increase in automation in mines. This contribution considers the possible impact of the Future of Work Report on South Africa's labour framework. The paper considers aspects from the report, namely, revitalising collective bargaining, lifelong learning for all, and supporting workers through transitions. Throughout the piece the authors consider where South Africa may be falling short in relation to these aspects and suggest strategies to fill those gaps.

I INTRODUCTION

Several types of work by their very nature carry an inherent risk for employees. Work may be 'dangerous, unhealthy, poorly paid, unpredictable and unstable'[1] despite it being a part of human life. Mine work carries certain inherent risks and employs a large number of individuals in South Africa and globally.

In addition to this inherent risk, because of the onset of the Fourth Industrial Revolution (4th IR) there is a high possibility of certain jobs being rendered

* BCom LLB LLM (UJ).
** BA, LLB, LLM (WITS); Lecturer, Faculty of Law, University of Johannesburg.
[1] ILO *Global Commission on the Future of Work: Work for a Brighter Future* (2019) 18.

obsolete due to the rise of automation and globalisation in the workplace.[2] For this reason work in the mining sector, apart from being inherently unsafe, stands to become increasingly precarious.

Increasingly, mining houses have started to move towards automation to increase their productivity and to be able to compete globally.[3] Automation tends to reduce costs and improve the quality of output.[4] Robots can also work for a continuous period with no breaks.[5] It is estimated that there will be an increase in automation, specifically robotics, in the mining sector by 27,1 per cent by 2022.[6]

In addition to this, for a number of years the effectiveness of collective bargaining globally has been brought into debate. Questions have arisen as to whether collective bargaining adequately meets the needs of workers or whether it rather merely serves the needs of employers engaging in a 'tick-box' exercise.[7] Unlike in the case of questions of productivity, this challenge may actually be resolved through effective technology.

Lastly, it is likely that there will be a large number of job losses due to the mismatching of skills.[8] This may be counteracted by retraining workers that are already in the sector. Thus, skills development will play an important role in what happens to the mining workforce for the coming years as automation inevitably increases.

There is a growing need for guidance in relation to how states may legislate in order to prepare for the onset of the 4th IR. As a result, the International Labour Organization (ILO) has sponsored the Global Commission on the Future of Work: Work for a Better Future (Future of Work Report) to discuss matters pertaining to these changes in the work environment as well as to find a framework with which governments can work to ready themselves and their labour markets for these changes. For purposes of this chapter, the authors consider certain aspects of the Future of Work Report, namely, revitalising collective bargaining, measures to support lifelong learning for all, and supporting people

[2] Ibid.

[3] D Lynas and T Horberry 'Human factor issues with automated mining equipment' (2011) 4 *The Ergonomics Open Journal* 74, 78 and 'Innovating for safety and productivity' https://www.riotinto.com/ourcommitment/smarter-technology-24275.aspx (accessed on 3 April 2019).

[4] Lynas and Horberry (n 3) 75.

[5] D Carbonero, T Ernst and E Weber 'Robots worldwide: The impact of automation on employment and trade' 2018 (4) *International Labour Office Working Paper* 1, 2.

[6] Potapov 'Robots go to the "bottom": Forecasts for automation in mining', accessible at https://www.miningreview.com/top-stories/robots-forecasts-automation-mining/ (accessed on 11 February 2019).

[7] G Heald *Why is collective bargaining failing in South Africa? A reflection on how to restore social dialogue in South Africa* (2016) 13.

[8] World Economic Forum 2016 as cited in MI Manda and SB Dhaou 'Responding to the challenges and opportunities in the 4th Industrial revolution in developing countries' 2019 *Association for Computing Machinery* 244, 247; and World Skills Conference 2019 *Mission Talent – Mass Uniqueness: A Global Challenge for One Billion Workers* (2019) 18.

through transitions.[9] The authors examine the impact this report may have on South Africa's labour law framework and, in particular, the role it may play in the mining sector. The writers first consider the Future of Work Report in broad strokes. Second, they consider the modernisation of collective bargaining. Third, the paper explores effective lifelong learning for all. Finally, it looks at supporting people during transitions in their workplaces associated with technological developments.

II GLOBAL COMMISSION ON THE FUTURE OF WORK: WORK FOR A BRIGHTER FUTURE

The future world of work is fast approaching and guidelines are necessary to ensure that everyone benefits from these technological changes.[10] The future world of work can open up opportunities, improve the quality of working life and bridge the gap between citizens in relation to socio-economic inequalities.[11] However, it can also lead to jobs being lost.[12] For this reason the Director-General of the ILO created the Global Commission on the Future of Work (Global Commission).[13] In October 2017 the Global Commission held its first meeting.[14] The Global Commission held conversations on 'aspects of the world of work, identifying key challenges and opportunities and trying to come up with recommendations for action by all stakeholders, including governments, employers' and workers' organisations'.[15] It was co-chaired by the Prime Minister of Sweden, Mr Stefan Lofven, and the President of the Republic of South Africa, Mr Cyril Ramaphosa.[16] The Future of Work Report was launched in South Africa on 1 March 2019.[17]

The report calls for a human-centred approach for the future of work. The idea is to place people and their work 'at the centre of economic and social policy and business practice'.[18] The approach is forward-looking and aims at developing humans to cope in a digital world[19] and strengthening social dialogue in order to

[9] ILO *Future of Work Report* (n 1).
[10] ILO *Future of Work Report* (n 1) 10.
[11] Ibid.
[12] Ibid.
[13] ILO *Future of Work Report* (n 1) 5.
[14] Ibid.
[15] Ibid.
[16] ILO *Future of Work Report* (n 1) 71.
[17] C Ramaphosa 'President Cyril Ramaphosa: Launch of ILO Global Commission on the Future of Work report', accessible at https://www.gov.za/speeches/address-president-cyril-ramaphosa-launch-report-ilo-global-commission-future-work-fairmont (accessed on 18 September 2020).
[18] ILO *Future of Work Report* (n 1) 24.
[19] ILO *Future of Work Report* (n 1) 28.

improve employees' quality of working life.[20] Additionally, the report contains three pillars in which it promotes state investment.[21] These pillars are investing in people's capabilities, investing in institutions of work, and investing in decent and sustainable work.[22] This chapter focuses mainly on specific recommendations made under the first three pillars, namely, revitalising collective representation, lifelong learning for all, and supporting people through transitions.

III REVITALISING COLLECTIVE BARGAINING

(1) *What does the Global Commission say about collective bargaining?*

As mentioned, the Future of Work Report considers the revitalisation of collective bargaining to aid the future of work. The ILO calls for 'public policies that promote collective representation and social dialogue'.[23] The Future of Work Report emphasises the important point that collective bargaining may assist in navigating 'future of work transitions'.[24] It is important to note that the current changes in the workplace, such as the increase in informal employment, make it 'harder for workers to organise and represent their collective interests'.[25] With the increase in the use of technological developments it is possible that work becomes even more precarious, making it even more difficult to support workers through collective bargaining structures. In addition, effective collective bargaining may improve workers' ability to adjust to new working environments.

Collective bargaining may be defined as:

> all negotiations which take place between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more workers' organisations, on the other for:
>
> (a) determining working conditions and terms of employment and/or
>
> (b) regulating relations between employers and workers; and/or
>
> (c) regulating relations between employer or their organisations and a workers' organisation or workers' organisations.[26]

The government, workers, workers' organisations, employers and employers' organisations are important role players in collective bargaining. The pursuit of effective collective bargaining ideally leads to socio-economic shifts in the lives of workers.

[20] Ibid.
[21] ILO *Future of Work Report* (n 1) 24.
[22] Ibid.
[23] ILO *Future of Work Report* (n 1) 41.
[24] Ibid.
[25] Ibid.
[26] Article 2 of the ILO Collective Bargaining Convention No 154.

The right to strike is embedded in the Constitution as well as the LRA and is central to collective bargaining.[27] It is an economic weapon that may be used by workers when they are dissatisfied with the result of the collective bargaining.[28] The LRA in chapter IV extensively covers strike action.[29] However, strikes appear to be a problematic course of action in South Africa. South Africa has the highest degree of strike action globally.[30] Strike action is supposed to be temporary and should not continue for a long time.[31] In South Africa strikes continue for long periods, such as the Lonmin, Implats and Amplats 2014 strikes.[32] Additionally, a strike that lasted almost five months took to place at Sibanye-Stillwater mine.[33]

Violent and unprotected strikes are a major strike-related problem that takes place at the mines.[34] Violence during strike action has increased to a point where it is normal for workers to act violently during a strike.[35] It was found that 60 per cent of workers feel that violence is necessary during a strike.[36] The violence has led to the 'intimidation of non-striking workers, damage to property and deaths'.[37] The best-known mining strike violence that has taken place in South Africa is the Marikana massacre that took place on 16 August 2012 when 34 miners were killed while striking.[38] The Marikana massacre has highlighted a key issue in the mining sector and indicates that collective bargaining processes are not achieving the desired results. Violent strikes hardly ever have a positive outcome. They may be counterproductive and costly for employers, especially if the premises of the workplace are damaged in the process.[39] For example, in March 2017 SAMWU embarked on strike action at Kouga local municipality and striking workers damaged the access control gates, windows and cars on the

[27] Section 23 of the Constitution and s 1 of the LRA.

[28] A van Niekerk and N Smit *Law@work* (2019) 415; M Botha 'Responsible unionism during collective bargaining and industrial action: Are we ready yet?' (2015) *De Jure* 328, 332.

[29] The LRA.

[30] Odendaal 2014 http://www.miningweekly.com/article/sa-one-of-the-worlds-mostviolent-strike-prone-countries-201 4-08-06 as cited in MM Botha and M Lephoto 'An employer's recourse to lock-out and replacement labour: An evaluation of recent case law' (2017) 20 *PELJ* 1 24.

[31] Heald (n 7) 46.

[32] J Theron, S Godfrey and E Fergus 'Organisational and collective bargaining rights through the lens of Marikana' (2015) 36 *ILJ* 849, 866; Department of Labour *Annual Report* (2018/2019) 9.

[33] L Malope 'How Amcu's Joseph Mathunjwa "won" a lost war' https://www.news24.com/citypress/business/how-amcus-joseph-mathunjwa-won-a-lost-war-20190421 (accessed on 18 September 2020).

[34] P Benjamin 'Beyond dispute resolution: The evolving role of the Commission for Conciliation, Mediation & Arbitration' (2014) 35 *ILJ* 10 as cited in Botha (n 28) 344.

[35] Ibid and Department of Labour *Annual Report* (n 32) 9.

[36] C Chinguno 'Marikana: fragmentation, precariousness, strike violence and solidarity' 2013 *Review of African Political Economy* 639, 639.

[37] Department of Labour *Annual Report* (n 32) 10.

[38] Ibid and Theron, Godfrey and Fergus (n 32) 849.

[39] Botha (n 28) 344.

premises.[40] Thus, strike action needs to be better controlled and there needs to be stricter implementation of the provisions of the LRA.

The Future of Work Report primarily recommends in this regard that workers' organisations must use digital technology to organise labour and in this way workers from different workplaces and countries can organise themselves through this platform.[41] This could help improve the effectiveness of collective bargaining. In the mining sector, specifically, this could serve to curb the challenges around violent strike action which is relatively prevalent and often stems from the intimidation of workers.

(2) *Collective bargaining law in South Africa*

South African law provides for collective bargaining in the workplace. Section 23(5) of the Constitution of the Republic of South Africa, 1996[42] (the Constitution) provides for collective bargaining. The LRA[43] gives effect to the labour rights provided for in the Constitution. One of the primary objectives of the LRA is 'to promote employee participation in decision-making in the workplace'.[44] This is then given effect to by the various sections in the LRA that give substance to the right to collective bargaining.[45]

The process of collective bargaining regarding the acquisition of organisational rights is as follows: an employer must be notified in writing by the union that it wishes to exercise its organisational rights.[46] Within 30 days of receiving such notice an employer must meet the trade union.[47] There must be an attempt to conclude a collective agreement thereafter.[48] If no agreement is reached, the Commission of Conciliation, Mediation and Arbitration (CCMA) may be approached, in writing, by any party.[49] It will first be dealt with through conciliation[50] and if the matter remains unresolved, it will then be dealt with by way of arbitration.[51]

Collective bargaining does not exclusively deal with the acquisition of organisational rights, as it may involve negotiation on other matters of mutual

[40] Department of Labour *Industrial Action Report* (2017) 29.
[41] Ibid.
[42] 108 of 1996.
[43] 66 of 1995.
[44] Section 1 of the LRA.
[45] Section 1 of the LRA and ch III of the LRA.
[46] Section 21(1) of the LRA.
[47] Section 21(3) of the LRA.
[48] Ibid.
[49] Section 21(4) of the LRA.
[50] Section 21(6) of the LRA.
[51] Section 21(4) of the LRA.

interest,[52] which can include negotiations to increase wages. The present LRA does not include a definition on 'matters of mutual interest'. However, the court in *City of Johannesburg Metropolitan Municipality v SAMWU* defined it as a matter that deals with the employer-employee relationship and a trade union and employer has an interest in such a matter.[53] There are no clear guidelines on what amounts to a matter of mutual interest and it can cover a broad range of topics. A collective agreement can also state what falls under matters of mutual interest.[54] The authors are of the view that collective bargaining at times is ineffective if workers are perhaps intimidated to participate or employers do not engage meaningfully. As noted above, at times these challenges have led to violent strike action in the mining sector,[55] for example, the Marikana massacre mentioned above.[56] The strike took place because an agreement had not been reached on an increase in wages as well as the poor working and living conditions of the miners.[57]

Employees' right to strike and employers' recourse to lock-out is extensively covered in section 64 of the LRA. An employee and employer can exercise their rights in terms of this section if the disputed issue has been referred to a council or the CCMA and a certificate has been issued stating that the matter remains unresolved and a period of 30 days has elapsed since the council or CCMA received the referral.[58] An employer has to be given 48 hours' notice prior to the commencement of the proposed strike.[59] The notice has to be in writing.[60] If the dispute relates to a collective agreement concluded in a council, notice has to be given to the respective council.[61] Additionally, if an employer is a member of an employers' organisation, notice has to be given to the employers' organisation.[62] In the case of a lockout, an employer has to give 48 hours' notice of the commencement of the lock-out.[63] The notice has to be in writing and be given to a trade union[64] and, if there is no trade union, to the employees.[65]

[52] Section 2 of the LRA.

[53] *City of Johannesburg Metropolitan Municipality v SAMWU* [2011] 7 BLLR 663 (LC) para 11.

[54] Ibid.

[55] P Benjamin 'Beyond dispute resolution: The evolving role of the Commission for Conciliation, Mediation & Arbitration' (2014) 35 *ILJ* 10 as cited in M Botha (n 28) 344.

[56] Theron, Godfrey, and Fergus (n 32) 849.

[57] Ibid and 'Marikana Massacre 16 August 2012' https://www.sahistory.org.za/article/marikana-massacre-16-august-2012 (accessed on 15 September 2020). Other strikes that have dealt with an increase in wages include the Lonmin, Implats and Amplats strikes that took place in 2014. See Theron, Godfrey and Fergus (n 32) 866.

[58] Section 64(1)*(a)* of the LRA.

[59] Section 64(1)*(b)* of the LRA.

[60] Section 64(1)*(b)* of the LRA.

[61] Section 64(1)*(b)*(i) of the LRA.

[62] Section 64(1)*(b)*(ii) of the LRA.

[63] Section 64(1)*(c)* of the LRA.

[64] Section 64(1)*(c)* of the LRA.

[65] Section 64(1)*(c)* of the LRA.

If the issue relates to a collective agreement concluded in a council, notice must be given to the relevant council.[66]

It is submitted that balloting can help prevent industrial action if there is only minority support for the strike.[67] It entails that a union or employers' organisation has to conduct a ballot of the members that will participate in the industrial action and only if there is majority support the strike action will be protected.[68] Previously, in terms of the Labour Relations Act of 1956, balloting prior to a strike was a requirement.[69] However, when the LRA of 1995 came into force, the requirement of secrets ballots were removed. Policy-makers have reintroduced this requirement in the Labour Relations Amendment Act 6 of 2014 as well as in the 2018 amendment to the LRA.[70] The LRA provides that when a trade union or employers' organisation intends to register their constitution they must provide that before a strike or lock-out is called, a ballot of its members must be conducted.[71] Section 19 of the Labour Relations Amendment Act[72] empowers the Registrar to provide for balloting requirements in the trade unions' and employer organisations' constitutions.[73] Trade unions and employer organisations should amend their constitutions and provide for recorded and secret ballots.[74]

The interpretation of the provision was unclear on whether the failure to conduct a ballot would lead to a strike being rendered unprotected. The Labour Court in *Mahle Behr SA (Pty) Ltd v NUMSA & Others; FOSKOR (Pty) Ltd v NUMSA & Others*[75] held that the failure to conduct a recorded and secret ballot will result in an interdict being granted against strike action. However, the Labour Appeal Court in *National Union of Metalworkers of South Africa & Others v Mahle Behr SA (Pty) Ltd* has held that section 95 of the LRA is only an arrangement between a trade union and its members and does not impact on the protected or unprotected status of a strike. This is in line with the view of authors Fergus and Jacobs.[76] Additionally, the inclusion of provisions in the constitution on recorded and secret ballots prior to strike action is the responsibility of the union and should not have an effect on an employee's right to strike.[77]

The requirement for secret ballots is a positive development which can help regulate whether or not a strike should take place based on the votes of the

[66] Section 64(1)*(c)* of the LRA.
[67] Botha (n 28) 345.
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Section 95(5)*(p)* of the LRA.
[72] 10 of 2018.
[73] Section 19 of the LRAA.
[74] Section 19 of the LRAA.
[75] (2019) 40 *ILJ* 1814 (LC) para 18.
[76] E Fergus and M Jacobs 'The contested terrain of secret ballots' (2020) 41 *ILJ* 757.
[77] Ibid.

majority of the members. It will also help in situations where unions call for industrial action to promote their own agendas. The legislature also permitted that voting may be done by any system that is recorded and secret.[78]

The authors are of the view that the requirement of a secret strike ballot is favourable and should be used more often in the mining sector when unions or employers want to embark on industrial action. One of the most efficient ways in which to conduct a secret ballot may be via the use of mobile applications. The use of technology to organise a workforce has been used in various countries. For instance, Walmart in the United States of America has a mobile application called 'WorkIt' which provides Walmart workers answers to questions relating to workplace rights, and it can also be used to organise the workers. Furthermore, in Sweden an application is being used where workers can seek advice on workplace matters and the use of an algorithm can inform companies when workers are likely to bargain.

(3) *Comparison between South African law and the Commission on the Future of Work*

There is an increasing desire to use multimedia platforms when collective bargaining.[79] This could lead to the welcome reduction of mass meetings, which can lead to the minimising of costs involved in bargaining.[80] As was seen at the onset of the Covid-19 pandemic, digitalisation of the collective bargaining process could also lead to a reduced risk in mass infections stemming from mass meetings. Additionally, the negotiation can be accurately recorded and the negotiator will not be influenced by any party's bias and emotions.[81] In other words, there is less likely to be any intimidation or interference with the balloting processes.

However, this may prove difficult in the South African mining sector as not all workers have access to the necessary technology to participate, such as a smart phone or reliable internet connection. In addition, in the past few years data prices have been in the news because of the high costs of data in South Africa.[82] The Competition Commission has embarked on an inquiry into the data-services market to find recommendations on reducing the price of data.[83] It was then found that data costs are too high and that Vodacom and MTN must

[78] Section 8 of the LRAA and s 95(9) of the LRA.

[79] Heald (n 7) 40.

[80] Heald (n 7) 31.

[81] Ibid.

[82] R Cokayne '"Data prices must fall!" – Competition Commission', accessible at https://www.moneyweb.co.za/news/south-africa/significant-reduction-in-sa-data-prices-imminent/ (accessed on 11 February 2020).

[83] Ibid.

'reduce prepaid monthly mobile data bundle prices within two months – possibly by between 30 per cent and 50 per cent'.[84]

However, in order to alleviate this, prominent employers can partner with service providers to provide wifi or data at reduced rates to the mining sector workforce. It could be specifically provided during times when workers must vote on a particular issue. Another way of alleviating this is to use an SMS-based voting system as opposed to one that relies on the use of an application on a smart phone and considerable data.

The use of applications in Sweden as well as the USA has led to positive outcomes in the labour markets of these countries. In Sweden the application receives approximately 900 calls per day on problems that workers face in the workplace, requiring advice on such problems.[85] The call details are logged into a database which can provide information about the labour market and economy.[86] The algorithm in the application can provide information on whether it is likely for workers to organise in a particular workplace.[87] This can help employers to better prepare for bargaining.[88]

In the past Walmart was not in favour of organised labour. The 'WorkIt' application has led to 'substantially better corporate-wide pay and leave policies'.[89] The use of such applications can solve the issues concerning the casualisation of workers because trade unions will be able to organise all workers despite them being, for instance, casual workers.

Government and other role players need to use collective bargaining as a tool to ease technological transformation because then they can give their input on the way forward. This may be done by including workers in the collective bargaining process, especially on matters dealing with technological transformation. This will lead to a workforce that is confident and will lead to an increase in productivity in the workplace.

In conclusion, digital technology has been used to organise labour in various countries, namely, Sweden and the USA.[90] Both these applications have had positive outcomes. The application in Sweden has a database that collects

[84] Ibid.

[85] J Maxwell 'How a labour union is using an algorithm to predict when to organise', accessible at https://www.vice.com/en_us/article/nep5wb/how-a-labor-union-is-using-an-algorithm-to-predict-when-to-organize (accessed on 30 August 2019).

[86] Ibid.

[87] Ibid.

[88] Ibid.

[89] T Wiggin 'Labour organisers look to apps to reach wider audiences' accessible at https://www.huffpost.com/entry/labor-organizers-apps-audiences_n_5b47a609e4b022fdcc577a47 (accessed on 30 August 2019).

[90] Ibid and Maxwell (n 85).

information and this provides information on the labour market and economy.[91] In addition, the application in the USA helps workers organise, which had been difficult to do in the past.[92] The use of technology to organise labour can be difficult in the mining sector in South Africa because of its associated costs but, as noted above, there are various ways in which to minimise these concerns.

IV INCREASING INVESTMENT IN PEOPLE'S CAPABILITIES: LIFELONG LEARNING FOR ALL

(1) *Global Commission on the Future of Work and Lifelong Learning*

Under this pillar of the Future of Work Report, the ILO 'calls for the formal recognition of a universal entitlement to lifelong learning and the establishment of an effective lifelong learning system'.[93] According to the Future of Work Report '[l]ifelong learning encompasses formal and informal learning from early childhood and basic education through to adult learning'.[94] By implementing lifelong learning and providing learning at different stages of a person's life it will dramatically increase the choices that will be available for future generations.[95] This will enable 'workers to assume their responsibility to engage proactively in their own learning'.[96]

Workers could benefit from new technologies as it has the potential to assist in opening up new paths for training, which can overcome time and resource constraints.[97] Additionally, lifelong learning could help those entering the world of work in securing jobs in automated industries such as mining.[98] Thus, a universal guarantee of lifelong learning will be necessary for the future of work.

A lifelong learning system can help the mining sector develop the skills of mineworkers and ensure that they remain employed despite changes to the way in which mines operate. Further, the establishment of a lifelong learning system should be the joint effort of government, employers, workers, and educational systems. Lastly, it is very important from a socio-economic perspective to ensure that even once mines are deplete, workers are employable in various sectors of society.

[91] Maxwell (n 85).
[92] Wiggin (n 89).
[93] ILO *Future of Work Report* (n 1) 30.
[94] Cokayne (n 82).
[95] Ibid.
[96] ILO *Future of Work Report* (n 1) 32.
[97] ILO *Future of Work Report* (n 1) 30.
[98] Ibid.

The report notes that government has the role of providing training and learning to workers in the form of 'skills development policies, employment services and training systems'.[99]

Furthermore, as noted above, workers will need to be 'assured of continuity of income and labour market security' because then they are more likely to participate in adult learning.[100] Additionally, governments need to have financing mechanisms in place that are best suited for their country and supports adult education.[101] Employers would also need to contribute to the financing of lifelong learning systems.[102] The ILO recommends that a system needs to be established where there is an 'employment insurance' or 'social funds' that allows workers to take paid leave for training. This could entail that workers get a certain 'number of hours of training rights, regardless of the type of work they do'.[103] If employers have their own programmes in place, they can work with workers' organisations 'to design relevant frameworks'.[104] The ILO is of the view that options to incentivise businesses to invest in training need to be explored.[105]

(2) *Current skills development framework in South Africa*

South Africa has adopted a number of skills development schemes. The most important of these is through the mechanisms created by the Skills Development Act (SDA).[106] The SDA governs skills development in the workplace and the Skills Development Levies Act (SDLA)[107] governs the levies to paid to fund the bodies mentioned in the SDA.[108] The employer pays for the levies and no deduction for the levies can be made from the employee's salary.[109] Currently, 1 per cent of the employee's salary is paid as a levy to the South African Revenue Services.[110]

The purpose of the SDA is to develop the skills of employees and improve the quality of their working lives. However, it not only benefits the employee but also the employer as it can improve productivity and competitiveness. Additionally, it promotes the workplace as a place of active learning by providing employees the opportunity to gain new skills and experience. Furthermore, it encourages

[99] ILO *Future of Work Report* (n 1) 31.
[100] Ibid.
[101] Ibid.
[102] Ibid.
[103] Ibid.
[104] Ibid.
[105] Ibid.
[106] 97 of 1998.
[107] 9 of 1999.
[108] Van Niekerk and Smit (n 28) 497.
[109] Ibid.
[110] *All Man Labour Services CC v The Services Sector Education and Training Authority* (2009) 30 *ILJ* 1052 (LAC) 12.

employees to participate in learning programmes.[111] The following institutions are part of the SDA's institutional framework: the National Skills Authority (NSA), the National Skills Fund (NSF), Sector Education and Training Authorities (SETAs), the National Qualification Framework (NQF), skills development institutes, and institutes in the Department of Labour.[112] SETAs promote and develop skills development in the workplace. The Minister of Higher Education and Training determines which sectors need education and training based on the needs of the employers and employees of those specific sectors.[113] SETAs have functions which include the development and implementation of sector skills plans and the promotion of learning programmes. This is critical to the mining sector and also in line with the ILO's recommendations.

The mining sector has its own SETA, namely, the Mining Qualifications Authority (MQA).[114] It was established in terms of the Mine Health and Safety Act[115] (MHSA) and later under the SDA.[116] Its mission is to '[e]nsure that the mining and minerals sector has sufficient competent people who will improve health and safety, employment equity and increase productivity standards'.[117] The function of the MQA is to 'generate education and training standards and qualifications in the mining industry',[118] and 'perform the functions of a sector education and training authority in terms of the Skills Development Act 1998 (Act 97 of 1998)'.[119] The MQA has improved the mining sector, specifically regarding health and safety, by creating an atmosphere for dialogue between the role players.[120]

Learnerships also play an important role in as far as skills development is concerned. Chapter IV of the SDA covers this. It needs to include a structured learning component and a structured work experience component for it to be established.[121] It also needs to be registered with the Director-General of Higher Education and Training.[122] The learnership must lead to a registered qualification by the South African Qualifications Authority.[123] An agreement takes place between the employee, learner and a skills development provider.[124]

[111] Section 2 of the SDA.
[112] Section 2(2) of the SDA; Van Niekerk and Smit (n 28) 498–99.
[113] Section 9(2)*(a)* of the SDA.
[114] See https://www.mqa.org.za/ (accessed on 14 February 2020).
[115] 29 of 1996.
[116] See https://www.mqa.org.za/ (n 114).
[117] See https://www.mqa.org.za/ (n 114).
[118] Section 46(1)*(d)* of MHSA.
[119] Section 46(1)*(e)* of the MHSA.
[120] S Macfarlane 'Reflecting on 25 years of democracy and the mining industry' (2019) *The Southern African Institute of Mining and Metallurgy* 66.
[121] Sections 16*(a)* and *(b)* of the SDA.
[122] Section 16*(d)* of the SDA.
[123] Section 16*(c)* of the SDA.
[124] Section 17(1) of the SDA.

The learner needs to be employed by the employer for a specified period and practical work experience needs to be provided as well as education and training which is mentioned in the agreement.[125] The skills development provider needs to also provide any education and training that is mentioned in the agreement.[126] This agreement needs to be registered with the SETA of that sector.[127]

In order to retain mineworkers during the 4th IR it is necessary for employers to create skills development programmes. Skills programmes are occupationally based and will lead to a qualification in terms of the NQF.[128] Skills programmes may be funded by a SETA or the Director-General of Higher Education and Training,[129] provided funds are available.[130] However, given the climate, it is ideal for these programmes to be geared at education surrounding technological development. For example, skills development related to coding and complex machine operation will be useful whether or not workers remain in mining.

The current unemployment rate in South Africa is 30,1 per cent[131] and this is disturbing. Further, the shortage of skills in South Africa has been a major concern and government has continuously focused on solving this problem.[132] The changes that have taken place in the educational system have also left much to be desired since they have failed to produce the skills that are necessary.[133] Payle correctly points out that the skills that are needed in the 4th IR are complex problem-solving, critical thinking, creativity, people management, coordinating with others, emotional intelligence, judgment and decision-making, service orientation, negotiation, and cognitive flexibility.[134] However, schools are yet to introduce modules dealing with these skills in all South African schools.[135]

[125] Section 17(2)*(a)* of the SDA.

[126] Section 17(2)*(c)* of the SDA.

[127] Section 17(3) of the SDA.

[128] Section 20(1) of the SDA.

[129] Section 20(3)*(a)* of the SDA.

[130] Section 20(3)*(c)* of the SDA.

[131] Stats SA *Quarterly Labour Force Survey: Quarter 1* (2020) 1; J Delay 'COVID-19: South Africa's unemployment rate expected to reach 50 per cent as economy keeps plummeting', accessible at https://www.iol.co.za/news/south-africa/covid-19-south-africas-unemployment-rate-expected-to-reach-50-as-economy-keeps-plummeting-48457893 (accessed on 15 September 2020).

[132] F Rasool and CJ Botha 'The nature, extent and effect of skills shortages on skills migration in South Africa' (2011) 9 *SA Journal of Human Resource Management* 1.

[133] Ibid.

[134] C Payle '10 Essential skills for the 4th Industrial Revolution', accessible at https://www.skills-portal.co.za/content/10-essential-skills-4th-industrial-revolution (accessed on 13 February 2020).

[135] 'President Cyril Ramaphosa highlights the Fourth Industrial Revolution in SA', accessible at https://germistoncitynews.co.za/210886/president-cyril-ramaphosa-highlights-fourth-industrial-revolution-sa/amp (accessed on 15 July 2019).

(3) *Comparison between South African law and the Global Commission on the Future of Work*

South African legislation covers programmes for school and university students and training for employees in the workplace. Learning programmes rarely benefit those that live in poor areas or do not have a certain level of schooling required by businesses. Thus, there are mainly programmes for adults and not programmes for all ages, and there are no lifelong learning programmes in place. In addition to this, it is difficult to initiate programmes of learning surrounding technological development if a particular area lacks the necessary infrastructure to initiate such programmes. It will be impossible to teach coding without computers, or to teach anything relating to the Internet without the necessary telecommunications infrastructure or even electricity. These are concerns that continuously plague not only South Africa but the continent as a whole.

Employers already contribute towards a skills development fund, which is a step in the right direction. They can also provide training and learning for employees. However, there is not much incentive for businesses to invest in training, except that there will probably be an increase in productivity if they do train employees. Furthermore, when employees are trained during working hours, there are no funds available to remunerate them for the leave they have taken for the training. This can be problematic since workers are not motivated to undergo training as they may not receive their salaries during this period. In addition, where there are funds to steer towards upskilling workers, it is very important that these are channelled towards skills that are in demand in the market.

The mining sector has also suffered the loss of highly skilled workers and there is a need for training for such jobs.[136] A large number of engineers have over the past few years left the country, with the result that there are very few highly skilled workers in this field and also a very limited number of people that are opting to go into this field in South Africa.[137] This could be due to the barriers created by the educational system, such as low educational standards, 'inadequate provision for early childhood development, declining Grade 12 pass rates, declining enrolments at FET colleges, lack of resources, under-qualified teachers, weak management and poor teacher morale'.[138]

In essence, although South Africa is attempting to make headway to improve the educational system so that it not only provides adequate channels for lifelong learning but also channels that feed into the needs of the market, it still has a long way to go. However, it can be well guided by imperatives outlined by the ILO and the needs of the mining sector and the broader market. By using these

[136] Rasool and Botha (n 132) 10.
[137] Ibid.
[138] Rasool and Botha (n 132) 6.

standards as a barometer it may be able to improve technological development in the sector, increase skills of workers and prepare them to enter the labour market when mines inevitably either become uneconomical to mine or technological development renders workers redundant.

V INCREASING INVESTMENT IN PEOPLE'S CAPABILITIES: SUPPORTING PEOPLE THROUGH TRANSITIONS

(1) *Global Commission on the Future of Work and supporting people through transitions*

The ILO 'calls for more investment in the institutions, policies and strategies that will support people through future of work transitions'.[139] This forms part of the first pillar of the Future of Work Report. People undergo many transitions during their lifetime. For instance, people transition from school to work, changing jobs and even retirement. These transitions are further exacerbated by the development of technology. The idea is for state support to improve or increase the choices open to individuals during these times.[140] It also has the potential of allowing people to 'shape their working lives'.[141] This will allow them to earn money while keeping pace with technological developments in society. This involves systems of social support and security that aim to consistently improve the lives of citizens whose communities tend to revolve around a particular sector. States should ideally strive to minimise citizen and worker dependence on a particular industry.

The Future of Work Report recommends that governments initiate employment programmes and support for young entrepreneurs.[142] This will ensure decent work for the youth.[143] In this way the youth will be equipped with skills that will be needed in the future and will be able to find jobs and opportunities at a faster rate than currently. The private sector has to also play a role by offering apprenticeships to young people.[144] This could be very beneficial specifically in the mining sector to enable even young people from disadvantaged backgrounds to secure more highly skilled employment in the sector. Additionally, young people who are not employed and are not studying or receiving training should be given the chance to participate in lifelong learning programmes.[145] In addition,

[139] ILO *Future of Work Report* (n 1) 32.
[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] Ibid.
[145] Ibid.

again, youth entrepreneurship minimises dependence on mines that may in time become less economically viable to mine.

It is also recommended that there should be support for older workers 'that expands their choices and enables a lifelong active society' as also considered above.[146] Older workers that choose to still be economically active should be given some form of assistance, for instance flexible working hours. In order to achieve this, '[g]overnment could increase opportunities for partial retirement, or raise the retirement age on an optional basis'.[147] This will also be critical in the mining sector where today there are still many workers who are elderly and have not previously been given the chance to upskill prior to reaching retirement age.

Furthermore, '[n]ew mechanisms need to be found to reconfigure unemployment insurance, training and leave entitlements as "employment insurance" improving employability … and empowering workers to pivot in the face of job loss'.[148] Jobs losses appear to be imminent in the mining sector for a number of reasons, ranging from economic viability to the ongoing effects of the Covid-19 pandemic. Sibanye-Stillwater plans on retrenching 1 142 workers from the Marikana mine.[149] Another mining company, Samancor Chrome, plans to retrench 2 488 workers.[150] In addition, the changes in the mining sector will not only impact workers but also the community who will need to be supported through these difficult transitions.

(2) *Skills development law and social protection in South Africa*

The Mineral and Petroleum Resources Development Act (MPRDA)[151] was enacted to change the mining sector[152] and to ensure sustainable development of minerals and petroleum in South Africa.[153] One of its objectives is to 'promote employment and advance the social and economic welfare of all South Africans'.[154] The MPRDA can help in creating a skills development plan that is specific to a particular mine.

[146] ILO *Future of Work Report* (n 1) 33.

[147] Ibid.

[148] ILO *Future of Work Report* (n 1) 32.

[149] 'Over 9 000 planned job cuts have been announced for South Africa in 2020 – these are the companies affected', accessible at https://businesstech.co.za/news/business/372434/over-9000-planned-job-cuts-have-been-announced-for-south-africa-in-2020-these-are-the-companies-affected/ (accessed on 12 February 2020).

[150] A Seccombe 'Samancor joins a growing list of SA's mining companies retrenching', accessible at https://www.businesslive.co.za/bd/companies/mining/2020-01-21-samancor-joins-a-growing-list-of-sas-mining-companies-retrenching/ (accessed on 12 February 2020).

[151] 28 of 2002.

[152] Department of Mineral Resources *Guidelines for the Submission of a Social and Labour Plan* (2010) 4.

[153] Preamble of MPRDA.

[154] Section 2*(f)* of the MPRDA.

A person wishing to own a mine needs to obtain a mining right.[155] An application for the right must be lodged at the regional manager's office situated in the mining area.[156] The MPRDA requires that a social and labour plan must be included in the application for a mining right.[157] Social and labour plans are covered in the regulations to the MPRDA. Furthermore, the right is valid for not more than 30 years.[158] A social and labour plan is a legal requirement[159] and binds the mining company.[160] Therefore, if a mining company does not comply with what is stated in its social and labour plan, the mining right can be suspended.[161]

The objectives of the social and labour plan are to promote employment and advancing the social and economic welfare of South Africans; to transform the mining industry; and to 'contribute towards the socio-economic development of the areas in which they are operating'.[162] The social and labour plan will be valid until a mine is issued a closure certificate.[163] The mine is required to provide the relevant regional manager an annual report that covers the mines compliance with its social and labour plan.[164] The mining community needs to be consulted when the social and labour plan is being drafted.[165] The social and labour plan should include a human resources development programme, which will include aspects such as mentorship and career progression plans for employees, which are both critical to the objectives proposed by the ILO. The objective 'is to ensure development of requisite skills in respect of learnerships, bursaries (of core and critical skills), artisans, training, other training initiatives reflective of Adult Basic Education and Training (ABET) demographics'.[166] Mineworkers can be trained in skills that will assist them in the mines as well as with skills that are not mining-related but can be used once the mine is closed down.[167]

The requirement that a social and labour plan needs to be developed to obtain mining rights is a good way of ensuring that all South Africans benefit from mining, especially the employees and the communities that employees are from and where the mining takes place. However, even though community members wish to be

[155] Section 22(1) of the MPRDA.

[156] Ibid.

[157] Section 25(2)*(f)* of the MPRDA and Regulation 42(1)*(a)* of the MPRDA.

[158] Section 23(6) of the MPRDA.

[159] B Meyersfeld 'Empty promises and the myth of mining: Does mining lead to pro-poor development?' (2017) 2 *Business and Human Rights Journal* 39.

[160] RO Lamola 'A critical analysis of the enforceability of social and labour plans in the South African mining industry' unpublished dissertation, University of Pretoria (2017) 36.

[161] Ibid.

[162] Regulation 41 of the MPRDA.

[163] Regulation 43 of the MPRDA.

[164] Regulation 45 of the MPRDA.

[165] Meyersfeld (n 159).

[166] Department of Mineral Resources (n 153) 8.

[167] C Rogerson 'Mining enterprise, regulatory frameworks and local economic development in South Africa' (2011) 5 *African Journal of Business Management* 13375.

part of the process it can be difficult as they lack the knowledge necessary to discuss this.[168] Mining is complex and the language barriers between the mine owners and the mining communities can also pose a problem.[169] However, in a recent landmark case the court held that those who will be affected by the mining operations have a right to see the licence applications.[170] This will prevent mining companies from withholding information from the mining community and it can help mining communities in holding mining companies accountable. Furthermore, it appears that mining companies are not being held accountable if they do not comply with their social and labour plan.[171] For instance, Implats Platinum disclosed that they had exceeded the carbon dioxide levels in the mine but they were not held accountable for the non-compliance.[172] This is an indication that even if mining companies provide for skills development plans in the social and labour plan and do not comply with it, they will often not be held accountable.

Social and labour plans can play a role in developing skills in the 4th IR by making it a requirement for mine companies to consider the skills needed for mines in the 4th IR and develop skills plans in this regard. Skills plans should also be flexible and should contain a broad outline on what will be done in the coming years. It should focus on the long-term growth of employees' skills.

(3) *Comparison between South African law and the Future of Work*

As previously noted, poor implementation of social and labour plans completely defeats their purpose. In addition, the reality that many mining houses retain licences despite poor implementation of social and labour plans ensures that communities are rendered ghost towns once mining houses close down. Trade unions must play a central role in ensuring that social and labour plans are followed through, well implemented and regularly updated. Updating plans will also ensure that mines and communities keep up with increased demands relating to the 4th IR. In addition to this, states must not be reluctant to suspend mining licences to ensure that these plans are met and communities are sustainably supported during and after the subsistence of a mine. Government cannot afford to avoid heavy-handedness in this regard. Should they turn a blind eye, we face a much broader challenge of supporting communities where generations of South Africans are uneducated, unskilled, unsupported and simply unable to compete in the rest of the country and globally.

[168] J Howard 'Half-hearted regulation: Corporate social responsibility in the mining industry' (2014) 131 *South African Law Journal* 20.

[169] Ibid.

[170] E Ellis 'Game-changing Xolobeni judgment orders applications for mining licences to be made public', accessible at https://www.dailymaverick.co.za/article/2020-09-14-game-changing-xolobeni-judgment-orders-applications-for-mining-licences-to-be-made-public/ (accessed on 16 September 2020).

[171] Howard (n 168) 24.

[172] Ibid.

VI CONCLUSION

As noted from this discussion, South Africa, although not truly meeting the relevant recommendations of the ILO, is well on its way in several respects. Collective bargaining in South Africa needs to include digital technology to aid the transitions that will take place in the 4th IR. There needs to be an introduction of an online platform to organise workers. However, there are difficulties of introducing such a platform in the mining sector. To solve this issue, service providers can collaborate with mine owners and provide a connection when there is a need to vote on an issue. Further, data prices are set to drop due to an inquiry instigated by the Competition Commission into the high data costs in South Africa. Employees should also participate in the collective bargaining process, especially when the issue is dealing with technological transformation. These are easily met provisions of the ILO's recommendations and are actually facilitated by imminent digitalisation that has characterised the period surrounding the onset of the Covid-19 pandemic.

A shortage of skills is a major concern in South Africa. There is legislation that covers skills development in general as well as exclusively in the mining sector, but in the age of 4th IR it will be important to address skills gaps in such a way that workers are able to participate meaningfully in a changing world. Government needs to be involved in developing skills development plans to equip the workforce with skills that are needed in the 4th IR. A lifelong learning programme will need to be introduced to benefit every citizen in South Africa regardless of the stage of their working life. The education system should ideally aid in implementing lifelong learning programmes and ensuring learners exit the school system with skills that are relevant to our changing economy. Additionally, workers should be encouraged to undergo training by being paid their salary or wage by a fund that is designated to pay workers who undergo training.

It is necessary for workers to be supported through transitions. The future world of work will bring a lot of changes to the world of work and people will need support to understand these changes. By being offered support during these changes, people will have more choices and will experience financial security. The MPRDA can aid in creating skills development plans that will help support workers through the changes brought about by the 4th IR. This can further be assisted by social and labour plans as covered by the MPRDA. The South African government can initiate employment programmes, especially in new fields in the mining sector. Mineworkers that are young can be offered apprenticeships by mining companies. The apprenticeships can offer training on robotics and machinery in the mines. Older workers should also be supported and be given an opportunity to remain working in the mines but in a more controlled manner so that their health is not affected.

The fact that South Africa has legislative regimes in place to facilitate skills development and collective bargaining bodes well for its ability to adapt to the

future of work, even in the mining sector. It will take careful analysis, research and meaningful implementation in the mining sector to meet our specific needs and align us with the guidance provided by the ILO in this regard. Most significantly, it will require concerted political will and effort to adequately address these concerns and prepare South Africans for the future of work.

CHAPTER 17

Wrongful acts by human employees and artificial agents: The disadvantages of human legal subjectivity

CHARLES TSHEPO MALATJI*

An event of wrongdoing while on duty has different outcomes for humans and 'robots'. Humans suffer a great deal of financial loss and might also get dismissed from work. In the coming Fourth Industrial Revolution, machines in the workplace will be capable of causing harm. However, due to the lack of legal subjectivity, machines cannot be held liable for their wrongdoing, whereas when an employee commits a delict while working in the scope of his or her employment, they might be dismissed from their employment and/or be held jointly liable. The employee's pension fund payment may be reduced pursuant to the employer's right to recourse. In consideration of certain conceptual factors, including wealth inequality and the high unemployment rate clouding against our society, this study suggests that the employer's right to recourse must be abolished in cases where employees have not acted in bad faith. The South African history of unfair labour practices must also be taken into account when considering whether the employee should be dismissed for the wrongdoing.

I INTRODUCTION

The employer's liability for his employees' conduct is based on the principles of fairness and justice, as against the parties who suffered the harm.[1] This means that although the primary party to bear the responsibility is the employee for his or her wrongful conduct, the employer is in a better financial position to compensate.[2] However, employees are still jointly sued with the employer in cases of misconduct or negligence.[3] This might have a detrimental impact on the financial livelihood of the employee. Not only can the employee be jointly sued, but he or she might even face a disciplinary hearing which might lead to a

* Charles Tshepo Malatji (LLB and LLM in Mercantile law, UJ) is a Candidate Legal Practitioner in the Polokwane Society of Advocates. He was one of five students appointed by the University of Johannesburg as research assistants for the faculty of law in 2019. He won a Best Oralist Award for the LexisNexis moot competition at the University of Pretoria in 2018. He also obtained a certificate in electronic engineering from the Samsung Engineering Academy in 2014.

[1] J Neethling, JM Potgieter and PJ Visser *The Law of Delict* (2006) 372–373.

[2] Neethling *et al* (n 1) 373.

[3] *PE v Ikwezi Municipality & Another* (2016) 37 (ILJ) 1799 (ECG) para 1.

dismissal.[4] In the case of the conduct of 'artificial agents',[5] however, there is no liability on part of the machines.[6] Not only do these artificial agents lack legal subjectivity, it is also impractical to hold machines liable for purposes of the law. Employers have a wide range of options to prevent further harm, for instance, the machine might be switched off or taken for reprogramming. Therefore, there are no consequences for artificial agents, whereas human employees stand to lose their jobs and other benefits such as pensions.[7]

In pursuit of the right to a fair labour practice,[8] the law could be reformed to offer more protection to human employees. The purpose of this paper is to explore this difficulty and to make suggestions as to how the law may be reformed to ensure that human employees are not being disadvantaged for being human. In the final instance, the paper argues that legislative reforms are imperative to ensure that 'bots' do not emerge as employees of choice due to liability issues.

II THE CONCEPT OF THE EMPLOYER'S VICARIOUS LIABILITY

(1) *The meaning of the employer's vicarious liability*

Employers may be held liable in more ways than one.[9] In the first instance, they are liable for accidents for which they are at fault, for instance, if such an employer carries out a dangerous operation without first establishing a safe method of work. This is called the employer's personal or direct liability.[10] However, the employer in certain instances is also responsible for the acts of his or her employees in the course of their employment, such as where an employee injures another by negligently handling a crane. This is called vicarious liability.[11] Quite distinguishable from personal liability, the employer's vicarious liability implies being held strictly liable for the actions of another. In these instances, the employer did not personally act and was also not at fault. However, he or she is held liable for the risks they created.[12]

Apart from proving the elements of delictual actions, the complainant needs to prove that the wrongful acts were committed by an employee in the scope of their

[4] A van Niekerk *et al Law at Work* (2018) 301–303.

[5] M Burgin and G Dodig-Crnkonic 'A systematic approach to artificial agents', accessible at https://arxi.org/ftp/arxv/paper/0902/0902.35.pdf (accessed on 26 July 2019). An artificial agent refers to intelligent machines in the workplace that are created to act or copy the behaviour of humans or that operate with insignificant or without human control.

[6] S Chopra and LF White *A Legal Theory for Autonomous Artificial Agents* (2011) 121.

[7] Chopra and White (n 6) 121.

[8] Section 23 of the Constitution of the Republic of South Africa, 1996.

[9] JH Munkman *Employer's Liability* 9 ed (1979) 1.

[10] Ibid.

[11] Ibid.

[12] D van der Merwe *et al Information and Communication Technology Law* (2015) 510.

employment.[13] The employer can also raise any defence his or her employee has at his or her disposal.[14] However, there are certain statutory forms of the employer's vicarious liability under which the employer has specific statutory defences at his or her disposal.[15] For instance, in terms of section 60 of the Employment Equity Act, the employer might be held liable for sexual harassment in the workplace unless the employer can prove that he or she did all that was reasonably practicable to ensure that the employee would not commit the offence.[16]

(2) *The requirements for employer's vicarious liability*

There are three requirements for the common-law doctrine of the employer's vicarious liability. These are that there must be an employer–employee relationship at the time of the harm, the employee must have committed a delict, and the employee must have acted within the scope of his employment.[17]

The first requirement is that there must be an employer–employee relationship. The point of departure in addressing this requirement is the definition of an employee as contained in both the Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA).[18] Both Acts define an 'employee' as:

> *(a)* any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and
>
> *(b)* any person who in any manner assists in carrying on or conducting the business of the employer.[19]

The definition primarily serves to distinguish between an employee and an independent contractor.[20] Independent contractors provide their services under the contract of mandate (*locatio conductio operis*) which is an agreement between the parties where one offers his or her services to the other without being placed under the control of the party who requires such services.[21] The general rule in this case is that the employer is not liable for any harm caused by the independent contractor with regard to the contract of mandate unless the employer can be

[13] Van der Merwe *et al* (n 12) 510, 511.

[14] Neethling *et al* (n 1) 385–388.

[15] D Millard and EG Bascerano 'Employer's vicarious liability in terms of the Protection of Personal Information Act' (2016) *PER* 3, 4.

[16] Act 55 of 1998.

[17] S Murray 'The extent of an employer's vicarious liability when an employee acts within the scope of employment' unpublished dissertation, North-West University (2012) 5.

[18] Ibid.

[19] Section 213 of the Labour Relations Act 66 of 1995 (LRA) and s 1 of the Basic Conditions of Employment Act 75 of 1998 (BCEA).

[20] M McGregor and A Dekker *Labour Rules* (2012) 15–18.

[21] Murray (n 17) 5.

held personally liable for the contributory fault on his or her part for the conduct of the independent contractor.[22]

Save to identify the test formulated by the courts in distinguishing between an employee and an independent contractor, this study does not discuss this issue in much detail as the study focuses mainly on vicarious liability of artificial agents as compared to that of independent contractors. Therefore, a more detailed discussion on this issue falls outside this study. The Labour Appeal Court in the case of *SA Broadcasting Corporation v Mckenzie*[23] formulated a test of six factors in determining the dividing line between an employee and an independent contractor. The factors are the following:

- The aim of the contract and whether the service to be provided is aimed at a specific or performance of a specific task.
- Whether the employee would be rendering the services personally because independent contractors can at times delegate the performance to others.
- Whether the services rendered are the disposal of the employer. Independent contractors usually set their own time framework to perform a specific task or attain a specific result.
- Independent contractors are on an equal footing with their principals while employees are their employer's subordinates.
- The contract of employment terminates upon the death of the employee while an independent contractor's contract of work is not terminated upon the death of the contractor.
- A contract of employment is terminated upon the expiration of the period of service while the contract of an independent contractor terminates on the production of a specific result.

It is important for the founding document to reflect the true nature of the agreement between the parties.[24] Sections 200A of the LRA and 83A of the BCEA also outline a set of factors, the existence of which can give rise to a presumption of employment.[25] These factors are subject to an earning threshold, and any worker above the threshold who can prove that any one of the factors is present is presumed to be an employee. The Code of Good Practice also contains guidelines to help determine whether a person who earns above the threshold can be considered an employee. [26]

The second requirement is that the employee must have committed a delict. This requirement implies that upon failure of the plaintiff to prove any of the

[22] Murray (n 17) 6.
[23] (1999) 20 *ILJ* 1936 (LAC) para 40.
[24] Murray (n 17) 8.
[25] Section 200A of the LRA and s 83A of the BCEA.
[26] Murray (n 17) 8.

delictual elements against the employee, the employer may raise any defence available to the employee.[27] There are five elements of a delict, namely, conduct, damage, wrongfulness, fault and causation.[28] An in-depth discussion on these elements is beyond the scope of this study.

The third requirement is that the delict should have been committed in the scope of the employee's employment.

In this respect, it is of particular importance that there must be a sufficient close connection between the conduct of the employer and his employment.[29] It does not matter whether the employee acted against the express wishes of his or her employer. For example, in *General Tyre and Rubber Co SA Ltd v Kleynhans*[30] the court found the employer vicariously liable although the driver of a tractor acted contrary to the express wishes of his instructor by driving the tractor on a public road, negligently causing an accident.[31] The most significant aspect of the employee's conduct was whether his actions fell within the risk created by his employer, as the court held in *Minister of Police v Rabie*:[32]

> By approaching the problem whether [an employee] acts were done in the course or scope of his employment from the angle of creation of risk, the emphasis is shifted from the precise nature of his intention and the precise nature of the link between his acts and his work, to the dominant question whether those acts fall within the risk created by [his employer].[33]

Following the latter *dictum*, the courts have over the years been less concerned with the intention of the employee and have focused more on the link between the employee's actions and the scope of his or her employment. In *Strauss v Hilfort Plastics (Pty) Ltd & Another*[34] an employee who was driving a work truck gave the plaintiff a lift contrary to the wishes of his employer. The employee was driving at a higher speed and lost control of the truck, which rolled and landed on its side and the plaintiff's arm became stuck between the surface and the truck. The High Court found that the employer was vicariously liable on the basis that the employee would not have had the opportunity to commit the wrongdoing had he not been issued with the motor vehicle when he met with the plaintiff under the circumstances that he did and, thus, he acted closely to the purpose of his employment, namely, to deliver the truck to his employer's premises.

[27] Neethling *et al* (n 1) 393.
[28] Neethling *et al* (n 1) 4.
[29] Neethling *et al* (n 1) 394.
[30] 1963 (1) SA 533 (N).
[31] Ibid.
[32] 1986 (1) SA 117 (A) para 134.
[33] Ibid.
[34] (4767/2007) [2011] ZAFSHC 61 (17 March 2011) paras 1–11 and 73–77.

III THE INFLUENCE OF THE BILL OF RIGHTS AND THE CONSTITUTIONAL DEVELOPMENT OF THE COMMON-LAW DOCTRINE

The Constitution of the Republic of South Africa, 1996 must be considered where further development and application of the law is concerned.[35] This is so because the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid.[36] In terms of section 38 of the Constitution, the superior courts have the ability to grant 'appropriate relief' when dealing with fundamental rights and freedoms. In addition the courts are empowered to grant 'just and equitable' relief when deciding on a constitutional matter. Although there is no clarity on what 'just and equitable' means in the Constitution, section 8 of the Promotion of Administrative Justice Act 3 of 2000 contains a list of factors considered to be 'just and equitable'.[37]

The Constitution contains and protects important rights such as the right to equality, dignity and fair labour practice. Some of these rights furthermore are regulated and protected under different statutes.[38] The Constitution also requires that when the courts develop the common law, they must promote the spirit, purport and object of the rights contained in the Bill of Rights.[39]

The constitutional development of the common law doctrine relates to the close connection test. The primary purpose of this test is to determine whether there is a sufficient connection between wrongful conduct of the employee and the business of the employer or the nature of his or her employment. The scope of the test was determined by the courts prior to the constitutional era.[40] In *Minister of Police v Rabie*[41] a police officer arrested, assaulted and laid a false charge against someone with whom he had a personal problem. The court formulated a subjective and objective test in the following terms:

> It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act of a servant does so fall, some reference is to be made to the servant's intention … The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant's act for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.[42]

[35] PJ Visser and JM Potgieter *Law of Damages* (2012) 17.

[36] Section 2 of the Constitution of the Republic of South Africa, 1996.

[37] Visser and Potgieter (n 35) 17.

[38] AJ van Eeden 'The constitutionality of vicarious liability in the context of the South African labour law: A comparative study' unpublished dissertation, UNISA (2014) 7.

[39] SA Constitution s 39(2).

[40] Van Eeden (n 38) 13.

[41] Ibid.

[42] *Minister of Police v Rabie* (n 32) 134.

The subjective and objective test formulated in *Rabie* has subsequently been followed in various other judgments.[43]

In the case of *Bezuidenhout NO v Eskom*[44] an employee gave a lift to a hitch-hiker while driving a marked Eskom vehicle contrary to the express instructions of his employer. The employee, who was on duty at the time, negligently caused an accident that caused severe head injuries to the hitch-hiker. The court held that since the vehicle was clearly marked and the hitch-hiker could have not been under the illusion that the owner of the vehicle owed a duty of care and the subjective state of mind of the employee who acted contrary to the wishes of his employer, there was no objective link between the employee's act in his own interests and the scope of his employment.[45]

In the case of *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy*[46] a barman was instructed by his employer to treat his customers with respect and to report potential violent incidents to his manager and avoid involvement in such situations. On the day of the wrongdoing Mr Reddy made rude comments regarding the barman's level of service. The barman reported this to his manager and he was directed to allow another employee to serve Mr Reddy. However, when Mr Reddy left the tavern, the barman followed and assaulted him. Upon finding that the employee had abandoned his duties before committing the wrongful act, the Supreme Court of Appeal (SCA) stated the following:

> It was a personal act of aggression done neither in furtherance of his employer's interest. Nor under his express or implied authority, not as an incident or in a consequence of anything Goldie was employed to do. The reason for and the circumstances leading up to the assault may have arisen from the fact that Goldie was employed by the restaurant as a barman, but personal vindictiveness leading to the assault on patrons does not render the employer liable.[47]

According to these two cases, an employer cannot be held liable in cases where his or her employees deviate from his or her instructions. This constitutes a narrow application of the common law doctrine and strengthens the idea that the doctrine would not follow all wrongful acts committed by the employee.[48]

The court in the case of *Grobler v Naspers*[49] deviated from the narrow and strict application of the close-connection test. In this case Mrs Grobler, who was the secretary to a junior manager, was sexually harassed by the manager to a point

[43] Van Eeden (n 38) 13.
[44] *Bezuidenhout v Eskom* 2003 (3) SA 83 (SCA) 1–7.
[45] Murray (n 17) 12.
[46] *Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* (2003) 24 *ILJ* 1337 (SCA).
[47] Murray (n 17) 13.
[48] Ibid.
[49] *Grobler v Naspers Bpk* 2004 (4) SA 220 (C) paras 1–7.

where she suffered serious psychological harm. The court held that the common law doctrine should be interpreted to give effect to the Bill of Rights and to reflect the values of human dignity, equality and freedom. The court also held that if vicarious liability cannot be founded on the creation of risk by the employer, the Constitution obliges the courts to establish the liability.[50] In another case dealing with vicarious liability for sexual harassment in the workplace, the Supreme Court of Appeal indicated that the employer was directly liable for failing in its common law duties to protect its employees against any harm, which included psychological harm. There are cases where such duties do not exist and statutory provisions are also inadequate. Therefore, courts should develop the common law doctrine to protect employees.[51]

IV THE CHANGING WORLD OF WORK IN CONTEXT OF THE FOURTH INDUSTRIAL REVOLUTION

The South African labour structure began as an agricultural and farming industry venture implemented by the Vereenigde Oostindische Compagnie (VOC) in 1652.[52] Over the years, the plantations saw a rise of skilled workers and the work was done in places far from the general public with no machines. These operations posed no threat to society.[53] Subsequently the Koi and San assisted the Afrikaners in discovering copper in Namaqualand. The British later established it as the first South African mining industry and, after that, diamonds were discovered in the 1860s, followed by the discovery of gold. The work in these mines included digging, loosening, shovelling, hosting and separating the minerals from the ores; for instance, in the case of diamonds the separation was done by handpicking the diamonds from ore.[54]

The First Industrial Revolution erupted in the Western world during the late eighteenth century.[55] This was the system that replaced handicraftsmen, introduced mass production and thus improved economies.[56] It introduced the new manufacturing system based on iron and steam. These inventions resulted in new and improved transport systems such as steamships and the railroad, and the invention of mechanical looms and other machinery, which cumulatively

[50] Murray (n 17) 14.

[51] *Media 24 Ltd & Another v Grobler* (2005) 26 *ILJ* 1007 (SCA) paras 62, 64, 66 and 70.

[52] M Nkosi *Black Workers White Supervisors: The Emergence of the Labour Structure in South Africa* (2017) 5.

[53] Nkosi (n 52) 12.

[54] Nkosi (n 52).

[55] PA Hart 'The new industrial revolution' 1968 *Washington and Lee Law Review* 187.

[56] Ibid.

lead to specialised labour and the factory system.[57] Specialisation and factories encouraged the migration from rural areas into the urban areas, thus changing the way people lived and interacted.[58] Mass production was also followed by the emergence of certain professions, for instance, in engineering, precision machinery manufacturing and security financing.[59]

Prior to 1873, horse whim transportation was still largely used in South Africa, particularly in the mines.[60] This system was characterised by the use of a horse or a mule to pull the merchandise.[61] This system was then replaced by steam engines, particularly in the diamond mines. This resulted in new professions, such as driving and mechanics. At this time in the colony, racial discrimination in the workplace was at its peak as the natives were not allowed to be employed in those new and emerging professions.[62]

The Second Industrial Revolution followed between 1875 and 1930.[63] It came as a result of new inventions such as the telephone, new synthetics and alloys, new applications of steel and oil, automobiles, electricity, and the internal combustion engine. The modern business organisations that were created during the Second Industrial Revolution resulted in greater mobility and a growing middle class.[64] The First and Second Industrial Revolutions shared several similar characteristics although in different ways. First, they were based on the adoption of new technologies that fundamentally altered the methods of manufacturing in a number of industries. Second, they both resulted in improved productivity and improved the standard of living of a broad segment of the population. Lastly, the new technologies had a significant effect on the way in which people worked, socialised and utilised their time.[65]

The advancement of various medications under the Second Industrial Revolution led to the specialisation of the health profession, specialisation of mechanic workers to repair the machines when they broke down as well as an influence on governments to create new and specialised departments to handle traffic, taxation, sanitation and various other services.[66] The farming industry

[57] BL Smith 'The Third Industrial Revolution: Policymaking for the internet' 2002 *Columbia Science and Technology Law Review* 1, 2.

[58] Smith (n 57) 2.

[59] G Marchildon 'Corporate lawyers and the second industrial revolution in Canada' 2001 *Saskatchew Law Review* 99, 101.

[60] Nkosi (n 52) 50

[61] Nkosi (n 52) 50, 51.

[62] Nkosi (n 52) 50.

[63] Smith (n 57) 2.

[64] Smith (n 57) 1, 2.

[65] Smith (n 58) 2.

[66] J Rafferty 'The rise of the machines: Pros and cons of the industrial revolution', accessible at https://britannica.com/story/the-rise-of-machines-pros-and-cons-of-the-industrial-revolution (accessed on 9 July 2019).

was also enabled to replace the primitive transport system that relied heavily on humans and animals to deliver their products with sophisticated and effective machines such as tractors and other specialised vehicles to till the soil and easily plant and harvest crops.[67]

Smith states that '[t]he Third Industrial Revolution has its genesis in the innovations in technology as well'.[68] At the heart of this industrial revolution is the Internet, which has forced companies to restructure themselves and the way in which they do business. The Internet was made possible by technological advances in computer hardware, telecommunications and software.[69] Specifically, there are four technological advances that gave rise to the Internet age. The first is low-cost computing power based on integrated circuits; the second is the advanced software that made computers more versatile and easy to use; the third is the high bandwidth telecommunications network; and the fourth is the development of the world-wide web.[70]

The Internet has profoundly altered methods of communication and the way in which people express and enjoy themselves. It has resulted in the invention of methods of communication that have enabled people to communicate both personally and professionally by using electronic mail and social media platforms.[71] Under the Internet revolution,[72] other methods of communication, such as the SMS and the MMS, were also invented.[73]

These impressive technological and industrial advancements brought about radical economic and social change in society and enhanced the need for the re-evaluation of the traditional basis of delictual liability as well as the formulation of a new form of liability without fault.[74] The increased mechanisation and advancement of technological equipment in almost every aspect of life revealed the inadequacy of the fault-based theory in dealing with the modernised world. Inventions such as electricity, nuclear power, aeroplanes and motor vehicles posed a potential danger to members of the public, against which people are virtually defenceless.[75]

Machines in the workplace posed a danger to society in various ways, as improperly functioning control systems usually result in faulty machine operations. For instance, the control system might change the working motion parameters or send improper signals of the machine's working condition and well-

[67] Rafferty (n 66).
[68] Smith (n 57) 2.
[69] Smith (n 57) 2.
[70] Smith (n 57) 4.
[71] Smith (n 57) 3.
[72] Smith (n 57) 17.
[73] Van der Merwe *et al* (n 12) 11–21.
[74] Neethling *et al* (n 1) 355.
[75] Ibid.

being.[76] These faulty operations will not only result in reductions in production quality or the production of defective products, but can also lead to accidents in the workplace, leading to either a loss of health or life or even the life of the operator.[77] Machine system failures may be mitigated by training employees in safe machine operation mechanisms, providing instructions on occupational safety, maintenance and repair, the supervision of the operations of the machine as well as supervision and documentation of the changes in the control system.[78] However, machine accidents can also be caused by negligence on the part of the operator.[79]

The world is yet to see another industrial revolution, this time with even more significant alteration to the world of work. This particular industrial revolution, referred to as the Fourth Industrial Revolution (4th IR) will alter the way in which people live, work and relate to their environment.[80] The first and main alteration in the world of work lies in the replacement of human employment skills with an automated workforce in certain instances.[81] These machines can enucleate human thoughts and perform duties with the same or even an improved expertise as humans.[82] The automation of work is preferred for its efficiency on both the quality and quantity of work.[83]

Although it is estimated that automation will create employment that is equivalent to more than half of the jobs to be lost,[84] mechanisation requires a new set of skills with which employees must be equipped to efficiently work with the machines.[85] There essentially are two types of automated work. The first is the full automation of the workplace which entails that machines will work with no human intervention, and the second is semi-automation where machines can work under human supervision or alongside humans.[86]

[76] M Dzwiarek 'An analysis of accidents caused by improper functioning of machine control systems' 2004 *International Journal of Occupational Safety and Ergonomics* 129.

[77] Dzwiarek (n 76) 129.

[78] Dzwiarek (n 76) 131, 132.

[79] In the case of *General Tyre and Rubber Co SA Ltd v Kleynhans* 1963 (1) SA 533 (N), the driver of a tractor acted contrary to the express wishes of his instructor by driving the tractor on a public road, negligently causing an accident.

[80] MJ van Staden 'Identification of parties to the employment relationship: An appraisal of teleological interpretation of statutes' LLD thesis, University of Pretoria (2017) 18.

[81] A Tassell 'Mining industry ready to embrace automation', accessible at http://crown.co.za/modern-mining-featured-news/6882-mining-industry-ready-to-embrace-automation (accessed on 25 March 2019); W Schoeman *et al* 'Artificial intelligence: Is South Africa ready?', accessible at https://www.accenture.com/t20170810T154838Z__w__/za-en/_acnmedia/Accenture/Conversion-Assets/DotCom/Documents/Local/za-en/Accenture-AI-South-Africa-Ready.pdf (accessed on 25 March 2019).

[82] AA Martino and FS Natali *Automated Analysis of Legal Texts Logic, Informatics, Law* (1991) xvi.

[83] ILO *Global Commission on the Future of Work* (2018) 1.

[84] There essentially are two types of automated work.

[85] Nkosi (n 52) 267.

[86] Chopra and White (n 6) 119.

The 4th IR also stages a new set of challenges in relation to machine accidents. It has been established that artificial agents' missile battery control systems, autopilots, train control systems and nuclear medicine-control software can cause patrimonial and personal damages if they operate incorrectly.[87] Not only can artificial agents cause physical harm such as damage to life and limb, but also economic loss[88] and, in cases where the machinery is entrusted with data protection,[89] such malfunctions can cause data loss.[90] Automation not only introduces new forms of work,[91] but also exposes the issue of injuries to members of the society.[92]

Against this backdrop, this means that machines under the 4th IR are capable of causing the same delictual actions that give rise to liability without fault on the part of the 'employer'.[93] These actions can arise from cases such as where a self-driving vehicle belonging to the company causes a fatal accident. For instance, on 19 March 2018 a self-driving Uber vehicle hit and caused the death of a 49 year-old woman in Arizona, North America.[94] Therefore, the pursuit of job automation does not absolve employers from liability without fault. Settlements for damages will also ensue under the 4th IR.[95]

V THE DIFFERENT OUTCOMES FOR HUMANS AND ROBOTS WHEN THEY CAUSE DELICTUAL HARM

The primary party to bear the responsibility in cases involving the 'employer-employee relationship' is the employee in the case of his wrongful conduct. However, the employer is in a better financial position to compensate and, thus, fairness and justice in favour of the third party justifies suing the employer as a joint wrongdoer.[96] The principles of joint wrongdoer is currently regulated by the Apportionment of Damages Act.[97] In terms of section 2(1) of the Act, joint wrongdoers are described as 'persons who are jointly and severally liable for the same damage'.[98] Thus, only persons who are liable to the plaintiff can be sued as

[87] There essentially are two types of automated work.

[88] Chopra and White (n 6) 121.

[89] A Bygrave *Data Privacy: An International Perspective* (2014) 9.

[90] Chopra and White (n 6) 121.

[91] ILO (n 83) 1.

[92] R Crootof 'War torts: Accountability for autonomous weapons' 2016 *University of Pennsylvania Law Review* 1347, 1354.

[93] Crootof (n 92) 1354.

[94] S Levin and J Garric-Wong 'Self-driving Uber kills Arizona woman in first fatal crash involving pedestrian', accessible at https://www.theguardian.com/technology/2018/mar/19/uber-self-driving-car-kills-woman-arizona-tempe (accessed on 23 July 2019).

[95] Levin and Garric-Wong (n 94).

[96] Neethling *et al* (n 1) 373.

[97] Apportionment of Damages Act 34 of 1956.

[98] Apportionment of Damages Act s 2(1).

joint wrongdoers.[99] Joint wrongdoers are jointly liable (sometimes to different degrees) to the full extent of the damage.

The plaintiff has a right to sue either one or both of the defendants, and when one of the defendants pays the full amount, he or she has a right of recourse against the other defendant. 'Given that the employee is also delictually liable, the employer and the employee are regarded as joint wrongdoers as against the prejudiced party.' However, only the employer has a right of recourse against the employee.[100]

The consequences of being a joint wrongdoer for employees are more detrimental as compared to their automated counterparts. There are two main unfavourable outcomes that befall employees under these circumstances. First, it might constitute 'conduct' for dismissal purposes;[101] second, the employer has the right to claim the money he or she paid to the victims pursuant to his or her right of recourse against the employee.[102]

When one considers the realities experienced by South Africans, one can then determine how detrimental these consequences can be for employees. First, South Africa is one of the most unequal societies in the world.[103] The wealth and income gap between the wealthy and the poor is overwhelming.[104] The inequality can be directly linked to the colonial and apartheid legacy, which marginalised the majority of citizens and denied them access to resources, quality education and economic opportunities.[105] Second, the unemployment rate in South Africa is high. At the time when these findings were made, the unemployment rate in South Africa stood at 29 per cent and the majority of those affected by unemployment is the youth.[106]

It must be noted that the contention that wealth inequality and unemployment was systematically created by South Africa's oppressive past has been affirmed by the Constitutional Court in of *Soobramoney v Minister of Health (KwaZulu-Natal)*,[107] where the court held:

[99] Neethling *et al* (n 1) 265.

[100] Neethling *et al* (n 1) 266, 368.

[101] *Simmers v Campbell Scientific Africa (Pty) Ltd & Others* (2014) 35 *ILJ* 2866 (LC) para 15 (*Simmers v Campbell*).

[102] Neethling *et al* (n 1) 373.

[103] SALDRU *The Gap Between the Rich and Poor: South African Society's Biggest Divide Depends on Where You Think You Fit In* (2018) 2.

[104] The World Bank *Overcoming Poverty and Inequality in South Africa* (2018) xvi.

[105] SALDRU (n 103) 5.

[106] D Webster 'Unemployment in South Africa is worse than you think', accessible at https://mg.co.za/article/2019-08-05-unemployment-in-south-africa-is-worse-than-you-think (accessed on 17 August 2019).

[107] 1998 (1) SA 765 (CC) para 8.

> We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.[108]

The court also held in *Azanian People's Organisation (AZAPO) & Others v President of the Republic of South Africa & Others* that future generations of the victims will also be affected by the legacy of poverty and unemployment.[109] The World Bank's affirmation of South Africa's inequality serves to prove that such a legacy persists in South Africa and that, therefore, it indeed is affecting future generations.[110] It thus is undoubtable that the current economic inequalities existing in South Africa are inextricably linked to the colonial and apartheid legacy. The labour protection and labour structures that are needed must be directed at reconstructing society to address the relentless consequences of the past.[111]

On the issue of dismissal, one may argue that there is adequate protection for the employee in terms section 188 of the Labour Relations Act.[112] This provides that when an employer seeks to dismiss an employee for purposes of misconduct or capacity, he or she can do so only for a fair reason, and that the fairness should be assessed in accordance with the Code of Good Practice in Schedule 8. Schedule 8 of the code provides:

> (4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of section 188.

[108] *Soobramoney v Minister of Health* (n 107) 8.

[109] *Azanian People's Organisation (AZAPO) & Others v President of the Republic of South Africa & Others* 1996 (4) SA 671 (CC) para 43 (*AZAPO*). The court held that '[t]he families of those whose fundamental human rights were invaded by torture and abuse are not the only victims who have endured "untold suffering and injustice" in consequence of the crass inhumanity of apartheid which so many have had to endure for so long. Generations of children born and yet to be born will suffer the consequences of poverty, of malnutrition, of homelessness, of illiteracy and disempowerment generated and sustained by the institutions of apartheid and its manifest effects on life and living for so many.'

[110] The World Bank (n 104) Xvi.

[111] *AZAPO* (n 109) 43.

[112] See also s 185 of the LRA.

(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.[113]

Thus, it is clear that dismissal is only permissible when it passes the fairness test determined by the LRA considering the gravity of the misconduct. Dismissal also usually is not permissible in the case of a first-time offence. Nevertheless, it is open to the employer to dismiss when he or she feels that the conduct does not warrant a lesser sanction and this might be upheld by the courts.[114] Therefore, when one considers the above-mentioned contextual factors of unemployment and inequality, when an employee is dismissed, it may be very difficult for him or her to find employment elsewhere. It is usually difficult for a low-income employee to save during the course of his or her employment and where the spouse (if any) may be unemployed.

This may be contrasted with the consequences for a robot in case of misconduct. It is impractical to hold machines liable for purposes of the law. Employers can have a wide range of options on how to prevent further harm. For instance, the machine might be switched off or reprogrammed. There are no adverse consequences for artificial agents, whereas human employees stand to lose their jobs.[115]

On the issue of recourse by the employer, section 37D(1)*(b)* of the Pension Fund Act[116] provides:

A registered fund may—

(a) deduct any amount due on the benefit in question by the member in accordance with the Income Tax Act, 1962 (Act No 58 of 1962), and any amount due to the fund in respect of—

…

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph *(bb)*) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which—

(aa) the member has in writing admitted liability to the employer; or

[113] See also s 188 of the LRA.

[114] *Simmers v Campbell* (n 101) and *Campbell Scientific Africa (Pty) Ltd v Simmers & Others* (CA 14/2014) [2015] ZALCCT 62 (23 October 2015) para 36.

[115] Chopra and White (n 6) 121.

[116] Pension Fund Act 24 of 1956.

> *(bb)* judgment has been obtained against the member in any court, including a magistrate's court, from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned.

Therefore, the pension fund is empowered, on termination of employment, to deduct from the amount due to their members any amount that was awarded against the member by a court of law due to the employer as a result of misconduct on the part of the employee.[117] This means that an employer who suffered financial loss due to the compensation of those who suffered harm caused by his employee's misconduct and where the employee does not have sufficient funds to reimburse the employer, the employer has the right to deduct that amount from his or her employee's pension fund and it may have a detrimental effect on the employee's entire retirement savings. In *Moodley v Scottburg/Umzinto North Local Transitional Council*[118] the court held that the misconduct referred to in section 37D(1)*(b)*(ii) of the Act refers to dishonest conduct or, at least, conduct characterised by elements of dishonesty, and that mere negligence would not suffice.[119]

Against this backdrop, if one again considers the abovementioned contextual factors, particularly the issue of economic inequality between the working class and the employer, the deductions from one's pension fund might be detrimental. If the employer was to deduct a large sum from the employee's fund, this will amount to a serious financial set-back. Employees usually have families to feed, children to educate or even unemployed descendants to take care of.[120]

Again, one should contrast these consequences with what might happen to a robot under such circumstances. The legal subjectivity of artificial agents and the effects they might have for existing liability foundational principles are purely theoretical.[121] This is so because within the existing legal principles, machines cannot be held liable for damages.[122] Therefore, unlike under the current dispensation where the primary bearer of the responsibility is the employee and the employer might vicariously assume responsibility,[123] in the case of automation the employer bears all the liability associated with machine accidents. Thus, the employer is more inclined to take certain protective steps, such as insuring

[117] Ibid.

[118] 2000 (4) SA 524 (D); the World Bank (n 104) Xvi.

[119] *Moodley* (n 119).

[120] *Moodley* (n 119).

[121] M Hildebrandt *Smart Technologies and the End of Laws* (2001) 12 and Emerging Technology from the Air XIV 'When an AI finally kills someone, who will be responsible? Legal scholars are furiously debating which laws should apply to AI crimes', accessible at https://www.technologyreview.com/s/610459/when-an-ai-finally-kills-someone-who-will-be-responsible/ (accessed on 20 April 2019).

[122] Hildebrandt (n 121) 13.

[123] Murray (n 17) 9.

machinery to cover any losses to third parties.[124] For instance, the employer might have a third party liability insurance to cover delictual claims arising from the use of robots in the workplace.

VI CASES IN WHICH THE DIFFERENT TREATMENT OF HUMAN EMPLOYEES IS JUSTIFIABLE

There are cases where employees act for personal purposes and deviate from their employers' mandate or act contrary to their employers' wishes.[125] These types of cases are known as deviation cases.[126] At face value, these cases fall outside the scope of the employees' employment and, thus, the employer should not be held vicariously liable. However, under the constitutional dispensation, the court still has a discretion to hold the employer liable if the conduct of the employee is sufficiently close to his or her employment.[127] These acts of misconduct in some cases constitute criminal activities. Therefore, the employer would have not been joined in such proceedings. However, due to the constitutional development of 'sufficient nexus' in determining the employee's scope of employment, the court might hold the employer liable.[128]

An example of such a case is *K v Minister of Safety and Security*.[129] The appellant was a young woman in her twenties. She had a disagreement with her 'male companion' early in the morning, around 03:00, in a place of entertainment and he refused to take her home. She then went to a nearby fuel station to call her mother. However, due to a telephone fault she could not do so. Meanwhile, three police officers in uniform driving a police vehicle pulled in at the station and offered her a lift home. On the way, the police officials decided to change the route, put a knife to her throat, took turns in raping her and abandoned her. The three police officials were convicted of rape and kidnapping.[130]

The Constitutional Court decided to infuse the spirit, purport and object of the Bill of Rights to the interpretation of the common law doctrine.[131] The court held that due to the commission of the brutal rape of the appellant and the failure by any of the police officials to discharge their constitutional duties and

[124] A Bertolin *et al* 'Robots and insurance', accessible at https://www.researchgate.net/publication/297188893_On_Robots_and_Insurance (accessed on 20 August 2019).

[125] In the case of *General Tyre and Rubber Co SA Ltd v Kleynhans* 1963 (1) SA 533 (N), the driver of a tractor acted contrary to the express wishes of his instructor by driving the tractor on a public road, negligently causing an accident.

[126] H Barnes '*F v Minister of Safety and Security*: Vicarious liability and state accountability for the criminal acts of police officers' 2014 *SA Crime Quarterly* 31.

[127] Barnes (n 126) 33.

[128] Ibid.

[129] *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

[130] *K v Minister of Safety and Security* [2005] 3 All SA 519 (SCA) paras 1–3.

[131] *K* (CC) (n 129) 22.

protect the appellant from harm by preventing the one or the other from raping her, there was a sufficient connection between the conduct of the police officials and their employment and, thus, the Minister was held liable.[132]

In these circumstances, the employees acted purely for personal purposes, violated their employer's wishes and also committed a crime.[133] Thus, the dismissal and joint-wrongdoers' right of recourse were or would be justifiable.

VII WAYS OF MITIGATING THIS DIFFICULTY

First, the employer can take out an insurance policy to cover the damages instead of using his right of recourse against his or her employees. Second, the employer can also allow the contextual factors – such as wealth inequality, poverty and unemployment – to be used in mitigation by the employer before making a decision to dismiss the employee or not. In cases where the employee's wrongdoing could also have been caused by a machine, there is a need for legal reform to revisit the employers' right to recourse. This could be achieved through an amendment to the Apportionment of Damages Act or by the introduction of new legislation to clarify the circumstances under which the right to recourse can or cannot be applicable. It is recommended that bad faith on the part of the employee should be the basis for the application of the employer's right to recourse. This would be similar to the Pension Fund Act's requirements of bad-faith misconduct on the part of the employee to be proven before his or her pension fund can be deducted to compensate the employer.[134]

VIII CONCLUSION

This study has reflected on the differences in the consequences of humans and robots in cases of wrongdoing in the workplace in order to underline the difficulty faced by humans. Depending on the gravity of the wrongdoing, employees may be dismissed and/or be held jointly liable for the wrongdoing,[135] whereas machines by their very nature cannot be held liable for wrongdoing. There are steps that might be taken to mitigate the situation. Employers may be required to have insurance covering wrongful acts by employees, humans and machines or a legislative outlawing of the right to recourse in circumstances in which the wrongful conduct of the employee can also be committed by robots. Although it is not possible to treat humans as one would treat robots, these steps will ensure less prejudicial treatment of employees. However, in cases of misconduct and bad faith, the consequences are justifiable.

[132] Barnes (n 126) 31, 32.
[133] *K* (SCA) (n 130) para 7.
[134] Ibid.
[135] *PE v Ikwezi Municipality & Another* (n 3) para 1.

INDEX

D

Q

R