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**DECENT WORK IN SOUTH AFRICA:  
AN ANALYSIS OF LEGAL PROTECTION  
OFFERED BY THE STATE IN RESPECT OF  
DOMESTIC AND FARM WORKERS**

By

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## **ABSTRACT:**

There have been a number of labour disputes in the agricultural sector in the past year. Domestic workers' wages and working conditions have also been under the spotlight. This study aims to determine whether or not the concept of decent work is adequately protected in South Africa's current legislation; the implementation of such legislation and whether or not, as a member of the United Nations, South Africa's legislation is in line with the international standards set by the International Labour Organization (ILO).

The study examines previous labour legislation in order to establish the extent of the protection offered to employees, particularly domestic and farm workers. It provides recommendations in respect of the current legislation based on the ILO standards, particularly the Labour Inspection Convention No. 81 of 1947, Convention No. 184 Concerning Safety and Health in Agriculture, 2001 and Convention No. 189 and Recommendation No. 201 Concerning decent work for domestic workers, 2011.

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## **ABBREVIATIONS:**

<b>ANC</b>	African National Congress
<b>BCEA</b>	Basic Conditions of Employment Act
<b>BCEAB</b>	Basic Conditions of Employment Amendment Bill
<b>CCMA</b>	Commission for Conciliation, Mediation and Arbitration
<b>COSATU</b>	Congress of South African Trade Unions
<b>DWCP</b>	Decent Work Country Programme
<b>ECC</b>	Employment Conditions Commission
<b>EEA</b>	Employment Equity Act
<b>FAWU</b>	Food and Allied Workers' Union
<b>HDI</b>	Human Development Index
<b>ICA</b>	Industrial Conciliation Act
<b>ILC</b>	International Labour Conference
<b>ILO</b>	International Labour Organization
<b>LRA</b>	Labour Relations Act
<b>LRAB</b>	Labour Relations Amendment Bill
<b>NDP</b>	National Development Plan
<b>NEDLAC</b>	National Economic Development and Labour Council
<b>NGP</b>	National Growth Plan
<b>NLA</b>	Native Labour (Settlement of Disputes) Act
<b>OHSA</b>	Occupational Health and Safety Act
<b>SAAPAWU</b>	South African Agricultural Plantation and Allied Workers' Union
<b>SADAGWU</b>	South African Domestic and General Workers' Union
<b>SADSAWU</b>	South African Domestic Services and Allied Workers'



	Union
<b>SADWU</b>	South African Domestic Workers' Union
<b>SD</b>	Sectoral Determination
<b>SDLA</b>	Skills Development Levies Act
<b>SETA</b>	Services Sector Education & Training Authority
<b>TES</b>	Temporary Employment Services
<b>UIA</b>	Unemployment Insurance Act
<b>UICA</b>	Unemployment Insurance Contributions Act
<b>UIF</b>	Unemployment Insurance Fund
<b>UN</b>	United Nations

## **CHAPTER 1: INTRODUCTION**

### **CONTENTS**

#### ***1.1 Introduction***

#### ***1.2 Purpose of the study***

#### ***1.3 Research methodology***

#### ***1.4 Rationale for the study***

#### ***1.5 Literature review***

#### ***1.6 Structure of the study***

#### ***1.1 Introduction***

It is estimated that there are currently 1 805 000 domestic and farm workers in South Africa, the majority of whom do not enjoy adequate legal protection.<sup>1</sup> South Africa is a developing country that is struggling to heal the scars of colonisation and apartheid. The government has adopted two economic strategies, namely, the National Growth Plan (NGP) and the National Development Plan (NDP) which specifically refer to decent work.<sup>2</sup> However, despite various pieces of national legislation, the undertakings of the South African Decent Work Country Programme of the International Labour Organization (ILO) and ratification of various conventions, domestic and farm workers remain trapped in the apartheid legacy. This study analyses the current labour legislation governing these sectors in order to determine whether or not it promotes decent work in South Africa.

#### ***1.2 Purpose of the study***

Prior to the enactment of the Constitution of the Republic of South Africa, 1996,<sup>3</sup> the black majority in South Africa were denied equal opportunities. They suffered inferior education, medical care, public services, housing and employment and were denied freedom of association. In 1994, South Africa became an open, transparent democracy, where every

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<sup>1</sup> There are currently 1 093 000 domestic workers and 712 000 agricultural workers in South Africa. Statistics South Africa 'Quarterly Labour Force Survey', Quarter 2, 2013, available at [www.statssa.gov.za/Publications/P02111/P02112ndQuarter2013.pdf](http://www.statssa.gov.za/Publications/P02111/P02112ndQuarter2013.pdf), accessed on 01 August 2013.

<sup>2</sup> J Theron 'Decent Work and the Crisis of Labour Law in South Africa' (2013) University of Cape Town, unpublished, 1.

<sup>3</sup> Constitution of the Republic of South Africa, 1996 will hereafter be referred to as "Constitution".

person has autonomy of choice and is able to reach their full potential. The Constitution's Bill of Rights provides for the protection of all employees. South African labour legislation has also evolved to protect vulnerable, uneducated and unskilled employees. This aims to provide the level of protection required by international standards.<sup>4</sup>

Prior to the amended Labour Relations Act 66 of 1995<sup>5</sup> and the Basic Conditions of Employment Act 75 of 1997,<sup>6</sup> the Labour Relations Act 28 of 1956<sup>7</sup> and other legislative measures excluded domestic and farm workers. The Labour Relations Act, 1995 and the Basic Conditions of Employment Act, 1997 extended the definition of "employee" to include most categories. Furthermore, South Africa is a member of the ILO and is required to comply with certain international standards.

An assessment of the concept of decent work in South Africa requires an understanding of the history of labour legislation in the country, as well as international labour standards. This will enable an analysis of whether or not current South African labour law protects all employees' right to decent work. Thus, the purpose of this study is to critically examine the current South African legislation, including the Labour Relations Amendment Bill, 2012 (LRAB) passed by Parliament in 2013, to determine, firstly, whether decent work in South Africa, with specific reference to domestic and farm workers, is protected and achievable. The second purpose is to determine whether or not South Africa is in line with the international standards set by the ILO.

The central question of this study is whether or not decent work is attainable in South Africa. The following research questions are therefore posed:

1. What is "decent work"?

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<sup>4</sup> This is clear in the introduction of the Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997 and the Sectoral Determinations (SD) in South Africa.

<sup>5</sup> Labour Relations Act 66 of 1995 will hereafter be referred to as the "Labour Relations Act, 1995" (LRA).

<sup>6</sup> Basic Conditions of Employment Act 75 of 1997 will hereafter be referred to as "Basic Conditions of Employment Act, 1997" (BCEA).

<sup>7</sup> Labour Relations Act 28 of 1956 will hereafter be referred to as "Labour Relations Act, 1956".

2. What is the previous and current legislation in respect of decent work in South Africa?
3. What international standards have been set by the ILO that members of the organisation are expected to adhere to?
4. Does the South African legislation adequately protect workers in terms of decent work, particularly domestic and farm workers?
  - i. Is South Africa in line with international standards? If not, is there any reasonable rationale or justification for such failure?
5. Are the adjudication remedies provided for accessible and available to such workers in terms of South African legislation?
6. What recommendations can be made in respect of the protection of domestic and farm workers in South Africa?

### ***1.3 Research methodology***

This study employed desktop research to undertake an extensive analysis of previous and current labour legislation. Case law is analysed, although this is limited as there have been few adjudications of cases relating to the protection of domestic and farm workers.

The concept of decent work has been the subject of extensive scholarly work and has also been extensively debated in social media. This study therefore includes a review of relevant authoritative surveys and reports on the attainment of decent work in South Africa.

### ***1.4 Rationale for the study***

Inhumane living and working conditions persist in the 21<sup>st</sup> century in many countries around the world. Domestic and farm workers are often the most affected. Many employers in these sectors do not comply with minimum standards and conditions of employment and ill-treat their employees.<sup>8</sup> The concept of decent work is particularly relevant in these sectors. This

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<sup>8</sup> D du Toit 'Not 'Work Like Any Other': Towards a Framework for the Reformation of Domestic Workers' Rights' 2011 32 *ILJ* 7. The article states that "in a recent 'blitz' of 576 employers of domestic workers in the Western Cape, for example, the Department of Labour found that only 42% complied with all relevant

is reflected in the recent increase of farm workers' minimum wage in Sectoral Determination 13 and the ratification of the ILO Domestic Workers Convention No. 189 of 2011 concerning decent work for domestic workers by South Africa.

This study will thus focus on the right to human dignity and equality enshrined in South Africa's Constitution; the rationale for these fundamental human rights and the attainment thereof.

### *1.5 Literature review*

There is a substantial body of literature on the issue of decent work both in South Africa and at a global level. Cohen and Moodley's (2012) study examines decent work in South Africa using five statistical indicators which are in line with the ILO's four decent work objectives in order to measure the progress in achieving decent work. The study draws attention to the high levels of unemployment in South Africa and the fact that labour legislation has not filtered down to informal workers, perpetuating vulnerability and inequality. Smit's paper (2011) examines the labour legislation and social protection in place to protect domestic workers.

Godfrey and Witten's article (2008) focuses on the positive aspects of the BCEA, while Bhorat, Kanbur and Mayet's article (2011) analyses the minimum wage in South Africa. The article examines whether or not employers are complying with the sectoral determinations laid down by the Employment Conditions Commission (ECC). Gobind, du Plessis and Ukpere's study (2012) assesses the level of compliance with the minimum wages and working conditions for domestic workers outlined in the BCEA.

However, the literature on decent work in South Africa tends to analyse the applicable law and the level of progress, without providing commentary or recommendations. In common

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requirements' in the Western Cape (*Report on the Domestic Worker Sector Blitz conducted from 2-12 February 2009 and the follow-up inspections conducted 2-12 March 2009 in the Western Cape* (unpublished)).

with Smit (2011), du Toit (2010) offers much insight into the realm of domestic work, focusing on the nature and regulation of such work. The study offers strategies to achieve decent work by monitoring compliance with the law and improving enforcement.

Furthermore, du Toit (2011) comments on the proposals for a convention on decent work for domestic workers prior to the adoption of the ILO Domestic Workers Convention No. 189 of 2011 concerning decent work for domestic workers. The study also analyses the situation after the adoption of this Convention and Recommendation. du Toit (2011) shows that there are large gaps between the ratification of the convention and implementation through the adoption of national legislation; the current study also focuses on this issue.

Many previous studies fail to answer the obvious question as to whether or not these rights and protection are effectively implemented. Moreover, studies on the implementation of the minimum wage do not focus on other basic conditions set by the labour legislation, such as decent living conditions, retrenchment packages and pensions. Finally, the question of decent work in the agricultural sector in South Africa has not received sufficient scholarly attention, despite the fact that farm workers are amongst the most vulnerable employees. Theron's article (2013) is amongst the few that address this issue. The reluctance on the part of employers in this sector to contribute to the social benefits provided for by the Unemployment Insurance Fund and the Skills Development Levy has also not been addressed.

### ***1.6 Structure of the study***

The first chapter outlined the purpose and rationale for the study, and provided a brief review of the literature on decent work, particularly in respect of domestic and farm work.

The second chapter examines the concept of “decent work”, including its history, meaning and whether or not it is necessary in South Africa. This requires a thorough exploration of

the work of the ILO, including the conventions that specifically address the issues surrounding decent work and the Decent Work Agenda.

Chapter three provides an in-depth analysis of the history of decent work in South Africa. It traces the history of the labour legislation, including the Industrial Disputes Prevention Act 20 of 1909, the Industrial Conciliation Act 11 of 1924, the Native Labour (Settlement of Disputes) Act, 1953 and, most importantly, the Labour Relations Act 28 of 1956 which was in place for most of the apartheid era.

The fourth chapter focuses on domestic and farm work. The first section examines the nature of employment and the protective measures offered to domestic employees, including the right to collective bargaining and the Sectoral Determination 7. This is followed by an analysis of farm work, including the nature of employment, the right to collective bargaining and the recent changes to the Sectoral Determination 13.

The fifth chapter focuses on constitutional provisions in respect of decent work in post-apartheid South Africa. It considers the various changes to South African legislation introduced by the Constitution of the Republic of South Africa. The international scenario is also examined, with the ILO serving as the point of departure in determining international labour standards.

Chapter six examines the availability and accessibility of adjudication processes for domestic and farm workers. This is vital as ensuring decent work may be determined by access to justice in terms of the labour law. This chapter investigates various mechanisms such as the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Courts in order to determine their effectiveness.

Recommendations and concluding remarks are provided in chapter seven, including the benefits of implementing the ILO Domestic Workers Convention No. 189 of 2011

concerning decent work for domestic workers, the ILO Labour Inspection Convention No. 81 of 1947 and the ILO Safety and Health in Agriculture Convention No. 184 of 2001.

It should be noted that, for the purposes of this study, the terms “farm” and “agriculture” will be used interchangeably, bearing in mind that the latter term refers to the broader sector. The terms “black” and “African” are also used interchangeably.



## **CHAPTER 2: THE CONCEPT OF “DECENT WORK”**

### **CONTENTS:**

- 2.1 Introduction***
- 2.2 Definition of “decent work”***
- 2.3 Decent work in South Africa***
- 2.4 Domestic and farm work***
- 2.5 Conclusion***

### ***2.1 Introduction***

Gender and racial discrimination had a huge impact on employment relations during the apartheid era. This legacy persists in the democratic dispensation; vulnerable employees are often denied their rights in terms of labour legislation. Informalization and externalization have also impacted the South African labour market and exacerbated non-compliance with labour law.<sup>9</sup> It is for such reasons that the International Labour Organization has adopted the concept of decent work, applicable to both women and men in order to achieve freedom, equity, security and human dignity, as one of its fundamental goals.<sup>10</sup>

### ***2.2 Definition of “decent work”***

Ghai (2003) notes that:

“The concept of “decent work” was launched in these terms in 1999, in the Report of the Director-General to the International Labour Conference meeting in its 87th Session. The idea both conveys the broad and varied dimensions associated with work today and encapsulates them in an expression that everyone can appreciate. But what does the notion of decent work really comprise?”<sup>11</sup>

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<sup>9</sup> P Benjamin ‘Decent Work and Non-Standard Employees: Options for Legislative Reform in South Africa: A Discussion Document’ 2010 31 *ILJ* 845.

<sup>10</sup> ILO ‘Report of the Director-General: Decent Work’ (1999) International Labour Conference: Geneva, 87<sup>th</sup> Session, available at [www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm#1](http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm#1), accessed on 30 March 2013.

<sup>11</sup> D Ghai ‘Decent work: Concept and indicators’ (2003) 142 *Int’l Lab. Rev.* 113.

The ILO defines decent work as employment that is not only a source of income but, of “personal dignity, family stability, peace in the community, democracies that deliver for people, and economic growth that expands opportunities for productive jobs and enterprise development”.<sup>12</sup> Decent work encapsulates the aspirations of working people to be employed and receive an income, rights, voice and recognition, family stability and personal development, as well as fairness and gender equality. In essence, these various dimensions of decent work underpin peace in communities and society.<sup>13</sup>

The ILO sets out four strategic objectives of decent work, with gender equality as a crosscutting objective. These are: (i) the creation of jobs; employment and income opportunities; (ii) guaranteeing of fundamental rights at work and achievement of international labour standards; (iii) extending social protection and social security; and (iv) the promotion of social dialogue and tripartism.<sup>14</sup> These pillars are elaborated on below:

- (i) *The creation of jobs; employment and income opportunities:* The goal of this objective is “not just the creation of jobs, but the creation of jobs of acceptable quality” where the quantity of employment cannot be divorced from its quality.<sup>15</sup> In order to attain this objective, job creation is imperative and all forms of employment must ensure non-discriminatory treatment, safe working conditions, collective bargaining rights and social security.<sup>16</sup> Furthermore, this requires that the economy is able to generate opportunities for investment, entrepreneurship, skills development and sustainable livelihoods.<sup>17</sup>
- (ii) *Guaranteeing of fundamental rights at work and achievement of international labour standards:* This should be achieved regardless of the levels of disadvantage or impoverishment. In essence, the law must be applicable to workers engaged in any form of work in order to protect fundamental rights in line

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<sup>12</sup> ILO, Decent Work Agenda, available at [www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-en/index.htm), accessed on 30 March 2013.

<sup>13</sup> V Van Vuuren et al ‘Decent Work in a Sustainable Workplace’ (1 – 3 August 2012) 25<sup>th</sup> Annual Labour Law Conference Presentation, Sandton Convention Centre, available at [www.lexisnexis.co.za/our-solutions/private-sector/compliance-and-training/allc-historical-presentations.aspx](http://www.lexisnexis.co.za/our-solutions/private-sector/compliance-and-training/allc-historical-presentations.aspx), accessed on 15 August 2013.

<sup>14</sup> ILO (note 12 above).

<sup>15</sup> ILO (note 10 above).

<sup>16</sup> T Cohen et al ‘Achieving “Decent Work” in South Africa?’ (2012) 15 *PELJ* 2.

<sup>17</sup> ILO (note 12 above).

with international labour standards, as all workers' interests should be represented.<sup>18</sup>

- (iii) *Extending social protection and social security*: This is a fundamental component of decent work that ensures employees' attainment of human dignity and the stability of the family and community.<sup>19</sup>
- (iv) *Promotion of social dialogue and tripartism*: This enables workers to join trade unions and engage in collective bargaining. Tripartism refers to dialogue between government and workers' and employers' organizations.

The concept of decent work indirectly obliges employers to offer all workers satisfactory conditions, irrespective of skills levels in order to promote human development. It should be noted that there is an undeniable link between decent work and human development, as measured by the Human Development Index (HDI).<sup>20</sup> This suggests that high levels of decent work can be achieved even without high income levels; and that high income levels do not necessarily mean that there are high levels of decent work.<sup>21</sup> The situation in South Africa is considered below.

### ***2.3 Decent work in South Africa***

South Africa has overcome many obstacles in the past, the greatest being the apartheid system based on racial segregation and discrimination. During the apartheid era, it was almost impossible for persons of colour to acquire decent employment, as most Africans were confined to unskilled labour.<sup>22</sup> The 1994 democratic dispensation and South Africa's new Constitution promised that this situation would change.<sup>23</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> R Anker et al 'Measuring Decent Work with Statistical Indicators' (2002) ILO Geneva 38.

<sup>20</sup> I Ahmed 'Decent Work and human development' (2003) 142 *Int'l Lab. Rev.* 264.

<sup>21</sup> Ibid, 270.

<sup>22</sup> The Masters and Servants Act, the Industrial Disputes Prevention Act 20 of 1909, the Industrial Conciliation Act 11 of 1924, the Native Labour (Settlement of Disputes) Act, 1953 and the Labour Relations Act 28 of 1956 are evidence of such limitations, which will be examined in Chapter three.

<sup>23</sup> The Constitution, 1996 provides a Bill of Rights Chapter, which includes the rights to human dignity, equality and freedom for all persons residing in South Africa.

South Africa has made a commitment to the attainment of decent work, mainly through promulgating labour legislation.<sup>24</sup> While such legislation has played a significant role in extending protection to all employees, new types of non-standard employment have emerged.<sup>25</sup> This is important in the debate on decent work, as employers in the informal sector do not always comply with the law. It is suggested that South Africa has paid insufficient attention to this consideration in enacting and implementing appropriate labour legislation.

Informalization refers to the casualization of the labour market, whereby workers shift from permanent to casual employment.<sup>26</sup> Externalization involves strategies adopted by employers that result in a lack of protection or avoidance of labour law. Examples include: (i) outsourcing; (ii) the use of fixed-term contracts; (iii) temporary and part-time work; and (iv) labour broking.<sup>27</sup> The incorporation of both processes in the South African labour market has led to inadequate legal protection of employees and a 25.6% unemployment rate that has increased by 0.4% in the past three months.<sup>28</sup> The South African labour market is characterized by imbalances; the low employment rate has enabled employers to alter “contracts” of employment, which includes changes to basic conditions of employment, most importantly relating to remuneration. Despite the fact that, as noted, decent work may be attainable in the absence of high income, in the South African context, it is suggested that decent work is intrinsically linked with low levels of income, as a result of the low levels of employment. Between 2012 and 2013, the country shed 254 000 jobs.<sup>29</sup> The link between high levels of unemployment and indecent work derives from the lack of job security in the South African labour market that ultimately give employers leverage over employees and discretion in respect of various aspects of employment, including remuneration, hours of

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<sup>24</sup> Labour Relations Act, 1995 the Basic Conditions of Employment Act, 1997 and the Employment Equity Act 55 of 1998. These Acts will be examined later in this dissertation and the link between the concept of decent work and the governing legislation will be drawn.

<sup>25</sup> Benjamin (note 9 above). This is the result of informalization and externalization, providing inadequate protection to workers. The number of informal sector employees is currently estimated at 2 085 000 (Statistics South Africa ‘Quarterly Labour Force Survey’, Quarter 2, 2013, available at [www.statssa.gov.za/Publications/P0211/P02112ndQuarter2013.pdf](http://www.statssa.gov.za/Publications/P0211/P02112ndQuarter2013.pdf), accessed on 01 August 2013).

<sup>26</sup> R Dicks ‘The growing informalization of work: Challenges for labour – recent developments to improve the rights of atypical workers’ *Law Democracy & Dev.* 39.

<sup>27</sup> Benjamin (note 9 above).

<sup>28</sup> Statistics South Africa ‘Quarterly Labour Force Survey’, Quarter 2, 2013, available at [www.statssa.gov.za/Publications/P0211/P02112ndQuarter2013.pdf](http://www.statssa.gov.za/Publications/P0211/P02112ndQuarter2013.pdf), accessed on 01 August 2013.

<sup>29</sup> *Ibid.*

work and working conditions. This results in a lack of decent work, which affects employees' everyday lives and their human development and potential.

#### ***2.4 Domestic and farm work***

Domestic and farm workers are two of the most vulnerable groups in the South African informal labour market.<sup>30</sup> It is thus essential that these groups of workers have adequate conditions of employment that are conducive to a respectable, adequate living and working environment.

While the number of female domestic workers decreased by 2.3% from June 2012 to June 2013, the number of male domestic workers increased by 6%; the overall decrease is 1.9%. The agricultural labour force increased by 11.6% during the same period.<sup>31</sup> These statistics cannot be used to determine whether or not the objective of decent work is being achieved in either sector. While employment opportunities have clearly been created in the latter sector, a mere increase in the number of workers does not infer that all four ILO decent work pillars are being met. Furthermore, many farm owners have retrenched workers due to increased production costs; in June 2013, 107 000 of those identified as unemployed in South Africa had previously been employed on farms. It is clear that the number of people employed as domestic and farm workers have decreased, while the numbers employed in the broader agricultural sector have increased. This impacts the possibility of attaining decent work in these sectors.

#### ***2.5 Conclusion***

In conclusion, the concept of decent work not only calls for decent income and employment opportunities, but embraces a civilised working environment that allows for a dignified lifestyle, meeting the four strategic ILO pillars of decent work. It is debatable whether this is currently achievable in South Africa in respect of domestic and farm workers. Chapter five provides an in-depth examination of these sectors in order to shed more light on this issue.

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<sup>30</sup> H Bhorat et al 'Minimum Wage Violation in South Africa' (2011) *DPRU Working Paper* 11/143, 4.

<sup>31</sup> Statistics South Africa (note 28 above).

## **CHAPTER 3: HISTORY OF DECENT WORK IN SOUTH AFRICA**

### **CONTENTS:**

#### ***3.1 Introduction***

#### ***3.2 Masters and Servants Act; Industrial Disputes Prevention Act 20 of 1909; Industrial Conciliation Act 11 of 1924; Native Labour (Settlement of Disputes) Act, 1953***

#### ***3.3 Labour Relations Act 28 of 1956***

#### ***3.4 Basic Conditions of Employment Act 3 of 1983***

#### ***3.5 Wage Act, 1957***

#### ***3.6 Conclusion***

#### ***3.1 Introduction***

Bhorat et al (2001) note that:

“Over the last one hundred years, political influences on the South African labour market have been characterised by a plethora of legislation that was instrumental in maintaining, until the early 1970s, a workforce strictly divided on the basis of race.”<sup>32</sup>

While the concept of decent work has only gained recognition during the past decade, during the colonial and apartheid eras, the majority of black South African employees were not protected by labour legislation; this can be viewed as a violation of the International Labour Organization’s decent work objectives. The previous legislation is examined in order to determine the extent of the exclusion of disadvantaged domestic and farm workers and to highlight the legislation’s failure to comply with the ILO’s decent work objectives.

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<sup>32</sup> H Bhorat et al *Fighting Poverty: Labour Markets and Inequality in South Africa* (2001) 3.

**3.2 Masters and Servants Act; Industrial Disputes Prevention Act 20 of 1909; Industrial Conciliation Act 11 of 1924; Native Labour (Settlement of Disputes) Act, 1953**

In the early 1300s, “Master and Servant laws” were enacted in England to provide employees with some level of protection. These laws were later enacted in South Africa; with the first Masters and Servants Act promulgated in 1841. However, there were certain restrictions and the Act was repealed in 1974.<sup>33</sup>

A further statute, the Industrial Disputes Prevention Act 20 of 1909, was applicable only to employers and white workers in the Transvaal colony. This Act was amended in 1924<sup>34</sup> to allow for the protection of all employees. Nonetheless, the Industrial Conciliation Act 11 of 1924<sup>35</sup> excluded black males from the definition of “employee” and precluded black unions from registering under the Act.<sup>36</sup> This demonstrates the exclusion of certain employees from labour legislation purely on the basis of race and ethnicity.

In 1930, the definition of “employee” was extended to include black persons; however, these gains were reversed when the National Party came to power in 1948. The Government passed the Native Labour (Settlement of Disputes) Act, 1953<sup>37</sup> which implemented a dual, separate system of labour relations for white and non-white workers. The NLA barred African workers from joining registered trade unions and from striking, thus tightening the exclusion of Africans from the industrial relations system.<sup>38</sup> The Industrial Conciliation Act introduced by the National Party in 1956 (now known as the Labour Relations Act, 1956) added to this polarisation by also excluding black women from the provisions of the Act.<sup>39</sup>

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<sup>33</sup> J Grogan *Workplace Law* 10 ed (2009) 4.

<sup>34</sup> The introduction of the Industrial Conciliation Act 11 of 1924.

<sup>35</sup> Industrial Conciliation Act 11 of 1924 will hereafter be referred to as “Industrial Conciliation Act” (ICA).

<sup>36</sup> S Godfrey et al *Collective Bargaining in South Africa: past, present and future?* (2010) 43.

<sup>37</sup> Native Labour (Settlement of Disputes) Act, 1953 will hereafter be referred to as “Native Labour Act” (NLA).

<sup>38</sup> Borat (note 32 above) 4.

<sup>39</sup> A Steenkamp et al ‘The right to bargain collectively’ (2004) 25 *ILJ* 948.

### ***3.3 Labour Relations Act 28 of 1956***

The Labour Relations Act 28 of 1956<sup>40</sup> also referred to as the amended Industrial Conciliation Act, 1956, was a product of the apartheid system. The definition of “employee” in section 1 of this Act excluded black women as well as domestic and farm workers. Amongst other provisions, the Act prohibited mixed race trade unions and provided for the reservation of skilled jobs for white workers. Following the report of the Wiehahn Commission, in 1981 the amended Labour Relations Act of 1956 extended protection to many more workers. However, black workers, domestic workers and agricultural workers were still excluded.<sup>41</sup> This Act allowed for the state to overrule an Industrial Council agreement, therefore giving the government complete control over the hiring practices of private sector employers.<sup>42</sup>

The Bantu Education Act, 1953 supplemented the Labour Relations Act, 1956 and required that African education be predominantly self-funded. Many Africans were obliged to leave school, exacerbating the difficulties already imposed by job reservation.<sup>43</sup> African workers who had no right to live in the urban areas were required to register for work with state labour bureaux in the rural areas.<sup>44</sup>

The Wiehahn Commission was appointed in 1977 to review labour law legislation in South Africa.<sup>45</sup> The Commission made several recommendations, the most important of which were that: (i) the collective bargaining and dispute settlement mechanisms provided for in the Labour Relations Act, 1956 be extended to black workers; and (ii) that the legislature

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<sup>40</sup> Labour Relations Act 28 of 1956 will hereafter be referred to as “Labour Relations Act, 1956”.

<sup>41</sup> Grogan (note 33 above) 4.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid. This does not necessarily mean that African workers were not employed. However, African employees who did find employment were discriminated against in various ways, including the denial of the right to join trade unions and the right to strike.

<sup>44</sup> C O’Regan ‘1979-1997: Reflecting on 18 Years of Labour Law in South Africa’ (1997) 18 *ILJ* 889. Such permits were only granted for a period of 12 months and dependants and family members were not allowed to accompany the worker.

<sup>45</sup> Ibid, 891.



establish an Industrial Court.<sup>46</sup> The 1979 interim Report of the Commission of Inquiry into Labour Legislation, Part 1 RP 47/1979 was a revolutionary step in labour law history.<sup>47</sup>

Although the existing system was flawed, much was changed due to the activities of the Industrial Court in ‘juridifying’ labour relations.<sup>48</sup> The establishment of the Industrial Court was an attempt to create a framework for the regulation of labour relations in a charged political climate.<sup>49</sup> It was intended as a forum where labour disputes could be settled by judicial means; the awards made by this court set out what were acceptable labour practices and what were not; this further revolutionised labour law in South Africa.<sup>50</sup>

### ***3.4 Basic Conditions of Employment Act 3 of 1983***

The common law contract of employment was based on freedom of contract. It entitled employers to adopt any standard, even if it violated public policy. The common law did not recognise fundamental human rights and minimum standards of employment; it is for this reason that there was statutory intrusion into the common law contract of employment.

Grogan (2009) notes that:

“It was recognised that the common-law contract of employment based on freedom of contract was ill suited to the collective relationship between employers and unionised workforces that spread throughout the industrialised world in the 19<sup>th</sup> century.”<sup>51</sup>

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<sup>46</sup> J Roos ‘Labour Law in South Africa 1976 – 1986 The Birthplace of a Legal Discipline’ (1987) *Acta Juridica* 96, 97, 98. At 98, it states that the introduction of the Industrial Court was one of the crucial factors that changed the face of labour relations and with it the legal nature of the labour relationship.

<sup>47</sup> Report of the Commission of Inquiry into Labour Legislation, Part 1 RP 47/1979.

<sup>48</sup> Roos (note 46 above) 105. “Juridifying” labour relations was defined as “the use of law to steer labour relations in a particular direction so as to reduce the freedom of action of employees and employers in shaping relations at work”.

<sup>49</sup> I Currie et al *The Bill of Rights Handbook* 5 ed (2005) 501.

<sup>50</sup> *Ibid.*

<sup>51</sup> Grogan (note 33 above) 3.

The 1983 Basic Conditions of Employment Act instituted two main changes. Firstly, it laid down minimum standards of service that all private sector employers were required to comply with; failure to do so would result in criminal sanctions.<sup>52</sup> However, this Act excluded domestic and farm workers until 1993.<sup>53</sup> Furthermore, the minimum standards tended to be low.<sup>54</sup> The provisions of the BCEA of 1983 were only applicable where there were no relevant wage regulating measures such as industrial council agreements, labour orders or wage determinations.<sup>55</sup> The second change brought about by the 1983 BCEA was that it prohibited employers “without prejudice to the provisions of the section 52a of the Child Care Act, 1983” from employing a person under the age of 15 years.<sup>56</sup>

### ***3.5 Wage Act, 1957***

The main objective of the Wage Act of 1957<sup>57</sup> was to determine minimum wages and terms of employment *via* a wage board.<sup>58</sup> The Minister of Labour would promulgate a wage determination to set minimum wages and conditions in a specific trade or industry. This determination then acquired statutory force as a regulation in terms of the Wage Act.<sup>59</sup> One of the downfalls of this Act was that it only applied when the Labour Relations Act, 1956 was deemed not to apply, thus indicating the latter’s supremacy over the Wage Act.

### ***3.6 Conclusion***

Prior to the Wiehahn Commission, South African labour legislation privileged whites by providing for job reservation and preventing any form of collective bargaining by other race groups. African employees were not protected by this legislation. The apartheid regime promulgated numerous laws to oppress employees of colour and prevent them from accessing economic opportunities. Black employees could not attain decent work as they were limited

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<sup>52</sup> Grogan (note 33 above) 4.

<sup>53</sup> G Standing et al *Restructuring the Labour Market: The South African Challenge* (1996) 135. From May 1993, an estimated one million agricultural workers, 656 772 regular and 394 425 casual employees, excluding those working in the homelands, were included. As from January 1994, domestic workers, numbering about 830 000 persons, were also included.

<sup>54</sup> Standing (note 53 above) 140.

<sup>55</sup> Standing (note 53 above) 133.

<sup>56</sup> Standing (note 53 above) 136.

<sup>57</sup> Wage Act, 1957 will hereafter be referred to as “Wage Act”.

<sup>58</sup> Standing (note 53 above) 143.

<sup>59</sup> Standing (note 53 above) 133.

to unskilled, manual labour. Whilst there were developments prior to 1977, the legislation continued to deny black employees their fundamental human rights; this included the exclusion of domestic and farm workers from legal protection. It is therefore clear that South Africa did not achieve the ILO decent work objectives. This is evident in the fact that there was little or no job creation or improvement in income in the domestic and agricultural sectors; and that, workers in these sectors were not guaranteed fundamental rights at work; social protection and social security were not extended to them; and social dialogue and tripartism were not promoted.

## **CHAPTER 4: DOMESTIC WORK AND FARM WORK**

### **CONTENTS**

- 4.1 Introduction***
- 4.2 Domestic work***
  - 4.2.1 Nature of employment***
  - 4.2.2 Sectoral Determination 7***
  - 4.2.3 Domestic workers' trade unions***
- 4.3 Farm work***
  - 4.3.1 Nature of employment***
  - 4.3.2 Sectoral Determination 13***
  - 4.3.3 Agricultural workers' trade unions***
- 4.4 Conclusion***

#### ***4.1 Introduction***

In terms of the protection and attainment of decent work, domestic and farm work deserve attention and special recognition. These sectors continue to display relics of the master-servant relationship. Despite attempts at regulation and the protection of domestic and farm workers, employers in these sectors enjoy a clear advantage due the current state of the South African economy and the depressed labour market. Workers are willing to take any job they can find. The nature of domestic and farm work and the various initiatives taken by the government to address abuse in these sectors are discussed below.

#### ***4.2 Domestic work***

##### ***4.2.1 Nature of employment***

An anonymous Orlando East worker shared her experiences of domestic work:

“Where I work, the utensils I use to eat stay outside. It is apartheid... Because they still think that Africans aren’t on the same level as them. When I want to eat I have to get the dishes from outside and she’ll dish up for me...”<sup>60</sup>

Domestic work is said to be one of the oldest and most important occupations for millions of women around the world and is rooted in the global history of slavery, colonialism and other forms of servitude.<sup>61</sup> The International Labour Organization estimates that domestic workers represent approximately 4 to 10% of the total workforce in developing countries and 1 to 2.5% of the total workforce in developed countries.<sup>62</sup> Excluding child domestic workers, there are currently approximately 53 million domestic workers worldwide. This number is increasing steadily in both developed and developing countries, with 83% of domestic workers being women.<sup>63</sup> Approximately 1 093 000 employees work in private households in South Africa.<sup>64</sup>

The South African legislation contains numerous definitions of a “domestic worker”. The BCEA defines a domestic worker as an employee who performs domestic work in the home of his or her employer and includes:

- (a) a gardener;
- (b) a person employed by a household as driver of a motor vehicle; and
- (c) a person who takes care of children, the aged, the sick, the frail or the disabled, but does not include farm workers.<sup>65</sup>

The definition presented in the BCEA differs in that farm workers are specifically excluded, which is contrary to that of Sectoral Determination 7: Domestic Worker Sector.<sup>66</sup> Section 1

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<sup>60</sup>M De Waal ‘Still on the fringes: Domestic workers see no light’ *Daily Maverick* available at [www.daily-maverick.co.za/article/2012-06-05-still-on-the-fringes-domestic-workers-see-no-light](http://www.daily-maverick.co.za/article/2012-06-05-still-on-the-fringes-domestic-workers-see-no-light), accessed on 18 March 2013.

<sup>61</sup>ILO (note 10 above).

<sup>62</sup>ILO ‘Decent Work for Domestic Workers Report IV (2)’ (2010) International Labour Conference: Geneva, 99<sup>th</sup> Session, available at [www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_123731.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_123731.pdf), accessed on 30 March 2013.

<sup>63</sup>ILO, available at [www.ilo.org/global/topics/domestic-workers](http://www.ilo.org/global/topics/domestic-workers), accessed on 02 April 2013.

<sup>64</sup>Statistics South Africa (note 28 above).

<sup>65</sup>Section 1 of the Basic Conditions of Employment Act, 1997.

of the Unemployment Insurance Act 63 of 2001<sup>67</sup> and the Unemployment Insurance Contributions Act 4 of 2002<sup>68</sup> contain similar definitions to the BCEA. In contrast, the SD7 defines the term as:

“Any domestic worker or independent contractor who performs domestic work in a private household and who receives, or is entitled to receive, pay and includes –

- (a) a gardener;
- (b) a person employed by a household as a driver of a motor vehicle; and
- (c) a person who takes care of children, the aged, the sick, the frail or the disabled;
- (d) domestic workers employed or supplied by employment services.”<sup>69</sup>

According to Benjamin (1980), the various definitions contain three crucial elements:<sup>70</sup>

- (a) a particular degree of close personal contact exists between the employer and employee;
- (b) the domestic worker works in the employer’s residence or at his or her premises; and
- (c) the worker is not be engaged in the employer’s commercial or business venture.<sup>71</sup>

Various factors set domestic work apart from other types of employment.<sup>72</sup> Domestic work generally refers to work performed in and for private households.<sup>73</sup> Furthermore, there is generally an unequal relationship between the employer and a domestic worker; domestic workers typically have personal and intimate knowledge of their employer’s life, yet because of the difference in race, class and work, this leaves many workers “vulnerable to verbal, physical, or sexual abuse by their employers”.<sup>74</sup>

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<sup>66</sup> Sectoral Determination 7: Domestic Worker Sector, South Africa, available at [www.labour.gov.za/DOL/legislation/sectoral-determinations/sectoral-determination-7-domestic-workers](http://www.labour.gov.za/DOL/legislation/sectoral-determinations/sectoral-determination-7-domestic-workers), accessed on 30 March 2013. It will hereafter be referred to as “Sectoral Determination 7” (SD7).

<sup>67</sup> Unemployment Insurance Act 63 of 2001 will hereafter be referred to as “Unemployment Insurance Act” (UIA).

<sup>68</sup> Unemployment Insurance Contributions Act 4 of 2002 will hereafter be referred to as “Unemployment Insurance Contributions Act” (UICA).

<sup>69</sup> Article 31 of the Sectoral Determination 7: Domestic Worker Sector, South Africa.

<sup>70</sup> P Benjamin ‘The Contract of Employment and Domestic Workers’ (1980) 1 *ILJ* 199.

<sup>71</sup> N Smit et al ‘Decent Work and Domestic Workers in South Africa’ (2011) 27 *Int’l J. Comp. Lab. L. & Indus. Rel.* 318.

<sup>72</sup> MA Chen ‘Recognizing Domestic Workers, Regulating Domestic Work: Conceptual Measurement, and Regulatory Challenges’ (2011) 23 *Can. J. Women & L* 169.

<sup>73</sup> D du Toit ‘Extending the frontiers of employment regulation: The case of domestic employment in South Africa’ (2010) 14 *Law Democracy & Dev.* 207.

<sup>74</sup> Chen (note 72 above) 169.

Furthermore, domestic workers are predominantly black females,<sup>75</sup> who are not members of trade unions.<sup>76</sup> As noted above, domestic employment is mostly informal.<sup>77</sup> The phrase “work like any other, work like no other”<sup>78</sup> sums up domestic work; in that the relationship between employer and employee is unique. It is a challenge to regulate an employment relationship within the privacy of the employer’s home, allowing for defiance of the law without being detected or disturbed by labour inspectors.<sup>79</sup> The relationship is often informal in respect of written particulars and administration. Furthermore, many domestic workers reside at their employer’s residential premises. Many suffer inhumane living conditions, while being “forced” to work long hours without overtime pay or adequate wages.

It should be noted, however, that not all domestic work is performed within the confines of a private household; some workers are employed through a “third party” agency or contractor.<sup>80</sup> Furthermore, some employers prefer to use temporary employment services in order to avoid the legal, administrative, technical issues covered in the Sectoral Determination.<sup>81</sup>

One of the greatest concerns is gender inequality in the domestic sector. This form of work is one of the oldest and most important occupations for many women. Domestic work is linked to the global history of slavery, colonialism and other forms of servitude, even though servitude is prohibited in terms of section 13 of the South African Constitution.<sup>82</sup>

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<sup>75</sup> ILO ‘Domestic workers across the world: Global and regional statistics and the extent of legal protection’ (2013) International Labour Office: Geneva, available at [www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_173363.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_173363.pdf), accessed on 04 March 2013, 33. It is stated that the racial distribution of domestic workers is highly uneven, with the vast majority classified as “African/black” (91 per cent) and the remainder as “Coloured” (9 per cent) in the 2010 Quarterly Labour Force Survey (South Africa). However, the majority of gardeners and landscapers, which fit within the scope of domestic work, are male. There are currently 223 000 male employees in private households in South Africa (Statistics SA (note 28 above)).

<sup>76</sup> In du Toit (note 73 above) 207, it is reported that no more than an estimated 5% of domestic workers in South Africa are registered with a trade union.

<sup>77</sup> du Toit (note 8 above) 3.

<sup>78</sup> ILO (note 62 above).

<sup>79</sup> du Toit (note 8 above) 2.

<sup>80</sup> Chen (note 72 above) 172. It is submitted that, although TESs may not be as prevalent in the domestic and agricultural sector, it is still an issue that requires attention in light of the first pillar of the ILO’s decent work objectives, namely fundamental rights for workers engaged in decent work.

<sup>81</sup> Benjamin (note 9 above). The Labour Relations Amendment Bill, 2012 has now specifically addressed the limitations of labour broking in the LRA.

<sup>82</sup> du Toit (note 73 above) 208, 221.

Employment in this sector remains gendered and has been understated due to the fact that it was previously performed as an unpaid “job” by women within the household. Despite attempts to define South African domestic “servants” as workers, it is submitted that many domestic workers find themselves in households that have not yet acknowledged this “shift”. The unequal power relations between employer and employee do not bode well for progress or the attainment of decent work. The following table shows the percentage of employers that provide benefits such as such sick leave, paid annual leave and UIF to domestic workers:

**Table 4.2.1**

Benefits:	Private Households (i.e. Domestic work):
Paid Annual Leave	19,5%
Paid Sick Leave	24,6%
Maternity/paternity Leave	8,8%
UIF	23,8%
Medical Aid	0,2%

Source: Statistics South Africa ‘Quarterly Labour Force Survey’, Quarter 2, 2013, available at [www.statssa.gov.za](http://www.statssa.gov.za), accessed on 01 August 2013.

This table illustrates the absence of the ILO pillars (ii), guaranteeing of fundamental rights at work and achievement of international labour standards and (iii), extending social protection and social security. This raises the question of whether the national labour legislation provides adequate protection that ensures decent work for domestic workers.

#### **4.2.2 Sectoral Determination 7**

In terms of section 55(1) of the BCEA, the Minister of Labour may make a sectoral determination for one or more sector and area. The Minister decides on various conditions based on recommendations by the ECC; these determinations are generally regarded as appropriate in specific sectors that are considered vulnerable.<sup>83</sup> The introduction of a sectoral determination for the domestic work sector was hinted at in the late 1990s but was only

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<sup>83</sup> M Visser ‘Sweeping changes? Organising and bargaining for the realisation of the rights of domestic workers’ (undated) Domestic Workers Research Project, available at [www.dwrp.org.za/images/stories/DWRP\\_Research/visser.pdf](http://www.dwrp.org.za/images/stories/DWRP_Research/visser.pdf), accessed on 06 September 2013, 4.



launched in 1999.<sup>84</sup> It involved 64 public meetings, 114 written representations, two surveys covering more than 300 employers and 4 000 domestic workers, an international study of the context and an economic analysis.<sup>85</sup> The determination is a culmination of the rights laid out in the BCEA and restates the provisions contained therein. Furthermore, Sectoral Determination 7 addresses various other conditions of employment, such as working time, minimum wages, annual leave and dismissals.

Expanding on the definition of a “domestic worker” expressed above, SD7 defines domestic employees as:

- (i) All domestic workers in South Africa;
- (ii) Persons employed by employment services;
- (iii) Independent contractors;
- (iv) A person doing gardening in a private home;
- (v) Persons who look after children, the aged, the sick, the frail or the disabled in a private household; and
- (vi) A person employed to drive the car taking the children of the household to school.

SD7 expressly provides that an employer may not make any deductions from a domestic worker’s pay except for (i) unpaid leave; (ii) a deduction (not more than 10% of the wage) for a room or other accommodation supplied to the domestic worker by the employer (specific requirements are laid down for such accommodation); (iii) with the written consent of the domestic worker, a deduction of any amount which the employer has paid or has undertaken to pay to any benefit of which the domestic worker is a member, a registered trade union, to any banking institution or to any person or organisation in respect of a dwelling or accommodation occupied by the domestic worker; (iv) a deduction (not exceeding 10% of the wage) towards repayment of any amount loaned or advanced to the domestic worker by the employer; and (v) a deduction which an employer is required to make by law or in terms of a

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<sup>84</sup> Media Statement by the Honourable Minister of Labour, Mr Membathisi Mdladlana on the release of a Report about wages and Conditions of Employment for Domestic Workers, 10 July 2001, available at [www.info.gov.za/speeches/2001](http://www.info.gov.za/speeches/2001), accessed on 06 September 2013.

<sup>85</sup> Ibid.

court order or arbitration award.<sup>86</sup> It is important that employers are aware of this provision as some insist that their employees pay for damages incurred whilst performing their domestic work duties; this is strictly prohibited by law.

The wages prescribed in the SD7 depend on (i) the area in which the worker works; and (ii) the number of hours worked. The current wage for domestic workers who work more than 27 ordinary hours per week is R8.95 per hour in Area A (listed municipal areas) and R7.65 per hour in Area B (rural areas). If a domestic worker works 27 ordinary hours or less per week, the current wage is R10.48 per hour in Area A and R9.03 in Area B. This clearly fails to address the undervalued, underpaid nature of domestic work or the decent work objectives of the ILO, in particular the third pillar of extending social protection and social security to domestic workers. It is important to note that, although SD7 provides for various conditions of employment, it is silent on the retirement age of domestic workers. This is considered in chapter five of this dissertation. Overall, the effect and implementation of SD7 has failed in South Africa as a result of a lack of knowledge and monitoring, as well as non-compliance on the part of employers. There have been numerous instances of workers being underpaid for the number of hours worked.<sup>87</sup> Yet the positive intentions of SD7 cannot be denied.<sup>88</sup>

#### ***4.2.3 Domestic workers' trade unions***

It is evident that domestic workers comprise a large segment of South Africa's labour force. It is therefore necessary to ensure that such workers have full access to the rights provided in terms of the LRA and other relevant legislation. Collective bargaining, also known as the right to participate in employee organizations, is entrenched in section 64 of the LRA and is the fourth ILO decent work objective, discussed in chapter two as the promotion of social dialogue and tripartism. However, the realization of this right is not easy due to: (i) the precarious nature of domestic employment, in that employees are usually the only employee

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<sup>86</sup> Clause 8 of Sectoral Determination 7: Domestic Worker Sector, South Africa.

<sup>87</sup> J Gobind et al 'Minimum wage and domestic workers' right to basic conditions of employment: Are employers complying?' (2012) 6(47) *Afr. J. Bus. Manage.* 11686, available at [www.academicjournals.org/AJBM](http://www.academicjournals.org/AJBM), accessed on 14 April 2013.

<sup>88</sup> du Toit (note 73 above) lists the following changes: (i) the number of UIF registrations and written contracts of employment for domestic workers; (ii) the reduced number of domestic workers who earn less than the prevailing minimum wage; (iii) the increase in the number of domestic workers receiving paid leave; and (iv) an increase in monthly earnings.

in the household and their ability to exercise leverage or bargaining power over their employer is rare due to their “lack of economic muscle”,<sup>89</sup> and (ii) the lack of supportive structures in the community in which they are employed.

The South African Domestic Workers’ Union (SADWU), an affiliate of the Congress of South African Trade Unions (COSATU) was the largest and most successful domestic workers’ union. In 1986, its membership was estimated at between 10 000 and 11 000 persons.<sup>90</sup> However, due to economic constraints, the union shut its doors. The two trade unions currently registered are the South African Domestic Services and Allied Workers’ Union (SADSAWU), formed in 2000, and the South African Domestic and General Workers’ Union (SADAGWU).<sup>91</sup> Both assist domestic workers on labour related matters, represent workers at the CCMA, promote awareness of the minimum wage among domestic workers and create overall awareness and empowerment in respect of domestic work.<sup>92</sup> However, these unions organize no more than an estimated 5% of all domestic workers in South Africa.<sup>93</sup> The harsh reality is that South African domestic workers may well have the right to collective bargaining, but the enforcement of these rights is hampered by a number of factors. The overwhelming majority of domestic workers are not unionized. It is suggested that a specialised bargaining council, or the assistance of civic or non-governmental organisation, could promote collective bargaining in this sector.<sup>94</sup>

### **4.3 Farm work**

#### **4.3.1 Nature of employment**

Farm work has been described as follows:

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<sup>89</sup> B Grant ‘Domestic Workers – Employees or Servants?’ (1997) *Agenda* 61, 63.

<sup>90</sup> S Pandit ‘Legal Protection of Domestic Workers: Could we learn from South Africa?’(2011) Domestic Workers Research Project, available at [www.dwrp.org.za/images/stories/DWRP\\_Research/shereen\\_pandit\\_icdd\\_paper\\_final\\_version\\_11-01-20.pdf](http://www.dwrp.org.za/images/stories/DWRP_Research/shereen_pandit_icdd_paper_final_version_11-01-20.pdf), accessed on 06 September 2013, 22, 23.

<sup>91</sup> *Ibid*, 23, 24.

<sup>92</sup> For more information, visit [www.sadsawu.com](http://www.sadsawu.com).

<sup>93</sup> du Toit (note 73 above) 207.

<sup>94</sup> Smit (note 71 above) 327.

“They farm, but they are not farmers. They do not own or rent the land they work. Nor do they own the tools and equipment they use. Yet they are at the heart of the world’s food production system. They feed the world. But who are they?”<sup>95</sup>

Section 1 of the BCEA defines a ‘farm worker’ as an employee who is employed mainly in or in connection with farming activities, and includes an employee who wholly or mainly performs domestic work in a home on a farm. There are currently approximately 712 000 agricultural workers in South Africa<sup>96</sup> and an estimated 1.3 billion farm workers worldwide, half of the world’s labour force.<sup>97</sup> Not only is farm work very physical in nature, it can often be dangerous. Farm workers are also exposed to the natural elements, the sun being the most dangerous.

In South Africa, farming has declined substantially over the years. This can be attributed to various factors, including globalization, the monopoly held by large corporations and the declining profitability of small scale farms. Most employment is in large scale agriculture, where farm owners and employers have been “shedding jobs for decades” in pursuit of profits. Furthermore, job creation depends on the allocation of resources between large scale agriculture and small scale farming. Farm owners are also confronted by land reform, which has resulted in many farm workers losing their jobs.<sup>98</sup> As an alternative to unemployment, farm owners resorted to offering seasonal work. Jobs are only available during certain seasons at the discretion of the farm owner, depending on the crop under cultivation. The recent protests by farm workers in the Western Cape which resulted in protracted strikes, were indirectly linked to the wages and working conditions of seasonal workers. In 2011, 391 119 out of a total of 821 967 farm workers (47.5%) were casual/seasonal workers.<sup>99</sup> Such workers lack employment security and fundamental rights at work, thus violating the ILO’s decent work objectives under pillars (i) and (ii).

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<sup>95</sup> ILO ‘Decent work in agriculture’ Labour Education 2003/2-3 No. 131-132, available at [www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---actrav/documents/publication/wcms\\_111457.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_111457.pdf), accessed on 16 September 2013, v.

<sup>96</sup> Statistics South Africa (note 28 above).

<sup>97</sup> ILO, available at [www.ilo.org/safework/areasofwork/hazardous-work/WCMS\\_110188/lang--en/index.htm](http://www.ilo.org/safework/areasofwork/hazardous-work/WCMS_110188/lang--en/index.htm), accessed on 02 April 2013.

<sup>98</sup> Theron (note 2 above) 7.

<sup>99</sup> Statistics South Africa ‘Agricultural Survey 2011’ (Preliminary), available at [www.statssa.gov.za/agriculture2009/Documents/Surveys/2011\\_Survey.pdf](http://www.statssa.gov.za/agriculture2009/Documents/Surveys/2011_Survey.pdf), accessed on 16 September 2013.

Another characteristic of farm work is workers' living arrangements. Many live on the farm with their living quarters either taking the form of payment in kind or incorporated into their employment contract.<sup>100</sup> This directly links farm workers and their employment with their livelihood, which is similar to domestic work. It is suggested that this reduces their opportunities and options to seek work elsewhere as most aspects of their lives are controlled by their employers.

While farm work is a predominantly male occupation, gender-based discrimination is also evident in the agricultural sector; many female workers do not receive the same wages as men and suffer sexual harassment.<sup>101</sup> They are also excluded from supervisory positions and receive unequal treatment. The following table shows the percentage of employers that provide benefits such as sick leave, paid annual leave and UIF to farm workers:

**Table 4.3.1**

Benefits:	Agricultural Sector: (including farm work)
Paid Annual Leave	45,2%
Paid Sick Leave	49,4%
Maternity/paternity Leave	18,9%
UIF	61,5%
Medical Aid	3,3%

Source: Statistics South Africa 'Quarterly Labour Force Survey', Quarter 2, 2013, available at [www.statssa.gov.za](http://www.statssa.gov.za), accessed on 01 August 2013.

While it is clear that agricultural employees have greater access to benefits than domestic workers, the lack of maternity or paternity leave can be intrinsically linked to gender inequalities in this sector.

<sup>100</sup> A Isaacs 'Trapped farm labour: obstacles to rights and freedom' (2003) *Development Update* 36.

<sup>101</sup> ILO, Bureau for Workers' Activities Background Paper 'Decent work in agriculture' (2003), available at [www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---sector/documents/publication/wcms\\_161567.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_161567.pdf), accessed on 04 April 2013, 31.

### 4.3.2 Sectoral determination 13

As noted above, section 55(1) of the BCEA provides that the Minister of Labour has the authority to make a sectoral determination for one or more sectors and areas. The Minister decides on various conditions based on recommendations by the ECC and the determinations are generally regarded as appropriate in specific sectors that are considered vulnerable.<sup>102</sup> The most common forms of non-compliance with sectoral determinations are unpaid overtime, non-adherence to working hours and most significantly, failure to pay minimum wages.<sup>103</sup>

The BCEA Sectoral Determination 13 addresses the working conditions of farm workers.<sup>104</sup> It contains detailed provisions for minimum wages, the manner of payment, leave and overtime work.<sup>105</sup> On 1 March 2013 Labour Minister Mildred Oliphant's announcement of an increase in the minimum wage provided for by SD13 to R105.00 a day triggered an outcry among farm owners and other businesses involved in farming.<sup>106</sup> The current sectoral determination satisfactorily addresses terms and conditions of employment in this sector. It is submitted that it is currently the most in-depth, protective determination. SD13 is divided into the following parts:

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<sup>102</sup> Visser (note 83 above) 4.

<sup>103</sup> S Woolman et al 'Down on the farm and barefoot in the kitchen: farm labour and domestic labour as forms of servitude' (2007) Domestic Workers Research Project, available at [repository.up.ac.za/xmlui/bitstream/handle/2263/4268/Woolman\\_Down\(2007\).pdf?sequence=1](http://repository.up.ac.za/xmlui/bitstream/handle/2263/4268/Woolman_Down(2007).pdf?sequence=1), accessed on 06 September 2013.

<sup>104</sup> Sectoral Determination 13: Farm Worker Sector, South Africa, available at [www.labour.gov.za/DOL/legislation/sectoral-determinations/sectoral-determination-13-farm-worker-sector/](http://www.labour.gov.za/DOL/legislation/sectoral-determinations/sectoral-determination-13-farm-worker-sector/), accessed on 30 March 2013. It will hereafter be referred to as "Sectoral Determination 13" (SD13).

<sup>105</sup> Woolman (note 103 above).

<sup>106</sup> See the following newspaper articles for further analysis:

C Paton 'Mooted 50% farm wage hike 'puts jobs at risk'' *MSN* available at [news.howzit.msn.com/mooted-50percent-farm-wage-hike-%E2%80%98puts-jobs-at-risk%E2%80%99](http://news.howzit.msn.com/mooted-50percent-farm-wage-hike-%E2%80%98puts-jobs-at-risk%E2%80%99), accessed on 25 February 2013;

INet Bridge, Sapa 'Labour axed as farmers face soaring wages, costs' *MSN* available at [news.howzit.msn.com/labour-axed-as-farmers-face-soaring-wages-costs-1](http://news.howzit.msn.com/labour-axed-as-farmers-face-soaring-wages-costs-1), accessed on 25 February 2013;

INet Bridge, Sapa 'New minimum farm wage set' *MSN* available at [news.howzit.msn.com/new-minimum-farm-wage-set](http://news.howzit.msn.com/new-minimum-farm-wage-set), accessed on 25 February 2013;

INet Bridge, Sapa 'Farms depend on paying starvation wages' *MSN* available at [news.howzit.msn.com/farms-depend-on-paying-starvation-wages-1](http://news.howzit.msn.com/farms-depend-on-paying-starvation-wages-1), accessed on 25 February 2013;

'New farm wage will harm SA: TAU' *MSN* available at [news.howzit.msn.com/new-farm-wage-will-harm-sa-tau-1](http://news.howzit.msn.com/new-farm-wage-will-harm-sa-tau-1), accessed on 25 February 2013.

- Part A: Application;
- Part B: Minimum wages, including the minimum wages of farm workers under the age of 18, payment of remuneration, information concerning pay, prohibited acts concerning pay, deductions;
- Part C: Particulars of employment, including written particulars;
- Part D: Hours of work, including emergency work, ordinary hours of work, extension of ordinary hours of work, overtime, compressed working week, work on Sundays, night work, meal intervals, rest period, public holidays;
- Part E: Leave, including annual leave, sick leave, family responsibility leave, maternity leave;
- Part F: Prohibition of child labour and forced labour; and
- Part G: Termination of employment.

Section 50 of the BCEA is applicable in the sense that it makes provision for exemptions from Ministerial determinations such as the new minimum wage determination. Certain prerequisites must be met by the employer to qualify for exemptions, including completing a BCEA Form 6 and attaching the employer's financial statements and additional financial break downs, specifically the gross farming income for the previous financial year and an estimate for the current financial year, less expenditure. The employer must also approach relevant trade unions in order to obtain consent to the application or, if there are no trade unions, obtain the consent of the employees affected by the application. If such consent is not forthcoming, the exemption application form must be served on the trade unions, indicating that they may make representations to the Minister of Labour. If employees who are not members of trade unions do not consent, the employer must provide proof of reasonable steps taken to bring the application to the notice of employees, for example, by posting a copy on the employees' notice board or at the entrances to their homes. These steps should also be recorded in the employer's affidavit.

The latest SD13 provides for a R36.00 increase in the daily minimum wage. It was reported that a total of 1 987 farmers sought exemption from the wage determination between February and April 2013, and the Minister of Labour granted 18 applications affecting 4 991

farm workers.<sup>107</sup> It is evident that farmers are attempting to balance fair and decent wages with productivity amidst the current farming crisis; however, determining the priorities depends on the rights, interests and power of each person involved in the employment relationship. It should also be noted that SD13 is silent on the health and safety aspects of farm work. This is of concern as it is an important issue in farm work.

Clause 32 of SD13 provides that every employer on whom this sectoral determination is binding must keep a copy of the sectoral determination or a summary in a place to which farm workers have access. In keeping with pillar (ii) of the ILO's decent work objectives, workers' awareness of their rights will reduce the likelihood of non-compliance on the part of employers. However, as noted previously, this depends on the extent to which compliance is monitored.

#### ***4.3.3 Agricultural workers' trade unions***

As noted above, section 64 of the LRA provides that every employee in South Africa has the right to strike. The promotion of social dialogue and tripartism is one of the ILO's four decent work objectives. In contrast with the domestic sector, collective bargaining is common in the farming sector. However, there are limitations to farm workers' right to strike. Traditional limitations include the remoteness of agricultural undertakings, difficulties in communication and the vulnerability of farm workers as a result of the link between their employment and accommodation arrangements. The largest farm worker trade unions are the South African Agricultural Plantation and Allied Workers' Union (SAAPAWU) and the Food and Allied Workers' Union (FAWU), which are both affiliated to COSATU.

However, the majority of farm workers who have gone on strike are unorganized, which raises concerns about the capacity of the trade unions operating in this sector and whether farm workers have sufficient rights to strike and engage in collective bargaining.<sup>108</sup> Furthermore, violence has been a feature of industrial action in the agricultural sector.

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<sup>107</sup> Finance 24 'More farmers seeking wage waiver', available at [www.fin24.com/Economy/More-farmers-seeking-wage-waiver-20130528](http://www.fin24.com/Economy/More-farmers-seeking-wage-waiver-20130528), accessed on 04 August 2013.

<sup>108</sup> Theron (note 2 above) 8.



Minister Oliphant released a statement condemning the violence experienced during the recent protests.<sup>109</sup> It is possible that farm workers resort to violence because they have no leverage against the farm owner and little bargaining power in respect of disputes of interest, such as wage increases and improved working conditions. Another reason is their vulnerability and impoverishment. A newspaper article commented on the rationale for the violence:

“persistent violence in the lives of people who are unemployed for much of the year, and who have seen their limited incomes rapidly eroded by food price increases that far outstrip the official inflation rate. They must battle each other, global commodity markets and their employers for opportunity, even for survival.”<sup>110</sup>

#### ***4.4 Conclusion***

It is concluded that the precarious nature of domestic and farm work often results in non-compliance with and non-enforcement of the statutory protection offered in South Africa. However, progress is seen in both Sectoral Determinations (SD7 and SD13), which explicitly stipulate various conditions of employment. The crucial question is whether such protection adequately provides farm and domestic workers with decent work, in line with the ILO’s four decent work objectives, namely the creation of jobs, guaranteeing of fundamental rights at work and achievement of international labour standards, extending social protection and social security; and the promotion of social dialogue and tripartism.

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<sup>109</sup> Department: Labour, Republic of South Africa, available at [www.labour.gov.za/DOL/media-desk/media-statements/2013/minister-of-labour-condemns-violence-in-the-motor-industry-industrial-action](http://www.labour.gov.za/DOL/media-desk/media-statements/2013/minister-of-labour-condemns-violence-in-the-motor-industry-industrial-action), accessed on 16 September 2013.

<sup>110</sup> Mail & Guardian ‘Editorial: Farm workers deserve better’ 16 November 2012, available at [mg.co.za/article/2012-11-16-00-editorial-farm-workers-deserve-better](http://mg.co.za/article/2012-11-16-00-editorial-farm-workers-deserve-better), accessed on 16 September 2013.

## **CHAPTER 5: GOVERNING LEGISLATION AND INTERNATIONAL STANDARDS**

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#### ***5.4 Conclusion***

#### ***5.1 Introduction***

The four strategic objectives of decent work (referred to as the four pillars of decent work) identified by the International Labour Organization are the basis for establishing whether or not decent work has been successfully achieved in South Africa. As noted in chapter two, these are: (i) the creation of jobs; employment and income opportunities; (ii) guaranteeing of fundamental rights at work and achievement of international labour standards (iii) extending social protection and social security; and (iv) the promotion of social dialogue and tripartism.

An examination of the provisions in relation to pillars (ii) and (iii) in decent work in South Africa, in particular domestic and farm workers, is required. Thus, the current South African legislation is analysed and measured against the international standards set down by the ILO.

## ***5.2 Current South African legislation***

### ***5.2.1 Constitution of the Republic of South Africa, Act 108 of 1996***

On 27 April 1994, South Africa held its first free and fair democratic election under the Independent Electoral Commission. The National Party lost power to the African National Congress (ANC) and the Constitution of the Republic of South Africa was drawn up by Parliament and promulgated by former president, Nelson Mandela. This ground-breaking piece of legislation unlocked the oppressive racial chains of apartheid by guaranteeing the right to equality, human dignity and freedom. The Constitution is the supreme law of the land; all other laws are invalid if they are inconsistent with the Constitution. The obligations in respect of the Constitution must be fulfilled; the Constitutional Court is an adjudication mechanism to ensure the fulfilment of the rights and duties imposed on the country. The Bill of Rights is the cornerstone of the new democratic order in South Africa; it guarantees numerous concrete, absolute rights on the one hand and, on the other, it provides for derogable rights. Sections 9 and 10 of the Constitution are regarded as absolute, thus demonstrating their significance in all aspects of life, including employment.

#### ***5.2.1.1 Section 9***

The right to equality contained in section 9 of the Constitution is one of the fundamental values upon which the Constitution is based. It not only provides for formal equality, but this is formulated in a substantive sense.<sup>111</sup>

Section 9 states that:

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<sup>111</sup> du Toit (note 8 above) 5.

“(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.”

It is evident that the above two provisions play a vital role in terms of formal equality (section 9(1)) and substantive equality (section 9(2)), which are applicable to all persons in South Africa, including domestic and farm workers.

Labour law in South Africa is premised on substantive equality.<sup>112</sup> Although all citizens equally enjoy the same legal protection and freedom in a democratic country, this acknowledges that there is an unequal relationship between employers and employees. Vulnerable employees find themselves in the same or similar situations to those under apartheid, whether because of: (i) their previous disadvantage; or (ii) their employers’ prerogative.<sup>113</sup>

In respect of (ii), a contractual relationship between an employer and an employee implies a bargain struck between equals; however, the traditional conceptualization of the employment relationship as one based on contract is misleading.<sup>114</sup> Although there has been an attempt to deal with this issue by means of labour legislation, some employees have limited bargaining power as a result of the power imbalance in employment relations, particularly in the domestic and farm sectors.

In conclusion, the right to equality is a fundamental human right granted in terms of the Constitution, which is in line with the first pillar of the ILO’s decent work objectives.

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<sup>112</sup> Ibid

<sup>113</sup> The vulnerability of employees is a direct result of lack of financial resources and in turn results in a lack of leverage and an unequal balance of power in the employment relationship. This indicates a lack of equality in the workplace.

<sup>114</sup> du Toit (note 8 above) 5.

Nonetheless, there are various impediments that prevent the fulfilment of this right, including employers' prerogatives and national legislation; these are discussed below.

### ***5.2.1.2 Section 10***

Human dignity is a significant right that is required in order to heal past apartheid wounds. As noted in Chapter 3, under apartheid, persons of colour were restricted to indecent employment, resulting in an infringement of their human dignity. This was reflected in low remuneration, limited choice of occupation and poor conditions of employment.

Human dignity is one of the founding provisions of the Constitution of South Africa.<sup>115</sup> Section 10 provides that 'everyone has inherent dignity and the right to have their dignity respected and protected', including workers engaged in decent work. Chief Justice Chaskalson (2000) commented on the recognition of human dignity as a founding value as follows:

"The affirmation of [inherent] human dignity as a foundational value of the constitutional order places our legal order firmly in line with the development of constitutionalism in the aftermath of the second world war."<sup>116</sup>

Section 10 is obligatory in all aspects of a person's livelihood, including labour law. Currie et al (2005) state:

"To summarise, human dignity is not only a justiciable and enforceable right that must be respected and protected, it is also a value that informs the interpretation of possibly all other fundamental rights and that is of central significance in the limitations enquiry."<sup>117</sup>

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<sup>115</sup> This is contained in section 1 of Chapter 1 of the Constitution, 1996.

<sup>116</sup> A Chaskalson 'Human Dignity as a Foundational Value of our Constitutional Order' (2000) *S. Afr. J on Hum Rts* 193, 196.

<sup>117</sup> See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 15.

Labour law and human dignity are significantly intertwined in South Africa. Furthermore, there is a strong link between human dignity and decent work. One of the primary goals of the ILO is to ensure decent and productive work in conditions of freedom, equity, security and human dignity. Human dignity is essential to attain the ILO's decent work objective of fundamental principles and rights at work (pillar (ii)). In conclusion, an employee is entitled to social protection and social security, the promotion of social dialogue and tripartism and minimum, adequate conditions of employment to guarantee the right to human dignity. These factors are discussed below.

### ***5.2.1.3 Section 23***

Chapter two of the Constitution contains several provisions that are applicable to employment and labour law.<sup>118</sup> In particular, Section 23(1) and (2) provide that:

- “(1) Everyone has the right to fair labour practices
- (2) Every worker has the right-
  - (a) To form and join a trade union;
  - (b) To participate in the activities and programmes of a trade union; and
  - (c) To strike.”

Section 23(1) and 23(2) of the Constitution differ in scope as the latter is only applicable to a ‘worker’, whereas the former is applicable to ‘everyone’. Thus, Section 23(2) broadens the scope of section 23(1).<sup>119</sup> Furthermore, the term ‘worker’ in respect of section 23(2) of the Constitution is considered to be broader than the category of ‘employee’ in the Labour Relations Act.<sup>120</sup> The Constitution has resulted in the creation and implementation of laws that are consistent with the various human rights; the most significant are the Labour Relations Act, 1995, the Basic Conditions of Employment Act, 1997 and the Employment Equity Act 55 of 1998.

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<sup>118</sup> Grogan (note 33 above) 5.

<sup>119</sup> Currie (note 49 above) 499.

<sup>120</sup> In *SA National Defence Force v Minister of Defence & another* (1999) 20 ILJ 2265 (CC) at para 25, section 23(2) was held to be applicable to members of the South African National Defence Force.

There are various mechanisms to address the inherent inequality between employers and employees;<sup>121</sup> these include the promotion of the concept of collective bargaining, the development of specialist tribunals to create rules for the workplace and the imposition of minimum conditions of employment.<sup>122</sup> Labour legislation that embraces such mechanisms, including the LRA and the BCEA are analysed in the next subsection.

### ***5.2.2 Labour Relations Act 66 of 1995***

In the case of *National Education Health and Allied Workers' Union v University of Cape Town*,<sup>123</sup> it was stated that:

“Where the legislature enacts legislation in the effort to meet its constitutional obligations, and does so within constitutional limits, courts must give full effect to the legislative purpose. Moreover, the proper interpretation of such legislation will ensure the protection, promotion and fulfilment of constitutional rights and as such will be a constitutional matter. In this way, the courts and legislature act in partnership to give life to constitutional rights.”<sup>124</sup>

The Labour Relations Act, 1995 came into operation on 11 November 1996. It provides equal protection to all, irrespective of race or nationality, in line with certain international standards.<sup>125</sup> It was enacted to give effect to the rights guaranteed in terms of in section 23(5) and (6) of the Constitution. The Act encourages collective bargaining and the settlement of disputes by providing forums to do so.<sup>126</sup> It also provides for straightforward procedures such as conciliation, mediation and arbitration that may be appropriate for less serious or smaller labour issues. This is important in the context of decent work as prior to the introduction of the LRA, no avenues were provided for black employees to settle disputes with their employers.

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<sup>121</sup> However, the list is not concrete; these are simply methods that Legislatures favour in terms of the development of statute.

<sup>122</sup> Grogan (note 33 above) 4.

<sup>123</sup> *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1(CC).

<sup>124</sup> *Ibid*, para 14.

<sup>125</sup> Benjamin (note 9 above) 845.

<sup>126</sup> Grogan (note 33 above) 6.

The driving force behind the LRA is the requirement of fairness in respect of dismissals, labour practices and collective bargaining. Section 213 of the LRA defines an “employee” as 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 any other person who in any manner assists in carrying on or conducting the business of an employer. It is noted that this is regardless of colour or race.<sup>127</sup> The LRA further states that every employee has the right to strike and that every employer has the right to lock-out.<sup>128</sup> In respect of collective bargaining, the LRA provides a safeguard for employees who participate in protected strikes, thus rendering their dismissal automatically unfair.<sup>129</sup> This right appears to satisfy the fourth pillar of the ILO objectives, the promotion of social dialogue and tripartism.

As noted above, the LRA provides for a number of new forums to settle disputes, including Labour Courts and Labour Appeal Courts and the Commission for Conciliation, Mediation and Arbitration, a mechanism to resolve disputes expediently and efficiently.<sup>130</sup> The competence and efficiency of these mechanisms is examined in chapter six.

It is clear that the promulgation of the Labour Relations Act, 1995 is progressive towards the attainment of decent work. It applies to domestic and farm workers in South Africa; this was previously not the case. While it extends protection to all workers, as envisaged in the Constitution, the issue still remains as to whether there is access to such protection, which is the second ILO objective that must be met in order to attain decent work (the full guarantee of fundamental rights at work).

Employers in South Africa have adopted several novel methods to restrict the labour law protection offered to employees. Two examples of this are informalization and labour

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<sup>127</sup> Section 2 of the LRA excludes the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and COMSEC.

<sup>128</sup> It should be noted that there are, however, prerequisites that ought to be met in order to protect the employees from recourse. These include the issue of a certificate of non-resolution or a lapse of 30 days after the referral by the Council or Commission, and 48 hours’ notice of the commencement of the strike, in writing, to the employer as provided for in section 64 (1)(a) and (b) of the LRA.

<sup>129</sup> This is provided for in section 67(4) and section 187 of the LRA.

<sup>130</sup> These mechanisms are contained in Chapter VII of the LRA.



broking.<sup>131</sup> In 2012, Parliament promulgated the Labour Relations Amendment Bill, 2012 (LRAB) to address the defects of the LRA. The LRAB was passed by Parliament on 20 August 2013.

The proposed amendment to section 65 of the LRA extends the limitation on the right to strike. If the issue in dispute is one that a party has the right to refer to arbitration or the Labour Court, it is no longer limited to the rights provided for in the LRA but will include any other employment law. This will broaden the scope of the applicable labour legislation to include other Acts, such as the BCEA and the EEA. Section 198 of the LRA regulates temporary employment services (TES) and is a topic of continuous scrutiny and debate in the academic legal field.<sup>132</sup> In the past decade, employment in TES has increased drastically. TES' employees either enjoy no protection or limited protection. This is due to the fact that South Africa's labour law mainly aims to protect standard employment relationships. The amendment to section 198(4)(d) will impose joint and several liability on the TES and the client if the TES contravenes the sectoral determinations made in terms of the BCEA. This is particularly relevant for domestic and farm workers who are employed via TES.<sup>133</sup> Section 198D provides that disputes about the interpretation or application of sections 198A to 198C may be referred to the CCMA or a bargaining council with jurisdiction for conciliation and, if not resolved, to arbitration. A justifiable reason for different treatment (referred to in the proposed sections 198A, 198B and 198C) includes different treatment which is a result of the application of a system that takes into account: (i) seniority, experience or length of service; (ii) merit; (iii) the quality or quantity of work performed; and (iv) any other criteria of a similar nature not prohibited by section 6(1) of the Employment Equity Act 55 of 1998.

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<sup>131</sup> Dicks (note 26 above) 1.

<sup>132</sup> This is evident in the following scholarly articles:

J Theron 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (2005) 26 *ILJ* 618;

P Benjamin 'Decent Work and Non-Standard Employees: Options for Legislative Reform in South Africa: A Discussion Document' 2010 31 *ILJ* 845;

T Cohen 'Debunking the legal fiction – *Dyokhwe v De Kock NO & others*' (2012) 33 *ILJ* 2318;

C Bosch 'The Proposed 2012 Amendments Relating to Non-standard Employment: What will the New Regime Be?' (2013) 34 *ILJ* 1631.

<sup>133</sup> This will provide adequate justice for a TES employee, who, in the past, was limited in holding a TES liable; a domestic or farm employee will be able to elect either party who he or she will institute legal proceedings against.

The insertions of section 198A, B, C and D in the LRAB can be perceived as a progressive step in promoting and protecting the rights of TES' employees, which may include domestic and farm workers, particularly the former.<sup>134</sup> However, these amendments still legally permit TES in South Africa despite organisations such as COSATU arguing for the outright banning of labour broking.

In essence, the LRAB contains provisions that offer protection that will ensure non-tolerance of the misuse of temporary employment arrangements and the abuse of fixed-term contracts; this is a “welcome step” towards the attainment of decent work.<sup>135</sup> However, domestic and farm workers still stand to suffer abuse in TES relationships as employers engaged in TES relationships constantly seek ways to bypass the laws to protect employees. Although section 65 is amended to eliminate the inconsistency between disputes that can be adjudicated under the LRA and those that are limited by the LRA, this may represent an unjustifiable widening of the scope of the limitation on the right to strike.

### 5.2.3 Basic Conditions of Employment Act 75 of 1997

“The Basic Conditions of Employment Act (BCEA) provides a floor of minimum conditions with which all employment contracts must comply”<sup>136</sup> Previously, under the common law, parties were free to agree to whatever terms and conditions of employment they wished

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<sup>134</sup> Section 198A of the Labour Relations Amendment Bill, 2012 states: “(1) In this section, a “temporary service” means work for a client by an *employee*—

(a) for a period not exceeding three months;

(b) as a substitute for an *employee* of the client who is temporarily absent;

or

(c) in a category of work and for any period of time which is determined to be a temporary service by a *collective agreement* concluded in a *bargaining council*, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8)..”

Similarly, section 198B states: “Fixed term contracts with employees earning below earnings threshold 198B.

(1) For the purpose of this section, a ‘fixed term contract’ means a contract of employment 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 an *employee*'s normal or agreed retirement age, subject to subsection (3).”

The insertion of section 198A and section 198B seeks to introduce additional protection for employees who earn on or below the threshold prescribed in terms of section 6(3) of the BCEA. Furthermore, section 198C protects vulnerable part-time employees and section 198D of the LRAB deal specifically with the general provisions applicable to sections 198A to 198C.

<sup>135</sup> Cohen (note 16 above) 331.

<sup>136</sup> S Godfrey et al ‘The BCEA: Statutory, Administrative and Case Law Developments’ (2008) 29 *ILJ* 2406.

within the limits of the law, reasonableness and good morals.<sup>137</sup> These were limited by the introduction of the BCEA and collective agreements that are binding on both parties in the contract of employment.

The BCEA applies to all employees and employers, except members of the National Intelligence Agency, the South African Secret Service, unpaid charity workers and COMSEC.<sup>138</sup> The Act sets minimum standards relating to, amongst other things, remuneration, hours of work, annual leave, sick leave, maternity leave, family responsibility leave, notice of termination of employment, payments on termination and a certificate of service. These are prescribed in order to ensure that decent work is attained in South Africa.<sup>139</sup>

In respect of remuneration, employees are entitled to be paid if they tender service as and when they are due to under the contract of employment, sectoral determination or collective agreement.<sup>140</sup> Further, section 30 provides that:

“An employer must display at the workplace where it can be read by employees a statement in the prescribed form of the employee’s rights under this Act in the official languages which are spoken in the workplace.”

This is important as it creates worker awareness of their rights and promotes equality among South African employees. However, this may be a challenge for illiterate employees as well as those who find it difficult to interpret the law.<sup>141</sup>

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<sup>137</sup> Grogan (note 33 above) 58.

<sup>138</sup> The original BCEA also excluded the South African National Defence Force in section 3 of the BCEA. This was deleted by an amendment to the BCEA in respect of Intelligence Services Act 65 of 2002 and confirmed in *Bongo v Minister of Defence & others* (2006) 27 ILJ 799 (LC).

<sup>139</sup> Section 2 of the BCEA adds that the purpose of the Act is to give effect to obligations incurred by the Republic as a member state of the ILO.

<sup>140</sup> Godfrey (note 136 above) 2406.

<sup>141</sup> Section 28(2) of the BCEA states that various sections including section 29, 30, 31 and 33 do not apply to an employer who employs fewer than five employees. In the case of domestic workers and certain farm workers, if they are employed in a private household, there are usually less than five employees, thus rendering section 30 inapplicable.

Regulating working hours and restricting ordinary hours of work are a constant struggle in the quest for decent work for domestic and farm workers. In terms of the BCEA, chapter two is of most relevance as it is applicable to both types of workers; there are no exclusions in respect of section 6(1) of the Act or due to their earnings exceeding the determination made by the Minister of Labour.<sup>142</sup> The BCEA provides that employers must regulate working times in accordance with the provisions of the Occupational Health and Safety Act 85 of 1993 and with due regard to the Code of Good Practice on the Regulation of Working Time and family responsibilities.<sup>143</sup>

Section 9(1) of the BCEA states that an employer may not require or permit an employee to work more than 45 hours in any week, nine hours in a day if the employee works five days or fewer in a week and more than eight hours in any day if the employee works more than five days a week. The exceptions to this provision which are applicable to domestic and farm workers are contained in section 10(1)(1A) and section 10(6)(a) of the BCEA.<sup>144</sup> Where employees work longer than the hours stipulated in section 9(1), employers are required to pay overtime, although employees may consent to normal pay for overtime worked in terms of section 10(3)(a). This is a perennial problem among domestic and farm workers, who are often unable to demand overtime pay (although deserving of such) for different reasons. This could be the result of their vulnerability and unequal position, an inability to articulate and express their needs, or the fear of dismissal.

A further reality in domestic and farm work relates to age. The BCEA is only applicable to persons over the age of 15 and it is illegal to employ a child under the age of 15.<sup>145</sup> However, the legislation fails to recognize that some domestic and farm workers find themselves in situations where they are forced to seek employment before they turn 15. The age limit is

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<sup>142</sup> At this time, GN R300 in GG 30872 of 14 March 2008, determines that all employees earning in excess of R149 736,00 per annum are excluded from sections 9, 10, 11, 12, 14, 15, 16, 17(2), and 18(3) of the Act with effect from 1 March 2008.

<sup>143</sup> Section 7 of the BCEA.

<sup>144</sup> An employee is entitled to extend his or her hours of work to: (i) 12 hours in a day if agreed to by the employee and the employer is required to pay overtime to the employee in terms of section 10(1A) of the BCEA; and (ii) a total of 15 hours of overtime in a week may be agreed to in a collective agreement in terms of section 10(6), even though overtime is limited to 10 hours in a week (section 10(1)(b)).

<sup>145</sup> This is provided for in section 43 of the BCEA.

commonly breached in these sectors and government's failure to address the issue of child labour in both domestic and farm work is of concern to the ILO.<sup>146</sup>

Furthermore, the issue of retirement needs to be addressed. The BCEA does not provide for deductions for a retirement fund, thus placing responsibility on the shoulders of the employer. This is inconsistent with the ILO's third pillar of social security. Domestic and farm workers are consequently forced to draw a government pension or grant, putting further pressure on the State. A link can be drawn between retirement and section 41 of the BCEA, which makes provision for severance pay. This states that, if an employer dismisses an employee for operational requirements or when their contract of employment terminates or is terminated in terms of the Insolvency Act 24 of 1936, severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer is payable. It is submitted that this is insufficient for a domestic or farm worker to support his or her family before gaining further employment. The national legislation and sectoral determinations are silent on retirement; there is no stipulated retirement age for domestic and farm workers, thus allowing an employer to terminate a worker's contract of employment without agreement. This is also sometimes disguised as retrenchment, where a worker is allegedly retrenched for "operational requirements". Again, severance pay will not be sufficient to ensure a comfortable retirement. Many farm and domestic workers work beyond retirement age as they have not been able to prepare for retirement and the loss of their job would have severe consequences for their families.

Despite the limitations of the BCEA, it expresses the governmental concept of "regulated flexibility" with the issuing of sectoral and ministerial determinations and it continues to be one of the most unrecognized pieces of labour legislation in South Africa.<sup>147</sup>

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<sup>146</sup> The ILO Worst Forms of Child Labour Convention No. 182 of 1999 was ratified by South Africa and is currently in force. The commitment to elimination of child labour in section 43 of the BCEA is insufficient and further monitoring of illegal child employment is required in order to fulfil the obligations of Article 6 of the Convention.

<sup>147</sup> Godfrey (note 136 above) 2406, 2407.

In 2012, Parliament adopted the Basic Conditions of Employment Amendment Bill (BCEAB), which proposes various alterations to the current BCEA. Of most significance, amendments to sections 68 to section 73 alter the provisions that address the issue of labour inspection.<sup>148</sup> These provisions are applicable to domestic and farm workers. Labour inspectors are these employees' best hope of resolving workplace disputes or violations by employers. These amendments should be considered in light of the ILO Labour Inspection Convention No. 81 of 1947 which South Africa ratified on 20 June 2013, but which is not yet in force. This Convention is analysed under the international standards and ILO later in this chapter.

The proposed amendment to section 93 of the BCEA provides for criminal penalties for offences relating to employing children under the age of 15, children who are at least 15 years old doing work which is prohibited by the Minister of Labour, assisting an employer to employ children under 15 years and forced labour, all of which are governed by sections 43, 44, 46, and 48 of the BCEA. The criminal sanction will increase from three to six years. This is relevant in the context of domestic and farm work, which constantly grapple with issues of servitude and illegal child labour.

The amendment proposed to Schedule 2 of the BCEA will increase the maximum permissible fine from R500 to R1 500. This is an improvement in sanctions for non-compliance with the BCEA on matters not involving underpayment. Finally, the proposed amendment to section 77 of the BCEA will provide extended jurisdiction to the Labour Court in respect of offences that fall within sections 33A, 43, 44, 46, 48, 90 and 92. Although these provide for criminal sanctions, the Labour Court will have exclusive jurisdiction to grant civil relief arising from a breach. These amendments are commendable and an improvement on the current legal

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<sup>148</sup> The proposed amendments in section 68 of the BCEAB will provide labour inspectors with the discretion to decide whether or not to allow an employer to secure a written undertaking. Currently, this is mandatory in terms of section 68 of the BCEA. In addition, the amendment to section 69 alters a few administrative requirements in respect of the compliance order; a labour inspector will no longer be required to serve the copy of the compliance order on the employer himself. This may be beneficial in ensuring the productivity of labour inspectors, as they could use this time to inspect other places of employment. Furthermore, section 70 broadens the exceptions to the limitations, whereby an employer may be issued with a compliance order and is obliged to fulfil it even if proceedings were taken against him for the recovery of an amount outstanding to the employee and, subsequent to such, proceedings were withdrawn.

consequences of non-compliance with the BCEA and breach of the conditions of employment.

#### ***5.2.4 Employment Equity Act 55 of 1998***

Section 2 of the Employment Equity Act 55 of 1998<sup>149</sup> states that its purpose is to:

“Achieve equity in the workplace by (1) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and (2) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, to ensure their equitable representation in all occupational categories and levels in the workforce.”

It is thus evident that the EEA gives effect to section 9 of the Constitution in respect of labour practices. Section 6 of the EEA ensures equality and the prohibition of unfair discrimination in the workplace in respect of any employment policy or practice. This Act is applicable to domestic and farm workers and provides a further avenue in respect of pillar (ii) of the ILO decent work objectives. Section 187 of the LRA is also applicable in this regard, as dismissal of an employee who is alleging unfair discrimination on one of the listed grounds will be deemed automatically unfair. This places the burden on the employer to prove its fairness. Thus, the EEA is a vital piece of legislation that will ensure equality in the domestic and farm sectors and is a mechanism for the attainment of decent work.

#### ***5.2.5 Unemployment Insurance Act 63 of 2001***

The Unemployment Insurance Act establishes an Unemployment Insurance Fund which employers and employees contribute to and from which employees or beneficiaries can receive benefits when unemployed; the purpose is to alleviate the harmful economic and social effects of unemployment.<sup>150</sup>

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<sup>149</sup> Employment Equity Act 55 of 1998 will hereafter be referred to as “Employment Equity Act” (EEA).

<sup>150</sup> Section 2 of the UIA.

Section 12 of the UIA states that a contributor or dependant is entitled to the following benefits:

- (a) Unemployment benefits;
- (b) Illness benefits;
- (c) Maternity benefits;
- (d) Adoption benefits; and
- (e) Dependant's benefits.

Beneficiaries receive one day's benefit (the average daily rate = the monthly rate multiplied by 12 and divided by 365) for every completed six days of employment as a contributor.<sup>151</sup>

It is submitted that some form of protection is offered to employees in South Africa in terms of sections 4 and 5 of the Unemployment Insurance Contributions Act and that domestic and farm workers benefit from such protection.<sup>152</sup> It is therefore evident that South Africa does provide protection from unemployment for workers involved in decent work. However, the vexed question remains as to whether the unemployment benefit is sufficient to enable workers who were previously engaged in decent work to maintain decent livelihoods. Recommendations in this regard are provided in chapter seven.

### ***5.2.6 Occupational Health and Safety Act 85 of 1993***

The purpose of the Occupational Health and Safety Act 85 of 1993<sup>153</sup> is to provide, *inter alia*, for the health and safety of persons at work and for the health and safety of persons in

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<sup>151</sup> Section 13 of the UIA.

<sup>152</sup> The Unemployment Insurance Contributions Act is applicable to all employers and employees, other than those who work less than 24 hours a month, under leadership agreements, employers or employees in the national and provincial spheres of government or other purposes, as stated in section 4 of the Act. Further, section 5 imposes the duty on every employer and employee to whom the Act applies to contribute to the Unemployment Insurance Fund.

<sup>153</sup> Occupational Health and Safety Act 85 of 1993 will hereafter be referred to as "Occupational Health and Safety Act" (OHSA).



connection with the use of plant and machinery. The Act also provides for the establishment of an advisory council for occupational health and safety.<sup>154</sup>

Subject to the provisions of subsection (2), section 1 defines an “employee” as any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person. Thus, the scope of OHSA is appropriately wide in that it covers private industry; the public and agricultural sectors; domestic workers in private households; and persons who are exposed to hazards even though this may not occur in the context of employment.

The OHSA requires employers to establish and maintain, as far as is "reasonably practicable" a work environment that is safe and does not pose a risk to the health of the worker. This means that the employer must ensure that the workplace is free of substances, articles, equipment, processes, etc. that will or may cause injury, damage or disease. Where this is not possible, employers are required to inform workers of these dangers, how to avoid them and how to work safely.<sup>155</sup>

The Advisory Council for Occupational Health and Safety advises the Department of Manpower on the formulation and publication of standards, specifications and other forms of guidance to assist employers and employees, the promotion of education and training in occupational health and safety and any matter regarding the performance of its functions. Furthermore, an employer with 20 or more employees must appoint a health and safety representative. An inspector may direct that an employer who employs fewer than 20 employees also appoint a health and safety representative. However, there are three limitations: (i) the appointments must be made within four months after the commencement of the Act; (ii) within four months after the employer commences business; or (iii) within four months from such time as the number of employees exceeds 20, as the case may be. Although the OHSA appears to provide adequate control, these provisions may be held as

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<sup>154</sup> Preamble of OHSA.

<sup>155</sup> Section 8 of OHSA.

discriminating against single employees. Current issues relating to labour inspectors are examined in chapter six.

### ***5.2.7 Other applicable legislation***

The Skills Development Levies Act 9 of 1999<sup>156</sup> imposes a skills development levy on designated employers to fund education and training in various sectors in South Africa; the aim is to expand employees' knowledge and competencies and increase the supply of skilled labour.<sup>157</sup> Certain employers are excluded from the Act, including any employer where there are reasonable grounds to believe that the total remuneration payable to all employees during a 12-month period will not exceed R500 000.

It is unlikely that domestic and farm workers will fall within the scope of the SDLA. However, this Act could benefit these sectors as domestic and farm workers are generally uneducated and are in most need of training via the Services Sector Education & Training Authority (SETA).

## ***5.3 International Standards***

### ***5.3.1 International Labour Organization (ILO)***

#### ***5.3.1.1 Introduction to the ILO***

The ILO is a specialized United Nations (UN) agency “which seeks the promotion of social justice and internationally recognised human and labour rights”.<sup>158</sup> It has adopted numerous conventions that have impacted labour law worldwide. It is thus important to carefully examine the history of the ILO, the various decent work programmes it has created and the ILO Labour Inspection Convention No. 81 of 1947, the ILO Safety and Health in Agriculture

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<sup>156</sup> Skills Development Levies Act 9 of 1999 will hereafter be referred to as “Skills Development Levies Act” (SDLA).

<sup>157</sup> For more info, see [www.serviceseta.org.za](http://www.serviceseta.org.za).

<sup>158</sup> ILO, available at [www.ilo.org/global/about-the-ilo/history/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm), accessed on 09 June 2013.

Convention No. 184 of 2001 and the ILO Domestic Workers Convention No. 189 of 2011 concerning decent work for domestic workers.<sup>159</sup>

### *5.3.1.2 History of the ILO*

The ILO was created in 1919, as a part of the Treaty of Versailles that ended World War I, in order to reflect the belief that universal and social peace can be accomplished if based on social justice.<sup>160</sup> The idea of a “makeable society” was the driving force behind the ILO and international labour law was a new instrument for putting social reforms into practice. Although UN members had discretion in respect of joining the ILO, all member states of the League of Nations were automatically added when the ILO’s Constitution came into effect after World War II.

The first annual International Labour Conference (ILC) commenced on 29 October 1919 and adopted six International Labour Conventions which addressed various international labour issues such as hours of work, unemployment, maternity protection and the minimum wage. The ILO has created a total of 189 conventions; if the conventions are ratified by a sufficient number of governments, they come into force. A hundred and eighty five countries are currently members of the ILO. South Africa joined the ILO on 26 May 1994.<sup>161</sup>

South Africa has ratified 26 of the 189 conventions, of which 24 are currently in force. While there are numerous conventions that are applicable to domestic and farm workers, ILO Domestic Workers Convention No. 189 of 2011 and ILO Safety and Health in Agriculture Convention No. 184 of 2001 deserve special recognition, albeit that the former has not been ratified and there has been no implementation of the latter in South African national legislation and the former is not yet in force.

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<sup>159</sup> ILO Conventions are available at [www.ilo.org](http://www.ilo.org).

<sup>160</sup> ILO (note 157 above).

<sup>161</sup> ILO Constitution Article 3, available at [www.ilo.org/dyn/normex](http://www.ilo.org/dyn/normex), accessed on 09 September 2013.

### ***5.3.1.3 ILO Decent Work Agenda and Decent Work Country Programmes***

The ILO has adopted a Decent Work Agenda which provides support through integrated Decent Work Country Programmes (DWCPs). The DWCPs are the main vehicle for the delivery of ILO support to various countries.

On 29 September 2010, the former Minister of Labour, Mr Membathisi Mdladlana, signed the Memorandum of Understanding of the DWCP between the Government of the Republic of South Africa and the ILO. The South African DWCP was a culmination of a highly consultative process between the ILO and the Social Partners through the National Economic Development and Labour Council (NEDLAC), which occurred against the backdrop of a global financial and economic crisis that threatened the significant employment gains made in South Africa since 1994.<sup>162</sup> The DWCP targets certain areas which exhibit major decent work deficits. The constituents formulated these in line with the four strategic pillars of decent work. These are as follows:

- (i) In respect of strengthening fundamental principles and rights at work, the constituents prioritised the promotion of the ILO Standards and Values through the ratification of conventions; improved compliance with existing commitments; and the strengthening of enforcement mechanisms through improved labour inspection;<sup>163</sup>
- (ii) In order to ensure the attainment of decent work, the constituents' priorities included placing decent work at the centre of economic and social policies, whether monetary, fiscal, procurement, trade, industrial or employment policies in order to ensure job creation and the promotion of employment;<sup>164</sup>
- (iii) In respect of social protection and social security in South Africa, the constituents' priorities included support for social security and health reform, and strengthening occupational safety and health by improving workplace safety, reviewing legislation and regulations and improving the functioning of the compensation

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<sup>162</sup> ILO 'Republic of South Africa Decent Work Country Programme 2010 to 2014' available at [www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/genericdocument/wcms\\_145432.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---integration/documents/genericdocument/wcms_145432.pdf), accessed on 16 March 2013, 4.

<sup>163</sup> Ibid, 21, 23, 24.

<sup>164</sup> Ibid, 21, 23, 24.

fund. In addition, the constituents prioritised the strengthening of union and employer organisations' response to HIV/AIDS at the workplace;<sup>165</sup> and

- (iv) The constituents also prioritised the strengthening of the institutional capacity of NEDLAC, Bargaining Councils and dispute resolution bodies, trade union and employer organisations and collective bargaining in order to promote social dialogue and tripartism. The priorities included the formalization of the informal economy by enforcing and promoting labour standards and tripartism.<sup>166</sup>

#### ***5.3.1.4 ILO Labour Inspection Convention No. 81 of 1947***

South Africa recently ratified the ILO Labour Inspection Convention No. 81 of 1947. The Convention offers much insight on the issue of inspection, which is a thorny problem in South Africa. It strives to provide greater protection to employees by ensuring the enforcement of the legal provisions relating to their conditions of work, such as "hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters".<sup>167</sup> Articles 9 and 10 of the Convention are of particular relevance to South Africa; the former requires that duly qualified technical experts and specialists assist with inspections, while the latter requires that there are sufficient numbers of labour inspectors to secure the discharge of the duties of the inspectorate.

Article 12 of the Convention empowers labour inspectors to enter freely and without prior notice at any hour of the day or night any premises which they have reasonable cause to believe are liable to inspection and to carry out any examination, test or enquiry which they may consider necessary in order to satisfy themselves that the legal provisions are being strictly observed. This could be beneficial in the context of domestic work; it will allow labour inspectors to enter domestic workers' places of work.

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<sup>165</sup> Ibid, 21, 23, 24.

<sup>166</sup> Ibid, 21, 23, 24.

<sup>167</sup> Article 3 of the ILO Labour Inspection Convention No. 81 of 1947.

The ratification of this Convention requires full compliance with every article and South Africa will have to amend the current provisions in respect of the labour inspectorate in the BCEA if they do not comply. This issue is addressed in chapter six.

### ***5.3.1.5 ILO Safety and Health in Agriculture Convention No. 184 of 2001***

The ILO Safety and Health in Agriculture Convention No. 184 of 2001 noted the principles embodied in numerous conventions, including the ILO Occupational Safety and Health Convention No. 155 of 1981. Its principles are as follows:

“Stressing the need for a coherent approach to agriculture and taking into consideration the wider framework of the principles embodied in other ILO instruments available to the sector, in particular the Freedom of Association and Protection of the Right to Organise Convention, 1948, the Right to Organise and Collective Bargaining Convention, 1949, the Minimum Age Convention, 1973, and the Worst Forms of Child Labour Convention, 1999”<sup>168</sup>

The Convention has not been ratified by South Africa. However, ILO Freedom of Association and Protection of the Right to Organise Convention No. 87 of 1948, ILO Right to Organise and Collective Bargaining Convention No. 98 of 1949, ILO Minimum Age Convention No. 138 of 1973, ILO Occupational Safety and Health Convention No. 155 of 1981 and ILO Worst Forms of Child Labour Convention No. 182 of 1999 have been ratified and various South African labour laws are based on these conventions.

ILO Convention No. 184 imposes various rights and duties on employers and employees in the agricultural sector which would be applicable to certain farm workers in South Africa. Article 8 provides, *inter alia*, that workers in agriculture have the right to be informed and consulted on safety and health matters, the right to participate in the application and review of safety and health measures and the right to select safety and health representatives and

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<sup>168</sup> Preamble of ILO Safety and Health in Agriculture Convention No. 184 of 2001.

representatives on safety and health committees. Moreover, workers have the right to remove themselves from danger when there is reasonable justification to believe that there is imminent and serious risk to their safety and health and inform their supervisor immediately.

Article 16 expressly limits the age for assignment to work in agriculture which by its nature or the circumstances in which it is carried out is likely to harm the safety and health of young persons to be no less than 18 years. This is an important provision which is justifiable as agriculture is dangerous work and young workers may not be skilled or educated enough to engage safely in such activities.

Gender equality is promoted in Article 18 of the Convention. It states that measures must be taken to ensure that the special needs of women workers are taken into account. This includes pregnancy, breastfeeding and reproductive health. This is consistent with ILO decent work aspirations, with gender equality as a crosscutting objective. It is submitted that this convention would be beneficial in the South African context and would address the limitations of the OHSA. A recommendation in respect of the ILO Safety and Health in Agriculture Convention No. 184 of 2001 is made in chapter seven.

#### ***5.3.1.6 ILO Domestic Workers Convention No. 189 of 2011***

The 16 June 2011 was a historic moment, where the ILC, meeting in Geneva for its 100th session, adopted the ILO Domestic Workers Convention No. 189 of 2011 concerning decent work for domestic workers. Many previous ILO measures had excluded domestic workers. The Convention contains 27 articles, which are mindful of the ILO's commitment to the promotion of decent work and recognize the significant contribution of domestic workers to the global economy. It also recognizes that while domestic workers constitute a significant proportion of the workforce, they remain marginalized in developing countries where there is a scarcity of jobs. The Convention further states that it is necessary to draw attention to the issue of domestic work as it 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 are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other human rights abuses.<sup>169</sup>

The definition of the term “domestic work” in the Convention is considered to be broad, but is nonetheless in line with the BCEA. It refers to work performed in or for a household or households, or work by any person engaged in domestic work within an employment relationship. A person who performs domestic work occasionally or sporadically and not as an occupation is not a domestic worker.

Article 3 is of great significance as it provides that each member state shall adopt measures to ensure the effective promotion and protection of the human rights of all domestic workers, as set out in the Convention. Moreover, each member shall adopt the measures set out in the convention to respect, promote and realize domestic workers’ fundamental rights at work, namely: (i) freedom of association and the effective recognition of the right to collective bargaining; (ii) the elimination of all forms of forced or compulsory labour; (iii) the effective abolition of child labour; and (iv) the elimination of discrimination in respect of employment and occupation. Finally, measures should be adopted to ensure that domestic workers and their employers enjoy freedom of association and the effective recognition of the right to collective bargaining. Members shall protect the right of domestic workers and their employers to establish and, subject to the rules of the organization concerned, to join organizations, federations and confederations of their own choice.

Other Articles include:

- (i) A minimum age for domestic work (Article 4);
- (ii) Protection against abuse, harassment and violence (Article 5);
- (iii) Fair terms of employment, including decent working conditions and living conditions, if applicable (Article 6);

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<sup>169</sup> Preamble of ILO Domestic Workers Convention No. 189 of 2011.



- (iv) Informing domestic workers of their terms and conditions of employment in an appropriate, verifiable and easily understandable manner through contracts in line with national laws, regulations or collective agreements, and providing the employer's particulars (Article 7);
- (v) Protection of migrant workers (Article 8);
- (vi) Freedom of domestic workers in respect of reaching agreement with employers, passport possession and movement to and from the household (Article 9);
- (vii) Promotion of equality in the workplace which is consistent with other workers (Article 10);
- (viii) Provision for minimum wage coverage (Article 11);
- (ix) Remuneration in cash at regular intervals at least once a month (Article 12);
- (x) Promotion of the right to a safe and healthy working environment (Article 13);
- (xi) Consideration of the characteristics and nature of domestic work which will not result in prejudicial treatment of domestic workers (Article 14);
- (xii) Protection against employment agencies (Article 15);
- (xiii) Provision for access to adjudication mechanisms for domestic workers (Article 16);
- (xiv) Provision for effective and accessible complaint mechanisms (Article 17);
- (xv) Application of the Convention through laws and regulations (Article 18); and
- (xvi) Non-effect of other ILO Conventions that have more favourable provisions that are applicable to domestic workers (Article 19).

The next step is to encourage ILO member states to ratify the convention as it is only binding on members that have registered their ratification with the ILO Director-General.<sup>170</sup> Thereafter, appropriate national legislation needs to be adopted.

South Africa ratified the ILO Domestic Workers Convention on 20 June 2013. Implementation is expected to be facilitated by the fact that the BCEA and Sectoral Determination 7 of 2012 regulate most of the basic rights laid down in the convention.<sup>171</sup>

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<sup>170</sup> Ibid, Article 21.

<sup>171</sup> D du Toit 'Domestic Workers' Convention: A breakthrough in human rights' (June 2011) 15 *Law Democracy & Dev.* 6.

However, there are other issues that South Africa needs to address in order to comply with Articles 16, 17 and 18 of the convention.

The adjudication mechanisms are discussed in chapter six, where the national mechanisms are analysed and critiqued. Chapter seven examines whether or not this convention offers additional benefits that are not provided for in current labour legislation.

#### ***5.4 Conclusion***

In conclusion, it is submitted that South Africa's Constitution and labour legislation such as the LRA, BCEA, EEA, UIA and OHSA are a progressive means to ensure equal, fair and dignified treatment of employees. It was noted that the ILO determines international labour standards that member countries worldwide are required to comply with. As an ILO Member it is therefore prudent for South Africa to ensure compliance with the conventions, particularly the ILO Labour Inspection Convention No. 81 of 1947 and the ILO Domestic Workers Convention No. 189 of 2011 concerning decent work for domestic workers. Some ILO decent work objectives are not adequately recognized in South African law and government initiatives, including job creation, the adequate provision of fundamental decent work rights and the accessibility of dispute resolution mechanisms. Until such time as these issues are addressed, decent work objectives are likely to remain aspirations.<sup>172</sup>

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<sup>172</sup> Cohen (note 16 above) 327.

## **CHAPTER 6: ACCESSIBILITY AND AVAILABILITY OF THE ADJUDICATION SYSTEM AND MECHANISMS OFFERED TO EMPLOYEES IN SOUTH AFRICA**

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#### ***6.1 Introduction***

The South African adjudication system caters for all persons, particularly disgruntled, vulnerable employees seeking compliance with legal rights and remedial action. The question is whether or not such rights guarantee access to justice and whether the application and effectiveness of the available legal avenues need to be improved. This chapter explores the mechanisms provided for in the two key pieces of labour legislation, namely the Labour Relations Act, 1995 and the Basic Conditions of Employment Act, 1997, in order to ascertain whether they present obstacles to the protection of domestic and farm workers in South Africa.

#### ***6.2 Labour Relations Act 66 of 1995 mechanisms***

The Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Courts seek to address failure on the part of employers to observe and ensure compliance with employees' rights. As stated in section 1(d)(iv) of the LRA, one of its primary objects is the "effective resolution of labour disputes".<sup>173</sup>

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<sup>173</sup> Grogan (note 33 above) 425.

### ***6.2.1 Commission for Conciliation, Mediation and Arbitration***

The CCMA is viewed as replacing the former Industrial Court.<sup>174</sup> It is a state-funded body but functions independently. Section 112 of the LRA established the CCMA on 1 January 1996. It provides that “the Commission for Conciliation, Mediation and Arbitration is hereby established as a juristic person.”

The CCMA plays a central role in the statutory dispute resolution process; most disputes not handled by private procedures or accredited bargaining councils are dealt with by the CCMA.<sup>175</sup> It is required to resolve, through conciliation, any dispute referred to it in terms of the LRA; if the dispute remains unresolved, arbitration follows if it is required by the LRA or the parties to the dispute consent to it. The CCMA has different forums to handle diverse workplace disputes, namely: (i) Conciliation; (ii) Mediation; (iii) Arbitration; and (iv) Con-Arb. In conciliation, a commissioner (or a panellist, in the case of a bargaining council or agency) meets with the parties in dispute and explores various options in order to settle the dispute by agreement. This provides for the quick and fair resolution of disputes, which is uncomplicated and inexpensive. There is no legal representation; the decision to settle is in the hands of the parties involved.<sup>176</sup> Mediation differs in the sense that a neutral third party is included in the “negotiation” process and is able to guide the proceedings in order to reach a mutually acceptable agreement. Arbitration is a more formal process than conciliation, in that it does not promote the continuation of collective bargaining and negotiations. A commissioner will listen to and investigate the demands of the parties and decide on a final settlement in the form an arbitration award. This award is imposed on the parties after hearing the evidence and is legally binding on them. Con-Arb is a speedier, one-stop process of conciliation and arbitration for individual unfair labour practices and unfair dismissals, which allows for conciliation and arbitration to take place continuously within the same day. It is compulsory in matters relating to dismissals for any reason relating to probation and any unfair labour practice relating to probation. If no objection is received, this process may be used for any other dispute within the workplace.

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<sup>174</sup> CCMA (2010), available at [www.ccma.org.za](http://www.ccma.org.za), accessed on 16 September 2013.

<sup>175</sup> Grogan (note 33 above) 426, 427.

<sup>176</sup> CCMA Conciliation Information Sheet, available at [www.ccma.org.za/UploadedMedia/InfoSheets\\_Conciliation\\_1\\_.pdf](http://www.ccma.org.za/UploadedMedia/InfoSheets_Conciliation_1_.pdf), accessed on 16 September 2013.

Section 138 of the LRA provides that a commissioner may conduct the arbitration in a manner that he or she considers appropriate in order to determine the dispute fairly and quickly. However the commissioner must deal with the substantial merits of the dispute with the minimum of legal formalities, thus providing discretion to arbitrators.<sup>177</sup> A party to the dispute may also give evidence, call witnesses, question any other party's witness and address concluding arguments to the commissioner.

The CCMA offers accessible and cheap resolution for employees and helps to address the shortcomings of adjudication such as the expense of the proceedings, court fees, prolonged litigation and the complexity of such. Given the nature of domestic and farm work, the CCMA is most applicable as these workers' lack of education or experience in the legal realm will not prejudice them in CCMA proceedings. Domestic and farm workers have used the CCMA effectively to resolve unfair labour practices, unfair dismissals or a collective bargaining issue. The table below shows that farm and domestic workers are among the seven categories of employees that use the CCMA the most:

**Table 6.2.1**

<b>REFERRALS BY WORKPLACE SECTOR: JULY 2012 (seven Highest referrals)</b>	
<b>Workplace Sector</b>	<b>Number of Referrals</b>
Retail	14%
Safety/Security (private)	11%
Domestic	8%
Business/Professional services	18%
Building/Construction	8%
Food/Beverage (manufacture & processing)	4%
Agriculture	4%

Source: Commission for Conciliation, Mediation and Arbitration (CCMA), available at [www.ccma.org.za](http://www.ccma.org.za), accessed on 01 August 2013.

<sup>177</sup> Section 138 of the Labour Relations Act, 1995.

While the CCMA is an effective tool in offering much-needed dispute-resolution services, other factors have a negative effect on domestic and farm workers. The context of domestic and farm work suggests that numerous vulnerable employees are hidden in their workplaces with no way of accessing employment justice. Their circumstances hinder access to remedial action. Firstly, domestic and farm workers work in close proximity to their employers. Secondly, given the fact that the majority of domestic and farm workers reside within the employer's premises, challenging the employer would not only affect their employment prospects, but would have a "domino ripple effect" on other facets of their livelihood. While the CCMA is renowned for its settlement agreement rate, (the reported settlement average for July 2012 was 74.6%),<sup>178</sup> the unequal power relationship between domestic and farm employees and their employers means that they are likely to enter into an agreement simply to protect their job security. The real nature of the problem is therefore not addressed.

### ***6.2.2 Labour Courts***

Established in 1995, the Labour Courts have the same status as a High Court. The Labour Court adjudicates matters relating to labour disputes. Appeals are made to the Labour Appeal Court.<sup>179</sup> While the Labour Court has exclusive jurisdiction over all matters related to the LRA, such matters must be first be referred to the CCMA for Conciliation.<sup>180</sup>

The Labour Appeal Court is available to disputants who are dissatisfied with the decision of the Labour Court; it is the final court of appeal in respect of matters that are the exclusive jurisdiction of the Labour Court and has the same status as the Supreme Court of Appeal.<sup>181</sup> Both the Labour Court and Labour Appeal Court are available to domestic and farm workers if the courts have jurisdiction over the matter at hand.

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<sup>178</sup> For the specific provincial settlement rates for July 2012, visit [www.ccma.org.za](http://www.ccma.org.za).

<sup>179</sup> See section 151 and section 157(2) of the Labour Relations Act, 1995.

<sup>180</sup> Grogan (note 33 above) 433.

<sup>181</sup> This is stated in section 167(3) of the Labour Relations Act, 1995.

Costs may be incurred by the parties to a dispute and the Labour Court has discretion in respect of such.<sup>182</sup> This is to the disadvantage of employees who are unable to afford such costs or the risk of costs. However, in terms of section 158 of the LRA, the Labour Court has the power to make an arbitration award or any settlement agreement an order of the Labour Court. It is submitted that this provision allows low-income employees to finalise their dispute and obtain the sanction of the Labour Court.

### ***6.3 Basic Conditions of Employment Act 75 of 1997 mechanisms***

Chapter 10 of the BCEA sets out mechanisms to monitor enforcement and legal proceedings. The most important are those relating to labour inspectorates and the exclusive jurisdiction given to the Labour Court in legal proceedings.

#### ***6.3.1 Labour Inspectors***

The Department of Labour is responsible for promoting good labour practices through various measures. Its Inspection and Enforcement Services provide advice and information and ensure compliance with South African labour laws through labour inspectors.<sup>183</sup> Labour inspectors play a significant role in the resolution of disputes.<sup>184</sup> Section 64 of the BCEA provides that:

“A labour inspector may promote, monitor and enforce the compliance with an employment law by-

- (a) Advising employees and employers of their rights and obligations in terms of an employment law;
- (b) Conducting inspections in terms of this Chapter;
- (c) Investigating complaints made to a labour inspector;

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<sup>182</sup> However, section 162 of the Labour Relations Act, 1995 states that “(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.” Thus, a Labour Court judge is required to follow the rules of legality and fairness in the determination of costs.

<sup>183</sup> Department: Labour, Republic of South Africa ‘Enforcement Manual for Labour Inspectors’, available at [www.labour.gov.za/DOL/downloads/documents/useful-documents/occupational-health-and-safety/enforcementmanual.pdf](http://www.labour.gov.za/DOL/downloads/documents/useful-documents/occupational-health-and-safety/enforcementmanual.pdf), accessed on 06 September 2013.

<sup>184</sup> Grogan (note 33 above) 439.

- (d) Endeavouring to secure compliance with an employment law by securing undertakings or issuing compliance orders; and
- (e) Performing any other prescribed function.”

However, labour inspectors are confronted by a number of challenges in fulfilling their duties. Firstly, there are insufficient personnel. The Department of Labour (2010) stated that:

“The Labour Department is well aware of the anomalies but cites a shortage of personnel as their major challenge. In the Western Cape province, the department has short of 90 inspectors, too few to monitor even one sector, let alone all the province’s workplaces.”<sup>185</sup>

In the year ending 31 March 2013, there were 1 251 labour inspectors.<sup>186</sup> Taking into account the number of domestic and farm workers, this suggests that many are not protected by labour inspectors. The other severe challenge facing inspectors is gaining permission from an owner or occupier to enter a domestic worker’s workplace. An inspector may not enter a domestic employer’s residence without consent; however, a court order may be issued. Such an order eliminates the element of surprise as the employer is forewarned of an inspection.<sup>187</sup>

The compliance orders issued by labour inspectors pose another challenge. The penalty imposed on employers who are non-compliant with BCEA provisions is a fine in accordance with Schedule Two of the Act. The maximum permissible fine in respect of matters not involving underpayment is R500, depending on the employer’s circumstances. In matters involving underpayment, the penalty depends on whether the employer has previously failed to comply with the same provision, and ranges from 25% to 200% of the amount due, including interest owing on the amount at the date of the order. Thus, it is submitted that, although there is a penalty for non-compliance with the BCEA not involving underpayment of employees, it does not represent a significant deterrent. However, the latest amendment to

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<sup>185</sup> Pandit (note 89 above) 11; (Makanya, Department of Labour , 2010).

<sup>186</sup> Department: Labour, Republic of South Africa ‘Department of Labour Annual Report 2011/2012’, available at [www.labour.gov.za/DOL/documents/annual-reports/annual-reports](http://www.labour.gov.za/DOL/documents/annual-reports/annual-reports), accessed on 18 March 2013.

<sup>187</sup> Pandit (note 89 above) 14.



Schedule 2 in the Basic Conditions of Employment Amendment Bill, 2012, which will increase the maximum fine to R1 500, may act as a greater deterrent for employers of farm and domestic workers.

Several articles in the ILO Labour Inspection Convention address the above realities. It is therefore hoped that these issues will be addressed in the near future in keeping with South Africa's ratification of the convention on 20 June 2013.

### ***6.3.2 Powers of the Labour Court***

Section 77 of the BCEA provides the Labour Court with exclusive jurisdiction in respect of all matters concerning the BCEA.<sup>188</sup> There have been various cases in which employees have sought recourse via section 77 of the BCEA. These include *Makume v Hakinen Transport CC*, *Moyi v Inkhunzi Contractors (Pty) Ltd*, *Shashape v Tswaing Local Municipality*<sup>189</sup> and *Ephraim v Bull Brand Foods (Pty) Ltd*.<sup>190</sup>

While it is important to differentiate between disputes relating to the provisions of an employee's contract of employment and disputes relating to the provisions of the BCEA, this is difficult due to section 4 of the BCEA.<sup>191</sup>

One of the positive provisions is contained in section 76 of the Act, which places the onus on the employer to: (i) prove that a record maintained by or for that employer is valid and accurate; or

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<sup>188</sup> Section 77 of the Basic Conditions of Employment Act, 1997 states: "(1) Subject to the Constitution and the jurisdiction of the Labour Appeal Court, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters in terms of this Act, except in respect of an offence specified in sections 43, 44, 46, 48, 90 and 92." It is submitted that this contradicts the objectives of the excepted provisions. Chapter 6, which focuses on the prohibition of the employment of children and forced labour, is a vital component of the BCEA that should be able to be raised not only in terms of the criminal justice system but also for civil relief in the Labour Court, as proposed in the BCEAB, 2012.

<sup>189</sup> (2011) 32 ILJ 928 (LC).

<sup>190</sup> (2010) 31 ILJ 951 (LC).

<sup>191</sup> Section 4 of the Basic Conditions of Employment Act, 1997 provides for the inclusion of a basic condition of employment in contracts of employment, which is only limited if: "(a) any other law provides a term that is more favourable to the employee; (b) the basic condition of employment has been replaced, varied, or excluded in accordance with the provisions of this Act; or (c) a term of the contract of employment is more favourable to the employee than the basic condition of employment".

(ii) who has failed to keep any record required by this Act that is relevant to those proceedings, to prove compliance with any provision of this Act.”

#### ***6.4 Case law regarding accessibility of adjudication in respect of decent work***

It should be noted that few cases have been reported that deal with the provisions of the BCEA.<sup>192</sup> Thus, in establishing whether or not basic conditions of employment are complied with in the domestic and agricultural sector, the onus is mainly on labour inspectors.

In respect of case law that specifically deals with the challenges faced by domestic and farm workers, although the CCMA is a useful tribunal in enforcing employee rights, the appeal or review process does not necessarily succeed in its objective of providing further justice to employees or employers. This is evident in case law, which reveals that the Labour Courts and Labour Appeal Court are hardly ever faced with disputes in which a domestic or farm worker serve as a party.<sup>193</sup>

#### ***6.5 Conclusion***

While progressive labour legislation is in place in South Africa, the policing and enforcement of the provisions of the law remains a challenge. This is particularly true in respect of domestic and farm work, in that, although dispute-resolution services are available to employees, the most effective being the CCMA, the shortage of labour inspectors and the complex circumstances of these workers are issues that government needs to address in order to ensure the fulfilment of the commitment South Africa has made to the ILO objectives of decent work.

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<sup>192</sup> Godfrey (note 136 above) 2418.

<sup>193</sup> South African Labour Court and Labour Appeal judgments may be accessed on [www.justice.gov.za/labourcourt/judgments.html](http://www.justice.gov.za/labourcourt/judgments.html).

## **CHAPTER 7: COMMENTARY AND CONCLUDING REMARKS IN RESPECT OF DOMESTIC AND FARM WORK IN SOUTH AFRICA**

### **CONTENTS:**

#### *7.1 Introduction*

#### *7.2 Legislative measures*

#### *7.3 International standards*

#### *7.4 Conclusion*

#### *7.1 Introduction*

The extension of the protection provided in the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997, the Employment Equity Act 55 of 1998, the Unemployment Insurance Act 63 of 2001 and the Occupational Health and Safety Act 85 of 1993 to domestic and farm workers is to be applauded and illustrates South Africa's commitment to transformation. However, limitations and obstacles still prevent the majority of workers from attaining decent work. This chapter focuses on these obstacles in order to provide recommendations in respect of domestic and farm workers.

#### *7.2 Legislative measures*

The Labour Relations Act, 1995 encourages collective bargaining and the settling of disputes and provides mechanisms such as the CCMA and the Labour Court to facilitate this process. However, as noted in Chapter 6, these mechanisms are challenged by various factors, such as the settlement agreement rate at the CCMA, and the costs and the formality of legal proceedings, which are prejudicial to an indigent, uneducated employee. This limits access to "justice" in the employment context and perpetuates inequality in the workplace. The LRA does not provide for simpler, less confrontational methods of resolving disputes that would be particularly relevant to domestic and farm workers. It is submitted that the LRA should introduce a forum similar to the CCMA that specifically provides informal services for workers within the vulnerable sectors. It is not realistic to expect a domestic or farm worker to secure legal representation and appear before a judge at the Labour Court; their employers have a significant advantage in all respects.

The Labour Relations Amendment Bill, 2012, offers some relief on the issue of labour broking (temporary employment services); however, it does not offer solutions to the difficulties domestic and farm workers currently face in terms of collective bargaining or dispute resolution systems, which the LRA purports to address.

The Basic Conditions of Employment Act, 1997 provides for adequate conditions of employment; however, there is no viable system to ensure compliance. The greatest shortcoming of the BCEA system is the scarcity of labour inspectors and the Department of Labour's inadequate performance. It is submitted that, because there is little or no monitoring of compliance with the BCEA, domestic and farm employers have leverage over their employees. This is indirectly responsible for domestic and farm workers' disinterest in using adjudication systems. The ultimate result is that indecent work within the informal sectors is perpetuated. There is an urgent need to find a long-term solution to this problem. An efficient compliance mechanism that does not rely solely on labour inspectors is called for.

The Basic Conditions of Employment Amendment Bill, 2012, which proposes various beneficial amendments and substitutions, would facilitate the greater protection of domestic and farm workers in South Africa. As noted in chapter six, the amendment of Schedule 2 of the BCEA would ensure greater punishment for non-compliance with the BCEA not involving underpayment. The proposed amendment to section 93 is ground-breaking, as, if the Bill is passed, it will provide for increased criminal sanctions for employers convicted of employing underage children or demanding or imposing forced labour. This is particularly relevant in the farm and domestic sectors. Although this may serve to as a deterrent to some employers, this provision will only be effective if there is adequate monitoring. Finally, the proposed amendment to section 77 of the BCEA will extend jurisdiction to the Labour Court in respect of offences that fall within sections 33A, 43, 44, 46, 48, 90 and 92, where it will have exclusive jurisdiction to grant civil relief arising from a breach.

It is clear that the Employment Equity Act, 1998 is a revolutionary piece of legislation that seeks to heal the past wounds of discrimination and inequality in the workplace. It provides

employees with various rights and promotes affirmative action in order to uplift the designated groups of black people, women and people with disabilities. It is submitted that the EEA is the perfect solution to the race and gender inequalities commonly found in the domestic and farm work sectors. However, the EEA is rarely utilised by domestic and farm workers in discrimination disputes as many are either unaware of the discrimination taking place or have difficulty challenging it in the Labour Courts.

The Unemployment Insurance Act, 2001, offers some protection to employees who lose their jobs. The ILO decent work objectives require that there be adequate social protection; the question remains as to whether or not the UIF is sufficient in doing so. The UIA, 2001 benefit should be slightly increased as one-sixth of an unemployed person's salary will not ensure the development and achievement of decent work in South Africa.

Furthermore, as noted in chapter five, only 61.5% of agricultural employees and 23.8% of domestic employees have access to the UIF benefit. Considering their vulnerability and inadequacy of the protection offered to these workers, these statistics are cause for concern. It is recommended that the government regulate and maintain compliance with the UIA and UICA; one of the obstacles to this recommendation is the problems with the labour inspection system.

The core issue relating to the Occupational Health and Safety Act, 1993 is the shortage of labour inspectors. This is linked to the above recommendations relating to the BCEA; there is an urgent need for a mechanism that will promote the BCEA and the OHSA and protect workers from non-compliance. Furthermore, the extension of the OHSA to domestic workers could enable the realization of the ILO's decent work objectives. As noted above, the realities of the South African context might render such a recommendation unattainable.

### ***7.3 International standards***

The ILO Labour Inspection Convention No.81 of 1947, which was recently ratified by South Africa, will facilitate the development of the BCEA's labour inspection system in South Africa. The onus now rests on the legislature and the executive to ensure compliance with this convention.

The ILO Safety and Health in Agriculture Convention No. 184 of 2001 is commended for its innovative approach to occupational safety in the agricultural sector. There are multiple benefits to ratifying this Convention, including the health and safety protection offered to all workers and gender equality in the workplace. The express statement of a minimum age for agricultural workers would prevent young people from being exposed to dangerous work on South Africa's farms. The Convention's measures relating to gender equality, including pregnancy, breastfeeding and reproductive health promote the fulfilment of the ILO decent work aspirations and section 9 of the South African Constitution.

The main concern relating to this convention is whether or not it would fit within South Africa's legislative framework. At present, the OHS Act is applicable to agricultural workers; however, implementation and monitoring compliance are challenges. Thus, prior to ratifying this convention (even if it were on South Africa's agenda in respect of decent work), preliminary inquiries would need to be conducted to determine any impediments. These include the capacity of labour inspectorates and South Africa's labour complaints mechanisms.

Various provisions of the ILO Domestic Workers Convention No. 189 of 2011 concerning decent work for domestic workers are not addressed in South African labour legislation. Firstly, the issue of maternity leave must be dealt with; domestic workers must be properly protected against employers who refuse to grant paid or unpaid maternity leave. Secondly, the grave problem of the right to overtime pay and the monitoring thereof is also not specifically dealt with. Again, both these issues relate to labour inspection. In order to align

South Africa's labour law with this convention, the government will need to ensure that effective labour inspectorates are in place.

#### ***7.4 Conclusion***

Although the rights entrenched in South Africa's Constitution only require the state to take reasonable steps to progressively realise various economic rights, namely the right to education, to housing and to health care, food, water and social security,<sup>194</sup> it is also necessary to ensure that each person's labour rights are realised. There is an inevitable link between essential human rights and the right to fair labour practices. The latter would enable the attainment of the ILO's decent work objectives and ensure that employees are able to develop every aspect of their lives.

The second chapter elaborated on the concept of "decent work", based on the ILO's decent work objectives and the four pillars. It was noted that domestic and farm workers are two of the most vulnerable categories of employees in South Africa; this renders the concept of decent work a very important one in these sectors. Chapter three outlined the history of South African labour legislation. It was noted that the Masters and Servants Act, 1841, Industrial Disputes Prevention Act 20 of 1909, Industrial Conciliation Act 11 of 1924 and the Native Labour (Settlement of Disputes) Act, 1953 did not extend protection to black employees.

Chapter four examined current South African legislation that applies to domestic and farm workers. Various provisions in the Constitution, LRA, BCEA, EEA, UIA, OHS Act and SDLA were discussed. The international standards set by the ILO were analysed, giving due consideration to three conventions, namely the ILO Labour Inspection Convention No. 81 of 1947, ILO Safety and Health in Agriculture Convention No. 184 of 2001 and the ILO Domestic Workers Convention No. 189 of 2011. Chapter five provided a detailed examination of domestic and farm work. It was established that there is a lack of tripartism in both sectors and that, although the sectoral determinations advance the rights of domestic and farm workers, there are limitations to such.

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<sup>194</sup> Woolman (note 103 above).

Chapter six elaborated on the LRA and BCEA's enforcement mechanisms. Finally, the current chapter addressed the shortcomings of the current legislative and protective measures in domestic and farm work and provided recommendations to serve as guidelines for South African labour law. It is prudent that South Africa consider the further steps that need be taken in order to ensure the fulfilment of the ILO's objectives, the South African Decent Work Country Programme and the latest ILO Domestic Workers Convention No. 189 of 2011, which has been ratified by South Africa. The true measure of ratification and compliance will be the enforcement of the new provisions and legislation consistent with such.

Standing et al (1996) note that: "in principle, labour security is greater the more the regulating legislation is comprehensive in its coverage"<sup>195</sup> Thus, as du Toit (2010) observes, it is a truism that effective regulation of different socio-economic activities is dependent on compliance by participants and enforcement by the state; the greater the protection and monitoring in the domestic and farm work sector, the greater will be the compliance by employers.<sup>196</sup>

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<sup>195</sup> Standing (note 53 above) 134.

<sup>196</sup> du Toit (note 73 above) 223, 224.



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