

**THE LEGAL POSITION OF DOMESTIC WORKERS
IN SOUTH AFRICA**

by

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(i)

FOREWORD

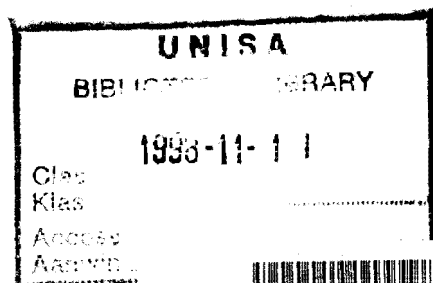
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SUMMARY

Until recently, the legal position of domestic workers in South Africa could be described as a relic of the nineteenth century, when the contract of employment and the common law defined the employer-employee relationship.

The legal rules which regulate the relationship between the domestic worker and her employer are examined. International labour standards and the legal position of domestic workers in other countries are considered. Cognisance is taken of the social phenomenon which finds domestic workers at the convergence of three lines along which inequality is generated, namely gender, race and class. Furthermore, the unique economic forces at play in this sector are examined.

The law will be stretched to its limits when attempting to resolve what is, essentially, a socio-economic problem. However, the working lives of a million people are at stake. The legislature has a constitutional, political and moral responsibility to attend to reform in this sector as a matter of urgency.

(iii)

Key terms

Domestic workers; social and historical factors; Economics of domestic service; International labour standards; Comparative perspective; Master and Servant laws; Contract of Employment; Legal position; Reform

CHAPTER 1

THE NATURE OF THE PROBLEM AND METHODOLOGY

Historians and sociologists generally define a domestic worker as 'one who occupies himself exclusively with the personal needs of an employer and of his family in such a way that this occupation establishes a relationship of personal dependence on the employer'.¹ Historically, the ranks of domestic workers were made up of valets, footmen, coachmen, butlers, grooms (men), 'maids-of-all-work', chambermaids, cooks, kitchen maids and nursery maids (women).² When the Basic Conditions of Employment Act³ became applicable to the domestic service sector on 1 January 1994, it defined a domestic worker as an employee charged wholly or mainly with the performance of domestic work on dwelling premises. Gardeners, chauffeurs and persons caring for children, the aged, the sick and the frail are specifically included under this definition. Farmworkers, however, are specifically excluded.⁴

Literature has shown that it is difficult to provide a satisfactory definition for a domestic worker.⁵ For purposes of this dissertation a domestic worker may be

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McBride TM The Domestic Revolution: The Modernization of Household Service in England and France, 1820-1920 (London 1976) 11.

2

Ibid 12. The definitions of a domestic worker, found in the writings of McBride, Hansen, Cock, Romero and others, are generally informed by the Western concept of a domestic worker. Legislation in African countries, such as Uganda and Tanzania, often reveals a wider definition according to which persons employed in hotels or lodging houses as cooks, barmen, valets or watchmen, will also be regarded as domestic workers. See 5.2.1 infra for a brief discussion of the definitions of domestic workers found in foreign legislation.

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3 of 1983 as amended by the Basic Conditions of Employment Act 137 of 1993.

4

Act 3 of 1983 s 1.

5

See, in general, Hansen KT Distant Companions: Servants and Employers in Zambia, 1900-1985 (London 1989) 6-15; Romero M Maid in the USA (New York London 1992) 11-16.

described as an employee who wholly or mainly performs waged⁶ domestic labour in the house of the employer. The vast majority of domestic workers in South Africa are female. For the sake of uniformity, therefore, the female personal pronouns 'she' and 'her' will be used throughout.

Until recently, the legal position of domestic workers in South Africa could be described as a relic of the nineteenth century, when the contract of employment and the common law defined the employer-employee relationship.⁷ The advent of industrialisation saw the employment relationship develop from one of status⁸ to one of contract.⁹ The contract of employment, however, has not proved to be an effective instrument for the fair regulation of the employment relationship.¹⁰ It rests on a false premise which holds the employer and employee to be equal parties to the contract as well as equal participants in the employment relationship.¹¹ In

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For an introduction to the debate regarding waged and unwaged domestic labour, see eg Williams CC Examining the Nature of Domestic Labor (Aldershot 1988); Oakley A Subject Women (Oxford 1981); James S Sex, Race & Class (Bristol 1975).

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See, in general, Selznick P Law, Society and Industrial Justice (New Brunswick 1980) 131-137.

8

Status may be seen as '... the sum total of the powers and disabilities which society confers or imposes on individuals irrespective of their own volition': Hepple BA and O'Higgins P Employment Law (London 1981) 56. See also Kahn-Freund O 'A Note on Status and Contract in British Labour Law' (1967) 30 The Modern Law Review 635. For Blackstone's classification of the master-servant relation as one of the most important relations of private life, see Selznick Law, Society and Industrial Justice 123. See also 6.2.1 *infra*.

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See, in general, Hepple and O'Higgins Employment Law 55-58.

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Haysom N and Thompson C 'Labouring under the Law: South Africa's Farmworkers' (1986) 7 ILJ 218 at 221-223 describe the common law contract of employment as having freed the employer of any legal binding concern for his employee. Kahn-Freund describes it as a 'figment of the legal mind' concealing a relation which in its inception is an act of submission, and in its operation is a condition of subordination: Davies PL and Freedland M Kahn-Freund's Labour and the Law (London 1983) 18.

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See Davies and Freedland Kahn-Freund's Labour and the Law 35.

reality, the unequal distribution of power between employer and employee is so great that the employer is normally in a position to unilaterally dictate the terms of the contract, whilst the employee is free only to accept or reject the contract.¹²

The new law of employment was selective in its incorporation of the old status-based master and servant model. Characteristics beneficial to the employer, such as his authority over his employee, were retained. Unfortunately, characteristics beneficial to the employee disappeared. The employment relationship was made impersonal. The employer was relieved of his care-taking function and the relationship became terminable at will.¹³ As discontent with the contract of employment grew, statutory protection, and later collective bargaining, were introduced to infuse the employment relationship with some degree of equality.¹⁴

Domestic workers have, however, traditionally been excluded from the protection of labour legislation.¹⁵ Furthermore, collective bargaining has, for various reasons,¹⁶ not been feasible in the domestic service sector. As a result, domestic workers remained entirely at the mercy of the contract of employment and the inadequate provisions of the common law (as was the case in the nineteenth century). The urgent need for legislative reform in the domestic service sector was

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See Kahn-Freund 'A Note on Status and Contract in British Labour Law' (1967) 30 The Modern Law Review 635 at 638. Such an employment contract may be regarded as a 'prerogative contract': Selznick Law, Society and Industrial Justice 135.

13

Ibid 136.

14

See Davies and Freedland Kahn-Freund's Labour and the Law 37-51.

15

At present, domestic workers are excluded from the provisions of the Labour Relations Act 28 of 1956, the Wage Act 5 of 1956, the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

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See 9.3 infra for a discussion of the absence of collective bargaining in the domestic service sector.

apparent. Yet, despite their large numbers,¹⁷ domestic workers themselves did not appear to have sufficient bargaining power to press for reform.

Fortunately, calls for reform came from church organisations,¹⁸ women's organisations¹⁹ and, eventually, trade unions.²⁰ These combined efforts appear to have persuaded the government to investigate the conditions of employment in the domestic service sector. Extensive proposals for legislative reform were made by the National Manpower Commission. The extension of the Basic Conditions of Employment Act to the domestic service sector marked the first move towards incorporating these recommendations into legislation.²¹ Whether and when the other recommendations will be accepted and incorporated into legislation, remains to be seen.

The purpose of this dissertation is to examine the law that regulates (or fails to regulate) the employment relationship between a domestic worker and her employer. Yet, legislative reform alone will not bring about a sudden or drastic improvement in the overall welfare of domestic workers. Law is an important instrument in the distribution of social power between employer and employee. However, law remains secondary to the forces of supply and demand, as well as

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According to the 1991 census, domestic workers number approximately 936 579. Central Statistical Service Population Census 1991 Summarised Results After Adjustment for Undercount Sch 10 (Pretoria 1991).

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See eg Budlender D A Fair Deal for Domestic Workers compiled for the Justice and Peace Committee of St Patrick's Catholic Church (Mowbray 1991).

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See eg the memorandum on domestic workers sent to the NMC by the Women's Legal Status Committee as early as 1982.

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See eg SADWU's Living Wage pamphlet.

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A summary of the NMC recommendations is contained in Gaz 13511 of 13 September 1991.

to the spontaneous creation of employee power to balance the power of the employer. Kahn-Freund points out that the social welfare of employees depends on the productivity of labour, the forces of the labour market and the degree of effective organisation of employees.²² This bodes ill for the domestic worker. First, domestic workers do not produce saleable commodities and therefore exchange value is not produced. Domestic service is thus deemed unproductive and, by implication, valueless.²³ Secondly, the economic recession has led to an increase in the unemployment level. The surplus of unskilled labour which is available has resulted in a buyer's market, making it difficult for the domestic worker to find employment at a wage commensurate with services rendered.²⁴ In the final instance, the conditions for effective association and organisation of domestic workers are often lacking. Domestic workers are a socially isolated and fragmented workforce. This, naturally, impedes unionisation.²⁵

The legal position of domestic workers in South Africa and suggestions for the improvement of this position cannot be evaluated in a legal vacuum. Chapter two, therefore, sets out to examine domestic service in a social and historical perspective, thereby attempting to shed some light on the complex and unique nature of this sector.

Chapter three highlights the economic forces at play in the domestic service sector. The central theme of this discussion is that of the household as a production unit and the continuous conflict of interests between higher worker wages and the maximisation of household welfare.

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Davies and Freedland Kahn-Freund's Labour and the Law 12-13.

23

Meer F Black Woman Worker (Durban 1990) 44.

24

Delpont E Domestic Service in South Africa and Britain: A Study in Applied Comparative Law (unpublished LLM paper) (Pretoria 1990) 35.

25

See, in general, Davies and Freedland Kahn-Freund's Labour and the Law 20-23.

Chapter four examines Conventions and Recommendations of the International Labour Organisation which may be of importance to the domestic service sector.

Chapter five contains a comparative study of the legal position of domestic workers in countries such as Zimbabwe and Swaziland.

Chapter six briefly reviews the Master and Servant laws which were applicable to the domestic service sector.

Chapter seven examines the contract of employment as the legal basis for the employment relationship.

Chapter eight analyses the legal rules regulating the employment relationship between the domestic worker and the employer. In this regard, the common law, as well as any statutory modification thereof, will be considered.

Chapter nine highlights areas of concern and considers the possibility of further legislative reform.

In conclusion, chapter ten speculates whether the limitations of labour legislation will be revealed when it attempts to address what is, in essence, a socio-economic problem.

CHAPTER 2

DOMESTIC SERVICE AS A SOCIAL AND HISTORICAL PHENOMENON

2.1 INTRODUCTION

A brief discussion of domestic service as a social and historical phenomenon is essential since these factors which, strictly speaking, fall outside the scope of the law may often find direct expression in the legal system.¹ Furthermore, it is important to realise the limitations of the law in dealing with the social realities of the employer-employee relationship in the domestic service sector. As Kahn-Freund points out: 'Law is a secondary force in human affairs, and especially in labour relations.'²

The domestic service sector displays certain unique characteristics of which the law traditionally has taken cognisance.³ In this regard, the distinctive profile of the South African domestic worker deserves attention. A South African domestic worker is typically a Black woman of low socio-economic standing. She is usually involved in an employment relationship characterised by the paternalistic attitude of the employer. Finally, the domestic worker finds herself isolated in a working environment where the barriers ordinarily separating an employee's working, playing and sleeping life do not necessarily exist.

2.2 THE PROFILE OF A DOMESTIC WORKER

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'Conventional wisdom, in any society, usually lags behind the facts of the present situation, since it represents thinking peculiar to a past generation': Clarke DG Domestic Workers in Rhodesia: the Economics of Masters and Servants (Gwelo 1974) 7.

2

Davies PL and Freedland M Kahn-Freund's Labour and the Law (London 1983) 13.

3

So eg domestic workers appear to be an exception to the common-law rule that the employer is not obliged to pay sick pay to an employee for temporary illness unless the illness is due to the employer's fault. See chapter 8.3.3.3 infra.

2.2.1 Introduction

In general, the relationship between an employer and an isolated employee may be described as one between a power bearer and a non-power bearer. The inequality inherent in such a relationship is well documented.⁴ Domestic workers and their employers are no exception. They are unequal participants in the interaction which inevitably accompanies domestic service. Furthermore, their relationship is defined by the entrenched structures which control the distribution of power and resources in a specific society.⁵ Indeed, good household management is perceived to be dependent on the strictly upheld distinction between employer and domestic worker.⁶

There is, however, one characteristic of the domestic service sector which exacerbates the usual inequality of the employment relationship. Domestic workers find themselves at the convergence of three lines along which social inequality is generated, namely gender, race and class.⁷ So extreme is the inequality between domestic workers and their employers in most instances, that their relationship has been described as a microcosm of the exploitation and inequality on which the

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See, eg, Davies and Freedland Kahn-Freund's Labour and the Law 20-23; Selznick P Law, Society and Industrial Justice (New Brunswick 1980) 134-136.

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Cock J Maids and Madams: A Study in the Politics of Exploitation (Johannesburg 1980) 231.

6

Hansen KT Distant Companions: Servants and Employers in Zambia, 1900-1985 (London 1989) 3.

7

Cock Maids and Madams 5. This matter is also highlighted in the report of the Director General of the International Labour Organisation at the seventh African regional conference, where it is stated that '... black women workers in South Africa suffer from double oppression as they are discriminated against on basis of race as well as sex': International Labour Office Report of the Director General: Seventh African Regional Conference (Geneva 1987) 45.

entire South African social order is based.⁸

2.2.2 Inequality based on gender

2.2.2.1 Women's work?

Bradley argues that six key tasks are performed mainly by women in the majority of societies. These are the provision of food, care for the home, child care, nursing the sick, teaching and manufacture of clothing. These tasks are often performed by women in the home as subsistence labour or unpaid homework.⁹

In an attempt to explain the absence of serious scholarly analysis of domestic service,¹⁰ Van Raaphorst points out that domestic service is often regarded primarily as a women's issue.¹¹ This attitude effectively frees the law and other disciplines from the obligation of addressing what is a complicated labour question.¹² In South Africa, domestic service represents the oldest and most

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Whisson MG and Weil W Domestic Servants: a Microcosm of 'the Race Problem' (Johannesburg 1978) 45-47.

9

Bradley H Men's Work, Women's Work (Cambridge 1989) 8-9.

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To date, only two comprehensive studies of domestic service in South Africa have been conducted. In Maids and Madams, Jacklyn Cock, a sociologist, conducted research into domestic service in the Eastern Cape. In her thesis entitled Between Two Worlds submitted for a doctorate in philosophy, Eleanor Mary Preston-Whyte made a study of the working life, social ties and interpersonal relationships of African women migrants in domestic service in Durban.

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The very status of domestic service is often in contention. It has been regarded as a normal function or even a form of healthy exercise: Van Raaphorst DL Union Maids Not Wanted: Organizing Domestic Workers 1870-1940 (New York 1988) 3.

12

McBride TM The Domestic Revolution: The Modernization of Household Service in England and France 1820 - 1920 (London 1976) 9-10.

common form of wage labour for Black women and it remains the single largest source of employment for women.¹³ A Central Statistical Service Survey conducted in 1991 revealed that eighty-nine per cent of all domestic workers in South Africa are Black women.¹⁴

Whilst it may thus be accepted that women represent the vast majority of domestic workers, domestic service is not, nor has it always been, an exclusively female domain. The Witwatersrand gold rush represents a brief period of our history during which Black men played a very important role in domestic service. During the 1890s, severe droughts and the rinderpest disease drove many Zulu men to leave the rural areas in order to find jobs in the urban areas. Word spread that the growing town of Johannesburg urgently needed a laundry service. Water was not easily obtainable in Johannesburg and, furthermore, most of the people in Johannesburg were unmarried men who had neither the time nor the inclination to do their own washing. The amawasha, who were mostly Zulu-speaking men, stepped in to provide a laundry service in the Rand towns. By 1914, however, the amawasha had more or less disappeared as a result of competition from modern steam laundry companies and the arrival of women, who were prepared to take over their duties. These redundant amawasha did not necessarily leave the city. They offered their services as unskilled 'house boys' or 'kitchen boys'. After the Anglo-Boer war, mines dropped the wages of their workers which resulted in men taking up higher-paid positions as 'kitchen boys'. Eventually, the influx of child labourers and Black women into the towns flooded the domestic service market to

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Approximately 893 980 women are employed as domestic workers compared to only 42 599 men. Central Statistical Service Population Census 1991 Summarised Results After Adjustment for Undercount Sch 10 (Pretoria 1991). The South African Domestic Worker's Union, however, has estimated that there are approximately two million domestic workers in South Africa: Place J 'Women and Children in South Africa: An Introduction' Women and Children at Risk in Southern Africa Conference Proceedings (Harare 1990).

14

Central Statistical Service Survey of Houses, Sectional Title Units and Domestic Workers (Pretoria 1993) 2: Flint S 'The Protection of Domestic Workers in South Africa: a Comparative Study' (1988) 9 ILJ 187 at 189-190. A similar trend was discernible in nineteenth-century Europe: McBride The Domestic Revolution 15.

such an extent that men began seeking alternative employment.¹⁵

Domestic service is not regarded as particular to women in all societies. In Zambia, for instance, the vast majority of domestic workers are men. Women are considered to be unsuitable for this position.¹⁶ Cock points out that in fourteenth- and fifteenth-century England, sons of upper-class families performed domestic service in aristocratic households. In many parts of colonial Africa, it was often men who performed domestic work for the dominant group.¹⁷ Many services developed under colonial rule, where it was a distinct advantage for the aspirant employee to speak the colonialist's language. Since boys were more often educated than girls, and since it was often not acceptable for women to work in the houses of unattached white men (most wives were left in Europe), domestic service came to be dominated by men in a number of places. In the post-independence era this trend has in some instances been reversed, leaving low-status domestic work to women.¹⁸

In South Africa, by contrast, domestic service in other people's homes is generally considered to be especially degrading for men. Present-day South African society does not regard domestic service as a proper occupation for a man. Domestic service is seen to degrade his manhood, while providing him with no promotion possibilities or opportunities of bettering himself.¹⁹ Cock explains that male

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Callinicos L Working Life: Factories, Townships and Popular Culture on the Rand (Johannesburg 1987) 53-58.

16

Hansen Distant Companions 2 and 84. According to figures supplied by the Organisation of Tanzania Trade Unions, 72 069 of the 179 355 domestic workers in this country are men.

17

Cock Maids and Madams 70.

18

Hay MJ and Stichter S (eds) African Women South of the Sahara (London 1984) 23.

19

Cock Maids and Madams 71-72.

domestic workers often experience a special edge to their deprivation which derives from the traditional role of males in a South African society. Male domestic workers, for example, feel emasculated by having to take orders from a White 'madam'; and they experience great hardship when saving for lobolo from the extremely low wage. However, Cock maintains that, because of the system of gender domination, female domestic workers are even more exploited than male domestic workers. Female workers generally receive lower wages and they usually have to continue to perform unpaid domestic labour in their own homes as well. The results of a Central Statistical Survey conducted in 1991 appear to support this belief.²⁰

American employers in the nineteenth century were prepared to pay higher wages for men, even though men and women performed similar work. Higher wages were essential to entice men into domestic service because it was considered more degrading for men than for women to become domestic workers. Male domestic workers enhanced the employer's social position. They were often placed in high-visibility jobs, with the purpose of exploiting their value as status symbols. These male domestic workers were usually selected as much for their stately appearance as for their abilities.²¹

2.2.2.2 The subordinate position of women in society as a whole

All women, to a lesser or greater degree, experience some form of gender based inequality in society as a whole. A study conducted by Cock of both domestic workers and their employers in the Eastern Cape showed that the majority of the women interviewed accepted their subordinate position in society. Women often appear to be trapped in an ideology of domesticity which accepts as natural and

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Ibid 316. Central Statistical Service Survey of Houses, Sectional Title Units and Domestic Workers Table 7.1

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Sutherland DE Americans and their Servants: Domestic Service in the United States from 1800-1920 (Baton Rouge London 1981) 106.

inevitable the relations of male domination and female subordination.²²

Cock draws an ironic comparison between the domestic worker and her employer (normally a woman), pointing out that both are 'domestic workers' and both are in a position of dependence:

The paid domestic worker is dependent on her employer but does not accept the legitimacy of her own subordination in the social order, she is not a deferential worker. The unpaid domestic worker on the other hand, is dependent on her husband, but usually accepts the legitimacy of her own subordination and is a deferential wife.²³

According to Cock, inequality on grounds of gender is maintained not only by measures aimed at keeping women in a position of dependence but also by sexist ideology which serves to legitimise this dependence.²⁴ These measures of gender discrimination operate on four levels, namely, legal status, employment, education and reproduction.²⁵

2.2.2.3 Legal status

The new Constitution prohibits discrimination on the grounds of, inter alia, sex and

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Cock Maids and Madams 265-267; Cock J Disposable Nannies? African Studies Seminar Paper (Johannesburg 1981) 5.

23

Cock Maids and Madams 161. It should, however, be remembered that Cock's research was conducted some fourteen years ago and that the research was based on a small sample of domestic workers and their employers in the Eastern Cape.

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Cock Maids and Madams 261 defines a sexist ideology as one which defines women as secondary, inferior and dependent.

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Ibid 8.

gender.²⁶ Gender discrimination has all but been eradicated from statutes²⁷ and common-law. However attitudes need to be changed in order to effect substantive equality. The Constitution has not done much to improve the legal status of African women who generally have no legal capacity in customary law.²⁸ They are often not permitted to own property in their own right, enter into contracts without the aid of a male guardian or even act as guardian to their children. Women in customary law are regarded as perpetual minors - subject always to the authority of men.²⁹

2.2.2.4 Employment

Women are playing an increasingly important role in the labour market, although the nature of their involvement in economic production differs from that of men. Many White women in South Africa have successfully escaped the kitchen, some even entering management positions and other male strongholds. The majority of Black women, however, could only manage the leap from agricultural service to domestic service.³⁰ Cock regards this as an example of racial and sexual hierarchies fusing

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The Constitution of the Republic of South Africa Act 200 of 1993 s 8.

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See eg the General Law Fourth Amendment Act 132 of 1993.

28

See Act 200 of 1993 s 181 regarding the position of customary law under the new Constitution.

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Cock Maids and Madams 241-249. See also Prekel T 'The Role of Black Women in the Economy' in Smollan R (ed) Black Advancement in the South African Economy (Johannesburg 1986) 41 and Prekel T 'The Quiet Contributors: Black Women at Work' (1989) IPB Joernaal 11.

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Cock Maids and Madams 250-253. However, in this regard Prekel 'The Quiet Contributors: Black Women at Work' (1989) 12 points out with regard to Black women, that '... in recent years many of them have moved upwards on the occupational ladder, steadily, but barely noticed. Particularly in white-collar occupations growing numbers of Black women are proving that diligence, drive and determination can do much to counter disadvantages and

to create the concentration of Black women in domestic service.³¹

2.2.2.5 Education

Traditionally, Africa has not regarded the education of her daughters as a priority.³² It may well be said that traditional African, as well as European cultures, have regarded the maternal function as the basic or pivotal attribute of the women's role.³³ Once again, racial and gender hierarchies fuse: if Black women escape the gender-based inequality in education, they are faced with the racially-based inequality.³⁴ The Director General of the International Labour Organisation has stated that the limited opportunities for education and skills training have resulted in less than five per cent of Black women in South Africa having pursued higher education to diploma or degree level.³⁵

2.2.2.6 Reproduction

Women of all races in South Africa are united in the dilemma that they have no

discrimination.'

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Cock Maids and Madams 252.

32

Hansen Distant Companions 181-182. See also Cock Maids and Madams 265-280 and International Labour Office Report of the Director-General: Seventh African Regional Conference 30.

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Cock Maids and Madams 258.

34

See also 2.2.3 infra.

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International Labour Office Report of the Director-General: Seventh African Regional Conference 45. See also Preston-Whyte E Between Two Worlds: A Study of the Working Life, Social Ties and Interpersonal Relationships of African Women Migrants in Domestic Service in Durban (PhD thesis University of Natal 1969) 37-41 for a discussion of the school education of domestic workers in Durban.

automatic right to paid maternity leave³⁶ and no guarantee of their jobs back after pregnancy.³⁷ The absence of sufficient day care facilities for children is a problem experienced by all working women. Class and, to a lesser extent, racially-based privilege come to the rescue of most White women, as they can often afford to place their children in private professional day care.³⁸

2.2.3 Inequality based on race

According to figures released after the 1991 Census, a mere 13 396 Whites (men and women) were employed as domestic workers. During recent months, newspapers have carried reports of White women turning to domestic service as a result of the economic recession. Reliable statistics on this relatively new phenomenon are not yet available. Whatever those statistics may reveal, it is unlikely that it will contradict Clarke's observation that:

Whites, quite simply, do not seek such (domestic service) employment, and will only work in domestic labour in their own household if persuaded to do so by economic consideration.³⁹

Cock states that the system of racial domination is the most conspicuous feature

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See 8.3.9 infra.

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This position falls far short of the standards set by the International Labour Organisation. See 4.4.5.3 infra. A suggestion has been made by the domestic workers committee of the NMC that this position justifies general reconsideration.

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Cock Maids and Madams 261. See also Prekel 'The Role of Black Women in the Economy' in Smollan (ed) (1986) Black Advancement in the South African Economy 43.

39

Clarke Domestic Workers in Rhodesia 38.

of the extreme inequality facing domestic workers in South Africa.⁴⁰ Hansen appears to share this view when she states that '... in Africa, at least till fairly recently, Europeans saw Blacks as fit only for domination'. Whisson and Weil, too, argue that the concept of race is used to explain defects and virtues in individuals or in the social system as a whole. Race or colour is a crucial factor in explaining that Whites are dominant and non-Whites subordinate, and that 'lighter' people are superior to 'darker' people.⁴¹

2.2.4 Inequality based on class

Hansen remarks that White employers during the colonial period in the then Northern-Rhodesia, as well as the mainly Black employers in post-independence Zambia, considered domestic workers as a sine qua non of social and economic position. During the colonial period the unequal master-servant relationship was maintained by using race to distance domestic workers from their employers. Not much has changed in post-independence Zambia, except for the phenomenon of class-based distinctions now replacing racially-based distinctions.⁴² Hansen, defining class in Marxist terms, asserts that the employer's power over a domestic worker results from his control over the resources which he can bring to bear on the work situation to effect his employee's compliance. Employers possess this control as a result of their comparatively advantaged position in class terms. Domestic workers are severely disadvantaged in class terms as they have nothing

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Cock Maids and Madams 232.

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Hansen Distant Companions 10. See also Preston-Whyte Between Two Worlds 244-246 for a discussion of the implications of racial differences between White employers and Black employees in the context of the wider South African society. For a discussion of domestic workers and race relations in the USA, see Romero M Maid in the USA (New York 1992) 27-29.

42

Hansen Distant Companions 2.

to sell but manual labour power.⁴³

An interesting aspect of class-inequality emerges when the position of domestic workers in the United States of America is considered. Palmer states that access to workers prepared to perform domestic service in return for wages is a constant which defines the elevated status of middle-class women. On the other hand, performing domestic service may be seen as defining the degraded status of working-class women of colour, especially married women, who may be expected to have homes of their own to care for. It appears that access to domestic service is a privilege reserved for middle-class and upper-class households.⁴⁴

In White South Africa, by contrast, domestic service is regarded as a birthright rather than a privilege.⁴⁵ All classes of White South Africans have access to domestic service. As Callinicos explains: 'At this rate of cheap labour, even less-skilled White workers could afford domestic service, and came to expect it as the right of all their race.'⁴⁶

Cock, in a similar vein, points out that while every woman in an advanced capitalist

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Ibid 14. See Whisson and Weil Domestic Servants 36-40 for a discussion of terminology used to denote class-based inequality. See also Meer F Black Woman Worker (Durban 1990) 37-39. See Cock Disposable Nannies? 1-8 for a general discussion of domestic service in Marxist terms.

44

Palmer PM Domesticity and Dirt: Housewives and Domestic Service in the United States, 1920-1945 (Philadelphia 1989) 13; see also Palmer's interesting discussion of 'Dirt and Divisions Among Women' 137-151. See further Pennington S and Westover B A Hidden Workforce: Homeworkers in England, 1850-1985 (Hampshire 1989) 3-5. For a general discussion of domestic service and class inequality in the USA, see Romero Maid in the USA 47-70.

45

This appears also to have been the position in colonial Northern Rhodesia and in independent Zambia. As Hansen Distant Companions 176 explains 'Even' casual White workers had access to the plentiful and cheap domestic labour which enabled them to pursue what they believed to be the distinctive and superior values of the European way of life.'

46

Callinicos Working Life 58.

society is subjected to a system of gender domination, her experience of it depends on her location in the class structure. Her position of class privilege provides her with the means to escape from the structure of constraints created by the system. Middle- and upper-class women are able to escape from their domestic roles by employing domestic workers. Because of the system of racial domination, the majority of White women have access to Black domestic labour, thereby freeing themselves to lead economically productive and socially varied lives. The affluent, leisured and hospitable lifestyles of these women may sometimes rest on the exploitation of Black domestic workers.⁴⁷

2.2.5 Inequality between domestic workers

Apart from the obvious sources of inequality between domestic workers and their employers there exist other, perhaps less obvious, indices which reinforce inequality between domestic workers.

In general, English-speaking domestic workers are held in high regard. English is felt to have a higher status than Afrikaans or an indigenous language. 'Pure' Afrikaans, in turn, has a higher status than the patois of the 'low-classed' urban Coloured people. Working attire also indicates a domestic worker's social standing. Domestic workers tend to wear old and secondhand clothes with an overall or apron. Some domestic workers wear uniforms. Uniforms tend to denote a lower social standing whereas civilian clothes indicate a higher social standing. The employer of a domestic worker dresses as a high status person vis-à-vis her employee. A status distinction further tends to exist between urban and rural people. Domestic workers from the rural areas are often preferred to domestic workers in towns, as they are considered to be more submissive, obedient and willing to work for lower wages

47

Cock Maids and Madams 259. See also Cock Maids and Madams 262-264 for a discussion on female 'parasitism' and class-bound femininity. For a discussion of how domestic workers in India are affected by inequality based on class, see Liddle J and Joshi R Daughters of Independence: Gender, Caste and Class in India (New Brunswick 1989) 150-151.

than the relatively sophisticated urban worker.⁴⁸

2.3 THE UNIQUE RELATIONSHIP BETWEEN THE DOMESTIC WORKER AND HER EMPLOYER

2.3.1 One of the family?

When attempts are made to explain the highly personalised relationship which exists between a domestic worker and her employer, the family analogy is a favourite theme.⁴⁹ Employers often assert that domestic workers are treated as one of the family. This view contrasts sharply with that held by domestic workers themselves. The domestic worker is quite aware that she is an employee and has to act like one and that she is not eligible for the privileges and benefits of being a member of her employer's family. She tends to strip her work of the emotional meaning that the employer attaches to it and exposes it for the hard labour that it is.⁵⁰ Although the nature of domestic service involves intimate contact between employer and employee, the relationship is generally characterised by formality and rigidity.⁵¹ Domestic workers often accuse their employers of denying their needs and feelings and perceiving them only in their occupational role. Such depersonalisation serves to maintain the social distance between employer and employee.⁵²

48

Whisson and Weil Domestic Servants 37-38.

49

Cock Maids and Madams 87-88.

50

Romero Maid in the USA 123-126.

51

Cock Maids and Madams 88. See Schuler M (ed) Empowerment and the Law (New York 1986) 368 and 376. See also Preston-Whyte Between Two Worlds 131-132 for a discussion of the interaction between employers and domestic workers.

52

Hansen captures the essence of this peculiar relationship in the title of her book: *Notions of gender, race and class conspire to transform the spatially close employer-employee*

Initially, domestic workers were employed in rural communities. These workers and their families often lived with the employer. They were considered part of the employer's household and were looked after in a paternalistic manner.⁵³ Today, the employment pattern has changed considerably. The vast majority of domestic workers are employed in urban areas. Practical impediments such as a shortage of housing space, and until recently legislation, prevent the domestic worker's own family from forming part of her employer's household.⁵⁴ Add to this the decline in numbers of live-in domestic workers, and the validity of the family analogy appears questionable.

The family analogy has often been applied to the detriment of domestic workers. It has been stated that the principle involved in the exclusion of the domestic worker from the benefits of labour legislation, seems to be that she is regarded as one of the family, so to speak, taking all the risks of whatever happens in the household.⁵⁵ Whisson and Weil point out that the only benefit a domestic worker may hope to gain from a personal attachment to the employer is that the employer, out of kindness but also self-interest, will in some way 'protect' her.⁵⁶

2.3.2 Paternalism as the dominant aspect of the employment relationship

relationship to one of such distance that employer and employee become no more than 'distant companions'. Preston-Whyte Between Two Worlds 241 explains that the employment of more than one domestic worker serves to keep mistress and servant at a distance: 'Co-workers look to each other for companionship and their unity as against the employer tends to drive a wedge between them and the housewife.'

53

Flint S 'The Protection of Domestic Workers in South Africa: a Comparative Study' (1988) 9 ILJ 187 at 190.

54

Ibid 191.

55

Stuttaford v Batty's Estate 1917 CPD 639 at 649.

56

Whisson and Weil Domestic Servants 44.

Cock asserts that paternalism is the dominant aspect of the relationship between the domestic worker and her employer. This paternalism is marked by a sense of superiority on the employer's part and an intense sense of dependence on the worker's part.⁵⁷ Paternalism may be benevolent, indifferent or even hostile. In its worst form it is manifested in the attitude that an employer should treat the domestic worker well in order to get the best service from his/her 'machine'.⁵⁸

The majority of writers stress the fact that many employers regard their domestic workers as perpetually irresponsible children,⁵⁹ incapable of making independent choices or decisions.⁶⁰ Supposedly benevolent employers generally believe that it is their Christian, moral or social duty to civilise and educate their domestic workers.⁶¹ A recurrent theme in literature dealing with domestic service in Africa is that of taking a 'raw' domestic worker and civilising her according to Western standards.⁶² Employers are advised to go about this task by 'talking slowly, simply and distinctly' to their domestic workers and treating them with tolerance and understanding but not with familiarity.⁶³ This brings us to the question of discipline. The right to discipline a domestic worker is inherent in the paternalistic attitude. Discipline may also be regarded as essential for assuring the worker's

57

Cock Maids and Madams 88. See also McBride The Domestic Revolution 23.

58

Van Raaphorst Union Maids Not Wanted 80.

59

McBride The Domestic Revolution 23; Cock Maids and Madams 102; Whisson and Weil Domestic Servants 20; Van Raaphorst Union Maids Not Wanted 80; Hansen Distant Companions 66.

60

Whisson and Weil Domestic Servants 239.

61

Hansen Distant Companions 77. See also Clarke Domestic Workers in Rhodesia 40.

62

See, in general, Whisson and Weil Domestic Servants 35-47.

63

Hansen Distant Companions 66. See also Cock Maids and Madams 91.

respect and deference. Disciplinary methods may vary from verbal chastisement to physical punishment.⁶⁴

An employer's paternalistic streak often comes to the fore when economic issues arise. The employer may take it upon himself to decide what should be regarded as an essential and what a non-essential or luxury purchase for the domestic worker.⁶⁵ This ties in with the view that a domestic worker's wage is regarded as pocket money to be spent on luxuries. Through payment in kind, the employer will provide what he believes to be necessities.⁶⁶ An employer may even feel that his paternalistic 'duties' extend to the domestic worker's own household. Giving unsolicited advice may also form part of what the employer regards as his caretaking function.⁶⁷

2.3.2.1 Payment in kind as a mechanism for reinforcing the pattern of paternalism and dependence

It is generally taken for granted that payment in kind forms an essential component of a domestic worker's total remuneration. Employers seem to consider such payments in kind as a justification for low monetary wages. Payment in kind includes the provision of food, accommodation, clothing, children's schooling expenses, the use of the telephone, radio, television or washing machine, medical

64

Cock Maids and Madams 96-98.

65

Hansen Distant Companions 282. See also Clarke Domestic Workers in Rhodesia 40; Van Raaphorst Union Maids Not Wanted 80.

66

See also 3.3.3 infra.

67

Hansen Distant Companions 209-210.

care and 'holidays with the family'.⁶⁸ The quality and quantity of such payment in kind is often not predictable.⁶⁹

Writers generally agree that the pattern of dependence and paternalism is reinforced by this mechanism: 'Payment in kind fulfils an ideological function by inducing feelings of gratitude and faithfulness in the employee and feelings of superiority and benevolent generosity in the donor.'⁷⁰ Whisson and Weil explain that in Western society, 'the giving and receiving of presents (as payment in kind may here be regarded) implies a form of equality, provided that the exchange is of goods of approximately equal value and of similar type'.⁷¹ The giving of unreciprocated 'gifts' places the domestic worker in the position of a child or a beggar. The domestic worker is thus seen as too poor, young or low in status to be able to participate in this system of exchange which inherently defines the social status of the participants.⁷² Clarke agrees with this view and adds that the continuation of payment in kind ensures the maintenance of the dependency relationship.⁷³ Romero explains that the domestic worker understands that a gift distorts the employee-employer relationship and places the domestic worker under an obligation to be loyal. Redefining work obligations as family or friendship obligations, ensures employers access to both the emotional commitment and the physical labour of

68

Whisson and Weil Domestic Servants 42. See also Cock Maids and Madams 151-155. For statistics regarding payment in kind, see Central Statistical Service Survey of Houses, Sectional Title Units and Domestic Workers Table 7.6.

69

Sutherland Americans and their Servants 112-114.

70

Flint 'The Protection of Domestic Workers in South Africa: a Comparative Study' (1988) 9 ILJ 187 at 194.

71

Whisson and Weil Domestic Servants 41.

72

See also 2.2.4 supra.

73

Clarke Domestic Workers in Rhodesia 41-42.

their employers.⁷⁴

2.3.3 The employment relationship and recruitment

The method by which domestic workers are recruited differs markedly from that by which other workers are recruited. Recruitment in the domestic sector is usually highly informal and takes place by word of mouth. The personal endorsement and recommendation of a previous employer carries much weight in this system. This places a burden on the domestic worker as she has to maintain a good relationship with her employer in order to receive a good or acceptable reference.⁷⁵

2.4 THE ISOLATED WORKING ENVIRONMENT OF THE DOMESTIC WORKER

Palmer points out that the domestic worker's workplace is her employer's home. Unlike other employees, domestic workers are expected to show the same interest in their jobs, and by implication their employer's household, as in their own homes and families.⁷⁶ This situation is particularly ironic in the case of live-in domestic workers. They are expected to embrace a stranger's family and household as their own, while effectively being separated from their own family and household.

The danger exists, especially in the case of live-in domestic workers, that domestic service may become a 'total institution'. In the case of live-in domestic workers, the barriers ordinarily separating the employee's sleeping, working and playing life are

74

Romero Maid in the USA 120-123.

75

McBride The Domestic Revolution 70-80. See also Whisson and Weil Domestic Servants 5-11 and Van Raaphorst Union Maids Not Wanted 55-57. See, in general, 8.3.6 infra.

76

Palmer Domesticity and Dirt 66.

absent. An extremely regimental approach towards domestic service is followed in some households. A domestic worker may be expected to do her work according to a rigid schedule and even her leisure hours may be subject to the employer's control.⁷⁷ Some employers impose social isolation upon their domestic workers by regulating their lives after working hours. Naturally, this problem is more prevalent amongst live-in domestic workers. Some employers require their domestic workers to be in their rooms at a certain time, some require them to introduce all their visitors and some even impose a total ban on visitors to the domestic worker's room. An unfortunate consequence of this social isolation is that the domestic worker is rendered especially vulnerable to sexual exploitation by male members of the household.⁷⁸

While the employer's control over the employee's leisure hours would be a foreign concept in most employment or service sectors, it is quite in keeping with the employer's paternalistic attitude towards domestic workers. Whisson and Weil remark that live-in domestic workers are actually 'on duty' throughout their waking hours and especially so when they are present in the house.⁷⁹ Domestic workers explain that it is not the hard physical work, but the feeling of being at the constant beck and call of the employer, which makes domestic service unbearable.⁸⁰

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For a discussion of domestic service as a quasi 'total institution', see Cock Maids and Madams 58-62. See also Van Raaphorst Union Maids Not Wanted 66-68.

78

Kedijang M 'Violence Against Domestic Workers - the Best-Kept Secret' (unpublished paper delivered at a Project for the Study of Violence Seminar University of the Witwatersrand 1990) 25 explains that '... in the case of domestic service, sexual harassment is characterised by an unwelcome imposition of sexual requirements in the context of extreme inequality of power in the master-servant relationship, combined with a desperation to keep the job on the part of the worker'. See also Meer F Black Woman Worker 44; Schuler (ed) Empowerment and the Law 365; Sutherland Americans and their Servants 70.

79

Whisson and Weil Domestic Servants 12 *et seq.*

80

Sutherland Americans and their Servants 100.

In a discussion of the forms of recreation available to live-in domestic workers, it becomes clear that even if employers did not consciously control their leisure time, domestic workers would generally have little choice about what to do in their spare time. As a result of class-based, and to a lesser degree racially-based discrimination, domestic workers normally do not have access to the recreation facilities in their areas of employment.⁸¹ Even after amenities have been opened to all races, domestic workers simply do not have sufficient funds to utilise these recreation facilities.

Perhaps even more disconcerting than the deprivation of a social life, is the live-in domestic worker's deprivation of a family life.⁸² As has been pointed out, practical impediments prevent the family of a domestic worker employed in an urban area from becoming part of the employer's household. Although no reliable figures are available regarding this issue, many, if not in fact the majority of domestic workers, are the sole breadwinners supporting their families.⁸³ In short, a woman living in a rural area and wishing to support her family by seeking employment as a domestic worker in an urban area, will be separated from her family.⁸⁴

Domestic workers stress the extreme loneliness and isolation experienced in their workplaces. It is often this extreme feeling of loneliness which drives the domestic worker to leave her job without any explanation.⁸⁵

81

Ibid 29-34. See also Cock Maids and Madams 55-57.

82

Cock Maids and Madams 49-54.

83

Ibid 49.

84

Flint 'The Protection of Domestic Workers in South Africa: a Comparative Study' (1988) 9 ILJ 187 at 190-191.

85

Sutherland Americans and their Servants 101; Romero Maid in the USA 3-4.

2.4.1 Violence directed at the domestic worker

As the incidence of violence in South Africa remains high, the domestic arena is increasingly used as a setting for uninhibited expression of rage, anger and frustration suffered in the wider society.⁸⁶ Kedijang asserts that, in this time of political change, many White South Africans fear 'the enemy within - those domestic workers, gardeners et cetera who have easy access to them and their children'.⁸⁷

Kedijang further claims that the increase of violence against domestic workers is not only a barometer of fear, but also an indication of the frustration generated by the perceived loss of control in the political and socio-economic environment.⁸⁸

The isolated and socially invisible nature of domestic service leaves the domestic worker wide open to abuse within the confines of her workplace. Add to this the domestic worker's dependence on her employer⁸⁹ as well as her perceived status as a 'child' in the family,⁹⁰ and it becomes clear why violence against domestic workers often remains a 'best kept secret'.⁹¹

86

Kedijang M 'Violence Against Domestic Workers - the Best-Kept Secret' 5.

87

Ibid 3.

88

Ibid.

89

See 2.3 supra.

90

See also Kedijang 'Violence Against Domestic Workers - the Best-Kept Secret' 3, where it is pointed out that '... the family members who are most likely to become victims of violence in the home are the least powerful in society, i.e. women and children'.

91

Ibid 24. See also Van Raaphorst Union Maids Not Wanted 55. Three forms of violence may be distinguished namely physical abuse, sexual harassment and verbal abuse.

This, then, is the social backdrop against which legislative reform in the domestic service sector should be considered.

CHAPTER 3

THE ECONOMICS OF DOMESTIC SERVICE

3.1 INTRODUCTION

3.1.1 Capitalism, industrialism and the domestic worker strata

The development of capitalism and the resultant industrialisation served to virtually eradicate the domestic worker strata in most countries with first-world economies.¹ Following the industrial development after World War I, a movement of women out of domestic service occurred in many countries, including England, the United States of America, Germany, France and Belgium. So, for instance, between June 1914 and June 1918, 450 000 women moved out of domestic service in Great Britain, 350 000 in the United States of America and 200 000 in Germany. Women seemed to prefer employment in workshops and in factories, as such employment was considered less arduous, restrictive and lonely than domestic service.²

Capitalism and industrialisation did not have the same effect on countries with third-world economies (such as, arguably, South Africa). The number of unskilled Black women seeking employment was simply too great and South Africa continued to employ domestic workers in the midst of the industrial expansion which had depleted the supply of domestic workers in other countries.³ Indeed, industrialisation created more opportunities for domestic workers as White prosperity grew with the expanding economy. Large numbers of Black men were

1

Collins JL and Gimenez M Work Without Wages: Comparative Studies of Domestic Labor and Self-Employment (New York 1990) 38.

2

Mariotti AM The Incorporation of African Women into Wage Employment in South Africa - 1920-1970 (PhD thesis University of Connecticut 1979) 135. She writes: 'The motto of the Australian female strikers in the thirties was "anything rather than return to bondage" as they steadily refused to become housemaids': ibid.

3

ibid 187.

drawn into production and the way was thus cleared for Black women to move into waged labour as domestic workers.⁴

Collins and Gimenez define those belonging to the propertiless class as persons who have to depend on wages or salaries for survival. In both first world and third world countries, women normally belong to the propertiless class. In first world countries, however, capitalism has resulted in domestic labour being unwaged labour among the propertiless classes. In effect, the 'lady of the household' must do her own domestic chores because capitalism has eroded the basis that made possible the existence of a 'servant' class by providing alternative employment options. Most women in these societies are, for all practical purposes, unpaid 'servants' in their own homes. In third world countries capitalism has, in contrast, expanded the basis that makes possible the existence of a 'servant' class. Thus, in these societies, domestic service remains the waged labour of the propertiless classes.⁵

The size of the domestic service sector makes it an important one in the South African economic system, particularly as a determinant of Black economic welfare.⁶ Historically, the economic relationship between employer and employee in the domestic service sector has been structured by social, legal and political arrangements.⁷ This chapter attempts to elucidate some aspects of this relationship.

4

Ibid 105.

5

Collins and Gimenez Work Without Wages 37-41.

6

Clarke DC Domestic Workers in Rhodesia: the Economics of Masters and Servants (Gwelo 1974) 13.

7

Ibid 9.

3.2 THE HOUSEHOLD AS A PRODUCTION UNIT

A household may be seen as a production unit seeking to maximise its own welfare. This may be achieved by meeting the highest level of household efficiency with the least input. Households usually adopt a profit maximising policy, whereby the aim is to maximise the difference between income and operating costs or expenditure. The employment of domestic labour, on terms favourable for the employer, plays an essential part in maximising household welfare and profits. The wage of a domestic worker is one of the few costs which can be controlled by the household. Basically, there is a conflict of interests between higher worker wages and the maximisation of household welfare. It is thus in the interest of the household to keep labour costs to the bare minimum. The bare minimum, in this case, may equate with the basic subsistence costs of the domestic worker. Normally wages exceed the minimum subsistence costs of the individual worker, but are insufficient to cover the subsistence costs of a domestic worker as well as her family.⁸

Domestic labour may increase the household welfare by providing either additional income and/or additional leisure time. If the employment of domestic labour either enables or frees a member of the household to enter the labour market, a return will be yielded well above the cost of employing the domestic worker. A member of the household may be freed from domestic labour, but choose not to enter the labour market, in this instance, increasing the leisure time of a household.

The best strategy for the employer is thus to ensure sufficient resources of domestic labour at the lowest possible price. This goal may be served by not creating other employment options, keeping legislative protection for domestic workers to the minimum, minimising the bargaining power of domestic workers and maintaining a policy of paternalist dependency. Such a strategy has been referred

8

Cock J Maid and Madams: A Study in the Politics of Exploitation (Johannesburg 1980) 38.

to as the proletarianisation of the peasantry or the process of under-development.⁹

The most obvious way to protect the domestic worker from possible exploitation, would be to minimise the profit the household is making at her expense. An acceptable limit could be placed on the household profit-making by ensuring that the domestic worker receives a wage of not less than a statutory fixed minimum amount and by setting out other minimum conditions of employment.¹⁰

3.3 THE NEED FOR MINIMUM WAGES

3.3.1 Historical perspective

The practice of minimum wage regulation is considered to have had its inception in New Zealand and Australia around the turn of the century. Minimum wage regulations initially served as a method of preventing and settling industrial disputes in these two countries and were aimed at eliminating 'sweating', that is the payment of exceptionally low wages.

Minimum wage regulations were soon introduced in other countries¹¹ in order to provide protection for particular categories of workers considered to be especially vulnerable.¹² The first minimum wage regulations introduced in the United States

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Clarke Domestic Workers in Rhodesia 15-18.

10

Various forces of supply and demand, as well as non-market forces, currently determine the wage rate of a domestic worker. See Clarke Domestic Workers in Rhodesia 17-18 for a detailed discussion of the determinants of wage rates.

11

In 1917 Mexico became the first country to include a reference to minimum wages in its Constitution: Starr G Minimum Wage Fixing: an International Review of Practices and Problems (Geneva 1981) 3.

12

In Europe, these regulations were initially mostly confined to the setting of minimum wages for homeworkers and agricultural workers: Starr Minimum Wage Fixing 1-2.

did not single out vulnerable categories of workers as such, but sought to protect females and minors.¹³

In South Africa, the pattern of the British Trade Boards Act of 1918 and the Wages Council Act of 1945 was followed.¹⁴ The Wage Act 5 of 1957¹⁵ provides for wage boards to be established by the responsible Minister where he is of the opinion that no adequate machinery exists for the effective regulation of remuneration or conditions of employment of employees in particular industries.¹⁶

3.3.2 The objectives of minimum wage fixing

Ensuring that wage earners receive what is considered to be a decent wage for reducing poverty at a particular time and place is an important objective ascribed to minimum wage fixing. Minimum wage fixing is also regarded as a method of preserving purchasing power, ensuring equal pay for equal work and promoting economic growth and stability.

According to Starr, however, only four basic roles for minimum wage fixing may be identified:¹⁷

13

ibid 1-3.

14

ibid 9.

15

See, in general, Rycroft A and Jordaan B A Guide to South African Labour Law (Cape Town Wetton Johannesburg 1992) 311-316.

16

For a further discussion of the Wage Act 5 of 1957 and its possible application in the domestic service sector, see 9.2 infra.

17

Starr Minimum Wage Fixing 17-18.

- The most limited role involves using minimum wage fixing to provide protection for low-paid workers who are regarded as especially vulnerable in the labour market.¹⁸
- Minimum wage fixing may also be used to ensure the payment of 'fair' wages. In this instance, protection is not limited to the lowest paid categories of workers.¹⁹
- Minimum wage fixing may be used to provide a basic floor for the wage structure. Almost all workers should be provided with 'safety net' protection against unduly low wages.²⁰
- Finally, minimum wage fixing may be used as an instrument of macro-economic policy for achieving economic stability and affecting major improvements in the distribution of income.²¹

3.3.3 The wages of domestic workers in South Africa

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See ibid 18-24 for a further discussion of minimum wage fixing as a method of providing protection for low-paid workers. See Hicks JR The Theory of Wages (New York 1966) 180-182 for a discussion of the impact of partial control of wages, eg in certain employment sectors only, on the labour market.

19

See ibid 24-37 for a further discussion of the payment of 'fair' wages. For a discussion of the concept of 'fair' wages, see Hicks The Theory of Wages 80-81.

20

See ibid 39-47 for a further discussion of minimum wage fixing as a method for providing a basic floor for the wage structure.

21

See ibid 47-53 for a further discussion of minimum wage fixing as an instrument for achieving economic stability. For a discussion of minimum wages policy options considered for post-independence Namibia, see Asombang WW Wages and Other Incomes: Policy Options for Independent Namibia (Lusaka 1989) 78-80. See in general Takirambudde PN and Molokomme AL The New Labour Law in Botswana Southern African Labour Monographs 1/94 (Cape Town 1994); Mhone GCZ Labour Market Policy and Structural Adjustment in Zimbabwe Southern African Labour Monographs 3/94 (Cape Town 1994).

The absence of noteworthy legislative protection regarding minimum wages leaves domestic workers at the mercy of the influences of the market and the discretion of the employer. While it may seem that the prevailing labour conditions in this sector approximate a free market situation, closer inspection reveals that this sector is free only to be exploited.²²

Reliable and comprehensive statistics on the wages of domestic workers are not readily available.²³ The most recent and reliable statistics on the wages of domestic workers are to be found in the Survey of Houses, Sectional Title Units and Domestic Workers conducted by the Central Statistical Service in October 1991. The survey was limited to the wages earned by full-time domestic workers employed in houses situated in the twelve most important urban areas in the country. According to the findings of this survey, monthly wages of these domestic workers ranged from an average of R264,40 (cash wage and payment in kind) paid to Black female workers employed in rented houses in the Orange Free State Goldfields to R610,65 (cash and payment in kind) paid to Black male workers employed in owner occupied houses on the Witwatersrand.²⁴

Previous research conducted regarding the wages of domestic workers was usually localised.²⁵ As a general observation, it may be said that a domestic worker earns

22

Clarke Domestic Workers in Rhodesia 51. See, in general, Meintjies van der Walt Minimum Wage Fixing for Domestic Labour? (1993) 4 ILJ 811.

23

Women's organisations, church groups, trade unions, the Black Sash, as well as newspapers and magazines, have at various stages offered statistics in this regard, but these statistics are often not scientifically verifiable.

24

Central Statistical Service Survey of Houses, Sectional Title Units and Domestic Workers October 1991 Table 7.1. The 1991 Census revealed that, country-wide, the largest percentage of domestic workers earned between R1 000 and R2 999 annually: Central Statistical Service Population Census 1991 Summarised Results after adjustment for Undercount Table 13.1

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So eg research conducted by Whisson MG and Weil W Domestic Servants: a Microcosm of 'the Race Problem' (Johannesburg 1978) in Cape Town during 1976 revealed that a 'full-

more (cash) in urban areas than in rural areas. This may be attributed to the perception that domestic workers employed in urban areas generally receive few benefits in kind, whereas a domestic worker employed in rural areas often receives benefits in kind such as board and lodging.²⁶ This phenomenon may also be attributed to the slightly higher level of education amongst urban domestic workers²⁷ and possibly the increased availability of other employment options in these areas. The area of residence and the economic standing of the employer may also influence the wages of domestic workers.²⁸ Domestic workers who possess specialised skills such as cooking, appear to command higher wages than unskilled domestic workers.²⁹

3.4 EXEMPTION FROM MINIMUM WAGE REGULATIONS

It is generally accepted that certain categories of workers may be excluded from the

time, live-out' domestic worker was earning an average monthly wage of R15,72 in Goodwood, and R22,92 in Bishopscourt. 'Full-time, live-in' domestic workers were earning marginally more at an average of R16,00 per month in Goodwood, R26,38 in Bishopscourt and R29,51 in Sea Point. The lowest wage for a full-time, live-in domestic worker was R5,00 per month, whilst the highest wages were R45 per month paid to a Coloured domestic worker in Sea Point and R100 per month paid to a White domestic worker in the same suburb: ibid 15. Similar research by Cock in the Eastern Cape during 1976 reveals that, in a sample of 225 households, wages ranged from R4 to R60 per month, the average being R22,77 per month: Cock Maids and Madams 29. Both these surveys revealed that regular wage increments were a rarity.

26

Fauber SA 'Minimum Wage Legislation in Developing Countries: Zimbabwe: A Case in Point' (1981) Journal for International Law (Cleveland) 385 at 390.

27

Whisson and Weil Domestic Servants 16.

28

ibid 15. The survey conducted by Whisson and Weil revealed that domestic workers in the predominantly Afrikaner, lower and middle income suburb of Goodwood were earning considerably less than their counterparts in the English-speaking, middle and upper income suburb of Sea Point.

29

ibid 16. The findings of the Survey of Houses, Sectional Title Units and Domestic Workers do not necessarily support this assumption Table 7.2.

scope of minimum wage protection.³⁰ Exemptions may be specified in legislation or may result from the decision of a minimum wage fixing authority. Exemptions are often justified by the argument that the productivity of certain persons is expected to be too low to permit them to be paid the normal minimum wage without seriously jeopardising their employment prospects.³¹

The exemption of domestic workers from the scope of minimum wage regulations is usually based on the special characteristics of the employment relationship in the domestic sector. In many countries (for example Brazil, Canada, France, Thailand and Uruguay) domestic workers have been excluded from minimum wage legislation because of the special nature of their employment relationship as well as the obvious problems of enforcement. In other countries (for example Ecuador and Panama) domestic workers are covered by minimum wage legislation, but at extremely reduced rates. However, in a few countries (for example the United States of America, Tanzania, Jamaica and the United Republic of Cameroon) domestic workers are entitled to the same minimum wage as other workers.³²

3.5 CRITERIA FOR FIXING MINIMUM WAGES

3.5.1 Introduction

Criteria for the fixing of minimum wages are essential for ensuring that minimum wages meet their set objectives and that decision-making in this regard is principled

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See 4.4.13 infra.

31

Fauber 'Minimum Wage Legislation in Developing Countries - Zimbabwe: A Case in Point' (1981) Journal for International Law (Cleveland) 385 at 390-394.

32

Starr Minimum Wage Fixing 55-58.

and reasoned.³³ Criteria for the fixing of minimum wages are often specified in legislation. They may be set out in brief statements of general principles or may be clearly listed as factors to be taken into account.³⁴

Most of the criteria formulated for fixing minimum wages are variants of the following concepts.³⁵

3.5.2 The needs of workers

3.5.2.1 Standards applied when setting wages

* { A minimum wage is often regarded as synonymous with a living wage.³⁶ Neither a minimum wage nor a living wage is necessarily a 'decent' wage. Starr points out that this is a controversial criterion since no objective or generally accepted way exists of determining which needs should be taken into consideration in order to establish what a 'decent' wage should be.³⁷

Budlender discusses the various standards applied when setting wages. The poverty

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See eg Asombang Wages and Other Incomes: Policy Options for Independent Namibia 60-62.

34

This approach is followed in the Wage Act 5 of 1957.

35

Starr Minimum Wage Fixing 91-95.

36

So eg SADWU sees the R550 to R650 per month demanded for domestic workers not as the ideal, but merely a pragmatic demand on the way to a living wage: SADWU Living Wage pamphlet (Johannesburg 1989).

37

Starr Minimum Wage Fixing 96. So eg estimates for a living wage allowing a Western Cape family to maintain a modestly low level standard of living during 1989 ranged from R 909,35 per month to R1 140 per month: Budlender D A Fair Deal For Domestic Workers (Mowbray 1989) 5.

datum-line refers to the barest minimum upon which subsistence and health can theoretically be attained under Western conditions. The poverty datum-line does not provide for a civilised standard of living as it covers only short-term day-to-day needs rather than longer-term needs which include items such as insurance and furniture.³⁸

The University of South Africa employs the minimum-living level and the supplemented- living level to measure the standard of living. The University of Port Elizabeth employs the household-effective level and household-subsistence level for the same purpose. Once again, only the lowest possible sum on which a specific size of household can survive in the relevant society, is reflected. The household-subsistence level and minimum-living level reflect only the very barest necessities. The supplemented-living level and household-effective level take into consideration items such as medical expenses, personal care, contributions to pension and other funds, recreation, insurance, and additional clothing, food, transport, household equipment, taxes and rent.³⁹

3.5.2.2 Poverty datum-lines and the domestic worker as a breadwinner

It should further be considered whose requirements ought to be assessed for the purposes of minimum wage fixing. Should a worker be regarded as a single person, a breadwinner or a head of a family? If a worker is regarded as a head of the family, the next question pertains to the size of the family, et cetera.⁴⁰

38

Budlender A Fair Deal For Domestic Workers 5-7.

39

See also Whisson and Weil Domestic Servants 49-52; Clarke Domestic Workers in Rhodesia 30-35, for a discussion of similar standards in the then Rhodesia.

40

Starr Minimum Wage Fixing 95-100.

Domestic workers are often the sole breadwinners of their families.⁴¹ Often they are forced to support their dependants in rural areas and must maintain economic links and rights in these areas to ensure that they will be able to return, should they become unemployed or unable to work.⁴²

These factors are normally not taken into consideration when wages are set with reference to poverty datum-lines or other minimum-living levels. Employers generally argue that they employ only one person in the household and that they therefore need to pay only the pro-rata share of the poverty datum-line. Budlender points out that this argument is fallacious, as the putative household consists of only two adults and therefore only two potential earners. Furthermore, approximately eighty per cent of domestic workers have dependant families. Rising unemployment may have pushed this percentage even higher.⁴³ Poverty datum-line figures are based on the needs of a nuclear family rather than those of the household. Domestic workers often support far more than the strictly defined nuclear family.

* } Employers of live-in domestic workers argue that they do not make provision for accommodation costs when determining a wage because they are already providing that worker with accommodation. In reality, accommodation is provided for the domestic worker only and her family is not allowed to live with her. The domestic worker thus needs to provide additional accommodation for her dependants. A domestic worker may also wish to retain a living space of her own in order to ensure that she is not so dangerously dependent on her employer for accommodation as well as employment.

The serious methodological problems encountered in the compilation of poverty

41

See 2.3.1 supra.

42

Clarke Domestic Workers in Rhodesia 16.

43

Budlender A Fair Deal for Domestic Workers 8.

datum- lines have resulted in many regarding these levels with suspicion. Trade unions have even been quoted as considering the poverty datum-lines to be a measure of poverty, which reinforces such poverty rather than helping people grow out of it.⁴⁴

3.5.3 Wages of workers in comparable sectors

A detailed examination of all the available indicators of the wage and income levels of the workers who are judged to be comparable to domestic workers may also serve as a point of departure for the deliberations of the minimum wage fixing authorities. Such information would at least ensure a greater degree of clarity and measurability when a minimum wage is decided upon.⁴⁵

In addition to the normal house-cleaning function, domestic service often entails elements of child-minding, cooking and nursing the frail or the aged. It would be particularly difficult to calculate the wage of a domestic worker with reference to child-minding and nursing functions.⁴⁶

44

Ibid 9-10. See also Asombang Wages and Other Incomes 42.

45

Starr Minimum Wage Fixing 100-104.

46

Budlender A Fair Deal for Domestic Workers 11 supplies the following figures of average monthly wages for women performing work comparable with that of domestic workers during 1989:

	<u>African</u>	<u>'Coloured'</u>
Canteen waitress	R715	no data available
Cook	R720	R846
Waitress/tea-maker	R609	R720

About seventy-five per cent of these workers also receive an annual bonus, usually equal to a month's salary. See also Collins and Gimenez Work Without Wages 37-42 for a discussion of the many services expected of paid as well as unpaid domestic workers (housewives).

3.5.4 The ability of the employer to pay the minimum wage

The employer's ability to pay the minimum wage is related to concepts such as productivity, the preservation of employment and the prevailing economic conditions.⁴⁷ In countries with first world economies, it is only as the socio-economic status⁴⁸ of a household increases significantly that unwaged domestic labour is likely to be substituted with waged domestic labour.⁴⁹

At present, domestic service in South Africa is available at such low cost that it is affordable not only to the upper and middle classes, but also to the skilled and organised working classes.⁵⁰ However, the cost of living has increased at an alarming rate over the past few years and the economic recession has led to the tightening of the household budget. As the wage of a domestic worker is one of the few costs which the household can control, the domestic worker often finds that she assists in stabilising the household budget by not receiving annual wage increments. Governmentally enforced increases in the cost of domestic labour will cut into the household profits and will thus force the household to explore other ways in which to trim its budget. This may lead to the dismissal of domestic

47

Starr Minimum Wage Fixing 107. It is difficult to establish a workable definition for ability to pay.

48

This ranking is based on levels of income, education and type of occupation. Collins and Gimenez Work Without Wages 35. For an interesting international study where labour inputs into domestic activities are assigned an imputed value which is the wage paid to workers performing similar activities in market enterprises, see Goldschmidt-Clermont L Economic Evaluations of Unpaid Household Work: Africa, Asia, Latin America and Oceania (Geneva 1987).

49

Collins and Gimenez Work Without Wages 41. It is normally the dual earner households who are in the greatest need of domestic service. The inability to employ waged domestic labour would lead to a decline in the quality of life of these establishments.

50

Mariotti The Incorporation of African Women into Wage Employment in South Africa - 1920-1970 103. The employment of domestic workers used to be the privilege of Whites, but recently Blacks, Indians and Coloureds have joined the ranks of employers.

workers.⁵¹

3.5.5 The requirements of economic development

This criterion covers all the repercussions that the setting or increase of minimum wages may have throughout the economy. The effect on economic growth and stability, as well as the effect on the employment and unemployment figures, needs to be considered.

Domestic workers, numbering approximately 936 579, comprise the second largest sector of the workforce. Therefore, as Starr points out:

The greater the number of workers legally covered, the greater the influence on wages actually paid, the greater the need for the minimum wage fixing authorities to be concerned about the impact on economic development goals.⁵²

The introduction of minimum wages in this sector will conceivably have many adverse effects.

Every increase in wages that takes place without a corresponding rise in productivity will affect an employer's ability to pay. While the nature of manufacturing industries allows for increased costs of labour to be passed on to the consumer, this opportunity to allocate increased labour costs does not exist in the

51

Fauber 'Minimum Wage Legislation in Developing Countries: Zimbabwe: A Case in Point' (1981) Journal for International Law (Cleveland) 385 at 393-398.

52

Starr Mimumum Wage Fixing 110.

case of households employing domestic workers.⁵³ Such an increase in wages without a corresponding rise in productivity could lead to an increase in unemployment.⁵⁴

The introduction of minimum wages may also discourage liberal hiring practices. Employers will more than likely become more conservative and selective in their hiring practices when a specified wage is made payable. Minimum wage regulations may be abused by employers who allow the minimum wage to function as a maximum wage. Such employers may be reluctant to grant raises and may even lower a worker's wages to the minimum level, where higher wages had previously been negotiated. It may further be argued that a minimum wage could turn a domestic worker into a commodity which, if priced out of the market, would be replaced by machines. Automation, while allowing the household to maintain profits, may also destroy many employment opportunities for domestic workers.⁵⁵

When Zimbabwe introduced minimum wage regulations, the government was so aware of the threat of dismissals and rising unemployment that the termination of employment, based solely on grounds of the requirement to pay minimum wages, was forbidden. Even before the minimum wage legislation was passed, the government was in possession of a list of employers who had dismissed workers in anticipation of minimum wages being implemented.⁵⁶

53

Fauber 'Minimum Wage Legislation in Developing Countries Zimbabwe: A Case in Point' (1981) Journal for International Law (Cleveland) 385 at 393.

54

Ibid 391. This point was also raised with regard to workers in post-independence Namibia: Asombang Wages and Other Incomes Policy 78-79.

55

For a discussion of the impact of labour-saving inventions on the labour market, see Hicks The Theory of Wages 121-127.

56

Ibid 389, 393, 394 and 398. Cock J Disposable Nannies? African Studies Seminar Paper (Johannesburg 1981) 24 states that the possible effect of a minimum wage in the domestic service sector is debatable. She quotes Lipton as stating, on the basis of the position in Botswana, that 'rising minimum wage rates damage employment prospects especially for

3.5.6 Compliance with minimum wage regulations

Enforcing compliance with a minimum wage for domestic workers will undoubtedly pose a major obstacle once such a minimum wage is established. A realistic assessment of the likely pattern of compliance will be needed to decide on the level of resources that will have to be devoted to enforcement activities in order to maintain credibility.⁵⁷

Economic pressures, poor knowledge of the law, illiteracy and limited resources for inspection will result in many, if not most, of the workers in the domestic service sector not receiving the wages to which they are entitled.⁵⁸ The market is overcrowded by domestic workers. If one domestic worker refuses to work for a wage lower than the legal minimum, another will be only too grateful to take her place. The low standard of living of most domestic workers also renders them prone to agree to accept less than the prescribed minimum wage. Wide-spread illiteracy will most likely cause a large number of domestic workers to remain ignorant of any legal rights they may be afforded.⁵⁹

Another factor which can make enforcement more difficult in developing countries such as South Africa, is the alleged or real existence of family ties between the domestic worker and her employer, as this often obscures the extent of the employer's responsibility. This phenomenon is especially prevalent in Black households employing young domestic workers. These workers are often referred

the unskilled, the rural and the female'. For this reason, Lipton argues against the extension of minimum wages to farmworkers or domestic workers.

57

See 3.5.7 *infra*.

58

Starr Minimum Wage Fixing 135.

59

Mariotti The Incorporation of African Women into Wage Employment in South Africa - 1920-1970 46-47.

to as 'sister' or 'child' and are made to share living quarters with the children of the household. Very often, these domestic workers are, in fact, distant relatives sent to urban areas in order to escape rural poverty or simply because their parents cannot support them any longer. Where these alleged or real family ties exist, the domestic worker will be extremely reluctant to complain of wages lower than the statutory minimum wage. Furthermore, the employer-employee relationship will be obscured to such an extent that inspectors will experience great difficulties in monitoring the position.⁶⁰

More generally, the special relationship of dependence that often exists between the domestic worker and her employer further reduces the likelihood of complaints against low wages being made. This is apparently true even in developed market economies where domestic workers have benefited from favourable trends in the labour market.⁶¹

Finally, it may be remarked that numerous studies of developing countries have revealed the existence of prevailing wage levels which fall far short of existing minimum rates prescribed by statute.⁶²

3.5.7 Towards improving compliance with minimum wage regulations

Given the general labour surplus found in South Africa, attempting to achieve a satisfactory level of compliance with minimum wage regulations will certainly

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SADWU is currently conducting research into this phenomenon. Thus far, Black employers of domestic workers appear to be more guilty of exploitation than their White counterparts.

61

Starr Minimum Wage Fixing 140. So eg a survey conducted in the United States of America during November of 1974 established that thirty per cent of all domestic workers earned less than the applicable minimum wage.

62

Ibid 141.

constitute an uphill struggle. Various methods could, theoretically, be applied in an attempt to improve compliance.

3.5.7.1 The allocation of manpower and financial resources

The enforcement of minimum wages in the domestic service sector, as in many other sectors, is likely to be severely hampered by the shortage of labour inspectors and insufficient administrative back-up services. These impediments will no doubt be blamed on financial constraints. In extreme cases, imbalances between material and human resources available may restrict the day-to-day activities of the inspectorate. When an inspector is required to move into rural areas, it may happen that no vehicle is available for his use or even that the roads in certain remote areas are impassable. Labour inspections will have to be planned carefully in order to concentrate on those establishments most in need of inspection, rather than those most convenient to inspect. The domestic service sector, being largely unorganised, should be an obvious target for inspection.⁶³

3.5.7.2 Promoting self-enforcement

* Violations of minimum wage regulations often occur due to a lack of awareness of the applicable minimum wage on the part of the employee. Employees should be made aware of the minimum wages to which they are entitled and taught how to go about contacting the labour inspectorate or Department of Labour. They should be encouraged to complain if their rights are violated. This will be the first step towards ensuring self-enforcement. The aid of trade unions in this sector could possibly be enlisted in the education drive.⁶⁴

63

ibid 142-143.

64

ibid 144. In future, employer's organisations in this sector too could be encouraged to

3.5.7.3 Simplified wage orders

The formation of a less complex wage order that avoids the unnecessary use of formal legal language would be more accessible to domestic workers and their employers alike.⁶⁵

3.5.8 The implications of incomplete compliance with minimum wage regulations

Extending minimum wage regulations to the domestic service sector creates an unfortunate dilemma:

The workers who are most in need of minimum wage protection are precisely those in respect of whom enforcement is most difficult. If these workers are excluded because a reasonable degree of compliance cannot be ensured, many low-waged workers will remain unprotected and at the risk of aggravated inequalities. However, if protection is extended to the domestic service sector and reasonable compliance cannot be ensured, cynicism, disrespect for the law and dissatisfaction with unequal treatment may result.

At best, minimum wage regulations in this sector will be regarded as a target to be achieved progressively, as administrative and economic factors permit. The perceptions and expectations of the domestic worker and her employer may be altered to the long-term benefit of the worker.⁶⁶ It is difficult to envisage minimum

educate their members regarding the implementation of minimum wage regulations and to supply them with relevant and up-to-date information.

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Ibid 145.

66

The same result, with less risk of adverse effects, could more than likely be achieved by

wage regulations in this sector as immutable lower limits which will be applied immediately and universally.⁶⁷

establishing guidelines in this regard: Whisson and Weil Domestic Servants 49-52. See also 9.2 infra.

67

Starr Minimum Wage Fixing 148-149.

CHAPTER 4

INTERNATIONAL LABOUR ORGANISATION CONVENTIONS AND RECOMMENDATIONS

4.1 INTRODUCTION

South Africa is not the only country faced with the challenge of seeking ways in which the law may successfully regulate the domestic service sector. The conventions and recommendations of the International Labour Organisation provide a suitable starting point in the quest for fair internationally acceptable employment standards.

The International Labour Organisation was established in 1919 to institute international standards concerning labour legislation.¹ The International Labour Organisation adheres to the principle of tripartism. Before conventions and recommendations are adopted, they must be approved by governments and representatives of workers and employers. Careful research and extensive consultation with interested parties precede the adoption of any convention and recommendation.² At present, there are more than one-hundred-and-fifty conventions and an even larger number of recommendations.³ These conventions and recommendations may be loosely categorised as those enshrining basic human rights,⁴ those dealing with conditions of work and providing for the establishment

1

International Labour Office International Labour Standards: A Workers' Education Manual (Geneva 1978) 3-6. See, in general, Valticos N International Labour Law (Kluwer 1979).

2

International Labour Office International Labour Standards 8. See also Brassey MSM et al The New Labour Law (Kenwyn 1988) 169.

3

For a general discussion of the principle of tripartite consultation, see Tajgman D International Labour Standards in Southern Africa Southern African Labour Monographs 4/94 (Cape Town 1994) 5; International Labour Office International Labour Standards 91 et seq.

4

See eg the Freedom of Association and Protection of the Right to Organise Convention 87

of machinery to set minimum wage standards⁵ and those dealing with the protection of women⁶ and children,⁷ as well as specific types of workers.⁸

4.2 THE STANDARD-SETTING PROCESS

Guidelines provided by the International Labour Organisation take the form of conventions and recommendations. Adopting these guidelines is not mandatory. The basic difference between these two forms of standard lies in the obligations incurred by ratifying states. Should a member country ratify a convention, that state is legally bound to implement the obligations it has assumed.⁹ There is regular international supervision of the way in which these obligations are observed. A recommendation, however, does not give rise to binding obligations. Recommendations merely provide guidelines for national policies and action. As a general rule, precise questions of conditions of employment, of safety and health, of social security and of human rights have been considered to be suitable for conventions. International Labour Organisation conventions originally contained relatively precise standards that could be taken over directly into national

of 1948; the Equal Remuneration Convention 100 of 1951 and the Equal Remuneration Recommendation 90 of 1951.

5

See eg the Hours of Work (Industry) Convention 1 of 1919 and the Minimum Wage Fixing Machinery Convention 26 of 1928.

6

See eg the Underground Work (Women) Convention 45 of 1935.

7

See eg the Minimum Age Convention 138 of 1973 and the Minimum Age Recommendation 146 of 1973.

8

See eg the Nursing Personnel Convention 149 of 1977. See also International Labour Office International Labour Standards 29-34; Brassey et al The New Labour Law 170.

9

When ratified, a convention has the same legal status as an international treaty: International Labour Office International Labour Standards 25. See also Brassey et al The New Labour Law 169.

legislation. The end of World War II saw the appearance of so-called promotional conventions. The text of these promotional conventions allows individual ratifying states to pursue the stated objectives, but by methods that are left largely to their own discretion.¹⁰

Recommendations have been considered suitable in instances where a subject is not yet considered ripe for a convention because it is relatively new and the standards are more or less exploratory. Recommendations are further to be preferred when an agreed aim may be achieved by a variety of methods and a measure of freedom is allowed for national action. Recommendations are also used to set targets for the development of standards which, if contained in a Convention, would attract few ratifications in the foreseeable future.¹¹

4.3 SOUTH AFRICA AND THE INTERNATIONAL LABOUR ORGANISATION

South Africa was one of the founder members of the International Labour Organisation, but was forced to withdraw from this organisation in 1964 due to political pressures. However, South Africa remained bound by the few conventions it had ratified before the withdrawal. These include the Unemployment Convention 2 of 1919; the Minimum Wage-Fixing Machinery Convention 26 of 1928; the Workmen's Compensation (Occupational Diseases) Convention (Revised) 42 of 1934; the Underground Work (Women) Convention 45 of 1935 and the Night Work (Women) Convention (Revised) 89 of 1948.¹² Following the April 1994 elections,

10

International Labour Office International Labour Standards 24.

11

International Labour Office International Labour Conventions and Recommendations (1919-1991) (Geneva 1988) i-viii. See also International Labour Office International Labour Standards 24-26.

12

International Labour Office Special Report of the Director-General on the Application of the Declaration Concerning the Policy of Apartheid in South Africa (Geneva 1988) 184.

South Africa has been readmitted as a member of the International Labour Organisation. Despite these twenty years of isolation, the conventions and recommendations of the International Labour Organisation have remained relevant because they all embody recognised standards of good labour relations.¹³

The industrial court has made extensive use of conventions and recommendations when dealing with matters pertaining to security of employment.¹⁴ The terms of these instruments referred to by the industrial court are normally instructive and provide for application not merely by way of statutory enactment, but also by '... collective agreements, work rules, arbitration awards or court decisions, and in such other ways as may be appropriate.'¹⁵

Conventions become part of our law upon ratification. However, certain provisions contained in those conventions may become part of our law without the need for ratification. According to Cameron, the industrial court has been attentive to international labour standards, because they form part of South African law on the common law principle that customary international law forms part of our law.¹⁶

13

Brassey in Brassey The New Labour Law 171. As Le Roux PAK and Van Niekerk A The South African Law of Unfair Dismissal (Kenwyn 1994) 31-32 explain, the conventions and recommendations of the International Labour Organisation form an international labour code which deals with a wide range of labour and social matters. See, in general, Brassey MSM Labour Relations Under the New South African Constitution South African Labour Monographs 5/94 (Cape Town 1994).

14

See eg Le Roux and Van Niekerk Law of Unfair Dismissal 31-37 for a discussion of how the industrial court was influenced by International Labour Organisation instruments in the development of its jurisprudence dealing with unfair dismissals.

15

Brassey in Brassey et al The New Labour Law 170-171.

16

Cameron ibid 234. Le Roux and Van Niekerk Law of Unfair Dismissal 31-32 point out that the industrial court has regarded itself as bound by these instruments in at least three decisions, namely Midde-Vrystaatse Suiwel Koöperasie v FBWU (16 June 1989 NH 11/2/1877, unreported); NAAWU v Pretoria Precision Castings (1985) ILJ 369 (IC); Olivier v AECl Plofstowwe & Chemikalieë, Bethal (1988) 9 ILJ 1052 (IC).

Le Roux and Van Niekerk explain that this view rests on the premise that the conventions and recommendations of the International Labour Organisation are part of international customary law and can thus be applied by our courts. According to them, it is at least debatable whether all or some of the provisions of, for instance, the Convention concerning Termination of Employment at the Initiative of the Employer¹⁷ and the Recommendation concerning Termination of Employment at the Initiative of the Employer,¹⁸ at this stage, form part of our law. Before a conclusion can be drawn in this regard, further information as to the acceptance of these instruments by the international community would be necessary.¹⁹

The new Constitution of South Africa²⁰ may influence the future use of conventions and recommendations. The Constitution explicitly states that the rules of customary international law binding on the Republic will form part of our law unless they are inconsistent with the Constitution or an Act of Parliament.²¹ Provision is also made for the continuation of international agreements which were vested in or binding on the Republic immediately before the commencement of the new Constitution.²²

Furthermore, the Constitution provides that when a court is interpreting the provisions of the Chapter on Fundamental Rights, it must, where applicable, have

17

158 of 1982.

18

166 of 1982.

19

Le Roux and van Niekerk Law of Unfair Dismissal 32.

20

Act 200 of 1993.

21

S 231(4).

22

S 231(1).

regard to public international law applicable to the protection of rights entrenched in this Chapter.²³

4.4 CONVENTIONS AND RECOMMENDATIONS WHICH MAY BE RELEVANT TO THE DOMESTIC SERVICE SECTOR

While this study does not lay claim to being comprehensive, the following conventions and recommendations will be discussed briefly as having possible relevance to the domestic service sector. With regard to the domestic service sector, the conventions and recommendations considered may be loosely categorised as those excluding domestic workers; those specifically applicable to domestic workers; those of general application which do not allow for exclusions; those of general application which make provision for the exclusion of certain categories of workers; and those of general application which specifically make provision for the possible exclusion of domestic workers.

4.4.1 Conventions which exclude domestic workers

The exclusion of domestic workers from the provisions of certain conventions and recommendations may be either implicit or explicit. Domestic workers are most often excluded by implication because domestic service does not appear to fall within the ambit of the definition of the sector to be covered. So, for instance, domestic workers will implicitly be excluded from the Convention concerning the

23

S 35(1). Fierce debate is raging regarding the horizontal and vertical application of Ch 3. The majority view appears to hold that this Chapter on fundamental rights has, by and large, only vertical application. See, in general, Brassey MSM Labour Relations Under the New South African Constitution; Naude F and Terblanche V 'The Interim Constitution: Effect on Private Litigation and our Common Law' 1994 De Rebus 609; Mureinik E 'A Bridge to Where? Introducing the Interim Bill of Rights' 1994 SAJHR 10.

Regulation of Hours of Work in Commerce and Offices,²⁴ because domestic service is not performed in commercial or trading establishments as defined.²⁵ So too, the Convention concerning the Application of the Weekly Rest Period in Industrial Undertakings²⁶ and the Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-Eight in the Week²⁷ will not apply because domestic service is not performed in a workplace which may be defined as an industrial undertaking.²⁸

4.4.2 Conventions which apply specifically to domestic workers

Only two conventions could be found which appear to be aimed specifically at domestic workers. As will be explained, both of these allow for the exclusion of certain categories of employees. Neither of them has been ratified by South Africa or any other Southern African state.²⁹

4.4.2.1 Convention concerning Sickness Insurance for Workers in Industry and Commerce and Domestic Servants³⁰

24
30 of 1930.

25
Art 1.

26
14 of 1921.

27
1 of 1919.

28
See Art 1 for the definition of the term 'industrial undertaking'.

29
Tajman International Labour Standards in Southern Africa Annexure 3.

30
24 of 1927.

This convention provides for the setting up of a system of compulsory sickness insurance.³¹ It is expressly stated that this convention also applies to domestic workers.³² Exceptions may, however, be made in respect of, *inter alia*, temporary employment which lasts for less than a specified period, casual employment or occasional employment.³³ Exceptions may also be made where the employee is a member of the employer's family.³⁴

4.4.2.2 Convention concerning Compulsory Widows' and Orphans' Insurance for Persons Employed in Industrial or Commercial Undertakings, in the Liberal Professions, and for Outworkers and Domestic Servants³⁵

The aim of this convention is to ensure that member countries set up or maintain a scheme of compulsory widows' and orphans' insurance which will be based on provisions at least equivalent to those contained in this convention.³⁶ It is especially provided that domestic workers will be covered by this convention.³⁷ Exceptions may be made if deemed necessary where, *inter alia*, the employee is a

31

Art 1.

32

Art 2(1).

33

Art 2(2)(a).

34

Art 2(3). See also the Convention concerning Medical Care and Sickness Benefits 130 of 1969.

35

39 of 1933.

36

Art 1.

37

Art 2(1).

member of the employer's family³⁸ or the employee is a domestic worker employed in the household of agricultural employers.³⁹

4.4.3 Conventions of general application which do not allow for exclusions

The wording of certain conventions makes it clear that general application is intended. Furthermore, these conventions do not make any provision for certain categories of workers to be excluded from their provisions.

4.4.3.1 Convention concerning Freedom of Association and Protection of the Right to Organize⁴⁰

This convention applies to '... workers and employers, without distinction whatsoever ...'.⁴¹ The wording is thus general enough to cover domestic workers as well as their employers. The convention provides that all employees and employers will have the right to establish and join organisations of their own choosing without previous authorisation. Such organisations must not be liable to be dissolved or suspended by administrative authority.⁴²

This convention has not yet been ratified by South Africa, but probably will be in

38

Art 2(2)(e).

39

Art 2(2)(j).

40

87 of 1948.

41

Art 2.

42

See, in general, Arts 2-10.

the near future. Lesotho and Swaziland are the only two countries in Southern Africa to have ratified this convention.⁴³ It is of special importance for two reasons. First, it provides workers with the means to defend their interests. Secondly, it is essential to the tripartite functioning of the International Labour Organisation.

4.4.3.2 Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value⁴⁴

This convention provides that each member country must, by appropriate means, promote and ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.⁴⁵ The wording is clearly wide enough to allow domestic workers to be covered by the provisions of this convention. South Africa has not ratified this convention. However, it has been ratified by Angola, Mozambique, Swaziland, Zambia, Zimbabwe and Malawi.⁴⁶

4.4.3.3 Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities⁴⁷

43

Tajgman International Labour Standards in Southern Africa Annexure 3.

44

100 of 1951.

45

Art 2(1). See Art 2(2) for a list of means by which this principle may be applied. See, in general, the Recommendation concerning Equal Remuneration for Men and Women Workers for Work of Equal Value 90 of 1951.

46

Tajgman International Labour Standards in Southern Africa Annexure 4.

47

156 of 1981.

The provisions of this convention apply to certain persons, namely men and women workers with responsibilities in relation to their dependent children, where such responsibilities restrict their possibilities of preparing for, entering into, participating in or advancing in economic activity.⁴⁸ However, it is specifically stated that this convention applies to all branches of economic activity and all categories of workers,⁴⁹ and therefore it should also apply to domestic workers (with family responsibilities).

The convention places an obligation on each member state to make it an aim of national policy to enable persons with family responsibilities to engage in employment without being subject to discrimination and without conflict between their employment and family responsibilities.⁵⁰ In order to achieve this aim the convention provides, for instance, that all measures compatible with national conditions must be taken to develop or promote community services, public or private, such as childcare and family services and facilities.⁵¹ It is provided, inter alia, that family responsibilities will not, as such, constitute a valid reason for termination of employment.⁵² This convention has not been ratified by South Africa or any other country in Southern Africa.⁵³

48

Art 1(1).

49

Art 2.

50

Art 3.

51

Art 5.

52

Art 8. Family responsibilities are often cited as a reason for termination of employment in the domestic service sector. See in general, Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities 165 of 1981.

53

Tajgman International Labour Standards in Southern Africa Annexure 3.

4.4.4 Conventions of general application which allow for the exclusion of certain categories of employees

The majority of the conventions examined fall under this category. So, for instance, a convention of general application may allow for the possible exclusion of persons employed on a casual basis. A considerable percentage of domestic workers is made up of casual workers who could therefore be excluded from its provisions. Furthermore, exclusion from the provisions of a convention may be allowed where an employee is employed in an undertaking in which only members of the same family are employed. Given the unique characteristics of the domestic service sector, it may well be that domestic workers will, in practice, fall under this category. As has been explained in Chapter two, the employer-employee relationship in this sector is often disguised by false claims of family ties.⁵⁴ Finally, agricultural workers are often specifically excluded from the provisions of a convention. Bearing in mind that the Basic Conditions of Employment Act⁵⁵ defines persons who perform domestic service on farms as agricultural workers and not as domestic workers,⁵⁶ problems may arise in this regard.

A convention may also suggest that a particular branch of economic activity, in respect of which special problems of a substantial nature arise, may be excluded. Given its unique character,⁵⁷ domestic service could well fall into this category.

54

See eg 2.3 *infra*.

55

3 of 1983.

56

S 1.

57

See eg 2.4 *supra*.

4.4.4.1 Convention concerning Minimum Age for Admission to Employment⁵⁸

The aim of this convention is to establish a national policy designed to ensure the abolition of child labour and to raise the minimum age for admission to employment to a level which allows the fullest physical and mental development of young persons.⁵⁹ This convention provides that a ratifying state must specify a minimum age for admission to employment or work within its territory. No person under this age will be admitted to employment or work in any occupation.⁶⁰ The age so specified must not be less than the age of completion of compulsory schooling and, in any case, must not be less than fifteen years.⁶¹

There are certain exceptions to this general prohibition. So, for instance, limited categories of employment or work, in respect of which special and substantial problems of application arise, may be excluded.⁶² Once again, given the unique characteristics of domestic service, exclusion is a definite possibility. The Convention concerning the Age for Admission of Children to Non-Industrial Employment 60 of 1937, which was revised by the 1973 Convention, made specific provision for domestic work in the family, performed by members of that family, to be excluded from its provisions.⁶³ Convention 138 of 1973 has not been

58

138 of 1973.

59

Art 1. See in general Delpont E Child Labour in South Africa - a Sociological and Legal Perspective: paper delivered at first International Conference on Children's Rights Johannesburg 30-31 May 1993.

60

Art 2(1).

61

Art 2(3).

62

Arts 3-6.

63

Convention 60 of 1937 Art 1(3)(b). See, in general, Recommendation concerning Minimum Age for Admission to Employment 147 of 1937.

ratified by South Africa. Zambia is the only Southern African country to have ratified this Convention. Convention 60 of 1937 was not ratified by any country in Southern Africa.⁶⁴

4.4.4.2 Convention concerning Benefits in the Case of Employment Injury⁶⁵

This convention provides for employment injury benefits to be granted to all employees and, in respect of the death of the breadwinner, to prescribed categories of beneficiaries.⁶⁶ It applies to all employees and thus, by implication, also to domestic workers. Exceptions may be made as deemed necessary in respect of, inter alia, persons whose employment is of a casual nature⁶⁷ and members of the employer's family living in his/her house, in respect of their work for him/her.⁶⁸

The Convention concerning Workmen's Compensation for Accidents 17 of 1925, which was revised by Convention 121 of 1964, applied to all employees employed by any enterprise, undertaking or establishment of whatsoever nature, whether public or private.⁶⁹ Exceptions were, however, allowed in respect of, inter alia, persons whose employment was of a casual nature or members of the employer's

64

Tajgman International Labour Standards in Southern Africa Annexures 3 and 4.

65

121 of 1964.

66

Art 4(1).

67

Art 4(1)(2)(9).

68

Art 4(1)(2)(c).

69

Convention 17 of 1925 Art 2(1).

family who worked on his behalf and who lived in his house.⁷⁰ No Southern African country, including South Africa, has ratified Convention 121 of 1964. Convention 17 of 1925 was ratified by Mozambique, Zambia and Angola.⁷¹

4.4.4.3 Convention concerning Termination of Employment at the Initiative of the Employer⁷²

This convention provides that the services of an employee may not be terminated unless there is a valid reason for the termination relating to the capacity or conduct of the employee or based on the operational requirements of the workplace.⁷³ The services of an employee may not be terminated for reasons related to his conduct or performance before he is provided with an opportunity to defend himself against the allegations made.⁷⁴ Where the employee feels that his employment has been unjustifiably terminated, he is entitled to appeal against that termination to an impartial body such as a court or arbitrator.⁷⁵ Provision is also made for a severance allowance to be paid to the employee.⁷⁶

This convention applies to all branches of economic activity and to all employed

70
Art 2(2).

71
Tajgman International Labour Standards in Southern Africa Annexure 4.

72
158 of 1982.

73
Art 4.

74
Art 7.

75
Art 8.

76
Art 12.

persons.⁷⁷ Provision is, however, made for the exclusion of certain categories of employees from all or some of the provisions of the convention.⁷⁸ These categories of employees include employees engaged under a contract of employment for a fixed period⁷⁹ and workers engaged on a casual basis for a short period.⁸⁰ This convention has not been ratified by any Southern African country, including South Africa.⁸¹

4.4.4.4 Convention concerning Minimum Wage Fixing with Special Reference to Developing Countries⁸²

This convention provides that each member of the International Labour Organisation which ratifies this convention, must establish a system of minimum wages which covers all groups of wage earners whose terms of employment are such that coverage would be appropriate.⁸³ The question will thus be whether the terms of employment of domestic workers are such that coverage would be appropriate.

77

Art 2(1).

78

Art 2(2).

79

Art 2(2)(9).

80

Art 2(2)(c). See also the Recommendation concerning Termination of Employment at the Initiative of the Employer 166 of 1982. For a discussion of the application and scope of this convention and recommendation, see Le Roux and Van Niekerk Law of Unfair Dismissal 32-33.

81

Tajgman International Labour Standards in Southern Africa Annexure 4.

82

131 of 1970.

83

Art 1(1).

The groups of wage earners to be covered will be determined by the competent authority in each country, after full consultation with the representative organisations of employers and employees concerned, where such organisations exist.⁸⁴ If a member decides that certain groups of wage earners are not to be covered by this convention, reasons must be furnished for not covering them.⁸⁵ Given the unique characteristics of the domestic service sector, there might be some degree of hesitance about allowing domestic workers to be covered by the provisions of this convention. South Africa has not ratified this convention, but Swaziland, Zambia and Tanzania have.⁸⁶

4.4.4.5 Convention concerning Occupational Safety and Health and the Working Environment⁸⁷

This convention provides for the formulation, implementation and periodical review of a coherent national policy on occupational safety, occupational health and the working environment.⁸⁸

This convention applies to all branches of economic activity including, presumably,

84

Art 1(2).

85

Art 2. See also the Recommendation concerning Minimum Wage Fixing with Special Reference to Developing Countries 135 of 1970, which further explains the purpose of minimum wage fixing; criteria for determining the level of minimum wages; coverage of the minimum wage fixing system; minimum wage fixing machinery; and adjustments of minimum wages.

86

Tajman International Labour Standards in Southern Africa Annexures 3 and 4.

87

155 of 1981.

88

Art 4.

domestic service.⁸⁹ Provision is, however, made for the exclusion from its application of limited categories of workers in respect of which special problems of a substantial nature arise. The unique working environment of the domestic worker could possibly pose a problem in this regard.⁹⁰ No country in Southern Africa, including South Africa, has ratified this convention.⁹¹

4.4.5 Conventions of general application which make specific provision for the possible exclusion of domestic workers

A number of conventions of general application provide for an exception from the application of the convention to be made in respect of domestic work for wages in private households and persons employed in domestic service.

4.4.5.1 Convention ensuring Benefits or Allowances to the Involuntarily Unemployed⁹²

The aim of this convention is to establish and maintain a scheme which ensures that a person who is involuntarily unemployed receives a benefit.⁹³ This convention

89

Art 1(1).

90

Art 2. See also the Recommendation concerning Occupational Safety and Health and the Working Environment 164 of 1981.

91

Tajgman International Labour Standards in Southern Africa Annexure 4.

92

44 of 1934.

93

This benefit may take the form of a payment related to contributions paid in respect of the beneficiary's employment or an allowance or a combination of a benefit and an allowance. Art 1(1).

applies to 'all persons habitually employed for waged salary'.⁹⁴ Provision is specifically made for persons employed in domestic service to be excluded from the application of this convention, if deemed necessary.⁹⁵ No country in Southern Africa, including South Africa, has ratified this convention.⁹⁶

4.4.5.2 Convention concerning the Protection of Wages⁹⁷

This convention provides, *inter alia*, for wages payable in money to be paid only in legal tender.⁹⁸ Partial payment of wages in the form of allowances in kind may be authorised by national laws,⁹⁹ provided the allowances are appropriate for the personal use of the worker and the value attributed to such allowances is fair and reasonable.¹⁰⁰ The convention also places restrictions on deductions which may be made from wages.¹⁰¹ It applies to all persons to whom wages are paid or payable, and would therefore include domestic workers in its scope. However, provision is made for the exclusion of certain categories of persons such as those

94

Art 2(1).

95

Art 2(2)(a). See also the Recommendation concerning Unemployment Insurance and Various Forms of Relief for the Unemployed 44 of 1934.

96

Tajman International Labour Standards in Southern Africa Annexure 4.

97

95 of 1949.

98

Art 3(1).

99

Art 4(1).

100

Art 4(2).

101

Arts 8-9.

employed in domestic service.¹⁰² This convention has been ratified by Swaziland, Zambia and Tanzania, but not by South Africa.¹⁰³

4.4.5.3 Convention concerning Maternity Protection (revised 1952)¹⁰⁴

This convention provides, *inter alia*, that a woman will be entitled to maternity leave for a period of at least twelve weeks.¹⁰⁵ A woman who is absent on maternity leave will be entitled to receive cash and medical benefits.¹⁰⁶ A woman who nurses her child will be entitled to interrupt her work for this purpose at times prescribed by national laws.¹⁰⁷ Interruption of work for the purpose of nursing is to be counted as working hours.¹⁰⁸ An employer may not give notice to a woman while she is absent from work on maternity leave. Notice of dismissal may not be given at such a time that the notice would expire during her maternity leave.¹⁰⁹

This convention applies to women employed in industrial undertakings and in non-

102

Art 2. See also the Recommendation concerning the Protection of Wages 85 of 1949 which further deals with deductions from wages, periodicity of wage payments and notification to workers of wage conditions.

103

Tajman International Labour Standards in Southern Africa Annexures 3 and 4.

104

103 of 1952

105

Art 3(1).

106

Art 4.

107

Art 5(1).

108

Art 5(2).

109

Art 6.

industrial and agricultural occupations.¹¹⁰ For purposes of this convention, the term 'non-industrial undertaking' specifically includes women who perform domestic work for wages in private households.¹¹¹ However, any member of the International Labour Organisation which ratifies this convention may provide for exceptions from the application of the convention in respect of, inter alia, domestic work performed for wages in private households.¹¹²

Zambia is the only Southern African country to have ratified this convention.¹¹³

4.5 CONCLUSION

It is interesting to note that none of the Conventions which has been discussed as having possible relevance to the domestic service sector has been ratified by South Africa.¹¹⁴ In summary, the conventions considered could theoretically have the following impact if effectively implemented in the domestic service sector:

- First, the two conventions which apply specifically to domestic workers may provide much needed social security in the form of a system of compulsory sickness insurance and a scheme of compulsory widows' and orphans'

110

Art 1(1).

111

Art 1(2)(h).

112

Art 7(1)(c). See also the Recommendation concerning Maternity Protection 95 of 1952 which further provides for maternity benefits, facilities for nursing mothers and infants, as well as the protection of the health of employed women during the maternity period.

113

Tajgman International Labour Standards in Southern Africa Annexures 3 and 4.

114

For that matter, very few of these conventions have been ratified by other countries in Southern Africa.

insurance.¹¹⁵

- Secondly, those conventions of general application which do not provide for exclusions would amplify the common law and constitutional right to freedom of association. These conventions would also provide substance to the equality clause contained in Chapter three of the Constitution.¹¹⁶
- With regard to those conventions of general application which provide for the exclusion of certain categories of workers, the provisions establishing a minimum age for admission to employment, as already contained in the Basic Conditions of Employment Act¹¹⁷ and the Child Care Act,¹¹⁸ would be amplified. Much needed social security in the form of benefits in the case of employment injury and a coherent national policy on occupational safety, occupational health and the working environment would be provided. At present, domestic workers are not covered by the provisions of the Labour Relations Act¹¹⁹ and therefore a valid reason for their dismissal is not required. The Convention concerning Termination of Employment at the Initiative of the Employer would thus introduce the element of a valid reason for dismissal.
- As yet, domestic workers are not covered by the provisions of the Wage

115

See 4.4.2 supra.

116

See 4.4.3 supra.

117

3 of 1983 s 17.

118

74 of 1983 s 52A.

119

28 of 1956.

Act¹²⁰ and no minimum wages are in force in the domestic service sector. The Convention concerning Minimum Wage Fixing might strengthen the argument for the introduction of minimum wages in the domestic service sector, since this convention advocates the widest possible coverage.¹²¹

- Finally, those conventions of general application which specifically provide for the exclusion of domestic workers would provide social security in the form of benefits for the involuntarily unemployed as well as maternity protection.¹²²

Three points of concern may be expressed with regard to the possible application of the above-mentioned conventions to the domestic service sector in general:

- One of the main problems in laying down international standards relates to the diversity of economic, social and political conditions, including the general standard of living and quality of life in different countries. The International Labour Organisation takes this into account by making provision in conventions for exclusions or adjustments or by laying down special standards for certain sectors.¹²³ It would appear that most of the conventions considered allow, implicitly or explicitly, for the possible exclusion of domestic workers or certain categories of domestic workers. This may point to the recognition by the International Labour Organisation of the unique characteristics of the domestic service sector. More specifically, it may point to the realisation that it would be extremely difficult

120

5 of 1957.

121

See 4.4.4 supra.

122

See 4.4.5 supra.

123

International Labour Office International Labour Standards 3-6.

to regulate fair employment standards in this sector.

- Furthermore, although the social security measures provided for in the above-mentioned conventions could greatly contribute towards relieving the plight of domestic workers, the weak economy may not allow for their effective implementation. Tajgman is more optimistic in this regard and points out that to the extent that economic strength is a factor in the implementation of standards, Southern Africa is the richest sub-region on the continent. He appears confident that the sub-region has the institutional capacity to facilitate the implementation of international labour standards.¹²⁴

A final concern is that the conventions considered may not necessarily satisfy the specific requirements of the domestic service sector. So, for instance, the needs of live-in domestic workers will require special attention. The fact that so many domestic workers are employed on a casual basis will also require special consideration. All things considered, it appears that the International Labour Organisation has failed to establish a structure of fair employment standards to cover the entire domestic service sector and to meet the particular needs of the domestic worker.

A specific convention¹²⁵ concerning the employment standards for domestic workers may prove more useful. Such a convention should be universal in character yet retain some degree of flexibility to accommodate the special needs of countries at different stages of development.

Initially, it may be preferable to provide for the needs of domestic workers in a recommendation, until such time as the subject is considered ripe for a convention.

124

Tajgman International Labour Standards in Southern Africa 3-4.

125

Much like the Conventions concerning Seafarers, Fishermen, Migrant Workers, etc.

Standards for domestic workers at first will be more or less exploratory. In the domestic service sector, a recommendation may be successfully used to set targets for the development of standards which, if contained in a convention, would attract few ratifications in the foreseeable future. Despite the enormous challenge posed by the drafting of such a convention, it may be a possibility worth exploring.

CHAPTER 5

INTERNATIONAL PERSPECTIVE - A COMPARATIVE STUDY

5.1 INTRODUCTION

Often the failure of a legal system to address a specific problem adequately leads one to inquire whether perhaps other legal systems may not have produced a better solution.¹ The comparative method is ideally suited to a study of this nature, as the improvement of national law or law reform has long been recognised as an important aim of comparative law.²

Because of the distinctive character of the domestic service sector in South Africa, it is unlikely that the complete solution to the present problems will be found in the legislation of other countries. A comparative study of labour legislation regarding the position of domestic workers in other countries could, however, enhance one's understanding of and insight into, the various methods which may be employed to regulate the domestic service sector.

For purposes of this study, the legal position of domestic workers in the United Kingdom, the United States of America, Norway, New Zealand, Zimbabwe, Swaziland, Nigeria, Uganda, Botswana, Tanzania, Egypt and the Seychelles has been considered.

5.2 HOW ARE DOMESTIC WORKERS COVERED BY LABOUR LEGISLATION?

1

Zweigert K and Kötz H Introduction to Comparative Law (trans Tony Weir) (Oxford 1987) 36.

2

Sir Henry Maine stated that the main function of comparative jurisprudence was to facilitate legislation and the practical improvement of the law. The use of comparative method for the purpose of law reform has also been recognised by writers such as Zweigert and Kötz and David and Brierley. It should be stated that comparative law is not a branch of the law as such, but rather a method of study and research: Hosten WJ et al Introduction to South African Law and Legal Theory (Durban 1977) XVII 3 1 1 (ii).

It is generally apparent that statutory regulation of employment and general labour relations in the private household sector displays great diversity. In Egypt,³ domestic workers are specifically excluded from labour legislation. In Norway,⁴ domestic workers are covered by a separate Act. In Zimbabwe,⁵ Swaziland,⁶ Botswana⁷ and Nigeria,⁸ special regulations regarding domestic workers are made in terms of existing labour legislation.

In the United States of America⁹ and the United Kingdom,¹⁰ special provisions regarding domestic workers are inserted into existing labour legislation. In New Zealand,¹¹ Uganda,¹² Tanzania¹³ and the Seychelles,¹⁴ domestic workers are

3

Domestic workers in Egypt are excluded from the definition of 'employee': Labour Code 137 of 1981 s 3(b).

4

Working Conditions for Domestic Servants Act of 1963.

5

Labour Relations (Domestic Workers) Employment Regulations of 1992.

6

Regulation of Wages (Domestic Employees) Order of 1985.

7

Employment (Domestic Employees) Regulations of 1984.

8

Labour Decree 21 of 1974.

9

Fair Labor Standards Act of 1938.

10

Employment Protection (Consolidated) Act of 1978; Race Relations Act of 1976; Sex Discrimination Act of 1975; Health and Safety at Work Act of 1974.

11

Minimum Wage Act 115 of 1983; Equal Pay Act 118 of 1972.

12

Employment Decree 4 of 1975.

13

Employment Ordinance (Cap 366); Security of Employment Act 62 of 1964; Severance Allowance Act 57 of 1962.

covered by labour legislation of general application. Provision is made, however, for the exclusion of domestic workers from certain sections of these acts.

Most of the legislation examined attempts to regulate the basic conditions of employment of domestic workers (and other workers), rather than providing for access to collective bargaining mechanisms or industrial courts. The provisions of the legislation examined may be summarised as follows.

5.2.1 Definitions

In most countries the definition of 'employee' used in labour legislation is wide enough to cover domestic workers.¹⁵ So, for instance, the Fair Labor Standards Act of the United States of America defines an 'employee' as 'any individual employed by an employer'.¹⁶ However, domestic workers are sometimes specifically excluded from the definition of 'employee'.¹⁷

In certain countries,¹⁸ the term 'domestic worker' is specifically defined. Such definitions are normally rather detailed. In Uganda, for instance, a 'domestic servant' is defined as 'any person employed in or about a private residence, or lodging house, or hotel, either wholly or partly, as cook, house servant, waiter,

14

Employment Act of 1985. This Act repeals the Control of Recruitment and Emigration of Domestic Service Act (Cap 167) and the Employment of Servants Act (Cap 170) 595.

15

See eg the Minimum Wage Act 115 of 1983 s 2 (New Zealand).

16

Fair Labor Standards Act of 1983 s 203.

17

See eg Labour Code 137 of 1981 s 3(b) (Egypt).

18

See eg Working Conditions for Domestic Servants Act of 1963 s 1 (Norway); Labour Relations (Domestic Workers) Employment Regulations, 1992 reg 3 (Zimbabwe) and Labour Decree 21 of 1974 s 90 (Nigeria).

butler, nurse, valet, barman, footman, chauffeur, washerman, gardener, groom or watchman'.¹⁹

5.2.2 Minimum wages

5.2.2.1 General

Some countries make specific provision for the establishment of a minimum wage for domestic workers.²⁰ In these countries, it is common practice to establish different wage levels for different classes of domestic workers.²¹ In Zimbabwe, for instance, wage levels are linked to the classification of operations and occupations in grades.²²

Exemption from minimum wage provisions is sometimes granted in respect of

19

Employment Decree 4 of 1975 s 66. Much the same definition applies in respect of domestic workers in Tanzania: Regulation of Wages and Terms of Employment Order, 1992 s 2.

20

See eg the Fair Labor Standards Act of 1983 s 206(f) (United States of America).

21

See eg Regulation of Wages (Domestic Employees) Order, 1985 s 1 read with Sch I, where ten different classes of domestic workers are specified (Swaziland).

22

In 1994, the monthly minimum wage levels for domestic workers were set as follows by the Labour Relations (Domestic Workers) Employment (Amendment) Regulations (No 3):

Grade 1: Yard/garden work - Z\$ R202,41 per month or 94c an hour;

Grade 2: Cook/Housekeeper with or without grade 1 duties Z\$ R202,42 per month or 95c an hour;

Grade 3: Baby-minder or disabled/aged minder (with or without grade 1 or 2 duties) - Z\$ 206,53 per month or 96c an hour

(Z\$ 1 is equal to approximately ZAR 2,20).

certain categories of domestic workers.²³ In the United States of America, for instance, the Fair Labor Standards Act excludes casual employees, who provide babysitting or companionship services, from the provisions regulating minimum wages.²⁴

In certain countries such as Tanzania, domestic workers are covered by regulations which provide for a national minimum wage.²⁵

Minimum wage levels are revised on a regular basis. In addition to a minimum wage, domestic workers in some countries are entitled to minimum allowances, awards or benefits.²⁶ So, for instance, domestic workers in Zimbabwe are entitled to minimum monthly allowances in respect of accommodation, transportation, lights and fuel.²⁷ In some countries,²⁸ special provisions ensure the protection of wages. Provisions relating to the keeping of wage records which, for example, reflect the rates of wages and the day on which wages are to be paid, are common.²⁹

23

See also 3.4 *infra*.

24

Fair Labor Standards Act of 1983 s 213(a)(15).

25

Regulation of Wages and Terms of Employment Order, 1992 s 3 read with Sch I. In 1993 the minimum wage level was set at Tsh 5 000 per month (plus-minus ZAR 35). The Hotel and Domestic Workers Union is presently demanding Tsh 23 000 per month (author's correspondence with Secretary- General of Hotel and Domestic Workers Union).

26

See eg Regulation of Wages and Terms of Employment Order, 1992 s 10 (Tanzania).

27

Labour Relations (Domestic Workers) Employment Regulations, 1992 s 54 and s 6 read with Sch II and The Labour Relations (Domestic Workers) Employment (Amendment) Regulations 1994 (No 3). The minimum allowances for domestic workers not provided with full accommodation are set at Z\$ 18,15 for accommodation, Z\$ 10,89 for transport, Z\$ 4,54 for lights, Z\$ 7,26 for fuel and Z\$ 4 for water.

28

See eg Employment Decree 4 of 1975 ss 29-37 (Uganda); Labour Decree 21 of 1974 ss 1-6 (Nigeria).

In Botswana, domestic workers are not covered by the minimum wage regulations.³⁰

5.2.2.2 Deductions from wages for rations, board and lodging

Deductions of this kind appear to be dealt with in one of three ways:

- No deductions from wages in respect of rations, board and lodging are allowed. In Swaziland, for instance, if an employer requires his domestic worker to occupy accommodation provided by the employer as part of his conditions of employment, such accommodation must be provided free of charge to the domestic worker.³¹
- Legislation provides for specific values to be allocated to board and lodging. These values may then, with certain provisions, be deducted from the wages.

In New Zealand, for instance, the cash value placed on board and lodging by legislation or agreement may be deducted from wages. If the cash value is not fixed in such a manner, the deduction in respect thereof may not exceed such an amount as will reduce the worker's wage by more than

29

See eg Employment Act, 1985 s 40 (Seychelles); Labour Relations (Domestic Workers) Employment Regulations, 1992 s 10(2) Zimbabwe.

30

Stewart JE and Armstrong A (eds) The Legal Situation of Women in Southern Africa (Harare 1990) 31-32. In a report entitled 'Labour Productivity in the Household Sector', it was recommended that the Department of Labour and Social Security carry out a study regarding the problem of domestic workers, including the feasibility of extending the minimum wage to them.

31

Regulation of Wages (Domestic Employees) Order, 1985 s 14.

fifteen percent for lodging or five percent for board.³² This provision applies to all workers, including domestic workers.

In Uganda a worker may, as part of his remuneration, receive food, a dwelling place or such other allowances or privileges as may be customary. The value attributable to such allowances or privileges may not exceed the cost to the employer of providing the same.³³ This provision applies to all workers, including domestic workers.

Deductions in respect of board and lodging are regulated by a written agreement between employer and employee.

In Zimbabwe, for instance, it is optional for the employer to provide, and the domestic worker to accept, rations. Only an employer paying an employee above the minimum wage may, with the consent of the employee, reduce the wage according to the cost of the rations. All employees, including domestic workers, are entitled to free lodging, transportation to and from work, lights and fuel for cooking or to such minimum allowances as specified by legislation.³⁴

5.2.3 Hours of work

32

Employment Wage Act, 1983 s 7.

33

Employment Decree 4 of 1975 s 30.

34

Labour Regulations (Domestic Workers) Employment Regulations, 1992 reg 6 read with Sch II. See footnote 27 above for the minimum allowances set for 1994.

5.2.3.1 Maximum hours of work

In most countries, provision is made in respect of domestic workers for maximum hours of work of between forty and fifty hours per week and eight to ten hours per day.

In the United States of America, the Fair Labor Standards Act provides that domestic workers may not work for more than forty hours per week.³⁵ Live-in domestic workers are, however, exempted from this provision.³⁶

In Norway, the maximum hours of work for domestic workers are nine hours per day or fifty hours per week. This does not compare favourably to the forty-hour work week prescribed for all other workers.³⁷

In Zimbabwe, the maximum hours of work for domestic workers as well as other workers, are forty-nine hours per week or nine-and-a-half hours per day. A domestic worker residing outside the premises of the employer may not be required to work beyond 19:00.³⁸ In Swaziland the maximum hours of work for domestic workers are forty-eight hours per week. The daily maximum hours are not fixed - a maximum working day of eight hours is suggested, but the employer and domestic worker are free to negotiate on this issue.³⁹

35

S 213(a)(15).

36

S 213(b)(21).

37

Domestic Servants Act of 1964 s 4.

38

Labour Relations (Domestic Workers) Employment Regulations, 1992 reg 5. As amended by the Labour Relations (Domestic Workers) Employment Regulations 1994 reg 6.

39

Regulation of Wages (Domestic Employees) Order 1985 s 6.

The maximum hours of work for domestic workers in Botswana are two-hundred-and-forty hours in four weeks.⁴⁰ This compares unfavourably to the maximum forty-eight hours of work per week prescribed for other workers.

5.2.3.2 Overtime and payment for overtime worked

Not all countries place a limit on the hours of overtime that may be worked or require that the employee agree to work overtime. However, most countries provide for special rates of payment with regard to overtime worked. In Norway, higher rates of pay are required for overtime worked.⁴¹ Domestic workers under the age of eighteen years may not be required to work overtime or mind the house or the children more than three times a week and not more than ten times in the course of four weeks.⁴²

In Zimbabwe a distinction is drawn between different 'types' of overtime. For overtime worked during an ordinary week, an employee is entitled to one-and-a-half times his current hourly wage; for overtime worked during the stipulated weekly day-off, the employee is entitled to double his current hourly wage; for overtime worked on a national holiday, the employee is entitled to her current daily wage and overtime wages.⁴³

40

Employment (Domestic Employees) Regulations, 1984 reg 2(b). See also Stewart and Armstrong (eds) The Legal Situation of Women in Southern Africa 31.

41

Domestic Servants Act of 1964 s 7. Sverdrup points out that, contrary to the provisions of s 7, it is not normal practice to pay for overtime in the case of domestic workers: Sverdrup T Employees in Private Homes Women's Law Working Paper No 33 (Oslo 1990) 13-15.

42

Domestic Servants Act of 1964 s 9.

43

Labour Relations (Domestic Workers) Employment Regulations, 1992 reg 8.

In the Seychelles the Minister of Labour may, in the case of domestic workers as well as other employees, make regulations prescribing the maximum hours of overtime to be worked and the extra rates of payment or time off in lieu of overtime worked.⁴⁴

There are, however, some countries, for example Swaziland, where it appears that no limit is set on the hours of overtime to be worked by domestic workers. The employer and employee must, however, agree on the overtime to be worked. A rate of one-and-a-half times the normal rate of wages is payable for such overtime.⁴⁵

In Tanzania, no limit appears to be placed on the hours of overtime to be worked. A domestic worker employed for the aggregate number of working hours exceeding nine hours on any day, will be entitled to be paid one-and-a-half times her hourly wage in respect of every hour or part of an hour worked in excess of nine hours.⁴⁶

5.2.3.3 Rest periods and meal intervals

In most countries provision is made for a rest period after five to seven hours of continuous work.

In Uganda all employees, including domestic workers, who work for longer than six hours in any day, must be given at least one break totalling at least thirty minutes, so arranged that the employee does not work continuously for more than five hours. Hours of work and breaks must be so arranged as not to require an

44

Employment Act, 1985 s 46.

45

Regulation of Wages (Domestic Employees) Order, 1985 s 13.

46

Regulation of Wages and Terms of Employment Order, 1992 s 6.

employee's presence at the workplace for more than twelve hours per day.⁴⁷

In Zimbabwe, an employer may not require or permit a domestic worker to work for a continuous period of six-and-a-half hours without a meal-break of at least thirty minutes, a lunch-break of at least one hour and a tea-break of at least fifteen minutes.⁴⁸

In Norway, the meal intervals of domestic workers are included in the hours of work if the domestic worker is not free from all duties and alone at such times, and cannot leave the place of work.⁴⁹

5.2.4 Weekly time off

Provision is made in most countries for a weekly period of rest. In Zimbabwe, a domestic worker is entitled to at least one-and-a-half days off work each week, at least twenty-four hours of which shall be continuous. Where the domestic worker's or employer's religious belief requires that a particular day be a non-working day, the domestic worker may make up the required hours of work on any other mutually acceptable day.⁵⁰

In Swaziland, domestic workers are entitled to one rest day each week; such rest

47

Employment Decree 4 of 1975 s 38.

48

Regulation of Wages and Terms of Employment Order, 1992 s 5(3).

49

Domestic Servants Act of 1964 s 5. Sverdrup Employees in Private Homes 10-11 points out that in reality, domestic workers do not have fixed breaks for meals. In the case of domestic workers responsible for the care of children for the whole day, the gross working hours will be comparable to the law's definition of ordinary working hours.

50

Labour Relations (Domestic Workers) Employment Regulations, 1992 reg 5(4).

day to be fixed by mutual agreement between the domestic worker and his employer.⁵¹

In Norway, domestic workers are entitled to a minimum of two days off during a fortnight.⁵²

In Uganda, domestic workers, like all other workers, are entitled to a weekly rest period of at least twenty-four continuous hours, which must, wherever practicable, include Sundays.⁵³

5.2.5 National holidays

Domestic workers are generally not prohibited from working on public holidays. However, all countries provide for special rates of payment with regard to work done on public holidays. Domestic workers in Zimbabwe are entitled to fully paid leave of absence on national holidays. If an employee consents to working on a national holiday, a higher rate of wages is payable. National holidays may not be set off against regular work days without the employee's consent. The employee is then entitled to at least two days off for each national holiday or half a national holiday worked or a day off for any lesser part of the national holiday worked.⁵⁴

Domestic workers in Swaziland are not prohibited from working on a public holiday, but an additional day's wages are payable if they do work on such a day.

51

Regulation of Wages (Domestic Employees) Order, 1985 s 12.

52

Domestic Servants Act of 1964 s 12.

53

Employment Decree 4 of 1975 s 41.

54

Labour Relations (Domestic Workers) Employment Regulations, 1992 reg 14.

Alternatively, by mutual agreement, the employee may be granted another day off work on full pay at a time suitable to both parties.⁵⁵

In Tanzania, a domestic worker employed on a public holiday other than a Sunday is entitled to twice his hourly wage (in addition to his normal monthly wage) in respect of every hour or part of an hour during which he is employed on such a day.⁵⁶

5.2.6 Annual/holiday/vacation leave

Provisions for holiday leave range from the extremely generous (Tanzania, for example, allows twenty-eight days of paid leave per calendar year) to poor (Nigeria, for instance, provides for only six working days of paid annual leave). Some countries even provide for the payment of additional holiday allowances.

After twelve months of continuous service with an employer, a domestic worker in Swaziland is entitled to twelve working days' paid leave. An employee receives an additional day's wages where a public holiday occurs during the period of annual leave. Where the service of an employee is terminated after a period exceeding twelve months from the date of commencement of service, the employee is paid an amount equal to one day's pay for each month of service during which he has earned, but not taken, annual leave.⁵⁷

In Zimbabwe, domestic workers accrue vacation leave at the rate of one-and-a-half

55

Regulation of Wages (Domestic Employees) Order, 1985 s 10. Public holidays are specified in Sch II of the Order.

56

Regulation of Wages and Terms of Employment Order, 1992, s 7(1). Casual workers are excluded from this provision (s 7(2)).

57

Regulation of Wages (Domestic Employees) Order, 1985 s 7.

working days a month. For this purpose, any portion of a month will be regarded as a full month. In the first year of employment, a domestic worker accumulates normal vacation leave, but may not proceed on such leave during that first year without the consent of the employer. A domestic worker is entitled to her ordinary wages for the period which she is on leave. A domestic worker who has accumulated vacation leave may, with the consent of the employer, elect to be paid in lieu of any vacation leave, or portion thereof, in addition to her current wage, in place of proceeding on such leave. Upon termination of employment, for whatever reason, a domestic worker is entitled to be paid the cash equivalent of the accumulated leave.⁵⁸

In Tanzania domestic workers are, once in every calendar year, entitled to twenty-eight days of paid leave at a rate of seven days in respect of each period of a full three months of service. The domestic worker and his/her employer agree to the time when the leave is to be taken. Leave may be accumulated by agreement of both parties. The domestic worker is entitled to payment in lieu of leave if his/her services cease before he/she has claimed the previous year's entitlement to leave. In cases where, at the commencement of the Order, the domestic worker was entitled to more leave than prescribed, he/she becomes entitled only to the leave prescribed by the provisions of the Order. However, he/she remains entitled to receive pay for the extra leave he/she would otherwise have had over and above the leave provided for in the Order, for as long as he/she continues to be employed by the same employer.⁵⁹ After every two years of continuous service with the same employer, a domestic worker is entitled to a leave allowance of Tsh 1 000 (plus-minus ZAR 6,70).

Workers in Nigeria are, after twelve months of continuous service, entitled to a holiday with full pay of at least six working days or, in the case of persons under

58

Labour Relations (Domestic Workers) Employment Regulations, 1992 reg 13.

59

Regulation of Wages and Terms of Employment Order, 1992 s 10(a) read with s 10(e).

the age of sixteen years, at least twelve working days.⁶⁰

Workers in Uganda are entitled to holidays with full pay at the rate of at least one-and-a-half working days for every completed month of actual service. Holidays may be taken at such time as may be agreed upon between the employer and the employee.⁶¹

5.2.7 Sick leave

Various aspects are taken into account when establishing measures pertaining to sick leave, for example:

- the period of continuous service;
- the actual period of sick leave;
- whether it is paid or unpaid sick leave;
- the period which must elapse before an employer is entitled to terminate the contract; and
- evidence of incapacity or a medical certificate.

After three months' service with an employer, and subject to the production of a medical certificate, a domestic worker in Swaziland is entitled to fifteen working days sick leave on full pay during each period of twelve months employment. Sick leave is not cumulative and may not be carried forward from one year to another. An employer may, in lieu of the medical certificate, accept such other evidence of incapacity as he considers appropriate.⁶²

60

Labour Decree 21 of 1974 s 17.

61

Employment Decree 4 of 1975 s 42.

62

Regulation of Wages (Domestic Employees) Order, 1985 s 8.

In Uganda a domestic worker, like any other employee who is engaged for a period not exceeding one month, is not entitled to pay for the days during which she is absent from duty owing to illness. An employee who has a written contract of service is entitled to receive wages and every other benefit stipulated in the contract of service for the first month of incapacity. If at the end of the second month of incapacity the employee continues to be absent, the employer is entitled to terminate the contract.⁶³

All workers in Nigeria are entitled to twelve working days sick leave in any one calendar year.⁶⁴

In Tanzania, a domestic worker is entitled to generous paid sick leave of up to the following maximum: For up to three months of continuous illness, the domestic worker is entitled to be paid full wages for each month of illness; during the following three months, the domestic worker is entitled to be paid half wages for each month of illness; after six months of continuous illness, employment may be terminated. A domestic worker must, as soon as is reasonably practicable, notify his/her employer of the absence and the reason for it. Furthermore the domestic worker must, if required by the employer, produce a medical certificate obtained from a qualified medical practitioner or any medical practitioner acceptable to the employer.⁶⁵

5.2.8 Maternity leave

The legislation of all the countries considered provides for varying periods of paid or unpaid maternity leave. The mother-to-be often has a choice with regard to when

63

Employment Decree 4 of 1975 s 57.

64

Labour Decree 21 of 1974 s 15.

65

Regulation of Wages and Terms of Employment Ordinance, 1991 s 10(b).

such maternity leave will commence. Of all the countries considered, Zimbabwe was the only one which limited the worker's entitlement to maternity leave with reference to the number of pregnancies.

After nine months of continuous service with an employer, subject to the production of a medical certificate, a domestic worker in Swaziland is entitled to thirteen working days maternity leave on full pay and thereafter without pay.⁶⁶ No limit appears to be placed on the period of unpaid maternity leave.

In Uganda, upon presentation of a medical certificate issued by a qualified medical practitioner, a pregnant woman may stop working four weeks prior to confinement. No woman may be allowed to work during the four weeks following her confinement. Where a woman is on maternity leave or remains absent from work for a longer period as a result of illness, certified by a qualified medical practitioner, and arising out of pregnancy, she must be given one month's paid leave and, where necessary, up to two months unpaid leave before the employer may give her notice of dismissal.⁶⁷ These provisions apply to domestic workers as well as other female employees.

In Zimbabwe, domestic workers, and all other female employees are covered by the same provisions relating to maternity leave.⁶⁸ These provisions are rather detailed. Upon presenting her employer with a certificate, signed by a registered medical practitioner or a state registered nurse or a suitably qualified person, certifying that the birth of her child is likely to take place within the next forty-five days, the domestic worker will, at her request, be granted maternity leave from a date

66

Regulation of Wages (Domestic Employees) Order, 1985 s 9.

67

Employment Decree 4 of 1975, s 46.

68

Labour Relations (Domestic Workers) Employment Regulations, 1992 reg 21 specifies that every female domestic worker will be entitled to maternity leave in terms of the Labour Relations Act, 1985 s 18.

specified by her until at least forty-five days after the date of birth of her child.⁶⁹ The aggregate of maternity leave which an employee may take before and after the birth of her child may not exceed ninety days. Under certain circumstances, this period of ninety days may be extended without pay. The employee is entitled to be paid not less than sixty percent of her normal wage and benefits during the period of maternity leave.⁷⁰

The frequency of paid maternity leave that a female domestic worker or any other worker in Zimbabwe may take, may not exceed once every twenty-four months, up to a total of three times, with respect to her total service with any one employer.⁷¹

During the period when a female domestic worker is on maternity leave, her normal benefits and entitlements, including her rights of security or advancement and the accumulation of pension rights, if any, will continue uninterrupted.⁷²

A female domestic worker who is the mother of a suckling child will, at her request, be granted at least one hour or two half-hour periods during each working day, during normal working hours, for the purpose of nursing her child. She may combine the portion or portions of time to which she is entitled with any other normal breaks so as to constitute longer periods such as she may find necessary or convenient for the purpose of nursing her child.⁷³

69

Labour Relations Act, 1985 s 18(a).

70

S 18(b).

71

S 18(d)(ii).

72

S 18(e).

73

S 18(f).

5.2.9 Termination of service

Legislation in most countries makes provision for notice of termination of service to be given. It is, however, not clear whether a valid reason for the termination of service is required. Legislation in the countries considered generally prohibits the employer from giving notice of termination of service while the domestic worker is on sick leave, maternity leave or holiday leave.

In Zimbabwe, every contract of employment must provide that an equal period of notice to terminate the contract will be given by either party.⁷⁴ This period may not be less than the interval of time separating one due date of payment of wages from the next. Where a month's notice has been agreed to, it will be taken to run from the first day of the month following the date on which notice is given.⁷⁵ A domestic worker is not obliged to give notice where she is unable to do so due to any emergency or compelling necessity.⁷⁶ An employer may not give notice of termination of employment to a domestic worker while the domestic worker is on sick leave, except where the domestic worker, within any one year of service, is certified to be unfit for work for any period in excess of six months.⁷⁷ Neither a domestic worker nor her employer may give notice of termination of employment while the domestic worker is on vacation leave.⁷⁸ The employer retains the right

74

Labour Regulations (Domestic Workers) Employment Regulations, 1992 reg 16(2) (subject to the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985).

75

Reg 16(2)(i).

76

Reg 16(2) (ii).

77

Reg 16(3) read with reg 15(5).

78

Reg 16(4). A domestic worker who has given or received notice to terminate employment will not be required or be permitted to proceed on vacation leave during the currency of such period of notice, except by written mutual agreement: Reg 16(5).

to dismiss a domestic worker and the domestic worker to terminate her employment summarily on grounds recognised by law as justifying summary termination of employment.⁷⁹ An employer may not give notice of termination of employment except with the prior written approval of the Minister of Labour.⁸⁰

In the Seychelles, the restriction on the termination of contracts of service which applies to other workers does not extend to domestic workers.⁸¹ Notice of termination may, however, not be given to a domestic worker while that worker is on sick leave or pregnant or on maternity leave, unless the competent officer so authorise.⁸²

5.2.10 General

Legislative provisions relating to domestic workers which do not readily fit into the above discussion, will now be considered.

5.2.10.1 Uniforms

In some countries, the employer is obliged to provide the domestic worker with a free uniform or other protective clothing. In Swaziland, an employer is obliged to provide a domestic worker, other than a casual or part-time domestic worker, with

79

Reg 16(6).

80

Reg 16(7).

81

Employment Act, 1985 s 65(2)(d) read with s 54.

82

S 65(3).

a suitable uniform. The uniform remains the property of the employer.⁸³

In Zimbabwe, an employer is obliged to provide a domestic worker with a free uniform or other suitable protective clothing. Such a uniform or protective clothing will become the property of the domestic worker three months after issue of the clothing to her, provided she is responsible for mending, washing and maintaining this clothing. A domestic worker who fails to return clothing supplied to her during the three months from the date of issue, will be liable for the cost of replacing such clothing. The employer may recover such amount from any money due to the domestic worker.⁸⁴

5.2.10.2 Piece-work, task-work or work on a ticket system

In Zimbabwe, an employer may not give out, nor may a domestic worker perform, work on a piece-work basis, a task-work basis, or a ticket system, unless the work concerned falls outside of the duties specified for her grade and is performed outside her normal hours of work.⁸⁵

5.2.10.3 Part-time and casual domestic workers

Casual workers are generally defined as those domestic workers who are not employed for more than one day at a time and who are paid at the end of the day's

83

Regulation of Wages (Domestic Employees) Order, 1985 s 11.

84

Labour Regulations (Domestic Workers) Employment Regulations, 1992 s 19(1)-(3). 'An employer who so recovers the cost of the replacement of clothing from a domestic worker must, in the assessment of such cost, make due allowance for fair wear and tear' (s 19(4)).

85

Labour Regulations (Domestic Workers) Employment Regulations, 1992 s 12.

work.⁸⁶ Part-time domestic workers are generally defined as those working for one employer for at least three days per week, but not for the full week.⁸⁷ Special provisions may be made with regard to these workers or they may be excluded from certain provisions in legislation.

In countries such as the Seychelles⁸⁸ and Tanzania,⁸⁹ part-time and casual workers are merely excluded from certain provisions in legislation.

In Zimbabwe, however, special provision is made for part-time and casual domestic workers. Here, any domestic worker employed on a part-time or casual basis will, unless the Minister of Labour approves otherwise in writing, be employed on an hourly basis. Such a domestic worker may not be paid less than double the hourly rate specified in the First Schedule for her grade in respect of each hour or part thereof worked.⁹⁰ A domestic worker who is employed simultaneously during any given period in two or more private households for a maximum of thirty hours per week, will be deemed to be employed on a part-time or casual basis in respect of each household in which she is employed.⁹¹

86

See eg with regard to the position in Swaziland, The Regulation of Wages (Domestic Employees) Order, 1985 s 2.

87

See eg Regulation of Wages and Terms of Employment Order, 1992 s 2.

88

Employment Act, 1985 ss 25, 45.

89

Regulation of Wages and Terms of Employment Order, 1992 s 10.

90

Labour Relations (Domestic Workers) Employment Regulations, 1992 reg 11(1).

91

Reg 11(2). In terms of the Employment (Domestic Workers) Regulations, 1981 which were repealed by the Labour Relations (Domestic Workers) Employment Regulations, 1992 (see Sch 5) part-time, contract or casual employment in more than one household was not permitted in domestic service. Any employment in this capacity was considered full-time employment meriting minimum wages and payments as set out in the Regulations. Any employee so employed as to serve more than one household or whose services were so

5.3 CONCLUSION

This comparative study of labour legislation pertaining to domestic workers in other countries started off as a response to the then Minister of Manpower's request for more information regarding the legal position of domestic workers in other, especially African, countries. This information formed part of the report compiled by the Domestic Workers Committee of the National Manpower Commission.⁹² A study of the legal position of domestic workers in the sub-region was arguably the most useful as these countries generally have in common a history of colonialism, a high rate of unemployment, relatively weak economies and weak trade unions in the domestic service sector.

On paper, many provisions with regard to *inter alia* minimum wages, maternity leave and holiday leave look impressive. Unfortunately, without both empirical research and a sound grasp of the socio-economic conditions facing domestic workers in these countries, it is difficult to assess to what extent the implementation of, and compliance with, labour legislation in the domestic service sector is successful. So, for instance, informal discussions with members of various organisations in Zimbabwe revealed that minimum wage regulations were widely disregarded. On the other hand, the various organs of the United Nations and certain foreign aid organisations apply great pressure to their employees to comply with minimum wage regulations if they have domestic workers in their employ. In Zimbabwe, the provisions regarding a minimum weekly rest period are also widely disregarded, even by semi-governmental bodies who have domestic workers in their

utilised by one or more employers as to serve more than one household or to take assignments from one or more household was entitled to ninety percent of the minimum wages and allowances from each such household. All the employers entering into such an arrangement were individually and collectively obliged to deliver the total amounts owing from all the other employers by the due dates for payment: Employment (Domestic Workers) Regulations, 1981 reg 9.

92

Du Plessis M and Bendeman H The Report and Recommendations of the Domestic Workers Committee Regarding the Legal Position of Domestic Workers (Pretoria 1991) Ch 6.

employ.

In Tanzania, the inclusion of domestic workers under the provisions regarding a national minimum wage appears at first glance to be fair. With the national minimum wage level set at Tsh 2000 per month, the demand for a minimum wage of Tsh 23000 by the Hotel and Domestic Worker's Trade Union seems unrealistic. However, reality dictates that it is impossible to survive on a monthly wage of Tsh 2000 and most workers take on at least one other job or participate in the informal economy in order to make ends meet.⁹³ Unfortunately, a live-in domestic worker is not likely to find the time or opportunity to take on a second job or participate in the informal economy. The fact that domestic service in other countries is not an as exclusively female domain as in South Africa,⁹⁴ further complicates the comparative study.

Despite these flaws, this comparative study has highlighted the fact that most other countries view the unique nature of the domestic worker as warranting special provisions and protection.

93

See, in general, Ndulu BJ 'Tanzania's Economic Development: Lessons from the Experience and Challenges for the Future' in Msambichaka LA (ed) Development Challenges and Strategies for Tanzania: An Agenda for the 21st Century (Dar es Salaam 1994); Shivji IG Law, State and Working Class in Tanzania circa 1920-1964 (Dar es Salaam 1986).

94

Hay MJ and Stichler S (eds) African Women South of the Sahara (London 1984) 38-40.

CHAPTER 6

THE MASTER AND SERVANT LAWS

6.1 INTRODUCTION

The debate regarding the legal position of domestic workers has traditionally concentrated on their exclusion from the provisions of labour legislation that could modify the common-law and provide much needed protection in the form of minimum conditions of employment and social security. However, domestic workers were not always excluded from labour legislation. On the contrary, the old master and servant laws contained specific and detailed provisions regarding domestic workers.¹

Although these master and servant laws did not fulfil the same functions or have the same aims as modern labour legislation, they played an important role in the evolution of the employment relationship from one of status to one of contract. In this context, the law has been described by Selznick as '... a vehicle of evolution that is itself transformed as its distinctive work is done'.² Originally, the law of master and servant looked to the household as a model and saw in its just governance the foundations of an ordered society. The position of the master and servant, although originating in contract, was perceived as one of legal status. The legal imagery of master and servant weakened and became anachronistic towards the end of the nineteenth century, yet the ancient usage persisted for a long time.³ It is for this reason that our master and servant laws, although repealed by 1974, still merit discussion.

1

In keeping with the wording of these laws, the terms 'master' and 'domestic servant' will be used.

2

Selznick P Law, Society and Industrial Justice (New Brunswick 1980) 122.

3

ibid 123.

The employment philosophy to which these repealed laws gave effect influenced the courts which decided our early cases on the contract of employment. These laws were characterised by a paternalistic tone and the introduction of the idea of criminal sanctions for the non-performance of contractual obligations.⁴ Furthermore, the master and servant laws often gave primacy to the interests of the employer over the interests of the employee.⁵ The master and servant laws of Natal and the Cape Colony displayed remarkable similarity to the English laws of master and servant.⁶ In order to shed some light on the peculiar nature of these laws, their development in England will be briefly considered. Thereafter, the master and servant laws which were applicable in South Africa will be examined with specific reference to domestic servants.

6.2 THE ENGLISH LEGAL BACKGROUND

6.2.1 The move from status to contract

From feudal times until the eighteenth century, the employment relationship in England was dealt with under the Law of Persons. Blackstone explained this by stating that the master and servant relationship fell within the ambit of private economic relationships.⁷ This relationship was '... founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill

4

With regard to the paternalistic nature of these laws, see Riekert JG The Natal Master and Servant Laws (LLM dissertation University of Natal 1979) 12-18. See, in general, Bundy C 'The Abolition of the Masters and Servants Acts' (1975) 2 South African Labour Bulletin 37.

5

Grogan J Riekert's Basic Employment Law (Cape Town Wetton Johannesburg 1993) 3-4.

6

See, in general, Riekert The Natal Master and Servant Laws 1-7.

7

According to Blackstone, the great relations in private life are those of master and servant, husband and wife, parent and child and guardian and ward": Kahn-Freund O 'Blackstone's Neglected Child: The Contract of Employment' (1977) Law Quarterly Review 508 at 511.

and labour will not be sufficient to answer the cares incumbent upon him'.⁸ Persons could be 'called to assist' because they consented to assist or, more often, because they were legally compelled to do so. The duty to serve another could, for instance, arise from the condition of 'having no visible effects' or being the child of a poor person. In effect, a servant could step into a working relationship without having any say in his conditions of service. These conditions were pre-determined by law. Blackstone, taking this into consideration, regarded being a servant as 'a status'. Thus he underplayed the contractual element of the employment relationship, seeking its origins rather in the Elizabethan Statute of Artificers⁹ with the servile status it created. His concept of the employment relationship is reminiscent of serfdom.¹⁰ It is only with the advent of industrialisation and the idea of contractual voluntarism that this relationship, based on status, developed into the relationship based on contract as we know it today.¹¹

6.2.2 The development of the master and servant laws

The legal status of servants in eleventh-century England was tantamount to slavery, the status of servants being hereditary and immutable. The thirteenth century saw a gradual relaxation of the system of servitude, to the extent that domestic servants

8

Blackstone as quoted in Kahn-Freund O 'Blackstone's Neglected Child: The Contract of Employment' (1977) Law Quarterly Review 508 at 511.

9

5 Eliz. C.4.

10

Kahn-Freund O 'Blackstone's Neglected Child: The Contract of Employment' (1977) Law Quarterly Review 508 at 514. See also Rycroft A and Jordaan B A Guide to South African Labour Law (Cape Town Wetton Johannesburg 1992) 26-32.

11

Ibid 514. See, in general, Fourie JSA 'Status en Kontrak in die Suid-Afrikaanse Arbeidsreg' 1979 THRHR 79.

were being paid and some form of contract of service entered into.¹² This move from status to contract could not have been made in one leap. The recognition of the contract of employment was soon followed by the first master and servant statute, which retained some elements of the old order.

This master and servant statute was enacted in 1349.¹³ This enactment, the Statute of Labourers,¹⁴ provided that certain able-bodied persons could be compelled to work for whatever master required their services. Wage levels were fixed and a servant departing before his/her term of employment ended, could under certain circumstances, be imprisoned. Thus the idea of a criminal sanction for non-performance of contractual obligations was introduced.¹⁵

The Statute of Artificers¹⁶ was enacted in 1562. This Statute consolidated and restated the law of master and servant. In an attempt to stabilise the labour force, it restated the principle of a legal compulsion to labour for those persons without property. Working hours were regulated and wage rates were set. It was stated that the minimum period of service was one year and that a notice period of four months was required. If a servant was found to be in breach of contract, he/she was liable to a whipping and imprisonment. Furthermore, a new master who employed a servant who had left his/ her previous employment without permission of his/her erstwhile employer, would be liable to a fine.

12

Riekert The Natal Master and Servant Laws 18-19.

13

Grogan Riekert's Basic Employment Law 3.

14

23 Edw. III C.1.

15

Riekert The Law of Master and Servant in Natal 19-21.

16

5 Eliz. C.4.

The English laws of master and servant were repealed in 1875 but, as will be shown, their influence lived on in the South African master and servant laws.¹⁷

6.3 SOUTH AFRICAN MASTER AND SERVANT LAWS

6.3.1 Introduction

The shortage of (cheap, black) labour invariably appears to have been the reason for the enactment of master and servant laws in South Africa.¹⁸ The earliest master and servant laws were those found in the Cape of Good Hope. After the abolition of slavery in 1834, the first Masters and Servants Ordinance¹⁹ was introduced in 1841. In terms of this Ordinance, a servant was defined as '... any person employed for hire, wages or other remuneration, to perform any handicraft or other bodily labour in agriculture or manufactures, or in domestic service, or as a boatman, porter, or other occupations of a like nature'.²⁰

Riekert points out that, although the declared purpose of this Ordinance was to provide for the protection of the labouring classes, the stabilisation of menial labour was its primary purpose. To the advantage of the servant, the master was obliged to pay the agreed wages, to continue paying such wages during a period of illness and to provide food and lodging if the servant resided on his master's premises.

17

Riekert The Natal Master and Servant Laws 21-30. Early Dutch law contained a series of 'placaaten' almost identical to the English master and servant laws which regulated the working conditions of domestic workers. Grogan Riekert's Basic Employment Law 3. Riekert The Natal Master and Servant Laws 92 points out that domestic service was not governed by the later English master and servant laws.

18

Riekert The Natal Master and Servant Laws 30-32.

19

Ordinance 1 of 1841.

20

Riekert The Natal Master and Servant Laws 37.

However, more emphasis was placed on the duties of servants, the rights of masters, and the punishment under the criminal law of servants who were in breach of contract. It would appear that this Ordinance also placed some restriction on the freedom of association of the servant.²¹ This Ordinance was repealed in 1856 by the Act to Amend the Laws Regulating the Relative Rights and Duties of Masters, Servants and Apprentices.²² The most important feature of this Act was the introduction of a wider range of offences which could be committed by servants and the prescription of more severe punishments.²³

The Natal master and servant laws and the laws in other provinces were directly influenced by the Cape master and servant laws. The 1850 Master and Servant Ordinance in Natal was virtually identical to the Cape Ordinance 1 of 1841. Domestic workers were covered by these ordinances.²⁴

It was stated, in general, that there were very few problems in the administration of master and servant laws vis-à-vis domestic workers.²⁵ Examples of a few provisions of the master and servants laws which were of specific relevance to the domestic service sector will now be discussed.

6.3.2 Examples of provisions found in master and servant laws

21

ibid.

22

Act 15 of 1856.

23

In terms of an amendment to this Act in 1873, a servant was given the option of paying a fine in lieu of imprisonment: Rieker The Natal Master and Servant Laws 38-39.

24

ibid 87-91.

25

ibid 154.

6.3.2.1 Provisions regarding the contract of service

Most of the master and servant laws laid down specific provisions with regard to the contract of service.

The Native Labour Regulations Act²⁶ provided that the employment contract of a domestic servant had to be in writing if made elsewhere than in the Colonies, and had to be certified by the British Consul or magistrate at the place where it was entered into.

The Natal Master and Servant Ordinance of 1850 differentiated between contracts of service entered into in the district of Natal and those entered into elsewhere. The latter were valid for up to three years after the servant had arrived in the district, while the duration of local contracts was dependent upon the manner of their execution.²⁷

The Natal Master and Servant Ordinance of 1850 stipulated that, in the case of a husband and wife applying for employment, the contract for the wife's services had to be made and executed by her. Either the father or the mother could contract for the services of their children under the age of sixteen years. The death of the husband released his wife from her contract of employment after the expiry of a period of one month from the date of his demise.²⁸

6.3.2.2 Provisions regarding accommodation and rations

26

15 of 1911.

27

See, in general, Norman-Scoble C Law of Master and Servant in South Africa (Durban 1956) 123-126.

28

Riekert The Natal Master and Servant Laws 96.

In general, the master of a domestic servant was obliged to provide accommodation and food for his servant. Failure to supply food, bedding and accommodation, constituted an offence.²⁹

In terms of the Natal Master and Servant Ordinance of 1850, where it had been agreed that the employee would reside on the premises of his employer, it was presumed that the employer had undertaken to provide the employee, as well as his wife and children, with lodging and sufficient food for the duration of his contract.³⁰

The Native Labour Regulations Act³¹ expressly stipulated the minimum ration scale for 'native' labourers and laid down minimum requirements with regard to accommodation. These provisions also applied to domestic workers.³²

6.3.2.3 Provisions regarding the payment and protection of wages

A duty was generally placed on the master to pay his servant such wages as were agreed upon.³³ Where the wages were not agreed upon, the court could determine this amount with reference to the prevailing rate of wages in the district. For the purposes of this determination, the court could also take into consideration the skill

29

Norman-Scoble Law of Master and Servant in South Africa 182.

30

Riekert The Natal Master and Servant Laws 96.

31

15 of 1911 sch 2.

32

Norman-Scoble Law of Master and Servant in South Africa 182-184.

33

Riekert The Natal Master and Servant Laws 97.

and ability of the particular employee.³⁴

The servant was protected against arbitrary deductions from his wages by the master. Whenever property belonging to the master was lost or damaged as a result of any unlawful act or omission of his servant, the magistrate could be approached to ascertain whether the servant was able to pay compensation for such loss and damage, and if so, to fix the amount of compensation and make an order as to payment thereof. Special provision was made for the Attorney-General to act on behalf of the domestic servant whenever the master of the domestic servant lodged an appeal against the decision of the magistrate.³⁵

The court could intervene if the servant experienced difficulties with regard to the payment of wages by the master. The court was entitled, even if the master was acquitted of the offence of withholding his domestic servant's wage, to give a finding on the wages that were actually due to the domestic servant. The court could give judgment in favour of the domestic servant for the specified amount and could also order the payment of costs by the master.³⁶

6.3.2.4 Provisions regarding the protection of servants in case of illness

With regard to a servant falling ill, provisions were normally made for the protection of that servant's wages, as well as protection from the termination of the contract of service.

This, however, was not always the case. The Natal Master and Servant Ordinance

34

Natal Master and Servant Ordinance of 1850 s 11.

35

Norman-Scoble Law of Master and Servant in South Africa 344.

36

Ibid 341.

of 1850 provided that an employee was not entitled to wages for any period during which he or she was prevented from working by reason of illness or accident, save for the wages already accrued at the commencement of the period of disability. However, the employer was obliged to provide a servant who resided on his premises with sufficient food during such period of incapacity. The employer was entitled to rescind the contract of employment summarily, if the period of incapacity lasted for longer than two months.

This position was altered by Law 3 of 1891, which provided extra protection for employees by stating that when domestic servants in Natal were hospitalised, their masters were obliged to pay the hospital the sum of one shilling per day in respect of 'Native' and Indian servants and two shillings per day in respect of other servants.³⁷

In case of illness, domestic servants in the Cape and Transvaal were entitled to full wages for the first month. Furthermore, the domestic servant was entitled to all the other benefits of the contract (for example food and lodging) for himself and his family for the period of incapacity not exceeding two months. The contract could not be terminated before the lapse of two months, unless it was for a fixed period which expired sooner.³⁸

6.3.2.5 Offences which could be committed by the master

In terms of the Natal Master and Servant Ordinance of 1850, an employer committed an offence when he failed to pay the stipulated wages, failed to deliver or delivered kind of a lesser quality or quantity than agreed upon, or failed to perform the contract faithfully.

37

Ibid 186. See also Riekert The Natal Master and Servant Laws 97 and 150.

38

Norman-Scoble Law of Master and Servant in South Africa 139.

The ill-treatment of an employee was also an offence. The court could order compensation to be paid in respect of any injury suffered by the servant as a result of such ill-treatment. If this compensation was not paid as ordered, the master could be sentenced to imprisonment for a period not exceeding one month.³⁹

It was an offence for any person to induce or entice any servant to leave the service of his employer, whether by offering higher wages or greater benefits. This offence was punishable by a fine not exceeding ten pounds. Where there was default of payment, the offender could be imprisoned with or without hard labour, for a period not exceeding three months.⁴⁰

6.3.2.6 Offences which could be committed by the servant

Certain acts or omissions by servants constituted criminal offences and carried harsh penalties. So, for instance, in terms of the Natal Master and Servant Ordinance of 1850, it was a criminal offence for a servant to refuse or neglect to perform his stipulated duty, to perform work in a negligent or improper fashion, to damage property of his employer by negligent or improper conduct, or to behave violently or insolently towards his employer. It was also a criminal offence for the servant to desert his employer's service or to be guilty of 'scandalous immorality', drunkenness, or other forms of gross misconduct.⁴¹

Penalties imposed on the servant in respect of any such offence were imprisonment for a period not exceeding one month, with or without hard labour and with or

39

Master and Servant Ordinance of 1850 ss 3-4.

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S 2. See also Norman-Scoble Law of Master and Servant in South Africa 299.

41

Master and Servant Ordinance of 1850 s 3. See Riekert The Natal Master and Servant Laws 103.

without sparse diet, or a private whipping in prison not exceeding twelve lashes, or a fine not exceeding five pounds.⁴²

6.3.2.7 Termination of Service

All the master and servant laws contained provisions with regard to the termination of service. The Natal Master and Servant Ordinance of 1850 required one month's notice of intention to terminate a monthly contract. Such notice could be given at any time of the month.⁴³ If either party gave the other notice of intention to terminate the contract and the employee remained, or was permitted to remain, in service for fourteen days after the period of notice had expired, the contract of service revived as if no such notice had been given.⁴⁴

The master was empowered to dissolve the contract of employment when his female domestic servant married or fell pregnant.⁴⁵

6.4 CONCLUSION

This discussion may have lent some support to the opening statement that the master and servant laws did not fulfil the same functions or have the same aims as

42

Ibid. See also Norman-Scoble Law of Master and Servant in South Africa 146.

43

Natal Master and Servant Ordinance 1850 s 7. The colonial statutes thus altered the common law position which entitles a domestic worker to a calendar month's notice.

44

S 8. See Riekert The Natal Master and Servant Laws 96.

45

Norman-Scoble Law of Master and Servant in South Africa 321.

modern labour legislation.⁴⁶ Selznick explains that throughout history, the law of employment has been a changing blend of three basic policies:

- the protection and guidance of the relationship between the employer and the employee;
- the exercise of police power to regulate the terms and conditions of employment in the public interest; and
- freedom of contract.⁴⁷

During the transition from status to contract, the blend of these policies led to legal rules being developed unevenly and empirically, in response to practical necessities.⁴⁸ The master had general authority to discipline his servant. The master's right of command and the servant's duty to obey, display characteristics of the status relationship. However, the authority of the master was limited by the requirement that his commands must be lawful.⁴⁹

In general, the master and servant laws regarded the employment relationship as an enduring relationship. A commitment by both parties was envisaged.⁵⁰ This approach guaranteed a constant supply of labour and saw to it that society was not burdened with the care of the poor and unemployed. The rule against enticement

46

See 6.1 supra.

47

Selznick Law, Society and Industrial Justice 122.

48

Ibid 124.

49

See also 6.3.2.5 and 6.3.2.6 supra and 8.4 infra.

50

See 6.3.2.7 supra.

further confirms the master's proprietary interest in his servant.⁵¹ Labour legislation today fulfils the opposite role, by protecting employees from exploitation by employers, a situation which could possibly follow as a result of the over-supply of labour. Modern legislation, for instance, seeks to protect employees from easy dismissal in response to economic fluctuations.

The master and servant laws placed a responsibility on the master to care for the servant.⁵² The mere status of master carried with it a responsibility for the general welfare of the servant. In modern labour legislation, such a duty is sadly lacking.⁵³

In terms of the master and servant laws, the courts were freely available to supervise the master and servant relationship. In this regard, criminal and civil sanctions were used. The courts were mainly at the service of the master, although there was recognition of the fact that servants needed protection and the master had to be accountable.⁵⁴

The influence of the employment philosophy contained in these laws may be discernable in the discussion of the current legal position of domestic workers which follows.

51

The rule against enticement has its origins in the Statute of Labourers of the 14th century. The labour scarcity which followed the Black Death gave rise to the need for a rule which protected the employer's supply of labour: Selznick Law, Society and Industrial Justice 126.

52

Ibid 128. See also 6.3.2.3 and 6.3.2.4 supra.

53

See eg 8.3.3.3 and 8.3.5 infra.

54

See also Grogan Riekert's Basic Employment Law 4; Selznick Law, Society and Industrial Justice 129.

CHAPTER 7

THE CONTRACT OF EMPLOYMENT AS THE LEGAL BASIS FOR THE EMPLOYMENT RELATIONSHIP

7.1 INTRODUCTION

Following the Roman-Dutch tradition, the employment relationship is viewed as having developed from the locatio conductio operarum - the letting and hiring of personal services in return for the payment of money. This is to be distinguished from the locatio conductio operis - the contract for services or the contract of the independent contractor.¹

A number of definitions for the contract of employment have been proposed² but, as Rycroft and Jordaan explain, none of these appears to be entirely satisfactory. This lack of a satisfactory definition is largely due to the fact that employment relationships differ in character according to the type of work, the nature of the industry and the degree to which statute and collective bargaining impinge on a specific employment relationship.³

1

Grogan J Riekert's Basic Employment Law (Cape Town Wetton Johannesburg 1993) 1; Rycroft A and Jordaan B A Guide to South African Labour Law (Kenwyn 1992) 34. The writings of Pothier provide some insight into the origin of the employment contract in South African law. Pothier, influenced by Roman law, overplayed the contractual element in the employment relationship. He viewed the employment relationship as completely based on the locatio conductio operarum, the contract of hiring of services. This contract was, however, originally used for the hiring of slaves and was only later extended to the hiring out of his labour by a free labourer. The locatio conductio operarum is thus, in a sense, a reflection of Roman slavery. Kahn-Freund O 'Blackstone's Neglected Child: The Contract of Employment' (1977) Law Quarterly Review 508 at 514-516.

2

See, eg, Brassey MSM 'The Nature of Employment' (1990) 11 ILJ 889 at 893-894.

3

Rycroft and Jordaan A Guide to South African Labour Law 34-35. Instead of attempting to define a contract of employment, they merely list the elements generally regarded as characteristic of the contract:

- an agreement to make personal services available;

It has to be decided on the basis of the facts of each case whether an employment relationship, as embodied by the contract of employment, is governed purely by the common-law, by any of the statutes mentioned above, or whether the relationship is determined by a combination of common-law and statute.⁴

In this regard, the existence or not of a contract of employment (locatio conductio operarum) will have to be established. Different legal consequences flow from the contract of employment and other contracts for the rendering of work. In general, only employees fall within the ambit of labour legislation and only employees are entitled to social security benefits.⁵

In the domestic service sector, identifying the contract of employment is also important. In the past, however, specifically defining the employee who is a party to such a contract as a domestic worker was of equal importance. In common-law, the rights of domestic workers and those of other employees differed with regard to, for instance, sick leave and notice of termination of employment.⁶ Furthermore, domestic workers were specifically excluded from certain statutes.⁷ However, the distinction between domestic workers and other employees has become less important since the extension of the Basic Conditions of Employment Act to the domestic service sector. Defining a domestic worker is now only relevant when

-
- remuneration; and
 - subordination.

4

See, in general, Grogan Riekert's Basic Employment Law 7-12.

5

See, in general, Rycroft and Jordaan A Guide to South African Labour Law 39-43.

6

See eg 8.3.3.3 and 8.4 infra.

7

Benjamin P 'The Contract of Employment and Domestic Workers' (1980) 1 ILJ 187. Benjamin at 198 explains that '... the term "common-law employee" is here used to include all employees who, for the purpose of the particular term of the contract of employment in consideration, are not covered by statute, wage determination or industrial council agreement'.

dealing with statutes from which domestic workers are still excluded.⁸

7.2 IDENTIFYING THE CONTRACT OF EMPLOYMENT

7.2.1 General

The first thing to be established in any particular case is whether the parties concerned have entered into a locatio conductio operarum and are therefore, respectively, employers and employees.⁹

In general it may be said that a contract of employment exists between parties when the reciprocal rights and duties expressly or impliedly agreed upon conform with the essentials of the locatio conductio operarum. As has been explained, these essentials are generally taken to be

- an agreement to make personal services available;
- remuneration; and
- subordination.¹⁰

Identifying these essentials, and thus the existence of a contract of employment, will rarely pose difficulties in the domestic service sector. However, there may be cases in other (employment) sectors where complex factual circumstances make it more difficult to identify the contract of employment.

8

See Ch 8 in general.

9

Grogan Riekert's Basic Employment Law 9.

10

Rycroft and Jordaan A Guide to South African Labour Law 34-35.

In response to this problem, the courts have devised a number of tests for distinguishing the contract of employment from other forms of contract entailing the provision of work.¹¹

Three broad tests may be identified and briefly summarised as follows:

7.2.2 The control test

This test is based on the premise that the employee is a person who is subject to the control exercised by his or her employer with regard to the manner in which his or her work is performed.¹² In recent years, the requirement for de facto control has changed to the requirement of a right of control. An employer may choose whether he or she wishes to exercise that right of control.¹³

7.2.3 The organisation test

Dissatisfaction with the control test led to a new test which posed the question whether the alleged employee was incorporated in the organisation of the employer.¹⁴ A person who is incorporated to a sufficient degree in the organisation of the employer, is regarded as an employee even though the employer may, in

11

See, in general, Le Roux PAK 'Identifying the Contract of Service' 1979 MB 50; Mureinik E 'The Contract of Service: An Easy Test for Hard Cases' (1980) 97 SALJ 246; Kelling AS "'n Beskouing van die Essentialia van die Dienskontrak' (1990) 15 TRW 107; Brassey MSM 'The Nature of Employment' (1990) 11 ILJ 889.

12

Colonial Mutual v MacDonald 1931 AD 412. See also Grogan Riekert's Basic Employment Law 10; Rycroft and Jordaan A Guide to South African Labour Law 41.

13

R v Feun 1954 (1) SA 58 (T); Rodrigues v Alves 1978 (4) SA 834 (A).

14

Rycroft and Jordaan A Guide to South African Labour Law 42.

fact, exercise little control over him.¹⁵ This test was dismissed by the Appellate Division as 'vague' and 'nebulous'.¹⁶

7.2.4 The multiple test or dominant impression test

Dissatisfaction with the above-mentioned tests led the courts to formulate yet another test. According to this test, the employment relationship is viewed as a whole and a conclusion is then formulated from the entire picture.¹⁷ Facts considered to be relevant in this regard include the form of the contract, the element of control, the method of payment and the employer's right of suspension and dismissal.¹⁸

7.3 IDENTIFYING A DOMESTIC WORKER

7.3.1 General

Identifying a domestic worker may, arguably, be more difficult than identifying a contract of employment. As will be illustrated, the courts have, for various reasons over a number of decades come up with rather unsatisfactory definitions of a

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Grogan Riekert's Basic Employment Law 11.

16

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at 63.

17

See, eg Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB 1976 (4) SA 446 (A).

18

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A). See, in general, Rycroft and Jordaan A Guide to South African Labour Law 42-44.

domestic worker:¹⁹

7.3.2 Definition of a domestic worker - South African courts

In Stuttaford v Batty's Estate²⁰ the court considered the meaning of the words 'domestic service' in the definition contained in the Workmen's Compensation Act.²¹ The court had to decide whether a chauffeur was in domestic service in terms of this Act. The Workmen's Compensation Act, which provided for free medical care (for a period of up to two years) and compensation for loss of wages due to disablement as result of an accident while at work, specifically excluded from its provisions domestic servants who were employed in a private household or in a boarding house or an institution in which not more than five such workers are normally employed.²²

The court considered the wide definition of 'domestic service' as set out in the English case of Pearce v Lansdowne²³ and concluded that it was by no means clear that the domestic service as referred to in the Workmen's Compensation Act was intended to have the same meaning as the domestic or menial service referred to in the English Workmen's Compensation Act of 1875.²⁴ Searle J pointed out

19

See 8.1.1.2.5 *infra* for the definition of a domestic worker contained in the Basic Conditions of Employment Act.

20

1917 CPD 639.

21

Act 25 of 1914 s 41.

22

S 2(1) read with s 41.

23

69 LT 316.

24

Workmen's Compensation Act of 1875 s 10.

that, in case of doubt, one ought to give a narrow rather than a liberal meaning to domestic service.²⁵ It was suggested that the test in determining whether a worker is in domestic service is not where the worker actually resides, but what the nature of his or her duties is. It was further held that the term 'domestic servant' does not have the same meaning as the English law term 'menial servant', and that the English law is not a safe guide in these matters. It would be preferable to refer to the relevant legislation in order to determine the meaning of the term 'domestic servant' in South African law.²⁶

In Van Vuuren v Pienaar NO,²⁷ the meaning of the words 'domestic service' was once again considered. The court had to determine whether an assistant matron in a school hostel could be granted relief under the Workmen's Compensation Act.²⁸ Her duty was to supervise work in the kitchen and to attend to the well-being of the children in the hostel, particularly those in the sick room. The court relied on the extremely wide definition of a domestic worker suggested by Roche, J in In Re Junior Carlton Club.²⁹ It was thus found that the assistant matron was a domestic worker and therefore not entitled to relief under the Act.³⁰

According to Norman-Scoble, this decision illustrates the danger of relying on

25

Stuttaford v Batty's Estate 1917 CPD 639 at 650.

26

Ibid 647. See also Norman-Scoble C Law of Master and Servant in South Africa (Durban 1956) 11-12.

27

1941 TPD 130.

28

Act 59 of 1936.

29

1922 1 KB 166 at 170.

30

Van Vuuren v Pienaar 1941 TPD 125. See further R v Bushveld Agencies Ltd 1954 (2) SA 457 (C), where the court also relied on the wide definition suggested in In Re Junior Carlton Club (1922) 1 KB 166.

English precedents when interpreting South African statutes. He argues that the language of the Act was being stretched too far, for domestic connotes home, and a hostel can hardly be regarded in that light.³¹

Benjamin suggests the following possible criteria of definition:

- a peculiar degree of close personal contact, not generally present in an employment relationship, must exist between employer and employee;
- the worker actually works in the employer's residence or on his premises;
- the worker must not be engaged in a commercial or business venture of the employer.³²

The nature of the employee's duties, however, should always be the ultimate test.

7.4 THE ADEQUACY OF THE CONTRACT OF EMPLOYMENT

7.4.1 General

31

Norman-Scoble Law of Master and Servant in South Africa 12. Flint S 'The Protection of Domestic Workers in South Africa: A Comparative Study' (1988) 9 ILJ 187 at 189 mentions the English case of Cameron v Royal London Ophthalmic Hospital (1941) 1 KB 350, where a hospital was held to be a domestic establishment, and a stoker working there to be a domestic servant.

32

Benjamin 'The Contract of Employment and Domestic Workers' (1980) 1 ILJ 187 at 199. In Stuttaford v Batty's Estate 1917 CPD 639 at 648, the case of Ex Parte Hughes 23 LJ, MC 138 is mentioned, where it was found that regard should be had to the nature of that which is the real and substantial part of a domestic worker's duty, and not those things which are merely ancillary to it.

At common-law, the contract of employment presents the employment relationship as a depersonalised, commercial and private transaction.³³ According to this contractual model of the employment relationship, an employee is viewed as placing his or her labour power at the disposal of the employer in return for a wage, in the same manner that an owner places a commodity on the market for exchange.³⁴

The contract of employment is generally found to be unable to govern the complexities of the employment relationship. Haysom and Thompson describe the common-law contract of employment as having freed the employer of any legal binding concern for his employee.³⁵ Kahn-Freund describes it as a '... figment of the legal mind' concealing a relationship which '... in its inception is an act of submission, in its operation ... is a condition of subordination'.³⁶ Selznick is equally unflattering in describing the contract of employment as a device for entering into 'legally unsupervised relations'.³⁷

Two principal shortcomings of the contract of employment may be identified. First, it is assumed that a contract of employment is entered into by juridically equal individuals who agree on the terms of a contractual exchange.³⁸ This assumption

33

Rycroft and Jordaan A Guide to the South African Labour Law 21-22. See, in general, Ch 1.

34

Jordaan B 'The Law of Contract and the Individual Employment Relationship' 1991 Acta Juridica: Labour Law 73 at 75-76.

35

Haysom N and Thompson C 'Labouring under the Law: South Africa's Farmworkers' (1986) 7 ILJ 218 at 221-223.

36

Davies PL and Freedland MR Kahn-Freund's Labour and the Law (London 1983) 18.

37

Selznick P Law, Society and Industrial Justice (New Brunswick 1980) 131.

38

See in general Rycroft and Jordaan A Guide to South African Labour Law 20-21; Grogan Riekert's Basic Employment Law 4; Jordaan 'The Law of Contract and the Individual Employment Relationship' 1991 Acta Juridica: Labour Law 73 at 75-78.

is false in the case of the ordinary employment relationship, but even more so in the case of domestic workers and their employers. Domestic workers, finding their services over-supplied and under-priced in a buyer's market, are hardly in a position to dictate the terms of the employment contract. Social and economic realities dictate that the domestic worker is free only to accept or refuse an offer of employment. Employers usually have sole and exclusive control over conditions of employment.³⁹

Secondly, the judicial perception of the relationship in purely economic terms, has been criticised. Such a perception results in the inequality of the parties' exchange, as well as the employee's personal and psychological interest in employment, being ignored. Employees are not in a strong enough bargaining position to withdraw their labour or leave their employment at will. While employers can replace an employee fairly easily with another employee, an employee may experience difficulties in obtaining a new job and thus has an interest in retaining the existing one.⁴⁰

7.4.2 Statutory modification of the common law

The inadequacies of the common-law contract of employment as discussed above may encourage exploitation in the employment realm. The South African legislature has relied on two methods to redress the inequality between the employee and employer.⁴¹ The first method entails imposing minimum general conditions of employment on employers and employees. The second method entails the

39

See in general Ch 2 and Ch 3 supra.

40

Rycroft and Jordaan A Guide to South African Labour Law 22-23. See also 8.5.2.2 infra.

41

The earliest examples of statutory modification of the common-law contract of employment are to be found in the Master and Servant Laws as discussed in Ch 6.

promotion of the concept of collective bargaining.⁴²

These two methods will be considered briefly.

7.4.2.1 Minimum standard legislation

According to Kahn-Freund's voluntarist model of industrial relations, labour law is concerned with regulating, supporting and restraining the power of management and the power of organised labour.⁴³ Industrial society is shaped by the collective forces of labour and capital. Labour law merely plays a supportive role to the primary influences of these social powers.⁴⁴

Minimum standard legislation, such as the Basic Conditions of Employment Act 3 of 1983 and the Occupational Health and Safety Act 85 of 1993, represents an interference by the legislature with the law of supply and demand.⁴⁵ Legal intervention is justified only when the disparity of social power is so great that the successful operation of autonomous negotiation machinery is prevented.⁴⁶ Minimum standard legislation may be used to create a 'floor' of wages and other conditions of employment for workers who find it difficult to establish and to enforce bilaterally agreed upon levels. Difficulties often arise when organisation in a specific sector is weak and the labour force is scattered in small enterprise

42

Grogan Riekert's Basic Employment Law 3-4.

43

Davies and Freedland Kahn-Freund's Labour and the Law 15-16.

44

Davis D 'Voluntarism and South African Labour Law - are the Queensbury Rules an Anachronism?' 1991 Acta Juridica: Labour Law 45.

45

Davies and Freedland Kahn-Freund's Labour and the Law 15-16.

46

Davis 'Voluntarism and South African Labour Law - are the Queensbury Rules an Anachronism?' 1991 Acta Juridica: Labour Law 45.

units.⁴⁷

In essence, minimum standard legislation may be used to mould the contract of employment. According to Kahn-Freund, this technique demonstrates the legislature's awareness that the contract of employment is no more than a tool of legal thought. The substance of mutual obligations between employer and employee is settled either unilaterally by the employer or bilaterally by collective bargaining or, in the absence of collective bargaining, by the law itself.⁴⁸ Taking this into consideration, it would appear that domestic workers stand to gain much from inclusion under the provisions of minimum standard legislation.

The first significant step towards extending minimum standard legislation to domestic workers was taken when the Basic Conditions of Employment Act became applicable to the domestic service sector on 1 January 1994.

The impact of the provisions of this Act on the employment relationship in the domestic service sector will be discussed in Chapter eight.

The Manpower Training Act 56 of 1981, the Occupational Health and Safety Act 85 of 1993 and the Guidance and Placement Act 62 of 1981 also apply to the domestic service sector. However, as will be explained in Chapter eight, the provisions of these statutes have little impact on the relationship between the domestic worker and her employer.

7.4.2.2 Collective bargaining

Although the domestic service sector is excluded from the provisions of the Labour

47

See also 9.3.3.1 *infra*.

48

Davies and Freedland Kahn-Freund's Labour and the Law 40.

Relations Act 28 of 1956, in theory at least, collective bargaining has always been possible in this sector. For reasons which will be explained in Chapter nine,⁴⁹ collective bargaining has not taken place in the domestic service sector.

49

See in particular 9.3 infra.

CHAPTER 8

LEGAL RULES REGULATING THE EMPLOYMENT RELATIONSHIP BETWEEN THE DOMESTIC WORKER AND THE EMPLOYER

8.1 INTRODUCTION

8.1.1 The sources of the rules governing the employment relationship

The reciprocal rights and obligations of employer and employee are determined by contractual arrangement, common law, statute, and collective agreements.¹ As indicated in Chapter seven, until recently the employment relationship between the domestic worker and her employer was governed almost entirely by contractual arrangements and the common law.² Although, theoretically speaking, collective bargaining was possible, it did not occur. The Guidance and Placement Act 62 of 1981, the Manpower Training Act 56 of 1981 and the Machinery and Occupational Safety Act 6 of 1983, (which has been repealed and replaced by the Occupational Health and Safety Act 85 of 1993³), have been applicable to the domestic service sector for some time, but have failed to have any impact.

The recent extension of the provisions of the Basic Conditions of Employment Act 3 of 1983 has changed this position. As will be explained, this Act now plays an important role in regulating the employment relationship between the domestic worker and the employee.

8.1.1.1 Common-law implied terms

1 See, in general, Rycroft A and Jordaan B A Guide to South African Labour Law (Cape Town Wetton Johannesburg 1992) 44-46.

2 See eg 7.1 and 7.3 supra.

3 Act 85 of 1993 s 49.

Prior to the statutory regulation of the domestic employment relationship introduced by the Basic Conditions of Employment Act, common-law rules, in the form of implied terms, were the most important source of rules governing this relationship. This was due to the absence of collective bargaining, as well as to the rarity of detailed contracts of employment specifically regulating the employment relationship between the domestic worker and the employer.⁴

8.1.1.2 Terms incorporated by legislation

8.1.1.2.1 General

For many years the substantive content of employment relationships in general has been determined by labour legislation. The provisions of such labour legislation are imperative in the sense that the parties may not agree to terms less beneficial than the prescribed minimum conditions.⁵

This could, until recently, not be said about employment relationships in the domestic service sector. As will be illustrated below, those Acts which have been applicable to the domestic service sector for some time, have failed to make any significant impact on the employment relationship in this sector.

However, the Basic Conditions of Employment Act 3 of 1983 may be expected to have a significant impact (in theory at least) on the employment relationship now that it has become applicable to the domestic service sector.

Because of its new-found importance in moulding the contract of employment in the domestic service sector, as well as its importance to the discussion below, the

4

See, in general, Rycroft and Jordaan A Guide to South African Labour Law 46.

5

Ibid.

following background information regarding the Basic Conditions of Employment Act is appropriate.

8.1.1.2.2 The purpose of the Basic Conditions of Employment Act 3 of 1983

The Basic Conditions of Employment Act lays down minimum conditions of employment for certain employees employed on certain premises. A wide definition is given to 'employee' and 'employer',⁶ but the Act then excludes certain employees from its ambit by deeming them not to be employees.⁷ This Act further contains provisions aimed at the monitoring or enforcement of its provisions.⁸ It does not prevent an employer and employee from agreeing to more favourable conditions of employment than those provided for by this Act.⁹

The Basic Conditions of Employment Act regulates the following:

- minimum hours of work;
- meal intervals;
- overtime and payment for overtime;
- work on Sundays;
- payment for work on public holidays;
- annual leave;
- sick leave; and
- termination of employment.

6

Act 3 of 1983 s 1.

7

S 1(2).

8

See, in general, Rycroft and Jordaan A Guide to South African Labour Law 299-311,

9

See, in general, Swanepoel JPA Introduction to Labour Law (3 ed) (Johannesburg 1989) 240-263.

8.1.1.2.3 Definition of a domestic worker

The Basic Conditions of Employment Act now defines a domestic worker as

'... an employee charged wholly or mainly with the performance of domestic work on dwelling premises, 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 and the disabled, but does not include a farm worker -

"Dwelling premises" means any premises being used wholly or mainly by a household for dwelling purposes'.¹⁰

This wide definition of a domestic worker¹¹ is to be welcomed, as it will ensure the protection of 'fringe' workers such as gardeners and chauffeurs.¹² Two categories¹³ of domestic workers are distinguished, namely live-in domestic

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S 1(1) of the principal Act as amended by Act 137 of 1993 s 1(b).

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See 7.5.3 supra for a discussion on the common-law definition of a domestic worker.

12

A domestic worker who is also charged with the guarding of poultry or livestock is specifically excluded from the definition of 'guard' (s 1(1) of the principal Act as amended by s 1(e) of Act 137 of 1993). The NMC recommended that a definition of a domestic worker should include specific reference to a cook: NMC Labour Legislation for Domestic Workers 43. See also Meintjies van der Walt L 'Die Regsposisie van Huishoudelike Werkers' (1989) De Rebus 605.

13

In the NMC working document on this matter, it was suggested that the following categories of domestic workers may be distinguished: (i) full-time (a full-time domestic worker may be regarded as a worker who works for one employer on a full-time basis. Such an employee may be resident, but need not be); (ii) part-time: (a) regular day worker; (b) casual employee; (iii) resident; (iv) non-resident; (v) skilled; and (vi) unskilled. See Du Plessis and Bendeman The Report and Recommendations of the Domestic Workers Committee Regarding the Legal Position of Domestic Workers (1991) 1019-1023.

workers¹⁴ and regular day-workers.¹⁵

A regular day worker is specifically excluded from the definition of a 'casual employee', which refers to a day worker who is employed by the same employer on not more than three days in any week.¹⁶

An employee who wholly or mainly performs domestic work on dwelling premises on a farm is regarded as a farm worker and not as a domestic worker.¹⁷ This artificial distinction is rather confusing and could result in different conditions of employment applying to employees performing exactly the same type of labour.¹⁸ The type of labour performed by an employee should arguably carry more weight

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"[L]ive-in domestic worker" means a domestic worker who resides on the dwelling premises of the household by which he is employed; ...: s 1(1) of the principal Act as amended by Act 137 of 1993 s 1(f).

15

"[R]egular day worker" means a domestic worker employed on not more than three days in any week by the same employer for a period of not less than four consecutive weeks': s 1(1) of the principal Act as amended by Act 137 of 1993 s 1(g).

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S 1(a). The decision to distinguish between casual workers and regular day workers is to be welcomed. In the proposed Amendment of the Basic Conditions of Employment Act 1993, the then Department of Manpower recommended that a distinction be made only between resident or live-in domestic workers, non-resident domestic workers and casual domestic workers. According to the Department, any further distinction would make the administration of the Act too expensive and cumbersome: Gaz 14494 of 24 December 1992 2. The trend in the employment of domestic workers appears to be moving from employing one on a full-time basis to employing one regularly once or twice per week. If the existence of this category of 'regular day workers' had been ignored as was recommended, the legislation would definitely have fallen short of its aim of setting out basic conditions of employment for domestic workers. While exact statistics are not available, it is quite feasible to assume that at least forty percent of all domestic workers are employed on a regular basis by the same employer for a period of not more than three days per week. If these domestic workers were to have been regarded as 'casual workers' in spite of the expected continuity of their employment, important provisions such as those relating to annual leave and sick leave would not have applied to them.

17

S1(d).

18

See eg 8.2.1.3.1 and 8.2.1.3.2 *infra* regarding the maximum spread-over and extension of working hours.

than the incidental fact, that the private household in which the domestic worker performs that type of labour, is situated on a farm.

8.1.1.3 Terms incorporated from collective agreements

Collective agreements, to date, play no part in the employment relationship in the domestic service sector.¹⁹ As has already been mentioned,²⁰ the Labour Relations Act 28 of 1956 is not applicable to the domestic service sector. As will be discussed in Chapter nine, the likelihood of reaching collective agreements in this sector appears remote.²¹

8.1.2 The role of the contract of employment

Bearing in mind the various sources of the rules governing the employment relationship as mentioned above, the legal rules regulating the employment relationship will now be considered. The duties of the employee, as well as the duties of the employer, will be considered. Furthermore, the termination of the employment contract, as well as remedies in case of breach of contract, will be considered.

In general, the common-law position, as well as any statutory amendment thereof, will be discussed. Differences in the legal position of domestic workers and the legal position of other employees will be highlighted.

19

See, in general, Rycroft and Jordaan A Guide to South African Labour Law 47.

20

See 7.4.2.2 supra.

21

See 9.3 infra.

The common law does not require any formalities for the conclusion of a valid contract of service. In the domestic service sector, a contract of employment is generally an oral agreement between the parties. The terms and conditions of the employment contract are rarely recorded.²²

The Basic Conditions of Employment Act 3 of 1983 may change this position. In terms of this Act, employers of domestic workers are given the choice of keeping certain prescribed records²³ or of entering into a written agreement, signed by both parties, in which are mentioned:

- the ordinary working hours; and
- the monthly, weekly or daily wage payable to the domestic worker.²⁴

8.2 DUTIES OF THE EMPLOYEE

8.2.1 To enter and remain in service

8.2.1.1 General

At common-law, the principal obligation of an employee is to place her personal services at the disposal of the employer as from the date agreed upon, and for the duration of the contract.²⁵ The availability of the services of the employee to the

²²

Swanepoel JPA Introduction to Labour Law (3 ed) (Johannesburg 1992) 8-9. See also 2.3.3 supra for a discussion of the recruitment of domestic workers.

²³

Act 3 of 1983 s 20(1).

²⁴

S 20A(1).

²⁵

The parties' intention must be gleaned from the surrounding circumstances where the date is not determined: Strachan v Lloyd Levy 1923 AD 670; Smit v Workmen's Compensation

employer is a pre-requisite for the payment of wages.²⁶ In turn, an employee may refuse to work if he or she has not been paid.²⁷

The agreement to provide service is a personal undertaking and therefore an employee may not delegate her duties to a deputy, unless the contract so provides.²⁸ It is, however, not uncommon for domestic workers to send a family member to perform their duties when they are personally unable to do so for reasons of ill-health or otherwise. This practice is more often than not accepted by the employer.

Agreement by the parties on the broad nature of the services to be rendered by the employee is an essential term of the employment contract.²⁹ The exact duties of the domestic worker need not necessarily be enumerated in fine detail, as it may be argued that, by custom or general usage, certain duties spring automatically from employment in the capacity as a domestic worker.³⁰

Commissioner 1979 (1) SA 51 (A) at 61.

26

Rycroft and Jordaan A Guide to South African Labour Law 51. See also Brassey MSM 'The Con-tractual Right to Work' (1982) 3 ILJ 247; Potchefstroom Municipal Council v Bouwer NQ 1958 (4) SA 382 (T).

27

Grogan Riekert's Basic Employment Law 30-31; Swanepoel Introduction to Labour Law 11-12. See also Queen v Plank & Others (1900) 17 SC 45.

28

Riekert J Basic Employment Law (1 ed) (Kenwyn 1987) 26. See also Negro v Continental Spinning and Knitting Mills 1954 (2) SA 203 (W); Terry v Variety Theatres Ltd 1928 (44) TLR 242. See, however, Mkize v Ballam 1914 (35) NLR 139.

29

Swanepoel Introduction to Labour Law 9-10; Rycroft and Jordaan A Guide to South African Labour Law 50.

30

Grogan Riekert's Basic Employment Law 21. In general, the employer cannot force the employee to perform work other than that agreed upon. Parties may, however, at any subsequent time amend this agreement by agreeing that the employee will perform a type of work different to that agreed upon initially: Swanepoel Introduction to Labour Law 16.

8.2.1.2 Refusal or failure to work

Except during periods of authorised absence such as annual leave,³¹ an employee is obliged to keep her services available until the employment contract comes to an end. At common-law, an employee is not entitled to payment during such periods of absence, unless otherwise agreed by the parties. Thus, the principle of 'no work, no pay' applies.³²

8.2.1.3 Hours of work

At common-law, no minimum or maximum hours of work or specific work days are prescribed for employees. The hours which the employee may be required to work, as well as the days on which the work is to be performed, will thus depend upon the agreement between the parties.³³ If parties do not expressly provide for working hours and work days in the contract of employment, regard must be had to the current practice in the specific industry and the nature of the employee's job to determine their true intention.

The position is the same with regard to the obligation to work overtime³⁴ and

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See, in general, 8.3.3 *infra*. See also Negro v Continental Spinning & Knitting Mills 1954 (2) SA 203 (W).

32

Boyd v Stuttford & Co 1910 AD 101. See also Rycroft and Jordaan A Guide to South African Labour Law 55-56.

33

Swanepoel Introduction to Labour Law 17; Rycroft and Jordaan A Guide to South African Labour Law 56.

34

Grogan Riekert's Basic Employment Law at 32 points out that an employee may be obliged to work overtime, in the sense that he or she may be dismissed for unreasonably refusing to do so. See also 8.2.1.3.3 *infra*.

work on Sundays and public holidays.³⁵

The Basic Conditions of Employment Act, however, has altered this position considerably as it contains detailed provisions relating to the hours of work as well as work days:³⁶

8.2.1.3.1 Ordinary hours of work

The Basic Conditions of Employment Act sets the maximum ordinary working hours at no more than forty-six hours in any week.³⁷ No special provision is made for domestic workers in this regard.³⁸ Provision is made for a maximum spread-over of twelve hours.³⁹ However, in the case of a farm worker or a live-in domestic worker, the maximum spread-over is set at fourteen hours.⁴⁰

The maximum daily ordinary working hours are fixed at not more than nine hours

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Rycroft and Jordaan A Guide to South African Labour Law 56-57; Riekert Basic Employment Law 29.

36

See, in general, Rycroft and Jordaan A Guide to South African Labour Law 304-306.

37

Act 3 of 1983 s 2.

38

This is in line with the NMC recommendations: Gaz 23511 of 13 September 1991 45. However, the majority of the commentaries received in respect of the NMC's recommendations proposed a working week of fifty-two ordinary working hours: Gaz 14494 of 24 December 1992 6. SADWU demands a working week of forty hours; comprising a five day working week, the maximum daily ordinary working hours being set at eight hours.

39

Act 3 of 1983 s 3(1).

40

S 3(1) of the principal Act as amended by Act 137 of 1993 s 2(a). The NMC recommended that special provision should be made for a maximum spread-over of fourteen hours in respect of resident or live-in domestic workers, but only if agreed to in writing by the domestic worker and the employer: Gaz 23511 of 13 September 1991 45.

and fifteen minutes in the case of employees who work five days per week, or not more than eight hours in the case of employees who work six days per week. The maximum daily ordinary working hours in the case of casual workers are fixed at not more than nine hours and fifteen minutes on any day.⁴¹ No special provision is made for domestic workers.⁴²

8.2.1.3.2 Extension of ordinary hours of work

Special provision is made for the extension of the working hours of farm workers and domestic workers. A written agreement, signed by both parties, may be concluded in terms of which the ordinary working hours of the farm worker or the domestic worker may be extended by not more than four hours per week. The period for which ordinary working hours may be extended must be agreed upon by employer and employee. This period agreed upon may not exceed four months (in the case of a farm worker), or twenty-six days (in the case of a domestic worker) in any continuous period of twelve months. The ordinary working hours of the farm worker or domestic worker must then be reduced by a corresponding number of hours during a period of the same duration as that during which the extended hours were in force, and in the same period of twelve months.⁴³

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Act 3 of 1983 s 4(1). See also Thompson C and Benjamin P De Kock's Industrial Laws of South Africa (2 ed) (Cape Town Wetton Johannesburg 1990) 202-203; Rycroft and Jordaan A Guide to South African Labour Law 303; Grogan Riekert's Basic Employment Law 32.

42

The NMC suggested that arrangements regarding travelling time, weekends and afternoons off, etc should be agreed upon between the employer and the domestic worker. A five-day working week should be implemented by agreement as far as possible: Gaz 23511 of 13 September 1991 45.

43

S 6 A of the principal Act as amended by Act 137 of 1993 s 3. An employer who concludes such an agreement must furnish the employee with a written copy thereof. Such an agreement may not have the effect of extending the ordinary daily working hours of farmworkers to more than ten hours in any day or, in the case of domestic workers, to more than twelve hours in any day (s 6A(3)).

Such an agreement must provide that the employer will pay the employee, for the duration of the period during which he works extended or reduced hours, the wage he would have received if he had worked ordinary working hours. In cases where the ordinary working hours of the employee have not yet been reduced after the period of twelve months has elapsed or on the termination of his contract of employment, the employer must pay him an amount calculated at the overtime rate⁴⁴ in respect of the extended working hours worked by virtue of the agreement.⁴⁵

A domestic worker may not work overtime on the day on which she works extended working hours.⁴⁶

While the extension of working hours in the case of farm workers may be a necessary measure during harvest time, it is difficult to imagine circumstances which would necessitate such an extension in the case of domestic workers.

8.2.1.3.3 Overtime

An employee normally only agrees to serve the employer during ordinary working hours. Therefore an employee is under no obligation to work overtime in excess of the agreed number of hours. However, overtime may be agreed upon by the employee and the employer and, in general, may not exceed three hours per day or

44

S 9(1) of the Basic Conditions of Employment Act 3 of 1983 provides that the employee's payment for overtime will be calculated at a rate of not less than one and one third times his wage for one hour, in respect of the overtime so worked.

45

S 6A(4) of the principal Act as amended by Act 137 of 1993 s 3.

46

S 6A(4)(c).

ten hours per week.⁴⁷ In the case of a domestic worker who takes care of children, the aged, the sick, the frail or the disabled, such overtime may not exceed fourteen hours in any week.⁴⁸

Payment for overtime in the case of domestic workers, as for other workers, is calculated at a rate of one-and-one-third of the hourly wage.⁴⁹

8.2.1.4 Work on Sundays

Work on a Sunday is not permitted unless an inspector has given written permission for work to be performed on a Sunday.⁵⁰ The practicability of this provision with regard to the domestic service sector appears questionable. It is doubtful whether the employers of domestic workers would make the effort to seek such written permission. A huge administrative burden would be placed on the Department of Labour if large numbers of employers were to decide to seek written permission to allow their domestic workers to work on a Sunday.

There are two ways in which an employee may be remunerated for work performed on a Sunday. If the employee has worked for a maximum of four hours, he should

47

Basic Conditions of Employment Act 3 of 1983 s 8(1). See also Rycroft and Jordaan A Guide to South African Labour Law 56-58; Thompson and Benjamin De Kock's Industrial Laws of South Africa 205; Van Jaarsveld and Fourie Suid-Afrikaanse Arbeidsreg 228; Geerdt's P Let Us Work Together (Pretoria 1991) 13-14.

48

S 8(1) of the principal Act as amended by Act 137 of 1993 s 5. The NMC recommended that overtime should never exceed ten hours per week. It was further recommended that no daily limit should be specified for resident or live-in domestic workers and that the three hour overtime limit per day should apply to the regular day worker as well as the casual worker: Gaz 13511 of 13 September 1991 46.

49

Basic Conditions of Employment Act 3 of 1983 s 9(1)(2). See also Thompson and Benjamin De Kock's Industrial Laws of South Africa 205.

50

Basic Conditions of Employment Act 3 of 1983 s 10(1)(a).

be paid an amount equal to his normal daily wage. If he has worked for more than four hours, he is entitled to an amount calculated at a rate of double his hourly wage rate in respect of the whole time worked by him on the Sunday.⁵¹ The employer may also pay the employee an amount calculated at a rate of not less than one and one-third times his wage rate in respect of the whole time worked by him on that Sunday and grant him, within seven days of that Sunday, one day's leave with payment.⁵² This remuneration must be paid to the employee not later than the pay day next succeeding the day in respect of which such remuneration is payable.⁵³

8.2.1.5 Work on Public Holidays

At common-law the employee, in the absence of an agreement to that effect, has no right to leave of absence on a public holiday. However, the right of an employee to be absent from work on such a holiday, may be governed by the particular custom obtaining in the particular type of employment. Even if an employee has a right to leave of absence on a public holiday, that employee will only be entitled to payment in respect of that day if so agreed with the employer.

The Basic Conditions of Employment Act has amended the common-law position

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S 10(2)(a).

52

S 10(2)(b). The NMC in principle recommended the inclusion of domestic workers under the Basic Conditions of Employment Act provisions regarding work on Sunday. However, the NMC was divided with regard to the wage rate applicable to workers who work only on a Sunday as domestic workers. One view held that these domestic workers should receive double pay for work on Sundays, the other held that the provisions of the Basic Conditions of Employment Act pertaining to Sunday work should not apply in the case of a domestic worker working only on a Sunday for a specific employer: Gaz 13511 of 13 September 1991 46.

53

S 10(3). See also Thompson and Benjamin De Kock's Industrial Laws of South Africa 205; Rycroft and Jordaan A Guide to South African Labour Law 304; Grogan Riekert's Basic Employment Law 32-33.

with regard to the right to leave of absence on public holidays, as well as the right to payment on these days. In terms of this Act,⁵⁴ the employee is entitled to paid public holidays as defined in the Public Holidays Act 36 of 1994.⁵⁵

The Public Holidays Act declares the days mentioned in Schedule 1 of this Act to be public holidays. Whenever a public holiday falls on a Sunday, the following Monday will be a public holiday.⁵⁶ Notwithstanding this provision, any public holiday will be exchangeable for any other day, which is fixed by agreement between an employer and employee.⁵⁷ Furthermore, this Act provides that every employee will be entitled to payment in respect of public holidays which will be at least as favourable as the payment provided for by the Basic Conditions of Employment Act.⁵⁸

Section 11 of the Basic Conditions of Employment Act provides that an employee, who does not work on a public holiday which falls on a day which otherwise is an ordinary working day for him, will be entitled to payment which may not be less than the wage payable to him in respect of time (excluding overtime) which is ordinarily worked by him on that day of the week.⁵⁹ If an employee works on a public holiday which falls on a day which otherwise is an ordinary working day for him, he will be entitled to an amount at least equal to the amount payable to him

54

S 11 read with s 1.

55

S 1 read with Schedule 11. This Act came into operation on 1 January 1995.

56

S 2(1). Twelve days are mentioned in Sch 1.

57

S 2(2).

58

S 5(1).

59

S 11(1).

in respect of time which is ordinarily worked by him on that day of the week plus the greater amount of the wage rate for time actually worked on that public holiday or an ordinary day's wage.⁶⁰

The employee may also receive an amount calculated at a rate of not less than one third of his wage rate in respect of the time actually worked on that public holiday and be granted, within seven days of such public holiday, one day's leave plus the ordinary wage payable for that day.⁶¹

An employee who works on a public holiday which falls on a day which otherwise is not an ordinary working day for him, will be entitled in respect of that public holiday to an amount which may not be less than his ordinary daily wage plus either an amount calculated at a rate of not less than his wage rate in respect of actual time worked or an amount at least equal to the wage payable to him in respect of an ordinary working day, whichever amount is the greater.⁶² Under these circumstances, an employee may also choose to receive an amount calculated at a rate of not less than one-third of his wage rate in respect of the actual time worked by him on the public holiday, and, within seven days of such public holiday, one day's leave for which he will be paid his ordinary daily wage rate.⁶³

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S 11(2)(a).

61

S 11(2)(b).

62

S 11(3)(a).

63

S 11(3)(b). The NMC in principle recommended the inclusion of domestic workers under the Basic Conditions of Employment Act provisions regarding work on public holidays. However, the NMC was divided with regard to the number of public holidays to be applicable to domestic workers. The majority view held that the Basic Conditions of Employment Act should apply in the same way as it applies to all workers (except those in shops and offices), while the minority view held that domestic workers should enjoy those public holidays provided for in the Public Holidays Act 5 of 1952. Certain members of the NMC suggested that regular day workers should be excluded from the provisions of the Basic Conditions of Employment Act in this regard: Gaz 13511 of 13 September 1991 47.

sector

'Reasonable efficiency' is particularly difficult to define with reference to a domestic worker. What a particular employer regards as reasonably efficient, will be closely connected to the particular circumstances of that household in which the domestic worker is employed. While one may expect of all domestic workers to have mastered the basic skills of dusting, sweeping and washing dishes, it is impossible to make assumptions with regard to the ability of domestic workers to operate sophisticated domestic appliances such as vacuum-cleaners and dish-washing machines.

When one considers more specialised skills such as cooking, it becomes apparent that one employer's idea of a reasonably competent cook will not necessarily correspond with that of the next employer.

8.2.2.3 Skills-training for domestic workers**8.2.2.3.1 Informal training**

The majority of domestic workers are reliant on their employers for what little skills-training they receive. The kind of training received will naturally correspond with the particular circumstances of the employer. In general, it may be said that training includes instruction regarding the use of domestic appliances found in a particular household, as well as basic food preparation. Domestic workers are often expected to take care of the employer's children, but rarely do they receive any training in this regard.

Church groups, women's organisations⁶⁸ and the South African Domestic Workers Union have during recent years embarked on training programmes aimed specifically at domestic workers. These programmes cover areas such as adult literacy, first aid, basic child-care, basic needle work, as well as basic to advanced cooking. These training programmes are growing increasingly popular.

8.2.2.3.2 The Manpower Training Act 56 of 1981

Domestic workers are covered by the Manpower Training Act, as the wide definition of 'employee',⁶⁹ 'workseeker'⁷⁰ and 'unemployed person'⁷¹ used in this Act, ensures the widest possible application. This Act aims to provide for the promotion and regulation of the training of manpower and, for that purpose, to provide for the establishment of a National Training Board, a Manpower Development Fund and a Fund for the Training of Unemployed Persons. The Act further provides for the establishment, accreditation, functions and powers of training centres, private training centres and industry training centres.⁷²

A number of these centres provide training for domestic workers. As will be

68

Eg the Black Sash and Women for South Africa.

69

Act 56 of 1981 s 1: 'Any person employed by or who performs work for any employer in any industry and who receives or is entitled to receive remuneration from such employer.'

70

S 1 '... a person over the age of fifteen years who is unemployed, is not required by law to attend school, is not a pupil or a student at an educational institution, is not awaiting admission to an educational institution and who is seeking work.'

71

ibid.

72

S 48 of this Act also contains provisions regarding the prohibition of victimisation of the employee by the employer. See also 8.3.7 infra.

standardising of this training, will play a crucial role in the improvement of the working conditions of domestic workers.

8.2.3 Good faith

8.2.3.1 General

At common-law, an employee is obliged to devote all normal working hours to furthering the employer's business interests (or, in the case of domestic workers, the household).¹ Rycroft and Jordaan note that the employee's implied obligation to serve the employer honestly and faithfully, clearly reflects the economic assumptions which the courts have brought to bear on the employment relationship. The moral responsibilities and ethical standards, which the courts appear to expect from employees, infuse the employment relationship with a moral content which appears to be at odds with the commerciality of the common-law contract of employment.²

8.2.3.2 Content of the duty

In furthering the employer's business interests, the employee must avoid a clash between her personal interests and those of the employer. This would, for instance, entail that the employee may not conduct

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Ketteringham v Cape Town City Council 1933 CPD 316; Mineworkers' Union v Broderick 1948 (4) SA 959 (A); Truter v Hancke 1923 CPD 43. See also Swanepoel Introduction to Labour Law 18; Grogan Riekert's Basic Employment Law 40.

2

Rycroft and Jordaan A Guide to South African Labour Law 59-60. Early case law seems to suggest that the obligation of good faith applied mainly, if not entirely, to the employee. See eg Dilks v Postma's Prospect Ltd 1921 WLD 4.

other unauthorised business during working hours. Furthermore, an employee may not, without the employer's permission, simultaneously work for another employer during working hours.³

The employee is obliged to refrain from dishonesty or moral misconduct, such as theft, which destroys the trust and confidence necessary for the continuance of a relationship of good faith. Rycroft and Jordaan observe that the moral content of a duty to serve in good faith is reflected by the fact that the employer is not required to show prejudice when dismissing an employee for dishonest conduct.⁴

8.2.3.3 Good faith and the domestic worker

Given the unique nature of the domestic service sector,⁵ the obligation of the domestic worker to serve in good faith takes on a new and important dimension. The domestic worker's workplace is her employer's home. It is common for employers to be absent from their homes when the domestic worker is performing her tasks. In order to perform her tasks and to prepare meals for herself, a domestic worker requires access to household supplies. Theft or alleged theft by the domestic worker often poses serious difficulties in this regard.⁶ Bearing

3

There is no absolute prohibition on holding two jobs: see Harrismith Building Society v Taylor 1938 OPD 36. See also Grogan Riekert's Basic Employment Law 40-41.

4

Rycroft and Jordaan A Guide to South African Labour Law 59-62. See also Flemmer v Ainsworth 1910 TPD 81.

5

See 2.3 supra.

6

Theft is regarded in such a serious light that dismissal is normally justified at first instance, regardless of the value of the property involved. See Grogan Riekert's Basic Employment Law 49-50.

in mind that the domestic worker usually has to perform her duties (some of which require the use of household supplies such as washing powder) and prepare her meals without the supervision of her employer, employers should be cautious about levelling allegations of theft. Few households are run so efficiently that the exact level of household provisions is known at all times.

Furthermore, a domestic worker is often expected to take care of her employer's children when the employer is absent. Grogan points out that in the case of a person applying for a position as a child-minder, a conviction on the grounds of child molestation would have to be disclosed, as such past misconduct would render the prospective employee totally unfit for the employment offered.⁷

8.2.4 Subordination

8.2.4.1 General

Subordination of the employee to the authority of the employer may be regarded as the most outstanding characteristic of the employment relationship. In Smit v Workmen's Compensation Commissioner it was stated that: 'The employee is in terms of the contract of service subordinate to the will of the employer. He is obliged to obey the lawful commands, orders or instructions of the employer ...'.⁸

Given the unique characteristics of the domestic service sector, subordination of the employee to the authority of the employer places

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ibid 46.

8

Smit v Workmen's Compensation Commissioner 1979 (1) SA 51 (A) at 61.

a particularly heavy burden on the live-in domestic workers. In the case of live-in domestic workers, the authority of the employer often extends beyond working hours and infringes on the employee's social activities and leisure time.⁹ It has been pointed out¹⁰ that this area of law deserves careful re-evaluation since it has its roots in the nineteenth and early twentieth centuries when Victorian notions of the employment relationships were prevalent.¹¹

The employee's subordinate status involves two elements, namely the employee's obligation to obey the employer's lawful commands and the obligation to behave in a respectful manner towards the employer. In short, the common-law requires all employees to show a reasonable degree of respectfulness or courtesy towards their employers, and to obey lawful instructions from the employer.¹²

8.2.4.2 Respectfulness

Grogan notes that respectfulness is a quality that is difficult to define. He submits that, in the employment context, it imposes a duty on the employee to behave in a manner compatible with the subordinate position in which the employee stands *vis-à-vis* the employer.¹³ Only

9

See 2.4 *supra*.

10

See 6.4 *supra*. See in general Rycroft and Jordaan *A Guide to South African Labour Law* 62.

11

See eg Grogan *Riekert's Basic Employment Law* 42-43.

12

Rycroft and Jordaan *A Guide to South African Labour Law* 64.

13

Grogan *Riekert's Basic Employment Law* 43; Rycroft and Jordaan *A Guide to South African Labour Law* 64-65. See also *Jamieson v Elsworth* 1915 AD 115. The duty to behave in a

frequent and/or gross acts of disrespect by an employee, which are directed at an employer, would justify summary dismissal. Furthermore, summary dismissal would only be justified if such acts suggest that the employee has repudiated the employer's lawful authority over her.¹⁴

8.2.4.3 Obedience

In the employment context, disobedience refers to the express repudiation by the employee of the employer's lawful authority, by the employee disobeying the employer's lawful commands.¹⁵ An employer's commands will be lawful only if they fall within the scope of the employee's contractual duties, if they are not contrary to the provisions of any legislative measure, or if they are not contrary to public policy.¹⁶ At common-law, summary dismissal is permissible only in instances where the employee's refusal to obey a lawful order is of a deliberate and serious nature.¹⁷

8.2.5 To refrain from misconduct

respectful manner extends to the employee's dealings with the employer's customers: Gogi v Wilson & Collins 1927 NLR 21. By analogy, a duty to behave in a respectful manner to other members or guests of the employer's household may be inferred in the case of domestic workers.

14

See eg Osche v Haumann 1910 OFS 59.

15

Moonian v Balmoral Hotel 1925 NPD 215; Oaten v Bentwitch & Lichtenstein 1903 TH 118. See also Grogan Riekert's Basic Employment Law 43-44; Swanepoel Introduction to Labour Law 17.

16

See eg Denny v SA Loan & Mercantile Co 3 EDC 47. See also Rycroft and Jordaan A Guide to South African Labour Law 64-65.

17

See eg Moonian v Balmoral Hotel 1925 NPD 215 at 219.

An employee is expected to conduct himself generally in accordance with accepted practice and policy of the employer. An employee who commits an act of serious misconduct, commits breach of contract and may be summarily dismissed. Whether an act of misconduct is sufficiently serious to warrant summarily dismissal, will depend on the specific circumstances of the case.¹⁸

Drunkenness hindering the ability of the employee to fulfil his duties effectively,¹⁹ gross negligence,²⁰ assault²¹ and intimidation²² have been considered examples of misconduct so serious as to warrant dismissal.

8.3 DUTIES OF THE EMPLOYER

8.3.1 Appointment and engagement

8.3.1.1 General

In general, the right to decide on the appointment of an employee vests

18

See, in general, Le Roux PAK and Van Niekerk A The South African Law of Unfair Dismissal (Kenwyn 1994) 121-151; see also Swanepoel Introduction to Labour Law 19.

19

See eg Wallace v Rand Daily Mail 1917 AD 479; Ndamse v Fyfe-King 1939 EDL 259; Lötter v Southern Associated Maltsters (1988) 9 ILJ 332 (IC).

20

Schneier and London Ltd v Bennet 1927 TPD 346.

21

See eg Abrahams v Pick 'n Pay Supermarkets (OFS) (Pty) Ltd (1993) 14 ILJ 729 (IC).

22

See eg NUMSA & another v Bonar Long NTC (SA) (Pty) Ltd (1990) 11 ILJ 1147 (IC).

in the employer.²³ The contract of employment is concluded as soon as the parties agree that the employee will render personal service for a fixed wage.²⁴ Service is a prerequisite for remuneration, consequently, should the employer fail or refuse to receive the employee into his service, he commits a serious breach of contract.²⁵ The employee should be received into service on the date on which the contract was concluded or on a future date that has been agreed upon.²⁶

8.3.1.2 A duty to provide work?

An employer is generally not obliged to provide his or her employee with any work to perform, provided the wages agreed upon are paid.²⁷

There are, however, exceptions to this rule: where an employee's

23

Port Elizabeth Municipality v Minister of Labour & Another 1975 (4) SA 278 (E) at 282. See also Rycroft and Jordaan A Guide to South African Labour Law 65.

24

Norman-Scoble C Law of Master and Servant in South Africa (Durban 1956) 168.

25

Grogan Riekert's Basic Employment Law 60. A Contract of employment is more than the mere exchange of labour for wages. Benjamin P 'The Contract of Employment and Domestic Workers' (1980) 1 ILJ 187 at 189 quotes Freedland as stating '... at the first level there is an exchange of work and remuneration. At the second level there is an exchange of mutual obligations for future performance.'

26

Rycroft & Jordaan A Guide to South African Labour Law 66-67; Grogan Riekert's Basic Employment Law 60.

27

Norman-Scoble The Law of Master and Servant in South Africa 171. 'The employee's compensation for enforced idleness is his remuneration': Grogan Riekert's Basic Employment Law 61. Brassey MSM 'The Contractual Right to Work' (1982) 3 ILJ 247 at 267-268 points out that laissez-faire capitalism would applaud this rule, as it is consistent with the idea of the employment relationship as a commercial arrangement in which the employee is an economic resource and his labour a commodity in which he trades. See also Collier v Sunday Referee Publishing Co Ltd (1940) 2 KB 247.

remuneration consists of a share of the profit, where he is paid on a commission basis or where an employee is remunerated on the basis of piece-work, the employer will be obliged to provide work. The employer will also be obliged to provide work where failure to work would amount to degradation of status, where there is a contract to provide training or where an employee's earning capacity is coupled to the publicity he gets on account of his work.²⁸

Given the nature of the services involved, it is doubtful whether domestic workers will ever fall under one of these exceptions.

When an employee tenders her services, but does not actually do the work, her right to remuneration will depend on the terms of the contract. In the case of an employee employed on a fixed salary, the mere tender of services will normally be regarded as sufficient to entitle her to her remuneration.²⁹

8.3.1.3 Assignment of services

Due to the personal nature of the contract of employment an employer may not, without the consent of the employee, assign the services of the employee to another employer.³⁰ Thus, in the absence of an

28

Grogan Riekert's Basic Employment Law 61; Swanepoel Introduction to Labour Law 13-14.

29

Brassey 'The Contractual Right to Work' (1982) 3 ILJ 247 at 263. See also Haysom N and Thompson C 'Labouring under the Law: South Africa's Farmworkers' (1986) 7 ILJ 218 at 233.

30

De Ferranti v Gottstein 1899 (6) OR; Nkomo v Torlage 1944 NPD 308; R v Magudulela 1939 TPD 239; De Jager v Sisana 1930 AD 76. See Norman-Scoble The Law of Master and Servant in South Africa at 175 for a discussion of the exceptions to this general rule in terms of the old master and servant laws.

agreement to this effect, an employer cannot compel an employee to work for another.³¹

It is, however, a relatively common practice in the domestic service sector for one employer to assign the services of a domestic worker to another if that employer has no work to occupy the domestic worker. The consent of the domestic worker is rarely asked. In practice, such consent would, in any case, be of little value, as a domestic worker is rarely in the position to deny a request from her employer to perform domestic service for another.

8.3.2 Remuneration

8.3.2.1 General

At common-law,³² the express or tacit obligation of the employer to remunerate the employee is essential for the validity of an employment contract.³³

The employer and employee normally agree upon the sum to be paid. In the absence of such an agreement, the employer is obliged to pay a reasonable amount, this amount generally being dictated by the custom

31

Grogan Riekert's Basic Employment Law 61.

32

See eg Brown v Hicks 1902 SC 314 at 315.

33

Rycroft and Jordaan A Guide to South African Labour Law 67-68. See, however, Rodrigues v Alves & Others 1978 (4) SA 834 (A).

and conditions of the locality.³⁴ It is not necessary that the amount of remuneration be expressed in a single sum, but the remuneration must at least be calculable.³⁵ Remuneration is normally computed in monetary terms, but an employee may also take his remuneration in kind or partially in money and partially in kind.³⁶ No minimum wage is prescribed by common-law.

The employer is obliged to pay wages promptly upon performance by the employee.³⁷ Failure to do so will result in breach of contract, thereby entitling the employee summarily to cancel the contract and claim damages.³⁸ Remuneration is payable on the day agreed upon. Payment may be daily, weekly, monthly, quarterly or even yearly, depending on the agreement between the parties, or in the absence of such an agreement, a custom.³⁹

In terms of the Basic Conditions of Employment Act, an employer is obliged to pay an employee's wage not later than on the day agreed upon between him and the employee.⁴⁰ Failure to comply with this

34

Norman-Scoble The Law of Master and Servant in South Africa 202.

35

Middleton v Carr 1949 (2) SA 374 (A).

36

Van Jaarsveld Die Suid-Afrikaanse Handelsreg 287-288. See also R v Bosch 1932 EDL 235.

37

Norman-Scoble The Law of Master and Servant in South Africa 202.

38

Grogan Riekert's Basic Employment Law 62; Riekert Basic Employment Law 42.

39

Swanepoel Introduction to Labour Law 10.

40

S 19(2).

provision, is an offence.⁴¹

8.3.2.2 Incomplete performance

Unless parties have agreed otherwise, remuneration becomes payable only at the end of the contract period.⁴² In the absence of an agreement to the contrary, an employee will thus have to work the full period agreed upon before he or she may claim wages due in terms of the contract for that period or any part thereof.⁴³ There are, however, exceptions to this rule: an employer is normally obliged to remunerate an employee for the availability of his or her services and not for actual work done. Thus, provided an employee continues to tender his or her services, an employer is obliged to continue paying the employee for the remainder of the term of the contract, even where the employer is prevented by factors outside his or her control from utilizing the employee's services.⁴⁴ Unless otherwise agreed, an employer remains obliged to remunerate an employee at the agreed rate during periods of suspension.⁴⁵

At common-law, the principle of 'no work, no pay' applies, therefore an

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S 25(1).

42

This is in line with the principle of reciprocity in bilateral contracts: Spencer v Gostelow 1920 AD 617 at 634; Myers v Sieradzki 1910 TPD 869; NUTW & Others v Jaguar Shoes (Pty) Ltd 1987 (1) SA 39 (N); Valasek v Consolidated Frame Cotton Corporation Ltd 1983 (1) SA 694 (N).

43

Rycroft & Jordaan A Guide to South African Labour Law 68-69.

44

Ibid 69. See also 8.2.1 supra.

45

See eg Gladstone v Thornton's Garage 1929 TPD 116.

employer is generally relieved of the obligation to remunerate the employee where the employee's services are not available to the employer.⁴⁶

8.3.2.3 Deductions

At common-law, unilateral deductions from an employee's wages for illiquid claims are prohibited.⁴⁷ The common-law does, however, allow for deductions by consent and by way of set-off.⁴⁸

Unilateral deductions from wages for breakages or other damages to the employer's property are not unusual in the domestic service sector. Benjamin⁴⁹ not only agrees that such unilateral deductions from wages are unlawful, but is of the opinion that an agreement to this effect is null and void.⁵⁰ He provides the following rationale for this rule:

- '(a) Workers are entitled to the wages they have contracted for;

46

See in general Rycroft and Jordaan A Guide to South African Labour Law 69-72. The Basic Conditions of Employment Act ss 12-13 have superseded the common law in respect of paid annual and sick leave: see 8.3.3.3 supra.

47

Grogan Riekert's Basic Employment Law 62; Rycroft and Jordaan A Guide to South African Labour Law 76. See also McLear v Rison 1914 CPD 731.

48

Certain requirements for set-off have to be met. See eg Schierhout v Union Government 1926 AD 286 at 291.

49

Benjamin 'The Contract of Employment and Domestic Workers' (1980) 1 ILJ 187.

50

See eg R v Van Breda 1933 SR 42 at 43; S v Collet 1978 (3) SA 206 at 211.

- (b) an employer cannot set himself up as judge of the value of the loss he has suffered; the correct place for such matters to be decided is a court of law which can address itself to the question of the employee's alleged negligence;
- (c) an illiquid claim cannot be set off against a liquidated claim;
- (d) the unequal nature of the employment relationship makes such deductions highly undesirable.⁵¹

The Basic Conditions of Employment Act prohibits deductions from an employee's remuneration except in accordance with a written authority given by the employee or in accordance with an order of court or a provision of any law.⁵² Rycroft and Jordaan suggest that this statutory prohibition of deductions does not exclude the operation of common-law set-off.⁵³

8.3.3 Provision of leave

8.3.3.1 General

At common-law, the employer is generally not obliged to grant an

51

Benjamin 'The Contract of Employment and Domestic Workers' (1980) 1 ILJ 187 at 195.

52

Basic Conditions of Employment Act 3 of 1983 s 19(1)(e).

53

Rycroft and Jordaan A Guide to South African Labour Law 76.

employee annual, sick or occasional leave,⁵⁴ unless the parties have expressly or tacitly agreed otherwise.⁵⁵ 'Leave', in this context, means leave of absence from work with the employer's permission. As has been explained,⁵⁶ an employee is entitled to payment only for periods she has actually worked or tendered her service. Therefore, even if the employer grants the employee leave of absence, that employee has no right to payment for the period of absence, except if the parties have agreed otherwise.⁵⁷

The provisions of the Basic Conditions of Employment Act have brought about considerable change in this regard.

8.3.3.2 Annual leave

At common-law, an employee is not entitled to any annual leave unless expressly provided for in the contract of service. Swanepoel, however, argues that the force of custom has already become so strong that paid annual leave will practically always be implied in a contract which has been concluded for an indefinite period.⁵⁸ If annual leave is provided for in a contract, the parties may agree when the leave may be taken.

54

For the position regarding leave on public holidays, see 8.2.1.5 supra.

55

See eg East London Municipality v Thomson 1944 AD 56 at 61; Carstens v Ferreira 1954 (4) SA 704 (T) at 706.

56

See, in general, 8.3.2 supra.

57

Rycroft and Jordaan A Guide to South African Labour Law 82-83.

58

Swanepoel Introduction to Labour Law 15-16. See, in general, East London Municipality v Thompson 1944 AD 56; Wallach's Printing and Publishing Co Ltd v Wallach 1932 AD 46.

In the absence of such agreement, leave may only be taken at the end of the period of service, or after one year's service in the case of an indefinite period contract. No provision is made for leave to be taken on a pro rata basis during the currency of a year.⁵⁹

When an employee has not availed herself of leave that has fallen due, she is not entitled to demand the monetary equivalent of such unused leave on dismissal. However, if it is at the request of the employer that the employee has not taken leave, she will be entitled to payment for accumulated leave.⁶⁰

The common-law position has been altered by the Basic Conditions of Employment Act. The following provisions now apply with regard to the domestic worker and her employer.

An outside sales assistant, a traveller, a traveller's assistant, a demonstrator-salesman, a property salesman, an insurance agent and a guard or a security guard are entitled to at least twenty-one consecutive days' and any other employee, excluding a regular day worker, to at least fourteen consecutive days' leave on full pay in respect of each period of twelve consecutive months for which the employee works for a single employer.⁶¹ The period of leave may be reduced by the number of days occasional leave on full pay granted to

59

Rycroft and Jordaan A Guide to South African Labour Law 83.

60

Reed v Richmond Local Board 1923 AD 50; Liquidators of Agricultural Supply Association Ltd v Taylor 1922 TPD 301. See also Rycroft and Jordaan A Guide to South African Labour Law 83; Grogan Riekert's Basic Employment Law 69.

61

S 12(1) of the principal Act as amended by Act 137 of 1993 s 6(a).

the employee at her written request.⁶²

An employer may not require an employee to work during her leave.⁶³

Annual leave may not be taken concurrently with sick leave or with a period of notice of termination of a contract of employment.⁶⁴

An employee's annual leave must be extended by one working day with full pay for each public holiday which falls within the period of leave.⁶⁵

Upon termination of service, provision is made for payment of wages for leave not taken.⁶⁶

In general, domestic workers are thus entitled to at least fourteen consecutive days' leave on full pay per year. The employer of a regular day worker is obliged to grant the day worker one working day's leave of absence on full pay in respect of every twenty-six working days for which she has been employed by that employer.⁶⁷ This section does not apply to casual employees.⁶⁸

62

S 12(1)(a)(ii).

63

S 12(1)(b).

64

S 12(2)(b).

65

S 12(2)(c).

66

S 12(4). See also Van Jaarsveld and Fourie Suid-Afrikaanse Arbeidsreg 229; Geerdts Let Us Work Together 14.

67

S 12(1)(c) of the principal Act as inserted by Act 137 of 1993 s 6(b). The NMC recommended that a regular day worker should ideally be in a position to take leave from her various employers concurrently: Gaz 13511 of 13 September 1991 48.

68

S 12(10).

It may well be argued that domestic workers, especially live-in domestic workers, should be entitled to at least twenty-one consecutive days' leave. At present, an outside sales assistant, a traveller, a traveller's assistant, a demonstrator-salesman, a property salesman, an insurance agent and a guard or a security guard are entitled to twenty-one days' leave.⁶⁹ These employees appear to have in common that they are separated from their families for lengthy periods of time, either because they have to work long and irregular hours or because they have to travel and live away from their families for certain periods. Live-in domestic workers find themselves in a similar position and should be entitled to similar leave benefits.⁷⁰

8.3.3.3 Sick leave

At common-law, an employer is not entitled to dismiss an employee for unauthorised absence as a result of illness, except where the absence continues for an unreasonably long period.⁷¹ An employee is generally not entitled to payment for periods of absence due to illness, unless this

69

S 12(1)(a)(i).

70

See also Gaz 13511 of 13 September 1991 48. SADWU recommends twenty-one working days annual leave after completing twelve months of service for full-time domestic workers. Domestic workers who work for different employers on different days, should be granted a minimum of three days paid leave per annum by each employer. Benjamin and Seady suggest that the practice of a month's annual leave is widespread in the domestic service sector. The statutory entrenchment of only two weeks' annual leave may lead to a reduction of leave periods for domestic workers. Benjamin P and Seady H '1993 Labour Legislation: Farmworkers, Domestic Workers, The Public Service Sector and Teachers' (1993) 6 ILJ 1406 at 1407.

71

Meysers v Sieradzki 1910 TPD 869 at 876. See also Rycroft and Jordaan A Guide to South African Labour Law 84. Brassey MSM 'The Effect of Supervening Impossibility of Performance on a Contract of Employment' 1990 Acta Juridica: Labour Law 22 at 41-42.

has been agreed to.⁷² However, an exception appears to exist in the case of domestic workers who are prevented by short spells of illness from rendering full services. In the case of Boyd v Stuttaford & Co,⁷³ the Appellate Division accepted a passage in Voet as a part of our law. In the judgment of the court a quo, of which the Appellate Division approved, Hopley J said:

'Having stated the law as above set forth (that is that employees are not entitled to sick pay), Voet proceeds to an exception which was no doubt dictated by motives of humanity and in favour of a particular class - viz domestic servants - who could ill afford to be sufferers by the rigid application of the rules previously laid down, and who from the nature of the relationship and contract as constructed in those days would be peculiarly at the mercy of their employees ...'.⁷⁴

He proceeded to quote a passage from Voet which Gane has translated as:

'Domestic servant paid for short illness - Nay indeed if male or female domestic servants have been prevented by illness of health from fulfilling in all respects, for a moderate space of time only, the services promised, deduction from the wages ought not

72

Swanepoel Introduction to Labour Law 16; Rycroft and Jordaan A Guide to South African Labour Law 84.

73

1910 AD 101.

74

ibid 105.

at once to be made on that account.⁷⁵

There is no duty upon the employer to pay for the employee's medical care, unless the employer himself calls for such medical service.⁷⁶

Provisions regarding sick leave for all employees, including domestic workers, are now regulated by the Basic Conditions of Employment Act. This Act provides for sick leave on full pay in a three-year cycle of not less than thirty working days in the case of employees who work not more than five days a week, and sick leave of not less than thirty six working days in the case of other employees.⁷⁷ The amount which should be paid to an employee in respect of sick leave on full pay may not be less than the normal wage.⁷⁸

An employee is not entitled to payment of wages if he or she is absent from work, without producing a medical certificate, for a period which is longer than two days.⁷⁹ The provisions of this section do not apply

75

Ibid 106. See also Norman-Scoble Law of Master and Servant in South Africa 184; Grogan Riekert's Basic Employment Law 70; Benjamin 'The Contract of Employment and Domestic Workers' (1980) 1 ILJ 187 at 195.

76

Fulls v Mollentze 13 SC 369; Argus Printing and Publishing Co v Van Niekerk 1895 OR 40. See, in general, Norman-Scoble Law of Master and Servant in South Africa 184-187. It appears that the Master and Servant laws placed domestic workers in a more favourable position.

77

S 13(1)(a)(b).

78

S 13(2).

79

S 13(3). This is in line with the NMC recommendations in this regard. However, two different views were held on the question of medical certificates. The majority view held that the provisions of the Basic Conditions of Employment Act regarding medical certificates are adequate and inclusion is appropriate. The minority view held that the period of two days of absence without a medical certificate is too short given the special circumstances of the domestic worker. It was suggested that this period be extended to three days. A large

to casual workers.⁸⁰

The employer of a regular day worker, however, is obliged to grant the regular day worker who is absent from work through incapacity, one working day's sick leave on full pay in respect of every twenty-six working days for which she has been employed by that employer.⁸¹

8.3.3.4 Meal intervals

At common-law, no provision is made with regard to meal intervals for employees.

The position is now regulated by the Basic Conditions of Employment Act which provides that an employer may not require or permit an employee to work for more than five hours without a meal interval of at least one hour.⁸² Furthermore, an employee may not be required to perform any work during the meal interval.⁸³ The meal interval may be shortened to thirty minutes by agreement between employer and employee. The agreement will not be of any force unless the employer

percentage of South Africans prefer to consult traditional healers. The possibility of accepting medical certificates issued by these healers may have to be considered in future. It was further suggested that employers of domestic workers should supply reasonable assistance to their employees with regard to transport and access to a medical doctor or a registered nurse: Gaz 13511 of 13 September 1991 48-49.

80

S 13(5)(1)(c). See also Van Jaarsveld and Fourie Suid-Afrikaanse Arbeidsreg 229; Geerdts Let Us Work Together 15.

81

S 13(1A) of the principal Act as inserted by Act 137 of 1993 s 7(b). This is in line with the NMC recommendations in this regard.

82

Basic Conditions of Employment Act 3 of 1983 s 7(1)(a).

83

S 7(1)(b).

has given written notice of such agreement to an inspector.⁸⁴
Employers of domestic workers, however, are not required to give written notice of such an agreement to an inspector.⁸⁵

A domestic worker who takes care of children, the aged, the sick, the frail and the disabled during the meal interval will be deemed to have worked during such meal interval.⁸⁶ Domestic workers are excluded from section 7(3)(c) of the Basic Conditions of Employment Act which provides that the time by which an employee's meal interval exceeds one hour and fifteen minutes will be regarded as time worked by the employee.⁸⁷

Whether these provisions will be of much practical use in the domestic service sector remains to be seen. The domestic worker often works unsupervised and eats whenever it is convenient.

8.3.4 Safe working conditions

8.3.4.1 General

At common-law, the employer is required to take reasonable steps in

84

S 7(2).

85

S 7(2) of the principal Act as amended by Act 137 of 1993 s 4(a).

86

S 7(3)(bA) of the principal Act as inserted by s 4(b) of Act 137 of 1993.

87

S 7(3)(c) of the principal Act as amended by Act 137 of 1993 s 4(c). This is in line with the NMC recommendations in this regard. The NMC further recommended, as a guideline, that the domestic worker and her employer should be able to negotiate tea times: Gaz 13511 of 13 September 1991 46.

order to provide the employee with safe and healthy working conditions.⁸⁸ Although the precise scope of this duty is ill-defined, it appears to include the provision of safe premises, safe machinery and tools, and a safe system of work.⁸⁹

The existence of an employment relationship does not automatically entitle an employee to a contractual claim for damages against the employer for injuries sustained during the course of that employee's employment.⁹⁰ Because the employer will not ordinarily be contractually liable for work-related injuries, the employee will have to prove delictual liability on the part of the employer.

The employer's liability (if any) will lie in delict, because as owner or controller of the undertaking (or household, in the case of domestic workers), he owes employees a duty to take reasonable care of their safety. In this regard, it should be pointed out that the employer's obligation to take reasonable care for the safety of employees is not an absolute obligation. It is expected of the employer only to take precautionary measures against accidents which could reasonably be foreseen.⁹¹ An employer is not expected to take precautionary

88

See eg Van Deventer v Workmen's Compensation Commissioner 1962 (4) SA 28 (T); Barker v Union Government 1930 TPD 120. See generally Machan TR 'Human Rights, Worker's Rights, and the 'Right' to Occupational Safety' in Ezorsky G (ed) Moral Rights in the Workplace (Albany 1987) 45; Scott A 'Safety and the Standard of Care' (1980) 1 ILJ 161.

89

See, eg Wilson's Clyde Coal Co v English (1937) 3 All ER 628. Scott 'Safety and the Standard of Care' (1980) 1 ILJ 161 at 166 points out that this classification is merely one of convenience and does not detract from the wider scope of the duty of care. Grogan Riekert's Basic Employment Law 63 notes that, in instances where the employer fails to meet this obligation, employees who refuse to work until a dangerous situation is corrected will not be considered to be in breach of contract. See, in general, J v M (1989) 9 ILJ 755 (IC) with regard to the employer's duty to prevent sexual harassment in the workplace.

90

Baker v Union Government 1930 TPD 128.

measures against all possible accidents. The circumstances of each case will have to be considered when determining whether an employer's actions or omissions are, in fact, reasonable.⁹²

8.3.4.2 The Occupational Health and Safety Act 85 of 1993

The imprecision of the common-law duty to provide safe working conditions was one of the reasons which persuaded the legislature to intervene in occupational safety as early as 1918.⁹³

At present, the substantive content of the employer's duty of care, as well as the employee's remedies, are largely regulated by statute.⁹⁴

Unlike some of its predecessors,⁹⁵ the Occupational Health and Safety Act also applies to domestic workers and private households. This Act relies on wide definitions of, for example, 'workplace'⁹⁶ and

91

For a discussion of what the employee must show in order to prove delictual liability, see Swanepoel Introduction to Labour Law 15; Rycroft and Jordaan A Guide to South African Labour Law 79. See, in general, Kruger v Coetzee 1966 (2) SA 428 (A); Macdonald v General Motors South Africa (Pty) Ltd 1973 (1) SA 232 (O).

92

Van Deventer v Workmen's Compensation Commissioner 1962 (4) SA 28 (T) at 31.

93

Grogan Riekert's Basic Employment Law 63. The earliest occupational safety legislation in South Africa was the Factories Act 28 of 1918.

94

Rycroft and Jordaan A Guide to South African Labour Law 80.

95

The Factories, Machinery and Building Work Act 22 of 1941 specifically excluded private houses from the definition of 'factory'. The Machinery and Occupational Safety Act 6 of 1983 was the first Act of this nature to apply to the domestic service sector.

96

Act 85 of 1993 s 1.

'employee';⁹⁷ to provide the widest possible protection in respect of health and safety matters for employees at their workplaces and to provide safety measures in connection with the use of machinery. The aim of this Act is to provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery.⁹⁸ Provision is also made for the protection of persons other than persons at work against hazards to health and safety arising out of, or in connection with, the activities of persons at work.⁹⁹ An advisory council for occupational health and safety is established in terms of this Act.¹⁰⁰

The Act follows a scheme of duties backed up by criminal sanctions.¹⁰¹

The objectives set out above may be reached partly through substantive provisions of the Act, but mainly through the regulations made in terms of the Act.¹⁰²

No regulations with specific application to the household have been issued in terms of this Act.¹⁰³ However, the following regulations

97

ibid.

98

See eg ss 7-10.

99

s 9.

100

See eg ss 2-6.

101

s 38.

102

See, in general, ss 43-44.

may be singled out as being of possible importance to the domestic service sector.

8.3.4.2.1 General safety regulations¹⁰⁴

Ladders: A duty is placed on the employer to ensure that every ladder is constructed of sound material and is suitable for the purpose for which it is used.¹⁰⁵ An employer is prohibited from using or permitting the use of a ladder if its rungs are damaged or are not fastened according to certain standards.¹⁰⁶

An employer is further prohibited from permitting the use of a ladder which is longer than nine metres and which is required to be leaned against an object for support.¹⁰⁷ An employer is obliged to take special precautionary measures to prevent articles from falling off when work is being done from a ladder.¹⁰⁸ Special regulations apply to the use of wooden ladders.

103

Regulations are subordinate legislation and a breach of a regulation may lead to criminal charges.

104

GN R1031 of 30 May 1986 as amended: GNs R433 of 20 June 1986; R1791 of 9 September 1988. These regulations were made in terms of s 35 of the Machinery and Occupational Safety Act 6 of 1983. However, s 43(5) of the Occupational Health and Safety Act 85 of 1993 provides that these regulations shall remain in force.

105

R13 A(1).

106

R13 A(2)(a)(b).

107

R13 A(5)(a).

108

R13 A(4)(a)(b).

8.3.4.2.2 Driven machinery regulations¹⁰⁹

Power driven washing machines, centrifugal extractors or similar machines of double cylinder construction, in which the inner cylinder, drum or basket rotates, must be provided with a door or lid on the outer cylinder. The door or lid on the outer cylinder must be so interlocked that the inner cylinder cannot be put into motion, unless the door or lid is closed, and the door or lid cannot be opened unless the inner cylinder is stationary.¹¹⁰

8.3.4.2.3 Facilities regulations¹¹¹

A duty is placed on every employer to provide sanitary facilities at the workplace.¹¹² An employer must provide a change-room for employees who need to undress.¹¹³ The windows of a change-room must be glazed in obscure glass or similar material.¹¹⁴ The entrance to the change-room must be screened in order to afford privacy.¹¹⁵

An employer may allow a change room to be used for the partaking of

109

GN R295 of 26 February 1988.

110

R13(9)(b).

111

GN R2362 of 5 October 1990.

112

R4(1)-(5).

113

R 4(1).

114

R4(2)(d).

115

R4(2)(e).

meals provided that a partition of at least two metres high is installed between showers and eating places¹¹⁶ and there is no direct communication between the change-room and toilet facilities.¹¹⁷ An employer must further make available an adequate supply of drinking water for his employee at the workplace.¹¹⁸

The discussion of these regulations is little more than an academic exercise. Few, if any, employers of domestic workers are aware that the Occupational Health and Safety Act applies to them and their employees, let alone of the content of these regulations.

While a household may not be as dangerous a workplace as a factory floor, the employer of a domestic worker is nevertheless obliged, at common-law as well as in terms of the provisions and regulations of Occupational Health and Safety Act, to provide a safe and healthy working environment for the domestic worker. In general, this may entail that the employer maintain electrical appliances, which the domestic worker must use, in a good and safe working condition. The employer may also be expected to provide the domestic worker with adequate training in the safe operation of such appliances.

8.3.4.3 The Compensation for Occupational Injuries and Diseases Act 130 of 1993

The Compensation for Occupational Injuries and Diseases Act 130 of

116

R4(3).

117

R7(a).

118

R7(b).

1993 provides employees with a limited right to compensation, but restricts the right of employees covered by this Act to recover damages from their employers for injuries sustained in the course of their employment.¹¹⁹ As was the case with the preceding Workmen's Compensation Act 30 of 1941, domestic workers are, however, excluded from the application of this Act.¹²⁰

8.3.5 Accommodation

In general, there is no statutory or common-law obligation upon an employer to provide an employee with board and/or lodging. An employer may, of course, contract to provide such board or lodging.¹²¹

8.3.6 Certificate of service/character reference

Given the methods of recruitment in the domestic service sector, a good character reference is almost essential for a domestic worker seeking employment.¹²²

119

For a discussion of the Workmen's Compensation Act 30 of 1941, see Rycroft and Jordaan A Guide to South African Labour Law 82; Swanepoel Introduction to Labour Law 15. See also Budlender G 'The Workmen's Compensation Act' 1984 (June) SALB 22; Mureinik E 'Workmen's Compensation and the Mugging that Arose "out of" Employment' (1980) 1 ILJ 33.

120

Act 130 of 1993 s 1. See also 9.6 supra.

121

Norman-Scoble Law of Master and Servant in South Africa 182; Grogan Riekert's Basic Employment Law 74.

122

See 2.3 supra.

At common-law, an employer is not obliged to provide an employee with a character reference upon termination of the employment contract. Furthermore, the employer is not obliged to supply information to any prospective employer as to the employee's character.¹²³ However, if the employer provides a reference or information, it is his duty to state what he honestly believes to be true. If he gives a reference or information he knows to be untrue, a subsequent employer who has relied on this reference, may claim for compensatory damages. In such a case, an employee may also institute an action for defamation and claim sentimental damages if the employer exceeded the limits of his privilege.¹²⁴

The Basic Conditions of Employment Act has altered the common-law position by requiring an employer to furnish an employee who leaves her job, with a certificate of service. This certificate must reflect the full names of the employee and employer, the employee's occupation, the date of termination and the employee's wage at the date of termination.¹²⁵ However, an employer will not be obliged to provide such a certificate in respect of a casual worker or an employee who has deserted.¹²⁶

It is difficult to imagine that this provision will, in practice, assist a

123

Norman-Scoble Law of Master and Servant in South Africa 187; Grogan Riekert's Basic Employment Law 74.

124

'The qualified privilege (of an employer) is based on the consideration that the interests of society require the giving of confidential information in matters of this kind': Norman-Scoble Law of Master and Servant in South Africa 188. See also McMillan v Mostert 1912 EDL 184; Stuart v Bell 1891 (2) QB 241.

125

Basic Conditions of Employment Act 3 of 1983 s 15(1).

126

S 15(2).

domestic worker in obtaining a certificate of service from an unwilling employer.

8.3.7 Victimisation

The common-law does not provide the employee with protection against victimisation. The provisions of legislation designed to protect employees would be rendered ineffective if employers could victimise employees exercising their rights under such legislation.¹²⁷

For various reasons,¹²⁸ domestic workers may be singled out as a particularly vulnerable group of employees. As a result of this vulnerability, the National Manpower Commission recommended that the following or a similar clause be inserted in the Basic Conditions of Employment Act:

'No employer should be allowed to dismiss a domestic worker or alter the conditions of employment to a position less favourable than it was previously because a domestic worker:

- has refused to perform an act contrary to the provisions of the Act; or
- has discussed his or her conditions of employment with other employees, employers or anybody else.¹²⁹

127

Grogan Riekert's Basic Employment Law 75; Norman-Scoble Law of Master and Servant in South Africa 177-179.

128

See eg 2.3 supra.

129

Gaz 13512 of 13 September 1991 52.

However, the domestic worker is already protected from victimisation by provisions of the Basic Conditions of Employment Act¹³⁰ as well as the Manpower Training Act¹³¹ and the Occupational Health and Safety Act.¹³² The need for a special clause, as suggested above, is thus not clear.

8.3.8 Keeping of prescribed records

At common-law, an employer is not obliged to keep any prescribed records.

In terms of the Basic Conditions of Employment Act, an employer of a domestic worker, unlike other employers, is still not obliged to keep records in the prescribed form or manner, or in such form or manner as approved by an inspector in writing, provided the employer and domestic worker have concluded a written agreement. This agreement must be signed by both parties and must contain reference to the ordinary working hours of the domestic worker per month, per week or per day, as the case may be.¹³³ Such an agreement may only be amended if both parties agree to the amendment, if it is made in writing on an existing agreement, and if both parties have initialled the

130

Act 30 of 1983 s 18.

131

Act 56 of 1981 s 48.

132

Act 85 of 1993 s 26.

133

Basic Conditions of Employment Act 3 of 1983 s 20A(1) as inserted by Act 137 of 1993 s 11. Standard contracts of employment have been made available free of charge to the public by the Department of Labour. See in general Grogan Riekert's Basic Employment Law 74.

amendment.¹³⁴

8.3.9 Prohibition of certain employment

The common-law does not prohibit the employment of pregnant women or young children.

The Basic Conditions of Employment Act alters this situation by prohibiting the employer from employing any person under the age of fifteen years.¹³⁵ Furthermore, an employer may not require or permit a female employee to work for the period of four weeks prior to her expected date of confinement and eight weeks after the date of her confinement.¹³⁶

134

S 20A(3) as inserted by Act 137 of 1993 s 11. The NMC suggested that a written contract of employment could be of particular value in the domestic service sector. One view held that the Basic Conditions of Employment Act should be amended to provide that no domestic worker may be employed for longer than three months without a written contract of employment. Both parties should keep a signed copy of the contract. The contract should be available for inspection. The other view held that the matter of an employment contract should be dealt with in the guidelines. No statutory compulsion should exist in this regard: Gaz 13512 of 13 September 1991 52.

135

S 17(a). The NMC suggested that guidelines should be drawn up requiring that a domestic worker who takes care of the elderly or of children, should be at least nineteen years old: Gaz 13511 of 13 September 1991 50.

136

S 17(b). An employee is not entitled to payment during this period and furthermore no provision is made for job security. See also Geerdts Let Us Work Together 18. The NMC, as a first step, recommended the inclusion of domestic workers under the provisions relating to maternity leave in the Basic Conditions of Employment Act. It was noted that domestic workers should be entitled to twelve weeks maternity leave, as well as unemployment benefits through an Unemployment Insurance Scheme. It was noted further that the provisions of the Basic Conditions of Employment Act are inadequate for female employees in all sectors of the workforce and that an investigation should be launched in order to examine the question whether female employees in all sectors should not be guaranteed their jobs back after a period of pregnancy and confinement. Certain members of the NMC contended that the job back guarantee should be limited to two pregnancies only. COSATU and SADWU stated that there should be no limitation on the number of pregnancies in this regard. Certain members of the NMC stated that domestic workers should be guaranteed

8.4 TERMINATION OF THE EMPLOYMENT RELATIONSHIP

8.4.1 Introduction

The termination of an employment contract is regulated by common-law as well as statutory and contractual principles. As will be discussed hereunder, the contract of employment may be terminated in terms of the provisions of the contract, in other words by notice, effluxion of time or completion of the job; by consent; by operation of law; by supervening impossibility of performance and by rescission for breach of contract.¹³⁷

With regard to the common law position, Rycroft and Jordaan¹³⁸ explain that the power of an employer to dismiss an employee summarily for serious breach of contract is not necessarily the most important means through which the employer can exercise control over the employment relationship. According to the authors, the employer's common-law right to terminate the contract on notice could have yet more devastating consequences, as the employer is in a position to lawfully dismiss the employee for any reason or for no reason at all,

their jobs back after a period of pregnancy and confinement regardless of the proposed investigation. As a special provision, it was recommended that regular day workers should also be entitled to maternity leave. Furthermore, it was recommended that guidelines should be set regarding time-off for visits to clinics et cetera. A domestic worker who is guaranteed her job back after pregnancy should be required to give written notice of her intention to return to work before she goes on maternity leave and also one month before actually returning to her job: Gaz 13511 of 13 September 1991 49-50. SADWU demands eight weeks paid maternity leave before a worker gives birth and at least six weeks paid leave after she gives birth.

137

Rycroft and Jordaan A Guide to South African Labour Law 86.

138

Ibid.

provided that reasonable notice of termination of service is given.¹³⁹ Being a lawful dismissal, it will not be scrutinised by the courts. Summary termination at least allows for the alleged reason for termination of employment to be tested.¹⁴⁰

8.4.2 Contractual arrangements, the common-law and the Basic Conditions of Employment Act

8.4.2.1 Fixed-term contracts

An employment contract concluded for a fixed term terminates on the expiry of such term.¹⁴¹ No notice of termination of service is required. However, notice may be given at any time before expiry of the term to prevent a tacit renewal of the contract.¹⁴² Parties to a fixed-term contract are free to terminate such a contract by agreement, before expiry of the term.¹⁴³

139

See also *Brassey MSM in Brassey et al The New Labour Law* 1-7; Rycroft A 'Is There Still a Right to Terminate Employment on Notice Without a Hearing?' (1989) 106 *SALJ* 270.

140

The employee, of course, may also terminate the employment contract on notice. Unfortunately the absence of opportunities for suitable alternative employment makes this an unrealistic option.

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The contract may, of course, be terminated beforehand on justifiable grounds or by agreement.

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R v Bhana 1941 SR 186.

143

Swanepoel *Introduction to Labour Law* 20. Rycroft and Jordaan *A Guide to South African Labour Law* 87-88.

8.4.2.2 Termination by breach of contract

Parties to an employment contract are contractually bound to fulfil certain obligations. If a party does not fulfil these obligations or if these obligations are not fulfilled in a satisfactory manner, he or she is guilty of breach of contract.¹⁴⁴

If a breach of contract occurs, the innocent party may choose to terminate the contract.¹⁴⁵ Should the conduct of the guilty party amount to a serious breach of an essential term of the employment contract,¹⁴⁶ the innocent party may choose to terminate the contract summarily.

8.4.2.3 Termination by notice

A contract of employment which has been entered into for an indefinite period, may be terminated on notice.¹⁴⁷ Parties may agree to a notice period, but if not, 'reasonable' notice must be given.¹⁴⁸ Whether the notice period is reasonable or not, will depend on the circumstances of

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See, in general, Grogan Riekert's Basic Employment Law 30-32.

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For a detailed discussion, see 8.5.2 infra.

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See eg Kaplan v Penkin 1933 CPD 223; Daniels v Thomas 1924 NLR 295; Myers v Sieradzki 1910 TPD 896 for examples of conduct constituting a breach of an essential term of the employment contract.

147

Rycroft and Jordaan A Guide to South African Labour Law 88-90; Swanepoel Introduction to Labour Law 20. See eg Blackley v City of Salisbury 1979 (1) SA 348 (R).

148

This has been referred to as a 'purely arbitrary rule' in Tiopaizi v Bulawayo Municipality 1923 AD 317 at 327.

every case. In this regard, the periodicity of payment is one of the most important considerations. So, for instance, an employee who is paid weekly, should receive a week's notice.¹⁴⁹ However, casual or daily employees who are paid a daily wage may be neither entitled to, nor required to give, notice of termination of service.¹⁵⁰ Reasonable notice in the case of all monthly paid workers is usually a month's notice, expiring at the end of a month (the unbroken month's notice). Notice given during the currency of the month takes effect only at the termination of the following month.¹⁵¹

There appears to be a distinction in common-law between domestic workers and other employees in this regard: Domestic workers, employed on a monthly basis, may be discharged at any time during the month by being given a month's notice from the date of dismissal (the broken month's notice). This, in effect, means that the domestic worker's notice month could run from, for example, the fifteenth of one month to the fifteenth of the next month.¹⁵²

This distinction has been criticised.¹⁵³ It has been suggested that domestic workers should be treated on the same basis as other

149

Ibid 320. See also Pemberton NO v Kessel 1905 TS 174.

150

Pretoria City Council v Minister of Labour & Others 1943 TPD 238 at 244.

151

Honono v Willowvale Bantu School Board & Another 1961 (4) SA 408 (C).

152

In Crawford v Tommy 1906 TS 843 it was held that notice may, in the case of domestic workers, be given to expire at any point - not necessarily at the end of a week or month. See also Tiopaizi v Bulawayo Municipality 1923 AD 317 at 325-326.

153

Benjamin 'The Contract of Employment and Domestic Workers' (1980) 1 ILJ 187 at 191-193; Flint 'The Protection of Domestic Workers in South Africa: A Comparative Study' (1988) 9 ILJ 1 and (1988) 9 ILJ 187.

common-law employees with regard to notice. Further it has been suggested that since the distinction between domestic or menial workers and other common-law employees is based on customary usage, it could be challenged by establishing the existence of a custom to the contrary.¹⁵⁴

Benjamin argues that the basis of the distinction is inappropriate in the context of the notice period, the reason for the distinction being that the close personal contact between a domestic worker and her employer could render a long period of notice intolerable. According to Benjamin, the test should not be based on the degree of contact between employee and employer, but on the ability of the employee to find alternative work and the employer to find a replacement.¹⁵⁵ The end of the month appears to be the best time to find work (and accommodation in the case of live-in domestic workers) and the domestic worker should thus be entitled to the same security of tenure as other common-law employees.

Notice is a unilateral and final act that does not require acceptance.¹⁵⁶ There are no formalities with regard to the serving of notice. Notice at common-law may be given either orally or in writing. However, notice must be clear, unambiguous and unconditional.¹⁵⁷ An employer may, instead of giving notice and allowing the employee to work during the notice period, pay the employee's remuneration for the notice period in

154

Benjamin 'The Contract of Employment and Domestic Workers' (1980) 1 ILJ 187 at 194.

155

Ibid. By analogy, see Fulton v Nunn 1904 TS 123.

156

Rustenburg Town Council v Minister of Labour 1942 TPD 220 at 224-225.

157

Ntsohi v Berlin Mission Society 1924 TPD 378. See also Rycroft and Jordaan A Guide to South African Labour Law 89-90.

advance and then terminate the employee's services with immediate effect.¹⁵⁸ Flint suggests that where payment in lieu of notice is given, such payment should include the value of non-cash items which form part of the wage. Thus, live-in domestic workers should receive accommodation pay as well as notice pay.¹⁵⁹

The Basic Conditions of Employment Act now provides for minimum periods of notice for domestic workers. During the first four weeks of employment, an employer or employee may terminate a contract of employment by giving the other party one working day's notice of termination of such contract unless, of course, a longer period of notice was agreed upon.¹⁶⁰ Thereafter, a weekly paid employee will receive one week's notice¹⁶¹ and a domestic worker paid otherwise than weekly will receive one month's notice¹⁶² unless a longer period of notice has been agreed upon. Notice must be given in writing except when given by an illiterate employee.¹⁶³ The provisions of this section

158

Crawford v Tommy 1906 TS 843. See also Napier B 'Terminating the Contract of Employment by Payment of Wages in Lieu of Notice' 1989 CLJ 31.

159

Flint 'The Protection of Domestic Workers in South Africa: A Comparative Study' (1988) 9 ILJ 187 at 195.

160

Basic Conditions of Employment Act 3 of 1983 s 14(1)(a).

161

S 14(1)(b). The common-law concept of a 'reasonable' period is closely linked to the periodicity of payment. So eg a week's notice would be given to a weekly paid worker and a month's notice would be given to a monthly paid worker.

162

S 14(1)(b) of the principal Act as amended by Act 137 of 1993 s 8(a). This is in line with the common-law position.

163

Basic Conditions of Employment Amendment Act 3 of 1983 s 14(5).

do not apply to casual workers¹⁶⁴ or regular day workers.¹⁶⁵

8.4.2.4 Termination by agreement

The employment contract may, at any time, be terminated by agreement between the employer and the employee.¹⁶⁶ The employee's consent to termination of the employment contract must be real.¹⁶⁷

8.4.2.5 Operation of law

In terms of the Insolvency Act 24 of 1936, a contract of employment is automatically terminated by the sequestration of an employer's estate.¹⁶⁸ The common-law regards the sequestration of an employer's estate as a breach of contract. The employee is therefore entitled to be

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S 14(5).

165

S 14(5) as amended by Act 137 of 1993 s 8(b). The NMC recommended as a special provision that a calendar month's notice should be given where accommodation is provided as part of the remuneration package. The rationale for this recommendation is that accommodation usually becomes available at the end of the month. Where applicable, and subject to the above, a regular day worker should be entitled to a pro rata notice period or notice pay: Gaz 13511 of 13 September 1991 51.

166

Rycroft and Jordaan A Guide to South African Labour Law 90; Swanepoel Introduction to Labour Law 21.

167

R v Van Breda 1933 SR 42; Small & Others v Noella Creations (Pty) Ltd (1986) 8 ILJ 470 (IC).

168

Act 24 of 1936 s 38.

compensated for any losses suffered as a result of such a breach.¹⁶⁹
 The Insolvency Act determines that employees have, within specified limits, a preferent claim for wages, leave pay or bonus due but unpaid at the date of sequestration.¹⁷⁰

8.4.2.6 Supervening impossibility of performance

8.4.2.6.1 General

The maxim lex non cogit impossibilia applies to employment contracts.¹⁷¹ According to the general rules of the law of contract, a contract is automatically discharged, and no further liability for future damages or performance arises, when such a contract becomes totally and objectively impossible of performance after its conclusion.¹⁷² However, a contract is not automatically discharged when the impossibility is only of a partial or temporary nature. Rycroft and Jordaan point out that these rules have not always been applied consistently to the employment contract.¹⁷³

8.4.2.6.2 Death of the employer or employee

169

Rycroft and Jordaan A Guide to South African Labour Law 90-91.

170

S 100(1)(2). Rycroft and Jordaan A Guide to South African Labour Law 91; Swanepoel Introduction to Labour Law 21.

171

Grogan Riekert's Basic Employment Law 130.

172

Peters Flamman & Co v Kokstad Municipality 1919 AD 427.

173

Rycroft and Jordaan A Guide to South African Labour Law 91-92. See, eg Johannesburg Municipality v O'Sullivan 1923 AD 201 and Boyd v Stuttaford & Co 1910 AD 101.

An employee's death terminates the employment contract as it becomes totally and objectively impossible for such an employee to fulfil his or her obligations in terms of the contract.¹⁷⁴ In general, an employer's death may not result in an automatic termination of the employment contract. The estate of the employer remains liable for remuneration for the unexpired period of the contract, unless the employee finds other employment.¹⁷⁵ However, it has been argued that an exception should be made where the employee's duties are of a highly personal nature.¹⁷⁶ The duties of a domestic worker are often of a highly personal nature. Domestic service could thus be regarded as one of these exceptions, especially in cases where the deceased employer was the only member of the household.

8.4.2.6.3 Sickness or disability

Sickness or disability may relieve the employee of the duty to tender his or her services for a limited period. However, the employer is not entitled to terminate the contract summarily unless the absence lasts for an unreasonably long period.¹⁷⁷

At common-law, the employer is generally not obliged to pay the employee during such period of absence unless they have agreed

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Rycroft and Jordaan A Guide to South African Labour Law 92.

175

Boyd v Stuttford & Co 1910 AD 101 at 114-115.

176

Van Jaarsveld SR and Coetzee WN Suid-Afrikaanse Arbeidsreg vol I (Johannesburg 1983) 124. See also Isaacson v Walsh & Walsh 1903 SC 573.

177

Rycroft and Jordaan A Guide to South African Employment Law 93.

otherwise.¹⁷⁸ Domestic workers, as has been explained,¹⁷⁹ appear to be an exception to this common-law rule and appear to remain entitled to remuneration during a short absence from work as a result of illness.¹⁸⁰ As has also been explained, the Basic Conditions of Employment Act has altered the common-law position.¹⁸¹

8.4.3 Consequences of the termination of an employment contract

The termination of a contract of employment brings to an end all ancillary or subsidiary agreements dependant on the main contract.¹⁸² This may pose a serious problem for live-in domestic workers. The provision of accommodation is a strong motivating factor for domestic workers, especially those from rural areas, to accept employment. Upon the termination of the contract of employment, the right to board and lodging is also terminated and the employer may sue for eviction.¹⁸³

178

Grogan Riekert's Basic Employment Law 130.

179

See 8.3.3.3 supra.

180

Boyd v Stuttaford & Co 1910 AD 101 at 119.

181

See 8.3.3.3 supra.

182

See, in general, Haysom N 'Dismissal and the Eviction of Employees from their Employer's Premises' (1981) 2 ILJ 259. Van Jaarsveld and Coetzee Suid-Afrikaanse Arbeidsreg 128. See also Haysom and Thompson 'Labouring under the Law: South Africa's Farmworkers' (1986) 7 ILJ 218 at 236.

183

An employer may not take the law into his own hands. If the employee will not willingly vacate the premises, the employer must apply to the competent court for an eviction order. In the case of employers taking the law into their own hands or having employees evicted by the police without a court order, the employee would be entitled to a spoliation order: Riekert Basic Employment Law 36-37.

This naturally places the live-in domestic worker in an even more vulnerable and insecure position.

An interesting question arises in the case where an employee is unlawfully dismissed. It may be argued that an employee is entitled to notice in such a case and would therefore be able successfully to defend an eviction action until such time as the contract has been lawfully terminated.¹⁸⁴ However, it has been suggested that once a contract of employment has been terminated, be it lawfully or unlawfully, the employee will have no right to remain upon or enter the premises of the employer.¹⁸⁵ Fortunately, eviction of domestic workers is becoming an issue of lesser importance as many domestics have homes of their own and no longer reside at the property of the employers.

8.5 REMEDIES FOR BREACH OF CONTRACT

8.5.1 General

If a party to an employment contract does not fulfil his or her obligations in terms of that contract, he or she will be guilty of breach of contract.

Rycroft and Jordaan point out that, under the guise of contractual

184

This would agree with the view held by Norman-Scoble Law of Master and Servant in South Africa 165. Flint 'The Protection of Domestic Workers in South Africa: A Comparative Study' (1988) 9 ILJ 187 at 197. See also Ngewu & Others v Union Co-Operative Bank and Sugar Co Ltd 1982 (4) SA 290 (N); Haysom N and Thompson C 'Employers, the Police and Due Process' (1983) 4 ILJ 1.

185

Venter v Livni 1950 (1) SA 528 (T). See also Haysom and Thompson 'Labouring Under the Law: South Africa's Farmworkers' (1986) 7 ILJ 218 at 237.

freedom, the common-law affords the employer control over the formation, content and termination of the employment contract.¹⁸⁶

The common-law shows little concern for procedural justice in the workplace and furthermore, on the substantive side, an employee is not afforded any interest in his or her employment other than the right to be paid for availability of service.¹⁸⁷ The courts have always been prepared to apply ordinary principles of the law of contract to determine whether an employee's breach of contract was of such a serious nature that summary dismissal was warranted. It was, however, not until fairly recently that the courts showed themselves willing to apply the ordinary principles of the law of contract in respect of the remedies for breach of employment contracts.¹⁸⁸

8.5.2 Termination

8.5.2.1 General

In the event of a breach of contract by the employer or employee, the question arises whether the innocent party may terminate the contract. If the conduct of the guilty party amounts to a serious breach of an essential term of the contract, whether express or implied, summary

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See, in general, Rycroft and Jordaan A Guide to South African Labour Law 95-104; Brassey MSM in Brassey et al The New Labour Law (Cape Town Wetton Johannesburg 1987) 5.

187

An employer is allowed to terminate the contract for any or no reason whatsoever, provided that the employee is given the agreed, statutory or otherwise, reasonable notice. The employee has no right to a hearing before such notice is given. Rycroft and Jordaan A Guide to South African Labour Law 96-97. Le Roux and Van Niekerk refer to the rapid transition from the common-law regulation of termination of employment to a jurisprudence of unfair dismissal at least equal to that of most market economies, as the most remarkable feature of South African labour law reform: Le Roux and Van Niekerk Law of Unfair Dismissal 1.

188

Rycroft and Jordaan A Guide to South African Labour Law 95.

dismissal will be justified.¹⁸⁹

8.5.2.2 The employer's right to terminate the contract of employment

In the event of a serious breach of contract by the employee, the common-law rule has always been dismissal or nothing. Although the parties may agree otherwise, the employer is generally not obliged to warn the employee or conduct an enquiry before final dismissal.¹⁹⁰ The employer is also not obliged to grant the employee an opportunity to improve his or her performance, to consider alternatives to dismissal or provide reasons for dismissal.¹⁹¹ Common-law only requires that termination should be unequivocal, clear and lawful.¹⁹²

The facts and circumstances of each case will have to be considered when deciding whether a particular incident of misconduct justifies summary dismissal.¹⁹³ Factors such as the nature of the employee's job, the nature and persistence of the misconduct, and actual or

189

Strachan v Prinsloo 1925 TPD 709; Kaplan v Penkin 1933 CPD 223; Daniels v Thomas 1924 NLR 295; Myers v Sieradzki 1920 TPD 869. See, in general, Grogan Riekert's Basic Employment Law 30-32.

190

Grundling v Bevers 1967 (2) SA 131 (W).

191

Nchobaleng v Director of Education (Tvl) & Another 1954 (1) SA 432 (T).

192

Norton v Mosenthal & Co 1920 EDL 115.

193

Wallace v Rand Daily Mails Ltd 1917 AD 479 at 491. See Sigwebela v Hulett's Refineries Ltd (1980) 1 ILJ 51 (N), where it was held that the employer carries the onus of proving the misconduct upon which he relies to justify a dismissal.

potential prejudice to the employer may be relevant in this regard.¹⁹⁴

Summary dismissal has been considered to be justified in the following instances:

- Gross incompetence, such as to render the employee unfit for the purpose for which he was employed;¹⁹⁵
- habitual negligence;¹⁹⁶
- disrespect and insubordination of a serious character or coupled with other incidences of misconduct;¹⁹⁷
- incidences of misconduct such as dishonesty,¹⁹⁸ regular cases of wilful absenteeism¹⁹⁹ or drunkenness at work, gross negligence and persistent idleness.²⁰⁰

194

Rycroft and Jordaan A Guide to South African Labour Law 97-98.

195

Hankey Municipality v Pretorius 1922 EDL 306.

196

Wallace v Rand Daily Mails Ltd 1917 AD 479.

197

See, in general, Norman-Scoble Master and Servant Laws in South Africa 150.

198

Federal Cold Storage Co Ltd v Angehrn & Piel 1910 TPD 1347.

199

Negro v Continental Spinning & Knitting Mills (Pty) Ltd 1954 (2) SA 203 (W). See, however, Schneier & London Ltd v Bennett 1927 TPD 346, where it was decided that an isolated instance of absence which does not prejudice the employer does not justify summary dismissal.

200

See, in general, Norman-Scoble Law of Master and Servant in South Africa 150-152.

- At common-law, absence as a result of participation in a strike has been held to justify summary dismissal.²⁰¹

As has been discussed,²⁰² the common-law entitles the employer to terminate a contract of employment by giving the agreed or 'reasonable' notice. No reason for such notice is required. The Basic Conditions of Employment Act now regulates the period of notice, but still no reason for the termination of the contract of employment is required.²⁰³

8.5.2.3 The employee's right to terminate the contract of employment

The rules with regard to the termination of the employment contract discussed above apply, in theory at least, to both employers and employees. However, as Rycroft and Jordaan point out, most employees are not in a position simply to withdraw their services and seek employment elsewhere.²⁰⁴

Employees may terminate the contract of employment by notice.²⁰⁵

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Summary dismissal at common-law is justified, whether the strike is lawful or not: R v Smit 1955 (1) SA 239 (C).

202

8.4.2 supra.

203

Act 3 of 1983 s 14.

204

Myers v Abramson 1952 (3) SA 121 (C). See also Rycroft and Jordaan A Guide to South African Labour Law 98-99.

205

See 8.5.2.1 supra. See, in general, Grogan Riekert's Basic Employment Law 76-77.

Furthermore, the employee will be entitled to terminate the contract of employment summarily, if the employer fails to perform an essential term of the contract, indicates a renunciation of his contractual obligations or renders the continuation of the employment of relationship dangerous and intolerable. This will, for instance, be the case if the employer fails to pay wages due²⁰⁶ or unilaterally alters the conditions of employment.²⁰⁷ Scoble asserts that an attempt by the employer 'on the chastity of his female servant' will also constitute a ground for the summary termination of the contract.²⁰⁸

8.5.3 Specific performance

Until fairly recently, it was regarded as 'settled law' that courts would not order specific performance of an employment contract.²⁰⁹ In the case of domestic workers, this denial of a claim for specific performance would also deprive them of a right to enforce such ancillary rights as the right to remain in occupation on the employer's

206

R v Plank & Others (1900) 17 SC 45. See also Riekert Basic Employment Law 26; Norman-Scoble Law of Master and Servant in South Africa 219.

207

Stewart Wrightson (Pty) Ltd v Thorpe 1977 (2) SA 943 (A). Under the old Master and Servant Law ss 7-10 of Law 13 of 1880 (T) and s 8 of Ch IV of Act 15 of 1856 (T), the changing of the employer's residence to another province constituted a ground for the summary termination of the contract. An employee may, however, elect to keep the contract alive and claim specific performance and damages from the employer: Rycroft and Jordaan A Guide to South African

Labour Law 99.

208

Norman-Scoble Law of Master and Servant in South Africa 220; Riekert Basic Employment Law 219-220.

209

See, in general, Rycroft and Jordaan A Guide to South African Labour Law 101-103; Grogan Riekert's Basic Employment Law 79-81; Brassey MSM 'Specific Performance: A New Stage for Labour's Lost Love' (1981) 2 ILJ 57; Mureinik E 'Invalid Dismissals: Reinstatement and Other Remedies' (1980) 1 ILJ 41.

premises in the case of unlawful dismissal.²¹⁰

'The inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship'²¹¹ and the absence of mutuality²¹² were advanced as the principal reasons for denying specific performance of an employment contract.

In the case of Schierhout v Union Government²¹³ it was held that specific performance of employment contracts could not be granted. It was held that employment contracts are of an extremely personal nature and that repudiation of the contract by one person automatically terminated it, leaving the innocent party with nothing to enforce.²¹⁴

The decision of Schierhout was first challenged in the decision of Stewart Wrightson (Pty) Ltd v Thorpe,²¹⁵ where it was held that an employment contract, like any other contract, left the innocent party with the choice of either enforcing or terminating the contract. In the decision of National Union of Textile Workers v Stag Packings (Pty) Ltd,²¹⁶ the court cautioned against elevating the decision in Schierhout

210

See, however, Coin Security (Cape) v Vukani Guards and Allied Workers Union 1989 (4) SA 234 (C).

211

Schierhout v Minister of Justice 1926 AD 99 at 133.

212

Rycroft and Jordaan A Guide to South African Labour Law 101-102.

213

1926 AD 286.

214

See, in general, Riekert Basic Employment Law 60; Norman-Scoble Law of Master and Servant in South Africa 227; Rycroft and Jordaan A Guide to South African Labour Law 101-103.

215

1977 (2) SA 904 (A).

to an inflexible rule. Although there are practical considerations which militate against orders for specific performance being granted, there is no general principle precluding the grant of such orders.²¹⁷

As will be discussed later, specific performance is a particularly thorny issue with regard to the domestic service sector and the unique characteristics of this sector. Employers fear that they will be forced to reinstate domestic workers and thus have someone whom they do not trust working in their homes. Domestic workers, on the other hand, may view reinstatement as infinitely preferable to seeking new employment in a very uncertain job market.

8.5.4 Claims for damages and wages due

8.5.4.1 General

In general, the normal common-law rules concerning recovery of damages for breach of contract, also apply to the employment contract.²¹⁸ Damages are only recoverable for pecuniary loss.²¹⁹ Damages which may have been prevented by reasonable preventive

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1982 (4) SA 151 (T).

217

See, in general, Brassey 'Specific Performance: A New Stage for Labour's Lost Love' (1981) 2 ILJ 57.

218

See eg Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd 1915 AD 1.

219

So eg no damages will be recoverable for loss of self-esteem or reputation. See, in general, Ndamse v University College of Fort Hare 1966 (4) SA 137 (E); Hawker v Life Offices Association of SA 1987 (3) SA 777 (C). The pecuniary loss must result directly from the breach and must not be too remote: Mills v Mangguteli 1911 EDC 228.

action may not be recovered.²²⁰

8.5.4.2 The employer's claim for damages

Instances of damages being awarded in favour of employers appear to be rare. In any event, as has been explained, employees are usually incapable of paying damages.²²¹ This is particularly true of domestic workers.

Damages have, however, been awarded for desertion,²²² for wrongful damages to the employer's property²²³ and for delictual damages for misappropriation of the employer's trade secrets and confidential information.²²⁴

8.5.4.3 The employee's claim for damages

In the case of an employer wrongfully (before its expiry date or without proper notice) terminating the contract of employment, the wronged employee may choose to treat the contract as cancelled and sue for damages. The employee may, on the other hand, decide to claim

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De Pinto v Rensea Investments (Pty) Ltd 1977 (2) SA 1000 (A). See also Rycroft and Jordaan A Guide to South African Labour Law 103-104.

221

See 6.4 supra.

222

Lilford v Black 1943 SR 46.

223

Blake v Hawkey 1912 CPD 817.

224

Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Gwhano (Pty) Ltd 1981 (2) SA 173 (T).

specific performance and sue for damages.²²⁵

The employee will be entitled to recover the amount he would have earned by way of wages had the contract continued to its lawful termination. The employee may further be entitled to consequential damages, for example relocation expenses and compensation for the loss of premises he would have occupied, but for the wrongful dismissal.²²⁶

The employee is, however, obliged to make reasonable endeavours to find alternative employment, thereby minimising his or her loss.²²⁷

8.5.4.4 The employee's claim for wages due

At common-law, an employee who has properly tendered his or her services to the employer may sue the employer for wages and other benefits due to him under the contract of employment at the time of its termination.²²⁸

An employee who deserts the service of his or her employer is not

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For a long time, due to the courts' unwillingness to allow specific performance, a claim for damages had been the only remedy available to employees for redressing their employer's unlawful conduct. Rycroft and Jordaan see this as a reflection of the paltry protection of employment security which the common-law has to offer the employee: A Guide to South African Labour Law 104.

226

Willenburg v Pickstone & Brother Ltd 1922 CPD 121; Myers v Abramson 1952 (3) SA 121 C.

227

Faberlan v McKay & Fraser 1920 WLD 24. See also Riekert Basic Employment Law 57-60; Norman-Scoble The Law of Master and Servant in South Africa 225-226.

228

Spencer v Gostelow 1920 AD 617.

entitled to recover any wages due to him at the date of desertion.²²⁹ Riekert criticises this position and submits that the principles of unjust enrichment, as set out in Spencer v Gostelow,²³⁰ should apply to cases of desertion as to other cases of gross misconduct which justify summary dismissal.²³¹

It is common practice for domestic workers to take their wage claims to the Small Claims Court. Since 1 January 1994 the Basic Conditions of Employment Act²³² regulates the position with regard to wage claims in the domestic service sector.²³³

229

Miller v Grobbelaar 1946 CPD 285; Malan v Van der Merwe 1937 TPD 244.

230

1920 AD 617.

231

Riekert Basic Employment Law 57.

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S 30.

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For a more detailed discussion, see 9.5 infra.

CHAPTER 9

AREAS OF CONCERN

9.1 INTRODUCTION

Two main areas of concern may be identified with regard to the present legal position of the domestic worker and her employer:

First, the shortcomings of the Basic Conditions of Employment Act 3 of 1983 should be considered. This Act has played an important role in alleviating, in theory at least, the extreme inequality which characterises the common law position of domestic workers. Nevertheless, the limitations of the provisions of this Act soon become apparent when the unique nature of the domestic service sector is considered.¹ The Basic Conditions of Employment Act is a statute of general application and, although it may be applied to other employment sectors to good effect, it is too inflexible to address adequately the specific concerns of the domestic service sector. So, for instance, the Act does not provide for minimum wages nor does it cater for regional differences in conditions of employment.

Secondly, the absence of collective bargaining, social security, protection against unfair labour practices and minimum wage provisions raises serious concern.

The question will now be considered whether there are any suitable mechanisms which may be used to rectify these, and other, inadequacies. Throughout the discussion, the recommendations of the National Manpower Commission with regard to the possible extension

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See 2.2 *supra*.

of labour legislation to the domestic service sector will be considered.²

9.2 THE NEED FOR MINIMUM WAGES AND DIFFERENTIATION IN CONDITIONS OF EMPLOYMENT

9.2.1 The Provisions of the Wage Act 5 of 1957

The Wage Act 5 of 1957 immediately springs to mind as a mechanism that may be used to provide for minimum wages, as well as differentiation in conditions of employment.

Whereas the Basic Conditions of Employment Act provides for specific minimum standards to be complied with, the Wage Act creates the machinery which may be used to determine minimum wages and other conditions of employment.³ In order to achieve this, the Act provides for the establishment of a Wage Board which consists of three members appointed by the Minister of Labour.⁴

The Wage Board conducts investigations, upon request of the Minister,

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The National Manpower Commission has since been replaced by the National Economic Development and Labour Council: National Economic Development and Labour Council Act 35 of 1994 s 2 read with s 9. A summary of the National Manpower Commission recommendations with regard to the possible extension of labour legislation to the domestic service sector is contained in Gaz 13511 of 13 September 1991.

3

The Wage Act may be regarded as supplementary to the Labour Relations Act 28 of 1956, since it provides for minimum conditions of employment in unorganised industries where conditions of employment are not and cannot be established by means of collective bargaining.

4

Act 5 of 1957 s 3. See, in general, Rycroft A and Jordaan B A Guide to South African Labour Law (2 ed) (Cape Town Wetton Johannesburg) 311-315.

in respect of a specific trade and area, and in respect of all employees or any one or more classes of employees in such trade. The Wage Board may then, on the grounds of information thus obtained, make recommendations to the Minister with regard to minimum conditions of employment.⁵

The Wage Act establishes certain criteria that the Wage Board has to take into consideration before making a recommendation. These criteria include:

- the ability of the employer concerned to carry on his business successfully should a recommendation of the Wage Board come into effect;⁶
- the cost of living in the area to which the recommendation would apply;⁷ and
- the value of board, rations, lodging or other benefits supplied to employees by employers in the relevant trade.⁸

The Minister may make a determination in accordance with the

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S 3(12).

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S 7(d). See also Swanepoel JPA Introduction to Labour Law (3 ed) (Johannesburg 1992) 178-179.

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S 7(e).

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S 7(f).

recommendation of the Wage Board if he deems it expedient.⁹ Upon publication in the Government Gazette, the wage determination becomes legally binding and enforceable.¹⁰

9.2.2 Differentiated conditions of employment

The needs and concerns of a domestic worker employed in an urban area may, to some extent, differ from those of a domestic worker employed in a rural area. For instance, domestic workers in rural areas are more likely to be faced with the practice of payment in kind being used as justification for a low cash wage. So too, will the needs and concerns of a live-in domestic worker differ from those of a domestic worker who does not live in. While the live-in domestic worker may be concerned with the quality of accommodation provided by her employer, a domestic worker who does not live in may be more concerned with the employer's contribution to her travel costs.

Bearing this in mind, it is quite conceivable that domestic workers will benefit from differentiated minimum conditions of employment. The Wage Board, or a similar body, could play a role in this regard. The Wage Board could, for instance, investigate specific conditions of employment regarding accommodation, meals, transport allowances, the provision of protective clothing and, taking into account all the relevant factors, make recommendations to the Minister in this regard. The services of the Wage Board, or a similar body, could further be enlisted to establish the value of payment in kind, including the value

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S 14(1). See Swanepoel Introduction to Labour Law 181-184 for a detailed discussion of determinations by the Minister.

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S 14(2).

of accommodation, food and other consumer goods. This may contribute towards showing that the emphasis on remuneration in kind as compensation for low cash wages is misplaced.¹¹

9.2.3 Minimum wages

9.2.3.1 General

Domestic workers require protection from exploitation which results from an oversupply of domestic workers, the generally unskilled or low level of schooling in this sector and the lack of bargaining power. The traditionally low wages paid in this sector need to be addressed.

However, the implementation of a country-wide minimum wage might have an unfavourable effect on the employment situation. The implementation of minimum conditions of employment and a minimum wage in the domestic service sector could have a detrimental effect on inflation and real income. The possibility of recovering a wage increase from others (as is the case in the business sector) does not exist in the domestic service sector.¹² Furthermore, the enforcement of a wage determination would present difficulties and would require an extensive

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In terms of the Basic Conditions of Employment Act, the value of payment in kind is included in a domestic worker's wage. Where the employer provides food, accommodation or any other benefit other than cash, the value of these benefits is placed at R100 per month or an amount agreed to in writing by the employer and employee, whichever is the larger amount: Reg 1148 of 3 June 1983 Reg 1(1) as amended by Reg 2545 of 31 December 1993.

12

The average total registered unemployment for the first six months of 1993 amounted to 308 076 persons. However, the 1991 Census revealed that approximately 2,1 million people were unemployed in 1991: NMC Annual Report 1993 39.

and well-organised body of inspectors in order to ensure compliance.¹³

9.2.4 The suitability of the Wage Act as a mechanism for providing minimum wages and differentiated conditions of employment

9.2.4.1 General

While a need clearly exists for some form of structure with regard to minimum wages and other specific conditions of employment in the domestic service sector, inclusion under the provisions of the Wage Act may not necessarily provide the most effective solution.¹⁴ Although the introduction of a minimum wage is not the only possible consequence of the inclusion of domestic workers under the provisions of the Wage Act, it represents the most controversial consequence. The possible impact of the introduction of a statutory minimum wage in the domestic service sector will provide some indication with regard to the suitability of the Wage Act. In this regard, the following should be considered.

9.2.4.2 Current levels of wages in the domestic service sector

Statistics regarding the average wage of domestic workers in South Africa might give some indication of the levels at which a minimum

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Gaz 12984 of 25 January 1991 41; NMC Labour Legislation for Domestic Workers 107-110. See 3.5.7 supra.

14

Inclusion under the provisions of the Wage Act proved to be the biggest bone of contention between members of the NMC. Agreement could not be reached on this issue: Gaz 12984 of 25 January 1991 12; Gaz 13511 of 13 September 1991 53. See, in general, Meintjies van der Walt L 'Minimum Wage Fixing for Domestic Labour?' (1993) 4 ILJ 811.

wage could be fixed. Unfortunately, the available statistics make it difficult to form a general picture of domestic worker wages. The 1991 Census, in an analysis of occupation by income, indicated that the majority of domestic workers (461 593) earned R1 000 - R2 999 per year. At the bottom end of the scale 50 852 domestic workers were indicated as earning no annual salary while an estimated 176 920 domestic workers earned R1 - R999 per year. At the top end of the scale, sixty-three domestic workers were indicated as earning more than R300 000 per year.¹⁵

A slightly clearer picture of domestic worker wages in urban areas emerges from the Survey of Houses, Sectional Title Units and Domestic Workers conducted in October 1991 in the twelve principal urban areas in South Africa. As indicated by the results of this survey, various factors, including the geographical location, the race and the sex of the domestic worker, influence the amount paid. Wages (in cash and in kind) range from R264,40 per month to R610,65 per month.¹⁶ The South African Domestic Workers Union has, at various stages, made demands regarding wages in accordance with the Congress of South African Trade Union's Living Wage Campaign. These demands include a monthly wage of between R350 and R650 per month, depending on the level of training of the domestic worker. In addition, full meals, protective clothing, transport costs and an annual service bonus equivalent to one month's salary, are demanded.

The National Congress of Trade Unions has been less vociferous than the Congress of South African Trade Unions on the issue of minimum

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Central Statistical Service Population Census 1991 Summarised Results After Adjustment for Undercount Table 13.1

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Central Statistical Service Survey of Houses, Sectional Title Units and Domestic Workers Table 7.1.

wages, but has recently made a public demand for a minimum wage of R720 per month.

The Congress of South African Trade Unions has repeatedly stressed that inclusion of domestic workers under the Wage Act would not have the automatic consequence of a minimum wage being introduced. However, it is conceivable that, regardless of the recommendations of the Wage Board and the decision of the Minister, political pressure may be applied until a minimum wage is instituted.¹⁷

Discussions with various women's organisations have indicated that a minimum wage is a value-laden concept. Many employers in the domestic service sector find the mere idea of a minimum wage disturbing, let alone the level at which the minimum wage may be set.¹⁸

9.2.4.3 The effect of minimum wages in other countries

Countries such as Zimbabwe¹⁹ and Tanzania²⁰ have introduced minimum wages for domestic workers. Although there is no scientific evidence in this regard, it appears that the introduction of minimum

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NMC Labour Legislation for Domestic Workers 110.

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See eg views expressed in The Pretoria News of 1 February 1991.

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See 5.2.2.1 supra. It should be pointed out that the minimum wage for domestic workers is extremely low. The 1994 minimum wage in Zimbabwe was set at between Z \$202 - Z \$206. That is less than ZAR 100. See 5.2.2.1 supra.

20

In Tanzania the minimum wage for domestic workers and all other workers not employed in the civil service, is set at Tsh 5000. This is equal to approximately ZAR 35.

wages was less than successful.

The introduction of a minimum wage in Zimbabwe reportedly led to the dismissal of a large percentage of domestic workers.²¹ Some employers, who were paying their employees more than the proposed minimum wage, decided to lower the wages of their employees accordingly. Due to ineffective policing, it currently appears that employers and employees are paying little heed to minimum wage regulations. The minimum wage, it would appear, exists on paper only and is of little consequence in practice.²²

9.2.4.4 Wage determination or guidelines?

Taking the above-mentioned factors into consideration, the mechanism of a Wage Board, or a similar body, remains the ideal vehicle through which to establish minimum conditions of employment. The specific features of the domestic service sector and the differing needs of geographical regions would be taken into account when establishing these conditions of employment.

* { These recommendations of a Wage Board, or a similar body, should not be contained in a legally binding wage determination, but should preferably be included in non-binding guidelines. It would be extremely difficult to monitor compliance with a wage determination in the domestic service sector. As has already been pointed out, the enforcement of a wage determination would require the services of an extensive and well-organised body of inspectors. This would place a

21

NMC Labour Legislation for Domestic Workers 108-109.

22

Fauber SA 'Minimum Wage Legislation in Developing Countries Zimbabwe: A Case in Point' 1981 Journal for International Law (Cleveland) 385 at 393-396.

heavy burden on the Department of Labour, while still not providing an absolute guarantee of compliance. If reasonable compliance cannot be ensured, cynicism, disrespect for the law and dissatisfaction with unequal treatment may result.²³ Employers may be just as likely to heed guidelines as they would be to heed a wage determination, while these would dispense with the need for inspectors and would hopefully not pose sufficient a threat to the employer for him to consider dismissing his employee.²⁴

In recessionary times, the services of a domestic worker may be considered a luxury. As the household budget shrinks, the position of the domestic worker becomes increasingly precarious. A legally binding minimum wage may prove to be the final factor leading to the dismissal of domestic workers. It has recently been suggested during a panel discussion presented by the Department of Domestic Science at the University of Pretoria that the mechanisation of the household becomes a viable option once the cost of employing a domestic worker reaches R400 per month. Given the remote chance of ensuring compliance with a wage determination in this sector and considering the accompanying risk of dismissal, wage guidelines appear to be the safer option.

If it is decided that a minimum wage determination for the domestic service sector should be the ultimate goal, a non-compulsory minimum wage guideline may be considered as a transitional measure. Recommendations of the Wage Board regarding domestic workers may be phased in over a period of at least five years. These recommendations could be applied as wage guidelines for at least two

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See 3.5.8 *supra*.

24

NMC Labour Legislation for Domestic Workers 110-111; Gaz 12984 of 25 January 1991 40.

years of this five year period. After this period a study should be conducted, possibly with the assistance of the Human Sciences Research Council, with regard to the effect of these guidelines. The effect of introducing a minimum wage should receive special attention in this study. If, on the strength of this investigation, it is felt that the introduction of a minimum wage will not create undue unemployment, the recommendations of the Wage Board should be implemented as a wage determination.

9.3 COLLECTIVE BARGAINING AS A MECHANISM FOR SECURING BETTER MINIMUM CONDITIONS OF EMPLOYMENT

9.3.1 General

In sectors where conditions of employment are regulated solely by minimum standards legislation, quality is often traded off for quantity. While coverage of minimum standards legislation may be all-embracing, the conditions of employment which are established will fall far short of that which can be achieved through collective bargaining. Furthermore, conditions of employment established by minimum standards legislation are far more rigid than conditions of employment established by collective bargaining.²⁵

From a legal perspective, nothing prevents employees and employers in the domestic service sector from participating in collective bargaining. Currently, however, even though this is the situation, legislation neither encourages nor provides a framework for collective

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Davies PL and Freedland M Kahn-Freund's Labour and the Law (London 1983) 57-58. See, in general, Le Roux F 'Labouring Despite the Law: Farmworkers, Collective Bargaining and Power Relations in South African Agriculture' (1993) 6 ILJ 1400.

bargaining. So, for instance, no provision is made for the establishment of collective bargaining bodies.²⁶ Domestic workers do not enjoy protection against dismissal if they participate in a lawful strike.²⁷ There are no coherent provisions protecting domestic workers from victimisation.²⁸ Furthermore, domestic workers receive no protection against unfair labour practices. Statutory intervention will thus be required in order to facilitate effective collective bargaining in the domestic service sector.

9.3.2 The feasibility of collective bargaining in the domestic service sector

The Labour Relations Act may be considered as a mechanism to encourage, protect, and provide a framework for collective bargaining in the domestic service sector. This Act promotes collective bargaining as the primary means of limiting and avoiding industrial conflict. Provision is made for the registration and regulation of trade unions and employer's organisations.²⁹ A framework is established within which the parties may determine conditions of employment through collective agreements,³⁰ and, when necessary, attempt to resolve disputes.

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See eg Act 28 of 1956 s 4 read with s 2(2).

27

Although it is not a criminal offence to go on strike, a domestic worker who does so, commits a breach of contract. This breach of contract may lead to dismissal. In terms of the Labour Relations Act, it would be an unfair labour practice to dismiss an employee for participating in a legal strike.

28

This despite protection against victimisation being provided for in terms of the Basic Conditions of Employment Act, as well as the Occupational Health and Safety Act 85 of 1993.

29

See, in general, Act 28 of 1956 ss 4-11; 13-15.

These agreements generally regulate minimum wages; maximum hours of work and overtime; whether overtime is voluntary or compulsory; overtime rates; sick leave; annual leave; public holidays; bonuses; trade union facilities; closed shop agreements and certain minimum requirements for the lawful termination of service.³¹

Self-government is thus promoted as the method preferable for regulating relations between employer and employee. Freedom of association is guaranteed³² and protection is provided against victimisation.³³

As will be explained later, the industrial court acts as a watchdog monitoring developments and, using the unfair labour practice definition,³⁴ intervening when practices undermine or impair the accepted standards of labour relations.³⁵

Effective collective bargaining presupposes the existence of representative trade unions and, in the case of the domestic service

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See, in general, ss 18-33, relating to the establishment, functions etc of an industrial council and ss 35-42, relating to the establishment, functions etc of a conciliation board.

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S 24.

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S 78.

33

S 66. See, in general, Cameron E, Cheadle H and Thompson C The New Labour Relations Act (Cape Town Wetton Johannesburg 1989) 1-5.

34

S 1.

35

S 17. See, in general, Cameron, Cheadle and Thompson The New Labour Relations Act 96-107.

sector, an employer's organisation.³⁶

9.3.2.1 Trade unions in the domestic service sector

As a power countervailing the employer, trade unions have generally been more effective than legislation has ever been or ever could be.³⁷ Unionisation of the working class has traditionally proved to be extremely important and successful in bringing about change in employment conditions. Unfortunately, the unique nature of domestic employment impedes unionisation. Domestic workers are a socially isolated and fragmented work-force. The conditions for the effective association of domestic workers are often lacking, as they normally work alone in the homes of the employers and find themselves under constant supervision and with little free time on their hands. Sociologists feel that unionisation is unlikely to succeed because of the atomised situation of domestic workers as set out above.³⁸

As has been pointed out, the establishment of trade unions in the domestic service sector is not prohibited.³⁹ In South Africa the unionisation of domestic workers, although still in its infancy, has proved to be more successful than in most other countries.⁴⁰ The

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Although it is possible for an individual employer to participate in collective bargaining (s 18(1)(a) of the Labour Relations Act provides that an employer may become a party to an industrial council if the registrar approves), this would be extremely impractical, given the large number of employers in the domestic service sector.

37

Davies and Freedland Kahn-Freund's Labour and the Law 21.

38

See 2.4 supra for a discussion of the isolated working environment of the domestic worker.

39

See, in general, 9.3.1 supra. See also Swanepoel Introduction to Labour Law 33-34.

reason for this success may be the fact that domestic workers in South Africa have a stronger sense of group identity, stemming from the consciousness of common interests. Domestic workers identify themselves as a distinct, exploited group in need of employment protection.⁴¹

On 29 November 1986, five domestic workers organisations merged to form the South African Domestic Workers Union.⁴² The South African Domestic Workers Union, which is affiliated to the Congress of South African Trade Unions, has approximately 24 149 paid-up members. The Black Domestic Workers Association which is affiliated to the National Council of Trade Unions, has approximately 8 434 paid-up members.⁴³ The aims of these unions are to protect and improve the wages and conditions of service of domestic workers, the settlement of disputes between domestic workers and their employers, the organising of unorganised domestic workers, the provision of training and education facilities for domestic workers, and the publication of articles and newsletters.⁴⁴

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In Britain, for instance, there were three unsuccessful attempts to unionise domestic workers between 1891 and 1914. These failures can be attributed mainly to the lack of effective association and common purpose. The Domestic Workers' Union of Great Britain, formed in 1910, had a membership of only 245 by 1912. This Union petered out during World War I. At present, however, British Trade Unions are beginning to recognise the poorly organised sector of marginal workers as the largest untapped reservoir for union growth: Flint 'The Protection of Domestic Workers in South Africa: a Comparative Study' (1988) 9 *ILJ* 187 at 198. See also Ewing KD 'Homeworking: A Framework for Reform' 1982 *ILJ* (UK) 110.

41

See, in general, Cock J Maid and Madams (Johannesburg 1980) 5-9.

42

SADWU Newsletter (Vol 1 no 1) 3.

43

Baskin J (ed) Unions in Transition: COSATU At The Dawn Of Democracy (Johannesburg 1994) 9.

44

NMC Labour Legislation for Domestic Workers 59-60.

Considering that domestic workers number some 936 579,⁴⁵ union membership of approximately 33 000 is extremely low. For all practical purposes, the domestic service sector may be regarded as unorganised and trade unions in this sector can hardly be described as representative. Unless there is a drastic increase in union membership, there is little chance of unions in this sector participating in collective bargaining as envisaged in terms of the Labour Relations Act.⁴⁶

A number of organisations which do not fit into the traditional trade union mould have recently been established to serve the interests of domestic workers. Apparently these organisations have no intention of entering into negotiations with employers or employers' organisations. So, for instance, the Western Cape-based Domestic Workers Association provides general assistance and advice to domestic workers and presents various skills-training courses for domestic workers.⁴⁷

The South African Homeworkers Organisation is the brainchild of Women for South Africa and the South African Agricultural Union. The aim of this organisation is to provide information as well as training for the benefit of its members. The organisation intends, *inter alia*, to provide a code of conduct for both employer and employee, to provide training for domestic workers, to give legal advice and negotiate for cost-effective funeral, endowment and medical benefits. The interesting feature of this organisation is that it extends membership to anyone

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Central Statistical Service Population Census 1991 Summarised Results After Adjustment for Under Count Sch 10.

46

Benjamin P and Seady H '1993 Labour Legislation: Farmworkers, Domestic Workers, The Public Service and Teachers' (1993) 6 ILJ 1406 at 1410-1412.

47

Women's Bureau of South Africa (1991) 16 Focus 12.

working in homes, even to those doing their own housework.⁴⁸

It is difficult to establish the general attitude of trade unions in the domestic service sector towards these organisations. Informal discussions with members of the South African Domestic Workers Union have revealed that some regard these organisations as a threat to their already low membership figures. Others have expressed a willingness to co-operate with these organisations with regard to training programmes for domestic workers.

A recent publication by the National Labour and Economic Development Institute⁴⁹ identifies low-wage sectors - such as the domestic service sector - as a potential area for union growth. It is pointed out that workers in these sectors want unions, but that unions often find it difficult to service these workers efficiently or attend to the many individual grievances which they have. The establishment of meaningful centralised bargaining forums and the development of new organising and servicing strategies are mentioned as examples of methods to resolve this issue.⁵⁰

9.3.2.2 Organisation of employers in the domestic service sector

While it can hardly be said that domestic workers are well-organised, the position of employers in this sector is even worse. No well-

48

South African Homeworkers Organisation information brochure.

49

NALEDI was established in 1993 and is controlled by a board appointed by COSATU's Central Executive Committee. NALEDI conducts research of relevance to South Africa's labour movement.

50

Baskin (ed) Unions in Transition: COSATU At The Dawn Of Democracy 30.

organised employers' body has yet emerged in the domestic service sector and therefore the possibility of collective bargaining becomes even more remote.

Many organisations claiming to represent employers of domestic workers have been established only to disappear a few weeks later. A case in point is the National Employers Organisation for Domestic Workers which promised to provide its members with a contract of service, a disciplinary code, free advice on labour matters and representation in court actions. Provision would also be made for pension benefits, funeral schemes and provident funds for domestic workers. The most important aim of this Organisation was to negotiate with trade unions in order to establish fair and realistic wage scales and service benefits. The establishment of an industrial council for this sector was ultimately envisaged.⁵¹

The South African Iron, Steel and Allied Industries Union established the Huishoudelike Werkgewer Vereniging which promises members legal representation, advice, and death benefits, as well as a contract of service and an employment manual.⁵²

The Confederation of Employers of Southern Africa has emerged as the most effective and consistent provider of advice and other services to employers of domestic workers. It should be stressed that the Confederation of Employers of Southern Africa aims to provide an information service and legal advice rather than organising employers

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National Employers Organisation for Domestic Workers information brochure.

52

Huishoudelike Werkgewer Vereniging information brochure.

in the domestic service sector.⁵³

Meintjies van der Walt coined the phrase 'bargaining impotency' to describe the situation where trade unions in this sector, unrepresentative as they may be, have no organised component of employers to negotiate with.⁵⁴ It would thus appear that collective bargaining in the domestic service sector, in the framework at present envisaged by the Labour Relations Act, will not be feasible in the foreseeable future. However, when one considers the possible benefits of collective bargaining in this sector, it may be worthwhile to seek alternative ways in which to encourage collective bargaining outside the rigid structures of the Labour Relations Act.

9.4 THE NEED FOR PROTECTION AGAINST UNFAIR LABOUR PRACTICES IN THE DOMESTIC SERVICE SECTOR

9.4.1 General

Although a wide variety of acts or omissions may constitute an unfair labour practice,⁵⁵ unfair dismissal may be regarded as the most common form of unfair labour practice in the domestic service sector. One of the greatest threats facing a domestic worker is the power of

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COFESA The Employers Code for Fair Labour Practices for Domestic Workers.

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Meintjies van der Walt 'Die regsposisie van huishoudelike werkers' 1989 De Rebus 605 at 607.

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See Labour Relations Act 28 of 1956 s 1.

her employer to dismiss her without any reason. Although providing for a period of notice to be given, the Basic Conditions of Employment Act did not improve this position by adding the requirement that the employer provide some justification for such a dismissal.

The provisions of the Labour Relations Act may be used to improve this situation by providing the domestic worker with some protection against unfair dismissal and other unfair labour practices.

9.4.2 The provisions of the Labour Relations Act 28 of 1956

The Labour Relations Act defines an unfair labour practice as

'... any act or omission, other than a strike or lock-out, which has or may have the effect that -

- (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;
- (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
- (iii) labour unrest is or may be created or promoted thereby;
- (iv) the labour relationship between employer and employee is or may be detrimentally affected thereby.⁵⁶

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S 1 as amended by s 1 of the Labour Relations Amendment Act 9 of 1991. See Brasseley *et al* The New Labour Law 49-59 for a general discussion of the unfair labour practice

9.4.3 Unfair labour practices and the domestic service sector

While domestic workers and their employers would benefit from the protection provided by the unfair labour practice definition, it would be necessary to take into account certain features of the domestic service sector which would be relevant to the application of the unfair labour practice definition.

When dealing with cases of unfair dismissal, the close personal relationship between employer and employee in this sector, as well as the fact that the employee's workplace is her employer's home, should be taken into consideration. As suggested by members of the National Manpower Commission, it may well be necessary to regard incompatibility and the breakdown of the relationship of trust as constituting a fair and valid reason for dismissal in certain circumstances. The industrial court has recognised incompatibility⁵⁷ as well as a breakdown in trust⁵⁸ as valid grounds for the termination of employment. The close personal relationship between the domestic worker and the employer may also require that provision be made for an agreed-upon probationary period of, for example, not longer than three months. When this employer-employee relationship has broken down, the strict procedures prescribed for dismissal in terms of the

definition.

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Larcombe v Natal Nylon Industries (Pty) Ltd Pietermaritzburg (1986) 7 ILJ 326 (IC); Radebe v SA Quilt Manufacturers (1992) 1 LCD 80 (IC); Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 318 (IC), Lubke v Protective Packaging (Pty) Ltd (1994) 15 ILJ 422 IC. See also Le Roux and Van Niekerk The South African Law of Unfair Dismissal 285-290.

58

Le Roux and Van Niekerk The South African Law of Unfair Dismissal 287-290.

Labour Relations Act become impractical.⁵⁹

9.4.4 Reinstatement as a possible remedy for unfair labour practices

In discussions with various women's organisations it appeared that, together with the question of minimum wages, the possibility of the reinstatement of domestic workers and protection against unfair dismissal elicited the most objections. Employers fear not being able to decide who should work in their households. The industrial court's power to order reinstatement is regarded as a serious threat to the employer's prerogative.

When drafting legislation for the domestic service sector, the legislature should take into consideration the unique characteristics of this sector. So, for instance, the court should be cautious in ordering reinstatement where the relationship of trust between the employer and employee has broken down.⁶⁰ Provision should be made for a monetary award instead of reinstatement.⁶¹

9.5 DISPUTE RESOLUTION IN THE DOMESTIC SERVICE SECTOR

9.5.1 General

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Ibid 289-290.

60

The NMC recommended that these issues should not be dealt with in the Act and that the court should exercise its normal discretion in this regard. However, it was agreed that these issues should be included in a code of fair labour practice: Gaz 13511 of 13 September 1991 42-43.

61

This should apply to both ss 43 and 46(9) applications.

The close personal relationship which exists between the domestic worker and the employer necessitates the quickest possible settlement of any dispute which may arise between them. The existence of clear and defined channels by which conflict between employees and employers can be directed is essential for a healthy relationship in this situation.⁶²

At present, the channels used to settle disputes in the domestic service sector are unsatisfactory. There is no effective method that may be applied by domestic workers and their employers to settle their disputes privately. Domestic workers and their employers sometimes refer their disputes to the small claims court. Unfortunately, the small claims court is not a specialised court which can take into consideration the unique nature of the domestic service sector. Disputes may thus not be resolved to the satisfaction of either party. Statutory intervention may be necessary to provide for effective methods of dispute resolution in the domestic service sector.

9.5.2 Provisions of the Labour Relations Act 28 of 1956

The Labour Relations Act provides for the resolution of disputes by the industrial court, by negotiation on industrial councils,⁶³ conciliation boards,⁶⁴ arbitration⁶⁵ and mediation.⁶⁶ After certain requirements

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See, in general, Davis D 'The Functions of Labour Law' (1980) 13 CILSA 212.

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Act 28 of 1956 ss 18-33; Swanepoel Introduction to Labour Law 65 et seq.

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Ss 35-42; Swanepoel Introduction to Labour Law 80-84.

65

Ss 45-49. Swanepoel Introduction to Labour Law 85-90.

have been met, the Act allows access to the industrial court⁶⁷ and, in the final instance, the labour appeal court.⁶⁸

Bearing in mind the nature of the domestic service sector and the fact that employers and employees in this sector do not, as a general rule, have the necessary degree of expertise to interpret legislation as complicated as the Labour Relations Act, the suitability of the above-mentioned methods of dispute resolution will be briefly considered.

9.5.2.1 Industrial Councils

Industrial councils are given the task of settling disputes which arise within the industry or area over which they have jurisdiction. However, the low level of unionisation among domestic workers and the almost total absence of organisation among their employers, results in bargaining impotency and renders the establishment of an industrial council in this sector remote.⁶⁹ Even if the problem of bargaining impotency could be resolved and an industrial council could be established, the formal structure of the industrial council and the procedural requirements which have to be met when referring a dispute for settlement would not be appropriate for the domestic service sector.

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S 44. Swanepoel Introduction to Labour Law 84-85.

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S 17.

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S 17A.

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See 9.4.3 supra.

9.5.2.2 Conciliation boards

When a dispute arises in an industry or area where no industrial council has been established, a party to the dispute may request an inspector of the Department of Labour to establish a conciliation board in order to resolve the dispute.⁷⁰ A conciliation board is temporary in nature and exists only for as long as is needed to settle a specific dispute or until it fails in this attempt.⁷¹

In theory, a conciliation board would be more suitable than an industrial council for the resolution of disputes in the domestic service sector because it also permits the resolution of disputes between a single employee and a single employer.⁷² Bargaining impotency and the absence of registration would thus not stand in the way of a domestic worker or her employer requesting the establishment of a conciliation board. In practice, however, the formal requirements which must be met when a dispute is referred to a conciliation board may prove daunting to a domestic worker or her employer, who generally has no knowledge of the intricacies of labour legislation. Furthermore, it is doubtful whether the Department of Labour will be able to cope with the considerable demands which will be placed on its staff by the domestic service sector.⁷³

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Ss 35-42.

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See, in general, Rycroft and Jordaan A Guide to South African Labour Law 152-154.

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S 35(1).

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The Department of Labour, eg, supplies secretarial and clerical staff to assist when a conciliation board is established: S 38. See also Gaz 13511 of 13 September 1991 43. As it is, the number of applications for conciliation boards increased from 14 698 in 1992 to 15 868 in 1993: NMC Annual Report 1993 65.

9.5.2.3 Mediation

Mediation is an increasingly popular way of resolving disputes in South African labour relations. The Labour Relations Act provides that parties to a dispute, at either industrial council or conciliation board level, may request the Minister of Labour to appoint a mediator if they are unable to settle their differences.⁷⁴ The mediator will then try to bring the parties together in their mutual quest to reach an agreement. The costs incurred by the mediator are paid out of state funds.⁷⁵ Mediation as provided for in terms of the Labour Relations Act, however, may not prove to be practical.

Far more use is made of non-statutory mediation where parties do not rely on the provisions of the Labour Relations Act, but simply agree to the appointment of a mediator.

Despite its use in the industrial and commercial setting, mediation in its present form may not be suitable for the domestic service sector from a practical point of view. The costs involved in the mediation process and the lack of suitable mediators may present difficulties.

In principle, however, the concept of mediation could be of use to the domestic service sector. Ways of tailoring the concept of mediation to accommodate the specific characteristics and requirements of this sector should be explored. So, for instance, organisations such as the Community Dispute Resolution Trust are already presenting workshops

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S 44.

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Expenses in connection with the mediation, including the fees payable to the mediator, must be approved before or after their occurrence by the Director-General: Labour. These expenses are paid from moneys appropriated by Parliament for this purpose: S 44(4).

to consider methods of resolving disputes in the domestic service sector.

9.5.2.4 Arbitration

Arbitration is also a popular way of resolving disputes in South African labour relations. In terms of the Labour Relations Act, parties to an industrial council or conciliation board who have reached a deadlock in their negotiations may agree to submit their dispute to arbitration.⁷⁶ Once again, the formal procedures involved may prove unsuitable for the domestic service sector. Furthermore, the costs involved in disputes referred to arbitration from a conciliation board would have to be borne by the parties themselves.⁷⁷ It is highly unlikely that the domestic worker or her employer will be willing or able to meet these costs.

As is the case with mediation, far more use is made of non-statutory arbitration where parties do not rely on the provisions of the Labour Relations Act, but simply agree to the appointment of an arbitrator.

Despite its successful use in the commercial and industrial setting, the concept of arbitration will have to be tailored to accommodate the specific characteristics of the domestic service sector.

9.5.2.5 Simplified methods of dispute resolution for the domestic service sector

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Ss 45-49. See Swanepoel Introduction to Labour Law 85-89 for a discussion of voluntary and compulsory arbitration.

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S 47(3).

From the above discussion it should be clear that none of the methods of dispute resolution provided for in the Labour Relations Act would be suitable for application to the domestic service sector, unless adapted to meet the specific needs of this sector.

The National Manpower Commission recommended that simplified dispute resolution procedures should be devised which did not place an additional burden on the staff of the Department of Labour. It was suggested that the party initiating the dispute should be obliged to endeavour to set up a meeting with the other party, in an attempt to reach a settlement. The aggrieved party could then refer the dispute to court, if the other party was not willing to attend such a meeting or if no settlement could be reached. It was agreed that some form of mediation or conciliation would be desirable before a matter could be referred to court. It was proposed that the use of mediation could be promoted by setting out guidelines in this regard in an information brochure. It was suggested that any person not involved in a specific dispute could act as mediator. The court should, in the final instance, decide whether a bona fide attempt had been made to set up a meeting for conciliation or mediation before hearing a case.⁷⁸

The National Manpower Commission's recommendation that some form of mediation or conciliation should be attempted before a matter is referred to court, is commendable. The close personal relationship between the domestic worker and her employer necessitates the quickest possible settlement of disputes. Should the proposed simplified conciliation procedure prove successful, the workload of the industrial court could be significantly decreased.

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Gaz 13511 of 13 September 1991 42-43; NMC Labour Legislation for Domestic Workers 138.

Bearing in mind the National Manpower Commission's admonition that a simplified conciliation procedure should not place an additional burden on the Department of Labour, it may well be asked who should act as mediator in disputes between the domestic worker and her employer.⁷⁹ Mediation requires an independent third party to assist with the settlement of a dispute. The Congress of South African Trade Unions suggested that trade union representatives should act as mediators. This may not be advisable as the neutrality of such mediators would be highly suspect. It was further suggested that any third party not involved in the dispute, even the next-door neighbour, could act as mediator. Once again, the neutrality and the mediation skills of such a person could be questionable.

A possible solution would be for the Department of Labour to initiate mediation training courses.⁸⁰ In this way, a voluntary body of skilled mediators could be established. The services of these mediators should be made available to domestic workers and their employers at a nominal fee.

9.5.3 The labour court system and the special needs of the domestic service sector

9.5.3.1 General

The Labour Relations Act provides for the establishment, and sets out

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NMC Labour Legislation for Domestic Workers 140.

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This could possibly be done in conjunction with IMSSA. In the first three months of 1993 alone, IMSSA dealt with 382 mediations: NMC Annual Report 1993 65.

the functions of, the industrial court and a labour appeal court.⁸¹ The establishment of an industrial court was necessitated by the complexity of labour law and the need for specialisation. The general courts were considered too formal and cumbersome to adjudicate in industrial disputes.⁸² Although the domestic service sector is excluded from the provisions of the Labour Relations Act and thus denied access to the industrial court, domestic workers and their employers are not entirely without a forum for the settling of their disputes.

In recent years domestic workers and their employers have made use of the small claims courts to settle their disputes. Claims instituted in these courts are mostly for wages in arrears, notice pay and leave pay that is overdue when a domestic worker's services are terminated without notice. Whilst numerous claims have been processed in this way,⁸³ dissatisfaction regarding the operation of the courts has been expressed by both the South African Domestic Workers Union and the registrars of the small claims court. The South African Domestic Workers Union has, on occasion, accused the registrars of bias. The fact that no representation is allowed in this court has led to further dissatisfaction. Registrars, on the other hand, complain that it is difficult to extract facts and evidence from the parties.

9.5.3.2 National Manpower Commission recommendations with

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S 17; s 17A. See, in general, Cameron, Cheadle and Thompson The New Labour Relations Act 96-106; Brassey et al The New Labour Law 1-16.

82

See, in general, Rycroft and Jordaan A Guide to South African Labour Law 252-257.

83

According to Meintjies van der Walt 'Die Regsposisie van Huishoudelike Werkers' 1989 De Rebus 611, the Johannesburg small claims court was, in 1989, hearing an average of fifty such cases per week.

regard to the labour court system

The National Manpower Commission recommended that an employer or an employee in the domestic service sector should have the right to elect to initiate legal proceedings in either the industrial court or a proposed 'small labour court'. The person initiating a dispute should have the choice of electing the appropriate court. However, the respondent should be able to petition the court for the case to be heard in a higher or lower court.⁸⁴

The 'small labour court' would operate on a similar basis to that of the small claims court. Such a court would have simplified procedures and no legal or other professional⁸⁵ representation would be allowed. However, the National Manpower Commission was of the opinion that trade unions or any other representation free of charge should not be excluded, as this would probably result in domestic workers approaching the industrial court instead of the small labour court. It was proposed that the Registrar of the small labour court should first endeavour to mediate disputes brought before the court. The small labour court should form part of the industrial court system and no right of appeal from this court should exist.⁸⁶

9.5.3.3 The necessity of a specialised court for the domestic

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Gaz 13511 of 13 September 1991 14.

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Any person, ie, who charges for appearing in court.

86

NMC Labour Legislation for Domestic Workers 139. The possibility of a small labour court was also considered during the NMC investigation regarding the consolidation of the Labour Relations Act. This possibility is still being considered by the industrial court: NMC Annual Report 1993 66.

service sector

The National Manpower Commission's recommendation of a simplified 'small labour court' which would operate along familiar lines to resolve disputes at a nominal cost is to be welcomed. By allowing trade union or other representation free of charge, the dissatisfaction voiced with regard to the current position in the small claims courts would be addressed. The fact that registrars of the small labour courts would presumably have expert knowledge of labour matters, would be an added advantage.⁸⁷

Merely allowing domestic workers and their employers access to the industrial court could present difficulties. It is doubtful whether an already over-burdened industrial court would be able to cope with disputes referred to it by an additional two million employees and one million employers.

The complicated and often time-consuming procedures that have to be followed before a dispute can be brought before the industrial court are not suited to the needs of the domestic service sector.⁸⁸ Furthermore, it is unlikely that domestic workers or their employers will be able to afford legal representation. Of greatest concern is the possibility that the industrial court will not have expert knowledge of the unique nature and specific needs of the domestic service sector. Such expert knowledge will be essential where the industrial court is called upon to

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See also Krige L 'Huishulp en Werkgever: Wat is Jul Regte?' July 1991 De Kat 52-54.

88

See eg 9.4.3 supra for a discussion of the possible difficulties regarding the establishment of industrial councils or conciliation boards in the domestic service sector. The industrial court has a large backlog of cases. The workload of the industrial court increased to 6 699 applications for the period 1 November 1992 to 31 October 1993, as against 6 042 for the same period during 1992: NMC Annual Report 1993 66.

determine an alleged unfair labour practice or when it is faced with a decision of granting or refusing reinstatement.

A specialised court, which could serve as a possible model for the domestic service sector, recently came into existence. The Agricultural Labour Act⁸⁹ which came into effect on 1 March 1994 extends, with certain changes, the Labour Relations Act to farming activities and, in addition, changes certain provisions of the Basic Conditions of Employment Act applying to farmworkers.⁹⁰ One of the innovations introduced by the Agricultural Labour Act is the creation of a special agricultural labour court.⁹¹

The main players in the agricultural sector, namely the Congress of South African Trade Unions and the South African Agricultural Union, agreed that the unique nature of this sector necessitated the establishment of a special court which would be accessible and affordable and where the processing of disputes would be simple and quick. It was envisaged that mediation should play a significant role in the resolution of disputes in the agricultural sector. Furthermore, it was agreed that the presiding officer of such a special court should play an active role in curtailing proceedings and that there should be no right to

89

Act 147 of 1993. This Act came into operation on 17 January 1994: NMC Annual Report 1993 19.

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The Agricultural Labour Act provides that the provisions of the Labour Relations Act, as construed by the Agricultural Labour Act, will apply to employers and employees engaged in farming activities. It does not amend the text of the Labour Relations Act and the terms of the Agricultural Labour Act can therefore only be understood by reading the two statutes in conjunction with each other: Act 147 of 1993 s 1.

91

S 17E of the principal Act inserted by Act 147 of 1993 s 2.

representation by qualified attorneys or advocates.⁹² The establishment of an agricultural labour court appears to be in line with the expectations of the Congress of South African Trade Unions and the South African Agricultural Union as set out above.

The agricultural labour court is empowered to hear any dispute concerning an alleged unfair labour practice between an employer and employee engaged in farming activities.⁹³ With powers equivalent to those of the industrial court in terms of s 46(a) of the Labour Relations Act, the agricultural labour court may determine a dispute on terms it considers reasonable, including compensation or reinstatement.⁹⁴

Disputes arising in the agricultural sector may still, under certain circumstances, be heard by the industrial court.⁹⁵ However, taking into account the expedited and inquisitorial approach envisaged for the agricultural labour court,⁹⁶ as well as the fact that it will not be a court of record, it would appear that the agricultural labour court is designed specifically for individual disputes such as unfair dismissals and other individual grievances.⁹⁷

92

Benjamin and Seady '1993 Labour Legislation: Farmworkers, Domestic Workers, The Public Service and Teachers' (1993) 6 ILJ 1406 at 1408.

93

S 17E (3) of the principal Act inserted by Act 147 of 1993 s 2.

94

S 17 E(4) of the principal Act inserted by Act 147 of 1993 s 2.

95

S 17 E(5) of the principal Act inserted by Act 147 of 1993 s 2.

96

S 17 E(6) of the principal Act inserted by Act 147 of 1993 s 2.

97

Benjamin and Seady '1993 Labour Legislation: Farmworkers, Domestic Workers, The Public Service and Teachers' (1993) 6 ILJ 1406 at 1408.

Of great importance is the provision that the agricultural labour court or the industrial court, in respect of disputes arising from farming activities, must take account of 'the specific farming situation'.⁹⁸ As Benjamin and Seady point out, the meaning of these words will be keenly contested in the initial cases brought before the agricultural labour court. An important characteristic of the agricultural sector which will have to be taken into consideration is that most workers and their families reside on the employer's premises. Trade unions may argue that this characteristic should be regarded as a reason for the agricultural labour court to adopt a strict test to the fairness of dismissals because of the immense prejudice employees will suffer. Farmers, on the other hand, may refer to the same characteristic as evidence to support their argument that reinstatement should not be imposed on a reluctant farmer.⁹⁹

A special court for the domestic service sector, established along the same lines and obliged to take account of the specific domestic service situation, would be of great benefit to the domestic worker and her employer. Furthermore, such a special court would also ensure that the industrial court would not be over-burdened by disputes referred to it by this sector.¹⁰⁰

9.6 A SEPARATE ACT FOR DOMESTIC WORKERS?

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S 17 E(4) as inserted by Act 147 of 1993 s 2.

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Benjamin and Seady '1993 Labour Legislation: Farmworkers, Domestic Workers, The Public Service and Teachers' (1993) 6 ILJ 1406 at 1408.

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See 9.5.2.5 supra.

It would appear from the above discussion that few provisions of the Labour Relations Act in its present form would be of practical benefit to the domestic service sector. Even provisions such as access to the industrial court and the protection of the unfair labour practice definition, would have to be modified to meet the specific needs of the domestic service sector. Making special provision for the domestic service sector would further complicate an already complicated piece of legislation.

A separate act containing only those provisions relevant to the domestic service sector and amended to suit its needs may be considered more practical.¹⁰¹ At the time when recommendations in this regard had to be made by the National Manpower Commission, there was strong opposition to the suggestion of a separate act. The Congress of South African Trade Unions regarded this suggestion as unacceptable, since it was incompatible with their 'All workers under the Labour Relations Act' campaign.¹⁰² It was feared that the domestic service sector would remain marginalised.

9.7 THE NEED FOR SOCIAL SECURITY IN THE DOMESTIC SERVICE SECTOR

9.7.1 General

Domestic workers have no form of social security to rely on when they

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Such an Act could possibly even contain provisions taken from the Basic Conditions of Employment Act, the Wage Act, the Unemployment Insurance Act and the Compensation for Occupational Injuries and Diseases Act, which have been amended to meet the specific needs of the domestic service sector.

102

NMC Labour Legislation for Domestic Workers 112.

become unemployed or retire. They have no right to social security benefits when they fall ill or are injured on duty and cannot work or when they have to interrupt their service as a result of pregnancy.

The wages of domestic workers are such that they can hardly be expected to save money in order to cover the unexpected loss of employment and thus remuneration, or to save for their retirement. Some domestic workers may qualify for a small state pension, while a few may be fortunate enough to benefit from pension schemes to which they and/or their employers have contributed.

The provisions of the Unemployment Insurance Act and the Compensation for Occupational Injuries and Diseases Act may be applied to alleviate this generally unsatisfactory position.

9.7.2 The provisions of the Unemployment Insurance Act 30 of 1966

The purpose of the Unemployment Insurance Act is to provide an income for unemployed persons who are willing to work, but are not able to find suitable employment. Provision is also made for the assistance of persons who by reason of illness¹⁰³ or pregnancy¹⁰⁴ are not able to earn their usual remuneration. Provision is further made for the payment of a lump sum to the widow, children or dependent of a deceased contributor.¹⁰⁵ The State, employers and employees

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Act 30 of 1966 s 36.

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s 37.

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s 38.

contribute to an Unemployment Insurance Fund.¹⁰⁶ Persons who have contributed to the fund may draw on it, if they have made contributions for a certain period of time and if they have been employed for a specific period during the preceding fifty-two weeks.¹⁰⁷ The endowment payable is normally set at forty-five per cent of the weekly wage for a total of twenty-six weeks out of every fifty-two.¹⁰⁸ Where a person suffers exceptional hardship and he or she has the necessary credits, an additional twenty-six weeks' benefit may be paid.

9.7.3 Compensation for Occupational Injuries and Diseases Act 130 of 1993

The Compensation for Occupational Injuries and Diseases Act provides for the establishment of a Compensation Accident Fund¹⁰⁹ which draws its income from compulsory annual contributions by employers. These contributions are based on the annual wage expenditure of the employer concerned and are calculated according to established tariffs.¹¹⁰ Provision is made for the payment of compensation to employees or their dependents for injuries or death caused by accidents or by industrial diseases contracted by them in the course of their employment.¹¹¹ Negligence on the part of an employer entitles the

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See, in general, Ch II of the Act. See also Swanepoel Introduction to Labour Law 166-167.

107

S 34.

108

Ss 34-35. Three years contributory employment is required to generate the maximum settlement, namely one week of benefits for each six weeks of such employment.

109

Act 130 of 1993 s 15.

110

Ss 85-88.

employee to increased compensation.¹¹²

9.7.4 The difficulties of extending social security benefits to domestic workers

Domestic workers are in dire need of even the limited social security benefits provided for by the Unemployment Insurance Act and the Compensation for Occupational Injuries and Diseases Act. Unfortunately, the present structure of these statutes is not suited to the unique characteristics of the domestic service sector. Serious administrative obstacles will have to be overcome before the extension of the provisions of these statutes to the domestic service sector can be considered. Even then, the enforcement of the provisions of these statutes will be extremely difficult.

While there was general agreement within the National Manpower Commission that the provisions of the Workmen's Compensation Act (as it then was before being repealed and replaced by the Compensation for Occupational Injuries and Diseases Act) and the Unemployment Insurance Act should in principle be extended to domestic workers, the practicalities of such extension necessitated further research.¹¹³ It had to be established what the administrative costs/contribution ratio would be in order to decide if inclusion would be cost effective. Furthermore, effective methods of collecting

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See, in general, ss 22-37 with regard to occupational injuries and ss 65-70 with regard to occupational diseases.

112

S 56.

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Gaz 13511 of 13 September 1991.

contributions had to be considered.

The National Manpower Commission appointed a technical sub-committee to investigate these matters. When the sub-committee could not come up with answers, an Australian labour consultant, Limbrick, was asked to investigate. Limbrick investigated the cost effectiveness of introducing social security legislation to the domestic service sector and made suggestions regarding the collection of contributions.¹¹⁴

114

See, in general, John Limbrick & Associates Extending the Provisions of the Workmen's Compensation Act and the Unemployment Insurance Act to Domestic Workers: A Report to the Department of Manpower (July 1993).

CHAPTER 10

TOWARDS MORE THAN LEGISLATIVE REFORM IN THE DOMESTIC SERVICE SECTOR

10.1 INTRODUCTION

Should the provisions of all labour legislation be extended to the domestic service sector, the legal position of domestic workers in South Africa would compare most favourably with the legal position of domestic workers in other countries. In theory, not only would the basic conditions of employment in this sector be regulated, but domestic workers would also have access to the industrial court and collective bargaining forums. Inclusion under the Compensation for Occupational Injuries and Diseases Act 130 of 1993 and the Unemployment Insurance Act 30 of 1966 might provide South African domestic workers with an entitlement to social security which their counterparts in many other countries are denied.

However, until such time as domestic workers are included under the provisions of the Labour Relations Act 28 of 1956, the Wage Act 50 of 1957, the Compensation for Occupational Injuries and Diseases Act and the Unemployment Insurance Act they will, inter alia, remain vulnerable to, and without protection against, unfair labour practices. Furthermore, they will be denied the opportunity to participate in collective bargaining and will remain deprived of any significant social security.

In this chapter, the question will briefly be raised as to whether the provisions of the new Constitution may not be used to provide some relief for domestic workers and to encourage the speedy inclusion of domestic workers under the provisions of the above-mentioned

statutes. In the final instance, the possibility of the effective implementation of labour legislation in the domestic service sector will be considered. Will labour legislation alone prove sufficient to effect real and positive change in this sector?

10.2 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, ACT 200 OF 1993

Domestic workers may be expected to look to Chapter three of the Constitution, which contains a Bill of Fundamental Rights, to obtain some relief from the disadvantages brought about by the exclusion from the statutes mentioned above.

The Constitution does, after all, contain the following guarantees with regard to labour relations:

- (1) Every person shall have the right to fair labour practices.
- (2) Workers shall have the right to form and join trade unions, and employers shall have the right to form and join employers' organisations.
- (3) Workers and employers shall have the right to organise and bargain collectively.
- (4) Workers shall have the right to strike for the purpose of collective bargaining.¹

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Act 200 of 1993 s 27. See also Cachalia et al Fundamental Rights in the New Constitution (Kenwyn 1994) 90-91. See, in general, Davis D in Van Wyk D, Dugard J, De Villiers B and Davis D (eds) Rights and Constitutionalism: The New South African Legal Order (Kenwyn 1994) 439-454.

The Constitution also guarantees that every person will have the right to freedom of association² and equality before the law.³

Alas, as Brassey observes, 'Domestic servants might be forgiven for wondering why the Chapter says they have rights when they so often do not ...'.⁴ Brassey argues that employment contracts between private citizens are beyond the scrutiny of Chapter three, to the extent that they derive their legitimacy from the common-law.⁵

Legislation, however, is subject to the scrutiny of Chapter three.⁶ Brassey therefore suggests a rather convoluted way in which Chapter three may be used to provide some relief for domestic workers. Using the example of a domestic worker who has been dismissed in circumstances amounting to an unfair labour practice, he immediately points out that such a dismissal, though unfair, is beyond direct challenge under Chapter three because it is a species of private action.⁷ However, he suggests a possible indirect challenge that might bring this dismissal within the ambit of the unfair labour practice jurisdiction in the Labour Relations Act. The argument concentrates on the exclusion of

2

S 17. See, in general, Cachalia et al Fundamental Rights in the New Constitution 59-62.

3

S 3. See, in general, Cachalia et al Fundamental Rights in the New Constitution 24-31.

4

Brassey MSM Labour Relations Under the New South African Constitution Southern African Labour Monographs 5/94 (Cape Town 1994) 11.

5

Ibid 17.

6

Act 200 of 1993 s 7 read with s 33.

7

See also Naude F and Terblanche V 'The Interim Constitution: Effect on Private Litigation and Our Common Law' 1994 De Rebus 609.

domestic workers from the provisions of the Labour Relations Act as a violation of their rights to fair labour practices and equality as guaranteed by Chapter three. Brassey is of the opinion that the court might be persuaded to issue an order declaring that this exclusion was a violation of the rights to fair labour practices. The court might also issue an order bringing domestic workers within the ambit of the statute by excising the excluding words or requiring the legislature to make such excision itself. In the final instance, Brassey suggests the possibility that the industrial court might treat domestic workers as covered by the statute on the grounds that their exclusion was constitutionally invalid.⁸

Cachalia et al appear to approach the application of the guarantee to fair labour relations from a somewhat different angle. In their view, section 27 will apply to those categories of employee and employer that are not covered by all the labour relations statutes. They suggest that the guarantee of fair labour practices will have a substantial effect on the common-law of employment. So, for instance, the common-law rule which allows an employer to terminate the contract of employment without reason will have to be reformulated, so that such termination is in accordance with fair labour practices. Cachalia et al appear certain that the effect of section 27 on the common-law of employment will be to confer what amounts to unfair labour practice jurisdiction on the ordinary courts.⁹

8

Brassey MSM Labour Relations Under the New South African Constitution 15-18. It is uncertain whether an indirect challenge, as proposed by Brassey, will succeed at present. The Constitution specifically states that the provisions of a law in force at the commencement of the Constitution promoting fair employment practices, orderly and equitable collective bargaining and the regulation of industrial action will remain of full force and effect until repealed or amended by the legislature: Act 200 of 1993 s 33(5). See also Davis in Van Wyk, Dugard, De Villiers and Davis (eds) Rights and Constitutionalism 453-454.

9

Cachalia et al Fundamental Rights in the New Constitution 90-91.

10.3 SOCIO-ECONOMIC REALITY AND THE LIMITS OF THE LAW

10.3.1 General

Let us assume that domestic workers and their employers will sooner or later be covered by all labour legislation - this change being brought about by the endeavours of the Department of Labour or the creative application of the provisions of Chapter three of the Constitution. The question still remains whether the law will be able to regulate the relationship between the domestic worker and her employer successfully. Will the law be able to effect real and positive change in this sector?

The following observations regarding the socio-economic reality facing domestic workers in South Africa may provide some indication of what the answers to these questions might be.

10.3.2 Domestic service as a survival strategy

10.3.2.1 'Trapped' workers?

It may be asked why people are prepared to enter into domestic service. Domestic service is perceived as an occupation without a future.¹⁰ The low status of domestic service is constantly remarked

10

Hansen KT Distant Companions (London 1989) 274.

upon, yet there is no shortage of labour in this sector.¹¹ Cock shows that domestic workers are to a large extent 'trapped' workers. 'They are trapped in a condition of subjugation, inferiority and immobility.'¹² Few people enter domestic service by choice - more often than not it is merely a question of having no other option available. People enter domestic service as a last resort.¹³

Cock points out that domestic service allows for movement into an urban setting. It provides a means of escape from rural poverty and the subordination and constrictions of a women's role in the traditional African society.¹⁴ The provision of accommodation, hand-outs of food and clothing, in addition to (admittedly low) wages, provide a temporary solution to the problem of rural poverty and hazardous conditions in over-crowded townships.¹⁵

Economic considerations will undoubtedly ensure a constant supply of domestic workers. As has been pointed out,¹⁶ domestic workers are often the sole breadwinners providing for, and supporting, their families.¹⁷ Domestic service, at least, provides a regular income and a

11

See, in general, Cock J Maids and Madams (Johannesburg 1980) 70-80.

12

Ibid 314.

13

Hansen Distant Companions 274.

14

Cock Maids and Madams 307. This escape route was temporarily blocked by influx control measures. Ibid 309.

15

Hansen Distant Companions 276; Cock Maids and Madams 307-312.

16

See 3.5.2 supra.

subsistence level of survival for many families.¹⁸ In striving to make a day-to-day living, domestic workers acknowledge their dependence on the income of their jobs by rationalising that 'half a loaf is better than no bread' and considering themselves to be 'the lucky ones'.¹⁹

10.3.2.2 Lack of education opportunities

While many domestic workers are dissatisfied with their working conditions and desire to exit from domestic service, few will succeed. Indeed, people who have left domestic service are quite often forced to return to this sector as it is the only form of employment available to them.²⁰ The scarcity of jobs and the lack of alternatives in the employment market are the greatest impediments facing domestic workers. Once again the effect of unequal education opportunities is felt. The majority of domestic workers are unskilled, and those who are semi-skilled find that their skills are not needed in other occupational domains.

The connection between education and upward mobility, which will in this case be escape from domestic service, is stressed frequently.²¹

17

Cock Maids and Madams 313; Hansen Distant Companions 16.

18

Hansen Distant Companions 276.

19

Ibid 16; Cock Maids and Madams 313.

20

Hansen Distant Companions 276.

21

Cock Maids and Madams 265, 312, 316; Hansen Distant Companions 14, 16; McBride TM The Domestic Revolution: The Modernisation of Household Services in England and France 1820-1920 (London 1976) 84.

Domestic service is viewed as the only job for people who are not educated and one from which they seldom escape: 'Once a servant, always a servant'.²² A common goal amongst domestic workers is to provide education for their children so that they will have no need to enter into domestic service.²³

10.3.2.3 Social immobility

In a study of domestic workers in nineteenth-century Britain and France, McBride describes domestic service as a 'bridging occupation' - an occupation which provided the conditions and opportunities that facilitated the movement from one occupation to another.²⁴ Domestic service was thus not regarded as a 'dead-end' job. Social mobility could be gained through domestic service. Marriage to the employer was the ideal vehicle for upward mobility. There were also cases of domestic workers who experienced dramatic improvement in station by inheriting assets from employers. Furthermore, domestic service exposed domestic workers to the rudiments of education. Although this education was meant to 'moralise' domestic workers and to increase their usefulness, skills acquired in this way did facilitate mobility.²⁵ McBride points out that social mobility was not always the reward for domestic service. Aspirations to social mobility sometimes remained unfulfilled. Such unfulfilled expectations even led to a disproportionate percentage of suicides among domestic workers.²⁶ Access to social

22

Hansen Distant Companions 276.

23

Ibid 16, 276; McBride The Domestic Revolution 84; Cock Maids and Madams 265-276.

24

McBride The Domestic Revolution 83.

25

Ibid 83-85.

mobility often depended on the intelligence of the worker or on pure chance.²⁷

Unfortunately, as Hansen explains, the upward mobility theory does not work in countries with shrinking economies. The thesis of upward mobility as discussed above, is based on the experience of one segment of female domestic workers during an expanding phase of the West's economic history. When exported to the developing world, this thesis has proved of little value. Domestic workers in developing countries enter into domestic service because they have to. They generally do not have illusions about acquiring benefits that might improve their prospects.²⁸

Van Raaphorst also expresses the opinion that upward mobility in domestic service is non-existent.²⁹ According to Van Raaphorst, the essential difference between Black and White life cycles is to be found in the fact that Whites regard domestic service as a passing phase in their lives. Blacks often regard domestic service as a life-sentence.³⁰

The very characteristics which underline the urgent need for the statutory regulation of the relationship between the domestic worker and her employer, raise serious concern regarding the effective

26

Ibid 108.

27

Ibid 109.

28

See, in general, Hansen Distant Companions 16-25.

29

Van Raaphorst DL Union Maids Not Wanted: Organizing Domestic Workers 1870-1940 (New York 1988) 12.

30

Ibid 43-44.

implementation and enforcement of such statutory measures. The law may well find itself pushed to the limits when attempting to resolve what is essentially a socio-economic problem.³¹ Although law reform may provide some relief with regard to conditions of employment in the domestic service sector, legislation alone will not be sufficient.

The problem concerning the domestic service sector is a multi-faceted one - necessitating a multi-faceted solution.

10.4 SUGGESTIONS FOR EFFECTIVE REFORM IN THE DOMESTIC SERVICE SECTOR

10.4.1 General

To criticise is, of course, easy. To suggest possible solutions to the many problems highlighted above is unfortunately an entirely different matter. The following suggestions may carry with them the seed of social engineering - something bound to offend the sensibilities of those who view the implementation of minimum standard legislation as an unwelcome intervention by the legislature in the law of supply and demand.

10.4.2 The Reconstruction and Development Programme

The Reconstruction and Development Programme has, during recent months, become the most important document to consult for guidance

31

See, in general, Delport E 'Legal Position of Domestic Workers: Current Developments and Prospects in Southern Africa' in Kalula E (ed) Labour Relations in Southern Africa (Johannesburg 1994) 157.

in matters of socio-economic development.

The Reconstruction and Development Programme is described as an integrated, coherent socio-economic policy framework, seeking to mobilise all our people and our country's resources toward the final eradication of apartheid and the building of a democratic, non-racial and non-sexist future.³² A key focus throughout the Reconstruction and Development Programme is the ensuring of a full and equal role for women³³ in every aspect of the society and economy.³⁴

The Reconstruction and Development Programme twice makes specific mention of domestic workers. First, domestic workers are mentioned as a group in need of particular attention with regard to health care programmes in the workplace.³⁵ Secondly, domestic workers are indicated as a group that has historically suffered disadvantage. In the light of this, it is then suggested that social security measures, in the form of a social security net, must focus initially on the needs of these disadvantaged groups.³⁶

Yet, the domestic service sector is conspicuously absent from the

32

African National Congress The Reconstruction and Development Programme: A Policy Framework (Johannesburg 1994) 1-2. See also White Paper on Reconstruction and Development Gaz 16085 of 23 November 1994.

33

African National Congress The Reconstruction and Development Programme: A Policy Framework (Johannesburg 1994) 9.

34

ibid 75 et seq.

35

ibid 48-49.

36

ibid 55-56.

suggestions regarding the building of the economy.³⁷ This oversight is disconcerting. It may be indicative of the fact that domestic service is still regarded as primarily a 'women's issue'. Domestic workers are still 'invisible workers', who have not found their own voice in order to take up their own cause and who, because of their 'invisibility', cannot rely on those in power to take up the cause on their behalf.³⁸

However, with its emphasis on education and development of those who historically suffered disadvantage, the Reconstruction and Development Programme should provide the ideal vehicle for launching any programmes aimed at the improvement of the legal and general situation of domestic workers.

It is suggested that such programmes follow a two-pronged approach.

10.4.2.1 Skills-training for domestic workers

The introduction of minimum standard legislation may not be enough to normalise the law of supply and demand in the domestic service sector. In order to have any real impact on the domestic service sector, the government, in addition to introducing further minimum standard legislation, will have to play an active role in reducing the supply of domestic workers.

Providing opportunities for training will be the first step towards shrinking the numbers of domestic workers. Manpower training centres,

37

Ibid 75 et seq. Special mention is made of various sectors including the corporate sector, the mining industry, agriculture, fisheries and forestry, etc.

38

See, in general, Ch 2 supra.

for instance, could be expanded in order to provide skills-training which would allow the domestic worker access to other employment sectors. These skills should ideally be of such a nature that they will strengthen her bargaining power during her search for a suitable job in another sector, which will enable her to exit from the domestic service sector. Cookery lessons are a good example of the skills-training envisaged. A domestic worker who has mastered cookery skills may eventually be able to find employment in the restaurant or hotel sector or, ideally, set up her own catering business. This may, of course, not be possible without government's commitment to job creation and to encouraging entrepreneurship.

A skilled domestic worker, though still employed in the domestic service sector, will hopefully be able to command a better salary. As was explained in chapter three, the product of the average unskilled domestic worker's labour is the leisure time created for her employer. If this product can be improved upon to provide something over and above free time, employers may well be persuaded to pay more for the product.

The law of supply and demand will operate to the benefit of the domestic worker, only once the supply of domestic workers has been drastically reduced. This may well be a prerequisite for the successful implementation of labour legislation in the domestic service sector.³⁹

10.4.2.2 Education campaign

39

See Sverdrup T Employees in Private Homes Women's Law Working Paper No 33 (Oslo 1990) for a discussion of the legal position of domestic workers in Sweden. In this country, the supply of domestic workers decreased drastically. Those who chose to remain in domestic service are highly skilled. Given these ideal circumstances, the law of supply and demand operates so successfully that domestic workers are in such a strong bargaining position that they hardly need minimum standard legislation.

Labour legislation cannot be effectively implemented if employers and employees remain ignorant of their rights. An extensive education campaign aimed at raising awareness, informing domestic workers and their employers about their respective rights and duties and instructing them in the exercise of their legal rights is essential. In this regard a valuable lesson may be learnt from the project Actions to Transform Socio-Labor Conditions of Domestic Service in Colombia which was successfully initiated in Bogota in 1981 and extended to other major Colombian cities in 1984.⁴⁰

The domestic service sector in Colombia, which towards the end of the 1970s represented 37% of the female work force, displays great similarities to the domestic service sector in South Africa.⁴¹ In an attempt to improve the position of domestic workers in Colombia, a three-pronged approach was followed to educate domestic workers, their employers as well as the legal profession.

10.5 CONCLUSION

If nothing else, this dissertation may have illustrated that there can be no hope of effective legislative reform in the domestic service sector unless some serious socio-economic obstacles are overcome.

The law will certainly be stretched to its limits when attempting to resolve what is, essentially, a socio-economic problem. Effecting real and positive change will be a frustrating, maybe even impossible, task. However, the working lives of a million people are at stake. The

40

León M in Schuler M (ed) Empowerment and the Law (New York 1986) 364 et seq.

41

Ibid 364-367.

legislature has a constitutional, political and moral responsibility to attend to reform in the domestic service sector as a matter of great urgency.

ABBREVIATIONS

AD	Appellate Division
ANC	African National Congress
Art	Article
<u>CILSA</u>	<u>Comparative and International Law Journal of South Africa</u>
<u>CLJ</u>	<u>Criminal Law Journal</u>
COFESA	Confederation of Employers of Southern Africa
COSATU	Congress of South African Trade Unions
CPD	Cape Provincial Division
EDC	Eastern Districts Court Reports
Gaz	Government Gazette
GN	Government Notice
IC	Industrial Court
<u>ILJ</u>	<u>Industrial Law Journal</u>
<u>ILJ (UK)</u>	<u>Industrial Law Journal (United Kingdom)</u>
IMSSA	Independent Mediation Service of South Africa
IPB	Instituut vir Personeelbestuur
KB	King's Bench
<u>MBL</u>	<u>Modern Business Law</u>
NALEDI	National Labour and Economic Development Institute
NLR	Natal Law Reports
NMC	National Manpower Commission

NPD	Natal Provincial Division
OFS	Orange Free State Reports
OR	Orange River Colony Reports
QB	Queen's Bench
SADWU	South African Domestic Workers Union
<u>SALB</u>	<u>South African Labour Bulletin</u>
<u>SAJHR</u>	<u>South African Journal of Human Rights</u>
SC	Supreme Court Reports
SR	SA Republic Reports
S	Section
Ss	Sections
<u>THRHR</u>	<u>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</u>
TPD	Transvaal Provincial Division
<u>TRW</u>	<u>Tydskrif vir Regswetenskap</u>
TS	Transvaal Supreme Court Reports]
Tsh	Tanzanian Shilling
UCT	University of Cape Town
UNISA	University of South Africa
Z\$	Zimbabwean dollar
ZAR	South African rand

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