



Those who have and those who don't; an investigation into the limited scope of application of social security in South Africa

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1 INTRODUCTION

“The idea of ‘social security’ is that of using social means to prevent deprivation and vulnerability.” (Dreze and Sen 1989:15)¹

One of the most crucial areas of concern in South African social security relates to the position of the excluded and marginalised groups (ie those excluded and marginalised in terms of the present formal social security system and classification). The scant attention (or lack of attention) paid to these categories in legal and other terms, the vast number of people affected in South Africa by the lack of proper social security protection, and the wide notion of what is constitutionally meant to be included and required in terms of social security regulation favoured in the South African context, warrant an in-depth investigation into their position. This is borne out by the constitutional imperative which grants to everyone the right to have access to social security and social assistance (s 27(1)(c) of the Constitution) and which obliges the state to implement appropriate measures to achieve the same (s 27(2)).

¹ Also see Olivier 1999:1199.

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2 THE EXCLUDED AND MARGINALISED CATEGORIES: A CONSPECTUS

A cursory glance at the areas of social security exclusion and marginalisation makes it clear that many categories and groups may be affected by this: to mention some, the unemployed (both in the temporary and structural sense); excluded employees (eg farmworkers and domestic servants); the self-employed, the informally employed and other atypically employed categories; the rural and urban poor; the aged dependant on social assistance; and non-citizens. Some of the categories do overlap, while not all persons belonging to a particular category or group could be said to be in need of reliance on a public system of social security (eg many professional self-employed people). For present purposes, and bearing in mind these remarks, the following non-exhaustive classification is suggested.

2.1 Statutorily excluded workers

2.1.1 *Persons who do not fit the “employee” concept*

The pattern that can be discerned from our labour and social security laws is evident: namely to extend social security protection only to those who qualify as “employees” or a similar term used in the context of a particular piece of legislation (such as “contributor” in section 2(1) of the Unemployment Insurance Act 30 of 1966 (UIA)).² Even though the statutory definitions might sometimes go further than what is understood at common law under the term “employee”,³ the respective definitions and/or the case law nevertheless make it clear that a category such as independent contractors is excluded.⁴ From this it follows that the self-employed, the informally employed, and several other categories of the atypically employed are for all legal and practical purposes excluded from vast areas of the social insurance system in South Africa, notably compensation for workplace injuries and diseases, and unemployment insurance.

It is true that in some instances the notion of “employee” has purposely been widened to include persons who should logically benefit from the particular social insurance scheme. So, for example, the definition of “employee” in section 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) provides for the inclusion of the dependants of a deceased employee. It is also true that the sphere of application of some of the relevant laws has over the past decade been extended so that more employees, and in one instance also persons who are not employees,

2 See generally Olivier 1998:669–685.

3 Eg s 213 of the Labour Relations Act 66 of 1995, s 1 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) and of the Employment Equity Act 55 of 1998 (EEA), which define the term in such a way as to include a person who assists an employer in the conducting or carrying on of a business.

4 See, for example, s 1 of the BCEA and the EEA respectively; s 213 LRA; *Smit v Workmen’s Compensation Commissioner* 1979 (1) SA 51 (A); *Niselow v Liberty Life Association of Africa Ltd* 1998 ILJ 752 (SCA); *Liberty Life Association of Africa Ltd v Niselow* 1996 ILJ 673 (LAC); *SABC v McKenzie* 1999 ILJ 585 (LAC); *MASA v Minister of Health* 1997 ILJ 528 (LC); *Oosthuizen v Mining & Engineering Supplies CC* 1999 ILJ 910 (LC).

have become entitled to social security benefits. For example, all employees, regardless of level of income, are now covered by COIDA (in contrast to the preceding legislation which restricted applicability to employees who earned less than a maximum annual amount, fixed from time to time). However, a monetary ceiling on the amount of remuneration to be taken into account for purposes of calculating benefits is still applicable.⁵ A similar development can be discerned in the provisions of the new Basic Conditions of Employment Act 75 of 1997.

2.1.2 *Persons deliberately and specifically excluded from the "employee" concept*

Despite the position as described above, one of the curious characteristics of social legislation in South Africa remains the exclusion of categories of persons from the ambit of the definition of "employee" (or a similar term) contained in the relevant laws, even though these persons would otherwise perfectly fit the concept of being employees. The most telling example is perhaps domestic workers employed in a private household (s 1 COIDA, s 2(2)(i) UIA). COIDA also does not cover persons employed outside South Africa⁶ while the UIA specifically excludes employees whose remuneration exceeds a certain monetary ceiling, migrant workers who have to be repatriated at the termination of their services, employees who are remunerated on a purely commission basis, casual employees working less than eight hours per week, seasonal workers, and civil servants (s 2(2)).

In the South African context many of these exclusions were previously determined along racial and gender lines, with the effect that these marginalised groups are most likely to be African and/or women.⁷ This preponderance of Africans and women in many of these categories might be regarded as a form of indirect discrimination. It is, therefore, to be hoped that the recommendation contained in both the ILO Country Review and the Labour Market Commission Report that coverage extensions (including the self-employed also) be introduced, will find favour with the legislature when statutory innovations are brought about (Standing *et al* 1996:446).

A dependant of a deceased employee can also qualify for a benefit in terms of many of these laws. The definition of "dependant"⁸ in the various social security laws is normally linked to the employee or contract of service concept in the sense that coverage is extended to dependants of deceased employees or persons who rendered services on the basis of a contract of employment. However, even though the definition of "dependant" makes provision for live-in partners and partners in an indigenous marriage to be

5 See Schedule 4 of the Act, as amended from time to time.

6 See also s 23 of COIDA.

7 See also Lund 1995:1,7.

8 The statutory method providing for the coverage of dependants differs: in some cases the definition of "employee" is widened so as to include dependants (see s 1 of COIDA); in other cases a specific definition of "dependant" is added to the legislation (s 38(7) of the UIA, s 1 of the Pension Funds Act 24 of 1956).

beneficiaries as well, satisfactory recognition of extended families, religious marriages and unconventional unions is often still lacking. Furthermore, it would appear that a spouse married to the deceased employee in terms of customary or religious law would sometimes not qualify as a beneficiary if there was also a civil law marriage with another wife subsisting at the time of the employee's death.⁹ It is doubtful whether the exclusion of these categories of *de facto* dependants will eventually pass constitutional and equality muster, given the constitutional prohibition of unfair discrimination based on marital status, religion and sexual orientation.¹⁰ Similar problems exist with regard to the exclusion of migrant workers, in particular where these are non-citizens who have obtained permanent resident status. This issue will be addressed in more detail below.¹¹

In essence, then, the effect of relying on the "employee" and "contract of service" notions (or similar notions employed by the legislature) in order to signify coverage is that large groups of those who work atypically, in particular independent contractors, so-called dependent contractors, the self-employed and the informally employed as well as the long-term unemployed, are excluded from protection. Given the strict categorial approach of South African social assistance, whereby protection in the form of social assistance is restricted to certain categories (in particular old age, disability and child care grants) and is made subject to an income and assets test,¹² the position thus is that these persons, as a rule, effectively enjoy no social security protection.

2.2 Persons not covered as a result of a lack of a statutory compulsion

Sometimes exclusion and marginalisation may be the result of the lack of a legal obligation to participate in a particular scheme or programme aimed at insuring people against certain social risks. Given the wide ambit of what is understood by social security in the South African context, it is apparent that membership of occupational retirement funds (ie provident and pension funds) would qualify as well – particularly in view of the fact that South Africa does not have a national or public retirement scheme. In the absence of a national pension scheme, private pension funds and, more recently, also provident funds, have mushroomed, especially over the past 35 years. There are no less than 16 000 of these funds in existence, covering around 74 % of formal sector workers. And yet, because of the high percentage of unemployment, only 40 % of the economically active population are covered (Van der Berg 1997:481, 485, 489).

However, viewed from a broader social security perspective, there are several other serious problems with the present retirement dispensation. Since, as a rule, there is no statutory obligation to the effect that contributions

⁹ See, for example, par (b) of the definition of "dependant" in COIDA.

¹⁰ See *Langemaat v Minister of Safety & Security* 1998 19 ILJ 20 (T).

¹¹ At par 2.4.

¹² Cf the pertinent provisions of the Social Assistance Act 59 of 1992, and the attendant regulations.

or benefits have to be transferred or preserved, should an employee change jobs or terminate his or her services, the implication is that (ex)- employees so affected may become reliant on the (meagre) state social grants for the elderly. The same result flows from the absence of an obligation to belong to a pension or provident fund. Consequently, those workers who do not so belong, including the informally and self-employed, later often become dependent on state social assistance. This is acknowledged in the White Paper for Social Welfare. The Department of Welfare therefore advocates compulsory retirement provision by all employees in formal employment and the creation of a scheme for the self-employed (White Paper 1997:48). Finally, incidences of racial discrimination as regards membership of and employer contributions to a pension and/or provident fund still occur, resulting potentially in effective marginalisation of some employees.¹³

2.3 The poor, the structurally unemployed and the informally employed

The rural and urban poor, the informally employed, as well as the structurally unemployed, generally pose major challenges to social security protection. This follows from the fact that they are usually not part of the formal workforce and are therefore as a rule excluded from social insurance mechanisms. In the absence of a universal system of social security coverage, social assistance measures also do not suffice. This is mainly so because of a categorial approach whereby services are limited and benefits restricted to specific categories of the poor and needy. This is aggravated by the often insufficient levels of coverage and difficulties in complying with and administering means testing. For these categories social security coverage will often mean more than merely providing a safety net as it is their very means of survival.

There is a growing interest internationally in ways to provide social security protection to these marginalised categories of people. Existing traditional and informal (mostly community-based) mechanisms of social security coverage on the basis of risk and/or need are increasingly being investigated. Supportive measures, for example by way of communal projects and savings, are both being documented and developed and implemented on a pilot study basis by institutions such as the ILO.¹⁴ Social structures and customary practices seem to be playing a crucial role in the creation of innovative strategies and alternative forms of coverage and protection.

The limited nature of the protection offered by the South African social security system seldom operates to the direct advantage of the poor and the informally employed amongst them. While it is estimated that around three million South Africans are beneficiaries under the present grant system, these grants provide extremely low levels of income support (eg the present

13 See *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC).

14 See Van Ginneken 1996.

value of the old age grant is R540). This also flows from the fact that on average the said benefits are used for five additional household members in African communities, while the means tests created in order to access these grants have tended to promote a poverty trap syndrome (Van der Berg 1997:490; White Paper 49). All of this is aggravated by the exceptionally high levels of unemployment and poverty in South Africa.

It is true, however, that the formal social assistance system has in recent years to some extent been modified in order to reach more of the poor and needy. For example, parity between the black and non-black beneficiaries of the means-tested old age grant was established in 1993 (Van der Berg 1997:488). Another example is the child support grant with its aim of replacing the state maintenance grant and targeting poor families in particular, extending monetary assistance on a means-tested basis to larger households with children under the age of seven years.¹⁵

2.4 Non-citizen migrant workers

It would appear that the lack of protection granted to migrant workers in the field of social security is one of the causes of social exclusion in South Africa. Their position leaves much to be desired. Apart from some exceptions in the case of foreigners with permanent residence status, non-nationals are mostly excluded from South African social security. This applies to virtually all social assistance benefits¹⁶ as well as certain branches of social insurance, such as the unemployment insurance scheme.

The exclusion of migrant workers raises serious questions of a constitutional nature. The rights enshrined in section 27(1)(c) of the Constitution are underpinned by the fundamental right to equality, enshrined in section 9. Jurisprudentially, the right to equal treatment has already been interpreted in the area of employment to imply that there is no basis for distinguishing between foreigners who have obtained permanent resident status and South African citizens.¹⁷

From a social security point of view this does not mean that all categories of non-citizen migrants would have to be treated alike. Even though the right to access to social security is extended to "every person", nonetheless, upon further analytical scrutiny, it is apparent that one cannot categorically state that all constitutional provisions relating to "any/every person" apply equally and to the same extent to non-citizens *illegally* in the country as they do to residents and citizens. The evolution of constitutional jurisprudence over time will set precedent in this regard. However, the White Paper on International

15 S 4 of the Social Assistance Act 59 of 1992, as amended; Government Notice R656 of 8 May 1998.

16 In view of the fact that South African citizenship is in terms of s 3(c) of the Social Assistance Act of 1992 one of the eligibility criteria for accessing almost all social assistance benefits (such as old-age and disability benefits, but not the foster child grant); see also s 12(1)(b)(i) of the Aged Persons Act 81 of 1967 for a similar restriction.

17 "Permanent residents should be viewed no differently from South African citizens when it comes to reducing unemployment." See *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC) par 30-31; see also *Baloro v University of Bophuthatswana* 1995 4 SA 197 (BSC).

Migration recognises that there is no constitutional basis to exclude, *in toto*, the application of the Bill of Rights owing to the status of a person while in South Africa, including illegal immigrants (White Paper on International Migration of 31 March 1999; par 2.2-2.4).

It also appears necessary to draw a distinction between *refugees* and illegal immigrants. The new Refugee Act 130 of 1998 places a general prohibition on the refusal of entry, expulsion, extradition or return of refugees to another country if the aforementioned acts will result in them being persecuted or their lives, physical safety and freedom being threatened (s 2(a) and (b)). It defines persons who qualify for "refugee" status as those persons who have fled their own country fearing persecution by reason of their race, religion, nationality, political opinion or their membership of a particular social group (s 3(a)). Certain other categories of persons, including dependants of those who have been granted refugee status (s 3(c)), would also qualify for refugee status. The significance thereof is that in principle refugees enjoy full legal protection, which includes the rights set out in Chapter 2 of the Constitution. Concomitant thereto is that refugees qualify for the constitutionally entrenched socio-economic rights in terms of section 27 of the Constitution.

It would also appear, barring a limited number of exceptions, that South Africa is not yet linked to the network of bilateral and multilateral conventions on the co-ordination of social security. This may operate to the disadvantage of both non-citizen migrant workers in South Africa and South Africans who take up temporary or permanent employment or residence in other countries.

3 CONSTITUTIONAL AND INTERNATIONAL LAW POINTERS

Finally, a consideration of aspects of the constitutional and international law regulation of the protection of the right (of access) to social security might help to shed some light on which approaches might be appropriate from a legal point of view. The constitutional imperative is a clear and unambiguous undertaking by the Constitutional Assembly to develop a comprehensive social security system, based on two paradigms, namely the right of access for everyone and financial viability. In order to ensure that there is governmental compliance with this constitutional obligation, section 184(3) provides for a peculiar monitoring and enforcement mechanism:

"Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment."

Furthermore, section 7(2) of the Constitution obliges the state to respect, protect and fulfil the rights contained in the Bill of Rights. There is, therefore,

18 Namely people who flee their own country owing to external aggression, occupation, foreign dominion or events that seriously disturb public order: s 3(b).

19 Eg in terms of s 60 of COIDA an employee or dependant of an employee who is resident outside the Republic or is absent from the Republic for a period(s) of more than six months, and to whom a pension is payable, can be awarded a lump sum, thereby losing any entitlement to the pension.

a duty on the State to act in a positive manner with regard to the right to have access to social security. However, while the right to access to social security does not entitle anyone to a particular kind of social security system, it obliges the state to make possible the realisation of the said right and not to act in an arbitrary and/or discriminatory manner when giving effect to the right.²⁰

In its first certification judgment the Constitutional Court remarked:

"It is true that the inclusion of socio-economic rights may result in the courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications. A court may require the provision of legal aid, or the extension of state benefits to a class of people who formerly were not beneficiaries of such benefits. In our view it cannot be said that by including socio-economic rights within a bill of rights, a task is conferred upon the courts so different from that ordinarily conferred upon them by a bill of rights that it results in a breach of the separation of powers".²¹

International precedent makes it clear that courts with constitutional power potentially wield enormous power in the shaping of social security law and labour law. More recently, the Constitutional Court adopted a relatively cautious approach by invoking the dual test of rationality and *bona fides* as the yardstick in this regard. It opined:

"... A court must be slow to interfere with rational decisions taken in good faith by the political organs and (medical) authorities whose responsibility it is to deal with such matters".²²

The right to social security, in addition to being subject to the general limitation clause, should be read against the background of the *internal* limitations contained in section 27 which *inter alia* relate to: (i) the right to access; (ii) *reasonable* legislative and other measures; (iii) within the state's *available resources*; and (iv) a framework of *progressive realisation*.

Any infringement of the right to (access to) social security in this limited sense of the word, of course, also has to comply with the limitations provisions of the Constitution (s 36). The Constitutional Court seems to be endorsing such an approach. In *Soobramoney* Chaskalson P pronounced:

"What is apparent from these provisions is that the obligations imposed on the state by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of lack of resources." (par 11).

The way in which international law deals with the protection of the right to social security might be equally instructive.²³ Even if the relevant provisions

20 See, for example, De Vos 1997:69-91.

21 *Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) 800 D-F (par 77).

22 *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) par 29.

23 Various international instruments contain provisions regarding the exercise of this right, such as the Universal Declaration of Human Rights of 1948 (Art 22), ILO Convention 102 of 1952 concerning Social Security (Minimum Standards), the Convention on the Elimination of all Forms of Discrimination against Women of 1979 (Art 11(1)(e)), the Convention on the Rights of the Child of 1989 (Art 26), and the European Social Charter (Art 2).

of most of these instruments are not legally binding on South Africa, they still have to be considered for purposes of interpreting the fundamental right to access to social security (s 39(1)(b) of the Constitution.)¹

4 CONCLUSION

Is the existing legal framework of South African social security adequate? The answer thereto may be moot, as many regard the system as astonishingly commendable, specifically in light of the current status of South Africa as a developing third world country in a constant state of flux. Instead of viewing the social security system as an expensive burden it should be embraced in order to provide a strong basis for sensitive development and improvement.

However, as long as mass unemployment continues, those marginalised and excluded in terms of the previous formal system cannot adequately be drawn into the economic and social mainstream by social security. Therefore, employment is the key denominator that will allow social security needs to be contained at levels commensurate with the fiscal ability of the economy. In its absence South Africa will hardly be able to make further progress to an advanced social security system. The challenge facing the welfare system is to advise appropriate and integrated strategies to address the alienation and the economic and social marginalisation of vast sectors of the population who are living in poverty and to address past disparities and fragmentation of the institutional framework in the delivery of welfare services.

Sources

Aged Persons Act 81 of 1967

Baloro v University of Bophuthatswana 1995 4 SA 197 (BSC)

Baromoto v Minister of Home Affairs 1998 BCLR 562 (W)

Basic Conditions of Employment Act 75 of 1997

Compensation for Occupational and Diseases Act 130 of 1993

Constitution of the Republic of South Africa 108 of 1996

Convention on the Elimination of all Forms of Discrimination against Women of 1979

Convention on the Rights of the Child of 1989

De Vos P "Pious wishes or directly enforceable human rights?: social and economic rights in South Africa's 1996 constitution" 1997 *SAJHR* 67

Dreze JP and Sen AK *Social security in developing countries* Clarendon Press (1991)

Employment Equity Act 55 of 1998

European Social Charter of 1951

²⁴ *S v Makwanyane* 1995 3 SA 391 (CC); 1995 (6) BCLR 665 (CC).

- Ex parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa.* 1996 1996 4 SA 744 (CC) 800 D–F
- Federal Ministry for Economic Co-operation and Development (Germany) *Supporting social security systems in developing countries* (1998)
- Fultz E & Pieris B *The social protection of migrant workers in South Africa* (ILO Harare 1997)
- ILO Convention 102 of 1952 concerning Social Security (Minimum Standards)
- International Covenant on Economic, Social and Cultural Rights (UN 1966)
- Johnson v Minister of Home Affairs* 1997 2 SA 432 (C)
- Jütting (University of Bonn Center for Development Research) *Strengthening social security systems in rural areas of developing countries* (1999)
- Kahn-Freund O “The impact of constitutions on labour law” 1976 *Cambridge Law Journal* 240
- Langemaat v Minister of Safety & Security* (1998) 19 ILJ 20 (T)
- Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC)
- Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC)
- Liebenberg S “The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa” 1995 *SAJHR* 359
- Lund F “State social benefits in South Africa” 1993 *International Social Security Review* 1
- Olivier M “A charter for fundamental rights for South Africa: implications for labour law and industrial relations” – 1993 *Journal of South African Law* 651
- Olivier M “Critical issues in South African social security: the need for creating a social security paradigm for the excluded and the marginalised” – 1999 *ILJ* 2199.
- Olivier M “Extending labour law and social security protection: the predicament of the atypically employed” 1998 *ILJ* 669
- Oosthuizen v Mining & Engineering Supplies CC* 1999 *ILJ* 910 (LC)
- Pension Funds Act 24 of 1956
- Poverty and Inequality in South Africa* Report (PIR) (1998)
- Raoul Wallenberg Institute of Human Rights and Humanitarian Law *General Comments or Recommendations adopted by the United Nations Human Rights Treaty Bodies, vol II: Committee on Economic, Social and Cultural Rights* (1997)
- Refugee Act 130 of 1998
- S v Makwanyane* 1995 3 SA 391 (CC); 1995 (6) BCLR 665 (CC)
- Smit v Workmen’s Compensation Commissioner* 1979 1 SA 51 (A)
- Social Assistance Act 59 of 1992

- Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC)
- Standing G *et al Restructuring the labour market: the South African challenge* (An ILO country review) (ILO Geneva 1996)
- UN Committee on Economic, Social and Cultural Rights *General Comments No 1* (1989) 3 (1990) 4 (1991) 5 (1994) and 6 (1995)
- Unemployment Insurance Act 30 of 1966
- Van der Berg S "South African social security under apartheid and beyond" 1997 *Development Southern Africa* 481
- Van der Waal & Jain "Managing credit for the rural poor" 1996 *World Development* 79
- Van Ginneken W *Promoting productivity and social protection in the urban informal sector: Social security for the informal sector: issues, options and tasks ahead* (ILO Geneva 1996)
- Vienna Convention on the Law of Treaties of 1969
- Vonk G *De coördinatie van bestaansminimumuitkeringen in de Europese Gemeenschap* (1991)
- White Paper for Social Welfare GN 1108 in GG 18166 of 8 August 1997.
- White Paper on International Migration of 31 March 1999.