



**UNIVERSITY *of the*  
WESTERN CAPE**

## **FACULTY OF LAW**

### **Extension of Social Security to the Informal Hospitality Industry Workers in South Africa**

Research Paper submitted in partial fulfilment of the requirements for the LLM degree  
in the Department of Mercantile Law and Labour Law

**MPUMUZI NGWENYA**

**Student Number: 3009325**

**Supervisor:**

**Dr Y Basson**

**Co-supervisor:**

**Dr T Kondo**

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## DECLARATION

I, **Mpumuzi Ngwenya**, do hereby declare that **‘Extension of social security to the informal hospitality industry workers in South Africa’** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signature: .....

Date: .....

DR Y Basson (Supervisor)

DR T Kondo (Co Supervisor)

Signature: .....

Signature: .....

Date: .....

Date: .....



## DEDICATION

To my mother who planted the seed of education in me, despite the very challenging circumstances. Your prayers and unwavering support sailed me throughout my academic journey. Today I harvest the fruits of your sacrifices. This paper is dedicated to you.



## ACKNOWLEDGEMENTS

I would like to give thanks to the almighty and omnipotent God for his blessings and strength to keep me going.

To Prof Kitty Malherbe, thank you for introducing me to Social Security law and giving me unreserved access to your well of knowledge.

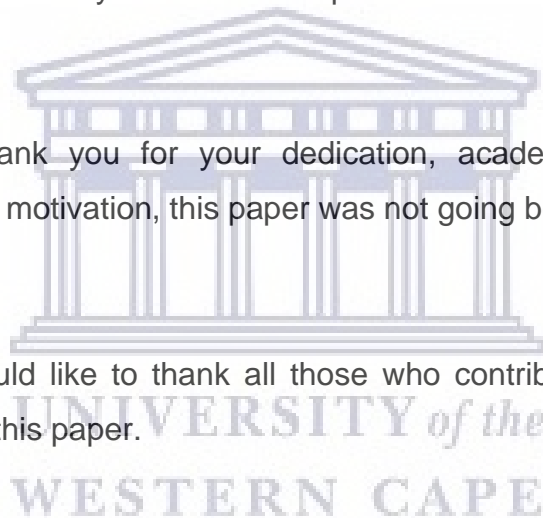
To my supervisor:

Dr Yvette Basson, thank you for your invaluable professional support and expert guidance in the field of Labour and Social Security law, even in the face of the unusual circumstances brought about by the COVID-19 pandemic and the national lockdown.

To my co-supervisor:

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## KEYWORDS

Hospitality Industry Workers

Hotels

Informal Workers

Migrant Workers

Poverty

Restaurants

Social Protection

South Africa

Vulnerable Workers

Women



## LIST OF ABBREVIATIONS AND ACRONYMS

AFP	Pension Fund Administrators (Chile)
AU	African Union
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CESCR	Committee of Economic, Social and Cultural Rights
DWA	Decent Work Agenda
EEA	Employment Equity Act
ESA	Employment Services Act
FDI	Foreign Direct Investment
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
ISSA	International Social Security Agency
MDG	Millennium Development Goals
NALEDI	National Labour & Economic Development Institute
OAU	Organisation of African Unity
OECD	Organisation of Economic Co-Operation and Development
PBSI	Pensión Básica Solidaria de Invalidez
SAA	Social Assistance Act
RISDP	Regional Indicative Strategy Development Plan
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SASSA	South African Social Security Agency
SCA	Supreme Court of Appeal
UDHR	Universal Declaration of Human Rights
UF	Unidad de Fomado
UN	United Nations
UNESCO	United Nations Economic, Social and Cultural Organisation
ICESCR	International Covenant on Economic, Social and Cultural Rights

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# CHAPTER ONE

## INTRODUCTION AND BACKGROUND

### 1.1 INTRODUCTION

The hospitality industry is one of the largest economic sectors in the world.<sup>1</sup> As a result, it is one of the top employment contributors, with its Travel and Tourism sector accounting for an estimated 10.3% of global GDP, translating to a US\$8.9 trillion contribution to the world's GDP and 330 million jobs in 2019.<sup>2</sup>

In the context of South Africa, the tourism industry also plays a crucial role in economic growth and job creation. Tourism in South Africa accounted for 2.8% of GDP in 2019,<sup>3</sup> and employed an estimated 709 000 individuals.<sup>4</sup> Therefore, the importance of this colossal industry in economic growth and development, coupled with its potential in poverty reduction cannot be overemphasised.

Notwithstanding the substantial contribution to the economy in South Africa the hospitality industry is plagued by numerous challenges. Of note are the harsh socio-economic conditions and chronic poverty that many workers are subjected to.<sup>5</sup> This is largely because many workers in the hospitality sector are informally employed, have no job security and are paid low wages.<sup>6</sup> The low level of the National Minimum Wage in South Africa further aggravates the situation. According to the Pietermaritzburg Economic Justice & Dignity Group, 'it is simply not enough to cover the 'costs of goods and services needed for dignity and household functionality' expected by workers.'<sup>7</sup>

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<sup>1</sup> World Travel & Tourism Council: Global Economic Impact & Trends 2020, available at <https://wtcc.org/Research/EconomicImpact/moduleId/1445/itemId/91/controller/DownloadRequest/action/QuickDownload>.

<sup>2</sup> World Travel & Tourism Council estimate, 2019 available at <https://wtcc.org/Research/Economic-Impact> (accessed 14 August 2020).

<sup>3</sup> <https://www.gov.za/about-sa/tourism> (accessed 14 August 2020).

<sup>4</sup> <https://www.gov.za/about-sa/tourism> (accessed 14 August 2020).

<sup>5</sup> <https://www.gov.za/about-sa/tourism> (accessed 14 August 2020).

<sup>6</sup> According to the United Nations in 2018, almost 8 per cent of the world's workers and their families lived on less than US\$1.90 per person per day.

<sup>7</sup> ILO Sectoral Activities Programme *Developments and challenges in the hospitality and tourism sector 2010* 14 available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_166938.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_166938.pdf) (accessed 11 August 2018).

<sup>8</sup> Pietermaritzburg Economic Justice & Dignity Group: Household Affordability Index November 2019 6 available at <https://pmbejd.org.za/wp-content/uploads/2019/11/November-2019-Household-Affordability-Index-PMBEJD-1.pdf> (accessed 15 August 2020)

Moreover, the hospitality industry relies heavily on specific types of workers, which tend to be mostly marginalised groups such as students, women, ethnic minorities and migrants.<sup>8</sup> Owing to this vulnerability, they are often exposed to precarious work that is physically and mentally demanding, such as enduring long hours standing, frequently walking and carrying items, and regular interaction with customers.<sup>9</sup> These tasks ultimately pose various detrimental physical and psycho-social risks such as accidents and high degrees of stress.<sup>10</sup>

Despite their exposure to various forms of risk and income insecurity, many informal workers, such as those in the hospitality industry, remain excluded from social security schemes.<sup>11</sup> According to Olivier and Mpedi, this 'is due to the fact that most social insurance schemes link the concept of *contributor* to that of *employee*'.<sup>12</sup> This presents challenges in that the concept of 'employee' is mostly limited to 'traditional' or typical formal sector workers.<sup>13</sup> Van Ginneken further posits that the major reason for the exclusion of informal economy workers from statutory social security coverage, is that they 'are unable or unwilling to contribute a relatively high percentage of their incomes to financing social security benefits, which do not meet their priority needs.'<sup>14</sup>

The fundamental purpose of social security schemes is to:

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<sup>8</sup> Employment experiences of Polish migrant workers in the UK hospitality sector (2011) *Tourism Management* (32) 5 1006–1019 available at [http://eprints.bournemouth.ac.uk/18431/1/Janta\\_et\\_al\\_Experiences\\_of\\_migrant\\_workers\\_TM\\_2011.pdf](http://eprints.bournemouth.ac.uk/18431/1/Janta_et_al_Experiences_of_migrant_workers_TM_2011.pdf) (accessed 11 August 2017).

<sup>9</sup> Eurofound (2004). *EU hotel and restaurant sector: Work and employment conditions*, Dublin, European Foundation for the Improvement of Living and Working Conditions 25.

<sup>10</sup> Eurofound (2004). *EU hotel and restaurant sector: Work and employment conditions*, Dublin, European Foundation for the Improvement of Living and Working Conditions 25 - 27.

<sup>11</sup> Olivier and Mpedi "The extension of social protection to non-formal sector workers – experiences from SADC and the Caribbean" (2005) 19 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* (ZIAS) 144 at 150-152.

<sup>12</sup> Olivier and Mpedi "The extension of social protection to non-formal sector workers – experiences from SADC and the Caribbean" (2005) 19 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* (ZIAS) 144 at 150-152.

<sup>13</sup> Olivier and Mpedi "The extension of social protection to non-formal sector workers – experiences from SADC and the Caribbean" (2005) 19 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* (ZIAS) 144 at 150-152.

<sup>14</sup> Van Ginneken "Extending social security: Policies for developing countries" (ESS Paper No 13, 2003) 9.

provide for basic income in cases of unemployment, illness and injury, old age and retirement, invalidity, family responsibilities such as pregnancy and childcare, and loss of the family breadwinner'.<sup>15</sup>

It is against this backdrop that this paper seeks to identify gaps and recommend how social security should be extended to informal workers particularly within the hospitality industry since it is largely populated by vulnerable worker groups.

## 1.2 BACKGROUND TO THE STUDY

Before the question can be asked whether social security should be extended to the informal hospitality industry workers, it is imperative to first understand the legal framework relating to the social security of workers – at the very least, those relating to the hospitality industry in South Africa.

Labour legislation and social security legislation are inextricably intertwined and overlap in many ways. The primary overlap is that

'access to an important component of social security (that is, social insurance) is gained through employment; similarly, a lack of access to employment bars access to social insurance'.<sup>16</sup>

Labour laws such as the Labour Relations Act (LRA),<sup>17</sup> Basic Conditions of Employment Act (BCEA),<sup>18</sup> and the Employment Equity Act (EEA),<sup>19</sup> play a key role in extending protection to workers but this is mainly during their tenure of employment (or as a result of unfair dismissal). As a result, it fails to provide protection during 'major life course transitions, such as between caring and employment; unemployment and employment; retirement and employment; precarious and permanent employment'.<sup>20</sup>

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<sup>15</sup> ILO Rules of the Game: A brief introduction to International Labour Standards (2014) 16. (Hereafter ILO Rules of the Game (2014)) 72.

<sup>16</sup> Basson Y 'Selected Developments in South African Labour Legislation related to Persons with Disabilities' *PER / PELJ* 2017(20) 1.

<sup>17</sup> Labour Relations Act, 66 of 1995 (LRA).

<sup>18</sup> Basic Conditions of Employment Act, 75 of 1997 (BCEA).

<sup>19</sup> Employment Equity Act 55 of 1998 (EEA).

<sup>20</sup> P Benjamin cited in Malherbe K 'Implementing Domestic Workers' Social Security Rights in a Framework of Transformative Constitutionalism'. In D. Du Toit 2013. *Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights* 117.

These 'transitions' are a common phenomenon for most workers,<sup>21</sup> including those in the hospitality industry. Thus, gaps are created in labour protection by this legislation, which in turn exposes workers in precarious work to social risks, resulting in loss of income.<sup>22</sup> Social security legislation endeavours to close the gaps and buffer against such contingencies.<sup>23</sup>

As a point of departure, the South African Constitution, 1996, guarantees 'everyone' the right of access to social security, including social assistance. Furthermore, section 27(2) places an obligation on the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [this] right'. Given the constitutional entrenchment of the right of access to social security, several pieces of legislation have been crafted, aimed at the development of a comprehensive social security system. Examples of these include the Unemployment Insurance Act,<sup>24</sup> Social Assistance Act,<sup>25</sup> and the Compensation for Occupational Injuries and Diseases Act (COIDA).<sup>26</sup>

Notwithstanding the robust nature of South Africa's social protection system at a macro level, in the context of informal workers, gaps do exist.<sup>27</sup> This, as discussed above, is attributed to the fact that 'most social insurance schemes link the concept of 'contributor' to that of 'employee'<sup>28</sup> and moreover, there are some provisions that indirectly exclude informal workers, including those in the hospitality industry from the formal social security framework.<sup>29</sup> The fact that most are unskilled and lowly paid,

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<sup>21</sup> Malherbe K 'Implementing Domestic Workers' Social Security Rights in a Framework of Transformative Constitutionalism'. In D. Du Toit 2013. *Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights* 117.

<sup>22</sup> Malherbe K 'Implementing Domestic Workers' Social Security Rights in a Framework of Transformative Constitutionalism'. In D. Du Toit 2013. *Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights* 117.

<sup>23</sup> Malherbe K 'Implementing Domestic Workers' Social Security Rights in a Framework of Transformative Constitutionalism'. In D. Du Toit 2013. *Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights* 117.

<sup>24</sup> *Unemployment Insurance Act*, 63 of 2001.

<sup>25</sup> *Social Assistance Act*, 13 of 2004.

<sup>26</sup> *Compensation for Occupational Injuries and Diseases Act*, 130 of 1993.

<sup>27</sup> Devereux S 'Social protection in South Africa: exceptional or exceptionalism?' (2011) *Canadian Journal of Development Studies / Revue canadienne d'études du développement*. 414.

<sup>28</sup> Olivier and Mpedi "The extension of social protection to non-formal sector workers – experiences from SADC and the Caribbean" (2005) 19 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht (ZIAS)* 144 at 150-152.

<sup>29</sup> See s 200A of LRA and s 83(A) of BCEA, which exclude independent contractors from definition of 'employee'.



only exacerbates the problem, as they also typically cannot afford private insurance such as retirement funds or medical aids.<sup>30</sup>

It is therefore clear that the many vulnerable groups of workers participating in the hospitality industry fall outside of the net captured by social security. Given this background, this thesis will identify the gaps in social security for these workers and recommend how those gaps can be addressed.

### **1.3 RESEARCH QUESTION**

The question posed by this research paper is: whether social security should be extended to the informal hospitality industry workers in South Africa?

### **1.4 RESEARCH OBJECTIVES**

The question above is directed by the following objectives:

- To discuss the vulnerability of workers.
- To outline the international framework relating to hospitality industry workers.
- To discuss the legal provisions in South Africa relating to hospitality industry workers.
- To compare how social security has been extended for hospitality industry workers in select countries.
- To recommend how social security could be adequately extended to hospitality industry workers in South Africa.

### **1.5 AIMS OF THE RESEARCH**

The aim of this research paper is to highlight the gaps in social security legislation which leave the atypical hospitality industry worker exposed to vulnerability. It further recommends the extension of the social security system into a broader and more comprehensive one that covers informal hospitality industry workers.

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<sup>30</sup> *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, constraints and Opportunities*, World Bank Report 2018 94.



## 1.6 SIGNIFICANCE OF THE RESEARCH

The vicious cycle of poverty continues to haunt societies in many developing countries including South Africa.<sup>31</sup> Almost half of the South African society is considered chronically poor, a section of the population of which the World Bank describes as characterised by high poverty persistence.<sup>32</sup> The majority of these people eke out a living through informal work, particularly young black women.<sup>33</sup> According to the ILO, the 'Informal economy in Africa is not a marginal phenomenon, but rather the space where the majority of working men and women sustain themselves'.<sup>34</sup> Therefore the magnitude of the vulnerability of informal workers, which is further compounded by the linkages between poverty, informality and decent work deficit,<sup>35</sup> underscores the significance of this research.

While there has been some research focused on the protection of workers' rights in the South African hospitality industry, there has been less focus on social security rights for informal workers in the sector. The rights of this group of workers were identified as of great significance for this research, since they face peculiar challenges in the hospitality industry, which, as alluded above often exposes them to various social risks, and vulnerabilities.<sup>36</sup>

Furthermore, a plethora of problems currently confronting South Africa, such as the falling economy,<sup>37</sup> have had devastating effects on workers' livelihoods in general, and informal workers in particular, especially due to their higher exposure to

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<sup>31</sup> United Nations Report 2018 available at <https://www.un.org/en/sections/issues-depth/poverty/> (accessed 19 May 2020).

<sup>32</sup> World Bank *World Bank Report 2018 Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, constraints and Opportunities*, (2018) 35 available at: <http://documents.worldbank.org/curated/en/530481521735906534/pdf/124521-REV-OUO-South-Africa-Poverty-and-Inequality-Assessment-Report-2018-FINAL-WEB.pdf> (accessed 30 July 2019).

<sup>33</sup> World Bank *World Bank Report 2018 Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, constraints and Opportunities*, (2018) 13 - 16.

<sup>34</sup> ILO Brief 14 April 2020 'The impact of the COVID-19 on the informal economy in Africa and the related policy responses' available at [https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/documents/briefingnote/wcms\\_741864.pdf](https://www.ilo.org/wcmsp5/groups/public/---africa/---ro-abidjan/documents/briefingnote/wcms_741864.pdf) Accessed 20 August 2020.

<sup>35</sup> ILO 'The informal economy: enabling transition to formalisation. Background document to the Tripartite Interregional Symposium on the Informal economy: Enabling Transition to Formalisation' ILO (Geneva), 2007 5 available at [https://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@emp\\_policy/documents/meetingdocument/wcms\\_125489.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_policy/documents/meetingdocument/wcms_125489.pdf) (accessed 15 June 2019).

<sup>36</sup> See 1.1 above.

<sup>37</sup> <http://www.statssa.gov.za/?p=13049> (accessed 20 August 2020)

occupational health and safety risks, illness, accidents or death, often without adequate access to social security schemes.<sup>38</sup> The advent of the global COVID-19 pandemic and the restrictive measures taken to curb it, has further exacerbated these risks, as it has not only increased the likelihood that they will suffer from illness, but also job losses and fewer working hours for those who remain employed.<sup>39</sup> According to the United Nations (UN), informal workers suffered a sixty percent decline in earnings in the first month of the crisis alone.<sup>40</sup>

As with so many aspects of this pandemic, the impacts are falling disproportionately on those who were already in precarious circumstances and who can least absorb the additional blow.<sup>41</sup>

The above challenges highlight the critical and urgent need for labour and social security policy interventions, in alleviating the plight of informal workers, such as those who toil in the hospitality sector. Therefore, the importance of safety nets for vulnerable workers cannot be overemphasised, especially in times of economic and health crises. Thus, this thesis seeks to explore the gaps in legislation that leave the atypical worker inadequately protected, and further aims to influence policy reform by recommending solutions, that will ensure more coverage for the affected hospitality industry workers.

The recommendations in this paper are aimed at influencing a policy shift towards extending the constitutional right of access to social security to everyone, especially the vulnerable informal workers in the hospitality industry. This will further guarantee the right to dignity and equality, the constitutional values that underpin this right.

## **1.7 METHODOLOGY**

This thesis consists of a literature review that draws from various primary sources such as the Constitution of the Republic of South Africa, legislation and case law, as well as secondary sources such as textbooks, academic papers and reports, international instruments and journal articles.

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<sup>38</sup> See fn 17 above.

<sup>39</sup> UN 2020, Policy Brief: The World of Work and COVID-19, June 2020. Available [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/genericdocument/wcms\\_748428.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/genericdocument/wcms_748428.pdf) 2 accessed 23 August 2020.

<sup>40</sup> UN 2020, Policy Brief: The World of Work and COVID-19, June 2020 2.

<sup>41</sup> UN 2020, Policy Brief: The World of Work and COVID-19, June 2020 2.

Since this paper primarily focuses on workers' rights and social security, relevant South African pieces of legislation such as the Labour Relations Act (LRA),<sup>42</sup> Basic Conditions of Employment Act (BCEA),<sup>43</sup> Unemployment Insurance Act and Compensation for Occupational Injuries and Diseases Act (COIDA) will be analysed.<sup>44</sup> Works by leading authors and academics such as Olivier and Mpedi, Malherbe, Ulrichs, Vettori and Basson among others, will be consulted for their expert analysis in the fields of labour and social security law.

The South African Constitution will play a key role in this thesis, since it is the foundation on which all the relevant legislation and social security rights are rooted. Furthermore, this paper examines and analyses the relevant International human rights instruments to establish the extent of the right to social security.<sup>45</sup> Since Chile was selected as a comparator jurisdiction, the use of relevant Chilean legislation and Constitution will be explored.

## **1.8 IMPORTANT CONCEPTS**

This paper identifies some rather complex and interrelated concepts, which feature prominently in the discussion of this topic. For the sake of clarity and better understanding, it is prudent that these terms are explained below.

### **1.8.1 Social protection and social security**

Social protection is a very broad concept encapsulating a number of methods to assist people when social risks materialise, including those from public, private and voluntary organisations. It goes beyond the provision of financial support and 'incorporates development strategies and programmes designed to ensure, collectively, at least a minimum acceptable living standard for all citizens'.<sup>46</sup> According to the definition provided by the 2002, Taylor Committee of Inquiry into a Comprehensive System of Social Security for South Africa:

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<sup>42</sup> *Labour Relations Act*, 66 of 1995.

<sup>43</sup> *Basic Conditions of Employment Act*, 75 of 1997.

<sup>44</sup> *Compensation for Occupational Injuries and Diseases Act*, No 61 of 1997.

<sup>45</sup> See Chapter 4 below.

<sup>46</sup> Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002) *Transforming the Present – Protecting the Future* 41.

“[C]omprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.”<sup>47</sup>

On the other hand, social security is country-specific, it is a flexible and dynamic concept and therefore does not have a universal definition.<sup>48</sup> Social security is a fluid concept, one which exhibits both structural homogeneity and heterogeneity.<sup>49</sup> There is, however, a golden thread running through all its diverse forms of existence namely; the ‘core elements’ (unemployment, ill health, maternity, child rearing, widowhood, disability and old age) of which protection is provided against.<sup>50</sup>

Although social security is not generally defined in South Africa,<sup>51</sup> some authors and institutions have made attempts to explain it. Pieters,<sup>52</sup> describes it as ‘the body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings (income from paid labour) or particular costs.’<sup>53</sup>

According to the Taylor Committee report,

“Comprehensive social protection for South Africa seeks to provide the basic means for all people living in the country to effectively participate and advance in social and economic life, and in turn to contribute to social and economic development.”<sup>54</sup>

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<sup>47</sup> Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002) *Transforming the Present – Protecting the Future* 41.

<sup>48</sup> Dekker, Adriette, et al. ‘Social Security: a conceptual view.’ *Law, Democracy & Development* 4.1 (2000) 3.

<sup>49</sup> Dekker, Adriette, et al. ‘Social Security: a conceptual view.’ *Law, Democracy & Development* 4.1 (2000) 3.

<sup>50</sup> Dekker, Adriette, et al. ‘Social Security: a conceptual view.’ *Law, Democracy & Development* 4.1 (2000) 3.

<sup>51</sup> Olivier MP et al *Introduction to Social Security* (2004) 13.

<sup>52</sup> Pieters (1993) Introduction into the basic principles of social security 2.

<sup>53</sup> Pieters (1993) as cited in Malherbe ED *Intergenerational solidarity and the provision of support and care to older persons* (unpublished LL.D thesis, University of the Western Cape, 2009) 3.

<sup>54</sup> Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (2002) *Transforming the Present – Protecting the Future* 41.

The White Paper for Social Welfare,<sup>55</sup> identifies poverty prevention, poverty alleviation, social compensation and income distribution as goals of social security. Furthermore, the White Paper defines social security as:

“[That system of law] which ensure that all people have adequate economic and social protection during unemployment, ill health, maternity, child rearing, widowhood, disability and old age, by means of contributory and non-contributory schemes for providing policies for their basic needs.”<sup>56</sup>

In light of the above, it is clear that social security – the primary focus of this theses, - is a component of the broader, umbrella concept of social protection. The discussion in this thesis will therefore be restricted to the narrower concept of social security benefits.

### 1.8.2 Social assistance and social insurance

Social assistance benefits are mainly aimed at ensuring that individuals do not fall below a certain basic minimum level of income.<sup>57</sup> Social security in South Africa may be classified into two sub-groups: social insurance and social assistance.<sup>58</sup> The primary purpose of social insurance is to ‘compensate employees for loss of income resulting from social risks such as unemployment or maternity’.<sup>59</sup> Social insurance is based on employee and employer contributions,<sup>60</sup> and is administered by various institutions such as investment companies, the Unemployment Insurance Fund (UIF), the Compensation for Occupational Injuries and Diseases Fund (COIDA Fund) and retirement schemes.<sup>61</sup> It comprises of numerous schemes that are unrelated, but are all exclusively accessible through employment.<sup>62</sup> ‘As a result of social insurance

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<sup>55</sup> Department of Welfare ‘White Paper for Social Welfare’: GN 1108 in GG 18166 of 8 August 1997 (hereafter ‘White Paper for Social Welfare’).

<sup>56</sup> At 97.

<sup>57</sup> Smit N & Mpedi LG ‘Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?’ (2010) 14 *Law, Democracy & Development* 3.

<sup>58</sup> Department of Welfare *White Paper for Social Welfare* (1997) 50.

<sup>59</sup> Malherbe K ‘Implementing Domestic Workers’ Social Security Rights in a Framework of Transformative Constitutionalism’. In D. Du Toit 2013. *Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights* 122.

<sup>60</sup> Smit N & Mpedi LG ‘Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?’ (2010) 14 *Law, Democracy & Development* 3.

<sup>61</sup> Basson, Y ‘The compliance of the South African social security system with the International Covenant on Economic, Social and Cultural Rights’ (2020) *Obiter* (forthcoming)

<sup>62</sup> Olivier and Mpedi ‘The extension of social protection to non-formal sector workers – experiences from SADC



schemes being linked to employment, a link exists between social insurance legislation and labour legislation'.<sup>63</sup> This therefore, underscores the need for a basic understanding of labour legislation which affects social insurance benefits.<sup>64</sup>

Social assistance benefits are exclusively administered by the state.<sup>65</sup> The primary source of social assistance funding is general revenue, namely income tax.<sup>66</sup> They are non-contributory and means-tested benefits, payable to groups in need of income support, such as people with disabilities, older persons, and children in the form of monthly payments, called social grants.<sup>67</sup> Furthermore, social assistance is ideally also expected to fill the residual gap left by inadequate social insurance coverage. (E.g. unemployment or maternity benefits).<sup>68</sup>

### 1.8.3 Informal work and the informal economy

According to Chen, informal work includes employment relationships that are not legally regulated or socially protected, and the use of 'atypical or nonstandard employees or workers'.<sup>69</sup> Since informal employees are not in a 'standard employment relationship', they are not covered by certain employment-related protections (as they do not necessarily pay tax or contribute to social security / insurance schemes).<sup>70</sup> Informal workers make up over 60 per cent of the global workforce, representing two billion people, yet they are often excluded from all forms of social protection.<sup>71</sup> The international Labour Organisation (ILO) 2002 Resolution and conclusions concerning

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and the Caribbean" 2005 19 Zeitschrift fur auslandisches und internationales Arbeits- und Sozialrecht (ZIAS) 150

152.

<sup>63</sup> Wiid, Y *The right to social security of persons with disabilities in South Africa* (Doctoral dissertation, University of the Western Cape, 2015) 14.

<sup>64</sup> Wiid, Y *The right to social security of persons with disabilities in South Africa* (Doctoral dissertation, University of the Western Cape, 2015) 14.

<sup>65</sup> Strydom EL et al *Essential Social Security* (2006) 7.

<sup>66</sup> Strydom EL et al *Essential Social Security* (2006) 7.

<sup>67</sup> White Paper for Social Welfare (1997) 48.

<sup>68</sup> Dekker, Adriette, et al. "Social Security: a conceptual view." *Law, Democracy & Development* 4.1 (2000) 7.

<sup>69</sup> Chen M 'Informality and Social Protection: Theories and Realities' (2008) 39(2) *IDS Bulletin* 18-27.

<sup>70</sup> WIEGO (Women in Informal Employment: Globalizing and Organizing) Extending Social Protection to Informal workers, March 2019 1.

<sup>71</sup> ILO. 2018. Women and men in the informal economy: A statistical picture. Third edition. Geneva: ILO. Available at: [https://www.ilo.org/global/publications/books/WCMS\\_626831/lang--en/index.htm](https://www.ilo.org/global/publications/books/WCMS_626831/lang--en/index.htm) (accessed 28 June 2019).

Decent Work and the Informal Economy,<sup>72</sup> has defined the informal economy as: 'All economic activities by workers and economic units that are - in law or in practice - not covered or insufficiently covered by formal arrangements.' The above definition will include workers who work without contracts, part-time or short-term contracts many of which work in the hospitality sector and will be used in this paper.

The segmented structure of the informal economy and recent research has necessitated a broader definition. According to this new definition, 'the informal economy is comprised of all forms of 'informal employment'- that is, employment without labour or social security-both inside and outside informal enterprises, including both self-employment in small unregistered enterprises and wage employment in unprotected jobs'.<sup>73</sup>

According to the ILO 'the informal economy thrives in a context of high unemployment, underemployment, poverty, gender inequality and precarious work' playing a significant role in such circumstances, especially in income generation, because of the relative ease of entry and low requirements for education, skills, technology and capital.<sup>74</sup> Smith and Mpedi posit that in Southern Africa, most workers in the informal economy do not work in the industry by choice; they are poorly paid and have little hope of migrating to the formal economy due to lack of formal skills.<sup>75</sup> Furthermore, the informal economy is characterised by severe decent work deficits and a higher share of the working poor. According to Smit and Mpedi, 'the important point to recognise is that it is much more likely that the informal economy will remain with us and even expand rather than decrease in size or scope'.<sup>76</sup>

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<sup>72</sup> ILO 2002 Resolution and conclusions concerning decent work and the informal economy International Labour Conference, 90th session, 2002 Geneva.

<sup>73</sup> Chen MA 'Rethinking the informal economy: Linkages with the formal economy and the formal regulatory environment' 2005 (10) *United Nations University World Institute for Development Economics Research* 18-27).

<sup>74</sup> ILO 'Conclusions concerning decent work and the informal economy', International Labour Conference, 90th Session (Geneva, 2002), para. 6, as reproduced in Appendix.

<sup>75</sup> S N & Mpedi LG 'Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?' (2010) 14 *Law, Democracy & Development* 6.

<sup>76</sup> Smit N & Mpedi LG 'Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?' (2010) 14 *Law, Democracy & Development* 8.

## 1.9 LIMITATIONS OF THE THESIS

The scope of this paper will primarily focus on social security for informal workers in the hospitality industry. Whilst it is appreciated that this is a broad subject that calls for extensive coverage, due to page restrictions, the discussion will only be limited to providing an overview of selected and more relevant legislation and international laws that seek to protect the identified vulnerable groups in the hospitality sector. The massive shock on the socio-economic landscape brought about by COVID-19 during the advanced stages of this paper, could not be ignored, therefore certain sections of this paper mention the effects of the pandemic on informal workers in the hospitality industry. Notwithstanding the foregoing, the paper will only refer to the law as of the 31<sup>st</sup> of January 2020.

## 1.10 CHAPTER STRUCTURE

The research paper is structured as follows:

**Chapter 1:** Provides an Introduction to the research.

**Chapter 2:** Provides an overview of the South African regulatory framework relating to hospitality industry workers, such as the Constitution as well as the additional relevant pieces of legislation such as the Unemployment Insurance Act 63 of 2001 (“UIA”), the Unemployment Insurance Contributions Act 4 of 2002 (“UICA”), the Labour Relations Act and the Compensation for Occupational Injuries and Diseases Act, No 130 of 1993 (COIDA).

**Chapter 3:** Provides a situational analysis of the hospitality sector through description of the nature and working environment. It will further focus on the vulnerability of the main groups of informal workers found in the industry.

**Chapter 4:** Discusses the international law framework relating to social protection.

**Chapter 5:** Provides a comparative study of the Chilean social security system with particular focus on social insurance for workers.

**Chapter 6:** Conclusions and recommendations.



## CHAPTER TWO

### THE SOUTH AFRICAN LEGAL FRAMEWORK RELATING TO HOSPITALITY INDUSTRY WORKERS

#### 2.1 INTRODUCTION

The effects of the apartheid legacy of deliberate racial and exclusionary policies, which relegated the majority of workers to marginalisation and abject poverty,<sup>77</sup> conspicuously backdrops the current social security scene in South Africa.<sup>78</sup> This chapter will however show that great strides have been taken in the development of policies that protect workers' rights and provide social security to vulnerable groups of workers. It will zoom in on the relevant Constitutional provisions, labour and social security legislation, with particular focus on social insurance policy. It will further reveal that, despite these crucial interventions, gaps still remain, which leave informal workers, including those in the hospitality industry, vulnerable and without any adequate social security.

#### 2.2 SOUTH AFRICAN CONSTITUTION

The Constitution of the Republic of South Africa is the cornerstone of the country's democracy.<sup>79</sup> Section 2 of the Constitution<sup>80</sup> provides that the Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.<sup>81</sup> It is therefore the highest law of the land

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<sup>77</sup> Defined by the UN in its 1995 report of the World Summit for Social Development as "a condition characterised by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to services."

<sup>78</sup> Frye I 'Poverty, Social Security and Civil Society in South Africa: Triangulating Transformation' Studies in Poverty and Inequality Institute 2008 12 Available at: [https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2\\_Downloads/Fachinformationen/Analyse/analyse\\_03\\_englisch\\_Poverty\\_and\\_Social\\_Security\\_in\\_SA.pdf](https://www.brot-fuer-die-welt.de/fileadmin/mediapool/2_Downloads/Fachinformationen/Analyse/analyse_03_englisch_Poverty_and_Social_Security_in_SA.pdf) (accessed 22 July 2019).

<sup>79</sup> Section 7(1) of the Constitution of the Republic of South Africa, 1996.

<sup>80</sup> Constitution of the Republic of South Africa, 1996.

<sup>81</sup> Section 2 of the Constitution.

and 'is the yardstick against which any laws must be measured'.<sup>82</sup> The Constitution recognises human dignity, equality and freedom as the core founding values of the democratic state.<sup>83</sup> This trinity of values is further reaffirmed by section 39, which compels the courts to promote the values that underline an open and democratic society based on human dignity, equality and freedom, when interpreting any of the fundamental rights in the Constitution and, therefore, this will include the right to access to social security.<sup>84</sup> Of particular importance to the right of access to social security and the recognition of the state as a social state, are the values of human dignity and equality.<sup>85</sup>

### 2.2.1 The right of access to social security

The Constitution<sup>86</sup> entrenches the right of access to social security. Section 27 provides that 'everyone' has the right of access 'to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'.<sup>87</sup> The state is required to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of these rights.<sup>88</sup> The right to social security is however not absolute. Section 36, presents a clause that limits the rights in the Bill of Rights, including the right of access to social security,<sup>89</sup> such a limitation will have to satisfy the requirement that it is only in terms of a 'law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors'.<sup>90</sup> In the *Khosa* case, the court cited the lack of resources as a justifiable limitation of the right of access to social security, however the method of allocation thereof, must be consistent with the Bill of Rights in general.<sup>91</sup>

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<sup>82</sup> Wiid, Y *The right to social security of persons with disabilities in South Africa* (Doctoral dissertation, University of the Western Cape, 2015) 58.

<sup>83</sup> Section 1 of the Constitution.

<sup>84</sup> Section 39(1) (a) of the Constitution.

<sup>85</sup> Malherbe ED *Intergenerational solidarity and the provision of support and care to older persons* (LL.D thesis submitted at the University of the Western Cape, 2009) 62.

<sup>86</sup> Constitution of the Republic of South Africa, 1996 (The Constitution).

<sup>87</sup> s27 (1) (c) of The Constitution.

<sup>88</sup> Section 27(2).

<sup>89</sup> Section 36(1).

<sup>90</sup> 'including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.'

<sup>91</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of*

### **2.2.1.1 The meaning of the term ‘everyone’**

In terms of section 27(1) (c) of the Constitution, the right of access to social security is guaranteed for ‘everyone’. In the case of *Khosa and others v Minister of Social Development and others*,<sup>92</sup> the Constitutional Court interpreted the meaning of the word ‘everyone’ for purposes of the right of access to social security. The court construed the word ‘everyone’ by taking into account the founding values that underpin the Constitution, the right to equality in particular.<sup>93</sup> It held that equality in respect of access to socio-economic rights is implicit in the reference to “everyone” being entitled to have access to such rights in section 27.<sup>94</sup> The Court found that the word ‘everyone’ could not be interpreted as being restricted to citizens only and accordingly did not comply with the guarantee of constitutional rights to ‘all people in our country’ as per section 7(1) of the Bill of Rights.<sup>95</sup> Therefore ‘everyone’ includes both citizens and permanent residents of South Africa.<sup>96</sup> In light of the above, it may be concluded that the Constitution guarantees the right of access to social security for informal hospitality industry workers who are permanent residents of South Africa, as it does to those who are citizens.

### **2.2.1.2 The right of ‘access to’ social security**

While the inclusion of socio economic rights in the Bill of Rights highlights progressiveness, the flagship of the South African Constitution, the writers of the Constitution made it certain that these rights were meticulously framed.<sup>97</sup> They were drafted ‘in such a way as not to place an absolute and unambiguous obligation on the

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*Social Development* 2004 (6) SA 505 (CC) para 45.

<sup>92</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC).

<sup>93</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 42.

<sup>94</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 42.

<sup>95</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 47.

<sup>96</sup> *Khosa and others v Minister of Social Development and others, Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 49.

<sup>97</sup> Malherbe ED *Intergenerational solidarity and the provision of support and care to older persons* (LL.D Thesis submitted at the University of the Western Cape, 2009) 62.

government to fulfil them'.<sup>98</sup> Malherbe posits that '[s]ocio-economic rights such as social security rights are formulated in such a manner as to place a higher premium on "access to" the relevant benefits, as opposed to the actual benefits themselves.'<sup>99</sup> Therefore, whereas the Constitution guarantees a right to access to social security, this does not mean that everyone may automatically qualify to receive social security or social assistance benefits upon demand rather that they are guaranteed an opportunity to apply based on certain criteria.<sup>100</sup> The government is still clothed with power to set criteria for the awarding of the benefits in a non-arbitrary or discriminatory manner.<sup>101</sup> The informal hospitality industry workers should accordingly also be presented with opportunities to apply for social security benefits.

### **2.2.1.3 Internal limitation on the right of access to social security**

Section 36 is not the only clause that presents a limitation to the right of access to social security. Section 27(2) provides for an additional qualification through the manner in which the right should be applied.<sup>102</sup> It places an obligation on the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of [this] right'. This progressive realisation requirement has been described as an obligation to develop a plan in order to give effect to the relevant fundamental right over time.<sup>103</sup>

The Constitutional Court in the *Grootboom* case stated that:

"The goal of the Constitution is that the basic needs of all in our society be effectively met and the requirement of progressive realisation means that the state must take steps to achieve this goal. It means that accessibility should be

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<sup>98</sup> Barberton (1999) as cited in <sup>98</sup> Malherbe ED *Intergenerational solidarity and the provision of support and care to older persons* (LL.D thesis submitted at the University of the Western Cape, 2009) 62.

<sup>99</sup> Malherbe ED *Intergenerational solidarity and the provision of support and care to older persons* (LL.D thesis submitted at the University of the Western Cape, 2009) 62.

<sup>100</sup> Wiid, Y *The right to social security of persons with disabilities in South Africa* (Doctoral dissertation, University of the Western Cape, 2015) 85.

<sup>101</sup> Van der Merwe (1998) Social transformation in South Africa by means of social assistance: A legal perspective 4; Olivier (1998) Some trends and critical issues in South African social security 6.

<sup>102</sup> Wiid, Y *The right to social security of persons with disabilities in South Africa* (Doctoral dissertation, University of the Western Cape, 2015) 87.

<sup>103</sup> Olivier M (ed) *et al Social Security: A Legal Analysis* (2003) 75.

progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time.”<sup>104</sup>

Basson explains that the crux of the progressive realisation requirement is that, more persons ought to be given opportunities to receive benefits from or to become members of social security schemes over time.<sup>105</sup> Accordingly, section 27(2) ‘projects the progressive building and maintenance of a social security system that can accommodate informal workers...’<sup>106</sup> This will include those workers in the hospitality sector. The right of access to social security is therefore a vital instrument in the realisation of some fundamental values that underpin the Constitution, particularly the right to dignity and the right to equality.

The Constitutional Court has stressed that the link between the rights to human dignity and equality in the context of the right of access to social security cannot be overemphasised.<sup>107</sup> The right to dignity in particular is a ‘foundational value’ of our Constitution,<sup>108</sup> and some authors have described the right to dignity as a source of other human rights.<sup>109</sup> Chaskalson further expounds that ‘respect for human dignity, and all that flows from it, is an attribute of life itself and not a privilege granted by the state’.<sup>110</sup>

Thus, living a life which includes all the freedoms and rights enshrined in the Constitution gives effect to the right to dignity of an individual.<sup>111</sup> It therefore follows that, the life of an informal hospitality industry worker, where livelihood generated

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<sup>104</sup> *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46. (CC) para 45.

<sup>105</sup> Wiid, Y *The right to social security of persons with disabilities in South Africa* (Doctoral dissertation, University of the Western Cape, 2015) 92.

<sup>106</sup> Malherbe K ‘Implementing Domestic Workers’ Social Security Rights in a Framework of Transformative Constitutionalism’. In D. Du Toit 2013. *Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights* 151.

<sup>107</sup> *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 BCLR569 (CC) para 52.

<sup>108</sup> Section 1(a) of the Constitution. See also Chaskalson A ‘Human Dignity as a Foundational Value of our Constitutional Order’ (2000) 16 *SAJHR* 196.

<sup>109</sup> Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 251.

<sup>110</sup> Chaskalson, A. (2000) Human dignity as a foundational value of our constitutional order. *South African Journal on Human Rights*, 16(2) 196.

<sup>111</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC) para 144; Chaskalson A ‘Human Dignity as a Foundational Value of our Constitutional Order’ (2000) 16 *SAJHR* 204.



through low wage, precarious jobs, in poor working conditions with inadequate workers' rights protection, is not a life of dignity.<sup>112</sup>

## 2.3 SOUTH AFRICAN LABOUR LEGISLATION

### 2.3.1 South African Labour Legislation and the Constitution

Section 23 of the Constitution affords 'everyone' the right to fair labour practices; to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike. 'Everyone' According to Cheadle, should be interpreted in the context of 'labour practices' which is the object of the sentence in Section 23(1). Given that 'labour practices are the practices that arise from the relationship between workers, employers and their respective organisations', <sup>113</sup> the term should therefore be restricted to persons specifically named in Section 23, thus workers, employers, trade unions and employers' organisations.<sup>114</sup>

Vittori argues that the use of broad terms in Section 23(1) in describing the rights conferred and beneficiaries of the right to fair labour practices ('everyone', 'all workers') points to the possibility of an 'extensive interpretation of the definition of employee' which may result in the likelihood of rendering the exclusion of some workers by labour legislation unconstitutional.<sup>115</sup> She further explains that the root of the question of who qualifies as a worker for purposes of Section 23 of the Constitution is that 'the relationship must be 'akin' to the relationship resulting from a contract of employment. What renders such relationship 'akin' to the relationship in terms of the common law contract of service is the presence of an element of dependency on the provider of work'.<sup>116</sup>

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<sup>112</sup> See 2.2 above.

<sup>113</sup> Cheadle, Davis, Haysom South African Constitutional Law: The Bill of Rights (2002) as cited in Vettori M S *Alternative means to regulate the employment relationship in the changing world of work* (2006). (Doctoral dissertation, University of Pretoria) 313.

<sup>114</sup> Cheadle, Davis, Haysom South African Constitutional Law: The Bill of Rights (2002) as cited in Vettori M S *Alternative means to regulate the employment relationship in the changing world of work* (2006). (Doctoral dissertation, University of Pretoria) 313.

<sup>115</sup> Vettori M S *Alternative means to regulate the employment relationship in the changing world of work* (2006). (Doctoral dissertation, University of Pretoria) 313.

<sup>116</sup> Vettori M S *Alternative means to regulate the employment relationship in the changing world of work* (2006). (Doctoral dissertation, University of Pretoria) 314.

In a recent Constitutional Court Judgement, Froneman J emphasises the significance of a broad interpretation of Section 23(1), in light of the prevalence of informal employment, the core of this theses. He states that:

“Contemporary labour trends highlight the need to take a broad view of fair labour practice rights in Section 23(1). Fewer and fewer people are in formal employment; fewer of those in formal employment have union backing and protection. More and more people find themselves in the “twilight zone” of employment as supposed “independent contractors” in time-based employment subject to faceless multinational companies who may operate from a web presence. In short, the LRA tabulated the fair labour practice rights of only those enjoying the benefit of formal employment—but not otherwise. Though the facts of this case do not involve these considerations, they provide a compelling basis not to restrict the protection of Section 23 to only those who have contracts of employment.”<sup>117</sup>

As it will be shown below, some atypical employees do enjoy protection in terms of labour legislation,<sup>118</sup> however It is submitted that section 23(1) provides for a broader coverage to the many atypical workers who may not be protected in terms of labour legislation, either because they do not qualify as employees or are specifically excluded. Such workers will include the various groups of informal workers found in the hospitality industry.

The Labour Relations Act 66 of 1995 (LRA) and the Basic Conditions of Employment Act 75 of 1997 (BCEA) are the two major statutes enacted to give effect to the rights contained in section 23. The Employment Equity Act 55 of 1998 (EEA) was enacted to give effect to the rights of designated groups in the employment relationship so as to achieve equity in the workplace.<sup>119</sup> The EEA defines designated groups as ‘black

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<sup>117</sup> Pretorius and Another v Transport Pension Fund and Another (CCT95/17) [2018] ZACC 10; [2018] 7 BLLR 633 (CC); 2018 (7) BCLR 838 (CC); (2018) 39 ILJ 1937 (CC); 2019 (2) SA 37 (CC) (25 April 2018) para 48.

<sup>118</sup> See s 200A of LRA and s 83(A) of BCEA.

<sup>119</sup> Malherbe K ‘Implementing Domestic Workers’ Social Security Rights in a Framework of Transformative Constitutionalism’. In D. Du Toit 2013. Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights. Pretoria: Pretoria University Law Press 76.

people, women and people with disabilities'.<sup>120</sup> What will follow below, is an overview of the above-mentioned statutes and how they give effect to the right of access to social security. Labour legislation and social security legislation are interwoven. According to Basson, they are 'linked in a number of ways. One of these is that access to an important component of social security (that is, social insurance) is gained through employment; similarly, a lack of access to employment bars access to social insurance'.<sup>121</sup>

### 2.3.2 Labour Relations Act (LRA)

Labour Relations Act, 66 of 1995 aims to advance economic development, social justice, and labour peace.<sup>122</sup> It is the 'centrepiece' of the South African legislation when it comes to Labour relations.<sup>123</sup> The Act promotes collective bargaining by creating a platform for engagement between employers and employees, providing for the right to strike and establishing means of obtaining organisational rights. Employees are protected against unfair Labour practice by the Labour Relations Act.<sup>124</sup> Furthermore it creates a dispute resolution tribunal and courts for the settling of disputes and access to free, quick justice in the form of the Commission for Conciliation Mediation and Arbitration (CCMA). Section 213,<sup>125</sup> describes an employee as:

- (a) [A]ny person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have meanings corresponding to that of 'employee'.

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<sup>120</sup> Section 1 of the EEA. Black people' is defined as 'a generic term which means Africans, Coloureds and Indians'.

<sup>121</sup> Basson Y 'Selected Developments in South African Labour Legislation related to Persons with Disabilities' *PER / PELJ* 2017(20) 1.

<sup>122</sup> Ryklief, S. (2012) 'A Confusion of Categories! A Case Study of the Organization of Casual and Contract Workers by the South African Commercial, Catering, and Allied Workers Union (SACCAWU)', paper prepared for the Solidarity Center, South Africa 5.

<sup>123</sup> Vettori S 'The regulation of terms and conditions of employment for workers in the South African hospitality industry' (2018) *African Journal of Hospitality, Tourism and Leisure* Vol. 4 (2) 3.

<sup>124</sup> Vettori S 'The regulation of terms and conditions of employment for workers in the South African hospitality industry' (2018) 3.

<sup>125</sup> Labour Relations Act 66 of 1995.



The LRA clearly provides a broad coverage for workers, though it expressly excludes some informal workers in the form of independent contractors. It should be noted however, that the 2015 amendment of section 198 of the LRA further broadened the scope of coverage, to specifically include informal workers in the categories of fixed term employees, part time employees and those employed by temporary employment services (TES) (labour brokers).<sup>126</sup>

### **2.3.2.1 *Discovery Health Limited v CCMA & Others***

Section 213 of the LRA,<sup>127</sup> definition of employee casts the legislative net wide enough to even protect foreign employees, including those hired without valid working visas. This position was confirmed by the landmark Labour Court decision of *Discovery Health Limited v CCMA & Others*,<sup>128</sup> where the employee was dismissed after the expiry of his work permit. The applicant contended that the respondent was not an employee due to the unlawfulness of his employment contract,<sup>129</sup> and consequently could not claim to have been dismissed.

On review by the Labour Court, the Court held that the contract of employment between the employee and employer was valid and remained so until it was terminated by the employer. The Court also found that foreign employees enjoy the same protections afforded by the LRA, regardless of their legal status. Furthermore, the court concluded that, the manner contended for by the applicant, will be open to abuse by unscrupulous employers willing to risk possible prosecution under the Immigration laws, employ foreigners without work permits, then at the end of the contract period refuse to pay them on the basis that the contract was void. Such foreigners would then be left destitute and without remedy.

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<sup>126</sup> Section 198(A) and Section 198(B) of the LRA.

<sup>127</sup> Of the LRA.

<sup>128</sup> *Discovery Health Limited v CCMA & others* [2008] 7 BLLR 633 (LC).

<sup>129</sup> Section 38 of the Immigration Act 13 of 2002 which prohibits employment of an illegal foreigner.

### **2.3.2.2 The rebuttable presumption**

The rebuttable presumption was introduced by the legislature instead of amending the definition of employee or widening the definition,<sup>130</sup> Section 200A of the LRA and section 83A of the BCEA provide that: a person who works for, or renders services to, another person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one of the following seven listed factors is present and subject to the earnings threshold:

- “(a) The manner in which the person works is subject to the control or direction of another person.
- (b) the person’s hours of work are subject to the control or direction of another person.
- (c) in the case of a person who works for an organisation, the person is a part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom that person works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.”

The onus of proof rests on the employer once the presumption is revoked and will have to rebut it on a balance of probabilities.<sup>131</sup> It is submitted that the presumption has been so far the most significant legislative intervention in ensuring that informal workers, including those in the hospitality industry are brought into the ambit of labour protection.

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<sup>130</sup> Fourie E ‘Non-standard workers: The South African Context, International Law and Regulation by the European Union’ (2008) *PER* 121.

<sup>131</sup> Fourie E ‘Non-standard workers: the South African Context, International Law and Regulation by the European Union’ (2008) *PER* 121.

### **2.3.2.3 Limitations of Scope of Coverage**

Some authors however criticise the effectiveness of the presumption. According to Fourie,

“[A]ll the presumption has done is to assist employees with problems experienced with the onus of proof, as the employer must now prove why the person who falls within the ambit of one or more of the presumptions is not an employee. Extending the necessary protection to non-standard workers should be a statutory arrangement, as a presumption is not a lasting solution’.

Whilst the LRA may be seen as providing for a much broader coverage than social security legislation, it however still expressly excludes the independent contractor from the ambit of protection, thereby leaving out hospitality industry workers, many of which are engaged as independent contractors.

### **2.3.3 Basic Conditions of Employment Act (BCEA)**

The Basic Conditions of Employment Act makes provision for the advancement of economic development and social justice through promoting and regulation of fair Labour practices.<sup>132</sup> The Act provides guidelines and minimum standards that employers must adhere to.<sup>133</sup> These include conditions of employment related to, working hours; leave; overtime, work on Sundays and public holidays; termination of employment and record maintenance by employer.<sup>134</sup> This now also includes the national minimum wage.<sup>135</sup> One of the most significant guidelines for women, as a vulnerable group and the vast majority of informal hospitality workers,<sup>136</sup> is maternity leave. According to section 25 of the BCEA a woman may commence maternity leave at any time from four months before the expected date of birth or on any other date

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<sup>132</sup> Ryklief, S. (2012) ‘A Confusion of Categories: A Case Study of the Organization of Casual and Contract Workers by the South African Commercial, Catering, and Allied Workers Union (SACCAWU)’, paper prepared for the Solidarity Center, South Africa 5.

<sup>133</sup> Vettori S ‘The regulation of terms and conditions of employment for workers in the South African hospitality Industry’ (2015) *African Journal of Hospitality, Tourism and Leisure* Vol. 4 (2) 3.

<sup>134</sup> Grogan J, Employment Rights Cape Town 2010 6.

<sup>135</sup> As per National Minimum Wage Act 9 of 2018.

<sup>136</sup> See 3.5 below.

medically necessary.<sup>137</sup> The Act covers casual, temporary and seasonal employees and excludes employees who work for less than 24 hours a month for an employer.<sup>138</sup>

Section 83 empowers the Minister, on advice of the Employment Conditions Commission to deem some classes of persons to be employees for the purposes of the BCEA or any other employment law. Thus, those atypical workers will further benefit from the protection provided by the LRA, once they are pronounced as employees.<sup>139</sup> By so doing, section 83, without any doubt, highlights the commitment of the legislature towards the extension of protection to vulnerable and informal workers.<sup>140</sup>

However, some commentators such as Fourie, question the logic behind the indirect regulation of the position of atypical workers, and the wisdom of leaving 'a matter of such importance up to the discretion of the Minister to adopt measures when he/she deems it appropriate', especially in light of the significant growth in atypical work.<sup>141</sup> This according to Fourie, does not present principled perspective' in dealing with this vulnerable group of workers.<sup>142</sup>

The BCEA also provides for state legislated Sectorial Determinations, which regulate terms, hours and basic conditions for vulnerable or special sectors,<sup>143</sup> and also incorporates the newly introduced national minimum wage.<sup>144</sup>

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<sup>137</sup> Dupper, O., Malherbe et al, 'The case for increased reform of South African family and maternity benefits' (2000) *Law, Democracy & Development* 4(1) 27-41.

<sup>138</sup> S 6(1) (c) of the Basic Conditions of Employment Act 75 of 1997.

<sup>139</sup> Fourie E "Non-standard workers: the South African Context, International Law and Regulation by the European Union' (2008) *PER* 123.

<sup>140</sup> Fourie E "Non-standard workers: the South African Context, International Law and Regulation by the European Union' (2008) *PER* 123.

<sup>141</sup> Fourie E "Non-standard workers: the South African Context, International Law and Regulation by the European Union' (2008) *PER* 123.

<sup>142</sup> Fourie E "Non-standard workers: the South African Context, International Law and Regulation by the European Union' (2008) *PER* 123.

<sup>143</sup> Fourie S in S Vettori 'The regulation of terms and conditions of employment for workers in the South African hospitality Industry' (2015) 3.

<sup>144</sup> S1 (a) The *Basic Conditions of Employment Amendment Act, No. 7 of 2018* states that 'basic conditions of employment' means a provision of this Act or sectorial determination that stipulates a minimum term or condition of employment, and includes the national minimum wage'.

This Act is therefore important for regulating working conditions for workers in the hospitality industry which, as discussed above, are often informal, vulnerable and unsafe.

### **2.3.3.1 Sectorial Determination 14 (SD14)**

Chapter 8 of the BCEA empowers the Minister of Labour to promulgate minimum conditions of employment for employees in specific sectors or areas, in the form of Sectorial Determinations (SD's). They are a 'safety net' in sectors with low union representation where wages and employment conditions have not been laid through collective bargaining between trade unions and employers.<sup>145</sup> SD14 specifically deals with the hospitality industry, it applies to the employers and employees in the sector and establishes basic conditions of employment which include working hours, leave, overtime, termination of employment and wages. SD's generally face criticism for being fragmented and lacking a national approach; for gazetting minimum wages which were way below the Minimum Living Level and often disadvantaged workers and benefitted powerful employers; as well as keeping workers stuck at the lowest wage levels and in poverty.<sup>146</sup> The minimum wage regulation function of Sectorial Determinations has however been effectively stripped off by the recent introduction of the National Minimum Wage Act 9 of 2018 which amends the BCEA.<sup>147</sup>

### **2.3.4 National Minimum Wage Act (NMWA)**

The National Minimum Wage Act 9 of 2018 (NMWA) came into effect on 1 January 2019. The NMWA provides for, amongst others, a national minimum wage; the establishment of a National Minimum Wage Commission. The Commission's primary function is to review the national minimum wage annually and make recommendations to the Minister for its adjustment.<sup>148</sup> The NMWA applies to all workers and their

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<sup>145</sup> Vettori S 'The regulation of terms and conditions of employment for workers in the South African hospitality Industry' (2015) 7.

<sup>146</sup> Coleman, N. 'A national minimum wage for South Africa'. In *27th Annual Labour Law Conference, The Changing Face of Labour Law: Tensions and Challenges* (2014) 5-7.

<sup>147</sup> Section 6(5) of the National Minimum Wage Act 9 of 2018.read together with section 51(3) of the Basic Conditions of Employment Amendment Act, 75 of 1997 (BCEA), allows the Minister to increase wages as well as the remuneration and associated benefits based on those wages in the industry-specific Sectorial Determinations as of 1 March 2020.

<sup>148</sup> Section 6 and 11 of the National Minimum Wage Act 9 of 2018.

employers,<sup>149</sup> excluding some designated workers.<sup>150</sup> It defines a ‘worker’ as any person who works for another and who receives, or is entitled to receive, any payment for that work whether in money or in kind.<sup>151</sup>

“A National Minimum Wage (NMW) creates a basic wage floor, below which no-one can fall, regardless of region or sector. Provides platform for union struggles for a living wage, including through Collective Bargaining.”<sup>152</sup>

The national minimum wage is currently pegged at R20.76 for each ordinary hour worked.<sup>153</sup> It is important to note however, that the Act currently excludes some sectors who are specifically listed under Schedule 1 and 2 as they have different minimum rates. These include domestic workers, farm workers and some workers under SD1<sup>154</sup> and SD2.<sup>155</sup> Section 2 of the NMWA further provides that:

“The purpose of the NMWA is to advance economic development and social justice by—

- (a) improving the wages of lowest paid workers;
- (b) protecting workers from unreasonably low wages;
- (c) preserving the value of the national minimum wage;
- (d) promoting collective bargaining; and
- (e) supporting economic policy.”<sup>156</sup>

The NMWA accordingly presents an opportunity to address some of the key challenges facing vulnerable hospitality industry workers, such as low wages, poverty and inequality. The 2016 National Minimum Wage Panel Report found that a National Minimum Wage may close the wage gap, including the gender wage gap, and in so doing overcome poverty.<sup>157</sup> The report further suggested that when they are effective,

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<sup>149</sup> Section 3 of the National Minimum Wage Act 9 of 2018.

<sup>150</sup> Of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service.

<sup>151</sup> Section 3 of the National Minimum Wage Act 9 of 2018.

<sup>152</sup> Coleman, N. ‘A national minimum wage for South Africa’. In *27th Annual Labour Law Conference, The Changing Face of Labour Law: Tensions and Challenges* (2014). 5-7.

<sup>153</sup> Schedules 1 and 2 of the NMWA, published under *Government Gazette No. 42060* As of 1 March 2020. See also <https://www.gov.za/speeches/new-nmw-base-rate-come-effect-march--department-employment> (accessed 11 September 2020).

<sup>154</sup> Contract Cleaning Sector.

<sup>155</sup> Wholesale and Retail Sector.

<sup>156</sup> Section 2 of the National Minimum Wage Act 9 of 2018.

<sup>157</sup> A National Minimum Wage for South Africa Recommendations on Policy And Implementation National Minimum Wage Panel Report to The Deputy President 2016.



minimum wages raise the earnings of low-paid workers and the incomes of their families.<sup>158</sup>

According to the Congress of South African Trade Unions (COSATU) the National Minimum Wage should not be viewed as a destination, but rather a 'vehicle and springboard towards a living wage for all workers, and restructuring of [the] economy'.<sup>159</sup> Collective bargaining must not be suppressed in the process, but instead be utilised as an instrument that improves on the National Minimum Wage.<sup>160</sup> Furthermore, the ILO explains that minimum wage systems are meant to 'supplement and reinforce' other social and labour policies and must not be viewed or implemented in isolation.<sup>161</sup> It is submitted however, that as much as the NMWA addresses numerous challenges plaguing the hospitality industry workers, a major setback remains the inadequate coverage of the many atypical and unregistered workers which include the undocumented migrants found in the hospitality industry.

### 2.3.5 Employment Equity Act (EEA)

Driven by the long South African history of discrimination, the purpose of the Employment Equity Act (EEA) is to achieve equity in the workplace. The elimination of unfair discrimination,<sup>162</sup> and the implementation of affirmative action policies,<sup>163</sup> are the vehicles that it uses for this purpose.<sup>164</sup> The EEA implements affirmative action measures, to redress the disadvantages in employment experienced by designated groups, so as to ensure their equitable representation in all occupational categories and levels in the workforce.<sup>165</sup>

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<sup>158</sup> Belman, D. and Wolfson, PJ 2014 'What does the minimum wage do?' cited by, 'A National Minimum Wage for South Africa Recommendations on Policy and Implementation National Minimum Wage Panel Report to The Deputy President 2016 30.

<sup>159</sup> Coleman, N. 'A national minimum wage for South Africa'. In *27th Annual Labour Law Conference, The Changing Face of Labour Law: Tensions and Challenges* (2014) 5-7.

<sup>160</sup> Coleman, N. 'A national minimum wage for South Africa'. In *27th Annual Labour Law Conference, The Changing Face of Labour Law: Tensions and Challenges* (2014) 5-7.

<sup>161</sup> Available [https://www.ilo.org/global/topics/wages/minimum-wages/definition/WCMS\\_439072/lang-en/index.htm](https://www.ilo.org/global/topics/wages/minimum-wages/definition/WCMS_439072/lang-en/index.htm) (accessed 20 October 2020).

<sup>162</sup> Section 2(a) of the EEA.

<sup>163</sup> Section 2(b) of the EEA.

<sup>164</sup> Basson Y "Selected Developments in South African Labour Legislation related to Persons with Disabilities" (2017) 7.

<sup>165</sup> Section 2 of *Employment Equity Act, No 55 of 1998*.

Section 6 provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including inter alia: race, gender, sex, pregnancy, marital status, family responsibility, and ethnic or social origin.<sup>166</sup> 'These provisions essentially confirm the constitutional right to equality and tailor the right to the workplace'.<sup>167</sup> The EEA is therefore instrumental in the protection of the rights of the diverse vulnerable groups who are informally employed in the hospitality industry.

### **2.3.6 Immigration Act ("the Immigration Act").**

The employment of foreigners in South Africa is regulated by the Immigration Act 13 of 2002, as amended ("the Immigration Act"). The Immigration Act provides for the admission of foreigners to their residence in and departure from South Africa and matters connected therewith including the ability of foreigners to work in South Africa.<sup>168</sup> Section 38 of the Immigration Act provides that no person shall employ an illegal foreigner. Furthermore, it places a duty on an employer to make an effort in ensuring that no illegal foreigner is employed,<sup>169</sup> and additionally places a criminal sanction for anyone who knowingly employs an illegal foreigner through the imposition a fine or a period of imprisonment not exceeding one year for a first offender.<sup>170</sup> It is submitted that the Immigration Act plays a critical role in national security in general and in the regulation of foreign workers in particular. However, the flip side is that it may push illegal migrant workers deeper into the shadows of exploitation, in fear of being detected by the authorities. Moreover, many informal migrant workers, including those in the hospitality industry remain exposed without social insurance cover, often due to lack of documentation and lack of portability of cover.<sup>171</sup>

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<sup>166</sup> Section 6 of Employment Equity Act, No 55 of 1998.

<sup>167</sup> Basson Y "Selected Developments in South African Labour Legislation related to Persons with Disabilities" (2017) 7.

<sup>168</sup> Preamble to the Immigration Act 13 of 2002, as amended.

<sup>169</sup> Section 38(2) of the Immigration Act.

<sup>170</sup> Section 49(3) of the Immigration Act.

<sup>171</sup> MP Olivier & GCZ Mhone 'Social protection in SADC: Developing an integrated and inclusive framework - The case of South Africa' in MP Olivier & ER Kalula (eds) *Social protection in SADC: Developing an integrated and inclusive framework* (2004) 136.



### 2.3.7 The Employment Services Act (“ESA”)

The Employment Services Act 4 of 2014 (“ESA”), came into effect in August 2015, with one of its objectives being to provide for the establishment of schemes to promote the employment of young workers and other vulnerable persons.<sup>172</sup> This Act introduces and formalises existing institutions which share its objectives, such as those that encourage productivity, provide training for unskilled workers,<sup>173</sup> and unemployment reduction.<sup>174</sup>

ESA has one of its aims being to facilitate the employment of foreign nationals in a manner that is consistent with the objects of the Immigration Act. It stipulates that employers may not employ foreign workers within the Republic without the relevant work permits issued in terms of the Immigration Act.<sup>175</sup> Furthermore, employers must satisfy themselves that there are no other persons within the Republic that has the needed skills before recruiting a foreign national.<sup>176</sup> It is therefore evident that ESA aims to deter the employment of undocumented immigrants while promoting the employment of citizens. However, it is interesting to note that ESA also preserves the right of the employee to enforce any claim they may have in terms of any statute or employment relationship against the employer, despite not having valid documentation.<sup>177</sup>

Section 8(4) reads:

An employee who is employed without a valid work permit is entitled to enforce any claim that the employee may have in terms of statute or contract of employment against his or her employer or any person who is liable in terms of the law.

It is clear therefore, that Section 8(4) of ESA effectively echoes and confirms the principles enumerated in the matter of *Discovery Health Limited v CCMA*,<sup>178</sup> discussed

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<sup>172</sup> Preamble to the Employment Services Act 4 of 2014.

<sup>173</sup> Chapter 5 of the ESA.

<sup>174</sup> Section 20 of the ESA..

<sup>175</sup> Section 8(1) of the Employment Services Act.

<sup>176</sup> Section 8(2) a of the Employment Services Act.

<sup>177</sup> Section 8 (4) of the Employment Services Act.

<sup>178</sup> *Discovery Health Limited v CCMA & Others* [2008] 7 BLLR 633 (LC).

above.<sup>179</sup> It can then be safely concluded that ESA plays a dual role, as it provides for strict regulation for employment of irregular migrants, while also protecting such workers from being exploited by employers.

### **2.3.8 Occupational Health and Safety Act (OHSA)**

The Occupational Health and Safety Act (OHSA)<sup>180</sup> is administered by the Department of Labour. The Preamble of the Act describes the purpose of the OHSA as: 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 machinery. OHSA places a duty on employers to maintain as far as reasonable and practical a work environment that is safe and without risk to the health of employees.<sup>181</sup> Employees also have corresponding duties, which include the duty to take reasonable care of their own health and safety, as well as for other persons who may be affected.<sup>182</sup> OHSA additionally imposes penalties for non-compliance with its regulations and may also refer some contraventions to the criminal justice system for adjudication.<sup>183</sup>

The Act provides protection to those who are 'employees'. Section 1 defines an 'employee' as any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person.<sup>184</sup> It is submitted that that OHSA like most labour and social security legislations also indirectly excludes some workers who do not fall under its definition of 'employee'. Such as some informal workers who may be independent contractors or self-employed while working in hazardous conditions.

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<sup>179</sup> See 2.3.2.1 above.

<sup>180</sup> The Occupational Health and Safety Act 24 of 1956 (OHSA)

<sup>181</sup> Section 8(1) of OHSA

<sup>182</sup> Section 14(a) of OHSA.

<sup>183</sup> Section 38(1) of OHSA.

<sup>184</sup> Section 1 of OHSA.

## 2.4 SOCIAL INSURANCE IN SOUTH AFRICA

### 2.4.1 Unemployment Insurance Fund (UIF)

The Unemployment Insurance Act (No.30, 1996) established the Unemployment Insurance Fund (UIF),<sup>185</sup> which is a social insurance fund, created to protect employees in the event of unemployment, its primary objective is to alleviate the harmful economic and social effects of unemployment to employees who become unemployed or their beneficiaries as the case may be.<sup>186</sup> It is therefore the main source of employment related social security.<sup>187</sup>

The Unemployment Insurance Contributions Act 4 of 2002 (“UICA”)<sup>188</sup> specifically applies to all employers and prescribes how the employers should contribute to the UIF Contributions fund. Participation in the unemployment insurance scheme is compulsory for both employees and their employers, unless specifically excluded by any of the relevant Acts.<sup>189</sup> This is done through monthly deductions of two per cent of the employee’s salary (one per cent by the employer and 1 per cent by the employee). The UIF covers for five contingencies, namely: unemployment, maternity, illness, and adoption and survivor benefits in the event of the contributor’s death.<sup>190</sup>

#### 2.4.1.2 Limitations of the Scope of coverage

The UIF covers employees in the formal economy, domestic workers and seasonal farm workers.<sup>191</sup> Dupper O, Olivier MP and Govindjee A,<sup>192</sup> criticise the UIF scope of coverage, they argue that is ‘narrow as it continues to exclude the atypically employed, the long-term unemployed and certain categories of migrant workers from its

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<sup>185</sup> Unemployment Insurance Act No. 63 of 2001 (UIF).

<sup>186</sup> S 2 of the UIF 2001.

<sup>187</sup> Devereux S & Getu M (eds) *Informal and Formal Social Security Systems in Sub Saharan Africa* (2013) 7.

<sup>188</sup> Unemployment Insurance Contributions Act (No. 4 of 2002).

<sup>189</sup> O Dupper, MP Olivier & A Govindjee “Extending Coverage of the Unemployment Insurance-system in South Africa” 438.

<sup>190</sup> Chapter 3 of the UIF 2001.

<sup>191</sup> S3 of the UIF 2001.

<sup>192</sup> Dupper, MP Olivier & A Govindjee “Extending Coverage of the Unemployment Insurance-system in South Africa”.

purview'.<sup>193</sup> The UIA covers only those who are defined as employees. The Act defines employees as:

Any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor.<sup>194</sup>

Dekker opines that the emphasis placed on 'remuneration' in the definition of 'employee' implies a more restricted scope of coverage than that provided for 'employees' in terms of the labour laws.<sup>195</sup> The UIA's narrow scope of coverage of the therefore excludes some informal economy workers who may not fall into the classification of 'employee'.

According to the Taylor Committee, 'the structural nature of the South African unemployment problem makes it difficult for the UIF to deal with this nature of unemployment'.<sup>196</sup> It is submitted that by only catering for formal employees - a minority in the hospitality industry, the UIA consequently leaves the majority of HTC (informal, female and immigrant) workers exposed.

#### **2.4.2 Compensation for Occupational Injuries and Diseases**

Compensation for Occupational Injuries and Diseases Act (COIDA), regulates compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases.<sup>197</sup> Compensation is paid to employees and their dependents out of the compensation fund, which is administered by the Department of Labour and financed through contributions by employers, on the basis of industry-based risk assessment.<sup>198</sup> The claim process takes into consideration a number of

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<sup>193</sup> Dupper, MP Olivier & A Govindjee "Extending Coverage of the Unemployment Insurance-system in South Africa" 438.

<sup>194</sup> Section 1 of UIA.

<sup>195</sup> Dekker AH Informal Social Security: A Legal Analysis (LLD-theses UNISA 2005) 58

<sup>196</sup> Chapter 6 of the Taylor Committee Report.

<sup>197</sup> S35 Compensation for Occupational Injuries and Diseases Act (COIDA).

<sup>198</sup> Olivier MP, Smit N & Kalula ER (eds) *Social Security: A legal analysis* (2003) Durban: LexisNexis Butterworths 37.

factors, these include, the manner in which the injury was sustained or the illness contracted and the extent of the injury or disease.<sup>199</sup>

The COIDA benefits include compensation for temporary, total or partial disablement, compensation for permanent disablement, and dependents' benefits. The compensation paid for temporary total disablement is 75% of the monthly earnings of the employee,<sup>200</sup> it is paid monthly for the duration of the disablement, up to a maximum period of 24 months. On the other hand the compensation payable for permanent disablement depends on the degree of permanent disablement and on which of the 4 categories it falls.<sup>201</sup> A lump sum is payable if an employee has permanent disablement of 30% or less.

Schedule 3 of COIDA lists the more common occupational diseases, in the event that an employee contracts a disease that is not listed he or she must prove that the disease is related to their work to receive compensation.<sup>202</sup> According to Myburgh et al, the limited availability of specialists and other resource based constraints have led to an under-reporting of occupational diseases.<sup>203</sup>

The system of no-fault compensation means that an injured or ill employee is entitled to compensation without having to prove that the employer was at fault for the accident.<sup>204</sup> Malherbe and Calitz posit that this system 'does not merely supplement the common law claim against an employer for damages, it replaces it'.<sup>205</sup> This type of compensation scheme may have an advantage over the common law claim for delictual damages, in that it saves the employee from going through the difficult burden of having to prove all elements of delict, expensive litigation process, risk of paying

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<sup>199</sup> Section 22(3) of COIDA. In the case of a deceased employee, his or her dependants may claim compensation in terms of section 1(xix) (d) of COIDA.

<sup>200</sup> Item 1 of Schedule 4 to COIDA.

<sup>201</sup> Items 2 – 5 of Schedule 4 to COIDA, provides for 4 categories of permanent disablement which are: a maximum of 100%, 31-99%; 30%; or less than 30%.

<sup>202</sup> Myburgh P, Smit N & Van Der Nest D 'Social security aspects of accident compensation: COIDA and RAF as examples' (2000) 4(1) *Law, Democracy & Development* 46.

<sup>203</sup> Myburgh P, Smit N & Van Der Nest D 'Social security aspects of accident compensation: COIDA and RAF as examples' (2000) 4(1) *Law, Democracy & Development* 46.

<sup>204</sup> National Treasury 'The Compensation Fund; Preliminary Report 2nd Draft' available at <http://www.treasury.gov.za/publications/other/ssrr/Session%20One%20Papers/Compensation%20Fund%20Project%202nd%20draft.pdf> (accessed 29 July 2019).

<sup>205</sup> Malherbe, K and Calitz, K 'The expediency of including claims based on disablement caused by sexual harassment in South Africa's system of workers' compensation' (2016) 27.3 *SLR* 476.

legal costs if unsuccessful or employer not having enough money to pay for damages, leaving the employee remediless,<sup>206</sup> as opposed to the relatively simple administrative route offered by COIDA. Moreover, Compensation under COIDA is payable even if the employer was not negligent.

#### **2.4.2.1 Occupationally-Acquired Novel Corona Virus Disease (COVID-19) and COIDA**

It is worth noting that the universal COVID-19 pandemic presented an unprecedented challenge and uncertainty as to the Compensation Fund's position. This was mainly attributed to the fact that it was a virtually new and unknown disease. However, on the 20th of March 2020, the Compensation Commissioner issued the Notice for Compensation of Workplace-Acquired COVID-19, in terms of section 6A of COIDA,<sup>207</sup> which provided clarity and guidance on the issue. The Notice defined COVID-19 as 'a disease contracted by an employee as defined in the COIDA Act arising out of and in the course of his or her employment'.<sup>208</sup> It further provides that workplace-acquired COVID-19 diagnosis should consider the inherent risk posed by the particular categories of work and occupations, in addition to an employee's exposure in the workplace or on approved official work trip.<sup>209</sup>

After a reliable diagnosis of COVID-19, the Compensation Fund should be able to consider all claims and determine whether the Fund is liable to pay compensation based on all the information that is submitted to it.<sup>210</sup> In light of the above, it is submitted that COIDA covers COVID-19 disablement just like any other occupationally acquired disease, but subject to special guidelines provided in the directive. This kind of protection is of critical importance, especially considering that HTC workers are often exposed to a working environment where regular interaction with customers is

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<sup>206</sup> Malherbe, K and Calitz, K 'The expediency of including claims based on disablement caused by sexual harassment in South Africa's system of workers' compensation' (2016) 27.3 *SLR* 482 -483.

<sup>207</sup> Notice for Compensation of Workplace-Acquired COVID-19 Available at [https://www.gov.za/sites/default/files/gcis\\_document/202003/43126gen193.pdf](https://www.gov.za/sites/default/files/gcis_document/202003/43126gen193.pdf) Accessed 28 September 2020.

<sup>208</sup> Notice for Compensation of Workplace-Acquired COVID-19 Available at [https://www.gov.za/sites/default/files/gcis\\_document/202003/43126gen193.pdf](https://www.gov.za/sites/default/files/gcis_document/202003/43126gen193.pdf) (accessed 28 September 2020).

<sup>209</sup> 3.1 Notice for Compensation of Workplace-Acquired COVID-19.

<sup>210</sup> 3.1 (a) – (e) Notice for Compensation of Workplace-Acquired COVID-19.



the norm,<sup>211</sup> which puts them at high risk of contracting contagious diseases such as COVID-19.<sup>212</sup>

#### **2.4.2.2 *Jooste v Score Supermarket Trading (Pty) Ltd***

The exemption of employers from liability has been hailed as a fundamental feature of COIDA and an improvement on the common law position.<sup>213</sup> The constitutionality of the section 35 prohibition was called into question in the Constitutional Court case of *Jooste v Score Supermarket Trading (Pty) Ltd*.<sup>214</sup> According to the plaintiff, the provision was unconstitutional in that it violated her rights to equality, fair labour practices, and access to courts. Her equality challenge was based on the fact that the provision denies employees their common law right to claim damages from their employers. In considering the constitutionality of section 35, the Court contrasted the administrative remedy provided by COIDA to the common law situation.

The court found out that section 35(1) is logically and rationally connected to the legitimate purpose of COIDA, which is to provide a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employee in the course of their employment.<sup>215</sup> The court also argued that there is no evidence of unfair discrimination and that COIDA does not violate the right of access to court, the right to equal protection and benefit of the law.

#### **2.4.2.3 *Limitations of the Scope of coverage***

The main weakness of COIDA is that its scope of coverage systematically excludes informal workers except for domestic workers. The Act defines an employee as follows:

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<sup>211</sup> See 3.4 above.

<sup>212</sup> WHO Operational considerations for COVID-19 management in the accommodation sector Interim guidance available at: <https://apps.who.int/iris/bitstream/handle/10665/331937/WHO-2019-nCoV-Hotels-2020.2-eng.pdf> (accessed 28 September 2020).

<sup>213</sup> Smit N 'Employment Injuries and Diseases' in Olivier MP, Smit N & Kalula ER (eds) *Social Security: A Legal Analysis* (2003) 466.

<sup>214</sup> *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1 106 (CC) para 2.

<sup>215</sup> *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1 106 (CC) para 17.



“Employee’ is defined as a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind.”<sup>216</sup>

The definition of an employee is generally restricted to persons who have entered into a contract of service with an employer, thereby excluding other workers. Myburgh *et al* criticises COIDA in that it provides a limited window for claiming compensation for occupational injuries, totally ignoring migrants who may later discover disease long after they have left the country.<sup>217</sup> The Taylor Commission found that despite the fact that non-standard workers constitute a large portion of workers, they often remain excluded from the cover of COIDA as they do not fall under the definition of ‘employee’.<sup>218</sup>

Furthermore, the Schedule 3 list makes no mention of psychological diseases like Post-Traumatic Stress Disorder (PTSD).<sup>219</sup> There is a record of past successful claims against the Compensation Fund made by workers who suffered from disablement caused by PTSD, however, no jurisprudence exists yet for a claim based on a psychological disorder as a result of sexual harassment.<sup>220</sup> As discussed in chapter 3.3.1 below, sexual harassment in the hospitality sector remains a prevalent issue.

Dekker opines that:

“The risk for people in the informal sector of sustaining occupational injuries and diseases is even greater, because they work under less strict supervision and in more dangerous and desperate situations. Ironically, those in need of more protection therefore have less protection in terms of the formal social security system.”<sup>221</sup>

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<sup>216</sup> Section 1 of COIDA.

<sup>217</sup> Myburgh, P Smit, N van der Nest, D Social security aspects of accident compensation: COIDA and RAF as examples, *African Journals On Line Vol 4, No 1* (2000) 46-47.

<sup>218</sup> Taylor Committee Report, ‘Report No 11: Coverage against Employment Injuries and Diseases’ (2002) 458.

<sup>219</sup> Malherbe, K and Calitz, K ‘The expediency of including claims based on disablement caused by sexual harassment in South Africa’s system of workers’ compensation’ (2016) 27.3 *SLR* 476.

<sup>220</sup> Malherbe, K and Calitz, K ‘The expediency of including claims based on disablement caused by sexual harassment in South Africa’s system of workers’ compensation’ (2016) 27.3 *SLR* 476.

<sup>221</sup> Dekker, A.H., 2005. *Informal social security: A legal analysis* (Doctoral dissertation, University of South Africa).

Owing to the above weaknesses of COIDA, many vulnerable informal workers in the hospitality industry find themselves exposed to risk without protection.

### 2.4.3 CONCLUSION

This chapter highlighted the Constitutional framework as playing a fundamental role in both the creation and promotion of the right of access to social security.<sup>222</sup> Furthermore, it provided an overview of the relevant South African social security and labour legislation which seek to protect workers. It additionally demonstrated that despite all these critical legislative interventions, vulnerable informal workers, including those in the HCT industry, have mostly been left out of the formal social security systems.<sup>223</sup> This, as discussed above, is attributed to the fact that ‘most social insurance schemes link the concept of ‘contributor’ to that of ‘employee’.<sup>224</sup> Moreover, they remain mute when it comes to compensation for psychological diseases like PTSD which are prevalent among the hospitality industry informal workers.<sup>225</sup>

Labour legislation provides limited protection for informal workers which consequently excludes many workers in the hospitality industry.<sup>226</sup> While labour legislation such as the LRA may be welcomed as providing a relatively broader scope of coverage, it still expressly excludes independent contractors.<sup>227</sup> Section 23(1) of the Constitution provides wider coverage than labour laws, it protects ‘everyone’ which includes workers, employers, trade unions and employers’ organisations and should include informal workers in the hospitality industry.<sup>228</sup> The Constitution however also presents internal limitations in the form of 27(2).

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<sup>222</sup> See 3.2.

<sup>223</sup> See 3.3 and 3.4.

<sup>224</sup> Olivier and Mpedi “The extension of social protection to non-formal sector workers – experiences from SADC and the Caribbean” (2005) 19 *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht (ZIAS)* 144 at 150-152.

<sup>225</sup> See 3.3.2.2.

<sup>226</sup> See 3.3

<sup>227</sup> See 3.4.1.

<sup>228</sup> See 3.3.1

The next chapter will identify the various groups of informal workers found in the hospitality sector and analyse how their exclusion from the above legislative framework intensifies their vulnerability to impoverishment, and different forms of risks.



## CHAPTER THREE

### SITUATIONAL ANALYSIS ON VULNERABILITY OF WORKERS IN THE SOUTH AFRICAN HOSPITALITY INDUSTRY

#### 3.1 INTRODUCTION

As noted above, the hospitality industry is a major force in job creation (9.4% of jobs worldwide).<sup>229</sup> It therefore; presents numerous opportunities for poverty reduction in many countries, yet this industry often relies on vulnerable groups of informal workers, who are susceptible to risk and income security but are not adequately covered by social security legislation.<sup>230</sup> This chapter will discuss the nature of the hospitality industry and unpack the factors that may force individuals into working under such vulnerable conditions. Furthermore, this chapter will identify women and immigrants as the groups that are more prone to engaging in precarious forms of informal work. The ultimate aim of this chapter is to present a cogent argument for the extension of social security to this group of vulnerable workers in the hospitality sector, the core of this research paper.

#### 3.2 THE NATURE OF THE HOSPITALITY INDUSTRY

The hospitality industry falls under the broad category of the Hotel Catering and Tourism sector (HCT). The ILO Governing Body defined the HCT sector as covering:

“(a) [H]otels, boarding houses, motels, tourist camps, holiday centers; (b) restaurants, bars, cafeterias, snack bars, pubs, nightclubs and other similar establishments; (c) establishments for the provision of meals and refreshments within the framework of industrial and institutional catering (for hospitals, factory and office canteens, schools, aircraft, ships, etc.); (d) travel agencies

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<sup>229</sup> World Travel & Tourism Council estimate, 2014 available at <http://zh.wttc.org/-/media/files/reports/economic-impact-research/regional-2015/world2015.pdf> (accessed 8 August 2017).

<sup>230</sup> Taal M 'Organising in the Hospitality Sector in South Africa' *Labour Research Service South Africa*, November 2012 12.

and tourist guides, tourism information offices; (e) conference and exhibition centres.”<sup>231</sup>

Hospitality sector industries such as hotels provide jobs that require low skills, are flexible, have less language requirements, and guarantee instant entry into the workplace. These qualities tend to attract the most vulnerable workers like women, youth and emigrants.<sup>232</sup> Additionally, the hospitality industry is highly ‘fragmented’ with around 20 per cent of the workforce located within multinational enterprises, compared to 80 per cent in small to medium enterprises.<sup>233</sup> The fragmented state results in variances in ‘performance and competence’, as well as difficulties in organising these employees.<sup>234</sup> Likewise, the small sized nature of the establishments often slips them through the large legislative nets. These are challenges associated with the monitoring and regulation of small, disjointed formations, a factor that is further aggravated by the atypical working hours which these employees work.<sup>235</sup>

### 3.3 INFORMAL WORKERS AND SOCIAL SECURITY

Due to the seasonal nature of work in the hospitality industry, many workers in this sector can be classified as ‘informal workers’. They are what the LRA categorises as ‘part time’, ‘fixed term’ or ‘temporary workers’.<sup>236</sup> The most affected are the unskilled and informally employed, who despite not being covered by formal social insurance schemes, also typically cannot afford private insurance.<sup>237</sup> Social insurance by its contributory nature, provides benefits to working age adults who are formally employed, whilst non-contributory social assistance is exclusively reserved for the

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<sup>231</sup> ILO: ‘Human resources development, employment and globalization in the hotel, catering and tourism sector’, Report for discussion at the Tripartite Meeting on Human Resources Development, Employment and Globalization in the Hotel, Catering and Tourism Sector, 2–6 April 2001, Sectorial Activities Programme (Geneva, 2001) 5.

<sup>232</sup> Baum T, *Migrant workers in the international hotel industry*; International Labour Office, International Migration Branch, Sectorial Activities available at the Department. – Geneva: ILO, 2012 9.

<sup>233</sup> Baum T, *Migrant workers in the international hotel industry*; International Labour Office, International Migration Branch, Sectorial Activities available at the Department. – Geneva: ILO, 2012 7.

<sup>234</sup> ILO ‘Migrant workers in the international hotel industry’ / Tom Baum; International Labour Office, International Migration Branch, Sectorial Activities Department. – Geneva: ILO, 2012 9.

<sup>235</sup> Vettori S, ‘The regulation of terms and conditions of employment for workers in the South African hospitality industry’. *African Journal of Hospitality, Tourism and Leisure* Vol. 4 (2) - (2015) 2.

<sup>236</sup> Vettori S, ‘The exploitation of Migrant Labour in the Hospitality Industry in South Africa’ *African Journal of Hospitality, Tourism and Leisure*, Volume 6(4)-(2017) 2.

<sup>237</sup> *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, constraints and Opportunities*, World Bank Report 2018 94.

economically inactive vulnerable groups such as children (via the Child Support Grant),<sup>238</sup> older persons (via the Older Persons Grant),<sup>239</sup> and persons with disability (via the Disability Grant).<sup>240</sup>

In general, workers in the informal economy are exposed to a wider range of risks than those in the formal economy.<sup>241</sup> They face 'specific disadvantages and most severe decent work deficits and their conditions are precarious and vulnerable.'<sup>242</sup> Informal workers are more susceptible to poverty, to work in dangerous and unhealthy environments, all factors which consequently increase the likelihood of illness, unemployment or disability.<sup>243</sup>

### 3.3.1 The use of workers who are not protected by labour legislation

The traditional form of full-time employment has over the years been subjected to universal transformation, which inadvertently resulted in the emergence of new forms of work and rapid growth in atypical employment.<sup>244</sup> This has had the unintended consequence that labour legislation that was originally crafted for the typical or traditional employee currently is not able to provide adequate protection for the emerging forms of atypical employment.<sup>245</sup> This poses serious challenges in regulating the protection of informal workers, especially in the hospitality sector which employs many atypical workers. The most conspicuous challenge noted above,<sup>246</sup> is the

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<sup>238</sup> Section 4 (a) Social Assistance Act 13 of 2004.

<sup>239</sup> Section 4 (e)

<sup>240</sup> Section 4 (d)

<sup>241</sup> ILO 'The informal economy: enabling transition to formalisation. Background document to the Tripartite Interregional Symposium on the Informal economy: Enabling Transition to Formalisation' ILO (Geneva), 2007 3. Available at [https://www.ilo.org/wcmsp5/groups/public/@ed\\_emp/@emp\\_policy/documents/meetingdocument/wcms\\_125489.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_policy/documents/meetingdocument/wcms_125489.pdf) (accessed 9 October 2019).

<sup>242</sup> ILO 'The informal economy: enabling transition to formalisation. Background document to the Tripartite Interregional Symposium on the Informal economy: Enabling Transition to Formalisation' ILO (Geneva), 2007 3.

<sup>243</sup> ILO 'The informal economy: enabling transition to formalisation. Background document to the Tripartite Interregional Symposium on the Informal economy: Enabling Transition to Formalisation' ILO (Geneva), 2007 3.

<sup>244</sup> Fourie, E. S. Non-standard workers: the South African context, international law and regulation by the European Union (2008). *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 11(4), 110.

<sup>245</sup> Fourie, E. S. Non-standard workers: the South African context, international law and regulation by the European Union (2008). *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 11(4), 111.

<sup>246</sup> See chapter 2.



definitional hurdle that excludes many hospitality industry workers who cannot prove the existence of an 'employment' relationship in terms of labour legislation. Unlike typical employees, they are often exposed to vulnerability and exploitation due 'in many instances to the absence of an employment relationship or the existence of a flimsy one', precarious work, lack of adequate social security protection and being unskilled.<sup>247</sup>

Most labour legislations in South Africa define an employee as:

"[A]ny person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and 'any other person who in any manner assists in carrying on or conducting the business of an employer.'"<sup>248</sup>

The use of atypical workers who do not qualify as employees in terms of labour legislation is prevalent in the hospitality industry, owing to this fact, many workers are vulnerable.<sup>249</sup> This according to Vettori, means that they remain unprotected when it comes to individual employee rights as well as by the protection extended to trade unions.<sup>250</sup> Union membership is only reserved for those classified as 'employees' and acts as a collective bargaining mechanism for better of working terms and conditions. Simply put, 'atypical employees are generally not protected by the legislation and are unable to bargain with the employer in order to establish improved working conditions'.<sup>251</sup> Vettori, further posits that, the often isolated location of holiday resorts, lodges, hotels and bed and breakfast establishments, makes it hard for trade unions to recruit members as well as for the 'Department of Labour to monitor and enforce

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<sup>247</sup> Fourie, E. S. Non-standard workers: the South African context, international law and regulation by the European Union (2008). *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 11(4), 111.

<sup>248</sup> S 213 of the Labour Relations Act 66 of 1995 (LRA) and s 1 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) share the same definition, whilst s1 of the Employment Equity Act 55 of 1998 (EEA) has an almost identical one.

<sup>249</sup> Vettori S 'The regulation of terms and conditions of employment for workers in the South African hospitality industry' (2015). *African Journal of Hospitality, Tourism and Leisure* Vol. 4 (2) 3-10.

<sup>250</sup> Vettori S 'The regulation of terms and conditions of employment for workers in the South African hospitality industry' (2015). *African Journal of Hospitality, Tourism and Leisure* Vol. 4 (2) 3-10.

<sup>251</sup> Vettori S 'The regulation of terms and conditions of employment for workers in the South African hospitality industry' (2015). *African Journal of Hospitality, Tourism and Leisure* Vol. 4 (2) 3-10.



protective labour legislation'.<sup>252</sup> Whilst some of categories atypical workers<sup>253</sup> may be said to be technically protected by existing legislation, in practice however, the peculiar conditions of their employment make it much more difficult to enforce rights.<sup>254</sup>

### **3.3.2 The exclusion of hospitality industry workers from social security coverage**

Notwithstanding the extension of social security benefits to various groups of workers, social security legislation primarily suffers the same handicap as labour legislation, particularly when it comes to the protection of the informal HTC workers. This results from the exclusion of the majority of informal workers, chiefly because they do not fit the statutory definition of an 'employee'.<sup>255</sup>

As previously alluded above,<sup>256</sup> despite their susceptibility to risk and income insecurity, many informal workers still remain uncovered by the blanket of social security.<sup>257</sup> Accordingly, social security statutes such as COIDA and UIA which are intended to protect vulnerable HTC workers, against major life course transitions, such as between caring and employment; unemployment and employment; retirement and employment; precarious and permanent employment',<sup>258</sup> fall short in the protection of atypical workers. Moreover, the working environment in the hospitality sector often exposes informal workers to numerous occupational health hazards yet, as it shall be discussed below, these workers are not adequately protected by social security.

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<sup>252</sup> Vettori S 'The regulation of terms and conditions of employment for workers in the South African hospitality industry' (2015). *African Journal of Hospitality, Tourism and Leisure* Vol. 4 (2) 3-10.

<sup>253</sup> Part time employees, fixed term employees and those employed by temporary employment services

<sup>254</sup> Fourie, E. S. 'Non-standard workers: the South African context, international law and regulation by the European Union' (2008). *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad*, 11(4), 110.

<sup>255</sup> See 2.4.1.2 and 2.4.2.3 for definitions of 'employee' in UIA and COIDA.

<sup>256</sup> See 1.1 above.

<sup>257</sup> ILO The informal economy and decent work: a policy resource guide, supporting transitions to formality / International Labour Office, Employment Policy Department – Geneva ILO 2013 8.1 2. Available at [file:///C:/Users/3009325/Downloads/wcms\\_210466.pdf](file:///C:/Users/3009325/Downloads/wcms_210466.pdf) accessed 9 October 2019.

<sup>258</sup> P Benjamin cited in Malherbe K 'Implementing Domestic Workers' Social Security Rights in a Framework of Transformative Constitutionalism'. In D. Du Toit 2013. *Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights* 117.

### 3.4 WORKING ENVIRONMENT IN THE HOSPITALITY SECTOR

The hospitality industry's working environment is both physically and mentally demanding, especially in hotels and restaurants where it may entail long hours standing, walking carrying items, routine movements and regular interaction with customers.<sup>259</sup> These miscellaneous tasks pose different physical and psycho-social risks, such as those associated with regular interaction with customers and contact with water and cleaning agents.<sup>260</sup>

According to research conducted by the Tourism and Hospitality Sector Education and Training Authority (THETA), the extent of business outsourcing in South Africa has become a powerful trend in the hospitality sector such that it is affecting 'wage levels and job security and other benefits'.<sup>261</sup> Additionally, research by the National Labour and Economic Development Institute (NALEDI) finds that more than 70% of workers in the sector are not covered by collective agreements or Bargaining Councils. According to the THETA research, the bulk of employees working in hotels are concentrated in lower job levels, either as service workers (54%) or general workers (18%), constituting a total of 72%. It is therefore clear that the above facts portray an image of a precarious, risky and insecure working environment, however due to gaps in labour and social security legislation, these vulnerable workers remain unprotected.

#### 3.4.1 Violence, stress and sexual harassment in the hospitality industry

In hotels and restaurants their unique market demand patterns, dictate working conditions that often require workers to engage in work usually considered as unsocial and abnormal.<sup>262</sup> Shift work during weekends, nights or holidays are part and parcel of the hospitality business.<sup>263</sup> For workers burdened with family responsibilities, this

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<sup>259</sup> Eurofound (2004). *EU hotel and restaurant sector: Work and employment conditions*, Dublin, European Foundation for the Improvement of Living and Working Conditions 25.

<sup>260</sup> Eurofound (2004). *EU hotel and restaurant sector: Work and employment conditions*, Dublin, European Foundation for the Improvement of Living and Working Conditions 25.

<sup>261</sup> Taal M 'Organising in the Hospitality Sector in South Africa' 2012 Labour Research Service South Africa 13.

<sup>262</sup> Busquets, J. (2010), 'Accommodations and consumption diversification in the sector of tourist accommodations and restaurant industries, and its effects on labour relations' study commissioned by the International Labour Organization, April 2010 19.

<sup>263</sup> Busquets, J. (2010), 'Accommodations and consumption diversification in the sector of tourist accommodations and restaurant industries, and its effects on labour relations' study commissioned by the International Labour Organization, April 2010 19.

working environment increases stress, especially on women who double up as natural caregivers and engage in domestic chores.<sup>264</sup>

While many workers have reportedly been found to enjoy the interface with customers, particularly in the service industry, some found it stressful when prolonged.<sup>265</sup> This may be attributed to the concept of 'emotional labour', whereby workers are expected to display positive emotions for the benefit of customers, even if they do not feel them.<sup>266</sup> Moreover, the interface between workers and customers tends to breed a fertile environment for potential violence in the hospitality sector than any other economic sectors. This is more prevalent in the 'night-economy,' that is, after dark in parts of the hotel and catering businesses.<sup>267</sup> Due to frequent contact with alcohol consuming patrons, in a sector that revolves around selling of alcohol, these workers are potentially exposed to 'violence and related intimidation'.<sup>268</sup>

Sexual harassment, including unwarranted attention or intimidation of a sexual nature, seems to be a widespread phenomenon experienced in the Hospitality industry.<sup>269</sup> In a report by the European Agency for Safety and Health at Work,<sup>270</sup> the HCT sector was the one most frequently noted as having a high degree of sexual harassment and bullying. Additionally, the report identified waiters, as workers more prone to various forms of sexual harassment - sexually suggestive comments, obscene language, and jokes, were rife.<sup>271</sup>

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<sup>264</sup> ILO 'Developments and challenges in the hospitality and tourism sector' (2010) Issues paper for discussion at the Global Dialogue Forum for the Hotels, Catering, Tourism Sector, 23–24 November 2010 (Geneva, 2010) 14.

<sup>265</sup> Hobbs et al., 2002 cited in Hoel H & Einarsen, S *Violence at work in hotels, catering and tourism* (2003) International Labour Office 5 - 6.

<sup>266</sup> Seymour, D. (2000). Emotional labour: A comparison between fast food and traditional service work. *International Journal of Hospitality Management*, 19(2), 159-171.

<sup>267</sup> Hoel H & Einarsen S 'Violence at work in hotels, catering and tourism' (2003) ILO Working Papers, International Labour Organization 5 – 6.

<sup>268</sup> Hoel H & Einarsen S 'Violence at work in hotels, catering and tourism' (2003) ILO Working Papers, International Labour Organization 5 – 6.

<sup>269</sup> Alexandra Topping 'Sexual harassment rampant in hospitality industry, survey finds' The Guardian International Edition 24 June 2018 available at <https://www.theguardian.com/world/2018/jan/24/sexual-harassment-rampant-hospitality-industry-unite-survey-finds> (accessed 20 October 2019).

<sup>270</sup> European Agency for Safety and Health at Work (2000): *Monitoring the State of Occupational safety and Health in the European Union- Pilot study summary report*. Bilbao: European Agency for Safety and Health at Work.

<sup>271</sup> European Commission (1998): *Sexual Harassment in the Workplace in the European Union*. European Commission Brussels.

In light of the above, it is clear that workers in the HCT sector are often exposed to physical and emotional occupational injuries, yet they are not protected by COIDA - the relevant legislation. Firstly, as discussed above, this can be attributed to the fact that COIDA systematically excludes informal workers from its coverage.<sup>272</sup> Secondly even if there were not excluded from coverage, the fact that the Schedule 3<sup>273</sup> list makes no mention of psychological diseases such as Post-Traumatic Stress Disorder (PTSD), <sup>274</sup> will make it very difficult for an under resourced worker to engage the limited services of specialists.<sup>275</sup>

### 3.5 WOMEN AND VULNERABILITY IN THE HOSPITALITY INDUSTRY

According to the Labour Research Service (LRS),<sup>276</sup> the hospitality industry is 'dominated by young, black, female workers in low skill, low pay employment.'<sup>277</sup> In many instances, these are often single mothers, who have a higher incidence of poverty and vulnerability to poverty.<sup>278</sup> Hunter Powell and Watson postulate that this phenomenon may be attributed to managerial custom of taking advantage of women's social and domestic skills which they develop 'through gender role socialisation and hire them for jobs involving cleaning, serving on people and nurturing children'.<sup>279</sup>

Kabeer and Subrahmanian opine that:

"The lack of acknowledgement of women's paid and unpaid work in public policies creates a double burden for Informality, women and social protection: identifying barriers to provide effective coverage for women, who have to

<sup>272</sup> See 2.4.2 above.

<sup>273</sup> Schedule 3 of COIDA (list of occupational diseases).

<sup>274</sup> Malherbe, K and Calitz, K 'The expediency of including claims based on disablement caused by sexual harassment in South Africa's system of workers' compensation' (2016) 27.3 SLR 476.

<sup>275</sup> Myburgh P, Smit N & Van Der Nest D 'Social security aspects of accident compensation: COIDA and RAF as examples' (2000) 4(1) Law, *Democracy & Development* 46.

<sup>276</sup> The Labour Research Service (LRS) is a labour support organisation established in 1986. It supports the core functions of trade unions such as collective bargaining and organising and helps to link unions with other role-players. Its work influences policies on workers' rights and gender equality in South Africa and the rest of Africa.

<sup>277</sup> Taal M 'Organising in the Hospitality Sector in South Africa' *Labour Research Service South Africa*, November 2012 12.

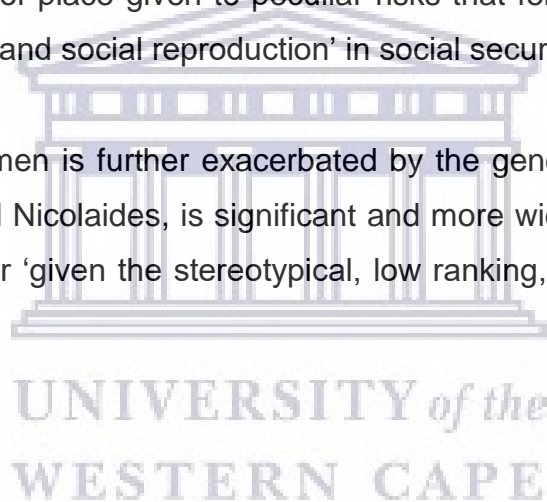
<sup>278</sup> World Bank *World Bank Report 2018 Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, constraints and Opportunities*, (2018) 38.

<sup>279</sup> Powell, P. H., & Watson, D. 'Service unseen: The hotel room attendant at work' (2006) *International Journal of Hospitality Management*, 25(2), 297-312.

engage in remunerated work while at the same time being in charge of unpaid, yet time-intensive, care responsibilities.”<sup>280</sup>

Moreover, the fact that many women are engaged in these temporary, low pay informal jobs, means that many do not have access to maternity benefits and social protection.<sup>281</sup> Section 25 of the BCEA provides for a minimum four months maternity leave which is unpaid. The lack of income during this period inevitably intensifies the vulnerability of women to impoverishment, moreover, after child birth they run the risk of losing those jobs.<sup>282</sup> This has the effect of forcing women to return to work prematurely, and consequently putting their health and that of their children at risk.<sup>283</sup> The premature return to remunerated employment is also often linked with shorter durations of breastfeeding, which also affects the child’s health and development.<sup>284</sup> Thus, there is no pride of place given to peculiar risks that female informal workers face ‘both in production and social reproduction’ in social security policies.<sup>285</sup>

The vulnerability of women is further exacerbated by the gender pay gap, of which according to Vettori and Nicolaides, is significant and more widespread in the South African hospitality sector ‘given the stereotypical, low ranking, low paying sex-typed jobs’ in the sector.<sup>286</sup>



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<sup>280</sup> Kabeer and Subrahmanian, 1997 in Ulrichs M ‘Informality, women and social protection: Identifying barriers to provide effective coverage’ (2016) OD/ Working Paper London 11.

<sup>281</sup> Dupper O, Malherbe K et al ‘The case for increased reform of South African family and maternity benefits’. *Law, Democracy & Development*, 4(1) 33.

<sup>282</sup> Ulrichs M (2016) 13.

<sup>283</sup> Ulrichs M (2016) 13.

<sup>284</sup> Horwood C, Haskins L, Alfors L. *et al.* A descriptive study to explore working conditions and childcare practices among informal women workers in KwaZulu-Natal, South Africa: identifying opportunities to support childcare for mothers in informal work (2019) *BMC Pediatr* 19, 382. Available at <https://bmcpediatr.biomedcentral.com/articles/10.1186/s12887-019-1737-7>. (accessed 10 October 2020).

<sup>285</sup> WIEGO Briefing note 2019 ‘Extending Social Protection to Informal Workers’ available at [https://www.wiego.org/sites/default/files/migrated/publications/files/Social%20Protection%20Informal%20Workers%20for%20web\\_0.pdf](https://www.wiego.org/sites/default/files/migrated/publications/files/Social%20Protection%20Informal%20Workers%20for%20web_0.pdf) (accessed 28 June 2019).

<sup>286</sup> Vettori S & Nicolaides A ‘Gender pay discrimination in the hospitality industry in South Africa’ (2019) *African Journal of Hospitality, Tourism and Leisure*, Volume 8 (3).



### 3.5.1 Factors that force women to work in vulnerable conditions

There are various factors that may force a woman to engage in precarious and vulnerable jobs, especially in the face of the associated risks and inadequate social security protection. These factors will in turn be discussed in the paragraphs below.

#### 3.5.1.1 Societal norms relating to the role of women in the family

One of the primary motivations to join the hospitality industry lies in the fact that the duties of being a care giver lie squarely on the shoulders of women as care givers.<sup>287</sup> Challenges faced by low-income caregivers are unique as they not only affect their well-being but that of children they care for.<sup>288</sup> The longer periods that women spend caring for other people makes them prone to regular employment interruptions and they end up finding themselves in part time and reduced labour participation.<sup>289</sup> Thus women's reproductive labour responsibilities tend to restrict the scope of paid economic activities they may engage in and this leads them to inevitably choosing lower quality informal jobs which are flexible.<sup>290</sup> The hospitality industry provides this kind of flexibility through shift, part-time and seasonal work.<sup>291</sup>

Working mothers need a measure of flexibility in their working hours, to deal with the added activities of acting as caregiver, for example, taking a child to and from day-care, cooking and going to medical appointments. This double burden of reproductive and paid work adversely affects women's paid labour participation as well as access to decent work.<sup>292</sup> Moreover, it has been found that women would rather increase their

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<sup>287</sup> Ulrichs M 'Informality, women and social protection: Identifying barriers to provide effective coverage' (2016) Kliwer) ODI Working Paper London 12.

<sup>288</sup> W, Yendork J S, Wright A W et al 'Adjustment profiles of low-income caregivers from the United States and South Africa: Contrasts and commonalities'. *Journal of child and family studies*, 27(2), 522-534.

<sup>289</sup> Ulrichs, M 'Informality, women and social protection: Identifying barriers to provide effective coverage' (2016) ODI Working Paper London 15.

<sup>290</sup> Samman et al (2016), in Ulrichs M 'Informality, women and social protection: Identifying barriers to provide effective coverage' (2016) ODI Working Paper London 12.

<sup>291</sup> Vettori S 'The regulation of terms and conditions of employment for workers in the South African hospitality industry' (2015) *African Journal of Hospitality, Tourism and Leisure* Vol. 4 (2).

<sup>292</sup> Floro M & Meurs M *Global trends in women's access to "decent work"* (2009) Geneva: Friedrich-Ebert-Stiftung 6 available at: <https://library.fes.de/pdf-files/iez/global/06399.pdf> accessed 27 September 2020.

total work time,'instead of replacing time in reproductive work with time in paid work, and shifting compensating amounts of reproductive work to men.<sup>293</sup>

The disparities evident in the allocation of time for household care work between man and women, as a result of social norms, are further fortified by the inadequate or lack of support from the state for social services such as child care facilities, maternity benefits and services catering for those with disabilities.<sup>294</sup>

### **3.5.1.2 Vulnerability of women to poverty**

Poverty and the exigencies of the family economy create a desperate need for women to engage in work that males shun such as casual work.<sup>295</sup> Female workers are not only overrepresented in the informal economy, they are anchored at the lower echelons of informal employment, where employment is more precarious, remuneration is lowest and erratic.<sup>296</sup> It is such penurious working circumstances that that continue to fuel the increasing 'feminisation of poverty'.<sup>297</sup> The inadequate protection against occupational injuries, or access to health insurance, further leaves women in a more vulnerable position as minor health shocks may result in far-reaching financial repercussions on their livelihoods, owing to 'high out-of-pocket health expenditures'.<sup>298</sup> Moreover, the greater longevity of women together with inadequate pension systems exposes women to higher risks of poverty in old age.<sup>299</sup>

There is more to the ramifications of poverty experienced by women than meets the eye. Research conducted by Wright et al, revealed that, with lack of adequate

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<sup>293</sup> Floro M & Meurs M *Global trends in women's access to "decent work"* (2009) Geneva: Friedrich-Ebert-Stiftung 6 available at: <https://library.fes.de/pdf-files/iez/global/06399.pdf> accessed 27 September 2020.

<sup>294</sup> Ulrichs, M 'Informality, women and social protection: Identifying barriers to provide effective coverage' (2016) ODI Working Paper London 13.

<sup>295</sup> Ulrichs, M 'Informality, women and social protection: Identifying barriers to provide effective coverage' (2016) ODI Working Paper London 12.

<sup>296</sup> Chen M, Vanek, Lund et al *Progress of the World's Women 2005: Women, Work and Poverty*. New York: United Nations Development Fund for Women.

<sup>297</sup> Cohen, T & Moodley L. Achieving 'decent work' in South Africa? (2012) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 15(2) 323.

<sup>298</sup> Ulrichs, M 'Informality, women and social protection: Identifying barriers to provide effective coverage' (2016) ODI Working Paper London 13.

<sup>299</sup> Ulrichs, M 'Informality, women and social protection: Identifying barriers to provide effective coverage' (2016) ODI Working Paper London 13.



employment opportunity and sufficient social security, means of which low income women strive to survive on, many of the alternative ways were 'erosive of dignity,' such as begging, reliance on kin for support, engaging in demeaning community casual work, and transactional sex.<sup>300</sup> Wright further found that:

"Dignity is experienced in many different ways that are both intensely personal and relational. Dignity is linked to women's sense of identity, and the dimensions of worthiness, self-esteem, self-respect and autonomy are important aspects of dignity in practice."<sup>301</sup>

The value of human dignity is firmly entrenched in the South African Constitution<sup>302</sup> and the Universal Declaration of Human Rights, recognises social security as 'indispensable' to the dignity of the person.<sup>303</sup> Yet many women in the hospitality industry suffer in poverty, whilst engaged in low paying, precarious work and without adequate social security to protect them.<sup>304</sup> Dignity is intricately interwoven with the value of decent work, it is one of the key pillars that underpin the International Labour Organisation's (ILO) decent work agenda.<sup>305</sup> 'Decent work is not only a source of income but more importantly a source of personal dignity, family stability....'<sup>306</sup> In light of the above, It is submitted that many women in informal work have no access to decent work. In a desperate bid to keep themselves afloat in the sea of poverty, they resort to casual, low income and precarious jobs which strip them of their inherent dignity. Chapter 4 will give an overview of the broader concept of decent work under the ILO's decent Work Agenda.

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<sup>300</sup> Wright G, Noble M, Ntshongwana et al 'Poverty erodes dignity: perspectives of low income female caregivers in South Africa (Lone Mothers Policy Brief No. 1). *Center for the Analysis of South African Social Policy (CASSAP); Institute for Poverty, Land and Agrarian Studies (PLAAS); Human Sciences Research Council (HSRC)* 2014 Oxford.

<sup>301</sup> Wright G, Noble M, Ntshongwana et al 'Poverty erodes dignity: perspectives of low income female caregivers in South Africa (Lone Mothers Policy Brief No. 1). *Center for the Analysis of South African Social Policy (CASSAP); Institute for Poverty, Land and Agrarian Studies (PLAAS); Human Sciences Research Council (HSRC)* 2014 Oxford.

<sup>302</sup> Section 10 of the Constitution of South Africa.

<sup>303</sup> Article 22 of the Universal Declaration of Human Rights.

<sup>304</sup> Taal M 'Organising in the Hospitality Sector in South Africa' *Labour Research Service South Africa*, November 2012 12.

<sup>305</sup> ILO *Report of the Director General: Decent work* ILC 87th session, Geneva (1999) available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm> (accessed 25 August 2019).

<sup>306</sup> ILO *Report of the Director General: Decent work* ILC 87th session, Geneva (1999) available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm> (accessed 25 August 2019).

### **3.5.1.3 Implications of intersecting inequalities**

There is strong link between gender inequality and human poverty.<sup>307</sup> According to the United Nations Development Programme, intersecting inequalities have an effect of restricting women's existing choices, as they limit them to meagre wage jobs in poor working conditions, with inadequate social security protection. They are the main contributors that drives gender discrimination in the labour market and the gender wage gap, which effectively reduce women's productivity.<sup>308</sup> Women Gender inequalities are therefore, a key factor to chronic poverty of women and the 'intergenerational reproduction of poverty'. The adverse effects of inequality are not only felt by the women in poor households, but have a domino effect on the lives of all household members.<sup>309</sup>

In South Africa, the gender wage gap is quite significant, according to the 2019 Inequality Trends in South Africa report, released by Statistics South Africa (Stats SA),<sup>310</sup> women earn approximately 30% less than male workers. The report further reveals that men have a higher likelihood of being employed and have relatively better-paying jobs compared to women.<sup>311</sup>

## **3.6 MIGRANT WORKERS AND VULNERABILITY IN THE HOSPITALITY INDUSTRY**

South Africa generally experiences a high influx of immigrants from its neighbours which is mainly due to pull factors such as higher living standards and employment opportunities.<sup>312</sup> Migrant workers exist all over the world in hotels of both developed

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<sup>307</sup> Cagatay N *Gender and poverty* UNDP Social Development and Poverty Elimination Division (1998) 12. Available at: <https://www.undp.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/gender-and-poverty/GenderandPoverty.pdf> Accessed 20 October 2020.

<sup>308</sup> Cagatay N *Gender and poverty* UNDP Social Development and Poverty Elimination Division (1998) 8

<sup>309</sup> Cagatay N *Gender and poverty* UNDP Social Development and Poverty Elimination Division (1998) 12.

<sup>310</sup> Inequality Trends in South Africa Report, Stats SA. Available at: <https://www.undp.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/gender-and-poverty/GenderandPoverty.pdf> accessed 20 October 2020.

<sup>311</sup> Inequality Trends in South Africa Report, Stats SA.

<sup>312</sup> Malherbe K The co-ordination of social security rights in Southern Africa: Comparisons with (and possible lessons to be learnt from) the European experience. [http://www.idd.org.za/images/stories/Ready\\_for\\_publication/V8-1\\_co-ordination\\_social\\_security\\_rights.pdf](http://www.idd.org.za/images/stories/Ready_for_publication/V8-1_co-ordination_social_security_rights.pdf) 64.

and developing countries.<sup>313</sup> In South Africa, the hospitality industry generally employs a proportionally higher number of migrants than other sectors.<sup>314</sup> They are therefore an integral part of the hospitality sector and the economy at large, yet they are often exposed to exploitation in the informal economy, without social security protection.<sup>315</sup> It is submitted that not all immigrant workers in this sector are vulnerable and work in the informal sector. There are some that are highly skilled, well remunerated, protected and formally employed in the sector.<sup>316</sup> This section will however focus on those who are vulnerable and engaged in informal work.

### **3.6.1 Factors influencing vulnerability of migrant workers**

The European Agency for Safety and Health at Work, explains that many migrant workers find jobs in seasonal or informal work and engage in jobs that are more precarious than those of local workers, in unsafe working environments, unhealthy workplaces and take up jobs that they are overqualified for in lower positions. These conditions leave them open to financial, emotional and physical exploitation and thus, vulnerable.<sup>317</sup>

#### **3.6.1.1 Xenophobia**

Xenophobia is a universal phenomenon that occurs in many countries including the United States, Europe and South Africa.<sup>318</sup> The South African Human Rights Commission (SAHRC) defines xenophobia as a 'deep dislike of non-nationals by nationals of a recipient state, it constitutes a violation of the human rights of a targeted

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<sup>313</sup> Tom Baum 'Migrant workers in the international hotel industry'(2012) International Migration Branch, Sectorial Activities Department Geneva: ILO, 2012 1.

<sup>314</sup> Vettori, Stella. 2018. 'How employers can utilise the law in South Africa to reduce and prevent xenophobic attacks against their employees in the hospitality industry', African Journal of Hospitality, Tourism and Leisure, Volume 7 (2) - (2018) 2.

<sup>315</sup> Vartia-Vaananen M, Pahkin K et al. 2006; ILO, 2001; ILO, 2003; AFL-CIO, 2005 'Protecting workers in hotels, restaurants and catering European Agency for Safety and Health at Work' 2008 16.

<sup>316</sup> Vartia-Vaananen M, Pahkin K et al 16.

<sup>317</sup> Vartia-Vaananen M, Pahkin K et al 16.

<sup>318</sup> Bordeau J. (2009). *Xenophobia*. The Rosen Publishing Group, Inc.

Tyler Anbinder, The Washington Post November 7, 2019 'Trump has spread more hatred of immigrants than any American in history' available at:

[https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8\\_story.html](https://www.washingtonpost.com/outlook/trump-has-spread-more-hatred-of-immigrants-than-any-american-in-history/2019/11/07/7e253236-ff54-11e9-8bab-0fc209e065a8_story.html) Accessed 20 September 2020.

group.<sup>319</sup> Harris however opines that in South Africa xenophobia manifests differently as it is intertwined with violence,<sup>320</sup> 'It is not just an attitude: it is an activity. It is not just a dislike or fear of foreigners: it is a violent practice that results in bodily harm and damage'.<sup>321</sup>

South Africa has within the last two decades seen an increase in xenophobic attacks,<sup>322</sup> especially targeting black Africans.<sup>323</sup> This kind of violence is largely rooted in the common belief amongst South Africans that immigrants are 'taking' their jobs.<sup>324</sup> This is a misconception that resulted in a brutal wave of xenophobic violence,<sup>325</sup> which at its peak, culminated in over 60 deaths in 2008,<sup>326</sup> with some victims reportedly being burnt alive by angry mobs.<sup>327</sup> Recurrent, sporadic and violent xenophobic attacks have since become a regular occurrence of South African life. For example, in 2009 an estimated 3,000 Zimbabweans were violently displaced from De Doorns, a farming area of the Western Cape.<sup>328</sup>

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<sup>319</sup> Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals available at: [https://www.sahrc.org.za/home/21/files/Non%20Nationals%20Attacks%20Report\\_1-50\\_2008.pdf](https://www.sahrc.org.za/home/21/files/Non%20Nationals%20Attacks%20Report_1-50_2008.pdf) Accessed 15 September 2020.

<sup>320</sup> Harris B (2002) Xenophobia: A new pathology for a new South Africa. *Psychopathology and social prejudice*, 169-184.

<sup>321</sup> Harris B (2002) Xenophobia: A new pathology for a new South Africa. *Psychopathology and social prejudice*, 169-184.

<sup>322</sup> Vettori, Stella. 2018. 'How employers can utilise the law in South Africa to reduce and prevent xenophobic attacks against their employees in the hospitality industry', *African Journal of Hospitality, Tourism and Leisure*, Volume 7 (2) - (2018) 1.

<sup>323</sup> Crush, J & Ramachandran, S. (2010). Xenophobia, *International Migration and Development. Journal of Human Development and Capabilities*, 11(2), 209–228.

<sup>324</sup> Ronnie R, Mullagee F, Basson Y, Godfrey S, (2017) International Labour Organisation: Future of Work Initiative\_Theme 2: decent jobs for all. *Social Law Project, University of the Western Cape/Labour and Enterprise Policy Research Group, University of Cape Town* 11.

<sup>325</sup> Ronnie R, Mullagee F, Basson Y, Godfrey S, (2017) International Labour Organisation: Future of Work Initiative Theme 2: decent jobs for all. *Social Law Project, University of the Western Cape/Labour and Enterprise Policy Research Group, University of Cape Town* 11.

<sup>326</sup> Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals available at: [https://www.sahrc.org.za/home/21/files/Non%20Nationals%20Attacks%20Report\\_1-50\\_2008.pdf](https://www.sahrc.org.za/home/21/files/Non%20Nationals%20Attacks%20Report_1-50_2008.pdf) Accessed 15 September 2020 11.

<sup>327</sup> Bearak B and Dugger CW 'South Africans Take Out Rage on Immigrants' *New York Times* May 20 2008, available at: <https://www.nytimes.com/2008/05/20/world/africa/20safrica.html>

<sup>328</sup> JP Misago, 'Violence, Labour and Displacement of Zimbabweans in De Doorns, Western Cape' Migration Policy Brief No. 2, Consortium of Refugees and Migrants in South Africa, Johannesburg, 2009; A. Robb and A. Davis, 'Toil and Trouble. Fire Burn. Cauldron Bubble: Xenophobia and Civil Unrest in De Doorns, South Africa,' Report for Scalabrini Centre, Cape Town 2009.

The State has a constitutional as well as an international law obligation to respect the basic human rights of immigrants in its territory.<sup>329</sup> Therefore, its functionaries such as police have a duty to protect victims of xenophobic violence. However, in South Africa, it is well documented that these institutions meant to protect the rights and dignity of victims are sometimes the perpetrators themselves.<sup>330</sup> A case in point is the infamous case of Mozambican taxi driver, Mido Macia, which was heard in the Pretoria High Court in 2015, where eight police officers were convicted of his murder, after being videotaped dragging him while handcuffed to a police van, where after he sustained fatal injuries.<sup>331</sup> It is therefore clear that with continued rise in social unrest and xenophobia, foreign victims are less likely to find protection from the state institutions, this point is further buttressed by Crush, who expounds that, State agencies have typically focused on identifying irregular migrants among victims of violence and then deporting them, reinforcing the biases and prejudices which fuelled the violence to begin with.<sup>332</sup>

In light of the above, Immigrants experience discrimination as a result of being of a different nationality in the access to labour market and workplace.<sup>333</sup> Given the high proportion of migrant workers in the hospitality industry, and the risk of violence that they face both in and outside the workplace,<sup>334</sup> it is submitted that they find themselves in a very vulnerable position which not only threatens their livelihoods but also their lives.

### **3.6.1.2 The demand for low-skilled work**

The reasons why immigrants find themselves in such vulnerable circumstances are complex and manifold. Some immigrants are without valid documentation, desperate

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<sup>329</sup> According to *Kiliko and others v Minister of Home Affairs and Others*(2006 (4) SA 114 (C): “the state under international law, is obliged to respect the basic human rights of any foreigner who has entered its territory, and any such person is under the South African Constitution, entitled to all the fundamental rights entrenched in the Bill of Rights...”

<sup>330</sup> In *S v Smith en Andere* [2002] JOL 9242(T) The court convicted four police dog unit policemen who videotaped themselves assaulting two Mozambican men in 1998.

<sup>331</sup> <https://ewn.co.za/2015/11/11/Macia-trial-Eight-accused-sentenced-to-15-years>

<sup>332</sup> Crush, J. (2014). Xenophobic violence in South Africa: Denialism, minimalism, realism.

<sup>333</sup> Vartia-Vaananen M, Pahkin K et al 16.

<sup>334</sup> Vettori, Stella. 2018. 'How employers can utilise the law in South Africa to reduce and prevent xenophobic attacks against their employees in the hospitality industry', *African Journal of Hospitality, Tourism and Leisure*, Volume 7 (2) - (2018) 2.



for work engage in these exploitative, poor working conditions outside of national legislative protection.<sup>335</sup> Furthermore, many migrant workers tend to be attracted to the precarious and insecure HCT jobs as they provide jobs that do not require high level skills, 'less language proficiency' or qualifications (since some of them may not be recognised in some countries).<sup>336</sup> Moreover, the poor working and employment conditions repel the indigenous population from the hospitality sector, thereby creating a gap for the immigrants to fill.<sup>337</sup>

Illegal immigrants find themselves in even worse circumstances because of their lack of documentation as well as relatives in the countries they work in, they end up taking lower wages and pick 'anti-social shifts' during holidays and privately do extra work for their managers.<sup>338</sup> Immigrants are also reported to be facing barriers to health and safety attributed to poor language skills, poor education levels, ignorance of employment rights, and lack of knowledge of where to go when aggrieved, low pay, and difficulties in validating qualifications.<sup>339</sup> Furthermore, their voices in the workplace are oftentimes stifled by their reluctance to join unions as this may endanger their status with their employers.<sup>340</sup>

It is submitted that the depth of vulnerability of informal migrant workers is significant, particularly for the undocumented, who work in constant fear of arrest or deportation. Furthermore, for women, the 'intersectionality' of migrants' multiple identities, only exacerbates the situation if one is black, a female, a mother, an immigrant, undocumented, and informally employed.

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<sup>335</sup> Taal M 'Organising in the Hospitality Sector in South Africa' 13.

<sup>336</sup> Eurofound (2004). *EU hotel and restaurant sector: Work and employment conditions*, Dublin, European Foundation for the Improvement of Living and Working Conditions 12.

<sup>337</sup> Eurofound (2004). *EU hotel and restaurant sector: Work and employment conditions*, Dublin, European Foundation for the Improvement of Living and Working Conditions 14.

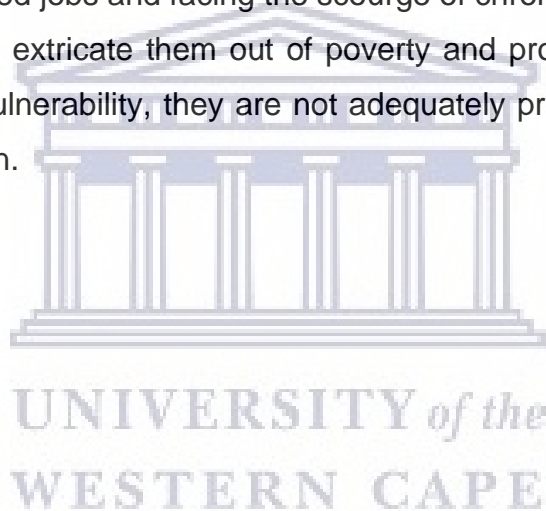
<sup>338</sup> Taal M 'Organising in the Hospitality Sector in South Africa' 13.

<sup>339</sup> Vartia-Vaananen M, Pahkin K et al 16.

<sup>340</sup> Taal M 'Organising in the Hospitality Sector in South Africa' *Labour Research Service South Africa* 13.

### 3.7 CONCLUSION

The above chapter demonstrated that despite being a mega industry, the hospitality sector often depends on vulnerable groups of workers, mainly informal workers who happen to be women and immigrants.<sup>341</sup> Their peculiar socio-economic circumstances, force them into unprotected, risky, precarious, low wage, temporary and seasonal work. These kinds of jobs are demeaning and often strip workers of their inherent personal dignity and are therefore far from being decent work.<sup>342</sup> Gender discrimination in employment opportunities and the burden of being primary care givers are some of the factors that perpetuate women's' vulnerability to poverty.<sup>343</sup> On the other hand migrants are often additionally subjected to exploitation by employers and xenophobia from co-workers and society at large, consequently they find themselves in unprotected jobs and facing the scourge of chronic poverty.<sup>344</sup> Working is simply not enough to extricate them out of poverty and protect them from social risks.<sup>345</sup> Despite their vulnerability, they are not adequately protected by labour and social security legislation.



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<sup>341</sup> See 3.5 and 3.6 above.

<sup>342</sup> See 3.5.1.2

<sup>343</sup> See 3.5.

<sup>344</sup> See 3.6.

<sup>345</sup> See 2.4.3.



## CHAPTER FOUR

### THE INTERNATIONAL LAW FRAMEWORK RELATING TO SOCIAL PROTECTION

#### 4.1 INTRODUCTION

International law occupies a very special place in South African law, as it plays an important part in guaranteeing the right to social security.<sup>346</sup> The Constitution instructs courts, tribunals and other forums to consider international law when interpreting the Bill of Rights.<sup>347</sup> It further places a duty on South African courts to prefer Interpretations of legislation that are consistent with international law.<sup>348</sup> In the interpretation of socio-economic rights such as the right to access social security, international law plays a significant role, as foreign domestic jurisdictions lack comparable jurisprudence for our courts to draw on.<sup>349</sup>

This chapter shall discuss the available international legal framework that seeks to protect workers. It should be noted that a large body of international law is already in place and that some instruments have not been signed and ratified by South Africa. They are nevertheless still binding. This chapter will provide an overview of selected legal instruments that are germane to the discussion of social security for vulnerable workers in the Hospitality industry. It will additionally identify the weaknesses and challenges which affect the effectiveness of these instruments.

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<sup>346</sup> Olivier M (ed) et al *Social Security: A Legal Analysis* (2003) 621.

<sup>347</sup> Section 39(1) (b) of the Constitution of the Republic of South Africa, 1996.

<sup>348</sup> Section 233 of the Constitution.

<sup>349</sup> Van Rensburg LJ, L Lamarche L 'The right to social security and assistance' in Brad D & Heyns C (eds) *Socio economic rights in South Africa* 2005 155.

## 4.2 INSTRUMENTS DEVELOPED BY THE UNITED NATIONS

### 4.2.1 United Nations' (UN) International Covenant on Economic, Social and Cultural Rights (ICESCR)

South Africa has been a signatory to the United Nations' (UN) International Covenant on Economic, Social and Cultural Rights (ICESCR) since October 1994,<sup>350</sup> but it only ratified on 12 January 2015. The ICESCR has been signed and ratified by approximately 165 countries, which means that these countries are obliged to domesticate its provisions.<sup>351</sup> However, non-ratification of the ICESCR by countries does not necessary absolve them from the responsibilities and obligations therein. This means that those countries that have only signed and not ratified have an obligation to enact laws which comply with the provisions of the ICESCR.<sup>352</sup>

The CESCR, in article 9, 'recognises the right of everyone to social security, including social insurance'.<sup>353</sup> The right to social security plays a vital role in guaranteeing human dignity for all persons who are confronted by situations that deprive them of their Covenant rights.<sup>354</sup> This should also include informal workers in the hospitality industry. Furthermore, CESCR obligates the states to guarantee an adequate standard of living to everyone.<sup>355</sup> However, Basson expounds that Article 9 on its own does not depict a comprehensive picture as to the 'scope and content of social security systems' beyond the reference to social insurance. It is in the General Comments released by the Committee for Economic, Social and Cultural Rights (CESCR) where the content of the right to social security is expressed.<sup>356</sup>

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<sup>350</sup> GA Res 2200A (XXI), UN GAOR Supp (No 16) 49, Doc A/6316 (1966) UNTS, entered into force 3 January 1976.

<sup>351</sup> Section 27(2) of the ICESCR provides that each state ratifying the ICESCR becomes bound by its provisions three months after such ratification. UN Committee on Economic, Social and Cultural Rights 'Status of the International Covenant on Economic, Social and Cultural Rights' available at <http://www.ohchr.org/Documents/Issues/HRIndicators/DataICESCR.xls> (accessed on 14/05/2014).

<sup>352</sup> Basson, Y 'The compliance of the South African social security system with the International Covenant on Economic, Social and Cultural Rights' (2020) Obiter (forthcoming).

<sup>353</sup> Article 9 of the ICESCR.

<sup>354</sup> Article 9 of the ICESCR.

<sup>355</sup> Article 11(1) of the ICESCR.

<sup>356</sup> Basson, Y 'The compliance of the South African social security system with the International Covenant on Economic, Social and Cultural Rights' (2020) Obiter (forthcoming).

#### **4.2.1.1 General Comment 19**

According to the CESCR, the right to social security includes the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to ensure protection from a number of contingences that result in a lack of work-related income, or unaffordable health care or insufficient family support.

General Comment 19, provides that each country must establish a social security system based on its domestic law and administered by a public authority.<sup>357</sup> This means that each State Party is free to tailor its social security systems' administration to its own needs, and that such administration must be transparent.<sup>358</sup> The CESCR identifies some contingencies for which any social security system should provide coverage.<sup>359</sup> These include sickness, maternity, disability, employment injury, unemployment, old age or death of a family member.<sup>360</sup>

According to Basson, there are a number of indicators that can be gleaned from the discussion of General Comment 19, and these can be used as a yardstick to determine whether a country's social security system meets the requirements established by the ICESCR.<sup>361</sup> These indicators are:

- the existence of a social security system
- the administration of such social security system by a public authority
- the coverage of a minimum of nine named contingencies
- the level of coverage provided by the social security system
- the level and duration of benefits provided
- the use of benefits in the realisation of other rights in the ICESCR.

Basson concludes that, a critical analysis of the elements of the right to social security in the ICESCR, exposes the shortfalls of South Africa's current social security system

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<sup>357</sup> General Comment 19 Part II.

<sup>358</sup> Basson, Y 'The compliance of the South African social security system with the International Covenant on Economic, Social and Cultural Rights' (2020) *Obiter* (forthcoming).

<sup>359</sup> General Comment 19 Item 2.

<sup>360</sup> General Comment 19 Item 2.

<sup>361</sup> Basson, Y 'The compliance of the South African social security system with the International Covenant on Economic, Social and Cultural Rights' (2020) *Obiter* (forthcoming).

in various areas which include the extent of coverage by social insurance and the use of social assistance benefits to realise other rights.

#### **4.2.2 The UN Convention on the Elimination of all Forms of Discrimination Against Women (CEDAWU)**

The UN Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) has been ratified by South Africa. This convention aims to promote equality between men and women, and moreover it requires the eradication of discrimination against women in the context of employment and particularly in as far as social security rights and the loss of seniority or benefits due to pregnancy are concerned.<sup>362</sup> Non-discrimination of women in social security according to Article 11(1) (e) must also find application on specific rights such as rights to benefits of retirement, unemployment, sickness, invalidity and old age and other disability. In addition, this convention also advocates for the right to have paid leave.<sup>363</sup>

There have, however, been some criticisms levelled against CEDAW. Campbell argues that exclusively focusing on gender is a monolithic approach in protecting women and therefore, “fails to capture the diversity of women and the range of their experiences”. It ignores the ‘complexity of discriminatory practices directed at intersecting identities’.<sup>364</sup> She proposes ‘mutual reinforcement of forms of discrimination such as racism, classism, ethnocentrism and heterosexism’.<sup>365</sup>

#### **4.2.3 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW)**

The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families<sup>366</sup> (ICRMW, the Migrant Workers Convention) was

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<sup>362</sup> Art 11(1) (e).

<sup>363</sup> Article 11(1) (e).

<sup>364</sup> Campbell M ‘CEDAW and women's intersecting identities: a pioneering new approach to intersectional discrimination’ (2015) *Revista Direito GV*, 180- 185.

<sup>365</sup> Campbell M ‘CEDAW and women's intersecting identities: a pioneering new approach to intersectional discrimination’ (2015) *Revista Direito GV*, 180- 185.

<sup>366</sup> GA resolution 45/158 of 18 December 1990.

adopted on 18 December 1990,<sup>367</sup> it is the most comprehensive international treaty in the field of migration and human rights. This Convention protects the interests of migrant workers in foreign countries, it establishes the minimum standards of human rights protection to which migrant workers and members of their families are entitled, and calls for recognition of the human rights of migrants and includes the right to social protection.<sup>368</sup>

Despite this convention being one of the UN core international human rights instruments, it nevertheless is one of the most neglected treaties, described as being 'a dead duck'.<sup>369</sup> It took 13 years for the Convention to draw just the 20 ratifications required for it to enter into force in 2003 and it currently has just 54.<sup>370</sup> The ratifying countries are predominantly countries of origin of migrants, who supposedly embraced the convention as an instrument to protect their nationals in destination countries.<sup>371</sup> Some researchers however suggest that this poor rectification record is attributed to the 'complexity, precision, and the lack of national security 'escape clauses'.<sup>372</sup>

#### 4.3 INTERNATIONAL LABOUR ORGANISATION INSTRUMENTS

##### 4.3.1 The role of the ILO

The main function of the ILO is to 'create and maintain international labour and social security standards that are aimed at promoting decent and productive work in conditions of freedom, equity, security, and dignity'.<sup>373</sup> Unlike other international organisations, the ILO is characterised by a unique and iconic feature of 'tripartism' as

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<sup>367</sup> UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 1990, 2220 UNTS 3.

<sup>368</sup> ILO International labour standards on labour migration available at: <https://www.ilo.org/global/topics/labour-migration/standards/lang--en/index.htm> (accessed 4 September 2019).

<sup>369</sup> Grange M 'The Migrant Workers Convention: A legal tool to safeguard migrants against arbitrary detention' in Desmond (ed) *Shining New Light on the UN Migrant Workers Convention* (Pretoria University Law Press, 2017) 72 -100.

<sup>370</sup> As of October 2018.

<sup>371</sup> Grange M 'The Migrant Workers Convention: A legal tool to safeguard migrants against arbitrary detention' (2017) 72 -100.

<sup>372</sup> Vucetic S 'Democracies and International Human Rights: Why is there No Place for Migrant Workers?' (2007) *The International Journal of Human Rights* 11:4, 403-428.

<sup>373</sup> Sengenberger W *The International Labour Organisation: Goals, Functions and Political Impact* (2014) 26

it does not exclusively engage governments but includes unions and employees.<sup>374</sup> To address challenges faced by workers, the ILO established a system of international labour standards, international Conventions and Recommendations.<sup>375</sup> The fact that some countries have not yet ratified these conventions,<sup>376</sup> does not exempt them from the obligations imposed as they are automatically obliged to observe, promote, and implement the core labour standards, by virtue of being a member.<sup>377</sup>

#### **4.3.2 Social Security (Minimum Standards) Convention, 1952 (No. 102)**

The Social Security (Minimum Standards) Convention No. 102 of 1952 was adopted on the 28<sup>th</sup> of June 1952 and came into force on the 27<sup>th</sup> of April 1955. Convention No. 102 is the cornerstone of all the ILO social security Conventions, it is the only international instrument, that exclusively deals with basic social security principles, it creates minimum standards that are ‘universally applicable’, for the entire 9 divisions of social security.<sup>378</sup> These divisions are medical care<sup>379</sup>, sickness benefit,<sup>380</sup> family benefit,<sup>381</sup> maternity benefit,<sup>382</sup> invalidity benefit<sup>383</sup> and survivors’ benefit.<sup>384</sup> It is submitted that this convention provides a blueprint of mutual, essential elementary social security principles upon which any foundation of a social security system should be built.

There have been, however, some criticisms of minimum social security standards. According to Vonk, the standards are not centred upon the concept of a right to social security for all and accordingly fail to deal with challenges of lack of coverage. Moreover, the standards have proved to be important for poor countries as seen by

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<sup>374</sup> Böhning R ‘The ILO and the new UN Convention on Migrant Workers: The past and future’ (1991) 25.

<sup>375</sup> ILO Rules of the Game: A brief introduction to International Labour Standards (2014) 16. (Hereafter ILO Rules of the Game (2014) 9.

<sup>376</sup> ILO ‘International Labour Standards Creation’ available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm> (accessed 20 May 2018).

<sup>377</sup> ILO Rules of the Game (2014) 16.

<sup>378</sup> The ILO Social Security (Minimum Standards) Convention, 1952 (No. 102) [http://www.ilo.org/secsoc/areas-of-work/legal-advice/WCMS\\_205340/lang--en/index.htm](http://www.ilo.org/secsoc/areas-of-work/legal-advice/WCMS_205340/lang--en/index.htm) (accessed 24 October 2017).

<sup>379</sup> Part II arts 7-12.

<sup>380</sup> Part III arts 13-18.

<sup>381</sup> Part VII arts 39-45.

<sup>382</sup> Part VIII arts 46-52.

<sup>383</sup> Part IX arts 53-58.

<sup>384</sup> Part X arts 59-64.



the rectification by mostly richer countries of which they are modelled.<sup>385</sup> The standards have a narrow approach seeking to only protect the formal sector,<sup>386</sup> this according to Olivier is attributed to the fact that C102 was developed during a time when there was still belief in the achievement of the goal of full employment in the formal sector.<sup>387</sup> Furthermore, Article 65 is littered with archaic references such as 'skilled manual males'<sup>388</sup> that seek to reinforce its bias towards formal and male workers. However as previously noted, most workers in developing countries are informal and female. South Africa has not yet ratified this convention.<sup>389</sup>

### 4.3.3 Employment Injury Benefits Convention

The Employment Injury Benefits Convention No. 121 of 1964 (C121) was adopted on 8 July 1964 and came into force on 28 July 1967.<sup>390</sup> This Convention provides detailed provisions for compensation of damages sustained from employment accidents, occupational diseases as well as accidents that occur during a worker's commute (the direct route between home and workplace). Furthermore, it provides flexibility for countries whose economic and medical facilities are not well developed.<sup>391</sup>

Some of the significant features of C121 are that it provides for employer financed cover for injury benefits, as opposed to other forms of social security which are funded by both the employer and employee, such as maternity benefits and pensions.<sup>392</sup> Secondly, periodic payment of compensation throughout the contingency as opposed

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<sup>385</sup> Vonk G 'The Social protection Floors Recommendation 2012 (No 202): The human rights approach to social security in ILO wrapping paper' in Olivier M, Dupper O & Govindjee A *The role of standards in labour and social security law* (2013) page 50.

<sup>386</sup> Vonk G 'The Social protection Floors Recommendation 2012 (No 202): The human rights approach to social security in ILO wrapping paper' in Olivier M, Dupper O & Govindjee A *The role of standards in labour and social security law* (2013) 50.

<sup>387</sup> Olivier M 'International Labour and Social Security Standards: A Developing Country Critique' in Olivier M, Dupper O & Govindjee A, *The Role of Standards in Labour and Social Security Law* (2013) 23.

<sup>388</sup> ILO Social Security (Minimum Standards) Convention 102 of 1952 Article 65(6).

<sup>389</sup> ILO 'Ratifications of C102 - Social Security (Minimum Standards) Convention, 1952 (No. 102)' available on [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312247](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312247) (accessed on 25 May 2019).

<sup>390</sup> Vonk G 'The Social Protection Floors Recommendation 2012 (No 202): The Human Rights Approach to Social Security in ILO Wrapping Paper' in Olivier M, Dupper O & Govindjee A *The Role of Standards in Labour and Social Security Law* (2013) 30.

<sup>391</sup> Article 2 of Employment Injury Benefits Convention, 1964 (No. 121).

<sup>392</sup> Article 20 of Employment Injury Benefits Convention, 1964 (No. 121).



to a lump-sum benefit, with exceptions for minor injuries.<sup>393</sup> Furthermore, Article 39, lists a schedule for occupational diseases and accidents,<sup>394</sup> however, it was further increased by Recommendation R121, which also extended the scope of coverage by including parties that were not included in the C121.<sup>395</sup> However South Africa is still to ratify C121 despite its importance to workers.

#### **4.3.4 The Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172)**

The Working Conditions (Hotels and Restaurants) Convention, 1991 (No. 172) aims to protect all workers in hotels, restaurants and similar establishments. It is the ILO instrument that specially caters for improvement of working conditions and the enforcement of workers' rights in this sector. This Convention's objective is that ratifying states adopt it within the confines of their national policies and to ensure that the workers concerned are afforded at least the minimum standards afforded to all workers in general, including those relating to social security entitlements.<sup>396</sup>

In light of the poor working conditions associated with the sector and low wages, this Convention provides for reasonable hours of work, overtime provisions, rest periods, and annual leave.<sup>397</sup> Article 6 goes even further by providing that those workers who receive tips from customers are additionally entitled to basic remuneration that is paid at regular intervals.<sup>398</sup> This Convention is however mute on the numerous vulnerable groups often found within this sector such as informal workers, women, both legal and illegal immigrants.

#### **4.3.5 Other ILO Conventions**

There are numerous other ILO Conventions that are relevant for this discussion but will not be discussed here. These include the Convention on the Elimination of all Forms of Racial Discrimination, Maternity Protection Convention, 2000 (No. 183)

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<sup>393</sup> Article 9 of Employment Injury Benefits Convention, 1964 (No. 121).

<sup>394</sup> Article 39 of Employment Injury Benefits Convention, 1964 (No. 121).

<sup>395</sup> Article 2 of R121 – Employment Injury Benefits Recommendation of 1964.

<sup>396</sup> Article 3.

<sup>397</sup> Article 4 & 5.

<sup>398</sup> Article 7.

Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), and The Discrimination (Employment and Occupation) Convention No 111 of 1958. The Migrant Workers (Supplementary Provisions) Convention 143 of 1975.

#### **4.3.6 ILO Recommendations**

##### **4.3.6.1 Social Protection Floors Recommendation**

Social Protection Floors Recommendation No 202 of 2012 (R202)<sup>399</sup> was adopted on 14 June 2012 during the 101st International Labour Committee session. R202 supplements the existing ILO social security standards. Member states are obliged to apply 'social inclusion' that will ensure higher levels of social security to as many people as possible including those persons in the informal economy.<sup>400</sup> The member states are further required to progressively ensure higher levels of social security protection according to particular socio-economic needs of each country.<sup>401</sup> R202 further emphasises that the creation of a sustainable social security system plays a key role in the transition from informal to formal employment.<sup>402</sup>

Vonk argues that 'R202 is capable of bridging the gap between ILO standards and the human right to social security, because by setting universal social protection standards and combining these with requirements as to access to justice, R202 also sets a standard as to what each individual citizen in the world can expect from his or her government.'<sup>403</sup>

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<sup>399</sup> Social Protection Human Rights available at <https://socialprotection-humanrights.org/instru/ilo-social-protection-floors-recommendation-2012-no-202/>.

<sup>400</sup> Art 3(e).

<sup>401</sup> ILO 'Social security for all: Building social protection floors and comprehensive social security systems' available at [http://www.socialprotectionfloor-gateway.org/files/social\\_security\\_for\\_all.pdf](http://www.socialprotectionfloor-gateway.org/files/social_security_for_all.pdf) (accessed 05 August 2019).

<sup>402</sup> Malherbe K 'Implementing Domestic Workers' Social Security Rights in a Framework of Transformative Constitutionalism' In D. Du Toit *Exploited, Undervalued and Essential: Domestic Workers And The Realisation Of Their Rights* (2013) 137.

<sup>403</sup> Vonk G 'The Social Protection Floors Recommendation 2012 (No 202): The Human Rights Approach to Social Security in ILO Wrapping Paper' in Olivier M, Dupper O & Govindjee A *The Role of Standards in Labour and Social Security Law* (2013) 30.

#### **4.3.6.2 The Transition from the Informal to the Formal Economy Recommendation**

The Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204), adopted in June 2015, is the first labour standard dealing specifically with the informal economy.<sup>404</sup> It was developed with the objective of achievement of decent work for all, through providing guidance to the tripartite constituents on how to facilitate the transition from the informal to the formal economy.<sup>405</sup>

Recommendation No. 204 is important in that, first, it recognises the lack of social security of informal workers and that most people do not enter into the informal economy by choice. Secondly, it recognises the high prevalence of informality in the economy and its effects on workers' rights. Thirdly, it acknowledges the broad diversity of causal factors for informality, and lastly, it facilitates the transition from the informal economy to the formal by providing practical guidance for guaranteeing social security for informal workers.<sup>406</sup>

WIEGO however criticises Recommendation No. 204 in that it excludes informal worker representation as it only 'limits representation to being within the ranks' of the traditional trade union delegations and 'according to national practice'. Since most 'national practices' exclude informal worker representation, this might prevent change.<sup>407</sup>

#### **4.3.6.3 Decent Work Agenda (DWA)**

The major goal of the ILO is the promotion of decent work for both men and women, it describes decent work as 'opportunities for women and men to obtain decent and productive work in conditions of freedom, equity, security and human dignity'.<sup>408</sup> The concept of decent work:

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<sup>404</sup> ILO Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204): Workers' guide, International Labour Office, Bureau for Workers' Activities (ACTRAV). - Geneva: ILO, 2017 1.

<sup>405</sup> ILO Transition from the Informal to the Formal Economy Recommendation 2015: Workers' Guide 1.

<sup>406</sup> ILO Transition from the Informal to the Formal Economy Recommendation 2015: Workers' Guide 1.

<sup>407</sup> Transition from the Informal to the Formal Economy Recommendation, 2015 (No. 204) Summary for MBOs: WIEGO, June 2015 2 available at <https://www.wiego.org/sites/default/files/migrated/resources/files/ILC-Recommendation-Summary-MBOs-English.pdf> (accessed 25 August 2019).

<sup>408</sup> ILO Report of the Director General: Decent work ILC 87th session, Geneva (1999) available at <http://>

is based on the understanding that work is not only a source of income but more importantly a source of personal dignity, family stability, peace in the community, and economic growth that expands opportunities for productive jobs and employment.<sup>409</sup>

According to Du Toit and Huysamen the Decent Work Agenda 'thus offers a theory as to why governments should intervene in labour markets'.<sup>410</sup> It is an appreciation of the flawed nature of free labour markets which are often open to abuse by unscrupulous employers who may exploit workers to reduce production costs, which consequently results in inefficiency and unfairness.<sup>411</sup>

The ILO identified four strategic objectives of decent work: creating jobs; guaranteeing rights at work; extending social protection and promoting social dialogue.<sup>412</sup> The extension of social protection is particularly identified by the ILO as key in poverty alleviation, inequality, care responsibilities and the promotion of social dialogue and tripartism.<sup>413</sup> Moreover "working through dedicated programmes and activities to protect such vulnerable groups as migrant workers and their families; and workers in the informal economy", is one of the DWA's aims for extension of social protection.<sup>414</sup>

It should be noted however, that the Decent Work Agenda (DWA) does not have the same status as a ratified Convention.<sup>415</sup> The DWA basically provides a framework for the implementation of universal labour and social protection goals.<sup>416</sup>

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[www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm](http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm) (accessed 25 August 2019).

<sup>409</sup> 'ILO Decent Work Agenda' available at <https://www.ilo.org/global/topics/decent-work/lang-en/index.htm> 9 (accessed 25 August 2019).

<sup>410</sup> Du Toit D & Huysamen E, Implementing domestic workers' labour rights in a framework of transformative constitutionalism in Du Toit D *Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights* (2013) 59.

<sup>411</sup> Du Toit D & Huysamen E, Implementing domestic workers' labour rights in a framework of transformative constitutionalism in Du Toit D *Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights* (2013) 74.

<sup>412</sup> 'ILO 'Decent Work Agenda'.

<sup>413</sup> ILO 'Decent work agenda'.

<sup>414</sup> Du Toit D & Huysamen E, Implementing domestic workers' labour rights in a framework of transformative constitutionalism in Du Toit D *Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights* (2013) 59.

<sup>415</sup> Rodgers G 'Labour market flexibility and decent work' (2007) *DESA Working Paper No. 47* 7.

<sup>416</sup> Rodgers G 'Labour market flexibility and decent work' (2007) 7.

The DWA may be credited for promoting alleviation of poverty, dignity of workers and advancing workers' rights, however it faces challenges when it comes to implementation.<sup>417</sup> Some governments support it, but they are reluctant to fully enforce it. This is primarily based on a school of thought that views strict labour standards as an impediment to job creation and economic growth.<sup>418</sup> Their argument is that flexible labour markets anchored on a combination of low labour standards and low labour costs, tend to attract Foreign Direct investment (FDI), which ultimately translates to job creation and economic growth.<sup>419</sup> This is a subject of much debate.<sup>420</sup> It is submitted however, that the delicate balance between quantity and quality when it comes to job creation is a challenging one, particularly for developing countries with runaway unemployment in the face of a competitive world economy.

#### 4.4 REGIONAL FRAMEWORK

##### 4.4.1 The African Charter on Human and Peoples' Rights (African Charter or Charter)

The African Charter on Human and Peoples' Rights (African Charter or Charter)<sup>421</sup> is a product of the former Organisation of African Unity (OAU) which was approved in 1981. It came into force in 1986.<sup>422</sup> South Africa acceded to the Charter on 9 July 1996. The Charter does not directly mention or guarantee the right to social security,<sup>423</sup> however; it indirectly refers to rights that are considered as specific exigencies of social security, as demonstrated by the articles that provide for, inter-alia, the right to enjoy the best attainable state of physical and mental health,<sup>424</sup> those that place obligations

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<sup>417</sup> Suttawet C & Bamber GJ 'International labour standards and decent work: a critical analysis of Thailand's experiences, with suggestions for theory, policy, practice and research' 2018 *Asia Pacific Journal of Human Resources*, 56(4) 539-565.

<sup>418</sup> Suttawet C & Bamber GJ 'International labour standards and decent work: a critical analysis of Thailand's experiences, with suggestions for theory, policy, practice and research' 2018 *Asia Pacific Journal of Human Resources*, 56(4) 539-565.

<sup>419</sup> Suttawet C & Bamber GJ 'International labour standards and decent work: a critical analysis of Thailand's experiences, with suggestions for theory, policy, practice and research' 2018 *Asia Pacific Journal of Human Resources*, 56(4) 539-565.

<sup>420</sup> The OECD Employment Outlook 2004 concludes, on the basis of extensive empirical work, that employment protection does not clearly lead to higher unemployment, although it was found to be associated with lower employment rates.

<sup>421</sup> 1981 OAU Doc CAB/LEG/67/3 (1990). (South Africa ratified the Convention on 7 January 2000).

<sup>422</sup> CA Odinkalu & C Christensen 'The African Commission on Human and Peoples' Rights: The development of its non-state communication procedure' (1998) 16 *Human Rights Quarterly* 235-280.

<sup>423</sup> Lindholt (1997) 217.

<sup>424</sup> Art 16.



to the state to protect the family's physical health and ensure that the sick receive medical attention.<sup>425</sup>

Every two years, parties to the Charter are obligated to submit reports on the level of compliance with the African Charter.<sup>426</sup> South Africa, however, seemingly struggles to comply with this obligation; this is evidenced by a pattern of inconsistency and long delays in submissions.<sup>427</sup> Moreover, the last report was submitted in 2015 and constituted a combination of five outstanding reports.<sup>428</sup> Basson, postulates that this may be a reflection of a lack of prioritisation of the rights contained in the Charter.<sup>429</sup>

## 4.5 SUB-REGIONAL FRAMEWORK

### 4.5.1 The Southern African Development Community Treaty and the SADC Charter of Fundamental Social Rights

The Southern African Development Community (SADC) Treaty<sup>430</sup> and the SADC Charter of Fundamental Social Rights<sup>431</sup> between them provide for the right to adequate social protection to all nationals within the region regardless of their academic qualifications or origin within SADC.<sup>432</sup>

The Southern African Development Community's (SADC) Code on Social Security supplements the provisions contained in the Charter of Fundamental Social Rights in SADC and the strategic direction outlined in the Regional Indicative Strategic

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<sup>425</sup> Art 133.

<sup>426</sup> Article 62 of the African Charter.

<sup>427</sup> African Commission on Human and Peoples' Rights 'State Reporting' <http://www.achpr.org/states/> (accessed on 11/06/2020).

<sup>428</sup> African Commission on Human and Peoples' Rights 'State Reporting' <http://www.achpr.org/states/> (accessed on 11/06/2020).

<sup>429</sup> Wiid, Y *The right to social security of persons with disabilities in South Africa* (Doctoral dissertation, University of the Western Cape, 2015) 167-168.

<sup>430</sup> SADC Treaty available at [https://www.sadc.int/files/9113/5292/9434/SADC\\_Treaty.pdf](https://www.sadc.int/files/9113/5292/9434/SADC_Treaty.pdf) (accessed 13 June 2019).

<sup>431</sup> See <http://www.lawschool.cornell.edu/womenandjustice/upload/SADC-Charter-of-Fundamental-Social-Rights-in-SADC.pdf> (accessed 13 June 2019).

<sup>432</sup> Fish JN 'Policies, protections and practices for migrant domestic workers in South Africa'. In D. Du Toit 2013. Exploited, Undervalued - And Essential: Domestic Workers And The Realisation Of Their Rights 235.



Development Plan (RISDP).<sup>433</sup> It was adopted by member states in 2008 and exclusively deals with social security. It aims to give SADC Member States, 'guidelines and strategic direction in the development and improvement of social security schemes', in order to boost the welfare of the citizens of the SADC region.<sup>434</sup> It covers a wide range of social security related issues such as social allowances, social insurance protection, social assistance and security for all genders, age groups, abilities and immigration status.<sup>435</sup> Article 4 of the Code provides that everyone in SADC has the right to social security and every Member State 'should establish and maintain a system of social security'.

#### 4.6 CONCLUSION

The above discussion has highlighted the significant role played by various international organisations in the development of labour and social security rights of workers. This is underscored by the role that International and regional standards play, as both a foundation on which member states build their domestic social security systems and as a benchmark by which those systems are measured. Most importantly, this chapter served to accentuate the important international law obligations that South Africa has, towards the protection and promotion of social security rights of vulnerable workers. Some of the responsibilities towards international law have been domesticated through the Constitution and confirmed through case law.<sup>436</sup> This may be viewed as a positive indication of the country's commitment to International law values in general and the extension of social security to vulnerable people in particular.

Despite the high ratification of the eight fundamental Conventions of the ILO by member states including South Africa,<sup>437</sup> a challenge still remains, to address the

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<sup>433</sup> SADC Code on Social Security available at <https://www.sadc.int/documentspublications/show/Code%20on%20Social%20Security%20in%20SADC> (accessed 13 July 2019).

<sup>434</sup> Social Protection Human Rights available at <https://socialprotection-humanrights.org/instru/ilo-social-protection-floors-recommendation-2012-no-202/> (accessed 13 July 2019).

<sup>435</sup> SADC Code on Social Security.

<sup>436</sup> *S v Makwanyane* 1995 3 SA 391 (CC).

<sup>437</sup> ILO 'Conventions and Recommendations' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (accessed 13 June 2019).

relatively low ratification rate of the many other important Conventions and Recommendations. There have been calls by some researchers to have ILO standards that deal with social security to be modernised and simplified in an effort to improve their ratification as most are found to be archaic, unnecessarily complex and detailed.<sup>438</sup>

The conflict between International Instruments dealing with migrant workers and domestic laws (migration and national security policies) is palpable, this is demonstrated by the reluctance of mainly destination countries to ratify them.<sup>439</sup> This only leaves informal immigrant workers exposed, not only to exploitation by employers but also to systemic abuse by governments. The next chapter aims to examine and draw lessons from the Chilean experience on its novel comprehensive security system



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<sup>438</sup> Dijkhoff, T 'International social security standards in the European Union' (2011) *Antwerpen: Intersertia* 7.

<sup>439</sup> See 4.2.3 above.

## CHAPTER FIVE

### COMPARATIVE STUDY

#### 5.1 INTRODUCTION

The previous chapters discussed South African social security policy and the relevant international instruments that protect and promote social security rights. The aim of this chapter is to consider social security systems available to workers in other jurisdictions. This chapter will give a comparative analysis of the Chilean social insurance system, looking specifically at Chilean Unemployment Insurance, Workman's compensation for Disease and Injuries and the Chilean Health Insurance coverage for workers.

The main motivator for choosing to consider Chile in this paper is simple in that the country has a similar socio-economic structure as South Africa, and has been previously used in comparative social security research. Besides sharing a common legacy of undemocratic regimes (i.e. apartheid in South Africa and dictatorship in Chile), both are developing countries confronted with social security challenges, such as the eradication of poverty and the inclusion of independent contractors and informal workers into their social security systems.<sup>440</sup>

#### 5.2 CHILEAN SOCIAL SECURITY SYSTEM

Like South Africa, Chile has over the last few years, invested in creating a comprehensive social security system, which has continuously strengthened itself, inter-alia, offering more protection for citizens against illness, disability, old age, unemployment, and poverty.<sup>441</sup> The key features of the Chilean Social security system are the use of individual mandatory savings accounts and private management as well as, a redistributive fund (Common Fund). According to Acevedo and Eskenazi et al, the Common Fund helps workers pool risks, by distributing resources from employed

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<sup>440</sup> See <https://www.social-protection.org/gimi/ShowCountryProfile.action?iso=CL> (accessed 1 September 2019).

<sup>441</sup> See <https://www.social-protection.org/gimi/ShowCountryProfile.action?iso=CL> (accessed 1 September 2019).

to unemployed workers and from stable firms to workers with low incomes and unstable jobs”.<sup>442</sup> This system also covers the hospitality industry workers. It is submitted that the Chilean approach to social security sets it apart as it pioneered a unique, innovative social security program that may be a model for many developing countries including South Africa.

### **5.2.1 Constitutional aspects**

The main source of Labour and social insurance policy in Chile is the 1980 Constitution of the republic of Chile (The Chilean Constitution); it is the foundation of all law. Article 19.8 of the Chilean Constitution guarantees the right to social security for all inhabitants. This is in contrast to the South African Constitution which merely provides for the right of access to social security.<sup>443</sup> Furthermore, the Chilean Constitution protects the freedom to contract, to work, collective bargaining, unionising and as well prohibits any form of unlawful; discrimination directed at workers.<sup>444</sup> The Chilean Constitution is supplemented by legislation which includes: Law 17 322 on social security payment; Law 16744 on Occupational accidents and diseases; Law 20 609 on Discrimination Prohibition; Law 19 728 on unemployment insurance and Supreme Decree 594 on health and environmental basic workplace conditions. Furthermore, Chile is a member of the ILO and has ratified numerous conventions since its inception in 1919.

### **5.2.2 Chilean Unemployment Insurance**

The Unemployment Insurance (UI) covers all private sector workers over 18 years old including temporary workers. It however excludes, the self-employed.<sup>445</sup> The UI is compulsory for all workers who fall under its ambit.<sup>446</sup>

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<sup>442</sup> Acevedo G, Eskenazi P et al (2006) ‘Unemployment insurance in Chile: A new model of income support for unemployed workers’ The World Bank SP Discussions Paper 0612 12-16. Available at <http://documents.worldbank.org/curated/en/262071468329399756/pdf/378040CL0Unemp1nce0SP0061201PUBLIC1.pdf> (accessed 1 September 2019).

<sup>443</sup> Section 27(1) (c) of the South African Constitution.

<sup>444</sup> Article 19.16 of the Chilean Constitution.

<sup>445</sup> Acevedo G, Eskenazi P et al (2006) ‘Unemployment insurance in Chile: A new model of income support for unemployed workers’ The World Bank SP Discussions Paper 0612 12-16.

<sup>446</sup> Acevedo G, Eskenazi P et al (2006) ‘Unemployment insurance in Chile: A new model of income support for unemployed workers’ The World Bank SP Discussions Paper 0612 12-16.

A tripartite system of funding finances the Chilean Unemployment Insurance, it constitutes, government, employers and the workers. Furthermore, its funding system is two-pronged: The first component is self-insurance by means of individual savings accounts that are funded through the contributions of the worker and employer, via a fixed percentage in the case of permanent contracts, and wholly by employers in the case of atypical or temporary workers. Contributions by each worker to the UI, constitute the worker's personal savings, which must be accessible only in the case of unemployment, termination of contract, retirement or any other event in which the worker leaves or loses her job.<sup>447</sup> It is submitted that this system effectively extends cover to informal workers – a feature that glaringly lacks in the South African system.

The other components of the program consist of a subsidy paid out of a Common Fund (Fondo" de" Cesantía" Solidario) financed through employers and by the government through fiscal contributions. This subsidy is meant to cover those unemployed workers who have insufficient funds reserved, due to their earnings and employment period.<sup>448</sup> The contributions by the three parties vary, and are dependent on whether workers are employed in temporary or permanent jobs.<sup>449</sup> Furthermore, temporary workers get a lump sum of their accumulated contributions whilst permanent employees access it over five-month period.<sup>450</sup>

### **5.2.3 Workmen's compensation in Chile**

The main Occupational Safety and Health law (OSH) is the Law No. 16744 National Act on Work-related Accidents and Professional Diseases, rules established by this Act are supplemented by the Labour Code, reformed in 2012.<sup>451</sup> Law No. 16744 provides for a compulsory and universal occupational social security insurance system to provide healthcare and financial compensations to workers who suffer a work-

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<sup>447</sup> See [http://conference.iza.org/conference\\_files/WoLabConf\\_2018/sehnbruch\\_k26305.pdf](http://conference.iza.org/conference_files/WoLabConf_2018/sehnbruch_k26305.pdf) (accessed 10 September 2019).

<sup>448</sup> Sehnbruch K & Carranza R 2015 'The Chilean System of Unemployment Insurance Savings Accounts,' Working Papers wp401, University of Chile, Department of Economics 6.

<sup>449</sup> Acevedo G, Eskenazi P, et al (2006) 'Unemployment insurance in Chile: A new model of income support for unemployed workers' The World Bank SP Discussions Paper 0612 12-16.

<sup>450</sup> Acevedo G, Eskenazi P et al (2006) 'Unemployment insurance in Chile: A new model of income support for unemployed workers' The World Bank SP Discussions Paper 0612 12-16.

<sup>451</sup> ILO, Occupational safety and health country profile: Chile available at [file:///C:/Users/3009325/Downloads/CountryRpt\\_CHL.pdf](file:///C:/Users/3009325/Downloads/CountryRpt_CHL.pdf) (accessed 10 September 2019).

related injury or who contract a professional disease. Article No 5 of Act 16744 defines “work related accident” as any injury that a person suffers caused by or in occasion of work, and that leads to disability or death.<sup>452</sup> The insurance covers all employees including self-employed workers and migrant workers.<sup>452</sup> It is interesting to note that compensation for loss of income, due to temporary disability, is virtually equal to the wages or salary earned while at work and it is accessible from the day of the accident. It covers both physical; and psychological conditions,<sup>453</sup> as opposed to the South African version that only covers mainly physical conditions. Moreover, the Act covers injuries sustained while commuting to work, such injuries are considered to be work related when they take place during commuting to and from the job.<sup>454</sup>

Despite a relatively broad coverage, Informal workers are not covered by the worker’s occupational safety insurance system. In 2013, the unprotected workforce was estimated at 28.7 percent of the total workforce.<sup>455</sup>

### 5.3 CONCLUSION

It is submitted that the Chilean social security model represents an innovative model for protection of vulnerable workers in general, and the hospitality industry workers in particular. The pillars that underpin the Chilean Social security system - the mandatory savings accounts, private management as well as, a redistributive fund, admittedly, provide a much more comprehensive and efficient social insurance coverage than the South African system. Furthermore, it proves to be a much more efficient system, especially in the context of financing and administration. Diamond P summarises his opinion on the Chilean social security system as follows:

The Chilean approach gets high marks for defending the system from political risk. The Chilean approach gets low marks for the provision of insurance and

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<sup>452</sup> Bachelet V C ‘Work-related injuries resulting in death in Chile: a cross-sectional study on 2014 and 2015 registries’ (2018) *BMJ open* 8(6) 2-3 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6009517/#R5> (accessed 10 September 2019).

<sup>453</sup> Código del Trabajo (última actualización 20.09.2014) (§ 3(b)) available at [https://isliedocs.com/philosophy-of-money.html?utm\\_source=countryrpt-chl](https://isliedocs.com/philosophy-of-money.html?utm_source=countryrpt-chl) (accessed 11 September 2019).

<sup>454</sup> Bachelet V C ‘Work-related injuries resulting in death in Chile: a cross-sectional study on 2014 and 2015 registries’ (2018) 2-3.

<sup>455</sup> Bachelet V C ‘Work-related injuries resulting in death in Chile: a cross-sectional study on 2014 and 2015 registries’ (2018) 2-3.



for administrative cost. As implemented in Chile, the approach gets high marks for its effects on capital accumulation...<sup>456</sup>

The Chilean social security system is admittedly not perfect, however it presents a novel approach that may be of benefit in the extension of social security to the informal hospitality industry workers in South Africa.



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<sup>456</sup> Diamond P *Privatization of social security: Lessons from Chile* (No. w4510). National Bureau of Economic Research (1993) 3.

## CHAPTER SIX

### CONCLUSIONS AND RECOMMENDATIONS

#### 6.1 CONCLUSION

This is the final chapter of this research paper. It draws conclusions regarding the vulnerability of informal hospitality industry workers in South Africa and the obstacles that they face, notably their exclusion from the coverage provided by social security schemes. It further provides some recommendations for the improvement of the social security system.

The primary aim of this paper was to address the research question which is, whether social security should be extended to the informal hospitality industry workers?<sup>457</sup> As a point of departure, the South African constitutional framework for social security rights, as well as the legislative provisions that seek to protect workers in the hospitality industry were discussed. These were found to be critical fundamental interventions, particularly, the constitutional guarantee of the right of access to social security.<sup>458</sup> However gaps in legislation still remain, which result in inadequate cover or total exclusion by social security schemes. This was mainly attributed to the fact that most social insurance schemes link the concept of *contributor* to that of *employee*, which often tends to limit protection to traditional or typical formal sector workers.<sup>459</sup>

Chapter 3 drew attention to the general harsh socio-economic conditions and chronic poverty that many workers are subjected to, particularly those who are informal workers in the hospitality industry. It was found that despite it being one of the largest industries in the world, the hospitality industry often relied on vulnerable groups of workers such as women and immigrants.<sup>460</sup> These groups were identified as having a higher incidence of chronic poverty and owing to this vulnerability, they were often

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<sup>457</sup> See 1.3 above.

<sup>458</sup> See Chapter 2 above.

<sup>459</sup> See 3.3 above.

<sup>460</sup> See Chapter 2 above.

exposed to precarious, low-pay work under poor working conditions, without social security protection.<sup>461</sup>

This paper further provided an overview of the international, regional and sub-regional legal framework in chapter four. The discussion of these instruments served to underscore the important duties and obligations that the South African state has in the promotion of social security rights in terms of ratified instruments.<sup>462</sup> It was however noted that some of the relevant instruments were still to be ratified.

In chapter five, Chile was used as a comparative study. It was partly chosen because of its common socio-economic challenges with South Africa, including an increasing informal workforce and huge influx of regional migrant workers. Chile was found to have an efficient and novel social security system that provided a much more comprehensive cover. The important lessons drawn from this study have been accordingly incorporated into the recommendations for a much more comprehensive social security system that is able to protect informal workers in the hospitality industry.

## **6.2 RECOMMENDATION**

While South Africa's social insurance system is able to provide extensive coverage to workers and, to an extent, comply with international labour and social security standards, much still needs to be done to also cover vulnerable groups within the hospitality industry. Mpedi and Nyenti propose that South Africa extend their statutory definition of 'employee' or 'worker' so as to include categories of employees that are currently not covered by their schemes.<sup>463</sup>

It is submitted that the South African social security legislation is rigid and focused on protection of mainly typical employees.<sup>464</sup> It is suggested that flexible social security schemes such as those in Chile, which allow informal and atypical workers to contribute together with formal employees, will spread social security coverage to the

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<sup>461</sup> See 2.5 and 2.6 above.

<sup>462</sup> See Chapter 4 above.

<sup>463</sup> Mpedi LG & Nyenti MAT 'Employment Injury Protection in Eastern and Southern African Countries' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 85.

<sup>464</sup> See chapter 2.

growing body of informal workers, especially in the hospitality industry.<sup>465</sup> It is further suggested that, like Chile, South Africa extend cover for occupational injuries to workers injured in transit to and from work.

Informal migrant workers are not adequately covered by South African labour and social security legislation, especially when they do not have proper documentation.<sup>466</sup> Moreover, the immigration legislation seems to clash with both. It was found that this leaves migrant workers in a more vulnerable position than other workers. It is therefore recommended that co-ordination of social security, labour legislation and Immigration legislation will provide policy certainty. Designing of portable, regional cross border social security systems, will allow migrant workers to freely move between countries without the risk of losing their social insurance. Mpedi suggests a creation of a regional instrument for social security coordination.<sup>467</sup>

It is further recommended that government introduces stricter labour law enforcement and punitive measures in the form of regular workplace inspections and hefty fines in the hospitality sector. This will help reduce the exploitation of atypical workers and also curb the illegal employment of migrant workers, which despite being illegal, often stirs xenophobic sentiments among workers.

It has been noted that women form the bulk of vulnerable informal workers especially in the hospitality industry, and hence are often victims of the poverty trap, gender wage gap, motherhood wage gap and prone to sexual abuse at work, but are not covered by adequate social security.<sup>468</sup> It is suggested that women-friendly social security legislation that addresses the particular vulnerabilities that affect women, will be able to address women's complex intersection of identities, which are largely overlooked in policy creation.

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<sup>465</sup> See 4.4.5.

<sup>466</sup> See 4.3 and 4.4.

<sup>467</sup> Mpedi LG 'Harmonising social security systems within the Southern African Development Community' (2009) 4 TSAR 697. <sup>468</sup> See 2.5,

The NMWA plays a critical role in addressing working poverty, it is however recommended that it be significantly increased in light of the prevailing harsh economic climate. This ultimately reinforces the inevitable need for government to fulfil its mandate of job creation, economic growth and providing a conducive environment for such.



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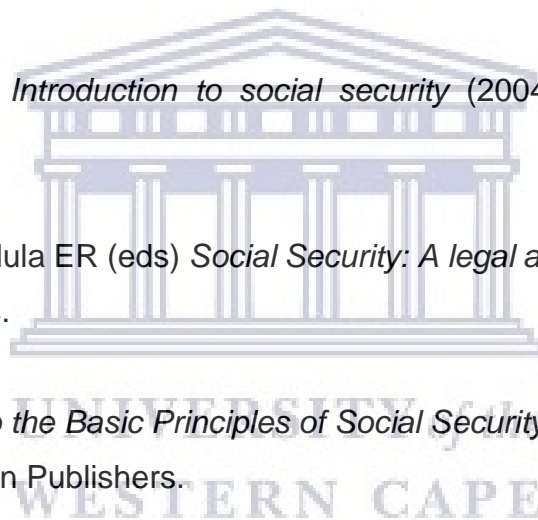
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