A LEGAL ANALYSIS OF THE SOCIAL PROTECTION FOR WORKERS ENGAGED IN ATYPICAL FORMS OF EMPLOYMENT IN SOUTH AFRICA

DOCTOR OF LAWS

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A legal analysis of the social protection for workers engaged in atypical forms of employment in South Africa

by

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DECLARATION BY STUDENT

I declare that the thesis hereby submitted to the University of Limpopo, for the degree of Doctor of Laws in Labour Law has not previously been submitted by me for a degree at this or any other university; that this is my work in design and in execution, and that all material contained herein has been duly acknowledged.

Mpho Sekokotla Date: 09 April 2024

Signed: 

DEDICATIONS

This thesis is dedicated to my boys, Kutshemba and Ntikelo Mhlongo and my dear husband, Ntiyiso Mhlongo who has been a supportive partner since the day I registered for this Doctorate. I appreciate all the contributions that he made to my academic journey and my life as a whole.

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I am so proud of this achievement. I know they are also very proud of me.

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It was not easy, but I made it!

ABBREVIATIONS AND ACRONYMS

RSA	REPUBLIC OF SOUTH AFRICA
AA	ASSOCIATION AGREEMENT
BCEA	BASIC CONDITIONS OF EMPLOYMENT ACT
BCEAA	BASIC CONDITIONS OF EMPLOYMENT AMENDMENT ACT
CEDAW	CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN
CJRS	CORONAVIRUS JOB RETENTION SCHEME
COIDA	COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT
COSATU	CONGRESS OF SOUTH AFRICAN TRADE UNIONS
COVID-19	CORONAVIRUS DISEASE
DSD	DEPARTMENT OF SOCIAL DEVELOPMENT
EBF	EXCLUSIVE BREASTFEEDING
ECF	EMPLOYEES COMPENSATION FUND
ECJ	EUROPEAN COURT OF JUSTICE
EEA	EMPLOYMENT EQUITY ACT
ESA	EMPLOYMENT SERVICES ACT
EU	EUROPEAN UNION

GDP	GROSS DOMESTIC PRODUCT
HRD	HUMAN RESOURCE DEVELOPMENT
ICESCR	INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
ILO	INTERNATIONAL LABOUR ORGANISATION
IMF	INTERNATIONAL MONETARY FUND
LAC	LABOUR APPEAL COURT
LC	LABOUR COURT
LIFO	LAST IN FIRST OUT
LMIC	LOW MIDDLE-INCOME COUNTRIES
LRA	LABOUR RELATIONS ACT
LRAA	LABOUR RELATIONS AMENDMENT ACT
LRS	LABORATORY RESEARCH SERVICES
MSD	MATERNITY, SICK LEAVE AND DEATH BENEFIT
NACTU	NATIONAL COUNCIL OF TRADE UNIONS
NDP	NATIONAL DEVELOPMENT PLAN
NEDLAC	NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL
NUMSA	NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA

OECD	ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT
OHSA	THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION
OSH	OCCUPATIONAL SAFETY AND HEALTH
RCTIFE	RECOMMENDATION CONCERNING THE TRANSITION FROM THE INFORMAL TO FORMAL ECONOMY
SABC	SOUTH AFRICAN BROADCASTING CORPORATION
SADC	SOUTHERN AFRICAN DEVELOPMENT COMMUNITY
SADCC	SOUTHERN AFRICAN DEVELOPMENT COORDINATION CONFERENCE
SALRC	SOUTH AFRICAN LAW REFORM COUNCIL
SASSA	SOUTH AFRICAN SOCIAL SECURITY AGENCY
SDA	SKILLS DEVELOPMENT AGENCY
SDG	SUSTAINABLE DEVELOPMENT GOALS
SER	STANDARD EMPLOYMENT RELATIONSHIP
SEWA	SELF-EMPLOYED WOMEN'S ASSOCIATION
SLA	SERVICE LEVEL AGREEMENT
TER	TEMPORARY EMPLOYMENT RELATIONSHIP

TES	TEMPORARY EMPLOYMENT SERVICE
TREC	TURFLOOP RESEARCH ETHICS COMMITTEE
UDHR	UNIVERSAL DECLARATION OF HUMAN RIGHTS
UIA	UNEMPLOYMENT INSURANCE AGENCY
UIF	UNEMPLOYMENT INSURANCE FUND
UK	UNITED KINGDOM
UN	UNITED NATIONS

ABSTRACT

The rapid growth in atypical employment across the globe brought both negative and positive impact to the labour market. For South Africa, in terms of curbing the ever-growing unemployment rate, it created problems for persons engaged in non-standard forms of employment as the labour legislation did not evolve when the labour market evolved. This failure to evolve included insufficient labour protection afforded to the atypical workers while stronger protection mechanisms were put in place for workers in standard employment. This study analyses the challenges that atypical employees are subjected to, and these can be seen through their lack of access to social protection which includes *inter alia,* access to benefits such as social security and employment incentives that are enjoyed by employees in permanent employment. A critique is made of the various mechanisms which the state has attempted to make in redressing the challenge followed by a comparative study between South Africa, the Netherlands, and the United Kingdom from which a few lessons can be drawn for South Africa to improve the working conditions of atypical workers. The study further draws on the existing international and regional labour standards coupled with the South African Constitution of 1996, as well as the national experience to make policy recommendations that will ensure the legal protection of these categories of workers. It is submitted that social justice and the democratisation of the workplace will remain a pipe dream if workers in non-standard employment continue to be excluded from the coverage of labour protection.

Keywords: Atypical employment, labour protection, social security, job security, income security, decent work, maternity protection

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CHAPTER ONE: INTRODUCTION AND BACKGROUND OF THE STUDY

1.1. Introduction

The study commences with a hypothetical case which depicts the precarious position that non-standard workers experience in their daily lives as they try to make ends meet in the labour market. Kgopotso[1] is a 29-year-old woman who was recently employed by the University of Mongalo[2] on the 1st of January 2021. She has been appointed as a temporary junior lecturer and should commence with her duties on the 1st of February 2021. It turns out that she is pregnant. Upon the discovery, she approaches the Human Resources office to inquire about the options which she has in this regard, as a member of staff at the University. She is then told that she has not been appointed as a full-time employee, but as an independent contractor and as a result thereof, she is not entitled to any maternity benefits afforded to other women who are employed permanently. She also learns that she has not accumulated enough leave days, therefore she may not even have an option to opt for annual leave instead.

She is also advised that she can only seek leave for a month after her child is delivered after which she would have to report for work. Furthermore, she cannot get medical aid for herself and her child. The University has a leave encashment practice for employees, but she does not qualify for the pay-out because she is not an employee. Kgopotso is now sitting with a problem, and she has no protection as the existing labour laws expressly exclude independent contractors from protection.

In light of the above, and since the advent of democracy, South African labour laws have taken a major shift as a result of transformative constitutionalism.[3] Consequently, the paramount challenge facing modern-day South African society and its transformative constitutionalism is that of securing greater levels of equality, socio-

[1] Fictitious character.
[2] Fictitious University.
[3] Hailbronner, M 'Transformative Constitutionalism: Not only in the Global South' (2017) 65 (3) *The American Journal of Comparative Law* 527–565; Albertyn, C 'Substantive equality and transformation in South Africa' (2007) 23 *South African Journal of Human Rights* 253-276.

economic and decent work amongst atypical workers. Approximately 29 years subsequent to the end of the apartheid system of racial injustices, the majority of workers in atypical employment remain excluded from the social protection framework afforded by both the social security system and labour laws[4] as espoused in the Constitution.[5]

Amongst other challenges encountered by workers in non-standard employment, the study addresses the central issue that currently, in South Africa, only workers who are recognised as 'employees' by South Africa's labour law framework qualify for social security benefits such as social insurance.[6] It points out that, consequently, the workers who are engaged in self-employment and atypical work do not have access to maternity benefits in the form of maternity leave (paid or unpaid).[7] Due to this predicament, they find themselves in financial hardship, especially for those who are in informal employment.[8]

At this stage, the study hypothesises that this exclusion constitutes a violation of core constitutional rights such as the right to dignity, health, life, equality, social security, children's rights as well as the responsibility that the state has to ensure that there is a progressive realisation of constitutional rights. It is submitted that the state's difference in treatment towards self-employed workers, and the subsequent impact on their constitutional rights to equality and dignity result in unfair discrimination, which would not be permitted in terms of the limitations clause.[9]

The thesis features a comparative study which examines the best practice in countries such as the Netherlands and the United Kingdom with the idea of investigating similar socio-economic status to South Africa to find lessons on the extension of maternity

[4] See for example, the Labour Relations Act 66 of 1995 (as amended); the Basic Conditions of Employment Act 77 of 1997 (as amended); the Employment Equity Act 55 of 1998 (as amended); and the Occupational Health and Safety Act 85 of 1995 (as amended); and the Mine Health and Safety Act 29 of 1996 (as amended).
[5] Constitution of the Republic of South Africa, 1996.
[6] Hicks, J. L. "Extension of social security benefits to women in the informal economy: a case for maternity protection" Doctoral Thesis submitted in fulfilment of a Doctoral Degree in Philosophy at the University of Kwazulu-Natal, 2021 3.
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*

benefits to self-employed workers through 'affordable, administratively efficient mechanisms that give effect to key components of International Labour Organisation Maternity Protection Convention 183.[10] The rationale for opting to compare South Africa with the UK and the Netherlands specifically is that the Netherlands ratified the Maternity Protection Convention of 2000 on the 15th of August 2009 already.[11] This sparked interest and prompted the study to investigate how the ratification has since benefited the country's jurisprudence. The UK on the other hand, is in a similar situation as South Africa in terms of ratification. They still have not ratified the Maternity Protection Convention of 2000, but they have enacted legislation directly intended to protect non-standard workers such as the Equal Pay Act[12] and the Contracts of Employment Act.[13] These are explained further in detail in Chapter 8 below.

In addition to the comparative study of the Netherlands and the United Kingdom, the study also features a glimpse into the systems of jurisdictions such as with other jurisdictions such as New Zealand, Namibia and USA.

The study creates implementation and practical design considerations that call on the state to ensure that persons engaged in self-employment, particularly participating in the informal economy, have access maternity benefits, making recommendations for the South African Law Reform Commission (SALRC) process currently underway. In 2019/2020 the Commission for Gender Equality submitted a proposal to the SALRC requesting the inclusion of female workers in informal employment to be included in maternity legislation.[14] On the 25th February 2020, the Advisory Committee met at the Commission for Gender Equality Offices in Durban to discuss matters over a draft legal framework document that was tabled.[15] At the meeting that the legal framework document would have to be converted into a draft discussion paper so that further research could be conducted to inform the discussion paper. It was agreed that a draft

[10] Hicks, J. L. "Extension of social security benefits to women in the informal economy: a case for maternity protection", Doctoral Thesis submitted in fulfilment of a Doctoral Degree in Philosophy at the University of Kwazulu-Natal, 2021 3.
[11] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::p11300_instrument_id:312328. Accessed on 29th February 2024.
[12] Equal Pay Act of 1970.
[13] Contracts of Employment Act of 1963.
[14] SALRC Annual Report 2029-2020. Accessed at https://static.pmg.org.za/SALRC_Annual_Report_-_2019-2020.pdf on 29th February 2024.
[15] *Ibid.*

discussion paper should be ready for consultation with experts in June 2020.[16] In a report issued in September 2022, the SALRC made eleven recommendations which were grouped into three categories.[17] The categories were as follows:

- Recommendations 1–7 deal with expanding access to the Unemployment Insurance Fund's maternal and parental benefits to self-employed workers.
- Recommendations 8–10 deal with extending the child support grant to eligible pregnant women and children from birth.
- Recommendation 11 deals with extending access to ECD services near to informal workplaces.

Since this meeting and the proposals in terms of Project 143 which was released in September 2023, the SARLC has not convened to draft a report on the update on improving the livelihood of the women engaged in informal employment. For the purposes of this study, the phrases atypical employment, non-standard employment and informal employment is used interchangeably.

Quite recently, South Africa has witnessed the mushrooming of atypical forms of employment as a major form of employment in many sectors of the economy. Be that as it may, the informal forms of employment relations exist alongside the formal employment relationship. As a result, this has brought far-reaching consequences, which are both positive and negative. For example, there is a greater representation of women in informal and temporary employment than there is in the permanent employment setting.[18] This situation, however, varies from country to country.[19] In Japan, most temporary jobs are offered to women and in Brazil and South Africa, the rate of women in temporary employment is higher than that of men.[20]

South Africa compared to other countries, features a greater detriment which non-employees are faced with on a daily basis. These challenges include unequal treatment for similar work done by a permanent employee.[21] Other rights which the

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[16] *Ibid.*

[17] **Project 143**: Report on Investigation into **maternity and parental benefits for self-employed workers**, 09 Dec 2022 [Released 13 Sep 2023. Accessed at https://www.justice.gov.za/salrc/reports/Report-Project143-MaternityParentalBenefits-SelfEmployedWorkers-FinalReport-2022.pdf on 29th February 2024.

[18] Casey, C & Alach, P 'Just a Temp?: Women, Temporary Employment and Lifestyle' (2004) 18 (3) *Work Employment & Society* (*Work Employ Society*) 459-480.

[19] *Ibid.*

[20] *Ibid.*

[21] Mcaciso Z, "Did the Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 do away with the TES practice in South Africa?", an unpublished LLM thesis from the University of Cape Town 2020 1

problem with atypical employment outlines include the idea that because independent contractors are not governed by any act in the execution of their duties, they do not enjoy the right to annual leave[22] and maternity leave[23] together with sick leave[24] and family responsibility leave.[25] They are not entitled to payments on termination of contract benefits, such as pension funds,[26] medical aid, car and house allowances. They cannot approach the *Commission for Conciliation, Mediation and Arbitration* (CCMA)[27] on grounds of unfair dismissal as stated in the Labour Relations Act[28] (hereinafter referred to as the LRA), where they take the institution they work for due to the fact that they are not their employees. They may, however, approach the CCMA in instances where they have disputes with the labour broker in instances of a triangular relationship.[29]

In summary, the scope of the study deals with the problems which are found under the various forms of atypical employment. The study deals with the rights which employees have access to in contrast to atypical workers. Furthermore, the study examines the problem that arises when atypical workers are left vulnerable, without rights to enforce or lack a solid ground to enforce those rights which are afforded in the LRA. The study also looks at how some of the aspects of South African law such as the need to amend the statutory definitions of 'employee' and the inclusion of non-standard workers in the scope of maternity protection which have been criticised by various authors can be a breakthrough for atypical workers.

Studies by authors such as Schoukens[30]and Hicks[31] have found that the type of work arrangement known as non-standard forms of employment (hereinafter referred to as non-standard employment) has rapidly developed into a contemporary and

[22] As stated in section 20 of the Basic Conditions of Employment Act 75 of 1997 (BCEA).
[23] As stated in section 25 of the BCEA.
[24] As stated in section 22 of the BCEA.
[25] As stated in section 27 of the BCEA.
[26] Pension Funds Act 24 of 1956.
[27] Commission for Conciliation, Mediation and Arbitration.
[28] Labour Relations Act 66 of 1995.
[29] Madala Z "non-standard workers cannot approach the CCMA", an unpublished LLM dissertation submitted at the University of Venda, 2022 76.
[30] Schoukens, P 'Digitalisation and social security in the EU: The case of platform work: from work protection to income protection?' (2020) 22(4) *European Journal of Social Security* 437.
[31] Hicks, J. L. "Extension of social security benefits to women in the informal economy: a case for maternity protection", Doctoral Thesis submitted in fulfilment of a Doctoral Degree in Philosophy at the University of Kwazulu-Natal, 2021 3.

fashionable ‘feature of labour markets’ around the world.[32] The overall importance of non-standard employment has augmented over the past few years in the developing world as its usage has become more extensive across economic occupations and sectors occupations.[33]

However, the use of non-standard work arrangement does not favour the workers it is meant to favour. This is because of the little protection that atypical workers have against any form of abuse, major ill-treatment from their employers due to the characteristics of their employment contracts.

In February 2015, the International Labour Organisation (ILO) had a Multilateral ‘Meeting of Experts’ on the issue of non-standard forms of employment that grouped experts that were selected after consulting with the Employer’s group, the Worker’s group and the respective governments, to discuss the challenges for the agenda on decent work that forms of employment that fall within the ambits of non-standard employment can produce.[34] According to the outcomes from the meeting called on member States, the employers’ and workers’ organisations were to develop policy solutions designed to address the discrepancies linked to non-standard forms of employment and related to decent work so that all workers, regardless of their work contract, could benefit from decent work agenda of the ILO.[35]

At the 2015 Multilateral Meeting of Experts, Governments and social partners were specifically requested to work together in implementing measures to address issues related to promoting equality and non-discrimination, inadequate working conditions and supporting an effective labour market, ensure proper social security cover for all workers, ensure freedom of association and promote safe and healthy places of work.[36]

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[32] Non-Standard Employment Around the World, “Understanding challenges, shaping prospects” International Labour Organisation (2016). Accessed at https://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm.

[33] *Ibid.*

[34] *Ibid.*

[35] Non-Standard Employment Around the World, “Understanding challenges, shaping prospects” International Labour Organisation (2016). Accessed at https://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm.

[36] *Ibid.*

The non-standard employment arrangement comprises four different employment arrangements that do not conform to the 'standard employment relationship' that is understood as work that is full-time, secure, indefinite, and contains elements of a subordinate relationship between an employee and an employer.[37] For some people, working under non-standard employment is a clear choice that bears positive outcomes. Nevertheless, for most workers, working under a non-standard employment is connected to insecurity.[38] Working under a non-standard employment can also be challenging for institutions and companies, economy as well as the overall performance of labour markets.

In 2015, the key trends in non-standard employment were as follows:

> In over 150 countries, the average use of temporary employees in registered private sector firms are 11 per cent, with about one-third of countries around this mean. There are wide divergences in the use of temporary employment, however, ranging from under 5 per cent in Jordan, Latvia, Norway and Sierra Leone to over 25 per cent in Mongolia, Peru and Spain. There are also considerable divergences in its use by firms: more than half of enterprises do not use temporary labour, whereas around 7 per cent use it intensively (more than half of their workforce is on temporary contracts). While women make up less than 40 per cent of total wage employment, they represent 57 per cent of part-time employees. Many women work part time as it allows them to combine paid work with domestic and care responsibilities. In countries such as Argentina, Germany, India, Japan, the Netherlands, Niger and Switzerland, there is more than a 25-percentage point difference in women's participation as part-time employees when compared to men.[39]

Various challenges with working under non-standard employment include issues such as the lack of security and protection that is afforded to the workers, social security protection only accessible to workers who are regarded as employees according to the labour legislation. It also tends to create problems in more ways that go beyond issues with job security. According to the ILO,[40] the following problems tend to be created by non-standardised employment.

First, employment security. When coming to the issues of employment security, workers under non-standard employment normally have very little job security. Some of these workers are employed seasonally, casually and some even work on a fixed-

[37] *Ibid.*
[38] *Ibid.*
[39] Non-Standard Employment Around the World, "Understanding challenges, shaping prospects" International Labour Organisation (2016) xxii. Accessed at https://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm.
[40] *Ibid.*

term contract wherein the work ends when the employment contract is terminated. In South Africa, the labour laws that protect employees against unjust dismissals does not extend to contract workers as their jobs end when their contracts end.[41]

Second, earnings. Workers employed under non-standard employment normally do not earn as much as the employees in permanent and standard employment who do the same work or even less. An employee could be doing half the job that the contractors are tasked to do for more money. This could be associated with issues such as the revenue which they yield for the institutions they work for, amongst others.[42]

Third, hours of work. Workers who only work 'on-call' and casual arrangements normally have limited control over when they work, which affects their work–life balance, income security, given that pay is uncertain. The ever-changing work schedules make it difficult to take on more jobs as income subsidy.[43]

Fourth, Occupational Safety and Health (OSH): The injury rates among workers in non-standard employment are generally higher than those by workers in standard employment due to a combination of lack of training and supervision, poor induction, communication breakdown caused by having too many parties involved in the employment arrangement as well as very little legal obligations.[44]

Fifth, social security: Workers in non-standard employment are at times excluded from social security coverage, by law. Even in seldom arrangements where they are covered, lack of continuity in employment coupled with short working hours may result in inadequate coverage or limited benefits during the term of work and even during retirement.[45]

Sixth, training: most institutions and companies do not offer on the job training for workers in non-standard contracts. This is because the companies feel they are not

[41] *Ibid.*
[42] Non-Standard Employment Around the World, "Understanding challenges, shaping prospects" International Labour Organisation (2016) xxii. Accessed at https://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm.
[43] *Ibid.*
[44] *Ibid.*
[45] *Ibid.*

investing in the workers as he or she may decide to take on employment elsewhere. Whereas when coming to offering training to permanent employees, it is regarded as an investment because chances of these workers using the skills, they acquire from the training to improve the financial status of that particular institutions are higher when one is permanently employed.[46]

Seventh, representation and other fundamental rights at work. For representation and other fundamental rights in the workplace, the ILO[47] submits that:

> Workers in non-standard employment may lack access to freedom of association and collective bargaining rights either for legal reasons or because of their more tenuous attachment to the workplace. They may also face other violations of their fundamental rights at work, including discrimination and forced labour. [48]

Eighth, labour markets and society: unfortunately, for workers in non-standard employment, it becomes very difficult for them to secure access to credit and housing, purchasing cars on credit as well as other available lending sources that one may deem a necessity for the daily running of one's life. So, the widespread use of non-standard employment may tend to support labour market division and lead to great financial instability in employment with consequences for economic constancy.

The injustices and imbalances created by working in a non-standard arrangement tends to hit women who are in their childbearing ages the most. This is because, for every child that the woman gives birth to, she is likely to take on very short maternity leave or otherwise settle for unpaid extension of what the company offers her.

Schoukens has observed that, traditionally and in 'labour-related social security schemes', the pattern followed is that of accommodating for the default case of a standard worker.[49] Fundamentally, standard work is commonly viewed as 'subordinated, full-time work of an indefinite duration'.[50] It may be defined as the 'stable, open-ended and direct arrangement between dependent, full-time employees

[46] Non-Standard Employment Around the World, "Understanding challenges, shaping prospects" International Labour Organisation (2016) xxii. Accessed at https://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm.
[47] *Ibid.*
[48] *Ibid.*
[49] Schoukens, P 'Digitalisation and social security in the EU: The case of platform work: From work protection to income protection?' (2020) 22(4) *European Journal of Social Security* 437.
[50] *Ibid.*

and their unitary employer.'[51] The 'standard' that is used by Eurostat and the ILO refers both to the regulatory model, which forms 'the basis for the regulation of the labour market, and to the model that is regarded as the 'standard' in all current employment relationships and that consequently automatically classifies different employment relationships as 'atypical'.'[52]

One of the motives behind the elevated occurrence of women who are engaged in the Temporary Employment Relationship (hereinafter 'the TER') is found in the developments that are aimed at liberating the usage of fixed-term contracts that were undertaken by some countries to enhance women's roles in the labour market.[53] Other authors opt to describe the workers in TER as working in Temporary Employment Services (TES). For the purposes of this study, these acronyms are used interchangeably.

Mcaciso[54] describes the TES as a practice that:

> …involves a triangular relationship where the TES places workers/employees with a client to provide labour for the benefit of the client. Over the years, there has been an outcry from organised labour for the ban of the TES practice on the basis that it encouraged the exploitation of workers and undermined job security. Other issues associated with the practice were low wages and inferior conditions of service of the placed workers compared to employees employed by the client doing same or similar work.[55]

1.2. TES relationship explained

Labour brokering, which is also known as TES, is a practice wherein three parties are involved in an employment arrangement. The TES is responsible for the recruitment and placing of workers with a particular company that becomes the client of the TES

[51] *Ibid.*
[52] *Ibid.*
[53] *Ibid.*
[54] Mcaciso Z, "Did the Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 do away with the TES practice in South Africa?", an unpublished LLM thesis from the University of Cape Town 2020 iii.
[55] *Ibid.*

to perform work in favour of the client.[56] In return for the provision of these workers, the TES is paid by the client. This then creates a triangular working relationship.[57]

In this triangular relationship:

> A relationship between the TES and its client is formed, and this relationship is generally regulated by a service level agreement (SLA). Another relationship is between the TES and the placed workers. A third relationship exists between the placed workers and the client. In this triangular arrangement, our law has for several years only recognised the relationship between the TES and the placed workers, as well as the relationship between the TES and its client. The third relationship between the client and the placed workers was not recognised, nor was it regulated, even though the existence of such a relationship was clear in the parties' interactions with each other.

Because of the lack of recognition in this relationship created between the client and the placed workers, a loophole was created in the legal system for clients and the TESs to treat the placed workers with unfairness and place them in unfair working conditions.[58] For example, workers placed with the client receive wages that are significantly lesser than those received by the employees of the client who are responsible for the same or similarly related work.[59]

The challenges connected with this triangular arrangement as illustrated above have caused reluctance from the employee organisations, 'particularly from the Confederation of South African Trade Unions (COSATU) and the National Council of Trade Unions (NACTU) who called for the total and complete ban of this practice in South African law.'[60] COSATU highlighted that:

> This practice is akin to the system of labour under the period of slavery as it perpetuates the exploitation of the vulnerable workforce, but on a broader scale, the exploitation of black people in South Africa as the vulnerable and powerless class.[61]

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[56] Mcaciso Z, "Did the Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 do away with the TES practice in South Africa?", an unpublished LLM thesis from the University of Cape Town 2020 1.
[57] Tshoose, C and Tsweledi, B 'A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa' (2014) 18 *Law Democracy and Development Journal* 336.
[58] Mcaciso Z, "Did the Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 do away with the TES practice in South Africa?", an unpublished LLM thesis from the University of Cape Town 2020 1.
[59] *Ibid.*
[60] *Ibid.*
[61] *Ibid.*

The traditional position of women in different civilisations and their responsibility to provide care may, in turn, challenge their power to bargain which will, in turn, make them appear to be more likely to accept jobs with little or no stability.[62] There is an existing perception that women are only partial contributors to household income. This perception tends to justify why women are offered lower remuneration.[63] The various employment systems which currently exist include, *inter alia*, the standard form of employment which is based on the Standard Employment Relationship (hereinafter 'the SER'). This type of employment is identified by a full-time employment service where there is only one employer with a contract of employment that is indefinite.

On the one hand, it is characterised by being subjected to the prescribed retirement age of a particular jurisdiction. On the other hand, TER is characterised by the substitution of a standard contract of employment with a contract between a company and a contractor. This form of employment is known as non-standard employment or atypical work. It forms part of atypical employment. Other forms of atypical employment include independent contractors, casual workers, seasonal workers, workers under the TER, workers under non-standard employment and contract workers. For the purposes of this study, all these categories of atypical employment are used interchangeably in the discussion on atypical forms of employment.

Atypical work is explained as a type of employment relationship that does not adopt the standard model of typical or full-time work.[64] The typical form of employment is the opposite of the atypical model of work.[65] It is where the employment model is on a full-time basis, which is secure with working hours that guarantee a regular income and provides social security systems directed at wage earners, providing for pension payments, leave, and other incentives as well as protection against unemployment and ill-health.[66]

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[62] International Labour Organisation (hereafter "the ILO) "Women in Non-standard Employment" INWORK Issue Brief No.9 accessed at http://ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_556160.pdf on 17 January 2020).

[63] ILO 2016b. Women at Work: Trends 2016. ILO: Geneva.

[64] Accessed at https://mpra.ub.uni-muenchen.de/39456/2/MPRA_paper_39456.pdf (date of use 06 January 2020).

[65] *Ibid.*

[66] Accessed at http: www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/ATYPICALWORK.html (date of use 06 January 2020).

According to Ngwenya:[67]

> 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.

The common terms used to describe these new workers are 'Atypical', 'non-standard', or even 'marginal' and often refer to those wo are participants in contract work, self-employment, fixed term, part-time work, piece rate work, self-employment, temporary, seasonal, casual, or even to employees who are provided by employment agencies, home workers and those employed in the informal economy.[68] Most of the time, these kinds of workers get remunerated for results and not for their time.

According to Fourie: 'their vulnerability is linked in many instances to the absence of an employment relationship or the existence of a flimsy one.'[69] This means that when a worker lacks legal backing, employers tend to take advantage of this lack and subject these workers to severe exploitation because even if they wish to seek protection, failure is inevitable. In most cases, these workers are not fully skilled, or they work in sectors with limited collective bargaining coverage resulting in them being left vulnerable to exploitation.[70] In theory, these workers should have the protection of the existing South African labour laws but in reality, the enforcement of their rights is challenging.[71]

Even though the total of workers engaged in the TER has increased considerably over the last 20 years, it is still regarded as an atypical form of employment according to legal guidelines.[72] The discussion was premised on the comparison between the typical and atypical forms of employment, which has resulted in the collapse of the SER and the introduction of new forms of work involving independent contractors,

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[67] Ngwenya, M "Extension of Social Security to the Informal Hospitality Industry Workers in South Africa", an unpublished LLM Dissertation from University of Western Cape 2020 12.
[68] Fourie, E 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 11 *Potchefstroom Electronic Law Journal* ("hereinafter "*PER Journal*") 111.
[69] *Ibid*.
[70] *Ibid*.
[71] *Ibid.*
[72] *Ibid.*

externalised, self-employed, temporary agency workers, casual, fixed-term, part-time or homeworkers and teleworkers, for example. It has been observed that there is an integral gender dimension to the discussion on atypical work, as the male workers are excessively present in the SER and there are increased numbers of women engaged in atypical work.

The challenges observed in this type of employment is a peril faced by most workers who are not included in the definition of an employee of a certain body or company as provided for under section 213 of the LRA[73] and section 1 of the Basic Conditions of Employment Act[74] (hereinafter referred to as the BCEA). The risk arises where such people are vulnerable either because they do not have labour rights or if they do have such rights, they do not have the status to enforce those rights, where employees enjoy these rights and protection which is afforded by the Constitution of South Africa.

As discussed above, the significantly growing atypical employment and the declining SER have both negative and positive implications in South African labour law, however, this depends on a personal point of view.[75] The growing and flexible utilisation of labour by capital is demonstrated through the multiplying of various arrangements of the TER, in comparison with the reduction of those engaged in the SER.[76]

Atypical employment does not have an exact origin but can be said to have developed through the employers' need to cut down employment costs in their everyday trade.[77] It can be said to have been created by employers who wished to escape the responsibilities of having the burden laid upon them to ensure the safeguard of full-time employees who require a lot more than the atypical non-standard employees.[78] The tripartite forms of employment mostly create vulnerability for the workers because of issues such as lack of grounds to enforce labour rights of total deprivation from the

[73] Labour Relations Act 66 of 1995.
[74] Basic Conditions of Employment Act 75 of 1997.
[75] K.E Owomomo, "Atypical work and social protection in post-apartheid South Africa: Preliminary thoughts about Social Policy Imperative", an unpublished LLM dissertation submitted at Rhodes University, 2010 52.
[76] *Ibid.*
[77] Bewley, T 'Why not cut pay?' (1998) 42 *European Economic View* 414.
[78] Supiot, A '*Beyond Employment: Changes in Work and the Future of Labour Law in Europe'* (1st Edition, Oxford University Press, United Kingdom) 2001 2.

enjoyment of the said rights.[79] So it arises where these people render services for their employers, then, there comes the problem of not enjoying the benefits which those employees enjoy simply because they do not have a contract of employment which they can use as leverage for such benefits.[80]

The Relevant Benefits afforded to workers in standard forms of employment are as follows:

- Maternity benefits
- Paternity benefits
- Adoption benefits
- Commissioning parental benefits
- Family responsibility leave.[81]

As the labour market develops, it also becomes more and more influenced by modern systems of labour laws. Systems of employment which are termed atypical forms of employment are established. In these forms of employment is where they encounter various other forms of TER employment.

South Africa, when compared to other countries has an even greater challenge regarding the SER and TER which such workers encounter daily. For example, in the *Jenkins v Kingsgate (Clothing Productions) Ltd,*[82] case of the European Court of Justice (ECJ), the idea of indirect discrimination was interpreted and extended to equal pay claims in terms of article 119.[83] In this case, the court stated that this existence of a non-standardised form of payment between part-time workers and full-time workers could to some extent be regarded as being discriminatory in terms of article 119 unless if the employer was able to substantiate the inconsistency subjectively. The court further held that remunerating Ms. Jenkins an amount lesser than her colleagues employed on a full-time basis would only be justified by article 119 if it was 'attributable to factors which are objectively justified and are in no way related to any discrimination

[79] Compa, L.A *'Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards*' *Cornell University Press* 2004 xiii.
[80] *Ibid*.
[81] *Ibid.*
[82] *Jenkins v Kingsgate (Clothing Productions) Ltd* [1981] 2 CMLR 24.
[83] Treaty on European Economic Community.

based on sex.' This means that the European jurisdiction precedented that it was discriminatory to employ workers on non-equal pay based on gender.

Notwithstanding the negative encounters by women in the working environment, it is imperative to note that other rights outlined within the SER and the TER include the idea of the TER workers not being governed by any Act.

The lack of employment law protection for these workers not only leaves them vulnerable but also violates some of their Constitutional rights. For example, the deprivation of maternity leave for women who are not in permanent employment violates their right to make reproductive choices in terms of section 12 of the Constitution (hereafter referred to as the Constitution),[84] because it means that unlike women in permanent employment, reproductive choices affect not only their physical well-being but their financial wellbeing as well. This, in turn, violates their right to equality in terms of section 9 of the Constitution because the women in the workplace are not treated equally.

Against this background, this study examines the challenges concomitant to employment under the various forms of atypical employment. The study scrutinizes the rights that employees have access to, as well as, how the problem arises when non-employees are left vulnerable and without platforms to enforce their rights. It is submitted that they also lack a solid ground to enforce their rights which are afforded in the LRA. The study also addresses the objective which it aims to achieve, also providing for possible solutions. Finally, the study critically addresses some of the aspects of South African labour law relating to workers under the TER as well as the Constitutional implications of not being an employee.

1.3. Problem statement

Atypical employment has mushroomed steadily in the South African labour market.[85] This form of employment poses a challenge for workers who are not defined as

[84] Constitution of the Republic of South Africa, 1996.
[85] As asserted by authors such as Benjamin P, Grogan J and Byrne D.

employees in various pieces of labour legislation in South Africa.[86] The challenge arises where such workers are vulnerable either because they do not have labour rights or if they do, they do not have platforms to enforce those rights while other employees enjoy these rights and protection which is afforded by the Constitution of South Africa.[87]

While the SER is identified by full-time employment, which includes a fixed-term contract of employment that is often subjected to the official minimum retirement age as prescribed in a country and by an employer,[88] this is not the case for atypical employment. The TER is characterised by a triangular employment relationship, which comprises a worker, a broker, and a company.[89]

The problem occurs when these workers are subjected to exploitative working conditions for little or no benefits whereas those employed in the SER do equal or little work and get more benefits. This remains a topical issue because in as much as these workers are expected to render similar services to an institution, in most cases they become affected by not applying the equal pay for equal work principle.

1.4. Research Questions

- How does the nature of the employment contract impact access to social protection for workers in atypical employment?
- How does the failure to be covered by the labour legislation affect workers in atypical employment?
- How do female workers engaged in atypical employment overcome discrimination in the workplace given the stigma of this form of employment in the working environment?
- How does atypical employment affect the constitutional rights of female workers engaged in atypical employment?

[86] Section 1 of the Basic Conditions of Employment Act 75 of 1997, Section 213 of the Labour Relations Act 66 of 1995 and Section 1 of the Employment Equity Act 55 of 1998 (hereinafter the BCEA, the LRA and the EEA).
[87] The Constitution of South Africa, 1996.
[88] *Ibid*.
[89] *Ibid*.

- What is the difference in the legal protection of female workers engaged in atypical forms of employment in comparison to those in standard forms of employment?
- What factors contribute towards the need for protecting the female workers engaged in atypical employment?

1.5. Aims and objectives of the study

- The aim of this study is to evaluate the impact that the nature of the employment contract has on the working conditions of workers.
- It evaluates the narrow legislative definition of 'employee' and how it affects the workers in atypical employment.
- The study explores mechanisms that will assist non-standard workers to overcome discrimination in the workplace given the stigma of their employment in the workplace.
- Furthermore, the study investigates the affected constitutional rights of female workers engaged in atypical employment.
- Lastly, this study explores the legal protection of female workers engaged in atypical forms of employment in comparison to those in standard forms of employment and the factors which contribute towards the need for protecting the female workers engaged in atypical employment.

1.6. Scope and limitation of the study

This study is focused on the current South African legal status of workers under the TER, the possibility of amending the definition of employee, and extending the rights afforded to employees to these workers who are currently excluded. It further focuses on the negative side of not being an employee in South Africa thus, disadvantaging workers working under exploitative conditions due to lack of legislative protection. It features a brief inclusion of systems of various jurisdictions such as Sweden and Belgium and a through, detailed comparative study between the Netherlands and the United Kingdom in Chapter 8.

1.7. Literature review

The problem with the existing labour laws is that, in as much as there has been a vast evolution in this aspect of the law, one can still observe several loopholes and gaps which exist. The issue with the failure to afford workers labour and social security protection under the TER has been discussed for years. 29 years into democracy and workers under the TER are still subjected to volatile working conditions.

The various problems and challenges which arise stem from the legislator's failure to protect and accommodate the dignity of the workers under the TER. They continue working under severe exploitation, for little benefits and all this originates from the failure to include workers under the TER in the definition of an employee.[90]

To determine which workers are afforded protection by the existing labour laws, the study begins by looking into which workers are categorised as employees which affords them protection by the labour laws, and which workers are not.

Section 213 of the Labour Relations Act 1995[91] defines an employee as:

> Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have meanings corresponding to that of employee.

Section 1 of the Basic Conditions of Employment Act 1997[92] defines an employee as:

> Any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer, and "employed" and "employment" have a corresponding meaning.

Section 1 of the Employment Equity Act 1998[93] defines an employee as:

> Any person other than an independent contractor who works for another person or for the State and who receives or is entitled to receive any remuneration and in any manner assist in carrying on or conducting the business of an employer.

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[90] Fourie, E 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 11 *Potchefstroom PER Journal* 111.
[91] Labour Relations Act 66 of 1995.
[92] Basic Conditions of Employment Act 75 of 1997.
[93] Employment Equity Act 55 of 1998.

Section 200A of the LRA includes a rebuttable presumption relating to the existence of an employment relationship for employees earning below the BCEA threshold. The LRA, as amended, states 'until the contrary is proved, for the purposes of this Act, any employment law and section 98A of the Insolvency Act,[94] a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

- the manner in which the person works is subject to the control or direction of another person;
- the person's hours of work are subject to the control or direction of another person;
- in the case of a person who works for an organisation, the person forms part of that organisation;
- the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- the person is economically dependent on the other person for whom he or she renders services;
- the person is provided with tools of trade or work equipment by the other person; or
- the person only works for or renders services to one person.

In the *South African Broadcasting Corporation (SABC) case,*[95] the Labour Appeal Court made a comparison between an employee and an independent contractor to determine the difference between the two classes of workers. The case tabulated the comparison between the two concepts as follows:

EMPLOYEE	INDEPENDENT CONTRACTOR
1. The employee must render personal services to the employer.	- The independent contractor has to produce a specified service or to produce a specified result.
2. The employee is expected to render these services at the request of the employer.	- An independent contractor is under no obligation to perform work personally unless there is an agreement to that effect.
3. It is the decision of the employer whether or not he or she wants	- An independent contractor is obliged to perform specified work

[94] Act 24 of 1936.
[95] *South African Broadcasting Corporation v Mckenzie* [1999] 1 BCLR 1 (LAC).

the employee to render the services.	or produce certain results within a specific time.
4. The employee is expected to obey the instructions of the employer regarding the work which should be done and how it should be done.	- An independent contractor is under no obligation to obey instructions regarding how he or she should perform the task.
5. The employment relationship terminates when the employee dies.	- The contract of service does not terminate when the contractor dies.

With this tabulated comparison in mind, one can determine who an employee is to identify who is protected under the labour legislation. This comparison covers all workers, whether male or female, and comes down to one conclusion. For the workers on the right side of the table, the rights and benefits are reduced as compared to the workers on the left.

Howard submits that, for independent contractors, there is a loss of access to legal protection and benefits that are afforded to standard arrangement workers.[96] For example, independent contractors are not exactly entitled to a legal right to a safe workplace and cannot claim compensation for an injury on duty.[97]

According to the legal formulation, the issue has always been premised on the outcomes of the disintegration of the concept of the SER.[98] Tealdi avers that there is a need to formulate a new legal concept of categories such as worker and employee, and to create a new notion of employment.'[99] Following this approach, the concept of subordination would also be revised to capture a broader variety of relationships, and discrimination behaviours towards workers would be prevented.[100] He adds further that, the Green Paper by the European Commission modernised labour law to address

[96] Howard, J 'Nonstandard Work Arrangements and Worker Health and Safety' (2017) 60 *American Journal of Industrial Medicine* 2.
[97] *Ibid.*
[98] Tealdi, C 'Typical and Atypical Employment: The case of Italy' *Munich Personal RePEc Archive* 2011 19a.
[99] *Ibid.*
[100] *Ibid.*

the challenges which are experienced in the 21st century, which was presented in 2006 with focus on the topic of atypical contracts.[101] This study emphasise the growth in the percentage of atypical contracts, with a robust sexual category and intergenerational element.[102]

The study supports Tealdi above in that, in the creation of a new concept of employment, a development can be made that may be accommodative of workers who are not employed under the SER. The likelihood is that the legal system can also be much more flexible towards these workers with regards to the benefits to which they may be entitled to, together with the benefits to which they currently have no access.

Tealdi goes further to add that, 'in accommodating the female workers, the Maternity Protection Convention[103] (which has not been ratified by South Africa), protects and applies to all women who are employed regardless of the type of employment they are engaged in.'[104] It is important to emphasise that South Africa has not ratified the Convention.[105]

Be that as it may, the Maternity Protection Convention regulates the working conditions of female workers and the necessity to afford security to them, especially those who are pregnant. It makes this the responsibility that is shared by both the state and the general public.[106] The Convention further provides for the protection of female workers engaged in informal employment.[107] Article 2 of the Maternity Protection Convention aims at extending security to women engaged in atypical employment relationships.[108] This Convention can positively be an influential instrument in the

[101] *Ibid.*
[102] *Ibid.*
[103] Maternity Protection Convention 183 of 2000.
[104] *Ibid.*
[105] https://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102888. Accessed on 30 March 2022.
[106] Lim L.L "More and Better Jobs for Women, an Action Guide" International Labour Office-Geneva 1998 143.
[107] *Ibid.*
[108] *Ibid*.

security of female workers in atypical forms of employment but, as it stands, its endorsement by South Africa is still a pipe dream.[109]

It is submitted that the Maternity Protection Convention of 2000 can be a good starting point in the development of the South African legal system. If this Convention can be ratified by South Africa, then it will be able to assist the women engaged in atypical employment who encounter challenges when juggling employment and building families. Currently, in a typical setting, a woman employed under the TER in the same company where other women employees are employed under the SER is likely to struggle with accessing benefits such as subsidized medical aid while the other women are afforded full medical aid cover. This, in turn, could mean that she cannot access proper healthcare services which will ultimately mean that should she decide to have children; she will have to deliver in public hospital facilities.

While women workers who are not classified as employees continue to endure indecent and unfavourable working conditions premised on their exclusion from the current labour laws, this Convention aims at redressing the problem. However, the challenge faced in South Africa is that this Convention has not been ratified and therefore cannot serve as a point of reference. It is submitted that, if the Convention can be ratified by South Africa, then at least the pregnant women can be afforded access to protection from ill-treatment emanating from a lack of traditional employment contracts. If South Africa ratifies this Convention, then the provisions of the protection of the BCEA would be extended to female workers who are currently not protected.[110]

In 1997, The Equal Treatment for Part-Time Workers Directive was introduced, and its aim was:

> To encourage social partners to remove obstacles that limit opportunities for the expansion of part-time work, and to give part-time workers equal hourly pay, pro-rata entitlements to sick leave and maternity pay, equal treatment for holidays, maternity leave, parental leave, and career breaks, redundancy, pension schemes, and training.[111]

[109] *Ibid.*
[110] Lim L.L "More and Better Jobs for Women, an Action Guide", International Labour Office-Geneva 1998 143.
[111] *Ibid.*

There were two objectives for this Directive. The first one was to remove discrimination, and the second one was to develop voluntary part-time work.[112]

The Equal Treatment for Part-Time Workers Directive encourages all social partners to do away with any obstructions that always put a limit to available opportunities to expand part-time work, and to allow part-time workers access to pro-rata entitlements to equal hourly pay, sick leave, parental leave, career breaks, equal treatment for holidays, redundancy, maternity leave and maternity pay, pension schemes, and training.

Tealdi concludes by reiterating the reinforcement of the treaty's provision made by the European Court of Justice when redefining 'workers' as all people who are involved in commercial activity.[113] This means that the provisions which cover the unrestricted association of workers also applies to the self-employed, the reason is that, the importance of the Directive on the application of equal treatment between men and women involved in a self-employed capacity is to safeguard the principle of equal treatment between men and women who are self-employed after all.[114]

Oliver provides another successful example observed in India.[115] According to the author, the Self-Employed Women's Association (SEWA) which was registered in 1972 is aimed at improving the welfare of women.[116] The association covers over one million women who work in the informal sector.[117] Oliver avers that:

> Through its links with formal insurance schemes, SEWA has managed to provide its members with wide-ranging services including credit, training, childcare, health care, pension, life insurance (for both death and disability), and insurance against loss of work equipment.[118]

One of the factors that make TER conform to various schools of thought is that it involves competing rights such as the right to equality, right to dignity, right to bodily

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[112] *Ibid.*
[113] Lim L.L "More and Better Jobs for Women, an Action Guide" International Labour Office-Geneva 1998 143.
[114] Dolvik, J 'Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles?' (2009) 40 (6) *Industrial Relations Journal* 491-509.
[115] Olivier, M *et al.* 'Informality, employment and social protection: Some Critical Perspectives for/from Developing Countries' (2012) *International Journal of Comparative Labour Law* 421.
[116] *Ibid.*
[117] *Ibid*.
[118] *Ibid.*

and psychological integrity, right to be protected from slavery, servitude, and forced labour, and most importantly the right to fair labour relations. These are briefly addressed below.

1.7.1 Constitutional values and non-standard workers

This aspect on Constitutional values and non-standard workers are dealt with in detail in Chapter 2. A brief discussion on Constitutional values serves as a foundation of the detailed discussion.

1.7.1.1 The right to equality

The constitutional right to equality is based on the idea that everyone is equal before the law. Section 9 of the Constitution makes provision for the right to equality.

Section 9 of Constitution provides that:

> (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.[119]

The Law Dictionary, defines equality as the condition of possessing the same rights, privileges, and immunities and being liable to the same duties.[120]

1.7.1.2 The right to human dignity

Section 10 of the Constitution provides that, *'everyone has inherent dignity and the right to have their dignity respected and protected.'* Human dignity, in its most basic form, refers to an inherent characteristic of humanity that every human being retains, in equal measure.[121] The common idea that 'everybody has integral human dignity is, in

[119] Section 9 of the Constitution, 1996.
[120] Accessed on https://thelawdictionary.org/equality/ at16 October 2019.
[121] Steinmann R "Law and human dignity at odds over assisted suicide" De Rebus 28 October 2015.

essence, the very contrast of the concept of *dignitas* in private law, which is entrenched in the idea that dignity refers to a person's status in society as applied in Roman Law.'[122]

1.7.1.3 The right to bodily and psychological integrity

Section 12(2)(b) of the Constitution provides that, '*Everyone has the right to bodily and psychological integrity, which includes the right— (a) to make decisions concerning reproduction.'* Section 25 of the BCEA[123] provides that an employee is entitled to maternity leave of four (4) consecutive months. This expressly implies that anyone who is outside the scope of the definition of an employee cannot get access to this duration of maternity leave.

This is one of the harshest situations that workers in the TER, more in particular women are faced with daily. The reason for this being said is that the section specifically provides for employees. This means that a woman who is employed under a temporary work contract already knows that according to the employment contract which she signed when she started her journey with the company at hand she cannot be entitled to the customary 4 months' maternity leave which is also known as accouchement leave.

1.7.1.4 Right to protection against slavery and forced labour

Section 13 of the Constitution states that no one may be subjected to slavery, servitude, or forced labour. To some extent, employment with deprivation of certain employment benefits and incentives may be regarded as slavery and exploitation.

1.7.1.5 Right to fair labour practices

Section 23(1) of the Constitution provides that, 'Everyone has the right to fair labour practices.' From the above constitutional provision, it can be deduced that in fact, all workers are entitled to fair labour practices and the exclusion of non-standard workers from the benefits and access of fair labour practices under section 23 constitutes a violation of the right to fair labour practices.

[122] *Ibid.*
[123] Basic Conditions of Employment Act 75 of 1997.

It is however, worth noting that even though non-standard contractors are excluded from the definition of employee, they are protected by section 23 (1) of Constitution and the law of contract in cases where the employer is bound by contractual obligations.

Independent contractors are specifically left out of the definition of an employee in South African labour legislation.[124] This being the case, how then do the courts determine when a person is an independent contractor? South African courts still apply the dominant impression test to make this determination.[125]

There are, however, various judicial tests that may be applied to determine whether a worker is an employee. These judicial tests are briefly discussed below:

First, the control test. This test is based on the extent of control that the employer can exercise over the employee. In the past, there used to have a *de facto* control which formed the control test, but that is no longer applicable in the current status, the courts do not dwell much on it but recognise that a right of control is sufficient.

The control test was first formulated in the *Colonial Mutual Life Assurance Society* case.[126] Under this test the degree of control which the employer has over the employee is looked into.

In *R v AMCA Services*,[127] the presiding officer made mention of a right to control, not only the end to be achieved by the other's labour and the general lines to be followed, but the detailed manner in which the work is to be performed. This test just basically implies that in determining whether a worker qualifies to be an employee, the authority which the employer has over the worker is now dissected. If it is found that the authority is too strong, it is then known that the worker qualifies to be an employee, but if not, it is also then known that the person is not an employee but an independent contractor.

[124] Fourie ES 'Non-standard workers: The South African Context, International Law and Regulation by the European Union' (2008) 11 *PER Journal* 115-184.
[125] *Ibid.*
[126] *Colonial Mutual Life Assurance Society Ltd v Macdonald* 1931 AD 412 (A) at 434-435.
[127] *R v AMCA Services and Another* 1959 (4) SA 207 (A).

The *Steven's case*[128] provided that the greater the control over the individual the more likely he is to be an employee.

Secondly, the organisation test. When the court found the control test inefficient it came up with another test. It held that, 'the general picture that emerged from the facts was of work done inside the company's organisation and that the collectors were members of its organisation and therefore employees.' In *S v AMCA Services*,[129] the organisation test was rejected by the Appellate Divisions based on the fact that instead of answering questions, it raised even more.

This test is premised on the theory that being a servant does not automatically subject one to submit to instructions. It rests on whether or not the worker is regarded as being part of the company or institution. This view was highlighted in the *SABC* case,[130] where the court held that:

> A person is an employee or is "part and parcel of the organisation" whereas the work of an independent contractor "although done for the business, is not integrated into it but is only accessory to it." An employee generally fits into an organisational framework of reporting structures, attends weekly or monthly meetings, and strives to attain the organisation's predetermined goals.[131]

Thirdly, the multiple or dominant impression test. Failure and deficiency of the control test and the organisation test called for a newer test to be applied. The courts approached the main question with a different tact.[132] The courts held that it has to be determined whether or not a specific working relationship depicts one of employment. From that determination, an approach to the various problems can be established.[133]

This is the test that is applied in the courts today. It depends on different indications to conclude whether or not the contract in issue is a contract of service.

This was also shown in the *Medical Association of SA v Minister of Health*.[134] In the *Smit* case,[135] the court held that 'the presence of a right of supervision and control is one of the most important indications that a particular contract is in all probability a

[128] *Stevens v Brodrib Sawmilling Company Pty Ltd* (1986) 160 CLR 16.
[129] *S v AMCA Services and Another* 1962 (4) SA 537 (A).
[130] *SABC v Mckenzie* [1999] 1 BCLR 1 (LAC).
[131] Freund, K 'Servants and Independent Contractors' (1951) 14 *Modern Law Review* 504.
[132] Grogan J *Workplace Law* (9th edition, Juta & Co Ltd, South Africa) 20.
[133] *Ibid*.
[134] [1997] 18 *ILJ* 28 (LC) 533.
[135] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 LAC.

contract of service.' This test was further used in the *Linda Erasmus* case,[136] where it was applied to show that an estate agent was indeed an employee. The onus to prove that a worker is an employee normally rests on such a person claiming to be an employee. The presumption just serves as an evidentiary device that is calculated to redirect the onus of proof of employment in situations where any of the indications can be identified.[137]

JV Du Plessis[138] defines an ordinary contract of employment as 'a contract of which an employee places his services at the disposal of another person or organisation.'[139]

Guidance in dealing with this particular test is derived from the English case of *Ready-mixed Concrete v Minister of Pensions and National Insurance*,[140] where the court held that a contract of service exists if:

> (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of that service for his master.
> (ii) He agrees, expressly or impliedly that in the performance of the service, he will be subject to the other's control in a sufficient degree to make that other, master.
> (iii) The other provisions of the contract are consistent with it being a contract of service.

Fourthly, the dominant impression test provides that a person is not an independent contractor if:

> 1. The worker is subject to the control of the employer as to the manner in which the worker's duties are or will be performed as to the hours of work.[141]
> 2. The amount paid or payable for the worker's services consist of or include earnings of any description which are payable on a regular basis, daily, weekly, monthly, or other intervals.[142]

In the *Smit case*,[143] the court held that the existence of a right to supervise and control is one of the main indications that a particular contract is one of service. The dominant

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[136] *Linda Erasmus Properties v Mhlongo* (2007) ILJ 28 (LC).
[137] Van Niekerk, A 'Employees, independent contractors and intermediaries' (2005) 2 *Contemporary Labour Law Journal* 11-12.
[138] JV Du Plessis, *A practical guide to labour law* (5 edition, Lexis Nexis, South Africa) 8.
[139] JV Du Plessis, *A practical guide to labour law* (5 edition, Lexis Nexis, South Africa) 9.
[140] *Ready Mixed Concrete v Minister of Pensions and National Insurance* [1968] QB 497.
[141] The Dominant Impression Test. Accessed at www. Paymaster.co.za-Independent Contractors on 26 January at 15:09.
[142] *Ibid.*
[143] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 LAC.

impression test was also applied in the *Medical Association of South Africa case*,[144] and the *Linda Erasmus case*.[145]

In *SA Broadcasting Corporation v Mckenzie,*[146] the court also applied the dominant impression test. In the *Medical Association* case,[147] the then president of the Labour Court and the Labour Appeal Court, Judge Zondo held that applying the dominant impression test has the potential of creating ambiguity, but a different determining approach was found to be unnecessary.

The legislative definitions of employee themselves already dictate that workers such as independent contractors are excluded from benefiting from the provisions of these labour laws. Benjamin submits that labour law should be able to fluently articulate an idea of protection that is restructured to warrant the continuity of the existing employment status to afford protection to workers during conversions from one job to another and that labour law should apply to all forms of work which is performed for other people, and not merely to work that is based on a permanent employment contract.[148] This methodology indicates that certain aspects of labour law need to be extended to workers who aren't either employees or employers: it calls for the implementation of newer definitions of the different classifications of workers that are protected by the legislation.[149]

Friedland adds that:

> In many countries, legal protection has been extended to some formally unprotected atypical workers, by creating a third category of labour to cover those who do not fall within the traditional categories of subordinate or independent work.[150]

Schmidt supports Friedland by saying that there should be 'transitional labour markets' developed that will provide greater security to workers during transition phases in their working life.[151]

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[144] [1997] 18, ILJ 28 (LC) 533.
[145] *Linda Erasmus Properties v Mhlongo* (2007) 28 *ILJ* (LC).
[146] 1999 20 *ILJ* 585 (LAC).
[147] 1997 18 *ILJ* 528 (LC).
[148] Benjamin, P 'Informal work and Labour rights in South Africa' (2008) 29 *Industrial Law Journal* 1588.
[149] *Ibid.*
[150] Friedland, J 'Why crafts? Influences on the Development of Occupational Therapy in Canada from 1890 to 1930' (2003) 70 *Canadian Journal of Occupational Therapy* 203.
[151] Schmidt, G 'Transitional Labour Markets: Theoretical Foundations and Policy Strategies' (2017) *The Palgrave Dictionary of Economics* 4.

Women independent contractors who are pregnant cannot take the full 4 months' maternity leave as prescribed by section 25(1) of the BCEA. Kehler[152] illustrates this notion by stating that:

> Most of the main challenges which women on farms in South Africa have to deal with are extreme discrimination and unequal treatment in the workplace topped with unfair labour practices.[153] These women are mostly only employed as casual or temporary labourers during times of harvest or other labour intensive farm work.[154] Even in cases where they work as seasonal workers for the entire year on the farm, they are not granted the rights of permanent workers.[155] These employment patterns lead as well to the majority of women working on farms not being covered by social insurance schemes such as pension funds, medical benefits, or maternity benefits.[156]

Most of the time, the farmers and their workers have no arrangements regarding maternity benefits, leave, and responsibilities during their pregnancy and breastfeeding after birth.

This leads to women working on the farms having to work until a week or two before the baby is born due to the fear of losing out of the income which is necessary for the expected baby.[157] These women have no guarantee that their jobs will be safe while they are on maternity leave.[158] These women are left with no choice but to work with hazardous chemicals, such as fertilisers and pesticides, throughout the period of pregnancy and breastfeeding.[159] This fear of forfeiting their jobs and the need to retain their income forces the women on the farms to work for as long as possible before the birth of the child endangers their health and that of their unborn babies.[160] The work performed on the farms is mostly physical and strenuous to the pregnant women and in most cases, there are no arrangements that would allow for them to perform less strenuous duties during the period of pregnancy.

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[152] Kehler, J 'Women and Poverty: The South African Experience' (2001) 3 *Journal of International Women's Studies* 48.
[153] *Ibid.*
[154] Bowles P, *The Essential Guide to Critical Development Studies* (1st Edition, Routledge Publishers, Canada) 296.
[155] *Ibid.*
[156] Stewart F *et al.* 'Pension Coverage and Informal Sector Workers: International Experiences.' Accessed at https://search.oecd.org/daf/fin/private-pensions/42052126.pdf on 17 February 2020.
[157] *Ibid.*
[158] Lyness, K.S. *et al.* 'Work and Pregnancy: Individual and Organizational Factors Influencing Organizational Commitment, Timing of Maternity Leave, and Return to Work' (1999) 41 *Sex Roles* 485–508.
[159] *Ibid.*
[160] Kehler, J 'Women and poverty: The South African experience' (2001) 03 *Journal of International Women's Studies* 48.

In the few cases where there are arrangements made for these women, they do not include benefits that are sponsored by the farmer. Pregnant women do have an option to go on prolonged maternity stretching over as long as three months. But this kind of leave is unpaid, and this is the reason why most of these women cannot afford to take prolonged maternity leave.[161] As a result thereof, these women are obliged to go back to work as early as a week post-childbirth due to lack of financial provision.

There are no child-care services on the farms, so these women are forced to stay at home and look after the baby until it's old enough to stay home with its siblings. This forces women to choose between staying at home to look after the baby, resulting in job loss, and going back to work leaving behind a week-old baby.[162]

The workers that are not employees receive none of the benefits afforded to the employees while they still bear the burden of pregnancy. The group that is excluded covers females who may have been working for that particular institution for many years but who at the point of pregnancy are engaged in TER.

To ameliorate these shortcomings, the existing laws of the governing fund need to be changed to make sure that workers are eligible to access their rights to maternity provisions that have accumulated to them through contributing to the fund when as soon as they become self-employed.

The definition of who an employee is has been a subjected to strong arguments and explanations at the labour forums such as the CCMA, the Labour Court (LC) and Labour Appeal Court (LAC), especially regarding employees' right to fair labour practices as entrenched in the Constitution.[163] It is rather crucial to determine who an employee is as it confirms who gets access to protection as afforded by the labour laws in South Africa.[164] This extends as far as classifying those not covered by labour laws under the group that is not entitled to receive protection and as a result thereof,

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[161] *Ibid.*
[162] *Ibid.*
[163] Matloga, N.S and Rapatsa, M.J 'Who Is (Should) Be Covered by Labour Law? Lessons from Kylie V CCMA' *Journal of Business Management & Social Sciences Research (JBM&SSR)* 2014 3 (5) 105.
[164] *Ibid.*

cannot claim such protection, this places them in continued vulnerability in the society.[165]

In *Kylie v CCMA and Others*,[166] the issue of defining and determining who is an employee was the subject matter. More in particular, regarding employees' right to fair labour practices and the vulnerability of illegal workers.[167] It was explored whether or not sex workers can access protection against unfair dismissal in terms of the LRA, a right which is exclusively enjoyed by employees.[168] In this case:

> The court defied the traditional approach that the relationship between the parties must be discerned primarily from the contract between the parties and held that the respondent was an employee for purposes of LRA, notwithstanding the fact the contract was undisputedly an independent contracting arrangement.[169]

Protection was afforded to Kylie even though she was a party to an illegal and otherwise unenforceable contract.

1.8. Research methodology

This study employed a traditional doctrinal approach, which is best suited for conducting an analysis of the state's statutory frameworks and policy initiatives concerning rights-based approaches to human life, human dignity, privacy, and related fundamental freedoms. The study adopted a qualitative style of research, and for these reasons, did not involve any empirical field study, thus limiting the conduct of research to secondary data obtained through the library and in materials such as textbooks, law reports, legislation, regulations, journal articles, policies, and case law, including reported and unreported judgments. The doctrinal approach was also used to analyse

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[165] *Ibid.*
[166] 2010 (4) SA 383 (LAC).
[167] Matloga, N.S and Rapatsa, M.J 'Who Is (Should) Be Covered by Labour Law? Lessons from Kylie V CCMA' *Journal of Business Management & Social Sciences Research (JBM&SSR)* 2014 3(5) 105.
[168] The Labour Appeal Court in *Kylie v CCMA* & others, had to grapple with the question of whether the definition of an employee extends to persons engaged in un-lawful activities. *Kylie* was employed in a massage parlour as a sex worker, her employer was (Michelle Van Zyl who was trading as Brigitte). In 2006, *Kylie* was informed by her employer that her employment was terminated, apparently without a prior hearing. In 2007, *Kylie* referred the dispute to the CCMA. In the CCMA, the legal question was whether the CCMA had jurisdiction to hear the matter in the light of the fact that *Kylie* had been employed as a sex worker and accordingly her employment was unlawful. The Commissioner handed down a ruling in which she concluded that the CCMA did not have jurisdiction to arbitrate on an unfair dismissal in a case of this nature. It was against this ruling that *Kylie* approached the Labour Court for review.
[169] *Ibid.*

laws and policies of various jurisdictions of the world, thus complementing the doctrinal method with vast elements of a comparative approach, which assisted towards the formulation of well-informed recommendations regarding the possibility of incorporating non-standard workers into the definition of an employee.

1.9. Definition of key concepts used in this study

In this part, important key concepts are defined for the present study:

1.9.1 Atypical workers

Mills defines atypical work as:

> A term used to cover workers engaged in a variety of employment relationships that fall outside the traditional paradigm, including employment which is a temporary or fixed-term, part-time, seasonal, casual, piece-rate, or home-based, as well as self-employment and contract work.[170]

In line with the definition by Mills, atypical work is the type of work that doesn't fall within the ambits of traditional work set-up where there is an employer/manager supervising the employer on a full-time, permanent basis.

1.9.2 Temporary employment services

Shoba defines TES as:

> A system involves three parties to an employment contract, namely: the client, TES, and the employee. In this type of employment relationship, the TES recruits the employees to make them available to work for the client. In terms of the LRA, the TES is the employer of the employee even though the employee works for and is controlled by the client.[171]

Tshoose and Tsweledi aver that it is 'any person who, for reward, procures for or provides to a client other person – (a) who renders services to, or perform work for, the client; and (b) who are remunerated by the temporary employment service.'[172]

It is a form of employment which features temporary work arrangements wherein a worker renders services to an employer on a temporary basis and receives wages for

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[170] Mills, S.W 'The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility?' (2004) 25 *Industrial Law Journal* 1204.
[171] Shoba S "Temporary Employment Services in Contemporary South Africa: A Critical Analysis", an unpublished LLM dissertation submitted at University of Kwazulu Natal, 2016 ii.
[172] Tshoose, C and Tsweledi, B 'A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa' (2014) 18 *Law Democracy and Development Journal* 336.

the temporary work done. It does not feature full-time employment where a worker earns wages continuously for an indefinite period.

1.9.3 Standard employment /Formal employment

Theron provides that:

> There seems to be a degree of consensus about at least three characteristics of the SER that distinguish it from nonstandard employment (to use the terminology that seems least problematic). Firstly, employment is full-time. This implies the employee has only one employer. Secondly, the employee works on the premises of the employer. This implies there is a workplace that is controlled by the employer. Thirdly, employment is ongoing, or for an indeterminate period. This indicates there is a contract of employment.[173]

This is the traditional method of employment where an employer is employed on a full-time, permanent basis rendering services to an employer in exchange for wages consistently in line with the employment contract in question.

1.9.4 Informal employment

Hussman defines informal employment as:

> All jobs in informal sector enterprises or all persons who, during a given reference period, were employed in at least one informal sector enterprise, irrespective of their status in employment and whether it was their main or a secondary job.[174]

In line with the definition by Hussman, informal employment refers to the type of employment wherein there is usually no standard employment contract in place. It includes self-employment.

1.10. Ethical clearance

The study was subjected to ethical clearance through the Turfloop Research Ethics Committee (TREC). This was only to obtain a permission letter to conduct the study. The role of the TREC is to ensure that the study conducted are not harmful to the people and/or animals participating and further that it is ethical and bears no prospects of bringing the governance of the state into disrepute. The nature and methodology of the study poses no threat to the wellbeing of all participants and therefore required no strict application for ethical checks. This is why a letter was obtained to grant permission to continue with the study.

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[173] Theron, J 'Employment is not what it used to be' (2003) 24 *Industrial Law Journal* 1249.
[174] Hussman, J 'Defining and measuring informal employment.' Accessed on R Hussmanns - Geneva: International Labour Office, 2004 - ilo.org on 11 February 2020 at 12:56.

1.11. Outline of chapters

Chapter 1 provides a general layout, introduction of the study, the research statement and research questions together with the literature review and the methodology to be employed. **Chapter 2** examines the position of non-standard female workers in South Africa's labour market. **Chapter 3** examines legal framework concerning workers under the TER in South Africa, which is inclusive of statutes, constitutional law, common law, case law and various policies/covenants and conventions currently in place as well as those which still require implementation. **Chapter 4** scrutinises decent work and atypical workers in South Africa while **Chapter 5** examines Maternity Protection for Women in Atypical Employment. **Chapter 6** covers the SADC instruments relevant to the protection of non-standard workers. **Chapter 7** addresses the role of the International Labour Organisation in protecting non-standard workers. **Chapter 8** conducts a comparative analysis of the laws of South Africa and various other jurisdictions such as the Netherlands and the UK, followed by lessons that can be learnt from these countries. **Chapter 9** provides conclusions and recommendations.

1.12. Summary

As it stands, the current legal system has not developed enough to allow for the protection of women engaged in atypical employment. There is not adequate legislation and instruments in place to afford these workers the labour rights and benefits which are afforded to the women who are engaged in the standard employment relationship. In this chapter, the author was able to identify the existing and prevalent practices that can be observed in the labour system. The author was also able to suggest possible solutions that may be implementable through this study as well as a Convention that can be ratified to provide the protection which is currently lacking in the South African labour law system.

In summation, the definition of an employee in section 213 of the LRA focuses on different aspects to those listed in section 200A. An employee is defined as any person who render a service for another or for the State, and who does so in exchange for

entitlement to remuneration. This includes any other person who partakes in conducting the business of an employer. The definition, however, excludes an independent contractor. Fourie avers that most non-standard workers in South Africa are black unskilled workers and women. These are the categories of people who were victims of the apartheid regime.[175] The exclusion of these workers from labour legislation qualifies as discrimination, which is prohibited by the almost all labour legislation and the Constitution of South Africa. The study asks the following question in this regard: Can it be viewed as enough to conclude that Arbitrators and the Labour Courts should have a duty to intervene and assist non-standard workers? The possibility of victory in this stance can be through legislative intervention which is a better option as it stands a chance of enabling the parties to participate in the labour market with a bit of certainty.'[176]

In the literature review, the various authors who have written about the challenges which women engaged in atypical work face daily were also critiqued and/or otherwise supported. The aim of this chapter, as an introduction, was realised, and in conclusion, it is still very necessary to investigate further and report on the findings.

The next chapter examines the position of non-standard female workers in South Africa's labour market.

[175] Fourie, E 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 11 (4) *PER Journal* 1.
[176] *Ibid.*

CHAPTER TWO: THE POSITION OF NON-STANDARD FEMALE WORKERS IN SOUTH AFRICA'S LABOUR MARKET

2.1. Introduction

The labour market is the primary arena in which most people interact with the economy. Productive work offers access to resources through earnings, and since the degree of these resources influences individuals' ability to participate in other parts of the economy, inequities in the labour market may have far-reaching effects in other areas. This is especially true for women, who may face additional challenges in the labour market. Women confront major hurdles in the labour market across the world, and South Africa is no exception. Women who are engaged in non-standard employment have, to date, not been afforded sufficient priority and these women make up a significant portion of the labour force, especially in low-and-middle income countries (LMICs).[177]

Engagement in non-standard work is challenging for everyone as it limits the workers access to many benefits that other workers engaged in standard forms of work have access to. It is more aggravated for women as they are faced with much more challenges than men because women have to battle for their position in the workplace, doing away with the stigmas attached to femininity as well as societal standards which tend to prescribe unfavourable living conditions for women. A woman still has to fight for a place in the boardroom due to the societal expectations which dictate that the position of the woman is at home, with the kids.[178]

While the woman is expected to fight through all that to find her place in the boardroom, many women who find themselves in those boardrooms unfortunately do so under non-standard contract of employment. This means that the battle is only half won as she still has to face the peril of being excluded from benefits that would have otherwise helped her to find comfort while accessing all the rights and benefits that other female workers in standard employment enjoy.[179]

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[177] Pereira-Kotze C.J.K, "Understanding the components of comprehensive maternity protection available and accessible to non-standard workers in South Africa: domestic workers as a case study", an unpublished PhD Thesis submitted at the University of Western Cape, 2023 iii.

[178] Aina, A.T Women in leadership roles". Accessed at https://d1wqtxts1xzle7.cloudfront.net/99479097/Women_in_leadership_roles-libre.pdf?1678102406 on 12 June 2023.

[179] *Ibid.*

Workers in non-standard employment are in most cases not paid the legal basic minimum wage and the type of work that they do often features dangerous working conditions.[180] It is aggravated by their lack of access to union membership.[181] Women, migrant workers and minority groups are most common groups likely to occupy these precarious work positions.[182]

According to Pareira-Kotze et al.:

> Many women work in positions of non-standard employment, with limited legal and social protection. Access to comprehensive maternity protection for all working women could ensure that all women and children can access health and social protection.[183]

Currently, women who are in non-standard employment do not have access to adequate social and legal protection and have no access to decent maternity protection which allows them access to decent medical care.

In every country in the world and under every economic system the common practice is that women face limitations in accessing paid work just because they are women.[184] Women's access to property is usually low, compared to that of men and this is frequently mediated through society's relationship with men.[185] Women face greater societal demands and consequently face greater social constraints on their physical mobility than men.[186]

Chen et al[187] submit that:

> Most working poor women are poor and disadvantaged not just because of gender roles and relationships. Class, religion, race/ethnicity and geography all intersect with gender to position many (though not all) women in precarious forms of work. In most regions of the world, certain communities – differentiated largely by

[180] Pereira-Kotze C.J.K, "Understanding the components of comprehensive maternity protection available and accessible to non-standard workers in South Africa: domestic workers as a case study", an unpublished PhD Thesis submitted at the University of Western Cape, 2023 iii.
[181] *Ibid.*
[182] *Ibid.*
[183] Pareira-Kotze, C 'Maternity protection for female non-standard workers in South Africa: the case of domestic workers' (2022) 657(22) *BMC Pregnancy and Childbirth* 2.
[184] Chen M, *et al.* Progress of the world's women 2005: women, work and poverty. United Nations Development Fund for Women, 2005. Accessed at https://www.unwomen.org/sites/default/files/Headquarters/Media/Publications/UNIFEM/PoWW2005_eng.pdf on 20th April 2023.
[185] Chen M, *et al*. Progress of the world's women 2005: women, work and poverty. United Nations Development Fund for Women, 2005. Accessed at https://www.unwomen.org/sites/default/files/Headquarters/Media/Publications/UNIFEM/PoWW2005_eng.pdf on 20th April 2023.
[186] *Ibid.*
[187] *Ibid.*

> religion, race, ethnicity or geography as well as by class – are over-represented among the poor: notably, rural communities and religious, racial, or ethnic minorities. In these communities, women are further disadvantaged by reason of their gender, but the fact that they are poor and disadvantaged stems in the first instance from their wider social identity and/or from where they live.

Pareira-Kotze et al add that the women engaged in non-standard employment are susceptible to receiving none, or inadequate maternity protection due to the features of informal employment arrangements.[188] About 30.1% of the women in non-standard employment make up the female workforce. An explanation of what the informal sector is may provide that these are institutions that employ less than five workers and does not deduct income tax from the wages of either of these workers. It should, however, be noted that domestic workers who work in private households are not included in definition of the informal sector by Statistics SA.[189] Almost all domestic workers in South Africa are women. They make up (94.5%) of domestic workers.[190]

The rights to human dignity and equality have already had an impact on the rights of many workers in South Africa together with other fundamental rights. Fundamental rights which include 'the right to human dignity, the right to fair labour practices, socio-economic rights and the protection of ethnic, religious and linguistic minorities, can add value to achieving decent work for all.'[191]

Nevertheless, a substantive approach with reference to equality is required when it comes to the extension of socio-economic rights to the vulnerable group of workers in the informal economy, more particularly vulnerable female workers.[192] This then requires institutional restructuring to address gender inequalities. This means, in other words, 'when extending these rights to women, their specific circumstances, including socio-economic factors, must be considered.' The notion of vulnerable women workers and substantive equality refers to the fact that equality in this regard does not necessarily encompass identical treatment but rather:

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[188] Pareira-Cotze, C 'Maternity protection for female non-standard workers in South Africa: the case of domestic workers' (2022) 657(22) *BMC Pregnancy and Childbirth* 2.
[189] *Ibid.*
[190] *Ibid.*
[191] Fourie, E and van Staden, M 'Labour Law, Vulnerable Workers and the Human-Rights Paradigm' *Legal Certainty and Fundamental Rights* (2020) 306.
[192] *Ibid.*

> Equal consideration for all may demand very unequal treatment in favour of the disadvantaged. The demands of substantive equality can be particularly exacting and complex when there is a good deal of antecedent inequality to counter.[193]

Many women working in informal employment may not be eligible for maternity benefits by the UIF. These employees include domestic workers whom most are eligible to receive these benefits but do not because they are not registered by their employers.[194] The women who qualify, are, after a means test is conducted, able to apply for social assistance through the national social grant scheme once the child has been born.[195] The maternity protection landscape in South Africa is complicated and inadequately understood. This is because of a recent policy analysis which showed that maternity protection is dispersed throughout different policy and legislative documents located in different sectors.[196]

Although most of the ILO minimum requirements for maternity protection are present in South African policy, the main issue and challenge is still with its implementation which is unclear and inconsistent for women in non-standard employment.[197] Building on a recent policy analysis which described the broad maternity protection policy environment in South Africa, a study conducted by Pareira-Kotze et al. was aimed at describing maternity protection to women in positions of non-standard employment in South Africa where they used domestic workers as a case study and found that:

> Women in positions of non-standard employment are vulnerable to receiving inadequate maternity protection due to informal employment arrangements. Comprehensive maternity protection includes health protection at the workplace, a period of maternity leave, cash payments and medical benefits while on maternity leave, job security (employment protection), non-discrimination, daily breastfeeding breaks and childcare support.

This results in the vulnerability of female workers in informal working arrangements which leads to a violation of their right to dignity and access to social protection in the working environment. In light of the above discussions, this chapter examines and unearths the intricate challenges faced by non-standard female workers in the South

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[193] *Ibid.*
[194] Pareira-Cotze, C 'Maternity protection for female non-standard workers in South Africa: the case of domestic workers' (2022) 657(22) *BMC Pregnancy and Childbirth* 2.
[195] *Ibid.*
[196] *Ibid.*
[197] *Ibid.*

African labour market. It should, however, be noted that research on the protection of women engaged in non-standard work is very limited.

2.2. Labour market overview

Currently, in South Africa, the labour society is governed by the major legislations such as the Constitution of South Africa,[198] LRA[199] the BCEA[200] and the EEA,[201] amongst others. These legislations are the cornerstone of the South African labour laws. The main objective of these labour laws is to provide legal protection to employees (more particularly the vulnerable employees) in an employment relationship. These objectives often get hindered by the challenges that come with gender issues, racial issues, issues with the implementation of affirmative action and the different types of employment contracts which exist in South Africa.

Most institutions are still headed by males, top positions are offered to men while women are mostly still at the bottom of the pyramid.[202] Most employers are still reluctant to employ women in lucrative positions due to the expenses that come with issues such as reproduction at home and production in the workplace. For those who are still willing to offer lucrative employment to women, they do so on a part-time or temporary basis because it becomes less expensive as opposed to having them on permanent and full-time employment. This hinders the rationale behind the adoption and enactment of legislation such as the EEA and instruments such as the ILO's Decent Work Agenda.

Francis et al[203] has argued that women in the South African labour market persistently suffer higher unemployment, lower wages, and more precarious working conditions than men, even when doing the same work for the same employer.

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[198] 1996.
[199] Act 6 of 1995.
[200] Act 75 of 1995.
[201] Act 55 of 1998.
[202] Aina, A.T "Women in Leadership roles" Accessed at https://d1wqtxts1xzle7.cloudfront.net/99479097/Women_in_leadership_roles-libre.pdf?1678102406 on 12 June 2023.
[203] Francis, D., & Valodia, I. (2020a). South Africa needs to mitigate the worst of its inequalities in tackling coronavirus. The Conversation. https:// theconversation.com/south-africas-budget-to-deal-with-covid-19-fails-topave-way-for-more-equal-society-141458.

Currently, equal opportunity and equal treatment in the labour market are at the core of decent work.[204] Regrettably, for women in South Africa and around the world, additional challenges that hinder them from accessing employment are still prevalent.[205] Once they enter the labour market, appointments to managing positions which feature strong decision-making powers remain elusive.[206]

According to the Quarterly Labour Force Survey of the 2nd quarter of 2021:

> The South African labour market is more favourable to men than it is to women. Men are more likely to be in paid employment than women regardless of race, while women are more likely than men to be doing unpaid work. The proportion of men in employment is higher than that of women; more men than women are participating in the labour market as the labour force participation rate of men is higher than that of women; and the unemployment rate among men is lower than amongst women. The rate of unemployment among women was 36,8% in the 2nd quarter of 2021 compared to 32,4% amongst men according to the official definition of unemployment. The unemployment rate among black African women was 41,0% during this period compared to 8,2% among white women, 22,4% among Indian/Asian women and 29,9% among coloured women.

The South African system introduced what was termed affirmative action in 1994. The objective behind affirmative action was to create a balance by introducing policies and practices which were aimed at reducing discrimination based on race, gender and disability in the labour market.[207] Consequently, a transformation to the labour market through the implementation of anti-discrimination and affirmative action laws has been a prioritised focus of the democratic government since 1994.[208]

However, 29 years post the introduction of the policy on affirmative action, the reality has not changed much. The South African labour market still dominantly favours the males over the females for different reasons ranging from the uncertainty of

[204] Statistics South Africa, South African labour market is more favourable to men than women. Accessed at https://www.statssa.gov.za/?p=14606 on 03 April 2023.
[205] *Ibid.*
[206] *Ibid.*
[207] White Paper on Affirmative Action in the public service, Notice 564 of 1998, March 1998. Accessed at https://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/frameworks/white-papers/affirmative.pdf on 11 April 2023.
[208] Mosomi, J 'An empirical analysis of trends in female labour force participation and the gender wage gap in South Africa' (2019) 33(4) *Agenda* 30.

competence in women to challenges relating to the multitasking that women often get subjected to between performing at work, as well as performing at home.[209]

Rogan and Alfers submit that:

> In the early part of the post-apartheid period in South Africa, a 'feminisation of the labour force' coincided with an increasing concentration of women in unemployment as well as in informal and low-paid work. In other words, and as observed at the time, an improvement in female labour participation did not seem to 'buy' much for South African women. Accordingly, the overrepresentation of women in informal employment has been identified as a key source of gender inequality in the labour market.[210]

What would appear as a remedy for an already unequal country appears to be aggravating factor for the women in the working society.

2.3. The labour force survey

South Africa is one of the countries with most unequal societies in the world and the prime driver of economic inequality is created through access to formal employment.[211] During the Covid-19 Pandemic,[212] workers in lower-paid formal employment were exposed to the risk of job loss.[213] The Unemployment Insurance Fund (UIF) provided some temporary relief for this group of workers, but it was beset by administrative failures.[214] The informal workers had no protection whatsoever. Approximately a third of the South African workforce is employed in the informal economy.[215] The 2020 lockdown removed their ability to generate income completely.[216] An analysis of the Labour Force Survey data shows that:

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[209] T Mbuli, "The glass ceiling effect in South African companies: an illusion or reality", an unpublished PhD Thesis submitted at the University of Western Cape, 2022 68.
[210] Rogan, M and Alfers, L 'Gendered inequalities in the South African informal economy' (2019) 33(4) *Agenda* 91.
[211] Ranchhod, V and Daniels, ARC 'Labour Market Dynamics in South Africa at the onset of Covid- 19 pandemic' (2021) 89(1) *South African Journal of Economics* 44.
[212] Covid-19 pandemic is explained as: COVID-19 (coronavirus disease 2019) is a disease caused by a virus named SARS-CoV-2. It can be very contagious and spreads quickly. Over one million people have died from COVID-19 in the United States. COVID-19 most often causes respiratory symptoms that can feel much like a cold, the flu, or pneumonia.
[213] Francis, D *et al.* 'Politics, Policy, and Inequality in South Africa under COVID-19' (2020) 9 (3) *Agrarian South: Journal of Political Economy* 346.
[214] *Ibid.*
[215] ILO (2018) Women and Men in the Informal Economy: A Statistical Picture (Third Edition) Geneva: International Labour Office.
[216] Francis, D *et al*. 'Politics, Policy, and Inequality in South Africa under COVID-19' (2020) 9(3) *Agrarian South: Journal of Political Economy* 346.

> There are 2.6 million South Africans working in the informal sector as own-account workers or their employees. Approximately, a million more people are employed as domestic workers, many of whom do not have employment contracts or any unemployment benefits.[217]

It was hypothetically predicted that at the end of the lockdown:

> Many of these workers, especially women, who often occupy the most precarious positions in the labor market, will find it very difficult to re-establish their work on the street corners, taxi ranks, and train stations around the country. These workers, sometimes called 'the precariat', have work, but no protection whatsoever.

There is a need to acknowledge that the social structure of the labour force in the Global South differs from that of the northern advanced industrialised societies.[218] Where the Global South has historically been dominantly composed of fulltime permanently employed workers that are represented mainly by national industrial unions, in the South, a multiplicity of classes and class fractions exist.[219] Namely, the informal sector, urban workers, small entrepreneurs, the unemployed, and peasants.[220] The industrial working class is a minority, while trade unions do not often represent the majority of workers, let alone other strata. Consequently, the principal agent of the Southern pact has been the developmental state, not the organised associations of capital and labour.[221]

Rogan and Alfers add that the growing participation of women in the labour force perhaps does not come as a surprise that the main concern has been whether increased labour force participation may have coincided with improvements in the equality of pay.[222] They further submit that:

'A large percentage of both women and men are, therefore, employed in the informal economy where work, by definition, lacks social and legal protection and where earnings are typically low.'[223]

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[217] *Ibid.*
[218] *Ibid.*
[219] *Ibid.*
[220] *Ibid.*
[221] *Ibid.*
[222] Rogan, M and Alfers, L 'Gendered inequalities in the South African informal economy' (2019) 33(4) *Agenda* 91.
[223] Rogan, M and Alfers, L 'Gendered inequalities in the South African informal economy' (2019) 33(4) *Agenda* 92.

2.4. Sectoral and occupational distribution

Occupational distribution is defined as 'the grouping of the population of a country into different productive sectors or occupations'[224] This grouping consists of three stages which are primary occupations, secondary occupations, and tertiary occupations.[225] These are the different categories of qualifications that determine which level of employment a person qualifies for. One does not just enter a tertiary occupation with no skill or qualification. For example, a person with primary education would not qualify to hold a position that requires tertiary education at master's level.[226]

These are some of the factors that contribute towards unemployment. The market may offer employment that requires tertiary education to a group of people who do not possess any form of education. This automatically means that they do not qualify for the job and consequently cannot contest for such a position. The lack of proper education is common amongst women. Some of the underlying reasons come with historic disadvantages which include lack of access to tertiary education for females owing to reasons such as gender segregation and having very little faith in the competence of females.

It has been submitted that one of the major contributions to gender wage gap is occupational and sectoral segregation.[227] Borrowman et al have investigated the determinants of aggregate occupational and sectoral segregation by gender in developing countries using a unique, household-survey-based aggregate cross-country database including sixty-nine countries between 1980 and 2011.[228]

Their investigation found that:

> Using two aggregate measures of segregation the study shows that occupational and sectoral segregation has increased over time in many countries. It finds that income levels have no impact on occupational or sectoral segregation; trade openness has little impact on sectoral segregation but increases occupational

[224] https://www.kofastudy.com/courses/ss1-economics-2nd-term/lessons/population-distribution-week-6/topic/occupational-distribution/
[225] *Ibid.*
[226] Taylor, N 'The dream of Sisyphus: Mathematics Education in South Africa' *South African Journal of Childhood Education* (2021) 11(1) 6.
[227] Borrowman, M and Klasen, S 'Drivers of Gendered Sectoral and Occupational Segregation in Developing Countries' *Feminist Economics* (2020) 26(2) 1.
[228] *Ibid.*

> segregation. Rising female labor force participation is associated with falling sectoral but increasing occupational segregation; rising education levels tend to increase rather than decrease segregation. Income inequality is associated with rising segregation. While the overall effects of structural change are small and mostly insignificant, a high share of commerce and services is associated with lower overall segregation.[229]

The findings from this study found that occupational and sectoral segregation has in fact risen over the past few years. It also finds that this rise is not due to income levels or trade openness but has a lot to do with little or no female participation in the labour force. In fact, the educational levels don't even decrease occupational and sectoral segregation, they increase it. What is likely to contribute towards lower overall segregation is in fact a high share of commerce and service.[230]

This could also be a contributing factor to uneducated women's desire to enter the labour market as this would mean they would have to work under non-standard employment arrangements. The drive towards climbing up the corporate ladder to a market that can easily compete with men in similar positions can be discouraging when looking at the issue of sectoral and occupational distribution. The author opines that for women in non-standard employment, these sectoral and occupational systems tend to be applied in a stricter sense when compared to that of men. For example, an institution can easily appoint a man with secondary education with the hope that they will obtain tertiary education while already in the system but would be reluctant to do so for a woman in the same position owing to the little faith that society has in women, especially the uneducated and the semi-educated.

2.5. Employment conditions

The various methods and forms of protection that are required in the workplace also vary from workplace to workplace. Depending on the working conditions that a worker is subjected to, the one method of employment protection might not work for the other. For example, a woman who is employed to work on the farms under unbearable hot temperatures does not require the same protection as a woman who is employed to sit in front of a computer and capture data on a daily basis does.

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[229] *Ibid.*
[230] *Ibid.*

This is especially when coming to issues such as maternity protection. A pregnant woman who works on the farm or at a mine need more protection against exposure to toxic substances which may pose great potential harm to her and her unborn child whereas a woman in the latter position may require maternity protection in the form of access to financial maternity benefits as well. Employment conditions also include the literal conditions that come with the employment. These conditions include factors such as job descriptions, working hours, compensation, dispute resolution, leave policies.

For the workers in standard employment, section 9(1) of the BCEA[231] provides for the regulation of working hours for employees. It states that the employer should not permit an employee to work for more than 45 hours a week but is very silent on workers who are not regarded as employees. This creates an impression that due to the unregulated working hours; employers may subject workers in non-standard employment to prolonged working hours.

Section 10 of the BCEA provides for payment for working overtime. It states that an employer may not require or even permit an employee to work overtime unless based on agreement and that the employer has to pay the employee at least one and a half times the employee's wage for overtime work done. This provision does not apply to non-standard workers and thus means that the exclusion leaves room for the employers to subject the workers to overtime work, even on an unpaid basis because their overtime work is unregulated.

Section 14 of the BCEA further provides for meal intervals and provides that an employer must give an employee who works more than five (5) hours a meal interval of at least one (1) hour.[232] Section 16 provides for the doubling of wages for every hour's work performed on Sundays. This provision does not apply to workers who are not regarded as employees and therefore means that workers in non-standard employment do not have the privilege to access this benefit and therefore creates a bit of prejudice on their part.

[231] 75 of 1997.
[232] Section 14(1).

Extra pay that comes in the form of night work,[233] public holidays,[234] is also available to employees only at the exclusion of non-employees. Section 20 of the BCEA provides for annual leave that is made available to employees. Section 20(2) provides for annual leave of 21 consecutive leave days with full remuneration in respect of each 12-month interval while section 21 provides for payment for such annual leave. Section 22 provides for sick leave; section 25 of the BCEA provides for maternity leave of four (4) consecutive months and section 27 provides for family responsibility leave[235] which are only available for employees. The exclusion of non-standard workers from the coverage of the definition of 'employee' means that these workers cannot access any of these rights that are envisaged in the BCEA.

2.5.1 Remuneration

The challenge with gender wage gaps in the labour market, is that most institutions offer more decent remuneration to men than they do to women, and this applies to women in both standard and non-standard employment. The challenge for women in non-standard employment stems from the need to grapple with issues of lower pay simultaneously with fighting for employment security and access to labour protection. The gender wage disparity challenge is a global problem. A study by Kulich and Trojanowski[236] found that 'bonuses awarded to men are not only larger than those allocated to women, but also that managerial compensation of male executive directors is much more performance-sensitive than that of female executives.' Chen et al. [237] submit that the issues with gender disparities in the work place are more common in developing countries. This is also based on the general misconception that leadership is typically associated with masculinity traits the society tends to erroneously link with competence and ability to lead.[238] With this perception, it may be

[233] Section 17(2).
[234] Section 18(2).
[235] Family responsibility leave is available for the birth of children, illness of the children, and in the event of the death of a spouse of a life partner of the employee, the parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.
[236] Kaluch, *et al*. 'Who gets the carrot and who gets the stick? Evidence of gender disparities in executive remuneration' (2011) 32(3) *Strategic Management Journal* 301.
[237] Chen M, *et al.* 'Progress of the world's women 2005: women, work and poverty'. United Nations Development Fund for Women, 2005. Accessed at https://www.unwomen.org/sites/default/files/Headquarters/Media/Publications/UNIFEM/PoWW2005_eng.pdf on 20th April 2023.
[238] Schein, V.E 'A global look at psychological barriers to women's progress in management' (2001) 57(4) *Journal of Social Issues* 675.

justified why it is so common that institutions find nothing wrong with paying women lower pay for similar work done by men. This reverts to placing the women at home, with the kids while the men go out to work.

Although with the evolution of daily activities in the labour society, it is still evident that the shift from viewing men as more superior to women in the workplace based on masculinity and issues based on competence is still but a pipe dream. This issue has been dominant for decades and persists, to date. The practice is that even if the woman is engaged in full-time employment and has maintained continuous careers, or work even works in male-dominated professions, they still receive lower compensation than men with comparable qualifications and experience.[239]

Kaluch et al.[240] submit that:

> For these reasons, it appears that women's differential career choices and experience cannot entirely explain the pay gap. This gap, then, can be seen to result, at least in part, from discrimination to be a consequence of other factors that are yet to be identified.

The unjust position that women find themselves in relating to their recognition, their remuneration, their access to executive positions, their access to permanent job contracts and their ability to compete in the labour market creates vulnerability of women both in typical and atypical forms of employment. At times it serves as the reason behind why most women find themselves unemployed or discouraged to search for employment.

2.5.2 Unemployment

Historically, women were not meant to participate in the labour market.[241] This dates back to the biblical days where men were meant to be the sole providers while women had to bear kids and tend to the household activities.[242] With the evolution of life and the relaxation of oppressive practices, more and more women are tapping into the labour market and even more into managerial and executive positions. Even yet, it

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[239] Kaluch, *et al.* 'Who gets the carrot and who gets the stick? Evidence of gender disparities in executive remuneration' (2011) 32(3) *Strategic Management Journal* 303.
[240] *Ibid.*
[241] Jayachandran, S 'Social Norms as a Barrier to Women's Employment in Developing Countries' *IMF Economic Review* (2021) 69 576.
[242] Titus 2:3-5 NIV.

comes as no surprise to find an unemployed woman but comes as a great shock to find a man unemployed. This is based on societal expectations and practices that have been in existence for a long time.

Most women, both educated and uneducated tend to be comfortable with their unemployment with the view that the men in their lives will cater for their financial needs and otherwise. While it is an even bigger challenge for the educated group, it doesn't appear to bother the uneducated majority.[243] Some of the issues behind the unemployment of women are caused by factors such as their lack of competitiveness in the labour market based on the employers' reluctance to employ women due to the expected multitasking between their roles at work and at home.[244] Most employers always avoid issues that come with reproduction, it has been said that it costs more to employ a woman than it does to employ a man due to the anticipated 100% contribution that men are expected to give in comparison to the apportioned effort that women are expected to give.

A study by Chen et al. reported that 'within each employment status category, women reported fewer days of work and more days of unemployment per year than men.'[245] With such findings, it may be the rationale behind why employers would opt to employ men as against women.

For example, when the Covid-19 pandemic hit the world, women in employment suffered disproportionately more from higher unemployment than their male counterparts because most women, including those who engage in some kind of employment tend to participate in such employment with little or no skills in sectors that were mostly affected by the Covid-19 response measure.[246] Due to the limitations to economic activities, 'the poverty outcomes show worsened vulnerability for female-headed households given that, even prior to the pandemic, poverty was already higher

[243] Chaturvedi, G & Sahai, G 'Understanding Women's Aspirations: A Study in Three Indian States' *Indian Journal of Women and Social Change* (2019) 4(1) 71.
[244] *Ibid.*
[245] Chen M, *et al.* Progress of the world's women 2005: women, work and poverty. United Nations Development Fund for Women, 2005. Accessed at https://www.unwomen.org/sites/default/files/Headquarters/Media/Publications/UNIFEM/PoWW2005_eng.pdf on 20th April 2023.
[246] Chitiga, M *et. al* 'How COVID-19 Pandemic Worsens the Economic Situation of Women in South Africa' (2022) 34 *European Journal of Development Research* 1627.

amongst women.'[247] When Covid-19 hit in 2019, Women's unemployment rate reached 31.3% against 27.2% for men in Quarter 4 of 2019.[248] This is in addition to the high statistics of unemployment and poverty amongst women in comparison to men.

This is credited to factors such as various post-apartheid legislations of equalising labour market entry as well as improved education. Tracking unemployment by gender between 1994 and 2014,[249] shows that women unemployment was unambiguously higher than that of men throughout that period.[250]

Chitiga et al. submit that:

> This is especially true in the formal occupations and high-paying jobs. Indeed, women are more likely to be hired in low-skilled occupations (36.2%) than in high-skilled occupations (11.7%), while these shares are, respectively, 14.4% and 24.8% for men. Only 5.7% of women are employed as managers compared to 10% for men. Other studies also confirm the same pattern of occupational segregation.

It is indeed challenging for women to participate in the labour market with ease due to *inter alia,* the employers' reluctance to employ them and the difficulty that they have to face in executing their required jobs in line with their respective job descriptions. To explain in broader details how unemployment affects women, the concept is broken down into two categories, namely narrow unemployment and non-searching unemployment.

2.5.3 The narrow unemployed

Narrow unemployment refers to the people who are unemployed but are seeking jobs and trying to get some work.[251] They actively participate in searching for new jobs.'[252] There are many people, both educated and uneducated who relentlessly search for

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[247] *Ibid.*

[248]Statistics South Africa. 2019. Quarterly Labour Force Survey, Quarter 4. http://www.statssa.gov.za/publi cations/P0211/P02114thQuarter2019.pdf.

[249] Mosomi, J. 2019. Distributional changes in the gender wage gap in the post-apartheid South African labour market. WIDER Working Paper No. 2019/17. Cape Town: UNU World Institute for Development Economics Research.

[250] Chitiga, M *et. al* 'How COVID-19 Pandemic Worsens the Economic Situation of Women in South Africa' (2022) 34 *European Journal of Development Research* 1627.

[251] https://www.investopedia.com/terms/u/unemployment.asp. Accessed on 12 June 2023.

[252] Nattrass, N 'Unemployment, Employment and Labour-Force Participation in Khayelitsha/Mitchell's Plain' *Centre for Social Science Research* CSSR Working Paper No. 12 October 2002.

jobs on a daily basis. They do not have employment as yet but have not given up on the opportunity to one day secure employment. This category of unemployed persons is rife in women. This is owed to the number of female-headed households resulting from the high statistics of men who abandon their families. Women are mostly regarded as primary caregivers and nurturers. This in turn places them on the unfavourable side of things because unlike men, they cannot just decide to wake up and abandon their children.

This also contributes to the high representation of women in non-standard employment. The dire need to make money to feed their children is the reason why they end up opting to settle for insecure, unprotected and unreliable forms of employment. The desperation to feed their children compels them to take on, *inter alia* casual jobs, seasonal jobs, jobs as independent contractors, domestic works just to make ends meet. This desperation to feed their children also results in them not having issues taking on jobs which lack security, feature unbearable working conditions and lower paying jobs.[253]

2.5.4 The non-searching unemployed

While on the notion of the practice of women being homemakers and bearers of children, the non-searching unemployed category of women features women who both educated and uneducated are just not looking for jobs. For some of these women, this may be motivated by the societal and even biblical belief that the man is the sole provider. This is, however, not the only factor that contributes to the non-searching category of women. At times this is motivated by the difficulty with multitasking being a mother, a wife, and a working woman. This multitasking results in women's perpetual fatigue that has a bearing on both the mental and physical wellbeing of the woman.

Chitiga et al, add that:

> Moreover, it places a very heavy burden on women, as they have to attend to many domestic chores including home care and schooling while schools are closed as well as preparing meals. As a result, women have very limited time to do other work. Being at home, workers are not using the capital in the factories, which becomes less productive. This decreased productivity of factors of

[253] Rajan SI and Sukendram S, *Understanding Female Emigration: Experience of Housemaids* (1st Edition, Routledge, India) 197.

> production impacts the production of all sectors, although with different intensities.[254]

The woman tends to be discouraged to look for a job either due to the prospects of slacking either at home or in the workplace or even because she is conditioned to believe that she is the nurturer, and her husband is the provider.

2.6. The status of women in the labour market

Historically, women have always been viewed as 'homemakers' as opposed to 'breadwinners' and providers like men are. This has resulted in societal standards making it easy for employers to take women for granted and offer them lesser remuneration than they offer to men. As Mosomi[255] submits, 'the labour market under apartheid was characterised by patriarchal traits where the white male 'breadwinner' received a civilised wage assumed to be a family wage whereas women were perceived as home makers.'[256]

According to Cock:

> Influx control laws and pass laws prevented black women from migrating to urban areas in search of formal employment. The main occupation for black women was domestic work where the pay was low, and the working conditions were precarious.[257]

Rogan and Alfers submit that women are currently overrepresented in the informal economy in comparison to men. [258] They do however add that:

> In attempting to understand gendered income inequality in the informal economy it is important to emphasise that this disadvantage is unlikely to be derived from a single identifiable cause. Women in the informal economy are disadvantaged not just because they tend to be concentrated in forms of employment which carry higher economic risks, but also by a range of other factors such as lower education levels, lack of technical skills and human capital, unequal responsibility in the domestic sphere, and patriarchal practices ingrained in the social fabric.[259]

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[254] Chitiga, M *et. al* 'How COVID-19 Pandemic Worsens the Economic Situation of Women in South Africa' (2022) 34 *European Journal of Development Research* 1636.
[255] Mosomi, J. 2019. Distributional changes in the gender wage gap in the post-apartheid South African labour market. WIDER Working Paper No. 2019/17. Cape Town: UNU World Institute for Development Economics Research.
[256] Chen M, *et al.* "Progress of the world's women 2005: women, work and poverty.", United Nations Development Fund for Women, 2005. Accessed at https://www.unwomen.org/sites/default/files/Headquarters/Media/Publications/UNIFEM/PoWW2005_eng.pdf on 20th April 2023.
[257] Cock, J. *Maids and Madams: A Study in The Politics of Exploitation*, Johannesburg, Ravan Press (1980) 9.
[258] *Ibid.*
[259] *Ibid.*

A cross-sectional analysis that was conducted revealed that there was an improvement to the labour force participation of women in the labour market.[260] It showed that, for example:

> In the third quarter of 2015, the female share of the labour force in South Africa was 46% up from 42% in 1993. This increase in labour force participation is attributable to, among others, increased investment in education for women, changes in the returns to female labour market characteristics and anti-discrimination legislation.

The abolition of apartheid laws and oppressive societal standards have contributed towards elevating women to better positions compared to where they were 10 years ago.

2.7. Summary

The position of women in the labour market has gradually improved in comparison to where the recognition of women was 20 years ago. However, with this gradual increase, it is still evident that there is still a bit of ground to cover. This is especially so when considering women for executive and managerial positions because in these departments, women still lack quite a bit. For a developing country, like South Africa, the situation is slightly more challenging than in developed countries who seem to be a step ahead in recognising the potentials of female workers across the labour market. Hypothetically speaking, 10 years from now, South Africa may have possibly moved a step ahead judging by the progress that has been made since the end of the apartheid regime and owing to the contributions made by interventions such as affirmative action and the Constitution.

[260] Mosomi, J An empirical analysis of trends in female labour force participation and the gender wage gap in South Africa' (2019) 33(4) *Agenda* 30.

CHAPTER THREE: LEGAL FRAMEWORK ON THE PROTECTION OF WORKERS ENGAGED IN NON-STANDARD EMPLOYMENT RELATIONSHIP

3.1. Introduction

The current labour legislation is tilted towards favouring and providing protection for the workers who are engaged in the Standard Employment Relationship.[261] The reason is that there is a large number of precedents in place favouring the SER which are applied and used in the Labour courts daily, while there is close to none that was set with the workers engaged in TER[262] in mind. This, according to the author, is rather discriminatory and does not align with section 9 of the Constitution of South Africa, 1996.[263] This is also in line with the principle of equal treatment.[264]

The existing labour laws of South Africa provide for the access to paid maternity leave for employees.[265] Unfortunately, the South African legal system which provides protection to employees does not consider the other category of female workers who are engaged in atypical forms of employment such as, self-employed women, women in uniform (defence/secret service), and those in the informal economy.[266] Ideally, domestic workers and farm workers are entitled to four months maternity leave, but this leave is on an unpaid basis.[267] There are still large inequalities that exist between men and women in South Africa as well as women of different classes, SER and race.[268] It is safe to presume that most working women have access to, and are entitled to maternity protection including employment security and paid maternity leave but the biggest challenge in South Africa, currently is that the application of these rights

[261] Hereinafter referred to as SER.
[262] Hereinafter referred to as TER.
[263] Constitution of South Africa Act 108 of 1996.
[264] The principle of equal treatment is a principle that was established to ensure that "all people – and in the context of the workplace, all workers – have the right to receive the same treatment and not to be discriminated against on the basis of criteria such as age, disability, nationality, race and religion." Accessed at https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/equal-treatment on 20 March 2020.
[265] COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[266] *Ibid.*
[267] *Ibid.*
[268] *Ibid.*

exists on paper but not practically enjoyed due to the limitation in implementation, coverage and monitoring of these policies.[269]

The LRA retained the provisions of labour brokers and is now provided by section 198(1) of the Act, however, with the little renovation as now termed as TES.[270] For the purposes of this chapter, TER, TES, and labour brokers are used interchangeably. According to Gumede, the LRA introduced a new section that deal with liability of the labour broker or otherwise the client for any failure to observe labour laws including the BCEA, a collective agreement, sectoral determination, or an arbitration award.[271] He adds that:

> However, there were several shortcomings of the LRA namely: it was the labour broker that was responsible for disputes arising in respect of unfair dismissal or unfair labour practices; the labour broker employees were underpaid when compared to those employees employed by the client directly; even though the nature of their employment was meant to be temporary but it was often for an indefinite period; they were also subjected to unfair payment of benefits such as pension fund, and medical aid, it was also impossible and complicated for these employees to identify the identity of their true employer because of the arrangement of this triangular employment relationship.[272]

Byrne's submits that:

> The use of labour brokers or TES is argued to be a driver of inequality and poverty in South Africa and that the LRA contributed to this. The argument held that the triangular relationship created between TES companies, client companies, and TES workers, with no time limit to ensure that it was indeed temporary, resulted in these workers having diminished rights and protections.[273]

Byrne argues that the failure to treat workers equally in the workplace amounts to discrimination. He argues that the triangular relationship, which is created comprising of the TES companies, the client companies as well as the workers in the TES result in these workers having little or no rights and protection.

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[269]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.

[270] Gumede B.J., A critical examination of the interpretation and application of the law relating to Temporary Employment Services in South Africa", an unpublished LLM dissertation submitted at the University of KwaZulu-Natal, 2018.

[271] *Ibid.*

[272] *Ibid.*

[273] Byrne D, "NUMSA v Assign Services (2017) 38 *ILJ* 1978 (LAC) - The implications for triangular relationships in the South African workplace", an unpublished LLM dissertation submitted at the University of the Witwatersrand, 2018 3.

Discrimination on its own is an ongoing challenge that the equality courts grapple with on a day-to-day basis. This is, however, mostly discrimination based on *inter alia* gender, age, race, tribe, culture but hardly ever on the employment relationship.[274] The author opines that, in as much as there have been quite many writers who have written on this field of study, it remains one of the most stagnant fields of law.

The challenges faced by non-standard workers date back to centuries before democracy and even after the numerous attempts, they are still left with little or no protection whatsoever. The LRAA[275] also could not provide a solution that is beneficial to workers in the TER. This failure to amend the terminology has proven to be the main reason behind the continued abuse and exploitation of the workers in the TES.

This chapter looks at the various legislative framework, namely statutes, common law, case law, constitutional law, and other frameworks, both nationally and internationally dealing with the legal protection afforded to non-standard workers. Such a framework may help in addressing the challenges faced by the workers who are engaged in non-standard forms of employment. This chapter also incorporate changes and developments which have occurred in the employment sector, especially where the TER is concerned amid the Covid-19 pandemic.

In the first quarter of 2020, South Africa recorded its first case of the Covid-19 which prompted an abrupt halt in economic activities compelling some of the companies to retrench their workers as a result of yield in output. On the 26th of March 2020, the country had a level 5 lockdown restriction implemented and most companies were forced to close shop. This meant that most workers were expected to be paid without working and that, in turn, put a major financial strain on these companies which then called for retrenchments. It is common knowledge that when it comes to retrenchments in companies, the Last in First Out (LIFO) policy is always applied but it is even more common to have temporary employees removed from the system. It is the workers in TER that suffered the most with little or no recourse at their disposal. The discussion

[274] Byrne D, "NUMSA v Assign Services (2017) 38 *ILJ* 1978 (LAC) - The implications for triangular relationships in the South African workplace", an unpublished LLM dissertation submitted at the University of the Witwatersrand, 2018 3.
[275] Labour Relations Amendment Act 8 of 2018.

of the legislative framework begins with the common law position of the relationship between the employer and the workers.

3.2. The need to provide legal protection to the non-standard workers.

With the rapidly rising statistics of unemployment and lack of job security in South Africa, there is a serious need to afford protection to all workers internationally regardless of the employment contract they find themselves engaged in. According to *Statistics South Africa*, the unemployment rate currently sits at 33.9%.[276] This includes people who are in and out of employment, those who work on contract basis, casual and seasonal workers because most of these people are in most cases not working because there are no seasonal fruits at that time in the case of seasonal workers. The statistics continue to grow at an alarming rate, and one may begin to wonder where the solution lies.

Part of the assisting mechanisms may be extension of social security to the workers engaged in atypical work. This can be done firstly by including them under the definition of employee as per labour legislations and secondly by affording them the benefits that are afforded to other workers who are employed on a permanent basis. When analysing the challenge borne by independent contractors for example, these workers can be incorporated and classed into the definition of employee for full access to all benefits that other workers have access to. This can be a starting point and may aid in eradicating unemployment greatly.

The need for affording protection dates back to the 1980s when institutions started realising the need to lower costs of their day-to-day activities owing to rising prices of trade and production.[277] The lowering of industry costs, which is termed 'flexible labour market' was introduced. This was because the 'powers that be' had noticed that failure to introduce the flexible labour market would increase labour costs. This flexibility came in many different forms including the changing of employment levels.[278]

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[276]Accessed at https://www.statssa.gov.za/?page_id=737&id=1. on 22 November 2022.
[277] Cohen, C & van der Meulen-Rodgers, 'The feminist political economy of Covid-19: Capitalism, women, and work' 16 (2021) *Global Public Health* 1382.
[278] Standing, Guy. "The Precariat." The Precariat: The New Dangerous Class. London: Bloomsbury Academic, 2011. 1–25. Bloomsbury Collections. Web 5. 22 Nov. 2022.

Standing Guy submits that:

> In essence, the flexibility advocated by the brash neo-classical economists meant systematically making employees more insecure, claimed to be a necessary price for retaining investment and jobs. Each economic setback was attributed in part, fairly or not, to a lack of flexibility and to the lack of 'structural reform' of labour markets.[279]

As globalisation developed and as the people in leadership positions proceeded with their attempts to make the market flexible, job insecurities grew and when job insecurities grew, so did inequalities in the working environment thus creating 'the precariat.'[280] The term precariat is a merger of (precarious) portmanteau[281] and proletariat[282]. Ploteriat suggests 'a society consisting mostly of workers in long-term, stable, fixed-hour jobs with established routes of advancement, subject to unionisation and collective agreements, with job titles their fathers and mothers would have understood, facing local employers whose names and features they were familiar with.'[283]

In a precariat setting, the worker would not know who their employer is or how many colleagues they were employed with or were likely to have in the future.[284] These workers were also not part of the 'middle class', because they did not have a stable or predictable salary or the status and benefits that middle-class people were supposed to possess.[285]

Accordingly, over the years, into the 1990s, more people, not just in countries that were developing, found themselves in a status that was referred to as 'informal' by development economists and anthropologists.[286] Probably they would not have found

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[279] *Ibid.*
[280] 'In sociology and economics, the precariat is a neologism for a social class formed by people suffering from precarity, which means existing without predictability or security, affecting material or psychological welfare. The term is a portmanteau merging precarious with proletariat.'
[281] 'A portmanteau word, or portmanteau is a blend of words in which parts of multiple words are combined into a new word, as in smog, coined by blending smoke and fog, or motel, from motor and hotel. In linguistics, a portmanteau is a single morph that is analysed as representing two underlying morphemes.' Accessed at https://en.wikipedia.org/wiki/Portmanteau on 22 November 2022.
[282] 'The proletariat is the social class of wage-earners, those members of a society whose only possession of significant economic value is their labour power. A member of such a class is a proletarian.' Accessed at https://en.wikipedia.org/wiki/Proletariat on 22 November 2022.
[283] Guy, S. The Precariat: The New Dangerous Class. London: Bloomsbury Academic, 2011. 1–25. Bloomsbury Collections. Web p6. 22 Nov. 2022.
[284] *Ibid.*
[285] *Ibid.*
[286] *Ibid.*

this a helpful way of describing themselves, let alone one that would make them see in others a common way of living and working. So, they were not working class, not middle class, not 'informal.'[287] This now begged the question, what were they? A flicker of recognition would have occurred in being defined as having a precarious existence.[288] Friends, relatives and colleagues would also be in a temporary status of some kind, without assurance that this was what they would be doing in a few years' time, or even months or weeks hence. Often, they were not even wishing or trying to make it so.[289]

Guy defines the notion precariat as:

> A distinctive structure of social income, which imparts a vulnerability going well beyond what would be conveyed by the money income received at a particular moment. For instance, in a period of rapid commercialisation of the economy of a developing country, the new groups, many going towards the precariat, find that they lose traditional community benefits and do not gain enterprise or state benefits. They are more vulnerable than many with lower incomes who retain traditional forms of community support and are more vulnerable than salaried employees who have similar money incomes but have access to an array of enterprise and state benefits. A feature of the precariat is not the level of money wages or income earned at any particular moment but the lack of community support in times of need, lack of assured enterprise or state benefits, and lack of private benefits to supplement money earnings.[290]

Apart from insecurity and insecure social income, there is no work-based identity for those in precariat. At the time they engage in the employment, the jobs they do cannot be deemed to be careers.[291] Especially because of the absence of social memory which is a feeling of belonging to an occupational community steeped in practices that are stable with codes of ethics and norms of reciprocity, behaviour and fraternity.[292] The precariat environment does not feel as part of a labour community that is solidaristic. This then strengthens a sense of alienation and instrumentation in what they have to do. The attitudes and actions that are derived from precariousness, drift towards a lifestyle of opportunism.[293]

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[287] Guy, S. "The Precariat." The Precariat: The New Dangerous Class. London: Bloomsbury Academic, 2011. 1–25. Bloomsbury Collections. Web pp7. 22 Nov. 2022.
[288] *Ibid.*
[289] *Ibid.*
[290] *Ibid.*
[291] *Ibid.*
[292] *Ibid.*
[293] *Ibid.*

For the workers in a precariat, there is no 'shadow of the future' hanging over their actions, to give them a sense that what they say, do or feel today will have a strong or binding effect on their longer-term relationships.[294] This is because the precariat knows there is no shadow of the future, because there is no future in what they are doing. Guy avers that:

> To be 'out' tomorrow would come as no surprise, and to leave might not be bad, if another job or burst of activity beckoned. The precariat lacks occupational identity, even if some have vocational qualifications and even if many have jobs with fancy titles. For some, there is a freedom in having no moral or behavioural commitments that would define an occupational identity. We will consider the image of the 'urban nomad' later, and the related one of 'denizen', the person who is not a full citizen. Just as some prefer to be nomadic, travellers not settlers, so not all those in the precariat should be regarded as victims. Nevertheless, most will be uncomfortable in their insecurity, without a reasonable prospect of escape.[295]

Currently, taking a job on a temporary basis is a strong indicator of a kind of precariousness.[296] For some it may be viewed as a 'steppingstone' to the development of a career, while for many it may be a 'steppingstone' leading into a lower income status.[297] Accepting a temporary job after a spell of unemployment, as urged by many policy makers, can actually result in lower earnings for years coming ahead. Once a person enters a lower step job, the probability of upward social mobility or of gaining a 'decent' income is permanently reduced. Taking a casual job may be a necessity for many, but it is unlikely to be a promotion of social mobility.[298]

Another form of a precariat is part-time employment which appears to be a tricky understatement that is a feature of our tertiary economy, this is so in comparison to industrial societies.[299] In most countries, part-time is defined as being employed or remunerated for less than 30 hours a week. Many people who choose or find themselves obliged to take a job on a part-time basis find that they have to work more than anticipated and more than they are being paid for. Part-timers who are often women, may end up being subjected to more exploitation, being expected to do more

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[294] *Ibid.*
[295] *Ibid.*
[296] Guy, S. The Precariat: The New Dangerous Class. London: Bloomsbury Academic, 2011. 1–25. Bloomsbury Collections. Web pp15. 22 Nov. 2022.
[297] *Ibid.*
[298] *Ibid.*
[299] *Ibid.*

undercompensated work that falls outside their paid hours, and having to do extra work to retain a niche of some sort.[300]

The growth of the precariat is owed to growth in globalisation that is said to have mainly occurred between 1975 and 2008.[301] This growth occurred because of politics and institutional changes during that period. This was the time when work structures were mostly reworked, and employment contracts adjusted to suit the changes that were taking place. The main idea for all employers was to reduce labour costs by replacing most of the workers under traditional work contracts to temporary contracts, casual and seasonal workers with the idea of getting similar output while spending slightly lesser than they would have under the typical employment arrangements which include benefits such as social security packages. It is also easier to hire and fire workers who are not engaged in traditional working contracts as opposed to those who are engaged in non-traditional contracts such as temporary workers.

Guy submits that:

> For three decades, making it easier to fire workers has been advocated as a way of boosting jobs. This, it is argued, will make potential employers more inclined to employ workers since it will be less costly to be rid of them. Weak employment security has been depicted by the International Monetary Fund (IMF), the World Bank and other influential bodies as necessary to attract and retain foreign capital. Governments have accordingly competed with one another in weakening employment protection and have made it easier to employ workers with no such protection.[302]

The introduction of the precariat has created rather unfavourable working conditions for all people who find themselves associated with it thus, creating an even bigger challenge for all such workers. According to literature, 'the dominant image of the precariat stems from numerical flexibility, through what were long called 'atypical' or 'non-standard' forms of labour.'[303]

An additional characteristic of flexibility can be seen in the growing use of temporary labour, which enables firms to change employment arrangements and patterns

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[300] *Ibid.*

[301] Guy, S. "Why the Precariat Is Growing." The Precariat: The New Dangerous Class. London: Bloomsbury Academic, 2011. Bloomsbury Collections. Web. 26.

[302] Guy, S. "Why the Precariat Is Growing." The Precariat: The New Dangerous Class. London: Bloomsbury Academic, 2011. Bloomsbury Collections. Web. 32.

[303] *Ibid*.

quickly, so that they can adapt and alter their division of labour.[304] The use of temporary labour bears many cost advantages because the wages are slightly lower, issues around experience-rated pay is easily avoided, there is close to no entitlement to enterprise benefits which is lower and there is lesser risk because taking on somebody temporarily results in the absence of commitment that might be regretted, for whatever reason.[305]

The use of temporary workers benefits the firms more than it benefits the workers because the workers are usually expected to do more for less as opposed to the permanent workers who would expect to be paid proportionally when they accept or take on the particular employment. Also, knowing that their employment is not as secure as that of workers in traditional work arrangements creates some kind of inevitable fear that if they do not perform under the hefty and unbearable working conditions, they may be told to leave and with the high unemployment rate in South Africa, they know that they can be replaced at any given time.

Because of how vulnerable workers in atypical employment tend to be, there is a serious need to protect them against institutional abuse caused by the lack of employment security and lack of job stability. The workloads that they are expected to carry out for lesser pay and benefits is unfair to their health and well-being and at the end of it all, they are human, just like the workers who have permanent employment contracts.

3.3. The definition of the notion employee in different labour legislations

Ordinarily the term ‘employee’ refers to any person who works for another person, whether on a part-time or full-time basis, works for a certain organisation or even the state, and receives remuneration for rendering a specific service to what is purported to be his or her employer. This is regardless of whether or not there exists an oral or written contract of employment.[306] This further means that the employee also has

[304] *Ibid.*
[305] *Ibid.*
[306] Mokofe, W.M “The Regulation of Non-Standard Employment in Southern Africa: The Case of South Africa With Reference To Several Other SADC Countries”, an unpublished LLD thesis University of South Africa, 2018 31.

rights and responsibilities that are recognised rights and responsibilities.[307] Mokofe notes that:

> It is important to define the term 'employee' because a lot hinges on the distinction between employees and persons who are not employees. South African labour legislation applies only to employees, and only an employee can claim protection against unfair dismissal. It is therefore critical to be able to distinguish between employees in standard employment relationships and non-standard workers. [308]

The concept of 'employee' is defined by many instruments in different ways. Dominantly, these instruments, such as the ILO Conventions and the South African Constitution refer to 'worker' than 'employee.' [309] The court in the *Broadbent v Crisp* case held that, 'the concept 'worker' is much wider than that of 'employee' as it can include an individual who is self-employed, provided that he or she is under an obligation to carry out the work him- or herself.'[310]

It would appear that the word employee is more formal than using the word worker. There are, however, statutory definitions of the word 'employee.' These are discussed in detail below.

3.3.1. Who is an employee?

In terms of the LRA,[311] the BCEA[312] the SDA[313] and the EEA[314] define employee as, '(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) in any manner assists in carrying on or conducting the business of an employer.' It is important to note the definition of employee, especially since it only covers a worker who is of a particular category.

The Occupational Health and Safety Act[315] (OHSA) however, defines employee as 'any person who is employed by or works for an employer and who receives or is

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[307] *Ibid.*
[308] *Ibid.*
[309] *Ibid.*
[310] (1974) ICR 248 National Industrial Relations Court.
[311] Labour Relations Act 66 of 1995.
[312] Basic Conditions of Employment Act 75 of 1997.
[313] Skills Development Act 97 of 1998.
[314] Employment Equity Act 55 of 1998.
[315] Occupational Health and Safety Act 85 of 1993.

entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person.'[316] The UIA, however, defines an 'employee' 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.' Among the employees expressly excluded from the application of the UIA are employees who are employed for less than 24 hours a month with a particular employer. It accordingly excludes those within the informal sector of employment, as well as atypical workers.[317]

This provision means that even though atypical workers have the right to maternity leave in terms of the BCEA, they are expressly excluded from claiming maternity benefits under the UIA.

3.4. The Common law

The common law is important for conducting this study for the following reasons:

a) The first reason is that the common law is the basis of most, if not all contemporary fields of law.[318] It provides that foundation for the employment contract as well as the general rules of employment. It can also be used as a reference even in the absence of any legislative or constitutional provision(s). The legislation addresses the gaps which exist in law, especially those that are not satisfactorily addressed by the common law. But the main point is that the common law remains the foundation of our labour law.

b) Secondly, the Constitution requires that the courts 'interpret the common law principles in accordance with constitutional values in order to adapt to current needs of the society.' [319]

c) Thirdly, where the current legislation proves to be less beneficial than the common law, it will always be used as a reference.[320]

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[316] Section 1 of the OHSA.

[317] Behari, A 'Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits' *(*2019) 31 *Mercantile Law Journal* 254.

[318] Conradie M "A Critical analysis of the right to fair labour practices'', an unpublished LLM dissertation submitted at the University of Free State, 2013 12.

[319] *Ibid.*

[320] *Ibid.*

d) Fourthly, the workers who are specifically excluded by the BCEA, the EEA, and the LRA, other legislation, the Constitution, and their contracts of service.[321]

It is also worth noting that contracts of employment, although based on the common law, overrides the common law.[322] But it is also highlighted that even though the common law may be overridden by the Constitution and legislation, the common law did not disappear from the scene. Though it is no longer the only foundation of an employment relationship, the common law contract of employment is still one of the most significant foundations of the legal base for the creation of an employment relationship.[323]

3.5. The Constitutional framework

Section 2 of the Constitution states as follows:
'This 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.' With the supremacy of the Constitution, taking into account its dominance and in looking at the various frameworks that exist in the law, this part of the chapter looks into the perspective of the South African Constitution as a starting point.

While section 2 of the Constitution states that the Constitution is the supreme law of the Republic, Section 39 states that:

> (1) When interpreting the Bill of Rights, a court, tribunal, or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality, and freedom, (b) must consider international law, (c) may consider foreign law.
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights.
> (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by the common law, customary law, or legislation, to the extent that they are consistent with the Bill.

[321] *Ibid.*
[322] *Ibid*.
[323] *Ibid.*

While the Constitution is the supreme law of the country, it also contains the Bill of rights which is in Chapter 2. The Bill of rights has several provisions which are for preserving the necessary rights such as the right to dignity and reproduction which to some extent work against the female workers engaged in atypical work. Below, this study will examine each of these rights in detail, starting with the right to fair labour practices.

3.5.1. THE RIGHT TO FAIR LABOUR PRACTICES

Section 23 of the Constitution deals primarily with employment related matters. As stated in Chapter 1 above and in summary, the section provides for everyone's access to fair labour practices. It further provides that every worker has a right to join and participate in activities of the trade union.

The first part of this section provides for everyone to have a right to fair labour practices.[324] However, this is not the case. If section 23(1) was observed with caution, read, and interpreted as it should be, then the imbalance and workplace discrimination would not exist. It appears to state that the common law did not exactly provide for fair labour practices in the employment relationship. Recently, however, it seemed as though the courts were eager to improve the common law to address the fairness concept in detail. In *Boxer Superstores Mthatha & another v Mbenya*[325] and in *Murray v Minister of Defence*[326] it was held respectively that, 'all contracts of employment contain an implied term that employers must treat employees fairly.' Consequently, it was found in *Jonker v Okhahlamba Municipality & others* [327] that, 'an ordinary breach of contract may infringe the employee's wider constitutional right to fair labour

[324] Section 23(1) of the Constitution.
[325] *Boxer Superstores Mthatha & another v Mbenya* (2007) 28 *ILJ* 2209 (SCA).
[326] *Murray v Minister of Defence* (2008) 29 *ILJ* 1369 SCA. This case involved the limits of the exclusive jurisdiction of the labour courts under the Labour Relations Act 66 of 1995 (the LRA). Boxer Superstores argued that in substance Ms Mbenya, its former employee, was complaining about the unfairness of her dismissal, even though she claimed in her application that the dismissal was 'unlawful'.
[327] *Jonker v Okhahlamba Municipality* Jonker v Okhahlamba Municipality and Others (LD71/05) [2005] ZALC 22; [2005] 6 BLLR 564 (LC); (2005) 26 *ILJ* 782 (LC) (21 February 2005) at 568-569. In this case, the first respondent had suspended the applicant in May 2003. After certain exchanges between the representatives of the parties, the applicant was reinstated, and he tendered his services on 1 December 2003. He was then demoted. He referred the dispute to the CCMA. An award was issued and set aside on review on 3 December 2004. The reviewing Judge ordered that the applicant be reinstated to his position of Municipal Manager with effect from 22 May 2003. He remarked, in passing, that he did not think that the "chances of disciplining the applicant have lapsed ... If the award is corrected the third respondent will still retain the chance of disciplining the applicant if it wants to proceed with the disciplinary proceedings against the applicant.

practices.' In *Tsika v Buffalo City Municipality* as well as *Mogothle v Premier of the Northwest Province*[328] it was held that 'employers owe a general duty of fairness to employees in terms of the contract of employment.' Freund et al also refer to the case of *Globindlal v Minister of Defence & others*[329] where it was decided that 'in a situation where an employee is not covered by the LRA, it could be argued that it was an implied term of the contract that the rights enshrined in section 23 of the Constitution, form an integral part of the contractual relationship.'[330]

This position was overturned by the decision in *South African Maritime Safety Authority v McKenzie,*[331] where it was held that 'the common law contract of employment contains no implied duty of fairness, and more specifically not an implied right not to be unfairly dismissed. Such an implication can only be drawn from the common law or legislation. It is, however, possible that parties expressly/tacitly agree on the inclusion of such a duty.' The court in this case, however, accepted the possibility that the common law may require development for the protection of the workers that are not protected by the current LRA.

Grogan opines that although the legislative definition does not seem to specify, for an act or omission to constitute an unfair labour practice that one aggrieves of, it must be by an employer against an employee.[332] He further states that an employer cannot be said to have committed an unfair labour practice against other employers' employees.[333] This means that 'the client of an SER cannot perpetuate an unfair

[328] *Mogothle v Premier of the Northwest Province & another* (2009) 30 *ILJ* 605 LC. The applicant was employed by the department with effect from 1 April 2006. He answers to the first respondent (the premier) and also to the second respondent (the MEC), to the extent that the premier has delegated her powers to him. The applicant's contract incorporates a number of statutory and other regulatory provisions, including, it would seem, the SMS code. On 4 November 2008, an article appeared in the Mail and Guardian in which imputations of corruption were levelled against the applicant. The article stated that the applicant, a member of Thathana Farms CC, was the beneficiary of a state grant and had signed the operative contract in both his official capacity, as a representative of the donor, and in his capacity as a representative of Thathana, the recipient of the grant. On 10 November 2008, the MEC appointed Sekela Auditors to investigate the allegations made in the article. At this point, the MEC self-evidently considered that there was no risk that the applicant might compromise the investigation, because he took no steps to suspend him.
[329] *Globindlal v Minister of Defence & others* (2010) 31 *ILJ* 1099 (NGP).
[330] Conradie M "A Critical analysis of the right to fair labour practices'', an unpublished LLM dissertation submitted at the University of Free State, 2013 12.
[331] *South African Maritime Safety Authority v McKenzie* (2010) 31 *ILJ* 529 (SCA).
[332] Grogan J *Employment Rights* (11th Edition, Juta Publications) 2014 112.
[333] *Ibid*.

labour practice against a 'hired' employee even if the client is an employer of other employees in its own right.'[334]

3.5.2. The Right to human dignity

The discussion on human dignity as laid out in Chapter 1 above, has revealed that 'this right is an enforceable right that must be respected and protected, it is also a value that informs the interpretation of possibly all other fundamental rights and it is further of central significance in the limitations inquiry.'[335] An illustration of this statement was made *Christian Education South Africa v Minister of Education,*[336] where it was stated that, when complementing rights under the limitations clause, one must ask how the constitutional significance of dignity is affected.

Decent work and human dignity are somewhat intertwined. With the introduction of access to decent work afforded to people engaged in employment (in whichever way), there is also a need to advocate for affording workers engaged in atypical work access to decent work. It violates their dignity in many ways than one when a worker is subjected to unequal treatment in the workplace because of their employment contract. In their paper, Kolot et al.[337] state that 'various definitions of the criteria and indicators of decent work are considered, which form the basis for understanding its essence and content saturation.'[338] They describe decent work from the perspective of equal opportunities for men and women to get a decent and productive job in the conditions of freedom, justice, protection and human dignity.[339]

According to the ILO,[340] 'decent work is productive work that respects human rights and guarantees the safety, protection and opportunity to participate in all decisions that may affect the activity of a working person.'[341] This means that, the main link

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[334] *Ibid.*
[335] *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para [35].
[336] 2000 (4) SA 757 (CC) para [15].
[337] Kolot, A *et al.* 'Development of a decent work institute as a social quality imperative: lessons for Ukraine' (2020) 13 *Economics and Sociology* 3.
[338] *Ibid.*
[339] *Ibid.*
[340] International Labour Organization. (2000). Decent Work in the Information Economy. Report of the Director-General. Geneva. Accessed at https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm on 23rd March 2022.
[341] *Ibid.*

between human rights and non-standard work can be located in the decency of the work they are expected to perform, their working conditions as well as the length that the law goes to protect these workers. Currently, with an observation of how they have little or no protection leaving them vulnerable with exposure to indecent working conditions, it can be safe to conclude that their right to human dignity in the workplace is violated.

3.5.3. The Right to freedom and security of a person

The Constitution also provides for the right to freedom and security of a person. It also refers to everyone's right to bodily and psychological integrity which is stated in section 12(2). This right incorporates the right to make reproductive decisions, security, and control over their bodies. This means that every individual, including those who are engaged in atypical work, should also be afforded the freedom to make reproductive decisions without any restrictions or contractual obligations which make it almost impossible to freely decide whether they want to reproduce or not. This means that they should be allowed to make decisions on how and when they want to fall pregnant without risking income and job security. Section 12 (2) states that:

> Everyone has the right to bodily and psychological integrity, which includes the right
> (a) to make decisions concerning reproduction;
> (b) to security in and control over their body; and
> (c) not to be subjected to medical or scientific experiments without their informed consent.

In particular, section 12(2) (a) provides the right to make decisions concerning reproduction. The submission which the author makes regarding this section is that, for women engaged in atypical employment, decisions relating to reproduction are not as easy as for those in the SER. Before they make decisions to reproduce, they must ensure that the decision is very much calculated because failure to do so may result in them losing out on income for the duration of the pregnancy (if it is a high-risk pregnancy) and throughout their maternity leave. Sometimes it may even end up being a complete job loss.

It is submitted that the lack of control over one's body and destiny essentially involve a loss of dignity. In an instance where a female worker engaged in atypical work has

to undergo endless engagement with her managers pleading to at least have some form of job security for her while she handles reproduction issues, constant engagements with colleagues calling in for favours because whether the woman likes it or not, working longer during pregnancy will inevitably become beneficial to her and her finances.

In *NK v Minister of Safety and Security*,[342] the Constitutional Court found that, amongst others, the right to freedom and security of the person imposed a positive obligation on the state to prevent violations of physical integrity, where possible. This right then signifies the importance of distinct autonomy. Currie and De Waal[343] indicate that this leads to a right to bodily self-determination which is more concerned with an individual's integrity than his/her welfare. Recognising a constitutional right from an anatomy view means that morals may have to be abandoned in protecting and preserving such a right.[344] The reason being that the right to bodily autonomy is not related to the welfare of the person but the preservation of such a person's integrity.[345]

An illustration of the prejudice that may tend to be a violation of these workers' right to freedom and security can be seen where a pregnant woman who works outside the ambits of the SER finds herself in a position where her job security is threatened by the pregnancy. From the 3rd trimester, especially depending on the work that she does, she may no longer be able to fulfil her professional duties. This could result in loss of income or even job loss. This injustice or imbalance actually impacts a woman's productive decision to have kids because she runs a strong risk of either losing her job or her income. The failure of the woman to freely exercise her Constitutional rights in terms of section 12(2)(b) is a serious violation that can only be remedied or redressed by either implementation of amendments or otherwise just categorising workers under TER as employees for statutory protection and benefits.

The Discussion Paper on Maternity Protection states that:

> In South Africa maternity benefits are covered through a social insurance scheme - the unemployment insurance fund. Working women are obliged to draw on their unemployment contributions to the Unemployment Insurance

[342] JOL 14864 (CC) (CCT 52/04).
[343] Currie I et. al, *Bill of Rights Handbook* (Juta publications 2013) 270.
[344] *Ibid*.
[345] Labour Relations Amendment Act 8 of 2018.

> Fund (UIF) to cover maternity leave, and should they at a later stage become unemployed, their pot of unemployment funds on which they can draw, has been diminished whilst the partners fund is not affected. The sense is that it is discriminatory for women to draw on unemployment funds to cover for maternity leave – this is in fact penalising women for giving birth.[346]

This submission clearly states that there is still quite a lot to cover in terms of bridging the gap between men and women in the workplace, more especially for women who are not covered by the definition of employee.

3.6. The Labour Relations Act

According to Benjamin, the LRA made provision for the use of TES which is also known as Labour brokers from as early as 1983.[347] The author maintains that:

> The Labour Relations Act of 1995, section 198(1) defined a temporary employment service (TES) as 'any person who, for reward, procures for or provides to a client, other persons – (a) who render services to, or perform work for, the client; and (b) who are remunerated by the temporary employment service.'[348]

He goes further to add that:

> Although this section acknowledged that a TES worker 'perform(s) work for the client', section 198 (2) clarified that the employment relationship is between the worker and the TES. It reads: "For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer."[349]

This produced a triangular working relationship where someone works for a client but is an employee of a TES while there is a commercial contract relationship that exists between a TES and a client.[350] In 2014, the LRA was amended.[351] The main and most important labour legislation after the Constitution is the LRA. The LRA was enacted in 1995.[352] Section 213 of the LRA specifically excluded independent contractors from

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[346] COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.

[347] Benjamin, P 'Restructuring triangular employment: the interpretation of section 198A of the Labour Relations Act' (2016) 37 *International Law Journal* 28-29.

[348] *Ibid* 28.

[349] *Ibid* 28.

[350] *Ibid*.

[351] Section 198

[352] "The Labour Relations Act of 1995 was enacted to give effect to section 27 of the Constitution; to regulate the organisational rights of trade unions; to promote and facilitate collective bargaining at the workplace and at sectoral level; to regulate the right to strike and the recourse to lockout in conformity

its scope of coverage, that is independent contractors are excluded from the notion of employee. Accordingly, the LRA defines the concept employee as:

> (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
>
> (b) any 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”.

The specific exclusion of independent contractors is still unaddressed. Various authors have written extensively on the topic, but the problem appears to be persistent.[353] What could the cause of this perpetuity be?

The cause of the problem is the failure to implement existing laws. The LRAA for example was an attempt to redress the problem with the lack of protection faced by workers outside the SER, this could be the 7th year but there is still a major challenge with implementation thereof.

Section 198 of the LRA governs TES. It states that:

> (1) In this section, "temporary employment service" means any person who, for reward, procures for or provides to a client other persons-
> (a) who render services to, or perform work for, the client; and
> (b) who are remunerated by the temporary employment service.
> (2) For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.
> (3) Despite subsections (1) and (2), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person.
> (4) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any of its employees, contravenes-
> (a) a collective agreement concluded in a bargaining council that regulates terms and conditions of employment;
> (b) a binding arbitration award that regulates terms and conditions of employment;
> (c) the Basic Conditions of Employment Act; or
> (d) a determination made in terms of the Wage Act.

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with the Constitution; to promote employee participation in decision-making through the establishment of workplace forums; to provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose; to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act; to provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control; to give effect to the public international law obligations of the Republic relating to labour relations; to amend and repeal certain laws relating to labour relations; and to provide for incidental matters.’”

[353] Authors such as Benjamin P, Grogan J and Byrne D have contributed towards literature on the LRA.

(5) Two or more bargaining councils may agree to bind the following persons, if they fall within the combined registered scope of those bargaining councils, to a collective agreement concluded in any one of them-

(a) temporary employment service;

(b) a person employed by a temporary employment service; and

(c) a temporary employment service client.

(6) An agreement concluded in terms of subsection (5) is binding only if the collective agreement has been extended to non-parties within the registered scope of the bargaining council.

(7) Two or more bargaining councils may agree to bind the following persons, who fall within their combined registered scope, to a collective agreement-

(a) temporary employment service;

(b) a person employed by a temporary employment service; and

(c) a temporary employment service's client.

(8) An agreement concluded in terms of subsection (7) is binding only if-

(a) each of the contracting bargaining councils has requested the Minister to extend the agreement to non-parties falling within its registered scope;

(b) the Minister is satisfied that the terms of the agreement are not substantially more onerous than those prevailing in the corresponding collective agreements concluded in the bargaining councils; and

(c) the Minister, by notice in the Government Gazette, has extended the agreement as requested by all the bargaining councils that are parties to the agreement.

Section 200A has unsuccessfully attempted to address the issue. It states that:

(1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if anyone or more of the following factors are present:

(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 forms 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 he or she 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.

(2) Subsection (1) does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.

(3) If a proposed or existing work arrangement involves persons who earn amounts equal to or below the amounts determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are employees.

(4) NEDLAC must prepare and issue a Code of Good Practice that sets out guidelines for determining whether persons, including those who earn in excess of the amount determined in subsection (2) are employees.

3.7. The Labour Relations Amendment Act[354]

3.7.1. The legislative provisions

In an attempt to remedy the daily challenges which, the workers in atypical employment face, the legislature introduced the Labour Relations Amendment Act.[355] Mcaciso, in his thesis provides a background to the amendment of the then LRA.[356] He states that:

> Initially, the TES practice was regulated in a limited way by the Labour Relations Act[357] as well as the Labour Relations Act 66 of 1995 (LRA). The LRA initially only regulated the TES practice in so far as it recognised that the TES is the employer of placed workers and it created provisions for joint and several liability for the client and the TES under certain limited circumstances. Despite these attempts to regulate the practice, organised labour felt it was still not good enough as the same problems continued to persist, as a result they continued to challenge the constitutionality of this practice and called for it to be completely banned. In response, the legislature introduced the Labour Relations Amendment Act No 6 of 2014 (LRAA**)** in an effort to close the loopholes identified. Section 198A (3)(*b*) (the deeming provision) introduced by the LRAA stipulates that after a period of three months of placement of workers by a TES with a client, the client is deemed the employer of those workers.[358]

Mcaciso[359] opines that the main component that sparked a legal debate is the interpretation of this reckoning provision in South Africa, subsequently creating two views on how the provision should actually be interpreted.[360] The primary view is a 'dual employment' interpretation which proposes that after the lapsing of a three months placement, both the TES and the client become employers of the placed workers.[361] The subsequent view is a 'sole employment' interpretation which proposes that after the lapsing of the three months, the client becomes the sole employer of the placed employees.

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[354] Labour Relations Amendment Act 6 of 2014.
[355] *Ibid.*
[356] Mcaciso Z "Did the Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 do away with the TES practice in South Africa?", an unpublished LLM thesis from the University of Cape Town 2020 iii.
[357] Labour Relations Act 28 of 1956.
[358] Mcaciso Z, "Did the Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 do away with the TES practice in South Africa?", an unpublished LLM thesis from the University of Cape Town 2020 iii.
[359] *Ibid.*
[360] *Ibid.*
[361] *Ibid.*

In 2018, the legal debate was eventually settled by the Constitutional Court in the A*ssign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*.[362] The majority view in the Constitutional Court ruled that the latter view of sole employment was the correct interpretation to be attributed to the deeming provision, whilst the lesser view favoured the dual employment interpretation.

The LRAA was introduced after the call by COSATU to ban the TES was made.[363] As a response to the call, the legislature then introduced the LRAA which included mechanisms that were intended to provide adequate protection to the vulnerable employees involved in the TES practice and to neutralise COSATU.[364] The most important feature introduced by the LRAA was contained under section 198A(3)*(b).*[365] This provision is what is now known as the deeming provision.[366]

In terms of the LRAA, temporary service is defined *inter alia* as employment that is less than three months. Section 198A(3)(*b*) reads that:

> For purposes of the LRA, an employee not performing such temporary services for the client is - (i) deemed to be the employee of that client and the client is deemed to be the employer; and (ii) subject to the provisions of section 198B, employed on an indefinite basis by the client.

This meant that the deeming provision was intended to place the placed workers in a position where they would be deemed to be employees of the client they were placed under if they worked for that client for a period exceeding three months.[367] However, the question that remained was:

> If the client becomes the employer of the placed workers after the three months' placement period has lapsed, does this mean the TES falls away from the triangular arrangement or do both the client and the TES become dual employers of the placed workers post the deeming?

The first case that was heard by the Commission for Conciliation, Mediation and Arbitration (CCMA), was the *Assign Services (Pty) Ltd v Krost Shelving and Racking*

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[362] (CCT194/17) [2018] ZACC 22.
[363] COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[364] Mcaciso Z, "Did the Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 do away with the TES practice in South Africa?", an unpublished LLM thesis from the University of Cape Town 2020 1.
[365] *Ibid.*
[366] *Ibid.*
[367] *Ibid.*

(Pty) Ltd and National Union of Metal Workers of South Africa (*NUMSA).*[368] In this case, the National Union of Metal Workers of South Africa (NUMSA) was acting on behalf of its members who were procured by a TES to a client for the purposes of providing services to that client.[369] After three months of their placement lapsed, NUMSA then contended that, because of the deeming provision in the LRAA, the placed workers were now supposed to become the employees of the client and the client had become their employer.[370]

The TES denied this position and submitted that the correct interpretation to be attributed to the deeming provision is that, after the three months' period the client and the TES both become the employers of the placed workers and that:

> A dual employment relationship is formed. At the CCMA the commissioner, Abdool Carrim Osman, agreed with NUMSA's interpretation and concluded that after the deeming provision is triggered, the client became the sole employer of the placed workers. This interpretation is often referred to as the 'sole employment' interpretation.

The matter was referred to the Labour Court by way of review where the TES challenged this decision. The Labour Court decided in favour of the TES and concluded that the deeming provision indeed created dual employment, with both the TES and the client becoming employers of the workers.[371] This interpretation is often referred to as the 'dual employment' interpretation.

Aggrieved by this outcome, NUMSA appealed the matter in the Labour Appeal Court where the Court decided in favour of NUMSA and confirmed the interpretation attributed by the CCMA to the deeming provision.[372] The labour broker then took the matter to the Constitutional Court as the court of final instance then concluded that:

> The sole employment interpretation is what is intended by the deeming provision and consequently, confirmed the initial decision of the CCMA as well as the decision of the LAC. Accordingly, the law as it currently stands favours the sole employment interpretation.

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[368] (2015) ECEL 1652-15 (Unreported).
[369] Mcaciso Z, "Did the Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 do away with the TES practice in South Africa?", an unpublished LLM thesis from the University of Cape Town 2020 1.
[370] *Ibid.*
[371] *Ibid.*
[372] Mcaciso Z, "Did the Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22 do away with the TES practice in South Africa?", an unpublished LLM thesis from the University of Cape Town 2020 1.

This legislation amended various sections of the LRA but still failed to include independent contractors in the scope of the definition of employee.

Gumede submits that:

> In an attempt to curb these injustices faced by these employees a number of proposals for amendments of the LRA were made. In 2010 the Department of Labour suggested that labour legislation including the LRA be amended to provide protection for vulnerable workers. One of the important proposals was the Labour Relations Amendment Bill[373] which proposed a change of the definition of an employee.

Authors such as Gumede[374] suggested amendments that called for a complete ban of labour brokers. However, the National Economic Development and Labour Council (NEDLAC) noted that this approach was going to cause many job losses.[375] Shortly after that, in the year 2012 NEDLAC began to implement policy which provided for significant changes to the existing laws relating to atypical employment which introduced the Labour Relations Act. Another policy process began at NEDLAC which proposed significant changes to the law relating to nonstandard employment which led to the coming into effect of the Labour Relations Amendment Act.[376]

Byrne submits that:

> The amendments to section 198 of the LRA that came into effect in 2015, aimed to remedy this by introducing protections for lower-paid labour broker workers (earning below a regulated threshold) after they have worked for a TES for three months.

This means that it has been established that the core aim of the amendments to the LRA was based on the discrimination that was brought by section 198. When the legislature amended it, it had the objective of remedying the injustice which the workers in the TER continue to endure in the hands of their employers.

Benjamin states that:

> The LRA was amended and came into operation in January 2015. The LRA (as amended) amended section 198 and introduced section 198A with an aim of preventing the exploitation faced by the TES employees. Section 198A (3)(b) of the LRA as amended introduces the 'deeming provisions/section' in

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[373] Labour Relations Amendment Bill of 2010

[374] Gumede B.J, "A critical examination of the interpretation and application of the law relating to Temporary Employment Services in South Africa", an unpublished LLM dissertation submitted at the University of KwaZulu-Natal, 2018 11.

[375]Memorandum of Objects: Labour Relations Act Amendment Bill, 2012 available at accessed at http://www.labour.gov.za/DOL/downloads/legislation/bills/proposed-amendment-bills/memoofobjectslra.pdf on 22nd November 2022.

[376] Benjamin, P 'Restructuring triangular employment: The interpretation of section 198A of the Labour Relations Act' (2016) 37 *International Law Journal* 29; Brassey, M & Chealdle, H 'Labour Relations Amendment Act 2 of 1983 (1983) *4 International Law Journal* 37.

> terms of which workers earning below the earning threshold as contemplated in section 6(3) of the BCEA, and who have been placed with a client for more than three months are deemed to be employees of the client.[377]

This means that the intended amendments which were meant to introduce a positive change to the status of the workers in the TER did not go as per intention. As already submitted by Benjamin, it was meant to prevent the exploitation of the workers in the TER, and without any evidence required, it is clear that the intention of the amendments did not materialise much because even though there has been an amendment, the temporary workers continue to suffer.

There are certain questions and issues which were not addressed by the LRAA. Issues such as whether the amendment of section 198(3) (b) means that the TER and its client are regarded as dual employers of these workers or not.[378] Another issue that needs consideration is what then happens to the hired employees if the client one day decides to terminate the commercial contract which he or she has with the labour broker, would this mean that the employee is dismissed by the client or not?[379] The Labour Court attempted to address those issues in *NUMSA v Assign Services and Others*,[380] where it held that once section 198(3)(b) becomes active, it then makes the client the sole employer for the determinations made by the LRA.

According to Tshoose and Tsweledi,[381] section 198 of the LRAA still continues to cover all employees.[382] Even after the amendments, the general perception is still that 'a TES is the employer of persons whom it employs and pays to work for a client, and that a TES and its client are jointly and severally liable for specified contraventions of employment laws.' While the main idea behind amending the then LRA was to save workers from low-income and vulnerable working conditions, this

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[377] Benjamin, P 'Restructuring triangular employment: The interpretation of section 198A of the Labour Relations Act' (2016) 37 *International Law Journal* 29; Brassey, M & Chealdle, H 'Labour Relations Amendment Act 2 of 1983' (1983) 4 *International Law Journal* 37.
[378] Gumede B.J, "A critical examination of the interpretation and application of the law relating to Temporary Employment Services in South Africa", an unpublished LLM dissertation submitted at the University of KwaZulu-Natal, 2018 11.
[379] *Ibid.*
[380] (2017) ZALAC 45.
[381] Tshoose, C & Tsweledi, B 'A Critique of the Protection afforded to Non-standard Workers in a Temporary Employment Services context in South Africa' 2014 18 *Law, Democracy and Development* 341.
[382] *Ibid.*

was not achieved by the amendments as it failed to introduce measures to protect workers under the TES.

The amendments were also meant to provide measures to redress the prejudice endured by workers under the TES by providing remedies in the following ways:

a. An employee bringing a claim for which a TES and client are jointly and severally liable may institute proceedings against either the TES or the client or both and may enforce any order or award made against the TES or client against either of them;
b. A labour inspector acting in terms of the BCEA may secure and enforce compliance against the TES or the client, as if it were the employer, or both;
c. A TES may not employ an employee on terms and conditions of employment which are not permitted by the LRA, any employment law, sectoral determination or collective agreement concluded in a bargaining council that is applicable to a client for whom the employee works;
d. The Labour Court or an arbitrator may now rule on whether a contract between a TES and a client complies with the Act, and make an appropriate award;
e. A TES must be registered to conduct business, but the fact that it is not registered is no defence to any claim instituted in terms of section 198A; and
f. A TES must provide an employee it assigns to a client with written particulars of employment that comply with section 29 of the BCEA, when the employee commences employment.

One of the sections that brought hope to the affected parties was section 198A of the LRAA[383] which reads as follows:

(1) In this section, a "temporary service" means work for a client by an employee-
(a) for a period not exceeding three months;
(b) as a substitute for an employee of the client who is temporarily absent; or
(c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8).
(2) This section does not apply to employees earning in excess of the threshold prescribed by the Minster in terms of section 6 (3) of the Basic Conditions of Employment Act.
(3) For the purposes of this Act, an employee –
(a) performing a temporary service for the client is the employee of the temporary employment services in terms of section 198 (2); and
b) not performing such temporary service for the client is deemed to be the employee of that client and the client is deemed to be the employer; and

(4) The termination by the temporary employment services of an employee's service with a client, whether at the instance of the temporary employment service or the

[383] Act 6 of 2014.

client, for the purpose of avoiding the operation of subsection (3) (b) or because the employee exercised a right in terms of this Act, is a dismissal.
(5) An employee deemed to be an employee of the client in terms of subsection (3) (b) must be treated on the whole not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment.
(6) The Minister must by notice in the Government Gazette invite representations from the public on which categories of work should be deemed to be temporary service by notice issued by the Minister in terms of subsection (1) (c).
(7) The Minister must consult with NEDLAC before publishing a notice or a provision in a sectoral determination contemplated in subsection (1) (c).
(8) If there is conflict between a collective agreement concluded in a bargaining council, a sectoral determination or a notice by the Minister contemplated in subsection (1) (c) –
(a) the collective agreement takes precedence over a sectoral determination or notice; and
(b)the notice takes precedence over the sectoral determination."

As with most of the existing legislation, the biggest challenge is implementation of the laws that were enacted but not fully implemented. Section 198A for example, was meant to do away with workers who are employed on a permanent basis as temporary workers with their contracts being continuously renewed. It provided that workers employed by labour brokers were allowed a maximum period of three months, after which the worker would be deemed a permanent employee of the labour broker.[384] Labour brokers are strongly reluctant to retain workers as its own employees for different reasons such as financial and social. Therefore, the purpose of the section has not been realised as yet.

The need for scholars to continue contributing to this particular field of labour law arises because of the vagueness that is attached to the interpretation of the amendments. From the extracted content of the amendments, the interpretation may be that First, in terms of section 198A (3)*(b)*, the employee becomes an employee of the client and ceases to be an employee of the TES. Secondly, the employee remains an employee of the TES but is also deemed to be an employee of the client.'[385]

Tshoose and Tsweledi submit that the confusion in interpreting and implementing section 198A was caused by the inconsistency between the Memorandum of

[384] Section 198A (1) of the LRAA.
[385] Tshoose, C & Tsweledi, B 'A Critique of the Protection afforded to Non-standard Workers in a Temporary Employment Services context in South Africa', 2014 (18) *Law, Democracy and Development* 341.

Objectives and a through interpretation of statutes actually leads to propelling outcomes.[386] They further submit that:

> A purposive interpretation shows that section 198A should be interpreted to give effect to the notion that the employee remains an employee of the TES but is also deemed to be an employee of the client, is a correct one.[387]

3.7.2. Caselaw

Numsa v Assign Services and Others[388]

The *NUMSA* case is one of those cases where the Labour Court had to critically analyse the provisions of section 198 of the LRA. The case went onto the Labour Appeal Court in 2017. The findings of the case are discussed below:

3.7.2.1. Facts

Krost is a manufacturing company which specialised in the manufacture of steel racking, mezzanine floors, shelving, mezzanine floors lockers. For Krost to carry some stock, they quote and work on certain given projects. The products manufactured by Krost are custom made. Krost employs a total of 130 staff members, 40 of whom are salaried employees and about 90 staff members on wages. All of them work in the factory. Assign is a labour broker that supplies workers to Krost. The number of placed workers varied between 22 and 40 at any time, with this variation depending on the type of projects which were given to Krost.

On or around the 1st of April 2015, there were about 22 placed workers who Assign had supplied to Krost on a full-time basis for three months. Their placement was predated on 01 January 2015. These workers were within the ambit of the application of section 198A(3)(b) of the Labour Relations Act (as amended)[389] and were as a result thereof, not affected by any of the exclusions listed in section 198A(1) or (2). This was a TES agreement between Assign, Krost, and the workers.

About 80% of the workers assigned by Assign were the National Union of Metalworkers of South Africa (NUMSA) workers. During the subsistence of the TES

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386 *Ibid.*
387 *Ibid.*
388 (2017) ZALAC 44; (2017) 38 *ILJ* 1978 (10 July 2017).
389 Labour Relations Amendment Act of 2014.

arrangement, there was a pay parity between the workers placed by Krost, from Assign as well as the workers working there full-time.

Krost received a report informing him that the placed workers are prone to declaring a right to be employed by Krost. This, even with the prospects of causing a labour unrest even without the CCMA deciding.

3.7.2.2. Legal question

'Who becomes the employer of the placed workers when three months referred to in section 198A(3)*(b)* of the LRA kicks in?'

3.7.2.3. Submissions

Assign contended that the correct interpretation of section 198A(3)*(b)* should be that all the workers placed by Krost should continue being the employees of Assign for the purposes of the LRA. The situation suggested by Assign is referred to as 'dual employment.'

The submissions held that:

> Assign's contention has been that the correct interpretation of s198A(3)(b), which is also referred to as the deeming provision, should be that workers placed by it at Krost remain employees of Assign for all purposes, and are deemed to also be employees of Krost for the LRA. This situation is referred to as the dual employment position.

NUMSA suggested the 'sole employment' position which states that in terms of the provision in question, the placed workers were with effect from the 1st of April 2015, regarded as employees of Krost only for the purposes of the LRA. Krost made no submission and was not in support of either one of them.

3.7.2.4. Decision

The Commissioner concluded that:

> Section 198A(3)(b) should be interpreted that "deemed" means that the client (Krost) becomes the sole employer of the placed workers for purposes of the LRA once the threshold of the three-month period elapsed. The Commissioner was satisfied that his interpretation is the one that will provide greater protection for the vulnerable class of employees identified by section 198A(3)(b).

He added that the relevant provisions contained in section 198A(3)*(b)* should be interpreted similarly to how the law handles the concept of child adoption. As already known and in an adoption case, it is the adoptive parent that is regarded as the parent of the adopted child. In this regard, and in the best interest of the child, in a scenario where the adoptive parent gets full guardianship and all parental obligations necessary for the adopted child's upbringing.

Lastly, in his award, the Commissioner stated that:

> The law does not regard a biological parent and the adoptive parent as dual parents, as doing so would lead to uncertainty and confusion. Equally in the case at hand there are a number of problems that could arise in the 'dual employment' interpretation, for example, who would be responsible for the disciplining of the placed workers and who's [sic] disciplinary code would be applicable, that of the TES or that of the Client? Furthermore, how would 'reinstatement' occur if there is dual employment? This would lead to greater uncertainty and confusion for the vulnerable employees the Act is seeking to afford greater protection to.' '*Furthermore, the fact that the employee may institute proceedings against either the (TES) or the Client or both the TES and the client in terms of s 198 (4)(a) and that any order or award made against a (TES) or client in terms of this subsection may be enforced against either, does not in its plain reading make the TES a dual employer. The purpose of instituting proceedings is to determine liability and the fact that one may institute proceedings against either the TES or the client, or both and enforce an order or award against either, does not necessarily create dual employment. In the amended LRA, in sections relating to organisational rights and picketing, the sections allow for the citing of a third party controlling access to the workplace e.g. (landlord), and the enforcing of awards against such parties. This however does not render the third party concerned to be a dual employer of the employees of the actual employer.*

In his award, the Commissioner referred to the memorandum of objects which accompanied the first version of the Labour Relations Amended Bill and held *inter alia*, that if the workers placed by Krost are not employed to perform temporary services, they are regarded as employees of the client and not those of the TES.

3.8. The Basic Conditions of Employment Act

The BCEA[390] governs the working conditions of the persons in a working environment.[391] Unfortunately, it only provides for employees. Reference can be made

[390] Basic Conditions of Employment Act 75 of 1997.

[391] The Basic Conditions of Employment Act was enacted to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic

to section 1 of this Act which states that 'employee means— (a) any person, excluding an independent contractor, who works for another person or the State and who receives, or is entitled to receive remuneration: and (b) any other person who in any manner assists in carrying on or conducting the business of an employer.' This means that most, if not all provisions in this Act specifically exclude independent contractors, leaving them out in the cold with little or no protection. Grogan[392] submits that the BCEA applies to all persons who are engaged in employer and employee relationships. However, this is with certain exceptions. He also adds that it is only applicable to employers and employees who are defined in section 1 of the BCEA.[393] He goes on to say that to qualify for a claim of entitlement to the benefits in the BCEA, the person must fall within the ambits of the statutory definition of employee.[394]

Grogan argues that independent contractors and other workers excluded by these definitions are not entitled to the basic conditions of employment.[395] Below are some of the rights which independent contractors cannot benefit from because of the specific exclusion. The discussion below is based on the relationship between the employer and the person rendering the service to him or her and not between the broker and the worker. The rationale behind this approach is that in as much as it may be supported by section 200A of the LRA, the relationship that plays the biggest role is not one between the labour broker but the one between the employer and the worker because that is where the services are rendered, therefore, section 200A may to some extent prove to have been a futile attempt of remedying the problem faced by workers excluded by legislation.

According to Gumede:

> Sections 64, 65, and 66 of the BCEA empower a labour inspector to ensure that employees work under the terms and conditions prescribed under labour legislation, this includes having written employment contracts. It is not clear, therefore, whether a labour inspector can issue an undertaking or a compliance order against the client for a failure to comply with the BCEA in respect of the contracts of employment.

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as a member state of the International Labour Organisation; and to provide for matters connected therewith.

[392] Grogan J, *Employment Rights,* (Juta Publications 2014) 84.

[393] *Ibid.*

[394] *Ibid.*

[395] *Ibid.*

As highlighted above, the purpose of the BCEA is mainly to secure the comfortable working conditions of the workers in a particular working environment. It also ensures that the provisions of the BCEA are not just laws on paper but are provisions that can be practically implemented. This is why the BCEA also allows for an inspector to assess the working environment to verify if such conditions are in line with the prescribed labour laws which now contains the availability and access to written working contracts.

He adds that:

> Presumably, the written contracts of employment would have been more consistent with the International Labour Organisation (ILO) Private Employment Agencies and the Recommendations which also require employees to have employment contracts. Although the court in the *NUMSA* case[396] was not obliged to take into account the evidence presented by the *Amicus curiae* (CAPES) in support of the submissions made on behalf of Assign Services, it is submitted that had the court considered this evidence perhaps it would have come to a different conclusion than the sole employer interpretation.[397]

In Gumede's view and in accordance with the *NUMSA* case,[398] these written contracts which the inspector would have to check also have to be in line with the guidelines which the ILO and the Private Employment Agencies provide for. Even though in the case in question the applicant was not required to consider the evidence, which was offered by the *amicus curiae,* it was found that if the court had considered it, it would have come to a different conclusion.

Section 82(1) of the BCEA further states that:

> For the purposes of this Act, a person whose services have been procured for, or provided to, a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer. (2) Despite subsection (1), a person who is an independent contractor is not an employee of a temporary employment service, nor is the temporary employment service the employer of that person. (3) The temporary employment service and the client are jointly and severally liable if the temporary employment service, in respect of any employee who provides services to that client, does not comply with this Act or a sectoral determination.

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[396] (JA96/15) [2017] ZALAC 44; (2017) 38 ILJ 1978 (LAC); [2017] 10 BLLR 1008 (LAC) (10 July 2017).
[397] Gumede B.J, "A critical examination of the interpretation and application of the law relating to Temporary Employment Services in South Africa", an unpublished LLM dissertation submitted at the University of KwaZulu-Natal, 2018 11.
[398] *Ibid.*

This means that contrary to section 200A of the LRA, an independent contractor is not by any chance an employee. This is in terms of section 82(2) which provides that despite a person working as an independent contractor, he or she is not an employee of the broker he or she works for. This means that contrary to the intentions of the legislator, the issue which has always been topical was never addressed by including section 200A in the LRA. This means that the entire Chapter 3 of the BCEA still does not apply to the excluded workers. It provides for benefits such as annual leave,[399] sick leave,[400] maternity leave,[401] and family responsibility leave.[402]

It is also important to mention that the provisions of BCEA will only apply to employees on a fixed-term contract earning less than the BCEA threshold, which is currently **R224 080,30** per year. The following are the additional key points to be considered:

- An employee employed temporarily for longer than 3 months will be deemed to be a permanent employee – *unless* the employer can satisfactorily prove that there was a justifiable business reason for the temporary appointment.
- Such business reasons could for example be seasonal employment; employment on a specified project; internships; temporary increases in work volume; positions funded by external sources for limited periods; after retirement age was reached; appointment in place of someone who is absent for a temporary period; or 'the nature of the work for which the employee is employed is of a limited or definite duration.'
- A temporary employee (even if the reason for the temporary status is justified) may, after 3 months, on the whole not be treated less favourably than a comparable permanent employee – including payments, benefits and having the same opportunities in terms of vacancies, access to training and development. Justifiable differentiation such as merit, performance, seniority, length of service, for example, may however be applied.
- A temporary employee who is employed for longer than 24 months, will be entitled to severance pay of at least one week's remuneration for each completed year of service.
- The contract of a temporary employee must now be in writing, must specify the reason why the appointment is only temporary and must contain the employee's agreement to the temporary appointment. If the contract needs to be extended, a full new contract should be signed in the same way, instead of simply giving an extension letter.
- In respect of temporary employees already in employment, there is a 3-month period of grace after the Act becomes operative.[403]

[399] Section 20 of the BCEA.
[400] Section 22 of the BCEA.
[401] Section 25 of the BCEA.
[402] Section 27 of the BCEA.
[403] Griessel J "Non-standard employment under the LRA Amendment Act" *The National Human Resources Directory* accessed at https://www.hrworks.co.za/articles/246-non-standard-employment-under-the-lra-amendment-act on 23rd March 2022.

3.8.1. Annual Leave

Section 20 (2) provides that:

> An employer must grant an employee at least 21 consecutive days' annual leave on full remuneration in respect of each annual leave cycle; or by agreement, one day of annual leave on full remuneration for every 17 days on which the employee worked or was entitled to be paid; by agreement, one hour of annual leave on full remuneration for every 17 hours on which the employee worked or was entitled to be paid.

This section empowers the provision of annual leave from employer to employee. Which means that the 21 consecutive days are afforded to the workers who, without question qualify as employees but leaves those who are left out of the scope of the definition without any entitlement to annual leave. This entails that in a company that has both employees and independent contractors, it is only the employees who will be afforded annual leave while the TER workers are presumably expected to hold the fort.

3.8.2. Sick leave

Section 22(2) states that:

> During every sick leave cycle, an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks. (3) Despite subsection (2), during the first six months of employment, an employee is entitled to one day's paid sick leave for every 26 days worked. (4) During an employee's first sick leave cycle, an employer may reduce the employee's entitlement to sick leave in terms of subsection (2) by the number of days" sick leave is taken in terms of subsection (3).

Independent contractors are not entirely entitled to paid sick leave as employees are. From the inception of the employment contract, an employee already has days that are secured for the different categories of leaves that are provided by the BCEA. For independent contractors, however, this is not the case. It appears that employers are still susceptible to employing people under a working contract that may contain clauses such as 'Your status is that of an Independent Contractor.'[404] Sometimes the contract may state further that 'as an Independent contractor, you are not entitled to paid annual leave, or paid sick leave, paid responsibility leave, and you are not entitled

[404] https://www.labourguide.co.za/contracts-of-employments/300-employee-or-contractor

to be paid for overtime worked and you're not entitled to be paid for public holidays or Sundays worked.'[405]

3.9. The Employment Equity Act[406]

The Employment Equity Act aims to address issues of equity in the workplace.[407] Regrettably, as a contract worker who is desperate to make money to be able to support his or her family, one is forced to work under such conditions. This works in favour of the employer because the more time the contractor spends at work generating revenue for the employer, the bigger the employer's bank account becomes, at the expense of the worker.

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, and the implementation of affirmative action policies, are the vehicles that it uses for this purpose. 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.[408]

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.'[409] The constitutional right to equality is essentially covered in this provision and tailors the right to equality in the workplace.[410] The EEA is consequently influential in protecting the rights of the varied susceptible categories of people who are employed in the hospitality industry informally.[411]

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[405] *Ibid.*
[406] Employment Equity Act 55 of 1998.
[407] *Ibid.*
[408] Ngwenya M, "Extension of Social Security to the Informal Hospitality Industry Workers in South Africa", an unreported LLM Dissertation at University of the Western Cape 2020 28.
[409] Section 6 of the Employment Equity Act 55 of 1998.
[410] Basson, Y 'Selected Developments in South African Labour Legislation related to Persons with Disabilities' 2017 (20) *PER Journal* 7.
[411] Ngwenya M, "Extension of Social Security to the Informal Hospitality Industry Workers in South Africa", an unreported LLM Dissertation at University of the Western Cape 2020 29.

3.10. The Employment Services Act[412]

The Employment Services Act 2014[413] (ESA) is one of the employment legislation which is applicable in South African labour laws. Its purpose is

> To provide for, public employment services, the establishment of schemes to promote the employment of young work seekers and other vulnerable persons, schemes to assist employees in distressed companies to retain employment, facilitate the employment of foreign nationals in a manner that is consistent with its objects and the Immigration Act, 2002, the registration and regulation of private employment agencies, the establishment of the Employment Services Board, the establishment of Productivity South Africa, the establishment of Supported Employment Enterprises, transitional provisions and matters connected therewith.

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.[414] This Act introduces and formalises existing institutions which share its objectives, such as those that encourage productivity, provide training for unskilled workers, and unemployment reduction.[415] 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.[416] Furthermore, employers must satisfy themselves that there are no other persons within the Republic that has the needed skills before recruiting a foreign national.[417] It is therefore evident that ESA aims to deter the employment of undocumented immigrants while promoting the employment of citizens.[418] 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.[419]

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[412] Employment Services Act 4 of 2014.
[413] *Ibid.*
[414] Preamble to the Employment Services Act 4 of 2014.
[415] Section 20 of the ESA.
[416] Section 8(1) of the Employment Services Act.
[417] Section 8(2) a of the Employment Services Act.
[418] Ngwenya M, "Extension of Social Security to the Informal Hospitality Industry Workers in South Africa", an unreported LLM Dissertation at University of the Western Cape 2020 30.
[419] *Ibid.*

One of its cores and most important functions is the promotion of young people who are seeking jobs as well as the promotion of other vulnerable persons. Vulnerable persons in this instance refers to the workers who are engaged in TES. The ESA has been active since 2015, with all these years, its effectiveness in protecting these vulnerable workers still leaves a lot to be desired.

3.11. Compensation for Occupational Injuries and Diseases Act (COIDA)[420]

Section 1 (xviii) of COIDA defines employee 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, and includes-- (a) a casual employee employed for the purpose of the employer's business; (b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract; (c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker; (d) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee; 1- but does not include- ...- (i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act No. 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force; (ii) a member of the Permanent Force of the South African Defence Force while on "service in defence of the Republic" as defined in section 1 of the Defence Act, 1957; (iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act, 1958 (Act No. 7 of 1958), on "service in defence of the Republic" as defined in section 1 of the Defence Act, 1957; (iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work; (v) a domestic employee employed as such in a private household.

In *Sylvia Bongi Mahlangu and Another v Minister of Labour and Others*,[421] the Constitutional Court made a ruling that the failure to include domestic workers under the definition of 'employee' was unconstitutional after the Compensation for Occupational Injuries and Diseases Act (COIDA) had declined to make a pay out after

[420] Compensation for Occupational Injuries and Disease Act 130 of 1993.
[421] (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020).

a Domestic worker drowned in her employers' pool and died while executing her duties.[422] The facts of the case are as follows,

> The mother of the first applicant (deceased) was employed as a domestic worker in a private home for 22 years. On 31 March 2012 the deceased drowned in her employer's pool in the course of executing her duties as a domestic worker. The first applicant, the daughter and sole dependent of the deceased, approached the Department of Labour to enquire about compensation for her mother's death. The first applicant was informed that she could neither get compensation under COIDA, nor could she get unemployment insurance benefits for her loss which would ordinarily be covered by COIDA. The first applicant along with the South African Domestic Service and Allied Workers Union (SADSAWU) (applicants) brought an application in the High Court to have section 1(xix)(v) of COIDA declared unconstitutional to the extent that it excludes domestic workers employed in private households from the definition of "employee."

On the 19th of November 2020, the Constitutional Court handed down judgment in the application made by the daughter of the deceased. The application was a confirmation of an order made by the High Court of South Africa, Gauteng Division, Pretoria (hereinafter referred to as the High Court), wherein section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act[423] was declared unconstitutional because it excludes domestic workers who are employed in private households from the definition of 'employee' and effectively denies them access to compensation should they contract diseases or suffer disability, injuries or even death in the course of executing their employment duties.

The applicants in this case contended that the legislated exclusion of domestic workers from the ambits of COIDA is an infringement of their right not to be unfairly discriminated against in terms of '*section 9(3) of the Constitution on the basis of race, sex and/or gender and social origin, as the exclusion differentiates between domestic workers employed in private households and other employees covered by COIDA, without any rational connection to a legitimate government purpose*.'[424] The purpose of COIDA is to extend social insurance to employees who contract diseases, get injured, or die in the course of their employment.[425] They argued further that excluding

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[422] *Ibid*.
[423] *Ibid.*
[424] *Sylvia Bongi Mahlangu and Another v Minister of Labour and Others case* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020).
[425] *Ibid.*

domestic workers from COIDA divests them of the benefits of social insurance, consequently infringing their right to social security under section 27(1)(c) of the Constitution.[426] In conclusion, the applicants argued that the exclusion of domestic workers from COIDA violates their right to dignity under section 10 of the Constitution.[427]

The Minister of Labour, Director-General of the Department of Labour and the then Acting Compensation Commissioner (respondents) accepted that *'section 1 (xix)(v) of COIDA is unconstitutional.*[428] *However, they contended that it was unnecessary to challenge the constitutionality of COIDA through a court application as the relief sought by the applicants would be of academic value because the Minister was spearheading amendments to COIDA in order to include domestic workers*.'[429]

On the 23rd of May 2019, the High Court made an order declaring that the exclusion of domestic workers from COIDA was indeed unconstitutional and invalid and further ordered that section 1(xix)(v) be removed from COIDA.[430] The High Court however, did not give the reasons for its declaration of constitutional invalidity.[431] Instead, it postponed the issue of the 'retrospective effect' of the order of constitutional invalidity to afford the parties an opportunity to file further submissions in that regard.[432] On the 17th of October 2019, the High Court then made an order that the declaration of invalidity should apply in retrospect to afford assistance to other domestic workers who died or were injured at work before the order was granted.[433]

The main judgment handed down by Victor AJ (Mogoeng CJ, Khampepe J, Majiedt J, Madlanga J, Theron J and Tshiqi J concurring), confirmed that the order of constitutional invalidity made by the High Court was valid and ordered that the order should bear immediate and retrospective effect from 27 April 1994.[434] It further held

[426] Constitution of the Republic of South Africa, 1996.
[427] *Ibid.*
[428] *Sylvia Bongi Mahlangu and Another v Minister of Labour and Others case* (CCT306/19) [2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 ILJ 269 (CC); 2021 (2) SA 54 (CC) (19 November 2020).
[429] *Ibid.*
[430] *Ibid.*
[431] *Ibid.*
[432] *Ibid.*
[433] *Ibid.*
[434] *Ibid.*

that excluding domestic workers from the definition of 'employee' constitutes a violation of the rights to:

> Access to social security in terms of section 27(1)(c) read with section 27(2) of the Constitution; equal protection and benefit of the law under section 9(1) of the Constitution; human dignity in section 10 of the Constitution; and constitutes indirect discrimination on the bases of race, sex and gender, in terms of section 9(3) of the Constitution which proscribes unfair discrimination by the state on certain grounds.

The second judgment handed down by Jafta J (Mathopo AJ concurring) approved that the challenged provision is inconsistent with the Constitution and therefore invalid but the reasons for the judgment were slightly different from those of the first judgment. The second judgment differed from the main judgment on three issues. The judgment held as follows:

> First, it held that the socio-economic right guaranteed by section 27(1) of the Constitution is not at all violated. Second, that in this matter it has not been shown that denying domestic workers the COIDA benefits enjoyed by other workers impairs their right to dignity guaranteed in section 10 of the Constitution. Third, the second judgment held that the majority judgment's failure to apply the *Harksen* test, made it difficult to determine whether the applicants had established that the impugned provision constitute unfair discrimination.

In a third judgment, Mhlantla J agreed with the main judgment that the disputed provision was indeed unconstitutional. This is in so far as it is '*not consonant with the constitutional rights to equality and dignity, and unfairly discriminates against domestic workers*.' However, Mhlantla J found that on a plain reading of the section under scrutiny, and due to other incongruences between the statutory right and the constitutional right, simply incorporating COIDA into the right to social security in section 27(1)(c) is an untenable proposition. In this regard, Mhlantla J agreed with the second judgment penned by Jafta J.

The third and final judgment established that:

> It is insufficient to take cognisance of the discrimination that makes up the present lived experiences of domestic workers but that it is necessary to also acknowledge the historical significance of the role that domestic workers play and the accompanying struggles they face. Many of these can be typified as caused by the intersection of various axes of discrimination such as race, sex, gender, and social class. This condition is further exacerbated by the private nature of the sphere in which they work. Consequently, domestic workers are unseen and unheard to the detriment of their constitutional rights despite the pivotal role they play in society.

The Constitutional Court then upheld the decision of the High Court and ordered that the applicant receives her pay-outs as beneficiary from a death that her mother suffered while executing her duties as a private domestic worker.

3.13. Reflecting on the Jurisprudence of the courts over the last decade on the notion of employee: a South African perspective

3.13.1. Introduction

Although the number of workers in non-standard employment has grown significantly over the last two decades, they continue to be regarded as in 'atypical employment.[435] In terms of legal regulation, the debate has thus focused on the distinction between 'typical' and 'atypical' employment, which is the result of the disintegration of the standard employment relationship and the emergence of new forms of work involving externalised, part-time, casual, fixed-term, temporary agency workers, self-employed, independent or homeworkers and teleworkers, to name but a few.[436] There is an important gender dimension to the debate on atypical work, as men are disproportionately represented in standard employment relationships and increasing numbers of women in the labour force work under atypical conditions.[437]

The increasing atypical employment and the decreasing Standard Employment Relationship (SER) in South Africa have both negative and positive implications, depending on whose point of view is considered.[438] The increasing flexible use of labour by capital is evident in the proliferation of different forms of atypical employment, contrary to the contraction of (SER) typical or permanent employment.[439]

The call for the extension of social protection that is afforded to employees to atypical workers has been growing rapidly in the past decade. Countless articles flooded scholarship where various authors were calling on the need to include and incorporate atypical workers into the definition of employees by various legislations. For example,

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[435] Eurofound, "Atypical Work." Accessed at https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary on 28th November 2022.
[436] *Ibid.*
[437] *Ibid.*
[438] Owomomo K.E*, "Atypical work and Social Protection in post-apartheid South Africa: Preliminary thoughts about Social Policy Imperative",* Rhodes University, 2010.
[439] *Ibid.*

authors such as Fourie and Grogan have covered the call for social protection afforded to atypical workers.

3.13.2. The Kylie Case

The need for social protection has evolved over the years and it always seems like the silver lining in the clouds is eminent. In a popular case of *Kylie v CCMA,*[440] the court was challenged with a matter pertaining to whether or not a sex worker could be regarded as an employee for the purposes of accessing protection by labour legislations. The facts of the case were as follows:

Kylie was a sex worker. On the 27th of April 2006, she was informed that her employment was terminated. This termination apparently came without a prior hearing and for reasons which were not fundamentally relevant to the present dispute. On the 14th of August 2006, the dispute between Kylie and her employer was referred to arbitration and set down to be heard on 13 September 2006. Before evidence could be heard, second respondent (Commissioner Bella) enquired as to whether the Commission had jurisdiction to hear the matter in the light of the fact that the appellant had been employed as a sex worker and accordingly her employment was unlawful.
On the 11th of December 2006, second respondent handed down a ruling in which she concluded that the Commission did not have jurisdiction to arbitrate on an unfair dismissal in a case of this nature. It was against this ruling that the appellant approached the court *a quo* on review.
Cheadle AJ held that:

> The definition of employee in section 213 of the Labour Relations Act 66 of 1995 ('LRA') was wide enough to include a person whose contract of employment was unenforceable in terms of the common law. However, he held that a sex worker was not entitled to protection against unfair dismissal as provided in terms of section 185 *(a)* of the LRA because it would be contrary to a common law principle which had become entrenched in the Republic of South Africa Constitution Act 108 of 1996 ('the Constitution') that courts 'ought not to sanction or encourage illegal activity'.

[440] *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8; 2010 (4) SA 383 (LAC); 2010 (10) BCLR 1029 (LAC); (2010) 31 *ILJ* 1600 (LAC); [2010] 7 BLLR 705 (LAC) (26 May 2010).

In the *Kylie case*,[441] the court held that prostitutes are employees but cannot be protected under the Act because they trade in illegal activities. Only legal and lawful trades are protected. In any aspect of law, it is learnt that illegal trading is not protected by the South African Labour Law. For the purposes of labour rights and the benefits, such workers are not considered to have the opportunity to enjoy such rights. For example, workers who are excluded from enjoying the benefits of labour law.

The CCMA recently ruled that sex workers are not employees for the purposes of the Act that it lacked jurisdiction to consider the claims of applicants for unfair dismissal. The commissioner in the *Kylie case*,[442] stated that the work she performed was illegal because it appears to be contrary to the *Sexual Offences Act*.[443] The parties' agreement was not a legally binding and enforceable contract and consequently the applicant was barred from bringing a claim under the Act.

In discussing the scope of the right to fair labour practices under section 23 of the Constitution, the court held that:

> Section 23(1) provides that 'everyone has the right to fair labour practices. The term 'everyone', which follows the wording of section 7(1) of the Constitution which provides that the Bill of Rights enshrines the right 'of all people in the country', is supportive of an extremely broad approach to the scope of the right guaranteed in the Constitution.[444]

Judge Ngcobo went on to explained that the term 'everyone' in this context means that it should technically apply to everyone. He stated that:[445]

> *The word 'everyone' is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system.*

He went on to add that from the day the Constitutional Court became operational, it has maintained consistency in its approach. In *S v Makwanyane*,[446] Chaskalson P (as he then was) said that:

> The right to life and dignity 'vests in every person, including criminals convicted of vile crimes. The learned president went on to say that these criminals 'do not forfeit

[441] *Kylie v CCMA and Others* (2008) 29 *ILJ* 1918 (LC).
[442] *Ibid.*
[443] Sexual Offences Act 23 of 1957.
[444] *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8; 2010 (4) SA 383 (LAC); 2010 (10) BCLR 1029 (LAC); (2010) 31 *ILJ* 1600 (LAC; [2010] 7 BLLR 705 (LAC) (26 May 2010. Para 16.
[445] *Kylie v CCMA ibid* para 17.
[446] [1995] ZACC 3; 1995 (3) SA 391 (CC) para 173.

> their rights under the Constitution and are entitled, as all in our country now are, to assert these rights, including the right to life, the right to dignity and the right not to be subjected to cruel, inhuman or degrading punishment.

This affirmation of protection of a very broad constituency of persons is not undermined by the finding in *S v Jordan.*[447] In their minority judgment, O'Regan and Sachs JJ observed that:[448]

> *The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body. This is not to say that as prostitutes they are stripped of the right to be treated with respect by law enforcement officers. All arrested and accused persons must be treated with dignity by the police. But any invasion of dignity, going beyond that ordinarily implied by an arrest or charge that occurs in the course of arrest and incarceration cannot be attributed to section 20(1A)(a) but rather to the manner in which it is being enforced. The remedy is not to strike down the law but to require that it be applied in a constitutional manner. Neither are prostitutes stripped of the right to be treated with dignity by their customers. The fact that a client pays for sexual services does not afford the client unlimited license to infringe the dignity of the prostitute*.

The question raised in this case is whether or not section 23 coverage extends its protection to a sex worker. In *NEHAWU v UCT*,[449] the Constitutional Court emphasised that:

> The focus of section 23(1) of the Constitution was on the 'relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both.' That approach followed upon the judgment in *SANDU v Minister of Defence*[450] at paras 28 – 30. Even if a person is not employed under a contract of employment, that does not deny the 'employee' all constitutional protection. This conclusion is reached despite the fact they 'may not be employees in the full contractual sense of the word' but because their employment 'in many respects mirrors those of people employed under a contract of employment'.

If it can be accepted that the constitutional right to fair labour practices vests in 'everyone' and that it doesn't only apply to parties to a contract of employment but to all people in an employment relationship, to the outcome that all people who are

[447] *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amici Curiae (*CCT31/01) [2002] ZACC 22; 2002 (6) SA 642; 2002 (11) BCLR 1117 (9 October 2002).
[448] *S v Jordan ibid* at para 74.
[449] *NEHAWU v UCT* (2003) 24 *ILJ* 95 (CC) para 40.
[450] (1999) 20 *ILJ* 2265 (CC).

engaged in services pursuant to an employment relationship such as the appellant in this case, are covered by section 23, becomes particularly convincing.[451]

In *Denel (Pty) Ltd v Gerber,*[452] after examining various local authorities, Judge Ravelas J said:

> I am unable to agree with the approach adopted by the Industrial Court in Callanan, by this court in Briggs and by Lord Denning MR and Lord Justice Lawton in Massey's case and Lord Justice Lawton in Ferguson's case which, it seems to me, is to the effect that, once it is found that the alleged employee voluntarily made an arrangement in terms of which he or she would be an 'employee' of his or her own company or close corporation which would provide services to the alleged employer, he cannot later be found to have been an employee of the company with which his or her own had an agreement to provide services. As I have indicated above already, the main weakness of that approach is that it disregards the realities of the relationship between the parties and is open to abuse because it makes it possible for two persons to take themselves out of the reach of such important legislation as the Act and the Basic Conditions of Employment Act 75 of 1997.

The principle in the *Kylie* case is that it cannot be fair to overlook the term 'everyone' under section 23 of the Constitution. Technically, all people engaged in any form of employment arrangement should have access to fair labour practices regardless of the contract that they are party to. In this case, it was noted that sex work is an illegal form of trade, but it was also noted that be that as it may, Kylie was still covered by the term 'everyone', and this meant that she was entitled to have access to the benefits and the rights under the Constitution. Although this case was decided a while ago, it has not improved the lives of persons who do not fall within the ambits of the definition of employee, except that it paves a path in the right direction because it means that there are prospects that in the near future, it will be considered that where a constitutional provision makes reference to 'everyone' means that their context should be extended to everyone and not just the favoured categories of people.

3.13.3. SITA V CCMA[453]

The *Sita v CCMA* case was also used to determine who an employee is. In this case, the court developed tests that are used as guidelines to determine what exactly makes

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[451] *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (CA10/08) [2010] ZALAC 8; 2010 (4) SA 383 (LAC); 2010 (10) BCLR 1029 (LAC); (2010) 31 *ILJ* 1600 (LAC); [2010] 7 BLLR 705 (LAC) (26 May 2010. Para 22.
[452] *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC).
[453] (2008) 29 *Industrial Law Jornal* (*'ILJ')* 2234 (LAC).

up an employment relationship. This is done by looking into whether or not an employer has control and supervision over an employee, whether the worker forms an integral part of the employer's organisation, as well as other essential elements which suggest the existence of an employment relationship.

These factors were expanded by the courts in cases such as *Sita v CCMA* wherein the following three tests were developed:

(a) The control test, in which one determines employment by looking at the control that the employer has over the work, the manner in which the work must be done, as well as when and where such work ought to be done.[454]

(b) The organisation test, in which it is not necessary to determine whether the worker submits to the orders (control) of the employer, but rather to establish if the person is an integral part of the organisation.[455]

(c) The dominant impression test, in which the court examines a variety of factors, including supervision and personal services of the worker, among others, in order to determine whether there is a dominant impression that the person performing such duties is an employee.[456]

Although these tests play a crucial role in distinguishing between an independent contractor and an employee, the challenges always come with ascertaining who is an employee.[457] Consequently, any person who seeks a remedy in accordance with the

[454] *Colonial Mutual Life Association v Macdonald* 1931 AD 412 (A). See also *Phaka and Others v Bracks and Others* (2015) 36 *ILJ* 1541 (LAC) para 27; *Colonial Mutual Life Assurance Society Ltd v MacDonald* (1931) AD 412 (A) at 434-435; and Code of Good Practice: Who is an employee? GNR 1774 in GG 29445 of 1st December 2006.
[455] *Universal Church of the Kingdom of God v Myeni and Others* (2015) 36 *ILJ* 2832 (LAC) para 31. See also *Bank van Handel en Scheepvaart NV v Slatford* (1953) 1 QB 284 (CA) 295.
[456] *Ongevallekommisaris v Onderlinge Versekeringsgenootskap* AVBOB 1976 (4) SA 446 (A). *Pam Goldings Properties (Pty) Ltd v Erasmus and Others* (2010) 31 *ILJ* 1460 (LC) at para 15. See also *SA Broadcasting Corporation v Mckenzie* (1999) 20 *ILJ* 585 (LAC) at pars 590F-591D; *Medical Association of South Africa and others v Minister of Health and others* (1997) 18 *ILJ* 528 (LAC) 536C-E. See also part 2 of the Code of Good Practice: Who is an employee, which provides the rebuttable presumption as to who is an employee in terms of s 83A of the BCEA and section 200A of the LRA. Furthermore, it is required that any person interpreting these sections must consider this Code.
[457] Maloka, T and Okpaluba, C 'Making your bed as an independent contractor but refusing 'to lie on it': Freelancer opportunism' (2019) 31 *SA Mercantile Law Journal* 54-75.

labour legislation bears the onus of proving that he or she is covered under the ambits of the definition 'employee.'[458]

In other cases,[459] the courts have held that whether a contract of employment was concluded or not, the legal relationship between the parties may be gathered, *inter alia*, from an examination of the contract, which they have or might have concluded.[460] In *CMS v Briggs*,[461] the court held that it is crucial for the parties to keep to their bargain. The emphasis in this case was that public consideration plays a crucial role in making important determinations. The court held that the issue with public policy is activated by a person's choice to get involved in work relationships that take them out of the world of employment and that persons who make that choice, should stick by those choices.[462]

3.13.4. *Discovery Health Limited v CCMA*[463]

The main issue in this case was whether or not a foreign national who works for another person without the necessary work permit should be regarded as an employee in terms of the LRA or not. It was based on the misrepresentation by the Third Respondent, Lanzetta who was an Argentinian national. He had misled the Applicant into believing that he had a legal work permit when he was appointed. Upon discovery that this was not true, the Applicant terminated his employment. Lanzetta then approached the CCMA alleging unfair dismissal. There were issues around whether or not the CCMA had jurisdiction to hear the matter in the first place.

The issue with jurisdiction was brought by the Applicant who contended that it is only matters that involve employees as per labour legislation that should be heard by the CCMA and in this instance, they submitted that Lanzetta was in fact not an employee. The invalidity of the employment contract between Lanzetta and the Applicant was,

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[458] M McGregor and Dekker A (eds.) *et al. Labour law rules* (4th ed. 2021, Cape Town: Siber Ink) 32-35.
[459] Such as Borcheds v CW t/a Lubrite Distributors (1993) 14 *ILJ* 1262 (LAC) and Denel (Pty) Ltd v Gerber (2005) (LAC).
[460] *Smit v Workmen's Compensation Commissioner* (1979) (1) SA 51 (A) at 64B; *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 *ILJ* 673 (LAC) at 683DE; *SA Broadcasting Corporation v McKenzie* (1999) 20 *ILJ* 585 (LAC) at 591E.
[461] *CMS v Briggs* (1998) 19 *ILJ* 271 (LAC).
[462] *Ibid.*
[463] (JR 2877/06) [2008] ZALC 24; [2008] 7 BLLR 633 (LC); (2008) 29 *ILJ* 1480 (LC) (28 March 2008).

according to the Applicant, due to the fact that he was a foreign national who worked without the required work permit. On this premise, the Applicant argued that Lanzetta could not approach the CCMA for recourse.[464]

The Commissioner ruled that Lanzetta was in fact an employee and that the CCMA had the necessary jurisdiction to hear the matter. In his ruling he stated that while it cannot be argued that a contract of employment with a foreign national who fails to produce a valid work permit should be regarded as a valid employment contract, it cannot be said that the invalidity of the employment contract means that the worker in question should be excluded from the protection of the LRA.[465] The matter was escalated to the Labour Court which observed that the ambits of section 23 of the Constitution do not depend on whether or not a person has a valid employment contract. It is activated by one rendering service to another for remuneration. A similar approach was employed in the *Liberty Life Association of Africa v Niselow*[466] and *Wyeth SA (Pty) v Manqele & Others*[467] with issues relating to the determination of who is an employee.

The findings at the Labour Court were that:

- the contract between the Applicant and Lanzetta was in fact not invalid even though Lanzetta did not have a work permit;
- Lanzetta was regarded as an employee and was under the protection of section 213 of the LRA;
- He was entitled to approach the CCMA for recourse.

Because Lanzetta qualified to be an employee, the matter was remitted to the CCMA for a ruling on his unfair dismissal.

3.13.5. *LAD Brokers v Mandla*[468]

The appeal was brought after the Cape Town Labour Court had made a ruling that the Respondent was an employee and had to be awarded compensation in the amount of R103 500.00 after he was unfairly dismissed by the Appellant. The main

[464] *Ibid.*
[465] *Ibid.*
[466] (1996) 17 *ILJ* 673 (LAC).
[467] (2005) 26 *ILJ* 749 (LAC).
[468] *LAD Brokers v Mandla* (1998) 19 *ILJ* 271 (LAC).

issue was whether or not the Respondent was indeed an employee or an independent contractor. The Appellant was a labour broker operating in the engineering and draughtsman industry. Weatherford, a company overseas had offered the Respondent employment with the salary and benefits clearly communicated. The Appellant served as the 'middle-man' facilitating the processes between the parties. The Appellant and Respondent only met when the Respondent had to sign the contract of employment between himself and Weatherford.

The contract clearly stated that the Respondent was employed as an independent contractor. Weatherford used the Appellant to pay the Respondent the agreed wages. In the period the Respondent worked for Weatherford, the Appellant never intervened in the monitoring process between these parties. When Weatherford terminated the Respondent's contract, he instituted proceedings for unfair dismissal which yielded no results after which he then pursued the Appellant for recourse on unfair dismissal.

The Labour Court ruled that there was indeed an existing employment contract between the Respondent and the Appellant, and that the Respondent's dismissal was unfair, further that they had to compensate the Respondent in the sum of R103 500.00 plus costs. The Appellant then approached the Labour Appeal Court challenging this ruling. The learned Judge remarked that the case was a unique tripartite employment relationship. After establishing that the employment relationship was caused by issues with supervision and control of the Respondent by the Appellant, the Labour Appeal Court dismissed the appeal with costs.

3.13.6. *NEHAWU v UCT*[469]

The case was brought by NEHAWU on behalf of the workers who were working at the 1st Respondent (UCT) rendering outsourced work including gardening and cleaning. The issue was based on whether or not the workers were transferred with the business upon transfer of a business as an ongoing concern. UCT planned to outsource the work that was initially performed by workers who were members of

[469] (2003) 24 *ILJ* 95 (CC).

NEHAWU. UCT and NEHAWU held discussions about what would happen to the workers upon such outsourcing. The talks yielded no results and UCT went on to implement its plan to outsource and dismiss some of the workers.

Two hundred and sixty-seven (267) workers were given notice of retrenchment. The workers rejected the notices and contended that they wanted to be transferred with the new company. UCT refused to allow this to happen and advised them to apply for employment with the new company instead. Most of the workers heeded to the advice and those who applied were appointed. The new arrangement did not last long as most of the workers resigned due to pay-cuts.

NEHAWU approached the Labour Court relying on section 197 of the LRA.[470] The application was dismissed with costs. NEHAWU was not satisfied with the ruling and approached the Labour Appeal Court for relief. The Labour Appeal Court dismissed the appeal with costs after which the Constitutional Court was approached. The Constitutional Court ruled in favour of NEHAWU stating that:

> Upon the transfer of a business as a going concern as contemplated in section 197(1)(a), workers are transferred to the new owner. The fact that there was no agreement to transfer the workforce or part of it between UCT and the contractors did not, as a matter of law, prevent a finding that the outsourcing was a transfer of a business as a going concern. Whether the outsourcing constituted the transfer of one or more businesses as a going concern is a question that has yet to be determined.

The Labour Appeal Court was said to have erred when dismissing the appeal as NEHAWU had valid grounds for rejecting the order which it was granted.

3.14. International Employment Laws Governing Atypical Workers

Various countries, just like South Africa have different employment laws that govern how the employment practices operate in their particular jurisdictions. South Africa, for

[470] Section 197 of the LRA states that, "(1) A contract of employment may not be transferred from one employer (referred to as 'the old employer') to another employer (referred to as 'the new employer') without the employee's consent, unless – (a) the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; or (b) the whole or a part of a business, trade or undertaking is transferred as a going concern – (i) if the old employer is insolvent and being wound up or is being sequestrated; or (ii) because a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency."

example, has section 23 of the Constitution[471] which mainly serves the purpose of providing for fair labour practices, it has the LRA,[472] BCEA,[473] the EEA,[474] and the various court precedents which the labour courts still use to make rulings when they deal with employment disputes. Currently, in South Africa, most if not all the employment laws deal with the protection of workers who are engaged in full-time, permanent employment (the SER) while those who are engaged in casual, temporary, and non-standardised employment also known as atypical employment are still left vulnerable.

Various legislations have tried to remedy the position, for example, section 198(1) of the LRA was one of the attempts which were introduced as a remedy to protect and include the workers in the atypical forms of employment. But with the experience which South Africa has seen since the enactment of the LRA, there has been very little or no change in the provisions of the LRA. The biggest problem arises when the employer refuses to take responsibility for the worker as in most cases they allege that they are not their employees but the employees of their labour brokers, if applicable. Therefore, the disputes continue as the question remains, who is the employer of workers engaged in atypical forms of employment? Is it the labour broker? Is it the contractor? Is it the actual employer who appointed the worker through a labour broker? The absence of clarity in this instance is the main reason why South Africa still has a long way to go in remedying the existing problem.

One major challenge which the writer has identified in the existing labour structure is that women engaged in atypical work tend to be more victimised by these working laws because they endure problems with sexual harassment, the failure to accommodate their maternity needs the same way as the women engaged in the SER are able to enjoy. As already stated above, most, if not all institutions fail to treat women in their working spaces equally in that women who have permanent or full-time

[471] *Smit v Workmen's Compensation Commissioner* (1979) (1) SA 51 (A) at 64B; *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 *ILJ* 673 (LAC) at 683DE; *SA Broadcasting Corporation v McKenzie* (1999) 20 *ILJ* 585 (LAC) at 591E.
[472] Labour Relations Act 66 of 1995.
[473] Basic Conditions of Employment Act 75 of 1997.
[474] Employment Equity Act 55 of 1998.

employment contracts are able to enjoy a full four (4) months' maternity leave while the women in temporary employment are given just a month at the most.

This in itself is discriminatory because the maternity needs of women are in no way defined by the type of employment contract which they have with their employer but is the same as the recovery and needs of the child are necessary and require more than just a month.

Be that as it may, section 39 (1) of the Constitution provides that:

> 39. (1) When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

Furthermore, section 233 provides that:

> when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

This section looks at the legal status observed by various international laws which are provided for in the laws of different states, the different policies, conventions, reports, treaties, for example. which cater for implementation of the employment laws which are intended to assist workers in the TER. It mainly focuses on the legal framework governing these vulnerable workers as well as the various laws which the different countries have in place regulating employment relationships.

3.14.1. The International Labour Organisation (ILO)

A study by Chen has found that 'informal work includes employment relationships that are not legally regulated or socially protected, and the use of 'atypical or nonstandard employees or workers.'[475] Subsequently, informal employees are not in a 'standard employment relationship' which means that they are not covered by certain employment-related protections because they do not necessarily pay tax or contribute to social security/insurance schemes.[476] 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.[477] The international Labour Organisation (ILO) 2002

[475] Chen M 'Informality and Social Protection: Theories and Realities' (2008) 39(2) *IDS Bulletin* 18-27.
[476] *Ibid.*
[477] *Ibid.*

Resolution and conclusions concerning Decent Work and the Informal Economy, 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.'[478]

The ILO was formed in 1919 as part of the Treaty of Versailles that played a major role in ending the World War 1.[479] When the ILO was formed, there were only 42 states that became members of the organisation.[480] The ILO is now sitting at 187 member states.[481] The aims and objectives of the ILO are contained in its preamble.[482] The aims and objectives are to 'improve, monitor and supervise social conditions throughout the world.'[483] This monitoring, improving and supervising of social conditions can be achieved through the formulation of measures for the:

> Regulation of the hours of work and regulation of the labour supply;
>
> • prevention of unemployment and provision of an adequate living wage;
> • protection of workers against sickness, disease and injury arising out of their employment; • protection of children, young persons and **women**, and provision for old age and injury; • protection of the interests of workers when employed in countries other than their own; • recognition of the principle of equal remuneration for work of equal value; and • recognition of the principle of freedom of association.[484]
> The International Labour Organisation (ILO) is a United Nation agency that brings together representatives of employers, workers and government globally. Its role is to formulate and develop policies, minimum standards and good practice in the workplace. Since its inception in 1919, the ILO has always had the issue of maternity protection for women at the core of its heart.[485]

One of the measures created to achieve the improvement of social conditions is through the protection of women. This protection includes, *inter alia* and most importantly, the provision of access to maternity protection in the workplace and the

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[478] *Ibid.*
[479] Gondoza D "The Reform of the Labour Dispute Resolution System in Zimbabwe", an unpublished LLD thesis submitted at the Nelson Mandela University 2022 8.
[480] *Ibid.*
[481] Thomas, H & Turnbull P.J, 'From a 'Moral Commentator' to a 'Determined Actor'?' How the International Labour Organization (ILO) Orchestrates the Field of International Industrial Relations' *British Journal of Industrial Relations* 2021 7.
[482] Accessed at https://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO accessed on 23rd February 2022.
[483] Gondoza D, "The Reform of the Labour Dispute Resolution System in Zimbabwe", an unpublished LLD submitted at the Nelson Mandela University 2022 28.
[484] *Ibid.*
[485] COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.

prevention of gender discrimination. This means that as one of the core objectives of the ILO, the protection and provision of access to maternity protection remains the core business of the establishment of the ILO.

3.14.2. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

'CEDAW, is an international legal instrument that requires countries to eliminate discrimination against women in all areas and promotes women's equal rights. CEDAW is often described as the international bill of rights for women.'[486] It is aimed at protecting the rights of women in general and also incorporates the protection of women in the workplace as it also contains provisions for fair labour practices for everyone.

The CEDAW advocates that states avert discrimination against women based on maternity and guarantee their effective right to work by providing for '*maternity leave with pay or comparable social benefits.*'[487]

The preamble of the Convention makes reference to the rationale behind its enactment. It states one of the objectives as follows:

> Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole.

Article 2 of CEDAW states that:

> In order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures: (a) To prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status; (b) To introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances; (c) To encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development

[486] https://iknowpolitics.org/sites/default/files/cedaw-for-youth.pdf
[487]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.

> of a network of childcare facilities; (d) To provide special protection to women during pregnancy in types of work proved to be harmful to them.

Although it does not state the duration, (b) provides that CEDAW is also aimed at introducing maternity leave that should include payment or otherwise equal social benefits which that particular institution affords other women regardless of the type of contract they have with the institution without a threat of job loss, social allowances or otherwise senior positions if they were in managerial positions. (d) Although not specific also relates to the protection of women during their pregnancy. This provision is aimed at combating unfair working conditions for female workers who, because of the lack of protection from labour laws are forced to work under very strict and harsh working conditions even in their pregnancy because of the fear of losing their jobs based on the lack of security which they have in the workplace.

Kehler[488] addressed some of the issues that are faced by the women who work on a casual basis on the farms. He stated that there is just no arrangement made between the farmer and the pregnant woman be it on her working conditions or her life after delivery. Sometimes the farms deal with harmful chemicals which may not be safe for the mother and her unborn baby, but the farmer still expects those hazardous chemicals to be administered on his crops by the workers, pregnant or not. On her antenatal care days, she gets a deduction from her wages. After delivering the baby, the farmer makes no provision for the mother's recovery but instead places the responsibility on her to decide how she wants to nurse her recovery while fending for her baby. The longer she takes, the lesser her wages, if any. The women are forced to go back to work without full recovery because of their fear to lose out on the wages which the farmer is guaranteed to deduct. These are just some of the ways in which women are not treated fairly in the workplace because they lack legal backing.

South Africa ratified CEDAW in 1995 already.[489] There were just issues with its compliance with the CEDAW regulations which called for the submission of an initial report within a year of ratification and periodic reports every four years.[490] South Africa

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[488] Kehler J 'Women and poverty: The South African experience' (2001) 03 *Journal of International Women's Studies* 48.

[489] Parliamentary Monitoring Group, "South Africa's compliance with the Convention on the Elimination of all Forms of Discrimination against Women & 1995 Beijing Platform for Action reporting requirements: Commission on Gender Equality briefing," Accessed at https://pmg.org.za/committee-meeting/ on 21 June 2023.

[490] *Ibid.*

has not submitted these reports and this affected its ratification. The first report was only submitted in 1998 which covered the period between 1994 and 1997 and the second in 2009 which covered the period between 1998 and 2000.[491] However, despite the challenges with its actual ratification, the provisions of CEDAW are currently binding on South Africa and therefore serve as law in the Republic.

3.14.3. The Convention on Termination of Employment[492]

The Convention on Termination of Employment[493] was enacted as historically as 1982. South Africa has, however, not ratified this convention. Its objective was to regulate the termination of employment for different categories of workers. It does, however, not protect the workers engaged under the TER. Its article 2 paragraph 2 provides for exclusions which may be made in light of the nature of the contract of employment and state that:

> Member may exclude the following categories of employed persons from all or some of the provisions of this Convention: (a) workers engaged under a contract of employment for a specified period of time or a specified task; (b) workers serving a period of probation or a qualifying period of employment, determined in advance and of reasonable duration; (c) workers engaged on a casual basis for a short period.

This exclusion refers to exclusion of workers in the TER and relates to their exclusion from the protection of any beneficial provisions contained in the Convention. It states that workers who are engaged in a contract of employment for a specific period of time or a specific task, workers who are serving a period of probation or a certain period of employment, and workers who are engaged in employment on a casual basis for a short period of time are excluded from enjoying all the favours and the benefits which are afforded to the workers with permanent employment contracts.

South Africa has not ratified this Convention.[494] The effect is that its provisions are not binding on it and thus, doesn't serve the Republic in anyway.

3.14.4. The Universal Declaration of Human Rights (UDHR)[495]

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[491] *Ibid.*
[492] Convention no. 158 of 1982.
[493] *Ibid.*
[494] Accessed at https://www.ilo.org/dyn/normlex/en/f?p on 21 June 2023.
[495] Universal Declaration on Human Rights of 1948.

This Instrument was promulgated in 1948 and the purpose of its promulgation was to protect and promote human rights. The Declaration contains provisions for the protection and promotion of the rights of women such as:

- the right to equality,[496]
- the right to protection against any forms of discrimination,[497]
- freedom of movement,[498]
- the right of women to own property,[499]
- the right to access to public service equal to all,[500]
- the right to peaceful assembly and association,[501]
- the right to education,[502]
- the right to protection against unemployment, right to work; right to social security; the right to social protection, including social security; equality in the workplace[503].
  Article 24 of the Declaration places emphasis on the special need for protection of women and children.

3.14.5. The International Covenant on Economic, Social and Cultural Rights (ICESCR)[504]

The ICESCR was entered into in 1966 for the purpose of protecting women workers who are engaged in informal employment.[505] It contains important provisions for the protection of women such as, the equal right of women and men to the enjoyment of all economic benefits,[506] social and cultural rights in the Covenant and the fact that state parties must ensure this equal enjoyment,[507] to provide for the right to work.[508] It takes cognisance of the importance of an integrated approach to support this. According to Fourie:

> This integrated approach obliges governments to provide technical and vocational guidance, training programmes and policies to achieve the economic, social and cultural development necessary to attain the full realisation of this right. This approach supports the empowerment of vulnerable workers to ensure sustainability.

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496 In Article 1 and 7 of the Declaration.
497 In Article 7 of the Declaration.
498 In Article 13 of the Declaration.
499 In Article 17 of the Declaration.
500 In Article 21(2) of the Declaration
501 In Article 20 of the Declaration.
502 In Article 26 of the Declaration.
503 In Article 24 of the Declaration.
504 of 1966.
505 Fourie, E 'Social Protection Instruments and Women Workers in the Informal Economy: A Southern African Perspective' *PER Law Journal* 2021(24) 6.
506 In Article 3 of the ICESCR.
507 *Ibid.*
508 In Article 6 of the ICESCR.

This is contained in Article 6(2) of the ICESCR.

Article 7 then goes further to discuss the factors that are deemed to contribute to decent work and equal treatment for all. Amongst these factors are equal treatment, decent and fair wages, safe and healthy working environment, regulated working hours, and equal remuneration.[509]

3.15. The Role and Impact of Social Security Legislation in the Protection of Non-Standard Workers

3.15.1. Women

'Many women work in positions of non-standard employment, with limited legal and social protection. Access to comprehensive maternity protection for all working mothers could ensure that all women and children can access health and social protection.'[510] In most cases, it is found that women that are engaged in non-standard employment are mostly vulnerable to receiving inadequate or no maternity protection due to informal employment arrangements that they usually find themselves in.[511] It has to be explained that comprehensive maternity protection includes health protection at the workplace, job security, a period of maternity leave, cash and medical benefits while on maternity leave, non-discrimination, daily breastfeeding breaks and childcare support.[512]

According to Pareira-Kotze et. al:

> Access to all components of maternity protection is needed to successfully combine work and breastfeeding, yet in research and programme implementation, the focus appears to mainly be on paid maternity leave, breastfeeding breaks, and childcare. Information on the accessibility of maternity benefits for non-standard workers is limited and the full package of maternity protection may seem unrealistic. All working women who are pregnant or breastfeeding, including those in atypical forms of dependent work, should be able to access comprehensive maternity protection, and this would provide women and children access to health and social protection.

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[509] Fourie, E 'Social Protection Instruments and Women Workers in the Informal Economy: A Southern African Perspective' *PER Journal* 2021(24) 6.

[510] Pareira-Kotze, C et. al 'Maternity protection for female non-standard workers in South Africa: the case of domestic workers' (2022) *Research Square* 2.

[511] *Ibid.*

[512] *Ibid.*

Statistics have shown that women engaged in non-standard employment make up 30.1% of females engaged in employment in South Africa.[513] The informal sector in South Africa refers to organisations that employ a maximum of five people and do not deduct any tax from their wages and salaries. Domestic workers who work in private households are not included in the South African Statistics definition of the informal sector.[514] Most of these domestic workers (making up 94.5%) in South Africa are women. In South Africa, Maternity leave and most employment protection is regulated through the Basic Conditions of Employment Act of the National Department of Employment and Labour, formerly the National Department of Labour.[515]

The Unemployment Insurance Fund (UIF) allows access to payment of about 66% of a woman's previous earnings while she is on maternity leave.[516] In 2021, it was reported that only 59% of all employed women in South Africa could confirm that they are eligible to contribute towards the UIF whereas in 2019, only 20% of domestic workers reported being registered for the UIF.[517] Many of these women, predominantly those not working in formal employment may be ineligible for UIF maternity benefits (such as domestic workers who are eligible but not registered by their employers) and because of this, they can therefore apply for social assistance through the national social grant, the South African Social Security Agency (SASSA) scheme once the child has been born.[518] The maternity protection landscape in South Africa is complicated and not adequately understood.[519]

A policy analysis showed that in South Africa, maternity protection is dispersed across different legislative and policy documents across different sectors and although most of the ILO minimum requirements for maternity protection are present in the South African policy, its implementation is still not clear and not consistent for women who are engaged in non-standard employment.[520]

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513 Pareira-Kotze, C et. al 'Maternity protection for female non-standard workers in South Africa: the case of domestic workers' (2022) *Research Square* 2.
514 *Ibid.*
515 Pareira-Kotze, C et. al 'Maternity protection for female non-standard workers in South Africa: the case of domestic workers' (2022) *Research Square* 2.
516 *Ibid.*
517 *Ibid.*
518 *Ibid.*
519 *Ibid.*
520 *Ibid.*

3.15.2. Inadequate implementation of existing policy and legislation

There is still a major challenge with inadequate implementation of existing policy and legislation in South Africa to such an extent that certain categories of workers are protected by sectoral determinations, an additional legal measure that is intended to protect certain sectors, established by the labour department.[521] These sectoral determinations are aimed at prescribing minimum rates of remuneration and certain conditions of employment in specific sectors such as minimum standards for housing and sanitation if the workers live on the employers' premises, regulation of work-related allowances, regulation of benefits such as pension, medical aid, leave, unemployment funds.[522] Sectoral Determination 7 was intended for Domestic Workers and Sectoral Determination 13 for Farm Workers.[523]

Even though these sectoral determinations provide for provisions for employment conditions, those persons who work less than 24 hours per month for a particular employer are effectively only protected by the minimum wages standards of the sectoral determinations.[524] Provisions related to maternity leave in the sectoral determinations simply state that women in these sectors should be entitled to and protected by the same benefits as all workers. The Sectoral Determination 7 for Domestic Workers states that from 2003, domestic workers will be entitled to contribute to and claim maternity benefits from the UIF through the Unemployment Insurance Act of 2001.[525]

Be that as it may, breastfeeding breaks and cash benefits are however, not described or mentioned in these sectoral determinations. In practice, these sectoral determinations do not provide much more protection and simply repeat basic maternity protection provisions that are described in other labour laws as being applicable to domestic workers and farm workers, and give no regard to the heterogeneous nature of employment in these sectors.[526] Therefore, 'the existence of these sectoral Page

[521] Pareira-Kotze, C et. al 'Maternity protection for female non-standard workers in South Africa: the case of domestic workers' (2022) *Research Square* 2.
[522] *Ibid.*
[523] *Ibid.*
[524] *Ibid.*
[525] Unemployment Insurance Act 63 of 2001.
[526] Pareira-Kotze, C et. al 'Maternity protection for female non-standard workers in South Africa: the case of domestic workers' (2022) *Research Square* 2.

13/22 determinations for some groups of non-standard workers is insufficient, since they are not being adequately monitored and enforced for implementation. While policy is usually developed at a national level, implementation takes place at the provincial (i.e., sub-national) level.'

It was described that:

> maternity protection policy may be less well implemented at the provincial level: "… when you go to the provincial level, that's where you see … disjuncture between policy development, and implementation…." Therefore, even though there is national policy and legislation for most components of maternity protection, some of which applies to non-standard workers, this does not guarantee its implementation. Therefore, many women working informally remains unprotected. One key informant recommended that simply implementing existing maternity protection for all would be beneficial to non-standard workers: "I think so far, the protection that is currently available in the law, if enforced, it would go a long way." The following section provides further examples of how the cash benefit component of current maternity protection legislation is inadequately implemented.[527]

3.16. Social insurance (current social insurance benefits and whether social insurance provide legal protection to the non-standard workers)

3.16.1. Limited cash benefits are available to non-standard workers while on maternity leave

Limited cash benefits are made available for workers in non-standard employment who are on maternity leave. Non-standard workers usually experience difficulties accessing cash benefits while they are on maternity leave. Having access to social insurance (and therefore cash benefits while on maternity leave) may be complex and is not the same for certain non-standard workers. It is only those who work at least 24 hours per month (average of 6 hours per week) for an employer that can register with the UIF and participate in the social insurance scheme. Those who work less than 24 hours per month are considered part-timers.[528]

Pareira-Kotze submits that:

> Social insurance provides temporary relief and the amount received is related to how long a worker has been contributing to the fund. Certain non-standard workers (for example, domestic workers) may work for multiple employers in a month, sometimes working for different employers on different days of the week and may

[527] *Ibid.*
[528] Pereira-Kotze C, Doherty T, Faber M. 'Maternity protection for female non-standard workers in South Africa: the case of domestic workers.' *BMC Pregnancy Childbirth* 2022.

> not be working more than 24 hours for a single employer in a month. These workers would be excluded from participation in the social insurance programme in SA. To be able to claim social insurance while on maternity leave (from the UIF), employers need to register their workers and both employers and workers need to contribute 1% of monthly earnings to the UIF.[529]

3.17. Summary

This portion of the research has demonstrated evidence that the South African legislative framework to a large extent and although laws have been promulgated, still has a problem with the implementation of these laws. It is also discernible that South African labour laws are fully equipped and loaded with legislation and precedents aimed at assisting vulnerable workers whereas these workers continue to suffer daily. In a 2018 review of breastfeeding in South Africa, Martin-Wiesner[530] concluded that, 'while legislation exists to protect workplace breastfeeding, no financial resources have been allocated and government lacks capacity to monitor or evaluate these laws' implementation.' It cannot be said that there is enough that has been written and enacted to protect these workers if they still work in undesirable working conditions. Furthermore, once a worker engaged in TES finds him-/herself in a situation where he or she is on the verge of losing his or her job even though he or she possesses all the required skills and has the necessary qualifications and experience, for example, it also tampers with such a person's right to dignity and as it has already been mentioned by the various authors, the right to dignity tends to be affected when one stands to be retrenched because they lack security and protection from the same laws that were enacted to protect them. As a result, there is still a very strong need for the implementation of existing labour laws to protect workers engaged in the TER.

[529] *Ibid.*
[530] Pereira-Kotze, C et. al 'Legislation and Policies for the Right to Maternity Protection in South Africa: A Fragmented State of Affairs' *Journal of Human Lactation* (2022) 38(4) 687.

CHAPTER FOUR: DECENT WORK AND ATYPICAL WORKERS IN SOUTH AFRICA

4.1. Introduction

Providing decent work for all people engaged in employment under any type of contract includes providing for equality and promotion of dignity and equal pay in the workplace. It also refers to providing a working environment that is safe, preserves the dignity and health of all people working in that environment without exposing them to any exploitation. In defining what decent work entails, it may be prudent to begin by defining what 'work' is. Work is when an individual renders a service to someone, or to themselves in the case of self-employment in exchange for payment or remuneration.

Tshoose also submits that,[531] decent work refers to:

> The availability of employment in conditions of freedom, justice, security, and human dignity. This is a multidimensional concept introduced by the ILO in 1999. It has four key components, namely, employment conditions, social security, workplace rights and social dialogue. To this end, the preamble to the ILO Constitution sets out several objectives in this regard, including the protection of workers from illness, accidents, the protection of children, women, and the support of the elderly. The ILO pursues these noble values and goals by developing international labour and social security standards, which member states must ratify and incorporate into their national law.

Decent work is also defined as 'paid employment where the return will at least sustain a person's life and provide sufficient additional resources to allow them to take part in society and achieve reasonable human aspirations.'[532]

The concept of decent work is more rounded than mere subsistence and this is because decent work is not limited to employment and access to social security in the formal economy but also extends to the position of unregulated wage earners and people in informal employment.[533]

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[531] Tshoose, C.I 'Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa' (2022) 25 *PER Journal 2021* 1.
[532] Antoniadou, M *et al.* 'Prologue: In search of decent work' 2021 Howard House, Wagon Lane, Bingley BD 16 1WA UK 3.
[533] Athanasou, J.A 'Decent Work and its Implications for Careers' 2010 *Australian Journal of Career Development* 19(1) 36.

According to Athanasou,[534] the concept of decent work originates from Article 23 of the United Nations' Universal Declaration of Human Rights in 1948. He submits that:

> As far back as 1948, the Universal declaration of human rights expressed the concept of decent work in relation to employment of acceptable quality: (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. (2) Everyone, without any discrimination, has the right to equal pay for equal work. (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

In 1999, the Director General of the ILO, Juan Somavia, adopted decent work as the ILO's central goal. He defined it as, one of the core goals proclaimed by the International Labour Organisation (ILO) which is to provide 'social security measures to provide a basic income to all in need of such protection and comprehensive medical care' which was proclaimed for the first time in its Declaration of Philadelphia in 1944 which was then repeated in the Social Security (Minimum Standards) Conventions of 1952.[535]

In 1999, the ILO took a decision to make 'decent work' its primary goal by introducing four (4) strategic objectives which are 'the promotion of rights at work, employment, social protection and social dialogue.'[536] In a more practical sense, these represent:

- an income that permits the worker a reasonable life;
- work where there is equal opportunity and without discrimination;
- occupational health and safety;
- trade union representation;
- a social security safety net for illness, disability, old age and maternity.[537]

Athanasou submits that, the idea of decent work symbolises a set of clear principles that are broad enough to consider the varying social and economic conditions throughout the world. He adds that these principles also allow for implementation on a both local and wider space. The right to decent work encompasses the following:

- adequate work of acceptable quality in which rights are protected and which generates a sufficient income;

[534] *Ibid.*
[535] Son, K 'Ship of Theseus: from ILO Standards to outcome of Maternity Protection Policy' *Journal of Social Policy* (2022) 1.
[536] Antoniadou, M *et al* 'Prologue: In search of decent work' 2021 Howard House, Wagon Lane, Bingley BD 16 1WA UK 3.
[537] Athanasou, J.A 'Decent Work and its Implications for Careers' 2010 *Australian Journal of Career Development* 19(1) 37.

- income-generating pursuits such as wage employment as well as self-employment or home working;
- the availability of work and conditions for income generation;
- fair and favourable conditions of work (e.g., suitable wages, occupational safety and health, hours of work and the right of workers to organise);
- work that is consistent with the dignity of a person. The right to work excludes abusive work, such as bonded labour.

It has also been said that promoting access to jobs and reducing the unemployment rate without considering the quality and content of the jobs in question may prove to be futile as it cannot be regarded as progress.[538] It proves futile to promote rights at work without checking whether there are jobs for the job seekers. What needs to be done is to promote the voices of the people as well representation in the workplace as a mechanism for curbing the idea of anything outside decent work.[539]

The ILO has worked on a decent work operation in accordance with the Decent Work Agenda as it serves as a key component of the battle against poverty and social exclusion globally.[540] There have been comparisons and contrasts made between decent work and dignified work.[541] Some authors have criticised decent work alleging that it lacks methodological correctness.[542] Many scholars advocating for feminism have argued that the concept of decent work has made space for the protection of informal forms of employment where female workers are over-represented.[543]

Athanasou provides a criterion for decent work under several categories:

In order for one to have access to decent work in line with work and wages, the following is used as the test:

> **Firstly, Work and Wages**: Your wage is sufficient to cover the living expenses of you and your family members Your wage compares reasonably to the general level of wages or the living standard of others Your wage is paid regularly. You are not forced to work overtime If you work overtime, then you are paid extra (minimally the basic hourly wage plus all additional benefits you are entitled to).[544]
>
> **Secondly, Work and Holidays**: You receive a minimum of three weeks paid holidays. You do not have to work during national holidays or weekends If you

[538] Antoniadou, M *et al*. 'Prologue: In search of decent work' 2021 Howard House, Wagon Lane, Bingley BD 16 1WA UK 13.
[539] *Ibid.*
[540] Athanasou, J.A 'Decent Work and its Implications for Careers 2010 *Australian Journal of Career Development* 19(1) 36.
[541] *Ibid.*
[542] *Ibid.*
[543] *Ibid.*
[544] *Ibid.*

have to work on a national or religious holiday, you are entitled to compensation If you have to work during the weekend, you have the right to a rest period of 24 uninterrupted hours instead (not necessarily in the weekend, but at least in the course of the following week) If you have children at school then your paid holidays are allowed to coincide with the holidays of school-going children If you have family responsibilities, then you have the same opportunities as other workers who have no such responsibilities.[545]

Thirdly, Maternity and Work: If you are pregnant or on maternity leave, you are entitled to medical and midwife care without any additional cost If you are pregnant or you are breastfeeding, then you should be exempt from work that might bring harm to you or your baby. Your maternity leave is at least 14 weeks During maternity leave, your income should amount to at least two-thirds of your preceding salary.

Fourthly, Health and Safety at Work: Your employer makes sure that the workplace is safe. Your employer provides protective clothing and other necessary safety precautions for free. You receive training in all work-related safety and health aspects. You have been shown the emergency exits When you inform your superior about an imminently or actually dangerous situation on the job, you are not made to take up that job while the situation lasts Your rights to work and income are protected when you are ill The first three days of your absence due to sickness are compensated. When you are ill, you are entitled to an income of 60 per cent of the minimum wage) for at least six months. You should not be fired during the first six months of an illness If you are disabled due to an occupational disease or accident, you receive a somewhat higher benefit than when the cause is not work related.[546]

Fifthly, Social Security: You have the right to a pension from the age of 65, set as a percentage of the minimum wage or a percentage of the earned wage. If the breadwinner dies, the spouse and children are entitled to a benefit, expressed as a percentage of the minimum wage, or a percentage of the earned wage. If you are unemployed then you will have a right to an unemployment benefit for a limited period of time set as a percentage of the minimum wage or a percentage of the earned wage. You and your family members should have access to the necessary minimal medical care at an affordable price.[547]

Sixthly, Fair Treatment at Work: It is taken as given that men and women receive equal pay for work of equal value, regardless of their marital status. There is no pay inequality based on religion, race or ethnic background. The wages and salary system is clear and open. There is a clear match between pay and position. There is no sexual intimidation or gender discrimination. All workers, regardless of gender, religion, race or ethnic background, are entitled to equal training and education opportunities. You know whom to turn to for help in case of discrimination. Whenever you ask questions about discrimination or file a complaint, you feel protected against intimidation and against being dismissed.[548]

Seventhly, Children at Work: There is no work performed by children that could harm their health or hamper their physical and mental development.[549]

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[545] *Ibid.*
[546] *Ibid.*
[547] *Ibid.*
[548] *Ibid.*
[549] *Ibid.*

> **Eigthly, Forced Labour:** You are allowed to look for work elsewhere. When you look for work elsewhere, you are not threatened with dismissal or reduced pay. You, not your employer, hold your own passport or ID When you have not yet fully paid back a personal loan provided by your employer, you still receive pay.[550]
>
> **Ninthly, Trade Union Rights:** Your trade union is entitled to negotiate with your employer on the terms of employment without hindrance. You are free to join a trade union (this is part of the fundamental human rights). You are not put at a disadvantage when you are active in a trade union outside working hours.'[551]

4.2. Atypical workers and decent work: Contextual and a definitional perspective

As the world moves, and the strong enforcement of the 4th Industrial revolution seems to be taking over most of employment roles across the developed world countries, issues such as contemporary careers continue to get affected by constricted labour market conditions as well as the changes in the nature of work.[552] On this premise it is noted that accessing decent work has become an international challenge. The ILO considers 'decent work to be not only a fundamental human right but also one of the main challenges the world is facing.' According to the ILO, the conditions for decent work are 'having access to full and productive employment, benefitting from rights at work, having guarantees of social protection, and promoting social dialogue.'[553] The following are the conditions:

> Employment opportunities; adequate earnings and productive work; decent working time; combining work, family and personal life; work that should be abolished; stability and security of work; equal opportunity and treatment in employment; safe work environment; social security; and social dialogue, employers' and workers' representation.[554]

As it stands, currently in South Africa, access to decent work appears to be a far-fetched pipe dream for workers who are engaged in atypical work. The employer is hardly concerned with retaining the temporary worker or independent contractor as terminating the work contract with them is much easier than it is for permanent workers. This results in endured exploitation in the workplace, settling for minimal wages and unbearable and uncertain working conditions with employment retention challenges.

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[550] *Ibid.*
[551] *Ibid.*
[552] Masdonati, J et. al 'Decent work in Switzerland: Context, conceptualization, and assessment' (2019) 110(A) *Journal of Vocational Behavior* 12.
[553] *Ibid.*
[554] *Ibid.*

The standard employment relationship (SER) can be characterised as a 'socially protected, dependent, full-time job, the basic conditions of which (working time, pay, social transfers) are regulated to by collective agreements or by labour and/or social security law became firmly institutionalised after the Second World War.'[555]

Kolot et al.[556] submit that:

> The lack of decent work due to threateningly high unemployment, the spread of atypical employment, keeping wage payments to a minimum, destruction of the collective agreement in regulation of social and labour relations, the risks of occupational diseases and work-related incidents.

Decent work is defined as:

> Decent work is of paramount importance as it seeks to achieve both economic and social progress. It is vital for all subjects of social and labour relations. Decent work programs provide access to competitive jobs and productive employment. It is extremely important that for an economically active person, decent work is a favourable and safe working environment, adequate remuneration, respect for human rights at work, development of opportunities in the field of formation and growth of human capital, protection of collective and individual interests, and social protection against the risks that are constantly being reproduced.[557]

Currently, legislation on maternity protection and guidance in most countries focuses on women who are employed in permanent and full-time positions.[558] Moreover, the research on maternity protection mainly concentrates on cash payments during maternity leave while excluding other elements of comprehensive maternity protection which includes health protection, job security, non-discrimination, breastfeeding breaks, and childcare.[559] Internationally, informal employment is growing and informal work is not adequately acknowledged in research and policy.[560] Informal employment refers to 'a large and heterogeneous group of working arrangements covering enterprises and employment relationships that are not legally regulated or socially protected.'[561]

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[555] Murphy, C and Turner, T 'Employment stability and decent work: Trends, characteristics and determinants in a liberal market economy' (2023) 0(0) *Journal of Industrial Relations* 3.
[556] Kolot, A 'Development of a Decent Work Institute as a Social Quality Imperative: Lessons For Ukraine' (2020) 13(2) *Economics and Sociology* 70.
[557] *Ibid.*
[558] Pereira-Kotze, C., Feeley, A., Doherty, T. *et al.* 'Maternity protection entitlements for non-standard workers in low-and-middle-income countries and potential implications for breastfeeding practices: a scoping review of research since 2000.' *International Breastfeed J* (2023) 18, 9.
[559] *Ibid.*
[560] *Ibid.*
[561] *Ibid.*

4.3. Atypical workers and the employment law legislation dilemma

There is currently a very big challenge faced by atypical workers in South Africa and on a national level. The biggest challenge stems from the legislator's failure to extend labour protection to all workers including independent contractors and other atypical workers. This has now led to a major dilemma because when it comes to interpretation of the labour legislation read together with the Constitution, it is found that the dilemma is created by the exclusion of non-standard workers from labour benefits.

At times it emerges that workers who perform the very same duties and have the same job description do not enjoy the same treatment and access to protection that the legislator bore in mind when they enacted the different labour protection laws. While there have been attempts to address some of these problems through amendment of domestic legislation, such amendments have not yielded much positive results as the affected groups of workers still suffer job insecurity, lack of labour protection, issues with maternity leave, inability to access social security, lack of skills development and even low income in most instances.

Mokofe submits that:

> Non-standard workers, as opposed to standard workers, may not have access to social protection, will have lower levels of employment security (contracts can be easily terminated) and will face greater risks with respect to workplace health and safety. They will also experience difficulties with exercising their right to collective bargaining or to join trade unions.[562]

Needless to say, all workers, regardless of the employment contract should be able to access as much benefits as the workers in standard employment do. This not only serves as fulfilment of the ILO's desire to provide decent work but also a fulfilment of the Constitutional right to equality.

4.4. Unpacking the building blocks of decent work for the protection of atypical workers

One of the core values of the ILO is to provide access to decent work for everyone who participates in the working environment. Below are ways in which workers

[562] Mokofe, M.W "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished LLD Thesis submitted at the University of South Africa in 2018, 71.

engaged in atypical work are purported to have access to decent work. These are presented as the building blocks of decent work for the protection of atypical workers.

4.4.1. Labour protection of atypical workers

As already submitted above, workers who are engaged in atypical employment do not enjoy most of the labour protection afforded to the counterparts in the Traditional Employment Relationship (TER). The challenge has been ongoing and with continuous research it is always discovered that the main source of the problem is the perpetual exclusion endured by this category of workers. The exclusion is based on the legislator's failure to include all workers clearly and unambiguously in the definition of employee, not leaving out workers such as independent contractors.

Currently, the only rights which workers in atypical employment may enjoy are those that are included in the bears vagueness and ambiguity as it is unclear what is meant by fair labour practices. The Constitution of the Republic of South Africa, 1996[563] as they refer to 'everyone.' For example, section 23 of the Constitution makes provision for labour relations. Section 23(1)[564] appears to be in favour of all people but has some ambiguity. Ideally it would mean that everyone, regardless of their contract of employment has the right to fair labour practices and that would be favourable to the workers that are not employees. It states that:

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

Although Section 23(1)[565] states that everyone has the right to fair labour practices, it still fails to protect **all** workers as it becomes limited by the other labour legislations which exclude non-standard workers.

The Constitution which guarantees the right to these fair labour practices as well as the LRA[566] which stipulates what constitutes unfair labour practices, provided stability

[563] Hereafter referred to as the Constitution.
[564] of the Constitution of South Africa.
[565] *Ibid.*
[566] Act 66 of 1995.

and certainty to the meaning of unfair labour practices.[567] According to section 23(1) of the Constitution, everyone has a right to fair labour practices.[568] Because this right is entrenched in the Constitution, it is therefore given force by legislation.[569] There is currently no specific legislation enacted to give provision to atypical workers. Most, if not all labour legislation refers to 'employees.'

4.4.2. Labour Legislation

There are different South African legislations that were enacted to protect workers and allow them access to decent work. However, just like with the issue of labour protection and access to social security, workers excluded under the definition of 'employee' cannot fully rely on them for the provision of the said decent work.

4.4.2.1. The Labour Relations Act[570]

The first and main labour legislation in South Africa is the LRA. The LRA was enacted to:

- give effect to section 27 of the Constitution;
- regulate the organisational rights of trade unions;
- promote and facilitate collective bargaining at the workplace and at sectoral level;
- regulate the right to strike and the recourse to lockout in conformity with the Constitution;
- promote employee participation in decision-making through the establishment of workplace forums;
- provide simple procedures for the resolution of labour disputes through statutory conciliation, mediation and arbitration (for which purpose the Commission for Conciliation, Mediation and Arbitration is established), and through independent alternative dispute resolution services accredited for that purpose;
- establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the Act;
- provide for a simplified procedure for the registration of trade unions and employers' organisations, and to provide for their regulation to ensure democratic practices and proper financial control; to give effect to the public international law obligations of the Republic relating to labour relations;
- amend and repeal certain laws relating to labour relations; and to provide for incidental matters.

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[567] Maimela, C 'Cancer employees and the right to fair labour practices in terms of the Labour Relations Act 66 of 1995' 2019 *De Jure Law Journal* 5.
[568] *Ibid.*
[569] *Ibid.*
[570] Labour Relations Act 66 of 1995.

Throughout the LRA it makes reference to affording protection to 'employees.' For example, section 4 of the LRA provides for employees' right to freedom of association. This means that only workers who are regarded as employees may exercise this right. According to section 213 of the LRA, an employee is:

> (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
> (b) any 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."

According to this definition, independent contractors are excluded from the protection of the LRA, especially all the provisions that make reference to employees. Maimela[571] submits that:

> Section 186(2) of the Labour Relations Act provides that unfair labour practices can only occur in the context of an employer-employee relationship and does not extend beyond this relationship. This means a job applicant who happens to have cancer, does not have a right to fair labour practices; which in turn means that unfair labour practices cannot be committed against an applicant, as he or she is not an employee.

Issues pertaining to the right to fair labour practices appear to be extending coverage to all workers but in actual fact cover the employees.

4.4.2.2. Basic Conditions of Employment Act[572]

The Basic Conditions of Employment Act (BCEA) was passed to provide the working conditions for workers in the working environment. It was passed:

> To give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic as a member state of the International Labour Organisation; and to provide for matters connected therewith.

Section 3 of the BCEA states that its coverage is extended to all employers and their employees. While Section 1 defines an employee as:

> (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive 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 a

[571] *Ibid.*
[572] Basic Conditions of Employment Act 75 of 1997.

> corresponding meaning; “employers’ organisation” means any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions; “employment law” includes this Act.

The definition also excludes independent contractors as it makes reference to employees. This consequently results in the inaccessibility of the rights contained in Chapters 2 and 3 of the BCEA. Bearing in mind that these chapters contain all the provisions that are intended to offer protection to the people concerned it provides for leave intervals, regulated working hours, overtime and other benefits that can only be enjoyed by employees.

4.4.2.3. The Employment Equity Act (EEA)[573]

The EEA was enacted to redress the historic effects of apartheid in the workplace and for workers who were previously disadvantaged on the basis of race. This came after there were traces of discriminatory laws post-apartheid and some form of inequality in the workplace, the occupation, as well as the income within the labour market on a national level. It was enacted after it was discovered that there were disparities that create a major disadvantage for certain groups of workers and that redressing these disparities would take more than just repealing discriminatory laws.

The EEA was enacted to promote the constitutional right to equality as enshrined in section 9 of the Constitution, to eliminate unfair discrimination in employment, to ensure that employment equity is implemented to redress the effects of discrimination, to achieve a diverse workforce that mostly represents the people, to promote economic development and efficiency in the workforce and to give effect to the obligations created by the ILO with South Africa being one of its member states. While the EEA could have provided redress for the inequalities in the workplace, section 1 defines an employee as:

> Any person other than an independent contractor who - (a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) in any manner assists in carrying on or conducting the business of an employer.

[573] Employment Equity Act 55 of 1998.

4.5. Social security protection of atypical workers

The ILO, in collaboration with the United Nations Women (UNWOMEN) and Women in Informal Employment: Globalizing and Organizing (WIEGO) in partnership with the Department of Social Development (DSD) hosted a workshop on the 10th and 11th of August 2022 in Gceberha wherein they consulted with workers in the informal sector, the self-employed as well as the atypical workers on the DSD's draft policy proposals to extend social security in the form of retirement provisions to these categories of workers.[574] South Africa's current social security system does not provide for workers outside formal employment and often times, these workers cannot afford to contribute to voluntary retirement systems resulting in most of these workers retiring without any form of income and are forced to be subjected to poverty and destitution post-retirement.[575]

At the workshop, there was a consensus reached that the DSD should establish a fund where informal sector workers, the self-employed and atypical workers will be able to contribute and save for their retirement.[576] The participants also expressed the need to introduce access to medical benefits to the informal sector workers and they suggested mechanisms that would make the process of contributing easier.[577]

4.6. The relevant social security law legislation

Section 27(1)(c) of the Constitution provides for social security and social assistance in South Africa. It 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.' Section 7 further provides that the state has to take reasonable measures to handle the socio-economic rights with utmost importance. Section 7(2) further provides that, 'the state must respect, protect, promote and fulfil the rights in the Bill of Rights.'[578] In *Glenister v President of the Republic of South Africa,*[579] Justice Ngcobo held that:

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[574] Extension of Social Security to Informal Sector workers, Self Employed and Atypical Workers Consultative Workshop *ILO* Accessed at https://www.ilo.org/africa/countries-covered/south-africa/WCMS_855417/lang--en/index.htm on the 2nd March 2023.
[575] *Ibid.*
[576] *Ibid.*
[577] *Ibid.*
[578] Basson, Y 'The compliance of the South African social security system with the international covenant on economic, social and cultural rights' (2020) 41(4). *Obiter* [online].
[579] *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) par 105.

> This obligation goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the state to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights.

The Social Assistance Act, the Unemployment Insurance Fund Act, the Compensation on Occupational Injuries and Diseases Act and the Pension Funds Act are all under the umbrella of the right to social security.[580]

Social Assistance Act [581]

The provision for social assistance in South Africa is governed by the Department of Social Development. It subscribes to the South African Social Security Agency (SASSA) under the SASSA Act[582] and provides South Africans with social grants for persons with little or no income. The grants come in different categories and include *inter alia* child support grants and old age grants.

The Unemployment Insurance Fund Act [583]

The Unemployment Insurance Fund Act governs the provision of Unemployment Insurance Fund (UIF). It serves as the major social insurance scheme.[584] It provides benefits for persons who are employed and contributing towards the UIF and who due to contingencies such as illness, pregnancy, or dismissal are unable to work while executing the employer's mandate.[585] It pays out once the contributing member is unable to work and therefore has no income. For example, the BCEA makes provision for unpaid leave for mothers for a period of four (4) consecutive months. At the time when the other does not receive any income, the UIF steps in to provide income for the time being until she returns to work.

Compensation on Occupational Injuries and Diseases Act[586]

[580] Basson, Y 'The compliance of the South African social security system with the international covenant on economic, social and cultural rights' (2020) 41(4). *Obiter* [online].
[581] Social Assistance Act 13 of 2004.
[582] South African Social Security Agency Act 9 of 2004.
[583] Unemployment Insurance Fund Act 63 of 2001.
[584] Basson, Y 'The compliance of the South African social security system with the international covenant on economic, social and cultural rights' (2020) 41(4). *Obiter* [online].
[585] *Ibid.*
[586] Act 130 of 1993.

The purpose of the Compensation on Occupational Injuries and Diseases Act (COIDA)[587] is to compensate workers who become injured or fall ill while executing the employer's mandate and are unable to work because of such injury or illness.[588] At the time when a worker loses income owing to the injury or illness, COIDA provides monetary compensation so that the victim can continue sustaining a decent life even after the injuries.

Pension Funds Act[589]

There are many different types of retirement schemes in South Africa. Workers who are eligible to contribute, make monthly contributions to the relevant retirement funds who keep these funds until the workers reach retirement age upon which they make a pay-out in the terms agreed upon between the member and the fund. This eases retirement for the members and allows them to retire comfortably and covered financially.

According to the expanded definition, 'the rate of unemployment among women, at 48,7%, was 8,1 percentage points higher than among their male counterparts in the 2nd quarter of 2021.'[590]

Statistics South Africa in 2021 found that:

> Women accounted for 43,4% of total employment in the second quarter of 2021. Of those in managerial positions, 66,9% were men compared to 33,1% of women. Overall, close to a third (30,1%) of all people who had jobs in the 2nd quarter of 2021 were employed in Elementary and Domestic work occupations. Women dominated the Domestic worker, Clerical and Technical occupations while the rest of the occupations were dominated by men. Only 5,5% of Domestic worker jobs were occupied by men while only 11,9% of Craft and related trade jobs were occupied by women.[591]

Statistics South Africa further found that:

> Basic standards and rights of employees in the workplace form an integral part of the Decent Work Agenda. In the 2nd quarter of 2021, approximately three quarters (75,0%) of employees were entitled to paid sick leave. However, the proportion was higher among men (76,4%) than among women (73,3%). About 8 in every 10 (83,5%) employees were entitled to maternity or paternity leave during this period.

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587 *Ibid.*

588 Basson, Y 'The compliance of the South African social security system with the international covenant on economic, social and cultural rights' (2020) 41(4). *Obiter* [online].

589 Pension Funds Act 24 of 1956.

590 Statistics South Africa, South African labour market is more favourable to men than women. Accessed at https://www.statssa.gov.za/?p=14606 on 03 April 2023.

591 *Ibid.*

> The share of men who were entitled to paternity leave (89,0%) was higher than the share of women who were entitled to maternity leave (76,8%) in the 2nd quarter of 2021.

In addition to these findings, the ILO reported that:

> Decent work is one of 17 Global Goals that make up the 2030 Agenda for Sustainable Development. An integrated approach is crucial for progress across multiple goals. According to the International Labour Organization (ILO), decent work involves opportunities for work that is productive and delivers a fair income; security in the workplace and social protection for families; better prospects for personal development and social integration; freedom for people to express their concerns, organise and participate in the decisions that affect their lives; and equality of opportunity and treatment for all women and men.[592] Access to social protection is recognised by both the ILO and the United Nations as a basic human right. It is one of the four strategic objectives of the ILO's Decent Work Agenda. In the 2nd quarter of 2021, men were more likely to have their employers contributing to their pension/retirement fund than women. Just over half (51,3%) of male employees had their employers contributing to their pension/retirement fund compared to 45,8% of women. In relation to entitlement to medical aid benefit from the employer, there were no gender differences between men and women. About a third (31,2%) of both men and women were entitled to this benefit. Social dialogue plays an important role in advancing opportunities for decent work amongst men and women.[593]

Social dialogue involves all the different types of negotiation that occur amongst various role players in the labour market.[594] The ILO has reported that there is more than half of the employees that revealed that their annual salary increment was determined only by the employer.[595] It further revealed that this half was made up of approximately 52,8% women and 52,3% men. In these figures, 27,5% were male employees and their salary increase was negotiated between the union and employer compared to the 22,7% of women. This meant that the annual salary was negotiated through the bargaining council for 11,0% of female employees compared to 7,7% of their male counterparts.[596]

4.7. Summary

Access to decent work has been one of the tabled purposes of the ILO and has made major progress on allowing access to decent work for employees across the globe. However, the global challenge comes with workers under atypical employment who struggle to access decent work due to different limitations that make it difficult for them

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[593]Decent Work, International Labour Organisation (ILO). Accessed at https://www.ilo.org/global/topics/decent-work/lang--en/index.htm on 26th April 2023.
[594] *Ibid.*
[595] *Ibid.*
[596] *Ibid.*

to do so. As it stands there is little labour protection, little access to social security that is provided to employees afforded to atypical workers. They do not have access to social security provisions such as the COIDA, pensions funds as well as the UIF. The inability of atypical workers to access these defeats the ILO's area of focus which is to grant access to decent work for all people in the employment sector.

CHAPTER FIVE: MATERNITY PROTECTION FOR WOMEN IN ATYPICAL EMPLOYMENT

5.1. Introduction

> Many women work in positions of non-standard employment, with limited legal and social protection. Access to comprehensive maternity protection for all working women could ensure that all women and children can access health and social protection.[597]

The purpose of the South African Labour laws is aimed at protecting all persons engaged in employment. However, there are many gaps that exist in the Labour Laws in terms of protection of certain categories of workers, namely, the workers who are excluded as employees in terms of the legislation such as non-standard workers resulting in them lacking protection. Non-standard workers are workers who work under specific conditions such as *inter alia* temporary, casual, seasonal and part-time workers. In these gaps, exists the challenge with maternity protection for women engaged in non-standard employment.

According to the ILO Flagship Report:[598]

> The lack of protection renders people vulnerable, particularly informal workers, migrants and the forcibly displaced, and especially women in those groups who face multiple discriminations. The rapid extension of social protection coverage to those not yet adequately covered, through social insurance, tax-financed schemes or a combination of both, is essential for reducing their vulnerability and promoting decent work.

The legislation's failure to recognise these workers as employees means that they do not enjoy the sixteen-week maternity leave afforded to female employees in terms of section 25(1) of the Basic Conditions of Employment Act (the BCEA). To alleviate this prejudice on the part of pregnant women and new mothers, the International Labour Organisation introduced the Maternity Protection Convention 183 of 2000 (the Convention). This Convention accommodates and protects the women engaged in non-standard work. However, for South Africa, the challenge is in the failure to ratify the Convention.

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[597] Pereira-Kotze, C 'Maternity protection for female non-standard workers in South Africa: the case of domestic workers' (2022) *BMC Pregnancy Childbirth* 1.

[598] World Social Protection Report 2020–22: Social protection at the crossroads – in pursuit of a better future International Labour Office – Geneva: ILO, 2021 21. Accessed at file:///C:/Users/mpho.sekokotla/Downloads/ILO%20World%20Social%20Protection%20Report%202020%20to%202022.pdf on 20th September 2022.

This failure has resulted in the provisions of the Convention not being applicable to South Africa. Its ratification could ease the prejudice that the workers excluded by legislation encounter when dealing with reproductive issues and maternity leave especially given the burden that comes with having a new-born child without job security. For example, Article 4 of the Convention provides for maternity protection. It includes in it access to maternity leave for all women regardless of their employment contract. This provision calls for access to maternity leave of at least 14 weeks minimum and in the maternity leave, a compulsory period of six weeks leave post childbirth shall be made accessible to the mother to allow ample time for her to rest and recover before going to work. The solution to this challenge lies in the ratification of the Convention.

Returning to work after childbirth is challenging for working mothers. Childcare quality may have lifelong effects on children's health, development and cognitive function. Over 60% of working women globally are informal workers without employment or maternity protection, but little is known about how these women care for their children.[599]

Non-standard employment does not spread evenly across the labour market. In general, and across the world, the main role players in non-standard employment are young people, migrants and women compared to other population groups such as the older generation and men.[600] The overrepresentation of this group is a reflection of the greater problems that they have in entering and staying in the labour market. This then demonstrates the level of disadvantage and discrimination that they endure.[601] This also reveals the consequent responses of employers.[602]

For the women specifically, its resonances the imbalanced dispersal of unpaid work that they assume in the home as well as the consequences of this disparity on the chances of them obtaining standard jobs. All of this while bearing in mind the

[599] Horwood, C et. al 'I can no longer do my work like how I used to': a mixed methods longitudinal cohort study exploring how informal working mothers balance the requirements of livelihood and safe childcare in South Africa' *BMC Women's Health* 21, 288 (2021). https://doi.org/10.1186/s12905-021-01425-y accessed on 07th February 2022.
[600] Non-Standard Employment Around the World, "Understanding challenges, shaping prospects" International Labour Organisation (2016) p 117. Accessed at https://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm 7th of February 2022.
[601] *Ibid.*
[602] *Ibid.*

availability and the hours that some employees in Standard Employment Relationship (SER) require as well as the reluctance that some employers usually have when hiring women because of other demands on them outside work such as house chores and most importantly, having children.[603] This chapter examines the issue of maternity protection for women in atypical employment.

5.2. A brief historical background on maternity protection

Maternity protection has been an ongoing challenge for decades. Numerous scholars such as Fourie[604] have written extensively on the need to extend maternity protection to workers who are engaged in non-standard employment, but to date, very little change has been made. There has been a number of attempts made by the legislator to improve the coverage of maternity protection to non-standard workers, but to no avail. In South Africa, there have also been attempts made to formalise and regulate domestic work for example, through legislations such as the Sectoral Determination for the Domestic Work Sector.[605]

However, it is the women in non-standard employment who are more prone and vulnerable to receiving none or inadequate maternity protection.[606] Proper and comprehensive maternity care includes benefits such as:

> Health protection at the workplace, a period of maternity leave, cash payments and medical benefits while on maternity leave, job security (employment protection), non-discrimination, daily breastfeeding breaks and childcare support.[607]

5.3. What is maternity protection?

> All working women who are pregnant or breastfeeding, including those in atypical forms of dependent work, should be able to access comprehensive maternity protection, and this would provide women and children access to health and social protection.[608]

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603 *Ibid.*
604 Fourie, E 'Social Protection Instruments and Women Workers in the Informal Economy: A Southern African Perspective', *PER Journal* 2021(24) 6.
605 National Department of Labour (NDoL). 2002. Basic Conditions of Employment Act (BCEA) Sectoral Determination 7: Domestic Worker Sector of 2002. Republic of South Africa. Available from: http://www.safii. org/za/legis/consol_reg/sd7dws457.pdf.
606 Pereira-Kotze, C., Doherty, T. & Faber, M. Maternity protection for female non-standard workers in South Africa: the case of domestic workers. *BMC Pregnancy Childbirth* 2, 657 (2022).
607 *Ibid.*
608 *Ibid.*

According to the Congress of South African Trade Unions' (COSATU) discussion paper on maternity protection,[609] maternity protection covers:

> Decent work and maternal health are key inter linked and mutually reinforcing. For women to achieve economic and social empowerment there is a need for maternity protection at work. Maternity protection enables women to combine their reproductive and productive roles successfully and prevent inequality in the workplace. Simply, maternity protection refers to the following:
>
> * Maternity leave
> * Cash and medical benefits
> * Health protection at work
> * Breastfeeding- breaks
> * Employment security
> * Non-discrimination
> * Providing a healthy environment for mother and child - Opportunity for women to choose motherhood freely
> * Job retention

A possible and viable way of empowering women is by providing access to decent life and work for women and ensuring the health and safety of their children.[610] One of the cherished goals of both working men and women is the ability and opportunity to raise a family. However, pregnancy and maternity have been found to be one of the most vulnerable times for working women and their families.[611] Pregnant women and nursing mothers need special and specific protection to prevent any possible harm to the health of their infants, and require sufficient time for the birth, recovery as well as nursing their children.[612] Together, they also need protection to safeguard their job security caused by pregnancy or maternity leave.

This protection guarantees the continued vital income which is required for the wellbeing of the mother, children and the entire family.[613] Safeguarding the health of pregnant and nursing mothers as well as granting them protection from job discrimination is a prerequisite of achieving frank equality of treatment and opportunity for both men and women in the work place.

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[609] COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[610] *Ibid.*
[611] *Ibid.*
[612] *Ibid.*
[613] *Ibid.*

The impact that childbearing has on women is far reaching beyond how it affects them physically and psychologically. At times, it also affects their employment and job security. Women who do not fall within the ambits of employee or the SER tend to have problems when they have children because unlike the women in the SER, their job security solely depends on the agreement they have with the employer and not the legislation.

While the International Labour Organisation (the ILO) adopted its initial two Conventions on women and work over a century ago, it still appears as though the barriers to women in the working environment, recognising the value and importance of women in the labour market, remains persistent, inflexibly repelling the attempts to try and bring change.[614]Through the different jurisdictions, the different countries and states, women continue to endure difficulties securing good and well-paying jobs.[615] If they do, it is in low-income generating jobs where they do not earn enough to afford decent lifestyle.[616]

'Anti-discrimination laws, equal pay laws, maternity leave, social security laws, minimum pay and working time laws, and laws governing atypical work have not resulted in women's equality in the labour market. While some women have benefitted, too many women have not.'[617]

5.4. Why is maternity leave important?

- It gives the mother enough time to rest before and after birth;
- The period allows the women's body to recover after birth;
- The mother is also given ample time to bond with the baby;
- Breast milk is guaranteed to the child therefore ensuring growth.[618]

5.5. Why is maternity protection important for women in the working environment?

In the modern economy, there are more women entering the labour market and impacting the development of the economy as compared to the past decade or so.

[614] Campbell, M 'A Better Future for Women at Work' (2018) *Oxford Human Rights Hub Journal* 2.
[615] *Ibid.*
[616] *Ibid.*
[617] *Ibid.*
[618]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.

Women are just as important as men in the workplace, it is just the gender dynamics that make them differ in many regards, but they also require utmost protection in the workplace because of issues such as reproduction that tend to have a major impact on how secure their jobs are when they approach birth, maternity and breastfeeding while working.

COSATU's discussion paper on Maternity Protection states that:

> Other than contributing to productive work, women also serve the social reproduction burden, of reproducing the next generation of workers for the capitalists, government and labour. Also worth noting is the fact that lack or no maternity protection would yield poor results and little productivity as women and the babies pay extra costs because they are subject to vast stress and health disorders. The safeguard of the health of pregnant workers including their babies and the protection against employment discrimination due to motherhood are integral to all working-class women.[619]

Maternity protection in the workplace is very important as it ensures that women and children's health is not affected and threatened during and after pregnancy. Therefore, maternity protection laws have the potential of yielding positive results as it allows for women to have access to better opportunities of participating in the working environment.

The discussion Paper on Maternity Protection adds that:

> Maternity protection in the last half century has been marked by progress in law, and development in workplace practice. There is also a rising social expectation regarding the rights of working women during their child – bearing years. Yet, the gains registered have so far failed to resolve the fundamental problem experienced by most (especially those working in the informal sector), if not all working women at some point in their professional lives.[620]

Another problem that adds onto the already existing problems faced by women in the workplace is stigma and stereotype. These may be major contributing factors to the origin of the failure to improve or adjust the role of women in the working environment. There is a general assumption which implies that women are meant to stay at home and look after the kids while running the household and men should be out there

[619]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[620] *Ibid.*

working, bringing home an income for his wife and kids. This is why some people have even gone to an extent of saying that 'this is a man's world.'

In support of this statement, the discussion Paper on Maternity Protection states that:

> The notion that men are the sole providers for women and children has rapidly become a myth of the past. Nowadays, an increasing number of households in all regions of the world depend on two incomes to maintain a suitable standard of living. The number of women working throughout their childbearing years is escalating, a fact which makes adequate maternity protection even more imperative.[621]

The main reason why there are more women in atypical employment (part-time work) is because of the traditional role of caregiving, tending to children, taking care of the elderly and other domestic responsibilities.[622] In Europe in 2014, there was about 27% of female part-time workers who stated that they chose part-time work because of the need to multi-task between looking after children and taking up employment.[623]

In 2011, the ILO passed the Domestic Workers Convention, 2011 (No. 189). The Convention 'requires domestic workers to be recognised as workers and given appropriate terms and conditions and has had a significant impact at the national level'. [624] The Convention has been ratified by South Africa and bears prospects of improving the livelihood of domestic workers in general.

According to the UN Working Group Against Women in Law and Practice:[625]

> A truly transformative legal and policy approach to care work would harmoniously pursue: (i) the recognition of care work to ensure that women who work in the formal and informal care sector enjoy fair and just working conditions and that employers develop care friendly policies for women and men; (ii) the reduction of care work by properly investing in public services including health care, education and affordable child care services; and (iii) the redistribution of care work among multiple actors including the state and men by adopting amongst other things adequate paternity and parental leave policies.

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[621]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.

[622] Non-Standard Employment Around the World, "Understanding challenges, shaping prospects" International Labour Organisation (2016) p 121. Accessed at https://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm.

[623] *Ibid.*

[624] Campbell, M 'A Better Future for Women at Work' (2018) *Oxford Human Rights Hub Journal* 5.

[625] UN Working Group on Discrimination Against Women in Law and Practice 'Discrimination Against Women in Economic, Social and Cultural Life with a Focus on the Economic Crisis' (2014) A/HRC/26/39 [91]-[97]. Accessed at https://www.google.com/search?q=UN+Working on 03rd March 2022.

It has been established that informal workers in general, lack the social protection that is received by workers in formal employment, including benefits such as 'access to paid leave, sick leave, maternity leave or unemployment benefits'.[626] One of the characteristics of informal employment is poor job security, low earnings and unsafe work conditions, particularly for women.[627] In 2019, statistics showed that among a total of 6.8 million working women, almost 2 million women are engaged in informal work.[628] This means that these 2 million women receive unfair and unequal maternity treatment when compared to women in formal employment.

In the modern working environment, informal activities are regarded as inferior in a market range.[629] This places women under a category that is caught between production and reproduction.[630] This leaves female workers in a compromised position.[631] This is why the discussion Paper on Maternity Protection provides that:

> Not only is maternity leave and appropriate medical care essential to enable a woman to retain or regain her health and to return to work, but income replacement during her leave period has become indispensable for the well – being of herself, her baby and entire family. Many women do not afford to take maternity leave, because they do not have access to cash and health benefits. Therefore, women are forced to stop working few days before birth and return to work early after birth, that put risk to their own and child's health.[632]

In the Netherlands, there is some subjective evidence that employers tend to be reluctant to employ young women altogether, this is because employers try to evade costs related to maternity leave.[633] Easing the use of fixed-term contracts in certain instances may mean that such hesitancy is mitigated, because employers for the reasons stated above, prefer to hire young women on temporary basis rather than on

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[626] International Labour Organisation: Men and women in informal work: a statistical picture (third edition). In: International labour Office, Geneva. Geneva, Switzerland; 2018. http://www.ilo.org/wcmsp5/groups/publi c/---ed_protect/---protrav/---safework/documents/publication/wcms_ 110314.pdf accessed on 07th February 2022.

[627] Chen MA, "The informal economy: Definitions, theories and policies. Women in informal economy globalizing and organizing": WIEGO Working Paper 2012, 1.

[628] Statistics South Africa: Quarterly labour force survey: quarter 1 2019. Edited by Africa SS. Pretoria: Statistics South Africa; 2019.http://www. statssa.gov.za/publications/P0211/P02111stQuarter2019.pdf.

[629] Mabilo M, "Women in the informal economy: Precarious labour in South Africa", Degree of Master of Arts (Political Science) in the Faculty of Arts and Social Sciences at Stellenbosch University 2018 3.

[630] *Ibid.*

[631] *Ibid.*

[632]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.

[633] Non-Standard Employment Around the World, "Understanding challenges, shaping prospects" International Labour Organisation (2016) p 128. Accessed at https://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm.

a permanent basis because that way, they have less entitlement to maternity benefits.[634]

This practice, however, is not only discriminatory but also reinforces the view that women are workers 'at the margin' who are not fully committed to their careers and not dependent on wage employment for their livelihood.[635] This is a characterisation that places women under the risk of being confined to employment under the TES for prolonged periods of time.[636]

As generally known, Informal workers do not have access to enjoy privileges such as maternity leave, minimum wages, job and wage security, occupational health, and safety protection.[637] Workers engaged in informal work earn very low income and is usually the most neglected group of workers, especially when it comes to health.[638]

Viewing women as individual people with their own lives as opposed to viewing them as workers or even as mothers, calls for a challenge to the existing paradigms for research and policy to be able to protect and promote both the maternal and new-born health and development.[639] Such research is necessary to appreciate the interactions between employment conditions in the form of 'economic relationships, social protection, labour rights and work benefits, workplace conditions' (general physical and psychosocial conditions of work) as well as health outcomes of women, pregnant women and mothers, and their children.[640]

With due consideration to the fact that one of the first ways in social protection was realised was through paid maternity leave, it is important to note and mention that this still has not received enough attention.[641]

'Despite the importance of maternity cash benefits and maternity healthcare for ensuring the health and well-being of women and their babies, many women,

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634 *Ibid.*
635 *Ibid.*
636 *Ibid.*
637 Bhan G *et al.* "Informal work and maternal and child health: a blind spot in public health and research" Bulletin of the World Health Organisation 2020 219. Accessed at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7047022/pdf/BLT.19.231258.pdf on 01 March 2022.
638 *Ibid.*
639 *Ibid.*
640 *Ibid.*
641 Son, K & Boger, T 'The Inclusiveness of Maternity Leave Rights over 120 Years and across Five Continents' *Social Inclusion, 9*(2), 275-280.

particularly those in self-employment and in vulnerable forms of employment, are not sufficiently covered.'[642] Several countries have made efforts to close or at least reduce coverage and adequacy gaps and to promote gender equality in employment: examples include the replacement of employer liability mechanisms by collectively financed social insurance and the financing of childcare as part of the maternity insurance scheme.[643]

Crous[644] in his master's dissertation has indicated that the protection of workers engaged in atypical work would increase. The study focused on the rise in the number, development and amendment to the existing labour laws and stated that the only issue delaying the development of the labour laws is that of implementation.[645] In this case, it is argued that one thing that would help in developing the law is the ratification of the Maternity Protection Convention of 2000. With the ever-changing circumstances of the law, a general observation that can be likely made is finding that, the existing labour legislation has unsuccessfully adapted to the evolving structure and needs of the labour market.[646]

South Africa has quite a number of labour laws aimed at protecting pregnant women.[647] The Labour Relations Act[648] specifically indicates that an employer is not permitted to terminate an employee's employment contract due to her pregnancy but a vast number of pregnant women reporting cases of contracts being terminated due to pregnancy is still a 'thing.'[649]

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[642] *Ibid.*

[643] World Social Protection Report 2020–22: Social protection at the crossroads – in pursuit of a better future International Labour Office – Geneva: ILO, 2021 55. Accessed at file:///C:/Users/mpho.sekokotla/Downloads/ILO%20World%20Social%20Protection%20Report%202020%20to%202022.pdf on 20th September 2022.

[644] M Crous "Atypical work in South Africa and beyond, a critical overview", an unpublished LLM dissertation submitted at the University of Johannesburg 2013.

[645] *Ibid.*

[646] Maharaj, S "Workers of the world, un-united: a discussion through a gendered lens on why stronger protection of workers in the informal economy will better equip South Africa to cope with labour market changes of the fourth industrial revolution" *HeinOnline* 2020 239.

[647] Benjamin, N 'How far have we come in Promoting Working Women's Rights to Gender Equality and Decent Work?' *Labour Research Service* 2017 93. Accessed at https://www.lrs.org.za/wp-content/uploads/2021/01/Bargaining-Indicators-2017.pdf#page=93 on 08th of March 2022.

[648] Labour Relations Act 66 of 1995.

[649] Benjamin, N 'How far have we come in Promoting Working Women's Rights to Gender Equality and Decent Work?' , *Labour Research Service* 2017 93. Accessed at https://www.lrs.org.za/wp-content/uploads/2021/01/Bargaining-Indicators-2017.pdf#page=93 on 08th of March 2022.

A study conducted in 2021 found that informal female workers were very vulnerable, and this affected their childcare practices. The participants of this study were low paid and did not have access to maternity protection. They relied on savings, government child grants and family support to provide for their families and the new-born children.[650] The findings indicated that as a result of their financial pressure, most women working under the TER returned to work leaving their babies behind at a very young age. They had to place their young babies in the care of other people, creating so much anxiety for them.[651]

COSATU's Discussion on Maternity Protection Paper states that:

> Access to maternity protection is an important part of accountability for women's health by both private and public sector informal or formal. As joint breadwinning becomes the norm, discrimination in employment on the basis of actual or potential maternity has implications for the whole society. In all parts of the world, working women who become pregnant are faced with the threat of job loss, suspended earnings and increased health risks due to inadequate safeguards for their employment and the rights which derive thereof. The maternity protection is a fundamental human rights issue and essential component of gender equality, it plays an important role in economic growth and poverty reduction and it's critical to the Agenda of Decent Work in the world of work.[652]

As already identified, the international community has at length, acknowledged maternity protection as an instrument for the attainment of the protection of women and gender equality in the workplace.[653] This dire need was established by the growing discrimination endured by female workers in the workplace based on their roles in reproduction and the effect that reproduction has on their work.[654] Naturally, women have been said to be outstanding multi-taskers, but this tends to take a major toll on them and their performance at work; especially given the burden that comes with having a new-born child without job security.

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[650] Horwood, C et. al 'I can no longer do my work like how I used to': a mixed methods longitudinal cohort study exploring how informal working mothers balance the requirements of livelihood and safe childcare in South Africa' *BMC Women's Health* 21, 288 (2021). https://doi.org/10.1186/s12905-021-01425-y accessed on 07th February 2022.

[651] *Ibid.*

[652] COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.

[653] Mosamane TM "Improving maternity protection in the Lesotho workplace through foreign and international law considerations", an unpublished LLM Dissertation submitted at the University of the North-West 2018 12.

[654] *Ibid.*

Studies have shown that formal maternity protections safeguard a mothers' time away from work, giving them time to recover from childbirth, to be able to breastfeed and to be close to their new-borns and monitor their childcare plans.[655] Maternity protection increases infant nurturing practices and effects for the mothers and their babies.[656]

It has been submitted that the issue of maternity protection has been the ILO's highlight since its launch in 1919.[657] A number of instruments on maternity protection such as the Maternity Protection Convention, 2000 (No. 183) and the Maternity Protection Recommendation, 2000 (No. 191) have managed to receive attention over the years.[658] The Maternity Protection Convention provides for 'maternity leave, health protection of pregnant employees, job security and maternity benefits.'

5.6. Maternity Protection Convention 183 of 2000

Article 2 of the Convention provides that the Convention was created and drafted to cater and accommodate all women in the working environment, including women who are engaged in atypical work arrangements.[659]

Article 4 of the Convention provides for maternity protection. It includes access to maternity leave for all women regardless of their employment contract. It reads as follows:

> 1. On production of a medical certificate or other appropriate certification, as determined by national law and practice, stating the presumed date of childbirth, a woman to whom this Convention applies shall be entitled to a period of maternity leave of not less than 14 weeks.

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[655] Nandi A, et. al 'Increased duration of paid maternity leave lowers infant mortality in low and middle-income countries: a quasi-experimental study' 2016 13(3) *PLoS Med*.

[656] *Ibid.*

[657] Mosamane TM "Improving maternity protection in the Lesotho workplace through foreign and international law considerations", an unpublished LLM Dissertation submitted at the University of the North-West 2018 2.

[658] *Ibid.*

[659] Article 2 of the Maternity Protection Convention 183 of 2000. Accessed at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312328:NO on 09 June 2022. It reads as follows:

1. This Convention applies to all employed women, including those in atypical forms of dependent work.
2. However, each Member which ratifies this Convention may, after consulting the representative organizations of employers and workers concerned, exclude wholly or partly from the scope of the Convention limited categories of workers when its application to them would raise special problems of a substantial nature.
3. Each Member which avails itself of the possibility afforded in the preceding paragraph shall, in its first report on the application of the Convention under article 22 of the Constitution of the International Labour Organization, list the categories of workers thus excluded and the reasons for their exclusion. In its subsequent reports, the Member shall describe the measures taken with a view to progressively extending the provisions of the Convention to these categories.

> 2. The length of the period of leave referred to above shall be specified by each Member in a declaration accompanying its ratification of this Convention.
> 3. Each Member may subsequently deposit with the Director-General of the International Labour Office a further declaration extending the period of maternity leave.
> 4. With due regard to the protection of the health of the mother and that of the child, maternity leave shall include a period of six weeks' compulsory leave after childbirth, unless otherwise agreed at the national level by the government and the representative organizations of employers and workers.
> 5. The prenatal portion of maternity leave shall be extended by any period elapsing between the presumed date of childbirth and the actual date of childbirth, without reduction in any compulsory portion of postnatal leave.

This provision calls for access to maternity leave of at least 14 weeks minimum and in the maternity leave, a compulsory period of six weeks leave post childbirth shall be made accessible to the mother to allow ample time for her to rest and recover before going to work. Article 5[660] proceeds to make provision for illnesses that may arise from the pregnancy or the childbirth. It gives the woman access to leave; however, the duration of the leave is not stated as it depends on national laws and policies. [661]

Article 8 of the Maternity Protection Convention provides for employment protection and protection from discrimination based on pregnancy. Articles 8(1) and (2) state that:

> 1. It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer.
>
> 2. A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.

This means that when a woman has taken time off to recover from pregnancy and childbirth, under the protection of this Convention, she should not have to worry about the security of her job as the leave she would have taken will be provided for by the

[660] Article 5 of the Maternity Protection Convention 183 of 2000. Accessed at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312328:NO on 09 June 2022

[661] Article 5 of the Maternity Protection Convention 183 of 2000 reads as follows:
"On production of a medical certificate, leave shall be provided before or after the maternity leave period in the case of illness, complications or risk of complications arising out of pregnancy or childbirth. The nature and the maximum duration of such leave may be specified in accordance with national law and practice."

Convention. Further, the very same position that the woman occupied before she went on leave should still be available to her with the same earnings, or more, if applicable.

Article 10 provides for breastfeeding breaks. It allows women the right to take time off work to bond and breastfeed the child at regular intervals to ensure the nurtured health and growth of the child.

The Maternity Protection Convention is aimed at covering the following:

> The extension of the scope of coverage to include ALL employed women and include those in atypical forms of dependent work:
>
> - Health care benefits;
> - The maternity leave of 14 weeks, which includes a period of six weeks' compulsory leave after childbirth;
> - Protection against dismissal from employment during pregnancy, maternity leave or during a period following the woman's return to work due to pregnancy related reasons;
> - Extension of protection against discrimination to women who are seeking employment;
> - Cash benefits during leave of at least two-thirds of previous earnings;
> - Paid breaks to breastfeeding mothers;
> - Additional leave for illness or complications related to pregnancy or childbirth;
> - Health and Safety at the workplace.[662]

The Maternity Protection Convention provides for access to maternity leave stretching over 14 weeks to women to whom the instrument covers.[663] For women who are absent from work on maternity leave, they shall be entitled to a cash benefit which is aimed at ensuring that they are able to maintain themselves and the new-born child in conducive environments and conditions of health, with an appropriate standard of living which shall not be less than two thirds of the earnings she had or a competitive amount.[664]

The Maternity Protection Convention also necessitates ratifying member states to ensure that pregnant women or nursing mothers are under no obligation to perform work which is deemed harmful to her health or that of her child.[665] It also makes

[662]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[663] *Ibid.*
[664]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[665] *Ibid.*

available the protection of women from discrimination based on maternity leave, pregnancy, or during a period following her return to work, excluding grounds unrelated to the pregnancy, birth or nursing.[666]

There is also guaranteed job retention after maternity leave in accordance with the Convention.[667] It also provides that the working mother has to return to the same position paid at the same original rate.[668] The Convention affords women the right to daily breaks or daily reductions of hours of work to accommodate breastfeeding of the child.[669] Revised Maternity Protection Convention[670] also promotes equality of all women in the workforce regardless of their employment contract, especially when coming to their health needs and equality between women and men, thus covering diversity in social development and economic development of members.[671]

For extensive coverage of 'maternal and equality rights', the aforesaid instruments are supported by the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) which is aimed at providing for equality by elimination of discrimination at the workplace and the Social Security (Minimum Standards) Convention, 1952 (No. 102) which recognises the necessity for maternity benefits.[672]

South Africa displayed its commitment to realising full gender equality when it formed part of the African countries who took part in adopting the African Union's Agenda 2063. It also forms part of the United Nations' (UN) framework for Sustainable Development Goals (SDG). Both the SDG and the African Union's Agenda 2063 are committed to realising full gender equality. As a signatory of the framework, South Africa is obliged to implement the necessary programmes and mediations in order to achieve gender equality. In 2012, the National Development Plan (NDP) was concluded and serves as South Africa's 'vehicle' towards the achievement of the SDG and it views active participation and women empowerment as one of the most essential in the transformation of the economy.

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[666] *Ibid.*
[667] *Ibid.*
[668] *Ibid.*
[669] *Ibid.*
[670] Convention on Maternity Protection of 2000.
[671] *Ibid.*
[672] Mosamane TM "Improving maternity protection in the Lesotho workplace through foreign and international law considerations", an unpublished LLM Dissertation submitted at the University of the North-West 2018 2.

The NDP therefore makes the following recommendations:

- Public employment should have a specific focus on unemployed women;
- The transformation of the economy should involve the active participation of women and the empowerment of women;
- There should be support for women's leadership in all sectors of society;
- Measures should be implemented for women to have access to basic rights;
- Women should have no fear of crime and should be protected by the law;
- There should be nutrition intervention for pregnant women; and
- Women should have access to anti-retroviral treatment and effective routine micro-biocides.[673]

This means that in addition to ratifying the Maternity Protection Convention of 2000, the implementation of the framework mentioned above could also participate in the improvement of the working conditions of women.

Gender differences in the working space are quite common. The treatment and the pace of development is never the same for women as it is for men because of issues such as childbirth. The effects that childbirth has on a woman has far-more reaching consequences than meets the eye. It involves a lot of emotional change, financial burdens, lack of sleep just to mention a few. When met with another challenge of the lack of job security because of the type of employment contract that the woman has, the situation just worsens. Brugiavini et al have made a few findings along the lines of the lack of job security and access to maternity leave that formally employed women have access to, and have found that:

> Maternity leave policies have important effects on several labour market outcomes of women and are specifically designed to reduce gender differences in the various dimensions of working life and to contrast the negative consequence of fertility decisions.[674]

A study by J Hicks[675] captured and examined the manner in which women in 'organised labour structures' were able to mobilise and navigate around the need to form a legislative response to the topical issue of gender justice in the style of maternity

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[673] *Ibid.*

[674] Brugiavini A, Pasini G, Trevisan E 'The direct impact of maternity benefits on leave taking: evidence from complete fertility histories' (2013) 18(1) *Advances in life course research* 48.

[675] Hicks J "Campaigning for social security rights: Women in the informal economy and maternity benefits" accessed at https://www.tandfonline.com/doi/full/10.1080/10130950.2019.1609809?scroll=top&needAccess=true on 08th February 2022.

benefits extended to women in self-employment as well as those employed under informal arrangements.[676] The study found that:

> Currently, only workers recognised as 'employees' by South Africa's labour law framework qualify for social security benefits such as Unemployment Insurance and maternity benefits (Unemployment Insurance Act 63 of 2001, Unemployment Insurance Contributions Act 4 of 2002, and Labour Relations Act 66 of 1995), resulting in discrimination against and hardship for informal economy and self-employed workers.[677]

This supports the main objective of this research in that it advocates for the benefits which are extended to women currently engaged in SER to the women engaged in the TER comprising of employment such as domestic work, self-employment and informal employment.

Another problem which has not been entirely addressed in South Africa is the challenge encountered by domestic workers. Although South Africa has ratified the Domestic Workers Convention[678] which set the working standards for domestic workers and technically recognising domestic workers as employees (which means that they have access to employee-related benefits and have some level of social security like other formally employed persons), it is still obvious that their employment conditions leave a lot to be desired.[679] In South Africa domestic work is unfortunately still regarded as informal work as it is work that is done in private households with employers that are under no obligation to provide benefits like medical aid, paid maternity leave and pension.[680]

Studies have found that almost 70% of the domestic workers in South Africa are without formal contracts.[681] As a result, thereof, domestic work is highly marginalised.[682] Many domestic workers in South Africa wake up each morning to leave their homes or arrive in South Africa from neighbouring countries with the expectation of improving their lives and those of their children, at times they even come

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[676] *Ibid.*
[677] *Ibid.*
[678] Domestic Workers Convention 189 of 2011.
[679] Benjamin N "How far have we come in Promoting Working Women's Rights to Gender Equality and Decent Work?" *Labour Research Service* 2017 93. Accessed at https://www.lrs.org.za/wp-content/uploads/2021/01/Bargaining-Indicators-2017.pdf#page=93 on 08th of March 2022.
[680] *Ibid.*
[681] *Ibid.*
[682] *Ibid.*

as undocumented migrants, thus, increasing their exposure to extreme exploitation.[683] All these take place despite South Africa being at the vanguard of ensuring that domestic workers are covered with most of the core protections as required by international standards with the amendment to the Labour Relations Act to accommodate Sectoral Determination 7 (SD7).[684]

With its paramountcy and supremacy, the Constitution provides protection to the citizens of South Africa. This protection extends to every person that lives in the Republic but to some extent stretches further to protect women, children and persons living with disabilities as affirmative action suggests. One of the main aims of the Constitution is gender equality, women empowerment and eliminating all forms of discrimination against women.[685]

There are many international instruments on decent work and equality in the workplaces.[686] Amongst these international instruments is the Maternity Protection Convention.[687] As briefly mentioned above, it may be the instrument used to address and close the gap which the women in question currently have to endure. The biggest challenge currently is the failure by South Africa to ratify this convention and enact it into law. Historically, South Africa was not part of the ILO until it re-joined on the 26th of May 1994 and ratified all its 8 fundamental conventions.[688]

The ILO has adopted the Maternity Protection Convention, 2000 (No. 183) (although still not ratified by South Africa) supplemented by the Maternity Protection Recommendation, 2000 (No. 191) with the aim of promoting maternity protection at work.[689] Employment and non-discrimination, maternity leave, cash and medical

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683 *Ibid.*
684 *Ibid.*
685 South African Law Reform Commission, Project 143: Maternity and parental benefits for self-employed workers in the informal economy 06 May 2021. Accessed at https://www.justice.gov.za/salrc/dpapers/dp153-prj143-MaternityParentalBenefits-July2021.pdf on 26th January 2022.
686 Fourie, E 'Social Protection Instruments and Women Workers in the Informal Economy: A Southern African Perspective' *PER Journal* 2021(24) 2.
687 Maternity Protection Convention 183 of 2000.
688 Fourie, E 'Social Protection Instruments and Women Workers in the Informal Economy: A Southern African Perspective' (2021) 24 *PER Journal* 3.
689 Mosamane TM "Improving maternity protection in the Lesotho workplace through foreign and international law considerations", an unpublished LLM Dissertation submitted at the University of the North-West 2018 ii.

benefits, health protection and breastfeeding are recognised by the ILO as principles of maternity protection.

The Convention on Maternity Protection No. 183[690] is an ILO international treaty.[691] It only becomes binding when a member state has ratified it.[692] When this has been done, then the member state, has to give a progress report on the implementation of the particular Convention to the ILO.[693] Important international and regional Conventions need a member state to provide for maternity benefits which comprise of paid leave or leave with satisfactory social security benefits for **all** women regardless of the employment contract that exists between her and the employer.[694]

Countries are mandated to afford special attention to the workers who are not adequately protected by social security, including self-employed workers in the informal economy.[695] The protocol to the African Charter on Protection of the Rights of Women in Africa[696] states that: '*States should adopt and enforce legislative and other measures to guarantee women equal opportunities at work*' and should guarantee adequate and paid pre- and post-natal maternity leave.'[697]

The Maternity Protection Convention, No. 183,[698] was established by the ILO to promote 'equality of all women in the workforce and the health and safety of the mother and child', simultaneously recognising the different economic and social development of ILO member countries, the difference of the development and enterprises of practice regarding maternity protection.[699] As of March 2020, the Convention now covers the following key subject areas:

• Maternity leave

[690] Convention on Maternity Protection of 2000.
[691]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[692] *Ibid.*
[693] *Ibid.*
[694] *Ibid.*
[695] *Ibid.*
[696] Adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, 11 July 2003.
[697]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[698] Convention on Maternity Protection of 2000.
[699] Regulatory Impact Assessment of ILO C183 – Maternity Protection Convention, May 2021, UN Women 6. Accessed at https://iset-pi.ge/storage/media/other/2021-09-30/d470bd40-21fa-11ec-91c5-3b7fb0237ca5.pdf on 02 June 2022.

- Breastfeeding mothers
- Benefits
- Employment protection and non-discrimination
- Health protection
- Leave in case of illness or complications.[700]

Mosamane alludes that:

> Against this background, the International Labour Organisation (ILO), which oversees the adoption and implementation of labour standards, considered maternity protection as central in enabling women to reconcile work with their childbearing roles. Adequate maternity protection ensures that women are placed on an equal footing with men in employment and occupation.[701]

Mosamane advocates for maternity protection and access of all women to maternity provisions regardless of the employment contract which they are a party to. According to the author, this is an opportunity to attempt to redress the existing imbalances between men and women which can be observed in the workplace. It is submitted that Mosamane is correct in holding that adequate maternity protection not only ensures that women are placed on an equal footing, but it also allows women in atypical employment the ability to fully recover and nurture their children until a reasonable time when they can go to day-care or stay at home with a nanny.

According to Benjamin:

> As informal economy workers, women's family responsibilities limit the types of activities and amount of time they can spend on their paid business activities and the provision of childcare facilities can play an essential role in expanding employment opportunities. The importance of childcare for workers with family responsibilities is clearly recognised in the ILO Workers with Family Responsibilities Convention, 1981 (No. 156), and Recommendation No. 165, which calls upon all member states to take measures to develop or promote community services, public or private, such as childcare and family services and facilities (Article 5). To address the gender dimension of informality, policy responses, programmes and projects need to recognise that providing childcare is a basic necessity for expanding women's

[700] *Ibid.*

[701] Mosamane TM "Improving maternity protection in the Lesotho workplace through foreign and international law considerations", an unpublished LLM Dissertation submitted at the University of the North-West 2018 ii.

> employment opportunities and enabling them to shift from informal economy activity to formal economic activity.[702]

It is very important to forge a balance between the access to employment and responsibilities which women have in the workplace by giving due attention to the fact that all these laws that are intended to protect women have been passed, the main issue is still implementation.

While the social protection policies in South Africa are aimed at decreasing vulnerability and helping women stabilise income should they be unemployed, get injured at work, get disabled, fall ill and during pregnancy by ensuring that they have at least a basic level of income security, the main challenge is still with implementation.[703] The amendments made to the Unemployment Insurance Agency (UIA) were signed into law on the 18th of January 2017 and provide that 'a beneficiary for maternity payment is an employed person who has been employed for at least 13 weeks.'[704]

The UIA presents a smaller and what seems to be a 'reasonable qualifying period of 13 weeks.' A woman can, however, only claim this maternity payment based on her acquisition of contribution credits, for example, the benefit is based on the number of days of work.[705] There is consequently no minimum period of payment benefits for a woman has not accumulated enough credits, which may restrict the entitlement to the contribution of the individual woman and not as part of a social contribution of all employed men and women.[706] Therefore, all women who are unemployed, women who are working under atypical forms of employment or women who are in situations where their employers are not compliant with the UIA, however, remain excluded from maternity protection in any form.[707] In order for maternity benefits to be a limitless right,

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[702] Benjamin N "How far have we come in Promoting Working Women's Rights to Gender Equality and Decent Work?" *Labour Research Service* 2017 96. Accessed at https://www.lrs.org.za/wp-content/uploads/2021/01/Bargaining-Indicators-2017.pdf#page=93 on 08th of March 2022.
[703] *Ibid.*
[704] *Ibid.*
[705] Benjamin N "How far have we come in Promoting Working Women's Rights to Gender Equality and Decent Work?" *Labour Research Service* 2017 98. Accessed at https://www.lrs.org.za/wp-content/uploads/2021/01/Bargaining-Indicators-2017.pdf#page=93 on 08th of March 2022.
[706] *Ibid.*
[707] *Ibid.*

the extension of these benefits to women who are unemployed, continues to be a challenge.[708]

The amendments also provide for a sliding scale to a fixed rate of 66% payment of the earnings of the beneficiary at the date of the application. It is worth noting that while these amendments technically make the UIA compliant with the ILO Maternity Protection Convention 183 (2000), 'article 16(1) of the 2014 Southern African Development Community (SADC) Protocol on Employment and Labour, and the 2007 Code on Social Security in the SADC, there still remains the challenge of providing women with an unrestricted entitlement to maternity benefits.'[709]

In 2012 (27-29 March), COSATU held a conference where their basis was gender protection, maternity protection as well as the ratification of the Maternity Protection Convention (2000).[710] In this conference, COSATU took a resolution on the necessity to ratify the key ILO Conventions which include *inter alia* the ILO Convention 183 and Recommendation 191 on Maternity Protection.[711] The maternity protection Discussion Paper which was prepared was aimed at addressing the concerns relating to *state practice and non-compliance with international laws* regarding access to maternity benefits for all categories of working women.[712] All categories of working women means women engaged in both the TER and SER working arrangements.

The Discussion Paper contended that in as much as it may be admitted that women workers are covered by existing labour laws such as the Constitution, the BCEA, the LRA and the Unemployment Insurance Fund (UIF), there is still a huge *lacuna* in the labour laws as there are no specific labour laws aimed at addressing the issue of maternity protection and benefits and to what extent these are stretched to.

According to the Discussion Paper:

> Women working in the formal economy have to draw their maternity benefits from universal coffers (meant for both men and women) which is the

[708] *Ibid.*
[709] Benjamin N "How far have we come in Promoting Working Women's Rights to Gender Equality and Decent Work?" *Labour Research Service* 2017 96. Accessed at https://www.lrs.org.za/wp-content/uploads/2021/01/Bargaining-Indicators-2017.pdf#page=93 on 08th of March 2022.
[710]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[711] *Ibid.*
[712] *Ibid.*

> Unemployment Insurance fund (UIF). It is sad that some categories of women working as domestic workers, farm-workers, casuals, subcontractors, part-timers or volunteers are excluded from the benefits of maternity protection. It is even worse for those working in the informal economy![713]

The main contributor to this problem is the ambiguity and lack of coverage of all workers by the LRA and BCEA.

The Discussion Paper also made an effort to identify the existing gaps between the International Standards and National Labour Laws.[714] One of the questions raised at the discussion was '*when is South Africa as a signatory to the ILO going to respect the international laws and bring the Convention before the competent authority for a decision on a possible ratification of Convention C183??´* A motivation for this question is that the national labour laws have an opportunity for the Ratification of this Convention.[715]

A submission by the Discussion Paper was that 'the existing labour laws are still not amended to recognise and create an enabling environment for the currently highly feminised formal and informal labour market.' This submission was made in 2012, it is now 2022 and the position has not changed much as women workers still continue being treated in accordance with their employment contract and standards.

The Discussion Paper concluded that the failure of the government to adopt this very important instrument created for working women continues to create workplace discrimination and contributes to the underrating of women's contribution to the country's general Gross Domestic Product (GDP) as well as the entire economy.[716]

The focal point of this study is the issue of ratification of the Maternity Protection Convention (2000). This is why it has been submitted that issues such as non-discrimination in employment, cash and health benefits, breastfeeding and health protection, maternity leave, are all recognised by the ILO as the doctrines of maternity protection.[717] Therefore, in order to achieve actual maternity protection, South Africa

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[713]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[714] *Ibid.*
[715] *Ibid.*
[716] *Ibid.*
[717] Mosamane TM "Improving maternity protection in the Lesotho workplace through foreign and international law considerations", an unpublished LLM Dissertation submitted at the University of the North-West 2018 ii.

needs to adopt the recommendations made by the ILO in the Maternity Protection Convention (2000).[718]

The Maternity Protection Convention No. 183,[719] was enacted by the ILO to promote 'equality of all women in the workforce and the health and safety of the mother and child.'[720] This Convention lays out the minimum standards that require implementation to allow for working mothers and pregnant women adequate protection in the working environment.[721] So far, the Convention has only been ratified by 38 ILO member countries.[722] Georgia, for example, has been a member of the ILO since 1993 and still has not ratified the Convention.[723] While the Labour Code of Georgia has made substantial progress in the past decade 'e.g. increasing the ceiling on paid maternity leave benefits in 2013 and introducing the paid parental leave concept in 2020', there are still aspects of important maternity protection that still have not received the required attention.[724]

Because of this failure to ratify the Convention, even the latest Georgian labour legislation that was adopted in September 2020 still lacks some of the standards that are set by the ILO Maternity Protection Convention.[725]

Also, adding onto the standards of the Convention, Georgia has dedicated itself to updating its labour legislation in line with that of the EU and along the framework of the 2014 Association Agreement (AA).[726] Amongst the relevant legislative themes are anti-discriminatory and gender equality laws, labour law, as well as safety and health at work.[727] Whereas this current pledge does not necessarily mean that Georgia would be held accountable for directly altering the EU legislation into a legal framework of its own, or sets a timeframe for developing some of the fresher standards, the Georgian

[718] *Ibid.*
[719] Convention on Maternity Protection of 2000.
[720] Regulatory Impact Assessment of ILO C183 – Maternity Protection Convention, May 2021, UN Women 6. Accessed at https://iset-pi.ge/storage/media/other/2021-09-30/d470bd40-21fa-11ec-91c5-3b7fb0237ca5.pdf on 02 June 2022.
[721] *Ibid.*
[722] *Ibid.*
[723] *Ibid.*
[724] *Ibid.*
[725] *Ibid.*
[726] *Ibid.*
[727] Regulatory Impact Assessment of ILO C183 – Maternity Protection Convention, May 2021, UN Women 6. Accessed at https://iset-pi.ge/storage/media/other/2021-09-30/d470bd40-21fa-11ec-91c5-3b7fb0237ca5.pdf on 02 June 2022.

legislators would have to at least consider the over-all philosophies of the EU labour and social protection law.[728]

In this policy context, an important step towards aligning Georgian legislation with international practices would be the ratification of Convention No. 183, 'promoting the rights of working mothers, ensuring the safety and well-being of mothers and children, and helping level the playing field for both genders in the labour market.'

There are a number of areas of labour law that are covered by the ILO.[729] These include, *inter alia* social protection, job security, forced labour, atypical employment and collective bargaining.[730] One of the areas that received specific attention is maternity and the protection of female workers in all matters that relate to pregnancy.[731] Pregnancy, the intention to fall pregnant, maternity, places female workers in a different situation in comparison to male employees. This will have a big impact on her handiness at work and at the requirements of her workplace. Because of this, the particular needs of a female employee may lead to discriminatory practices against women in the labour market.[732]

There was an investigation followed by a report that was issued in 2015 describing the Status of Women in the South African Economy.[733] The unemployment rate for women in 2015 was estimated at 28.7% in comparison to men with who were at 24.4%.[734] Studies have shown that there are fewer hopeless women jobseekers in comparison to men.[735] This shows that there are more women seeking employment than men in South Africa.[736]

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[728] *Ibid.*
[729] Mosamane TM "Improving maternity protection in the Lesotho workplace through foreign and international law considerations", an unpublished LLM Dissertation submitted at the University of the North-West 2018 ii.
[730] Mosamane TM "Improving maternity protection in the Lesotho workplace through foreign and international law considerations", an unpublished LLM Dissertation submitted at the University of the North-West 2018 6.
[731] *Ibid.*
[732] *Ibid.*
[733] Benjamin N "How far have we come in Promoting Working Women's Rights to Gender Equality and Decent Work?" *Labour Research Service* 2017 93. Accessed at https://www.lrs.org.za/wp-content/uploads/2021/01/Bargaining-Indicators-2017.pdf#page=93 on 08th of March 2022.
[734] *Ibid.*
[735] *Ibid.*
[736] *Ibid.*

Benjamin submits that 'there however remains a number of challenges women face in accessing the labour market including their historical disadvantage in relation to accessing skills, education and training, resources and networks.[737] Anecdotal evidence from women involved in Labour Research Service (LRS) programmes points to the fact that employers continue to see childbearing as a negative interruption and are dissuaded from employing young women.'[738]

While the key recommendation of this study is an amendment to the existing labour laws which exclude independent contractors, there are also various recommendations which were discussed by the South African Law Reform Commission in May 2021 which were aimed at affording workers outside the scope of employment as set out in the Labour Legislation.

The *Grootboom* case,[739] requires the extension and implementation of a firm maternity and parental benefit scheme for South African workers who are in informal employment. With the failure to extend and implement these maternity benefits, the state is indirectly promoting unfair discrimination against workers who are employed under categories not conforming to the SER through the existing employment legislation.[740]

Currently, there are various human rights instruments that advocate for the extension and protection of state maternity and parental benefits to workers who fall outside the ambits of the SER. They are:

(a) Maternity Protection Convention, 2000 (No.183) (articles 6(5) and 6(6) [Not ratified by South Africa];
(b) Recommendation Concerning the Transition from the informal to Formal Economy (No. 204) (article 18);
(c) Social Protection Floors Recommendation, 2012 (No.202) (article 5(a));
(d) Convention on the Elimination of All Forms of Discrimination Against Women (article 12);
(e) Universal Declaration of Human Rights (article 25);

[737] *Ibid.*
[738] *Ibid.*
[739] *Government of the Republic of South Africa and Others v Grootboom and* Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000).
[740] South African Law Reform Commission, Project 143: Maternity and parental benefits for self-employed workers in the informal economy 06 May 2021. Accessed at https://www.justice.gov.za/salrc/dpapers/dp153-prj143-MaternityParentalBenefits-July2021.pdf on 26th January 2022.

(f) International Covenant on Economic, Social, and Cultural Rights (articles 9 and 12);
(g) Convention on the Rights of Persons with Disabilities (article 25);
(h) African Charter on the Rights and Welfare of the Child (article 14);
(i) Protocol to the African Charter on Human and People's Rights and the Rights of Women in Africa (Maputo Protocol) (article 14);
(j) Charter of Fundamental Social Rights in the SADC (article 10);
(k) SADC Protocol on Gender and Development (article 19).

The Maternity Protection Convention, 2000 (No.183) for example has the prospects of liberating the workers in the TER and allowing them access to proper and necessary maternity care facilities for some of the reasons discussed in Chapter 1 above.

Mogapaesi[741] submits that:

> The ILO Maternity Protection Convention is more liberal in its scope. According to article 2(1), the provisions of the Convention will be applied to all employed women, including those in atypical forms of dependent work. This provision requires an ILO member that ratifies the Convention to not only limit its application of maternity protection in national law to women employed under formal contractual arrangements.

With the ratification of the Maternity Protection Convention, all workers, both employees and non-employees will be covered and will have full coverage of the Convention. This will mean that all working women will be treated equally and will have equal access to the maternity protection that is otherwise only afforded to women who are employees according to domestic legislation.

The intention of the Convention is 'to extend coverage to a broad range of nonstandard work arrangements such as casual and seasonal workers, fixed term contracts, temporary agency work and informal employees in all sectors.'[742] By providing a definition the term 'woman' in article 1 to extend its application to 'any female person without any discrimination whatsoever', the Convention eliminates any likelihood of discrimination against any female worker who is otherwise entitled to the protection as envisaged in the Convention.[743]

[741] Mogapaesi, T. 'An overview of maternity protection in Botswana: A critique of the Employment Act through the International Labour Organisation's Maternity Protection Convention lens' 2022 55(1) *De Jure Law Journal* 57.
[742] *Ibid.*
[743] *Ibid.*

'Consequently, if employers are not compelled to provide maternity leave, women would be placed in a position where they would have to choose between child rearing and fulfilling their liberty to be active participants in the labour market. This results in an indirect discrimination as their male counterparts are less likely to be faced with similar circumstances. Furthermore, leave benefits are essential because there is a need to protect the health of both the expectant mother and child. This affords them adequate time to rest before and after childbirth as is medically advisable to do so.'[744]

The call for the extension of access to maternity has grown in the past few years and has even gained momentum since the advent of democracy. It has been highlighted in various policy debates and several authors have also engaged in attempts to redress the legal gap that exists in the law that tends to prejudice female workers in so many ways.

A study by Hirani and Premji[745] found that:

> Despite the duration of maternity leave guaranteed by South Africa's national legislation being aligned with minimum ILO guidelines, this may be inadequate to support optimal breastfeeding practices. Four months of maternity leave is provided to working women, but Exclusive Breast Feeding (EBF) is recommended until 6 months of age. Researchers have shown that EBF declines when women return to work.

It has been established that a substantial number of female workers who are self-employed and independent contractors (also known as 'own-account' workers in the informal sector have no access to subsidised social insurance because these benefits are related to the form of employment which the woman is associated with.[746]

Benjamin submits that:

> When contributory schemes like unemployment insurance or maternity payment are linked to formal employment, women are less likely to benefit from these forms of social protection. Women are over-represented in the low skill, low paid, casual, temporary forms of employment and over

[744] *Ibid.*
[745] Hirani, S. A., Premji, S. S. 'Mothers' employment and breastfeeding continuation: Global and Pakistani perspectives from the literature' 2009 *12*(2), *Neonatal, Pediatric and Child Health Nursing* 18-24.
[746] South African Law Reform Commission, Project 143: Maternity and parental benefits for self-employed workers in the informal economy 06 May 2021. Accessed at https://www.justice.gov.za/salrc/dpapers/dp153-prj143-MaternityParentalBenefits-July2021.pdf on 26th January 2022.

> represented in sectors like services that tend to be prone to more precarious forms of employment. As women bear the overwhelming responsibility for unpaid work such as domestic work and care work, their patterns of employment are irregular and they are less likely to be covered by contributory social insurance schemes as compared to men. Employed women on average earn less than employed men resulting in lower levels of benefits. In 2003 South Africa extended unemployment benefits to domestic workers but to date very few employers are in compliance with this legal obligation.[747]

With all submissions made by different authors, and with the existing labour laws, the main issue and challenge is with implementation.

According to the Women's Legal Centre, most of the countries that have ratified the Maternity Protection Convention, 2000(183) now provide for both cash benefits incentives and maternity leave which also allow for paid leave.[748] Taking into consideration the recognition that the law affords these benefits to permanent workers, the submission is that this Convention be ratified, and the benefits therein be extended to workers engaged in atypical working arrangements.

The Commission has made a number of recommendations to improve the working conditions and access to basic maternity benefits for women in South Africa. These are briefly discussed below:

1. The Commission recommends that:

> the existing Unemployment Insurance Fund system be extended by the Department of Employment and Labour to self-employed workers in the informal economy, so as to make provision for the extension of maternity and parental benefits outlined in the Unemployment Insurance Fund Act (UIFA) and BCEA to all workers. This will bring informal economy self-employed workers into a social security system as envisaged in section 27(2) of the Constitution. Implementation of the proposed maternity and parental benefits contribution scheme for informal economy self-employed workers will promote fulfilment of the State's obligation in terms of the international instruments that are binding upon South Africa.

This recommendation generally entails that one of the possible ways to deal with the injustice faced by women in the workplace can be placed in governmental provision of secured maternity benefits, some of the challenges that have been raised and deemed

[747] Benjamin N "How far have we come in Promoting Working Women's Rights to Gender Equality and Decent Work?" *Labour Research Service* 2017 98. Accessed at https://www.lrs.org.za/wp-content/uploads/2021/01/Bargaining-Indicators-2017.pdf#page=93 on 08th of March 2022.
[748] Babych Y "Regulatory Impact Assessment of ILO C183 – Maternity Protection Convention", UN Women, 2021, Tybilisi Georgia. Accessed at https://iset-pi.ge/storage/media/other/2021-09-30/d470bd40-21fa-11ec-91c5-3b7fb0237ca5.pdf on 27th January 2022.

problematic such as the violation of section 12(2)(b) of the Constitution may be addressed and resolved.

2. The Commission also recommends that as stated in section 25 of the BCEA, the same period that is afforded to women under the SER should also be extended to the women under the TER. The BCEA provides for an uninterrupted period of four (4) consecutive months' maternity leave while earning a salary. It is therefore recommended that this benefit, as it is, be extended to the women engaged in atypical employment as a remedy for the existing discrimination.[749]

As previously argued above, childbirth is equally traumatic for all women regardless of their employment. It is rather unfair to exclude women in the TER from the provisions of section 25 of the BCEA simply because of the employment contract that they are engaged in. Therefore, the recommendations stating that there be an extension of the provisions of section 25 made to the women excluded will close the gap and 'do away' with the discrimination that currently exists.

Mogapaesi[750] provides that:

> If employers are not compelled to provide maternity leave, women would be placed in a position where they would have to choose between child rearing and fulfilling their liberty to be active participants in the labour market. This results in an indirect discrimination as their male counterparts are less likely to be faced with similar circumstances. Furthermore, leave benefits are essential because there is a need to protect the health of both the expectant mother and child. This affords them adequate time to rest before and after childbirth as is medically advisable to do so.

The challenges that have been identified in the already prevailing interventions are obviously not easy to overcome because if they were easy to overcome, the gaps would have been closed and the issues addressed, by now. They will need a more reliable and 'gendered analysis' of the *lacunae* in legislation that already exists as well as addressing the issue with enforcement. The ability to disable the limitations faced by women in partaking in the labour market actually requires a concentrated

[749] South African Law Reform Commission, Project 143: Maternity and parental benefits for self-employed workers in the informal economy 06 May 2021. Accessed at https://www.justice.gov.za/salrc/dpapers/dp153-prj143-MaternityParentalBenefits-July2021.pdf on 26th January 2022.

[750] Mogapaesi, T 'An overview of maternity protection in Botswana: A critique of the Employment Act through the International Labour Organisation's Maternity Protection Convention lens' (2022) 55(1) *De Jure Law Journal* 64.

contribution from all role players involved in stimulating the gender standards and issues with power that continuously diminish the value of the contribution women make to society.

According to the ILO World Social Protection Report 2020–22,[751] 'some countries have made decisive progress towards universal or near-universal effective maternity coverage. Despite the positive developmental impacts of supporting childbearing women, only 44.9 per cent of women with new-borns worldwide receive a cash maternity benefit.'

According to Pareira-Kotze:

> In current maternity protection policy and legislation, certain benefits are defined as being applicable to all workers, namely maternity leave, medical benefits, employment protection (job security), non-discrimination, breastfeeding breaks, and support with childcare responsibilities. However, the availability of cash benefits while on maternity leave (enabled through social insurance) is defined differently in legislation for those working less than 24 hours per month for an employer.[752]

Benefits such as social insurance are not available to certain groups of non-standard workers in South Africa. An example of these are the self-employed workers working in the informal economy.[753] The perception in this study was that all women should receive equal maternity protection through current legislation and policy.[754] It was further noted that there were different ways in which this protection could be accessed: '… the labour laws should protect everyone, equally. And there's huge gaps or discrepancies or this inequality, I think, when you look at [it] from a social perspective … especially the more informal sector, like as it may be the case of domestic workers. They are excluded from this kind of benefits. Paid maternity leave is not guaranteed, it's something that is voluntary.' [755]

[751] World Social Protection Report 2020–22: Social protection at the crossroads – in pursuit of a better future International Labour Office – Geneva: ILO, 2021 21. Accessed at file:///C:/Users/mpho.sekokotla/Downloads/ILO%20World%20Social%20Protection%20Report%202020%20to%202022.pdf on 20th September 2022.
[752] Pereira-Kotze, C et. al 'Legislation and Policies for the Right to Maternity Protection in South Africa: A Fragmented State of Affairs' (2022) 38(4) *Journal of Human Lactation* 687.
[753] *Ibid.*
[754] *Ibid.*
[755] *Ibid.*

5.7. Maternity protection benefits available to women in positions of non-standard employment in South Africa

Currently, in South Africa, the only guaranteed financial support that women engaged in atypical employment are guaranteed to receive (depending on their level of income) is child support grants as provided for under Section 27(1)*(c)* which states that everyone is guaranteed access to social security provisions especially if 'including, if they are unable to support themselves and their dependents, appropriate social assistance.'[756] This right is further safeguarded by Section 27(2) which provides for State's responsibility to ensure that it takes reasonable measures to achieve a 'progressive realisation' of this right.

While Social insurance is implemented for workers through the Unemployment Insurance Fund (UIF), it is mostly limited to employees in the formal sector and often times excludes the workers in the informal sector.[757] In contrast to Social Insurance, there is only Social Assistance which is provided by the South African Social Security Agency (SASSA) and pays an amount of R490 per child under the age of 18 years and usually doesn't take into account the type of employment the parent(s) are engaged in.[758] In this current economic state, this may be the only financial assistance that many women not receiving paid maternity leave or maternity benefits can access after childbirth.[759]

In the components of maternity protection available in South Africa's legislation that conform to international standards include the duration of maternity leave, non-discrimination in the workplace, job security, provision of medical benefits, and health protection, while it has been found that cash benefits and breastfeeding breaks are not adequately guaranteed in South Africa's legislation.[760]

[756] Pereira-Kotze, C et. al 'Legislation and Policies for the Right to Maternity Protection in South Africa: A Fragmented State of Affairs' (2022) 38(4) *Journal of Human Lactation* 687.
[757] *Ibid.*
[758] *Ibid.*
[759] *Ibid.*
[760] *Ibid.*

In most countries, issues pertaining to Maternity protection legislation and guidance focus on full-time and permanently employed women.[761] On a global level, there is over 60% of employed people who work in informal settings, worse in low-and-middle-income countries as this number is higher. In Africa alone, 86% of employment is informal.[762]

Pereira-Kotze et. al however submit that:

> While there is no evidence to show how access to maternity protection in South Africa differs based on socio-economic status, there is acknowledgement, globally and nationally, that research on implementing comprehensive maternity protection for all is urgently needed, especially for women working in the "informal" sector.

They further opine that there is a serious need for deep investigations on maternity protection policy implementation, especially for women engaged in non-standard employment. There should be due consideration afforded to the expansion of programs for social assistance and the improvement of their efficiency as well for easy access of those who need it.[763] According to a report from the South African Law Reform Commission,[764] 'there is currently work underway in South Africa to extend social security benefits beyond women employed formally and to consolidate social security.'

The successful integration of maternity protection policies across government departments and improved monitoring and evaluation of existing legislation could yield positive outcomes that may contribute to implementation and policy coherence.[765] Digital technology opportunities could also be used to streamline service delivery for social benefits across government sectors such as online, and telephonic chat lines just to ease pregnant women's access to obtaining assistance for completing their applications for social insurance benefits.[766] What sets the South African position apart

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[761] *Ibid.*
[762] *Ibid.*
[763] Pereira-Kotze, C et. al 'Legislation and Policies for the Right to Maternity Protection in South Africa: A Fragmented State of Affairs' (2022) 38(4) *Journal of Human Lactation* 696.
[764] South African Law Reform Commission. (2021). Maternity and parental benefits for self-employed workers in the informal economy. Project 143: Discussion Paper 153 (Issue May). http://www.justice.gov.za/salrc/dpapers/dp153-prj143-MaternityParentalBenefits-July2021.pdf.
[765] Pereira-Kotze, C et. al 'Legislation and Policies for the Right to Maternity Protection in South Africa: A Fragmented State of Affairs' (2022) 38(4) *Journal of Human Lactation* 696.
[766] *Ibid.*

is the state's constitutional obligation to realize social security and health care rights as set out in section 27(2) of the Constitution.[767] Therefore, civil society organisations should pressurise the government to realise maternity protection rights by way of the legislative and policy changes suggested above.[768] Literature on the ease of accessibility of maternity benefits for non-standard workers is limited and the full package of maternity protection may, for different reasons seem unrealistic.[769]

5.8. Discussion on the recent issues to cover both spouses on the issue of parental leave

Fontana and Schoenbaun submit that the protection for fathers and other non-birth parents such as adoptive parents does not always receive adequate consideration.[770] In South Africa for example, progressive amendments have been made by the Labour Laws Amendment Act[771] which contains gender-inclusive provisions; however, these changes may be insufficient to contribute to gender equality through improved maternity protection and shared caregiving responsibility.[772]

5.8.1. *Werner Van Wyk, Ika Van Wyk, Sonke Gender Justice v Minister of Employment and Labour*[773]

This case was about a couple challenging the constitutionality of Section 25 and 26 of the BCEA citing that it was discriminatory as it only extended its coverage to women and referred to maternity leave only side-lining the men and issues around paternity leave.

The facts were as follows:

FACTS

[767] *Ibid.*
[768] *Ibid.*
[769] Pereira-Kotze C, et, al 'Maternity protection ben- efts for non-standard workers in low-and-middle-income countries and potential implications for breastfeeding practices: A scoping review' (2023) *International Breastfeed Journal*.
[770] Fontana D. & Schoenbaun N 'Unsexing pregnancy' (2019) 119(2) *Columbia Law Review* 2.
[771] Labour Law Amendment Act of 2018.
[772] Pereira-Kotze, C et. al 'Legislation and Policies for the Right to Maternity Protection in South Africa: A Fragmented State of Affairs' (2022) 38(4) *Journal of Human Lactation* 696.
[773] 2022-017842 An unreported case decided at the South Gauteng High Court in September 2022.

Mr. Werner van Wyk (van Wyk) applied to his employer for four months' leave so that he could take care of his new-born child because his wife had returned to operating her two businesses after their child was born. The request made by van Wyk was declined. Van Wyk was employed in a formal setting while his wife was self-employed when their child was born. Based on this, the assumption would be that van Wyk had better access to employment rights that were available to all people in the working class. Pursuant to the refusal to grant him the four-months leave, he approached the court for a recourse against his employer.

Van Wyk filed the following constitutional issues in his application:

> The sections are unconstitutional insofar as they unfairly discriminate against fathers of newborn children by unjustifiably limiting the father's rights to paternity leave in South Africa. The sections ought to be extended to ensure equal rights of all mothers, fathers and same-sex parents of newborn children in South Africa to include, among other things, circumstances where a father is the primary caregiver, allow for extended leave policies, extend the definition of maternity leave to include parental and include the recognition of a new category of leave for pregnant or breastfeeding parents to six weeks.
>
> Whether the Minister of Employment and Labour is obliged to amend the legislation to encapsulate circumstances where fathers are the primary caregivers to their newborn children and accordingly – to the extent that workplace policies deviate from this standard – they, themselves, will give rise to unconstitutionality.

5.9. Extending the definition

Currently, under labour laws, a female employee is entitled to four (4) months of unpaid maternity leave after a child is born. The van Wyk case sought to extend the scope of maternity leave to include parental leave and caregiving leave.[774]

It is stated that, 'While maternity leave is not expressly defined in the BCEA, the provisions of section 25 relate to pregnancy and birth, and a pregnant employee's right to maternity leave.'[775]

[774] https://www.cliffedekkerhofmeyr.com/en/news/publications/2022/Practice/Employment/employment-law-alert-19-september-maternity-leave-whos-in-and-whos-out.html. Accessed on 24th January 2023.
[775] *Ibid.*

It was not the first time this status was being challenged. There was a same-sex couple who entered into a surrogacy agreement and applied for paid maternity leave and was denied in 2015 in *M I A v State Information Technology Agency (Pty) Ltd.* [776]

The summary of this case is as follows:

The gay couple had just welcomed the birth of their baby through a surrogate mother. Consequently, this meant that the couple was fully responsible for the child as the surrogate mother was not required to parent this child post-birth. One of the parents of the child applied for 'maternity' leave with his employer and the application was subsequently rejected on the basis that the company's in-house maternity leave policy only applied to women. The court hearing the matter ruled in favour of the father of the baby, called for an amendment of the BCEA and submitted that:

- The well-being of the new-born infant necessarily requires a devoted and full-time care giver, particularly in the first months of life.
- The best interests of the child were paramount, as is required by both the Children's Act and the Constitution of South Africa.
- The employee, as the parent of the child, should be allowed to take that role, even if he had not physically given birth to the infant.
- There was no reason why the employee was not entitled to the benefit of four months of unpaid maternity leave.[777]

The Labour Court adopted a 'purposive interpretation' of maternity leave and found that the right to maternity leave is not linked solely to the welfare of the child's mother but also in the best interests of the child. If it does not rule in the best interests of the child, it would be tantamount to ignoring the principles enshrined in the Constitution as well as the Children's Act.[778]

Having considered these issues and the developments in our law, the Labour Court declared that the way in which the employer's maternity leave policy was applied was unfairly discriminatory towards the father of the child. The Labour Court further directed the employer not to discriminate against surrogate parents when applying the

[776] [2015] JOL 33060 (LC).
[777]Bregmans, 12 January 2016, Bregman Moodley Attorneys. Accessed at https://www.bregmans.co.za/same-sex-couples-and-paternity-leave/ on 24th January 2023.
[778] I*bid.*

policy in future, and to pay the applicant the equivalent of two months' salary (in addition to the two).[779]

5.10. Status of fathers in line with paternity leave

According to section 27 of the BCEA, parents who have been working for an institution for a period exceeding four (4) months are entitled to paid family responsibility leave of 3 days during each annual leave cycle. It should be noted that family responsibility leave also includes the birth of a child.[780]

Should the employer require proof of birth of a child after a request is made, then such proof needs to be made available at the instance of the employee. According to the amendments made to the BCEA Basic Conditions of Employment Amendment Act (BCEAA) in 2018,[781] employees are entitled to be paid paternity leave of 10 days on the birth of a child. Such payments are made through the Unemployment Insurance Fund (UIF).[782] Adoptive parents are also entitled to a paternity leave of 10 days from the date that the adoption order is granted or when the child is placed in the care of a prospective adoptive parent by a competent court, pending the finalisation of an adoption order in respect of that child, whichever date occurs first.[783]

The payment allocated for paternity benefits must be paid at a rate of 66% of the earnings of the beneficiary at the date such application is made and should be made subject to the maximum income threshold set in the Unemployment Insurance Act (UIA).[784] A worker intending to make such application is required to notify the employer in writing (unless the employee is unable to do so) of the date on which the employee plans to start parental leave; and return to work after parental leave.[785] The notice must be submitted at least one month prior to the employee's child's birth; or the adoption date in the case of adoptive parents or if it is not reasonably practicable to do so, as soon as it becomes reasonably practicable.[786]

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[779] *Ibid.*
[780] https://mywage.co.za/decent-work/family-responsibilities. Accessed on 24th January 2023.
[781] Basic Conditions of Employment Amendment Act 7 of 2018.
[782] https://mywage.co.za/decent-work/family-responsibilities.
[783] *Ibid.*
[784] *Ibid.*
[785] *Ibid.*
[786] *Ibid.*

5.11. Comparison with other jurisdictions

Countries like the United Kingdom have provisions for maternity allowance for self-employed women in its Maternity and Parental Leave Law and Regulations.[787] Sweden has flexible rules that afford parental leave system provided for in the *Forsakringskassan's* rules and regulations.[788] In the *Forsakringskassan's* rules and regulations there are provisions for both paid and unpaid maternity leave, even for workers engaged in atypical employment.

According to the World Social Protection Report, there exists a gap between coverage of full-time employees and those that are in other types of employment and this gap is relatively small in Finland and Sweden.[789] It also shows that other countries have more pronounced coverage gaps for certain categories of workers. It lastly adds that, 'self-employed workers in particular are significantly less likely to contribute to social insurance, but large coverage gaps also exist for part-time workers, temporary employees and multiple job holders in some countries.'[790]

In New Zealand, the Parental Leave and Employment Protection Act[791] provides for parental leave for self-employed persons. According to section 71C of the Act, a self-employed person who is eligible for parental leave is, 'a person who is (a) primary carer in respect of a child, and (b) meets the parental leave payment threshold test.' [792]

For Namibia, the provisions for maternity leave were established by the Social Security Commission in accordance with the Social Security Act[793] which administers security

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[787] Georgiou D "Legal Regulation of Self-Employment in the United Kingdom" accessed at https://www.researchgate.net/profile/Despoina-Georgiou-6/publication/354921375_Legal_Regulation_of_Self-Employment_in_the_United_Kingdom/links/61543d842b34872782f8f845/Legal-Regulation-of-Self-Employment-in-the-United-Kingdom.pdf on 02 February 2022.

[788] Duvander, A and Viklund, I 'How long is a parental leave and for whom? An analysis of methodological and policy dimensions of leave length and division in Sweden' 2020 40(5) *International Journal of Sociology and Social Policy* 479.

[789] World Social Protection Report 2020–22: Social protection at the crossroads – in pursuit of a better future International Labour Office – Geneva: ILO, 2021 21. Accessed at file:///C:/Users/mpho.sekokotla/Downloads/ILO%20World%20Social%20Protection%20Report%202020%20to%202022.pdf on 20th September 2022.

[790] *Ibid.*

[791] Parental Leave and Employment Protection Act of 1987.

[792] South African Law Reform Commission, Project 143: Maternity and parental benefits for self-employed workers in the informal economy 06 May 2021. Accessed at https://www.justice.gov.za/salrc/dpapers/dp153-prj143-MaternityParentalBenefits-July2021.pdf on 02nd January 2022.

[793] Act 34 of 1994.

schemes that are divided into two (02). These divisions are the Maternity, Sick Leave and Death Benefit (MSD) as well as the Employees Compensation Fund (ECF). Section 21 of the Act allows for a self-employed person who is registered as an employee to contribute towards both the contributions that are payable by an employer and employee as well as those in subsection (2) of the Act.

In the USA, flexible types of work arrangements had already started to increase even before the pandemic because of the rise in the cost of the labour force as well as the toughened global competition.[794] However, this increase intensified due to the COVID-19 outbreak.[795] According to Gartner report, in the USA, '32% of organizations are replacing full-time employees with contingent workers as a cost-saving measure.'[796] Also, this report mentioned that organisations were likely to continue to increase their use of periodical workers in order to maintain the flexibility in the management of their workforce.[797] This is consistent with what was proposed in the principal management model of flexible-firm developed by Atkinson[798] that insists upon 'the importance, for organizations, to increase the plasticity of their structure through flexible staffing arrangements to be able to face the challenges of an unpredictable environment.'

It has been identified that the main problem with these contemporary forms of employment relationship has a lot to do with the fact that they are temporary, flexible and non-standard in character, which has augmented the already complex dynamics of Human Resource Development (HRD) during this extraordinary turbulent crisis.[799] Freelancers are independent contractors, who work on their own, they are not tied to one specific employer, and they lack a long-term contractual commitment.[800]

The challenging income position of temporary and part-time workers is extremely pertinent against the contemporary background of unemployment rates, slow

[794] Chabani, Z and Hamouche, S 'COVID-19 and the new forms of employment relationship: implications and insights for human resource development' (2021) 53(4) *Industrial and Commercial Training* 367.
[795] *Ibid.*
[796] *Ibid.*
[797] *Ibid.*
[798] Atkinson, J 'Manpower strategies for flexible organisations*'* *Personnel Management* 1984 16 3.
[799] Chabani, Z and Hamouche, S 'COVID-19 and the new forms of employment relationship: implications and insights for human resource development' (2021) 53(4) *Industrial and Commercial Training* 367.
[800] Kazi, A.G. *et al.* 'The freelancer: a conceptual review' *Sains Humanika* 2014 2 2.

economic growth and pressures of international competition.[801] These circumstantial features brought non-standard employment back to the position as one of the highly debatable solutions to restore, or at least maintain, overall employment rates.[802] Newer types of contracts that deregulate employment stability and working time have become increasingly popular, like mini-jobs and zero-hour contracts.[803] Zero hour contracts are those where the employer is not obliged to provide the employee with regulated minimum number of workers. Is its mostly practised in the United Kingdom.[804] Up till now, they compare to the former European objectives that regulate non-standard forms of employment to reduce labour market division.[805] Thus, the fear revealed that more non-standard jobs come with the danger of ending up in a similar situation as the USA, that is: 'a situation where labour force participation increases but at the same time poverty stays unaffected. In other words, unemployed poor just shift into working poor.'[806]

In the *Pierre-Val v. Buccaneers* case:[807]

> The Court of Appeals for the Second Circuit upheld a decision by the lower to exempt Delaware North Sport service from paying concession workers overtime at Orioles Park in Baltimore.[808] Tampa Bay have become the fifth NFL team to get served with a lawsuit from its cheerleaders, it emerged today. Papers were filed against the Buccaneers by former cheerleader Manouchcar Pierre-Val accusing them of violating federal wage law. In the suit, Pierre-Val's attorney Kimberly Woods alleges many of the same facts as those that preceded it including unpaid promotional appearances, multiple practices per week, and several hundred hours worked for the team, all for a flat per-game wage.
>
> Pierre-Val, 25, is a registered nurse from Orlando who cheered for the Bucs during the 2012 to 2013 season. During that time, her attorney said, she was paid $100 per game but worked many more unpaid hours leading cheerleading clinics, visiting charity events, posing for swimsuit calendars and practicing. 'If you do the math,' Woods said, 'you see she earned less than $2 per hour — while the minimum wage in Florida was $7.67. Woods also anticipated the 'you knew what you were getting into' defence, noting that one cannot waive her rights

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[801] Horemans, Jeroen. "Atypical employment and in-work poverty" *Handbook on in-work poverty*. Edward Elgar Publishing, 2018 1.
[802] *Ibid.*
[803] *Ibid.*
[804] Adams, A and Prassl, J 'Zero-Hours Work in the United Kingdom' Conditions of Work and Employment Series No. 101 2018 1.
[805] *Ibid.*
[806] Airio, I 'Change of Norm? In-Work Poverty in a Comparative Perspective' *(*2008) 92 *Finland: Studies in social security and health* 344.
[807] *Pierre-Val v. Buccaneers Limited Partnershi*p 8:2014cv01182.
[808] McLeod, Christopher M., *et al*. 'Cruel Optimism in Sport Management: Fans, Effective Labor, and the Political Economy of Internships in the Sport Industry' *Journal of Sport and Social Issue* 2018 42(3) 186.

> under the Fair Labour Standards Act. Pierre-Val is the only named plaintiff as of now and was paid $3,000 less than minimum wage during her one year with the team.[809]

It follows similar actions against the Buffalo Bills, Cincinnati Bengals, Oakland Raiders and New York Jets filed by cheerleaders claiming they were underpaid.[810]

In India however, a self-employed person is defined in section 2 of the Unorganised Workers' Social Security Act[811] which is the mother body of section 6 of the National Social Security Board. This board authorises every state government to create a State Security Board for atypical workers. In terms of this Act, section 2 defines a 'self-employed worker' to mean:

> Any person who is not employed by an employer but engages himself or herself in any occupation in the unorganised sector subject to a monthly earning of an amount as may be notified by the Central Government or the State Government from time to time or holds cultivable land subject to such ceiling as may be notified by the State Government.

Lesotho still lags behind in terms of progress. A study by Mosamane[812] found that Lesotho's maternity protection is deficient, in comparison to South Africa's. This study was conducted by assessing the legislative framework in order to determine whether or not there has been adequate compliance with the international standards.[813] The study also examined the South African maternity protection and it was found that South Africa is a few steps ahead of Lesotho in terms of its progress in the maternity protection.[814] One of the objectives of the study was also to try and explore lessons which Lesotho can learn from South Africa, if any.

Before Lesotho passed its Labour Laws, they relied on the common law. The common law which they relied on actually offered close to no maternity protection because an employer could just decide to fire a woman because she was pregnant or without

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[809] Watson L 20 May 2014 "Tampa Bay Buccaneers become FIFTH team to be sued by cheerleader who claims she earned less than $2 an hour" https://www.dailymail.co.uk/news/article-2633987/Tampa-Bay-Buccaneers-fifth-team-sued-cheerleader-claims-earned-2-AN-HOUR.html.
[810] Jessica Roy 28 January 2016 New York Jets Cheerleaders Win $324,000 Settlement Over Unpaid Work https://www.thecut.com/2016/01/ny-jets-cheerleaders-win-324000-settlement.html.
[811] The Unorganised Workers' Social Security Act of 2008.
[812] Mosamane TM "Improving maternity protection in the Lesotho workplace through foreign and international law considerations", an unpublished LLM Dissertation submitted at the University of the North-West 2018 ii.
[813] *Ibid.*
[814] *Ibid.*

providing a reason why he or she was firing the pregnant woman.[815] At that time, pregnant workers or even female workers who had the intention of falling pregnant had very little job security and they often fell victim to unfair gender discrimination.

Lesotho became a member of the ILO in 1966.[816] Lesotho, like South Africa has also not ratified the Maternity Protection Convention 183 of 2000, however, even if this is the case, it is not exempted from taking note of the aforesaid equality rights and international standards on maternity protection.[817]

Lesotho has the Labour Code Order[818] (hereinafter 'the Code') which was enacted to assist with labour matters. However, the Code contains relevant provisions that appear to be a bit lacking. Because of this lack, the female workers are left vulnerable. This vulnerability was illustrated in the *Makamohelo Makafane v Zhongtian Investment (Pty) Ltd*.[819] In this case:

> A female employee (applicant) was dismissed after delivering to the employer a letter from the hospital stating that she was pregnant. The employer responded by saying it could not continue to work with her because of her pregnancy. The Labour Court held that her dismissal was unfair and reinstated her to her former position. In light of the aforesaid, the essential question is whether the current legislative framework, despite containing some protection, is adequate and in line with the ILO standards on maternity protection. The opinion is upheld that the protection can be improved upon when best practices of other jurisdictions are considered.

This goes to show that dismissal of an employee simply because she is pregnant constitutes unfair dismissal and if reported at the Labour forums, the employer may be on the firing line while the employee gets reinstated with costs burdening the employer.

Lesotho in comparison with South Africa, has also attempted to make several maternity protection provisions. Instruments such as the Constitution of South Africa, [820]the Basic Conditions of Employment Act,[821] the Employment Equity Act,[822] the

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[815] *Ibid.*
[816] https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11003:0::NO::: accessed on 02nd February 2022.
[817] Mosamane TM "Improving maternity protection in the Lesotho workplace through foreign and international law considerations", an unpublished LLM Dissertation submitted at the University of the North-West 2018 3.
[818] Labour Code Order 24 of 1992.
[819] LC/76/2013.
[820] Constitution of South Africa, 1996.
[821] Basic Conditions of Employment Act 75 of 1997.
[822] Employment Equity Act 55 of 1998.

Labour Relations Act,[823] for example, make South Africa appear as if it is a few steps ahead of Lesotho in terms of development and the provision of maternity benefits to female workers.[824]

Botswana, like South Africa has not ratified the Maternity Protection Convention yet the framework on maternity protection is still underdeveloped.[825] There is quite a lot that remains unaddressed by Botswana legislation on the entitlements that women have towards maternity leave. Mogapaesi has found that there is a great significance in the protection against maternity discrimination in the workplace as it serves as a tool for safeguarding women's human rights and job security.[826] He explains that its significance is found in the following grounds:

> Firstly, a need is recognised to protect the life and health of the expectant female worker and their unborn child. This extends to the need to afford adequate maternity leave before child birth and after confinement, as well as protecting women from work that could be hazardous to their health and safety as well as that of their unborn children. Secondly, the protection is geared towards ensuring that the interruption of a female worker's employment due to pregnancy and maternity should not translate to the cessation of an income. Finally, the protection secures the employment of the woman so that she may not be dismissed nor demoted solely for the reason of her pregnancy and/or maternity.

In Botswana, in order to qualify for maternity leave benefits, section 113(1) of the Employment Act[827] requires that a pregnant female employee should give notice to her employer through the submission of a written certificate that is signed by a medical officer, a registered nurse, and a midwife, confirming that medical officer's opinion that the employee is likely to go on leave within six weeks immediately after the date of the certificate.[828] After receiving the notice, the employer must immediately allow the employee to go on leave.[829]

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[823] Labour Relations Act 66 of 1995.
[824] Mosamane TM "Improving maternity protection in the Lesotho workplace through foreign and international law considerations", an unpublished LLM Dissertation submitted at the University of the North-West 2018 4.
[825] Mogapaesi, T 'An overview of maternity protection in Botswana: A critique of the Employment Act through the International Labour Organisation's Maternity Protection Convention lens' (2022) 55 (1) *De Jure Law Journal* 57.
[826] *Ibid.*
[827] Act 6 of 2008.
[828] Mogapaesi, T 'An overview of maternity protection in Botswana: A critique of the Employment Act through the International Labour Organisation's Maternity Protection Convention lens' (2022) 55(1) *De Jure Law Journal* 63.
[829] *Ibid.*

The employer must also not expect the employee to resume work until the six weeks have elapsed. If an employer denies the employee leave, such employer will be guilty of an offence and liable to a fine not exceeding P1500 or alternatively to imprisonment for a term not exceeding six months or to both.[830] If the employer allows the employee to resume work or requires her to perform any work within six weeks immediately after her confinement, the employer shall be liable to a fine not exceeding P1000 or to imprisonment for a term not exceeding six months or to both.

So, upon serving this notice to the employer, the female employee is permitted to take twelve weeks statutory maternity leave.[831] In this period, she shall not be allowed to go to work or even perform any work under her contract of employment.[832] An employer who refuses permission for the female worker to go on maternity leave commits an offence under the Act.[833] The standard proposed in the Maternity Protection Convention is similar in that 'it requires a pregnant female employee to produce a medical certificate stating the presumed date of childbirth in order to be entitled to leave.'[834]

In the case of *Ramoswetsi v Mpepu Private Senior Secondary School (Pty) Ltd,*[835]

> The Industrial Court took the view that the provisions of this section require strict compliance as per the rule of interpretation in the section 45 of the Interpretation Act. In terms of section 45 of this Act, whenever a provision uses the word "shall", it is intended that whatsoever needs to be done under that provision is pre-emptory and cannot be dispensed with. For this reason, the Court proceeded to hold that an application for maternity leave must be accompanied by the medical certificate signed by the medical official or midwife. Further, the employee is required to comply with the stipulated timelines. That is, the application for leave must be made at least six weeks prior to the expected date of confinement. If an employee fails to make this application or give notice to the employer in accordance with section 113(1), then her application for maternity leave will be considered non-compliant with the Act and will result in the loss of maternity leave pay. The applicant in this case was found to have applied for maternity leave eleven days before confinement and her application was not accompanied by the required certificate. For this reason, the Court concluded that her claim for maternity leave pay was unenforceable.

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830 *Ibid.*
831 *Ibid.*
832 *Ibid.*
833 *Ibid.*
834 *Ibid.*
835 1992 2 BLR 243 (IC).

The protection of women's rights in the workplace should be preserved and nurtured because research has found that notwithstanding the activeness of women in the workplace, women continue to endure discrimination in various forms.[836] Just like the males in the workplace, women are susceptible to discrimination on the basis of their sex, nationality, religious choices and race i*nter alia*.[837] However, in most cases, the females may suffer double risk as they are likely to be discriminated against due to their reproductive function.[838]

5.12. Summary

Unfortunately, South Africa still has not domesticated and ratified the ILO Convention No. 183.[839] The failure to ratify this convention means, to a large extent, that there is no obligation and responsibility to comply with certain obligations.[840] It is only when a state has ratified a Convention that it will be decoded into its domestic legislation and enforcement measures including compliance can be instituted.[841] A complete approval and ratification of the ILO Convention No. 183[842] stands a chance of introducing many opportunities.[843] Among the issues is the '*full recognition of the role of women to the society and nation at large*.'[844]

South African laws as enshrined in its Constitution,[845] the LRA, and the BCEA, together produce an opportunity to begin to prepare for the Adoption of Convention 183.[846] 'Treating maternity as a disability or the leave as a period of unemployment or being sick could be considered discriminatory, such as the case of South Africa, also,

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[836] Welle, B. & Heilman, M.E 'Formal and Informal Discrimination against Women at Work: The Role of Gender Stereotypes' The Centre for Public Leadership Working Papers, Harvard University Press (2005) 24.
[837] Mogapaesi, T 'An overview of maternity protection in Botswana: A critique of the Employment Act through the International Labour Organisation's Maternity Protection Convention lens' (2022) 55(1) *De Jure Law Journal* 57.
[838] *Ibid.*
[839] Convention on Maternity Protection of 2000.
[840]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[841] *Ibid.*
[842] Convention on Maternity Protection of 2000.
[843]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[844] *Ibid.*
[845] Constitution of South Africa, 1996.
[846]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.

the UIF benefits that are provided during pregnancy could be drained such that if a beneficiary finds herself unemployed, they might not be entitled to any social protection.[847]

There should consequently be a clear contrast between maternity benefits and unemployment insurance because this is more advantageous to male employees who do not have maternity obligations to cater for.[848] Undeniably, maternity benefits should be independent from the general unemployment fund.[849] Women, through the biological process of carrying pregnancy not only contribute to the overall Gross Domestic Product (GDP) of South Africa but all constantly adds to the prevailing human resource basis of the nation.[850]

By ratifying the Maternity Protection Convention,[851] South Africa will be amongst a collection of nations that prioritise the wellbeing of pregnant women and nursing mothers and there is a greater chance of the reduction of the mortality rates.[852] Notwithstanding the efforts made at international level to adopt Convention 183 and Recommendation 191 on maternity protection in 2000, it is unfortunate to note that the Government of South Africa still has not ratified this honourable and liberal international instrument.[853] Most African countries, including South Africa have not yet adopted the Convention into law.[854] Bearing in mind the modern world of work which is characterised by a high upsurge of job insecurity, maternity protection should assure job retention after child-birth.[855]

[847]COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[848] *Ibid.*
[849] *Ibid.*
[850] *Ibid.*
[851] Maternity Protection Convention of 2000.
[852] COSATU Gender Conference, Discussion Paper-Maternity Protection. Accessed at http://mediadon.co.za/wp-content/uploads/2019/09/2012-April-COSATU-Maternity-protection.pdf on 08 June 2022.
[853] *Ibid.*
[854] *Ibid.*
[855] *Ibid.*

CHAPTER SIX: THE SADC INSTRUMENTS RELEVANT TO THE PROTECTION OF NON-STANDARD WORKERS

6.1. Introduction

> Non-standard employment is the opposite of the standard employment relationship, which is work that is full time and indefinite. Non-standard employment includes an unequal employment relationship between an employee and an employer. Some workers choose to work in non-standard employment, and the choice has positive results. Nonetheless, for the majority of workers, non-standard employment is associated with job insecurity, exploitation, and the absence of trade unions and collective bargaining.[856]

With the shift in patterns of employment and work, there has been a major call for a shift in existing labour governance and management. While the main contract of employment is one involving an employer and employee, mainly serving each other on a permanent and indefinite period of time, over the years there has been an evolution in contracts of employment. More employment arrangements were introduced including ones where the employer employs a worker for a set period of time and upon expiration of that particular period, the employment relationship ceases to operate.

Mokofe submits that:

> Casualisation and externalisation have resulted in the exclusion of numerous workers from the protection provided by labour legislation. Union coverage for non-standard workers is very low. Social insurance structures and labour directives that protect nonstandard workers can be realised only if workers are given a voice and representation in trade unions. The ILO has also embraced the concept of 'decent work', which has four goals: employment opportunities, workers' rights, social protection, and representation. The ILO decent work agenda can be used to promote the improvement of the conditions of vulnerable non-standard workers.[857]

With this evolution came issues including the failure of labour laws to evolve with the changes in employment arrangements. For example, with these changes from the traditional employment arrangement to temporary workers, seasonal workers, casual workers, self-employed, workers engaged in general atypical and informal employment relationships still grapple with issues around lack of job security, lack of

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[856] Mokofe, W.M "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished Doctoral thesis submitted at the University of South Africa 2018 iii.

[857] Mokofe, W.M "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished Doctoral thesis submitted at the University of South Africa 2018 73.

access to social security benefits, protection against unfair dismissals for example. The gap was created by the lack of evolution of labour laws when employment arrangements began evolving.

According to Fourie,[858] workers engaged in atypical employment:

> Are not recognised, regulated or protected by labour legislation or social protection measures and can be characterised by varying degrees of dependency and vulnerability. In countries where the informal economy is increasingly creating a parallel economic world to that of the formal economy, the extension of protection by facilitating the ability of these workers to bargain collectively and the role of national and local governments become increasingly important. Women workers in the informal economy are particularly vulnerable and face discrimination on multiple grounds and levels as gender inequalities in the informal economy cut across race and class lines.

It is of utmost importance that these labour laws purported to afford protection to workers be extended to accommodate the workers in atypical work arrangements.[859] As the informal economy grows, it creates an even bigger need for the extension of coverage of these laws. The biggest challenge is the difficulty in affording protection to these workers without legislative intervention.

Fourie[860] therefore submits that:

> Labour law must thus meet the challenges posed by the realities of new forms of work. The important function of labour law to protect and promote the human dignity of workers will often result in a cross-over of various subsystems of the law. If we consider human dignity as an important component of labour law, then we need to consider an interdisciplinary approach and the promotion of such an approach. This approach will mean that labour law can no longer function in isolation and other branches of the law, such as social security law, corporate law, human rights and family law will increasingly have an impact on the human dignity of workers.

While a majority of the world has merged into a democratic society, it is very important that a way is forged, especially when coming to issues pertaining to social protection afforded to women in the informal economy. The ways in which this can be achieved

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[858] Fourie, E "Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy", an unpublished LLD Thesis submitted at the North-West University 2018 x.
[859] *Ibid.*
[860] *Ibid.*

may be through the innovation of new legal framework that is linked to concepts such as freedom, social justice as well as human rights.[861]

Workers in the hospitality industry are one of the examples of atypical workers. This industry contributes greatly towards economic growth as well as the Gross Domestic Product (GDP).[862] In as much as this industry is a big economic contributor, it has been observed as one of the industries that encounter major problems when coming to the employment arrangement. This is because it relies on the informal employment categories who are the workers in question for this study.

This category of workers tends to experience the most strenuous working arrangements as they are in most cases subjected to long hours of standing, unregulated working hours as well as unreasonable job descriptions.[863] These tend to weigh heavily on their emotional and physical wellbeing and the worst part is that with all these unbearable working conditions, they are the most marginalised group. They do not have access to social protection. Students, women, migrant workers and ethnic minority tend to be the most affected groups of workers in the employment setting.[864]

Mokofe notes that:

> However, it is necessary to point out that employees in traditional full-time employment are well protected in some Southern African states. The currently available regulation is largely unable to protect non-standard workers, and in numerous instances workers are regarded as 'non-standard', due to the narrow interpretation of the word 'employee.'[865]

While lack of access to social protection is the point of departure, it also needs to be noted that these workers do not have access to social security. Scholars such as Olivier and Mpedi,[866] argue that some of the causes of this lack may be due to challenges with their inability to contribute towards social security schemes because they do not earn enough to contribute, or they are just unwilling to contribute towards

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[861] *Ibid.*
[862] Ngwenya, M "Extension of Social Security to the Informal Hospitality Industry Workers in South Africa", an unpublished LLM Dissertation from University of Western Cape 12.
[863] *Ibid.*
[864] *Ibid.*
[865] Mokofe, W.M "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished Doctoral thesis submitted at the University of South Africa 2018 73.
[866] Olivier M and Mpedi G '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.

social security schemes.[867] It is usually aggravated by their lack of options as their unaffordability of social insurance schemes offered by the employer means that they cannot consider private schemes as a way out.[868]

Fourie[869] submits that:

> International and regional institutions are playing an increasingly important role in the empowerment of women, the promotion of equality and decent work for all women. This study identifies and critically considers the relevant international institutions and instruments, the impact of international standards, regional institutions and regional labour standards, particularly those of the African Union (AU) and the Southern Africa Development Community (SADC), and other global initiatives directed at the social and labour protection of women workers in the informal economy.

The challenges with the little or no protection of workers engaged in atypical employment are not only limited to South Africa. The problem stretches as far as the SADC region and internationally.[870] SADC is the organisation that oversees and governs the countries in the SADC region. The SADC region headquarters are situated in the capital of Botswana, Gaborone.[871]

According to Mpedi & Nyenti:[872]

> The roots of the SADC can be traced back to the Southern African Development Coordination Conference (SADCC), which was established in 1980 by Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. The primary purpose of the SADCC was to achieve regional cooperation amongst its member states. The eventual objective was to reduce economic, technological and transport dependence on the then apartheid South Africa. The demise of apartheid in South Africa resulted in the SADCC transmuting into a development-focussed regional organisation, currently known as the SADC.

The SADC has its basis on the 'principle of the sovereign equality of all member states.'[873] This means that it is constructed on the notion of striving towards equality

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867 *Ibid.*
868 *Ibid.*
869 Fourie, E "Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy", an unpublished LLD Thesis submitted at the North-West University 2018 x.
870 The SADC region is made up of 15 countries, namely, Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.
871 Mpedi, L.G and Nyenti, M.N.T 'Key International, Regional and National Instruments Regulating Social Security in the SADC *A General Perspective'* SUN MeDIA MeTRO 1st Edition 2015 87.
872 *Ibid.*
873 Article 4(a) of the 1992 Treaty of the Southern African Development Community (SADC Treaty).

for states who are members of the SADC. The SADC is recognised as one of the eight African Union's (AU) Regional Economic Communities.[874]

According to Mokofe:

> Southern African states have thus far accepted the ILO core standards as a basis for regulating minimum employment standards. The SADC Charter of Fundamental Social Rights strengthens the ILO international labour standards as the basis for the regional vision in the SADC Treaty, as described by the Treaty's goals, prime concerns and blueprints. The ILO has had a powerful influence on labour law policies in Southern African states and has encouraged member states to ratify and apply core labour standards. Today all member states in the region have ratified the eight ILO core labour standards.[875]

A historical background on the SADC conducted by Hicks[876] established that:

> South Africa joined the SADC in 1994. It is signatory to a slate of instruments concerning non-discrimination against women, and the provision of social security rights and benefits – including those relating to maternity benefits. The Charter on Fundamental Social Rights in the SADC calls on member states to "create an enabling environment consistent with ILO Conventions on discrimination and equality and other relevant instruments," so that gender equality and equal opportunities for men and women are created, including "access to employment, remuneration, working conditions, [and] social protection…."

The Charter goes further to declare that member states are obliged to create an enabling environment 'so that every worker in the Region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits.'

The abovementioned provisions are an articulation of the legal obligation of member states including South Africa to extend the social security protection mechanisms such as maternity protection to workers of all categories, regardless of the nature of their contract of employment.[877] This is reflected best in the Code on Social Security in the SADC.[878] In relation to maternity protection and with reference to the ILO Maternity

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[874] The African Unions Regional Economic Communities is made up of the Community of Sahel-Saharan states, Common Market for Eastern and Southern Africa, East African Community, Economic Community of Central African states, Economic Community of West African states, Intergovernmental Authority on Development in Eastern Africa, Southern African Development Community, and Union du Maghreb Arabe (Union of Arab Maghreb).

[875] Mokofe, W.M "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished Doctoral thesis submitted at the University of South Africa 2018 71.

[876] Hicks, J.L "Extension of Social Security Benefits to Women in the Informal Economy: A Case for Maternity Protection" Doctor of Philosophy Thesis. University of Kwazulu-Natal 2021 80.

[877] *Ibid.*

[878] Minimum Standards (2008).

Protection Conventions,[879] member states are obliged to 'establish and progressively raise their systems of social security, at least equal to that required for ratification of International Labour Organisation (ILO) Convention Concerning Minimum Standards of Social Security No. 102 of 1952.'[880]

To support this notion, the study by Hicks submits that:[881]

> The Code calls on member states to expand progressively the coverage and impact of their social insurance schemes to the entire working population, and that they 'should provide and regulate social insurance mechanisms for the informal sector.' With specific reference to ILO Convention 183, the Code obliges member states to 'ensure that women are not discriminated against or dismissed on grounds of maternity and that they enjoy the protection provided for in the ILO Maternity Protection (Revised) Convention No. 183 of 2000,' and 'progressively provide for paid maternity leave of at least 14 weeks and cash benefits of not less than 66% of income.'

The SADC Protocol on Gender and Development of 2008 which has been ratified by South Africa, and informally referred to as the SADC CEDAW, aims to 'provide for gender mainstreaming and the empowerment of women, to eliminate discrimination on the basis of gender, and to achieve gender equality.'[882] States are specifically empowered to implement affirmative action mechanisms to eliminate all barriers that prevent them from participating meaningfully in all spheres of life and create a conducive environment for such participation.'[883]

The study by Hicks also notes that:

> In relation to the rights of working women, the Protocol calls on state parties to enact policies and legislation to ensure equal access, benefits and opportunities for women in trade and entrepreneurship, 'taking into account the contribution of women in the formal and informal sectors' – ensuring that policies in these sectors are gender responsive. To promote equal access to employment and benefits, state parties are obliged to 'provide protection and benefits for women and men during maternity and paternity leave.[884]

[879] Convention 102 and 138
[880] Hicks, J.L "Extension of Social Security Benefits to Women in the Informal Economy: A Case for Maternity Protection" Doctor of Philosophy Thesis. University of Kwazulu-Natal 2021 80.
[881] *Ibid.*
[882] *Ibid.*
[883] *Ibid.*
[884] *Ibid.*

On the 17 of August 2022, the SADC signed the SADC Treaty in Windhoek, Namibia.[885] The objectives of this treaty are, 'to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration.'[886] The idea is for these objectives to be achieved through increased regional integration that is premised on equitable and sustainable development.[887]

On the 9th of March 2001 and following the establishment of the SADC Treaty, the SADC decided to restructure its institutions at an Extra-ordinary Summit and that is where the SADC Treaty Amendment (2001) was adopted.[888] The rationale behind the restructuring was based on institutional reform that was necessitated by numerous challenges encountered when the transition from the SADCC to the SADC was made.[889]

Article 4 of the Treaty of the Southern African Development Community of 1992 (SADC Treaty) provides for the principles of the SADC which are as follows:

SADC and its Member States shall act in accordance with the following principles:

Article 5 of the SADC Treaty provides for the objectives. The objectives of SADC shall be to:

> (a) Promote sustainable and equitable economic growth and socioeconomic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;
> (b) Promote common political values, systems and other shared values which are transmitted through institutions which are democratic, legitimate and effective;
> (c) Consolidate, defend and maintain democracy, peace, security and stability;
> (d) Promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States;
> (e) Achieve complementarity between national and regional strategies and programmes;

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885 Accessed at https://www.sars.gov.za/legal-counsel/international-treaties-agreements/trade-agreements/sadc-treaty-and-protocols/#:~:text=The%20Treaty%20of%20the%20Southern,893%20of%2012%20September%202000 on 27th September 2022.
886 Accessed at https://www.sadc.int/pages/history-and-treaty on 27th September 2022.
887 *Ibid.*
888 Hicks, J.L "Extension of Social Security Benefits to Women in the Informal Economy: A Case for Maternity Protection" Doctor of Philosophy Thesis. University of Kwazulu-Natal 2021 80.
889 Accessed at https://www.sadc.int/pages/history-and-treaty on 27th September 2022.

(f) Promote and maximise productive employment and utilisation of resources of the Region;
(g) Achieve sustainable utilisation of natural resources and effective Protection of the environment;
(h) Strengthen and consolidate the long standing historical, social and cultural affinities and links among the people of the Region;
(i) Combat HIV/AIDS or other deadly and communicable diseases;
(j) Ensure that poverty eradication is addressed in all SADC activities and programmes; and
(k) Mainstream gender in the process of community building.

This chapter examines the role played by the SADC in the lives of non-standard workers as well as the methods of intervention to assist and protect non-standard workers.

6.2. Background of the SADC

SADC was originally founded in April 1980 as the Southern African Development Coordination Conference (SADCC) by leaders of the so-called Frontline States in Southern Africa. The original aim was to create a mechanism whereby member states could formulate and implement projects of common interest in select area in order to reduce their economic dependence, particularly, but not only on the Republic of South Africa.[890]

Southern Africa has occupied its place on the global stage, resulting from the SADC.[891] Before the SADC Treaty was signed, the organisation operated under a non-binding and loose structure known as the SADCC.[892] The SADCC origins lie in the Frontline States which are a group of Southern African countries that played an active role in fighting for independence from colonial government.[893] In 1992, the SADCC was converted to the SADC.[894] Consequently, in the 1960s and 1970s, the newly independent states were in support of national liberation regional movements by

[890] Smit, P.A 'SADC Charter on Fundamental Social Rights: First Step to Regional Labour Standards' Labour Law Research Network Inaugural Conference Pompeu Fabra University, Barcelona June 13-15, 2013 3.
[891] Saurombe, A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2015) 15(2) *PER Journal* 456.
[892] *Ibid.*
[893] *Ibid.*
[894] Fourie, E. 'Perspectives of Workers in the Informal Economy in the SADC Region' (2017) 4 *Open Edition Journals* 80.

coordinating their diplomatic, political and military struggle to bring to an end colonial and white minority rule.[895]

According to Mokofe:[896]

> All the Southern African countries, with the exception of Namibia and Zimbabwe, achieved independence in the 1960s or 1970s. Upon achieving independence, the Southern African states were faced with underdeveloped economies characterised by small formal sectors, limited domestic markets, high levels of poverty and stark income inequality. With the absence of a significant entrepreneurial class, the state adopted the primary role in driving economic development, adopting what has been described as an 'ideology of economic development.' This dominant role for the state, and its overriding concern with economic development, manifested itself in a highly interventionist approach to industrialisation. Accordingly, exploring the regulation of non-standard employment in South Africa necessitates a historical approach.

The idea behind this action was to secure 'international cooperation for economic liberation and collective self-reliance.'[897] According to the late President of Botswana, Sir Seretse Khama, 'economic dependence had in many ways made political independence somewhat meaningless.'[898] President Kaunda of Zambia made an additional effort to establish a transcontinental belt of economical and independently powerful nations from *Dar es Salaam* as well as Maputo along the Indian Ocean to Luanda in the Atlantic Ocean.[899] According to Saurombe:[900]

> This *de facto* regional organisation needed a treaty and a number of other legally binding instruments. Thus, the SADC was formed as an international regional organisation established in terms of a treaty and declaration referred to as the 'Treaty of Southern African Development Community', signed by the heads of state and government of the signatory Member States. The SADC Treaty provides the legal framework of the organisation by setting out the status, principles and objectives, and obligations of Member States; the membership, the institutions, procedural matters relating to areas of cooperation among Member States, cooperation with other international organisations, financial issues, dispute settlement, and lastly sanctions, withdrawal and dissolution. The SADC Treaty makes provision for the formulation of subsidiary legal instruments such as protocols giving specific mandates to various

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[895] Saurombe, A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' *PER Journal* 2015 15(2) 456.
[896] Mokofe, W.M "The Regulation of Non-Standard Employment in Southern Africa: The Case of South Africa with Reference to Several Other SADC Countries", an unpublished LLD thesis University of South Africa, 2018 23.
[897] *Ibid*.
[898] *Ibid.*
[899] *Ibid.*
[900] Saurombe, A 'The Role of SADC Institutions in Implementing SADC Treaty Provisions Dealing with Regional Integration' (2015) 15(2) *PER Journal* 457.

SADC institutions. A total of twenty-three protocols have so far been formulated.

The SADC Treaty therefore, serves as the main instrument for the states who are its members and provides guidelines on the day-to-day operations of these states. It also served as a liberation tool for the states that were subjected to colonialism and oppression by the white government.

Article 21(3)*(f)* acknowledges the plight that the workers in the informal economy are faced with resulting from the lack of social protection extended to them due to the nature of their work settings.[901] As a result of this acknowledgement, it provides that one of the key areas or focus area of the Treaty is the notion of decent work as well as social protection and social integration for all persons engaged in employment regardless of their employment contract. In order to realise the objectives of the Treaty, member states will have to collaborate in relation to suitable legal framework, institutional framework and implementing of programmatic framework.[902]

6.3. SADC INSTRUMENTS RELEVANT TO THE PROTECTION OF NON-STANDARD WORKERS

It has been established in the chapters above that those atypical workers or workers engaged in non-standard employment do not enjoy legislative protection afforded to the other workers in other categories of employment such as workers with permanent or standard employment contracts. The ambits of legislations such as, *inter alia,* the Basic Conditions of Employment (BCEA),[903] the Labour Relations Act (LRA),[904] the Labour Relations Amendment Act (LRAA),[905] do not extend to the workers who do not qualify or are not covered under the definition of employee.

SADC instruments bear the potential of extending labour social protection to all workers, including those who fall outside the ambits of the definition employee, known as non-standard workers.[906] The SADC Treaty is one of those instruments and

[901] Fourie, E. 'Perspectives of Workers in the Informal Economy in the SADC Region' (2017) 4 *Open Edition Journals* 89.
[902] *Ibid.*
[903] Basic Conditions of Employment Act 75 of 1997.
[904] Labour Relations Act 66 of 1995.
[905] Labour Relations Amendment Act 6 of 2014.
[906] Fourie, E. 'Perspectives of Workers in the Informal Economy in the SADC Region' (2017) 4 *Open Edition Journals* 89.

contribute greatly towards improving the livelihood of workers engaged in non-standard employment.[907]

This issue has been debated over a prolonged period of time and with attempts to redress the challenge, such has not yielded positive results as the vulnerability of workers under the non-standard forms of employment still subsists. It is a problem faced by this category of workers on a global, national, regional and municipal level. This segment of the study focuses on the instruments that are in place to protect atypical workers on a regional level, namely, the SADC.

According to a study by Mokofe,[908] 'the trend towards democratisation in the Southern African region since the early 1990s has been accompanied by extensive labour law reforms. For example, South Africa recently amended its labour laws through the LRAA[909] in an attempt to address some of the challenges facing the labour relations system in the country.' According to these amendments, 'the forms of non-standard employment to which the LRA clearly does apply, in terms of the amendments, are labour broking arrangements, part-time workers, and temporary workers in direct employment (who are referred to as 'workers with fixed-term contracts'). In this regard, there are three new sections that apply to workers earning below a specified threshold, as well as amendments to certain existing sections.'

The study by Mokofe[910] notes that:

> the regulation of workers in non-standard employment is mainly a legal notion used in labour law, constitutional law, and municipal law, at the regional and global levels. The ILO has had a strong influence on the labour systems of Southern Africa. The SADC has encouraged member states to ratify and implement the core standards of the ILO Conventions. The ILO has also assisted numerous states in the region (Botswana, Lesotho, Malawi, Namibia, Swaziland, and South Africa) to develop labour legislation that is consistent with international standards.

In the year 2003, the SADC adopted a Charter of Fundamental Social Rights which was aimed at entrenching the institution of tripartism as a chosen method to promote

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907 *Ibid.*

908 Mokofe, W.M "The Regulation of Non-Standard Employment in Southern Africa: The Case of South Africa with Reference to Several Other SADC Countries", an unpublished LLD thesis University of South Africa, 2018 18.

909 Labour Relations Amendment Act 6 of 2014.

910 Mokofe, W.M "The Regulation of Non-Standard Employment in Southern Africa: The Case of South Africa with Reference to Several Other SADC Countries", an unpublished LLD thesis University of South Africa, 2018 22.

the harmonising of legal, social, and economic policies and programmes as well as to provide a framework for recognising regional labour standards.[911]

Since its creation, the SADC has adopted twenty-seven (27) Protocols and three (3) Charters.[912] In these international instruments, is included the SADC Charter of Fundamental Social Rights which was adopted in 2003 and the Protocol on Employment and Labour which was adopted in 2014.[913]

6.3.1 The Charter of Fundamental Rights of the European Union

Article 31(1) of the Charter provides for access to the right to working conditions that favour the health, safety and dignity of all workers. Article 31(2) provides that every worker is supposed to have reasonable working hours with limited work spans, access to reasonable time to rest as well as annual leave.

These sections of the Charter are aimed at ensuring that all people who engage in work under any type of contract should not be subjected to working conditions that are indecent and unfavourable to their physical and mental wellbeing. This is part of the promotion of the right to decent work as one of the objectives of the ILO and the SADC.

In doing so, Article 34 goes on to provide access to social assistance and social security. It states that:

> 1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
>
> 2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.
>
> 3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

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[911] Mokofe, W.M "The Regulation of Non-Standard Employment in Southern Africa: The Case of South Africa with Reference to Several Other SADC Countries", an unpublished LLD thesis University of South Africa, 2018 22.
[912] Budeli-Nemakonde, M. 'Workers' right to freedom of association and collective bargaining in SADC countries' (2020) 7(2) *African Journal of Democracy and Governance* 94.
[913] *Ibid.*

Article 34 provides for access to maternity protection by providing for access to social security benefits during the period of maternity. This protection is extended to **everyone** who resides in and moves in the European Union and extends provision of the right to social and housing assistance to those who need it.

6.3.2. SADC Charter Of Fundamental Social Rights

Article 2 of the Charter provides for its objectives. It can be said that the general objective of the Charter is to 'facilitate harmonious labour relations through close and active consultations among social partners.'[914] The Charter expressly states the objectives as:

> 1. The objective of this Charter shall be to facilitate, through close and active consultations among social partners and in a spirit conducive to harmonious labour relations, the accomplishment of the following objectives: (a) ensure the retention of the tripartite structure of the three social partners, namely, governments, organisations of employers and organisations of workers; (b) promote the formulation and harmonisation of legal, economic and social policies and programmes, which contribute to the creation of productive employment opportunities and generation of incomes, in Member States; (c) promote labour policies, practices and measures, which facilitate labour mobility, remove distortions in labour markets and enhance industrial harmony and increase productivity, in Member States; (d) provide a framework for regional co-operation in the collection and dissemination of labour market information; (e) promote the establishment and harmonisation of social security schemes; (f) harmonise regulations relating to health and safety standards at work places across the Region; and (g) promote the development of institutional capacities as well as vocational and technical skills in the Region.[915]

The Charter serves as an instrument designed to provide general protection of workers in the workplace. It makes provision for access to social security, health, and safety standards as well as the promotion of development of institutional capacities in the SADC region.

In Article 3, the Charter recognises the universality and indivisibility of basic human rights that are asserted in instruments such as the African Charter on Human and Peoples' Rights, the United Nations Universal Declaration of Human Rights, the

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[914] *Ibid.*

[915] SADC Charter Of Fundamental Social Rights Accessed At Https://Ihrda.Uwazi.Io/En/Document/1ekgoexjp4lsi5l34cxfscerk9?Page=6.

Declaration of Philadelphia and other relevant international instruments and the ILO Constitution.[916]

Article 4 of the Charter 'obliges member states to create enabling environments to improve working and living conditions, to protect health, safety and the environment, to create employment and remuneration, and to provide education and training.'[917]

Article 10 of the Charter provides for social protection of workers. It states that every worker, regardless of their status or type of employment, should have access to adequate social protection, and be able to enjoy adequate social security benefits. It goes further to state that 'persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance.'[918]

Article 11 of the Charter makes provision for the improvement of working and living conditions. It states that:

> Member States shall create an enabling environment so that: (a) Harmonisation of minimum requirements laid down in labour legislation and in particular the introduction of equitable basic working and living conditions, the specifications of minimum rest periods, annual paid leave, compassionate leave, paid maternity leave, occupational health and safety protection, and stipulation of acceptable rules and compensation for overtime and shift work, are achieved; (b) Every worker in the Region shall have a right to a weekly rest period and annual paid leave, the duration of which must be progressively harmonised in accordance with the national practice; and (c) The conditions of employment for every worker in the Region shall be stipulated in national law, a collective agreement or a contract of employment.[919]

Article 11 of the Charter makes reference to 'every worker.' This phrase means that all workers, under all categories should be able to enjoy the rights that are afforded to employees and non-employees. This also includes having access to basic needs such as maternity leave for all working women and annual paid leave for every working person.

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[916] Budeli-Nemakonde, M 'Workers' right to freedom of association and collective bargaining in SADC countries', (2020) 7(2) *African Journal of Democracy and Governance* 94.
[917] Mokofe, W.M "The Regulation of Non-Standard Employment in Southern Africa: The Case of South Africa with Reference to Several Other SADC Countries", an unpublished LLD thesis University of South Africa, 2018 22.
[918] Budeli-Nemakonde, M 'Workers' right to freedom of association and collective bargaining in SADC countries' (2020) 7(2) *African Journal of Democracy and Governance* 94.
[919] *Ibid.*

Furthermore, and in addition to the responsibilities created by the SADC Charter, some countries in the SADC region now have the right to 'fair labour practices' engrained in their Constitutions.[920] For example, section 23(1)[921] stipulates that 'everyone' has the right to fair labour practices. On this premise, more SADC member states have also copied South Africa and extended the scope of legislation to other workers who are not contractual employees.[922] For instance, in Swaziland, the definition of an employee has been extended in the Swaziland Industrial Relations Act 1999 to go as far as protecting vulnerable workers, including workers in non-standard employment.[923] Consequently, the protection of workers in non-standard employment in the SADC region, as can be seen in these latest constitutional and legislative developments, calls for a legal approach.[924]

Furthermore, Article 4.1 of the Employment Relationship Recommendation[925] requires that:

> A country's national policy should ensure that protection is available to all forms of employment relationships, including those involving multiple parties. As one of the publications prepared in preparation for adoption of the Recommendation noted, the challenge in respect of triangular employment relations lies 'in ensuring that employees in such a relationship enjoy the same level of protection traditionally provided by law for employers that have bilateral employment relationships, without impeding legitimate private and public business initiatives.'[926]

Mokofe submits that the category of employment falling within the ambits of non-standard workers form an essential part of the Southern African labour force.[927] But, in comparison, like employees under the standard contract, non-standard workers also need labour law regulation and protection as both categories structure the whole work

[920] Mokofe, W.M "The Regulation of Non-Standard Employment in Southern Africa: The Case of South Africa with Reference to Several Other SADC Countries", an unpublished LLD thesis University of South Africa, 2018 24.
[921] of the Constitution of South Africa, 1996.
[922] Mokofe, W.M "The Regulation of Non-Standard Employment in Southern Africa: The Case of South Africa with Reference to Several Other SADC Countries", an unpublished LLD thesis University of South Africa, 2018 24.
[923] *Ibid.*
[924] *Ibid.*
[925] Employment Relationship Recommendation 198 of 2006.
[926] Mokofe, W.M "The Regulation of Non-Standard Employment in Southern Africa: The Case of South Africa with Reference to Several Other SADC Countries" an unpublished LLD thesis University of South Africa, 2018 24.
[927] *Ibid.*

force of the labour market in the Southern African region.[928] It is therefore difficult to differentiate non-standard employment from standard employment, especially when it comes to the rights to fair labour practice that are afforded to workers in general.[929]

6.3.3. The Code on Social Security[930]

The Code on Social Security was enacted in 2007. Its purpose is to provide social protection to everyone who is in need of protection, including protection in the workplace, provision of social security for all persons who are unable to fend for themselves and their families. It also contains a provision on maternity protection.

Article 8 of the Code provides for access to both maternity and paternity leave in the event a man and a woman have a new-born baby while engaged in employment under any contract. According to Article 8:

> 8.1. Member States should ensure that women are not discriminated against or dismissed on grounds of maternity and that they enjoy the protection provided for in the ILO Maternity Protection (Revised) Convention No. 183 of 2000.
> 8.2. Member States should ensure that working conditions and environments are appropriate for and conducive to pregnant and nursing mothers.
> 8.3. Member States should progressively provide for paid maternity leave of at least 14 weeks and cash benefits of not less than 66% of income.
> 8.4. Member States are encouraged to provide for paternity leave.[931]

In line with the Maternity Protection Convention 183 of 2000, SADC member states should provide social protection to all persons engaged in employment by providing them with time off work to look after a new-born child. Unlike the Maternity Protection Convention which only makes reference to maternity leave, the Code goes further to provide for access to paternity leave for fathers as it maintains that the upbringing of a child is not solely dependent on the mother but is a shared responsibility between both the mother and the father of the new-born child.

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[928] Mokofe, W.M "The Regulation of Non-Standard Employment in Southern Africa: The Case of South Africa with Reference to Several Other SADC Countries", an unpublished LLD thesis University of South Africa, 2018 24.
[929] *Ibid.*
[930] The Code on Social Security of 2007.
[931] Code on Social Security of 2007. Accessed at https://www.sadc.int/sites/default/files/2021-08/Code_on_Social_Security_in_SADC.pdf on 27th September 2022.

6.3. Maternity Protection in the SADC region

As mentioned above in the previous chapter, maternity protection is essential, and its positive contribution can be seen at a time when a new mother needs as much money and support as possible because of piling medical bills and providing necessities for the new-born child. There however, exists a vast limitation to the access which women have to maternity protection. In South Africa for example, labour laws are mainly extended to a certain category of working women who fall within the ambits of the definition of employee.

For example, workers who are not covered under the statutory definitions of employee are excluded from making contributions towards social security schemes and financial provisions for maternity needs. Some of the excluded categories include, *inter alia*, workers engaged in atypical forms of employment such as temporary workers, contract workers, casual workers and independent contractors. Until such a time when the legislation is amended to accommodate and cover these categories of workers, they will continue being left vulnerable, especially during the maternity period.

In South Africa, the BCEA sets out the right to maternity leave by affording maternity leave of four months with a leave period of six compulsory weeks.[932] The corresponding right to maternity benefits operates through the Unemployment Insurance Act[933] as a contributory social security scheme.[934] According to the BCEA,[935] 'the payment of maternity benefits will be determined subject to the provisions of the UIA.[936] In terms of section 24(1) of the UIA, 'a female employee may apply for maternity benefits, provided she falls pregnant while contributing to the Unemployment Insurance Fund (the Fund).' It is worth noting that the UIA covers all employees and their employers, unless if expressly excluded in the context.[937]

The prejudice for workers engaged in atypical work comes in the eligibility discussion. Behari provides that:

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[932] Behari, A Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits' (2019) 31 *Mercantile Law Journal* 249.
[933] Unemployment Insurance Act 63 of 2001.
[934] Behari, A Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits' (2019) 31 *Mercantile Law Journal* 249.
[935] Section 25(7).
[936] Behari, A 'Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits' (2019) 31 *Mercantile Law Journal* 249.
[937] *Ibid.*

> the BCEA and the LRA provide maternity protection to employees within the definition of 'employee' in each applicable labour law statute. Certain groups of workers may be excluded from the rights to maternity protection if they do not fall within the definition of 'employee.' For instance, the BCEA provides for maternity leave to all 'employees' with the exception of those employees who work less than 24 hours a month for an employer.

In both the BCEA and the LRA an 'employee' is defined as 'any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer.'[938] Because of this definition, all employees who have access to maternity leave as provided for in the BCEA, are also afforded protection against dismissals in terms of the LRA.[939]

According to Behari:[940]

> South Africa is bound by various international and regional instruments which recognise social security as an essential aspect of maternity protection. The ILO and the SADC are key international and regional organisations whose standards will serve as a benchmark in indicating the extent to which South African labour laws fail to provide maternity protection in the form of cash benefits to pregnant employees.

Maternity protection that comes in the form of cash benefits is recognised under the Protocol on Employment and Labour (the Protocol) [941] and the Code on Social Security (the Code).[942] The Protocol still has not received a satisfactory number of ratifications making it less authoritative as it should be and not binding on member states that have still not ratified it. It relies on the premise of the ILO's Maternity Protection Convention,[943] the Social Security (Minimum Standards) Convention[944] and the Social Protection Floors Recommendation.[945] These serve as a yardstick for the standards of social security and maternity protection.[946]

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[938] Behari, A 'Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits' (2019) 31 *Mercantile Law Journal* 253.
[939] *Ibid.*
[940] Behari, A 'Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits' (2019) 31 *Mercantile Law Journal* 241.
[941] Adopted in March 2017.
[942] Code on Social Security of 2008.
[943] Maternity Protection Convention 183 of 2000.
[944] Social Security (Minimum Standards) Convention of 1952.
[945] Social Protection Floors Recommendation of 2012.
[946] Behari, A 'Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits' (2019) 31 *Mercantile Law Journal* 248.

The Protocol states that:

> Member states must ensure the provision of maternity protection to all employees, including those in atypical forms of employment. Furthermore, member states must endeavour to increase maternity protection to the standards set by the ILO Maternity Protection Convention, 2000.[947]

According to the Protocol, maternity benefits should be funded through an insurance scheme that is compulsory for all workers.[948] It adds that the maternity benefits in question should include antenatal, birth, postnatal and provisions for hospitalisation, if ever necessary.[949]

The Protocol also provides that every worker should have access to adequate social protection and the enjoyment of social security benefits irrespective of their status and employment contract.[950] The Protocol also calls for member states to create and maintain a social security system that is consistent with the standards of the Social Security (Minimum Standards) Convention[951] and the Social Protection Floors Recommendation.[952]

The Code provides for the minimum standards of social protection as well as a framework that monitors the standards of both the regional and national levels. According to the Code, maternity protection is a form of social security.[953] The Code provides that social security is, 'public and private, or to mixed public and private measures', which are designed to protect individuals and families against income insecurity caused by maternity, among other aspects.[954]

While article 8 of the Code provides that ‘member states should ensure that women enjoy the protection provided for in the Maternity Protection Convention, 2000’,[955] it further states that ‘every member is guided to establish and maintain a social security

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[947] Article 7.
[948] Behari, A ’Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits’ (2019) 31 *Mercantile Law Journal* 248.
[949] Behari, A ’Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits’ (2019) 31 *Mercantile Law Journal* 249.
[950] *Ibid.*
[951] Social Security (Minimum Standards) Convention of 1952.
[952] Social Protection Floors Recommendation of 2012.
[953] Behari, A ’Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits’ (2019) 31 *Mercantile Law Journal* 249.
[954] Article 1.5.
[955] Article 8.1.

system at a level at least equal to that required for the ratification of the Social Security (Minimum Standards) Convention, 1952.'[956]

Article 8.3 of the Code provides for paid maternity leave of at least fourteen weeks and further states that a woman who goes on maternity leave is entitled to cash benefits to the amount of 66 per cent of her previous earnings. According to Behari:[957]

> The most significant limitation to the scope and cover of maternity protection in South African law arises from its exclusion of employees. A specific category of employee excluded from the right to maternity leave in South Africa is part-time employees who work less than 24 hours a month for an employer. Wider categories of employee are excluded from receiving maternity cash benefits through the UIA. The UIA excludes atypical employees who work less than 24 hours a month for an employer and persons who have resigned or temporarily suspended their employment. As a consequence of the exclusion of atypical employees from the UIA, an atypical employee may claim unpaid maternity leave under the BCEA but will not be able to claim cash benefits over the leave period. These exclusions prevent South African labour laws from meeting the standards of the scope and cover of maternity protection set out in the Maternity Protection Convention, 2000, and the SADC Protocol.

Even though still not ratified by South Africa, the Maternity Protection Convention,[958] is aimed at ensuring that all women get access to maternity protection regardless of their contract of work. Because the Maternity Protection Convention contains provisions with great potential to improve the working conditions of all people engaged in some form of work, its ratification bears prospects of improving the livelihood and wellbeing of all working women in the Southern Africa.

Article 16.1 of the Protocol provides a regional standard which requires that 'maternity protection which includes cash benefits must be extended to workers in atypical employment.'[959]

According to Behari:[960]

> All pregnant employees should be entitled to maternity benefits, whether they are employed in the formal or informal sectors of employment. It must be recognised that women are often given the most precarious and poorly-paid work in the informal sector. They are often more likely to be employed

[956] Article 8.
[957] Behari, A 'Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits' (2019) 31 *Mercantile Law Journal* 257.
[958] Maternity Protection Convention 183 of 2000.
[959] Behari, A. 'Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits' (2019) 31 *Mercantile Law Journal* 258.
[960] *Ibid.*

> as part-time employees. Atypical employment offers women the opportunity to work part-time or as contract workers in order to minimise the time pressure on their lives created by the work/care conflict. Atypical work helps women fulfil their social roles as mothers and homemakers. These dual responsibilities cannot be fulfilled in full-time employment because of the failures of workplace policies, or the failures of the labour-law system to structure working environments which meet the needs of women. Therefore, it is often women in atypical forms of employment who remain vulnerable as workers.

The exclusion issue continues to serve as a prejudice to pregnant women because of their lack of access to maternity protection that is otherwise afforded to other categories of workers. This impacts negatively on the pregnant women because their job security is threatened, their financial stability becomes threatened, this results in the failure to adequately provide for the new-born child because the initial stages after childbirth are the most expensive and without income, the process can result in frustration.

According to Behari:[961]

> The BCEA, together with the UIA, adequately meet minimum international and regional standards for the provision of maternity cash benefits save for their failure to accommodate atypical employees. The exclusion set out in the UIA prevents the extension of maternity benefits as a minimum social security guarantee to all pregnant employees. Although, given South Africa's economic climate, it would be unrealistic to expect labour or social security legislation to provide four months' paid maternity leave equal to the employee's full remuneration, labour legislation in South Africa should provide sufficient social support to ensure the subsidisation of childbirth and the childcare needs of employees in both formal and informal employment. Ideally, South African labour legislation should provide clear and certain minimum standards for paid maternity leave which are inclusive of different types of workers and which ensure that women employees are not left to rely on collective bargaining.

The ILO has greatly influenced labour law in the Southern African region.[962] It is worth noting that 'all SADC member states have ratified the ILO core Conventions.'[963] Therefore, the regulation of workers in non-standard employment in Southern Africa cannot be studied without special attention being given to municipal, regional, and international law. This makes a legal approach to the study compelling.[964]

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961 *Ibid.*
962 Mokofe, W.M "The Regulation of Non-Standard Employment in Southern Africa: The Case of South Africa with reference to Several Other SADC Countries", an unpublished LLD thesis University of South Africa, 2018 24.
963 *Ibid.*
964 *Ibid.*

6.4. Shortcomings associated with non-ratification of instruments relevant to the protection of non-standard workers in the SADC region

One of the benefits or advantages that come with ratifying an instrument is that its content and coverage extends to that particular jurisdiction.[965] Also, the contents of the instrument also form part of the domestic legislation and becomes binding to the member state.[966] The failure to ratify the instruments results in the inability to apply and depend on the benefits that would have otherwise formed part of the jurisdiction. The Maternity Protection Convention for example, contains all the relevant grounds that bear the prospects of releasing women in the atypical employment from the agony of not having access to the benefits afforded to the women in typical employment setting.

Mokofe[967] submits that:

> the growth and presence of non-standard employment since the 1970s has revealed an important concern in a number of countries, both at the global and national levels. The overall significance of non-standard employment has increased in recent decades in both developed and developing states, as its use has grown exponentially across economic sectors and employment.

The ILO has had a strong labour law influence on the labour law systems in Southern Africa. It is worth noting that all SADC member states have ratified the ILO core Conventions.[968] Furthermore, the regulation of workers in non-standard employment will allow for the 'broadening of the safety net for vulnerable workers not only in South Africa but the entire SADC region.'[969] Regulation of workers in non-standard employment in the Constitutions of most Southern African countries post-independence and the democratic era was inspired by the standards that are set in the international labour law instruments, especially the ILO Convention on the Right to Organise[970] and the Employment Relationship Recommendation.[971]

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[965] Lehman, M 'National Blockchain Laws as a Threat to Capital Markets Integration' 26(1) *Uniform Law Review* 148.
[966] *Ibid.*
[967] Mokofe, W.M "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished Doctoral thesis submitted at the University of South Africa 2018 iii.
[968] Mokofe, W.M "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished Doctoral thesis submitted at the University of South Africa 2018 24.
[969] *Ibid.*
[970] ILO Freedom of Association and the Right to Organise Convention 87 of 1948.
[971] ILO Employment Relationship Recommendation 198 of 2006.

6.5. Summary

It can be seen from the analysis made above and reference to international law that there is a dire need for South Africa to enact a system that would allow self-employed workers, those employed in the informal economy as well as atypical workers in general access to maternity protection. Failing to do so, would result in South Africa neglecting its obligations under international law and to its fellow member states. The provisions stated in the SADC instruments may yield positive results for the current challenges that the South African labour fraternity is currently grappling with, therefore, it is necessary to uphold the objectives of the SADC instruments.

CHAPTER SEVEN: THE ROLE OF THE INTERNATIONAL LABOUR ORGANISATION (ILO) IN PROTECTING NON-STANDARD WORKERS

7.1. Introduction

Labour Law, internationally, is continuously evolving to offer more protection for the workers. Whilst the scope and extent of employment and categories of workers vary, this study focuses on atypical workers as a vulnerable group. To this end, an analysis of the ILO's attempts to afford atypical workers protection and access to decent work is undertaken. This is done through a critical analysis of the ILO instruments that provide for ways to combat discrimination in the working environment and improve the living standards of this group of workers. A central instrument in this investigation is the Maternity Protection Convention 183 of 2000. Its aim, in sum, is to allow access to decent treatment of expecting and new mothers who are engaged in atypical work. Furthermore, the convention makes provision for access to maternity leave for all women in the working class regardless of their contract of employment. The measures of protection are further enhanced by the Recommendation Concerning the Transition from the Informal to Formal Economy (RCTIFE) (no. 204) of 2015. Articles 16, 17 and 18 of the RCTIFE cover the protection that should be extended to workers in the informal economy.

The ILO has acknowledged:

> The increase in non-standard work and the need for labour and social protection of such work through specific conventions and recommendations pertaining to particular categories of non-standard work, support for micro-enterprises, programmes aimed at the promotion of extension of social protection to informal workers, support for mutual health insurance schemes, and research and investigation into the extension of social protection to non-standard workers.[972]

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. Smith and Mpedi[973] 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

[972] Fourie, E 'Perspectives of Workers in the Informal Economy in the SADC Region' (2017) 4 *Open Edition Journals* 80.
[973] Smit, N and 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.*

hope of migrating to the formal economy due to lack of formal skills. 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.' According to Fourie:[974]

> A concerned International Labour Organization (hereafter ILO) reacted to this prediction by initiating a number of "employment missions" to developing countries as part of the ILO World Employment Programme. Reports highlighted the potential of the informal sector to create employment and reduce poverty. Currently the renewed interest in the informal economy can be contributed to the fact that the informal economy is closely linked to the formal economy and contributes to the economy. During the 1970s the term "informal sector" was used by the ILO to identify activities of the working poor who were not recognised, recorded or protected by public authorities. This term has been replaced by the wider term "informal economy" to extend coverage to a very diverse group of workers not limited to workers in a specific sector.

In South Africa, the role played by international labour standards is immensely essential in developing labour law and serves as a source of customary international law. Post democracy, in 1994, the constitutional dispensation started recognising the value and importance of international standards as an inherent aspect of a democratic country. After leaving the ILO in March 1967, South Africa re-joined the organisation on 26 May 1994 and has since then, ratified all 8 of the fundamental conventions.[975] Most of these fundamental Conventions apply to all workers and if they don't, contain a provision for extension to excluded categories of workers.[976]

The ILO instruments provide for ways to combat discrimination and protect workers in informal employment against any forms of discrimination they may incur in the working environment. With issues such as challenges that come with ratification, the attempts that the ILO keeps making to improve the living standard of atypical workers is gradually contributing positively towards their livelihood.

It has been working towards improving the lives of all people who are engaged in atypical work without access to the benefits that workers in traditional work

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[974] Fourie, E "Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy", an unpublished LLD Thesis submitted at the North-West University 2018 2.
[975] Fourie, E. 'Perspectives of Workers in the Informal Economy in the SADC Region' (2017) 4 *Open Edition Journals* 80.
[976] *Ibid.*

relationships (TER) have access to. For example, as far back as 1979, the ILO introduced the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which was aimed at protecting all women against discrimination in the workplace.

In 2000, the ILO introduced the Maternity Protection Convention 183 of 2000 which was aimed at allowing access to decent treatment at work for expecting new mothers who are engaged in atypical work. It laid out access to maternity leave for all women in the working class regardless of their contract of employment. It also introduced the Recommendation Concerning the Transition from the Informal to Formal Economy (RCTIFE) (no. 204) in 2015. Articles 16, 17 and 18 of the RCTIFE cover the protection that should be extended to workers in the informal economy.

Fourie[977] submits that:

> The South African position with reference to domestic workers appears to provide an adequate regulatory framework in respect of the regulation of these workers; however, in practice there are various challenges, including the enforcement of the legislative provisions and a disregard for the notion of substantive equality. Although domestic workers enjoy some protection, waste pickers and informal traders as own-account workers without a distinctive employee-employer relationship are excluded from most labour and social protection measures and innovative and tailor-made solutions are required. The regulation of waste pickers and informal traders in South Africa is fragmented and lacks comprehensive and uniform legislation is absent.

In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work. According to this Declaration, all member states are expected to adopt at least three of the fundamental conventions.[978] According to the International trends, there is a systematic extension of coverage to include non-standard workers, however, most member states have not ratified the relevant conventions. This almost defeats the objectives of the instruments.[979] This could result in the low prevalence of non-standard workers that member states have in their jurisdictions.

In 1999, the Decent Work Report highlighted the large number of workers who remain without social security in a global economy and a campaign to extend coverage also

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[977] Fourie, E "Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy", an unpublished LLD Thesis submitted at the North-West University 2018 xi.
[978] Fourie, E. 'Perspectives of Workers in the Informal Economy in the SADC Region' (2017) 4 *Open Edition Journals* 80.
[979] *Ibid.*

to developing countries was initiated. In 2001, embedded in the decent work concept, the International Labour Conference prioritised the extension of social security coverage and emphasised the importance of national strategies to include employment and social policies.

In 2011, two main problems were identified with existing social security instruments, namely that certain provisions are outdated and that existing instruments are not in line with the ILO's objective of providing social security to all as a large number of workers in the informal economy are excluded as many social security provisions were based on the traditional full-time employment paradigm.

The exclusion of those outside the formal economy who continued to live in poverty without adequate social protection placed the extension of coverage to these workers at the 'heart of the ILO's mandate and mission.' While the least affected categories of workers are those engaged in the traditional contracts of employment, the most affected category is the workers engaged in atypical employment. They are the ones who endure the most exploitation and abuse by their employers due to the lack of access that they have to the legislation intended to protect them.

The Social Protection Report 2014-2015 indicated that 73% of the world's population continue to live without adequate social protection coverage and their fundamental rights are often only partially realised or not at all. The ILO recognised that social protection includes social security, conditions at work, occupational safety, and labour migration.

Social protection floors are defined as sets of basic social security guarantees which secure protection aimed at prevention or alleviating poverty, vulnerability and social exclusion. Extending social protection to workers is vital in realising the fundamental right to social security. The limited scope of social protection schemes and the specific exclusion of workers in the informal economy can often be ascribed to factors such as, the formal sector bias of social insurance schemes, the existence of an employer-employee relationship, the low contributory capacity and incompatibility priority needs.

Domestic courts and legislature have an inherent duty to protect its people in all aspects of their daily activities. As mentioned above, the purpose of having labour laws is solely to create order and protect all people in the working environment.

However, in most cases, when domestic legislation fails to make provision and coverage for certain pressing issues, the ILO instruments tend to assist in addressing any challenges that may not have been addressed by the domestic instruments. The International instruments include Conventions, Protocols and Recommendations. Although the challenge may lie in ratification, the instruments are always readily available for application.

According to Fourie:[980]

> The ILO has adopted the concept of 'decent work', which has set four objectives for member states namely: employment opportunities, workers' rights, social protection, and representation. This concept of decent work could be used to provide impetus to the improvement of the precarious position of workers in the informal economy. It is important to link decent work initiatives with other labour and social protection initiatives. The ILO is committed to making decent work a reality for all and this is clearly illustrated by the recent adoption of the ILO Convention concerning Decent Work 189 of 2011 and the supporting recommendation.

Historically and on a national level South African courts have had to depend on the International Labour Organisation (ILO) instruments to enhance labour law and social security rights enshrined in the Constitution, 1996.[981] In all these years, one of the ILO's major initiatives of promoting decent work agenda has been social security and labour law since its inception in 1919.[982]

7.2. Development of the ILO

The ILO was founded in 1919 and has been regarded as a vital 'trend-setter' in social security and labour protection.[983] It was founded after the First World War as a sub-organisation of the League of Nations and was replaced by the United Nations (UN) after the Second World War.[984] The ILO then became the premier agency of the UN in 1946.[985] This was after the Versailles peace negotiations that were aimed at

[980] Fourie, E. 'Perspectives of Workers in the Informal Economy in the SADC Region' (2017) 4 *Open Edition Journals* 81.
[981] Tshoose, C.I, 'Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa' 2022 (25) 1 *PER / PELJ* 1.
[982] *Ibid.*
[983] Son, K 'International Labour Organization and Global Social Governance' Cambridge University Press 1.
[984] Jurgen, W 'The prevalence of communication. A case study in the communication history of the International Labour Organisation (ILO)' (2022) *Studies in communication* 1.
[985] Mokofe, M.W "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished LLD Thesis submitted at the University of South Africa in 2018 74.

harmonising the standards and rules on an international level while creating common purpose for this purpose.[986]

The main function of the ILO was to:

> Collect and disseminate information and communication on labour conditions in the world in order to adopt conventions and make recommendations on the basis of this information (e.g., on daily working hours, night work, women's and children's work, etc.).[987]

Tshoose submits that:

> The preamble to the ILO Constitution sets out several objectives in this regard, including the protection of workers from illness, accidents, the protection of children, women, and the support of the elderly. The ILO pursues these noble values and goals by developing international labour and social security standards, which member states must ratify and incorporate into their national law.[988]

One of the ILO's goals is extending 'social security measures to provide a basic income to all in need of such protection and comprehensive medical care.'[989] There has however, been negative criticism of the ILO's objectives.[990] For example, it has been stated that the ILO's 'standard setting' benefits the workers in formal settings as opposed to those in the informal setting environments. Resultantly, the individuals in low- and middle-income countries (LMIC's) would not benefit from the protection opportunities afforded by the ILO.

The following examples of tangible measures 'urgently required' are listed in the Preamble as:

> Regulation of working hours, including the establishment of a maximum working day and week; regulation of the labour supply; avoidance of joblessness; provision of a satisfactory living wage; protection of the worker against illness, disease, and injury as a result of his or her employment; protection of children, young persons, and women; provision for old age and injury; protection of the welfare of workers when employed in states that are not their own; acknowledgement of the standard of equal compensation for work of equal value; and acknowledgement of the principle of freedom of association.[991]

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[986] *Ibid.*
[987] *Ibid.*
[988] Tshoose, C.I 'Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa' 2022(25) *PER Journal* 1.
[989] *Ibid.*
[990] *Ibid.*
[991] Mokofe, M.W "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished LLD Thesis submitted at the University of South Africa in 2018 74.

The ILO has acknowledged the increase in non-standard work and the need for labour and social protection of non-standard work in the following ways:

> (a) drawing up conventions and recommendations pertaining to particular categories of non-standard workers, such as part-time workers and homeworkers;
> (b) support for micro-enterprises in the informal economy;
>
> (c) programmes like Strategies and Tools against Social Exclusion and Poverty (STEP) to promote the extension of social protection to informal workers;
>
> (d) support for mutual health insurance schemes; and
>
> (e) the continuance of work at its social security department, commissioning research and investigating the extension of social security protection to nonstandard workers.[992]

In a quest to curb the perpetual prejudice and abuse that the workers engaged in atypical work endured over the years, the International Labour Organisation (ILO) adopted instruments such as the Maternity Protection Convention 183 of 2000 (the Convention) to address the *lacunae* that exists in issues pertaining to maternity protection for women in the working environment and the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). While the Convention has been discussed at length above, there are other instruments that the ILO adopted to protect the workers engaged in atypical employment. There have been Conventions and recommendations passed subsequently, comprising 'various areas of social security – health care, old-age, disability, employment injury, unemployment, and maternity – have suggested a two-pillar social security system: social insurance for workers, and social assistance for the rest, to achieve universal coverage of social security.'[993]

A study by Fourie[994] found that:

> The ILO World Social Protection Report 2017-19 indicated that 71% of the world's population continue to live without adequate social protection coverage and their fundamental rights are often only partially realised or not at all. Extending social

[992] Fourie, E "Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy", an unpublished LLD Thesis submitted at the North-West University 2018 23.
[993] Son, K 'International Labour Organization and Global Social Governance' Cambridge University Press 1.
[994] Fourie, E "Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy", an unpublished LLD Thesis submitted at the North-West University 2018 4.

protection to these workers is vital in realising the fundamental right to social security.[995]

It also needs to be noted that in order for the provisions of these instruments to apply to a member state, the member state needs to have ratified the particular instrument. In most cases, the challenge with application lies in the member state's failure to ratify these instruments resulting in their provisions not assisting the persons whom it was designed for.

7.3. The tripartite structures of the ILO

The ILO is made up of three (3) main bodies being the International Labour Conference, the Governing Body, and the International Labour Office.[996] The figure below illustrates the organisation of the tripartite structures of the ILO.

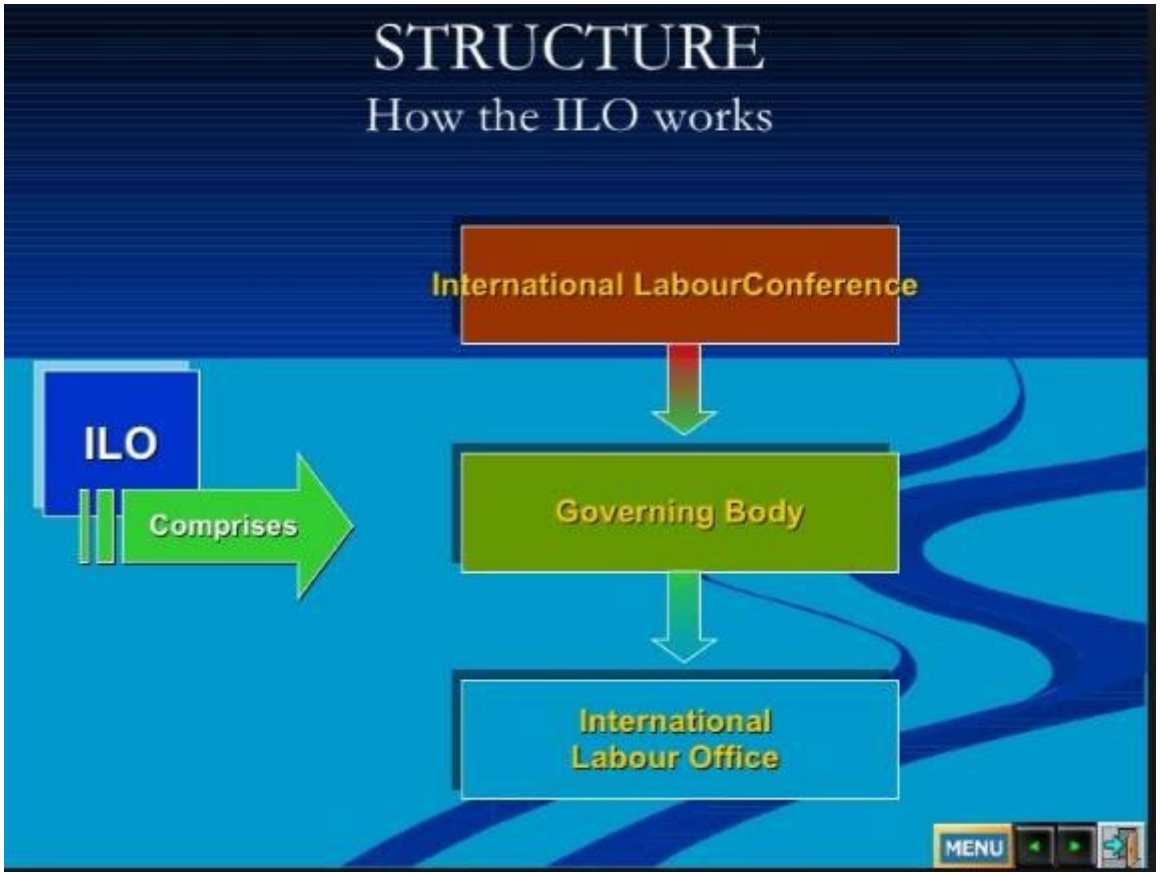

Figure 1: the Tripartite Structure of the ILO.

[995] *Ibid.*

[996] Mokofe, M.W "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished LLD Thesis submitted at the University of South Africa in 2018 75.

Source: https://www.researchgate.net/figure/The-unique-tripartite-structure-of-the-ILO-in-the-UN-system_fig1_350514066 (Accessed on 28 February 2023)

7.4. The structure explained

1. The International Labour Conference is the leading body that makes the policies. It has annual gatherings in Geneva where each state sends through a representative delegate. The delegation is made up of two persons elected by government. The one delegate speaks on behalf of the workers while the other employers. The main function of the Conference is to adopt new labour standards.[997]

2. The governing body is responsible for the executive duties of the ILO. It determines which matters are to be included in the agenda of the Conference, it manages the Conference budget and makes decisions on policy issues. It is made up of 56 members which comprises 28 members from the government, 14 from the employer representatives and 14 from workers representatives.[998]

3. The International Labour Office is the bureaucracy of the ILO. It performs the daily activities that are required to give effect to the mandate of the ILO. It is headed by the Director-General who is appointed for a fixed term.[999]

7.5. Rationale behind international law studies

The rationale behind including international law studies stems from the Constitutional provisions which encourage the inclusion of international law when interpreting the rights in chapter 2 of the Constitution. Sections 39, 213 and 233 encourage the application of foreign and international law when interpreting domestic laws. The inclusion is also to ensure that South Africa moves in the same direction as other jurisdictions and does not merely stand on its own because the law is not static and therefore always offers lessons that can be learnt from other states and the thorough interpretation of their laws.

7.6. Constitutional basis for referring to international law

As the saying goes, 'no man is an island.' South Africa and its laws are not independent. In fact, South African law stems from Roman-Dutch Law which forms the

[997] Mokofe, M.W "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished LLD Thesis submitted at the University of South Africa in 2018 76.
[998] *Ibid.*
[999] *Ibid.*

basis of almost the entire domestic laws. Thus, the rationale behind including international law in this study is to learn from the practices of other jurisdictions while activating the provisions of section 39 of the Constitution. Section 39 reads as follows:

> 1. When interpreting the Bill of Rights, a court, tribunal or forum
>   (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>   (b) must consider international law; and
>   (c) may consider foreign law.
> 2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
> 3. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

The study covers the Bill of Rights as it includes provisions of chapter 2 of the Constitution. Section 39 of the Constitution also states that when the Bill of Rights is interpreted it should also include international and foreign law.[1000]

Section 35 of the Interim Constitution of South Africa,[1001] had a provision for the inclusion and consideration of international law when interpreting the Bill of Rights. It read that:

> (1) In interpreting the provisions of this chapter, a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.

When the 1996 Constitution was enacted, it incorporated the provisions of section 35(1) of the Interim Constitution of South Africa which then read as follows,

> When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[1002]

[1000] Section 39 (1) (a-c) of the Constitution.
[1001] Interim Constitution of South Africa, 1993.
[1002] Section 233 of the Constitution of South Africa, 1996.

Tshoose submits that, 'international law is viewed as a pillar of South Africa's legal system since it became a member of the international community with the advent of democracy.'[1003]

International law was recognised for the first time in 1993 in the country's history, which helped with the motivation of the application of international law in the country.[1004] According to Olivier et al, this step signified that South Africa intended to adhere to internationally accepted rules and norms in the wake of the end of the apartheid law system. [1005]

The Constitution of South Africa in section 231 provides that:

> 231. (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
> (5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

Tshoose submits that:

> Section 231(3) of the Constitution makes it clear that when Parliament agrees to the ratification of or accession to an international agreement such agreement becomes part of the law of the country only if Parliament expressly so provides and the agreement is not inconsistent with the Constitution.

With section 231(4) being the most important sub-section under section 231, whenever there is an international agreement, it will become recognised as law in South Africa once it is enacted into law by national legislation.

[1003] Tshoose CI 'Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa' 2021(24) *PER Journal* 4.
[1004] Olivier *et al. Introduction to Social Security* 163-164.
[1005] *Ibid.*

7.7. ILO supervisory systems and mechanisms

The Supervisory systems and mechanisms of the ILO is governed by Article 22 of the ILO's Constitution. It reads as follows:

> Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request.

When a state has ratified a Convention, it creates an obligation for itself to enact and apply the terms of the Convention into its domestic laws and practices. The supervisory mechanisms created by the ILO's Constitution exercise routine supervision that comes in the form of the inspection of reports submitted by countries to the various supervisory bodies.[1006] The supervisory mechanisms help to ensure that countries implement the Conventions they ratify.[1007] On a regular basis, the ILO examines the application of standards in member states and identifies areas where they could be better applied and if it finds problems in the application of standards, it seeks to assist through technical assistance and social dialogue.[1008] The main function of the supervisory mechanisms are to monitor and follow up on whether or not member states who have ratified Conventions have enacted them into their national laws.

7.8. How the instruments are developed

The process of developing the Instruments is based on the international standards which assist in the process of devising the Conventions, Protocols and Recommendations.[1009] The ILO derives the international standards from its annual International Labour Conference held in Geneva. The conference houses representatives from different states, governments, workers, employees, employers, and trade unions from all over the world. This is where they discuss the different labour challenges and possible solutions. The International Labour Office then jots down the problems and issues raised, together with the possible solutions and

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[1006] Mokofe, M.W "The regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries", an unpublished LLD Thesis submitted at the University of South Africa in 2018 76.

[1007] https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-supervisory-system-mechanism/lang--en/index.htm. Accessed on 28 February 2023.

[1008] *Ibid.*

[1009] Tshoose CI 'Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa' 2022(25) 1 *PER Journal* 4.

recommendations. Such is then circulated between all persons who were present at the conference for comments.[1010]

The International Labour Office also formulates a draft instrument for comments as well. It is then submitted to the Conference for amendments, if necessary and presented for adoption. The participants at the Conference then scrutinise the draft instrument for further comments. In order for the draft to be accepted, there must have been a two-thirds vote. Once it has been accepted and adopted, the member states are expected to submit any instrument to their states for enactment of pertinent legislations and ratification of the instrument in question.[1011]

7.9. ILO instruments aimed at protecting atypical workers

With the primary purpose of the ILO being to protect all persons in the working community, the ILO introduced numerous instruments aimed at protecting workers engaged in atypical employment activities. These include *inter alia* the Maternity Protection Convention 183 of 2000 and the Convention on The Elimination of All Forms of Discrimination Against Women (CEDAW).

7.9.1. The Maternity Protection Convention 183 of 2000

Before the European Union implemented its own standards on maternity protection in 1992, the ILO was the only trendsetter on maternity protection.[1012] For the longest time, most organisations viewed women as mothers and expected them to be 'pregnant, barefoot and behind the stove' as opposed to viewing them as income generators.[1013] For example:

> The Food and Agriculture Organisation emphasized mother and infant health while the World Bank did not refer to women in its economic productivity plans for LMICs until the 1970s. In contrast, the ILO contributed to the extension of the statutory support for pregnant women workers in both ratifying and non-ratifying countries.[1014]

[1010] *Ibid.*
[1011] *Ibid.*
[1012] Son, K 'International Labour Organization and Global Social Governance' Cambridge University Press 6.
[1013] Boris, E, "Making the Woman Worker: Precarious Labor and the Fight for Global Standards", 1919-2019, Oxford: Oxford University Press 2019 92.
[1014] International Labour Organization (1965), Summaries of Reports on Unratified Conventions and on Recommendations (Article 19 of the Constitution), Geneva: International Labour Organization.

In 1919 at its very first conference, the ILO adopted its first Maternity Protection Convention and since then it has been working on updating and developing the Convention to suit the different eras every three decades, adopting the Maternity Protection Convention 103 of 1952 and the Maternity Protection Convention 183 of 2000. The ILO included,

> Standards that addressed maternity protection measures for all after the 1944 Declaration of Philadelphia. The second Maternity Protection Convention required states to broaden the coverage of maternity benefits to all employed women, including domestic workers and farmworkers, and to introduce a social assistance scheme for women who do not qualify for maternity insurance. However, the ILO succumbed to LMICs' complaints that it would be too costly to expand the coverage of maternity protection to all employed women, allowing states to adopt this standard in accordance with the level of national economic development.[1015]

The ILO has played a very significant role in the development of labour standards and Conventions over the past century.[1016] A deviated employment category that deviates from standard employment and which covers workers outside of the traditional employment relationship has been acknowledged by the ILO.[1017] The changes to the traditional perceptions of work have received the attention of the ILO, and since 1990 this subject has been addressed at its annual conferences.[1018]

The ILO has acknowledged the upsurge in non-standard work and the need to protect non-standard workers by means of the following:

> (a) Conventions and Recommendations pertaining to particular categories of non-standard workers, such as part-time workers and homeworkers;
> (b) support for micro-enterprises in the informal economy;
> (c) programmes like Strategies and Tools against Social Exclusion and Poverty (STEP) to promote the extension of social protection to informal workers;
> (d) support for mutual health insurance schemes; and
> (e) the continuance of work at its social security department commissioning research and investigating the extension of social- security protection to non-standard workers.[1019]

[1015] Son, K "International Labour Organization and Global Social Governance", Cambridge University Press 6.
[1016] Mokofe W.M 'The international labour organisation in pursuit of decent work in Southern Africa: an appraisal' (2020) 41 (3) *Obiter* 567.
[1017] *Ibid.*
[1018] *Ibid.*
[1019] *Ibid.*

Until the year 2000, the provision of social security was the only standard that pursued 'universal coverage of maternity protection.'[1020]

According to the preamble, the Maternity Protection Convention of 2000 was adopted to revise the 1952 Convention.[1021]

When the third convention was adopted, it consolidated its goal of broadening 'the coverage of maternity protection to all women by lifting the compromise formulation of the coverage standard and continuing to include the provision of a social assistance scheme.'[1022]

The ILO's Maternity Protection Convention, provides that all employed women, including those in atypical forms of dependent work, must be covered for pregnancy, childbirth and their consequences. In particular, protected persons should be entitled to maternity benefits for a minimum period of 14 weeks (including six weeks of compulsory leave after childbirth) for a minimum of two thirds of their previous income. Medical care provided to protected persons must include antenatal, childbirth and postpartum care. This convention also establishes the right to work breaks for breastfeeding, as well as provisions on health protection, job protection and non-discrimination.[1023]

[1020] Son, K 'International Labour Organization and Global Social Governance' Cambridge University Press 7.

[1021] The preamble reads as follows: in order to further promote equality of all women in the workforce and the health and safety of the mother and child, and in order to recognize the diversity in economic and social development of Members, as well as the diversity of enterprises, and the development of the protection of maternity in national law and practice, and noting the provisions of the Universal Declaration of Human Rights (1948), the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (1979), the United Nations Convention on the Rights of the Child (1989), the Beijing Declaration and Platform for Action (1995), the International Labour Organization's Declaration on Equality of Opportunity and Treatment for Women Workers (1975), the International Labour Organization's Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998), as well as the international labour Conventions and Recommendations aimed at ensuring equality of opportunity and treatment for men and women workers, in particular the Convention concerning Workers with Family Responsibilities, 1981, and taking into account the circumstances of women workers and the need to provide protection for pregnancy, which are the shared responsibility of government and society, and having decided upon the adoption of certain proposals with regard to the revision of the Maternity Protection Convention (Revised), 1952, and Recommendation, 1952, which is the fourth item on the agenda of the session, and having determined that these proposals shall take the form of an international Convention.

[1022] *Ibid.*

[1023] Tshoose, C.I, 'Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa' 2022 (25) 1 PER Journal 19.

Article 2 of the Convention addresses the scope of coverage of the Convention. It also mentions that the Convention applies to **all** women in the working environment, regardless of the employment contract that governs their working environment. Article 3 covers health protection of women in the workplace. It provides that all pregnant women should not be expected to perform work that poses a health risk to them and/or their unborn babies.[1024]

Article 4 provides for maternity leave that is afforded to the working women. It extends the access to maternity leave of 14 uninterrupted weeks to all women, including atypical workers. Article 5 goes to the extent of providing maternity leave to pregnant women either before or after the pregnancy where illnesses or complications relating to the pregnancy ensue. Articles 6 and 7 cater for benefits that should be afforded to the pregnant women. It includes access to social security in the form of cash and medical benefits for all women in the working environment. Articles 8[1025] and 9 provide for protection of pregnant women against any discrimination which may arise out of the woman's pregnancy. It refers to the protection of the woman from dismissal based on pregnancy.

7.9.2. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

South Africa was signatory to the Convention in 1993, and ratified it in 1995, and is consequently legally obligated to implement the state commitments that are contained therein.[1026] The purpose of CEDAW is to provide protection to women against discrimination on the basis of pregnancy.[1027] As a point of departure and a means to ensure that discrimination against women in the workplace is alleviated, Article 11(1) provides the right to job security as well as all the benefits and conditions of service,

[1024] Article 3 reads as follows: "each Member shall, after consulting the representative organizations of employers and workers, adopt appropriate measures to ensure that pregnant or breastfeeding women are not obliged to perform work which has been determined by the competent authority to be prejudicial to the health of the mother or the child, or where an assessment has established a significant risk to the mother's health or that of her child."
[1025] Article 8 reads as follows: 1. It shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Articles 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer. 2. A woman is guaranteed the right to return to the same position or an equivalent position paid at the same rate at the end of her maternity leave.
[1026] Hicks, J.L "Extension of Social Security Benefits To Women In The Informal Economy: A Case For Maternity Protection" Doctor of Philosophy Thesis. University of Kwazulu-Natal 2021 65.
[1027] *Ibid.*

including the right to social security and the protection of health.[1028] CEDAW specifically 'addresses the right to maternity leave, as a concrete measure to prevent discrimination against women on the grounds of childbearing and to ensure their right to work, by calling on state parties to 'introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowances.'[1029]

CEDAW also encourages states to 'enable parents to combine family obligations with work responsibilities and to participate in public life, in particular through promoting the establishment and development of a network of child-care facilities.' According to Article 12, state parties are obligated to enact measures 'to eliminate discrimination against women in the field of health care,' including access to family planning, 'and ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.'

States have been held accountable for failing to enact measures to deliver on their commitments in terms of such international conventions, and this provision in CEDAW in particular. In *Elisabeth de Blok et al v Netherlands*,[1030] the Netherlands was accused of violating its obligations in terms of article 11(2)(b) of CEDAW by not enacting measures to provide paid maternity leave to self-employed women. The CEDAW Committee, the international body tasked with monitoring state compliance with CEDAW obligations, held that the right to maternity leave should be extended to self-employed women, and stated that the failure to provide maternity benefits constituted a direct form of discrimination on that basis, a violation of CEDAW. The implications of this ruling for South Africa are self-evident, in that any similar challenge would in all likelihood be successful. Equally, this ruling would constitute persuasive authority in a South African court tasked with interpreting South Africa's responsibilities in terms of international law.

7.9.3. Declaration on Equality of Opportunity and Treatment for Women Workers of 1975

[1028] *Ibid.*
[1029] *Ibid.*
[1030] CEDAW/C/57/D/36/2012.

The Declaration on Equality of Opportunity and Treatment for Women Workers of 1975 identified the following measures to ensure equality of opportunity as well as equal treatment for women in the workplace:[1031]

- The elimination of maternity as a cause for discrimination;
- employment security throughout pregnancy;
- the right to maternity;
- the right to cash benefits to replace wages lost during the leave period;
- the right to return to work without the loss of acquired rights; and
- the right to adequate health and medical care during pregnancy, at the time of childbirth, and postnatal.

The issues mentioned above are, in most cases covered under most labour legislation and where the discussion is premised on social legislation, it is limited to maternity and is, as expected limited to women. However, this scope is usually limited to women who are engaged in formal or typical employment, leaving out the women who do not have formal employment.

Article 1 of the Declaration provides for equal treatment and prevention of discrimination on the basis of sex.[1032] Article 6 reads as follows:

> (1) With a view to stimulating women's integration in the workforce on a footing of equality with men, all measures shall be taken to encourage a more equitable balance in their distribution in the various sectors of the economy, in the various branches, professions and occupations and the various levels of skill and responsibility. (2) In accordance with the provisions of the Discrimination (Employment and Occupation) Convention, 1958 (No. III), there shall be no discrimination on the grounds of sex in employment or occupation. (3) There shall be no discrimination against women workers on the grounds of marital status, age or family responsibilities. (4) Special measures shall be taken to ensure that the potentialities, aptitudes, aspirations and needs of women, including those living in rural areas, as well as those of men are taken fully into account in employment promotion programmes and strategies. (5) Positive measures shall be taken to stimulate the equal access of women to top positions in both the public and the private sectors. (6) So far as possible, jobs and workplaces shall be so designed as to be suitable for all workers, women as well as men.

Article 8 addresses issues around maternity protection. Article 8(1) provides for protection against discrimination caused by pregnancy, childbirth and maternity issues. It also provides for the rights that women have to retain their positions at work

[1031] Olivier, M.P *Introduction to Social Security Law,* LexisNexis (2004) 368.

[1032] Article 1(1) provides that there shall be equality of opportunity and treatment for all workers. All forms of discrimination on grounds of sex which deny or restrict such equality are unacceptable and must be eliminated. (2) Positive special treatment during a transitional period aimed at effective equality between the sexes shall not be regarded as discriminatory.

post maternity. It also covers adoptive parents. Article 8(3) extends the protection to **all** working women. It reads as follows: '(3) Because maternity is a social function, all women workers shall be entitled to full maternity protection in line with the minimum standards set forth in the Maternity Protection Convention (Revised), 1952 (No. 103), and the Maternity Protection Recommendation, 1952 (No. 95), the costs of which should be borne by social security or other public funds or by means of collective arrangements.'

In South Africa, maternity protection is limited to women engaged in formal employment. This is because the protection is regulated by labour legislations such as the LRA, the BCEA, the UIA and the EEA. These legislations extend their coverage to workers who are regarded as employees, resulting in the exclusion of workers who fall outside the ambits of the employment category.

7.9.4. Recommendation Concerning the Transition from the Informal to Formal Economy (NO. 204)

The Preamble of the ILO's Recommendation acknowledges that 'most people enter the informal economy not by choice but as a consequence of a lack of opportunities in the formal economy and in the absence of other means of livelihood and recalling that decent work deficits – the denial of rights at work, the absence of sufficient opportunities for quality employment, inadequate social protection and the absence of social dialogue – are most pronounced in the informal economy.' [1033]

Article 4 recognises that:

> The Recommendation applies to all workers and economic units – including enterprises, entrepreneurs and households – in the informal economy, in particular:
> (a) those in the informal economy who own and operate economic units, including:
> (i) own-account workers;
> (ii) employers; and
> (iii) members of cooperatives and of social and solidarity economy units;
> (b) contributing family workers, irrespective of whether they work in economic units in the formal or informal economy;
> (c) employees holding informal jobs in or for formal enterprises, or in or for economic units in the informal economy, including but not limited to those in

[1033] Preamble of Recommendation Concerning the Transition from the Informal to Formal Economy 204 of 2015.

subcontracting and in supply chains, or as paid domestic workers employed by households; and
(d) workers in unrecognized or unregulated employment relationships.

Articles 16, 17 and 18 cover the protection that should be extended to workers in the informal economy. They provide ways to combat discrimination and protect workers in informal employment against any forms of discrimination they may incur in the working environment. The articles read as follows:

> 16. Members should take measures to achieve decent work and to respect, promote and realize the fundamental principles and rights at work for those in the informal economy, namely:
>
> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour; and
> (d) the elimination of discrimination in respect of employment and occupation.
>
> 17. Members should:
>
> (a) take immediate measures to address the unsafe and unhealthy working conditions that often characterize work in the informal economy; and
> (b) promote and extend occupational safety and health protection to employers and workers in the informal economy.
>
> 18. Through the transition to the formal economy, Members should progressively extend, in law and practice, to all workers in the informal economy, social security, maternity protection, decent working conditions and a minimum wage that takes into account the needs of workers and considers relevant factors, including but not limited to the cost of living and the general level of wages in their country.

According to Fourie:[1034]

> Formal Economy of 2015 was adopted in June 2015 and sets out important strategies for consideration when facilitating the transition from the informal economy to the formal economy. These strategies include the: (a) diversity of characteristics of the informal economy; (b) circumstances and the needs of specific workers in the informal economy (c) necessity to address diversity through tailored approaches; (d) effective promotion and protection of human rights; (e) fulfilment of decent work for all (f) promotion of gender equality and non-discrimination and the need to pay older people.

7.9.5. Social Protection Floors Recommendation 202 of 2012

[1034] Fourie, E "Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy", an unpublished LLD Thesis submitted at the North-West University (2018) 77.

The first international instrument to serve as a guideline to various states on closing gaps and achieving universal protection by establishing comprehensive social security mechanisms was Recommendation 202.[1035] According to Tshoose,[1036] the following issues appear to form part of the aim of the Recommendation:

> First, the implementation, as a priority, of social protection floors as a fundamental element of national social security systems and as a starting point for countries that do not have a minimum level of social protection; and second, the extension of social security with a view to progressively ensuring higher levels of social security to as many people as possible according to national economic and fiscal capacity and as guided by ILO's other social security standards.

The ILO's strategy to social security coverage for all, included a horizontal dimension, to extend a set of core social security guarantees by establishing a social protection floor and a vertical dimension that seeks the provision of a wider range of benefits and extension of coverage in line with the existing social security conventions, through a gradual approach.

This led to the adoption of the *Social Protection Floors Recommendation* (2012) (No 202) and this is an important instrument when considering the extension of social protection to vulnerable women workers in the informal economy. This was considered a better approach to the extension of social security for all and a more realistic approach for developing countries as the recommendation provides guidance to member states to establish and maintain social protection floors.

The preamble recognises the value of social security as a tool in the prevention and reduction, of poverty, inequality, social exclusions, social insecurity, and the promotion of gender and racial equality and in support of the transition from informal to formal employment. This is pertinent to women workers in the informal economy as they are often excluded from coverage and face discrimination on multiple grounds such as, race and gender. The preamble also undeniably recognises the link between sustainable social security systems and the transition to formal employment.

[1035] Tshoose, C.I, 'Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa' 2022 (25) *PER Journal* 22.
[1036] *Ibid.*

Article 3 recommends that member states apply important principles such as non-discrimination, gender equality and demonstrates a responsiveness to special needs. This is an important principle for these workers as it has been highlighted that specific groups of workers in the informal economy, such as domestic workers and home workers have very specific needs in respect of social protection.

Owing to this Recommendation, there should at least be four elementary social security guarantees made up of access to 'essential health care and basic income security for children', benefits for both older and younger persons who do not earn sufficient income.[1037] The Recommendation aims to promote access to dignity for all persons, therefore the security guarantees that are provided to these persons should preserve their right to dignity.

Article 5 of the Recommendation reads as follows:

> The social protection floors referred to in Paragraph 4[1038] should comprise at least the following basic social security guarantees:
> (a) access to a nationally defined set of goods and services, constituting essential health care, including maternity care, that meets the criteria of availability, accessibility, acceptability and quality;
> (b) basic income security for children, at least at a nationally defined minimum level, providing access to nutrition, education, care and any other necessary goods and services;
> (c) basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and
> (d) basic income security, at least at a nationally defined minimum level, for older persons.

The focus of Article 5 is in paragraph (c), where issues of affording persons of an 'active age' access to basic income security to persons who because of issues such as sickness, maternity, unemployment, and disability, are unable to earn a decent or sufficient income. This now offers protection to the workers who because of their limited access to remuneration in times they are unable to work, lose income because of the type of employment contract they find themselves attached to. Under this

[1037] *Ibid.*

[1038] Members should, in accordance with national circumstances, establish as quickly as possible and maintain their social protection floors comprising basic social security guarantees. The guarantees should ensure at a minimum that, over the life cycle, all in need have access to essential health care and to basic income security which together secure effective access to goods and services defined as necessary at the national level.

Recommendation, there can be recourse or compensation offered to them at times when the employer cannot.

In its preamble, it is stated that one of its goals is to 'reaffirm' social security as a basic human right and that 'acknowledging that the right to social security is, along with promoting employment, an economic and social necessity for development and progress, and recognising that social security is an important tool to prevent and reduce poverty, inequality, social exclusion, and social insecurity, to promote equal opportunity and gender and racial equality, and to support the transition from informal to formal employment.'[1039]

According to Fourie:[1040]

> Social Protection Floors Recommendation 202 of 2012 attempts to provide all workers with a basic level of social security to ensure health and dignity. States are required to provide minimum levels of protection through social protection floors. Basic social security guarantees, such as health care, income security during illness, and unemployment and maternity benefits can ensure some protection for informal economy workers. The recommendation also highlights the value of cooperation of all stakeholders in realising minimum levels of protection.[1041]

7.9.6. Universal Declaration of Human Rights (UDHR)

The UDHR was ratified by South Africa in 1994. Meaning that its provisions are binding on South Africa as a member state.[1042] Article 22 of the UDHR states as follows:

> Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

The formulation of Article 22 creates a clear link between every individual's right to social security and this is so regardless of the category of work or contract of employment one finds themselves attached to.[1043] The responsibilities undertaken by

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[1039] Preamble of the Social Protection Floors Recommendation, 2012 (No. 202).
[1040] Fourie, E. 'Perspectives of Workers in the Informal Economy in the SADC Region' (2017) 4 *Open Edition Journals* 80.
[1041] *Ibid.*
[1042] Hicks, J.L "Extension of Social Security Benefits to Women in the Informal Economy: A Case for Maternity Protection" Doctor of Philosophy Thesis. University of Kwazulu-Natal (2021) 65.
[1043] *Ibid.*

the state to endorse appropriate measures to realise everyone's right to 'economic, social and cultural rights, and their significance for the attainment of dignity are essential to social development.'[1044] With human dignity being one of the keystones of the founding provisions of the South African Constitution 1996,[1045] the significance of the right to social security could not be more emphasised.

Article 23[1046] of the UDHR provides for employment protection. It provides for access to the right to work, free choice of employment, just and unfavourable employment, as well as protection against unemployment. It provides for access to equal pay, right to adequate remuneration, and the right to form and join a trade union of their choice.

Article 24 makes provision for access to rest and leave. It reads as follows, 'Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.'

Article 25 provides for the right to security in the event of employment loss. It reads as follows:

> 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. 2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

It further requires 'states to enact measures to provide for the health and well-being of all – and mothers and children in particular. Such measures include social services and the right to social security in the event of unemployment or other lack of livelihood.'[1047]

7.9.7. International Covenant on Economic, Social, and Cultural Rights (ICESCR)

[1044] *Ibid.*

[1045] Constitution of South Africa, 1996.

[1046] 1. Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. 2. Everyone, without any discrimination, has the right to equal pay for equal work. 3. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. 4. Everyone has the right to form and to join trade unions for the protection of his interests.

[1047] Hicks, J.L 'Extension of Social Security Benefits to Women in the Informal Economy: A Case for Maternity Protection' Doctor of Philosophy Thesis. University of Kwazulu-Natal (2021) 65.

The ICESCR was ratified by South Africa in 2015 and provides the most comprehensive article on the right to health in international human rights law.[1048] Its mission is to get states to recognise that 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health is enshrined in several international legal instruments including the International Covenant on Economic, Social and Cultural Rights. It includes freedoms and entitlements.'[1049] Its monitoring committee is the UN Committee on Economic, Social and Cultural Rights (CESCR) and details the phases that states need to adopt in order to achieve the full realisation of this right.[1050]

The ICESCR also notes that the right to health is 'closely related to and dependent upon the realisation of other human rights, as contained in the international Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.'[1051]

The reference made by the ICESCR to 'the highest attainable standard of physical and mental health' is not limited to the right to health care and the specific wording of the subsequent literature notes that the right to health covers a wide range of different socio-economic factors that promote conditions in which people can lead a healthy life.[1052]

According to Hicks, 'the ICESCR notes that since the adoption of this instrument, the notion of health has widened in scope in that more determinants of health are being taken into consideration, such as resource distribution and gender differences.'

The ICESCR enforces important obligations on the state to ensure the provision of paid maternity leave to working mothers or right to social security and leave with

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[1048] Hicks, J.L 'Extension of Social Security Benefits to Women in the Informal Economy: A Case for Maternity Protection' Doctor of Philosophy Thesis. University of Kwazulu-Natal (2021) 71.

[1049] Accessed at https://www.who.int/news-room/fact-sheets/detail/human-rights-and-health#:~:text=and%20human%20rights-,The%20right%20to%20the%20highest%20attainable%20standard%20of%20physical%20and,It%20includes%20freedoms%20and%20entitlements on 22nd February 2022.

[1050] Hicks, J.L 'Extension of Social Security Benefits to Women in the Informal Economy: A Case for Maternity Protection' Doctor of Philosophy Thesis. University of Kwazulu-Natal (2021) 71.

[1051] *Ibid.*

[1052] *Ibid.*

'adequate social security benefits.'[1053] While Article 7 provides for the right to 'just and favourable conditions of work', Article 9 declares 'the right of everyone to social security, including social insurance.' In several provisions, this Convention identifies the family unit as a fundamental unit of society and contains measures to protect and assist families. Article 10 requires state parties to provide paid leave or adequate social security to mothers before and after childbirth – an obligation that overlaps with that of Article 9.[1054]

7.9.8. Fundamental Principles and Rights at Work (1998)

The Fundamental Principles and Rights at Work Convention was adopted in 1998 and later amended in 2002. Its objective is to protect and promote interests of all persons in the working environment. Article 2 of this instrument declares that: all states who are members of the ILO whether or not they have ratified the Convention or not are obligated to respect, promote and realise the Convention by virtue of membership of the ILO. They are expected to respect and promote the fundamental rights included in the Convention including:

> (a) freedom of association and the effective recognition of the right to collective bargaining;
> (b) the elimination of all forms of forced or compulsory labour;
> (c) the effective abolition of child labour;
> (d) the elimination of discrimination in respect of employment and occupation; and (e) a safe and healthy working environment.

Fourie[1055] adds that:

> In terms of this declaration, member states are required to adopt at least the core conventions containing certain fundamental rights. South Africa has ratified all eight of the core conventions. The minimum standards reflected in these conventions also form part of domestic legislation in South Africa. When ILO standards are included in national legislation they become most effective in terms of enforcement. Internationally the trend is to extend coverage to include nonstandard workers, but the number of countries that have ratified relevant conventions in this respect remains low. Therefore, the effectiveness of these conventions in protecting the position of non-standard workers is limited.

[1053] Hicks, J.L 'Extension of Social Security Benefits to Women in the Informal Economy: A Case for Maternity Protection' Doctor of Philosophy Thesis. University of Kwazulu-Natal (2021) 71.
[1054] *Ibid.*
[1055] Fourie, E "Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy", an unpublished LLD Thesis submitted at the North-West University (2018) 24.

Article 2*(d)* supports the idea behind this study as it provides for protection against discrimination that workers endure because of the type of employment contract they find themselves associated with.

7.10. Using ILO maternity instruments for the extension of maternity leave policies in South Africa

One of the most important recognitions enjoyed by the ILO is that it has been viewed as an essential trendsetter in labour protection and access to social security.[1056] The ILO has strived towards providing social security to all persons who could benefit from its existence. It went as far as allowing provisions for 'subsequent conventions and recommendations, covering various areas of social security – health care, old-age, disability, employment injury, unemployment, and maternity – have suggested a two-pillar social security system: social insurance for workers, and social assistance for the rest, to achieve universal coverage of social security.'[1057] However, it has been under intense criticism as it has been said that its standard-setting activities have only benefited workers in the formal sector excluding those in the informal sector.

A thesis by Deacon in 2013[1058] pointed out that maybe the challenge with standard-setting doesn't dwell much on the concept of standard-setting but rather that of interpreting and implementing the standards set by the ILO. Various scholars have provided support for the submission by Deacon by showing that indeed the international standards set by the ILO does not reach the workers in informal employment.[1059]

7.11. South Africa's compliance with international instruments aimed at protecting atypical workers

South Africa became a member state of the ILO since 1994 when it re-joined the organisation after being absent for a period of thirty (30) years. There are a number of instruments that it has ratified and there are those that remain unratified. It can be said that there is still a lag in terms of compliance with the instruments that it has ratified, and there are issues relating to those that would benefit the state if they were to be

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[1056] Son, K. 'Ship of Theseus: from ILO Standards to Outcome of Maternity Protection Policy' (2022) *Journal of Social Policy* 1.
[1057] *Ibid.*
[1058] Deacon, B. (2013), *Global Social Policy in the Making: the Foundations of the Social Protection Floo*r, Bristol: Bristol University Press.
[1059] *Ibid.*

ratified. There has been acceptable compliance to instruments such as The Fundamental Principles and Rights at Work (1998). In its article 2, it makes provision for a state to refrain from practising forced labour, the practice of using child labour is non-existent in South Africa but discrimination on the basis of employment and occupation is still a challenge. Tracing back to the source of this research project where it has been established that certain categories of workers do not have access to certain rights and privileges that are only afforded to certain groups, means that there is still a bit of ground to be covered to address Article 2 of the Fundamental Principles and Rights at Work instrument.

In addition to that, the ICESCR which was ratified by South Africa in 2015 provides for everyone's access to the rights to 'food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement.' While these are regarded as basic human rights enshrined in Chapter 2 of the Constitution, the issue of equality, especially in the workplace is still a challenge for the workers engaged in atypical work. They are not treated the same as the workers engaged in standard work are and this just creates problems of upholding the mission of the right to decent work.

The Maternity Protection Convention 183 of 2000 still has not been ratified by South Africa regardless of numerous calls and requests for its ratification, there has not been a positive response. Consequentially, this means that its failure to ratify results in not having a need to comply with the instrument. Generally, without the issues of ratification, compliance with international instruments has not reached a satisfactory point and still leaves a lot of ground to cover.

7.12. Summary

It is evident that the ILO continues to make effort to improve the lives of people and to afford them protection in the workplace. The ILO continues to invest in instruments that appear to be granting atypical workers the protection that they desperately need but with this effort comes quite a number of challenges revolving around issues of ratification, implementation, interpretation and application of these instruments. In as much as there is a display of gradual

progress in the improvement of atypical workers, there is still a lot to do in terms of getting the intended beneficiaries to actually benefit from the instruments that are adopted for their benefit.

CHAPTER EIGHT: COMPARATIVE ANALYSIS OF THE PROTECTION OF WORKERS IN NON-STANDARDISED EMPLOYMENT: SOUTH AFRICA, THE NETHERLANDS, AND THE UNITED KINGDOM

8.1. Introduction

The problems and challenges with the lack of protection of workers engaged in atypical work is a global challenge. Various jurisdictions across the world still grapple with the failure to sufficiently provide protection for the workers who are not regarded as employees. Most states, like South Africa have been making several attempts to create a balance between workers in Standard Employment Services (SER) and Temporary Employment Services (TES), but this has not yielded the desired results. For example, in the United Kingdom (UK), a step in developing issues with gender-equality and protection of the women has been incorporated in the Proclamation of the European Pillar of Social Rights.

"The proclamation of the European Pillar of Social Rights in 2017 marks a renewed commitment to gender equality in the European Union (EU). Principle 2 of the Pillar reaffirms the centrality of equality between men and women which 'must be ensured and fostered in all areas, including regarding participation in the labour market, terms and conditions of employment and career progression.' Work-life balance features prominently as one of the means of achieving greater gender equality. Principle 9, dedicated exclusively to this theme, reflects the EU's aim of moving away from a model of rights related to care that centre on women towards a model which acknowledges that both men and women have caring responsibilities. In line with delivering on the Pillar, the EU institutions have adopted a new directive on work-life balance. Similar developments in law and policy have been taking place in several European states, signalling a shift in national welfare and labour law systems towards greater recognition of the need for legal intervention to support work-life balance.[1060]

In South Africa, the amendments made to the Labour Relations Act[1061] attempted to redress the existing problems with the lack of protection of atypical workers. It has been 4 years and the amendments still fail to protect these workers. One of the main

[1060] Pavlou, V 'Whose equality? Paid domestic work and EU gender equality law' 2020(1) *European Equality Law Review* 1.
[1061] Labour Relations Amendment Act 8 of 2018.

issues and causes of the challenge is implementation. South Africa has well-drafted and equipped labour legislation with great potential to address and close the gap that exists. Authors such as Rapatsa and Matloga[1062] have written about the legislature's failure to protect this vulnerable group of workers for the longest time, there has been little or no change or implementation of the possible solutions that could help with addressing the problem.

The problem can also be detected where it is found that the failure to protect and implement laws intended to protect workers not included as employees also creates problems with maternity care for women and paternity for men because while employees have access to four consecutive months of accouchement leave,[1063] the workers who are not categorised as employees are not entitled to this leave.

Pavlou submits that:

> Having access to suitable leave arrangements from work to care for dependants is an important tool towards gender equality for two reasons. First, it allows more women to enter and remain in paid jobs without being penalised for taking up unpaid caring roles. Second, giving caring rights to men nurtures an equalitarian vision of caring, whereby responsibilities are shared between men and women; such a vision can be a first step towards broader societal change concerning gender-based roles.[1064]

Women working under atypical arrangements are sometimes compelled to take unpaid leave to raise their children and at times even suffer running the risk of losing their jobs due to the lack of security. This is mainly by South Africa's failure to implement and ratify existing laws and policies that have the potential of providing protection for the workers excluded under the definition of employee.

This chapter focuses on a legal comparison between South Africa and the various states that are mentioned below. This particular comparison is based on the different legal systems which these states have regarding the position of workers excluded in the definition of employee. Based on the findings made above, it is evident that there are quite a few things which South Africa can learn from other states as a way of developing the current labour laws. In adopting these lessons, the South African legal

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[1062] Matloga, N.S and Rapatsa, M.J 'Who is (should) be covered by Labour Law? Lessons from Kylie v CCMA' *Journal of Business Management & Social Sciences Research (JBM&SSR)* 2014 3(5) 105.
[1063] Section 25 of the Basic Conditions of Employment provides access to maternity leave of four (4) months for female employees.
[1064] Pavlou, V, Whose equality? Paid domestic work and EU gender equality 2020 (1) *European Equality Law Review* 1.

system can easily close the gaps, address the uncertainties and clarify the ambiguity which exists currently.

8.2. The basis and rationale for comparative analysis

As the objective of this research is to improve the working conditions of workers engaged in non-standard work by affording them access to benefits that can otherwise only be accessed by workers engaged in standard forms of employment, it may be imperative to investigate how other jurisdictions in different countries manage to protect all their workers without any discrimination based on the type of contract of work they have entered.

Bukhari[1065] views that 'a comparative analysis is used to determine and quantify relationships between two or more variables by observing different groups that either by choice or circumstances is exposed to different treatments.'[1066] A comparative study focuses on two or more things that are similar and have the same features, compares them with the hope of finding similarities or difference that may aid in improving the question dealt with.

This study undertakes a comparative analysis of the level of protection afforded to atypical workers in South Africa and that of countries like the Netherlands and the United Kingdom. The rationale behind this comparison is investigate whether there can be any lessons learnt from these two jurisdictions or where the South African system appears to be better than these two countries. The end result of the analysis will be used as directives of what lessons can be extracted and used to improve where South Africa seems to have shortcomings.

8.3. Comparative study

One way of developing a country's laws or the law of a particular jurisdiction is by studying the laws of another jurisdiction and therefore learning from them. Although not many, there are several countries that offer better protection for workers in atypical work arrangements. At the outset, atypical forms of work were introduced due to the lack of stable employment relationships (e.g. permanent employment) and the lack of

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[1065] Bukhari, SAH "What is comparative study?" Accessed at Bukhari, Syed Aftab Hassan, What is Comparative Study (November 20, 2011). Available at SSRN: https://ssrn.com/abstract=1962328 or http://dx.doi.org/10.2139/ssrn.1962328. On 24th January 2023.

[1066] *Ibid.*

legal subordination (e.g. self-employment) or income security (e.g. part-time work).[1067] These atypical forms of work have been found to be predominantly common in Europe.[1068] In 2018, almost 60% of the working population in the European Union (EU) was still engaged in paid employment that was based on a full-time contract and permanent.[1069]

Employment in the form of part-time and/or temporary work was limited to only 14% and 19% of the working population, respectively.[1070] Self-employment was approximately 4.5%.[1071] There are, however, interesting trends behind these figures. For example, the three main forms of atypical work made up one-third of all employment relationships in the Organisation for Economic Co-operation and Development (OECD) countries[1072] and they are responsible for half of the net growth in employment since the 1990s.[1073] In France, Germany and Italy, the percentage of business activities in the ages ranging between 15 to 24 organised on the basis of an SER had dropped by 30 to 40 per cent in the period 1985-2015.[1074] Half of the working population works in one or other form of part-time employment in the Netherlands.[1075] The figures mentioned above indicate that atypical forms of employment continue to rise.[1076] But, also, it can be said that the rising variety in which atypical work establishes itself is more significant than the reported figures themselves.

This segment of the study looks at a number of different jurisdictions and the extent to which they go to protect this vulnerable group of workers. It also looks at similarities and differences (negative and positive) between these countries and South Africa followed by a chapter on whether or not any of those differences can be used as

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[1067] Schoukens, P et. al 'The EU social pillar: An answer to the challenge of the social protection of platform workers?' (2018) 20(3) *European Journal of Social Security* 222.
[1068] *Ibid.*
[1069] *Ibid.*
[1070] *Ibid.*
[1071] *Ibid.*
[1072] OECD countries comprise 38 member states including Austria, Australia, Belgium, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America.
[1073] Schoukens, P et. al 'The EU social pillar: An answer to the challenge of the social protection of platform workers?' (2018) 20(3) *European Journal of Social Security* 222.
[1074] *Ibid.*
[1075] *Ibid.*
[1076] *Ibid.*

recommendations to develop the South African labour laws. The comparative study is followed by lessons (if any), that can be learnt from these countries.

8.3.1. THE NETHERLANDS

Belgium, Germany, and the Netherlands are all part of the group of wealthy European democracies with a comparatively comprehensive welfare state, including stable social protection and health insurance that is statutory and which provides a quasi-universal access to world-class health services.[1077] Consequently, social benefit expenditure is very high, it is at around 28% of GDP in all three countries.

In the Netherlands, this notion was linked to the rise of workers with temporary contracts as well as the increase of the so-called 'ZZP'ers' (self-employed without personnel–staff).[1078] The flexibility of the labour markets and increasing pressures on unemployment benefits caused a growth division in social protection between workers with a permanent contract on the one hand as well as long-term unemployed, zero-hour contacts, flex workers and self-employed for whom in many cases social protection appears to be less generous.[1079] Continental welfare states observed a dual transformation since the 2000s, which resulted in a retrenchment of earnings-related benefits for atypical workers and long-term unemployed and prolonged social security to the so-called 'new social risks' and 'enabling' policies.[1080] Resultantly, work and family related spending such as 'in-work-benefits and parental leave' has shown an increase, while the accessibility of traditional 'passive' income support for the unemployed has shown a decline.[1081]

'The Netherlands is sometimes called 'the first part-time economy in the world', as nearly half of wage employees there, work part time. While most of the part-timers are women, there is a high proportion of male part-timers too, albeit mainly in the younger age group. Part-time work is not limited to marginal jobs but is a feature of mainstream employment. Most part-time workers are on permanent employment contracts, and the number of part-time hours worked is usually fixed, ensuring a degree of certainty

[1077] Cantillon, B et. al 'The COVID-19 crisis and policy responses by continental European welfare states' (2018) 55(2) *Social Policy Administration: An International Journal on Policy and Research* 2.
[1078] *Ibid.*
[1079] *Ibid.*
[1080] *Ibid.*
[1081] *Ibid.*

over earnings. All workers in larger firms have the right to request part-time hours, and the law places the onus on the employer to provide a justification for rejecting this against a limited set of business reasons.[1082]'

It has been established that the average wage-gap that exists between workers under the SER and part-timers is non-existent or negligible.[1083] Part-time workers may get overtime payments when there are collective agreements that provide for an increase in pay hour for rates worked further than those as per agreement in the employment contract.[1084] For most part-timers, pro rata workers contributing towards social insurance do so in exchange for pro rata entitlements.[1085] It has been submitted that the Dutch women prefer working fewer hours because of their domestic responsibilities but the only challenge is that they prefer those fewer working hours to being on a full-time or permanent basis.[1086]

In a study conducted by Sluiter et al[1087] in the Netherlands, it was found that freelancers, temporary workers, generally had job insecurity.[1088] It also bore in it replaceability and precarious values which were found to be barriers to the worker voice.[1089] These job insecurities and precarious values were associated with more suppression and lesser support from supervisors in the workplace.[1090] The authors submitted that:

> Atypical work (such as agency work; temporary, on-call and zero-hour contracts; and work performed outside the employment relationship, such as freelance and platform work) is associated with lower job satisfaction, higher perceived job insecurity, higher levels of sick leave and lower levels of mental and physical wellbeing and more occupational accidents. Vulnerable groups in the labour market are those who are young, low-skilled, female, migrant workers and workers with disabilities, work in atypical forms of employment.[1091]

[1082] Non-Standard Employment Around the World, "Understanding challenges, shaping prospects" International Labour Organisation (2016) p 125. Accessed at https://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm.
[1083] *Ibid.*
[1084] *Ibid.*
[1085] *Ibid.*
[1086] *Ibid.*
[1087] Sluiter, R et. al. 'Atypical work, worker voice and supervisor responses' (2020) *Socio-Economic View* 1.
[1088] *Ibid.*
[1089] *Ibid.*
[1090] *ibid.*
[1091] *Ibid.*

It appears as though the Netherlands likely faces a similar level of protection when coming to atypical workers, with slightly more protection when compared to South Africa. These workers are also viewed as vulnerable, with lower job security and even lower support from managers as they are 'easily replaceable.' This places them in unfavourable positions because the one moment a worker may have a job and the next moment, they could easily be dismissed without just cause because of the little or no protection which they have.

The Netherlands has experienced an increase of the practice of flexible types of employment contracts in the past decade.[1092] A rise in flexible employment and the number of independent contractors has been observed. For example, in 2003, about 13,6% workers were on flexible contracts while in 2015 about 21% of the workers were on flexible contracts. There was a rise of approximately 8% of workers employed under these types of contracts.[1093]

It seems like the most unsecure and flexible types of employment contracts, such as zero-hours contracts, are on the rise. Furthermore, the changes from flexible work to more permanent positions seem to be declining. Some are even pointing out true segregation in the Dutch labour market: '*with a decreasing group of well protected insiders enjoying permanent employment contracts on the one side, and a growing group of employees on the other side working in flexible employment relations that offer little protection against the loss of the job.*'[1094]

There is an opinion that the decrease of the labour income share is certainly associated with the flexibility of the labour market.[1095] When compared to workers under the SER, the workers under the TER who have flexible, non-standard contracts like temporary agency workers or workers with zero-hours contracts have less job security and are hardly organised.[1096] This all makes their negotiating position weak.[1097] On the one hand and in addition to this challenge, their presence on the

[1092] Zekić, N 'Reforming Labour Laws in the Netherlands: An Assessment of the Redistributive Effects' (2019) 107 *Kluwer Law International* 3.
[1093] *Ibid.*
[1094] *Ibid.*
[1095] DN Bulletin: "Flexibilisering arbeidsmarkt gaat gepaard met daling arbeidsinkomensquote" (accessed at https://www.dnb.nl/nieuws/nieuwsoverzicht-en-archief/DNBulletin2018/dnb372062.jsp on 18 May 2022).
[1096] Zekić, N 'Reforming Labour Laws in the Netherlands: An Assessment of the Redistributive Effects' (2019) 107 *Kluwer Law International* 5.
[1097] *Ibid.*

labour market undermines the negotiating position of the workers in the SER, because the two groups indirectly compete with each other.[1098] On the other hand, there are the economists who submit they are unable to determine whether the creation of flexibility of the labour market certainly has this negative effect on the growth of wages.[1099]

What most labour law systems in Europe have in common is that they protect the employee as the weaker party. Some of these protective rules have clear redistributive effects, such as the rules on minimum wage and collective bargaining. Collective agreements can be very effective redistributive mechanisms when they have a wide coverage. Mundlak confirms the role of trade unions (and collective agreements) in lowering inequality and some of them urge the governments to strengthen that role.[1100]

However, there is an important restriction to (collective) labour law in this respect and that is the fact that most protective norms are in principle confined to employment relationships. That means that persons who do not perform labour under an employment contract, such as independent contractors, generally do not benefit from labour law protection or from redistributive measures through the labour law.[1101]

The general rule, under labour laws of the Netherlands is that workers who do not fall within the ambits of the definition of 'employee' are not protected under their labour laws. This then means that the position for the workers not working under the SER in the Netherlands are excluded from the benefits afforded to those who are. The position is therefore almost similar to that of South Africa with minor differences.[1102]

In an attempt to redress the challenge with the lack of protection, in 2015 major changes were introduced in Dutch labour law through the Act on Work and Security which was based on a compromise between social partners.[1103] The idea behind the reform was to increase the situation of workers under the TER and those with flexible

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[1098] *Ibid.*
[1099] *Ibid.*
[1100] Mundlak, "The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers", in G. Davidov & B. Langille (eds), *The Idea of Labour Law, Oxford*: (Oxford University Press 2011) 317.
[1101] *Ibid.*
[1102] *Ibid.*
[1103] Zekić, N 'Reforming Labour Laws in the Netherlands: An Assessment of the Redistributive Effects' (2019) 107 *Kluwer Law International* 6.

contracts at the same time making the dismissal of these workers less costly.[1104] The result of the changes at the end should have been that the flexible or temporary contracts have become less flexible and the open-ended contracts less permanent and secure.[1105] Even after these proposals were made, there were strong doubts about whether they brought about the desired level of balance between the *'insiders'* and the '*outsiders*.'[1106] For instance, dismissals may have become less costly, but it appears that the dismissal procedure was made more rigid with even bigger risks for employers.[1107]

In 2018, the new government proposed new changes with the Act on Labour Market in Balance (*Wet Arbeidsmarkt in Balans*).[1108] The main purpose of this latest proposal for reform was the introduction of a purported 'cumulating ground for dismissal' in order to make it easier to dismiss employees.[1109] The new reform was actually only a correction of the Act on Work and Security, which made the Act on Work and Security still the most important amendment of the Dutch labour law since the Second World War.[1110] It is therefore interesting to see what changes were introduced in order to improve the position of flexible employees and to assess these changes in light of the discussion on economic inequality.

It is submitted by the study on European Commission that:[1111]

> Besides treating flexible employment as stepping stones and fostering transitions into permanent contracts, prescribing equal treatment of workers with atypical contracts has been one of the main ways to improve the position of flexible workers and to prevent abuse of atypical contracts. The three main Directives on atypical work, Directive 97/81 regulating part-time work, Directive 99/70 on fixed-term work, and Directive 2008/104 on temporary agency work, all rely on equal treatment as a means to improve the quality of these forms of employment.[1112]

[1104] *Ibid.*
[1105] *Ibid.*
[1106] *Ibid.*
[1107] *Ibid.*
[1108] Bell, M 'Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work' (2012) 37(1) European *Law Review* 34.
[1109] *Ibid.*
[1110] European Commission, Establishing a European Pillar of Social Rights, Brussels 26 April 2017, COM (2017) 250 final.
[1111] *Ibid.*
[1112] Bell, M 'Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work' (2012) 37(1) *European Law Review* 34.

If there are ever any future attempts on EU-level for the development of working conditions for both atypical and typical workers, it will probably be directed by the new European Pillar of Social Rights.[1113] This Pillar provides for a number of 'key principles and rights that are supposed to support' a 'fair and well-functioning labour markets and welfare systems.'[1114] In adding to the emphasis on the significance of the principles of non-discrimination and equal opportunities, the Pillar intends to spread the guarantee of equal treatment beyond the three forms of employment relationships (part-time, fixed-term, and agency work) that are currently covered by the Union and to provide for equal treatment between workers irrespective of the type of employment relationship and contract.[1115]

The Dutch Act on Employment and Security did not contain a clear intention to embrace equal treatment of workers engaged in atypical work.[1116] Nevertheless, equal treatment formed part of the reform of the law on dismissals.[1117] In the past, the employers in the Netherlands had an option to choose out of two procedures when dismissing a permanent worker.[1118] The first procedure almost had a guaranteed severance package, while the second procedure did not.[1119] The employer could only freely choose the procedure, which led to arbitrary consequences. The Act on Work and Security was mainly focused on the inequality of outcome of the process of termination and introduced a right to a standardised severance package for every employee with a minimum of 24 months in the position they occupied.[1120]

It is worth noting that, the severance package becomes due also in cases where the employer discontinues a fixed term contract. In other words, a worker working under a fixed-term contract is also entitled to receive a severance package if his/her contract is not extended, provided that that he/she worked for the same employer for a minimum of twenty-four months.[1121] It can be said that this is a step towards a more equal treatment of workers in atypical arrangements since before the reform, fixed-

[1113] *Ibid.*
[1114] *Ibid.*
[1115] *Ibid.*
[1116] Zekić, N 'Reforming Labour Laws in the Netherlands: An Assessment of the Redistributive Effects' (2019) 107 *Kluwer Law International* 10.
[1117] *Ibid.*
[1118] *Ibid.*
[1119] *Ibid.*
[1120] *Ibid.*
[1121] *Ibid.*

term workers were not entitled to any severance package. So, dismissal law has become slightly fairer for employees.[1122]

The Dutch law already provided for general rules on equal treatment of workers engaged in atypical work. The Civil Code provides that '*employers may not discriminate between part-time and full-time employees when drafting employment contracts*.' It also states that '*there should also be no discrimination between employees with fixed-term contracts and employees with open-ended contracts regarding the employment conditions*.' In adding to this, the collective agreement that is available to temporary agency workers now provides for same remuneration for temporary agency workers as the workers are directly employed by the user firm. Debatably, the principle of equal treatment of atypical workers had already infiltrated the Dutch labour law; there was however, actually no need to further develop this principle in the Act on Work and Security.[1123]

The Act on Work and Security was a complete reform of the labour law.[1124] With its enactment and for the first time since the Second World War, there were considerable changes that were introduced to the Dutch law on dismissals. [1125] Although the Act with its influence did not touch upon all the matters involved in the reform, its goal was to analyse the Act in terms of its anticipated effects on economic inequality.[1126] Economic literature does suggest that the increase of atypical work is one of the most important drivers of economic inequality today.[1127] Presently, the Netherlands has many people employed in atypical contracts and with this Act, the government had intended to develop the position of flexible workers.[1128]

The conclusion should be that the lawmaker is still reluctant to interfere with the idea of employers possibly concluding flexible employment contracts.[1129] There could be

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[1122] *Ibid.*
[1123] *Ibid.*
[1124] Montebovi, S 'Accommodating platform work as a new form of work in Dutch social security law: New work, same rules?' (2021) 74(3) *International Social Security Review* 62.
[1125] Smit, P & van Eck, BPS 'International perspectives on the fairness of South Africa's dismissal law' (2010) 43(1) *The Comparative and International Law Journal of Southern Africa* 52.
[1126] *Ibid.*
[1127] *Ibid.*
[1128] Zekić, N 'Reforming Labour Laws in the Netherlands: An Assessment of the Redistributive Effects' (2019) 107 *Kluwer Law International* 5.
[1129] Non-standard employment around the world: Understanding challenges, shaping prospects International Labour Organisation. Accessed at

intention to confront abuse of such atypical contracts.[1130] This may be achieved by procedures meant to fostering transitions into 'open-ended' contracts.[1131] These reforms are, consequently, focused on decreasing job insecurity.[1132] The question that remains, however, is whether such measures are actually effective enough.[1133] This is challenging to determine since there could be many different factors that influence how employers behave.[1134] It seems, however, that there are very little incentives that can reduce employment flexibility, especially in low-wage sectors.

That means that the workers falling under low-wage and low-skilled categories are likely not to benefit from these measures. The Dutch government openly recognises this likelihood but does not seem keen to create a balance between the low-skilled and high-skilled workers with these measures.[1135] The measures are not meant to be redistributive because the Netherlands already had measures in position to realise equal treatment of the atypical workers. It could be assumed that equal treatment is '*the most effective norm in terms of economic inequality: flexible workers may enjoy less employment security, but at least they receive equal pay compared to standard workers*.'[1136]

The Act on Work and Security introduced a positive transformation to strengthen the norm on equal treatment. It actually introduced an entitlement to a severance package for fixed-term workers for when their fixed-term contracts end but they must have worked for the same employer for at least two years in order to be entitled to these benefits.[1137] The amounts in these severance packages have, however, been lowered with the same reform. So there is uncertainty with the redistributive effect of the reform as it is very mixed. More or less the same time period adopted by the Work and Security Act. This means that the Dutch government introduced caps on top income

https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_534326.pdf on 19 May 2022.

[1130] *Ibid.*
[1131] *Ibid.*
[1132] *Ibid.*
[1133] *Ibid.*
[1134] Zekić, N 'Reforming Labour Laws in the Netherlands: An Assessment of the Redistributive Effects' (2019) 107 *Kluwer Law International* 13.
[1135] *Ibid.*
[1136] *Ibid.*
[1137] *Ibid*

in the semi-public and public sectors as well as caps on their bonuses in the banking sector. [1138]

There were measures taken by the government that were not necessarily aimed at improving the positions of workers that earned low incomes but attempted to tackle rising top salaries. These measures were not premised on redistributive motives but were rather reacting to financial crisis as well as the public outrage concerning the top incomes.[1139] So when these are considered, they show that the Netherlands has experienced very mixed reactions to the financial crisis as the rising economic inequality. Although it can be said that the Netherlands still deserves the title of 'champion of quality part time work', some types of contractual work arrangements, like the on-call work, are far less protective for workers. This includes 'zero-hours contracts and min-max contracts.'[1140] Min-max contracts is:

> A min-max contract is a fixed or temporary contract for a minimum number of hours per week, month or year. Those are the guaranteed hours. You also determine the maximum number of hours for which you can call your employee.[1141]

So basically, there hasn't been any real redistributive measures brought by the labour law reforms in the Netherlands. This then creates impressions that introducing new laws does not necessarily yield expected positive results.[1142]

8.3.2. The impact of Covid-19 on the social protection of atypical workers in the Netherlands

When the Covid-19 broke out internationally, most, if not all states took a huge knock economically when there were very strict restrictions imposed on the citizens of these states. In the Netherlands, from the 9th of March 2020 and with instructions for hygiene, the limitations on public activities gradually increased.[1143] On the 15th of March 2020, outlets such as fitness clubs, restaurants, and cafes were closed; and on the 16th of

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[1138] *Ibid.*
[1139] *Ibid.*
[1140] Non-Standard Employment Around the World, "Understanding challenges, shaping prospects", International Labour Organisation (2016) p 126. Accessed at https://www.ilo.org/global/publications/books/WCMS_534326/lang--en/index.htm.
[1141] https://business.gov.nl/running-your-business/staff/recruiting-and-hiring-staff/hiring-on-call-workers-with-a-min-max-contract/. Accessed on 1st March 2024.
[1142] *Ibid.*
[1143] Cantillon, B et. al 'The COVID-19 crisis and policy responses by continental European welfare states' (2018) 55(2) *Social Policy Administration: An International Journal on Policy and Research* 4.

March 2020, day care centres and schools were closed.[1144] On the 23rd of March 2020, what was referred to as an 'intelligent lockdown'–meaning that a high appeal is made on citizens' own responsibility to act in the collective interest–was declared wherein groups of more than two people were required to keep a safe social distance of 1.5 metres.[1145] The implementation of these instructions was comparatively merciful and citizens were mainly reminded to take their own health responsibilities.[1146] People were requested to work from home as much as possible and for work that involved personal contact, it had to be suspended for a while–with the exception of healthcare work.[1147] In May 2020, the lockdown was slowly relieved, starting with visits to nursing homes and hairdressers on the 11th of May 2020, resulting in the opening of the cafes, restaurants, primary schools and day care centres on the 1st of June 2020.

The advent of the global COVID-19 pandemic and the restrictive measures taken to curb it, had further exacerbated these risks, as it had not only increased the likelihood that they will suffer from illness, but also job losses and fewer working hours for those who remained employed. According to the United Nations (UN), informal workers suffered a sixty percent decline in earnings in the first month of the crisis alone.[1148]

The sectors that were mostly affected by the lockdown were: hospitality, arts and manufacturing. It is common knowledge that in these sectors, comparatively more people work with a vulnerable socio-economic profile, (these include low skilled, single persons, students, young people, low-skilled, the self-employed, tenants and workers with flexible labour contracts). In these hard-hit sectors, the wages are generally lower, and the workers naturally live in families that earn a lower income, a higher poverty and less financial reserves to cover periods of declining income.[1149]

Cantillon et. al,[1150] state that:

[1144] *Ibid.*
[1145] *Ibid.*
[1146] *Ibid.*
[1147] *Ibid.*
[1148] Ngwenya, M "Extension of Social Security to the Informal Hospitality Industry Workers in South Africa", an unpublished LLM Dissertation from University of the Western Cape 7.
[1149] Cantillon, B et. al 'The COVID-19 crisis and policy responses by continental European welfare states' (2018) 55(2) *Social Policy Administration: An International Journal on Policy and Research* 7.
[1150] *Ibid.*

> In a sector such as the hotel and catering industry, some 40% of employees have virtually no net assets (taking into account both liquid assets and other equity components). In addition, a lot of people, in, for example, the heavily affected cultural sector, are not adequately covered by the existing and newly introduced protection systems. Flexible and atypical work statutes are common here, they often do not benefit from compensatory measures. The coronavirus has also seriously challenged the work–life balance. During the lockdown, caring for the children and for the older people became more family based. This put a great deal of pressure on family life and on opportunities to remain economically active. Systems of parental leave were therefore extended in many countries.

As a response to the consequences of the COVID-19 pandemic, the continental welfare strengthened developing or existing new schemes of income support to: 'sick workers and their families, income support to quarantined workers who could not work from home, helping dealing with unforeseen care needs, income support to persons losing their jobs or self-employment income, helping firms to adjust working time and preserve jobs, financial support to firms affected by a drop in demand and helping economically insecure workers stay in their homes.'[1151] By so doing, they mended the restrictions to a certain extent, that had been obligatory on unemployment insurance in the recent past and provided additional protection mechanisms for the atypical workers who were often caught fallen by the wayside of social protection before the crisis.[1152]

Before the COVID-19 crisis, in the Netherlands, there was a system wherein a temporary unemployment scheme combined with a scheme for reduction of working hours was in place.[1153] On the 17th of March 2020, the Netherlands introduced Temporary Emergency Measures for the preservation of employment (NOW) and the Temporary Support Measure for Self-employed (TOZO) and with this introduction of the NOW and the TOZO, these schemes were abolished.

It was said that they were too complex as their administration was demanding and therefore slow; and the coverage was too limited because it was only extended to the risk of employees for whom the employer was obliged to continue paying wages in case of sickness. The risk of most of the workers with flexible labour relations or self-

[1151] *Ibid.*
[1152] *Ibid.*
[1153] Cantillon, B et. al 'The COVID-19 crisis and policy responses by continental European welfare states' (2018) 55(2) *Social Policy Administration: An International Journal on Policy and Research* 7.

employed (ZZP) was not covered within the ambits of these schemes while they were the categories most affected by the COVID-19 measures. These developments concurred with an already continuing discussion about the dualisation of the risk-selection by employers, labour market and the limited social security for non-standard workers as well as the self-employed.[1154]

It is clear that the social protection of atypical and/or non-standardised workers in the Netherlands still lacks in a few regards. For example, the Act on Work and Security was a complete reform of the labour law and was intended to be the way out or otherwise the 'saving mechanism' that the workers in atypical contracts could rely on, it failed to fully protect these workers and left many gaps unaddressed. At a time when atypical workers needed the most protection, (after the Covid-19 outbreak), instead of improving on the already developing mechanisms to protect the workers, the Netherlands abolished the NOW and the TOZO leaving atypical works out in the cold when everyone was suffering from job insecurity and trying to stay alive. The effort has been made, but there is still quite a lot lacking from the Dutch legal system.

8.4. The United Kingdom (UK)

The second state that the study conducts a comparison on is the UK. The rationale behind this choice is 'due to the advancement of United Kingdoms' laws and legislation in protecting their fixed-term contract employees.'

Fudge and Strauss state that:

> In the past few decades, European labour markets have undergone profound transformations as a result of globalisation, deindustrialisation and technological change.[1155] Among these, one of the most prominent has been the spread of atypical employment, which differs from the full-time permanent employment relationship which came to be seen as 'standard' during the industrial age.[1156]

This is supported by Bertolini who states that:

> These new forms of employment have been introduced in order to make labour markets more flexible, in an attempt to adapt them to the needs of post-industrial economies.[1157] Nevertheless, it has been widely argued that these

[1154] *Ibid.*
[1155] Bertolini,A"The Experience of Labour Market Disadvantage: A Comparison of Temporary Agency Workers in Italy and the UK", an unpublished PhD Thesis in Social Policy, University of Edinburgh, 2017 16.
[1156] *Ibid.*
[1157] *Ibid.*

> new forms of employment are of lower quality compared to their standard counterparts, producing, among others, more employment insecurity, worse working conditions and scant collective representation.[1158]

In the United Kingdom, atypical employment began with the 'master-servant relationship which later transformed into the current employer-employee relationship.'[1159] The origin of this relationship is from the feudal system where landlords owned agricultural lands that were utilised by the employees.[1160] So, in exchange for the land to grow crops, there were payment or tributes that were offered to the masters of the land.[1161] This concept was however, later substituted when the British Parliament introduced the Contracts of Employment Act[1162] with the current concept of employer-employee relationship.[1163] The usage of fixed-term contract employees became a trend and produced many problems such as unequal treatments and unfair dismissals because there was only limited protection provided to them.[1164] The rights of fixed-term contract employees had been abandoned by the employment laws until the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations[1165] and the Agency Workers Regulations[1166] were enforced.

According to Manas:[1167]

> Before the enforcement of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 and the Agency Workers Regulations 2010, there was only limited protection provided to the fixed-term contract employees in the United Kingdom under the common law. According to Simpson (2004), most of the rights and entitlements for the fixed-term contract employees usually expressed in the employment contract as legal terms and obligations or duties. Therefore, these rights are compulsory to comply with by the employers and the parties to the employment contract are prohibited from contracting out of them.

[1158] *Ibid.*
[1159] Manas, NHN et. al 'A Comparative Study on the Rights and Protection Provided for the Fixed-Term Contract Employees between Malaysia and the United Kingdom' (2019) 16(2) *Journal of Administrative Science* 77.
[1160] *Ibid.*
[1161] *Ibid.*
[1162] Contracts of Employment Act of 1963.
[1163] Manas, NHN et. al 'A Comparative Study on the Rights and Protection Provided for the Fixed-Term Contract Employees between Malaysia and the United Kingdom' (2019) 16(2) *Journal of Administrative Science* 79.
[1164] *Ibid.*
[1165] Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.
[1166] Agency Workers Regulations of 2010.
[1167] Manas, NHN et. al 'A Comparative Study on the Rights and Protection Provided for the Fixed-Term Contract Employees between Malaysia and the United Kingdom' (2019) 16(2) *Journal of Administrative Science* 85.

In line with the demand for fixed-term contract employment in the UK labour market, the Parliament developed a number of laws that directly and indirectly protect fixed-term contract employees.[1168] Amongst these laws are the Equal Pay Act,[1169] Contracts of Employment Act,[1170] the Employment Protection (Consolidation) Act[1171] and many others.[1172] However, despite all these legislations, the fixed-term contract employees still continued to face unfair discrimination and treatment until the government implemented the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations[1173] and the Agency Workers Regulations.[1174]

The enforcement of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations[1175] and the Agency Workers Regulations[1176] brought a huge transformation in the employment development in the UK, particularly for those in temporary employment.[1177] The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations[1178] is intended to protect temporary employees from being treated less favourably than the permanent employees.[1179] The primary significance of the enforcement of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations[1180] is that it recognised fixed-term employment as one of the terms of employment and distinguished it with the other forms of employment such as part-time and agency employment.[1181]

According to Regulation 1 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations,[1182] 'the fixed-term contract employment as the

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[1168] *Ibid.*
[1169] Equal Pay Act of 1970.
[1170] Contracts of Employment Act of 1963.
[1171] Employment Protection (Consolidation) Act of 1968.
[1172] Manas, NHN et. al 'A Comparative Study on the Rights and Protection Provided for the Fixed-Term Contract Employees between Malaysia and the United Kingdom' (2019) 16(2) *Journal of Administrative Science* 85.
[1173] Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.
[1174] Agency Workers Regulations of 2010.
[1175] Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.
[1176] Agency Workers Regulations of 2010.
[1177] Manas, NHN et. al 'A Comparative Study on the Rights and Protection Provided for the Fixed-Term Contract Employees between Malaysia and the United Kingdom' (2019) 16(2) *Journal of Administrative Science* 85.
[1178] Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.
[1179] *Ibid.*
[1180] *Ibid.*
[1181] Manas, NHN et. al 'A Comparative Study on the Rights and Protection Provided for the Fixed-Term Contract Employees between Malaysia and the United Kingdom' (2019) 16(2) *Journal of Administrative Science* 85.
[1182] Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.

contract of employment which will be terminated either on the expiry of a particular term, on the completion of a specific task or the occurrence of any specific events provided under the employment contract.'[1183] Part 4 and 5 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations,[1184] however, excludes certain types of categories of workers from the protection under this regulation. Workers such as the trainees under the government training schemes (Regulation 18), armed forces (Regulation 14), the agency employees (Regulation 19), and the apprentices (Regulation 20) are an exception.[1185] This exception is a weakness of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations.[1186]

However, Manas[1187] adds that:

> It should not restrain its application from equally binding upon all type of fixed-term contract employees for the sake of equality, fairness and adequate protection. The reason is that the importance of this legislation is to ensure that the employers will treat the fixed-term contract employees equally like the permanent employees. This protection was emphasised statutorily in regulation 2. However, according to regulation 4 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, the differences in treatment can be justified by the employer.

The Agency Workers Regulations[1188] was intended to protect the employees who were hired through employment agencies.[1189] Agency employees are defined as 'the individuals who were temporarily employed by the agency and the relationship between the employees and the agency would be governed under the contract of employment.'[1190] At this point, the agency assumed the intermediary role in providing the employees to the hirer for the temporary employment under a contract of service.[1191] The hirer in this context refers to 'a person who engaged in economic activity either in the public or private sector and whether he is operating it for profit

[1183] Manas, NHN *ibid* 85.
[1184] Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.
[1185] Manas, NHN et. al 'A Comparative Study on the Rights and Protection Provided for the Fixed-Term Contract Employees between Malaysia and the United Kingdom' (2019) 16(2) *Journal of Administrative Science* 86.
[1186] Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.
[1187] Manas, NHN *ibid* 86.
[1188] Agency Workers Regulations of 2010.
[1189] Manas, NHN *ibid* 86.
[1190] Regulation 3 of the Agency Workers Regulations of 2010.
[1191] Manas, NHN *ibid* 86.

or not.'[1192] He would supervise and give instructions to the agency employees in their work.[1193] This definition is provided under regulation 2.[1194]

In addition to that, the employees have the right to the necessary working and employment condition from the first day of the assignment.[1195] For instance, they should be entitled to the same access to the facilities offered to the other workers such as the company gym, car parking slots, canteen, and the minimum scale of the remuneration.[1196] Furthermore, the regulation 17[1197] stated that the agency or the employer should not unfairly dismiss the employees unless it can be justified for a reasonable cause.[1198] The employees also have the right to be protected from any detrimental treatment from the hirer or the agency.[1199] In addition to that, the employees also have 'a right to bring an action against the hirer or the agency before the employment tribunal for the breaches of any regulations.'[1200]

The UK's legislature is very focused on increasing and endorsing their employment laws.[1201] Not only do they have particular procedures and instructions such as the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations[1202] and the Agency Workers Regulations,[1203] that gave statutory recognition to each type of contractually based employment, the employment laws have also been rapidly revised and amended to give better protections and rights to the employees.

In the case of *Andrew Biggart v University of Ulster,*[1204] there were two workers working for University of Ulster one as an employee and one who was working on a fixed-term contract. The fixed-term worker's contract was not renewed, and he alleged that the non-renewal constituted an unfair dismissal as the University made no effort to deploy him like his colleague who was a permanent employee when the University was undergoing a reorganisation. The court ruled that the redundancy of

[1192] *Ibid.*
[1193] *Ibid.*
[1194] Agency Workers Regulations of 2010.
[1195] Regulation 5 of the Agency Workers Regulations 2010
[1196] Manas, NHN *ibid* 86.
[1197] of the Agency Workers Regulations 2010.
[1198] Manas, NHN *ibid* 86.
[1199] *Ibid.*
[1200] Agency Workers Regulations 2010.
[1201] Manas, NHN *ibid* 86.
[1202] Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations of 2002.
[1203] Agency Workers Regulations of 2010.
[1204] (Case Ref: 00778/05).

the employee constituted unfair dismissal and ruled further that the failure of the employer to properly explain to the fixed-term contract what the grounds at hand were constituted discrimination under regulation 3(3)a of the Agency Workers Regulations 2010.

In the UK, however, the concept of atypical work has climbed up a notch. This could be the impact of the Covid-19 which broke out in 2019. The labour market has since become flooded with even newer types or forms of atypical employment. The question that arises is whether or not this is a good contribution towards the safety and well-being of atypical workers because even with the fewer forms that existed in the labour market, they came with major challenges that countries have been battling with for decades now.

Studies have shown that atypical work is increasing in popularity in the UK, owing, partially to an ever more flexible labour market.[1205] An observation has shown that part-time workers are on the rise.[1206] There are now even 'newer' forms of atypical work that are emerging in the growing platform economy, such as platform work,[1207] crowd work,[1208] app-based work,[1209] portfolio work,[1210] unpaid forms of work that are within the phenomenon of the 'sharing economy' or actions that do not conform to a pattern of fixed work but still produce fixed income such as the activities performed by micro-enterprises or some owner-manager.[1211]

When employers design work-related social security provisions, they align it with the kind of employment contract that was concluded between the worker and the employer. If it is found that the work arrangement and the employment contract in

[1205] Schoukens, P et. al 'The EU social pillar: An answer to the challenge of the social protection of platform workers?' (2018) 20(3) *European Journal of Social Security* 220.
[1206] *Ibid.*
[1207] A platform worker implies a worker working for an organisation that provides specific services using an online platform directly to individuals or organisations. Examples of platform workers include Ola or Uber drivers, Swiggy or Zomato delivery agents, etc.
[1208] This is a type of work that uses an online platform to enable organisations or individuals to access an indefinite and unknown group of other organisations or individuals to solve specific problems or to provide specific services or products in exchange for payment.
[1209] Working in an app-based company which is an organization that primarily uses a mobile app to communicate with its users. For example, although people can use their desktop computers to hail a ride on Uber and Lyft, the mobile app lets them request service no matter where they are
[1210] When a person who works for several different companies or organizations at the same time: A portfolio worker may have a variety of different clients that they offer different services to, or they may work part-time for a company and have their own business as well.
[1211] *Ibid.*

place is within the ambits of atypical employment, then problems with social security tend to arise.

The European Pillar of Social Rights[1212] jointly started by the European Parliament, Commission and the Council in November 2017, indicated 20 rights and principles to support non-discriminatory and well-functioning welfare and labour markets systems.[1213] Principle 12 of the Pillar states that '*regardless of the type and duration of their employment relationship, workers, and, under comparable conditions, the self-employed have the right to adequate social protection*.' A proposal for a Council Recommendation was launched in order to have Principle 12 developed further by the European Commission on access to social protection for workers and the self-employed.[1214] Fascinatingly, this recommendation covers all forms of atypical work, and appeals for appropriate social protection for the different types of work.[1215]

Despite the fact that they may be set out in a divergent style when compared to the traditional standard work, SER that is used as an example for many labour-related social security schemes.[1216] A vital principle in the proposal for a Recommendation is 'the neutral character of the labour status of the worker: the basic principles shaping social security are equal for all workers, independently of the kind of work or of the eventual status of the work performed.'[1217] Nonetheless, in the submission of these impartial principles, social security schemes should consider as much as possible the specific working conditions under which the work is performed.[1218]

The proposed Recommendation, which 'seeks to ensure minimum standards in the field of social protection of workers and the self-employed', is applicable to all customary social insurance schemes that are related to labour (e.g. unemployment benefits, sickness and health care benefits, maternity and equivalent paternity benefits, invalidity benefits, old-age benefits, and benefits in respect of accidents at

[1212] European Commission, Proposal for an Inter-Institutional Proclamation on the European Pillar of Social Rights, *COM* (2017) 251.
[1213] Schoukens, P et. al 'The EU social pillar: An answer to the challenge of the social protection of platform workers' (2018) 20(3) *European Journal of Social Security* 224.
[1214] *Ibid.*
[1215] *Ibid.*
[1216] *Ibid.*
[1217] Schoukens, P et. al 'The EU social pillar: An answer to the challenge of the social protection of platform workers?' (2018) 20(3) *European Journal of Social Security* 224.
[1218] *Ibid.*

work and occupational diseases).[1219] This then follows the traditional definition of social security as it is applied in the coordination by the EU directives and rules related to equal treatment in social security.[1220]

8.4.1. The effect of The Covid-19 outbreak on the social protection of atypical workers in the United Kingdom

'The COVID-19 pandemic has triggered unprecedented government-mandated social and economic lockdowns across the globe.'[1221] For the Europeans, the government lockdowns declared and imposed from March 2020 going forward took a largely similar route, that paused public life and brought the entire economic industry on an abrupt halt.[1222] In order to prevent the most melodramatic social and economic consequences of these measures, the European governments quickly presented widespread social policy and labour market measures that were aimed at stabilising the employment sector therefore averting dismissals and supporting those whose livelihoods the crisis most intensely endangered.[1223]

The COVID-19 pandemic exposed a variety of susceptibilities in the European labour markets that are related to non-standard work.'[1224] However, it should be noted that the notion of 'non-standard work' and how it is related to social protection require further clarification.[1225] The ILO and the OECD agreed that the term 'non-standard work' covers 'all employment relationships that do not conform to the "norm" of full-time, regular, open-ended employment with a single employer.'[1226]

According to the OECD:[1227]

> Non-standard work includes '(1) self-employment;(2) temporary or fixed-term contracts; and (3) part-time work.' The ILO lists as examples of non-standard work 'temporary employment; parttime and on-call work; temporary

[1219] *Ibid.*
[1220] *Ibid.*
[1221] Seeman, A et. al 'Protecting Livelihoods in the COVID-19 crisis: A comparative analysis of European labour market and social policies' (2021) 21(3) *Global Social Policy* 551.
[1222] *Ibid.*
[1223] *Ibid.*
[1224] Seeman, A et. al 'Protecting Livelihoods in the COVID-19 crisis: A comparative analysis of European labour market and social policies' (2021) 21(3) *Global Social Policy* 551.
[1225] *Ibid.*
[1226] Seeman, A et. al 'Protecting Livelihoods in the COVID-19 crisis: A comparative analysis of European labour market and social policies' (2021) 21(3) *Global Social Policy* 551.
[1227] OECD (2015) Non-standard Work, Job Polarisation and Inequality, In It Together: Why Less Inequality Benefits All. Paris: OECD Publishing.

> agency work and other multiparty employment relationships as well as disguised employment and dependent self-employment.' However, these definitions of 'non-standard work' would be unsuitable for examining how groups outside of, or on the margins of, traditional social security systems have fared in the crisis. Most individuals in temporary or part-time employment are fully included in social security systems. By contrast, this typically does not apply to the self-employed, although this category of work is not included in the ILO's list of 'non-standard work.'

It has been recorded that, in the last quarter of 2019, France and Italy had higher unemployment rates of 8.23% and 9.50%, respectively while Germany had an unemployment rate of 3.20%, the United Kingdom 3.70% and Denmark 5.07%.[1228] As with the compositions of the labour market, the level of social protection that was afforded to different groups of labour market participants varied to a great degree across Europe.[1229]

Seeman et al.[1230] states that:

> During the pandemic, the United Kingdom introduced a 'temporary wage compensation programme' that was similar to the one established by Denmark, the Coronavirus Job Retention Scheme (CJRS). Under the (original) CJRS, employers could apply for compensation of 80% of monthly salary costs for laid off employees. Initially, a partial reduction of working hours was not possible. However, on 12 June 2020, the government published details of a flexible furlough scheme, which was introduced on 1 July 2020 (HM Revenue and Customs, 2020). Under the revised rules, employees could carry out part-time work for their employer or another employer while also receiving CJRS payments. The CJRS has since been extended until October 2021.

Novel cost-intensive wage reimbursement schemes were adopted in the Netherlands during the Covid-19 pandemic.[1231] In particular, in the context of the UK, where working age social protection is traditionally dominated by social assistance, the CJRS was a comparatively unusual policy measure.[1232] So consequential to the wage reimbursement schemes, the United Kingdom set aside the flexibility of their labour market temporarily.[1233] The intention was to 'protect livelihoods and to prevent the loss of valuable 'job matches', which would have come at a cost to the overall economy.'[1234]

[1228] OECD (2020a) Unemployment rate (indicator). Available at: https://doi.org/10.1787/52570002-en.
[1229] Seeman, A et. al 'Protecting Livelihoods in the COVID-19 crisis: A comparative analysis of European labour market and social policies' (2021) 21(3) *Global Social Policy* 551.
[1230] *Ibid*.
[1231] *Ibid.*
[1232] *Ibid.*
[1233] Seeman, A et. al 'Protecting livelihoods in the COVID-19 crisis: A comparative analysis of European labour market and social policies' (2021) 21(3) *Global Social Policy* 555.
[1234] *Ibid.*

The criteria for eligibility for short-time work was reduced during the pandemic. This meant that some of the 'non-standard workers' also became entitled to short-time work. As a mechanism to include the employees whose working hours are difficult to calculate (workers such as artists, freelance journalists) from these short-time work benefits, the government in France, for example opted to extend the usage of short-time work to these specific groups. In the UK, the CJRS wage replacement scheme provided a definition of the term 'employee' in a more expanded than regular manner in labour law.[1235] Because of the nature of their work, nevertheless, most 'non-standard workers', the self-employed could not benefit personally from the job retention schemes (even though they were eligible to apply for wage reimbursement for their employees).[1236]

The governments in Europe consequently implemented a range of supplementary measures intended to support 'non-standard workers. These included, for example:

> Tax rebates, eased rules for social security and tax payments, and loan guarantees for the self-employed. In addition, various types of money transfers were made available to 'non-standard workers', which will be the main focus of this section. As will be seen, three key measures were adopted to support 'non-standard workers' (and in particular the self-employed): (1) payments for business costs, (2) payments to cover loss of personal income and (3) undesignated social compensation in the form of lump-sum payments.

In the UK, a similar scheme was introduced. It was known as The Self-Employment Income Support Scheme (SEISS), which was aimed at being formally comparable to the layoff scheme. The SEISS issued taxable grants of 80% made up of historic profits, for a period of 3-months, limited to GBP 2500 (approx. EUR 2795) per month.[1237] The imbursement was made as a one-off payment made at the end of June 2020 for the period from March until June.

For the Self-employed persons with a low income and with no savings, there was an unequal effect by the lack of payment for 3 months. The SEISS was meant to close on the 13th of July 2020, but on the 29th of May 2020, the European government proclaimed a second round of SEISS, where those persons who were eligible and able

[1235] *Ibid.*
[1236] *Ibid.*
[1237] *Ibid.*

to claim a second grant could do so. The SEISS was further extended to September 2021.

8.5. Protection of non-standard workers in the Netherlands and the United Kingdom: lessons learned for South Africa

Although it appears as though the issue with the failure to extend labour protection that covers employees has no prospects of resolution for workers engaged in atypical work, the comparative study conducted able was able to find a few lessons that South Africa can learn from both the United Kingdom and the Netherlands with the idea to improve the current working condition of non-standard workers.

It is worth noting that Belgium, Germany and the Netherlands are categorised under the group of wealthy European democracies that is characterised by being a comprehensive welfare state with stable social protection and health insurance that is backed by statute and that extends its coverage to quasi, world-wide health services.[1238] In these countries, the social benefit expenditure is relatively very high and sits at around 28% Gross Domestic Product (GDP).[1239]

In the Netherlands, most part-time workers work on permanent employment contracts and their working hours are usually fixed which in turn guarantees fixed earnings as well.[1240] All workers in the big firms are entitled to request part-time hours and if such is rejected by the employer, they have to provide justification for rejecting the request against a limited set of reasons related to the business.[1241]

For most workers with part-time contracts, there are pro rata contributions towards social insurance in exchange for pro rata entitlements. The freelancers, temporary workers generally have job security.[1242] They also have severance packages for dismissals of employees where they have a guaranteed severance pay when dismissing an employee and where there is none through the Dutch Act on Employment and Security.[1243] The Act on Work and Security's main focus was on the

[1238] Cantillon, B et. al 'The COVID-19 crisis and policy responses by continental European welfare states' (2018) 55(2) *Social Policy Administration: An International Journal on Policy and Research* 7.
[1239] *Ibid.*
[1240] Burri, S et. Al 'On-call work in the Netherlands: trends, impact and policy solutions' International Labour Office, Geneva 2018 4. Accessed at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_626410.pdf on 1st March 2024.
[1241] *Ibid.*
[1242] *Ibid.*
[1243] Dutch Act on Employment and Security of 2014.

inequality of outcome of termination of employment and introduced the right to a standardised severance package for every employee who has worked for the same employer for at least 24 months. This severance package is not limited to just employees. It also becomes due in instances where the employer terminates a fixed term contract. This means that a worker who works under a fixed-term contract is also entitled to a severance package if the contract is terminated on condition that he/she worked for the same employer for a minimum of 2 years.

The collective agreement that is accessible to temporary agency workers now provides the same remuneration for temporary agency workers because they are employed by the user firm. This is because the Civil Code provides that there should not be any discrimination between employees with fixed-term contracts and open-ended contracts regarding their employment conditions.

In the United Kingdom, the Fixed-Term Employee (Prevention of Less Favourable Treatment) Regulations[1244] was enacted to breach a balance between temporary employees and permanent employees by protecting the temporary employees from being treated less favourably than the permanent employees. Agency workers are allowed to use the employer's facilities such as the parking lot, the gym, the canteen and access to minimum scale of the remuneration.

Principles 12 of the European Pillar of Social Rights[1245] provides that workers have the right to adequate social protection regardless of the type and duration of their employment relationship. It also developed a proposal for a Council Recommendation to create access to social protection for workers and the self-employed. This recommendation covers all forms of atypical work and offers appropriate social protection for different types of work.

The recommendation also ensures that minimum standards in the field of social protection of workers and the self-employed is applicable to all customary social insurance schemes related to labour health care benefits, maternity and equivalent paternity benefits, invalidity benefits, old benefits and the benefits in respect of accidents at work and occupation diseases.

[1244] Fixed-Term Employee (Prevention of Less Favourable Treatment) Regulations of 2000.
[1245] European Pillar of Social Rights of 2017.

During the Covid-19 outbreak, the UK introduced a novel cost-intensive wage reimbursement scheme. They adopted a range of supplementary measures intended to support non-standard workers. These included *inter alia* tax rebates, flexible rules for social security and tax payments, loan guarantees for the self-employed. Three key measures were adopted in support of non-standard workers (particularly the self-employed). They included payments for business costs, payments to cover loss of personal income and undesignated social compensation in the form of lump-sum payments.

8.6. Summary

The attempt made to protect 'non-standard workers' in the UK, proved to be slightly more successful in comparison to the Netherlands. The different funds which were made accessible assisted these workers during the Covid-19 pandemic and the intended aims and objectives of the introduction of these different funds were achieved with a bit of a lack hither and thither. There are however, a few things that South Africa can learn from how the UK protects this vulnerable group of workers.

CHAPTER NINE: CONCLUSION AND RECOMMENDATIONS

9.1. Introduction

The study commenced with a hypothetical case about a young woman who had been appointed as an independent contractor at the University of Mongalo.[1246] The young woman discovered that she was pregnant shortly after she was appointed by the University. Labour laws do not extend their coverage to workers who are excluded in the definition of employee. This automatically meant that there was a dilemma for the young woman. The study went on to look at the various ways in which workers in similar working arrangements such as this young woman face on a regular basis. It examined different ways in which the lack of access to labour legislation leaves them vulnerable and without recourse when faced with challenges.

The study argued the need to afford these workers equal access to different forms of labour protections mechanisms as a way to curb their vulnerability and afford them an opportunity to work in environments that give them more than just remuneration in the form of salaries and wages. This is the concluding chapter and addresses the ways in which the points raised at the beginning of the study were exhausted. It also provides the recommendations which are aimed at closing the gaps and addressing the existing problems in the labour community.

9.2. Conclusion

The unfair treatment endured by workers who fall outside the ambits of the definition of employee has been a problem dating back to the historical era and long before organisations such as the International Labour Organisation (ILO) could be formed. As already indicated below, the core objective of the formation of the ILO in 1919 was 'to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.'[1247] In doing so, the ILO has enacted and adopted various Instruments that are aimed at achieving these objectives. However, the problem that atypical workers experience continues to grow at a rapid rate. This growth is influenced by the increase in atypical employment owing to recent evolution of labour practices, technology and of course Covid-19.

[1246] Fictitious University.

[1247] https://www.ilo.org/global/about-the-ilo/lang--en/index.htm#:~:text=The%20main%20aims%20of%20the,dialogue%20on%20work%2Drelated%20issues. Accessed on the 2nd of November 2022.

In South Africa, several attempts have been made to address the challenge from the lack of social protection afforded to atypical workers. Even before the constitutional dispensation, there were great injustices experienced by atypical workers. When the Constitution[1248] was enacted, it introduced the right to equality in section 9, this technically meant that equality should be practised in the workplace. Section 10 provides for the right to dignity was also proclaimed and this meant that in every situation the dignity of every person in the Republic must be preserved and promoted within the context of the workplace. Section 23(1) reads as follows: 'Everyone has the right to fair labour practices.'

Ideally, this would mean that every person, every worker should have their right to equality, dignity and fair labour practices protected but, this is not the case. The main labour legislations do not accommodate workers who are not regarded as employees, and this is where the problem is premised. The LRA[1249], the BCEA[1250], as well as the EEA[1251] all define employees as:

> (a) any person, excluding an independent contractor, who works for another person or for the state and who receives or is entitled to receive, any remuneration, and
> (b) any 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."

This definition, for example, immediately disqualifies independent contractors from coverage and means that all protective provisions do not accommodate these workers. There have been new categories of independent contractors since this legislation was passed. These include informal workers, casual workers, seasonal workers, homeworkers, temporary workers, some domestic workers, for example. The general practice is that only workers who are employed on a permanent basis or otherwise what is known as Standard Employment Relationship (SER) are the main beneficiaries of the protection from labour legislation.

They have access to social protection and benefits that include retirement benefits, job security, medical aid, maternity and paternity leave and protection from unfair dismissals while those who are engaged in Temporary Employment Relationships

[1248] Constitution of South Africa, 1996.
[1249] Section 213 of the Labour Relations Act 66 of 1995.
[1250] Section 1 of the Basic Conditions of Employment Act 75 of 1997.
[1251] Section 1 of the Employment Equity Act 55 of 1998.

(TER) do not have access to these benefits. The argument presented by this study is for the extension of social protection to the workers who are excluded from legislative protection afforded to the workers in the SER.

The injustice and inequality created by this failure to extend the protection is mostly experienced by migrant workers, new graduates, and female workers. As already presented in this study above, female workers are the group that is most vulnerable for reasons such as the reluctance from employers to employ female workers primarily due to issues with reproductive responsibilities.

Most female workers, especially young women in their childbearing years struggle with securing decent jobs because employers are usually not willing to carry the responsibility of paid maternity leave when these young women are due for child delivery.

The call to extend social protection to non-standard workers has not received as much attention as it should, and this creates perpetual challenges in the workplace. However, in 2018, the LRAA[1252] of South Africa was enacted and its objective was to:

> Amend the Labour Relations Act, 1995, so as to provide criteria for the Minister before the Minister is compelled to extend the collective agreement as contemplated in the Act; to provide for the renewal and extension of funding agreements; to provide for picketing by collective agreement or by determination by the Commission in terms of picketing regulations; to provide for the classification of a ratified or determined minimum service; to extend the meaning of ballot to include any voting by members that is recorded in secret; to provide for the independence of the registrar and the deputy registrar; to provide for an advisory arbitration panel; to provide for an advisory arbitration award; to provide for transitional provisions; and to provide for matters connected therewith.

This was one of the amendments that had the potential of curbing the problems with the much-advocated issue with the failure to accommodate non-standard workers in the main labour legislations, but instead, it amended other issues such as extension of funding agreements and the meaning of ballot to include any voting by members that is recorded in secret and nothing on extending social protection to non-standard workers. This on its own shows that the call for extension of these benefits is far from being heeded to.

[1252] Act 8 of 2018.

The Southern African Development Community (SADC) has adopted instruments such as the SADC Charter of Fundamental Social Rights which is aimed at protecting workers in the workplace and the provision of access to social security benefits, health and safety standards and promoting development of institutional capacity in the SADC region while the ILO adopted the Maternity Protection Convention 183 of 2000.[1253]

The Maternity Protection Convention is aimed at extending social security benefits to **all** pregnant working women regardless of their employment contract. This means that it accommodates everyone who is female and engaged in some form of employment. It covers women employed under the SER as well as women working in the TER. Its ratification bears prospects of improving the wellbeing of all working mothers by allowing them access to maternity leave favourable and conducive to the working mother. The topical issue with the Maternity Protection Convention is that it has not yet been ratified by South Africa, therefore, its contents are not applicable to South Africans until such a time that it is ratified. So, with all being said and done, if the challenge is not legislative exclusion, it is implementation of existing labour laws and if it is not failure to properly implement existing legislation, it is with failure to ratify Instruments that bear potential of assisting the predicament faced by non-standard workers internationally.

'The heterogeneity of non-standard employment makes it challenging for many women to access maternity protection. There are policy amendments that could be made and improvements to policy implementation that would enhance non-standard workers' access to maternity protection. Potential long-term benefits to women and children's health and development could come from making comprehensive maternity protection available and accessible to all women.[1254]'

To this end, the main aspects covered in this thesis are summarised below. Chapter 1 was the main introduction to the study and covered the background and problem which the study was aimed at covering. This was the foundation and groundwork of the study as it also covered aspects on different arguments submitted by different authors in the literature review. A brief discussion on the research methodology which

[1253] Maternity Protection Convention 183 of 2000.
[1254] Pereira-Kotze, C., Doherty, T. and Faber, M. 'Maternity protection for female non-standard workers in South Africa: the case of domestic workers' 657 (2022) *BMC Pregnancy Childbirth* 1.

the study followed throughout the analysis as well as the definition of key concepts was encompassed in chapter 1.[1255]

With the advancement of the study came chapter 2[1256] which was a discussion on the position of non-standard workers in South Africa. Under this chapter was the overall labour overview which examined how women still experience difficulties with career development as a whole and how it is aggravated by non-standard employment women find themselves party to. The chapter covered challenges with remuneration, unemployment as well as sectoral and occupational distribution. The chapter concluded by examining the status of women in the labour market.

In chapter 3,[1257] the legal framework on the protection of workers engaged in non-standard employment relationship was discussed. It covered the need to protect non-standard employees as well as the different framework such as Constitutional and legislative framework as well as case law such as *inter alia* the Kylie case, the *Sita* case, the *Discovery Health* case. It also examined the inadequacy in implementing existing policy and legislation and lastly, aspects of social assistance and assessment of whether or not social assistance provides adequate protection to non-standard workers.

Chapter 4[1258] was a discussion on decent work and atypical workers in South Africa. It covered the dilemma with legislative employment law and unpacked the building blocks of decent work for the protection of atypical workers. It examined features of social protection of atypical workers as well as aspects of relevant social security laws pertaining to non-standard workers.

Maternity protection for female atypical workers was covered in chapter 5.[1259] Commencing with a brief historical background on maternity protection, what maternity protection is as well as why maternity leave is important. The Maternity Protection Convention 183 of 2000 was discussed in detail followed by maternity benefits which are accessible to women in non-standard employment. The status of fathers in line

[1255] Chapter 1 of the thesis commenced on page 1.
[1256] Chapter 2 commenced on page 42.
[1257] Chapter 3 commenced on page 61.
[1258] Chapter 4 commenced on page 125.
[1259] Chapter 5 commenced on page 141.

with paternity leave was covered followed by a comparison of South Africa's access to maternity protection with other jurisdictions.

Chapter 6[1260] examined the SADC instruments that are relevant to the protection of non-standard workers. It commenced with a brief background of the SADC looking into the SADC instruments that are relevant to the protection of non-standard workers. The different instruments were discussed concluding with a discussion on the shortcomings associated with non-ratification of instruments relevant to the protection of non-standard workers in the SADC region.

The role of the ILO in protecting non-standard workers was covered in chapter 7.[1261] The chapter commenced with the development of the ILO followed by a discussion on the tripartite structure of the ILO. The rationale behind international law studies was explained supported by the constitutional basis for referring to international law. The ILO supervisory systems and mechanisms as well as how the instruments are developed were examined followed by the different instruments that are aimed at protecting atypical workers. The chapter concluded by an examination of South Africa's compliance with international instruments aimed at protecting atypical workers.

Chapter 8[1262] was the penultimate chapter with a comparative analysis of the protection of the workers in non-standard employment. The comparison was between South Africa, the Netherlands and the United Kingdom. Here, there were a few lessons for South Africa to learn with the aim of improving the current status of non-standard workers.

Chapter 9[1263] is the last chapter and contains the conclusion and overall recommendations.

9.3. Recommendations

In light of the above discussion, the study recommends the following:

The study recommends:

[1260] Chapter 6 commenced on page 188.
[1261] Chapter 7 commenced on page211.
[1262] Chapter 8 commenced on page 241.
[1263] Chapter 9 commenced on page 269.

9.3.1. Revision of concept of employee

First and foremost, the study recommends that a clear and straightforward re-examination or revision of the concept 'employee' be considered. It would be beneficial to include non-standard workers in the ambits of the different legislative definitions of who exactly an employee is because this is where the problems stem from. This inclusion will direct the employers to offer equal treatment and equal benefits to all workers, regardless of the nature of employment contract concerned. This will compel institutions to draft their employment contract with due consideration of the suitable entitlements which workers have access to in line with their remuneration, their job descriptions, the level of employment, for example.

9.3.2. Ratification of the Maternity Protection Convention 183 of 2000

The best way to improve the livelihood of female atypical workers is for South Africa to ratify the Maternity Protection Convention of 2000 and incorporate all its provisions into national law. By so doing, issues pertaining to lack of access to maternity protection will have been extinguished and **all** women will be able to enjoy maternity benefits regardless of the nature of their employment contract. Bearing in mind that often, ratification tends to bear little impact on the wellbeing of the patrons, it is aimed at covering, such ratification should be accompanied by enactment of the provisions into domestic law.

9.3.3. Enactment of international instruments into domestic law

Enactment of the provisions of already ratified Instruments into national law is recommended. In line with the supervisory mechanisms, some of the instruments that have not yet been enacted as national law should be enacted so that they may be applied in labour matters on a national basis as well. Such enactment may drive the legislature along the part of achieving better implementation of challenging issues such as lack of adequate protection afforded to non-standard workers.

9.3.4. Extension of labour protection to all workers

There should be an extension of labour protection to everyone who is engaged in the working environment regardless of the nature of their employment contract. Labour protection for workers should not be on the basis of the type of employment

contract that the worker finds him-/herself engaged in. By doing so, protection will be extended to all workers.

9.3.5. Regulated working hours for part-time workers

In the Netherlands, part-time workers receive permanent employment contracts with regulated working hours to reduce the statistics of the persons affected by the plight of atypical workers. This results in these part-time workers accessing benefits of traditional employees due to the nature of their employment being permanent employment contract. South Africa should adopt a system that allows for part-time workers to receive regulated employment conditions such as working hours.

9.3.6. Pro-rata contributions towards social insurance for all non-standard workers

The Netherlands has pro rata contributions towards social insurance for workers with part-time contracts. This is where workers contribute towards social insurance based on their remuneration. They have access to social insurance like permanent employees do, it contributes positively towards issues with social protection. South Africa, like the Netherlands should have specialised social insurance policies for part-time workers. They can access their social insurance that matched the contributions that they make and this can serve as a benefit.

9.3.7. Job security for independent contractors, freelancers and temporary workers

It is further recommended that the freelancers and temporary workers should receive some form of job security as may be suitable in accordance with the state. This may come through the creation of suitable employment contracts. Granting them access to benefits that are afforded to workers in standard employment.

9.3.8. Severance packages for fixed-term contracts

The study recommends that South Africa should introduce a system wherein a person whose fixed-term contract is terminated receives severance packages.

9.3.9. The introduction of the zero-hour contracts

The benefits of adopting the zero-hour contracts would be allowing the workers to take on many contracts and tenders at a time. This would bridge the gap between the lack of financial security as it would allow them to make more money to be able to sustain themselves. South Africa could introduce zero-hour contracts as a form of atypical work that bears more benefits as opposed to short-falls experienced in the other forms of atypical work that sometimes hoard workers while not making their stay in the institution worthwhile.

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