Improving maternity protection in the Lesotho workplace through foreign and international law considerations

TM Mosamane

orcid.org/0000-0001-8250-8112

Mini-dissertation submitted in partial fulfillment of the requirements for the degree *Masters of Law* in *Labour Law* at the North-West University

Supervisor: Dr A Botes

Graduation ceremony: October 2018

Student number: 29334969

This dissertation reflects the position of the law up until the 30th May 2018 when the research was completed.

ABSTRACT

Working provides a passage to a better life for both men and women globally. However, employment insecurity, discrimination, unfavourable working conditions and absence of maternity leave have acted as barriers for women to fully participate in the workplace. 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. The ILO has adopted the *Maternity Protection Convention*, 2000 (No. 183) supplemented by the *Maternity Protection Recommendation*, 2000 (No. 191) to promote maternity protection at work. Employment and non-discrimination, maternity leave, cash and medical benefits, health protection and breastfeeding are recognised by the ILO as principles of maternity protection. Thus, to achieve effective maternity protection, Member States to the ILO have to adopt these elements at national level.

The aim of this study is to improve Lesotho's maternity protection, which appears to be deficient with regard to the afore-mentioned. This is done by assessing Lesotho's legislative framework on maternity protection in order to crosscheck its compliance with international standards. The next part of the study explores the South African maternity protection which demonstrates significant progress from that of Lesotho. An analysis of the South African maternity protection is made with the intention of providing lessons for Lesotho, where it appears that Lesotho is lagging behind.

Keywords: international labour organisation, maternity protection, health protection, maternity leave, breastfeeding, discrimination, cash benefits, pregnancy

OPSOMMING

Om te werk bied 'n weg na 'n beter lewe vir beide mans en vrouens wêreldwyd. Alhoewel werksonsekerheid, diskriminasie, ongewenste werksomstandighede en die afwesigheid van kraamverlof hindernisse stel vir vrouens om ten volle te kan deelneem in die werksplek. Op grond hiervan het die Internasionale Arbeidsorganisasie (IAO), wat die goedkeuring en implementering van arbeidsstandaarde oorsien, kraambeskerming beskou as die sentrale punt om vrouens in staat te stel om haar rol in die werksplek en haar swangerskap te kan versoen. Voldoende kraambeskerming verseker dat vrouens op gelyke grondslag met mans met betrekking tot werk en beroep. Die IAO het die *Maternity Protection Convention*,2000 (No. 183), aangevul deur die *Maternity Protection Recommendation*, 2000 (No. 191), aanvaar om die beginsels van kraambeskerming by die werk te bevorder. Nie-diskriminasie ten opsigte van aanstelling, kraamverlof, kontant en mediese voordele, gesondheidsbeskerming en borsvoeding word deur die IAO erken as die beginsels van kraambeskerming. Die Lede State van die IAO sal dus die bogenoemde elemente moet instel op nasionale vlak om sodoende effektiewe kraambeskerming te verseker.

Die doel van die studie is om die kraambeskerming in Lesotho te verbeter, wat gebrekkig voorkom in terme van bogenoemde elemente. Die studie sal die wetgewende raamwerk in terme van kraambeskerming in Lesotho evalueer deur middel van kruisverwysing om die voldoening aan internasionale standaarde te bepaal. Die volgende deel van die studie ondersoek kraambeskerming in Suid-Afrika, wat betekenisvolle vordering toon. 'n Analise van kraambeskerming in Suid-Afrika word gedoen met die intensie om leiding te bied aan Lesotho, waar dit voorkom of Lesotho agterweë gebly het.

Sleutelwoorde: internasionaal arbeidsorganisasie, kraambeskerming, gesondheidsbeskerming, kraamverlof, borsvoeding, diskriminasie, kontantvoordele, swangerskap

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

Afr. Hum. Rts. L. J	African Human Rights Law Journal
AJHTL	African Journal of Hospitality Tourism and Leisure
APTU	Alliance of Progressive Trade Unions
BCEA	Basic Conditions of Employment Act
CC	Constitutional Court
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CILSA	Comparative and International Law of Southern Africa
EEA	Employment Equity Act
GG	Government Gazette
GN	Government Notice
ILJ	Industrial Law Journals
ILO	International Labour Organisation
J. Afr. L	Journal of African Law
J. S. Afri.L	Journal of South African Law
Juta's Bus. L	Juta's Business Law
LAC	Labour Appeal Court
LC	Labour Court
LAWSA	Law of South Africa
LLJ	Lesotho Law Journal

LRA	Labour Relations Act
MHSA	Mine Health and Safety Act
NEHAWU	National Education Health & Allied Workers Union
OHSA	Occupational Health and Safety Act
SADC	Southern African Development Community
SA Merc LJ	South African Mercantile Law Journal
SAJHRM	South Africa Journal of Human Resource Management
UN	United Nations
UIA	Unemployment Insurance Act
UIAA	Unemployment Insurance Amendment Act
UICA	Unemployment Insurance Contributions Act
UIF	Unemployment Insurance Fund
WHO	World Health Organisation

Chapter 1: Introduction and problem statement

1.1 Introduction

Maternity protection is recognised globally as one of the central issues in the workplace.[1] Protection of maternity ensures primarily that gender equality[2] in the workplace is achieved by minimising the impact of childbearing on working women.[3] The notion of equal rights was first established by the United Nations through its founding Charter which recognised the need to promote and encourage respect for human rights without distinction between men and women.[4] The UN has over the years adopted international human rights instruments such as the *Universal Declaration of Human Rights*, 1948, the *International Covenant on Civil and Political Rights*, 1966, and the *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979.[5] These instruments have been central to the promotion of equality between men and women in all spheres of life. Since they deal with universal human rights, they incorporate labour rights that are key to the protection of women at work. The protection of all labour rights around maternity is pivotal for substantive equality, and ultimately to protect the dignity of women.

1.2 Problem statement

Lesotho has a large number of women making up the workforce in both the formal and informal sectors of employment. As of 2013, the labour force comprised about 52,3 per cent of women.[6] When these women intend to expand their families whilst they are still under employment, they

---

1 ILO 2015 *Social protection for maternity: key policy trends and statistics* 2.

2 Equality in this context refers to substantive equality as compared to formal equality. Formal equality refers to equal treatment between men and women in the workplace while substantive equality deals with the removal of obstacles which prevent women from getting the same opportunities as men in employment. Thus, special treatment for women is necessary in order to ensure that they receive equal opportunities and equal enjoyment of rights in the workplace. See Smith 2014 *Afr. Hum. Rts. L. J* 611-613.

3 ILO 2007 *Safe maternity and the world of work* 2.

4 A 1(3) of the *United Nations Charter* (1945).

5 Lesotho and South Africa have both ratified these instruments. The intention of the study is however not to critically discuss whether Lesotho and South Africa comply with the obligations of UN as Member States. Reference is merely made to the UN instruments to establish a baseline for relevant human rights of women that need protection in particular the right to equality and dignity.

6 Frota "Cash and Medical benefits for pregnant and breastfeeding women" 10.

naturally would have to seek refuge in the labour laws for possible maternity protection. Prior to statutory intervention, the common law regulated the employment relationship, in terms of which little to no protection was afforded to pregnant employees. An employer could easily dismiss an employee at any time, without even providing a reason for the dismissal.[7] Pregnant employees or even female employees *intending* to become pregnant therefore had very little job security, worked under unsafe circumstances and were regularly victims of unfair gender discrimination.[8]

Due to the escalation of a call by international trade unions to recognise labour matters owing to poor work conditions after the First World War, intervention was necessary to achieve this goal.[9] Therefore, the International Labour Organisation (ILO) was founded shortly after the war, to establish basic human and economic rights in the workplace.[10]

The ILO is a United Nations agency primarily concerned with setting the international standards of labour in workplaces.[11] These standards are legal instruments in the form of Conventions and Recommendations.[12] Unlike Recommendations, Conventions are legally binding instruments subject to ratification by Member States.[13] Once a Convention is ratified, it means a Member State acknowledges it as a legally binding document.[14]

Maternity protection has been under the ILO's spotlight since its inception in 1919.[15] Various instruments on maternity protection such as the *Maternity Protection Convention*, 2000 (No. 183) and the *Maternity Protection Recommendation*, 2000 (No. 191) have seen the light over the years. The Maternity Convention provides for maternity leave, health protection of pregnant employees, job security and maternity benefits. For extensive coverage of maternal and

---

7 Grogan *Workplace Law* 3.

8 Grogan *Workplace Law* 3. South Africa sources are used when contextualising the Lesotho law due to the similarity of common law. Common law that was applicable in South Africa was introduced in Lesotho through the *General Law Proclamation 2B* of 1884 which stated that law to be administered in Lesotho (Basutoland then) shall as nearly as circumstances permit be the same as the law for the time being in force in the colony of the Cape of Good Hope (the present Western Cape, South Africa). It is through the said Proclamation that Lesotho's common law is similar to that of South Africa. See Poulter 1969 *J. Afr. L* 128-143.

9 Valticas *International Labour Law* 18.

10 Servais *International Labour Law* 24.

11 Sengenberger 2013 *The International Labour Organization* 9.

12 A 19 of the *ILO Constitution*, 1919.

13 ILO 2005 *Rules of the Game: A brief introduction to International Labour Standards* 19.

14 ILO 2005 *Rules of the Game: A brief introduction to International Labour Standards* 19.

15 ILO 2010 *Maternity at work: Review of national legislation* 1.

equality rights, the aforesaid instruments are backed by the *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111) which strives for equality by prohibiting discrimination at the workplace and the *Social Security (Minimum Standards) Convention*, 1952 (No. 102) which recognises the need for maternity benefits. The position of the ILO will be fully analysed in Chapter 2 of this study.

Lesotho has been a member of the ILO since 1966.[16] As a Member State, Lesotho must abide by ratified international standards set by the ILO.[17] Even though Lesotho has not ratified the *Maternity Protection Convention*, it is not excused from observing the aforesaid international standards on maternity protection and equality rights.[18]

The essential legislative framework on maternity protection in Lesotho is the Labour *Code Order* 24 of 1992 (hereinafter "the Code"). The Code contains provisions on various aspects relevant to maternity protection, but it seems to be lacking in others. This consequently leaves female employees in Lesotho vulnerable. This is illustrated in the matter of '*Makamohelo Makafane v Zhongtian Investment (Pty) Ltd*,[19] where a female employee (applicant) was dismissed after delivering to the employer a letter from the hospital stating that she was pregnant.[20] The employer responded by saying it could not continue to work with her because of her pregnancy.[21] The Labour Court held that her dismissal was unfair and reinstated her to her former position.[22] 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.

The Republic of South Africa has, over the years, also made provisions for maternity protection through numerous legal instruments. The *Constitution of the Republic of South Africa*, 1996 lays down the foundation for protection of women in the workplace.[23] It is backed by legal

---

16 http://www.ilo.org/dyn/normlex/en/f?p=1000:11003:::NO::: (accessed 28 April 2017).
17 ILO 2005 *Rules of the Game: A brief introduction to International Labour Standards* 19.
18 ILO *Maternity Resource Package: International rights and guidance on Maternity Protection at work* 7.
19 '*Makamohelo Makafane v Zhongtian Investment (Pty) Ltd* LC/76/2013.
20 '*Makamohelo Makafane v Zhongtian Investment (Pty) Ltd* LC/76/2013 para 6.
21 '*Makamohelo Makafane v Zhongtian Investment (Pty) Ltd* LC/76/2013 para 7.
22 '*Makamohelo Makafane v Zhongtian Investment (Pty) Ltd* LC/76/2013 para 11-12.
23 S 9(3) of the *Constitution of the Republic of South Africa*, 1996.

instruments such as the *Employment Equity Act*,[24] the *Basic Conditions of Employment Act*,[25] the *Labour Relations Act*,[26] *Unemployment Insurance Act*,[27] *Occupational Health and Safety Act*[28] and the *Mine Health and Safety Act*.[29] Because of the maternity provisions in these instruments, the opinion is held that proper protection is offered in terms of job security, specific provisions regarding discrimination, social security and safety at work. In these respects, it seems South Africa might be a few steps ahead of Lesotho.

1.3 Objectives of the study

The primary objective of this study is to highlight the importance of maternity protection at a workplace and to determine the extent to which Lesotho conforms to the international standards on maternity protection, as set out by the ILO. The secondary objective is to consider the best practices in South African maternity protection. The purpose of considering South Africa is because it seems that South Africa provides appropriate protection to female employees in accordance with international standards, whilst Lesotho seems not to do so. The final objective of the study is to make recommendations for Lesotho, based on the requirements of the ILO on maternity protection and having considered the practices of South Africa in terms of maternity protection.

1.4 Framework of study and research methodology

This study will be divided into five chapters. Chapter one is the introduction and the problem statement. Chapter two provides an international perspective on maternity protection by focusing mainly on the position of the ILO. This chapter analyses the standards set by the ILO on different aspects of maternity protection. Chapter three shifts the focus to Lesotho's legislative framework on maternity protection, in order to establish the sufficiency of protection currently provided to female employees. Chapter four explores the South African maternity protection, to find potential lessons for Lesotho where South Africa appears to have made significant progress. Best practices in South Africa will be considered to ultimately make

---

24 55 of 1998 (Hereinafter EEA).
25 75 of 1997 (Hereinafter BCEA).
26 66 of 1995 (Hereinafter LRA).
27 63 of 2001 (Hereinafter UIA).
28 85 of 1993 (Hereinafter OHSA).
29 29 of 1996 (Hereinafter MHSA).

recommendations. Chapter 5 will conclude the study, containing closing remarks and recommendations for Lesotho in light of the findings made throughout the study.

This study is based on a literature study through relevant textbooks, journals, legislation, case law and international instruments. The study will also make use of applicable electronic sources as well as newspaper articles.

Chapter 2: An international perspective on maternity protection: the position of the ILO

2.1 Introduction

In ensuring the development and subsequent protection of employees' labour rights across the globe, the International Labour Organisation (ILO) was established by the signatories to the Peace Treaty of Versailles[30] and is vested with the authority to set minimum labour standards addressing different areas of work. By setting these minimum standards, the ILO aims to protect employees and to cultivate a healthy and stable working environment, conducive to an effective and productive workplace.[31]

Various areas of labour law are covered by the ILO; among others job security, social protection, forced labour, collective bargaining and atypical employment. One of the areas receiving particular attention is maternity and the protection of (mainly female)[32] employees in all matters related to pregnancy. Pregnancy, maternity, or the intention to have children in the future, places a female employee in a different situation compared to a male employee, and will likely influence her availability for work and her workplace needs. As a result, the specific needs of a female employee may lead to discriminatory practices against women in the labour market. Consequently, one could expect the adoption of special provisions of law to provide protection to female employees in matters related to pregnancy, taking into account their reproductive roles in society.[33] From its inception in 1919, maternity protection has been one of the focal points of the ILO, as evidenced by adopting an instrument to this effect in the year it was established.[34]

---

30 Valticas *International Labour Law* 27.

31 Cruz 2012 *Good Practices and challenges on the Maternity Protection Convention, 2000 (No. 183) and the workers with Family Responsibilities Convention 1981 (No. 156): A comparative study* 7.

32 Since women bear the principal obligation of childbearing, the ILO devotes greater attention to their protection in order to enable them to reconcile work with their reproductive roles. See ILO 2007 *Safe maternity and the world of work* 2.

33 ILO 2007 *Safe maternity and the world of work* 2.

34 ILO 2010 *Maternity at Work: Review of national legislation* 1.

This chapter is aimed at an exposition of maternity protection as prescribed by the ILO through different instruments and programmes. All Member States of the ILO, inclusive of Lesotho and South Africa,[35] are obligated to abide by the minimum standards to ensure the proper protection of every employee.[36] .

2.2 Labour issues prior to the ILO and the need for intervention

Historically, a contract of employment can be traced as far back as the *locatio conductio operarum* of Roman law. This concept was later incorporated into the Master and Servant contract of English law.[37] In the absence of statutory rules or restrictions, parties enjoyed full freedom of contract; this meant that they could freely determine the terms and conditions of their relationship as they saw fit.[38] As a result, the negotiations in concluding a contract of employment tended to favour employers over the employees because employees were desperate to earn a living.[39] Employees were subsequently inclined to accept any offer presented, including unfavourable working conditions. Employers seem to have been able to use their authority as master to impose terms and conditions of employment detrimental to the employees, knowing it was unlikely that the conditions proposed would be challenged.[40]

Consequently, employees would often work long hours for very low wages, there were no restrictions on child labour, and women would work under harsh conditions, whether they were pregnant or not.[41] Logic dictates that a lack of comprehensive labour laws meant that female employees were especially vulnerable, as their unique role in society and the impact it might have on their employment seemed not to have been recognised. Female employees were either expected to return to work after a short period of time following the birth of a child, or sometimes failed to retain their jobs.[42] Apart from unfavourable working circumstances or a lack of job security, female employees could also be victims of discrimination in terms of access to

---

35 www.ilo.org/public/english/standards/relm/country.htm (accessed 17 May 2018).

36 www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (accessed 28 August 2017).

37 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 105. The South African employment relationship was influenced by the Master and Servant contract of the English law. See Swiegers *Britain and the labour question in South Africa: The interaction of State, capital, labour and colonial power*, 1867-*1910* 126.

38 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 105-106.

39 Alcock *History of the International Labour Organisation* 4.

40 Alcock *History of the International Labour Organisation* 4.

41 Alcock *History of the International Labour Organisation* 4.

42 Alcock *History of the International Labour Organisation* 4.

employment because of their biological roles in society.[43] A possible reason for this could be that the employer may not have wanted to deal with the absence of an employee during childbirth and subsequent child care.

As nations became more industrialised, intervention by an international organisation was necessary to address the unfavourable conditions workers were subjected to and among other aspects address the tenuous position of female employees.

2.3 Establishment of the International Labour Organisation

A call for the establishment of an international organisation addressing labour issues was initiated by the likes of Robert Owen,[44] Adolphe Blanqui,[45] Villerme[46] and Edouard Ducpetiaux.[47] However, the idea was mainly promoted by Daniel Legrand through his numerous appeals to the main countries in Europe.[48] His contention was that countries were more concerned about generating income and less concerned about the plight of workers.[49] This, according to Legrand, would lead to social unrest. He further emphasised that the success of a country depended on the physical and moral wellbeing of its workers; therefore, industrialised countries should come

---

43 Tilly and Scott *Women, Work and Family* 3.

44 Hatcher 2013 *European Journal of Training and Development* 417-424. Robert Owen (1771-1858) was a social reformer born in Wales. While in Manchester during the British Industrial Revolution, he was saddened by the deteriorating working conditions of workers. He persuaded the British government to change labour laws, particularly child labour laws. He even called for factory owners to 'be aware of the injustice and useless cruelty inflicted upon the most helpless in our society.' In 1818 at the Congress of Aix-la-Chapelle, Robert Owen also tried to convince European nations to improve the conditions of workers and called for an international regulation on labour issues. His argument was that countries attempting to improve the conditions of workers would be outcompeted by other countries which did not.

45 Bernaz *Business and Human Rights* 47. Jerome Adolphe-Blanqui (1798-1854) was an economist born in Nice, France. He believed that the only way to improve working conditions is by cooperation between different governments to set up an international regulation of labour matters.

46 Bernaz *Business and Human Rights* 46. Louis-Rene Villerme (1782-1863) was a physician and economist born in Paris, France. He is known for his publication on the physical and moral state of workers in cotton, wool and silk factories. The study highlighted the state of working conditions, child labour, hours of work and low wages. His proposition was that French and international manufacturers should come together and limit the number of working hours.

47 Bernaz *Business and Human Rights* 47. Edouard Ducpetiaux (1804-1868) was a penologist born in Brussels, Belgium. Ducpetiaux reflected on the notion of international labour regulation as a solution to the improvement of working conditions. He believed that this cause would be effectively executed by intellectuals joining hands.

48 Sinha *Industrial Relations, Trade Unions and Labour Legislation* 558. Daniel Legrand (1783-1859) was born in Basel, Switzerland but moved to Alsace in France with his parents. He presented the idea of an international labour legislation to France, Germany, Great Britain and Switzerland in the hope to convince them. He also subscribed to the idea of an international regulation because countries which improved working conditions meant that they would incur higher labour costs and as a result, they would suffer from competition by other countries which did not bother about improved working conditions.

49 Alcock *History of the International Labour Organisation* 6.

together and discuss the appalling conditions of workers.[50] The general proposal put forward by the above-mentioned individuals was to have an organisation capable of setting universal standards for workplaces around the globe.

Part XIII of the Versailles Peace Treaty signed in 1919 established the ILO as an entity meant to deal with universal labour issues.[51] The Treaty of Versailles was signed by twenty-nine States which automatically became the ILO founding members upon ratification of the Treaty, while thirteen other States that had been invited were also considered founding members of the ILO.[52] South Africa was part of the body of founding members, while Lesotho was not.

The first International Labour Conference held in 1919 in Washington adopted six international labour standards. The said international standards were the *Hours of Work (Industry) Convention* (No.1), *Unemployment Convention* (No.2), *Maternity Protection Convention* (No.3), *Night Work (Women) Convention* (No.4), *Minimum Age (Industry) Convention* (No.5) and the *Night Work of Young Persons (Industry) Convention* (No.6). Evidently, the import of matters pertaining to maternity and the position of female employees in the workplace was recognised by the ILO, and thus placed at the top of its agenda.

In 1946, the ILO became the first specialised UN agency after the foundation of the UN.[53] The Committee of Experts on the Application of Conventions and Recommendations[54] affirmed working in cooperation with other UN agencies and intergovernmental organisations in gathering information that helps the CEACR to assess the application of some of the Conventions. The CEACR even underlined that the international labour standards and provisions of the UN human rights treaties supplement each other in areas common to both

---

50 Alcock *History of the International Labour Organisation* 6.

51 Servais *International Labour Law* 22; Bernaz *Business and Human Rights* 49.

52 Treaty of Versailles, 1919. The 29 signatories were Belgium, Bolivia, Brazil, British Empire (Great Britain), Canada, Australia, South Africa, New Zealand, India, China, Cuba, Czechoslovakia (Czech Republic, Slovakia), France, Greece, Guatemala, Haiti, Honduras, Italy, Japan, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, Serbo-Croatian-Slovene State (Serbia, Croatia, Slovenia), Siam (Thailand), Uruguay. The other 13 countries were Argentina, Chile, Colombia, Denmark, Netherlands, Norway, Paraguay, Persia (Iran), Salvador, Spain, Sweden, Switzerland and Venezuela.

53 Sengenberger 2013 *The International Labour Organization* 9.

54 Hereinafter CEACR. The CEACR was established in 1926 to provide an impartial and technical evaluation of the state of the application of international labour standards by Member States. It is composed of 20 eminent jurists from different regions of the world appointed on a three-year term by the Governing Body of the ILO. ILO 2005 *Rules of the Game: A brief introduction to International Labour Standards* 102.

organisations.[55] The two organisations have thus worked in solidarity to enforce international instruments.

Since its establishment, the aim of the ILO has been to provide decent employment for both men and women, to improve social protection; and to reinforce social dialogue between governments, employers and workers.[56] However, central to the purpose of the ILO is the adoption of international labour standards in the form of Conventions and Recommendations.[57] To date, the ILO has adopted 189 Conventions, 205 Recommendations and 6 Protocols.[58] In formulating these international labour standards, the ILO utilises its unique tripartite structure consisting of governments, employers and workers to engage all stakeholders on an area of concern before adopting a standard.[59]

The international labour standards referred to above should be used as a yardstick by governments in consultation with employers and workers when implementing and drafting their national labour laws and policies.[60] As evidenced previously, the ILO began adopting conventions dealing with different labour issues as early as 1919, and has been doing so continuously ever since. The organisation also reviews and updates the standards from time to time to stay relevant in the changing world of work and, in some instances, to broaden their scope of coverage.[61] Upon ratification, a Convention becomes binding to a Member State. However, some of the Conventions which deal with matters that are regarded as the core labour standards are binding on Member States purely by virtue of their membership to the ILO.[62]

As an additional function of the ILO, it has adopted mechanisms that assist Member States on the effective implementation of the standards they have ratified.[63] If there are any problems

---

55 ILO: CEACR Report III (Part 1A) 2017 para 85.

56 ILO 2010 *Achieving MDG 5 through Decent Work* 2. .

57 ILO 2005 *Rules of the Game: A brief introduction to International Labour Standards* 15.

58 www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB;1:0::NO::: (accessed 25 August 2017).

59 Valticas *International Labour Law* 28.

60 Cruz 2012 *Good Practices and challenges on the Maternity Protection Convention, 2000 (No. 183) and the workers with Family Responsibilities Convention 1981 (No. 156): A comparative study* 23.

61 For instance, the *Holidays with Pay Convention (Revised)* 1970 (No. 132), *Seafarers' Identity Documents Convention (Revised)* 2003 (No. 185) and the *Maternity Protection Convention* 2000 (No. 183).

62 Examples of such Conventions are *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111), *Worst Forms of Child Labour Convention*, 1999 (No. 182), *Minimum Age Convention*, 1973 (No. 138) and the *Abolition of Forced Labour Convention*, 1957 (No. 105).

63 ILO 2005 *Rules of the Game: A brief introduction to International Labour Standards* 10.

encountered in the application of those international labour standards at national level, the ILO provides technical assistance to the Member States.[64] This is done by sending ILO officials and experts to meet with government officials in order to discuss problems and solutions on application of an international standard.[65] Member States are also assisted in drafting their national legislation to conform to the international labour standards.[66]

2.3.1 Adoption of international labour standards

The International Labour Office arranges the process of adoption of the Conventions and Recommendations. Prior to the adoption of the international labour standards, the Labour Office identifies issues of concern amongst Member States and thereafter prepares a report which is circulated to governments, employers and workers, for comment.[67] A second report is then prepared with a draft instrument for discussion at the International Labour Conference where amendments will be made if necessary. After the draft has been discussed, it will be adopted if it attains a two thirds majority of the Member States' votes.[68]

2.3.2 Ratification of international labour standards

According to the ILO Constitution,[69] Member States have an obligation to submit standards adopted at the International Labour Conference to their respective national authorities for consideration.[70] Upon ratifying a Convention, it becomes binding on that State and it will be subject to the ILO supervisory body to ensure that the standard is correctly implemented.[71] A Member State may decide not to ratify a Convention but still refer to the standard for guidance while drafting their national labour laws. Conversely, Member States may first develop their

---

64 ILO 2005 *Rules of the Game: A brief introduction to International Labour Standards* 101.
65 ILO 2014 *Rules of the Game: A brief introduction to International Labour Standards* 114.
66 ILO 2014 *Rules of the Game: A brief introduction to International Labour Standards* 114.
67 Cruz 2012 *Good Practices and challenges on the Maternity Protection Convention, 2000 (No. 183) and the workers with Family Responsibilities Convention 1981 (No. 156): A comparative study* 21.
68 A 19(2) of the *ILO Constitution*, 1919.
69 A 19 of the *ILO Constitution*, 1919.
70 ILO 2005 *Rules of the Game: A brief introduction to International Labour Standards* 19; Cruz 2012 *Good Practices and challenges on the Maternity Protection Convention, 2000 (No. 183) and the workers with Family Responsibilities Convention 1981 (No. 156): A comparative study* 21.
71 ILO 2005 *Rules of the Game: A brief introduction to International Labour Standards* 19.

national laws and policies to be in compliance with an international standard before it ratifies the ILO standard.[72]

In 1998, the International Labour Conference adopted the Declaration on Fundamental Principles and Rights at Work, after four principles had been identified as essential in tackling social injustices. The principles relate to the freedom of association and the recognition of collective bargaining, elimination of forced or compulsory labour, abolition of child labour, and the elimination of employment discrimination which is relevant for the present discussion.[73] According to the Declaration, Member States have an obligation and commitment to "respect, promote and realise" these principles regardless of whether or not they have ratified their Conventions.[74] The obligation is imposed on Member States simply by virtue of their membership to the ILO.

2.4 ILO and maternity protection

As already pointed out, the international community has for a long time identified maternity protection as a tool for the achievement of gender equality and protection of women at work.[75] The need for protection arose as a result of discrimination against women in employment because of their reproductive roles and the impact it might have on their work. Women had to be enabled to find a balance between their maternal roles on the one hand, and to access and remain in employment on the other. Commitment to afford them protection is evidenced by the adoption of the *Maternity Protection Convention* as one of the first international labour standards of the ILO at its foundation in 1919. The importance of maternity protection under the ILO can be drawn from the following statement made by the International Labour Office:

> Maternity is a condition which requires differential treatment to achieve genuine equality and in this sense, it is more of a premise of the principle of equality than a dispensation. Special maternity protection measures should be taken to enable

---

72 Cruz 2012 *Good Practices and challenges on the Maternity Protection Convention, 2000 (No. 183) and the workers with Family Responsibilities Convention 1981 (No. 156): A comparative study* 21.

73 Conventions covering these principles are *Freedom of Association and Protection of the Right to Organize Convention*, 1948 (No. 87), *Right to Organize and Collective Bargaining Convention*, 1951 (No. 98), *Forced Labour Convention*, 1930 (No. 29), *Abolition of Forced Labour Convention*, 1957 (No. 105), *Minimum Age Convention* 1973 (No. 148), *Worst Forms of Child Labour Convention*, 1999 (No. 182), *Equal Remuneration Convention*, 1951 (No. 100), *Discrimination Employment and Occupation Convention,* 1958 (No. 111).

74 Para 2 of the ILO Declaration on Fundamental Principles and Rights at Work.

75 ILO 2015 *Social protection for maternity: key policy trends and statistics* 2.

> women to fulfil their maternal role without being marginalised in the labour market.[76]

The concern of the ILO is and has been since its foundation to prevent women from being treated differently in workplaces, due to their sex and gender.[77] Of particular importance to this study, the ILO recognises women's reproductive role.

The ILO has adopted three Conventions addressing maternity protection at the workplace. The abovementioned convention[78] was the first to precisely deal with maternity protection.[79] The *Maternity Protection Convention (Revised)*, 1952 (No. 103)[80] was adopted to broaden the scope of protection by the ILO due to the increasing participation of women in the labour market.[81] The up to date standard is the *Maternity Protection Convention*, 2000 (No. 183)[82] and the accompanying *Maternity Protection Recommendation*, 2000 (No. 191).[83] The role of the Recommendation is to supplement the Convention by providing guidelines for the application of the Convention.[84]

Convention No. 183 is divided into five different elements, namely scope, maternity leave, cash and medical benefits, health protection, employment protection and non-discrimination. These components of the Convention will subsequently be analysed.

2.4.1 Scope of coverage

Unlike its predecessors, Convention No. 183 has broadened the scope of protection to include all women. Convention No. 3 afforded protection to only women working in public or private industrial or commercial undertakings.[85] Convention No. 103 included women working in non-

---

76 International Labour Office, 1996.

77 ILO 2010 *Maternity at Work: Review of national legislation* 1.

78 Hereinafter Convention (No. 3).

79 It is no longer open for ratification but remains in force in Member States that have not denounced it.

80 Hereinafter Convention No. 103. This Convention is not open for ratification anymore but remains in force to those that have ratified it unless they have subsequently ratified the latest convention.

81 Naeima *Working women and their rights in the workplace: international human rights and its impact on Libyan Law* 119.

82 Hereinafter Convention No. 183. So far 34 Member States have ratified this Convention. However, Lesotho and South Africa are yet to ratify the said Convention. See www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INTRUMENT_ID:312328 (accessed 09 October 2017).

83 Hereinafter Recommendation (No. 191).

84 *Maternity Protection Recommendation*, 2000 (No. 191); ILO 2012 *Handbook of procedures relating to international labour Conventions and Recommendations* 2.

85 A 3 of the *Maternity Protection Convention*, 1919 (No. 3).

industrial workplaces, in agriculture and women working from home.[86] The present Convention has, however, extended the coverage of protection to include all women regardless of their occupation, as well as women employed in atypical forms of work[87] such as part time, casual, seasonal and informal workers. The earlier conventions focused primarily on women who fell under the standard employment relationship; however, as atypical employment increased, it resulted in a large number of women engaged in atypical forms of employment being excluded from coverage.[88] The most recent Convention now extends coverage to these atypical employees. Convention No. 183 is gender specific, in that it provides maternity protection only to females. However, Recommendation No. 191 makes provision for parental leave, which should include leave for fathers.[89]

2.4.2 Health protection

Protective health standards in the workplace are an important aspect of maternity protection. The required occupational health and safety of female employees and their children during pregnancy and after childbirth must be promoted. The aim is to protect women from workplace hazards that may cause pregnancy complications and or affect their health or their child's health.[90] Convention No. 183 imposes an obligation on Member States to take measures to ensure that pregnant and breastfeeding workers are not subjected to work that may be harmful to their health or that of the child.[91] This could include work that requires physical effort beyond what can reasonably be expected from a pregnant or nursing mother. The provision could, for instance, force employers to provide the necessary protection in a workplace where potentially toxic or hazardous substances are present, such as in the mining industry or wastewater treatment plants.

Recommendation No. 191 raises the standard on how to safeguard the health of a pregnant or nursing mother and that of her child. It lays down guidelines in item 6 on ensuring safer working conditions. Employers must undertake risk assessments at workplaces to ensure a safe

---

86 A 1 of the *Maternity Protection Convention (Revised)*, 1952 (No. 103).
87 A 1, A 2(1), A 2(2) of the *Maternity Protection Convention*, 2000 (No. 183).
88 ILO 2010 *Maternity at Work: Review of national legislation* 37.
89 Item 10 of the *Maternity Protection Recommendation*, 2000 (No. 191).
90 Paul 2004 *Healthy beginnings: Guidance on safe maternity at work* 9.
91 A 3 of the *Maternity Protection Convention*, 2000 (No. 183).

and healthy workplace.[92] If risks are identified, alternative measures should be implemented. Alternative measures include elimination of the risk, adaptation of women's conditions of work, a transfer to another post without loss of pay, and paid leave when the transfer is not possible.[93] Importantly, alternative measures should be taken according to item 6(3) if the work is physically demanding and involves exposure to hazardous biological, chemical and physical agents.[94] National laws of some of the ILO's Member States already make provisions to transfer pregnant or nursing women to a safer job or working environment if a risk to her health or that of her child is established.[95]

The Recommendation goes on to provide that pregnant or nursing women should not perform night work if it is medically inadvisable for them to do so.[96] Furthermore, pregnant women should be afforded time to regularly go for medical check-ups, as long as they have furnished the employer with adequate notice of their absence.[97] Time off for medical check-ups is fundamental for working women in order to monitor and avoid complications that arise from pregnancy and childbirth.[98]

2.4.3 Maternity leave

ConventionNo.183 mandates a longer period of maternity leave than was prescribed by the previous conventions (namely 12 weeks). This Convention requires Member States to provide a maternity leave period of no less than 14 weeks,[99] which includes a compulsory period of six weeks after the birth of the child.[100] This means that female employees are not allowed to return to work or be instructed to return to work by the employer during this period.

---

92 Item 6 of the *Maternity Protection Recommendation*, 2000 (No. 191).
93 Item 6(2) of the *Maternity Protection Recommendation*, 2000 (No. 191).
94 Item 6(3) of the *Maternity Protection Recommendation*, 2000 (No. 191).
95 ILO 2010 *Maternity at Work: Review of national legislation* 77. The position in France is that in the event a pregnant woman or breastfeeding mother is exposed to a risk, the employer is obliged to temporarily transfer her to another position which is safe for her condition. Likewise, in Iceland, if an assessment indicates that during the period of pregnancy or after childbirth the health of a woman seems to be in danger, the employer is required to temporarily alter her working hours.
96 Item 6(4) of the *Maternity Protection Recommendation*, 2000 (No. 191).
97 Item 6(6) of the *Maternity Protection Recommendation*, 2000 (No. 191).
98 Paul 2004 *Healthy beginnings: Guidance on safe maternity at work* 9.
99 A 4(1) of the *Maternity Protection Convention*, 2000 (No. 183).
100 A 4(4) of the *Maternity Protection Convention*, 2000 (No. 183).

The standards protecting women during the prenatal period are particularly important to deter pregnant workers from continuing to work under circumstances that pose a risk to their health. It is equally important to safeguard the health of the mother and child *after birth* due to high maternal mortality which occurs shortly after giving birth.[101] This underlines the importance of compulsory postnatal leave for the mother to be able to recover mentally and physically.[102] The compulsory leave during the postnatal period is similarly vital for the development of the child. According to Ellemes and Kalembo,[103] among other researchers, the wellbeing of a new-born is dependent on the care of and bonding with the mother. The period after childbirth is described as a period where the baby naturally indicates its needs to the mother, thus establishing a long-term relationship. Lack of bonding between the mother and child during that period is likely to have a negative physical and psychological impact on the child.[104] Furthermore, this period encourages women to take enough rest, and eliminates the danger of them returning to work before being fully recovered from childbirth.[105]

In case of complications arising out of pregnancy or the birth of a child, the leave should be extended.[106] Such period of extension is at the discretion of Member States. The importance attached to the extension of leave is that it prevents long term health risks and costs that would arise if the complications are not treated immediately.[107] Recommendation No. 191 goes further (than Convention No. 183) by urging Member States to increase the maternity leave period to at least 18 weeks. The Recommendation stipulates that where more than one child is born at the same time, the period of maternity leave should also be extended.[108]

The Recommendation further states that fathers should be allowed to take the mother's remaining maternity leave if she passes away shortly after giving birth or is incapacitated to the extent that she cannot take care of the child.[109] As indicated earlier, the Recommendation makes provision for parental leave which will also be extended to fathers.[110] This leave should

---

101 ILO *Maternity Protection Resource Package: Maternity leave and related types of leave* 2.
102 ILO *Maternity Protection Resource Package: Maternity leave and related types of leave* 2.
103 Ellemes and Kalembo 2016 *International Journal of Nursing Sciences* 362.
104 Ellemes and Kalembo 2016 *International Journal of Nursing Sciences* 363.
105 ILO 2014 *Maternity and paternity at work: Law and Practice across the world* 8.
106 A 5 of the *Maternity Protection Convention*, 2000 (No. 183).
107 ILO 2014 *Maternity and paternity at work: Law and Practice across the world* 14.
108 Item 1 of the *Maternity Protection Recommendation*, 2000 (No. 191)
109 Item 10 of the *Maternity Protection Recommendation*, 2000 (No. 191).
110 See para 2.4.1.

be available upon lapse of maternity leave.[111] Parental leave is not gender specific in that it equally gives fathers the opportunity to support the mother and play a role in the development of the child.[112]

2.4.4 Cash benefits

During maternity leave, female employees temporarily cease to work. Since the ILO does not prescribe for maternity leave to be paid leave, female employees will not necessarily receive their wages during this period.[113] Under these circumstances cash benefits will be necessary to enable them to continue maintaining themselves and their families. Therefore, women who are employed in ILO Member States which do not provide paid maternity leave, should be entitled to cash benefits[114] sufficient to take care of herself and the child during maternity leave.[115] The amount ought to be at least two-thirds of the earnings she received prior to maternity leave.[116] This minimum provided in Convention No. 183 notwithstanding, Recommendation No. 191 suggests that cash benefits should be raised to the full amount of the earnings she received prior to maternity leave.[117] If she receives the full amount, the female employee will be able to maintain a suitable standard of living for her child and family. She will not feel any effect of income suspension or shortage of income that would have been caused by maternity leave. Thus, it will not be necessary for her to rush back to work. This recommendation would, however, only be feasible for developed countries with strong economies; it would be difficult for developing countries to sustain such payments.[118]

Member States have to ensure that the conditions for qualifying for cash benefits allow as many female employees as possible to qualify.[119] Nonetheless, women who do not qualify for cash benefits should be assisted through social assistance.[120] *Social assistance* is a tax-financed form

---

111 Item 10(3) of the *Maternity Protection Recommendation*, 2000 (No. 191).

112 Matthias 1995 *CILSA* 251; Dupper 2002 *Stellenbosch Law Review* 90; Smit 2011 *Journal of Comparative Family Studies* 18.

113 In over half of the Member States investigated by the ILO, maternity leave is either unpaid, payment is less than two-thirds of usual earnings or not provided for the entire duration of maternity leave at all. See ILO 2010 *Maternity at Work: Review of national legislation* 20.

114 A 6(1) of the *Maternity Protection Convention*, 2000 (No. 183).

115 A 6(2) of the *Maternity Protection Convention*, 2000 (No. 183).

116 A 6(3) of the *Maternity Protection Convention*, 2000 (No. 183).

117 Item 2 of the *Maternity Protection Recommendation*, 2000 (No. 191).

118 ILO 2014 *Maternity Protection in SMEs: An international review* 20.

119 A 6(5) of the *Maternity Protection Convention*, 2000 (No. 183)

120 A 6(6) of the *Maternity Protection Convention*, 2000 (No. 183).

of social security provided by the State to those who are in need, while *social insurance* encompasses employer and employee contributory schemes intended to provide income security during periods where one is unable to work due to contingencies such as maternity.[121] It follows therefore that an employee has to be a contributor in order to make a claim for benefits under social insurance schemes. While Member States should ensure that the conditions for qualifying for cash benefits can be satisfied by a majority of women, it is inevitable that not all women will qualify. Many low-paid workers cannot afford to contribute towards social insurance schemes. These are women who would then require social assistance.[122]

Financial support during unpaid maternity leave is crucial in terms of economic and health protection. The intention of cash benefits is to provide income security during the unpaid maternity leave period when women are unable to generate an income.[123] Cash benefits furthermore safeguard a pregnant employee from delaying maternity leave or returning too soon after the birth, for fear of losing wages, especially when her health and that of the child require a longer maternity leave period.[124] Without cash benefits, pregnant or breastfeeding women could put themselves in danger and under pressure to work, so that their families do not suffer economically.[125] The cash benefits also assist women with maternity costs, such as medical check-ups.[126]

Convention No. 183 provides that payment of cash benefits should not be the sole responsibility of the employer.[127] Rather, cash benefits should be financed through a compulsory social insurance or public fund.[128] The rationale behind the idea of unburdening employers is to promote access to the labour market for women. Employers are likely to discriminate against women (when it comes to retaining or recruitment) into the workplace to avoid the costs of

---

121 Strydom *et al Essential Social Security Law* 6-10.
122 Darooka Social Security: A Woman's Human Right 9; Van Ginneken *Extending Social Security: Policies for developing countries* 70.
123 ILO 2007 *Safe maternity and the world of work* 6.
124 Dupper 2001 *Stellenbosch Law Review* 425.
125 ILO 2015 *Social protection for maternity: Key policy trends and statistics* 1.
126 ILO *Maternity Protection Resource Package: Cash and medical benefits* 4.
127 A 6(8) of the *Maternity Protection Convention*, 2000 (No. 183).
128 A 6(8) of the *Maternity Protection Convention*, 2000 (No. 183).

maternity benefits.[129] This negatively impacts on the ILO's objective to achieve gender equality in the workplace, particularly with reference to the appointment of women of child-bearing age. In terms of the Recommendation, both men and women should contribute to the compulsory social insurance schemes that finance maternity benefits.[130] Payments towards maternity benefits that do not differentiate between men and women "reinforces the notion of solidarity between men and women as men also contribute."[131] From this pool of money intended to cover amongst others employment injury benefits and sickness benefits, female employees are also able to claim maternity benefits.[132]

Financial support during maternity leave is either provided through social security, employer liability or a mix of both.[133] Social security as indicated earlier either takes the form of social assistance (which is provided by the State) or social insurance whereby employers and employees contribute to social security schemes which will later provide cash benefits during maternity leave.[134] Employers at times bear direct responsibility for maternity costs, depending on the laws of a Member State.[135] In terms of a mixed system, the responsibility of cash benefits is shared by the employer and the social security systems. However, the aim of the ILO has been to provide technical assistance to Member States in order to move from burdening employers with costs of maternity benefits to utilising social security systems for financing benefits.[136] Convention No. 183 encourages Member States to finance maternity benefits through social insurance schemes.

For protection against socio-economic distress, the ILO adopted the *Social Security (Minimum) Standards Convention*, 1952 (No. 102). This Convention mentions maternity as one of the nine classical risks that require protection.[137] In terms of article 47 of the Convention, maternity benefits provided by Member States have to cover a period of pregnancy, birth of the child, and

---

129 Dupper 2001 *Stellenbosch Law Review* 427; Van Ginneken *Extending Social Security: Policies for developing countries* 66.

130 Item 4 of the *Maternity Protection Recommendation*, 2000 (No. 191). See also Mpedi 2012 *Acta Juridica* 271.

131 Olivier "Gender Discrimination in Labour Law and Social Security: Perspectives from SADC" 256.

132 ILO 2014 *Maternity and paternity at work: Law and Practice across the world* 20. It should be noted that this is more relevant in social security systems that utilise a single social security scheme to cover all contingencies.

133 ILO 2010 *Maternity at Work: Review of national legislation* 23.

134 Strydom *et al Essential Social Security Law* 6-10.

135 Examples of such countries are Mauritius, Tanzania, Zambia and Zimbabwe.

136 ILO 2010 *Maternity at Work: Review of national legislation* 24.

137 The others risks include unemployment, sickness, old age, family, invalidity, employment injury, death and medical care.

the period after childbirth.[138] The maternity benefits should include medical care and hospitalisation where necessary for the duration of maternity.[139]

Furthermore, the ILO in 2012 adopted the *Social Protection Floors Recommendation* (No. 202) to guide Member States on how to improve their social security systems. The Recommendation requires Member States to establish social protection floors which consist of a basic social security guarantee that ensures income security and health care.[140] Despite the fact that the Recommendation covers all men, women and children, the main targets are vulnerable groups such as children and women.[141] The aim of the Recommendation is to ensure that they receive a basic social security guarantee, in the form of healthcare or income security throughout their lives.[142] To achieve this purpose, the national social protection floors have to consist of at least the following social security guarantees: access to essential health care including maternity care; basic income for children; basic income security for persons unable to generate income due to maternity, sickness, unemployment or disability; and, lastly, basic income security for older persons.[143]

2.4.5 Employment and non-discrimination

The need for employment protection in matters relevant to maternity arose from the misconception that pregnant women are incapable of working.[144] The concern of employers was loss of production when a pregnant woman went on maternity leave.[145] Consequently, women would either not be appointed, or would be dismissed before, during or after maternity leave. In the context of discrimination, women would be treated in a different manner from men by employers denying them the same employment rights and opportunities because of the woman's biological role.[146] In light of the importance of job security and the right to equality and equal opportunity, the ILO found it imperative to protect women under these circumstances.

---

138 *Social Security (Minimum Standards) Convention*, 1952 (No. 102).
139 A 49 of the *Social Security (Minimum Standards) Convention*, 1952 (No. 102).
140 Item 4 of the *Social Protection Floors Recommendation*, 2012 (No. 202).
141 ILO 2011 *Social protection floor for a fair and inclusive globalization* 9.
142 Item 4 of the *Social Protection Floors Recommendation*, 2012 (No. 202).
143 Item 5 of the *Social Protection Floors Recommendation*, 2012 (No. 202).
144 Dowd 1986 *Fordham Law Review* 699.
145 Boswell 2009 *Agenda* 78.
146 Dowd 1986 *Fordham Law Review* 699.

Employment protection of women is twofold: First of all, the ILO advocates for the protection of female employees against dismissal associated with pregnancy, maternity leave or the period following maternity leave.[147] The present ILO standard has extended the period of protection in this regard, unlike Convention No. 3[148] and Convention No. 103[149] which only provided protection against dismissal *during* the period of maternity leave. Dismissal will, however, be permitted for reasons not related to pregnancy, birth of a child and consequences that may flow from the birth of a child, but the employer will have to prove reasons for dismissal.[150] Shifting onto the employer the burden of proof that dismissal of the employee is not related to maternity protects the female employees in that they have no obligations to gather evidence which would otherwise be a difficult task to carry out if the burden of proof was placed on them.[151]

Secondly, women returning from maternity leave have a right to retain their position or hold an equivalent position which pays at the same rate.[152] In circumstances where it is not medically advisable to return to the same position because of child birth complications, the female employee is entitled to hold an equivalent position which is not harmful to her health.[153] The ILO's purpose here is to prevent pregnant or nursing women from being placed at a disadvantage, compared to other employees, particularly by being overlooked for promotions or being demoted at a workplace because of their reproductive roles. Denying a woman the opportunity to return from maternity leave, or demoting her to a post inferior to the one she held prior to maternity, has been identified as gender discrimination.[154] Recommendation No. 191 adds that the maternity leave period should be regarded as a period of service.[155] This means that maternity leave should not affect the woman's entitlements such as promotions or salary increases, as her period of service was not interrupted by the maternity leave. If the

147 A 8 of the *Maternity Protection Convention*, 2000 (No. 183).
148 A 4.
149 A 6.
150 A 8 of the *Maternity Protection Convention*, 2000 (No. 183).
151 ILO 2010 *Maternity at Work: Review of national legislation* 67.
152 A 8(2) of the *Maternity Protection Convention*, 2000 (No. 183).
153 ILO *Maternity Protection Resource Package: Employment protection and Non-discrimination* 10.
154 ILO *Maternity Protection Resource Package: Employment protection and Non-discrimination* 9.
155 Item 5.

employer were to disregard maternity leave as a period of employment, female employees would find it difficult to earn promotions because of breaks caused by maternity leave.[156]

It is evident that the ILO calls on Member States to take measures ensuring that maternity is neither a source of discrimination within the workplace, nor access to employment for women.[157] In that regard, the ILO also adopted the *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111)[158] with the aim of eliminating all forms of discrimination in employment and occupation. Even though the Convention lacks provisions relating to pregnancy and maternity as sources of discrimination, it emphasises that differential treatment on the basis of sex amounts to discrimination and must be eradicated from the workplace.[159] Despite pinpointing sex as a basis of discrimination, the Convention makes no mention of gender as a ground of employment discrimination. Therefore, since gender refers to the social role based on sex, it should perhaps be read into sex in the Convention as it is an extension of one's sex.[160]

In order to ensure equal treatment and opportunities in the workplace, Convention No. 183 has also extended protections to include women seeking employment.[161] The notion of non-discrimination in this context addresses circumstances whereby women are not hired or given equal opportunities, because of the possibility of pregnancy, maternity leave and breastfeeding. These discriminatory practices ought to be eliminated from all workplaces to ensure equal opportunities for all.

Women seeking employment shall not be subjected to a pregnancy test or required to produce a certificate as proof of having had a pregnancy test.[162] If employment were subject to a pregnancy test, women (particularly of childbearing age) would be denied access to the labour market. As a result, the ILO would not achieve its objective of bridging the gap of inequality between men and women at the workplace. It is noteworthy to mention that under Convention No. 183, two defences are available for employers to justify their discriminatory practices at the

---

156 Their severance packages for continued period of work would also be affected.
157 A 9 of the *Maternity Protection Convention*, 2000 (No. 183).
158 Hereinafter Convention (No. 111).
159 A 1 of the *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111).
160 Chioma 2012 *Nigerian Law Journal* 17-18.
161 A 9.
162 A 9(2) of the *Maternity Protection Convention*, 2000 (No. 183).

workplace. Firstly, the discrimination may be justified if the nature of work is not suitable for either pregnant or nursing women.[163] Secondly, it is justifiable if it is apparent that the job would pose a substantial health risk to the woman or child.[164]

2.4.6 Breastfeeding

Breastfeeding is imperative for the health of a new-born child and the mother, thus requiring accommodation in the workplace.[165] At the 54th World Health Assembly of the WHO, Member States were urged to take into consideration the requirements of the ILO in setting up and improving policies that ensure breastfeeding at a workplace.[166] Apart from establishing a connection between the mother and the infant, breastfeeding is essential for the mother's health and emotional well-being.[167] Breast milk contains all the necessary nutrients which the infant's body requires for constant development, particularly during the first six months after birth.[168] The ILO has acknowledged the importance of breastfeeding since the time of the adoption of the first ILO Convention on maternity protection.

Convention No. 183 requires women to be afforded daily breastfeeding breaks, or reduction of working hours which shall be regarded as working time.[169] The employer can therefore not reduce pay if the mother takes breaks for breastfeeding. The number and duration of breastfeeding breaks, and procedure for reducing hours of work, are left at the discretion of Member States to decide, as long as at least one daily break is provided.[170] The ILO has discovered through research that most Member States provide breastfeeding breaks for a period up to six months.[171] Lesotho and South Africa fall amongst ILO Member States that provide breastfeeding breaks for up to six months.[172]

Recommendation No. 191 provides that the length of nursing breaks should be altered to accommodate some of the mother's special needs. For instance, if a woman requires more time

---

163 A 9(2)(a) of the *Maternity Protection Convention*, 2000 (No. 183).
164 A 9(2)(b) of the *Maternity Protection Convention*, 2000 (No. 183).
165 Kathleen, Kathleen and Taylor 2013 *Breastfeeding Medicine* 137.
166 WHO Resolution 2001.
167 Labbok 2006 *International Journal of Gynecology* 278.
168 Labbok 2006 *International Journal of Gynecology* 277.
169 A 10 of the *Maternity Protection Convention*, 2000 (No. 183).
170 A 10(2) of the *Maternity Protection Convention*, 2000 (No. 183).
171 ILO 2010 *Maternity at Work: Review of national legislation* 105.
172 This aspect will receive detailed attention in later chapters.

to produce breast milk, the nursing break should be extended to afford her sufficient time. Proof of the aforementioned needs is subject to the production of a medical certificate.[173] Moreover, hygienic nursing facilities should be provided at the workplace. However, when assessing legislation in some Member States, the ILO discovered that a requirement to provide nursing facilities is likely to encourage discrimination, as employers will be reluctant to hire women if they had to provide nursing facilities in future.[174]

2.4.7 Other instruments in collaboration with ILO

It has been indicated earlier that the ILO is a UN specialised agency and it therefore works in collaboration with the UN. Maternity protection is part of this remit. According to the *Universal Declaration of Human Rights*, 1948 motherhood and childhood deserve special care and social protection.[175] The *International Covenant on Economic, Social and Cultural Rights,* 1966 ascertains the mother's right to special protection before and after child birth, together with paid leave or leave with sufficient social security benefits.[176]

Furthermore the *Convention for Elimination of All Forms of Discrimination Against Women*, 1979 suggests that State Parties must take measures aimed at promoting gender equality and elimination of discrimination against women at the workplace.[177] The *Convention on the Right of the Child*, 1989 recommends that measures be taken to ensure the protection of children of working parents.[178] The above instruments are used by the UN to establish protection for human rights.

Likewise, the Southern African Development Community[179] has adopted numerous instruments for maternity protection.

In terms of the *Charter of Fundamental Social Rights in SADC*, 2003, Member States are required to strive for gender equality by ensuring that men and women are granted equal

---

173 Item 7 of the *Maternity Protection Recommendation*, 2000 (No. 191).
174 ILO 2010 *Maternity at Work: Review of national legislation* 86.
175 A 25(2).
176 A 10(2).
177 A 11(1).
178 A 18(3).
179 Hereinafter SADC. Lesotho and South Africa are Members of SADC. See www.sadc.int/member-states/ (accessed 16 May 2018).

opportunities regarding access to employment and equal remuneration.[180] According to the Charter, Member States also have to ensure that all those who have a right to social security benefits are afforded access to such benefits.[181]

In 2008, SADC adopted the *Code on Social Security* with the intention of assisting Member States to improve their social security schemes to cover a large proportion of workers. In terms of the Code, Member States have to endeavour to provide paid maternity leave for a period of 14 weeks, with the minimum cash benefits being 66% of their income.[182]

Finally, the SADC *Protocol on Employment and Labour*, 2014 makes provision for elimination of discrimination based on, amongst others, sex and gender in order to promote equality in employment.[183] The protocol encourages State Parties to ratify and implement the ILO *Social Security (Minimum Standards) Convention*, 1952 (No. 102) and the ILO *National Floors of Social Protection Recommendation*, 2012, in order to ensure that every worker is entitled to sufficient social security benefits.[184]

2.5 Conclusion

The conditions of workers were appalling, prior to the introduction of an international organisation regulating labour matters. The ILO in cooperation with other international and regional organisations has achieved a great deal of change in the world of work since its foundation in 1919. The international labour standards established by the ILO set a benchmark to be used by Member States when drafting national laws. This also applies to countries that may not have ratified a convention.

Maternity protection has been on the agenda of the ILO since its inception. This is evidenced by the adoption of the various Conventions and Recommendations dealing with maternity protection in the workplace over nearly a century. A number of the elements ensuring maternity protection have been incorporated into the national laws and policies of almost every country in

---

180 A 6.
181 A 10.
182 A 8(3) of the *Code on Social Security* (2008).
183 A 7.
184 A 16.

the world.[185] This is an indication that maternity protection is a fundamental labour right cherished around the world. Therefore, it is expected that more countries should consider ratifying the latest convention relating to maternity protection, as well as the related social protection conventions.

Having highlighted the ILO's position on maternity protection, the next chapter will focus on Lesotho's legislative framework on maternity protection. The benchmarks outlined above will be used to determine whether Lesotho is currently providing the protection it should. Thereafter, the position in South Africa will be discussed to draw guidance for Lesotho where appropriate.

---

[185] ILO 2007 *Safe maternity and the world of work* 6.

Chapter 3: Lesotho's legislative framework on maternity protection

3.1 Introduction

In the preceding chapter, the standards of the ILO pertaining to maternity protection were analysed. The relevant international labour standards set a benchmark for maternity protection which ought to be followed by all ILO Member States. The following chapter seeks to determine the extent to which Lesotho provides for maternity protection through its legislation. The significance of examining Lesotho's legislative framework is, firstly, to determine whether it is in line with the international labour standards and, secondly, to ascertain whether there are areas of the legislation that are lacking in terms of maternity protection. In the subsequent chapter, an investigation will be done into the legislative position in South Africa regarding maternity, so as to investigate possible lessons for Lesotho.

3.2 Lesotho and the ILO

Lesotho is a landlocked sovereign state which gained its independence on 4 October 1966 from British rule.[186] The King of Lesotho is the Head of State while the Prime Minister is the Head of Government.[187] The country is characterised by a pluralist legal system which comprises common law, indigenous customary law and statutory law which operate side by side.[188] Despite these laws being equally binding, statutory law prevails where inconsistencies exist. It also adopts a dualist approach towards national law and international law. This means that, before an international treaty can be binding, there has to be an act of Parliament to domesticate such a treaty.[189]

As a sovereign state, the country has promulgated various labour statutes such as the *Employment Act* 22 of 1967, *Regulation of Wages & Conditions of Employment Act* 35 of 1969, *Employment (Amendment) Act* 14 of 1977 and the *Employment Regulations*, 1988. With the

---

186 Maqutu and Sanders 1987 *CILSA* 378.

187 As a constitutional monarch, the powers of the King are largely ceremonial. He normally acts on advice of the Prime Minister in exercise of his duties. The Prime Minister possesses executive authority. He is responsible for appointment of Cabinet and Government Officials.

188 Maqutu and Sanders 1987 *CILSA* 379.

189 Pholo *Lesotho Justice Sector and the Rule of Law* 24. This however excludes customary international law.

assistance of the ILO, these pieces of legislation were eventually merged into one document in the form of the *Labour Code Order* 24 of 1992.[190] This was after the ILO called, in 1990, for an improvement of Lesotho's labour laws to conform to international standards.[191]

As indicated, Lesotho has been a member of the ILO since 1966. To date, it has ratified 23 ILO Conventions, with 22 of them still in force, while only one ILO convention has been denounced.[192] The State signifies its commitment to the ILO under section 4(c) of the Code. That is, the application and interpretation of any vague provisions of the Code or subsidiary legislation to the Code are made in consideration of the provisions of the ILO Conventions and Recommendations. In the process Lesotho aims to maintain the standards of the ILO.

The application of the above provision was witnessed in the case of *Palesa Peko v The National University of Lesotho.*[193] The applicant was suspended by the employer (the University) for being absent from work without explanation. It appeared that she had absented herself from work in order to be in hospital with her ill son who had just undergone an appendectomy.[194] The Labour Court had to consider whether the absence of a parent from work due to the illness of a child could be regarded as unauthorised absence.[195] Since the Labour Code did not offer guidance on this matter, section 4(c) of the Code was invoked to apply the provisions of *Workers with Family Responsibility Convention*, 1981 (No. 156).[196] Even though Lesotho has not ratified the *Workers with Family Responsibility Convention*, the Labour Court held that in terms of this Convention,[197] the applicant was entitled to be with her ill child.[198]

The above case illustrates the importance of seeking guidance from the international standards where the legislation is lacking at national level. In this way, Lesotho is able to develop

---

190 Rugege 1994 *ILJ* 930; S 241 of the *Labour Code Order* 24 of 1992.

191 Lethobane "Tripartite Conference on the Labour Code Order"; ILO 2012 *Lesotho Baseline Report: Worker Perspectives from the Factory and Beyond* 3.

192 www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200COUNTRYID:103188 (accessed 14 September 2017). Lesotho denounced the *Minimum (Age) Industry Convention*, 1919 (No. 5) on 14 June 2002.

193 *Palesa Peko v The National University of Lesotho* LC/33/94. Hereinafter *Palesa Peko's case.*

194 *Palesa Peko v The National University of Lesotho* LC/33/94 1-2.

195 *Palesa Peko v The National University of Lesotho* LC/33/94 3.

196 *Palesa Peko v The National University of Lesotho* LC/33/94 3-4.

197 A 1 provides that the Convention shall apply to workers with responsibilities in relation to their dependent children, where such responsibilities restrict entering, participating in or advancing in economic activity. A 8 further provides that family responsibilities shall not be a valid reason for dismissal.

198 *Palesa Peko v The National University of Lesotho* LC/33/94 4-5.

domestic law by remedying the deficiencies within its legislation. The standards help Lesotho to model its labour legislation in line with international standards.

Despite Lesotho being a member of the ILO, it has not ratified any of the maternity conventions which have been adopted by the ILO since its inception. This, however, does not mean that the provisions of Convention No. 183 are meaningless in Lesotho. It is bound by section 4(c) of the Code to consider the provisions of the international labour standards relevant to maternity protection. The Labour Courts has shown in *Palesa Peko's case* that it is prepared to invoke the provisions of international labour standards, particularly where the domestic law is silent or lacking.

3.3 Legislative framework on maternity protection

3.3.1 The Constitution of Lesotho[199]

As a sovereign State, the country adopted the Constitution which came into effect in 1993. Since then the Constitution has been continuously updated through several amendments. It is the supreme law of Lesotho and any law that is incompatible with it is considered null and void and of no effect.[200] This entails that the legitimacy of the country's other laws are weighed against the standards of the Constitution.

The *Constitution of Lesotho* is somewhat lacking in terms of labour relations provisions. This is in contrast to the *Constitution of the Republic of South Africa*, 1996 which has devoted considerable attention to labour relations under section 23.[201] Nonetheless, Mosito[202] argues that some of the constitutional provisions relating to aspects such as equality and discrimination may be given labour law interpretations. In terms of discrimination, for instance, section 18 of the Lesotho Constitution prohibits any manner of discrimination on numerous listed grounds. "Discrimination" under the Constitution[203] is described as follows

> ...different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons

---

199 *Constitution of Lesotho*, 1993. Hereinafter the Constitution.
200 S 2 of the *Constitution of Lesotho*, 1993.
201 Mosito 2014 *LLJ* 33. The provisions contained in this section will be alluded to in a following chapter.
202 Mosito 2014 *LLJ* 34-35.
203 S 18(3) of the *Constitution of Lesotho*, 1993.

> of one such description are subjected to disabilities or restriction to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

The provision relating to discrimination does not directly refer to maternity protection. However, since sex is included amongst the listed grounds, female employees may arguably rely on sex discrimination when they are being treated less favourably than their male colleagues because of their biological roles. Pregnancy, however, is not included as one of the listed grounds on which discrimination is prohibited. Nonetheless, considering that section 18 does not contain a closed list, pregnancy may be implicitly included under discrimination based on any "other status", which is listed. In such a case, an aggrieved party would have to establish discrimination on the grounds of pregnancy, as well as the unfairness thereof.[204]

Since the labour legislation has to be applied or interpreted with reference to the general prohibition of discrimination contained in the Constitution, the discrimination provisions of the Code are drawn from section 18 of the Constitution. As a result, in dealing with discrimination cases, the Labour Courts have to give effect to the non-discrimination provision of the Constitution. The same applies to the equality provisions.

The Constitution also makes provision for unenforceable socio-economic rights as principles of state policy, in its Chapter III. They cannot be enforced by the courts of law. Neither can a party sue over them. Rather, the principles of state policy are meant to guide authorities in the exercise of their duties.[205] The unenforceability of principles of state policy was cemented in *Khathang–Tema Baitsokoli & Another v Maseru City Council & Others*[206] where the court pointed out that the State cannot be taken to task for non-fulfilment of principles of state policy.

Despite being unenforceable, workers may sometimes utilise the principles of state policy to prove violation of their rights.[207] This means that elements of maternity protection may be derived from the principles of state policy provided under the Constitution. One of the obligations flowing from the principles of state policy is that the State has to afford equal opportunities for all, particularly the disadvantaged groups.[208] Women are historically classified

---

204 McGregor 2002 *Juta's Bus Law* 106.
205 S 25 of the *Constitution of Lesotho*, 1993.
206 *Khathang-Tema Baitsokoli & Another v Maseru City Council & Others* C of A (CIV) NO.4/05.
207 Mosito 2014 *LLJ* 42.
208 S 26(2) of the *Constitution of Lesotho*, 1993.

as one of the disadvantaged groups.[209] The aforesaid provision is consequently meant to ensure, amongst others, that there is equality between men and women in all areas of life. By striving for equal opportunities for all, women are able to access and participate in the labour market without being differentiated on their biological role in society.

The principles of state policy require the adoption of measures to ensure just and favourable conditions of work.[210] This provision is of particular importance in terms of maternity protection, since it necessitates policies that are aimed at achieving, firstly, safe and healthy working conditions secondly, equal opportunities between men and women at the workplace and, thirdly, protection of working women before and after childbirth.[211] Apart from advocating for equality at the workplace, this provision goes to the core of maternity protection, with respect to the health of female employees as well as the health of the child.

While parties cannot go to court over principles of state policy, it does not mean that they are of no use. Aggrieved parties may instead rely on the principles, in order to prove violation of their maternity protection rights.

3.3.2 The Labour Code Order 24 of 1992

The Code is the primary source of law on labour and employment in the private sector.[212] It is the basic source of protection for female employees with respect to maternity protection and other related conditions of employment. The Code addresses a number of maternity protection elements which will be discussed below.

As has been discussed earlier, certain exposures at the workplace may present health hazards to pregnant or nursing employees.[213] These agents may be physical, biological or chemical. The

---

209 Klugman and Twigg 2016 *Journal of International and Comparative Law* 518.

210 S 30 of the *Constitution of Lesotho*, 1993.

211 S 30 of the *Constitution of Lesotho*, 1993.

212 S 2(1).According S 2(2) theLabour Code as amended by Act 9 of 1997, its application does not include;
(a) any person (other than person employed in civil capacity) who is a member of
(i) Lesotho Defence Force;
(ii) Lesotho Mounted Police;
(iii) National Security Service;
(iv) Lesotho Prison Service (Lesotho Correctional Services)
(b) Such category or class of public officer, such public authority or employee thereof as the Minister may by order specify and to the extent therein specified.

213 See para 2.4.2 above; Paul 2004 *Healthy beginnings: Guidance on safe maternity at work* 17.

hazards include extreme temperatures, long hours of work without rest, heavy objects, bacteria and harmful gases. The Code mandates employers to guarantee health and safety at the workplace for all employees, where possible.[214] This is the only provision within the Code which pregnant or nursing employees can rely on, in alleging lack of health protection in the workplace. While female employees in the public service are protected against hazardous work during pregnancy and for four months after the birth of a child,[215] employees in private sector receive no such protection. Lack of protection against hazardous work raises, amongst others, possibilities of spontaneous abortions, stillbirths, deformed babies and abdominal and back pain.[216]

Furthermore, employers in Lesotho are not forced to permit pregnant employees to take paid time off for medical check-ups as prescribed by the ILO. As a consequence, pregnant employees may face a health risk because they are reluctant to go for medical check-ups for fear of losing their wages.

Amongst several provisions for maternity protection, another significant provision in Lesotho is that which regulates night work. Female employees who perform night work are excused from such duty during pregnancy for a period of three months before childbirth and three months after childbirth.[217] During these stipulated periods, the employer must provide female employees with alternative work.[218] These alternative measures have no bearing on other maternity benefits, such as the length of leave. It appears that the Code only makes provision for alternative work in terms of night work.

The Code addresses the notion of discrimination in section 5. By so doing, it gives effect to the general prohibition of discrimination contained in section 18 of the Constitution. It prohibits discrimination based on various grounds, including discrimination on the basis of sex.[219] This provision refers to discrimination in terms of access and retention of employment, as well as terms and conditions of employment such as remuneration, working hours and retirement benefits.

---

214 S 93 of the *Labour Code Order* 24 of 1992.
215 *Basic Conditions of Employment for Public Officers Legal Notice* 32 of 2011.
216 Gwisai 2015 *Zam. L. J* 119.
217 S 130(1)(b).
218 S 130(1)(b) of the *Labour Code Order* 24 of 1992.
219 S 5(1) of the *Labour Code Order* 24 of 1992.

In circumstances where a pregnant woman is denied access to employment, she may refer to the above provision in order to establish sex discrimination. The basis of her argument would be that her condition was used as grounds to not hire her. Nonetheless, without specific legal protection for job applicants under the Code, employers are likely to decide against hiring women because of their childbearing role.[220] Secondly, it is arguable that this non-discrimination provision similarly affords women an opportunity to claim sex discrimination against the employer in situations whereby the aforesaid employer does not allow them to return to work following maternity leave.

The ILO identifies that pregnancy testing can be used as a source of discrimination against job applicants. In spite of that, section 5 of the Code is silent on the issue of pregnancy tests or general medical testing which can expose pregnancy. This is inconsistent with article 9 of Convention No. 183 which requires measures meant to prohibit discrimination in employment to include pregnancy testing except where the law permits such tests due to the type of work.

Section 5(1) of the Code appears to be narrow considering the definition of discrimination under Convention No. 111. In addition to the listed grounds of discrimination, Convention No. 111 describes discrimination as including "such other distinction, exclusion or preference that has the effect of nullifying or impairing equality of opportunity..." This description foresees that there may be grounds of discrimination other than those that have been listed under article 1(1)(a). On the contrary, section 5(1) does not contemplate grounds of discrimination other than those that have been listed. It portrays a closed list. This in effect excludes factors such as gender, pregnancy and family responsibility as one of the prohibited grounds of discrimination in employment and occupation under the Code.

It is worth noting that section 5(4) of the Code recognises that discrimination is not unlawful if the reason of such discrimination relates to an inherent requirement of a particular job.[221]

There are circumstances or acceptable grounds for dismissal of workers, such as capacity, conduct or operational requirements.[222] According to section 66(2) of the Code, the burden of proving that the dismissal is fair rests upon the employer. Nevertheless, there are various

---

220 Olivier 2013 *Development Southern Africa* 105.
221 This concept will be discussed in detail in the next chapter.
222 S 66(1) of the *Labour Code Order* 24 of 1992.

grounds listed under the Code which may not be a ground for dismissal regardless of whether or not an employee has been issued with an adequate notice of dismissal. The grounds of sex and pregnancy cannot constitute valid grounds for dismissal.[223] Most importantly, this means that a pregnant employee may not be dismissed on account of pregnancy unless the employer can show that the reason for dismissal is not in any way related to pregnancy or the consequences associated with birth of the child. The court in *'Makamohelo Makafane v Zhongtian Investment (Pty) Ltd* confirmed that an employee cannot be dismissed for the reason of pregnancy.[224] Moreover, absence to attend to family responsibilities does not constitute a valid ground of dismissal.[225] The rationale behind this ground is consideration of the responsibilities emanating in particular from the birth of a child which attracts family care-giving responsibilities for working women.

The remedy against an unfair dismissal on the above-mentioned grounds is that an employee is entitled to be reinstated to her position, without loss of remuneration or any other of the benefits she would have received had there been no dismissal.[226] The court will not make an order of reinstatement if it is impossible to do so. In the event it is impracticable to reinstate the employee, or she is not interested in reinstatement, the court will compensate the employee a fair amount considering the circumstances of the case.[227] No additional penalty is imposed on employers to further deter them from unfairly dismissing female employees on the aforesaid grounds.

In terms of section 133 of the Code, an employer is under obligation to release a pregnant employee from work for a period of six weeks before the birth of the child.[228] It is the duty of the pregnant employee to notify the employer of the expected date of childbirth through a medical certificate. The period of maternity leave which is unpaid includes a compulsory period of six weeks after the birth of the child.[229] The foregoing indicates that the maternity leave

---

223 S 66(3)(d) of the *Labour Code Order* 24 of 1992.
224 '*Makamohelo Makafane v Zhongtian Investment (Pty) Ltd* LC/76/2013.
225 S 66(3)(d) of the *Labour Code Order* 24 of 1992.
226 S 73(1) of the *Labour Code Order* 24 of 1992.
227 S 73(2) of the *Labour Code Order* 24 of 1992.
228 S 133 of the *Labour Code Order* 24 of 1992.
229 S 133(2) of the *Labour Code Order* 24 of 1992. The underlying rationale behind maternity leave is the health of the female employee as well as that of the child. This is why during this period an employer cannot demand an employee to return to work. See Dupper 2001 *Stellenbosch Law Review* 423.

period in Lesotho is 12 weeks, as per the requirements of the Code. The period obviously falls short of the 14 weeks period set by Convention No. 183.

In cases where a female employee suffers from any problems stemming from childbirth to such an extent that she is declared medically unfit for work, the maternity period should be extended to eight weeks after the birth.[230] Likewise, during this extended period, an employer is not allowed to demand that an employee return to work. An employer who allows a woman to work knowing full well that she ought to be on maternity leave, or demands that she work during the period of maternity leave, is liable for a fine of three hundred *maloti* or three months imprisonment, or both. [231] This punishment is similarly imposed on employers who refuse to allow female employees to take maternity leave or any necessary extension of the leave.[232] It is apparent that the Code ensures compliance with the maternity leave provisions, by imposing criminal liability on employers.

A female employee can claim unfair dismissal against the employer for termination of employment during the statutory maternity leave or during the period when the leave has been extended.[233] In terms of section 136(3) of the Code, a successful claim of unfair dismissal against the employer attracts a fine of four hundred *maloti*. According to section 136(1) of the Code, it is therefore automatically unfair to dismiss a female employee while she is on statutory maternity leave.

A decision in *Fang Yang Supermarket v Moqhali and Another*[234] dealt with the termination of an employee's employment during her maternity leave. The respondent (employee) in agreement with the applicant (employer) proceeded on maternity leave which was to run from 4 December 2006 to 2 April 2007.[235] She was duly paid her maternity leave benefits[236] and later received a month's salary while already on leave. Upon return from maternity leave she was told by the employer that there is no work for her anymore.[237] In a claim for unfair dismissal, the employer alleged that the employee was dismissed on 4 December 2006 for theft. However, the employer

---

230 S 133(4) of the *Labour Code Order* 24 of 1992.
231 S 135(b) of the *Labour Code Order* 24 of 1992.
232 S 135(a) of the *Labour Code Order* 24 of 1992.
233 S 136 of the *Labour Code Order* 24 of 1992.
234 *Fang Yang Supermarket v Moqhali and Another* LC/REV/126/07.
235 *Fang Yang Supermarket v Moqhali and Another* LC/REV/126/07 1.
236 The issue of maternity benefits will be discussed later in this chapter.
237 *Fang Yang Supermarket v Moqhali and Another* LC/REV/126/07 2.

failed to produce the charges that had been laid against the employee for theft.[238] The court noted that the employee cannot be dismissed while on maternity leave.[239] The Labour Court concluded that the employee had been unfairly dismissed. It should be noted, however, that if the misconduct charges against the employee were legitimate, section 66(1)(b) of the Code (which deals with misconduct dismissals) would come into operation. It would be within the right of the employer to dismiss her on account of misconduct regardless of whether or not she is on maternity leave.

It is expected of employers to afford nursing mothers a daily break of one hour in order to breastfeed the child.[240] The nursing of the child is permitted for a period of six months.[241] It is left up to the employer and the employee to decide on a suitable time for breastfeeding. Furthermore, the nursing period is regarded as working time.[242] This means that the employer cannot deduct wages for time taken off for breastfeeding the child. There is, however, no obligation imposed on the employer to provide nursing mothers with nursing facilities. Consequently, legislated nursing breaks could become of no use to a nursing employee, since they lack facilities for privacy where they can breastfeed their children. An employer who denies an employee time off for nursing purposes is liable to a fine of four hundred *maloti*.[243]

One of the ILO's most fundamental aspects of maternity protection is the provision of cash and medical benefits to woman on maternity leave. Cash benefits do more than provide income replacement. The health of the mother and child, the well-being of their families, and all expenses associated with pregnancy and childbirth[244] should be covered by cash benefits. As has been indicated in the preceding chapter, the ILO demands that Member States without paid maternity leave ensure that employees receive sufficient cash benefits through compulsory social security schemes.[245] Notwithstanding the importance of maternity cash benefits, Lesotho lacks a compulsory social security scheme intended to provide women with such benefits during

---

238 *Fang Yang Supermarket v Moqhali and Another* LC/REV/126/07 2.
239 *Fang Yang Supermarket v Moqhali and Another* LC/REV/126/07 4.
240 S 137(1) of the *Labour Code Order* 24 of 1992.
241 S 137(1) of the *Labour Code Order* 24 of 1992.
242 S 137(1) of the *Labour Code Order* 24 of 1992.
243 S 137(3) of the *Labour Code Order* 24 of 1992.
244 Pregnancy, maternity and childbirth are the periods of expenditure. These expenses include amongst others medical checkups, travel expenses to hospitals and clinics, as well as food and clothing expenses for the newborn.
245 See para 2.4.4. The idea behind a compulsory social insurance scheme by the ILO was mainly to relieve employers from the sole responsibility of maternity benefits.

maternity leave. In effect, where employers do not provide paid maternity leave, employees receive no other financial support as there is no social security scheme.[246]

Unfortunately no obligation is imposed on employers to pay wages to their employees during the maternity leave period.[247] It is left up to the parties in the employment relationship to decide on contractual arrangements regarding the payment of wages during this period. Without a legal obligation to provide paid maternity leave, employers seldom agree with employees on the payment of such wages.

In 2013, Lesotho was one of the three countries without mandatory paid maternity leave.[248] Only in recent years have small improvements been made regarding the introduction of paid maternity leave to certain categories of workers. Following the promulgation of the *Labour Code (Wages) Amendment Notice*, 2015, paid maternity leave has been extended to a number of sectors. In the textile, clothing and leather manufacturing sector, female employees who have worked continuously for more than one year with the same employer are entitled to six weeks paid maternity leave, while the other six weeks is unpaid.[249] As has been indicated above, during the unpaid six weeks the employees receive no other financial support since there is no social security scheme in Lesotho. This is also the case in the private security sector. Employees in the private security sector working for the same employer for more than one year are entitled to six weeks paid maternity leave.[250] The six weeks paid maternity leave is certainly insufficient and this may prompt new mothers to rush back to work before it is advisable to do so.[251]

A rather substantial development towards paid maternity leave was made in the retail, tourism, hotel and restoration, transport and construction sectors, as well as for small businesses with fewer than ten employees, and domestic workers. Workers in the aforementioned sectors with more than one year of continuous service with the same employer are entitled to twelve weeks

---

246 Olivier 2013 *Development Southern Africa* 98.
247 S 134 of the *Labour Code Order* 24 of 1992.
248 Klugman and Twigg 2016 *Journal of International and Comparative Law* 530. The other two countries were the United States and Papua New Guinea.
249 Item K(1) of the *Labour Code (Wages) Amendment Notice*, 2015.
250 Item K(3) of the *Labour Code (Wages) Amendment Notice*, 2015.
251 Dupper 2001 *Stellenbosch Law Review* 428.

of paid maternity leave at a rate of one hundred per cent of wages.[252] With the exception of the private security sector, wages are limited to two child births.

The implication of the above provisions providing for paid maternity leave is that female employees with less than twelve months of service are excluded from the category of employees entitled to *paid* maternity leave. Also in the excluded group are employees with more than one year of service with the same employer but not continuous service. It goes to show that paid maternity leave in Lesotho is limited to a certain category of female employees. This is despite the fact that there is no other financial support where leave is partly paid or unpaid. The position of Lesotho in this instance largely fails to measure up to the standards of Convention No. 102 and Convention No. 183 which mandate Member States to provide maternity benefits through a compulsory social insurance or public fund.

Taking note of the deficiency of the legislation regarding paid maternity leave, trade unions frequently advocated for an improvement. In 2017, a senior trade union official from the Independent Democratic Union of Lesotho called on government to review the law pertaining to maternity protection, saying, "right now, the biggest issue is that of the maternity laws in this country."[253] Highlighting a number of aspects relating to maternity protection, the trade union official had the following to say;

> ...95% of employees in the textile industry and factory workers in Lesotho are women but they have their maternity rights mishandled. The situation is bad, so bad [that] women resort to hiding their pregnancies while others simply leave their babies before time to rush back to work as they only get six paid weeks of maternity leave instead of the 12 weeks they deserve. It is the responsibility of the government to rectify the laws and evaluate the labour code in order to force employers to respect the rights of women in the workplace, including the issue of paid maternity leave.[254]

Apart from the fact that employers are not obliged to pay all employees who take statutory maternity leave, it is also a problem that, in sectors where paid leave is mandated, employers must carry the burden. This poses a challenge in a country where the majority of employers are small businesses which can barely afford to provide paid maternity leave.[255]

---

252 Item K(2) of the *Labour Code (Wages) Amendment Notice*, 2015.
253 Ranooe *Lesotho Times* 20.
254 Ranooe *Lesotho Times* 20.
255 Olivier 2013 *Development Southern Africa* 104.

The ILO's study on Lesotho's social security framework discovered several shortcomings. Amongst others, the ILO pointed out that the employers are vested with too much responsibility to cover social security risks such as maternity.[256] For instance, where paid leave is mandated by legislation, employers assume responsibility for paying employees during maternity leave instead of having a social security scheme which would cater for maternity benefits.

The country has been planning for some time to introduce a comprehensive social security scheme. Lack of adequate protection afforded to female employees was one of the reasons behind the planned scheme.[257] This initiative led to the introduction of a draft Bill termed the *Consolidated National Social Security Bill*, 2000. Maternity insurance is listed as one of the social insurance items under the Bill.[258] The purpose of including maternity insurance was to provide maternity benefits to all female employees who needed it. Although it was a bold step, to this day the bill has not been passed into law. A federation of trade unions called the Alliance of Progressive Trade Unions (APTU) called on the then government to prioritise the implementation of the National Social Security Scheme. One of APTU's concerns was the need for a social security scheme to provide maternity benefits, particularly in the private sector.[259] It remains to be seen when the issue will be addressed by the government.

3.4 Conclusion

Despite not ratifying Convention No. 183, Lesotho has adopted to some extent, a legal framework to ensure maternity protection of women in employment. However, the extent of protection seems to be insufficient in light of Convention No. 183. There are no express provisions regulating health protection of pregnant female employees. Discrimination is addressed in the general sense, by proscribing discrimination based on sex without including discrimination on the basis of pregnancy or maternity or in the general sense of gender. In terms of dismissal, however, grounds of sex, pregnancy and family responsibility cannot be reasons for a dismissal.

---

256 ILO 2013 *Government of Lesotho National Social Security Law Policy Brief.*
257 Olivier 2013 *Development Southern Africa* 98.
258 Clause 3(2)(c) of the *Consolidated National Social Security Bill*, 2000.
259 Ntsukunyane *Lesotho Times* 8.

Furthermore, the period of maternity leave in both private and public sectors falls short of the required minimum period under Convention No. 183, and employers have no obligation to pay female employees on maternity leave except in sectors where paid maternity leave is mandated by the *Labour Code* (*Wages*) *Amendment Notice*, 2015. Despite paid leave being mandated in certain sectors, not all employees qualify because there are conditions to be fulfilled such as the length of continuous service with the same employer in order to qualify for paid leave. What is more, the country to this day does not have a comprehensive social security scheme to provide maternity benefits. To this end, the initiative to come up with a social security scheme has only resulted into the crafting of a Bill.

The next chapter will explore the South African legal framework and best practices regarding maternity protection to establish the extent to which South Africa provides for maternity protection.

Chapter 4: South African maternity protection - potential lessons for Lesotho

4.1 Introduction

The discussion in the previous chapter had regard to the coverage of maternity protection in Lesotho. This chapter similarly seeks to explore the extent of maternity protection in South Africa. The ultimate goal is to identify possible lessons for Lesotho in this respect. As will be seen, South Africa adopts a different approach from Lesotho regarding maternity protection, thus making South Africa a good comparator in this respect.

As indicated earlier,[260] the ILO recognised that the childbearing role of women has been a great obstacle for them in the workplace in terms of access to employment, job security and discrimination.[261] South Africa has not been an exception in this matter. Prior to the steady promulgation of protective legislation, working women in South Africa similarly enjoyed very limited protection in the workplace. As a point of departure, the development of South African maternity protection will be traced. An exposition of the current legal position on the issue will follow.

4.2 Development of maternity protection in South Africa

Prior to the new democratic dispensation, where equality and dignity were recognised as some of the key values underpinning the Republic,[262] the different elements of maternity protection (as discussed in previous chapters) were seemingly inadequately addressed in South African law. The absence of proper protection in this respect resulted in employers taking the liberty to dismiss pregnant female employees.[263] Moreover, pregnant employees allowed to take maternity leave were not guaranteed their jobs upon the expiry of this leave.[264] It seemed to be within the sole discretion of the employer to readmit the employee back into the workplace, or not,

---

260 See para 2.2 above.
261 Le Roux, Rycroft and Orleyn *Harassment in the Workplace: Law, Policies and Processes* 68.
262 S 1 of the *Constitution of the Republic of South Africa*, 1996.
263 Boswell and Boswell 2009 *Agenda* 80; O'Regan 1997 *ILJ* 889.
264 Boswell and Boswell 2009 *Agenda* 80.

leaving her with little recourse. Discrimination on the grounds of the female's biological role in society was widespread, as she would not necessarily have been appointed for fear that she might need maternity leave or have to take care of her children in the future. Their absences from work due to maternity resulted in women having fewer employment opportunities than their male counterparts.[265]

As is evident from the above, maternity protection was once also limited in South Africa in terms of aspects such as discrimination, employment security and maternity leave. This state of affairs prevailed until there was a radical transformation in the South African labour legislation.[266]

4.3 Current maternity protection in South Africa

At the centre of protection in South Africa lies the *Constitution of the Republic of South Africa*, 1996[267] as the supreme law. All other national legislation has been enacted to give effect to the rights and values enshrined in the Constitution.[268] Among other things, the Constitution promotes the rights of workers, inclusive of working women. Other rights not specific to labour relations are similarly relevant and will be highlighted below.

4.3.1 The Constitution

Several provisions in the Constitution are of vital importance in promoting the rights of women in the workplace, in so far as it imposes obligations on the State to provide such protection.[269] Since equality and dignity are the core values of the Constitution, the Bill of Rights, Chapter 2 of the Constitution, is fundamental in terms of protecting female employees in these respects. Section 9 of the Constitution guarantees equality for all within South Africa's borders. The Constitution provides that the State[270] and any person[271] are enjoined not to unfairly

---

265 Dupper *et al Essential Employment Discrimination Law* 9.
266 Ferreira 2005 *Politeia* 197-198.
267 Hereinafter the Constitution.
268 Du Plessis 2011 *PER* 95-96. Rights and values in the Constitution are supplemented by subsidiary legislation such as the LRA which gives effect to rights conferred under s 23 of the Constitution. The EEA on the other hand gives effect to s 9(4) of the Constitution to prohibit and eradicate unfair discrimination while *Promotion of Administrative Justice Act* 3 of 2000 (PAJA) gives effect to rights and procedures associated with administrative action in s 33(3) of Constitution.
269 S 7(2) of the *Constitution of the Republic of South Africa*, 1996.
270 S 9(3) of the *Constitution of the Republic of South Africa*, 1996.
271 S 9(4) of the *Constitution of the Republic of South Africa*, 1996.

discriminate against another on grounds which include gender, sex[272] and pregnancy. The abovementioned three grounds form the basis of protection in terms of the Constitution against unfair discrimination for women in all spheres of life, including the workplace. On the other hand, section 9(5) provides the opportunity to prove that the alleged discrimination is nevertheless fair. The Constitutional Court has on previous occasions provided guidelines on determining unfair discrimination in view of the Constitution. In *Hoffmann v SA Airways*,[273] a set of enquiry was applied as follows:

> First whether the provision under attack makes a differentiation that bears a rationale connection to a legitimate government purpose. If the differentiation bears no such rationale connection, there is a violation of s 9(1). If it bears such rationale connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of s 9(3). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitations provision.

In a nutshell, the test takes the form of a three-stage enquiry in the order of rationality, unfair discrimination and justification. On the first step of rationality, it entails that provisions which are discriminatory must be intended to achieve a valid goal such as attaining equality.[274] To avoid contravention of section 9(1), the discriminatory provisions must be related to the purpose of the government. If the discriminatory provision appears to link with the aims of the government, the enquiry moves on to the next stage to determine whether the differentiation does not amount to unfair discrimination.

The next step of unfair discrimination concerns the determination of whether the differentiation complained of amounts to discrimination, and whether such discrimination is unfair. Discrimination based on a listed ground such as gender or pregnancy is presumed to be unfair,

---

[272] Sex entails biological differences in a form of male or female while gender refers to the social and cultural roles attached to men and women. See *Association of Professional Teachers & another v Minister of Education & others* 1995 16 *ILJ* 1048 (IC) 1080.

[273] *Hoffmann v SA Airways* 2000 21 *ILJ* 2357 (CC) para 24. See also *Harksen v Lane NO & others* 1998(1) SA 300 para 53; *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd* 2018 39 *ILJ* 415 (LC) para 53; *Mbana v Shepstone & Wylie* 2015 36 *ILJ* 1805 (CC) para 25-26.

[274] For instance, affirmative action differentiates between designated groups (black people, women and people with disabilities) against other people who do not fall in that category. However, the reason behind such differentiation is intended to address past inequality which was suffered by the said designated groups. See s 9(2) of the *Constitution of the Republic of South Africa*, 1996.

while the unfairness on an unlisted ground has to be proved by the aggrieved party.[275] If unfair discrimination is successfully established, the enquiry moves on to the justification process.

The final leg of the enquiry is tested against the limitation clause of the Constitution. The paramount question is whether unfair discrimination can be justified in terms of section 36(1) of the Constitution which provides that the rights may be limited for reasonable and justifiable reasons. In *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others*[276] this provision was interpreted to mean that the purpose of the limitation must be proportional to the extent of the infringement of the right in question. Therefore, for a proper justification, a balance has to be struck between the infringed right, its nature and importance against the purpose of the limitation.

Therefore, in determining the existence of unfair discrimination in case of maternity, the law or policy which acts to the detriment of women must be linked to a reasonable goal of government, or else there will be violation of equal rights. If such goal can be established, the court determines whether the differentiation between men and women amounts to unfair discrimination because the State is prohibited from unfairly discriminating against women on grounds such as pregnancy. If such discrimination does not pass the justification test, the court will conclude that there is unfair discrimination.

The Constitution further obliges the State to pass legislation which is intended to prohibit and ultimately eradicate unfair discrimination.[277] Pieces of legislation such as the EEA give effect to this provision, as far as prohibition of unfair discrimination is concerned.[278] Therefore, national legislation is the first line of defence in any claims of unfair discrimination.[279]

Section 23(1) of the Constitution guarantees fair labour practices in employment relationships. These refer to all practices which stem from an employment relationship (or something akin to

---

275 Smit and Olivier 2002 *J. S. Afri. L* 789; *Harksen v Lane NO & others* 1998 (1) SA 300 para 47; *Prinsloo v Van der Linde & Another* 1997 (3) SA 1012 (CC) para 28.

276 *National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others* 1999 (1) SA 6 para 35. See also *S v Makwanyane & Another* 1995 (3) SA 391 (CC) paras 328-330.

277 S 9(4) of the *Constitution of the Republic of South Africa*, 1996.

278 In addition to the EEA is the *Promotion of Equality and the Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA) similarly enacted to promote equality and eradicate unfair discrimination. To avoid an overlap with the EEA, PEPUDA applies to persons and areas which do not fall within the ambit of the EEA.

279 Du Toit *et al Labour Relations Law- A Comprehensive Guide* 670; *Minister of Health & Another v New Clicks South Africa (Pty) Ltd* 2006(1) BCLR 1 (CC) para 437.

it)[280] between employers and workers.[281] Section 23(1) of the Constitution entails amongst others that an employee must be dismissed for a fair reason, in accordance with a fair procedure.[282] It provides job security by ensuring that employees are not unfairly dismissed. This provision similarly applies to other labour practices inherent in an employment relationship, such as protection against unfair discrimination and appropriate terms and conditions.

Other relevant fundamental constitutional rights include the right to make one's own decisions regarding reproduction,[283] access to reproductive health care[284] as well as access to social security.[285] The right to make decisions pertaining to reproduction ensures that women are, for instance, free to expand their families without being discriminated against. Health-care services are necessary for pregnant and breastfeeding women to monitor their health and prevent complications that may arise. Lastly, social security provides for income lost during unemployment caused by contingencies such as maternity. These rights are essential in protecting pregnant employees and working mothers, although not specifically relevant to the workplace.

Section 36(1) recognises that the rights contained in the Bill of Rights are not absolute. The rights may be limited for reasonable and justifiable reasons, considering factors such as the nature of the right, purpose of the limitation, as well as the extent of the limitation.[286] In other words, these factors determine whether a right has been appropriately limited. As has been discussed in *Hoffman v SA Airways* above, differentiation that bears a rational connection with a legitimate purpose of government which unfairly discriminates against a complainant can consequently be justified in terms of section 36(1).

Section 39(1)(b) provides that international law should be considered by a court, tribunal or forum when interpreting the Bill of Rights. It follows that when interpreting constitutional provisions such as the right to equality and access to social security, reference ought to be

---

280 *South African National Defence Force Union v Minister of Defence* 1999 (4) SA 469.
281 *NEHAWU v University of Cape Town and Others* 2003 (3) SA 1 (CC) para 40.
282 *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others* 2003 24 *ILJ* 1712 (LC) 1726. It should be born in mind that disputes regarding dismissal will however first be addressed through relevant national laws before section 23(1) can be invoked.
283 S 12(2)(a) of the *Constitution of the Republic of South Africa*, 1996.
284 S 27(1)(a) of the *Constitution of the Republic of South Africa*, 1996.
285 S 27(1)(c) of the *Constitution of the Republic of South Africa*, 1996.
286 S 36(1) of the *Constitution of the Republic of South Africa*, 1996.

made to international instruments such as the *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111), *Maternity Protection Convention*, 2000 (No. 183) and the *Social Security (Minimum Standards) Convention*, 1952 (No. 102). Furthermore, foreign law may also be considered when interpreting the Bill of Rights.[287]

4.4 Protection against unfair discrimination in the workplace

As stated above, section 9 of the Constitution places an obligation on the State to enact legislation intended to prevent and prohibit discrimination. In a like manner, the ILO's Convention No. 111[288] requires Member States to develop policies aimed at eliminating discrimination.[289] Thus, the EEA was not only promulgated to give effect to the equality provisions in the Constitution but also as an initiative intended to eradicate discrimination as directed by Convention No. 111. More so, Convention No. 111 is one of the sources of reference when interpreting the provisions of the EEA.[290] The definition of discrimination in Article 1 of Convention No. 111 contains grounds which are similar to the prohibited grounds of discrimination in section 6(1) of the EEA, though the EEA has additional grounds of its own to increase relevance for the South African situation. It is also recognised in both article 1(1)(2) of Convention No. 111 and section 6(2)(b) of the EEA that exclusion or preference of a person for the reason of an inherent requirement of a particular job does not amount to discrimination.

In light of the above, it pertinent to explore the provisions of the EEA aimed at prohibiting unfair discrimination against female employees at the workplace. A discussion on the defences available to the employer against an unfair discrimination claim will follow.

4.4.1 Provisions of the Employment Equity Act

The EEA endeavours to ensure that equality in the workplace is attained. Since it is intended to give effect to section 9 of the Constitution, it elaborates on the right to equality by not only prohibiting unfair discrimination but also instructing employers to eliminate discriminatory

---

287 S 39(1)(c) of the *Constitution of the Republic of South Africa*, 1996.
288 South Africa ratified the *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111) on 5 March 1997.
289 A 2 of the *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111).
290 S 3(d) of the *Employment Equity Act* 55 of 1998.

practices and policies at the workplace.[291] The practices and policies referred to include amongst others recruitment, appointment, remuneration, employment benefits, terms and conditions of employment, promotions and dismissal.[292]

In a similar fashion to the Constitution, section 6(1) of the EEA presents numerous grounds on which the employer may be judged to have unfairly discriminated against an employee. Discrimination in terms of the EEA denotes exclusion or preference against an employee on various grounds which include race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.[293]

Critical amongst the aforesaid grounds is that an employee should not be subjected to unfair discrimination in a workplace either directly or indirectly[294] on the basis of gender, sex or pregnancy. In addition to the three grounds listed under the Constitution, the EEA adds the ground of family responsibility[295] as one of the areas where women are highly likely to suffer unfair discrimination in the workplace. Moreover, the protection against unfair discrimination is also extended to job applicants.[296] According to section 9 of the EEA, they are presumed to be employees for these purposes. As a result, a female applicant may not be passed over for appointment for fear that she might become pregnant in future.

For a successful claim of unfair discrimination, an employee has to prove that a differentiation was made on the grounds listed under section 6(1) of the EEA.[297] For the purposes of the present discussion, it would mean that a female employee ought to demonstrate that she was treated less favourably (such as receiving lower wages, being passed over for promotion, or

---

291 S 5 of the *Employment Equity Act* 55 of 1998.

292 S 1 of the *Employment Equity Act* 55 of 1998.

293 S 6(1) of the *Employment Equity Act* 55 of 1998.

294 Direct discrimination occurs when an employee is treated unfavourably because they possess certain characteristics such as those listed under section 6(1) of the EEA. Indirect discrimination on the other hand refers to instances whereby the employer's policies or practices appear to have a uniform application on all employees whereas in operation they negatively impact on certain group of employees due to their characteristics. See Gaibe 2011 *ILJ* 32-33.

295 See *Masondo v Crossway* 1998 19 *ILJ* 171 (CCMA) where an employee returning from maternity leave was instructed to work a night shift yet there were other employees without children who would work the night shift. As a result of this, she resigned and it was found by the Commissioner that the act of the employer discriminated against the employee on the basis of her family responsibility.

296 S 9 of the *Employment Equity Act* 55 of 1998.

297 *Transport and General Workers Union and Another v Bayete Security Holding* 1999 20 *ILJ* 1117 (LC);*Harksen v Lane NO & others* 1998 (1) SA 300.

even having been dismissed) on account of either gender, sex, pregnancy or family responsibility. In other words, she would have received a fair treatment if she was neither on maternity nor pregnant.

If a connection between the alleged differentiation and a listed ground cannot be established, the claim will fall short of discrimination.[298] In *Swanepoel v Western Region Council & Another*,[299] the applicant applied to court to set aside the decision by the respondent to appoint a black man allegedly associated with a ruling political party to a post for which she had also applied. She believed that there was unfair discrimination against her on the grounds of gender, race and political affiliation. The court found that there was lack of evidence proving discrimination against the applicant on any of the three listed grounds.[300]

In the event that discrimination on a listed ground can be established by the employee, the employer is afforded the opportunity to prove that the discrimination is fair.[301] By so doing, the employer is able to show that though conduct complained of may be discriminatory, it is discrimination permitted by law.[302] In other words, the employer can prove that the discrimination is justifiable through affirmative action or on the basis of an inherent requirement of the job.[303] In *Woolworths (Pty) Ltd v Whitehead*[304] the Labour Appeal Court held that the requirement of uninterrupted job continuity for at least 12 months was a justifiable inherent requirement of a job, and did not discriminate against Ms Whitehead due to her pregnancy.[305]

Employers may be vicariously liable for discrimination committed by their employees against other employees on the grounds of sex, gender, pregnancy or family responsibility. In terms of section 60(3) of the EEA, the liability arises where the employer fails to take measures that eliminate the discriminatory conduct allegedly committed by the employee after the incidents where immediately brought to the attention of the employer. Once the Labour Court decides that unfair discrimination has been successfully proven, it may order the employer to pay the wronged employee either compensation or damages. The employer may also be instructed to

---

298 Dupper and Garbers "Justifying Discrimination" 66.
299 *Swanepoel v Western Region Council & Another* 1998 19 *ILJ* 1418 (SE).
300 *Swanepoel v Western Region Council & Another* 1998 19 *ILJ* 1418 (SE) 1423A.
301 S 11 of the *Employment Equity Act* 55 of 1998.
302 *Association of Professional Teachers & another v Minister of Education & others* 1995 16 *ILJ* 1048 (IC) 1081.
303 S 6(2) of the *Employment Equity Act* 55 of 1998.
304 *Woolworths (Pty) Ltd v Whitehead* 2000 21 *ILJ* 571 (LAC).
305 *Woolworths (Pty) Ltd v Whitehead* 2000 21 *ILJ* 571 (LAC) para 129.

take measures which will prevent similar instances of unfair discrimination from taking place in the future to other employees.[306]

Article 9(2) of Convention No. 183 prohibits pregnancy tests by employers during recruitment to prevent discrimination that may occur if pregnancy is discovered. The EEA does not contain provisions relating to testing for pregnancy *per se*, but rather prohibits medical testing in general to cast a wider net.[307] Arguably, pregnancy may be discovered through medical testing and the employee could suffer unfair discrimination for this reason. The issue of testing for pregnancy is however rather complicated, because the employer may need to know the status of the applicant or employee considering the nature of the job as well as the risks that may be involved.[308]

4.5 Defences against an unfair discrimination claim

There are two instances where unfair discrimination may be permitted. Section 6(2) of the EEA affords employers a defence of affirmative action and inherent requirement of a job against a claim of unfair discrimination. Since the discussion is based on maternity protection, the focal point will be on the inherent requirement of a job.[309] This defence is similar to the one provided to employers under the LRA against claims of discriminatory dismissals.

4.5.1 Inherent requirement of a job

This defence arises where the employee lacks the necessary characteristics which are of particular importance for carrying out duties in a particular job.[310] In other words, the job is incapable of being performed unless one possesses the required attributes. It is the

---

306 McGregor 2002 *Juta's Bus. L* 102.

307 S 7 of the *Employment Equity Act* 55 of 1998.

308 For instance, pregnancy tests may be necessary in jobs where there is high exposure to chemical and radiation agents. In the mining industry, there is a need for the employer to take extra precautions when employees are pregnant. In order to comply with such, the employer needs to be aware of any pregnancies.

309 Affirmative action is not directly relevant for the present discussion because it deals with inequalities of the past by giving preference to a designated group of persons (black people, women and persons with disabilities) considered to have been historically disadvantaged in order to ensure that they are adequately represented in the workplace. Although not directly applicable to pregnant employees, a situation could arise where an employer may use this defence where he allegedly discriminated against a female applicant because she intended to become pregnant, while he was truly only aimed at reaching or maintaining affirmative action targets by appointing a male candidate from a designated group.

310 Du Toit and Potgieter *Unfair Discrimination in the Workplace* 88. See also *Whitehead v Woolworths (Pty) Ltd* 1999 20 *ILJ* 2133(LC); *Hoffman v South Africa Airways* 2000 21 *ILJ* 2357 (CC); *IMATU v City of Cape Town* 2005 11 BLLR 1048 (LC); *Bootes v Eagle Ink System KwaZulu-Natal* 2008 29 *ILJ* 139 (LC).

responsibility of the employer to establish before the court that the inherent requirement of the job at issue permits discrimination against the employee or applicant.[311]

Due to lack of a clear definition under the EEA, LRA or Convention No. 111, the courts have been strict in allowing an employer to rely on the defence of an inherent requirement of a job.The concept was at the centre of discussion in *Whitehead v Woolworths (Pty) Ltd* where Ms Whitehead alleged that she was a victim of discrimination as an applicant for employment due to her pregnancy.[312] The respondent contended that the discrimination was justified since the requirement of uninterrupted continuity for at least 12 months was an inherent requirement of a job. The respondent further argued that employers are entitled to discriminate where an inherent requirement is commercially justifiable. Waglay AJ was of the view that:

> to suggest that the requirement as in this case of uninterrupted job continuity is an inherent job requirement is to distort the very concept. If the job can be performed without the requirement, as in this case, then it cannot be said that the requirement is inherent...[313]

However, the employer succeeded with this defence on appeal in *Woolworths (Pty) Ltd v Whitehead*, with Willis JA[314] holding that the employer was entitled to take into account the pregnancy of the applicant before deciding whether or not to accept her into employment. The Labour Appeal Court further asserted that the employer was reasonable in relying on a commercial justification, since the requirement of uninterrupted continuity would have the impact on the profitability of the business.[315] The decision of the court *a quo* was as a result set aside.

O'Sullivan and Murray[316] opined that the judgement seemed to undermine the vulnerability of women by allowing employers to disguise, under the notion of inherent requirement of the job, the discrimination against pregnant women. It seems that instead of limiting disadvantages faced by women in the workplace, the Judge escalated their problem. The impact of the judgement is that it paves the way for employers to rely on the defence even where the

---

311 Dupper and Garbers "Justifying Discrimination" 70.
312 *Whitehead v Woolworths (Pty) Ltd* 1999 20 *ILJ* 2133 (LC) para 2.
313 *Whitehead v Woolworths (Pty) Ltd* 1999 20 *ILJ* 2133 (LC) para 37.
314 *Woolworths (Pty) Ltd v Whitehead* 2000 21 *ILJ* 571 (LAC) para 149.
315 *Woolworths (Pty) Ltd v Whitehead* 2000 21 *ILJ* 571 (LAC) para 131.
316 O'Sullivan and Murray 2005 *Acta Juridica* 25.

circumstances of the case do not permit such.[317] Justifications such as the profitability of a business should not be utilised to override pregnancy of an applicant or employee. The Labour Court judgement on the other hand showed that the court can be strict in permitting the defence. Caution should therefore be applied when interpreting this defence against the facts of a case. To ensure the rights of pregnant employees, a strict application of this defence is justified.

4.6 Protection against unfair dismissals

4.6.1 Labour Relations Act[318]

At the heart of job security protection for pregnant and breastfeeding employees lies the LRA. As has been emphasised, in the past, female employees had very little job security, if any, when their pregnancy and maternity leave was at issue. This matter is now appropriately addressed in the LRA. Section 185(a) of the LRA firstly recognises the general right of all employees not to be dismissed without a fair reason.[319] However, and more specifically, the employee's right to retain employment upon lapse of maternity leave is protected by section 186(1)(c), read together with section 187 (to be discussed below). It follows that an employer cannot refuse to allow an employee to resume work after maternity leave since that act would amount to a dismissal, particularly an automatically unfair dismissal.[320]

4.6.1.1 Automatically unfair dismissals

Section 187 deals with dismissals for reasons expressly prohibited by the LRA. Once the employee is able to show the existence of such a dismissal, it is presumed to be *automatically* unfair. It is then left up to the employer in terms of section 192 of the LRA to prove that the dismissal was indeed fair, meaning for a statutorily recognised fair reason.[321] However, if the employer fails to prove that the dismissal is fair, he cannot justify an automatically unfair dismissal through a defence such as an inherent requirement of a job. An employer is only

---

317 O'Sullivan and Murray 2005 *Acta Juridica* 25.
318 66 of 1995.
319 To be read with section 188 of the Act.
320 S 186(1)(c) of the *Labour Relations Act* 66 of 1995.
321 In terms of section 188, an employee may be dismissed for reasons related to the employee's misconduct or incapacity or the operational requirements of the employer.

permitted to rely on an inherent requirement of a job to prove that a dismissal in not automatically unfair when the dismissal is challenged on discriminatory grounds.[322]

Section 187(1)(e) holds that it is automatically unfair to dismiss an employee on account of pregnancy, intended pregnancy or any reason related to the employee's pregnancy. It is apparent that the scope of section 187(1)(e) is broad, as compared to article 8 of the *Maternity Protection Convention*, 2000 (No. 183) . While the Convention finds it unlawful to dismiss an employee for pregnancy, the LRA goes on to state additional factors of "intended pregnancy" and "any other reason related to the employee's pregnancy." Employees have often taken employers to task for failing to adhere to this provision, as will be seen below.

In *Wallace v Du Toit*,[323] the employer ended an employment relationship after learning about the employee's pregnancy. The employer was of the view that it is an inherent requirement of the job for someone looking after his children not to have children of her own. He believed that someone without children of their own would be devoted to his children. The court rejected his argument and held that he had dismissed the employee because of pregnancy, thereby contravening section 187(1)(e).

The court in *Sheridan v The Original Mary-Ann's at the Colony (Pty) Ltd*[324] found the employer to have been in contravention of section 187(1)(e) by dismissing the employee because she was pregnant. While three months pregnant, the employee's conditions of employment were altered by reducing her work shifts from five to one, on the grounds that she could not manage more than one shift. Upon expressing her dissatisfaction, the employee's contract was terminated with immediate effect.[325] She reported for duty on the next shift only to realise that she had been replaced. Evidence of the employee was not challenged and, as a result, the Labour Court concluded that the conduct of the employer contravened section 187(1)(e).[326]

Since section 187(1)(e) not only references pregnancy specifically, but also intended pregnancy or any other reason related to pregnancy, the employer may for instance not dismiss an employee who expressed her wish to become pregnant or because she is absent due to

---

322 Grogan *Dismissal* 134.
323 *Wallace v Du Toit* 2006 27 *ILJ* 1754 (LC) para 5. Hereinafter *Wallace case*.
324 *Sheridan v The Original Mary-Ann's at the Colony (Pty) Ltd* 1999 20 *ILJ* 2952 (LC) para 40.
325 *Sheridan v The Original Mary-Ann's at the Colony (Pty) Ltd* 1999 20 *ILJ* 2952 (LC) para 15.
326 *Sheridan v The Original Mary-Ann's at the Colony (Pty) Ltd* 1999 20 *ILJ* 2952 (LC) para 40.

breastfeeding. Any contractual agreements between the employer and employee forfeiting the right to any future pregnancy cannot override section 187(1)(e).[327] The employer cannot therefore talk the employee into an employment contract stipulating that the employee will not become pregnant during the duration of the employment. Even questions about intended pregnancy during interviews are impermissible, for the reason that they create potential discriminatory practices against women.[328]

The courts have on occasion been called upon to decide on cases regarding the scope of the phrase "reasons related to pregnancy" due to lack of a precise definition. Francis J[329] cautioned against treating the phrase in a similar manner on different facts. Referring to its interpretation, he was of the view that "no rigid rules can be given by this court and each matter should be considered on its own facts." Therefore, the facts of each case give direction on the application of the said phrase, bearing in mind that there has to be a close enough nexus between the reasons and the pregnancy.

In *Mnguni v Gumbi*,[330] an eight-month pregnant employee due to commence her maternity leave the following week complained of being tired to her employer. The employer told her that she seemed not to be interested in working and instructed her to go home and not come back until he called her.[331] She did not receive any call from the employer and she decided to make a follow-up call a week later, whereupon the employer invited her to work for discussion on the matter. She found someone else in her position and the employer told her that there was no work for her anymore. The court held that she was dismissed due to her pregnancy because the employer did not explain to her what he meant by instructing her not to come back to work until further notice.[332] Another reason that persuaded the conclusion of the court was the fact that she was immediately replaced by someone else a day after she was sent home.[333] The Labour Court further pointed out that her dismissal fell within the purview of the phrase "any reason related to pregnancy," since the employer was well aware that the reason for her

---

327 Grogan *Dismissal* 135.
328 Erasmus and Claassen (date unknown) www.labourguide.co.za (accessed 21 February 2018).
329 *De Beer v SA Export Connection cc t/a Global Paws* 2008 29 *ILJ* 347 (LC) para 23.
330 *Mnguni v Gumbi* 2004 25 *ILJ* 715 (LC).
331 *Mnguni v Gumbi* 2004 25 *ILJ* 715 (LC) paras 4-5.
332 *Mnguni v Gumbi* 2004 25 *ILJ* 715 (LC) para 18.
333 *Mnguni v Gumbi* 2004 25 *ILJ* 715 (LC) para 15.

tiredness was caused by pregnancy and sent her home for this reason.[334] Dismissal was therefore automatically unfair in terms of section 187(1)(e) of the LRA.

The extent of the phrase "any reason related to pregnancy" was the subject of adjudication in *De Beer v SA Export Connection cc t/a Global Paws*.[335] In agreement with the employer, the employee took one month's maternity leave (a period which is in contravention of the law). She gave birth to twins who were in poor health, and as a result asked for an extension of another month which the employer denied.[336] The employee was then dismissed for refusing to return to work as agreed. She alleged that her dismissal was automatically unfair for reasons related to her pregnancy.[337] The employer argued that the phrase "any reasons related to pregnancy" referred to the mother and not the illness of the baby.[338] However, the court was of the view that an employer who does not afford an employee four months maternity leave (as legally entitled) cannot dismiss such an employee for staying home to take care of an ill new- born child because clearly the illness is closely related to the employee's pregnancy.[339] Consequently, the court held that the scope of the phrase "any reasons related to pregnancy" extends to the illness of new-born babies who require care from their mothers.[340]

Despite the judgement in the *De Beer* case, employees cannot at all times depend on the scope of "any reasons related to pregnancy" when dismissed for staying home to take care of their ill children.[341] Family responsibility leave provided by the BCEA is available to employees when the child is born or is sick.[342] It is clear that, in the *De Beer* case, the employee's right to take care of the ill twins within the period of maternity leave was compromised by the reduction of the leave by the employer. Had the employee made use of the full maternity period as provided by the BCEA, she would have had time to take care of the ill babies without being dismissed.

---

334 *Mnguni v Gumbi* 2004 25 *ILJ* 715 (LC) para 17.
335 *De Beer v SA Export Connection cc t/a Global Paws* 2008 29 *ILJ* 347 (LC). Hereinafter *De Beer's case*.
336 *De Beer v SA Export Connection cc t/a Global Paws* 2008 29 *ILJ* 347 (LC) para 1.
337 *De Beer v SA Export Connection cc t/a Global Paws* 2008 29 *ILJ* 347 (LC) para 1.
338 *De Beer v SA Export Connection cc t/a Global Paws* 2008 29 *ILJ* 347 (LC) para 8.
339 *De Beer v SA Export Connection cc t/a Global Paws* 2008 29 *ILJ* 347 (LC) para 23.
340 *De Beer v SA Export Connection cc t/a Global Paws* 2008 29 *ILJ* 347 (LC) para 23.
341 Grogan *Dismissal* 133.
342 S 27(2) of the *Basic Conditions of Employment Act* 75 of 1997.

Factors ancillary to the employee's pregnancy cannot be relied upon by the employer, to dismiss the employee.[343] This was evident in *Swart v Greenmachine Horticultural Services*[344] where the employee was allegedly dismissed on numerous charges of misconduct, including misconduct for non-disclosure of pregnancy during her application for employment. The court found that non-disclosure of pregnancy was the dominant reason which ultimately led to the dismissal of the employee.[345] It held that the dismissal was automatically unfair on the basis of pregnancy or any reason related to pregnancy.

The employer may also contravene section 187(1)(e) through conduct committed by a third party. For instance, in *Memela v Ekhamazi Springs (Pty) Ltd*[346] the employer terminated the contract of the employee for failing to carry out her duties. The employee had fallen pregnant and was consequently denied entrance at a Mission where the employer carried out its business.[347] For failing to negotiate with the owners of the Mission to allow the employee to reach her working place, the court held that the employer had dismissed the employee for reasons related to her pregnancy.[348]

Another category of automatically unfair dismissals is described as discriminatory dismissals. A dismissal is deemed automatically unfair if the reason for the dismissal is connected to any of the listed grounds provided under section 187(1)(f). The grounds listed under 187(1)(f) are similar to the ones in section 6(1) of the EEA. Marcus AJ[349] in *Botha v A Import Export International CC* pointed out that the inclusion of the phrase "any arbitrary ground" designates that the list under section 187(1)(f) is not exhaustive. That is, there might be other discriminatory grounds in addition to those that have been listed.

For purposes of the present topic, however, dismissals under section 187(1)(f) are automatically unfair for the reason that they unfairly discriminate against (female) employees

---

343 Grogan *Workplace Law* 193.
344 *Swart v Greenmachine Horticultural Services (A Division of Sterikleen Pty Ltd)* 2010 31 *ILJ* 180 (LC).
345 *Swart v Greenmachine Horticultural Services (A Division of Sterikleen Pty Ltd)* 2010 31 *ILJ* 180 (LC) para 61.
346 *Memela v Ekhamazi Springs (Pty) Ltd* 2012 33 *ILJ* 2911 (LC).
347 The code of conduct of the Mission prohibited unmarried woman residing or working on its premises from falling pregnant.
348 *Memela v Ekhamazi Springs (Pty) Ltd* 2012 33 *ILJ* 2911 (LC) para 19.
349 *Botha v A Import Export International CC* 1999 20 *ILJ* 2580 (LC) para 29.

because of their gender, sex and family responsibility. In the *Sheridan* case,[350] the employer was also found to have unfairly discriminated against the employee because of her sex.

It is clear that an employee who is unfairly dismissed due to pregnancy may also have a claim of unfair discrimination on the grounds of gender or sex. In cases where an employee has experienced both an automatically unfair dismissal and unfair discrimination, she can seek relief under both the EEA and LRA in the CCMA or the Labour Court. An employee can be awarded damages under section 50(1)(e) of the EEA as well as additional compensation under the LRA in terms of section 193(1)(c) read with 194(3). In *Wallace*, the employer was found to have contravened section 6(1) of the EEA and section 187(1)(e) of the LRA. As a result, the employee was awarded damages in terms of the EEA and compensation in terms of the LRA.[351]

Section 193 of the LRA deals with unfair dismissal remedies. Three remedies at the disposal of the Labour Court or arbitrator are reinstatement, re-employment and compensation to the employee.[352] The employer will be ordered to reinstate or re-employ the employee except for the following: if such employee does not wish for the employment relationship to continue,[353] if the employment relationship has become intolerable; if it is not reasonably practicable to do so;[354] and if the dismissal is unfair for failure to follow fair procedure.[355]

In automatically unfair dismissal cases, the Labour Court may make an additional order considering the facts of the case.[356] For instance, in discriminatory dismissals, an additional order may take the form of an interdict restricting the employer from further discriminatory practices. The court may also award compensation of up to 24 months[357] remuneration in automatically unfair dismissals as compared to 12 month's remuneration awarded in general unfair dismissals.

---

350 *Sheridan v The Original Mary-Ann's at the Colony (Pty) Ltd* 1999 20 *ILJ* 2952 (LC) para 40.
351 *Wallace v Du Toit 2006* 27 *ILJ* 1754 (LC) paras 19-23.
352 S 193(1) of the *Labour Relations Act* 66 of 1995.
353 *Lukie v Rural Alliance CC t/a Rural Development Specialist* 2004 25 *ILJ* 1445 (LC).
354 *Mnguni v Gumbi* 2004 25 *ILJ* 715 (LC) para 18.
355 S 193(2) of the *Labour Relations Act* 66 of 1995.
356 S 193(3) of the *Labour Relations Act* 66 of 1995.
357 S 194(3) of the *Labour Relations Act* 66 of 1995.

4.6.1.2 Overlap between the provisions of LRA and EEA

There is certainly a nexus between the unfair discrimination provision under the EEA and the discriminatory dismissal provisions under the LRA. The implication is that an aggrieved employee may have a claim under either the LRA or the EEA.

Similar to the EEA, the LRA affords the employer the opportunity to justify the discriminatory dismissal alleged. The employer bears the onus of proving that the discrimination was fair as it was related to the inherent requirements of the particular job.[358] In other words, the employer has to prove that certain attributes are indispensable in carrying out duties considering the nature of a job, and for that reason he could not retain that employee.[359]

4.7 Maternity leave and health protection in the workplace

Protecting the health of a pregnant and breastfeeding employee (and ultimately that of the child as well) is one of the essential objectives of maternity protection. In South Africa, the BCEA, OHSA and MHSA form part of the protective legislation meant to protect the health of such employees.

4.7.1 Basic Conditions of Employment Act[360]

The BCEA ensures that there is adherence to fair labour practices in employment relationships as prescribed by the Constitution. It regulates minimum conditions of employment in the workplace. The basic rights covered by the BCEA include amongst others working hours,[361] leave,[362] remuneration[363] and termination of employment.[364] It specifies numerous rights of employees relevant to maternity protection, such as maternity leave.

---

358 S 187(2)(a) of the *Labour Relations Act* 66 of 1995. Another defence against a discriminatory dismissal is one of retirement age. A discriminatory dismissal is justified if the employee has attained a normal or agreed retirement age.

359 Van Niekerk *Unfair Dismissal* 43. For instance, in a disability case where an employee becomes disabled after appointment, a dismissal will be fair if the employer can prove that due to the inherent requirement of a job, the employee no longer possesses characteristics which are a necessity in order to carry out functions in a particular job.

360 75 of 1997.

361 S 9 of the *Basic Conditions of Employment Act* 75 of 1997.

362 S 20-27 of the *Basic Conditions of Employment Act* 75 of 1997.

363 S 32 of the *Basic Conditions of Employment Act* 75 of 1997.

364 S 37 of the *Basic Conditions of Employment Act* 75 of 1997.

4.7.1.1 Maternity leave

The BCEA guarantees pregnant employees a minimum of four months maternity leave[365] which may be taken anytime from four weeks prior to the birth of a child[366] or at a time when it is medically advisable to do so due to the health of the employee or unborn child.[367] It is clear from the above that, unlike in Lesotho, the period of maternity leave in South Africa is longer than that provided by Convention No. 183 which mandates a maternity leave period of at least 14 weeks. There is an apparent advancement (regarding the length of maternity leave in South Africa) since it falls slightly short of the 18 weeks' period suggested by Recommendation No. 191.

Section 49(1)(d) of the BCEA emphasises that any agreement reducing the length of maternity leave is invalid. In *De Beer*[368] referred to above, the employer and employee agreed on only one month maternity leave. The employer sought to rely on the agreement to prove that the employee was in violation of their agreement.[369] The court however held that the agreement was null and void because in terms of section 25 of the BCEA the employee was entitled to at least four months maternity leave.[370]

Maternity leave not only gives mothers time to take care of and bond with their new-born but also allows mothers to recover from the effects of childbirth. With those in mind, the BCEA provides that the employee may not return to work within six weeks after childbirth unless the mother is declared medically fit to return to work.[371] The same post-natal period is similarly available for employees who have suffered a miscarriage or gave birth to a stillborn in terms of section 25(4). This is irrespective of whether or not the employee had commenced her maternity leave.

South African labour legislation makes no provision for parental leave which should be available to both parents at the end of maternity leave. However, the proposed *Labour Laws Amendment*

---

365 S 25(1) of the *Basic Conditions of Employment Act* 75 of 1997.
366 S 25(2)(a) of the *Basic Conditions of Employment Act* 75 of 1997.
367 S 25(2)(b) of the *Basic Conditions of Employment Act* 75 of 1997.
368 *De Beer v SA Export Connection cc t/a Global Paws* 2008 29 *ILJ* 347 (LC) para 1.
369 *De Beer v SA Export Connection cc t/a Global Paws* 2008 29 *ILJ* 347 (LC) para 17.
370 *De Beer v SA Export Connection cc t/a Global Paws* 2008 29 *ILJ* 347 (LC) para 21.
371 S 25(3) of the *Basic Conditions of Employment Act* 75 of 1997.

Bill of 2015 passed by Parliament in 2017 introduces parental leave, adoption leave as well as commissioning parental leave.[372]

Section 27(2)(a) of the BCEA recognises the right of employees to three days paid family responsibility leave which should be available to employees when the child is born. Since women already qualified for maternity leave during this period, the aforementioned section was formulated with the father in mind (and all other employees who became parents via non-traditional means, such as adoptive parents). The three days provided to these parents has in the meantime been addressed by the *Labour Laws Amendment Bill*, 2015 mentioned above, even though it has not yet come into effect. Ten days parental leave,[373] and ten weeks leave for adoptive[374] and commissioning parents[375] are now introduced.

Even though maternity leave is a right, employers are not compelled to provide *paid* maternity leave. The *Unemployment Insurance Act*[376] is responsible for providing benefits to employees during maternity leave. This is one of the areas where Lesotho is largely lagging behind.

4.7.1.2 Health protection

The BCEA also protects the health of female employees and the new-born child. Thus, employers are not allowed to demand that pregnant and breastfeeding employees perform work that is hazardous to their health and that of the child.[377] This calls for risk assessments to be implemented by employers in order to identify potential hazards likely to affect the health of pregnant and breastfeeding employees.[378]

During pregnancy and for six months after childbirth, a female employee is excused from performing night work or work that is likely to be harmful to both her health and that of the

---

372 These changes came about after the landmark case of *MIA v State Information Technology Agency (Pty) Ltd* 2015 36 *ILJ* 1905 (LC) where a male couple had a baby with the help of a surrogate and one of the parents applied for maternity leave. Although the employer refused him maternity leave of four months due to the scope of this leave, the court however granted "maternity leave" but found that changes to relevant laws were necessary to bring it in line with new non-traditional methods of becoming parents. The court highlighted that these parents also need time off work to care for the child.

373 S 25A (1) of the *Labour Laws Amendment Bill*, 2015.

374 S 25B (1) of the *Labour Laws Amendment Bill*, 2015.

375 S 25C (1) of the *Labour Laws Amendment Bill*, 2015.

376 63 of 2001.

377 S 26(1) of the *Basic Conditions of Employment Act* 75 of 1997.

378 Badenhorst "Occupation health and safety considerations for the employment of female workers in hardrock mines" 69.

child.[379] During this period the employer is required to reasonably accommodate the employee by offering suitable alternative work without downgrading the terms and conditions of her employment contract.[380] However, section 26(2)(b) of the BCEA recognises that the employer may at times be unable to provide suitable alternative work for the employee. As a result, the duty to provide alternative work binds the employer only where it is practicable to do so.

An extensive interpretation into the meaning of section 26(2) was provided in *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd.*[381] A company policy placed an employee working in risky areas on extended unpaid maternity leave where suitable alternative employment could not be found. An employee challenged this policy on the grounds that by virtue of the word "must" in section 26(2), she is guaranteed suitable alternative employment on the same terms and conditions to her ordinary employment.[382] In interpreting this provision, the court remarked that section 26(2) ought to be read together with section 26(2)(b), which provides that alternative suitable employment should be provided where it is practicable to do so.[383] As such, the court was of the view that a correct interpretation entails that section 26(2) does not "guarantee" suitable alternative employment but rather "guarantees the right to be considered for alternative suitable employment."[384] Against this interpretation, the court concluded that the company's policy was not in contravention of the BCEA.

The BCEA is complemented by the *Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child*, issued by the Minister of Labour in terms of section 87(1)(b) of the BCEA.

4.7.1.2.1 Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child[385]

The underlying reason behind the introduction of the Code is to provide guidelines with respect to health protection of pregnant employees and nursing mothers at the workplace.[386] Section

---

379 S 26(2)(a) of the *Basic Conditions of Employment Act* 75 of 1997.
380 S 26(2) of the *Basic Conditions of Employment Act* 75 of 1997.
381 *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd* 2018 39 *ILJ* 415 (LC).
382 *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd* 2018 39 *ILJ* 415 (LC) para 41.
383 *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd* 2018 39 *ILJ* 415 (LC) para 42.
384 *Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd* 2018 39 *ILJ* 415 (LC) para 47.
385 GN R1441 in GG 19453 of 13 November 1998. Hereinafter the Code.
386 Item 1.2 of GN R1441 in GG 19453 of 13 November 1998.

26(1) of the BCEA, which refers to the protection of employees before and after childbirth, is read in conjunction with the Code in its application. It starts by indicating legal requirements necessary for the protection of pregnant and breastfeeding employees as contained in different statutes that have been discussed throughout this chapter. A number of notable guidelines for both employers and employees are set out in the Code, such as guidelines on identification and assessment of physical, ergonomic, chemical and biological hazards at the workplace.[387]

Item 5.2.1 places upon employers the duty to frequently identify possible hazards likely to affect the health of a pregnant or breastfeeding employee. Employers are also obliged to identify and keep a list of risk-free positions within the workplaces.[388] These positions are intended to offer alternative work to employees, particularly in instances where their work exposes them to hazards harmful to their health and child during pregnancy or after childbirth.[389] In terms of the Code, employers bear the responsibility to make pregnant and breastfeeding employees aware of hazards harmful to their health in the workplace.[390] Apart from discussing alternative work, this is to enable the employees to follow safe work procedures in order to avert possible harm. Employees have a corresponding duty to inform employers as soon as they learn about their pregnancy, since the employer cannot be expected to accommodate the employee if unaware of her needs.[391] It follows that the employer should make it easy for the employee to open up about her pregnancy without fear of discrimination.

As per Item 5.7, as soon as the employer learns about the employee's pregnancy, an assessment should be carried out regarding her physical condition and her job. Evaluation of the employee's job is to determine whether risks associated with her work allow for continuation with her duties in that line of work.[392] If the results of the assessment reflect potential health hazards, this must be made known to the employee in order to decide together on how to prevent or mitigate the risk in question.[393] Safety lessons by the employer to the employee are therefore necessary in such instances, to enable her to better protect herself against potential harm.

---

387 Item 6 of GN R1441 in GG 19453 of 13 November 1998.
388 Item 5.3 of GN R1441 in GG 19453 of 13 November 1998.
389 Vettori 2016 *AJHTL* 3.
390 Item 5.5 of GN R1441 in GG 19453 of 13 November 1998.
391 Botha and Cronje 2015 *SAJHRM* 4.
392 Botha and Cronje 2015 *SAJHRM* 4.
393 Item 5.8 of GN R1441 in GG 19453 of 13 November 1998.

In terms of item 5.12 of the Code, employees should be afforded the opportunity to visit medical centres or clinics during pregnancy and after childbirth, even during working hours. Such visits ensure that complications associated with pregnancy and childbirth can be monitored and addressed.

Lastly, both employers and employees are informed about several aspects of pregnancy which may affect the employee's performance. For instance, morning sickness and frequent visits to the ladies room may interrupt the work of a pregnant employee.[394] Standing or sitting for long periods at work may result in lower back pains as well as varicose veins.[395] Rest periods are therefore necessary to avoid such complications. In addition to that, tiredness caused by pregnancy disallows pregnant employees to work overtime or during the evening, particularly if the employer does not provide rest periods. Employers and employees are also made aware that the increasing size of the employee may require the supply of new clothing (where uniforms are worn in the workplace, for instance) and also a work station which will enable her to move freely.[396]

The provisions of the Code as discussed above are a reflection of Item 6 of the Recommendation No. 191. This is yet another indication of large strides taken by South Africa towards compliance with the international standards.

Although the Code does not carry the binding nature of a statute, its importance cannot be undermined. It is available to guide employers to comply with the statutory obligations entrenched under section 26 of the BCEA. Therefore, non-compliance with the Code eventually leads to violation of relevant BCEA provisions since the Code has to be considered when applying the BCEA.[397]

---

394 Badenhorst "Occupation health and safety considerations for the employment of female workers in hardrock mines" 64.

395 Vettori 2016 *AJHTL* 2.

396 Badenhorst "Occupation health and safety considerations for the employment of female workers in hardrock mines" 64-65.

397 S 87(3) of the *Basic Conditions of Employment Act* 75 of 1997.

4.7.2 Occupational Health and Safety Act[398] *and Mine Health and Safety Act*[399]

Tshoose[400] reckons that health and safety qualifies as a fundamental human right for employees in the workplace. This is correct, considering that section 24(a) of the Constitution recognises the right to an environment that is not harmful to health or wellbeing. Commitment by South Africa towards health and safety is reflected by the provisions of the OHSA and MHSA. These statutes are primarily concerned with the general health and safety of employees at the workplace.

According to section 8 of the OHSA, the employer has to ensure as far as is reasonably practicable that a working environment is safe and not harmful to the health of the employees. The provision is of general application to all employees in the workplace. Since pregnant and breastfeeding employees form part of a workforce, this implies that they are also entitled to a safe and healthy working environment. The obligations of the employer include minimizing any harmful hazards, and providing information and training regarding safety in the workplace that are likely to affect employees.[401] To ensure compliance with these duties, criminal liability is imposed on employers who fail to provide health and safety at the workplace.[402]

The MHSA, on the other hand, governs occupational health and safety in the South African mining industry. In terms of a relevant ILO standard, the *Underground Work (Women) Convention*, 1935 (No. 45)[403] addresses the employment of women at mines, in particular the performance of underground work which is strictly prohibited when an employee is pregnant.[404] The MHSA demands protection of female employees working underground through adoption of safety measures by employers. The MHSA requires mine employers to carry out risk assessments to identify potential hazards.[405] This should be followed by the implementation of measures preventing or mitigating the identified hazards.[406] The implication is that pregnant and

---

398 85 of 1993.
399 29 of 1996.
400 Tshoose 2014 *CILSA* 280.
401 Mischke 1995 *Juta's. Bus. L* 118.
402 S 38 of the *Occupational Health and Safety Act* 85 of 1993.
403 South Africa ratified this Convention on the 25 June 1936.
404 A 2 of the *Underground Work (Women) Convention*, 1935 (No. 45).
405 S 11(1) of the *Mine Health and Safety Act* 29 of 1996.
406 S 11(2) of the *Mine Health and Safety Act* 29 of 1996.

breastfeeding employees will not be exposed to work and an environment that is harmful to their health.

4.8 Payments of maternity benefits during maternity leave

As per the provisions of Convention No. 183, Member States without paid maternity leave ought to afford employees maternity cash benefits financed through a compulsory social insurance scheme. Bearing in mind that maternity leave is generally unpaid in South Africa, the unemployment insurance scheme remains the primary source of cash benefits during these periods. The provision of unemployment benefits is regulated by the UIA.

4.8.1 Provisions of the Unemployment Insurance Act

Maternity benefits in South Africa are provided through the Unemployment Insurance Fund[407] which is established under the UIA. The UIA operates side by side with the *Unemployment Insurance Contributions Act*[408] which oversees the payments into the UIF. In terms of section 4 of the UIA, the UIF is made up of contributions from employers and employees collected by UICA through the South African Revenue Services or Unemployment Insurance Commissioner. It is reckoned that the system of collection of contributions through SARS or the Commissioner enables the UIF to remain financially viable in order to meet its goals of offering benefits to employees affected by contingencies.[409]

Maternity entitles female employees to claim maternity benefits. The benefits are available to the employee during pregnancy, delivery and the period thereafter.[410] In order to coincide with the four months maternity leave provided by the BCEA, the period of payment for maternity benefits has been set at 17.32 weeks.[411] Furthermore, employees who withdraw maternity benefits retain their right to claim other benefits provided by the UIF.[412] For instance, an employee who has claimed maternity benefits is still entitled to unemployment benefits.

---

407 Hereinafter UIF.
408 4 of 2002. Hereinafter UICA.
409 Olivier and Smit *LAWSA* para 68.
410 S 24(1) of the *Unemployment Insurance Act* 63 of 2001.
411 Dooka 2002 *SA Merc LJ* 755.
412 Dooka 2002 *Juta's Bus. L* 70.

The income replacement rate is a maximum of 60% of the employee's earnings.[413] The rate of benefits the employee receives in South Africa is certainly lower than the 66% recommended under Convention No. 183. The implication is that breastfeeding mothers may feel compelled to return to work before the lapse of maternity leave. However, the *Unemployment Insurance Amendment Act* 10 of 2016[414] seeks to respond to this problem by increasing the rate to 66% of employee's normal earnings in order to comply with the international standards.[415] To improve the standard of rights and application for maternity benefits, other changes have been included in the UIAA. Female employees who have lost their child in their third trimester or bear a still-born child are to be entitled to full maternity benefits.[416] In terms of section 10(a) of the UIAA, female employees will now be able to claim maternity benefits eight weeks before the scheduled birth up to twelve months after childbirth.

4.9 Conclusion

The above discussion demonstrates that South Africa has made significant progress in terms of maternity protection. Not only does it offer an extensive legislative framework but there is substantial compliance with relevant international standards. The Constitution provides the basis for elements of maternity protection such as social security and health care as well as protection against discrimination and unfair dismissals.

The Constitution is complemented by numerous pieces of legislation. The EEA contains anti-discrimination provisions which protect female employees against unfair discrimination attached to their childbearing role. Not only does it protect female employees, it also recognises that prospective employees can be subjected to discrimination. The LRA further outlaws dismissals of a discriminatory nature against female employees.

Employment security is guaranteed in that maternity leave cannot be grounds for dismissal. The LRA contemplates that dismissal can also occur in cases of intended pregnancy and other reasons related to pregnancy. Such dismissals are declared automatically unfair.

---

413 12(3)(b) of the *Unemployment Insurance Act* 63 of 2001.
414 Hereinafter UIAA. The Amendment Act was signed into law in January 2017 but has not yet come into operation.
415 S 4(c) of the *Unemployment Insurance Amendment Act* 10 of 2016.
416 S 9(a) of the *Unemployment Insurance Amendment Act* 10 of 2016.

The provisions of the BCEA pertaining to the provision and length of maternity leave go beyond the international labour standards. Health protection under the BCEA is supplemented by the Code which guides employers and employees on identifying and dealing with hazards that may negatively impact on pregnant and breastfeeding employees. The OHSA and MHSA make further contributions regarding health and safety in the workplace by placing a general duty on the employer to ensure that health and safety in the workplace is observed.

Since maternity leave is mostly unpaid in South Africa, the UIA provides maternity benefits to employees who contribute to the UIF.

The next chapter seeks to draw conclusions and recommendations from the foregoing chapters. Since the South African perspective on maternity protection shows significant progress, the focal point will be on the lessons that Lesotho can learn from South Africa, where maternity protection practices correspond more closely with international standards.

Chapter 5: Conclusions and recommendations

5.1 Introduction

The purpose of this study was threefold. Firstly, the study was meant to measure Lesotho's maternity protection against international law. Secondly, the study was meant to explore the South African maternity protection in order to find potential lessons for Lesotho. The ultimate goal is to provide suggestions on how to improve Lesotho's maternity protection through recommendations where it appears to be lacking. This chapter is intended to present a general conclusion of the discussion, followed by lessons for Lesotho and recommendations.

5.2 Determining the extent of Lesotho's compliance with ILO's standards on maternity protection

Pregnancy and the period after childbirth represent the times when female employees are more vulnerable to the effects of workplace hazards. Consequently, the ILO recognises the need to protect their health by requiring specific measures to be taken at the workplace against dangerous work or working conditions and exposure to potential hazards.[417] It has been indicated in chapter 3 that, in Lesotho, there are no provisions which require measures to be taken on behalf of pregnant or breastfeeding employees such as alternative work where health hazards exist. The only provisions that exist relate to the general health and safety of all employees at the workplace; these do not necessarily take into account the needs of pregnant and breastfeeding employees. The general health and safety provisions are thus insufficient and fall short of the standards required by the ILO.

Maternity leave affords employees rest periods during their pregnancy and enables mothers to recover from the aftermath of childbirth.[418] For this reason, it is only logical for the ILO to set an adequate period of maternity leave. Convention No. 183 therefore provides for a period of 14 weeks maternity leave while the Recommendation No. 191 proposes a period of 18 weeks.[419] As

---

417 See para 2.4.2 above.
418 See para 2.4.3 above.
419 See para 2.4.3 above.

argued above, Lesotho fails to comply with the standards of the ILO by providing for a maternity leave period of only 12 weeks.[420]

Furthermore, to enable shared responsibility for a new-born child by both parents, the Recommendation provides for what is termed "parental leave" available to both parents at the end of maternity leave.[421] It recommends that Member States provide for some type of leave available to fathers under various circumstances, such as when the mother is not able to complete her leave period or if she dies. No such leave is offered under Lesotho's labour framework, and no talks are currently underway on this matter.

The position of the ILO pertaining to non-discrimination, as has been indicated in chapter 2, is that maternity should not be used to discriminate against female employees, including job applicants. The *Maternity Protection Convention* is backed up by the *Discrimination (Employment and Occupation) Convention* which aims at eliminating discrimination in employment and occupation. In Lesotho, the approach to discrimination under the *Labour Code* is narrow. Amongst the prohibited grounds of discrimination, only one maternity-related ground, namely sex, is included. Of greater concern, the definition of discrimination does not contemplate other grounds of discrimination. This leaves complainants with only the ground of sex in proving maternity-related discrimination. As a result, Lesotho falls short of the ILO standard which requires prohibition of discrimination on maternity as a whole which would include other grounds such as pregnancy or family responsibility.

The ILO furthermore recognises that the requirement of pregnancy tests in employment, where they are unrelated to the job requirements, promotes potential discrimination.[422] In Lesotho, the *Labour Code* is silent on the issue of testing for pregnancy, as well as medical testing in general. Thus, on this matter too, Lesotho fails to comply with the ILO standards.

The standard of the ILO with regards to paid leave is that in Member States where employers are not legally obliged to provide paid maternity leave, employees should rather receive cash benefits provided through compulsory social insurance schemes or a public fund.[423] In chapter

---

420 See para 3.3.2 above.
421 See para 2.4.3 above.
422 See para 2.4.5 above.
423 See para 2.4.4 above.

3, it was mentioned that employers in Lesotho are not legally obliged to provide paid maternity leave except in selected sectors. This matter presents a problem in Lesotho, since employees do not receive any financial support as there is no social insurance scheme.

Finally, the ILO recommends that where possible, nursing facilities should be established at the workplace.[424] Even though the *Labour Code* provides for nursing breaks, there is no obligation on employers to establish nursing facilities for privacy of breastfeeding mothers. On this matter, Lesotho once again falls short of the required standards of the ILO.

In light of the above discussions, it is apparent that Lesotho to a large extent fails to comply with the standards of the ILO regarding maternity protection.

5.3 Lessons for Lesotho from the South African position

The discussions in chapter 4 have demonstrated that South Africa complies more closely with the international standards and has made significant progress in terms of maternity protection, as compared to Lesotho. As a result, it provides essential lessons for Lesotho which will be discussed below.

5.3.1 Health protection

South Africa has shown particular progress under this aspect of maternity protection through provisions of the BCEA, OHSA and MHSA. It differs largely from the Lesotho position which lacks specific provisions meant for pregnant and breastfeeding employees. In addition to protection of pregnant and breastfeeding employees granted by the BCEA, the *Code of Good Practice on the Protection of Employees during Pregnancy and after the Birth of a Child* provides employers and employees with guidelines or measures to be taken in order to ensure there is utmost protection of the health of female employees and the unborn or new-born child.[425] These guidelines present a similar approach to that of the ILO, in particular the *Maternity Protection Recommendation* in terms of workplace risk assessments, alternatives to risky work, adaptation of working conditions, and time off for medical examinations for pregnant and breastfeeding employees. With the Code in mind, employers in South Africa have

---

424 See para 2.4.6 above.
425 See para 4.7.1.2.1 above.

certainty on measures to implement in order to protect the health of pregnant employees, the child and the breastfeeding employee. The provisions of the MHSA also present a similar approach to that of the *Maternity Protection Recommendation,* by demanding employers carry out risk assessments followed by precautionary measures where hazards are identified.[426] The enhanced health protection of employees provided by South Africa presents an ideal lesson for Lesotho in this regard.

5.3.2 Maternity leave

South Africa provides for an improved maternity leave period of at least four months (17.32 weeks) as compared to Lesotho's 12 weeks.[427] The South African position is not only in compliance with the international standard but provides a leave period which is far beyond the one expected by the *Maternity Protection Convention* and slightly below the period in the Recommendation.

In a similar manner to Lesotho, the South African law at present does not provide for *appropriate* leave for fathers to be taken after the child's birth (besides the three days' family responsibility leave). However, South Africa looks to soon provide for parental leave, after Parliament in 2017 approved the *Labour Laws Amendment Bill* of 2015 which is intended to offer employees ten days parental leave and ten weeks adoption and commissioning parental leave.[428] This initiative taken by South Africa is a stepping stone towards the provision of parental leave and in the process will soon comply with standards of ILO on such leave.

5.3.3 Employment protection

A broader approach adopted by the South African LRA towards pregnancy-related dismissals presents a valuable lesson for Lesotho. It does not only refer to pregnancy in the narrow sense of the word but casts the net wider by prohibiting dismissal on "intended pregnancy" and "any other reasons related to pregnancy".[429] This provides additional protection because it recognises that the woman's biological role in society is relevant not only when she is actually pregnant, but that her biological role has a wider impact on her personal life as well as employment life.

---

426 See para 4.7.2 above.
427 See para 4.7.1.1 above.
428 See para 4.7.1.1 above.
429 See para 4.6.1.1 above.

Unlike in Lesotho, where there is no additional or heavy penalty in cases of maternity-related dismissals, South Africa's LRA offers such remedy to further deter employers from unfair dismissals. The court may additionally award compensation of up to 24 month's remuneration over and above other remedies already awarded to the employee.

5.3.4 Non-discrimination

South African approach on non-discrimination is similar to the approach adopted by the *Maternity Protection Convention* and the *Discrimination (Employment and Occupation) Convention*. In addition to the prohibition of unfair discrimination provided in the Constitution, the EEA is specific in that it expressly prohibits unfair discrimination in the workplace on the grounds of sex, gender, pregnancy and family responsibility.[430] The aforesaid grounds are clearly maternity-related and present a broader perspective on non-discrimination, in contrast to Lesotho's position which prohibits unfair discrimination solely on the ground of sex. The South African perspective on this matter is clearly progressive and provides a valuable lesson for Lesotho.

Furthermore, in a similar fashion to Lesotho's *Labour Code* which is silent on pregnancy testing, the EEA of South Africa does not specifically mention or prohibit pregnancy testing. However, in order to cover a wide range of tests that may be performed on the employee, it prohibits medical testing of employees in general in order to prevent discrimination that may result from the outcome of the tests.[431] Testing for pregnancy should be understood to be included in this provision, since it has regard to the testing for some physical or biological condition which might to some extent affect the person's ability to perform work. It seems in this regard that South Africa again has a wider coverage of maternity protection than Lesotho.

5.3.5 Maternity benefits

South Africa, in this area of maternity protection, presents an advanced system which sets a great example for Lesotho, considering that Lesotho lacks a social insurance scheme for maternity benefits. The BCEA does not place employers under a legal obligation to provide paid maternity leave. However, lack of paid leave in South Africa is complemented by the UIF which

---

430 See para 4.4.1 above.
431 See para 4.4.1 above.

offers maternity benefits to employees during maternity leave.[432] Through the UIF, South Africa complies with the ILO. It was mentioned earlier that the social insurance scheme is financed by employers and employees in order to provide financial support to employees during maternity leave.[433]

5.4 Recommendations

- First of all, the principles of state policy in the Lesotho Constitution, in so far as they contain elements of maternity protection, must be given more weight to enable courts to enforce them when need arises. In this way the Constitution will serve as back-up to the Labour Code.

- It is recommended that Lesotho ratify the *Maternity Protection Convention* to demonstrate the country's commitment to abide by the provisions of the international standards which promote maternity rights of employees.

- The importance of maternity leave has largely been discussed. Therefore, the period of maternity leave should be increased from 12 weeks to 14 weeks, or more, in order to comply with the international labour standards.

- To enable fathers to also partake in the caring of the new-born child, the legislature should introduce parental leave which should be available to both parents (taken at birth by the father, or by both at the end of maternity leave). The length of parental leave should be determined according to national practice.

- The Labour Code specifies that the remedy for unfair dismissals on the grounds of maternity is reinstatement without loss of benefits. However, this remedy is not harsh enough to deter employers from committing maternity-related dismissals. It is therefore recommended that the Labour Code must offer additional penalties heavy enough to dissuade employers.

---

[432] See para 4.8.1 above.
[433] See para 4.8.1 above.

- To increase the scope of protection against pregnancy-related dismissals, the Labour Code must be amended to prohibit dismissal on the grounds of intended pregnancy and any other reasons related to the woman's pregnancy.

- Provisions relating to paid maternity leave largely vary in Lesotho's labour framework. To avoid this inconsistency, a compulsory social insurance scheme financed by both employers and employees' contributions must be established. Rather than having to burden employers in particular where paid maternity leave is mandated, employees will resort to the social insurance scheme for income replacement during maternity leave. The period of payment should correspond with the length of maternity leave.

- The anti-discrimination provision of the *Labour Code* must be widened by including gender, pregnancy and family responsibility as prohibited grounds of discrimination in employment or occupation. To curb discriminatory practices during employment, the aforesaid anti-discrimination provision must specifically prohibit pregnancy testing except where the inherent requirements of a job demand such tests.

- In view of the importance of protecting the health and safety of pregnant and breastfeeding employees, the provisions relating to protection of health in employment and occupation must be re-evaluated. There must be a legal obligation on employers to conduct risk assessment at the workplace, and adjust or offer alternative work for a pregnant or breastfeeding employee if the outcome of the assessment requires such adaptation. Furthermore, there must also be a legal obligation on employers to allow pregnant and breastfeeding employees paid time off for visits to clinics in order to monitor their condition.

- Finally, employers must be legally obliged to make arrangements for breastfeeding facilities. There is no point in affording employees breastfeeding breaks if there are no facilities to enable them to breastfeed in privacy.

5.5 Conclusion

In conclusion, the study shows that Lesotho has a long way to go in improving maternity protection, to comply with what is expected by the ILO. The existing legislative framework protecting maternal rights of female employees is inadequate at present. This leaves the

country with much room for improvement in terms of complying with international standards and lessons from the South African experience.

BIBLIOGRAPHY

Literature

Alcock *History of the International Labour Organisation*

> Alcock A *History of the International Labour Organisation* (Macmillan Press London 1971)

Badenhorst "Occupation health and safety considerations for the employment of female workers in hardrock mines"

> Badenhorst CJ "Occupation health and safety considerations for the employment of female workers in hardrock mines" in *South Africa Institute of Mining and Metallurgy, Hard Rock Safety Conference* (2009 September Sun City) 59-73

Bernaz *Business and Human Rights*

> Bernaz N *Business and Human Rights: History, law and policy-bridging accountability gap* (Routledge New York 2017)

Boswell and Boswell 2009 *Agenda*

> Boswell R and Boswell B "Motherhood deterred: Access to maternity benefits in South Africa" 2009 *Agenda* 76-85

Boswell 2009 *Agenda*

> Boswell R and Boswell B "Motherhood deterred: Access to maternity benefits in South Africa" 2009 *Agenda: Empowering women for gender equity* 76-85

Botha and Cronje 2015 *SAJHRM*

> Botha D and Cronje F "Occupational health and safety considerations for women employed in core mining positions" 2015 *SAJHRM* 1-12

Chioma 2012 *Nigerian Law Journal*

Chioma A "Gender and Social Change" 2012 *Nigerian Law Journal* 14-30

Cruz 2012 *Good Practices and challenges on the Maternity Protection Convention, 2000 (No.183) and the workers with Family Responsibilities Convention 1981 (No.156): A comparative study*

Cruz A Good Practices and challenges on the Maternity Protection Convention, 2000 (No.183) and the workers with Family Responsibilities Convention 1981 (No.156): A comparative study (Geneva, 2012)

Darooka Social Security: A Woman's Human Right

Darooka P Social Security: A Woman's Human Right Discussion Paper No.2 (2008)

Dooka 2002 *Juta's Bus. L*

Dooka T "Unemployment Insurance in South Africa" 2002 *Juta's Bus. L* 68-73.

Dooka 2002 *SA Merc LJ*

Dooka T "A critical evaluation of the Unemployment Insurance Act 63 of 2001 (Part I) 2002 *SA Merc LJ* 747-757

Dowd 1986 *Fordham Law Review*

Dowd NE "Maternity Leave: Taking sex differences into account" 1986 *Fordham Law Review* 699-766

Dupper *et al Essential Employment Discrimination Law*

Dupper O *et al Essential Employment Discrimination Law* (Juta Cape Town 2004)

Dupper and Garbers "Justifying Discrimination"

Dupper O and Garbers C "Justifying Discrimination" in Strydom E (ed) Essential Employment Discrimination Law (Juta Cape Town 2004)

Dupper 2001 *Stellenbosch Law Review*

Dupper O "Maternity Protection in South Africa: An International and Comparative Analysis (Part One)" 2001 *Stellenbosch Law Review* 421-438

Dupper 2002 *Stellenbosch Law Review*

Dupper O "Maternity Protection in South Africa: An International and Comparative Analysis (Part Two)" 2002 *Stellenbosch Law Review* 83-97

Du Plessis 2011 *PER*

Du Plessis L "The Status and Role of Legislation in South Africa as a Constitutional Democracy" 2011 *PER/PELJ* 92-102

Du Toit *et al Labour Relations Law: A Comprehensive Guide*

Du Toit *et al Labour Relations Law: A Comprehensive Guide* (LexisNexis Durban 2015)

Du Toit and Potgieter *Unfair Discrimination in the Workplace*

Du Toit D and Potgieter M *Unfair Discrimination in the Workplace* (Juta Cape Town 2014)

Ellemes and Kalembo 2016 *International Journal of Nursing Sciences*

Ellemes PN and Kalembo F "Supporting mothers to bond with their newborn babies: Strategies used in a neonatal intensive care unit at a tertiary hospital in Malawi" 2016 *International Journal of Nursing Sciences* 362-366

Ferreira 2005 *Politeia*

Ferreira GM "Developments in labour relations in South Africa: Ten years of democracy (1994-2004)" 2005 *Politeia* 197-214

Frota "Cash and Medical benefits for pregnant and breastfeeding women"

Frota L "Cash and Medical benefits for pregnant and breastfeeding women" in *The Lesotho Socio Economic Context of Maternity Protection Conference* (23-24 April 2013 Maseru) 1-43

Gaibe 2011 *ILJ*

Gaibe S "Employment Equity and Anti-Discrimination Law: The Employment Equity Act 12 Years On" 2011 *ILJ* 19-52

Grogan *Dismissal*

Grogan J *Dismissal* 3rd ed (Juta Cape Town 2017)

Grogan *Workplace Law*

Grogan *Workplace Law* 12th ed (Juta Cape Town 2017)

Gwisai 2015 *Zam. L. J*

Gwisai M "Maternity Protection and the 2013 Constitution of Zimbabwe: Dawn of a New Era for Women Employees?" 2015 *Zambia Law Journal* 85-120

Hatcher 2013 *European Journal of Training and Development*

Hatcher T "Robert Owen: A historiographic study of a pioneer of human resource development" 2013 *European Journal of Training and Development*

ILO 2010 *Achieving MDG 5 through Decent Work*

ILO *Achieving MDG 5 through Decent Work* (ILO Geneva 2010)

ILO: CEACR Report III (Part 1A) 2017

Report of the Committee of Experts on the Application of Conventions and Recommendations: General report and observation concerning particular countries, International Labour Conference 106th session 2017

ILO 2013 Government of Lesotho National Social Security Law Policy Brief

ILO 2013 Government of Lesotho National Social Security Law Policy Brief; Establishing Lesotho Social Security Organisation (LSSO)

ILO 2012 *Lesotho Baseline Report*: *Worker Perspectives from the Factory and Beyond*

ILO 2012 *Lesotho Baseline Report*: *Worker Perspectives from the Factory and Beyond* (ILO Geneva 2012)

ILO 2010 *Maternity at Work: Review of national legislation*

ILO Maternity at Work: Review of national legislation (ILO Geneva 2010)

ILO *Maternity Protection Resource Package*: *Cash and medical benefits*

ILO Maternity Protection Resource Package: Cash and medical benefits (ILO Geneva 2012)

ILO *Maternity Protection Resource Package: Employment protection and Non-discrimination*

ILO Maternity Protection Resource Package: Employment protection and Non-discrimination (ILO Geneva 2012)

ILO *Maternity Resource Package*: *International rights and guidance on Maternity Protection at work*

ILO Maternity Resource Package: International rights and guidance on Maternity Protection at work (ILO Geneva 2012)

ILO 2014 *Maternity and paternity at work: Law and Practice across the world*

ILO Maternity and paternity at work: Law and Practice across the world (ILO Geneva 2014)

ILO 2014 *Maternity Protection in SMEs: An international review*

ILO Maternity Protection in SMEs: An international review (ILO Geneva 2014)

ILO 2015 *Social protection for maternity: key policy trends and statistics*

ILO Social protection for maternity: key policy trends and statistics (ILO Geneva 2015)

ILO 2005 *Rules of the Game: A brief introduction to International Labour Standards*

ILO Rules of the Game: A brief introduction to International Labour Standards (ILO Geneva 2005)

ILO 2014 *Rules of the Game: A brief introduction to International Labour Standards*

ILO Rules of the Game: A brief introduction to International Labour Standards (ILO Geneva 2014)

ILO 2007 *Safe maternity and the world of work*

ILO Safe maternity and the world of work (ILO Geneva 2007)

ILO 2011 *Social protection floor for a fair and inclusive globalization*

ILO Social protection floor for a fair and inclusive globalization (ILO Geneva 2011)

International Labour Office, 1996

ILO Equality in employment and occupation Report III (Part 4B), International Labour Conference, 83rd session (ILO Geneva 1996)

Kathleen, Kathleen and Taylor 2013 *Breastfeeding Medicine*

Kathleen A, Kathleen M and Taylor J "Breastfeeding Support for Mothers in Workplace Employment or Educational Settings: Summary Statement" 2013 *Breastfeeding Medicine* 137-142

Klugman and Twigg 2016 *Journal of International and Comparative Law*

Klugman J and Twigg S "Gender at Work in Africa: Legal Constraints and Opportunities for Reform" 2016 *Journal of International and Comparative Law*

Labbok 2006 *International Journal of Gynecology*

Labbok M "Breastfeeding: A woman's reproductive right" 2006 *International Journal of Gynecology* 277-286

Lethobane "Tripartite Conference on the Labour Code Order"

Lethobane LA "The Tripartite Conference on the Labour Code Order No 24 of 1992: Its impact on Industrial Relation in the Public and Private Sector" Unpublished paper presented at a tripartite conference (1993 Maseru)

Le Roux, Rycroft and Orleyn *Harassment in the Workplace: Law, Policies and Processes*

Le Roux R, Rycroft A and Orleyn T *Harassment in the Workplace: Law, Policies and Processes* (LexisNexis Durban 2005)

Maqutu and Sanders 1987 *CILSA* 378

Maqutu WCM and Sanders AJGM "The internal conflict of laws in Lesotho" 1987 *CILSA* 377-404

Matthias 1995 *CILSA*

Matthias C "Achieving effective maternity rights in a post-apartheid South Africa: is the new constitution adequate?" 1995 *CILSA* 247-260

McGregor 2002 *Juta's Bus. L*

McGregor M "Elements of an Employment Discrimination Case" 2002 *Juta's Bus. L* 98-106

Mischke 1995 *Juta's. Bus. L*

Mischke C "Occupational Health, Safety, and Accident Compensation Legislation" 1995 *Juta's. Bus. L* 117-119

Mosito 2014 *LLJ*

Mosito KE "The Constitutionalism of Labour law in Lesotho" 2014 *LLJ* 33-58

Mpedi 2012 *Acta Juridica*

Mpedi L "The evolving relationship between labour law and social security" 2012 *Acta Juridica* 270-285

Naeima *Working women and their rights in the workplace: international human rights and its impact on Libyan Law*

Naeima FA *Working women and their rights in the workplace: international human rights and its impact on Libyan Law* (Doctor of Philosophy Thesis University of Wollongong 2011)

Ntsukunyane *Lesotho Times*

Ntsukunyane L "Workers to grill Minister" *Lesotho Times* (30 April 2015) 8

Olivier 2013 *Development Southern Africa*

Olivier M "Social protection in Lesotho: Innovations and reform challenges" 2013 *Development Southern Africa* 98-110

Olivier "Gender Discrimination in Labour Law and Social Security: Perspectives from SADC"

Olivier M "Gender Discrimination in Labour Law and Social Security: Perspectives from SADC" in Dupper O and Garbers C (eds) *Equality in the workplace: Reflections from South Africa and Beyond* (Juta Cape Town 2009)

Olivier and Smit *LAWSA*

Olivier MP and Smit N *The Law of South Africa* (Butterworths Durban)

O'Regan 1997 *ILJ*

O'Regan C "1979-1997: Reflecting on 18 years of Labour Law South Africa" 1997 *ILJ* 889

O'Sullivan and Murray 2005 *Acta Juridica*

O'Sullivan M and Murray C "Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy" 2005 *Acta Juridica* 1-41

Paul 2004 *Healthy beginnings: Guidance on safe maternity at work*

Paul J 2004 Healthy beginnings: Guidance on safe maternity at work (ILO Geneva 2004)

Pholo *Lesotho Justice Sector and the Rule of Law*

Pholo M *Lesotho Justice Sector and the Rule of Law* 2013: A review by AfriMap and the Open Society Initiative for Southern Africa 1-129

Poulter 1969 *J. Afr. L*

Poulter S "The Common Law in Lesotho" 1969 *J. Afr. L* 127-144

Ranooe *Lesotho Times*

Ranooe L "Call to revise labour laws" *Lesotho Times* (4 August 2017) 20

Rugege 1994 *ILJ* 930

Rugege S "Worker's collective rights under the Lesotho Labour Code" 1994 *ILJ* 930-943

Sengenberger 2013 *The International Labour Organization*

Sengenberger W *The International Labour Organization: Goals, Functions and Impact* (Friedrich Ebert Stiftung Germany 2013)

Servais *International Labour Law*

Servais J *International Labour Law* (Wolters Kluwer Netherlands 2014)

Sinha *Industrial Relations, Trade Unions and Labour Legislation*

Sinha PRN *Industrial Relations, Trade Unions and Labour Legislation* (Dorling Kindersley India 2009)

Smit and Olivier 2002 *J. S. Afri.L*

Smit N and Olivier M "Discrimination based on Pregnancy in Employment Law" 2002 *J. S. Afri.L* 783-795

Smit 2011 *Journal of Comparative Family Studies*

Smit R "Family Related Policies in Southern African Countries: Are working parents reaping any benefits?" 2011 *Journal of Comparative Family Studies* 15-36

Smith 2014 Afr. *Hum.Rts. L. J*

Smith A "Equality Constitutional Adjudication in South Africa" 2014 *Afr. Hum. Rts. L. J* 609-632

Strydom *et al Essential Social Security Law*

Strydom E (ed) *et al Essential Social Security Law* (Juta Cape Town 2006)

Swiegers *Britain and the labour question in South Africa: The interaction of State, capital, labour and colonial power*, 1867*-1910*

Swiegers G *Britain and the labour question in South Africa: The interaction of State, capital, labour and colonial power, 1867-1910* (Philosophiae Doctor Thesis University of Free State 2014)

Tilly and Scott *Women, Work and Family*

Tilly L and Scott J *Women, Work and Family* (Routledge New York and London 1987)

Tshoose 2014 *CILSA*

Tshoose C "Placing the Right to Occupational Health and Safety within a Human Rights Framework: Trends and Challenges for South Africa" 2014 *CILSA* 276-296

Valticas *International Labour Law*

Valticas N *International Labour Law* (Kluwer Netherlands 1979)

Van Ginneken *Extending Social Security: Policies for developing countries*

Van Ginneken W *Extending Social Security: Policies for developing countries* (ILO Geneva 2003)

Van Niekerk *Unfair Dismissal*

Van Niekerk *Unfair Dismissal* 4th ed (Siber Ink Cape Town 2008)

Vettori 2016 *AJHTL*

Vettori S "Employers duties towards pregnant and lactating employees in the hospitality industry in South Africa" 2016 *AJHTL* 1-12

WHO Resolution 2001

World Health Organization Resolution WHA54.2: Infant and young children nutrition (2001)

Case law

Association of Professional Teachers & another v Minister of Education & others 1995 16 *ILJ* 1048 (IC)

Bootes v Eagle Ink System Kwazulu-Natal 2008 29 *ILJ* 139 (LC)

Botha v A Import Export International CC 1999 20 *ILJ* 2580 (LC)

De Beer v SA Export Connection cc t/a Global Paws 2008 29 *ILJ* 347 (LC)

Fang Yang Supermarket v Moqhali and Another LC/REV/126/07

Harksen v Lane NO & others 1998(1) SA 300

Hoffmann v SA Airways 2000 21 *ILJ* 2357 (CC)

IMATU v City of Cape Town 2005 11 BLLR 1048 (LC)

Khathang-Tema Baitsokoli & Another v Maseru City Council & Others C of A (CIV) NO.4/05

Lukie v Rural Alliance CC t/a Rural Development Specialist 2004 25 *ILJ* 1445 (LC)

'*Makamohelo Makafane v Zhongtian Investment (Pty) Ltd* LC/76/2013

Manyetsa v New Kleinfontein Gold Mine (Pty) Ltd 2018 39 *ILJ* 415 (LC)

Masondo v Crossway 1998 19 *ILJ* 171 (CCMA)

Mbana v Shepstone & Wylie 2015 36 *ILJ* 1805 (CC)

Memela v Ekhamazi Springs (Pty) Ltd 2012 33 *ILJ* 2911 (LC)

*MIA v State Information Technology Agency (Pty) Ltd*2015 36 *ILJ* 1905 (LC)

Minister of Health & Another v New Clicks South Africa (Pty) Ltd 2006(1) BCLR 1 (CC)

Mnguni v Gumbi 2004 25 *ILJ* 715 (LC)

National Coalition for Gay and Lesbian Equality & Another v Minister of Justice & Others 1999 (1) SA 6

NEHAWU v University of Cape Town and Others 2003 (3) SA 1 (CC)

Netherburn Engineering CC t/a Netherburn Ceramics v Mudau & others 2003 24 *ILJ* 1712 (LC)

Palesa Peko v The National University of Lesotho LC/33/94

Prinsloo v Van der Linde & Another 1997 (3) SA 1012 (CC)

Sheridan v The Original Mary-Ann's at the Colony (Pty) Ltd 1999 20 *ILJ* 2952 (LC)

S v Makwanyane & Another 1995 (3) SA 391

South African National Defence Force Union v Minister of Defence 1999 (4) SA 469

Swanepoel v Western Region Council &Another 1998 19 *ILJ* 1418 (SE)

Swart v Greenmachine Horticultural Services (*A Division of Sterikleen Pty Ltd*) 2010 31 *ILJ* 180(LC)

Transport and General Workers Union and Another v Bayete Security Holding 1999 20 *ILJ* 1117 (LC)

Wallace v Du Toit 2006 27 *ILJ* 1754 (LC)

Whitehead v Woolworths (Pty) Ltd 1999 20 *ILJ* 2133 (LC)

Woolworths (Pty) Ltd v Whitehead 2000 21 *ILJ* 571 (LAC)

Legislation register

Basic Conditions of Employment Act 75 of 1997

Basic Conditions of Employment Act 3 of 1983

Basic Conditions of Employment for Public Officers Legal Notice 32 of 2011

Constitution of Lesotho, 1993

Constitution of the Republic of South Africa, 1996

Consolidated National Social Security Bill, 2000

Employment Act 22 of 1967,

Employment (*Amendment*) *Act* 14 of 1977

Employment Equity Act 55 of 1998

Employment Regulations, 1988

Labour Code (*Wages*) *Amendment Notice*, 2015

Labour Code Order 24 of 1992

Labour Laws Amendment Bill, 2015

Labour Relations Act 66 of 1995

Mine Health and Safety Act 29 of 1996

Occupational Health and Safety Act 85 of 1993

Regulation of Wages & Conditions of Employment Act 35 of 1969

Unemployment Insurance Act 63 of 2001

Unemployment Insurance Amendment 10 of 2016

Unemployment Insurance Contributions Act 4 of 2002

International instruments

Charter of Fundamental Social Rights in SADC (2003)

Convention for Elimination of All Forms of Discrimination Against Women (1979)

Convention on the Right of the Child (1989)

Declaration on Fundamental Principles and Rights at Work

Discrimination (Employment and Occupation) Convention, 1958 (No. 111)

International Covenant on Economic, Social and Cultural Rights (1966)

ILO Constitution, 1919

Maternity Protection Convention, 1919 (No. 3)

Maternity Protection Convention (*Revised*) 1952 (No. 103)

Maternity Protection Convention, 2000 (No. 183)

Maternity Protection Recommendation, 2000 (No. 191)

SADC Code on Social Security (2008)

SADC Protocol on Employment and Labour (2014)

Social Protection Floors Recommendation, 2012 (No. 202)

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

Treaty of Versailles, 1919

Underground Work (*Women*) *Convention*, 1935 (No. 45)

Universal Declaration of Human Rights (1948)

United Nations Charter (1945)

Workers with Family Responsibility Convention, 1981 (No. 156)

Government publications

GN R1441 in GG 19453 of 13 November 1998

Internet sources

Erasmus N and Claassen A (date unknown) www.labourguide.co.za (accessed 21 February 2018)

www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB;1:0::NO::: (accessed 25 August 2017)

www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200COUNTRYID:103188 (accessed 14 September 2017)

www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm (accessed 28 August 2017)

www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312328 (accessed 09 October2017)

www.sadc.int/member-states/ (accessed 16 May 2018)

www.ilo.org/public/english/standards/relm/country.htm (accessed 17 May 2018)