



Promoting social security in the workplace: a pursuit  
for social insurance protection of non-  
standard workers

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**SOLEMN DECLARATION**

I hereby declare that the dissertation entitled: Promoting social security in the workplace: a pursuit for social insurance protection of non-standard workers, is submitted in partial fulfilment of the requirements for the Master of Laws (LLM) degree at North West University (NWU). The dissertation is the product of my research and opinion with the exception of references of the sources acknowledged herein and that I have not at any prior time submitted it to any other university for any qualification.

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## **DEDICATION**

To my family who have always believed in my academic capabilities.

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## **ABSTRACT**

Social security is a constitutional right that supports individuals in a variety of social contexts. Everyone inclusive of those in all employment relationships is guaranteed the right in terms of Section 27(1) (c) of the Constitution of the Republic of South Africa 1996. Notwithstanding this constitutional guarantee, various workers in non-standard forms of employment are precluded from social security by labour legislations that facilitates access to social insurance. This is striking and necessitates legal intervention because social insurance assumes a crucial role in a society where work-related diseases, occupational disability, retrenchment and retirement caused by age can bring about devastating financial repercussions towards the workers and their dependants.

The concept of employment has also evolved to an extent whereby standard forms of employment are not the only modes of employment assisting in the growth of the economy and cater for the livelihood of people. Thus, the inadequate legislative framework affording social insurance protection to non-standard workers propels a less inclusive and inflexible economy. Against this background, this research will demonstrate that South African labour legislations have been reformed to be in line with constitutional principles such as equality, human dignity and social security. A comprehensive social security system that could accommodate all workers is an endeavour to be achieved.

This dissertation focusses on the role assumed by the South African legal framework in promoting social security in the workplace. The fundamental research question of the study is premised on the extent to which the South African legal framework provides non-standard workers access to social insurance, with the view of seeing whether these workers' constitutional right of social security is fairly promoted in the workplace.

## **KEY WORDS**

Non-standard workers, social security, social insurance, labour market, South Africa

## CHAPTER 1: INTRODUCTION

### **1.1 Problem statement**

#### *1.1.1 Background*

Non-standard workers are, *inter alia*, defined as workers who diverge from the traditionally accepted form of employment, which is formal and legally regulated.<sup>1</sup> These types of workers are usually employed for certain or limited periods of time, and may include temporary workers, seasonal workers, part-time workers, independent contractors and other types of workers in the informal sector.<sup>2</sup> Non-standard workers form a large segment of the South African labour market, which is clear from the fact that approximately thirty percent of the South African workforce is dependent on workers in the informal sector that mainly comprises of non-standard workers.<sup>3</sup> These workers are generally categorised as vulnerable employees who are prone to unfair labour practices.<sup>4</sup> In most instances they get limited access to social security benefits from work.<sup>5</sup> Despite this being the case, these workers nevertheless form part of the labour market and support the expansion of the economy.

In South Africa, social security is usually accepted to be in the form of social assistance and social insurance.<sup>6</sup> Social assistance is regarded as the form of government assistance that is non-contributory in nature and has a qualifying criterion that must be met.<sup>7</sup> It is mainly regulated by the *Social Assurances Act*<sup>8</sup> that contains social assistance mechanisms that intend to provide social security to the poor and vulnerable.<sup>9</sup> Within the framework of labour relations, social security is mainly regulated through different social insurance legislations such as the *Compensation for Occupational Injuries and Diseases Act* (hereinafter the COIDA),<sup>10</sup>

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<sup>1</sup> Basson *et al* *The New Essentials Labour Law Handbook* 70-71.

<sup>2</sup> Mills 2004 *ILJ* 1204.

<sup>3</sup> Rogan 2019 *WIEGO* 1.

<sup>4</sup> Gomez and Gunderson 2005 *CLELJ* 180.

<sup>5</sup> Gomez and Gunderson 2005 *CLELJ* 180.

<sup>6</sup> Newaj 2023 *Obiter* 123.

<sup>7</sup> Newaj 2023 *Obiter* 129.

<sup>8</sup> Section 3 of the *Social Assistance Act*, 13 of 2004

<sup>9</sup> Section 3 of the *Social Assistance Act*, 13 of 2004.

<sup>10</sup> Preamble of the *COIDA* 130 of 1993.

the *Unemployment Insurance Act* (hereinafter the *UIA*)<sup>11</sup> and the *Occupational Diseases in Mines and Works Act* (hereinafter the *ODIMWA*).<sup>12</sup> These protective labour legislations primarily have contributory schemes financed by a portion of employees' salaries and tend to predominantly afford a great protection to standard employees.<sup>13</sup> Despite this being the case, non-standard employees who are often less likely to qualify for social security in the form of income security, illness, maternity and employment injury largely appear to be in need of this protection.<sup>14</sup>

The needs of a world that is changing swiftly are reflected in the global trend of increasing numbers of non-standard workers forming part of the labour market.<sup>15</sup> South Africa is a member of the International Labour Organisation (henceforth the *ILO*), that is a United Nations agency that recognises the necessity to provide social security to non-standard workers.<sup>16</sup> Therefore it is imperative that South Africa lives-up to the standards as set out in the different treaties and conventions that it has ratified in the *ILO*.<sup>17</sup> Currently, the *Labour Relations Act* (hereinafter the *LRA*)<sup>18</sup> and the *Basic Conditions of Employment Act* (henceforth the *BCEA*)<sup>19</sup> have provisions ensuring that certain non-standard workers are granted labour protection,<sup>20</sup> for example, sections 198A, 198B and 198C of the *LRA* extend protection to non-standard employees earning the earnings threshold as provided for in section 6(3) of the *BCEA*.<sup>21</sup> In addition, the *BCEA* also makes provision for extending or altering any basic condition of employment by the minister towards any employee, and for as long as this does not conflict with the aims and objectives of the Act.<sup>22</sup> This therefore stands to prove that, there is a disparity in the labour protection afforded to the various categories of workers, and because of this the Minister has the authority to intervene where necessary.

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<sup>11</sup> Preamble of the *UIA* 63 of 2001.

<sup>12</sup> Devereux 2021 *SAJE* 422; and Preamble of the *ODIMWA* 78 of 1973

<sup>13</sup> Devereux 2021 *SAJE* 422.

<sup>14</sup> Fourie 2008 *PELJ* 111.

<sup>15</sup> Kalleberg (2000) 26 *Annual Review of Sociology* 342.

<sup>16</sup> Mokofe 2020 *Obiter* 576.

<sup>17</sup> Mokofe 2020 *Obiter* 576.

<sup>18</sup> sections 198A, 198B and 198C of the *LRA* 66 of 1995.

<sup>19</sup> Section 6(3) of the *BCEA*, 75 of 1997

<sup>20</sup> Section 6(3) of the *BCEA* 75 of 1997.

<sup>21</sup> Section 6(3) of the *BCEA* 75 of 1997.

<sup>22</sup> Section 50 of the 7 *BCEA* 75 of 1997.

Alongside the introduction of minimum wages, South Africa has also implemented its unemployment insurance in such a way that it caters social protection for certain categories of non-standard workers.<sup>23</sup> This is evident from section 3(2) of the *UIA*, that provides that the Act applies to seasonal and domestic workers.<sup>24</sup> In spite of the different statutory provisions relating to social security as mentioned, the current position in South Africa reflects that unemployment insurance is often less accessible to non-standard workers;<sup>25</sup> and occupational health and safety legislation do not always cover them.<sup>26</sup>

South Africa has implemented different social security strategies that sought to protect non-standard workers.<sup>27</sup> During the year 2020, the *Covid-19* pandemic lockdown rules made it clear that certain non-standard workers suffered the harsh effects of the pandemic.<sup>28</sup> From this, government provided these workers with social relief in the form of an amount of three hundred and fifty rand that, to date, some people still access. Through solidarity funds, donations were also made to those in need.<sup>29</sup> Temporary employee relief schemes (Covid-19 TERS) were placed into effect to provide income protection to eligible non-standard workers through the domain of the *Unemployment Insurance Fund* (henceforth the UIF).<sup>30</sup> This demonstrated the nation's awareness that non-standard workers' access to social insurance was restricted, therefore strategic social insurance measures had to be formulated. Accordingly, these measures can serve as a basis for permanently extending social insurance for these workers.<sup>31</sup>

### *1.1.2 Motivation*

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<sup>23</sup> Mufamadi and Koen 2021 *South African Journal on Human Rights* 282.  
<sup>24</sup> Section 3 of *the Unemployment Insurance Fund Act* 63 of 2001.  
<sup>25</sup> Rapatsa 2014 *Mediterranean Journal of Social Science* 1069.  
<sup>26</sup> Olivier 2007 *Obiter* 419.  
<sup>27</sup> Razavi 2022 *The Indian Journal of Labour Economics* 277.  
<sup>28</sup> Devereux 2021 *SAJE* 422.  
<sup>29</sup> Devereux 2021 *SAJE* 422.  
<sup>30</sup> Reg 2(2.1) (a) in GN 215 in GG 43161 of 26 March 2020.  
<sup>31</sup> Devereux 2021 *SAJE* 426.

Non-standard workers are mainly precluded from labour regulations that might otherwise favour them, and as a result often bear the social risks associated with the status of their employment.<sup>32</sup> In spite of the precarious regulatory framework surrounding non-standard employment, the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution) nevertheless protects everyone's right to fair labour practice that encompasses the right to social security.<sup>33</sup> This therefore imply that, in order to eradicate or lessen discrimination to anyone, the South African social security system ought to be more inclusive.

South Africa also has a history of apartheid that has left other members of society destitute and becoming less competitive in the labour market. This has affected the way in which the concept of employment is understood by marginalised groups.<sup>34</sup> Due to these circumstances, enhancing employment standards and expanding social security protection in the form of income, injury on duty, maternity and illness benefits for marginalised groups have become some of the principal goals of the post-apartheid labour legislation.<sup>35</sup> Olivier accordingly asserted that social security is a requirement for a state that is founded on human rights.<sup>36</sup> This essentially indicated that the limitation of social security should be a last resort, particularly when circumstances prove that one needs to assert that right. In addition, innovative strategies to promote social insurance coverage for all workers can be a reasonable step towards progressively realising the right to social security as stipulated in section 27(2) of the Constitution.

In most instances poverty, illiteracy and a lack of work prospects are linked to individuals resorting to non-standard employment.<sup>37</sup> Because of this, the informal sector increasingly becomes a way to secure employment for the less skilled, even though the work conditions and social insurance protection afforded in the sector

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<sup>32</sup> Lund 2008 *International Social Security Review* 10.

<sup>33</sup> Section 23 of the *Constitution of the Republic of South Africa*, 1996.

<sup>34</sup> Tshizanga *The labour law protection of non-standard workers in South Africa* 19.

<sup>35</sup> Clarke 2004 *Canadian Journal of African Studies* 558.

<sup>36</sup> Olivier 2007 *Obiter* 430.

<sup>37</sup> Lund 2008 *International Social Security Review* 15.

may not be favourable.<sup>38</sup> On this basis, it often appears that non-standard employees suffer from the social risks associated with the need to access social insurance,<sup>39</sup> as they often tend to work under adverse or hazardous work environments, which at times leave incapacitated or unable to work further.<sup>40</sup> It is against this background that it frequently becomes essential for these workers to access social security at the workplace.

In the case of *Sylvia Bongji Mahlangu and Another v Minister of Labour and Others* the court emphasised that the right to equality and human dignity as laid out in the Constitution should be upheld when assessing the form of protection to be provided to non-standard workers.<sup>41</sup> In this case, the dependants of a domestic worker whose employment was non-standard in nature, were denied access to social insurance under *COIDA* upon the occupational death of this worker.<sup>42</sup> The court in this case made it apparent that it is about time that the social security rights of non-standard workers should be catered for and their voices heard, especially when due consideration is given to the level of exploitation they endure regularly.<sup>43</sup> Therefore, in this matter one of the provisions of the *COIDA* was rendered unconstitutional in as far as it excluded domestic workers.<sup>44</sup>

Other constitutional rights such as equality and human dignity tend to be associated with the right to social security.<sup>45</sup> This is due to the fact that women are more likely than men to work in informal jobs such as domestic work.<sup>46</sup> In addition to this, black people are more likely than those of other racial groups to work in informal

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<sup>38</sup> Mokofe *The Regulation of Non-standard Employment in Southern Africa: the case of South Africa with Reference to Several Other SADC Countries* 4.

<sup>39</sup> Quinlan 2015 *International Labour Office Geneva* 6.

<sup>40</sup> Quinlan 2015 *International Labour Office Geneva* 6.

<sup>41</sup> *Sylvia Bongji Mahlangu and Another v Minister of Labour and Others* BCLR 1 (CC); [2021] para 97.

<sup>42</sup> *Sylvia Bongji Mahlangu and Another v Minister of Labour and Others* BCLR 1 (CC); [2021] para 8.

<sup>43</sup> *Sylvia Bongji Mahlangu and Another v Minister of Labour and Others* BCLR 1 (CC); [2021] para 195.

<sup>44</sup> *Sylvia Bongji Mahlangu and Another v Minister of Labour and Others* BCLR 1 (CC); [2021] para 195-196.

<sup>45</sup> *Sylvia Bongji Mahlangu and Another v Minister of Labour and Others* BCLR 1 (CC); [2021]

<sup>46</sup> Rogan 2019 *WIEGO* 4.

occupations such as informal farm labour, casual or informal jobs such as street vending.<sup>47</sup> In the case of *Khosa and Others v Minister of Social Development*, it was decided that the right to access social security is something that should be considered within the ambit of the fundamental rights in the Constitution.<sup>48</sup> Therefore, when making use of the concept of reasonableness when it comes to limiting the right to social security, it must be considered that the Constitution is quite specific that everyone is guaranteed access to socio-economic rights.<sup>49</sup>

Non-standard employment is frequently connected with the gaps in social insurance coverage.<sup>50</sup> This is often considered to constitute a challenge in the promotion of both constitutional rights and the country's adaptation to the transformed labour force that propels non-standard employment.<sup>51</sup> Advancing a fair and inclusive social insurance system can alleviate these challenges and acknowledge that the world of employment has been transformed from the accepted form of standard employment.<sup>52</sup> In essence, social insurance in the workplace, which is largely regulated by legislations such as the *COIDA*, the *UIA* and the *LRA* that predominantly promotes social insurance protection for standard employees, can accommodate non-standard employees as well. The research, therefore, assesses how existing legal regulations provide social insurance protection to non-standard workers, and whether this substantially promotes the constitutional right of social security.

### *1.1.3 Research question.*

To what extent can South Africa provide non-standard workers access to the right to social security through social insurance?

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<sup>47</sup> Fourie 2008 *PELJ* 145.

<sup>48</sup> *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC) para 42.

<sup>49</sup> *Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC) para 42.

<sup>50</sup> Gomez and Gunderson 2005 *CLELJ* 180.

<sup>51</sup> Behrendt *et al* 2019 *International Social Security Review* 19.

<sup>52</sup> Behrendt *et al* 2019 *International Social Security Review* 19.

## **2. Research aim and objectives.**

### **2.1 Aim**

The aim of this research is to assess the feasibility of South African labour laws providing social insurance to non-standard workers, and whether this conforms to the protection of social security in the workplace.

### **2.2 Objectives.**

To achieve the aim of this research, the current South African legislation and the developments made regarding the provision of social insurance to non-standard workers will be assessed. In particular, the provisions of the Constitution, the *LRA*, *COIDA*, *UIA*, the *BCEA* and other relevant international instruments such as the *ILO*, and other UN human rights instruments and Conventions are outlined in the context of their application to the South African social security system for workers.

## **3. Research method(s)**

For the purposes of this research, a desktop study was done. The following research methods were used:

### (a) Primary and secondary sources

Primary and secondary sources of law including books, journal articles and government publications, among others, were used.

### (b) Case law and court decisions

To ensure viability of proposed recommendations, court decisions were utilised.

### (c) Legislation

Considering that an important part of this research paper is premised on the need for adequate legislative frameworks, the existing legislations, for example, the *LRA*, the *COIDA*, the *UIA*, the *BCEA* and other legislations applicable to South Africa were considered.

(d) International and foreign sources

International and foreign sources such as international instruments relevant to South Africa were also considered. This is because the crux of the dissertation lies on the constitutional right to social security, and section 39(1)(b) of the Constitution requires international law to be considered when interpreting constitutional rights.

(e) Internet sources

Web sites were accessed for further information on the topic. Furthermore, the dates available in the bibliography are those dates the websites were accessed through a link in the footnotes.

This study is referenced according to the North-West University Faculty of Law House Style.

### ***3.1 Limitation of the study***

This research paper concentrates solely on South Africa's social security laws pertaining to non-standard workers and does not extend to make a comparison of the legal position in other countries.

## **4. Framework**

The research paper comprises of five chapters:

(a) Chapter 1

This chapter outlines the problem statement, background, motivation, aims and objectives, the research question and the research methodology together with the scope and limitations of the research.

(b) Chapter 2

This chapter provides a brief overview of social insurance as a kind of workplace social security. Therefore, the purpose of this is to examine how the concept applies

to the various non-standard employees in South Africa, and their current position in having social security protection.

(c) Chapter 3

This chapter outlines the influence of the Constitution on the current labour legislation that provide social security benefits to workers. The aim of this is to assess the extent to which these legislations have developed and how viable they are in protecting non-standard employees` access to social insurance.

(d) Chapter 4

This chapter provides an analysis of the international and regional instruments that apply to the South African social security system at work. In this context, there is particular exposition of the ILO labour standards, as South African legislation must conform to them. The purpose of the discussion of the international and regional instruments is to evaluate the extent to which South Africa has come in applying them to make social insurance accessible to non-standard workers.

(e) Chapter 5

This chapter provides a conclusion to the research. It addresses whether non-standard employees in South Africa's social security system are given significant consideration when it comes to accessing social insurance, and whether it is feasible for the country to expand this protection of social insurance. In addition to this, recommendations on the shortcomings that require development to make social insurance a reality for atypical workers are made.

## **5. Relevance for the Research Unit**

This research focuses on the legal protection of non-standard workers in South Africa. It focuses on the justice in practice because mostly vulnerable groups of people form part of the employment sectors that largely consist of non-standard workers. Aspects such as the realisation of socio-economic rights and other human

rights form a major part of the legal protection that ought to be provided to non-standard workers. Further, the law is still developing in this regard, and with this being the case, the findings of this research are intended to fulfil the objective of how the legal protection for these workers can possibly be improved.

## **6. Statement regarding ethics**

The research was centred on a desktop-study and all the primary and secondary sources were referenced. In the process of completing this research, no individual or group interviews and questionnaires were used. The researcher's motive for this was to avoid discussions concerning any topics or issues that might be embarrassing, sensitive or upsetting. No criminal or other disclosures requiring legal action and having potential adverse effects, risk or hazards for research participants were made during this research. Therefore, there was no need for arrangements to be made regarding insurance and indemnity to counter against the potential legal liability of the North-West University for harm to participants arising from conducting the research. An application was made by the researcher to ensure compliance with the North-West University clearance standards.

## **CHAPTER 2: AN OVERVIEW OF SOCIAL INSURANCE AND ITS APPLICATION TOWARDS VARIOUS NON-STANDARD WORKERS IN SOUTH AFRICA**

### ***2.1 Introduction***

Workplace social insurance in South Africa is usually associated with formal or standard employment.<sup>53</sup> Current laws primarily prioritise what is deemed to be an employee before providing social security benefits at work.<sup>54</sup> Despite this being the case, various international law instruments contend that social insurance forms part of the fundamental rights that are guaranteed to everyone, regardless of the industry or the type of employment they are engaged in.<sup>55</sup> Also because international law is recognised as law in the Constitution,<sup>56</sup> the courts have, to some level, intervened to ensure that national legislation does not unjustifiably limit these workers' right to social insurance. Hence there have been developments made in the *COIDA*, the *UIA* and the *LRA*,<sup>57</sup> which this study deems as recognising the limited social insurance coverage provided to non-standard workers.

This chapter explores the definition of social insurance as it applies to the South African labour market. The purpose, therefore, is to bring about a comprehensive understanding of the level of protection non-standard employees have in accessing social insurance. In the build-up to examining this level of protection, a historical overview of social insurance along with how the transformation of the labour market has broadened its application towards various workers in South Africa is provided. Furthermore, to validate the existing framework within which social insurance provides protection to non-standard workers, the challenges when selected groups of non-standard workers want access to it, are discussed.

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<sup>53</sup> Rapatsa 2014 *Mediterranean Journal of Social Science* 1069.

<sup>54</sup> Section 213 of the *LRA* 66 of 1995; section 1 of the *BCEA* 75 of 1997.

<sup>55</sup> Smit and Mpedi 2010 *Law, Democracy & Development* 14; see also article 23(3) of the *Universal Declaration of Human Rights (UDHR)*, 1948.

<sup>56</sup> Section 39(1)(b) of the *Constitution of the Republic of South Africa*, 1996.

<sup>57</sup> Section 11 of the *COIDA* 130 of 1993, Section 3 of the *UIA* 63 of 2001, see also section sections 198A, 198B and 198C of the *LRA* 66 of 1995.

## **2.2 Defining Social Insurance**

Social insurance is regarded as an element of social security that safeguards employees and their dependants against financial difficulties.<sup>58</sup> The concept has received significant recognition and protection under both national and international laws. Within the ambit of national law, it is protected as a Constitutional right in terms of section 27(1)(c) of the Constitution. And the *South Africa Social Security Agency Act* defines it as benefits obtained through subscriptions financed by people to ensure the preservation of their income.<sup>59</sup> On an international level, the idea is defined by integrating it into several contingencies that are protected in terms of different treaties and conventions.

According to Smit and Mpedi, social insurance denotes income substitution achieved through social programmes that aim to protect employees' earnings through benefits.<sup>60</sup> It is regarded as a type of social security intended to safeguard workers and their dependents against income losses brought on by income reduction due to social risks associated with their employment.<sup>61</sup> It is fragmented and includes a variety of schemes incorporating retirement pensions, unemployment insurance, health and disability insurance,<sup>62</sup> which are financed by way of subscriptions paid by employees, companies and government.<sup>63</sup> To enable stability, social insurance contributions are usually made to be obligatory for workers who are regarded to be eligible for it.<sup>64</sup>

Accessibility to social insurance is not income based.<sup>65</sup> This essentially indicates that, unlike in social assistance where financial need is a means-test criterion, social insurance does not give due regard to the income level of an individual when

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<sup>58</sup> Newaj 2023 *Obiter* 129.

<sup>59</sup> Section 1 of the *South Africa Social Security Agency Act* 9 of 2004.

<sup>60</sup> Smit and Mpedi 2010 *Law Democracy & Development* 161.

<sup>61</sup> Tshoose *Social Assistance: Legal reforms to improve coverage and quality of life for the poor people in South Africa* 25.

<sup>62</sup> Wiki South Africa "date unknown" <https://wikisouthafrica.co.za/social-insurance-in-south-africa/>

<sup>63</sup> Smit and Mpedi 2010 *Law Democracy & Development* 3.

<sup>64</sup> Olivier and Smit 2003 *Social security: A legal analysis* 597-598, see also Makino 2008 *Institute of Developing Economies* 11.

<sup>65</sup> Basson 2020 *Obiter*.

determining eligibility.<sup>66</sup> Instead, it considers the qualifying requirements of the insurance scheme. Therefore, given that it is not means-tested this study argues that this paves a way for all inclined workers who want to form part of social insurance, to make contributions and benefit; and that a restriction based on the recognition as “employee”, stagnates the process of allowing social insurance to be universal.

Paden equates social insurance to a phenomenon that fulfils a social purpose.<sup>67</sup> This suggests that the alleviation of poverty and a fair income distribution encompass the concept. Accordingly, the impacts of unemployment that are propelled by old age, diseases and occupational disability intend to be minimised through the concept.<sup>68</sup> Consequently, the concept would not act as a mere financial tool to aid against the risks of not having an income but would also act as a way of accomplishing social justice. This is because social insurance and social justice have a shared focus on achieving a significant social purpose.

In *Government of the Republic of South Africa v Grootboom* the Court highlighted that one of the fundamental constitutional objectives is to enhance people`s standard of living through social justice.<sup>69</sup> This study therefore argues that the connection between social insurance and social justice necessitates social insurance to be equally accessible among all workers in society. Accordingly, Midgley contends that, to make social justice a reality, social insurance should lessen the disparities faced by the less privileged members of a society.<sup>70</sup> This fundamentally implies that the promotion of social justice can be reached if social insurance systems prioritise the elimination of inequities among vulnerable members of society. Non-standard employees are mainly considered to be vulnerable in the labour market and have less access to social insurance.<sup>71</sup> On this note, this study opines that the affiliation of social insurance to the recognition as employees, is an impediment to realising

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<sup>66</sup> Basson 2020 *Obiter*.

<sup>67</sup> Paden 1998 *Public Affairs Quarterly* 179.

<sup>68</sup> Paden 1998 *Public Affairs Quarterly* 179.

<sup>69</sup> *Government of the Republic of South Africa v Grootboom* 2001(1) SA (CC) para 1.

<sup>70</sup> Midgley *Social Insurance and Social Justice* 127.

<sup>71</sup> Rapatsa 2014 *Mediterranean Journal of Social Science* 1069.

the idea of social justice in the labour market and making social insurance a reality for all workers.

### **2.3 Social insurance in the labour market**

#### *2.3.1 A Historical Background*

Assimilating the present social security protection in the South African labour market necessitates a thorough understanding of its historical origins. Social security was first implemented in South Africa during 1918 and 1930.<sup>72</sup> The concept received prominence during this period under the purview of social assistance, which catered social protection to the majority of white and coloured people.<sup>73</sup> During that period, racial segregation was apparent and the country's non-contributory social assistance programmes were designed to help the white impoverished population.<sup>74</sup> From this, the government began to re-evaluate the social security protection given to those forming part of the labour market during 1922.<sup>75</sup> As a consequence, a social insurance system that targeted skilled working members of the workforce was implemented.<sup>76</sup> Its regulation took form at a later stage by way of the *Pensions Funds Act*.<sup>77</sup>

During the apartheid era, the majority of the black population were not highly skilled because of the *Bantu Education Act*<sup>78</sup> that governed the education system.<sup>79</sup> This essentially indicated that they could not fairly compete in the labour market and as a result had to resort to any form of employment; specifically informal employment that was mainly non-standard in nature. As such, the labour market and any social insurance benefits emanating from it, economically and socially benefited the working group of the white population.<sup>80</sup> This being the case, the implementation

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<sup>72</sup> Seekings and Nattrass *Class, Race, and Inequality in South Africa* 34-38.

<sup>73</sup> Seekings and Nattrass *Class, Race, and Inequality in South Africa* 34-38.

<sup>74</sup> Woolard *et al* 2011 *Canadian Journal of Development Studies* 360.

<sup>75</sup> Seekings *Journal of Southern African Studies* 258.

<sup>76</sup> Van der Berg 1997 *Development Southern Africa* 485.

<sup>77</sup> Van der Berg 1997 *Development Southern Africa* 485.

<sup>78</sup> *Bantu Education Act* of 1953.

<sup>79</sup> Festus *et al* 2016 *South African labour market* 579.

<sup>80</sup> Van der Berg 1997 *Development Southern Africa* 486.

of a social insurance system that targeted skilled labourers was undoubtedly intended to prohibit black employees from gaining any social insurance protection.<sup>81</sup>

The state of social security in the labour market became less exclusive after the apartheid era.<sup>82</sup> This was premised on the industrialisation in the mining and manufacturing sector that took form in South Africa when black people were allowed to form part of the working force to a great extent and had trade unions to advocate for their labour rights.<sup>83</sup> Social insurance in the form of private retirement, pensions and provident funds became accessible to the semi-skilled black population that was working.<sup>84</sup> However, because the majority of the African working population was unskilled and could not be targets of the private social insurance schemes, it was inevitable for them to inadequately benefit in these further established social insurance systems. Against this background, an anti-apartheid movement to make social insurance universal was established, and several reform initiatives were considered to make social insurance a reality for many workers.<sup>85</sup>

Adjustments were made by broadening the *UIA* to include different non-standard workers such as seasonal and domestic workers.<sup>86</sup> Moreover, the abovementioned *Pension Funds Act* that targeted skilled white labourers, was amended to be more inclusive for workers of all races.<sup>87</sup> These continuing legal reforms are deemed as an acknowledgement of the precarious nature of non-standard employment, and as a way to broaden access to the limited social insurance protection of these workers.

In 2021, a published green paper of the Department of Social Development acknowledged recommendations from NEDLAC affirming that different social insurance measures accommodating workers who form part of the informal sector should be considered.<sup>88</sup> In addition, a compulsory social insurance scheme that would accommodate non-standard workers in the event of disability, ill-health and

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<sup>81</sup> Van der Berg 1997 *Development Southern Africa* 485.

<sup>82</sup> Makino 2008 *Institute of Developing Economies* 13.

<sup>83</sup> Van der Berg 1997 *Development Southern Africa* 485.

<sup>84</sup> Van der Berg 1997 *Development Southern Africa* 485

<sup>85</sup> Makino 2008 *Institute of Developing Economies* 31.

<sup>86</sup> Section 3 of the *Unemployment Insurance Fund Act* 63 of 2001.

<sup>87</sup> *Pension Funds Amendment Act* 11 of 2007.

<sup>88</sup> Reg 3.2 in GN 741 GG 45006 of 18 August 2021.

retirement, amongst others, was presented as a suggestion.<sup>89</sup> Contributions towards this compulsory social insurance would be through a system upholding common good, where assistance would be provided to the poor working class.<sup>90</sup> Considering this, this study infers that the green paper recognised the disparities following the social insurance protection given to non-standard workers. Therefore, the proposed compulsory social insurance programme serves as an important development to achieving common good and stability in the labour market. This is evident from the assertion of Samson, who provided that well-developed countries in the global arena often tend to make use of social security systems that are broad in terms of accommodating the categories of their workers.<sup>91</sup>

Despite this proposal of extending social insurance to non-standard workers, it has been apparent that to date there is no existing legislation emanating from the proposition of this green paper. This is evident from the fact that the majority of South African non-standard workers still have limited or no access to social security.<sup>92</sup> On this basis, this research affirms that South Africa recognises non-standard employee`s limited access to social insurance. However, it is hesitant to test the effectiveness of proposed strategies. Consequently, it continues to uphold its historical restrictions on social security access in the workplace.

### *2.3.2 The transformed labour market and social insurance*

There are different perceptions of the labour market in South Africa. When aspects such as involving trade unions and bargaining councils that advocate for the promotion of rights and interests of their members are considered, the labour market is regarded as inflexible.<sup>93</sup> In spite of this, the apparent development of non-standard employment in the country is considered an indicator that the labour market is versatile.<sup>94</sup>

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<sup>89</sup> Reg 3.2 in GN 741 GG 45006 of 18 August 2021.

<sup>90</sup> Reg 3.2 in GN 741 GG 45006 of 18 August 2021.

<sup>91</sup> Samson *et al*, 2004.

<sup>92</sup> Reg 2.3.2 in GN 741 GG 45006 of 18 August 2021.

<sup>93</sup> Makino 2008 *Institute of Developing Economies* 5

<sup>94</sup> Omomowo 2010 *Department of Sociology, Rhodes University* 2.

Over three decades into a constitutional democracy in South Africa, a substantial number of the population still experience unemployment and lack access to sufficient resources.<sup>95</sup> This has consequently contributed to making the nation one of those with the utmost income inequality in the world.<sup>96</sup> Due to this high-income inequality, this study perceives that it is inevitable for different non-standard jobs to increase in the labour market, and this can be ascribed to the lack of skills and job opportunities for these workers.<sup>97</sup> This research then argues that the degree of social insurance protection that is in existence for these workers will continue to be a constant concern that impacts the functioning of the economy and its discriminatory policies if not addressed adequately.

To some point non-standard employment can be prolonged and appears to be permanent for certain workers.<sup>98</sup> In the case of *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*, the Constitutional Court provided that, sections 198(2) and 198A(3)(b) of the *LRA* should be interpreted in such a way that an employment relationship gets to be created if non-standard employees who have been working through a temporary employment service (hereinafter the TES), have worked for a period of more than three months.<sup>99</sup> As such, this ultimately resulted in the non-standard workers being afforded the status that would accord them benefits similar to those in standard employment.<sup>100</sup> Considering this, it is argued that the Court acknowledged the level of unfair labour protection that non-standard workers are subjected to. Therefore, the judgement constituted a strive to have non-standard workers recognised in the social insurance protection provided to standard employees.

Technological advancement also assumed a role in increasing non-standard jobs in the labour market. This is due to the fact that, digital platform workers are projected

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<sup>95</sup> Liebenberg 2007 *ESR Review* 3.

<sup>96</sup> World Bank Group 2024 <https://www.worldbank.org/en/country/southafrica/overview#1>

<sup>97</sup> Dicks 2007 *Law, Democracy & Development* 39-40.

<sup>98</sup> McCann 2014 *International Journal of Law in Context* 513.

<sup>99</sup> *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) para 84.

<sup>100</sup> *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) para 84.

to be more than 100,000 in South Africa.<sup>101</sup> Moreover, in accordance with the precepts of section 213 of the *LRA* and section 1 of the *BCEA*, these workers are non-standard employees because they are regarded as independent contractors.<sup>102</sup> Therefore, they are excluded from social insurance protection in terms of *UIA* and the *COIDA*.<sup>103</sup>

In the case of *Uber SA v NUPSAW* the commissioner of the Commission for Conciliation, Mediation and Arbitration (hereinafter CCMA) made an award in favour of the Uber SA drivers and declared them employees for purposes of the *LRA*.<sup>104</sup> The decision was overturned by the Labour Court that declared the drivers independent contractors.<sup>105</sup> However, Mokofe held the stance that this matter indicates the endeavour made to afford recognition to the fact that technology has brought about different workers in the labour market.<sup>106</sup> On this note, this study contends that the nature of employment expands with technological developments, and work social insurance systems should adapt to these developments because the world is gradually functioning in dependence of technology workers who in most instances are non-standard workers.

#### ***2.4 Challenges of social insurance access on selected groups of non-standard workers***

The preceding discussion of social insurance within the labour market has demonstrated the endeavour of regulatory reform to provide non-standard workers access to social insurance. However, there is a distinction between being guaranteed a right in terms of policy and getting the right exercised.<sup>107</sup> Thus, in reality, the peculiarities of non-standard employment make it difficult for the workers to execute their rights.<sup>108</sup> Additionally, their social circumstances proved

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<sup>101</sup> Ncamane 2023 *SAMERCLJ* 11.

<sup>102</sup> Ncamane 2023 *SAMERCLJ* 3.

<sup>103</sup> Gomez and Gunderson 2005 *CLELJ* 180.

<sup>104</sup> *Uber SA v NUPSAW* 2018] 4 BLLR 399 (LC).

<sup>105</sup> *Uber SA v NUPSAW* 2018] 4 BLLR 399 (LC) para 81.

<sup>106</sup> Mokofe 2022 *Obiter* 361.

<sup>107</sup> Makino 2008 *Institute of Developing Economies* 16.

<sup>108</sup> Fourie 2008 *PELJ* 111; see also Mojapelo and Odeku *African Journal of Public Affairs* 117.

that access to the right to social security through social insurance is not as practical as guaranteed in the Constitution.

Casual workers commonly employed on intermittent basis; face barriers to accessing social security benefits due to the unstable nature of their work.<sup>109</sup> These workers can be hired for a fixed term on a permanent job.<sup>110</sup> However, the *LRA* attempts to circumvent this through section 198B, which provides that fixed term contracts may only be for a duration longer than three months.<sup>111</sup> Therefore, this study argues that social insurance programs ought to guarantee that casual workers access benefits while they are employed, and adjustable contribution that accommodate their work periods should be considered.

Part-time workers who often work fewer hours than full-time employees have also less access to social security benefits. The workers limited access to social insurance can be attributed to the few hours or days worked.<sup>112</sup> Despite this, section 198C of the *LRA* protects certain categories of these workers. This stems from the provision states that an employer must not treat part time employees less favourably than full time employees unless there are justifiable reasons to do so.<sup>113</sup> Thus, it is crucial to determine whether part-time workers should be given pro-rated social benefits or have access to the same benefits as full-time workers, based on the hours they worked. The following is a discussion on some of the challenges faced by other categories of non-standard employees in accessing social insurance.

#### *2.4.1. Informal farm workers*

The *ILO* confirms that informal work is increasing globally since it accounts for over 60% of the global labour market.<sup>114</sup> Among individuals engaged in informal work, farm workers are noteworthy and relevant to this study due to their significant economic impact in South Africa.<sup>115</sup> Despite their economic impact, it is documented

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<sup>109</sup> Basson *et al* *The New Essentials Labour Law Handbook* 70-71

<sup>110</sup> Basson *et al* *The New Essentials Labour Law Handbook* 70-71.

<sup>111</sup> Section 198B of the *LRA* 66, of 1995.

<sup>112</sup> Basson *et al* *The New Essentials Labour Law Handbook* 72-73.

<sup>113</sup> Section 198B of the *LRA* 66, of 1995.

<sup>114</sup> ILO 2018 <https://www.ilo.org/resource/news/more-60-cent-world%E2%80%99s-employed-population-are-informal-economy>.

<sup>115</sup> O`Neil 2024 <https://www.statista.com/statistics/371233/south-africa-gdp-distribution->

that informal farm workers rarely have access to social insurance.<sup>116</sup> Additionally, the working conditions in the agricultural sector are not favourable towards the health and safety of these workers.<sup>117</sup> This follows from the assertion that occupational health and safety measures are seldom placed into effect in the sector.<sup>118</sup> However, due to lack of options and income need, workers in this sector continue to work under the conditions and endure the limited work social insurance coverage.<sup>119</sup>

Social insurance protection is limited for informal farm workers as they are often uninformed of their social security rights,<sup>120</sup> a situation often attributed to their low level of education. It is also contended that social insurance does not protect informal farm workers due to their non-contributions, which is caused by low-income levels that only allow them to maintain a living.<sup>121</sup> Furthermore, farm work is typically seasonal and therefore impacts on the status of the workers to be regarded as permanent employees.<sup>122</sup> Moreover, in this sector, employers know that employees prioritise creating an income to make a living over the potential risks that may necessitate social insurance.<sup>123</sup> Consequently, employers tend to be reluctant to comply with relevant legal requirements enabling social insurance access for the workers. With this being said, it becomes clear that, although social insurance intends to eliminate the risks of lack of income during unemployment, it

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- across-Economic sectors/#:~:text=This%20statistic%20shows%20the%20distribution%20of%20the%20gross,62.61%20percent%20of%20the%20total%20value%20added%2C%20respectively.
- 116 Taylor Committee Report 'Report No 11: Coverage against Employment Injuries and Diseases' (2002) 458.
- 117 Lund 2012 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-246X.2012.01445.x>
- 118 Lund 2012 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-246X.2012.01445.x>
- 119 Smit and Mpedi 2010 14 *Law, Democracy & Development* 17.
- 120 ILO "date unknown" <https://www.ilo.org/global/topics/dw4sd/themes/informal-economy/lang--en/index.htm> (a.
- 121 Triegaardt "date unknown" <https://www.dbsa.org/sites/default/files/media/documents/2021-03/Accomplishments%20and%20challenges%20for%20partnerships%20in%20development%20in%20the%20transformation%20of%20social%20security%20in%20South%20Africa.pdf>
- 122 Rapatsa 2014 *Mediterranean Journal of Social Science* 1069. See also Dupper *et al* 2010 *Stellenbosch Law Review* 444; see also Barrientos and Barrientos *Social Protection Discussion Paper Series* 20.
- 123 Thebus 2021 <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdf65a>

does not fulfil its purpose because most of the workers susceptible to these risks stay vulnerable. Therefore, it suggested that it is incumbent that these workers be afforded social insurance protection because they contribute to the economy,<sup>124</sup> while enduring work-related risks and dangers. Hence, the formulation of legal regulations specifically targeted for informal workers would address the challenge of social insurance access.

#### *2.4.2 Independent contractors*

In South Africa, labour legislation is quite specific with regard to the exclusion of independent contractors from its protection.<sup>125</sup> This also excludes them from social insurance protection. Various social insurance legislations, such as *COIDA* and the *UIA*, have social insurance premised on contributions from companies and their employees. Thus, this implies that only employees who are in legally recognised employment contracts are eligible for protection under these laws.<sup>126</sup> Independent contractors struggle to build an acceptable employment relationship because they are hired by numerous employers, resulting in uncertainties in their income. Given this, their capacity to contribute towards work-related social insurance schemes is limited.

Independent contractual workers are not always linked to lack of skills or low-income levels.<sup>127</sup> This is because skilled labourers sometimes decide to engage in self-employment.<sup>128</sup> This can be ascribed to their exercise of the right to freedom of trade, occupation and profession as stipulated in section 22 of the Constitution. However, their skills and education do not make them less susceptible to the lack of social insurance protection in the event of unemployment.<sup>129</sup> Considering this, this study argues that the regulatory system of excluding independent contractors from social insurance protection, reveals that the country fails to acknowledge the modernised labour market and flexible employment choices made by labourers. In

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<sup>124</sup> Statista *South Africa: Distribution of gross domestic product (GDP) across economic sectors from 2012 to 2022*.

<sup>125</sup> Section 213 of the *LRA* 66 of 1995, see also section 1 of the *BCEA* 75 of 1997.

<sup>126</sup> Dupper *et al* 2010 *Stellenbosch Law Review* 444.

<sup>127</sup> Winkler *et al* 2017 <http://hdl.handle.net/10986/27932>.

<sup>128</sup> Winkler *et al* 2017 <http://hdl.handle.net/10986/27932>.

<sup>129</sup> Winkler *et al* 2017 <http://hdl.handle.net/10986/27932>.

support of this Mpedi and Smit also argue that lack of affordability is not always an impediment to make social insurance contributions. Non-standard workers can become active participants if provided with the opportunity to contribute to social insurance programmes or if the programmes are accommodative towards them.<sup>130</sup> Therefore, it is necessary to reasonably accommodate independent contractors' needs for social insurance using a variety of strategic means.

### *2.4.3 Temporary Workers*

Workers employed through the TES tend to have limited access to social insurance.<sup>131</sup> This happens because their employment tends to be terminated rather than made permanent as required.<sup>132</sup> However, The *LRA* and the *BCEA* regulates these employment relationships to some extent. This stem from the provisions of the *LRA* and the *BCEA* which provide that, unless the individual hired is an independent contractor, the TES becomes the employer instead of the client that hired the services of the TES.<sup>133</sup> Accordingly, section 198A(3) of the *LRA*, confirms that employees hired under these services should be regarded as employees provided that they have worked for more than three months.<sup>134</sup> Despite this, employers often hesitate to make compulsory social insurance contributions for temporary workers due to their perception of them as temporary employees. As such, these workers face the hurdle of constantly endeavouring to prove their status as employees.<sup>135</sup> From this, the absence of social insurance protection for these workers leads to social economic issues surrounding unemployment after the termination of these TES agreements.

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<sup>130</sup> Smit and Mpedi 2010 *Law, Democracy & Development* 3.

<sup>131</sup> Theron 2010 *ILJ* 851.

<sup>132</sup> Section 198B of the *LRA* 66 of 1995.

<sup>133</sup> Section 198 of the *LRA* 66 of 1995, and section 1 of the *BCEA* 75 of 1997.

<sup>134</sup> section 198A(3)(b) of the *LRA*; see also *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) para 84.

<sup>135</sup> Section 198A(3)(b) of the *LRA* 66 of 1995; see also *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17).

## ***2.5 Conclusion***

The nexus between formal employment and access to social insurance creates significant inequality for non-standard workers and it impacts on the objective of social justice. The discussion in this chapter made it apparent that social insurance is a necessity that supports workers when faced with socio-economic risks stemming from their inability to work permanently. The chapter demonstrated that non-standard employees are not immune to these risks, however, they remain to be less protected in social insurance although the Constitution guarantees them the right. The chapter has also highlighted the challenges non-standard workers face in obtaining social insurance despite legislative reform efforts. Therefore, it is uncertain whether these legislative amendments are not properly implemented or whether they are simply inadequate to cater for the various categories of employees who require social insurance. Consequently, the next chapter provides a discussion on the influence of the Constitution on the regulatory framework providing social security to workers. The aim is to determine the extent to which these laws have developed to accommodate non-standard workers and to examine successfully whether they can be implemented to guarantee non-standard workers access to social insurance.

## **CHAPTER 3: THE INFLUENCE OF THE CONSTITUTION ON LEGISLATION PROVIDING SOCIAL SECURITY TO WORKERS**

### ***3.1 Introduction***

In the broad sense, social security is regarded as a versatile concept described in light of the social and economic factors affecting a particular country.<sup>136</sup> It is regarded as an important protective umbrella that intends to alleviate economic and social problems through different measures of social assistance and social insurance.<sup>137</sup> To delineate this study, the research is restricted to social security within the framework of social insurance. The focus is whether existing legislation fairly promotes non-standard workers' right to social security at the workplace.

This research contends that, the right to social security is both a constitutional and legislative entitlement that should be promoted. The Constitutional Court has appreciated the justification of socio-economic rights inclusive of social security in the case of the *Certification of the Constitution of the Republic of South Africa*.<sup>138</sup> Therefore, the promotion of work social security would suggest that all workers attain substantial and justified access to social insurance. This would then imply that the interpretation of legislations should place priority on granting all workers access to unemployment insurance, provident pensions and injury at work benefits to a reasonable extent.

This chapter outlines the extent to which the Constitution has impacted South African labour legislations regulating social security access towards workers. To contextualise this discussion, various provisions of the Constitution that are social security-related are discussed. In addition to this, various labour legislations such as the *LRA*, *COIDA*, *UIA* and the *BCEA* are referred to with the view of determining the level of progress they have made in accommodating non-standard workers' access to social insurance.

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<sup>136</sup> Olivier *et al Introduction to Social Security* 18.

<sup>137</sup> Woolard *et al Southern Africa Labour and Development Research Unit* 2.

<sup>138</sup> *Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC) see also, Olivier and Jansen Van Rensburg *Law Democracy & Development* 87.

### ***3.2 Constitutional perspective on non-standard workers' right to social insurance***

Social security is a constitutional right that is guaranteed to everyone in terms of section 27(1) (c) of the Constitution.<sup>139</sup> Additionally, this section provides that among other things, when people are incapable of providing for themselves including those they support, they should be provided with social assistance. Government is required to progressively realise this right after due consideration has been given to reasonable measures within the available resources of the state.<sup>140</sup> Notwithstanding this, Liebenberg asserts that the progressive realisation of the right to social security denotes that, government is placed under the duty to implement progressive and reasonable measures that seek to expedite access to the right and lessen its deprivation to excluded groups.<sup>141</sup> In the case of *Khosa and Others v Minister of Social Development*, the court held that the unavailability of comprehensive evidence substantiating that government would incur costs in including a group excluded in social security was not enough to prove that government lacked the resources.<sup>142</sup> This indicates that the state cannot merely use the shortage of resources as a justification for not progressively realising the right to excluded groups.

This study acknowledges that the extension of social insurance towards non-standard workers is more than just an issue of legislative reform but can also have consequential effects on government expenditure and administration. Considering this, this research argues that these factors should not be a justification for limiting the right, because government is not prevented from investigating various strategies that are cost effective or innovative and may involve aspects such as involving private funding assistance or international income support. Dekker also submitted that both the International Social Security Association and the ILO have the power to fund suitable social security programmes and to promote research in

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<sup>139</sup> Section 27(1) of the Constitution of the Republic of South Africa, 1996.

<sup>140</sup> Section 27(2) of the *Constitution of the Republic of South Africa*, 1996.

<sup>141</sup> Liebenberg 2010 *European Journal of International Law* 188.

<sup>142</sup> *Khosa and Others v Minister of Social Development* BCLR 569 (CC) para 19; see also Currie and De Waal *Bill of Rights Handbook* 572.

the area of informal social security.<sup>143</sup> Thus, since some non-standard workers are in informal employment, these informal social security programmes may be able to provide them with access to benefits. Furthermore, in the case of the *Certification of the Constitution of the Republic of South Africa*, the Constitutional Court gave due regard to the fact that, even though socio-economic rights may have significant budget implications, these rights are nevertheless constitutional rights that are legitimate and should be promoted.<sup>144</sup>

The state's responsibility to safeguard workers' rights encompasses an obligation to ensure that the right to social security is accessible to all the people forming part of the labour market.<sup>145</sup> To ensure that constitutional values pervade all social relationships, the Constitution acts as a yardstick for achieving the desired transformative constitutionalism.<sup>146</sup> The Court, in the case of *Tshwane City v AfriForum*,<sup>147</sup> provided that one of the crucial ways of healing the divisions of the apartheid regime is through upholding a transformative constitution that mainly promotes equality.<sup>148</sup> The stepping stone towards achieving this is through effecting a change in certain processes that have been adopted.<sup>149</sup> It is inevitable for employment relationships to form part of the recognised social relationships as mentioned above. In addition, non-standard workers are considered as part of the phrase "everyone" used in provision of section 27(1) (c) of the Constitution.<sup>150</sup> In light of this, this research argues that a change in labour laws would be the most effective method to safeguard constitutional rights, such as equality and human dignity while granting non-standard workers reasonable access to social insurance.

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<sup>143</sup> Dekker 2008 *Law Democracy and Development* 128.

<sup>144</sup> *Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744 (CC) para. 77.

<sup>145</sup> Motala *et al Social Security Review* 2021 36.

<sup>146</sup> Langa 2006 *Stellenbosch Law Review* 351-360.

<sup>147</sup> *Tshwane City v AfriForum* 2016 (6) SA 279 (CC) para 8.

<sup>148</sup> *Tshwane City v AfriForum* 2016 (6) SA 279 (CC) para 8.

<sup>149</sup> *Tshwane City v AfriForum* 2016 (6) SA 279 (CC) para 8.

<sup>150</sup> Fourie 2008 *PELJ* 128.

### **3.3 Constitutional limitation on workers' rights to social insurance**

As previously mentioned, social security is not an absolute right, rather it is subjected to internal constraints, because the state should only provide it after carefully considering reasonable measures, within its available resources.<sup>151</sup> The Constitution also encourages the limitation of rights to be in accordance to what is deemed as reasonable and legitimate.<sup>152</sup> These limitation clauses make it clear that South Africa does not have all the resources to make the right accessible to everyone on an immediate basis.<sup>153</sup> This demonstrates that all non-standard workers cannot be reasonably allowed access to social insurance. On this note, this study argues that factors such as reasonableness and innovative strategies need to be considered in the proper context. This is because different non-standard workers have different societal risks and circumstances, for example, certain non-standard workers of the same company can conduct the same tasks and bear the occupational dangers as those employed by the employer on a standard basis. In this regard, this research argues that the concept of an equitable distribution of resources must be considered before access to social insurance is unjustly limited for non-standard workers. In the case of *Mahlaule and another v Minister of Social Development*,<sup>154</sup> the Court upheld this idea and provided that, wherever a legislative interpretation unjustly restricts access to the right to social security, the appropriate course of action is to preserve and maintain compliance with the rights outlined in the Constitution.<sup>155</sup>

### **3.4 Legislations regulating access to social security at the workplace.**

Section 39(1)(2) of the Constitution states that legislation should also be interpreted by the courts in the context of giving priority to the spirit, purport and objects of the rights in the Constitution.<sup>156</sup> This provision requires the interpretation of legislations to be in line with constitutional values such as equality, human dignity

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<sup>151</sup> Section 27(1) of the *Constitution of the Republic of South Africa*, 1996.

<sup>152</sup> Section 36 of the *Constitution of the Republic of South Africa*, 1996.

<sup>153</sup> Mpedi 2017 *Recht in Afrika – Law in Africa – Droit en Afrique* 38.

<sup>154</sup> *Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 45.

<sup>155</sup> *Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC) para 45.

<sup>156</sup> Section 39 (2) of the *Constitution of the Republic of South Africa*, 1996.

and fairness. Thus, it is central to ensuring that legislations regulating access to social security at the workplace are interpreted in a way that promotes the inclusion of all workers, including those in non-standard employment. The crux of this research is to assess how legislations accommodate non-standard workers' rights to social insurance and whether this fulfils the constitutional objective of promoting social security in the workplace. Therefore, an evaluation of how the Constitution has impacted labour legislation is given below to determine the extent to which these legislations accommodate non-standard workers.

#### *3.4.1 The Labour Relations Act*

The *LRA* was enacted with the primary purpose of giving effect to constitutional values such as social justice, fair labour practice and the promotion of work environments built on democracy.<sup>157</sup> Section 39 (2) of the Constitution makes provision that every law, inclusive of labour law, should be interpreted and applied in compliance with the objects of the rights in the Constitution.<sup>158</sup> In addition section 3(b) of the *LRA* guides any person applying the Act to interpret the provisions of the Act in accordance with the Constitution. With respect to this *LRA* provision, it becomes inevitable to infer that there is a clear relationship between the Constitution and the *LRA*.

The *LRA* does not comprehensively regulate workers' access to social insurance, but it extensively influences their legal standing, because the prerequisite in requesting social insurance is the recognition as an employee. The Act also intends to promote and advance constitutional rights as conferred in section 27 of the Constitution.<sup>159</sup> Despite this being the case, it is an accepted practice that social security benefits stemming from ill-health, retrenchment or other factors detrimental to a person's ability to continue working and are regulated in such a way that due regard is given to the definition of one as an employee.<sup>160</sup> In most cases non-standard workers

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<sup>157</sup> Section 1 of *the LRA* 66 of 1995.

<sup>158</sup> Section 39 (2) of *the Constitution of the Republic of South Africa*, 1996.

<sup>159</sup> Preamble of the *LRA* 66 of 1995, see also Section 1 (a) of the *LRA* 66 of 1995.

<sup>160</sup> Fourie 2008 *PELJ* 110.

forming part of certain industries tend to be excluded from qualifying as employees in terms of the *LRA* and as a result cannot enforce any labour rights.<sup>161</sup>

In the judgment of the *first Certification of the Constitution of the Republic of South Africa*, the Court indicated that labour statutes would be placed under constitutional investigation to establish whether the rights of workers and employers are upheld.<sup>162</sup> Therefore, the *LRA* incorporated the provisions that stand to promote labour protection for non-standard employees such as temporary employees employed in the form of the TES, fixed-term contract employees and part-time employees.<sup>163</sup> Currently, sections 198A, 198B and 198C of the *LRA* extend labour protection to employees earning under the earnings threshold as provided for in section 6(3) of the *BCEA*.<sup>164</sup> These provisions enable non-standard employees to be eligible for social security benefits by recognising their employment status. On this background, these recognised non-standard workers stand to have the same social security benefits as those in standard employment. This follows from the declaration that these workers must not receive less favourable treatment than permanent employees, unless there is a valid cause to do so.<sup>165</sup>

The protection of human rights in a work environment is the main objective that labour laws seek to achieve.<sup>166</sup> It is held that, although labour Acts are primarily based on section 23 of the Constitution, their key objective is to ensure fundamental rights at work, regardless of social class or poverty levels.<sup>167</sup> In addition, Anker also asserted that one essential component of decent work as provided in the *ILO* is expanding social security in order to realise different workers' fundamental rights such as equality, human dignity and the secureness of their families.<sup>168</sup> Accordingly,

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<sup>161</sup> Fourie 2008 *PELJ* 122.

<sup>162</sup> *Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC) para 67.

<sup>163</sup> Sections 198A, 198B and 198C of the *LRA* 66 of 1995.

<sup>164</sup> Sections 198A, 198B and 198C the *LRA* 66 of 1995.

<sup>165</sup> Sections 198A, 198B, 198C and Section 198D (2) the *LRA* 66 of 1995.

<sup>166</sup> Mojapelo and Odeku *African Journal of Public Affairs* 112.

<sup>167</sup> Arbuckle *Decent work in South Africa: an analysis of legal protection offered by the state in respect of domestic and farm workers* 9.

<sup>168</sup> Mojapelo and Odeku *African Journal of Public Affairs* 72.

since one of the elements pervading fair labour practice is access to social security, this research argues that promoting these objectives would be inclusive of granting all workers reasonable access to social insurance, as such the *LRA* must continue to extensively protect different categories of workers.

#### *3.4.2 The Compensation for Occupational Injuries and Diseases Act*

The *COIDA* makes provision for social security benefits for workers who contract occupational diseases or die while acting within the scope of their employment.<sup>169</sup> The Constitutional Court in *Jooste v Score Supermarket Trading*<sup>170</sup> exemplified *COIDA* as a social legislation that has an important contribution on the sensitive and complex relationship surrounding workers, employers and society at large.<sup>171</sup> Therefore, the sphere of social security protection regulated in terms of the Act is ascribed to eradicating poverty and providing social payments or income that workers or their dependents can make use of.<sup>172</sup>

The Compensation Fund set up in accordance with the terms of the *COIDA* mandates employers to pay subscriptions to a centralised government fund and employers should also register and effect these contributions to the fund.<sup>173</sup> This suggests that, in order to pay subscriptions on the employee's behalf, the employer would need to formalise the work relationship to some extent, which is more noticeable in standard employment. Despite this being the case, unlike the *LRA*, *COIDA* has a broad definition of an employee.<sup>174</sup> Currently, the Act includes casual workers, domestic workers and employees whose services are procured in the form of a TES.<sup>175</sup> Therefore, the inclusion of these employees under *COIDA* demonstrates that, to a certain degree, there is a category of certain non-standard workers eligible for social insurance under the Act.

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<sup>169</sup> *Compensation for Occupational Injuries and Diseases Act* 130 of 1993

<sup>170</sup> *Jooste v Score Supermarket Trading* 1999 (2) SA 1; 1999 (2).

<sup>171</sup> *Jooste v Score Supermarket Trading* 1999 (2) SA 1; 1999 (2).

<sup>172</sup> Newaj 2023 *Obiter* 128.

<sup>173</sup> Myburg *et al Social Law Democracy and Development* 45.

<sup>174</sup> Section 1 of *COIDA* 130 of 1993.

<sup>175</sup> Section 1 of *COIDA* 130 of 1993.

The Act also has certain categories of employees that are excluded from the scope of its protection. Section 1 of the Act, excluded domestic workers from accessing benefits.<sup>176</sup> However, the case of *Mahlangu v Minister of Labour*<sup>177</sup> provided a pivotal precedent regarding the exclusion of domestic workers from accessing social insurance under the Act.<sup>178</sup> In this matter, the dependents of a domestic worker were denied access to social security benefits upon the occupational death of this worker because *COIDA* precluded domestic workers.<sup>179</sup> The Court in this matter emphasised important constitutional provisions such as equality and human dignity in reaching its ruling.<sup>180</sup> For these reasons, the provision excluding domestic workers from accessing benefits in terms of the Act was regarded unconstitutional in as far as it discriminated against these category of workers.

The ruling of the majority in this matter considered payments attained under *COIDA* to be equivalent to social security as conferred in section 27 of the Constitution.<sup>181</sup> The Court relied on the decision in *Government of the Republic of South Africa v Grootboom (Grootboom)*<sup>182</sup> and declared that the rights in the Constitution are interrelated and with that in mind, social security should over time be made readily accessible in such a way that it not only becomes accessible to those mentioned in the *COIDA*, but it should become accessible to a larger number of diverse individuals.<sup>183</sup> This, demonstrates that social security plays a crucial role in the lives of people and although the Act precludes certain groups of employees from qualifying for benefits under it, the Constitution has influenced the courts to develop the law in this aspect.

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<sup>176</sup> Section 1 (d) (v) of *COIDA* 130 of 1993.

<sup>177</sup> *Sylvia Bongji Mahlangu and Another v Minister of Labour and Others* 2021 (1) BCLR 1 (CC).

<sup>178</sup> *Sylvia Bongji Mahlangu and Another v Minister of Labour and Others* 2021 (1) BCLR 1 (CC).

<sup>179</sup> *Sylvia Bongji Mahlangu and Another v Minister of Labour and Others* 2021 (1) BCLR 1 (CC).

<sup>180</sup> *Sylvia Bongji Mahlangu and Another v Minister of Labour and Others* 2021 (1) BCLR 1 (CC).

<sup>181</sup> Newaj 2023 *Obiter* 136.

<sup>182</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46(CC)

<sup>183</sup> Chenwi 2013 *De Jure* 747, See also *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46(CC) para 45.

### 3.4.3 Unemployment Insurance Act

The *UIA* offers short-term unemployment insurance to eligible employees.<sup>184</sup> Currently, it does not protect the entire labour force because national and provincial government personnel are not included.<sup>185</sup> Contributors or their dependents receive benefits from the *UIF* in the event of unemployment, death, child adoption, illness or pregnancy.<sup>186</sup> It is financed by payments equal to two percent of employees' remuneration, of which the employee and employer each pay half.<sup>187</sup>

South Africa has implemented its unemployment insurance in such a way that it also caters social protection for certain categories of non-standard workers.<sup>188</sup> Currently, domestic workers and seasonal workers are covered.<sup>189</sup> It is submitted that the *UIAA* brought forward changes that intended to benefit women, since it intended to cover workers who are paid less.<sup>190</sup> Furthermore, the maternity benefits are provided at a percentage of sixty six from the contributions made by the female employee.<sup>191</sup> Despite this, the low level of contribution to *UIF* by women in non-standard employment still persists.<sup>192</sup> During the year 2019, it was recorded that registered domestic workers account for just twenty per cent of *UIF* contributions.<sup>193</sup> On this note, coverage for *UIF* is largely dependent on employers registering their employees and making contributions on their behalf.<sup>194</sup> This poses a challenge for non-standard workers to access benefits, because employers tend to be reluctant to register them. Unemployment insurance funds are also rated at a low level of coverage for workers in the informal sector.<sup>195</sup>

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<sup>184</sup> Millards 2007 *De Jure* 242.

<sup>185</sup> Millard 2007 *De Jure* 242.

<sup>186</sup> Millards 2007 *De Jure* 242.

<sup>187</sup> Department of Labour *Basic Guide to The Unemployment Insurance Fund(UIF)*.

<sup>188</sup> Section 1 of the *Unemployment Insurance Act* 63 of 2001.

<sup>189</sup> Section 1 of the *Unemployment Insurance Act* 63 of 2001.

<sup>190</sup> Plagerson *et al* 2018 Cambridge *University Press* 300.

<sup>191</sup> Section 12(3)(b) to the *Unemployment Insurance Act* 63 of 2001.

<sup>192</sup> Plagerson *et al* 2018 Cambridge *University Press* 300.

<sup>193</sup> Skinner *et al* 2021 *WIEGO* 12.

<sup>194</sup> Skinner *et al* 2021 *WIEGO* 12.

<sup>195</sup> Vodopivec 2009 | *Institute for the Study of Labour* 4.

After the eruption of the Covid-19 pandemic, the Department of Employment and Labour amplified the unemployment insurance by implementing the Covid-19 Temporary Employee Employer Relief Scheme (Covid-19 TERS).<sup>196</sup> The whole purpose of this was to ensure that income losses suffered from the pandemic in the different businesses were at least recovered for a certain period of time.<sup>197</sup> The contributions made towards the scheme were set in such a way that the affordability of the employees was catered for, for example, the base contribution was put down at the applicable minimum wage, which is set in a particular industry or the minimum wage set at national level.<sup>198</sup> It is clear that not all non-standard workers are covered by *UIF* because of the distinction made amongst different categories of employees. Thus, these (Covid-19 TERS) were deemed as strategies to effect social security benefits. However, they were exclusionary to some extent, as they catered for those who were already *UIF* contributors. This study contends that South Africa was in a position to effect social insurance strategies to protect workers due to unforeseen loss of income risks, therefore, this serves as a basis for permanently expanding social insurance for all workers.<sup>199</sup> In addition, it would be efficient to enhance government-provided social security schemes for every employee, irrespective of the category of employment that they find themselves in.<sup>200</sup> On this note, it is concluded that, to achieve a significant level of consistency with the remainder of South Africa's social security system, enhancements that would allow significant universal coverage in social insurance need to be made in the *UIF* regulatory framework.

### **3.5 Conclusion**

Social security is a right that is interrelated to other constitutional rights such as equality and human dignity.<sup>201</sup> One of the most important ways to advance the right to social security at work is to make social insurance accessible to all workers. This chapter examined the influence of the Constitution on legislations providing social

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<sup>196</sup> Koena and Mufamadi 2021 *South African Journal on Human Rights* 35-36.

<sup>197</sup> Keena and Mufamadi 2021 *South African Journal on Human Rights* 35-36.

<sup>198</sup> Koena and Mufamadi 2021 *South African Journal on Human Rights* 36-37.

<sup>199</sup> Devereux 2021 *SAJE* 426.

<sup>200</sup> Koena and Mufamadi 2021 *South African Journal on Human Rights* 36-37.

<sup>201</sup> *Government of the Republic of South Africa v Grootboom* 2001(1) SA (CC) para 23.

security to workers. It is evident from the discussion that the Constitution is the supreme law<sup>202</sup> that accommodates all workers in respect of social insurance access. Hence, it was incumbent for all legislation to conform to it.<sup>203</sup> Legislations granting social security towards workers have undergone some reformation to better align with the principles of the Constitution. However, a huge number of non-standard workers remain excluded from accessing social insurance because of the way access to it is administered. Therefore, this confirms that, despite reformation, these legislations are mainly geared towards the protection of social insurance access for non-standard workers engaged in formal employment relationships.

Considering the above and learning from international law, this study suggests that legislation promoting the labour rights of non-standard workers should be specifically customised for these workers. Therefore, the following chapter analyses South Africa's adherence to international, regional instruments and how this adherence can pave the way for non-standard workers' rights to access social insurance.

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<sup>202</sup> Section 2 of the *Constitution of the Republic of South Africa*, 1996.

<sup>203</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (2004) (4) SA 490 (CC) para 72.

## **CHAPTER 4: A COMPILATION OF INTERNATIONAL AND REGIONAL INSTRUMENTS APPLICABLE TO SOUTH AFRICAN WORKERS' SOCIAL SECURITY SYSTEM**

### ***4.1 Introduction***

The Constitution acknowledges the significance of international law and considers its relevance for interpreting rights in the bill of rights.<sup>204</sup> Within the sphere of labour and social security protection, the United Nations (hereinafter the UN) founded the *ILO* that is geared towards fostering social justice and labour rights.<sup>205</sup> The *ILO* has assumed a pivotal function in shaping the South African social security system towards workers.<sup>206</sup> This has been accomplished through setting standards in various conventions and recommendations. The *ILO* is also tailored towards the promotion of decent work which incorporates social protection and equality for all workers.<sup>207</sup> Despite South Africa's ratification of various international instruments and membership in the *ILO*, its labour and social security regulations still appear to place non-standard workers in precarious positions.

The purpose of this chapter is to examine how international and regional instruments are applied to the South African social security system at work with specific reference to the relevant ILO labour standards. Additionally, the impact made by these instruments in the South African labour social protection will be alluded to, with the view of evaluating how social insurance protection can be extended towards non-standard workers.

### ***4.2 Relevance of International law in promoting work social insurance***

Once ratified and incorporated into legislation, international agreements are treated as law in South Africa, provided they do not contradict with the Constitution.<sup>208</sup> International instruments assume a significant role towards guiding a country's

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<sup>204</sup> Section 39 (1)(b) of the *Constitution of the Republic of South Africa*, 1996.

<sup>205</sup> ILO "date unknown" <https://www.un.org/youthenvoy/2013/08/ilo-international-labour-organization/>.

<sup>206</sup> Mokofe 2020 *Obiter* 573.

<sup>207</sup> McGregor *Quarterly Law Review for People in Business* 150–154.

<sup>208</sup> Section 231(4) of the *Constitution of the Republic of South Africa*, 1996.

domestic laws and encourages international collaboration to improve social protection.

South Africa does not have a comprehensive social security system,<sup>209</sup> and it lacks in protecting non-standard workers' rights. Consequently, social insurance protection in the labour market is oriented towards standard employment. Accordingly, this study contends that the difficulty in obtaining social insurance for non-standard workers is increased by the absence of comprehensive legislation tailored towards non-standard workers protection. Therefore, the extension of the protection can be achieved by referring to existing legal provisions that are mostly found in international instruments. Against this background, it is argued that existing legislation in South Africa should conform to international standards to create an inclusive social insurance system that would advance the constitutional right of social security in the workplace.

### **4.3 The United Nations**

The United Nations (hereinafter the UN) is a global organisation founded in 1945.<sup>210</sup> Its constitution also known as the UN Charter serves as its cornerstone. According to the preamble of the Charter, the mandate of the UN is to:

reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom.<sup>211</sup>

The aforementioned makes it evident that the UN's goal is to safeguard human dignity by raising standards of living and eliminating existing discrimination. This aligns with the promotion of a non-discriminatory social security system that protects various categories of individuals. From this, it is argued that the guiding

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<sup>209</sup> Cohen and Moodley 2012 *PELJ* 332.

<sup>210</sup> United Nations "Charter of the United Nations" 1945, 1 UNTS XVI. Retrieved From: <https://www.un.org/en/about-un/> (15-09-2020).

<sup>211</sup> Preamble of Charter of the *United Nations and Statute of the International court of Justice* 1945.

principles in the preamble of the UN Charter, present concepts that ought to be incorporated into South Africa's social security framework in the workplace. Adhering to the principles would enable the country to promote the UN sustainable development goal 8, that is geared towards safeguarding labour rights that encompass workplaces that are conducive and secure for all workers, including those in precarious positions such as non-standard workers.<sup>212</sup> The UN uses different instruments that advance social security in the workplace. A discussion of the relevant instruments applicable to South Africa are alluded to below.

#### *4.3.1 The Universal Declaration of Human Rights (1948)*

The Universal Declaration of Human Rights (hereinafter the *UNDHR*) is the main international instrument upholding human rights globally.<sup>213</sup> It affirms the intrinsic value and dignity of every person and creates a shared-norm for human dignity and well-being. It is regarded as the cornerstone of the UN's efforts to uphold and advance human rights.<sup>214</sup> This instrument is not legally binding in South Africa, however, its provisions have been incorporated into various international and regional treaties, such as the Constitution and legislations that South Africa is obligated to conform to.<sup>215</sup> Additionally, South Africa has ratified several international human rights treaties that are founded on the principles of this declaration.<sup>216</sup>

The discussion of the *UNDHR* is relevant to this study because the *UNDHR* affirms that social insurance forms part of the fundamental rights that are guaranteed to “everyone”, regardless of the industry or the type of employment they are engaged in.<sup>217</sup> Article 25 of the *UNDHR* puts forward significant circumstances that make social insurance necessary for everyone, including unemployment, illness,

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<sup>212</sup> United Nations “date unknown” <https://unric.org/en/sdg-8/>.

<sup>213</sup> Preamble of the *Universal Declaration of Human Rights (UDHR)*, 1948.

<sup>214</sup> Preamble of *the Universal Declaration of Human Rights (UDHR)*, 1948.

<sup>215</sup> Mbaya 2018 <https://www.news24.com/News24/sas-constitution-embodies-the-universal-declaration-of-human-rights-20181210>.

<sup>216</sup> Mbaya 2018 <https://www.news24.com/News24/sas-constitution-embodies-the-universal-declaration-of-human-rights-20181210>.

<sup>217</sup> Article 23(3) of the *Universal Declaration of Human Rights (UDHR)*, 1948.

incapacity, old age and other forms of subsistence poverty brought by circumstances that cannot be controlled.<sup>218</sup> The *UNDHR* also promotes the social protection of maternity towards all female workers, regardless of the industry in which they are working.<sup>219</sup> Therefore, this suggests that the *UNDHR* promotes an inclusive social insurance that is accommodative towards all workers.

Furthermore, the *UNDHR* affirms this universal right to social insurance through granting everyone significant rights including equality without discrimination,<sup>220</sup> social security benefits in the case of unemployment,<sup>221</sup> the liberty to select a desired job occupation and the right to fair and conducive working conditions.<sup>222</sup> The court, in the case of *Sylvia Bongi Mahlangu and Another v Minister of Labour and Others* considered that the *UNDHR* obliges South Africa to interpret *COIDA* in such a way that domestic workers are granted social insurance protection.<sup>223</sup> It is thus evident that non-standard workers are discriminated against by the South African social insurance legislations. However, the courts are actively using international instruments as guidance to address this prejudice. Therefore, the decision of the Court in *Sylvia Bongi Mahlangu and Another v Minister of Labour and Others* highlights the necessity of upholding human rights, through interpreting South African social insurance legislation in such a way that there is conformation to the tenets of international instruments.

#### 4.3.2 *The International Covenant on Economic, Social and Cultural Rights (1966)*

The International Covenant on Economic, Social and Cultural Rights (1966) (hereinafter the *ICESCR*) is a part of the UN instruments that advance human rights conferred in the UN Charter.<sup>224</sup> The *ICESCR* was put into effect in 1976,<sup>225</sup> and

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<sup>218</sup> Article 25 (1) of the Universal Declaration of Human Rights 1948.

<sup>219</sup> Article 25 (2) of the *Universal Declaration of Human Rights 1948*.

<sup>220</sup> Article 7 of the *Universal Declaration of Human Rights (UDHR)*, 1948.

<sup>221</sup> Article 7 of the *Universal Declaration of Human Rights (UDHR)*, 1948.

<sup>222</sup> Article 23 of the *Universal Declaration of Human Rights (UDHR)*, 1948.

<sup>223</sup> *Sylvia Bongi Mahlangu and Another v Minister of Labour and Others* para 36.

<sup>224</sup> Preamble of the *International Covenant on Civil and Political Rights* 1966.

<sup>225</sup> Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 14.

South Africa ratified it in 2015.<sup>226</sup> The *ICESCR* contains significant clauses that protects non-standard workers' rights to social insurance. Article 9 of it affirms the precepts of article 23(3) of the *UNDHR* and guarantees "everyone" the right to social security as well as social insurance.<sup>227</sup> Furthermore, General Comment 19 of the *ICESCR* elaborates on article 9 of the *ICESCR* and provides that:

Steps must be taken by States parties to the maximum of their available resources to ensure that the social security systems cover workers inadequately protected by social security, including part-time workers, casual workers, the self-employed and homeworkers. Where social security schemes for such workers are based on occupational activity, they should be adapted so that they enjoy conditions equivalent to those of comparable full-time workers. Except in the case of employment injury, these conditions could be determined in proportion to hours of work, contributions or earnings, or through other appropriate methods. Where such occupation-based schemes do not provide adequate coverage to these workers, a state party will need to adopt complementary measures.<sup>228</sup>

General comment 19 of the *ICESCR* widely accepts social security and ultimately calls for social insurance to be equitably accessible to everyone. This denotes that access should not be unreasonably restricted after considering the existing private or public system of social security.<sup>229</sup> As such, member states ought to give appreciation to the members of society who are vulnerable such as those in non-standard forms of employment who often have it hard in accessing the right.<sup>230</sup> This reflects further on the provisions of section 27 (2) of the Constitution that caters everyone access to social security. In addition, it gives rise to the idea that something needs to be done before the right can be limited on the face of it. Accordingly, to guarantee that nothing prevents people from exercising their rights under the *ICESCR*, measures such as requiring everyone to contribute to social

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<sup>226</sup> Basson 2020 *Obiter* 851.

<sup>227</sup> Article 9 of the *ICESCR*, 1966.

<sup>228</sup> General Comment 19 of the *ICESCR*.

<sup>229</sup> General Comment 19 of the *ICESCR* .

<sup>230</sup> General Comment 19 of the *ICESCR*.

insurance within their means is upheld.<sup>231</sup> Also, member states are placed under the obligation of ensuring that they do more to protect the workers.

Furthermore, the *ICESCR* requires member states to promote the right to freedom of occupation<sup>232</sup> by making sure that the chosen profession is protected.<sup>233</sup> This therefore suggests that social insurance should be a component in the legal protection of the chosen occupation, which may also encompass a non-standard occupation. The Covenant further protects individuals who work, through regarding them as workers rather than as employees.<sup>234</sup> The South African legislative framework discussed in Chapter 3 of this study illustrated how the concept of employee disregards certain non-standard workers who form part of the labour market. Therefore, it is contended that the covenant's reference to the term, "worker", demonstrates the intention to legally acknowledge the diverse range of individuals who are working.<sup>235</sup>

#### ***4.4 The International Labour Organisation***

South Africa joined this United Nations organisation when it was first established in 1919. And due to its apartheid practices, it renounced its membership in 1964, but later returned in 1944.<sup>236</sup> The fundamental principles of the ILO are advancing social justice and the global recognition and protection of labour rights.<sup>237</sup> The ILO acknowledges the existence of non-standard employment, and urges the necessity for its protection.<sup>238</sup> This has been apparent through standards that are set out in various conventions, recommendations and protocols of the ILO. Subsequently, South Africa has ratified numerous ILO conventions pertaining to the social protection of various workers.

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<sup>231</sup> General Comment 19 of the *ICESCR*.

<sup>232</sup> Article 6 of the *ICESCR*, 1966.

<sup>233</sup> Article 6 of the *ICESCR*, 1966.

<sup>234</sup> Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 15.

<sup>235</sup> Fourie *Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy* 88.

<sup>236</sup> ILO 2013 *The role of the ILO during and ending apartheid* 1-5.

<sup>237</sup> ILO "date unknown" <https://www.ilo.org/about-ilo>.

<sup>238</sup> Mokofe 2020 *Obiter* 576.

#### 4.4.1 *The Social Security (Minimum Standards) Convention*

The Social Security (Minimum Standards) Convention (hereafter the SSMSC), is the main source of reference that offers direction in creating a social security framework.<sup>239</sup> The Convention promotes public social insurance as a measure of safeguarding the interests of workers.<sup>240</sup> In addition, it recognises different contingencies that require social security through nine branches comprising of:

medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, survivors' benefits.<sup>241</sup>

South Africa has not ratified this convention,<sup>242</sup> this could be due to the convention's comprehensive nature and the country's limited resources. Despite this, the Convention is nevertheless flexible in that it permits member states to affirm and have a minimum of three of the mentioned nine branches.<sup>243</sup> Accordingly, it is evident from the identified branches that South Africa complies with the Convention to some extent since it has over three of the mentioned branches. For this reason, it is opined that the country is in a position of ratifying the SSMSC since it also endeavours to formulate a comprehensive social security system that is inclusive towards all workers and eradicates inequality. This would also be in line with section 27 of the Constitution and the principles of the SSMSC that intend to protect everyone's social protection.<sup>244</sup>

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<sup>239</sup> ILO <https://www.ilo.org/resource/ilo-social-security-minimum-standards-convention-1952-no-102>.

<sup>240</sup> Article 6 of the ILO Convention 102 of 1952.

<sup>241</sup> ILO <https://www.ilo.org/resource/ilo-social-security-minimum-standards-convention-1952-no-102>.

<sup>242</sup> Hagemeyer *Social Security Review* 53.

<sup>243</sup> ILO <https://www.ilo.org/resource/ilo-social-security-minimum-standards-convention-1952-no-102>.

<sup>244</sup> ILO "General Survey on Social Security Instruments" 2011. [https://www.ilo.org/ilc/ILCSessions/99thSession/reports/WCMS\\_152602/lang-en/index.htm](https://www.ilo.org/ilc/ILCSessions/99thSession/reports/WCMS_152602/lang-en/index.htm).

#### 4.4.2 *The Discrimination (Employment and Occupation) Convention 111 (1958)*

The Discrimination (Employment and Occupation) Convention (hereinafter the CDE O), was enacted with the purview of ensuring that signatory states implement their domestic legislations in such a way that it guarantees equal treatment for all individuals.<sup>245</sup> South Africa has ratified this Convention since 1997, and it is obligated to implement its national laws in such a way that it lessens discrimination in the sphere of employment. Through its recommendation the CDEO guides the country`s legislative framework to protect all workers inclusive of non-standard workers by eradicating discrimination on all employment factors including social security.<sup>246</sup> Therefore, this indicates that non-standard workers should not be unfairly discriminated against from accessing social insurance. In the case of *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd*, the court ruled that it was unconstitutional to distinguish between workers who were paid weekly and those who were paid monthly for purposes of social insurance in the form of pension benefits.<sup>247</sup> In this matter, the majority of the weekly-paid workers were of the African race, and those paid on a monthly basis were of the white race.<sup>248</sup> Thus, the court provided that:

discrimination is unfair if it is reprehensible in terms of the society`s prevailing norms. Whether society will tolerate the discrimination depends on what the object is of the discrimination and the means used to achieve it. The object must be legitimate and the means proportional and rational.<sup>249</sup>

This indicates that, if discrimination goes against accepted social norms and moral principles, it is unfair. Therefore, it is necessary for both the motivation behind the prejudice and the tactics employed, to be consistent with ethical standards and societal norms. Discriminating against non-standard workers from accessing social

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<sup>245</sup> Article 2 of the Discrimination (Employment and Occupation) Convention 111 (1958).

<sup>246</sup> ILO Recommendation 111 (1958).

<sup>247</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* [1997] 11 BLLR 1438 (LC).

<sup>248</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* 1997] 11 BLLR 1438 (LC).

<sup>249</sup> *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* para 1997 11 BLLR 1438 (LC) 295.

insurance affects the broader society and therefore, the means applied to effectuate this discrimination is not rational since the employees are excluded without considering any consistent alternatives to accommodate the workers. Considering this, it is argued that the status of being considered as an employee to qualify for social insurance is an arbitrary ground that is prohibited in terms of section 6 of the Employment Equity Act and the principles of the CDEO. This is because equitable treatment and opportunities regarding occupations, with the goal of doing away with any prejudice<sup>250</sup> are some of the foundational principles of the Convention. Lastly, article 1 of the CDEO prohibits arbitrary exclusions that impair the parity of opportunities or treatment in the workplace.<sup>251</sup> This indicates non-standard employees should be given the opportunity to access social insurance instead of being denied the right.

#### *4.4.3 The Occupational Safety and Health Convention, 1981 (No. 155)*

Article 2 of the Occupational Safety and Health Convention, 1981 (hereafter the OCSHC), stipulates that all workers in the economic activity covered by the Convention are subject to its application.<sup>252</sup> This means that non-standard workers are also subject to the protection of occupational safety and health, even though they may form part of excluded categories in terms of the Convention.<sup>253</sup> In South Africa, occupational health and safety legislation largely excludes non-standard workers, and therefore limits them access to social insurance coverage in the event of occupational diseases or injuries. This means that they would be left in destitute positions should the need arise for social insurance access. Despite this, non-standard workers such as domestic workers are provided with social security in the event of maternity, disability or injury at work in terms of article 14 of the Domestic Workers Convention 189 of 2011.<sup>254</sup>

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<sup>250</sup> Tshoose 2022 *PELJ* 20.

<sup>251</sup> Article 1 of Convention 111 of 1952.

<sup>252</sup> Article 2 of Convention 155 of 1981.

<sup>253</sup> Article 2 of Convention 155 of 1981.

<sup>254</sup> Domestic Workers Convention, 189 of 2011.

South Africa ratified the OCSHC in 2013, because of the increased nature of black and female workers occupying the domestic work profession.<sup>255</sup> This has therefore resulted in the *LRA* and the *BCEA* being reformed with provisions that stand to protect the labour rights of these non-standard workers through formalising this employment to some extent.<sup>256</sup> Considering this, it is apparent that ILO standards continue to shape the framework of social protection towards non-standard workers. Thus, there is some form of compliance to some ILO instruments on the social protection of non-standard workers even though many non-standard workers remain excluded from social insurance.

#### **4.5 Regional Instruments**

Regional legal instruments were introduced after the adoption of the *ILO* social security standards.<sup>257</sup> These instruments are geared towards addressing specific conditions in specified regions.<sup>258</sup> All states that form part of these instruments aim to follow the different conventions and recommendations to address common issues. The different instruments can have a binding and a non-binding effect. The umbrella of regional instruments is found in the regions of the African Union (hereinafter the AU) and the South African Democratic Alliance (hereinafter SADC).<sup>259</sup>

##### **4.5.1 The African Union**

The African Union (AU) was founded with the purpose of encouraging integration and fostering economic development on the member states of Africa.<sup>260</sup> South Africa is a member of the AU and is obligated to eradicate discrimination and promote equality in human rights.<sup>261</sup> Therefore, the AU has several regulations that advocate for labour rights and safeguard legal interest in the employment space. The African

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<sup>255</sup> Blackett and Tiemeni *International Journal of Comparative Labour Law* 204.

<sup>256</sup> Blackett and Tiemeni *International Journal of Comparative Labour Law* 206.

<sup>257</sup> Hagemeger *Social Security Review* 53.

<sup>258</sup> Fourie *Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy* 148.

<sup>259</sup> Fourie *Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy* 148.

<sup>260</sup> AU <https://au.int/en/overview>.

<sup>261</sup> Article 2 of the African Charter on Human and Peoples' Rights 1981.

Charter on Human and People's Rights obligates its member states to implement legislations that conform to the precepts of the Charter.<sup>262</sup> Furthermore, the Social Protection Plan for the Informal Economy and Rural Workers 2011-2015 recognises that a significant portion of the workforce in African labour markets consists of informal workers.<sup>263</sup> Therefore, the AU promotes and favours programmes that seek to safeguard social protection and advance work that is informal through regulation.<sup>264</sup> This is because article 3(j) of the AU *Constitutive Act* provides that member states should adopt an approach that seeks to promote social development in African countries,<sup>265</sup> and this correlates with the promotion of social security for all workers.

#### 4.5.2 *The South African Development Community (SADC)*

Originally known as the Southern African Development Coordination Conference (SADCC), the SADC was established in 1980.<sup>266</sup> Member states of the SADC have shared ideals and values with their goal entailing a regional community, raising living standards, reducing poverty, advancing social justice and freedom and ensuring everyone lives in peace and security. The region's labour market is typified by high rates of unemployment and, in certain nations, up to most of the employment being informal.<sup>267</sup> This acknowledges the importance of protecting non-standard employees.

##### 4.5.2.1 Charter of the Fundamental Social Rights in SADC (2003)

The Charter of the Fundamental Social Rights in SADC (2003) (hereafter "the SADAC Charter) emphasises that all workers have the right to social protection, and this right is independent from the nature of employment or status.<sup>268</sup> Therefore, non-

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<sup>262</sup> Preamble of the African Charter on Human and Peoples' Rights 1981.

<sup>263</sup> AU 2011 [https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfoEcon&RuralWorkers\\_2011.pdf](https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfoEcon&RuralWorkers_2011.pdf) 18.

<sup>264</sup> AU 2011 [https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfoEcon&RuralWorkers\\_2011.pdf](https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfoEcon&RuralWorkers_2011.pdf) 18.

<sup>265</sup> Article 3 (j) of the Constitutive Act of the AU.

<sup>266</sup> Fourie *Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy* 20.

<sup>267</sup> SADC <https://www.sadc.int/pillars/employment-labour-0>.

<sup>268</sup> Article 10 of the *Charter of the Fundamental Social Rights in SADC* (2003).

standard employees are also included in this protection. Article 11 of the SADC Charter advocates for better working conditions, and these conditions encompass the necessary social protection for all workers.<sup>269</sup> Some of the principles of the SADC Charter have been incorporated in the provisions of the *BCEA*, which intends to provide better working conditions for workers, however, this excludes non-standard workers such as independent contractors.<sup>270</sup> Therefore, member states are obligated to ensure that this is adhered to. The Charter protects non-standard workers in that it dictates that all workers have the freedom to select their type of employment,<sup>271</sup> they should be remunerated fairly for the chosen employment,<sup>272</sup> and also be protected against hazardous work environments.<sup>273</sup> These factors facilitate access to social insurance in the sense that fair remuneration can enable contributions to social insurance by non-standard workers, and safe working conditions co-exist with social insurance. Despite this, it once again depends on the way a country incorporates these principles in its national legislation. Currently in South Africa, this is not clear because national legislation mainly concedes to upholding these standards towards standard employees.

#### 4.5.2.2 The SADC Code on Social Security

The Code on Social Security ((hereafter the SADC Code) was accepted in June 2007 under the domain of the Integrated Committee of Ministers in Namibia.<sup>274</sup> It had the express purpose of providing social security to all workers; article 6 of the SADC code mandates member states to implement different measures that ensure that social insurance is made broad to cover different people. In essence, all workers inclusive of non-standard workers should be provided with social insurance access. The Code intended to ensure that, this is achieved through strategic measures that ensure that social insurance becomes broad to include everyone, particularly

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<sup>269</sup> Article 10 of the *Charter of the Fundamental Social Rights in SADC* (2003).

<sup>270</sup> Section 1 of the *BCEA* 75 of 1997.

<sup>271</sup> Article 14(a) of the *Charter of the Fundamental Social Rights in SADC* 2003.

<sup>272</sup> Article 14(b) of the *Charter of the Fundamental Social Rights in SADC* 2003.

<sup>273</sup> Article 12 of the *Charter of the Fundamental Social Rights in SADC* 2003.

<sup>274</sup> Mpedi 2011 *De Jure* 18.

workers in the informal sector.<sup>275</sup> The Code extended social security protection to migrant workers and calls for member states to include them too. It also made it clear that, social insurance should maintain income at a sustainable level on which workers can be able to make a living.<sup>276</sup> The Code has no binding effect in South Africa, however, it provides strategic guidance for creating and enhancing social security programmes throughout the SADC region of which South Africa is a member, therefore it can be used as guidance to expand social security towards excluded groups such as non-standard workers.<sup>277</sup>

The country also has a great potential of attracting migrant workers who tend to form part of its working class.<sup>278</sup> Significantly such migrant workers tend to work in non-standard forms of employment. Section 1 of the *UIA* provides that migrant workers who are required to depart from South Africa when their employment is terminated, are not regarded as "contributors".<sup>279</sup> Accordingly, they are excluded from social insurance protection as opposed to the migrant workers who are not required to depart the country. In addition, the *ODMIWA* has been proven to be useful in protecting migrant workers who have worked or are working in the mining sector to access social insurance.<sup>280</sup> However, the administrative burden that is in place, makes it difficult for the workers to access social insurance.<sup>281</sup> This indicates that South Africa does not completely adhere to this SADC instrument.

#### ***4.6 South Africa`s progress in applying regional and international instruments to protect non-standard workers` social insurance rights***

Notwithstanding the ongoing difficulties, South Africa has made some progress in putting regional and global instruments in place to protect non-standard workers' social insurance rights. Its ratification of various treaties and conventions has resulted in the revision of numerous legislations to guarantee social insurance

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<sup>275</sup> Code on Social Security in *SADC* 2007.

<sup>276</sup> Code on Social Security in *SADC* 2007.

<sup>277</sup> Nyenti and Mpedi 2012 *PELJ* 255.

<sup>278</sup> Khumalo 2022 *Obiter* 573.

<sup>279</sup> Khumalo 2022 *Obiter* 573, see also section 3(1)(d) of the *UIA*.

<sup>280</sup> Khumalo 2022 *Obiter* 576.

<sup>281</sup> Khumalo 2022 *Obiter* 577.

coverage for certain non-standard workers. Domestic workers are eligible to receive survivor, unemployment, maternity and illness benefits through the realm of the *UIF*.<sup>282</sup> In addition, various temporary workers employed under labour brokers and certain informal workers are provided with protection under the *LRA*<sup>283</sup> and the *UIA*.<sup>284</sup>

The *BCEA* has also been customised in such a way that the Minister of labour may propose specific sectoral determinations that outline the fundamental terms of employment applying to a particular sector.<sup>285</sup> Consequently, the South African taxi industry was included in the scope of the *UIF* in 2005 after the implementation of Sectoral Determination 11: Taxi Sector 2005.<sup>286</sup> Thus, while independent contractors remained excluded for social insurance protection, informal workers, for example, taxi drivers were granted social insurance coverage through *UIF*. In light of this, it is contended that another workable way to provide social insurance to excluded employees in the informal sector could be through sectorial determinations. These sectorial determinations to some extent enable the formality of certain non-standard jobs which could facilitate the formation of social insurance access of non-standard employees.

In 2019, South Africa enacted a minimum wage legislation that intended to limit income inequality and guaranteed those in employment a just and reasonable income.<sup>287</sup> Currently, the amount stands at R27,58 for normal worked hours<sup>288</sup> from an amount of R20 per hour on specific sectors, which was set in 2019.<sup>289</sup> This income method is applicable to all workers, including non-standard workers.<sup>290</sup> In

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<sup>282</sup> Section 1 of the *UIA* 63 of 2001.

<sup>283</sup> Sections 198A, 198B and 198C of the *LRA* 66 of 1995.

<sup>284</sup> Section 1 of the *UIA* 63 of 2001.

<sup>285</sup> Section 50 of the *BCEA* 75 of 1997.

<sup>286</sup> See clause 34(1) of the *Sectoral Determination 11: Taxi Sector* 2005 for the definition of "taxi sector".

<sup>287</sup> Labourwise 2018 <https://www.labourwise.co.za/labour-news-teazer/new-national-minimum-wage-1-january-2019>.

<sup>288</sup> Reg 1 in GN 4331 GG 50073 of 2 February 2024.

<sup>289</sup> Labourwise 2018 <https://www.labourwise.co.za/labour-news-teazer/new-national-minimum-wage-1-january-2019>.

<sup>290</sup> Section 1 of the *National Minimum Wage Act*, 2018.

this regard, it is submitted that this policy is a step in the right direction toward creating a framework that would provide non-standard workers the opportunity to contribute to social insurance programmes. This is crucial because the policy specifies the minimum wage that employers must pay employees. This would thus minimise the pressure on the state's social assistance programmes, since the minimum wage can aid the workers to contribute to the economy, and factors such as poverty and low standards of life can be reduced.

South Africa's compliance with the *ILO* social security and labour standards is apparent from the fact that there is currently an existing social security system that is administered through government and makes provision for different contingencies that are listed as part of the nine branches in the SSMSC. The country also intends to implement universal coverage of national health insurance (hereinafter NHI). On 15 May 2024 President Ramaphosa signed the NHI bill, which was deemed as a stepping stone towards achieving comprehensive, universal and high-quality health care for everybody. All workers inclusive of non-standard workers will be eligible for coverage under the scheme, and in this instance non-standard employees who lack affordability will be protected. However, this insurance provision is set to take effect in a period of 14 years. Considering this, this research argues that this health insurance would lessen the harsh effects of lack of workplace medical insurance on non-standard workers.

#### ***4.7 Lessons for expanding social insurance through international and regional instruments***

South Africa can take valuable lessons to expand social insurance by applying the abovementioned international and regional instruments. The instruments have universal coverage of social insurance, and their systems are comprehensive. This would enable the nation to have access to broad coverage, which among other advantages can guarantee better standards of living and a social security system, which can lower poverty.<sup>291</sup> The SSMSC also puts forward a set of guidelines that ensure excellent governance, financial sustainability, beneficiary rights, respect for

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<sup>291</sup> Tshoose 2022 *PELJ* 12.

the law and equality of treatment without discrimination.<sup>292</sup> This can align with the objectives of the South African Constitution, and would require the regulatory framework to actively adopt measures that accommodate the diverse needs of workers. Additionally, the country would be able to take steps toward implementing social insurance access if different occupations were legally recognised in accordance with ILO conventions.

#### ***4.8 Conclusion***

The UN put forward the principles of protecting human rights and has brought forward different conventions to ensure compliance of the protection on the right to social security. It developed the ILO that has also brought forward various conventions and recommendations in the quest of protecting social insurance of non-standard workers. It additionally facilitated the development of a more comprehensive social security system for South Africa. Despite the lessons from the international and regional instruments on social security protection, South Africa still has limited social insurance protection. Therefore, this target of reaching universal social insurance is dependent on how a country decides to put forward international instruments in its national laws. Based on the above, it is concluded that, to incorporate non-standard workers more effectively into social insurance programmes, South Africa is still researching and implementing reform measures. Among these are initiatives to increase the coverage of social security and regulate standard employment. Thus, universal social insurance can be achieved with regional and international tools being effectively applied into a country`s national legislation.

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<sup>292</sup> The ILO Social Security (Minimum Standards) Convention 102.

## **CHAPTER 5: CONCLUSION AND RECOMMENDATIONS**

### ***5.1 Introduction***

This chapter concludes the research that included an examination on the extent to which non-standard workers access the right to social insurance. The main goal was to investigate the extent to which the existing South African legal framework provides social insurance towards the workers and whether it substantially promotes the right to social security in the workplace. This chapter also provides recommendations on the shortfalls that require development.

This mini dissertation highlighted that promoting social security in the workplace is significantly affected by discriminatory practices. This stems from the status and recognition as an employee or contributor through labour legislations. As such, it was argued that the current position is indicative that non-standard forms of employment will persist in the labour market and that the workers will continuously endure the harsh financial effects stemming from lack of social insurance protection. Consequently, it is posited that, to fairly protect these workers through social insurance, legal intervention is required.

South Africa has undertaken to improve employment standards and extend social security to vulnerable workers.<sup>293</sup> Despite this effort, the current labour and work social security legislation remains largely geared towards the protection of those in standard forms of employment. This proves a gap that needs to be filled in labour legislation to afford social insurance protection to non-standard workers.<sup>294</sup> Furthermore, the inadequate social security system that fails to provide comprehensive social insurance for all workers exacerbates socio-economic issues and can potentially create a heavy burden on the state's social assistance programme.

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<sup>293</sup> Clarke 2004 *Canadian Journal of African Studies* 558.

<sup>294</sup> Mojapelo and Odeku *African Journal of Public Affairs* 120.

## **5.2 Conclusion**

The informal sector in South Africa is over-populated,<sup>295</sup> however, non-standard workers are nevertheless in precarious legal positions. This has propelled disparities in the world of work, where an indifference is made between affording work social security to standard workers with some exclusion of non-standard workers despite everyone bearing the social and economic consequences stemming from the need to access social insurance. Therefore, it becomes imperative that non-standard workers should have social insurance to protect them from socio- economic issues.

The prevailing view is that non-standard workers form part of the labour market, and some form part of those who are in an employment relationship. Therefore, they are entitled to social security benefits as outlined in Section 27 of the Constitution.<sup>296</sup> However, this research has shown that the legal reform made, is not always favourable towards these workers. The *UIA* and *COIDA* currently guarantee certain non-standard workers, such as seasonal and domestic workers access to social insurance benefits.<sup>297</sup> The *LRA* has also largely impacted the legal position because a worker is supposed to be recognised as an employee before they can be provided with social insurance access.<sup>298</sup> Thus, access to social insurance benefits tends to be highly dependent on the employers compliance and other administrative measures in the Acts, which accommodate the workers. This has resulted in a large segment of workers forming part of this category of employment to continue to experience challenges in accessing social insurance. Additionally, this continuously makes the idea of conforming to the *ILO* standards concerning decent work increasingly difficult to achieve.

Despite the above, the country acknowledges the existence of non-standard workers and their impact in the growth of the economy.<sup>299</sup> However, to date existent regulatory systems are not always tailored towards the rights of these workers.

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<sup>295</sup> Rogan 2019 *WIEGO* 1.

<sup>296</sup> Fourie 2008 *PELJ* 128.

<sup>297</sup> Section 11 of the *COIDA* 130 of 1993, Section 3 of the *UIA* 63 of 2001, see also section sections 198A, 198B and 198C of the *LRA* 66 of 1995.

<sup>298</sup> Section 1 of the *LRA* 66 of 1995, see also section 200A of the *LRA* 66 of 1995.

<sup>299</sup> Clarke 2004 *Canadian Journal of African Studies* 558.

Thus, to effectively incorporate non-standard workers into social insurance programmes, South Africa needs to do away with its historical origins of limiting access to social security and affirm that the world of work is composed of a variety of employees who are not in standard employment. Also, administrative barriers and lack of compliance by employers that create challenges for workers access to social insurance need to be addressed to promote the right to social security. The constitutional right to social security is interrelated with other rights as provided in Chapter 3 of this study. As such, legislation that facilitates access to the right to social insurance ought to comply with the Constitution.

International and regional instruments have acted as guiding mechanisms to allow South Africa to consider non-standard workers in a comprehensive social insurance system. Consequently, South Africa affirms the precepts of these international instruments since it also seeks to achieve a decent work strategy as endeavoured by the ILO,<sup>300</sup> however, its lack of a more accommodative regulatory system has left many non-standard workers destitute. Considering this, it is crucial to find a solution to the issue raised in this study since it may result in comprehensive regulations regarding non-standard forms of employment in pursuit of social insurance access. By considering the socio-economic climate and the variety of employment categories, South Africa would be relieved of managing several challenging problems.

In response to the research question, the overall findings of this research demonstrate that despite ongoing obstacles, the South African social security system caters social insurance protection for certain groups of non-standard workers in an equivalent manner to those employed in standard employment. But it does not sufficiently promote their right to social security in the workplace because many non-standard workers remain excluded from social insurance due to reasons mentioned. Thus, to legitimately grant workplace social insurance to all members forming part of employment, more work must be done to address persisting

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<sup>300</sup> United Nations "date unknown" <https://unric.org/en/sdg-8/>.

workplace inequalities and the disparities surrounding the legal protection afforded non-standard workers. Transformation needs to be implemented on labour and social security regulation to address the diverse needs of the workforce.

In essence, the findings imply that further research might be required to ensure that non-standard workers are legally recognised in workplace social insurance. Inadequate legal recognition towards non-standard workers leads to the concept of social security being completely irrelevant towards many workers.<sup>301</sup> Based on the above, the following recommendations have been proposed to improve the rights of non-standard workers to access social security at the workplace.

### **5.3 Recommendations**

*5.3.1 A comprehensive definition of employee and contributor that includes non-standard workers should be included in the labour and social insurance laws of South Africa*

The labour market is filled with various employees who transcend the definition of standard employees.<sup>302</sup> Despite this, in most instances all workers tend to bear the same social risks and income insecurity in the event of unemployment.<sup>303</sup> Rather than providing a precise definition of a non-standard worker or extending the current definition of an employee to include these workers, the *LRA* added the rebuttable presumption clause to facilitate the process of confirming an employee's status.<sup>304</sup> This is constantly subjected to legal disputes as both the employer and the employee have their different perspectives on factors as mentioned in the presumption. Consequently, this persistent legal disputes regarding the employment status between the employer and the workers, highlight the necessity for creating robust clauses that are explicit in terms of confirming the employment relationship between the parties. Furthermore, after applying the presumptions to

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<sup>301</sup> Smit and Mpedi 2010 *Law Democracy and Development* 8.

<sup>302</sup> *Ibid.*

<sup>303</sup> Quinlan 2015 *International Labour Office Geneva* 6.

<sup>304</sup> Part 2 of the Code of Good Practice: Who is an employee, GNRR 1774 of 1 December 2006.

confirm the status, courts may also reach different conclusions regarding the employment status. This can lead to a great deal of scepticism regarding the true definition of an employee, which in turn may encourage employers to exclude non-standard workers from any labour protection that may facilitate access to social insurance. Therefore, the definition of an employee in terms of the *LRA* should be broadened in a way that non-standard workers are defined in the Act to facilitate their reasonable access to their social insurance.

In terms of the *UIA*, contributions are made by the employer and the employee to a centralised government body for access to social insurance.<sup>305</sup> The Compensation Fund established in accordance with the terms of the *COIDA*, mandates employers to pay subscriptions to a centralised government fund; employers should also register the employee and effect these contributions to the fund.<sup>306</sup> Many non-standard workers are denied access to this opportunity to contribute to these funds because they are not in legally recognised employment relationships where there is an employer. On this note, it is recommended that non-standard workers who are in a situation whereby an identifiable employer cannot be established; *COIDA* and the *UIA* should require the workers to pay the employers and employees contributions to the schemes if they have the necessary contributory capacity. Workers in the informal economy with low earnings might not be drawn to this alternative. Thus, for non-standard workers who do not have the same contributory capacity as those in formal employment, it will be necessary to create a set contribution scale based on the worker's contributory capacity.

In essence, these contributory schemes should not place the requirement of an employment relationship to preclude non-standard workers from accessing social insurance. Instead, the affordability, accommodation and inclination of the workers to form part of the social insurance should be prioritised. Incorporating non-standard workers as contributors and employees within labour legislation can enable them to actively participate in social insurance programs.

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<sup>305</sup> Myburg *et al Social Law Democracy and Development* 45.

<sup>306</sup> Myburg *et al Social Law Democracy and Development* 45.

### *5.3.2 Monitor compliance by Employers on the registration of workers for social insurance*

There is a power imbalance between employers and employees as this research has demonstrated in chapter three.<sup>307</sup> This is especially apparent when workers in the informal sector wish to protect their labour rights. Due to this, employers tend to exploit non-standard workers in the informal sector to a point whereby the workers accept work under less favourable conditions without social insurance access.<sup>308</sup> And as such, many eligible non-standard workers are not protected by social insurance because access to it depends on their registration by the employers.<sup>309</sup> Therefore, the employers' inadequate compliance with labour statutes should be addressed to promote social insurance access.

Corrective measures to remedy this non-compliance would be inclusive of ensuring that employers who are found to be in violation of labour legislation such as the *COIDA* and the *UIA* are held accountable. This can potentially prevent the persisting exploitation and promote access to social security in the workplace. In addition, compliance by the employer should be properly monitored, and where possible appropriate sanctions should be put forward, if the required compliance is not apparent in the employers' conduct. This might have the potential of misconduct on the employers' side and make them use of employees whom they do not have to register. Based on the above, this research argues that employers should be banned from operating until there is compliance with the sanctions, or the legal framework set forward.

The workers should also be placed in a position in which they are encouraged to report any lack of compliance from the employer and be protected against such reporting. This can be effectively achieved by making sure that anonymous routes

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<sup>307</sup> Theron 2014 [https://www.southafricanlabourbulletin.org.za/wp-content/uploads/2021/11/Non-standard-employment-and-labour-laws\\_0.pdf](https://www.southafricanlabourbulletin.org.za/wp-content/uploads/2021/11/Non-standard-employment-and-labour-laws_0.pdf).

<sup>308</sup> Thebus 2021 <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a>

<sup>309</sup> Thebus 2021 <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a>.

for reporting are established, and that employees together with relevant stakeholders are protected by the law. As such, Infractions should be reported without worrying on bearing any consequences.

### *5.3.3 Establish measures to raise awareness that promotes social security towards all workers*

Strategic educational campaigns and awareness raising can help workers realise the benefits of social security. Offering learning and informational programmes to capacitate workers regarding their rights to social security can serve as an educational and effective measure. The findings of this research have demonstrated that numerous non-standard workers have low levels of education and are not well informed about their labour and constitutional rights in the workplace. This always leaves them resorting to precarious working conditions without any social insurance protection. Considering this, this study contends that all relevant stakeholders inclusive of employers should actively work together towards ensuring that all workers are aware of these rights. This can be encouraged through ensuring that all workers in the workplace are actively placed in programmes that educate them on the right and all the relevant social insurance schemes of the work environment. In addition, this should not only be achieved in the workplace, but society in general should be educated about social insurance rights.

### *5.3.4 Collective bargaining abilities of non-standard workers should be improved*

Labour rights are limited among non-standard workers due the limited trade union participation of the workers.<sup>310</sup> This accordingly limits their right to social insurance. Even though this is the case, every worker is guaranteed the right to fair labour practice as stipulated in section 23 of the Constitution. Thus, to properly give effect to the right to social insurance towards non-standard workers, this research opines that involving trade unions towards the protection of workers in non-standard forms of employment must be implemented. Self-employed workers should be incorporated in bargaining councils that will include terms that would allow them

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<sup>310</sup> Fourie 2008 *PELJ* 111.

reasonable access to social insurance. In addition, factors such as allowing non-standard workers to organise themselves to enable them to voice their work grievances, would possibly enable them to work as a team to fight for their social insurance rights.<sup>311</sup>

Therefore, this research recommends that the collective bargaining capacity of non-standard workers can possibly bring about an opportunity for the workers to be incorporated in the necessary social insurance schemes. As such, reasonable contributions can be subtracted from the wages of the non-standard employees who have worked for the employer for a reasonable period. Trade unions together with employer organisations can enter into collective agreements to ensure that labour rights such as social insurance are catered for towards workers in non-standard forms of employment.

#### *5.3.5 Government should implement other measures that can provide social security towards non-standard workers in the event of unemployment*

The South African government should implement other measures that can provide social security towards non-standard workers in the event of unemployment. It can be in the form of monetary value or other government social security measures. These measures can curb the socio-economic risks emanating from the unemployment of non-standard workers. The following can be the different ways in which the government can protect the social insurance rights of the workers:

- firstly, the workers can be encouraged to enter stokvels where there would be some form of legal regulation;
- secondly, the workers should be members of societies that stand to educate and motivate them to be a part of the savings schemes;
- thirdly, if financial or mechanical equipment are needed to enable the workers to continue working, the government should request donations from private entities and assist these workers to continue to be a part of employment.

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<sup>311</sup> Smit and Mpedi 2010 *Law Democracy and Development* 27.

- Lastly, the government should provide mandatory schemes that are financed by taxpayers' money for reasonable non-standard workers who cannot afford contributions.

All these strategic measures can possibly aid the government's social assistance programme and enable non-standard workers to make a living without having to depend solely on social assistance from the government.

## **BIBLIOGRAPHY**

### ***Literature***

Arbuckle 2013 *Decent work in South Africa: an analysis of legal protection offered by the state in respect of domestic and farm workers*

Arbuckle ML 2013 Decent work in South Africa: an analysis of legal protection offered by the state in respect of domestic and farm workers (LLM dissertation University of KwaZulu Natal 2013)

Basson 2020 *Obiter*

Basson Y "The Compliance of the South African Social Security System with the International Covenant on Economic, Social and Cultural Rights" 2020 *Obiter*

Basson *et al* *The New Essentials Labour Law Hand Book*

Basson AC *et al* (eds) *The New Essentials Labour Law Hand Book* 6<sup>th</sup> ed (Labour Law Publications CC Centurion 2017)

Blackett and Tiemeni *Regulatory innovation in the governance of decent work for domestic workers in South Africa*

Blackett A and Tiemeni TG *Regulatory innovation in the governance of decent work for domestic workers in South Africa: Access to justice and the Commission on*

*Conciliation, Mediation and Arbitration Working paper* (LLDRLMont tréa 2016)

Behrendt *et al* 2019 *International Social Security Review*

Behrendt C, Nguyen QA, Rani Q Social protection systems and the future of work: Ensuring social security for digital platform workers 2019 *International Social Security Review* 19

Cohen T & Moodley (2012) *PER* 320

Cohen T & Moodley L "Achieving decent work in South Africa" (2012) 15 (2) *PER* 320-332

Clarke 2004 *Canadian Journal of African Studies*

Clarke M Ten Years of Labour Market Reform in South Africa: Real Gains for Workers? 2004 *Canadian Journal of African Studies* 558

Dicks 2007 *Law, Democracy & Development*

Dicks R The growing informalisation of work: Challenges for labour – recent developments to improve the rights of atypical workers 2007 *Law, Democracy & Development* 39-40

Department of Labour *Basic Guide to The Unemployment Insurance Fund (UIF)*

Department of Labour *Basic Guide to The Unemployment Insurance Fund (UIF)* available at [https://www.labour.gov.za/DocumentCenter/Publications/Unemployment%20Insurance%20Fund/Basic%20Guide%20to%20the%20Unemployment%20Insurance%20Fund%20\(UIF\).pdf](https://www.labour.gov.za/DocumentCenter/Publications/Unemployment%20Insurance%20Fund/Basic%20Guide%20to%20the%20Unemployment%20Insurance%20Fund%20(UIF).pdf) accessed on 12 September 2024

Dekker 2008 *Law Democracy and Development*

Dekker A.H Mind the gap: suggestions for bridging the divide between formal and informal social security 2008 *Law Democracy and Development* 128

Dicks "date unknown" *Law, Democracy & Development*

Dicks The growing informalization of work: Challenges for labour – recent developments to improve the rights of atypical workers "date unknown" *Law, Democracy & Development* 40

Dupper et al 2010 *Stellenbosch Law Review*

Dupper O *et al* 2010 "Extending coverage of the Unemployment insurance-system in South Africa " *Stellenbosch Law Review* 444

Devereux 2020 *SAJE*

Devereux S Social protection responses to COVID-19 in South Africa 2020 *SAJE* 421-422

Festus *et al* 2016 *South African labour market*

Festus L *et al* "The South African labour market, 1995–2015" 2016 *South African labour market* 579

Fourie 2008 *PELJ*

Fourie ES Non-standard workers: the South African Context, International Law And Regulation by the European Union 2008 *PELJ* 1-143

Fourie *Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy* 20

Fourie E *Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy* 20 (LLD dissertation North West University 2018)

Gomez and Gunderson 2005 *CLELJ*

Gomez R and Gunderson M Non-Standard and Vulnerable Workers: A Case of Mistaken Identity 2005 *Canadian Labour & Employment Law Journal* 180

Hagemejer *Social Security Review*

Hagemejer H The Right to Social Security and its Implementation: What Role can the ILO Social Security Standards Play? *Social Security Review* 53

Koena and Mufamadi 2021 *South African Journal on Human Rights*

Koena and Mufamadi 2021 "Independent contractors and Covid-19 relief: Tax and social insurance legislative reform to extend protection to independent contractors" *South African Journal on Human Rights* 36-37

Kalleberg 2000 *Annual Review of Sociology*

Kalleberg A "Nonstandard employment relations: Part-time, temporary and contract work" (2000) 26 *Annual Review of Sociology* 341

Khumalo 2022 *Obiter*

Khumalo 2022 "Social insurance coverage for SADC migrant workers in South Africa: a regional and international framework compliance analysis" *Obiter* 573-577

Langa 2006 *Stellenbosch Law Review* 351-360

Langa P "Transformative Constitutionalism" 2006 *Stellenbosch Law Review* 351-360

Liebenberg 2007 *ESR Review*

Liebenberg S "Socio-economic rights Under a transformative Constitution" 2007 *ESR Review* 3

Lund 2008 *International Social Security Review*

Lund F "Work-related social protection for informal workers" 2012 *International Social Security Review* 9-15

Lund 2008 *A journal of African studies*

Lund F "Social security and the changing labour market: Access for non- standard and informal workers in South Africa" 2008 *A Journal of African Studies* 188-193

Makino 2008 *Institute of Developing Economies*

Makino K "The Changing Nature of Employment and the Reform of Labour and Social Security Legislations in Post-Apartheid South Africa" 2008 *Institute of Developing Economies* 11.

McCann 2014 *International Journal of Law in Context*

McCann D " Equality through precarious work regulation: lessons from the domestic work debates in defence of the Standard Employment Relationship" 2014 *International Journal of Law in Context* 513

McGregor *Quarterly Law Review for People in Business*

McGregor M Globalization and decent work (part 1) 2006 *Quarterly Law Review for People in Business* 150–154

Midgley *Social Insurance and Social Justice*

Midgley *Social Insurance and Social Justice* 127

Millards 2007 *De Jure*

Millard D "Informal Social Security and the Self-Employed: A Case for including the Self-Employed in Social Protection Structures, 40" 2007 *De Jure* 242

Mills 2004 *ILJ*

Mills SW "The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility" 2004 *Industrial Law Journal* 1204

Mojapelo and Odeku 2023 *African Journal of Public Affairs*

Mojapelo RM and Odeku OK "Perspectives on Failure to Extend Protection to the Atypical Workers in South Africa African" 2023 *Journal of Public Affairs* 112

Mokofe *The international labour organisation in pursuit of decent work in Southern*

Mokofe WM *The international labour organisation in pursuit of decent work in Southern* (LLD thesis University of South Africa 2018)

Mokofe 2020 *Obiter* 576

The international labour organisation in pursuit of decent work in Southern Africa: an appraisal 2020 *Obiter* 576

Mokofe 2022 *Obiter* 361

Mokofe W achieving decent work for digital platform workers in South Africa 2022 *Obiter* 361

Mufamadi and Koen 2021 *South African Journal on Human Rights*

Mufamadi and Koen Independent contractors and Covid-19 relief: Tax and social insurance legislative reform to extend protection to independent contractors 2021 *South African Journal on Human Rights* 282

Mpedi 2017 *Recht in Afrika – Law in Africa – Droit en Afrique*

Mpedi 2017 "Social Protection Law in the Republic of South Africa" *Recht in Afrika – Law in Africa – Droit en Afrique* 38

Ncamane 2023 *SAMERCLJ*

Ncamane N "Digital platform workers and the Conundrum of the definition of an 'employee' in the era of the fourth industrial revolution "2023 *SAMERCLJ* 11

Nyenti and Mpedi 2012 *PELJ* 255

Nyenti and Mpedi 2012 The impact of SADC social protection instruments on the setting up of a minimum social protection floor in Southern African countries *PELJ* 255

Newaj 2023 *Obiter*

Newaj K "A critical evaluation of whether benefits provided for in COIDA fall within the ambit of the constitutional right to access social security protected in section 27(1)(c) of the Constitution" 2023 *Obiter* 129-137

Olivier and Jansen Van Rensburg 2000 *Law Democracy &. Development*

Olivier M and Jansen Van Rensburg L "Protection and enforcement of the right to social security" 2000 *Law Democracy &. Development* 87

Olivier 2007 *Obiter*

Olivier M "*Extending* employment injury and disease protection to non-traditional and informal economy workers: the quest for a principled framework and innovative approaches" 2007 *Obiter* 41-43

Omomowo 2010 *Department of Sociology, Rhodes University*

Omomowo K "Atypical work and social protection in post-apartheid South Africa: preliminary thoughts about social policy imperative" 2010 *Department of Sociology, Rhodes University 2*

Paden 1998 *Public Affairs Quarterly*

Paden R "Social Security, Social Insurance, And Social Justice " 1998 *Public Affairs Quarterly* 179

Plagerson *et al* 2018 *Cambridge University Press*

Plagerson S *et al* " Social Security and Gender Justice in South Africa: Policy Gaps and Opportunities" 2018 *Cambridge University Press* 300

Samson *et al*, 2004

Samson M *et al* 2004. "The Social and Economic Impact of South Africa's Social Security System". Final Report, Commissioned by the Economics and Finance Directorate,

Skinner *et al* 2021 WIEGO

Skinner S *et al* Informal Work in South Africa and COVID-19: Gendered Impacts and Priority Interventions 2021 *WIEGO* 12

Van der Berg 1997 *Development Southern Africa*

Van der Berg S South African social security under apartheid and  
Beyond 1997 *Development Southern Africa* 485

Vodopivec 2009 *Institute for the Study of Labour*

Vodopivec (2009) "Introducing Unemployment Insurance to  
Developing Countries" Policy Paper No. 6 *Institute for the Study of  
Labour* 4

Theron 2010 *ILJ* 851

Theron J "Decent Work and Non-standard Employees: Options for  
Legislative Reform in South Africa: A Discussion Document" 2010 *ILJ*  
851

Tshoose *Social Assistance: Legal reforms to improve coverage and quality of life for  
the poor people in South Africa*

Tshoose C.T *Social Assistance: Legal reforms to improve coverage and  
quality of life for the poor people in South Africa* (LLD dissertation  
University of South Africa 2016)

Woolard et al 2011 *Canadian Journal of Development Studies*

Woolard *et al* "The history and impact of social security in South  
Africa: experiences and lessons" 2011 *Canadian Journal of  
Development Studies* 360

Razavi 2022 *The Indian Journal of Labour Economics*

Razavi S "Making the Right to Social Security a Reality for All Workers"  
"2022 *The Indian Journal of Labour Economics* 277

Rogan 2019 *WIEGO*

Rogan "Informal Workers in Urban South Africa: Statistical Snapshot" 2019  
*WIEGO* 1

Rapatsa 2014 *Mediterranean Journal of Social Science*

Rapatsa M "Atypical or Non-Standard Work: A Challenge to Workers'  
Protection in South Africa" 2014 *Mediterranean Journal of Social  
Science* 1069

Seekings and Nattrass *Race, and Inequality in South Africa*

Seekings J and Nattrass N *Class, Race, and Inequality in South Africa* (John  
K. Castle Publications Fund of Yale University's Program in Ethics, Politics,  
and Economics 2005)

Quinlan 2015 *International Labour Office Geneva*

Quinlan M "The effects of non-standard forms of employment on  
worker health and safety " 2015 *International Labour Office Geneva*

Smit and Mpedi 2010 *Law, Democracy & Development*

Smit N and Mpedi L.G The Compliance of the South African Social  
Security System with the International Covenant on Economic, Social  
and Cultural Rights "Social protection for developing countries: Can  
social insurance be more relevant for those working in the informal  
economy?" 2010 *Law, Democracy & Development* 14

Tshizanga *The labour law protection of non-standard workers*

Tshizanga G.K *The labour law protection of non-standard workers*  
(LLM dissertation University of South Africa 2020)

Van der Berg 1997 *Development Southern Africa*

Van der Berg S "South African social security under apartheid and beyond" 1997 *Development Southern Africa* 485-486

### **Case law**

*Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17)

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* (2004) (4) SA 490 (CC)

*Certification of the Constitution of the Republic of South Africa*, 1996 (10) BCLR 1253 (CC)

*Government of the Republic of South Africa v Grootboom* 2001(1) SA (CC)

*Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* 11 BLLR 1438 (LC)

*Khosa and Others v Minister of Social Development* 2004 (6) SA 505 (CC)

*Mahlaule and another v Minister of Social Development* 2004 (6) SA 505 (CC)

*Sylvia Bongji Mahlangu and Another v Minister of Labour and Others* 2021 (1) BCLR 1 (CC)

*Tshwane City v AfriForum* 2016 (6) SA 279 (CC)

*Uber SA v NUPSAW* 2018 4 BLLR 399 (LC)

### ***Government publications***

GN 215 in GG 43161 of 26 March 2020

GN 741 GG 45006 of 18 August 2021

GN 4331 GG 50073 of 2 February 2024

### ***Legislation***

*Basic Conditions of Employment Act 75 of 1997*

*Constitution of the Republic of South Africa, 1996*

*Compensation for Occupational Injuries and Diseases Act 130 of 1993*

*Labour Relations Act 66 of 1995*

*Occupational Diseases in Mines and Works Act 78 of 1973*

*Sectoral Determination 11: Taxi Sector 2005*

*National Minimum Wage Act, 2018*

*Unemployment Insurance Act 63 of 2001*

*Pension Funds Amendment Act 11 of 2007*

*Social Assistance Act, 2004*

*South Africa Social Security Agency Act 9 of 2004*

### ***International instruments***

African Charter on Human Rights

AU Constitutive Act

Charter of the Fundamental Social Rights in SADC 2003

Code on Social Security in SADC 2007

Occupational Safety and Health Convention, 1981 (No. 155)

Discrimination (Employment and Occupation) Convention 111 (1958)

International Covenant on Civil and Political Rights 1966.

ILO Convention 111 of 1952

ILO Recommendation 111 (1958)

Universal Declaration of Human Rights (1948)

### ***Internet sources***

AU 2011 [https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfoEcon&RuralWorkers\\_2011.pdf](https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfoEcon&RuralWorkers_2011.pdf) 1

AU 2011 [https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfoEcon&RuralWorkers\\_2011.pdf](https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfoEcon&RuralWorkers_2011.pdf) 1 date accessed 25 August 2024

ILO "date unknown" <https://www.ilo.org/global/topics/dw4sd/themes/informal-economy/lang--en/index.htm>(a

ILO "date unknown" Informal Economy' <https://www.ilo.org/global/topics/dw4sd/themes/informal-economy/lang--en/index.htm> (a

ILO <https://www.ilo.org/resource/ilo-social-security-minimum-standards-convention-1952-no-102>

ILO <https://www.ilo.org/resource/ilo-social-security-minimum-standards-convention-1952-no-102> date accessed 22 August 2024

ILO 2003 [https://www.ilo.org/global/about-theilo/newsroom/news/WCMS\\_005285/lang--en/index.htm](https://www.ilo.org/global/about-theilo/newsroom/news/WCMS_005285/lang--en/index.htm) date accessed

ILO 2003 World Employment and Social Outlook: Trends 2023  
[https://www.ilo.org/global/about-theilo/newsroom/news/WCMS\\_005285/lang--en/index.htm](https://www.ilo.org/global/about-theilo/newsroom/news/WCMS_005285/lang--en/index.htm) date accessed 17 July 2024

ILO 2018 <https://www.ilo.org/resource/news/more-60-cent-world%E2%80%99s-employed-population-are-informal-economy>

ILO 2018 <https://www.ilo.org/resource/news/more-60-cent-world%E2%80%99s-employed-population-are-informal-economy>  
date accessed 13 July 2024

Labourwise 2018 <https://www.labourwise.co.za/labour-news-teazer/new-national-minimum-wage-1-january-2019>

Labourwise 2018 <https://www.labourwise.co.za/labour-news-teazer/new-national-minimum-wage-1-january-2019> date accessed 27 August 2024

Lund 2012 <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-246X.2012.01445.x>

Lund F Work-related social protection for informal workers 2012  
<https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.1468-246X.2012.01445.x>  
date accessed 21 July 2024

Mbaya 2018 <https://www.news24.com/News24/sas-constitution-embodies-the-universal-declaration-of-human-rights-20181210>

Mbaya 2018 *SA's Constitution embodies the Universal Declaration of Human Rights* <https://www.news24.com/News24/sas-constitution-embodies-the-universal-declaration-of-human-rights-20181210> date accessed 21 September 2024

SADC <https://www.sadc.int/pillars/employment-labour-0>

SADC <https://www.sadc.int/pillars/employment-labour-0> date accessed 24 August 2024

Thebus 2021 <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a>

Thebus S 'Working and living conditions of migrant farm women reminiscent of ' 2021 <https://www.iol.co.za/capeargus/news/working-and-living-conditions-of-migrant-farm-women-reminiscent-of-apartheid-989268b4-6ea8-4c94-b162-6bc93bdff65a> accessed on 20 June 2023

Triegaardt "date unknown"  
<https://www.dbsa.org/sites/default/files/media/documents/2021-03/Accomplishments%20and%20challenges%20for%20partnerships%20in%20development%20in%20the%20transformation%20of%20social%20security%20in%20South%20Africa.pdf>

Triegaardt "date unknown"  
<https://www.dbsa.org/sites/default/files/media/documents/2021-03/Accomplishments%20and%20challenges%20for%20partnerships%20in%20development%20in%20the%20transformation%20of%20social%20security%20in%20South%20Africa.pdf>

social%20security%20in%20South%20Africa.pdf date accessed 28 August 2024

Wiki South Africa "date unknown" <https://wikisouthafrica.co.za/social-insurance-in-south-africa/>

Wiki South Africa "date unknown" Social Insurance in South Africa: Everything You Need to Know in 2023 <https://wikisouthafrica.co.za/social-insurance-in-south-africa/> date accessed 17 July 2024

World Bank Group 2024 <https://www.worldbank.org/en/country/southafrica/overview#1> date accessed

World Bank Group 2024 <https://www.worldbank.org/en/country/southafrica/overview#1> date accessed 13 July 2024

Winkler, H. E *et al* 2017 <http://hdl.handle.net/10986/27932>

Winkler, H., E *et al* "Expanding social insurance coverage to informal workers" World Bank 2017 <http://hdl.handle.net/10986/27932> date accessed 26 July 2024

## **LIST OF ABBREVIATIONS**

AU	African Union
BCEA	Basic Conditions of Employment Act
BLLR	Butterworths Labour Law Reports
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
CLELJ	Canadian Labour & Employment Law Journal
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LRA	Labour Relations Act
NHI	National Health Insurance
ODIMWA	Occupational Diseases in Mines and Works Act
PELJ	Potchefstroom Electronic Law Journal
SADC	South African Development Community
SAJE	South African Journal of Education
UNDHR	Universal Declaration of Human Rights
UN	United Nations
WIEGO	Women in Informal Employment: Globalizing and Organizing