Domestic Workers' Laws and Legal Issues in South Africa

November 2014

WIEGO LAW & INFORMALITY PROJECT

Social Law PROJECT

WIEGO
Women in Informal Employment Globalizing and Organizing

Domestic Workers' Laws and Legal Issues in South Africa

Women in Informal Employment: Globalizing and Organizing is a global network focused on securing livelihoods for the working poor, especially women, in the informal economy. We believe all workers should have equal economic opportunities and rights. WIEGO creates change by building capacity among informal worker organizations, expanding the knowledge base about the informal economy and influencing local, national and international policies.

WIEGO's Law & Informality project analyzes how informal workers' demands for rights and protections can be transformed into law.

The **Social Law Project (SLP)**, based at the University of the Western Cape in South Africa, is a dynamic research and training unit staffed by a core of research and training professionals specialising in labour and social security law. It aims to promote sustainable workplace democracy by:

- conducting (applied) research supportive of the development of employment rights and rights-based culture in the workplace.
- providing training services in labour and social security law with a focus on client-specific training need.

Publication date: November 2014

Please cite this publication as:
Social Law Project. 2014. *Domestic Workers' Laws and Legal Issues in South Africa.* WIEGO Law and Informality Resources. Cambridge, MA, USA: WIEGO.

Published by Women in Informal Employment: Globalizing and Organizing (WIEGO).
A Charitable Company Limited by Guarantee – Company No. 6273538, Registered Charity No. 1143510

WIEGO Secretariat
Harvard Kennedy School,
79 John F. Kennedy Street
Cambridge, MA 02138, USA
www.wiego.org

WIEGO Limited
521 Royal Exchange
Manchester, M2 7EN,
United Kingdom

Introduction

The fundamental problem to be addressed is that the entire labour law system in South Africa, as in other countries, is based on "standard" employment – that is to say, the relationship between workers in full-time, indefinite employment and their employers, typically in medium to large workplaces. This applies to the content of the law as well as the institutional framework through which the law is applied. The result is that workers in "non-standard" positions (such as part-time, temporary or agency workers) enjoy limited legal protection. This applies even more to those employed "casually" or "informally", which simply means that the employer disregards some or all legal requirements.

Individual and collective labour law

In terms of content, "Individual labour law" is concerned with the rights that each worker possesses individually – most importantly, the right not to be unfairly dismissed and not to be exposed to "unfair labour practices"[1] or unfair discrimination. These rights are the same for all employees, and all workers have the same rights to enforce them, though not all employees have access to the courts.

"Collective labour law" is mainly concerned with workers' right to organize, to form trade unions and to bargain collectively with their employers. Historically, it developed as a result of the weak position of the individual worker in relation to the employer and the ability of workers to strengthen their position by acting collectively. It thus developed in workplaces and sectors where workers were employed in large enough numbers to form effective unions. Collective labour law evolved as a body of rules to regulate this process and create institutions for collective bargaining to take place, including the regulation of disputes (strike law) and the enforcement of collective agreements.

An unintended consequence was that workers employed individually or in small workplaces did not reap the same benefits of organization and many or most of the advantages of collective labour were not available to them.

Self-employed workers

A further anomaly is that labour rights (individual as well as collective) are almost entirely limited to "employees" – that is, workers who have entered into a (written or verbal) employment contract with their employer or are deemed to have done so. In practice, most workers are considered to be employees but significant numbers fall outside this definition – for example, "independent contractors" (who render services for their own account or ("small traders" who sell goods or services to the public) and agency workers (who are employed by agencies to work for the agency's clients).

[1] As defined in section 186(2) of the Labour Relations Act 66 of 1995 ("LRA").

All these workers are excluded from the protection of labour law, though as citizens they will enjoy the same protection as other citizens in terms of other laws. But they may also be subject to special laws applicable to their activities, such as trading – which, in many cases, are geared to the needs and realities of big enterprises.

The distinction between employees and self-employed-workers may be justified in cases where a person runs a business on classic capitalist lines with a view to becoming a medium or large employer. But for millions of workers world-wide performing "survivalist" activities, because they are unable to find employment, this is not the case, even though the work they do may be identical to the work done by other workers for employers. The fact that they have no specific employers will render many employment rights inapplicable to their situation. However, the constitutional right to equality implies that all protections enjoyed by employees should be extended to other workers in such forms as may be appropriate.

Gender

Gender discrimination or differentiation is another problem bound up with many aspects of labour law. Because most workers during the formative years of labour law were men earning a living for their families, the stereotype of the male bread-winner and his typical needs became an unspoken part of the standard employment model. This means that various problems experienced mainly by women, such as sexual harassment, presented new challenges to existing rules and institutions.

Adaptation of the system has not solved underlying problems

In recent decades, and in South Africa since 1994 in particular, labour law has to some extent moved beyond its historical limitations. The right of all workers to equal protection is recognized, as well as the need of certain categories of workers for special forms of protection. The need for gender-sensitiveness and certain special forms of protection for women workers have also become part of the law. But the system as a whole, and its institutional framework in particular, remain geared to the standard employment model.

It is not too much to say that large employers and large trade unions (and extremely highly-paid individual employees) are still the only parties who are fully able to enjoy all the rights and benefits of the system. All other employers and workers experience various limitations in enjoying or enforcing their rights.

Against this background, non-standard workers remain extremely disadvantaged. There are, in fact, very few rights that they can enforce easily or at all within the existing legal framework.

Why focus on domestic workers and street vendors?

Domestic workers and street vendors are two major categories of non-standard workers. Domestic workers are for the most part employees but are a classic example of non-standard employees. They are almost universally employed as individuals (not collectively) in private households (not in formal workplaces). They are frequently employed on a part-time basis, in many cases "informally" (without regard for legal requirements). Few institutions of labour law are applicable or accessible to them.

Street vendors enjoy even less protection. To the extent that they are not employees, the basic rights of labour law do not apply to them even in a formal sense. It will be seen that the non-labour regulation under which they operate is often inappropriate to their situation and/or ineffectively or improperly applied. Special complications arise in the case of workers employed by street vendors to assist them, thus bringing an employment relationship into existence between them and placing the rights and duties of workers and employers on them.

The vast majority of domestic workers, and many street vendors, are women. Questions of gender and discrimination on the basis of gender are thus interwoven with the problems of legal regulation.

Empowerment

Because of the large numbers of workers involved in these occupations, the effective implementation of their rights is an important objective in its own right. But, over and above this, domestic workers and street vendors offer important case studies for the regulation of non-standard work under extremely challenging conditions. However, the constitutional rights to equality and fair labour practices cannot be said to be satisfied if those who are compelled to work under such conditions enjoy less protection than other workers. The legal system needs to accommodate the basic rights of workers, not vice versa.

It has often been pointed out that the measure of a society is the way in which it treats its most vulnerable members.

But the converse of this is that, in a society divided by class interests, the protection of workers' rights – and even their existence – depends on the empowerment of workers to articulate and, if needs be, act to ensure the implementation of those rights. This is demonstrated by the fact that domestic workers as well street vendors enjoy numerous rights on paper which are not applied in practice – not because the workers are disinterested but because they lack the means of ensuring their implementation.

The term "empowerment" is used to describe the process of equipping workers with that capacity. This includes the capacity to identify shortcomings in the existing legal

and institutional framework as well as to ensure that rights are applied in practice. The purpose of this project is to promote such empowerment.

Organization

History has made it clear that organization, or collective action, is essential to achieving any social objective or legal change. But organization has to be based on a clear understanding of the nature of the problem being addressed – in this case, shortcomings of the legal framework when measured against the basic rights and legitimate needs of workers – as well as identifying changes in the legal framework that will be needed to overcome those limitations.

This part of the project will focus on the first of these questions: identifying the key legal issues that need to be addressed in each of the two sectors (domestic work and street vending) and the specific legal provisions relating to each sector that are in need of change. These findings will then be tested and developed through interviews with workers in each sector, through capacity-building workshops and will be published in the final report together with all relevant information and insights that have been acquired through this process of engagement.

1. Identifying the Key Legal Issues

The starting point is to recognize and understand the oppressive realities that domestic workers are faced with on a daily basis – the problems, deprivations, humiliations and abuses – as well as their causes and effects. Thanks to intensive campaigning and research in recent years, these realities are no longer a secret kept hidden in the privacy of employers' homes, and their social origins are much more clearly understood.

Perhaps the most obvious problem is low wages. But this is only one aspect of an inter-related set of deep-rooted social conditions. In itself it can be explained as a result of too few job opportunities, too many workers competing for those jobs and a lack of formally recognized skills. The result is a self-perpetuating vicious circle: locked into low-paid, insecure jobs, domestic workers, and often their children, have little opportunity to acquire skills or escape from their poverty trap.

The consequences, however, are far-reaching. Low wages and dependency translate into massive inequality between worker and employer, extreme disempowerment of workers and extensive power in the hands of employers, leaving the workers exposed to exploitation and abuse. Live-in domestic workers experience this most acutely, sometimes being housed under inhumane conditions and suffering physical or sexual assault. Migrant domestic workers, who in practice cannot qualify for work permits and are therefore almost always "illegal" (unless they have refugee status or are applying for political asylum) face the greatest exploitation of all. All these conditions, taken together, undermine the workers' most basic human right: the right to dignity.

But low wages and all that goes with it are not a given. As noted already, the inappropriateness of the prevailing collective bargaining system to domestic workers goes a long way in explaining their disadvantaged position. This is explained only partly by the general lack of organization among domestic workers as well as employers.

However, the labour law system in South Africa (as in other countries) recognizes the need for a safety net for workers in unorganized sectors in the form of minimum wages and conditions of employment determined by the state. An important part of the problem is that the minimum wages set by the Minister of Labour in the Sectoral Determination for the Domestic Worker Sector each year are the lowest in the country. The State, in other words, takes the existing status of domestic workers at the bottom of the job market as a given and perpetuates it.

It should be emphasized that these conditions continue even though, with one exception, domestic workers enjoy the same rights as all other workers.[2] But it has

[2] The exception is the right to compensation for injury or illness incurred at work. The exclusion of domestic workers from the scope of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 is the subject of submissions to the Department of Labour calling for their inclusion.

already been noted that a significant degree of "informality" is found in the domestic sector; in other words, workers' rights are widely disregarded, to greater or lesser degrees, with relative impunity. Or, to put it differently, much of the treatment meted out to domestic workers is unlawful. This indicates that the enforcement and dispute resolution mechanisms created by labour law as well as other branches of the law, like the collective bargaining system, are relatively ineffective in the domestic sector.

Lack of organization is yet another widespread reality of life for domestic workers, which explains much of these abuses. Workers who are strongly organized are in a position to resist infringements of their rights and put pressure on government and employers to address problems. But lack of organization, too, cannot be understood in isolation from the legal framework. The constitutional right to organize is intended to be promoted by creating practical opportunities to organize for all workers, not only those in standard employment. In practice, however, this is not the case.

Thus there are serious gaps in the legal framework, both in the way that rights are designed and in the way they are enforced, which render domestic workers' labour and other rights ineffective. Some of these gaps are in conflict with the requirements of ILO Convention 189 on Domestic Work, which South Africa ratified in 2013. But many of the gaps are not specifically addressed by Convention 189, which does not directly challenge the traditional framework of labour law.

The next part of this document will look at the legal provisions more closely in order to pinpoint the problems as a basis for empowering workers to press for changes. Numbers in brackets next to sub-headings refer to sections in the book, *Exploited, under-valued – and essential*, where these issues are discussed in more detail.

2. Problem Areas in the Law

2.1 The right to form trade unions

Lack of organization lies at the root of many of the disadvantages experienced by domestic workers. Everyone has the right to freedom of association and every worker has the right to form and join a trade union, to participate in the activities of a trade union and to strike.[3] The LRA applies these by providing that every "employee" has the right

(a) to participate in forming a trade union or federation of trade unions; and

(b) to join a trade union, subject to its constitution.

And, once a trade union has been formed, every member has the right, subject to the constitution of that trade union,

(a) to participate in its lawful activities;

(b) to participate in the election of any of its office-bearers, officials or trade union representatives;

(c) to stand for election and be eligible for appointment as an office-bearer or official and, if elected or appointed, to hold office; and

(d) to stand for election and be eligible for appointment as a trade union representative and, if elected or appointed, to carry out the functions of a trade union representative in terms of this Act or any collective agreement.[4]

Organizational rights

These rights go no further than *allowing* workers to form trade unions; there is no indication of how they can go about it. As domestic workers have found, however, this is where the problem lies. The main purpose of the LRA is "to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution" (above), including the right of workers to form or join trade unions. It does this mainly by creating *organizational rights* that are intended to assist workers in forming trade unions as well as the functioning of trade unions after they are formed. The main organizational rights are set out in sections 12 to 16 of the LRA. They are as follows:

(a) Any office-bearer or official of a "representative"[5] trade union may enter the employer's premises in order to recruit members or communicate with members. But, in the domestic sector, this can only happen if the employer agrees.[6]

[3] Sections 18 and 23 of the Constitution.
[4] Section 4(1) and (2), LRA.
[5] In practice, this means a union with upwards of 20 per cent membership among the workers in the workplace.

(b) Any member of a representative trade union may authorize the employer to deduct trade union subscriptions from the employee's wages and pay them to the union ("stop order facilities").

(c) In a workplace which has a majority trade union and where at least 10 members of that union are employed, those members may elect a trade union representative ("shop steward") from among themselves, or up to a maximum of 20, depending on the number of trade union members in the workplace. Shop stewards have various rights; for example, to monitor the employer's compliance with the law.

(d) A shop steward, or an employee who is an office-bearer of a representative trade union or of a trade union federation, may take reasonable time off during working hours to perform her or his trade union functions.

(e) Subject to certain limits, shop stewards are entitled to obtain all relevant information from the employer that he or she needs to perform her or his functions . Likewise, an employer who is consulting or bargaining with a majority trade union must disclose to the union all relevant information to enable it to engage effectively. However, the right to disclosure of information is excluded in the domestic sector.

It is obvious that these rights are intended for larger workplaces with a significant trade union presence. With the exception of the right to stop-order facilities, none of them are relevant to unions trying to organize workers in households with one or two employees.

Employment agencies

Organizational rights may, however, be relevant to domestic workers employed in larger numbers by agencies ("temporary employment services" or labour brokers, such as Marvellous Maids). Even here, however, their value will be limited. In terms of the LRA, the agency is the workers' employer,[7] and the agency's office is therefore the "workplace" where organizational rights can be exercised. Since they are actually working at clients' homes elsewhere, this will have little practical meaning.

The new section 21(12) of the LRA tries to address this problem by providing that, if a trade union seeks to exercise its organizational rights in respect of employees of labour brokers, it may do so in the workplace of either the labour broker or its clients. This is clearly important for areas where labour brokers place large numbers of workers with clients, but will not really help where individual workers are placed with individual employers.

---

[6] Section 17, LRA.
[7] Section 198, LRA.

Conclusion

The LRA contains no other provisions to assist trade unions in organizing that could be of any assistance to domestic workers. Nor does it provide for any other form of organization that would be more suited to the circumstances of domestic work.

This applies also to other forms of worker organization promoted by other statutes – for example, health and safety representatives or committees formed in terms of the Occupational Health and Safety Act of 1993, which are limited to workplaces with 20 or more employees.

In practice, domestic workers are left completely to their own devices when it comes to building organization. All that is certain is that the organizational model created by the LRA is not appropriate to their needs.

2.2 The Right to Engage in Collective Bargaining

The right of all workers to engage in collective bargaining is also laid down in section 23 of the Constitution and the LRA also sets out "to give effect to and regulate" this right. It does so, however, exclusively within a framework of collective bargaining between registered trade unions and employers or registered employers' organizations.

Thus, a binding collective agreement can only be entered into between a registered trade union and an employer or employers' organization.[8] Assuming that a registered trade union existed in the domestic sector, it could not enter into "collective" agreements with the employers of individual domestic workers. It would need an employer's organization to negotiate with, and no such organization has been formed.

Bargaining councils have the power to create binding collective agreements and perform various other important functions at a sectoral level. However, bargaining councils can only be formed by registered trade unions and registered employers' organizations that are "sufficiently representative" of workers and employers in the sector.[9] "Sufficiently representative" is not defined but in practice it means a majority or close to a majority of workers in the sector. If the domestic sector has a million employees, this means that up to 500,000 workers would need to be unionized.

In an effort to promote collective bargaining in less organized sectors, the LRA also provides for "statutory councils" to be formed by registered trade unions and employers' organizations representing or employing at least 30 per cent of workers in

[8] See definition of "collective agreement", s 213, LRA, read with s 23.
[9] Sections 27-29, LRA.

the sector.[10] This still presents the enormous challenge of organizing up to 300 000 domestic workers into a registered trade union or unions.

Once again, agencies are the only part of the domestic sector where collective bargaining between a registered trade union and employers, resulting in binding collective agreements, would be feasible. In practice this has not happened. Agency workers are not easy to organize and unions have tended to concentrate on individual domestic workers – who, as experience has shown, are no less difficult to organize.

Leaving aside agencies, therefore, the LRA creates no machinery to enable domestic workers to exercise their right to engage in collective bargaining.

2.3 Determining Terms and Conditions of Employment

As noted already, sectoral determinations are seen in the context of our labour law as a "substitute" for collective agreements in unorganized sectors. In the case of the domestic sector, Sectoral Determination 7 of 2002 ("SD7", which is updated annually) lays down minimum wages and other minimum conditions. The low level of the minimum wage has also been noted. But this is not the only problem with SD7 or with sectoral determinations in general. Two shortcomings in particular should be noted.

Non-participation of workers

While having minimum conditions is clearly an improvement on having none, the way in which they are set can only be described as disempowering for the workers. The process is driven entirely by the Department of Labour, based on an investigation in which the Minister must call for "representations by members of the public".[11] Domestic workers and their organizations may make, and have made in the past, such representations without any visible result. In essence, the workers are onlookers of a process in which they should be participants.

Section 52 of the BCEA, while not requiring the Minister to involve domestic workers and employers in articulating their demands, also does not prevent it. However, in the absence of a legal duty to consult or negotiate, and of a strong organization of domestic workers to press for it, the current provision prevents the voice of domestic workers from being heard. This may be one important reason for the low level of wages.

Non-recognition of skills

Since 2002 SD7 has not only set a very low minimum wage, but has also set it at a single level without any differentiation. In other words, all domestic workers – regardless of

[10] Section 39, LRA.
[11] Basic Conditions of Employment Act (BCEA), s 52.

experience, education or skills – are treated as though they were at the least skilled level. Although domestic work entails a wide range of activities involving different levels of skills and responsibility, from cleaning to cooking and caring for the elderly, these are not taken into account.

The problem, however, goes further. The Skills Development Act of 1998 (SDA) was enacted, among other reasons, "to improve the quality of life of workers, their prospects of work and labour mobility".[12] It has numerous other objectives – for example, "to encourage workers to participate in learning programmes" – that make clear its developmental approach in relation to the empowerment of workers as well promoting economic growth. No category of workers is excluded.

In the case of domestic workers this approach would call for a systematic programme to identify skills needs and promote skills development in the form of accredited qualifications which, in order to serve "labour mobility", would have to be generic. It would also need to be linked to the benchmarking of skills as a basis for determining appropriate minimum wages.

Yet, apart from a very limited skills development programme from 2002 to 2005, nothing of the kind has materialised. In 2012, an accredited General Education and Training Certificate: Domestic Services was launched for the Hygiene & Cleaning Services sub-sector of the Services Sector. It seems to be aimed at training the staff of commercial organizations and to be offered by a number of private training institutions. While it may be accessible to individual domestic workers and agency employees, narrowly-focused initiatives of this kind are unlikely to bring about the professionalization of domestic work on a significant scale.

Section 20 of the SDA offers a framework within which skills programmes for domestic workers could be transformed. The programmes would equip workers with nationally-recognized occupational qualifications. This would enable them to progress to more advanced qualifications, thus transforming the perception of domestic work as unskilled, low-paid work.[13]

The SDA places no duty on the State to make this happen. Section 20 states that "any person" who has developed such a programme may apply to have it registered and may also apply for a subsidy to launch it. In practice it would seem that an organization of domestic workers would be critical in mobilizing for such a possibility to become a reality.

[12] Section 2(1)(a), SDA.

[13] Although the perceived threat to jobs caused by a shift from a low-wage model to a higher-wage model is not the issue here, it may be noted that – in line with the Decent Work agenda of the International Labour Organization – it would imply a shift from the existing pattern of long hours at low wages to fewer hours at higher wages.

2.4 Exclusion of Part-time Workers

Most of the protection provided by SD7, like the BCEA, does not apply to workers "who work less than 24 hours per month for an employer". Only the minimum wage laid down by SD7 applies to all domestic workers. Provisions relating to maximum hours of work, paid leave, rest periods, the duty to provide the worker with written information and the like apply only to those who work 24 hours or more for an employer.

The intention is no doubt to relieve employers who employ workers for only a few hours per week for administrative duties. The effect, however, is that workers who work for a number of employers may be excluded from all protection except the right to the minimum wage.

Take, for example, the case of a worker who works a total of 100 hours per month for five different employers, or 20 hours per month for each employer. This means that none of those employers will be required to give the worker paid leave, and all of them could require the worker to work all year without any break.

This is another clear case where the law does not take the realities of "non-standard" work into account and where the voice of workers who find themselves in such a position, or that of their organization, is essential in finding a balanced solution.

The LRA has been amended to protect lower-paid part-time workers by providing that an employer may not treat them less favourably than a comparable full-time employee unless there is a justifiable reason for doing so.[14] However, this protection does not apply to employers with fewer than 10 employees or workers who work less than 24 hours per month for an employer – so domestic workers (and others) in the position described above would not benefit at all.

2.5 The Protection of Live-in Domestic Workers

Protection against abuse

It has been noted that live-in domestic workers face particular hazards, being as they are in a most isolated position and under their employers' control even after working hours. This means that they are especially vulnerable to abuse, including physical violence or sexual harassment, as well as limits that may be imposed on their right of access to their families or children.

[14] LRA, s 198C.

It goes without saying that physical abuse will always be a criminal offence either of assault or of a more serious kind such as rape, and may also amount to a wrongful act (a delict) in terms of civil law or harassment in terms of the Employment Equity Act (EEA), entitling the worker to claim damages and/or compensation.

However, these are not adequate remedies. Laying a criminal charge or suing the employer in court (assuming the worker can find a way of covering the cost) is not compatible with the intimate nature of the domestic employment relationship and, in practice, will mean an end to the relationship. The law does not require this, and the worker has a legal right to remain in her job. But, in reality, this is unlikely to happen. A claim of unfair dismissal is likely to result in an order of compensation rather than reinstatement.[15] The effect is that the worker cannot defend her rights without losing her job.

This cannot be right. Effective protection must mean being able to challenge abusive conduct and to require the employer to treat her with respect while remaining in her job.

Similar challenges are presented by the evil of family violence, where abuse is inflicted on persons (usually women and children) who are in ongoing relationships with and often dependent on the abuser. Here the law has recognized that "the remedies currently available to the victims of domestic violence [i.e., criminal charges or delictual claims] have proved to be ineffective"[16] and that special measures were needed. These measures are contained in the Domestic Violence Act.

It is possible that this Act could be invoked by a live-in domestic worker who has suffered violence (which is defined as including "emotional, verbal and psychological abuse" or "any other controlling or abusive behaviour towards a complainant") at the hands of her employer. However, there are important differences between family relationships and working relationships. The unique nature of domestic work makes it necessary to design a process for domestic workers to access appropriate forms of intervention to prevent abuse. The Domestic Violence Act could be studied for possible guidelines, but domestic workers themselves are in the best position to identify what would or would not work for them.

Living conditions

The Constitution guarantees everyone a right of access to "adequate housing"[17] and ILO Convention 189 calls for live-in domestic workers to have decent and private accommodation. But neither the BCEA nor SD7 explains what this means in the case of South Africa. SD7 allows an employer to deduct a maximum of 10 per cent from a

[15] See s193 of the LRA.
[16] Preamble to the Domestic Violence Act 116 of 1998.
[17] Section 26, Constitution.

worker's wage for accommodation provided it meets certain requirements. This means that no deduction may be made for accommodation that fails to meet these requirements, but no standards are laid down that employers must comply with.

The only other protection for a live-in domestic worker is the requirement that, if the employer terminates a fixed-term contract prematurely, the worker must be allowed to remain in her accommodation for at least a month. However, the employer may apparently charge the worker 10 per cent of her wage for that period, regardless of the quality of the accommodation.[18]

ILO Recommendation 201, which offers guidelines for the implementation of Convention 189, suggests that the food provided to live-in domestic workers must be "of good quality and sufficient quantity, adapted to the extent reasonable to the cultural and religious requirements, if any, of the domestic worker concerned".[19] The BCEA and SD7 both accept that food may be treated as payment in kind and prohibit employers from making deductions from workers' wages for food, but say nothing about the quality of the food.

Apart from abuse, lack of access to family and children is perhaps the greatest problem experienced by live-in domestic workers. The Constitution protects the rights of children and a right to be with one's family, and Recommendation 201 calls on member states to "address the work–life balance needs of domestic workers".[20] However, South Africa has not done this and has left the rights of employers as property-owners unaffected.

There is clearly a need for employers as well as domestic workers to be involved in a process to design a system for regulating the position of live-in domestic workers in a way that strikes a reasonable balance between their rights and those of employers.

2.6 Protection Against Discrimination

Discrimination on grounds such as race, gender or religion against employees is prohibited in terms of ILO Convention 111 on discrimination in employment, which South Africa has ratified. The EEA is supposed to give effect to this prohibition. Unfortunately, the EEA has caused ambiguity by prohibiting "unfair discrimination" rather than "discrimination" on these grounds. An amendment to the EEA now expressly allows an employer to prove that discrimination on a prohibited ground is "fair" or "justifiable".

[18] SD7, clause 26, which seems to be incorrectly drafted.
[19] Article 17(d).
[20] Article 25(1)(b).

This means that an employers could, for example, refuse to employ a child-minder who is HIV-positive on the basis that, even though this may amount to discrimination on the ground of HIV status, it is "justifiable" from the standpoint of protecting the employer's child against the risk of HIV infection. It would be left to the CCMA commissioner to decide whether the defence has merit.

Also in other ways domestic workers and work-seekers would be exposed to the danger of "justifiable" prejudices of employers that would be strictly prohibited in other countries where Convention 111 is applied. The danger is especially great in the domestic sector where importance is attached to protecting the employer's privacy, rights as a householder and family rights. Consequently, the employer's beliefs as to what is acceptable in the domestic environment may be given more weight. Engagement with the Department of Labour would be one way of addressing this danger, short of a challenge to the legality of the new provision.

2.7 Developing an appropriate institutional framework

Dispute resolution procedures

If negotiation fails, it is necessary to resolve a dispute about the implementation of legal rights in court. In most civil (i.e., non-criminal) disputes this means going to the Magistrate's Court or the High Court, depending on the size of the claim, or to a special court such as the Family Court. Amounts of less than R12,000 can be claimed in the Small Claims Court. The latter court is the only court where access is free and legal representation is not allowed. Going to any other court is likely to be impossible for a domestic worker because of the cost and the complexity of proceedings.

Labour and employment disputes arising from the LRA and EEA are dealt with by the Labour Court and the CCMA.[21] In general, more serious claims are dealt with by the Labour Court, such as claims of automatically unfair dismissal[22] and claims arising from the contract of employment. But the Labour Court is also likely to be inaccessible to an individual domestic worker.

The CCMA has jurisdiction over most other disputes that are likely to arise between a domestic worker and an employer.[23] However, for the reasons noted under **Protection against abuse** (above), it is difficult, if not impossible, for a domestic worker to launch a claim against her employer while remaining in an employment relationship. The result

[21] The Commission for Conciliation, Mediation and Arbitration; though it is better known by its abbreviation.
[22] I.e., dismissal based on prohibited grounds such as trade union membership, religion or exercizing a right in terms of the LRA: see s 187(1), LRA.
[23] Including unfair discrimination and sexual harassment, in terms of an amendment to s 10 of the EEA.

is that all the recorded cases brought by domestic workers against their employers were claims of unfair dismissal – i.e., after the employer has terminated the relationship.

Domestic workers thus have no effective way of pursuing disputes against their employers arising from their rights in terms of the LRA and EEA. As in the case of violence and abuse, this points at the need to craft a special process based on the realities of the domestic work relationship.

The enforcement process

Disputes arising from rights contained in the BCEA and SD7 – for example, if a worker is required to work more than the maximum hours or is not paid the minimum wage – are referred to the Department of Labour. An administrative process then follows, involving an inspection by a labour inspector who must investigate if the complaint is well-founded. If so, a compliance order will be issued and, if the employer fails to comply, it may result in a court order against the employer.[24]

This highly formal process was clearly designed for large workplaces, such as factories, and is well-suited to that environment. But it is not well-suited to the intimacy of the domestic environment and research shows that domestic workers are, for this reason, very reluctant to call for intervention by a labour inspector.

Although there is much debate about the fact that a labour inspector may not enter a domestic home without the householder's consent or an order of the Labour Court, there is no evidence that refusal by employers has presented significant problems in practice. The real problem lies in the fact that the procedure itself is inappropriate.

And, apart from this, there is no way that fewer than 1,000 labour inspectors can monitor approximately a million homes where domestic workers are employed, together with the hundreds of thousands of small, medium and large workplaces which they need to visit. Once again, engagement with workers and employers will be needed to design a system for promoting compliance that would work in the context of this sector.

2.8 Access to Social Security

Despite the existence of an extensive system of grants available to vulnerable groups in terms of the Social Assistance Act 13 of 2004 – in particular, the child support grant, disability grant and older person's grant – the social security system provides no all-round support or safety net for those unable to earn a living. This applies to all workers (lower-paid workers in particular), not only to domestic workers. Solutions must

[24] See sections 64-69, BCEA. The recent amendments to the BCEA have streamlined up the enforcement procedure.

therefore be sought at the level of society as a whole rather than in the domestic sector alone.

The fundamental reason for this state of affairs is undoubtedly the underdevelopment of the south African economy, which has been unable to generate sufficient jobs (and decent jobs in particular) and leaves up to 40 per cent of the economically active population unemployed. For the same reason, the national market is too limited to offer enough space for all those seeking to engage in independent economic activity (such as trading) to earn a decent living. Furthermore, tax revenue is too limited for the government to address all the needs of the people adequately in the short to medium term.

Domestic workers were included under the Unemployment Insurance Act for the first time in 2003. This also provides for illness and maternity benefits. However, the benefits it offers are aimed at short-term unemployment for employees in between jobs, lasting for a maximum of 238 days (about eight months), and are not intended to address the phenomenon of mass structural unemployment. Benefits are also limited to a maximum of 58 per cent of average earnings for the lowest-paid workers.

It is, however, estimated that only about 20 per cent of employers have registered their domestic workers for UIF. Since the Act is enforced by means of labour inspection, just like the BCEA, there seems little prospect of bringing about general compliance in the absence of a system aligned with the realities of the sector, as discussed above.

Domestic work is covered by the Occupational Health and Safety Act, which places a duty on employers to maintain a safe and healthy working environment. The institutions created by the Act (such as health and safety committees), however, are clearly designed for large formal workplaces.

It has been noted that domestic workers are excluded from compensation for injuries or illness sustained at work. This is almost certainly unconstitutional and will need to be remedied by the Department of Labour.

2.9 The Migrant Labour System

It has been noted that migrant domestic workers are in an especially vulnerable position and, arguably, are subjected to levels of exploitation that undermine employment standards throughout the sector. This is so because, in terms of the Immigration Act, migrants only qualify for work permits if their employer can show that no South African with the necessary skills or experience can be employed. The only migrant workers who are allowed to work legally are political refugees or asylum-seekers.

The result is that the vast majority of migrant domestic workers have no possibility of obtaining work permits. Yet poverty and natural or human-made disasters in countries

to the north make it inevitable that a continuing stream of migrants will make their way to South Africa in search of greater security, even if forced to work under conditions of illegality. For many women, and significant numbers of men, there is little option but to seek domestic employment.

The Labour Court has ruled that migrant workers are entitled to the protection of labour law for as long as they are employed, even if they have no work permits and cannot remain in the country. In other words, they face deportation if the immigration authorities locate them. As a result, they are exposed to the worst forms of exploitation, and employers are under no pressure to respect their legal rights because, as the Labour Court noted in the judgment referred to above, the workers "are powerless (on account of their unauthorised engagement) to initiate any right of recourse against those who engage them".[25]

Solutions to these problems, too, lie far beyond the domestic sector, in a reconceptualization of the Southern African labour market that would eliminate dysfunctional barriers – even though domestic workers need to be part of those solutions.

[25] *Discovery Health Limited v Commission for Conciliation, Mediation and Arbitration & Others* [2008] 7 BLLR 633 (LC).

3. Conclusion

This overview of the legal framework of domestic work has shown a number of shortcomings, undermining its effectiveness and resulting in a significant degree of non-compliance with legal requirements and violations of workers' rights. Research has identified a number of factors that help to account for such non-compliance on the part of employers:

- Lack of awareness of legal requirements;
- Undervaluation of domestic work; not seeing the domestic worker as an equal or a person who needs to be respected;
- The perception that enforcement is ineffective and that there is no need to comply; and, in some cases,
- Lack of the financial resources needed to employ a domestic worker even at the minimum wage.

Then why do domestic workers, even those who are not migrants, submit to the treatment they receive? Here, three main factors have emerged:

- Lack of awareness of their rights;
- Fear of losing their jobs if they complain; and
- Lack of effective organization.

The last factor is the most critical. Without effective organization there can be no momentum to reform the legal framework, to make domestic workers' voices heard in the law-making process, to monitor and compel compliance with domestic workers' rights. But an organization cannot be effective unless its members are empowered and able to exert democratic control.

This is particularly so in the domestic sector. Ultimately, the worker needs to engage with the employer on an individual basis. The employer will remain able to take advantage for as long as the domestic worker is seen as a social inferior. The empowerment of domestic workers needs to address this inequality, ensuring that workers are equipped with the necessary knowledge as well as professional skills to be respected as human beings performing a valuable function.