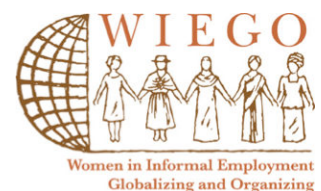


Towards Inclusion of South African Domestic Workers Under the Compensation for Occupational Injuries and Diseases Act

November 2014



WIEGO LAW & INFORMALITY PROJECT



Towards Inclusion of South African Domestic Workers Under the Compensation for Occupational Injuries and Diseases Act

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.

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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.

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Introduction

Domestic workers in South Africa are covered by a raft of legislation. They are, however, still excluded from protection under the Compensation for Occupational Injuries and Diseases Act (COIDA), although government has undertaken to amend the Act to include them. Until this happens, they are denied the right to claim compensation from the Fund and are left with the option of suing their employers at common law for injuries suffered at work.

It is important that we understand the Compensation for Occupational Injuries and Diseases Act (COIDA) in the broader regulatory framework for domestic workers.

This paper will situate protection of domestic workers against occupational injuries and diseases within the broader regulatory framework covering domestic workers. The paper will provide an overview of the law-making process in seeking further coverage for domestic workers against occupational injuries and diseases.

Regulatory Framework for South African Domestic Workers: National Law

We start with the national laws covering domestic workers because the national preceded and contributed to the international standards. Sectoral Determination 7 was promulgated in South Africa in 2002 and informed the making of Convention 189 for domestic workers adopted at the ILC in Geneva in 2011.

Table 1: Labour legislation coverage for domestic workers in South Africa

Legislation	Purpose	Definition of Domestic Work	Coverage of Domestic Workers
Constitution of the Republic of South Africa, 1996¹	Provides the supreme law of the Republic	Not specifically defined	Covers domestic workers as citizens and as workers together with all other categories of workers.
Labour Relations Act, 66 of 1995 (LRA)	<p>To advance economic development, social justice, labour peace and the</p> <ul style="list-style-type: none"> • democratization of the workplace by fulfilling the primary objects of this Act which includes: giving effect to and regulating the fundamental rights conferred by section 23 of the Constitution; • giving effect to obligations incurred by the Republic as a member state of the ILO; • promotion of orderly collective bargaining and collective bargaining at sectoral level. 	<p>Article 17 (1)</p> <p>"domestic sector" means the employment of employees engaged in domestic work in their employers' homes or on the property on which the home is situated.</p>	Covers domestic workers together with all other categories of workers.

¹ Constitution of South Africa, <http://www.gov.za/documents/constitution/1996/a108-96.pdf>

<p>Compensation for Occupational Injuries and Diseases Amendment Act, No 61 of 1997</p>	<p>To provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith.</p>	<p>Domestic employee employed as such in a private household.</p>	<p>Domestic workers are specifically, excluded.</p>
<p>Basic Conditions of Employment Act, 75 of 1997 (BCEA)</p>	<p>To advance economic development and social justice by -</p> <ul style="list-style-type: none"> • fulfilling the primary objects of this Act which includes: • giving effect to and regulating the right to fair labour practices conferred by section 23(1) of the Constitution • giving effect to obligations incurred by the Republic as a member state of the ILO. 	<p>“domestic worker” means an employee who performs domestic work in the home of his or her employer and includes—</p> <ul style="list-style-type: none"> (a) a gardener; (b) a person employed by a household as driver of a motor vehicle; and (c) a person who takes care of children, the aged, the sick, the frail or the disabled, but does not include a farm worker. 	<p>Covers domestic workers together with all other categories of workers, but is really aimed at standard employees.</p>

<p>Employment Equity Act, 55 of 1998 (EEA)</p>	<p>To achieve equity in the workplace by:</p> <ul style="list-style-type: none"> • promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; • implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace. 	<p>Not specifically defined</p>	<p>Covers domestic workers, as with all other categories of workers, but is really aimed at standard employees.</p>
<p>Skills Development Act (SDA), 97 of 1998</p>	<p>To provide an institutional framework to devise and implement strategies on national, sector and workplace levels to develop and improve the skills of the South African workforce.</p>	<p>Not specifically defined</p>	<p>Covers domestic workers, as with all other categories of workers, but is really aimed at standard employees.</p>
<p>Unemployment Insurance Act, 63 of 2001 (UIA)</p>	<p>To establish an unemployment insurance fund to which employers and employees contribute and from which employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful economic and social effects of unemployment.</p>	<p>“domestic worker” means an employee who performs domestic work in the home of his or her employer, and includes:</p> <ul style="list-style-type: none"> (a) a gardener; (b) person employed by a household as a driver of a motor vehicle; and (c) person who takes care of any person in that home. 	<p>Amended in 2003 to include domestic workers.</p>

Sectoral Determination 7: Domestic Worker Sector, South Africa (SD7) 2002	To make special provision for basic conditions of employment for domestic workers, over and above the general provisions of the BCEA.	“domestic worker” means an employee who performs domestic work in the home of his or her employer and includes— (a) a gardener; (b) a person employed by a household as driver of a motor vehicle; and (c) a person who takes care of children, the aged, the sick, the frail or the disabled, but does not include a farm worker; (d) domestic workers employed or supplied by employment services.	Specifically covers domestic workers.
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Domestic workers in South Africa are not protected by any special statute and, except for one limited exception,² they enjoy the same statutory protection as all other employees. Section 23 of the Constitution affords “everyone” the right to fair labour practices and therefore applies to employers as well as workers. Two principal statutes, the Labour Relations Act 66 of 1995 (LRA) and the Basic Conditions of Employment Act 75 of 1997 (BCEA), were enacted to give effect to the rights contained in section 23. In addition, section 9 of the Constitution guarantees the right to equality and the right not to be unfairly discriminated against. The Employment Equity Act 55 of 1998 (EEA) was enacted to implement these rights in the employment relationship. These statutes apply to all “employees”. Thereafter, in 2002, the Minister of Labour promulgated Sectoral Determination 7: Domestic Workers Sector (SD 7) in terms of section 51(1) of the BCEA to regulate minimum standards of employment for workers in the domestic sector. This makes South Africa one of a relatively few countries in which the need for standard-setting, premised on the unique conditions of the domestic sector, has been acknowledged.

² Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013) 76. http://www.pulp.up.ac.za/pdf/2013_11/2013_11.pdf

Steps have been taken to address the circumstances of this sector specifically. Effective as of 1 April 2003, domestic workers were furthermore included under the Unemployment Insurance Act 63 of 2001 (UIA) which regulates the payment of, among others, unemployment and maternity benefits to qualifying contributors.³

In sharp contrast to apartheid, when domestic workers were deliberately excluded from the reach and protection of labour or employment law, domestic work is presently extensively regulated by the Labour Relations Act 66 of 1995 (LRA), Basic Conditions of Employment Act 75 of 1997 (BCEA) and Sectoral Determination 7 of 2002 (SD7) which prescribes the basic employment conditions of domestic workers. These legislative measures are enhanced by a Bill of Rights in which the constitutional rights of domestic workers are protected. Post-apartheid legal reform reflects a conscious and comprehensive attempt to include domestic workers as workers within the established labour and employment law framework.⁴

Until 2002, domestic workers were not protected by any special legislation. However, in that year the Minister of Labour promulgated **Sectoral Determination 7 of 2002 (SD7)**.

Domestic workers working for an employer for more than 24 hours a month have been covered by the Unemployment Insurance Act 78 since 2002. Workers working less than 24 hours a month for an employer, however, are excluded. On 19 July 2013, the Minister of Labour published proposed amendments to the Unemployment Insurance Act, 2001, for general information and presentations. The exclusion of workers “employed for less than 24 hours a month with a particular employer, and their employers” is maintained.

Effective as of 1 April 2003, domestic workers were furthermore included under the Unemployment Insurance Act 63 of 2001 (UIA) which regulates the payment of, among others, unemployment and maternity benefits to qualifying contributors.⁵

³ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013) 76.

⁴ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013) 34.

⁵ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013)76.

Domestic Violence Act 116 of 1998⁶

The inadequacy of the general remedies of criminal and civil law as the sole means of protecting domestic workers against violence and abuse has been noted, and the possibility of including live-in domestic workers within the ambit of the Domestic Violence Act has been mooted.⁷

This underlines the need for equivalent protection, based on the conditions of domestic work, to be designed for all domestic workers. To ensure compliance with Convention 189, such protection must be “effective”. The Recommendation suggests that this calls for accessible complaints mechanisms which ensure that all complaints are investigated and prosecuted.⁸ It further suggests programmes to relocate domestic workers from abusive households; the rehabilitation of workers who fall victim to abuse, harassment or violence; and the provision of temporary accommodation and health care.⁹

Occupational Health and Safety Act (OHSA)¹⁰

Domestic workers are included in the scope of OHSA, whose main goal is the promotion of health and safety at work.¹¹ OHSA requires every employer to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of employees.¹² In addition, employers are required to take all reasonably practicable steps to establish what actual or potential hazards to employees’ health and safety exist at the workplace and to eliminate or mitigate such (potential) hazards.¹³

Social Assistance Act (SAA) 13 of 2004¹⁴

There are a number of grants that domestic workers, depending on their income levels, may apply for in terms of the Social Assistance Act (SAA).¹⁵ First, a number of

⁶Domestic Violence Act <http://www.justice.gov.za/legislation/acts/1998-116.pdf>

⁷ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013)110.

⁸ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013)110.

⁹ Recommendation, art 7.

¹⁰Occupational Health and Safety Act

<http://www.labour.gov.za/DOL/downloads/legislation/acts/occupational-health-and-safety/amendments/Amended%20Act%20-%20Occupational%20Health%20and%20Safety.pdf>

¹¹ Preamble of OHSA.

¹² Occupational Health and Safety Act, sec 8(1).

¹³ Occupational Health and Safety Act, sec 8(2) (b) and (d).

¹⁴ Social Assistance Act http://www.saflii.org/za/legis/consol_reg/saa13o2004rangnr898617/

social assistance grants are payable to persons raising vulnerable children. A domestic worker who is the primary caregiver of a child under the age of 18 will therefore qualify for the child support grant, provided she or he complies with the means test and meets the other requirements for receipt of the grant. Domestic workers may also qualify for foster child grants payable to foster parents.¹⁶

Older Persons Act 13 of 2006¹⁷

The Older Persons Act 13 of 2006 provides for the regulation of residential facilities and the broadening of the scope of financial assistance to community organizations to include community-based support programmes and home-based care.¹⁸ One of the objects of the Act is to “shift the emphasis from institutional care to community-based care in order to ensure that an older person remains in his or her home within the community for as long as possible”.¹⁹

The Older Persons Act therefore provides the legislative framework for the care and protection of older persons. While it regulates *how* care should be provided for older persons, it does not determine *when* older persons are entitled to rely on the state for care (except for reg 22(1), regulations regarding older persons, such as GN R 260 in GG 33075 of 1 April 2010, that provides for higher financial awards to service providers who provide services to “older persons who have been disadvantaged by unfair discrimination”). Hence, legislation giving effect to the shared responsibility of the state and older persons’ families and communities for older persons’ care remains to be enacted.²⁰

Immigration Act 13 of 2002²¹

South Africa faces a quandary in dealing with migration. The Preamble to the Immigration Act 98²² recognizes the need for migrant labour, stating the aim of enabling “the South African economy [to] have access to the full measure of needed

¹⁵ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013)130.

¹⁶ SAA, sec 1, defines “foster parent” as “a person, except a parent of the child concerned, in whose custody a foster child has been placed in terms of any law”.

¹⁷ Older Person’s Act http://www.justice.gov.za/legislation/acts/2006-013_olderpersons.pdf

¹⁸ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013)142.

¹⁹ The Older Persons Act 13 of 2006, sec 2(c).

²⁰ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013)142.

²¹ Immigration Act <http://www.treasury.gov.za/legislation/acts/2002/act13-02.pdf>

²² Immigration Act 13 of 2002.

contributions by foreigners". Immediately following this statement, however, the Preamble adds that "the contribution of foreigners [must] not adversely impact on existing labour standards and the rights and expectations of South African workers". Section 32 states that "illegal foreigner[s]" must "depart" and enjoins immigration officials to deport "any illegal foreigner" found in the Republic. The Act then proceeds to regulate the conditions under which non-South Africans may enter the country and avoid deportation.^{23, 24}

Refugees Act 130 of 1998²⁵

Section 27(b) of the Refugees Act goes on to state that "a refugee enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution".²⁶ These provisions draw a distinct line between refugees and economic migrants in terms of legal protections. Because these protections are only applicable to registered refugees, the majority of migrants from African countries who stream across South Africa's porous borders to escape economic and political hardship but do not apply for, or cannot establish, refugee status remain outside the scope of legal protections.

As such, they face an uncertain future as they are prohibited from entering into employment and, if they do, are vulnerable to exploitation. Furthermore, they do not have access to vital social security rights, which often forces undocumented migrants to lead lives of penury and permanent insecurity in unregulated economic activity. But, as we shall see below, the courts have in a number of cases upheld certain basic rights of migrant workers despite their undocumented status.²⁷

²³ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013)236.

²⁴ Department of Home Affairs, Republic of South Africa – Refugee Status and Asylum. <http://goo.gl/sWFQ5V>.

²⁵ Refugees Act http://www.saflii.org.za/za/legis/consol_reg/ra130o1998rangnr955542/

²⁶ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013)239.

²⁷ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013)239.

Regulatory Framework for South African Domestic Workers: Key International Law

Domestic workers enjoy the same putative protection as every other worker under the international instruments ratified by South Africa. For the purposes of this study we focus on key legislation that most directly affects domestic workers.

Convention 189²⁸

South Africa was one of the first parties to sign Convention 189 and ratified it on 7 June 2013. South Africa is in a fortunate position as most of the regulatory framework prescribed by the Convention already exists and has done so for more than a decade.²⁹

The obligation to implement such reforms derives from the substantive provisions of the Convention itself and would thus, strictly speaking, only be established one year after ratification of the Convention.³⁰

There is no need to anticipate any resistance to this kind of reform once the Convention had been ratified. On the contrary, the drafters of the South African Constitution had embraced the internationalization of our law in section 233 of the Constitution which provides as follows:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”.³¹

Section 233 creates an independent constitutional duty, not grounded in the text of Convention 189, to interpret all new reforms and to reinterpret all existing South African legislation on domestic work in conformity with Convention 189.³² The

²⁸ Convention 189 for domestic workers

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::p12100_instrument_id:2551460

²⁹ Sectoral Determination 7, which regulates the basic conditions of employment for domestic workers, came into operation in 2002.

³⁰ Art 21. The Convention only becomes binding on those Members of the ILO whose ratifications have been registered with the Director-General of the ILO with effect from a date 12 months after registration. South Africa’s ratification was registered on 20 June 2013: ILO ‘Ratifications of C189 – Domestic Workers Convention, 2011 (No 189)’ http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0:NO:11300:P11300_INSTRUMENT_ID:2551460 (accessed 30 June 2013).

³¹ S233 of the South African Constitution Act 108 of 1996.

³² Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013) 36.

Constitution prescribes a similar cosmopolitan approach for the future whenever the Bill of Rights, as opposed to legislation, is used to ground a claim about the rights of domestic workers in South Africa. Section 39(1) (b) requires that every court, tribunal or forum must consider international law³³ (in this case, Convention 189) before it determines the content or meaning of a specific right in the Bill of Rights for domestic workers.³⁴ This injunction forms part of a more general purposive or value-based approach to the interpretation of the Bill of Rights. In line with this approach, when it considers Convention 189, a court will likewise be required to take into consideration both the specific rights in the Convention and the foundational values or ethos that animate the Convention as a whole.³⁵

Sections 39(1) (b) and 233 form the backbone of a constitutional perspective on domestic work after Convention 189. This chapter explores the synergy that section 39(1) (b) invites between the constitutional rights of domestic workers under the South African Bill of Rights and the rights of domestic workers under Convention 189.

Workers with Family Responsibilities Convention 156 of 1981

Closely linked to the living conditions experienced by live-in workers is the question of their work-life balance. South Africa has not yet ratified the Workers with Family Responsibilities Convention 156 of 1981. Recommendation 201, however, calls on member states to address this issue in respect to domestic workers and also to ensure that the working hours of domestic workers under the age of 18 are limited to ensure adequate time for family contact.³⁶

Recommendation 201³⁷

Article 25 of ILO Recommendation 201 recommends that member states and employer and worker organizations establish policies and programmes for literacy and skills training for domestic workers.³⁸ This is the first, and an essential, measure

³³ S39 (1) (b) of the South African Constitution Act 108 of 1996.

³⁴ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013) 36.

³⁵ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013) 36.

³⁶ Du Toit D *Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights* (2013) 102.

³⁷

http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID,P12100_LANG_CODE:2551502,en:NO

³⁸ Recommendation 201, Art 25.

towards fostering the professionalization of domestic work and towards enabling domestic workers to enhance their career prospects both within and outside the domestic sector. At the same time, enhanced skills and employment opportunities are critical to empowering domestic workers, reducing the inequality between workers and employers and challenging the perception of the domestic worker as a “lesser being”.³⁹

ILO conventions on Labour Inspection in industry and commerce, 1947 (No 81)⁴⁰

Article 3(1) of Convention 81 sets out the three main functions of a labour inspectorate. The first is to secure the enforcement of legal provisions governing working conditions and the protection of workers, including those governing working hours, wages, safety and health welfare.⁴¹ The second is to inform and advise employers and workers of the most effective means of complying with the legal provisions.⁴²

Convention 118 of 1962 for the Equality of Treatment (Social Security)⁴³

The Equality of Treatment (Social Security) Convention 118 of 1962 likewise provides for equality of treatment under a ratifying country's social security legislation 156 to workers of other ratifying countries,⁴⁴ particularly in relation to schemes for the maintenance of acquired rights and rights in course of acquisition.

Convention 143 of 1975 for Migrant Workers (Supplementary Provisions)⁴⁵

The Migrant Workers (Supplementary Provisions) Convention 143 of 1975 goes further, requiring ratifying states to respect the basic human rights of all migrants for employment, independently of their status. In terms of this Convention, irregular

³⁹ Du Toit D Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights (2013) 204.

⁴⁰ Convention 81, labour inspection,

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_I D:312226:NO

⁴¹ Convention 81, art 3(1).

⁴² Du Toit D Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights.

⁴³ Convention 118, Equality of treatment,

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_I D:312263:NO

⁴⁴ The Equality of Treatment (Social Security) Convention 118 of 1962, Art 10.

⁴⁵ Convention 143, Migrant workers,

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_I D:312288:NO

migrant workers are entitled to “equality of treatment for [themselves and their families] in respect of rights arising out of *past* employment as regards remuneration, social security and other benefits”.⁴⁶

The principles of equal treatment and non-discrimination are embodied in numerous international human rights treaties. These treaties promote migrants’ enjoyment of their human rights, regardless of geographic location or citizenship status. From an ideological perspective, the notion of “essential humanity” is central to the consideration of legislative protection for migrant domestic workers. In the case of South Africa, this holds particular resonance within the guiding constitutional commitment to human rights and social equality.⁴⁷

South Africa has acceded to a number of international human rights instruments that censure violation of people’s freedoms and protect the rights of refugee immigrants. The Refugee Convention imposes an obligation on states to offer asylum to anyone who can show that they have a well-founded fear of persecution on account of their “race, religion, nationality, membership of a particular social group or political opinion” if sent back home. In addition, South Africa is bound by the international customary law principle of *non-refoulement* of refugees to a state where they are likely to face persecution or inhuman and degrading punishment.⁴⁸

⁴⁶ The Migrant Workers (Supplementary Provisions) Convention 143 of 1975, Art 9.

⁴⁷ Du Toit D Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights (2013)230-251.

⁴⁸ Du Toit D Exploited, Undervalued-And Essential: Domestic Workers and the Realisation of their Rights (2013) 238.

Plugging the Legal Gap: The Process for Inclusion of Domestic Workers under COIDA

Notwithstanding the vast legal coverage for domestic workers in South Africa, there is one gap which surfaced even before enactment of SD7 in 2002. That is, protection against occupational injuries and diseases.

The Compensation for Occupational Injuries and Diseases Act defines an employee:

“(xix) “employee” means a person who has entered into or works under a contract of service ... with an employer ... (d) ...but does not include (v) a domestic employee employed as such in a private household; (xlvii)”⁴⁹

In terms of COIDA, statutory benefits are payable from the Compensation Fund to employees or the dependants of deceased employees for injuries, diseases or death arising out of, and in the course of, employment. Although the definition of “employee” in section 1 is broad enough to cover domestic workers, domestic workers employed in a private household are expressly excluded from the scope of COIDA⁵⁰. Section 35 of COIDA provides that the injured or ill employee’s claim against the Compensation Fund substitutes all other legal remedies for loss of income due to the injury or illness.⁵¹

Employees covered by COIDA are therefore barred from suing their employers for loss of income due to an occupational injury or disease. As domestic workers are excluded from the scope of COIDA they have no claim against the Compensation Fund. The only recourse they are left with is to sue their employers at common law for injuries suffered at work. This, however, is cold comfort since domestic workers

⁴⁹ Compensation for Occupational Injuries and Diseases Act (COIDA)

⁵⁰ The definition of “employee” in sec 1 broadly defines an employee “as a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind”. It is followed by a list of persons expressly included as well as a list of persons expressly excluded from the scope of COIDA. Apart from domestic workers, the other excluded categories consist of members of the police and security forces, who are covered by other statutes, and independent contractors. These exclusions replicate similar exclusions contained in Compensation for Occupational Injuries and Diseases Act 130 of 1993’s predecessor, the Workmen’s Compensation Act of 1941, which was repealed by COIDA.

⁵¹ In terms of sec 35(1): “no action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death”.

are exactly the type of vulnerable employees who cannot afford litigation against their employers, whom COIDA sets out to protect.⁵²

“It has been argued by the Compensation Fund that the rationale for the exclusion of domestic workers and informally employed is that it is logistically impossible to administer. For domestic workers it is difficult to administer and monitor as there is potential for a single employee to have multiple employers. In case of an injury, the domestic worker has to take the civil route of claiming compensation from the employer.”⁵³

However, in terms of the Constitution as well as Convention 189 it has been argued that the exclusion of domestic workers from the scope of COIDA is unjustifiable.

South African Law Reform Commission (SALRC)

The SALRC is an advisory body whose aim is the renewal and improvement of the law of South Africa on a continuous basis.⁵⁴ In 2004, Cabinet agreed that the highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.⁵⁵ In 2010, the SALRC called for written comment and representations in response to the Discussion Paper 117 on the repeal and amendment of legislation administered by the Department of labour.

In 2.151 of the Discussion Paper, the advisory committee submitted that:

“...although domestic workers are regarded as employees in the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997 there are public policy reasons for the exclusion from the Compensation for Occupational Injuries and Diseases Act 130 of 1993. This exclusion is

⁵² See *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* 1999 (2) BCLR 139 (CC) para 12.

⁵³ Treasury. 2007. The Compensation Fund. Preliminary Report. 2nd Draft. P3

⁵⁴ SALRC Discussion Paper 117. Statutory Law Revision. (Legislation administered by the Department of Labour)(2010) 13.

⁵⁵ SALRC. . Discussion Paper 117. Statutory Law Revision. (Legislation administered by the Department of Labour) (2010)13.

therefore not necessarily discriminatory or unfair but a review of the exclusion may be warranted.”⁵⁶

The Social Law Project prepared a response to specifically address 2.151. The response was submitted jointly with eight other organizations.

The submission put forward the argument that:

- There are no valid policy reasons for the exclusion of domestic workers in private households from the protection of COIDA and that, on the contrary, such exclusion may be discriminatory as well as an infringement of their right to fair labour practices and equal treatment.
- The duties placed on employers by the Unemployment Insurance Act, which includes domestic workers, are similar to that of COIDA, thus refuting the original justification for exclusion on the grounds that it would be “logistically impossible to administer”.⁵⁷
- No compelling reasons exist for excluding domestic workers from COIDA and exclusion amounts to an infringement of domestic workers’ right to fair labour practices
- Exclusion of domestic workers from COIDA impacts disproportionately, and adversely, on black women employees. A case can be made out that such exclusion constitutes indirect discrimination on the grounds of race and gender.
- Exclusion of domestic workers from COIDA denies them access to legal protection and benefits equal to that enjoyed by other workers.
- The South African Law Reform Commission should recommend the deletion of paragraph (d) (v) of the definition of “employee” in section 1 of COIDA rather than merely a review.

The SALRC October 2011 Report on Legislation administered by the Department of Labour noted that:

“NEDLAC is the vehicle by which government, labour business and community organizations will seek to cooperate, through problem-solving and negotiation, on economic, labour and development issues and related challenges facing the country ...The Council shall consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament.”⁵⁸

⁵⁶ SALRC Discussion Paper 117. Statutory Law Revision. (Legislation administered by the Department of Labour) (2010) 46.

⁵⁷ Treasury The compensation Fund. Preliminary Report. 2nd Draft. (2007) 3.

⁵⁸ SALRC. 2011. Report on Legislation Administered by Department of Labour. pxii

NEDLAC

NEDLAC would need to advise Parliament on the matter of inclusion of domestic workers under COIDA. There has been no evidence which shows that the matter has ever been tabled at NEDLAC.

Parliament

During an address in September 2011 to delegates at a conference on "decent work" in the sector, Labour Minister Mildred Oliphant confirmed that her department intended to extend the Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993 to include domestic workers.⁵⁹

In the 2013 Budget vote address in the National Assembly, Oliphant reiterated that "[t]he proposed changes to the Compensation for Occupational Injuries and Diseases Act, COIDA, will see domestic workers and farmworkers covered by these protective measures".⁶⁰

In Soweto, Oliphant told workers that South Africa's domestic workers were edging closer to being covered by the Compensation for Occupational Injuries and Diseases (Coida) Act.

Oliphant told workers during a Domestic Worker Imbizo held at the Grace Bible Church that the Act was currently undergoing a Parliamentary review and would be passed in the near future.

She further indicated that the Unemployment Insurance Act was also being reviewed. She said the review would include extending benefits to workers when going on maternity, extending the claim period and the benefit's timeframe.

Despite these statements, it is unclear what steps, if any, have been taken to set the review by NEDLAC in motion and/or draft the amendment in question. Inquiries addressed to the Department of Labour have thus far elicited no concrete information.

⁵⁹ SABINET Law. COIDA will be Extended to Include Domestic Workers.

<http://www.sabinetlaw.co.za/labour/articles/coida-will-be-extended-include-domestic-workers>

⁶⁰ Budget vote address by the Hon. Minister of Labour: Ms Mildred N Oliphant, MP, National assembly. 22^{May} 2013. <http://www.labour.gov.za/DOL/media-desk/speeches/2013/budget-vote-address-by-the-hon-minister-of-labour-ms-mildred-n-oliphant-mp-national-assembly>

Labour Unions and Support Organizations

On 9 September 1997 COSATU applauded Parliament's Portfolio Committee on Labour for the amendments to the COIDA Bill.⁶¹ COSATU also recommended that a number of matters be further investigated by the Department and be resolved within 18 months. One such matter was the urgent inclusion of domestic workers under COIDA, as the matter had, according to them, been under investigation since 1992.⁶²

The COSATU submission in November 2001 on the domestic workers sectoral determination report pointed out that continued exclusion of domestic workers from the UIF and COIDA was not acceptable. The Report did not provide any recommendations because these issues, it was understood, would be substantially considered in other processes.⁶³

In their submission to the Parliamentary Portfolio Committee on Labour in August 2011, SADSAWU stated that:

“Without this work so much other work will not be done – yet domestic workers are invisible in our country and they do not have all the rights that other workers have. The right to occupational health and safety as set out in COIDA is not applicable to domestic workers.”

Trade union density for the sector is less than 1 per cent. Hence, the voice of domestic workers is feeble. The South African Domestic Services and Allied Workers Union (SADSAWU) is, in theory, an affiliate of COSATU. In reality, however, they are not a full affiliate. Neither SADSAWU nor COSATU have been consistent in lobbying government in the COIDA matter.

Employers Organizations

Employers' organizations in the mould of standard employment (i.e. member organizations representing the interests of employers) does not exist in the domestic work sector. The sector is, however, inundated with labour brokers and employment agencies.

⁶¹ COSATU <http://www.cosatu.org.za/docs/pr/1997/pr0909.html> (accessed 23/09/14)

⁶² *ibid*

⁶³ COSATU. 2001. Submission on the domestic workers sectoral determination report. <http://www.cosatu.org.za/docs/subs/2001/Domestic.htm#uif>

Conclusion

The legislative regime in South Africa can be described as generally supportive of the rights of domestic workers. However, the realization of those rights needs attention. While the legal space exists, it has not been effectively occupied by the beneficiaries. A case in point is the issue of protection of domestic workers against occupational injuries and diseases, which has been in progress for over 10 years. The reason that the issue has been drawn out for so long is largely due to the marginal position of domestic workers both as an employment sector and as organized labour. More effective organization of empowered domestic workers would go a long way to quicken the pace of change towards more effective realization of the rights of domestic workers.

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