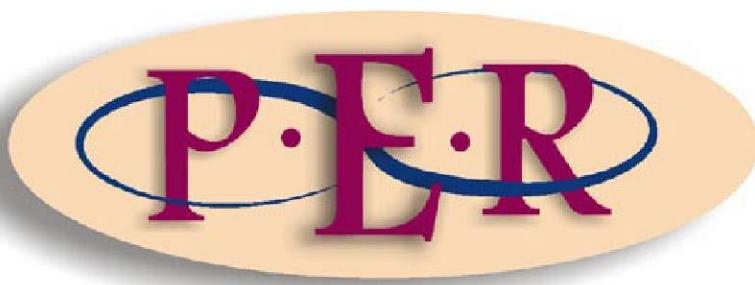


Authors: MP Olivier and A Govindjee

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A CRITIQUE OF THE UNEMPLOYMENT INSURANCE AMENDMENT BILL, 2015

MP Olivier* and A Govindjee**

1 Introduction: The need to amend the *Unemployment Insurance Act, 2001*

The publication of proposed amendments to the *Unemployment Insurance Act* 63 of 2001 (the UIA / the Act), including the tabling of an *Unemployment Insurance Amendment Bill* (B25-2015) (the Bill) for public consideration, is a welcome occurrence. This presents the opportunity to address existing shortcomings, deficiencies and inconsistencies facing the Unemployment Insurance Fund (the UIF / the Fund). Indeed, the extension of coverage (through the amendment of section 3(1)), the adjustment of the accrual rate of a contributor's entitlement to unemployment insurance benefits, the extension of the maximum duration of benefits (in terms of an amendment to section 13(3)(a)), the focus on matters relating to maternity benefits and the intention to use the Fund for preventing unemployment and re-integration into employment (via an expanded section 5) are all examples of noteworthy interventions. Notwithstanding these advancements, there are various crucial matters of substance that require further revision, in some instances due solely to the manner in which the proposed amendments have been formulated. These matters of substance relate to the following areas:

- Non-compliance with particular international standards
- Issues of coverage and application
- The purpose of the UIA and the application of the Fund: Preventing / combating unemployment and re-integration

* Marius Olivier. BA LLB (UP) LLD (UNISA). Extraordinary Professor, Faculty of Law, Northwest University (Potchefstroom), South Africa; Adjunct-Professor, Faculty of Law, University of Western Australia (UWA), Perth, Australia. E-mail: olivier@isl-p.org.

** Avinash Govindjee. BA LLB (Rhodes) LLM (*cum laude*) (UPE) LLD (NMMU). Professor of Law, Head of the Department of Public Law and Deputy Head of the Labour and Social Security Law Unit, Nelson Mandela Metropolitan University, South Africa and consulting attorney: Cliffe Dekker Hofmeyr. Email: avinash.govindjee@nmmu.ac.za.

- Benefits rates and periods
- Maternity benefits
- Dependents' benefits
- Dispute resolution and adjudication
- Penalties and offences

Each of these issues is considered in turn in this note, which essentially reflects on the proposed changes to the UIA and their shortcomings, including in the context of international standards.¹

2 Key substantive issues in need of revision

2.1 ***Non-compliance with particular international standards***

2.1.1 *Background*

The importance of aligning the UIA with international standards flows from the constitutional confirmation that South Africa is bound by ratified international instruments.² The *Constitution of the Republic of South Africa, 1996* (the Constitution) also contains prescripts to consider international law when interpreting the Bill of Rights and to accord a reasonable interpretation to the UIA, which is consistent with international law, when interpreting any legislation (section 233).³

Some attempt has been made to align the UIA to international and regional standards. Most notable in this regard is the setting of the rate of maternity benefits at 66% of a (female) contributor's earnings,⁴ which will make the UIA compliant with

¹ This note draws to some extent on a comment submitted to the Unemployment Insurance Commissioner, South Africa during August 2013 (Olivier and Govindjee 2013 <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-fl/documents/UIA%20AMENDMENT%20BILL%20%28Comments%20-%20Institute%20for%20Social%20Law%20and.pdf>). These remarks, made during 2014, have been substantially revised, in order to provide commentary on the latest version of the Bill.

² Section 231(2) of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*).

³ Sections 39(1)(b), 233 of the *Constitution*.

⁴ See the proposed addition of s 12(3)(b) to the *Unemployment Insurance Act 63 of 2001* (UIA / the Act).

the provisions of the *International Labour Organisation (ILO) Maternity Protection Convention 183* (2000),⁵ article 16(1) of the 2014 *SADC Protocol on Employment and Labour*, and the 2007 *Code on Social Security in the SADC*.⁶

Several international including regional instruments inform unemployment provision and therefore serve as yardsticks against which to measure the UIA and its intended amendments. These instruments could potentially influence the interpretation of the relevant statutory provisions and the interplay between the constitutional and the (to be amended) UIA statutory framework. Building on the *Universal Declaration of Human Rights* of 1948, which grants to everyone the right to social security⁷ and the "right to security in the event of ... unemployment", the UN's 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESCR) specifically provides that "The State Parties to the present Covenant recognize the right of everyone to social security, including social insurance" as being of "central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights".⁸ The importance of the ICESCR and the General Comment (No. 19 of 2008) for the discussion on employment protection has been significantly heightened by South Africa's ratification of this instrument on 12 January 2015.⁹ Of relevance also for the coverage of maternity benefits under the UIA is the 1979 *UN Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), ratified by South Africa on 15 December 1995.¹⁰ *ILO Recommendation 202 of 2012 on National Floors of Social Protection* is another example of a recent international instrument which, albeit not binding in nature, provides core guidelines in respect of (minimum) social protection, including minimum benefits in the event of unemployment and

⁵ See art 6.3 of the *ILO Maternity Protection Convention 183* (2000) (*Convention 183*).

⁶ See art 8.1 of the *Code on Social Security in the SADC* (2007).

⁷ Article 22 of the *Universal Declaration of Human Rights* (1948).

⁸ See *CESCR General Comment No 19: The Right to Social Security* UN Doc E/C.12/GC/19 (2008) (*General Comment No 19*) para 1.

⁹ See OHCHR 2015 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en.

¹⁰ See OHCHR 2015 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en.

maternity.¹¹

More recently, the (not yet in force) *SADC Protocol on Employment and Labour*¹² was adopted in 2014,¹³ covering both unemployment and (unemployment-related) maternity.¹⁴

Unemployment benefits constitute one of the nine social security branches covered by the core ILO social security Convention, that is *ILO Social Security (Minimum Standards) Convention*.¹⁵ If the UIA were to be compliant with *Convention 102*, this would assist in the ratification by South Africa of *Convention 102* – the Convention can be ratified by compliance with three of the nine branches.¹⁶ Both article 11(2) of the new *SADC Protocol on Employment and Labour* and article 4.3 of the *Code on Social Security in the SADC* require of SADC Member States to align their social security system with the standards embedded in *ILO Convention 102*. In addition, the higher-level ILO Convention in this area, namely the *Employment Promotion and Protection against Unemployment Convention*,¹⁷ contains provisions that are crucial for evaluating the state of unemployment insurance protection in South Africa.

It is therefore important to note that despite the attempt indicated above to align the UIA with international and regional standards, there are several examples of non-compliance with these standards (including but not restricted to *Convention 102*), appearing from the Bill, read with the provisions of the UIA. The following need to be mentioned in particular:

- The failure to provide for a *minimum* period of benefits
- Maternity benefits – issues of coverage and disparate treatment

¹¹ See paras 5(a), 5(c) and 9(2) of the *ILO Recommendation on National Floors of Social Protection 202* (2012) (*Convention 202*).

¹² *SADC Protocol on Employment and Labour* (2014).

¹³ See SATUCC 2015 <http://www.satucc.org/sadc-protocol-on-employment-labour>.

¹⁴ See arts 15 and 16 of the *SADC Protocol on Employment and Labour* (2014) respectively.

¹⁵ Ch IV of *Convention 102*. The other branches are medical care, sickness, old age, employment injury, family, maternity, invalidity and survivors' benefits.

¹⁶ See art 2(a)(ii) of *Convention 102*.

¹⁷ *Employment Promotion and Protection against Unemployment Convention 168* (1988) (*Convention 168*).

- The waiting period – access to unemployment benefits
- The unavailability of benefits in the event of partial unemployment and the suspension or reduction of earnings

2.1.2 *The failure to provide for a minimum period of benefits*

Convention 102 requires a *minimum* period for which benefits should be paid in relation to:

- unemployment benefits (13 weeks);¹⁸
- sickness benefits (normally 26 weeks, but can be reduced to 13 weeks);¹⁹ and
- maternity benefits (a minimum of 12 weeks);²⁰

In order to preclude abuse, the two Conventions (102 of 1952 and 183 of 2000) then stipulate that a minimum *qualifying* period (of work / contributions, one assumes) can be stipulated as far as these different categories of benefits are concerned.²¹ Article 6(5) and (6) of *Convention 183* of 2000 (*Maternity Protection Convention*) (quoted immediately below) refers to qualifying conditions in relation to maternity benefits, qualified by the need to ensure that "a large majority of women" should be able to satisfy them and, if a woman is unable to meet these qualifying conditions, she should be entitled to (means-tested) social assistance.

6.5 Each Member shall ensure that the conditions to qualify for cash benefits can be satisfied by a large majority of the women to whom this Convention applies.

6.6 Where a woman does not meet the conditions to qualify for cash benefits under national laws and regulations or in any other manner consistent with national practice, she shall be entitled to adequate benefits out of social assistance funds, subject to the means test required for such assistance.

The UIA apparently does not comply with these minimum periods for which benefits should be paid, as it links eligibility to benefits to the period of contribution (ie

¹⁸ Article 24 of *Convention 102*.

¹⁹ Article 18(1) and (2) of *Convention 102*.

²⁰ Article 52 of *Convention 102*. This may be extended to 14 weeks in accordance with art 4.1 of the *ILO Maternity Protection Convention 183* (2000), read with art 6 of the same Convention.

²¹ See art 17 (sickness benefits), art 23 (unemployment benefits) and art 51 (maternity benefits) of *Convention 102*.

contribution credits). And yet, it now introduces a *qualifying* period of 13 weeks for maternity benefits.²² Perhaps this could have been seen as a "reasonable" qualifying period had the position been that the woman would have been entitled to the full 17.32 weeks of maternity *benefits* – however, as discussed in paragraph 2.5.4 below, section 24(4) of the UIA still refers to a *maximum* period of benefits of 17.32 weeks, suggesting that the actual amount to be received will depend upon the build-up of contribution credits.²³ The UIA does not contain minimum qualifying periods for any of the other benefit types, a fact which is the subject of later discussion.

In a recent publication the ILO makes it clear that these minimum benefit periods must apply in the event that *Convention 102* has been ratified.²⁴ At the core of this requirement is the need to ensure that benefits should be paid for an adequate period of time – in fact, the right to social security, in the ICESCR sense of the word, also implies that at the expiry of the period for which unemployment (insurance) benefits are received, the social security system should ensure adequate protection of the unemployed worker, for example through social assistance.²⁵ This is echoed by the guideline contained in *ILO Recommendation 202 on National Floors of Social Protection*, which requires "basic income security, at least at a nationally defined minimum level, for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability". In short, an unemployment benefit regime based on the acquisition of "contribution credits" or "days of benefit based on days of work", which does not provide for a minimum period of benefits in accordance with the requirements of *Convention 102*, is likely to be regarded as being in conflict with *Convention 102* and, for that matter, as far as maternity benefits are concerned, with the requirements of *Convention 183*.²⁶ Continuing to link the period of benefits to the accumulated contributions is problematic, given the international law imperatives, and prejudices newer

²² See s 24(6) of the Act, as introduced by the Bill, which states that a contributor is not entitled to benefits unless she was in employment, whether as a contributor or not, for at least 13 weeks before the date of application for maternity benefits.

²³ The amended s 24(5) does state that a contributor who has a miscarriage during the third trimester or bears a still-born child is entitled to a *full* maternity benefit of 17.32 weeks.

²⁴ ILO *Social Security* 94.

²⁵ *General Comment No 19* para 16.

²⁶ Article 4 of *Convention 102*.

employees who have been unable to accumulate sufficient credits even to enjoy the minimum level of benefits. Simultaneously, however, it has to be reiterated that a qualifying period of work or contributions could be introduced in relation to all categories of benefits available under the UIA to preclude abuse.

2.1.3 Maternity benefits – issues of coverage and disparate treatment

In the area of maternity benefits under the UIA, it could be argued that the *ILO Maternity Protection Convention 183* of 2000 should be the gold standard. The increase of the rate of maternity benefits to reflect a universally applicable rate of 66% of the (female) contributor's earnings is a clear indication that compliance with *Convention 183* is intended.²⁷ The need to comply with this Convention further flows from the provisions of article 8.1 of the *Code on Social Security in the SADC*, which stipulates that "Member States should ensure that *women are not discriminated against* or dismissed on grounds of maternity *and that they enjoy the protection provided for in the ILO Maternity Protection (Revised) Convention No. 183 of 2000*" (emphasis added). This is underlined by the provisions of the more recent *SADC Protocol on Employment and Labour*, which stipulates that "State Parties shall ensure that maternity protection is afforded to all employed women, including those in atypical forms of dependent work, and shall endeavour to increase protection to the level provided for in the ILO Maternity Protection (Revised) Convention, 2000 (No. 183)".

A closer analysis of the Bill leaves one with the clear impression that the provisions of the Bill, read with the UIA provisions, do not fully comply with the requirements of *Convention 183*. This applies in particular in relation to issues of coverage and disparate treatment. As regards coverage, both the sphere of persons covered by the UIA and the nature of the benefits available require comment. Article 1 of *Convention 183* stipulates that the term "woman" applies to any female person without discrimination whatsoever, while article 2 provides that the Convention "applies to all employed women, including those in atypical forms of dependent

²⁷ See para 2.1.1 above.

work".²⁸ This is in fact confirmed by the interpretation to the right to social security in article 9 of the ICESCR in relation to both unemployment and maternity benefits – General Comment No 19 makes it clear that those involved in atypical forms of work should also be covered.²⁹ And yet, given the narrow framework of persons covered by the UIA, in particular the emphasis in the definition of "employee" in section 1 of the UIA on "remuneration" in respect of services rendered and the exclusion of independent contractors, the implication is that only employees working within the framework of an identifiable employment relationship are covered by the UIA – no attempt has been made to cover workers in atypical forms of dependent work. Determining precisely who will be entitled to claim benefits might be aided, at least to some extent, by the presumption contained in section 200A of the *Labour Relations Act* (LRA), 1995 as to who is an employee. This presumption is made applicable to the UIA by virtue of the provisions of this section, read with the definition of "employment law" in section 213 of the LRA.³⁰ Given that there are various factors that might make the presumption inapplicable (such as the earnings threshold and the need to identify an "employer" who is the recipient of the services rendered), this is, however, likely to be of only limited assistance.

Also, as far as benefits are concerned, as indicated in paragraph 2.1.2 above, article 6.6 of *Convention 183* requires that a woman who does not meet the conditions to qualify for cash benefits shall be entitled to adequate means-tested social assistance benefits. However, it is clear from the provisions of both the UIA and the *Social Assistance Act*, 2004 that neither working women who do not qualify as "employees" under the UIA nor unemployed females are entitled to any maternity benefits under any public system in South Africa.³¹

As far as disparate treatment / discrimination is concerned, two issues need to be raised.

²⁸ Under certain circumstances, the impact of this provision could be limited – see art 2.2 of *Convention 183*.

²⁹ Paras 16 and 19 of *General Comment No 19*.

³⁰ *Labour Relations Act* 66 of 1995 (LRA).

³¹ *Social Assistance Act* 13 of 2004.

Firstly, the Bill now introduces a qualifying period of 13 weeks applicable to maternity benefits³² but not to other categories of benefits (ie unemployment, illness, adoption and dependants' benefits). It is submitted that this patently discriminatory provision cannot be justified from the perspective of *Convention 183* and the equality provision of the *South African Constitution*. In addition, it falls foul of the non-discrimination obligation contained in article 2(2) of the ICESCR (which prohibits discrimination on the basis of gender, among other factors).³³ In fact, from a principled perspective, one could interrogate this form of disparate treatment from the position that that recognition needs to be accorded to the social function of maternity, according to CEDAW, in conjunction with the confirmation, in terms of the provisions of article 4(2) of CEDAW, that the adoption of special measures by State Parties, including those aimed at protecting maternity, shall not be considered discriminatory.³⁴

Secondly, as explained in paragraph 2.5.3 below, the suggested amendment of section 13(5) of the UIA still does not provide for female claimants to have an unrestricted entitlement to maternity benefits should they already have used / exhausted their days of benefits claimed in terms of other categories (unemployment, illness or adoption benefits); however, access to these other categories of benefits is not affected by maternity benefits that have already been claimed. In our view this also amounts to a form of discrimination against females (as only they, and not males, could fall foul of this form of disparate treatment), and in fact between various categories of female beneficiaries.

2.1.4 Waiting period – access to unemployment benefits

According to section 16(1) of the UIA, an unemployed contributor is not entitled to unemployment benefits for any period of unemployment lasting less than 14 days. However, article 24.3 of *Convention 102* restricts this period to 7 days. It is necessary to align this provision of section 16(1) with that of *Convention 102* in this

³² See the proposed s 24(6) of the UIA.

³³ Also see *General Comment No 19* para 29.

³⁴ See art 5(b) of *UN Convention on the Elimination of All Forms of Discrimination against Women* (1979).

regard.

2.1.5 Unavailability of benefits in the event of partial unemployment and the suspension or reduction of earnings

The *Unemployment Insurance Act, 1966*³⁵ (the UIA, 1966) made provision in principle for the payment of benefits in the event of partial unemployment (ie where the employee concerned had lost one job but retained another³⁶ or even where the unemployed contributor had accepted employment at less than half the average rate of earnings which he/she had earned before becoming unemployed).³⁷ Currently, only domestic workers with multiple jobs are able to claim unemployment benefits despite having lost one job.³⁸ The Bill supplements this by introducing subsection 12(1B) so that a contributor employed in any sector who loses his or her income due to reduced working time, despite still being employed, is entitled to benefits *if the contributor's total income falls below the benefit level that the contributor would have received if he or she had become wholly unemployed*. This amendment is subject to the contributor's having enough credits in to be able to enjoy this benefit.

It has to be noted that the more recent ILO Convention dealing with employment promotion and unemployment, namely the *ILO Employment Promotion and Protection against Unemployment Convention 168* of 1988, also suggests the extension of coverage to the contingencies of -

- a loss of earnings due to partial unemployment, defined as a temporary reduction in the normal or statutory hours of work,³⁹ and
- a suspension or reduction of earnings due to a temporary suspension of work, without any break in the employment relationship for reasons of, in particular, an economic, technological, structural or similar nature.⁴⁰

The proposed amendment appears to be directed towards a particular situation

³⁵ *Unemployment Insurance Act* 30 of 1966 (hereinafter the UIA, 1966).

³⁶ See s 35(11) of the UIA, 1966.

³⁷ See s 48 of the UIA, 1966.

³⁸ See s 12(1A) of the UIA.

³⁹ See art 10.2(a) of *Convention 168*.

⁴⁰ See art 10.2(b) of *Convention 168*.

involving a loss of income due to *reduced working time* only. While a contributor with sufficient accumulated credits may now enjoy unemployment benefits in this scenario, loss of income for other reasons (for example, suspension or other non-suspension-related reductions of earnings) is not addressed. This proposed amendment may be criticised as being insufficiently supportive of efforts to reintegrate employees (who are not domestic workers) in the case of partial unemployment or for the failure to comprehensively address other instances of reduced earnings (occasioned by a temporary suspension of work intended in *Convention 168*, other than as a result of reduced working time).

The current provisions of the UIA, as well as the proposed amendments which are not addressed by the provisions of the Bill other than in the manner described above, therefore arguably fall short of the protection provided under both the UIA, 1966 and *ILO Convention 168*.

2.1.6 Recommendations

The above examples indicate that the current UIA regime, as well as the provisions of the Bill, are in several respects not aligned with international and regional standards, in particular ILO standards. It is recommended that the provisions of the current UIA be thoroughly canvassed to bring the Act in line with the relevant standards, and that the Bill be expanded to make provision for the changes required to align the UIA with the applicable ILO, UN and SADC instruments.

2.2 Issues of coverage and application

2.2.1 Non-alignment of the coverage / application provisions of the amended UIA to relevant provisions of the Unemployment Insurance Contributions Act, 2002

While the Bill amends the provisions of the UIA to ensure effective coverage extension of the UIF to civil servants, learners and migrant workers, the concomitant provisions of the *Unemployment Insurance Contributions Act, 2002*⁴¹ (the UICA) have not been amended.⁴² As such, there is currently no mandate to compel these

⁴¹ *Unemployment Insurance Contributions Act 4 of 2002* (hereinafter the UICA).

⁴² See s 4 of the UICA.

workers and their employers to contribute to the UIF.

2.2.2 State / Government as employer

The proposed deletion of section 3(1)(c) of the UIA will ensure that public employees will in future be covered by the Fund, although members of parliament, cabinet ministers, deputy ministers, members of provincial legislatures and municipal councilors will remain excluded. The Memorandum on the Objects of a previous draft of the Bill suggested that "The inclusion of public servants will not affect the budget of the State since the UIF will pay benefits and Government reimburse the actual expenses paid as benefits." It is unclear whether this arrangement is still intended. However, it must be noted that neither the previous version of the Bill nor the Bill itself contains any statutory provision for the State / Government as employer to be exempted from the obligation to contribute. It is submitted that this is a matter that needs to be statutorily regulated. Furthermore, no explanation is given as to why the State / Government as employer would be exempted from the obligation to contribute.

2.2.3 Migrant workers

One issue requires brief observation: The previous version of the long title of the Bill indicated that UIF benefits are extended to "foreign workers who are within the country". The need for retaining this restriction (of a foreign worker having to be "within the country" in order to benefit from the UIF) was seriously questionable and has now been removed in the Bill. In any event, it is submitted that it should be possible to make appropriate arrangements, also via dedicated bilateral arrangements, to provide for the necessary verification and checks to enable foreign workers who have returned to their home country to receive benefits. This may indeed be necessitated by the fact that in terms of the provisions of the *Immigration Act 13 of 2002* they may well be compelled to leave South Africa upon losing their jobs. A failure to make the necessary provision in this regard may in the absence of sufficient justification be regarded as a form of nationality discrimination. Note should be taken of the interpretation given to article 2(2) of the ICESCR to the effect that non-nationals, including migrant workers who have contributed to social security

schemes, should be able to benefit from that contribution or retrieve their contributions if they leave the country.⁴³ Attention is also drawn to the provisions of section 16 of the *Social Assistance Act* 13 of 2004, read with Regulation 31 of the 2008 Regulations in terms of the SAA, which contains arrangements for the payment of social assistance grant benefits to beneficiaries who are outside South Africa. Regulation 31(2) provides that the South African Social Security Agency may require any person who is absent from the country and who continues to receive a social grant to report at such frequency as the Agency determines to a South African mission or office for purposes of identity verification or to present any qualifications as the Agency may determine for purposes of verifying any information in connection with a beneficiary.

2.2.4 Coverage of the self- and informally employed

As indicated above, the current UIA restricts coverage to employees who work for employers within the context of an identifiable employment relationship. As suggested, at least as far as maternity benefits are concerned, this is out of step with the coverage provisions of *Convention 183* of 2000 (see paragraph 2.1.3 above). A recent ILO publication notes the world-wide trend to increasingly include self-employed workers in social insurance schemes, including unemployment insurance schemes in some countries.⁴⁴ Also, there is a clear trend in Africa as well to develop appropriate frameworks for the accommodation in social security (including social insurance schemes) of persons who work informally. Recent social security legislation developed by the ILO for Swaziland and Lesotho respectively contains provisions that stipulate that special measures to accommodate the self- and informally employed need to be taken. This is reminiscent of the provision in the UIA, which stipulated that a 12 month period was granted within which arrangements needed to be developed to include domestic workers within the framework of the UIA.⁴⁵ In fact, article 9 of the ICESCR has been interpreted to imply that "part-time workers,

⁴³ See *General Comment No 19* para 36.

⁴⁴ ILO *Social Security* 136-138. Examples of countries mentioned in this report include Columbia, Switzerland, Chile, Canada and the Republic of Korea.

⁴⁵ See Olivier "Unemployment Insurance" para 83; Van Kerken and Olivier "Unemployment Insurance" 436-437.

casual workers, seasonal workers, and the self-employed, and those working in atypical forms of work in the informal economy" should also be covered.⁴⁶

2.2.5 Recommendations

Following amendment to the UIA, the provisions of the UICA are likely to require some reconsideration and revision. The position of the State as employer requires clarification, particularly in respect of State contributions to the Fund. Finally, in this regard, the position of self-employed workers should be reconsidered, particularly given the worldwide trend to include self-employed workers in social insurance schemes.

2.3 The purpose of the UIA and the application of the Fund: Preventing / combating unemployment and re-integration

2.3.1 The absence of a sufficient statutory mandate to prevent, combat and minimise unemployment

The proposed amendments to the UIA are partly aimed at preventing *contributors* from becoming unemployed and at aiding contributors to re-enter the labour market (should they become unemployed). This is evident from the proposed amendment to section 5 of the UIA, which relates to the application of the Fund, and which now includes the Fund's being used to "finance the retention of contributors in employment and the re-entry of contributors into the labour market and any other scheme aimed at vulnerable workers".

The role to be played by the UIF in relation to the broader objectives of unemployment prevention and reintegration is important. Given the manner in which the purpose of the UIA (section 2) is *currently* circumscribed (namely, the establishment of a Fund from which unemployed employees or their beneficiaries are permitted to benefit), however, it is doubtful whether there is a proper statutory basis and mandate for the UIF to serve the wider ambit of preventing, combating and minimising unemployment and the creation of unemployment alleviation

⁴⁶ See *General Comment No 19* para 16, read with paras 33 and 34.

schemes, for example. Section 10 of the UIA confirms that any surplus in the Fund may be used "to give effect to the purposes of this Act" (which are confined to the provision, from the Fund, of unemployment benefits to certain employees, and for the payment of illness, maternity, adoption and dependants' benefits related to the unemployment of such employees), confirming the importance of amending section 2 to reflect broader purposes.

While this is not the task of an unemployment insurance scheme alone but in fact the primary responsibility of the State, the role of the UIF in potentially preventing unemployment and bringing jobless people from unemployment or inactivity into work is a fundamental one. The present limited and short-term impact of the UIF (which will at least be improved by the extension of benefits to a maximum period of 365 days, discussed below) and its desired labour-market orientation should be addressed so that the Fund may contribute appropriately to preventing and combating unemployment and to the reintegration of the unemployed into the labour market. Developing such linkages in the UIA is likely to enhance the relevance and impact of the Fund for unemployed persons who are desperately in need of assistance. Such matters are also inadequately addressed in the *Employment Services Act, 2014*,⁴⁷ highlighting the importance of their (more detailed) inclusion in the UIA. The present slew of proposed amendments, it is respectfully submitted, falls short in this regard. The emphasis of the proposed amendments when it comes to employment retention and labour-market re-entry is clearly on *existing contributors*. Such an amendment will do little to enhance the ability of unemployed non-contributors who have never been in employment to utilise the resources of the Fund for the purposes of obtaining employment. The proposed amendment to section 5, if applied literally, will be unable to make a significant dent in the unemployment rate and will restrict the Fund's resources to a limited group of persons. The position might of course have been different had the Fund's considerable resources been previously (and consistently) invested in broader employment reintegration and retention initiatives.

This is also in contrast with previous legislation, namely the UIA, 1966, which was

⁴⁷ *Employment Services Act 4 of 2014.*

better aligned with broader unemployment policy objectives, permitting the Minister, for example, to introduce schemes to combat unemployment.⁴⁸ It needs to be noted that the proper integration of unemployment protection and employment promotion has also received international attention.⁴⁹ In particular, article 2 of *ILO Convention 168* of 1988 requires of States to ensure that their system of protection against unemployment contributes to the promotion of full, productive and freely chosen employment. According to article 7 of the Convention, the means to achieve this should include, *inter alia*, employment services, vocational training and vocational guidance. Also, article 15 of the *SADC Protocol on Employment and Labour* imposes an obligation on State Parties, with due regard to the means available, to adopt measures to –

- (a) adopt proactive policies and measures towards inclusive economic and social development so as to absorb the majority of the labour force into productive employment and income-generating activities;
- (b) adopt measures to increase investment in education and training, and stimulate and support job creation initiatives;
- (c) ...;
- (d) provide support structures to be set up to assist entrepreneurs in the establishment and development of small- and medium-sized enterprises;
- (e) formulate national and regional policies and strategies to enhance productivity, in particular by developing a framework for the implementation of the Declaration on Productivity;
- (f) ...;
- (g) facilitate the implementation of the SADC employment promotion action plan;
- (h) cooperate to harmonise and strengthen skills development initiatives;

⁴⁸ See, in general, in this regard Van Kerken and Olivier "Unemployment Insurance" 417-421; Govindjee, Olivier and Dupper 2011 *Stell LR* 205-227.

⁴⁹ See, for example, *Convention 168* and ILO 2010 http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_123390.pdf 42.

- (i) ...;
- (j) adopt appropriate regulations for both enterprises and employment relations that balance economic efficiency and social redistribution goals; and
- (k)

2.3.2 The need to extend the statutory basis for employment retention of contributors and re-entry into the labour market

The proposed amendment of section 5 of the UIA may also be criticised for affording the UIF a limitless discretion with respect to the manner in which it may use its funds to retain contributors in employment and assist unemployed contributors to re-enter the labour market. The manner in which these important objectives are to be achieved in future is not reflected elsewhere in the Bill. This may be contrasted with the approach adopted, for example, in respect of the envisaged amendment of the *Compensation for Occupational Injuries and Diseases Act, 1993*⁵⁰ (COIDA) which, it is intended, will include a new chapter pertaining to employment re-integration and return-to-work.⁵¹ Also, one would have expected appropriate statutory links between the UIA and the *Employment Services Act, 2014* to ensure and enhance a coordinated and integrated response to labour market accommodation of the unemployed, in particular unemployed workers.

2.3.3 Memorandum misalignment

Finally in this regard, clause 2 of the Memorandum on the Objects of the *Unemployment Insurance Amendment Bill, 2015* ("the Memorandum") also appears to be somewhat at odds with the proposed amendment to section 5 (referring only to "make provision for the refinancing of unemployment insurance beneficiaries to facilitate re-entry into the labour market").

⁵⁰ *Compensation for Occupational Injuries and Diseases Act 130 of 1993.*

⁵¹ Compensation Fund of South Africa 2012 <http://www.labour.gov.za/DOL/documents/annual-reports/compensation-for-occupational-injuries-and-diseases/2012/compensation-fund-annual-report-2012> 8.

2.3.4 *Recommendations*

In summary, it is recommended that:

- the use of the Fund for preventative and re-integrative purposes ought to be specifically reflected in section 2 of the UIA (dealing with the "purpose of this Act"). Section 2 should be amended accordingly and deliberately aligned with (an expanded understanding of) sections 5 and 10 of the UIA, so that the Fund (including any Fund surplus) may be utilised to achieve broader outcomes such as unemployment prevention and employment creation / re-integration;
- section 5 should be appropriately amended, as the proposed amendment to section 5 fails to address the notions of unemployment prevention and employment entry / re-entry adequately, requiring amplification in order to be effective and in order to properly contribute to preventing and combating unemployment more broadly, and for purposes of the reintegration of as many unemployed persons into the labour market as possible. Rather than restricting the use of the resources of the Fund for the purposes of employment retention and re-integration to contributors, the Fund could be deliberately linked to national employment creation initiatives, even though the State bears the primary and overall responsibility in this regard;
- section 12 of the UIA, which enumerates the various benefits to which a contributor or dependant is entitled, might also be expanded to include benefits relating to unemployment prevention and employment reintegration.

2.4 *Benefits rates and periods*

2.4.1 *Reading sections 12(3)(b) and (c) disjunctively*

The Bill seeks to amend the general provision pertaining to the benefits contained in the UIA⁵² by the addition of two new subsections pertaining to benefit rates. The first new subsection relates specifically to maternity benefits (indicating that such

⁵² Section 12 of the UIA.

benefits must be paid at a rate of 66% of the earnings of the beneficiary at the date of application, subject to the maximum income threshold set by the Minister). The second new subsection creates a differential rate of payment between the first 238 days of benefits⁵³ and the remainder of the credits (subject to the 365-day maximum benefit duration during a four-year period set in the proposed amendment to section 13 of the UIA), which is to be paid at a flat rate of "20" – it is unclear whether this "20" refers to an income replacement rate of 20% of income or the lesser amount of 20% of only the existing benefit entitlement.

It is clear that these two new subsections must be read disjunctively, so that the proposed section 12(3)(b) applies to maternity benefits (which, in terms of section 24(4) may be obtained for a maximum period of 17,32 weeks only), while the proposed section 12(3)(c) applies to all other benefit types. The Memorandum makes insufficient reference to this distinction, indicating only that "Clause 5 seeks to amend section 12 of the Act by providing for the payment of benefits to contributors who lose part of their income due to reduced working times, and to provide for a fixed rate of payment of maternity benefits". The distinction (in the application of section 12(3)(b) to maternity benefits and the application of section 12(3)(c) to all benefits other than maternity benefits) ought to be clarified in the wording of the amended section 12 and by further amending the Memorandum, as this will greatly assist in the proper interpretation of the amended section.⁵⁴

2.4.2 Unemployment benefits and the use of credits

The proposed insertion of section 13(3)(b) creates a differential regime in respect of benefits received in the case of unemployment. Only in the case of unemployment, according to the present wording of this section, must benefits be paid to a contributor irrespective of whether or not benefits have been received during a four-year cycle (provided that the unemployed contributor still has available credits). This

⁵³ To be paid at the income replacement rate set in s 12(3)(b) of the UIA.

⁵⁴ As discussed previously and in greater detail in the next section of this commentary, maternity benefits in South Africa should be aligned with the requirements of the ILO's *Convention 183* and other relevant UN as well SADC instruments. In fact, these benefits should be de-linked (and treated separately) from the other benefit types in the UIA, as is the case in many other jurisdictions.

singling out of unemployment benefits for special treatment ought to be addressed, particularly when considering that section 13 falls within the first (general) part of chapter 3 of the UIA and deals with the right to benefits in general. The formulation of section 13(3)(b) is also unaligned with the related clause 6 of the Memorandum, which does not make specific reference to "unemployment benefits".

A further issue with the present wording of the amended section 13(3)(b) is that it fails to clarify precisely *which benefits* may have been received for the section to apply. The wording indicates only that "unemployment benefits must be paid to the unemployed contributor regardless of whether the contributor has received *benefits* within that four year cycle, if the contributor has credits" (emphasis added). The use of the word "benefits" towards the end of the provision should therefore be clarified – so that readers may understand precisely when this subsection is applicable. More technically, it may be preferable to indicate that the payment of the benefits must occur *provided that* the contributor has credits (the word "if" is used at present).

Finally, the wording of the amended section 13(6) ought to be reconsidered; the presently proposed formulation may lead to uncertainty and confusion. The wording is ambiguous and brings into question the operation of the "four-year cycle", referring to "an application for benefits ... within the four-year cycle *of a previous claim*" (own emphasis). The explanatory Memorandum to the Bill states that "a new provision ... seeks to allow contributors to claim benefits if they have credits, regardless of whether or not they claim within that four-year cycle." Our understanding of the legal position is that the four-year cycle is a "moving cycle" and that whenever a period of employment ends, the Fund will go back a period of four years (from the day after the date of the end of the period of employment)⁵⁵ in order to calculate the benefits available (by subtracting the number of days during that four-year period in respect of which benefits have already been paid from the number of days in credit).

2.4.3 Ministerial powers to set/amend

Schedule 2 to the UIA is amended by the substitution of a paragraph pertaining to

⁵⁵ See the amended s 13(3)(a) of the UIA.

the Income Replacement Rate (IRR). The IRR determines the percentage of a contributor's previous income to which the contributor is entitled in the form of benefits.⁵⁶ The Bill seeks to empower the Minister to vary the IRR and the benefit period (the maximum number of days that benefits may be received in the event of unemployment) through Regulations. While it may be acceptable to involve the Minister in the variation of the minimum and maximum IRRs and in respect of the setting of a flat replacement rate, the manner in which this occurs should correspond expressly with existing provisions of the UIA. In particular, section 12(3)(a) and (b) permits the Minister, with the concurrence of the Minister of Finance, to amend the scale of benefits contained in Schedule 3 within certain parameters. The Minister must, when performing this function, consult with the Board⁵⁷ and comply with the procedure set in section 55 of the UIA. Similarly, Schedule 2 should be amended to reflect this type of consultation in the procedure required with respect to the variation of the IRR and the setting of the flat replacement rate. In other words, a more elaborate and emphatic provision is arguably necessary in this regard.

More problematically, the proposed amendment to Schedule 2 seeks to permit the Minister to vary the *benefit period* by regulation. This matter is presently governed by section 13(3) of the UIA and, it is suggested, should in view of the public interest and the interest of contributing employers and employees not be amendable by ministerial regulation. In other words, an amendment to the Act should be required to adjust the benefit period given the importance of the maximum benefit period for contributors and their beneficiaries.

2.4.4 Recommendations

In summary, it is recommended that:

- the wording of subsections 12(3)(b) and (c) be amended in order to clarify that a disjunctive reading is appropriate;

⁵⁶ Schedule 2 to the UIA.

⁵⁷ In terms of s 12(4)(a) of the UIA.

- the proposed subsection 13(3)(b) is problematic for various reasons, and should be amended to also apply in instances other than in respect of unemployment benefits, clarifying which benefits may have been received for the section to apply, provided that the contributor has credits available;
- the wording of section 13(6) is ambiguous and this should be amended to clarify the operation of the four-year cycle for the purposes of deducting the benefits already paid by the UIF; and
- the Minister's power to vary the IRR and to set a flat replacement rate ought to be curtailed by incorporating a procedure akin to that required in the event that the scale of benefits is modified (i.e. a proper consultation procedure).⁵⁸ The power of the Minister to adjust the (maximum) benefit period by regulation should be removed.

2.5 Maternity benefits

2.5.1 Qualifying period

As indicated above, section 24(6), which provides for a 13-weeks qualifying period, is now being added to the UIA by the provisions of the Bill. As suggested, a similar qualifying period does not apply in the case of unemployment, illness and adoption benefits. As indicated above, it is suggested that this is in conflict with the core right to equality enshrined in section 9 of the *Constitution*, especially as this impacts on women and applicable international standards. It needs to be noted that the UIA, 1966, did indeed contain a qualifying period (in principle 13 weeks) in relation to almost all the benefit categories – ie unemployment benefits,⁵⁹ illness benefits,⁶⁰ maternity benefits⁶¹ and adoption benefits.⁶²

2.5.2 Unclear formulation of the (envisaged new) section 24(6) of the UIA

Section 24(6), to be inserted in the UIA via the provisions of the Bill, stipulates that

⁵⁸ Sections 12(3) and (4) of the UIA.

⁵⁹ Section 35(13)(a) of the UIA, 1966.

⁶⁰ Section 36(6)(e) of the UIA, 1966.

⁶¹ Section 37(5) of the UIA, 1966.

⁶² Section 37A(5)(b) of the UIA, 1966.

"A contributor is not entitled to benefits unless she was in employment, whether as a contributor or not, for at least 13 weeks before the date of application for maternity benefits." It is not clear what is meant by the following phrases "... unless she was in employment, whether as a contributor or not ..."'

2.5.3 Failure to regulate the claiming of maternity benefits in the event of the exhaustion of other UIF benefits

As indicated above, the current UIA provides that the days of benefits that a contributor is entitled to may not be reduced by the payment of maternity benefits.⁶³ However, it does not contain a provision that allows for the non-reduction of days of maternity benefits in the event that any other category of benefits preceding the period for which maternity benefits are paid is claimed. The approach or practice of the UIF not to pay maternity benefits in the event that non-maternity-related UIF benefits have been received (and exhausted), and yet to pay both maternity benefits and other non-maternity-related UIF benefits where maternity benefits have been claimed and received first is not supported by the South African constitutional framework and the relevant international standards.

The Bill now adds a new subsection 13(5)(b) to the UIA, which stipulates that "The payment of maternity benefits may not affect the payment of unemployment benefits".

In our view, this provision does not address the shortcoming indicated above. In fact, it amounts to a repetition of the current section 13(5).⁶⁴ It is accordingly submitted that (the new) section 13(5)(b) of the UIA should be reformulated to clearly indicate that the payment of unemployment, illness and adoption benefits does not affect the payment of maternity benefits.

2.5.4 Discrepancy between section 24(4) and section 24(5), as amended

Section 24(4) of the UIA provides that the *maximum* period of leave for which maternity benefits are payable is 17.32 weeks. This provision is, however, subject to

⁶³ Section 13(5) of the UIA.

⁶⁴ Which will become the new s 13(5)(a).

the provision in section 13(3)(a), which stipulates that the actual available days of benefits accrue at a rate of one day of benefits for every five days of employment. On the other hand, the amended section 24(5) provides that, in the case of miscarriage during the third trimester or a still-born child, a *full* maternity benefit of 17.32 weeks is payable (in fact, the amendment erroneously refers to "17 to 32 weeks"). Subsection 24(5) does not, however, apply to a contributor who voluntarily terminates her pregnancy (section 24(7)). In any event, there appears to be no justification to provide for a *full* benefit in the one case and a *maximum* benefit in the other case. Section 24(4) and/or (5) should be amended in a way that would align these two provisions.

2.5.5 Recommendations

It is accordingly recommended that the 13-week qualifying period applicable for maternity benefits be reconsidered. In addition, the wording of the proposed amendment to section 24(6) requires reformulation and the inconsistent position described, depending upon whether maternity benefits are exhausted before other benefits or vice versa, should be addressed. Finally, the use of the terms "maximum" and "full" in sections 24(4) and (5) of the Bill should be standardised.

2.6 Dependents' benefits

It is clear that the issue of dependants' benefits remains fraught with difficulties. Three issues in particular may be highlighted:

2.6.1 Definition

Section 30 of the UIA circumscribes the notion of dependants' benefits by referring, firstly, to a "surviving spouse or a life partner of a deceased contributor" and secondly to "any dependent child of a deceased contributor" in certain instances. It is unclear how extensively the notion of "spouse" should be interpreted, as the UIA contains no such definition.⁶⁵ The present wording of the UIA creates certain difficulties that should have been addressed in the amendment Bill. For example,

⁶⁵ See, in general in this regard, Van Kerken and Olivier "Unemployment Insurance" 444.

does a life-partner or spouse who was married to the deceased employee in terms of customary or religious law qualify as a beneficiary if there was also a civil law marriage with another wife subsisting at the time of the employee's death? COIDA, for example, includes a detailed definition of the concept of "dependant of an employee" and, in section 54, stipulates the payment of compensation in the event of an employee's death in some depth, so that spouses / life partners and children of the deceased employee are dealt with equitably. The *Social Assistance Act*, 2004 defines dependant to mean "a person whom the beneficiary is legally obliged to support financially and is in fact supporting", drawing no distinction between spouses / life partners and children for its purposes. Court cases in South Africa have also emphasised that unfair discrimination based *inter alia* on marital status is impermissible.⁶⁶

2.6.2 *Hierarchy and waiting period*

Linked to the previous remarks, the amendment Bill perpetuates a hierarchy in respect of dependants' benefits, continuing to rank children below claimants who satisfy the understanding of "surviving spouses and life partners" and entitling the dependent child to claim only if there is no surviving spouse or life partner or in instances where the surviving spouse or life partner fails to apply for benefits within eighteen months of the contributor's death. The creation of such a hierarchy appears to be based on the unfounded assumption that the surviving spouse / life partner will, in all instances, use the benefits obtained from the Fund to care for all dependent children (even children who were dependent on the deceased but were not children of a surviving spouse or life partner). To make matters worse, a dependent child might have to wait for 18 months for the surviving spouse / life partner to make his / her decision to claim benefits, before the child would know whether he / she should claim benefits.⁶⁷ No proper explanation for this proposed amendment is offered by the Memorandum. It is unclear, also, whether a 20 year-

⁶⁶ See, for example, *Langemaat v Minister of Safety and Security* 1998 ILJ 20 (T) and *Amod (born Peer) v Multilateral Motor Vehicle* 1999 4 All SA 421 (A). This is also the approach adopted by the Pension Funds Adjudicator when determining the range of dependants for the purposes of the *Pension Funds Act* 24 of 1956. See, for example, *Van der Merwe v The Southern Life Association Ltd (WC)* Unreported Case No PFA/WE/21/1/98.

⁶⁷ In terms of the current wording of the UIA, the period is six months.

old dependant who is not a learner would lose his / her entitlement to claim a benefit from the UIF in the case where the deceased employee's spouse fails to lodge a claim within eighteen months following the employee's death (by which time the deceased's child is over the age of 21). Whether or not such a claimant would be able to claim retrospectively in such a situation is uncertain and demonstrates one of the side-effects of the excessively lengthy period afforded to the surviving spouse / life partner for the purposes of claiming a benefit from the Fund. Furthermore, in our view the exclusion of children's separate claims/entitlements in the event that the surviving spouse or life partner is claiming dependants' benefits, via the subordination of their claims to those of surviving spouses or life partners, constitutes a transgression of the constitutional principle (at least for children under the age of 18) that a child's best interests are of paramount importance in every matter concerning the child.⁶⁸

2.6.3 *Nominees*

Finally, in this regard, the proposed amendment to section 30 by way of inserting a new provision allowing contributors to nominate their beneficiaries in cases of death benefits, although well-intentioned, may create confusion and introduce an element of complexity in the administration of dependants' benefits on the part of the UIF. The inserted sections 30(2A)(a) and (b) appear to contradict one another⁶⁹ and may precipitate legal challenges in future, particularly when there is a competing claim between an alleged dependant and nominated beneficiary. The administrative burden on the Fund is likely to increase as a result of the proposed insertion. In the absence of a clear definition explaining the intended interaction and prioritisation between nominees and dependants, a potential myriad of legal challenges may result. Such complications, as experienced in the context of pension fund matters,

⁶⁸ See s 28(2) of the *Constitution*. For similar criticism in relation to the *current* six-month waiting period for children, see Olivier, Dupper and Govindjee 2011 *Stell LR* 415-416.

⁶⁹ The first subsection apparently creates an entitlement to a benefit for any nominated beneficiary, while the second subsection completely qualifies that entitlement. It may be better to combine these two subsections into one provision in order to clarify that the entitlement of a nominated beneficiary is subject to there being no surviving spouse, life partner or dependent child of the deceased contributor.

should best be avoided.⁷⁰

2.6.4 *Recommendations*

The following recommendations pertaining to dependants' benefits are advanced:

- It is recommended that the Bill be amended to consider whether a person was or would have been (wholly or mainly) financially dependent on the deceased. The use of the concept of a "surviving spouse or life partner" ought to be revisited.
- In the event of more than one dependant, an equitable sharing of the benefits must be ensured (as is the case with pension / provident fund payments and the broad definition of "dependant" in section 1 of the Pension Funds Act, 1956 and other social legislation discussed above). This may assist, for example, in the protection of the best interests of the children of a deceased contributor and in alleviating the vulnerable position of children in general.
- Even if the distinction between a surviving spouse / life partner (on the one hand) and a dependent child (on the other) is retained for the purposes of claiming dependants' benefits in terms of the UIA (which is not recommended), the eighteen months' waiting period for dependent children is excessive and should be reduced, given that it is likely to fall foul of the standard of the best interests of the child.
- The inclusion of a subsection dealing with nominated beneficiaries may result in administrative difficulties, disputes and some confusion. The insertion should preferably be removed, or at least be properly qualified in order to more clearly spell out the intended prioritisation in respect of nominees and dependants.

⁷⁰ See *Kaplan & Katz v Professional and Executive Retirement Fund* 1999 3 SA 798 (SCA).

2.7 *Dispute resolution and adjudication*

2.7.1 *Lack of an independent appeal institution*

The UIA makes provision for an appeal to a regional appeals committee in the event of a decision to suspend a person's right to benefits, or a decision relating to the payment or non-payment of benefits.⁷¹ The matter may be referred to a national appeals committee if a person is dissatisfied with the decision of a regional appeals committee.⁷² However, these institutions – the regional and national appeals committees – cannot be regarded as either independent or external appeal mechanisms. They are not external institutions and are not independent vis-à-vis the UIF, as they are constituted as committees of the Board and since, at least as far as the regional appeals committee is concerned, a public servant (who could, in principle, be a staff member of the UIF or the Department of Labour) is a member of the committee.⁷³

The Labour Court is indicated as the court which has jurisdiction in respect of all matters in terms of the Act, unless otherwise provided and except in the case of an offence.⁷⁴ However, the Labour Court's jurisdiction is effectively restricted to a *review* application and it may not hear an appeal against a decision of the UIF or a regional appeal committee or the national appeal committee,⁷⁵ or the statement of a special case on a question of law.⁷⁶

It is therefore evident that the UIF does not provide for an independent appeal institution. In this regard attention is drawn to section 34 of the *Constitution*, which stipulates that: "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." In addition, according to the *ILO Social Security (Minimum Standards) Convention (Convention*

⁷¹ Section 37(1) of the UIA.

⁷² Section 37(2) of the UIA.

⁷³ On the importance of independent appeal institutions in terms of international law, see, in general, Nyenti, Olivier and Govindjee "Reforming the South African Social Security Adjudication System".

⁷⁴ Section 66 of the UIA.

⁷⁵ See s 66, read with s 37(3) of the UIA.

⁷⁶ Section 67 of the UIA.

102 of 1952), every claimant shall have a right of appeal in the case of a refusal of a benefit, or in the case of a complaint as to its quality or quantity. The *ILO Employment Promotion and Protection against Unemployment Convention (Convention 168 of 1988)* provides that a dispute concerning the refusal, withdrawal, suspension, or reduction of the quantum of benefits must be resolved by the body administering the scheme, and that there should thereafter be a (simple and rapid) appeal to an independent body. In this regard, it has previously been concluded that "the establishment of a dedicated social security adjudication mechanism to deal with social security disputes is recommended ... adopting this approach would also make South Africa compliant with the international standards...".⁷⁷

2.7.2 The absence of provisions regulating the establishment and functioning of the National Appeals Committee

The UIA regulates the establishment of regional appeals committees.⁷⁸ The Bill also inserts a provision that ensures that the constitution of the Board must provide for the functions of a regional appeals committee.⁷⁹ However, similar regulating provisions in relation to the *national* appeal committee are absent. It is recommended that a proper regulatory framework in relation to the national appeal committee be inserted into the UIA, in particular as it is not clear how the national appeals committee is to be appointed / established and how it should be composed.⁸⁰

2.7.3 Recommendations

The nature of the regional and national appeals committees should be revisited when the Bill is debated. In particular, the independence of these institutions should be ensured. The Bill should also create a proper regulatory framework for the functioning of the national appeals committee.

⁷⁷ Olivier, Dupper and Govindjee 2011 *Stell LR* 422.

⁷⁸ See s 36(A)(1) of the UIA.

⁷⁹ See the new s 50(2)(a)(iA) of the UIA.

⁸⁰ Olivier, Dupper and Govindjee 2011 *Stell LR* 419-423.

2.8 *Penalties and offences*

2.8.1 The need to expand on and make the levying of a charge by the Fund, an agent or person purportedly acting on behalf of an applicant for benefits an offence

According to the amendment Bill, section 33 of the UIA is to be amplified by the addition of a subsection prohibiting the fund, an agent or person who purportedly acts on behalf of an applicant for benefits from levying any charge against the applicant. There are two concerns in this regard.

Firstly, the prohibition is narrow in scope, restricting only the levying of a charge in the case of the *processing* of an application for benefits (and not expressly covering other parts of the benefit application process, such as the giving of advice or filling in of forms).

Secondly, and more importantly, the prohibited conduct is not made an offence, resulting in the provisions of section 65 of the UIA not being triggered. Section 65 of the UIA confirms that any person convicted *of an offence in terms of this Act* is liable to a fine or to imprisonment, or to both a fine and imprisonment. Contraventions of the new section 33(3) of the UIA should expressly be listed as an offence on the same basis that persons who contravene, for example, sections 63(1) and 64(1) of the UIA are guilty of an offence. This will then trigger the Act's penalty clause in section 65. Failure to link the prohibited section 33 conduct to an offence and, thereby, to a penalty, is likely to result in the prohibition's remaining completely unenforced and unenforceable.

2.8.2 Recommendations

The scope of the newly inserted prohibition in section 33 of the UIA should be broadened and the prohibited conduct should explicitly be noted as an offence, so that section 65 of the UIA is triggered and the provision is enforceable.

3 Overall conclusions and recommendations

Several changes to the *Unemployment Insurance Act*, to be introduced via the

provisions of the recently published amending Bill, are to be commended. These relate among others to the extended period of benefits (a maximum of 365 days), the increase of the rate of maternity benefits to 66% of a (female) contributor's earnings, the adjustment of the accrual rate of a contributor's duration of benefits from 1 day for every 6 days of employment to 1 day for every 5 days of employment,⁸¹ and some attempt to provide for the retention of contributors in employment and the re-entry of unemployed contributors into the labour market.

And yet, it is evident that there is a need for a thorough revision of the Bill, implying that key changes need to be made to the UIA. Some of the broad areas of revision concern the need to ensure the alignment of the Bill and the UIA to a standardised framework, with specific reference to international and regional standards and constitutional prescripts; and the removal and/or amendment of provisions which are discriminatory, poorly formulated, inconsistent or unaligned with the UICA and the Memorandum on the Objects of the Unemployment Insurance Amendment Bill, 2015, for example. More specifically, there are core matters of substance that require further consideration and revision.

This note, while acknowledging the important contribution made by the Bill to the developing unemployment insurance landscape in South Africa, focuses attention on key areas requiring reconsideration (either because of the manner in which the Bill has dealt with the issue or because of a failure to address an existing lacuna). These areas include:

- the (lack of) alignment of the UIA with ILO, UN and SADC standards, particularly in relation to minimum periods of benefit, persisting issues of coverage and disparate treatment in respect of maternity benefits, the waiting period in respect of access to unemployment benefits, and the unavailability of benefits (in general) in the event of partial unemployment and the suspension or reduction of earnings;

⁸¹ There is, in fact, a discrepancy between the proposed amendment to s 13(3) of the Act (which refers to the accrual of one day's benefit for every five days of employment) and the wording contained in the original explanatory memorandum (which referred to accrual of one day's benefit for every four days of employment).

- issues of coverage and application, including the failure to synchronise the UIA with the UICA, the manner in which public servants and the State / Government as employer are to be included, matters pertaining to migrant workers (in particular their entitlement to claim / receive benefits when they are outside South Africa) and the coverage of the self- and informally employed;
- the (insufficient) mandate for and manner in which the Fund's relationship with the key objectives of employment promotion and preventing / combating / minimising unemployment and re-integration into employment is addressed (including the manner in which section 5 has been drafted and the failure to align the provisions of sections 2, 5 and 10 of the Act);
- matters pertaining to benefit rates and periods, including the need to read sections 12(3)(c) and (d) disjunctively, inconsistent and unclear provisions regarding entitlement to benefits once available "credits" / days of benefits have been used, the application of the four-year cycle and the minister's power to set / amend the Income Replacement Rate (IRR) and to vary the benefit period by regulation;
- maternity benefits, in particular the 13-week qualifying period, the unclear formulation of the proposed section 24(6) of the UIA, the failure to regulate the claiming of maternity benefits in the event of the exhaustion of other UIF benefits and the discrepancy between sections 24(4) and (5) (as amended);
- various matters pertaining to dependants' benefits, especially in respect of definitions, the creation of a claims hierarchy and waiting period and the introduction of a beneficiary nominations process (for the purpose of the receipt of death benefits);
- the lack of an independent appeal institution and the absence of provisions regulating the establishment and functioning of the National Appeals Committee; and

- the need to expand on and make the levying of a charge by the Fund, an agent or person purportedly acting on behalf of an applicant for benefits an offence.

As alluded to above, the manner in which the amendments to the Act have been formulated may, in some instances, cause confusion in respect of the appropriate manner in which the revised Act is to be interpreted. This is problematic for a number of reasons and is likely to result in difficulties in the application of the Fund in years to come if left unaddressed. The discord between the proposed amendments and the Memorandum on the Objects of the *Unemployment Insurance Amendment Bill, 2015* is also noteworthy. The Memorandum appears to have been appended to the Bill as something of an afterthought and fails to provide a proper (or, in some cases, any) explanation for a range of core issues that have been included in the Bill. It is respectfully submitted that the Memorandum requires revision in order that it may properly explain the intention behind some of the proposed amendments and their likely application. Various other recommendations have been advanced in an attempt to address the concerns raised.

BIBLIOGRAPHY

Literature

Govindjee, Olivier and Dupper 2011 *Stell LR*

Govindjee A, Olivier M and Dupper O "Activation in the Context of the Unemployment Insurance System in South Africa" 2011 *Stell LR* 205-227

ILO *Social Security*

International Labour Organisation *Social Security and the Rule of Law* (ILO Geneva 2012)

Nyenti, Olivier and Govindjee "Reforming the South African Social Security Adjudication System"

Nyenti M, Olivier M and Govindjee A "Reforming the South African Social Security Adjudication System: The Role and Impact of International and Regional Standards" in Olivier M, Dupper O and Govindjee A (eds) *The Interaction between International, Regional and National Labour Law and Social Security* (Juta Cape Town 2013) 287-304

Olivier "Unemployment Insurance"

Olivier M "Unemployment Insurance: General Framework" in Joubert WA (ed) *LAWSA* Vol 13 2nd ed (LexisNexis Durban 2013) 3

Olivier, Dupper and Govindjee 2011 *Stell LR*

Olivier M, Dupper O and Govindjee A "Redesigning the South African Unemployment Insurance Fund: Selected Key Policy and Legal Perspectives" 2011 *Stell LR* 396-425

Van Kerken and Olivier "Unemployment Insurance"

Van Kerken E and Olivier M "Unemployment Insurance" in Olivier M, Smit N and Kalula E (eds) *Social Security: A Legal Analysis* (LexisNexis Durban 2003) 415-460

Case law

Amod (born Peer) v Multilateral Motor Vehicle 1999 4 All SA 421 (A)

Kaplan & Katz v Professional and Executive Retirement Fund 1999 3 SA 798 (SCA)

Langemaat v Minister of Safety and Security 1998 ILJ 20 (T)

Van der Merwe v The Southern Life Association Ltd (WC) Unreported Case No

PFA/WE/21/1/98

Legislation

Compensation for Occupational Injuries and Diseases Act 130 of 1993

Constitution of the Republic of South Africa, 1996

Employment Services Act 4 of 2014

Labour Relations Act 66 of 1995

Pension Funds Act 24 of 1956

Social Assistance Act 13 of 2004

Unemployment Insurance Act 30 of 1966

Unemployment Insurance Act 63 of 2001

Unemployment Insurance Amendment Bill (B25-2015)

Unemployment Insurance Contributions Act 4 of 2002

International instruments

CESCR General Comment No 19: The Right to Social Security UN Doc E/C.12/GC/19 (2008)

Code on Social Security in the SADC (2007)

Employment Promotion and Protection against Unemployment Convention 168 (1988)

ILO Maternity Protection Convention 183 (2000)

ILO Recommendation on National Floors of Social Protection 202 (2012)

ILO Social Security (Minimum Standards) Convention 102 (1952)

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

SADC Protocol on Employment and Labour (2014)

UN Convention on the Elimination of All Forms of Discrimination against Women

(1979)

Universal Declaration of Human Rights (1948)

Internet sources

Compensation Fund of South Africa	2012
http://www.labour.gov.za/DOL/documents/annual-reports/compensation-for-occupational-injuries-and-diseases/2012/compensation-fund-annual-report-2012	
Compensation Fund of South Africa 2012 Annual Report	
http://www.labour.gov.za/DOL/documents/annual-reports/compensation-for-occupational-injuries-and-diseases/2012/compensation-fund-annual-report-2012 accessed 31 March 2015	
ILO 2010 http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_123390.pdf	
International Labour Organisation 2010 <i>General Survey Concerning Social Security Instruments in Light of the 2008 Declaration on Social Justice for a Fair Globalization (Report III Part 1B)</i>	
http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_123390.pdf accessed 27 March 2015	
OHCHR 2015 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en	
United Nations Office of the High Commissioner for Human Rights 2015 <i>Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination against Women</i> http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en accessed 27 March 2015	
OHCHR 2015 http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en	
United Nations Office of the High Commissioner for Human Rights 2015 <i>Ratification Status for CESCR - International Covenant on Economic, Social and Cultural Rights</i> http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/	

Treaty.aspx?Treaty=CESCR&Lang=en accessed 27 March 2015

Olivier and Govindjee 2013 <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-fl/documents/UIA%20AMENDMENT%20BILL%20%28Comments%20-%20Institute%20for%20Social%20Law%20and.pdf>

Olivier M and Govindjee A 2013 *Comments on the Unemployment Insurance Bill, B-2013* <http://www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-fl/documents/UIA%20AMENDMENT%20BILL%20%28Comments%20-%20Institute%20for%20Social%20Law%20and.pdf> (accessed on 31 March 2015)

SATUCC 2015 <http://www.satucc.org/sadc-protocol-on-employment-labour>

Southern African Trade Union Co-ordination Council 2015 *SADC Protocol on Employment and Labour* <http://www.satucc.org/sadc-protocol-on-employment-labour> accessed 27 March 2015

LIST OF ABBREVIATIONS

CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CESCR	United Nations Committee of Economic, Social and Cultural Rights
ICESCR	United Nations International Covenant on Economic, Social and Cultural Rights
ILO	International Labour Organisation
IRR	Income replacement rate
LRA	Labour Relations Act 66 of 1995
OHCHR	United Nations Office of the High Commissioner for Human Rights
SADC	Southern African Development Community
SATUCC	Southern African Trade Union Co-ordination Council
Stell LR	Stellenbosch Law Review

UIA	Unemployment Insurance Act
UIF	Unemployment Insurance Fund
UN	United Nations

A CRITIQUE OF THE UNEMPLOYMENT INSURANCE AMENDMENT BILL, 2015

MP Olivier* and A Govindjee**

SUMMARY

The contribution critically reflects on the proposed amendments to the *Unemployment Insurance Act* Act 63 of 2001 (the UIA / the Act), introduced via the provisions of the *Unemployment Insurance Amendment Bill* of 2015 (B25-2015). Several shortcomings and deficiencies are addressed and improvements introduced by the proposed amending legislation, including the extension of coverage to a wider range of beneficiaries, the extension of the period of benefits (to a maximum of 365 days), the increase of the rate of maternity benefits of a (female) contributor's earnings, the adjustment of the accrual rate of a contributor's duration of benefits from 1 day for every 6 days of employment to 1 day for every 5 days of employment, and some attempt to provide for employment retention and the re-entry of unemployed contributors into the labour market.

And yet, despite these important contributions to the development of unemployment insurance in South Africa, several matters appearing from the Bill point towards inconsistent, inadequate and inappropriate treatment of core elements of the unemployment insurance system. Recommendations have been made to address these matters, which among others relate to:

- The insufficient alignment of the UIA with ILO, UN and SADC standards in key areas of concern;

* Marius Olivier. BA LLB (UP) LLD (UNISA). Extraordinary Professor, Faculty of Law, Northwest University (Potchefstroom), South Africa; Adjunct-Professor, Faculty of Law, University of Western Australia (UWA), Perth, Australia. E-mail: olivier@isl-p.org.

** Avinash Govindjee. BA LLB (Rhodes) LLM (*cum laude*) (UPE) LLD (NMMU). Professor of Law, Head of the Department of Public Law and Deputy Head of the Labour and Social Security Law Unit, Nelson Mandela Metropolitan University, South Africa and consulting attorney: Cliffe Dekker Hofmeyr. Email: avinash.govindjee@nmmu.ac.za.

- Unclear or absent provisions in relation to the coverage and/or application of the UIA in relation to public servants, migrant workers, and the self- and informally employed;
- Inadequate provision for employment promotion, the prevention, combating and reduction of unemployment, and reintegration into employment;
- Inappropriate provisions relating to benefit rates and periods, among others concerning the Minister's power to set/amend the Income Replacement Rate and to vary the benefit period by regulation;
- Inconsistent and discriminatory provisions requiring a 13-week qualifying period for accessing maternity benefits;
- Inappropriate provisions regarding dependants' benefits, including the strengthening of the existing claims hierarchy in favour of spouses and life partners at the expense of children;
- The absence of an independent appeal institution; and
- Poorly formulated provisions, with evident discord between the provisions of the Bill and the Memorandum settings out its objectives.

KEYWORDS: dependants' benefits; employment promotion; employment reduction; employment reintegration; independent appeal mechanism; international standards; maternity benefits; regional standards; social security; unemployment benefits; unemployment insurance; *Unemployment Insurance Act*; *Unemployment Insurance Bill* 2015; unemployment insurance coverage; unemployment promotion; unemployment rate.