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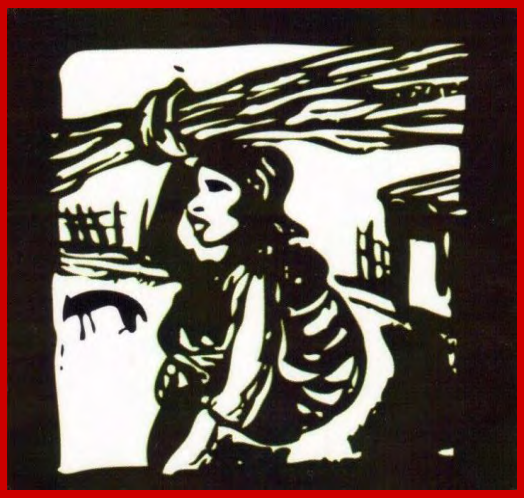

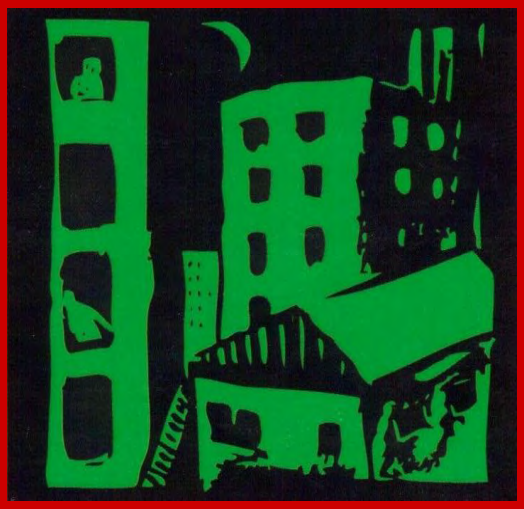

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Mahlangu and Another v Minister of Labour and Others 2021 (2) SA 54 (CC): A missed opportunity for the praxis

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ABSTRACT

The Constitutional Court in Mahlangu and Another v Minister of Labour and Others 2021 (2) SA 54 (CC) ("Mahlangu") *dealt with the constitutionality of section 1(xix)(v) of the Compensation for Occupational*

[*] This research was undertaken during my LLB studies at the University of the Free State. Most of the substantive work informing this article was conducted during that period. I wish to thank Dr Ntando Sindane, Dr Martie Bloem, Dr Nombulelo Shange, Mushibudi Motimele and Khanya Motshabi for their insightful comments during the development of the paper. I am immensely grateful for the mentorship of Dr Sindane and Khanya Motshabi. Any errors in the article remain my own.

MAHLANGU v MINISTER OF LABOUR: A MISSED OPPORTUNITY FOR THE PRAXIS

Injuries and Diseases Act 130 of 1993, which excluded domestic workers from the definition of "employee" and as a result denied them the social security benefits provided under the Act. This case note argues that, notwithstanding this ruling, there are solutions that still need to be explored to enable domestic workers to be fully / sufficiently protected in terms of labour law. In particular, the note demonstrates that the court could have extended its jurisprudence and provided legal certainty about the protection that ought to be afforded to domestic workers who are statutorily excluded. In addition, stricter measures should be taken to ensure that domestic employers comply with their statutory obligations and make certain that their domestic employees receive social security and other benefits under the law. The case note concludes by proposing that legislation be enacted to address problems surrounding the recognition and employment of domestic work within employment law.

Keywords: domestic work; employee; transformative constitutionalism; substantive equality; social security; employment law

1 INTRODUCTION

Scholars and jurists of constitutional law have laboured to demonstrate the importance of definitional clarity in the parlance of the new South Africa underpinned by the values of the Constitution.[1] This new era, known as the era of transformative constitutionalism,[2] has laden the courts with the duty to interpret and (re)define legal concepts in order to bring them into alignment with the norms and aspirations of the Constitution. Indeed, the Constitutional Court was called upon to engage in such an exercise when it had to determine the constitutional validity of section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) in *Mahlangu and Another v Minister of Labour and Others ("Mahlangu")*.[3] Chiefly, it was called upon to decide on the following issues: the constitutionality of the exclusion of

[1] Constitution of the Republic of South Africa, 1996. For a discussion of the meaning of legal concepts in the era of transformative constitutionalism, see Van der Walt A "Legal history, legal culture and transformation in a constitutional democracy" (2006) 12 *Fundamina Journal of Legal History* 1; Sindane N "Why decolonisation and not transformative constitutionalism" (2021) 15 *Pretoria Student Law Review Journal* 236; Langa P "Transformative constitutionalism" (2006) 17 *Stellenbosch Law Review* 351; Madlingozi T "Social justice in a time of neo-apartheid constitutionalism: Critiquing the anti-black economy of recognition, incorporation and distribution" (2017) 1 *Stellenbosch Law Review* 123.

[2] See Klare K "Legal culture and transformative constitutionalism" (1998) 14 *South African Journal on Human Rights* 146 at 150, where he defines transformative constitutionalism as "a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction".

[3] *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC).

domestic workers from the definition of "employee" under the COIDA and any resultant violations of the rights to equality and dignity found in the Constitution.[4]
The argument of this case note will be made in four sections. After this introduction, the second section examines the facts of the case and the court's findings. The third argues that in spite of the breakthrough that the judgment represents for domestic workers, there is still much that needs to be done to give practical effect to the recognition of domestic workers as workers in terms of relevant legislation. The section asserts that a mere declaration of constitutional invalidity does little to set out measures that craft a framework for legislative recognition of domestic workers. The fourth section presents examples of measures that could be considered in this regard. The fifth and final section concludes the case note.

2 FACTS OF THE CASE

Ms Mahlangu was employed as a domestic worker in a private home at the time of her death. On the morning of 31 March 2012, she drowned in her employer's pool in the course of executing her duties.[5] Following Ms Mahlangu's death, her daughter, the first applicant, who was financially dependent on her mother, approached the Department of Labour ("the Department") to enquire about compensation for her mother's death.[6] She was informed that she could receive neither compensation in terms of COIDA for her loss nor unemployment benefits. Dissatisfied with this outcome, the first applicant, together with the South African Domestic Services and Allied Workers Union (SADSAWU), applied to the High Court to have section 1(xix)(v) of COIDA declared unconstitutional to the extent that it excluded domestic workers employed in private households from the definition of an "employee".[7]

2.1 The Constitutional Court's views on the proceedings in the High Court

The High Court granted an order declaring section 1(xix)(v) of COIDA unconstitutional but did not furnish any reasons for making such an order. It merely made its orders based on draft orders prepared by the parties, who had "settled" the issue of the section's unconstitutionality.[8] The failure of the High Court to furnish reasons for making the order it did was met with dissatisfaction by the Constitutional Court.[9] Here, the latter referred to its earlier ruling in *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited,*[10] where Cameron J noted

[4] Sections 9 and 10 of the Constitution.
[5] *Mahlangu* (2021) at para 7.
[6] *Mahlangu* (2021) at para 8.
[7] *Mahlangu* (2021) at para 133.
[8] *Mahlangu* (2021) at para 13.
[9] *Mahlangu* (2021) at paras 13–17.
[10] *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* 2019 JDR 0719 (CC).

> the respect this Court pays to the views of the High Court and for the Supreme Court of Appeal. Our precedents say that this Court functions better when it is assisted by a well-reasoned judgment (or judgments) on the point in issue.[11]

The court raised this concern in line with the fact that judgments of the Constitutional Court cannot be appealed to a higher court, and as such, before any matter can be heard by the court, issues that are to be contested should already have been adjudicated upon by another high court.[12] The Constitutional Court is, therefore, a court of final instance; as such, the views and opinions of other high courts play a significant role in shaping or influencing the jurisprudence of the Constitutional Court.

2.2 Proceedings in the Constitutional Court

The heart of the applicants' claim was that exclusion of domestic workers by the definition of an "employee" under COIDA amounts to unfair discrimination and impairs their fundamental dignity. The applicants argued that because domestic workers are predominantly black women, this means that the discrimination against them constitutes indirect discrimination on the basis of race and gender.[13] Furthermore, the exclusion of domestic workers from COIDA is not rationally connected to the ends sought to be achieved by the Act, which are to afford social insurance to employees who are injured, contract diseases, or die in the course of their employment.[14]

The respondents conceded that the exclusion of domestic workers from COIDA limits their rights under the Constitution.[15] Given the absence of any justifiable purpose for the limitation which would satisfy the requirements of section 36 of the Constitution, the respondents did not oppose the application for an order of invalidity.

It must be noted that this case attracted three judgments: the majority judgment by Victor AJ; the minority judgment by Jafta J; and the concurring judgment by Mhlantla J.

2.2.1 The majority judgment by Victor AJ

The majority judgment held that COIDA "must be interpreted through the prism of the Bill of Rights and effect must be given to the foundational values of equality and dignity".[16] The judgment further stated that to regard COIDA purely as a statutory mechanism for addressing what were formerly common law claims between employer and employees is unjustifiably restrictive.[17] To divorce COIDA from social security because it affords "compensation" misses the wide net of social security that the

[11] *Tiekiedraai* (2019) at para 20.

[12] Section 172(2) of the Constitution empowers the High Court, the Supreme Court of Appeal, or a court of similar status to make an order concerning the constitutional validity of an Act of Parliament, a provincial act, or any conduct of the President.

[13] *Mahlangu* (2021) at para 18.

[14] *Mahlangu* (2021) at para 20.

[15] *Mahlangu* (2021) at para 26.

[16] *Mahlangu* (2021) at para 49.

[17] *Mahlangu* (2021) at para 52.

Constitution provides for and seeks to address. The judgment had regard to the objectives of COIDA and recognised that their purpose is to provide "compensation" to employees in the form of social security.[18] Victor AJ held that COIDA must be read in consonance with section 27(1) of the Constitution.[19] According to the judgment, this approach would advance the objectives of the statute and promote substantive equality.[20]

Related to this line of thinking was the majority judgment's findings on the equality and dignity claims. In dealing with the equality claim, the judgment invoked the rationality test.[21] In *Prinsloo v Van Der Linde*,[22] the Constitutional Court stated that in regard to "mere differentiation", the constitutional state is expected to act in a rational manner. To this effect, the court held that the state should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose.[23] The rationality test is also found in *Harksen v Lane N.O*.[24] However, the judgment had regard only to the first stage of *Harksen test* which relates to rationality.[25] In coming to its ruling, the Constitutional Court held that

> the respondents who are conceding the challenge understandably do not proffer a basis for the differentiation. In these circumstances, the differentiation between domestic workers and other categories of workers is arbitrary and inconsistent with the right to equal protection and benefit of the law under section 9(1).[26]

It is also important to highlight Victor AJ's analysis of the notion of intersectionality and how it serves as an interpretative tool for the courts to use in understanding the social structures that shape the experience of vulnerable and marginalised people. To begin with, the judgment accepted both the applicant and amici's submissions that domestic

[18] *Mahlangu* (2021) at para 52.

[19] *Mahlangu* (2021) at para 66.

[20] *Mahlangu* (2021) at para 88. In *Minister of Finance & Others v Van Heerden* 2004 (6) SA 121 (CC) at para 40, the court stated that "this substantive notion of equality recognizes that besides [the] uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist … it is therefore incumbent on courts to scrutinize in each equality claim the situation of the complainants in society, their history and vulnerability, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context". See also *President of South Africa & Another v Hugo* 1997 (4) SA at para 41.

[21] *Mahlangu* (2021) at para 71.

[22] *Prinsloo v Van Der Linde* 1997 (3) SA 1012 (CC) at para 25.

[23] *Prinsloo* (1997) at para 25.

[24] *Harksen v Lane N.O.* 1998 (1) SA 300 (CC).

[25] *Mahlangu* (2021) at para 71. In this regard, the first stage of the *Harksen* test states: "Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not then there is a violation of section 8(1)." It must be noted that reference to section 8 applies equally to section 9. In *Harksen*, the court was faced with a challenge in respect of the Interim Constitution.

[26] *Mahlangu* (2021) at para 72.

workers are predominantly black women.[27] This means that discrimination against them constitutes indirect discrimination on the grounds of race, sex and gender.[28] It also means that domestic workers experience discrimination on more than one ground: according to Victor AJ, "this therefore anticipates multiple grounds of discrimination simultaneously converging".[29]

In giving meaning to the "intersectional" nature of discrimination, the majority judgment had regard to the scholarly writing of Crenshaw, who has demonstrated how overlapping categories of identity (race, sex and gender) impact on individuals and institutions.[30] According to the judge, "intersectional discrimination in our constitutional jurisprudence means an acknowledgment that discrimination may impact on an individual in a multiplicity of ways based on their position in society and structural dynamics at play".[31] The judge also had regard to the Constitutional Court's jurisprudence reflecting on intersectional discrimination.[32] In *Minister of Finance v Van Heerden*, Moseneke J held that the notion of substantive equality highlights that race, class and gender differences and systemic under-privilege are among the factors that persist in South African society.[33]

In applying this concept to the facts in the case, the majority judgment noted that the idea of convergent forms of discrimination is relevant to the case of domestic workers, especially so "when one considers the fact that domestic work is a precarious category of work that is often undervalued because of patronising and patriarchal attitudes".[34] To demonstrate how these grounds of discrimination intersect in the case of domestic workers, the judge cited scholarly writings which highlight that it has always been the belief that black women suffer multiple axes of discrimination based on their race, gender and class.[35] In particular, "the racial hierarchy established and maintained by the apartheid government placed black women at the lower levels of this social

[27] *Mahlangu* (2021) at para 73.

[28] *Mahlangu* (2021) at para 73. See also section 9(3) of the Constitution, which contains an open-ended list of grounds establishing unfair discrimination. In terms of section 9(5), discrimination based on the grounds listed in section 9(3) is presumptively unfair.

[29] *Mahlangu* (2021) at para 74.

[30] Crenshaw K "Demarginalizing the intersection of race and sex: A black feminist critique of anti-discrimination doctrine, feminist theory, and anti-racist policies" (1989) *University of Chicago Legal Forum* 139; *Mahlangu* at para 85.

[31] *Mahlangu* (2021) at para 76.

[32] The judge made reference to the following cases*: National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) at para 113; *Hassam v Jacobs N.O.* 2009 (5) SA 572 (CC) at para 28; *Minister of Finance* (2004) at para 27.

[33] *Minister of Finance* (2004) at para 27.

[34] *Mahlangu* (2021) at para 90.

[35] Nolde J "South African women under apartheid: Employment rights with particular focus on domestic service and forms of resistance to promote change" (1991) *Third World Legal Studies* 203 at 204.

hierarchy".[36] According to the majority judgment, the marginalisation that domestic workers face can be understood by way of this historical analysis.[37]

In concluding the discussion, Victor AJ held that analysing discrimination through the lens of intersectionality and taking into account multiple axes of indirect discrimination will have an impact on achieving structural systemic transformation.[38] In ruling on the equality challenge, the majority judgment held that the exclusion of domestic workers, and therefore their dependants, from deriving benefits under COIDA limits rights of equality before the law in terms of section 9(1) and the right not to be discriminated against unfairly, a right guaranteed in section 9(3) of the Constitution.[39]

Turning to the dignity challenge, the judgment held that the dignity of domestic workers is impaired by their exclusion from the definition of "employee". The exclusion demonstrates that domestic work is undervalued and not considered as "real work" of the kind performed by workers who do fall within the definition of the impugned section of COIDA.[40] Furthermore, the judgment held that the idea that domestic work is not real work but merely an inherently feminine endeavour is deeply sexist and has a stigmatising effect on the dignity of domestic workers.[41] For these reasons, the majority held that the exclusion of domestic workers from the impugned provision in COIDA was an egregious limitation on their right to be treated with dignity.[42]

2.2.2 The minority judgment by Jafta J

The minority judgment agreed that the impugned provision in COIDA was inconsistent with the Constitution. However, Jafta J differed materially with the reasons that the majority judgment gave in this regard. First, the minority judgment did not find that the socio-economic rights guaranteed in section 27(1) of the Constitution are violated at all. Secondly, in Jafta J's view, it had not been proven that denying domestic workers the COIDA benefits enjoyed by other workers violates their right to dignity. Lastly, since the applicants did not rely on section 9(3) of the Constitution[43] for their unfair discrimination claim, unfairness could not be presumed.[44]

Be that as it may, the judgment held that there is a straightforward path to the outcome reached by the majority, that is, through section 9(1) of the Constitution, which

[36] Wing A & De Carvalho E "Black South African women: Toward equal rights" (1995) 8 *Harvard Human Rights Journal* 57 at 60.
[37] *Mahlangu* (2021) at para 100.
[38] *Mahlangu* (2021) at para 105.
[39] *Mahlangu* (2021) at para 107.
[40] *Mahlangu* (2021) at para 108.
[41] *Mahlangu* (2021) at para 112.
[42] *Mahlangu* (2021) at para 115.
[43] This section sets out the grounds on which discrimination would be presumed unfair. These include sex, gender, race, ethnicity, social origin, and colour.
[44] *Mahlangu* (2021) at paras 135–136.

guarantees everyone equality before the law.[45] In the context of an equality claim, a successful challenge can be raised by proving that the impugned provision has no legitimate governmental purpose;[46] alternatively, it can be shown that the impugned provision discriminates against a category of people on the grounds listed in section 9(3) of the Constitution and that there is no justifiable reason for this.[47]

In relation to the rationality enquiry, of relevance is the ruling in *Law Society of South Africa v Minister of Transport,* where the court stated that the requirement of rationality is restricted to the threshold question of whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise.[48] Accordingly, the minority judgment held that the impugned provision in COIDA serves no governmental purpose, let alone a legitimate one. The provision thus failed on the rationality standard and was therefore inconsistent with section 9(1) of the Constitution.[49]

In regard to the dignity challenge, the minority judgment did not agree that the dignity of domestic workers was violated in any way and that (in regard to the social security challenge) their right to have access to social security was infringed. To unpack these two points, the minority judgment held that the dignity of domestic workers is not reliant on the work they do: dignity attaches to individuals regardless of the work they do because the latter is not a personal attribute of theirs.[50] As regards the social security claim, the minority judgment did not agree that COIDA is legislation contemplated in section 27(2) of the Constitution.[51]

Basing itself on this premise, the judgment held that there is nothing in the language of section 27(2) which indicates that one of the conditions for claiming the right in section 27(1)(c) is that harm has been suffered as a result of bodily injuries sustained by an employee in the course of employment.[52] In other words, a claimant does not have to suffer bodily injury in the course of employment before being entitled to a claim under section 27(1)(c) of the Constitution. Claimants have only to prove that they are unable to support themselves and their dependents in order for appropriate social assistance to be granted. However, that is not the case with a claim under COIDA. Proceeding from this position, the minority judgment held that the COIDA claim for compensation for bodily injuries does not constitute a socio-economic right enshrined in section 27(1) of the Constitution.[53]

[45] *Mahlangu* (2021) at para 138.
[46] Section 9(1) of the Constitution.
[47] Section 9(3) of the Constitution.
[48] *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) at para 35.
[49] *Mahlangu* (2021) at para 159.
[50] *Mahlangu* (2021) at para 165.
[51] Section 27(2) of the Constitution.
[52] *Mahlangu* (2021) at para 171.
[53] *Mahlangu* (2021) at para 181.

2.2.3 The concurring judgment by Mhlantla J

The judgment by Mhlantla J agrees with the majority judgment that the impugned provision is unconstitutional. It also agrees with the reasoning on the equality and unfair-discrimination claims. However, the judgment disagrees with the majority on the social security challenge and instead supports the reasoning of the minority judgment in that regard.[54] What is clear from the language of the judgment is its intention to deal less with the merits of the matter than with a consideration of the nature of domestic work and domestic workers in the post-apartheid context. The judgment recognises that domestic workers are predominantly women and, in particular, black women. Furthermore, it recognises that the discriminatory notion exists that domestic work, with its low wages and poor working conditions, should be performed by black people as a form of slavery, servitude, subordination and oppression.[55] Even in the democratic dispensation, where domestic workers have achieved unionisation as well as statutory protection,[56] the reality on the ground is that some "employers are uninformed about labour laws"[57] while others are "defiantly reluctant to abide by them".[58] The judgment concludes by affirming that *Mahlangu* must go beyond symbolic victory for domestic workers and "cement their rights and place in our society".[59]

I agree with this sentiment; however, I must add that the judgment should not only cement domestic workers' rights in South African society but also make it possible for them to vindicate their rights at the instance of a breach. That should be the practical and not only symbolic victory for domestic workers pioneered by *Mahlangu.* In what follows, this case note demonstrates that there are problems which persist for domestic workers despite the ruling in this case. The argument is that, beyond the ruling on the unconstitutional provision, there is more work to be done in addressing problems which are a thorn in the side for domestic workers. These problems inform what this contribution refers to as "the praxis of a missed opportunity" in *Mahlangu*.

3 THE PRAXIS OF A MISSED OPPORTUNITY

3.1 The Basic Conditions of Employment Act 75 of 1997

Domestic work is now regulated by the Basic Conditions of Employment Act (BCEA). The Act defines a domestic worker as

[54] *Mahlangu* (2021) at para 183.
[55] *Mahlangu* at para 188.
[56] Among the relevant statutes are the Basic Conditions of Employment Act 75 of 1997 (BCEA); Unemployment Insurance Act 63 of 2001; Unemployment Insurance Contributions Act 4 of 2002; and National Minimum Wage Act 9 of 2018.
[57] Fish J "Engendering democracy: Domestic labour and coalition-building in South Africa" (2006) 32 *Journal of Southern African Studies* 107 at 112.
[58] *Mahlangu* (2021) at para 190.
[59] *Mahlangu* (2021) at para 191.

> an employee who performs domestic work in the home of his/her employer and includes a gardener, a person employed by a household as driver of a motor vehicle, a person who takes care of children, the aged, the sick, the frail or the disabled.[60]

The purpose of the Act includes giving effect to and regulating the right to fair labour practices conferred by section 23(1) of the Constitution.[61] Amongst other provisions in the Act, the provisions that protect the rights of employees include the regulation of working time, leave, particulars of employment and remuneration, termination of employment, and the prohibition of employment of children and forced labour.

Be that as it may, domestic workers enjoy limited statutory protection. I make use of the word "limited" for reasons which I will indicate below. Chapter Two of the Act BCEA makes it explicitly clear that the Act does not apply to an employee who works less than 24 hours a month for an employer.[62] The question, then, is: What happens to a case of a domestic worker who works for more than one employer and whose combined hours of work exceed 24 hours? Even if it is the case that a domestic worker works less than 24 hours a month for a particular employer, this does not imply that he or she does not need the statutory protection afforded to domestic workers who work more than 24 hours, as stipulated by the Act.[63]

To mitigate this exclusion, the Minister of Labour made a sectoral determination in 2002 in line with section 51(1) of the Act.[64] Sectoral Determination 7 did little to address the exclusion of domestic workers employed for less than 24 hours. Clause 1(3) of the sectoral determination provides that only clauses 2 and 3 (setting the minimum wages) apply to domestic workers who work less than 24 hours per month for an employer.[65] In other words, the working pay due to domestic workers employed for less than 24 hours a month must be commensurate with the minimum wage. However, such workers are on their own in as far particulars of employment, hours of work, leave, and termination of employment are concerned. In stark contrast, domestic workers who work more than 24 hours a month for an employer are protected in such situations.

This is an untenable and problematic state of affairs, especially in the light of the fact that the definition of a domestic worker does not state that there are specific types of domestic workers who need statutory protection and others who do not. This exclusion of domestic workers employed for less than 24 hours is both a conceptual and practical problem that has to be addressed.

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[60] Section 1 of the BCEA.

[61] Section 2(a) of the BCEA.

[62] Chapter Two of the BCEA regulates working time. This structure is maintained throughout the Act; see further; Chapter Three which regulates leave, Chapter Four which regulates particulars of employment and remuneration, Chapter Five which regulates termination of employment.

[63] Sections 6, , 19, 28(1), 36 of the BCEA.

[64] Section 51(1) of the BCEA.

[65] Sectoral Determination 7: Domestic Worker Sector. Clause 1(3). Regulation Gazette No. 7434. Vol. 446.

The purpose of the BCEA is to advance economic development and social justice by establishing and enforcing basic conditions of employment and giving effect to obligations incurred by the Republic of South Africa as member state to the International Labour Organization (ILO).[66] According to the ILO, part of what lends to the vulnerability and precarious situation of domestic work is the private and informal nature of the job.[67] The ILO reports that domestic work is still largely undervalued and even if it is paid, the work remains poorly regulated.[68]

Cock's observation that the same is true in South Africa remains valid.[69] She laments that domestic workers' experiences typify ultra-exploitation, arguing that they are both a microcosm of the patterns of inequality in South Africa and a significant contributor to them.[70] These patterns of inequality leave domestic workers who work less than 24 hours a month for an employer unprotected and vulnerable to all manner of abuse and manipulation.[71] Since employers are not obligated to enter into any employment contract with such workers, anything goes. Domestic workers are prone to abuse of power by their employers including being severely exploited, undertaking forced labour, and, in some instances, being subject to unlawful termination of employment.[72]

3.2 The Unemployment Insurance Act 63 of 2001 and the Unemployment Insurance Contributions Act 4 of 2002

The Unemployment Insurance Act plays a major role in the context of social security for domestic workers.[73] The purpose of the Act is 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 alleviate the harmful economic and social effects of unemployment.[74]

In terms of section 12(1) of the Act, employees can claim benefits – including unemployment benefits, illness benefits and maternity benefits – which assist them in mitigating the effects of unemployment.[75] What is of significance for this case note is section 3(1) of the Act, which deals with the concept of a "contributor" and excludes employees working for less than 24 hours a month with a particular employer.[76] The

[66] Section 2 of the BCEA.
[67] International Labour Organization (ILO) *Report IV(1): Decent work for domestic workers* Geneva: ILO (2010).
[68] ILO (2010).
[69] Cock J *Maids and madams: A study in the politics of exploitation* Ravan Press (1980) at 307.
[70] Cock (1980) at 307.
[71] Fish (2006) at 117.
[72] *Mahlangu* (2021) at para 195.
[73] Unemployment Insurance Act.
[74] Section 2 of the Unemployment Insurance Act.
[75] Section 12(1) of the Unemployment Insurance Act.
[76] Section 3(1)(a) of the Unemployment Insurance Act.

consequence thereof is that domestic workers specifically employed for less than 24 hours for a particular employer are not recognised as "contributors" for the purpose if this Act and cannot claim any benefit under the Act. This group of domestic workers find themselves without any statutory protection in respect of unemployment benefits. A similar statutory exclusion is also found in the Unemployment Insurance Contributions Act 4 of 2002.[77]

The implications of the exclusions are that if domestic workers like these become unemployed, they, together with their beneficiaries, will not be entitled to unemployment benefits, illness benefits or dependants' benefits. The result is that the harmful social and economic effects of unemployment go unremedied in the case of such domestic workers despite their having been employed previously as domestic workers. Mhlantla J, writing a concurring judgment in *Mahlangu*, posits that "domestic work is mostly an informal type of employment due to its private nature as well as the manner in which the work is carried out".[78] What could be the nature of employment for a certain domestic worker might not necessarily be the same for another domestic worker even though they are employed for the same number of hours. The same can be said in instances where a domestic worker is employed for 20 hours per month for one employer and for another 15 hours per month with another employer. Therefore, to exclude certain domestic workers from the reach of the Unemployment Insurance Act for any reason is a miscarriage of justice.

3.3 Compliance measures

To ensure better working conditions for domestic workers, what is necessary in addition to an order of constitutional invalidity made in *Mahlangu*, is the need to explore an effective compliance system in respect of domestic work.. Strict compliance measures with the BCEA must be given effect to in order to ensure full and equal protection under the Act. This is significant in the context of domestic workers, whose reality is that some employers are "defiantly reluctant" to follow the law in their households while others are intentionally or otherwise uninformed about labour laws.[79] Similarly, some domestic workers are themselves uninformed about the benefits they are entitled to under the country's employment and social security legislation.

To ameliorate this situation, South African employment law makes use of labour inspectors to ensure compliance with the law.[80] Their functions include advising employees and employers about their rights and obligations under employment law, as well as investigating complaints made to them.[81] However, a serious concern is that the

[77] Section 4(1) of the Unemployment Insurance Contributions Act.

[78] *Mahlangu* (2021) at para 184.

[79] *Mahlangu* (2021) at para 190.

[80] Kubjana L "The legal protection of domestic workers in South Africa: A square peg it is (into a round hole)" (2016) 17 *Obiter* 549 at 560.

[81] Section 64(1)(a)(d) of the BCEA.

intervention of labour inspectors is dependent on a prior complaint and thus not suitable for those who know little about the relevant laws. Such workers are unlikely to report the conduct of their employers if they are unaware that certain acts are outlawed, or to seek help from the relevant bodies available to assist them in vindicating their rights.[82]

In this regard, it is still unclear how compliance orders should be given effect to in the context of domestic workers. Given the nature of the sector, this case note cannot rule out the possibility that there may be some domestic employees who are not aware of the ruling in *Mahlangu.* Such workers are unaware that they can now claim compensation for injuries and diseases that occurred in the course of their employment. The same goes for unemployment insurance in the case of employees who are covered by the Unemployment Insurance Act.

3.4 Practical measures by the government to give effect to *Mahlangu*

In the time since the judgment was handed down in 2020, the Department of Employment and Labour has taken various measures to give effect to the order. Two interventions deserve mention. An initial step by the Department was an effort to increase public awareness on the significance of the inclusion of domestic workers in terms of COIDA.[83] The Compensation Commissioner's first point of call was to communicate this development in a notice in the Government Gazette of 10 March 2021.[84]

The notice set out the process for registration and the parameters for claiming compensation from the Compensation Fund. However, according to James et al., the notice neglected to "provide more constructive procedural information for assistance to domestic employers to enable them to register their domestic workers effectively and efficiently".[85] In other words, insufficient information is provided to employers about how to navigate the online registration process. This is problematic, given that some domestic employers refuse to comply with the relevant legislation while others are not fully aware of changes in regulations. It is submitted that the complexity of the registration process adds another hurdle, with the result that employers who are willing to take the effort to register their employees might end up giving up due to these difficulties.

According to COIDA, as amended, a claim must be made within a one year after the injury or death occurred to the employee.[86] Because this timeframe is restrictive and

[82] Kubjana (2016) at 560.

[83] James et al. "Domestic workers in South Africa: Inclusion under the Compensation for Occupational Injuries and Diseases Act" (2023) 96 *The Thinker* 13 at 19.

[84] James et al. (2023) at 19. See also Regulation 106 in *GG* 44250 of 10 March 2021.

[85] James et al. (2023) at 19.

[86] Section 44 of COIDA.

can exclude a number of domestic employees,[87] the second intervention by the legislature has been to extend the timeframe. According to section 24 of the Compensation for Injuries and Diseases Amendment Act, the prescription period is extended to three years.[88] This period in which to report a workplace accident applies to both retrospective and new claims.[89] It must be noted that before domestic workers can claim compensation in terms of COIDA, their employers should first register with the Compensation Fund's new integrated online claims management system (CompEasy). This intervention is a step in the right direction. It will allow domestic employers who are not yet familiar with the CompEasy system a grace period in which to figure out their way around the registration process without prejudicing domestic workers.

4 POTENTIAL LEGISLATIVE REFORM OR ENACTMENT

South African labour and social security law must be revised to better solidify the rights of domestic workers. To do this, legislation that regulates domestic work sector must be drafted in such a way that it does not exclude domestic workers employed for less than 24 hours for a particular employer. As indicated earlier, those are likely to be employees who work for more than one employer and whose working hours are less than 24 hours per month in respect of that specific employer. On closer examination, these would be domestic employees whose combined hours of work for an employer exceed 24 hours and, thus, conceptually make them eligible for protection under the BCEA. The Act must therefore be drafted to take account of these type of scenarios and extend statutory protection to those domestic workers as well. A blanket exclusion of domestic workers who work less than 24 hours for an employer exacerbates the injustice and prejudice that currently takes place against domestic workers.

Similarly, the Unemployment Insurance Act must also be revised in order to reflect the same stance as suggested above in respect of the BCEA. One last issue is compliance measures. The current law as regards domestic work lacks firm compliance measures. To illustrate this point, the failure by an employer to register their employee(s) with the Compensation Fund is considered an offence. However, James et al. point out that "the enforcement of this provision has not gained much traction, particularly in the domestic work sector as many domestic workers are still without written contracts".[90]

It is clear that compliance with the law on the part of domestic employers is an issue. Not only should COIDA prescribe fines for non-compliance but there must also be inspectors who check up regularly on every household that employs a domestic. Ensuring that domestic workers are able to exercise their statutory rights effectively

[87] James et al. (2023) at 20.

[88] Section 24 of Compensation for Injuries and Diseases Act Amendment Act 10 of 2022.

[89] James et al. (2023) at 20.

[90] James et al. (2023) at 21.

and are afforded an avenue by which to vindicate them is central to South Africa's transformative constitutional project.[91]

5 CONCLUDING REMARKS

This case note should not be understood to be implying that the *Mahlangu* judgment made no material difference in the domestic work sector. In fact, the majority judgment is a symbol of hope and assurance that the transformation project is being given effect to and used to improve the conditions of the vulnerable and the underprivileged in South African society.

However, the state should strive to emancipate domestic workers fully and improve their working conditions irrespective of how private and secluded the nature of their employment is. Domestic employers must know that they do not do any favour to domestic employees by complying with the law: they must accept that it is a statutory obligation placed upon them by virtue of entering into an employment contract with a domestic worker and benefiting from his or her service. Similarly, domestic workers must be aware that the services they render are deserving of legal protection. they do not carry their services at anyone's mercy. The relationship between an employer and an employee in terms of domestic work is a two-way street: as much as employees benefit from their work in terms of the income they receive, their employers also get a different but equally significant benefit from their service.

The rights of domestic workers must be cemented in society, but, importantly, domestic workers must see and believe that the state is regulating fair working conditions for them. The amendments made to COIDA as a result of the ruling in *Mahlangu* do try to accommodate domestic workers; however, as noted earlier, issues regarding registration on the CompEasy system and navigating it may pose some difficulties. This might require a concerted effort by both the state as well as the relevant stakeholders, including domestic employers and labour unions, to ensure the practical operationalisation of labour and social security laws in regard to the domestic work sector.

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