

LIST OF ABBREVIATIONS

AC	Appeal Court
ACTRAV	International Labour Organisation Bureau for Workers' Activities
All ER	All England Reports
APRM	African Peer Review Mechanism
BCEA	Basic Conditions of Employment Act
BCLR	Butterworth Constitutional Law Reports
BLLR	Butterworths Labour Law Reports
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CCSD	Canadian Council on Social Development
CFA	Committee on Freedom of Association of the ILO
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
COSATU	Congress of South African Trade Unions
CODESA	Convention for a Democratic South Africa
COIDA	Compensation for Occupational Injuries and Diseases Act
COMESA	Common Market for Eastern and Southern Africa
DPRU	Development Policy Research Unit
EAT	Employment Appeal Tribunal
EEC	Economic Council of Canada
ELS	Employment and Labour Sector

EU	European Union
FAWU	Food and Allied Workers Union
FDI	foreign direct investment
FEDUSA	Federation of Unions of South Africa
FOSATU	Federation of South African Trade Unions
IC	Industrial Court
ICA	Industrial Conciliation Act
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICLS	International Conference of Labour Statisticians
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IMF	International Monetary Fund
IRLR	Industrial Relations Law Report
IFI	International Financial Institutions
ITR	Industrial Tribunal Reports
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
LRAA	Labour Relations Amendment Act
MLR	Modern Law Review
NEDLAC	National Economic Development and Labour Council
NEPAD	New Partnership for Africa's Development
OECD	Organisation for Economic Co-operation and Development

OHSA	Occupational Health and Safety Act
OTM	Organisation of Mozambican Workers
QLFS	Quarterly Labour Force Survey
SACU	Southern African Customs Union
SADC	Southern African Development Community
SAJHR	South Africa Journal of Human Rights
SANDU	South African National Defence Union
SAP(s)	Structural adjustment programmes
SAYIL	South African Yearbook of International Law
SDA	Skills Development Act
SEWU	Self-Employed Women's Union
SLASA	Strengthening and Labour Administration in Southern Africa
STEP	Strategies and Tools against Social Exclusion and Poverty

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 Introduction and background to the study

Non-standard employment is not necessarily novel or unique to the current era. It has existed since the inception of paid employment as a primary source of sustenance.¹ Nevertheless, the growth and increasing prominence of non-standard work since the 1970s has revealed an important concern.

It is important to distinguish briefly between the concept of an 'employee' and the concept of a 'worker', as used in this study. While the concepts are closely related, they occur separately in the labour market. In this study, the term 'employees' refers to workers who enjoy protection from job-related hazards, have adequate and stable earnings, have social protection, and enjoy the right to organise and to bargain collectively (standard employment). The term 'workers', however, refers to those workers who are engaged in a contractual employment relationship, but do not have social security benefits, job training, or protection from job-related hazards, and who are unable to exercise their basic rights at work (non-standard forms of employment). Examples include part-time workers, fixed-term workers and those managed by temporary employment services (or labour brokers). As has been stated by Krahn, 'employment insecurity is an essential aspect of the definition of non-standard work'.² These concepts will be further explored in detail in Chapter 2 of this study.

However, it is crucial to note that the difficult relationship between the various categories of standard and non-standard work has led some researchers to contend that 'a deeper understanding of the phenomenon is needed'.³ In a study for the Canadian Policy Research Networks (CPRN), some authors suggested 'that a simple distinction between standard and non-standard work does not adequately capture the

¹ Classical social thinkers such as Marx, Weber, and Durkheim sought to explain the consequences of the precariousness created by the rapid social change associated with the emergence of the market economy in the nineteenth century. See also Webster *et al* *Grounding Globalization: Labour in the Age of Insecurity* 2–3.

² Krahn *Non-standard Work Arrangements: Perspectives on Labour and Income* 35–45.

³ Townson *Women in Non-standard Jobs: The Public Policy Challenge* 2.

growing diversity of non-standard employment relationships that has emerged over the last two decades.⁴

For instance, as stated by these authors, the differences between indefinite and temporary employment is blurred, given the range of contracts, such as temporary, casual and seasonal employment, present today.⁵ In particular, more accurate definitions and actions to address the concerns of these workers are required. Without research, 'it will be difficult to formulate clear policy directions to address the needs of temporary workers and to respond effectively to the labour market implications of the growing temporary help industry.'⁶

Briefly, in the 1980s, researchers began to highlight the growth of non-standard employment in many industrialised countries.⁷ For instance, the European Commission drafted legislative proposals on temporary employment in 1982 which dealt with contract workers and those employed through agencies dealing with temporary employment.⁸ In 1987 the Organisation for Economic Cooperation and Development (OECD) began to refer to the phenomenon of non-standard employees in its regular publication *Employment Outlook*.⁹ The International Labour Organisation (ILO), also in 1987, documented the growth of this type of employment in industrialised countries.¹⁰ In 1990, the Economic Council of Canada (ECC) drew attention to the contrast between 'good jobs and bad jobs' in a landmark report.¹¹

From the mid-1980s, free trade and the expansion of global markets became key economic issues. The Free Trade Agreement between Canada and the United States came into effect at the beginning of 1989 and led to significant changes in the Canadian economy and labour markets.¹² With these developments many analysts attributed the expansion of non-standard employment to economic change and an

⁴ Lowe *et al* *Re-thinking Employment Relationships* 11.

⁵ *Ibid.*

⁶ Lowe *et al* *What's a Good Job? The Importance of Employment Relationships* 12.

⁷ Organisation for Economic Co-operation and Development (OECD), 1987, *OECD Leading indicators and Business Cycles, 1960–1985, Main Economic indicators Sources and Methods* No. 39, Paris.

⁸ Schellenberg & Christopher *Temporary Employment in Canada: Profiles, Patterns and Policy Considerations* 2.

⁹ OECD *Employment Outlook* (1987).

¹⁰ 'The Rise of Non-standard Employment in Selected Associations of Southeast Asian Nations (ASEAN)' www.fes.de/cgi-bin/gbv?id=10792&ty=pdf (Date of use: 14 August 2015).

¹¹ Economic Council of Canada (1990), *Good Jobs, Bad Jobs: Employment in the Service Economy*. Ottawa: Ministry of Supply and Services.

¹² Campbell 1991 *Economic Journal* 157–179.

increased demand for workforce flexibility. For example, a study by the Canadian Council on Social Development (CCSD)¹³ concluded that the use of new forms of employment was one of many strategies used by business to achieve 'flexibility' and survive in the new economic environment. According to these authors, the globalisation of trade, the introduction of new technologies, the volatility of international markets, and rapidly changing consumer demand all placed new competitive pressures on firms operating in Canada and abroad.¹⁴ Labour markets were changing in response to globalisation and rapid change.

Other researchers have also highlighted the shift to contingent work as a response to economic restructuring¹⁵ and changing needs. Economists¹⁶ believe that alternative work-time arrangements are increasingly being adopted to provide the flexibility needed by employers. Gunderson and Riddell also note that contingent or non-standard employment has come to the fore in various forms, including sub-contracts, limited-term contracts, temporary-help through agencies, and part-time employment.¹⁷ Multiple employment, temporary employment, part-time employment, and own-account self-employment have increased considerably since the mid-1970s.

In an insightful contribution to the immense literature on the changing nature of employment, Thompson states that 'the standard model of employment is now one of inherent variability. Work has changed and is changing for better or for worse.'¹⁸

In a summary of research on the changing nature of work in Southern Africa, Webster submits that economic liberalisation has increased competitive pressures resulting in 'three different "worlds of work" for the individual worker. These are workers who have benefited from global integration; workers who continue to survive in employment but

¹³ Schellenberg & Christopher *Temporary Employment in Canada: Profiles, Patterns and Policy Considerations*162.

¹⁴ Vosko (1997) 19 *Comparative Labour Law and Policy Journal* 43–77; Schellenberg & Christopher *Temporary Employment in Canada: Profiles, Patterns and Policy Considerations*; Fudge *et al The Legal Concept of Employment: Marginalizing Workers*162.

¹⁵ Clawson & Clawson *Contingent Employment, Workforce Health, and Citizenship*; Kalleberg, Reskin & Hudson *Bad jobs in America: Standard and Nonstandard Employment Relations and job Quality in the United States. American Sociological Review*; Appelbaum, Bernhardt & Murnane *Low-Wage America: How Employers Are Reshaping Opportunity in the Workplace*; Wright & Dwyer *Methodological Appendices to 'The Patterns of job Expansion in the United States: A Comparison of the 1960s and 1990s'*.

¹⁶ Gunderson & Riddell 'The changing nature of work: Implications for public policy' in Riddell & St-Hilaire (eds) *Adapting Public Policy to a Labour Market in Transition*.

¹⁷ *Ibid.*

¹⁸ Thompson 2003 *ILJ (SA)* 1793.

under worse conditions; and workers who “make a living” in informal and unpaid work.’¹⁹

Non-standard employment has far-reaching consequences that cut across many areas of concern to labour lawyers and sociologists. In the words of Kalleberg, ‘creating insecurity for many people, it has pervasive consequences not only for the nature of work, workplaces, and people’s work experiences, but also for individual, social, and political outcomes.’²⁰ It is therefore important to regulate non-standard employment and protect workers in these new workplace arrangements that generate insecurity. It is against this background that this study examines the regulation of workers in non-standard employment in the Southern African with particular focus on South Africa.

1.2 Research problem and the subject matter of the study

The research in this study highlights the regulation of non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries.

Globally, labour laws are fashioned to regulate the indefinite employment or standard employment relationships in the industrial period.²¹ Traditionally, this refers to the period after the Industrial Revolution (1762). We are currently in the Information Age, and the world of work is changing.²² One of the most important changes relates to the form that employment takes.²³ Indefinite or ‘permanent’ employment is no longer the only form of employment.²⁴ In fact, there is a global shift toward flexible employment relationships.²⁵ Atypical work or non-standard work does not involve full-time work, and may involve an employee working for more than one employer.²⁶

The traditional form of work generally refers to the typical, standard, or conventional employment regime, which offers the employee good benefits. Non-standard or atypical workers, on the other hand, are usually very vulnerable as they are generally

¹⁹ Webster (2005) 26(1) *International Political Review* 55–71.

²⁰ Kalleberg (1995) 52(3) *Washington & Lee Law Rev* 771–798.

²¹ Dicks (2007) 11 *Law, Democracy & Development* 39.

²² *Ibid.*

²³ Supiot *et al Beyond Employment: Changes in Work and the Future of Labour Law in Europe* 1.

²⁴ *Ibid.*

²⁵ Theron (2007) 11 *Law, Democracy & Development* 25.

²⁶ Olivier (1998) 19 *ILJ (SA)* 669.

unskilled and work in sectors with little or no union representation.²⁷ Southern African countries' labour laws, as in other countries, are largely aimed at regulating standard employment relationships.

Nevertheless, there are different forms of employment in practice, including fixed-term workers, temporary workers, home workers, casual workers, sub-contracted labourers, independent contractors, and so forth. Some of these workers are excluded from the definition of an 'employee', which is decisive in determining whether a worker is entitled to the protection and benefits accorded by labour law. Furthermore, there are some workers who, while included within the definition, are not fully or equally protected as workers in the standard employment relationship.²⁸

The regulation of workers doing non-standard work is regarded as critical to addressing the challenges facing non-standard and vulnerable workers who make their living through informal work and sub-contracted labour. These workers are poorly paid and employed in unstable jobs that more often than not fall outside the scope of collective bargaining and labour protection. The growing 'informalisation' of the last 30 years has been a change for the worse that has produced a growing proportion of workers who survive without regular benefits or employment protection.²⁹

The proliferation of new work arrangements and heightened global competition has exposed a world-wide crisis in the regulation of workers in non-standard work arrangements. It is therefore timely to re-assess the concept of labour law and, in particular, its boundaries: Who qualifies as an 'employee' and who does not? Who is an 'employer' and who is not? The answers to these questions, after all, dictates who will – for better or worse – fall within the protective scope of labour law.

For Davidov and Langille, labour law has always been preoccupied with boundaries. They state: 'the first question to be asked when seeking to resolve any labour law issue is whether the parties are indeed "employees" and "employers" within the meaning of the applicable labour statute and/or the common law. If they are not, labour

²⁷ Department of Labour: New Employment Standard Green Paper (13 February 1996). See <http://www.info.gov.za/greenpapers/1996/labour.htm> (Date of use: 1 September 2015).

²⁸ Ibid.

²⁹ For general accounts of informalisation, see Standing *Global Labour Flexibility: Seeking Distributive Justice* and Fudge 'The legal boundaries of the employer, precarious workers, labour protection' in Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law*.

legislation will not apply to them.³⁰ But such divisions have always been problematic, and in recent years they have become even more pronounced.³¹

The metamorphosis of work has, according to Benjamin, polarised employment relationships. The dwellers in the world of work range from the knowledge workers of the 'new economy', to the vulnerable workers who make their living through informal work and by sub-contracting their labour.³²

Benjamin is of the view that in qualifying types of relationships, terms such as 'atypical' or 'non-standard' no longer carries the descriptive power they did some 20 or 30 years ago, when they were first used to identify an emerging trend in developed economies.³³ Precarity has become the norm, and in much of the developed world it is the dominant form of employment. Everywhere, labour law touches fewer lives than it once did. In other words, as Smit observes, 'casualisation and externalisation has left many workers outside the scope of protection offered by labour legislation.'³⁴

Under these conditions, the International Labour Organisation's Employment Relationship Recommendation (ILO-ER)³⁵ seeks to ensure that the scope of application of labour legislation is appropriate, and in so doing seeks to provide for the protection of employees – in particular, vulnerable workers in non-standard employment relationships. The ILO-ER proposes that countries should adopt a policy to clarify and, if necessary, to adapt the scope of labour legislation in order to ensure the effective protection of workers 'who perform work in the context of an employment relationship'.³⁶

³⁰ Davidov & Langille *Boundaries and Frontiers of Labour Law* 1.

³¹ Section 185 of the LRA states that every employee has the right not to be unfairly dismissed or subjected to unfair labour practices. The courts have developed numerous tests to determine whether an individual is an 'employee' or not (control test, organisation test, multiple or dominant impression test and reality test that are more in accord with global trends and the South African Constitutional framework). On the one hand the 'dominant impression test' requires the courts to take into account all relevant factors before making a decision. On the other hand, the 'reality test' requires the courts to determine the existence of any employment relationship by using a narrower criterion. See *Denel (Pty) Ltd v Gerber* (2005) 26 ILJ 1256 (LAC) 1293 and *State Information Technology Agency (Pty) v CCMA & others* (2008) 29 ILJ 1293 with regard to the 'reality test'.

³² Benjamin *Subordination, Parasubordination and Self-employment: A Comparative Study of Selected African Countries* 1.

³³ *Ibid.*

³⁴ Smit 2009 TSAR 516.

³⁵ ILO Employment Relationship Recommendation 198 of 2006.

³⁶ *Ibid.*

1.3 Aims, objectives and importance of the study

The aim of this study is to interrogate the regulation of workers in non-standard employment and their protection under regional laws, the laws of individual states, the International Labour Organisation (ILO), and in jurisprudence.

As the review of literature shows, there is a need for further research into labour law and labour market developments in both individual Southern African member states and on a regional basis. More work is needed both to understand the interaction between socio-economic, cultural and political factors and labour law, and to understand how labour law and labour institutions in the region can be improved in order to afford greater protection to workers, especially those in non-standard employment.

The regulation of non-standard employment in the Southern African working environment necessitates research, considering its importance and the place that workers in non-standard employment occupy in the region with regard to economic development. There are many unregulated workers who find themselves in non-standard work arrangements in the region. They include those who are managed by temporary employment services – generally known as labour brokers – fixed-term workers, and part-time workers, to mention but a few.

Furthermore, in the words of Kalleberg, ‘non-standard or precarious work is the dominant feature of social relations between employers and workers in the contemporary world.’³⁷ Studying non-standard work is essential because it leads to significant work-related consequences (e.g job insecurity, economic insecurity, inequality) and non-work-related consequences (e.g it negatively affects individuals who don’t have secure jobs and their families, and the community at large.³⁸ By investigating the changing nature of employment relations, we can frame and address a very large range of social problems: gender and race disparities; civil rights and economic injustice; family insecurity and work–family imbalances; identity politics; immigration and migration; political polarisation; and so on.

³⁷ Kalleberg (2009) 74 *American Sociology Review* 1–22.

³⁸ *Ibid.*

The *Economist*³⁹ has asked the question: 'Does it matter where you are?' In the real world, geography counts a great deal and it does matter where one is, especially if one happens to be at the southern most tip of Africa. The question therefore arises as to whether Southern Africa is capable of meeting the challenges of globalisation, which has led to a proliferation of workers in non-standard employment, by regulating them, or whether this will be another issue that is used as an excuse to blame the world for one's own misery.⁴⁰ The issue of globalisation can indeed be seen either as a threat or as a challenge to Southern Africa. The purpose of this study is, therefore, to explore the regulation of non-standard employment in the region and investigate to what extent the safety net has been extended to these vulnerable workers by individual states within the region.

Considering the aims as summarised above, this study is significant from both theoretical and practical viewpoints. Its theoretical significance stems from its potential contribution to the evolution of knowledge on the regulation of workers in non-standard employment in the region, about which not much has been written.

From a practical viewpoint, the study will assist in understanding the narrative of the regulation of workers in non-standard employment, which is closely aligned with the fight against exploitation, poverty, inequality, and unemployment, and the creation of 'decent work' within the Southern Africa.

This research is important because, in the region, due to globalisation and informalisation, a number of different categories of workers have emerged. These workers do not clearly fall within the protective ambit of labour law, which is mainly designed for standard workers. At this juncture, the author is of the view – which will be further examined in the thesis – that workers in non-standard employment are increasing both in kind and in number in the Southern African region. The study will identify the challenges that non-standard workers face and will propose possible solutions to improve their conditions. The scarcity of legal research on this issue adds relevance to the research.

³⁹ *The Economist* (1994) 'Does it matter where you are?' 13–14.

⁴⁰ Jordaan (2001) 18 *Development Quarterly Journal* 79–92.

This study also aims to improve the plight of the individual worker in Southern Africa. Employees, job seekers and employers will learn about their rights and duties concerning non-standard employment if it is regulated. This will also reduce the levels of exploitation experienced, especially by unskilled, non-standard workers, and will improve the standard of living of their families. Non-standard work often exposes workers to unacceptable working conditions and possible exploitation.⁴¹ Southern Africa has very high levels of poverty and income inequality, and the majority of Southern Africans receive very low salaries.⁴²

There is an urgent need for legislation to regulate workers in non-standard employment. The courts and labour inspectors all have a role to play in promoting law in the Southern African region. In addition, workers in non-standard employment must find a place in the various labour relations systems in Southern African states, most of which have not defined the concept in their labour relations systems. For example, it is noteworthy that a worker in non-standard employment is not defined in the South African Labour Relations Act (LRA),⁴³ or in its 2014 amendments. Other labour legislation, too, such as the Basic Conditions of Employment Act (BCEA), is silent.⁴⁴ The only mention of the term is found in the heading to Chapter 9 of the LRA, and in sections 21(8)(b)(v) and 32(5A). The former relates to whether a trade union is sufficiently representative for the purpose of exercising organisational rights, while the latter relates to whether a bargaining council is sufficiently representative.

1.4 Limitations and research problems of the study

Like any research, this study is subject to limitations. First, the subject matter is very broad and so not every aspect could be addressed in detail. With regard to questions of theory, it is clear that labour law scholars and judges hardly speak the same language. This can create an incorrect impression for emerging scholars in the field.

Second, one of the most apparent limitations in this study is the application of an inclusive approach with reference to several other SADC countries. One should be wary of examining foreign legal systems without regard to the contexts within which

⁴¹ 'Non-standard' employment relationships are often associated with withholding rights and benefits, especially those of unskilled workers.

⁴² ILO *National Economic Development & Labour Council (NEDLAC) Republic of South Africa Decent Work Programme* (2010–2014) 27.

⁴³ Labour Relations Act 66 of 1995 (LRA).

⁴⁴ Basic Conditions of Employment Act 75 of 1997 (BCEA).

they operate. Different legislation might have different underlying policies and objectives, and national socio-economic circumstances might differ. South Africa and several SADC countries will be investigated in this study. While these countries have different levels of economic development and growth, they nonetheless face many of the same challenges resulting from the rise of advanced technology. They also have similar historical legacies of colonial rule and, consequently, are subject to labour law systems that originated in Western countries.

Third, data on non-standard work are scarce and notoriously difficult to come by. One reason for this is that non-standard employment is not a precise concept and has no generally accepted definition. In particular, most Southern African states lack data or literature dealing with non-standard workers. In this regard, South Africa is the exception and has an abundance of literature, as will emerge from the literature review.

Fourth, accurate statistics regarding matters such as the extent of union membership,⁴⁵ the coverage of centralised collective agreements, and the number of informal and other forms of non-standard employment are scarce.⁴⁶

A fifth limitation is that scholarship addressing the evolution of labour law and its interaction with the labour markets in Southern Africa is limited in most countries, other than South Africa.

Furthermore, while increasing attention is being paid to comparative labour law, to date scholarship has been confined principally to Western industrialised democracies, East Asia, and Latin America. Reliable labour market data on the SADC region is similarly limited and often contradictory. Given this paucity of reliable and uniform data in the different countries, those Southern African countries for which data and studies exist are more frequently referenced.

While it is accepted that labour law has a strong impact on socio-economic conditions in general, and would normally require an inter-disciplinary approach,⁴⁷ the limitations

⁴⁵ Republic of South Africa Department of Labour *Annual Report* (1 April 2002–31 March 2003) 49–50 provides information concerning the number of trade unions registered (namely 504) but not the actual number of members.

⁴⁶ Thompson 2003 *ILJ* (SA) 1800.

⁴⁷ Gahan & Mitchell 'The limits of labour law and the necessity of interdisciplinary analysis' in Mitchell *Redefining Labour Law* 70–71.

inherent in a legal examination do not allow for an in-depth study of other fields. Consequently, debates arising in related fields – including organisational behaviour, human resource management, and labour economics – fall outside of the scope of this study.

This study focuses on workers in non-standard employment in Southern Africa and in particular South Africa. The thesis examines how workers in non-standard employment can be regulated in order to ensure that they are afforded protection by labour law. The ultimate aim in regulating these workers is to reduce unemployment, inequality, poverty, and to advance the ‘decent work agenda’ within the region.

1.5 Literature review

Law is a technique for the regulation of social power. This is true of labour law, as it is of other aspects of any legal system. Power – the capacity effectively to direct the behaviour of others – is unevenly distributed in all societies. There can be no society without a subordination of some of its members to others, without command and obedience, without rule makers and decision makers. The power to make policy, to make rules and to make decisions, and to make sure that these are obeyed, is a social power. It rests on many foundations. On wealth, on personal prestige, on tradition, sometimes on physical force, often sheer inertia. It is sometimes supported and sometimes restrained and sometimes even created by the law, but the law is not the principal source of social power.⁴⁸

This extract from Kahn-Freund’s seminal work on English labour law draws attention to the fact that the role of law in society is essentially supportive or instrumental. In other words, law should be viewed not as an end in itself, but rather as a means of promoting or achieving certain social ends.⁴⁹ The regulation of workers in non-standard employment is no different. If the above theory is accepted, then it is clear that for law to be effective in any society, it must be formulated from a perspective that is well-informed regarding the underlying dynamics of that particular society. Similarly, an understanding of the role of law in society can only be achieved if the basic social dynamics of the society are also understood.⁵⁰ As I embark on a literature review of

⁴⁸ Davies & Kahn-Freund *Labour and the Law* 14.

⁴⁹ Van Uytrecht (1995) 29 *ILJ* 1.

⁵⁰ *Ibid.*

the subject of workers in non-standard employment in the Southern African region, an understanding of the social dynamic of workers in non-standard employment lies at the heart of the fields of both labour relations and labour law. Nevertheless, much contemporary literature in both fields pays scant, if any, attention to the regulation of workers in non-standard employment in the Southern African region – with South Africa constituting a notable exception.

In view of the nature and complexity of the topic, the research will, in the main, draw from library resources such as journal articles, textbooks, decided cases, statutes, and other studies. Although much has been written on this subject in different countries or regions,⁵¹ and there is an impressive catalogue of outstanding scholarship on the topic, re-evaluation is required in order to establish the contribution that this work seeks to make to the existing body of knowledge. It is no easy charge to review the literature on the regulation of workers in non-standard employment in the Southern African states; while various eminent labour law scholars have written and shared their opinions on this topic in East Asia, Europe, Canada, and Latin America, not much has

⁵¹ See Benjamin *Beyond the Boundaries: Prospects for Expanding Labour Market Regulation in South Africa*; Theron *Employment is Not What it Used to Be*; Mhone *Enclivity and Constrained Labour Absorptive Capacity in Southern African Economies*; Olivier *Social Protection in the SADC Region: Opportunities and Challenges*; Mills *The Situation of the Elusive Independent Contractor and other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility*; Hepple *The Future of Labour Law*; Fourie *Non-standard Workers: The South African Context, International Law and Regulation European Union*; Kalula *Beyond Borrowing and Bending: Labour Market Regulation and Labour Law in Southern Africa*; Van Eck *Temporary Employment Services (labour brokers) in South Africa and Namibia*; Smit & Fourie *Perspectives on Extending Protection to Atypical Workers, Including Workers in the Informal Economy in Developing Countries*; Thompson *Borrowing and Bending: The Development of South Africa's Unfair Labour Practice Jurisprudence*; Vettori *The Employment Contract and the Changed World of Work*; Grogan *The New Dispensation - The Amendments to the Labour Relations Act, Part 1 – Non-standard employment*; Blanpain *Work in the 21st Century*; Godfrey et al *On the Outskirts But Still in Fashion: Homeworking in the South African Clothing Industry: The Challenge to Organisation and Regulation*; Bosch *Low-wage Work in Five European Countries and the United State*; Clarke et al *Workers' Protection: An Update on the Situation in South Africa*; Siphambe *Botswana's Economy and Labour Market: Are there Any Lessons for SADC Regional Integration*; Takirambudde *Protection of Labour Rights in the Age of Democratization and Economic Restructuring in Southern Africa*; Torres *Labour Markets in Southern Africa*. It is difficult if not impossible to list all the work already undertaken by other scholars or experts. On the one hand scientific production is an unfinished business. Whatever I write will not be the final word.

been written on Southern African states. As expected in studies where several other countries in the region are included, the literature review will pose some challenges to the researcher. These include the following.

It will be very difficult if not impossible to read all the material that has been written on this subject by scholars, given the volumes of data available on the subject matter and time limitations. In addition, the author writing on this topic does not prevent other people, scholars, researchers and jurists from writing on the regulation of non-standard work in the Southern Africa region and the world at large. It is a continuous process of acquiring knowledge and my contribution in this regard cannot be the final word. There are numerous scientific publications on the subject that may not be included in this study.

The regulation of workers in non-standard employment in the Southern African region, like any other form of regulation, will not be settled once and for all. The wheels of regulation will keep on turning for as long as scholars and jurists keep addressing the topic. Today's world of work keeps changing, and the regulation of workers in non-standard employment is here to stay. Therefore, a literature review is premised on selected research works and provides a suitable opportunity for evaluation as the reviewers rarely lay claim to more authority than the writers whose works were reviewed.

This study is not about competing with previous studies. It is about the contribution to knowledge that it can make. The literature review presents any researcher with numerous problems, not only because a lot has been written on this subject matter by more competent and renowned labour law scholars, but also because of the diversity of their approaches and perspectives. In law, as in many social science disciplines, there is no single voice or discourse on workers in non-standard work in South Africa or anywhere else for that matter. The various and sometimes divergent voices come from people expressing themselves from different backgrounds or contexts, some being more authoritative than others, making the task of any reviewer a particularly challenging one.

However, before I start to review the literature on the regulation of non-standard employment in Southern Africa, I must note that I am indebted to all those who have made contributions to knowledge on the regulation of non-standard employment in

Southern Africa and the world over, even though all the challenges of non-standard employment have not been addressed. Their contributions in this regard have opened the doors for researchers to examine how best to regulate non-standard employment in Southern Africa as a whole and South Africa in particular.

This study will demonstrate that the regulation of workers in non-standard employment goes beyond employment laws and touches on the socio-economic and political territory. Even in employment law, or the work environment, the regulation of non-standard workers has to do with fairness, equity and justice. These are all rights that are enshrined in the Constitutions of some of the SADC countries in the region. For example, in South Africa the right to fair labour practices is enshrined in the Constitution.⁵² Every worker has the right to form and join a trade union;⁵³ the right to participate in the activities of and programmes of the trade union;⁵⁴ the right to strike,⁵⁵ and the right to participate in collective bargaining.⁵⁶

It is often difficult to separate the right to fair labour practices from the right to equality and human rights in the work environment. These rights have been dealt with to some extent in Chapter 5 of the study. These rights play a pivotal role in the region in the fight against poverty, inequality, unemployment and 'working poverty'.

In order to enhance the study of the regulation of non-standard employment in South Africa, it is necessary not to view the challenges facing Southern African states in isolation. The examination of developments in other regions in the continent and particularly the international labour law standards championed by the ILO is essential.

The ILO has established eight Conventions that it considers fundamental.⁵⁷ These Conventions respectively establish minimum standards in relation to the rights of trade unions, employers' organisations and their members, their right to conduct their activities and programmes without interference from the state, the obligation to

⁵² Section 23 of the Constitution.

⁵³ Section 2(a) of the Constitution.

⁵⁴ Section 23(b) of the Constitution.

⁵⁵ Section 23(c) of the Constitution.

⁵⁶ Section 23 of the Constitution.

⁵⁷ The Freedom of Association and Right to Organise Convention 87 of 1948, the Right to Organise and Collective Bargaining Convention 98 of 1949, the Forced Labour Convention 29 of 1930, the Abolition of Forced Labour Convention 105 of 1957, the Minimum Age Convention 138 of 1973, the Worst Forms of Child Labour Convention 184 of 1999, the Equal Remuneration Convention 100 of 1951, and the Employment and Occupation Convention 111 of 1958.

promote collective bargaining, the minimum age of work and the prohibition of involuntary work. There are also Conventions addressing the prohibition of work exacted under threat of penalty, the right to equality in employment both in the sense of a right to equal pay for work of equal value, and the prohibition against discrimination in the work place.

This study has adopted an approach where reference is made to other several SADC states, bearing in mind the close relationship between the labour law regimes of many Southern African countries. In the context of regional integration and globalisation, most labour law scholars in the region and on the African continent have adopted a similar approach, as required by the integration of the Southern African states.⁵⁸

The importance of regulating non-standard employment in South Africa, its impact on poverty alleviation, workplace inequality, unemployment, economic growth and social justice, and the threat that non-standard employment pose to the advancement of democracy in this region warrants critical and complete research. In South Africa, for example, efforts are being made to regulate workers in non-standard employment. The amendments adopted by Parliament in 2014 go a long way towards addressing the situation of workers in non-standard employment. For the first time, legislation recognises the need for specific provisions to protect certain categories of non-standard employees.

However, for a detailed analysis of the regulation of non-standard work in Southern Africa, the works of Kalula, Theron, Fenwick, Vettori, Fourie, Landau, Benjamin, Jauch, Van Eck, Tørres, Olivier, Takirambudde and Du Toit remain exemplary. While there is some Southern African literature available that addresses non-standard employment (or work) differently, these research works appear to be fragmented, and do not suggest holistic alternatives to the current regulatory regime. They were nevertheless useful in developing the arguments in this study. They include the works of Le Roux, Bosch, Gericke, Grogan, Fourie, McGregor, Botes and Mureinik. With regard to international scholars who examine possible alternative regulatory models, the works of Bronstein, Freedland, Supiot and Mitchell were selected. Furthermore, it

⁵⁸ Kalula & Fenwick *Law and Labour Markets in East and Southern Africa: Comparative Perspectives*; Feys (1999) 20 *ILJ (SA)* 1445–1482; Takirambudde ‘The new labour law in Southern Africa: An overview’ in Kalula & Woolfrey (eds) *The New Labour Market: Reconstruction, Development and Equality* 132; Woolfrey (1991) 12 *ILJ (SA)* 703–720.

was necessary to include some other scholars who have written on this subject, and some of their observations and arguments are addressed below.

Theron highlights the notion that our present labour relations model is not as effective as it used to be. Theron further comments that:

One consequence of casualisation and externalisation is that the numbers protected by labour regulation had substantially diminished. Those who are protected can be viewed as 'insiders', in a position of relative privilege. Those outside the ambit of the legislation comprise unprotected employees (such as casual workers, or workers in the employ of a broker or satellite enterprise) or those nominally independent persons who are in fact in a relationship of economic independence (the so-called independent contractor). Accordingly, there are a growing number of persons who cannot meaningfully be called employees. By the same token, they cannot meaningfully be called independent contractors, because they are not in any real sense independent.⁵⁹

According to Grogan, the Labour Relations Amendment Act of 2014 in South Africa was a legislative innovation in response to calls from labour to eradicate labour broking and to prevent cunning employers from evading the provisions of the LRA, in particular by using fixed-term contracts and employing 'temporary' workers.⁶⁰ The author also observes that 'a close examination of the amendments discloses a distinct bias towards extending the rights of employees, or some of them, mostly at the expense (literal and figurative) of employers.'⁶¹

Vettori⁶² argues that South African atypical or non-standard workers generally do not enjoy the protection offered by legislation or collective organisations.⁶³ Consequently, because of their financial dependence on the provider of work, they are at the mercy of the provider of work with reference to wages and other conditions of work.⁶⁴ These workers are not protected from unfair dismissal, exploitation in the form of the payment

⁵⁹ Theron 2003 *ILJ* (SA) 1247–1273. Benjamin (2004) 25 *ILJ* 787 at 789 points out that the clear distinction between employment and self-employment has been blurred due to factors such as globalisation, deregulation and technological change. Many individuals are in the grey area between employment and self-employment.

⁶⁰ Grogan 2015 *Employment Law Journal* 1.

⁶¹ *Ibid.*

⁶² Vettori *Alternatives Means to Regulate the Employment Relationship in the Changing World of Work*.

⁶³ Mills 2004 *ILJ* (SA) 1203 at 1234–1235.

⁶⁴ Theron 2003 *ILJ* 1255.

of very low wages. They sometimes work in conditions that are hazardous to their health and safety, are excluded from certain social security protection, and do not enjoy the benefit of skills development levies.⁶⁵

Bronstein⁶⁶ suggests that, with the acceleration of globalisation processes, the need to address the mounting power of multinational enterprises (MNEs) gave rise to innovative mechanisms, including a variety of novel trade–labour institutional linkages. As Bronstein points out, the last three decades have been marked by an abundance of substantial labour reforms in numerous countries, such that a detailed account of these alone would easily provide materials for an entire body of literature.

This study intends to contribute to the development of knowledge in labour law and human rights in a discipline where limited contributions have been made. It will examine the regulation of non-standard employment in Southern Africa, and it will aim to advance an understanding that the fight for the regulation of non-standard employment is part of the regional fight for workplace equality, fair labour practices, unemployment, democracy, and the advancement of the decent work agenda and the eventual alleviation of poverty. As already indicated, the methodology will be comparative, historical and legal. Developments in other parts of the continent, regional bodies and international standards will be considered. The role of the Constitution of South Africa, the legislature, the labour inspectors, and the courts in promoting fair labour practices, particularly in the regulation of non-standard employment, will receive special consideration. The writer of this study hopes that it will be regarded as a meaningful addition to the body of literature in this subject.

1.6 Data collection and research methodology

Research methodology relates to the approach used by the researcher in addressing the subject and also describes how the conclusions were reached. It is therefore crucial to any research work and the value of the latter depends on the methodology used. Workers in non-standard employment are not a novelty in South Africa, nor are they a South African invention.

⁶⁵ Cheadle *et al* *Current Labour Law* 42.

⁶⁶ Bronstein *International and Comparative Labour Law: Current Challenges* 1–6.

Given the nature and complexity of the topic, the study will draw most of its material from library resources such as journal articles, text books, decided cases, statutes and other studies. The use of the internet and the pivotal role it will play in developing this study cannot be overlooked. The internet has reduced the entire world to a global village in terms of information sharing. However, there is paucity of scholarship with regard to comparative socio-economic and political information on Southern Africa.

The regulation of workers in non-standard employment is mainly a legal notion used in labour law, constitutional law, and municipal law, at the regional and global levels. The ILO has had a strong influence on the labour systems of Southern Africa.⁶⁷ The SADC has encouraged member states to ratify and implement the core standards of the ILO Conventions.⁶⁸ The ILO has also assisted numerous states in the region (Botswana, Lesotho, Malawi, Namibia, Swaziland, and South Africa) to develop labour legislation that is consistent with international standards.⁶⁹

Furthermore, labour law was used by the colonial rulers to organise and control the indigenous labour force. Numerous colonial territories had labour laws applied specifically to the (black) African populations.⁷⁰ These racially discriminatory laws were principally concerned with regulating temporary immigration, and applied in the same way as the masters and servants legislation in the British common law.⁷¹ In other countries, such as Botswana, Zambia and Malawi, racial discrimination was not directly institutionalised through labour laws, but other policies were implemented to compel the African population to seek wage employment.⁷² While it is important for local laws to be developed to deal with unique labour law challenges, foreign law still carries considerable weight in the region.

The regulation of workers in non-standard employment in South Africa cannot be understood without taking into account the history of the Southern African region. The region has experienced oppressive and interventionist labour regulation by colonial

⁶⁷ While this section focuses on the ILO, it is noteworthy that other UN organisations (such as those that address the elimination of discrimination) have also influenced labour laws in the region.

⁶⁸ See www.ilo.org (Date of use: 13 August 2015).

⁶⁹ Fenwick *et al* *Labour Law: A Southern African Perspective*.

⁷⁰ *Ibid.*

⁷¹ Fenwick & Kalula (2005) 21(2) *International Journal of Comparative Labour Law and Industrial Relations* 193–226.

⁷² An example of such a mechanism is the 'hut tax' imposed by the British in Zambia (and former colonies): the local African population was charged such high taxes on their homes that they were forced to work in copper mines.

and post-independence governments, to a non-interventionist stance adopted in order to support labour market 'deregulation', and a more recent shift towards protecting and promoting individual rights.⁷³ In these circumstances, it is suggested that the methodological approach to this thesis should be one that make reference to several other SADC countries with focus on South Africa, historical and legal.

1.6.1 An inclusive approach with reference to several other SADC countries

In pursuing a rich analysis that develops and advances the South African jurisprudence on labour law, the author favours an inclusive approach that makes reference to several other SADC countries. It is noteworthy that labour law in Southern Africa is comparative in nature.⁷⁴

This study will benefit immensely from experiences and jurisprudence from several other SADC countries. Referring to laws of several other SADC countries is *école de vérité* and can offer a much richer range of model solutions than a legal science devoted to single nations. The different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime, by even the most imaginative jurist who is immersed in his own system.⁷⁵ It is unnecessary to reinvent the wheel of justice over and over again. Much may be gained by looking at how other countries apply corresponding principles or address common problems.

While it must be acknowledged that SADC countries have very different levels of development and economic growth, they have similar historical legacies of colonial rule and they all have labour law systems that originated in Western countries. For example, Namibian law was 'received' from South Africa,⁷⁶ which in turn has a 'hybrid' or 'mixed' legal system, formed by the interweaving of a number of distinct legal traditions: a civil law system inherited from the Dutch, a common law system inherited from the British, and a customary law system that is indigenous (often called African customary law, of which there are many variations, depending on the tribal origin). The

⁷³ Fenwick & Kalula (2005) 21(2) *International Journal of Comparative Labour Law and Industrial Relations* 193.

⁷⁴ *Ibid.*

⁷⁵ In *S v Makwanyane & Another* 1995 (3) 391 (CC) 37, it was held that comparative human rights Jurisprudence will be of great importance while indigenous jurisprudence is developed. Gutteridge *Comparative Law: An Introduction to the Comparative Law Method of Legal Studies* 35–36.

⁷⁶ Schulz 'Legal interpretation and the Namibian Constitution: A paradigm shift: Through reason towards justice' in Hinz *et al* (eds) *The Constitution Work: 10 years of Namibian Nationhood* 192.

legal systems of Botswana, Lesotho, Namibia, South Africa, Swaziland and Zimbabwe share similar origins.⁷⁷

In addition, these countries also face similar legal, socio-economic and political challenges, coupled with a common border. These reasons accounted for referring to these Southern African member states. The value of referring to these countries is brilliantly captured in the following remark by Tørres:

Southern African countries face many of the same issues in their increasingly globalised economies. They share similar characteristics in their labour markets and confront many of the same issues in their relations with the international trade regimes and financial institutions like the World Bank and IMF. They face similar problems of unemployment and are confronted with high rates of poverty within the labour markets. They ponder over similar challenges of informal versus formal sector development, and share the same questions and dilemmas as to skill development, flexibility and restructuring of work. Migration, HIV and poverty compose different but yet shared, concerns. It is not surprising then, that along with these similar problems and challenges, Southern African countries are now also beginning to regard regional co-operation as a new strategy for economic development internationally.⁷⁸

Beyond the fact that all these countries belong to a particular region, the international community encourages co-operation with various continental and world bodies such as the African Union (AU), other regional communities, the European Union (EU), the ILO, the United Nations (UN) and so on. Given that no single nation exists in isolation from another anymore,⁷⁹ the South African courts often refer to foreign jurisprudence. Apart from developing a country's jurisprudence, legal comparison also enriches the judge's analysis of a case. Nevertheless, an approach that refers to the jurisprudence of several other states also includes history.

1.6.2 Historical approach

A long-time labour law expert at the ILO, Bronstein, stated:

⁷⁷ Kleyn *Beginner's Guide for Law Studies* 44; Du Plessis *An Introduction to Law* 66; Lee *An Introduction to Roman-Dutch Law* 12.

⁷⁸ Tørres *Labour Markets in Southern Africa* 18.

⁷⁹ Kleyn & Viljoen *Beginner's Guide for Law Students* 268–270.

Rights are not eternal realities that exist out of space and time. They are social phenomena which must be considered in a particular historical context, and it is within this context that their birth, development and vicissitudes should be analysed. History is made up of the interaction of many forces – social, economic, political, cultural and ideological – to which can be added the often crucial role played by some outstanding leaders and personalities. Any alteration in these forces can and frequently does lead to a change in law.⁸⁰

In view of the above, the history of Southern Africa will be examined. The history of Southern Africa is very relevant to its labour laws and for that reason this research will reflect on the historical developments in the region. Labour law in Southern Africa is influenced by the region's colonial past. Colonised in the eighteenth and nineteenth centuries, the region was viewed by the European powers mostly as a source of primary commodities for export. African workers provided cheap labour for the mines and agricultural estates, and for the small industry of secondary products and services used by settlers.⁸¹ Labour law was used by colonial rulers to organise and control the indigenous labour force. Many colonial territories had labour laws that applied specifically to the (black) African populations.

The pressure to decolonise the region after the Second World War compelled the colonial rulers to implement changes to discriminatory labour laws.⁸² Among the reforms was providing a means for channelling worker dissent.⁸³ However, trade unions were carefully monitored by colonial authorities to ensure that they confined themselves to 'economic' objectives.⁸⁴ The success of such policies was, however, limited, because in countries such as Namibia, Tanzania and Zambia, the labour law movement played a key role in the struggle for national independence.

The post colonial states in Southern Africa retained the labour law systems imposed during the colonial period. Like their predecessors, many of the postcolonial

⁸⁰ Bronstein *International and Comparative Labour Law* 8–9.

⁸¹ Mhone *Enclivity and Constrained Labour Absorptive Capacity in Southern African Economies*; available at www.ilo.org/public/english/region/afpro/harare/download/discussion_papers/pps12.doc (Date of use: July 2015).

⁸² Klerck, Murray & Sycholt 'The environment of labour relations' in Klerck, Murray & Sycholt (eds) *Continuity and Change: Labour Relations in Independent Namibia* 1–7.

⁸³ *Ibid.*

⁸⁴ Freund *The African Worker*; Damachi *et al* (eds) *Industrial Relations in Africa*.

governments imposed tight restrictions on trade unions and industrial action, which amounted to efforts to redefine the role of trade unions. Now, however, these measures were implemented in the name of 'national interest'.⁸⁵

Since the 1980s, labour laws in the region have been influenced by the adoption of economic liberalisation programmes.⁸⁶ Increasingly marginalised from the world economy in the 1970s and 1980s, many Southern African states borrowed heavily from the International Financial Institutions (IFIs). Structural adjustment programmes (SAPs) were imposed as preconditions for receiving financial assistance from the IFIs, and from Europe under both the Lomé and Cotonou processes.⁸⁷ In some countries, such as Botswana, economic liberalisation programmes were voluntarily adopted.⁸⁸ During this period, many Southern African governments abandoned their interventionist approach to industrial relations in favour of more market-oriented policies. According to Takirambudde, Southern African labour laws introduced in the 1990s embodied a paradigm shift towards 'limiting the role of the state, the acknowledgement of economic conflict between capital and labour, recognition of the managerial rights of the owner/manager and respect for trade union autonomy'.⁸⁹

The trend towards democratisation in the Southern African region since the early 1990s has been accompanied by extensive labour law reforms. For example, South Africa recently amended its labour laws⁹⁰ in an attempt to address some of the challenges facing the labour relations system in the country. The forms of non-standard employment to which the LRA clearly does apply, in terms of the amendments, are labour broking arrangements, part-time workers, and temporary workers in direct employment (who are referred to as 'workers with fixed-term contracts'). In this regard, there are three new sections that apply to workers earning below a specified threshold, as well as amendments to certain existing sections.⁹¹

⁸⁵ Klerck, Murray & Sycholt 'The environment of labour relations' 1–7.

⁸⁶ Takirambudde *Protection of Labour Rights in the Age of Democratization and Economic in Southern Africa*. See Knight *Labour Market Issues in Zimbabwe: Lessons for South Africa*.

⁸⁷ See Tørres *Labour Markets in Southern Africa*. See also, for example, Mailafia *Europe and Economic Reform in Africa – Structural Adjustment and Economic Diplomacy*.

⁸⁸ Siphambe (2004) 21(2) *Development Southern Africa* 353–364.

⁸⁹ Takirambudde (1995) 39(1) *Journal of African Law* 24.

⁹⁰ Labour Relations Amendment Act 2014.

⁹¹ Theron *Non-standard Employment and Labour Legislation: Outlines of a Strategy* 14.

All the Southern African countries, with the exception of Namibia and Zimbabwe, achieved independence in the 1960s or 1970s.⁹² Upon achieving independence, the Southern African states were faced with underdeveloped economies characterised by small formal sectors, limited domestic markets, high levels of poverty and stark income inequality. With the absence of a significant entrepreneurial class, the state adopted the primary role in driving economic development, adopting what has been described as an 'ideology of economic development'.⁹³ This dominant role for the state, and its overriding concern with economic development, manifested itself in a highly interventionist approach to industrialisation.⁹⁴ Accordingly, exploring the regulation of non-standard employment in South Africa necessitates a historical approach.

1.6.3 Legal approach

The point of departure under the legal approach is that the law regulates workers in non-standard employment in South Africa and several SADC countries. In 2003, SADC adopted a Charter of Fundamental Social Rights, which seeks to entrench the institution of tripartism as a preferred means to promote the harmonisation of legal, economic and social policies and programmes, and to provide a framework for the recognition of regional labour standards.

Article 4 of the Charter obliges member states to create enabling environments to improve working and living conditions,⁹⁵ to protect health, safety and the environment,⁹⁶ to create employment and remuneration,⁹⁷ and to provide education and training.⁹⁸ Article 10 requires members to create an enabling environment so that workers may enjoy adequate social security benefits, regardless of status and type of employment.

⁹² Zimbabwe achieved independence in 1980 and Namibia in 1990.

⁹³ Ibid.

⁹⁴ Freund *The African Worker*; Takirambudde *Protection of Labour Rights in the Age of Democratization and Economic Restructuring in Southern Africa*; Christie & Madhuku *Labour Dispute Resolution in Southern Africa: An Overview*; Dzimbiri *The State and Labour Control in Malawi: Continuities and Discontinuities between One-party and Multiparty Systems*. For a discussion of the interventionist approach to labour relations in Zimbabwe post-independence, see Knight *Labour Market Issues in Zimbabwe: Lessons for South Africa*.

⁹⁵ Article 11.

⁹⁶ Article 12.

⁹⁷ Article 14.

⁹⁸ Article 15.

Furthermore, besides the obligations of the SADC Charter, some states in the region have the right to 'fair labour practices' entrenched in their Constitutions. For example, section 23(1) of the South African Constitution stipulates that 'everyone' has the right to fair labour practices. Other SADC member states have also joined South Africa in extending the scope of legislation to workers other than contractual employees. For example, the definition of an employee has been extended in the Swaziland Industrial Relations Act⁹⁹ to protect vulnerable workers, including workers in non-standard employment. Accordingly, the protection of workers in non-standard employment in the SADC region, as we can see in these latest constitutional and legislative developments, calls for a legal approach.

In addition, Article 4.1 of the Employment Relationship Recommendation requires that a country's national policy should ensure that protection is available to all forms of employment relationships, including those involving multiple parties. As one of the publications prepared in preparation for adoption of the Recommendation noted, the challenge in respect of triangular employment relations lies 'in ensuring that employees in such a relationship enjoy the same level of protection traditionally provided by law for employers that have bilateral employment relationships, without impeding legitimate private and public business initiatives.'¹⁰⁰

The ILO has had a strong labour law influence on the labour law systems in Southern Africa.¹⁰¹ It is noteworthy that all SADC member states have ratified the ILO core Conventions. Therefore, the regulation of workers in non-standard employment in Southern Africa cannot be studied without special attention being given to municipal, regional and international law. This makes a legal approach to the study compelling.

1.7 The research questions

The study will address a number of research questions. The first question relates to the meaning and scope of non-standard workers and their protection under international law. The second question concerns the scope of non-standard workers under the evolving SADC regional labour laws. The third question deals with the relationship between international law and domestic laws relating to workers in non-

⁹⁹ Act 1 of 2000.

¹⁰⁰ ILO *The Employment Relationship*.

standard employment in South Africa and several other SADC states such as Lesotho, Mozambique, Namibia, South Africa and Swaziland.

This thesis will also tackle the following questions: What are the different groups of non-standard workers in Southern Africa? To what extent are these workers included in the definition of 'employee' in the Southern African jurisdictions? To what degree do non-standard workers benefit from the protection of labour law? What are their rights, if any, with regard to the formation of and/or joining trade unions? If they have the right to do so, are there practical obstacles that prevent them from joining trade unions and participating in collective bargaining? What lessons may be learnt from other jurisdictions? What possible solutions are there to improving the situation of non-standard workers in the region? How can labour law be rendered more effective so that it can continue to benefit all workers who need protection? And, finally, can these non-standard forms of work be categorised as decent work?

Most questions will refer to the regulation of workers in non-standard employment in Southern Africa, with specific reference to their protection and advancement in the era of democratisation and regional integration. The pivotal questions are those relating to the scope and regulation and protection of workers in non-standard employment in Southern Africa and the relationship between regional laws and case law on the one hand, and international law and jurisprudence on the other. The study will also respond to questions relating to the challenges facing workers in non-standard employment in South Africa in the future. It will further consider the application of international law and jurisprudence in this regard.

1.8 Assumptions and expected findings

The research is based on a number of assumptions. This research hinges on the assumption that there are numerous non-standard workers who are not as protected, or equally protected, as employees in standard employment relationships in South Africa and the SADC region as whole. Part-time work, fixed-term work, extended probation terms, on-call work and temporary work are examples of non-standard forms of employment. The study is also based on the assumption that improvements are inevitable and possible. This underlying assumption will be tested in this study.

Furthermore, regulating workers in non-standard employment will allow for the broadening of the safety net for vulnerable workers not only in South Africa but the entire SADC region. The regulation of workers in non-standard employment in the Constitutions of most Southern African states in the post-independence and democratic era was inspired by and meets the standards set in international labour law instruments, especially the ILO Convention on the Right to Organise¹⁰² and the Employment Relationship Recommendation.¹⁰³

The ILO standards exert influence on the protection of workers in non-standard employment in Southern African labour law and jurisprudence. Moreover, Southern African states may acquire knowledge from the ILO and from other nations to improve their legislation dealing with the regulation and protection of non-standard workers in the region.

The research will validate these assumptions. There is also a need for consistency and Southern African jurists and the courts are required to go the extra mile in regulating workers in non-standard employment. The regulation of workers in non-standard employment will also depend on their levels of participation in trade unions, and the collective bargaining activities of both employers and workers. Furthermore, the understanding and experiences of the application of labour laws in other jurisdictions, and the international labour law standards that regulate and protect workers in non-standard employment will be relevant.

1.9 Organisation of the thesis

Chapter 1 offers a general introduction and background to the study, outlines the research problems and the subject matter of the study, its aims and objectives, importance, limitations, scope and methods of data collection. The chapter also includes a literature review and underscores the main research questions and assumptions and expected findings. This chapter also deals with the research methodology and provides a summary of the chapters.

Chapter 2 deals with the theoretical background. The chapter defines the vital concepts used in the study and their connection to the subject matter. These concepts

¹⁰² ILO Freedom of Association and the Right to Organise Convention 87 of 1948.

¹⁰³ ILO Employment Relationship Recommendation 198 of 2006.

include work, employees, employers, standard employment, non-standard employment, globalisation and technological advancement, temporary employees (and labour brokers), fixed-term contracts, part-time work, informalisation of work, casualisation of work, and externalisation of work.

Chapter 3 explores the role, application and relevance of ILO standards in addressing the concerns of non-standard workers, the decent work agenda in a globalised era, including its four pillars and compliance and sustainability. The chapter also investigates regional instruments in the Southern Africa that seek to advance social protection in the region.

Chapter 4 deals with a case study of non-standard employment in Southern Africa. Chapter 4 attempts to answer the lingering interpretation question of the South African LRA by examining the reasonableness of fixed-term employment contract renewals and the protection afforded to non-standard workers by the South African Constitution of 1996.

Chapter 5 examines collective bargaining and trade unions in a globalised epoch. The chapter reviews the role played by collective bargaining and trade unions, as accepted methods by the ILO, in advancing and regulating terms and conditions of work and enhancing social justice and workplace democracy, particularly in respect of non-standard employment in the era of globalisation.

Chapter 6 concludes the research. The chapter includes the findings of the study, and demonstrates some challenges and expectations for workers in non-standard employment in South Africa and make references to several other SADC countries. The chapter includes some recommendations for advancing research on the development of labour law in Southern Africa and the world at large.

The study concludes with an all-inclusive bibliography that refers to the diverse research materials used by the author. The bibliography includes textbooks, journal articles, case law, legal instruments and other studies.

CHAPTER 2

THEORETICAL BACKGROUND TO NON-STANDARD WORK AND PARADIGMS OF WORK IN SOUTHERN AFRICA

2.1 Introduction

Chapter 2 defines the key concepts of the study and explores the various paradigms of work in Southern Africa. These include the concepts of employee, worker, employer, standard employment, non-standard employment, globalisation, technological advancement, temporary employment agencies (or labour brokers), fixed-term work, part-time work, informalisation of work, casualisation of work and externalisation of work. As indicated earlier in Chapter 1, this study deals with the regulation of non-standard employment, and it is therefore crucial to define these pivotal concepts so as to provide clarity and shed more light on the subject matter. Employment relations require the existence of employees and employers. Globalisation leads to informalisation as businesses need to be flexible in order to remain competitive in our globalised age. Informalisation has been achieved primarily through the increased casualisation of the labour force. The eventual result of casualisation is a reduction in the number of workers employed for definite periods. Externalisation is a further element that leads to rising levels of non-standard employment in the Southern African region. Its main feature is that it reduces the number of people employed by a business and so limits the application of labour law.¹⁰⁴ This, in turn, leads to a growth in non-standard workers.

Botha writes that 'difficult legal language will have an influence on the acceptance of the legal order.'¹⁰⁵ He continues:

Language (including legal texts) has a social and purposive role. It not only conveys information but communicates as well. The process of communication is not complete if the message is not properly understood. The law cannot fulfil its role to regulate and to order if it cannot be understood. If written rules (ie enacted law-texts) are to be obeyed, they must first be understood. The constitutional values of transparency,

¹⁰⁴ Theron & Godfrey *Protecting Workers at the Periphery*.

¹⁰⁵ Botha *Statutory Interpretation: An Introduction for Students* 28.

equality and a fair legal process can hardly be maintained if the people do not understand the legislation. A rights-culture will be successful only if those who are affected by the law realise that it is to their advantage to follow the rules. This will happen only if people are able to understand the rules. In this respect the plain language movement might help to bring those values and principles underlying the new constitutional order closer to the people.¹⁰⁶

Generally, law as a field of study has been criticised by social scientists from other disciplines and even by lawyers themselves – particularly positivists and those who advocate Critical Legal Studies – for its lack of accuracy and clarity.¹⁰⁷ Nevertheless, even in the natural or supposedly ‘exact’ sciences, absolute accuracy or precision is as unlikely as absolute veracity.

Permanent employment, as we traditionally understand it, is giving way globally to non-standard employment, and new categories of employment are emerging. The growth in technology, globalisation, market deregulation, and increased unemployment is responsible for changes in the make-up of the labour force. Labour law was designed to protect employees in the orthodox, permanent employment model, and is currently unable to protect workers in new categories of non-standard employment. It is becoming increasingly difficult for the courts to differentiate between a standard employee and a non-standard worker, as the two are so closely related.

Non-standard workers constitute a category of workers who form an integral part of the Southern African labour force. But, like standard employees, non-standard workers need some form of labour law regulation and protection as both categories make up the entire work force of the labour market in the Southern African region. It is therefore difficult to distinguish non-standard employment from standard employment, particularly when it comes to the rights to fair labour practice afforded to workers in general.

New categories of employment have been acknowledged by the International Labour Organisation (ILO), which has extended its protective net to workers who are outside of the conventional employment relationship. The ILO has developed labour standards

¹⁰⁶ Ibid.

¹⁰⁷ Unger *The Critical Legal Studies Movement* 224.

and Conventions that recognise the increase in the need for labour and social security protection for non-standard workers.¹⁰⁸

The ILO 'decent work' agenda includes four fundamental principles: decent work and equal work opportunities for everyone; the acknowledgment of workers' rights; access to social security; and access to representation. The concept of decent work has an effect on the improvement of the conditions under which vulnerable non-standard workers work. The majority of core labour standards relates to all workers, or includes terms providing for their extension to other categories of employment. In addition, the ILO has endorsed the Declaration on Fundamental Principles and Rights at Work 1998,¹⁰⁹ which requires member countries to adopt, as a minimum, the core Convention embodying certain core rights. Any study of the regulation of non-standard employment in labour markets generally, and in Southern Africa's labour law regime, in particular, requires one to be as precise as possible on the concepts used in the study.

The recognition of the increase in non-standard employment led the ILO to extend its protective net to workers who fall outside of the conventional employment relationship. This has resulted in the ILO developing labour standards and Conventions that acknowledge the increase in the need for labour and social security protection for non-standard workers. Workers in non-standard employment cannot enjoy decent work if they are unable to exercise the right to organise and to bargain collectively, and it is the exercise of these rights that resulted in the establishment of trade unions. On the other hand, the effect of non-standard employment on workers' rights in general, and the right to organise and bargain collectively in particular, along with the relationship between trade unions and non-standard employment, cannot be disregarded in any study of non-standard employment within the context of labour relations in Southern Africa.

¹⁰⁸ These include: (a) Conventions and recommendations pertaining to particular categories of non-standard workers, such as part-time workers and homeworkers; (b) Support for micro-enterprises in the informal economy; (c) Programmes like Strategies and Tools against Social Exclusion and Poverty (STEP) to promote the extension of social protection to informal workers; (d) Support for mutual health insurance schemes; (e) The continuance of work at its Social Security Department, commissioning research and investigating the extension of social security protection to non-standard workers.

¹⁰⁹ See the ILO review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_298_3_en.pdf. (Date of use: 13 May 2018).

Finally, non-standard workers not only deserve the regulation and protection of their work as an internationally recognised right, but can only thrive within the context of organisation and collective bargaining. As indicated above, these are separate but related elements of the labour market.

2.2 Who is an employee?

Ordinarily the term 'employee' means an individual who works part-time or full-time for another individual, organisation or the state, and is paid for rendering a specific service to his employer, whether or not there is an oral or written contract of employment. The employee also has recognised rights and responsibilities. It is important to define the term 'employee' because a lot hinges on the distinction between employees and persons who are not employees. South African labour legislation applies only to employees, and only an employee can claim protection against unfair dismissal. It is therefore critical to be able to distinguish between employees in standard employment relationships and non-standard workers.

The concept of 'employee' is defined in municipal and international law and also in written works. It is worth noting that the ILO Conventions instead refer to 'workers' and 'workers' organisations' and disregard the concept of 'employee'.¹¹⁰ The South African Constitution likewise refers to a 'worker' rather than an 'employee'.

The concept of 'worker' is much wider than that of 'employee' as it can include an individual who is self-employed, provided that he or she is under an obligation to carry out the work him- or herself.¹¹¹

The statutory definition of employee in South African labour law is provided in the LRA:

- (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

¹¹⁰ Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and the Right to Organise and Collective Bargaining Convention 98 of 1949.

¹¹¹ *Broadbent v Crisp* (1974) ICR 248.

(b) in any manner assists in carrying on or conducting the business of an employer.¹¹²

The term 'employee' is defined in similar terms in the BCEA,¹¹³ the Skills Development Act (SDA)¹¹⁴ and the Employment Equity Act (EEA).¹¹⁵ This definition is significant, since only those who meet the requirements of the definition of employees are protected by the labour legislation. For instance, the LRA provides that 'every employee' has the right not to be unfairly dismissed and not to be subjected to an unfair labour practice.¹¹⁶ There is a different definition of 'employee' in the Occupational Health and Safety Act (OHSA) and the Unemployment Insurance Act (UIA).¹¹⁷ So it is possible that a worker who is not regarded as an employee in terms of the LRA and the BCEA may be entitled to compensation in the event of an injury at work and may be entitled to unemployment insurance.

Further, the BCEA states that an employer may not require or allow 'an employee' to work more than 45 hours in any week.¹¹⁸ The Labour Relations Amendment Act (LRAA)¹¹⁹ has deleted the words 'contract of employment' from the definition of 'dismissal' in section 186. Dismissal thus presently means that '(a) an employer has terminated employment with or without notice.'¹²⁰ As stated by the explanatory Memorandum, the amendments seek to clarify that the termination of employment is regarded as a dismissal, whether or not there is a formal or written contract of employment.

There are two parts to the definition of employee in the LRA and the BCEA. It might appear that para (b) is broad enough to include workers who otherwise might not be viewed as employees in para (a).

¹¹² Section 213 of the LRA.

¹¹³ Section 1 of the BCEA.

¹¹⁴ Skills Development Act 97 of 1999.

¹¹⁵ Section 1 of the Employment Equity Act 55 of 1998.

¹¹⁶ Section 185 of the LRA.

¹¹⁷ Section 1 of the Occupational Health and Safety Act (OHSA) defines an employee as 'any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person.'

¹¹⁸ Section s 9(1) of the BCEA.

¹¹⁹ Labour Relations Amendment Act 6 of 2014.

¹²⁰ Section 18(1)(a) of the LRA.

In *Liberty Life Association of Africa v Niselow*¹²¹ the Labour Appeal Court (LAC) referring to part (b) of the definition, held as follows:

The latter part (of the definition) in particular may seem to extend the concept to employment far beyond what is commonly understood thereby. To adopt a literal interpretation though would clearly result in absurdity. I think that the history of the legislation which has culminated in the present statute, and the subject matter of the statute itself, lends support to a construction which confines its operation to those who place their capacity to work at the disposal of others, which is the essence of employment. It is not necessary in this case to decide where the limits of the definition lie. It is sufficient to say that in my view the “assistance” which is referred to in the definition contemplates that form of assistance which is rendered by an employee, though the person he assists may not necessarily be his employer. In my view it does not include assistance of the kind rendered by independent contractors.

Significant groups of workers are either not viewed as employees or are incapable of exercising their rights as workers, although they are afforded these rights by the labour legislation. It appears that it was these workers that the South African government took into account when it proposed the adoption of a new presumption as to who is an employee. The presumption was adopted in 2002.¹²²

In terms of this presumption, a person is presumed to be an employee, until the contrary is proved, regardless of the form of the contract, if any one or more of the following factors are present:

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person’s hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person is a part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

¹²¹ *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC) 683A–B; See also *Borchards v CV Pearce & Sheward t/a Lubrite Distributors* (1991) 12 ILJ 383 (IC), where the Industrial Court held that the ‘assistance’ should be rendered with some of regularity and there should be a legal obligation to render such ‘assistance’.

¹²² See s 83A of the BCEA and s 200A of the LRA.

- (e) the person is economically dependent on the other person for whom that person works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person;
- (g) the person only works for or renders service to one person.¹²³

However, the fact that this is only a presumption means it can be rebutted. Furthermore, the presumption applies only to persons earning below a prescribed threshold amount determined by the Minister of Labour in terms of section 6(3).¹²⁴

More significantly, the presumption is not likely to alter the fact that there are still huge numbers of workers who are not regarded as employees, to whom labour legislation does not apply, and that there are huge numbers of workers who are unable to exercise their rights as employees.¹²⁵

Only natural persons can be employees. Any natural person can be an employee, but there are some statutory constraints.¹²⁶ Nevertheless, juristic persons cannot be employees; they can only become independent contractors. The definition of 'employee' expressly excludes 'independent contractors' from its scope.¹²⁷ This makes it necessary to differentiate between the concept of an 'employee' and that of an 'independent contractor'. It is crucial at all times to differentiate between an employee and an independent contractor as this has great significance and poses a lot of challenges to South African labour law. The Code of Good Practice regards with approval the following difference between an employee and an independent contractor: an employee 'makes over his or her capacity to produce to another' while an independent contractor is someone 'whose commitment is the production of a given result'.¹²⁸ The South African courts have developed a number of tests to distinguish between these two concepts.

¹²³ Van Niekerk *et al* *Law@work* 63.

¹²⁴ The amount is determined from time to time by the Minister of Labour and is presently fixed at R205 433,30 per annum. The presumption has not been included in other labour legislation such as the EEA, the SDA, the UIA, the OHSA or COIDA.

¹²⁵ Theron *et al* *Keywords for a 21st Century Workplace* 21.

¹²⁶ See s 43 of the BCEA which, for example, forbids the employment of children under the age of 15 years.

¹²⁷ See Benjamin (2004) 25 *ILJ* 787 at 789, where Benjamin states that the 'terminology of contract is introduced through the exclusion of "independent contractor".'

¹²⁸ Item 34 of the *Code of Good Practice: Who is an employee?* This description was cited with approval in *Niselow v Liberty Life Association of Africa of Africa Ltd* (1998) 19 *ILJ* 752 (SCA).

The control test was developed in *Colonial Mutual Life Assurance Society v McDonald*¹²⁹ where the former Appellate Division had to consider whether an insurance agent was an employee. The court held that:

the contract between master and servant is one of letting and hiring of services (locatio conductio operarum) whereas the contract between the principal and contractor is the letting and hiring of some definite piece of work (locatio conductio operis).¹³⁰

Therefore, in terms of this test, the conclusive difference between an employee and an independent contractor is that the principal has no legal right to prescribe the manner in which the independent contractor attains the desired result. However, the employer may prescribe the methods that the employee uses, and will have recourse against the employee if that method turns out to be inefficient or ineffective. The 'control' test has been criticised by Grogan for its deficiency if applied in isolation without a consideration of the other tests.¹³¹

Disaffection with the control test led the courts to construct another test, known as the organisation test. Determining whether a person is an employee or an independent contractor will depend upon whether the person is part and parcel of the organisation. Put differently, one looks at the extent to which a person (the worker) is integrated into the organisation of the other person (the employer) or whether the one person is performing work inside the organisation of another. Nonetheless, the test was dismissed as inadequate by the Appellate Division in *S v AMCA Services and Another*¹³² and in *Smit v Workmen's Compensation Commissioner*¹³³ as being too vague to be of any use.¹³⁴

The inadequacies of the control and organisation tests led the courts to devise a third test, called the multiple or dominant impression test. This test, often regarded as the standard test used by South African courts, depends on various factors to determine whether a person is an employee or an independent contractor.¹³⁵ The test requires

¹²⁹ *Colonial Mutual Life Assurance Society v McDonald* 1931 AD 412.

¹³⁰ Ibid 433; see also *R v AMCA Services* 1959 (4) SA 207 (A).

¹³¹ Grogan *Workplace Law* 18.

¹³² *R v AMCA Services* 1959 (4) SA 207 (A).

¹³³ *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 63.

¹³⁴ The organisation test was rejected on the basis that it also raised more questions than it answered.

¹³⁵ Basson *et al Essential Labour Law* 27.

an appraisal of all the 'relevant factors'. Although it is impractical to put together a comprehensive list of relevant factors, the most important are the authority to supervise, ie whether the employer has the authority to supervise the other individual;¹³⁶ the employer's authority to choose who will perform the work; the employee's responsibility to work for a certain period or hours; whether a salary is paid for time worked or for a specific outcome; whether the employer supplied the employee with the tools or equipment to perform the job; whether the employer has the power to discipline and so on.¹³⁷ This test was criticised at its inception by Etienne Mureinik,¹³⁸ who stated that the lack of a clear definition of an employee revealed that the labour statutes occupied 'loose and ill-defined ground'. According to Mureinik, the 'dominant impression test' fails to say anything about the legal nature of the contract of employment and gives no assistance in difficult cases on the border between employment and self-employment (which he calls the 'penumbral' cases).¹³⁹ The dominant impression test to date has been applied mostly in the context of the Workmen's Compensation Act, which restricts compensation for injuries at work to employees.¹⁴⁰

The Labour Court in *Rumbles v kwa-Bat Marketing*¹⁴¹ adopted the approach that a contractual relationship is not definitive as to whether a person is an employee as defined, and that the court must examine the true nature of the relationship between the parties. The issue of whether a person is an 'employee' or an independent contractor was also examined by the Labour Appeal Court in *SABC v McKenzie*,¹⁴² where some of the important attributes of the contract of employment and the contract of work were identified and distinguished. The 'independent contractor' is bound to produce what is required in terms of his contract of work. He or she is not under the supervision or control of the employer. He or she is also not under any obligation to obey any orders of the employer with regard to the manner in which the work is to be performed. The independent contractor is his or her own master. In addition, the independent contractor is utilised by the employer to provide services to a person

¹³⁶ *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 63.

¹³⁷ Basson *et al Essential Labour Law* 27; Grogan *Workplace Law* 20.

¹³⁸ Mureinik (1980) 97 SALJ 246 at 258.

¹³⁹ *Ibid.*

¹⁴⁰ Rycroft & Jordaan *A Guide to South African Labour Law* 32.

¹⁴¹ *Rumbles v kwa-Bat Marketing* (2003) 24 ILJ 1587 (LC) para 19.

¹⁴² *SABC v McKenzie* (1999) BLLR (LAC), *per* Myburg JP at 590F–591F.

through a contract of service rather than through the common-law contract of employment.¹⁴³ In order to circumvent the duties of an employer, employers may transform employees into independent contractors or contract out work previously done by employees.¹⁴⁴ In practice, the difference is that an employee benefits from the protection of labour law and an independent contractor does not benefit from such protection.

Nevertheless, in *Niselow v Liberty Life Association of SA Ltd*,¹⁴⁵ the Supreme Court of Appeal approved of Brassey's construction¹⁴⁶ that an employee is a person who makes over his or her capacity to produce to another person, whereas an independent contractor is a person whose commitment is to produce a result.¹⁴⁷ The dominant impression test was also found to have shortcomings similar to those of other attempts to identify a defining attribute. At present, it is usual practice for employees, especially at the managerial level, to be identified in terms of the outcomes to be attained.¹⁴⁸

Furthermore, the statutory definition in the LRA and the BCEA is silent on the question of when a person recruited into employment becomes an 'employee'.¹⁴⁹ In *Wyeth v SA (Pty) Ltd v Manqele & others*¹⁵⁰ the argument was raised that the term 'works for another person' is cast in the present tense in the definition of 'employee' and that an applicant therefore becomes an employee only when he or she actually begins working for the employer.¹⁵¹ Taking account of section 23 of the Constitution, which affords 'everyone' the right to fair labour practices, the Labour Appeal Court adopted the purposive approach and concluded that persons who had signed contracts of

¹⁴³ Cheadle *et al* *South African Constitutional Law: The Bill of Rights* 18-7. A person who provides services under a contract of work cannot be regarded as an employee except in special circumstances.

¹⁴⁴ Du Toit *et al* *Labour Relations Law: A Comprehensive Guide* 77.

¹⁴⁵ *Niselow v Liberty Life Association of SA Ltd* (1998) 19 ILJ 752 (SCA).

¹⁴⁶ Brassey (1990) 11 ILJ 889.

¹⁴⁷ *Niselow v Liberty Life Association of SA Ltd* (1998) 19 ILJ 752 (SCA) 753H.

¹⁴⁸ Benjamin (2004) 24 ILJ 787 at 794.

¹⁴⁹ Section 9 of the EEA provides that ss 6, 7 and 8 of the EEA (which incorporate the principal protections against unfair discrimination) apply to applicants for employment; see Le Roux (1998) CLL 91.

¹⁵⁰ *Wyeth v SA (Pty) Ltd v Manqele & others* (2005) 6 BLLR 523 (LAC).

¹⁵¹ *Whitehead v Woolworth (Pty)* (1999) 8 BLLR 862 (LC); *Herbst v Elmar Motors* (1999) 20 ILJ 2465 (CCMA) 2468J–2469C.

employment, but who had not yet commenced work, were ‘employees’ for the purpose of the LRA.¹⁵²

In *Denel (Pty) Ltd v Gerber*¹⁵³ the Labour Appeal Court considered the following facts: Denel concluded an agreement with Multicare Holdings (Pty) Ltd in terms of which the company would provide certain human resources consultancy services to Denel. Multicare had one employee, namely Gerber, and on a regular basis, Multicare rendered invoices to Denel. Denel subsequently informed Gerber that her services had been terminated on the grounds of redundancy. Gerber argued that she was an employee of Denel, while Denel claimed that it had validly terminated a commercial contract with Multicare, and that Gerber was not employed by Denel.

The court accepted that Gerber was an employee of Denel ‘on the basis of the realities – on the basis of substance and not forms or labels.’¹⁵⁴ Next, the court considered the position of persons who voluntarily agree to render services through a separate legal entity in order to gain a more favourable tax dispensation. In a number of earlier decisions, the courts had held that such persons would be precluded from reclaiming employee status for purposes of protection against unfair dismissal.¹⁵⁵ Zondo JP put an end to this line of argument and held that an agreement for purposes of a better tax dispensation does not alter the realities of the relationship.¹⁵⁶ Nonetheless, the court did hold that, in the absence of reconciliation with the South African Revenue Services, the court had been approached with ‘dirty hands’ and that this would be taken into account when crafting a remedy.¹⁵⁷

¹⁵² In *Wyeth v SA (Pty) Ltd v Manqele & others* (2005) 6 BLLR 523 (LAC) para 30, the Labour Appeal Court relied on *NEHAWU v University of Cape Town & others* (2003) 24 ILJ 95 (CC) and held that the ‘LRA must therefore be purposefully construed in order to give effect to the Constitution’.

¹⁵³ *Denel (Pty) Ltd v Gerber* (2005) 9 BLLR 849 (LAC).

¹⁵⁴ *Denel (Pty) Ltd v Gerber* (2005) 9 BLLR 849 (LAC) para 22.

¹⁵⁵ *CMS Support Services (Pty) Ltd v Briggs* (1997) 5 BLLR 533 (LAC); *Bezer v Cruizer International CC* (2003) 24 ILJ 1372 (LAC). In *Callanan v Tee-Kee Borehole Castings (Pty) Ltd & another* (1992) 13 ILJ 279 (IC) at 1550D–E the former Industrial Court held that the courts will be unwilling to assist employees who want to ‘have their cake and eat it’. See also *Apsey v Babcock Engineering Contractors (Pty) Ltd* (1995) 16 ILJ (IC) 924D–F.

¹⁵⁶ *Van Niekerk* (2005) 26 ILJ 1904 at 1908 argues that parties should be entitled, for whatever perceived advantage, to decide and agree on their own status and designation even if this does exclude the employment relationship.

¹⁵⁷ *Denel (Pty) Ltd v Gerber* (2005) 9 BLLR 849 (LAC) paras 204–205.

2.3 Who is a worker?

Legislation regulating the labour market generally grants rights to 'employees' without giving any definition of this term.¹⁵⁸ Worker status is occasionally regarded as a 'half-way house' separating employee status and self-employed status. Generally, 'employees' are entitled to a vast number of labour-related rights as opposed to the fewer statutory rights and protection enjoyed by workers. In other words, the term 'employee' draws a line between a category of workers who benefit and enjoy considerable regulatory support, and a category of workers who rely on the interplay of market forces.¹⁵⁹

In the words of Theron, 'the literal meaning of "worker" is someone who works, and corresponding with the distinction between work and labour, would therefore include both work in an employment relationship and self-employment.'¹⁶⁰ Nonetheless, not everyone who works views him- or herself as a worker. Put differently, it is an expression that also relates to identity. Historically, the term 'worker' was generally used to differentiate 'between workers in production (also called "blue-collar workers") and employees in managerial and administrative positions.'¹⁶¹

Presently a more suitable distinction would seem to be between 'workers who find themselves in a relationship of economic dependence, whether or not it is an employment relationship or not, on the one hand, and self-employed professionals and entrepreneurs on the other.'¹⁶² In short, a 'worker' is a person by whom work is done under a contract of service, whether or not as an employee.

2.4 Standard and non-standard employment

In recent times, there have been numerous scholarly works and considerable discussion addressing the changing nature of employment and work relationships. It is therefore important to understand first the meaning of the term 'standard work', before considering what qualifies as 'non-standard work'.

¹⁵⁸ Davidov (2005) 34 *ILJ* (UK) 57 at 62.

¹⁵⁹ *Ibid.*

¹⁶⁰ Theron *et al* *Keywords for a 21st Century Workplace* 68.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

2.4.1 The meaning of standard employment

Standard employment describes employment in what is ordinarily termed a 'permanent' job or an 'indefinite' job or 'typical' employment.¹⁶³ Standard employment is occasionally described as a yardstick or paradigm to which employment should conform. However, none of the above terms is found in labour legislation, nor is there consensus on how standard employment should be defined.¹⁶⁴ It appears there are only two points of reference or bases on which consensus has been reached: it is work for an indefinite period, and it is full-time. However, the meaning of 'full-time' may vary. The majority of authors include a further element: the employee has only one employer.¹⁶⁵ These can be regarded as the requirements for full-time employment.

Edgell has created a catalogue of traits associated with standard employment, which originated from the Fordist manufacturing system, namely:

'job security, expectations of rising living standards through high wages, workplace participation of workers, the presence of strong trade unions, free collective bargaining, and a strong welfare state (ie welfare benefits provided by the state).'¹⁶⁶

Theron *et al* are of the view that the existence of a bilateral employment relationship must be seen as the criterion by which to distinguish standard employment from non-standard employment.¹⁶⁷ Other authors¹⁶⁸ are of the view that standard employment must take place at the employer's workplace. But, as with the meaning of full-time employment, what is or should be perceived as the workplace is also far from settled, particularly with regard to workers in a bilateral employment relationship in services such as transport or security, and in the case of workers in a tripartite employment

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid. A part-time worker, on the other hand, may have more than one employer.

¹⁶⁶ Edgell *The Sociology of Work: Continuity and Change in Paid and Unpaid Work* 145–166.

¹⁶⁷ Theron *et al* *Keywords for a 21st Century Workplace* 62.

¹⁶⁸ Vosko (1997) 19 *Comparative Labour Law and Policy Journal* 43–77; Schellenberg & Clarke *Temporary Employment in Canada: Profiles, Patterns and Policy Considerations*.

relationship.¹⁶⁹ Kalleberg¹⁷⁰ describes standard work as an ‘arrangement in which it is generally expected that work is performed full-time, continues indefinitely, and is performed at the employer’s place of business and under the employer’s direction.’

The standard employment relationship is the model upon which labour laws, legislation and policies, as well as union practices, are based. Norms or ideas about what is typical or ‘normal’ guide the making of laws and policy, and so shape labour relations. ‘In this way, the standard employment relationship is a normative model of employment. Work that differs from this model is commonly described as “non-standard”.’¹⁷¹ Other scholars¹⁷² define the standard employment relationship as a situation in which the worker has one employer, works full-time, year-round on the employer’s premises, enjoys extensive statutory benefits and entitlements, and expects to be employed indefinitely.¹⁷³

Normally, only employees in standard employment enjoy benefits from pension and medical aid schemes, and job security.¹⁷⁴ Some authors and organisations¹⁷⁵ contend that it is the availability of benefits and job security to standard employees that distinguishes standard employment from non-standard employment.

Nonetheless, Theron is of the view that the perspective shared in the above sentence ‘introduces a subjective element into the equation, since there is necessarily

¹⁶⁹ The workplace signifies ‘any premises or place where a person performs work in the course of his employment’, in terms of s 1 of the Occupational Health and Safety Act (OHSA). This means that in the case of employees whose employment has been externalised, and who work on the premises of the core business, the workplace would be the premises of the core business. Workplace has a similar description in s 1 of the BCEA, which defines a workplace as ‘any place where employees work’. However, the LRA defines the workplace differently. In terms of s 213 of the LRA, the workplace is the ‘place or places where the employee of an employer works’. For employees whose employment has been externalised, the premises of the core business where they actually work is therefore not regarded as their workplace. The difficulty is that it is not obvious what the workplace of such employees is. In the case of a labour broker or a service provider, for instance, it may be that the only premises that it has are the offices where its management and administration are based (if it has offices at all). This is not the place where the employees work. It is also often the case that the workers have no or limited contact with such offices.

¹⁷⁰ Kalleberg (2000) 26 *Annual Review of Sociology* 341.

¹⁷¹ Fudge & Vosko (2001) 22(3) *Economic and Industrial Democracy* 327.

¹⁷² Fudge *Precarious Work and Families*; Rodgers ‘Precarious work in Western Europe’ in Rodgers & Rodgers (eds) *Precarious Jobs in Labour Market Regulation: The Growth of Atypical Employment in Western Europe* 1–16; Schellenberg & Clarke *Temporary Employment in Canada: Profiles, Patterns and Policy Considerations*; Vosko (1997) 19 *Comparative Labour Law and Policy Journal* 43–77.

¹⁷³ Cranford, Vosko & Zukewich (2003) 58(3) *Industrial Relations* 454–482.

¹⁷⁴ *Ibid.*

¹⁷⁵ Fudge *Precarious Work and Families*; Schellenberg & Clarke *Temporary Employment in Canada: Profiles, Patterns and Policy Considerations*; see also Economic Council of Canada *Good Jobs, Bad Jobs: Employment in the Service Economy*.

considerable variation in the benefits provided, or the degree of job security workers enjoy. It may also be debatable whether workers should be expected to contribute to certain kinds of benefits.¹⁷⁶ Theron further argues that it is unlikely that there will be consensus regarding what comprises standard employment, and that any attempt to define standard work must be viewed as unreliable.¹⁷⁷

For Vosko, a standard work arrangement normally meant that employment would be carried out full-time, continue permanently¹⁷⁸ until retirement, or until either party gave notice of termination.¹⁷⁹ Work was also usually carried out on the employer's premises as directed by the employer. In addition, an employee was usually assured of pension benefits on retirement.¹⁸⁰ Vosko recognises three central pillars that form the cornerstones of standard employment as opposed to non-standard employment: 'This type of employment includes employee status (ie the bilateral employment relationship), standardised working time (normal daily, weekly, and annual hours), and continuous employment (permanency).'¹⁸¹ Furthermore, 'the standard employment relationship generally alludes to circumstances where the employee has one employer, works full-time, year-round on the employer's premises, enjoys extensive statutory benefits and entitlements and expects to be employed indefinitely.'¹⁸²

The importance of a study of standard employment, nonetheless, is that labour regulation in most Southern African states is informed largely by the paradigm of standard employment. Put differently, the premise on which labour regulation is based is sound for employees in standard employment, but not automatically so for non-standard workers. The standard employment relationship is the exemplar upon which labour laws and policies, together with union practices, are premised. Norms or thoughts about what is typical or 'normal' direct the enacting of laws and policy and

¹⁷⁶ Theron *et al* *Keywords for a 21st Century Workplace* 27.

¹⁷⁷ *Ibid.*

¹⁷⁸ Vosko *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* 336.

¹⁷⁹ Grogan *Workplace Law* 46.

¹⁸⁰ Once a contract is terminated by mutual agreement, it cannot be revived by one of the parties: see, for example, *Breet v Maxim Dantex SA (Pty) Ltd* (1993) 14 ILJ 1553 (IC).

¹⁸¹ Vosko *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* 336.

¹⁸² Fudge *Precarious Work and Families*; Rodgers 'Precarious work in Western Europe' 1–16; Schellenberg & Clarke *Temporary Employment in Canada: Profiles, Patterns and Policy Considerations*; Vosko (1997) *Comparative Labour Law and Policy Journal* 43–77.

therefore shape labour relations. The standard employment relationship is thus a normative model of employment.¹⁸³

Further, it is generally accepted in labour law scholarship worldwide that the ability of labour laws to protect and enable employees is seriously hindered by dependence on the orthodox employment relationship as a means by which rights and responsibilities are conferred.¹⁸⁴ The ILO has also dealt with the matter, leading up to deliberations at the ILO Conference, which gave rise to the adoption of the Employment Relationship Recommendation 198 of 2006.¹⁸⁵ In Southern Africa, as in most developing economies, the challenges to traditional labour law concepts are possibly even greater than those confronting labour law in the developed nations.¹⁸⁶ They comprise a situation where a great number of role players in the labour market are made up of 'own-account' workers, that is, workers in the informal sector of the economy.¹⁸⁷ High rates of unemployment and under-employment will always cause serious difficulties to the effectiveness of labour legislation.¹⁸⁸

In the circumstances mentioned above, it is hard to see how even widely expanded notions of the nature of the employment relationship could be effective in broadening the protective scope of labour law. The obvious result is that these matters make it very difficult for labour law in Southern Africa to fulfil its protective function. Most of the challenges confronting labour law exist because of its traditional dependence upon the standard employment relationship as the central point around which most of its protective mechanisms revolve.¹⁸⁹

¹⁸³ Vosko *Rethinking Feminization: Gendered Precariousness in the Canadian Labour Market and the Crisis in Social Reproduction*; Vosko 'Gender differentiation and the standard/non-standard employment distinction in Canada, 1945 to the present' in Juteau (ed) *Social Differentiation: Patterns and Processes* 25–80.

¹⁸⁴ See, for example, the essays in Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law* and, before them (*inter alia*) Supiot *Beyond Employment*.

¹⁸⁵ See ILO *The Employment Relationship*.

¹⁸⁶ Fenwick *et al* 'Labour law: A Southern African perspective' in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries*.

¹⁸⁷ Theron 'Employment is not what it used to be' in Webster and Von Holdt (eds) *Beyond the Apartheid Workplace: Studies in Transition* 293–294.

¹⁸⁸ See, for example, Benjamin 'Beyond the boundaries: Prospects for expanding labour market regulation in South Africa' in Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law* 181–204; See also similar remarks made by Lindsey, about the efficiency of labour law in Indonesia: Lindsey & Masduki 'Labour law in Indonesia after Soeharto' in Cooney S *et al* (eds) *Law and Labour Market Regulation in East Asia*.

¹⁸⁹ Fenwick *et al* 'Labour law: A Southern African perspective' in Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 17.

In his Report to the 102nd Session of the International Labour Conference, the Director-General of the International Labour Office observed that ‘the classic stereotype of a full-time permanent job, with fixed hours, and a defined benefit pension on the completion of a largely predictable and secure career path with a single employer, however desirable it might appear, is an increasingly infrequent reality.’¹⁹⁰ He also noted that ‘[t]oday, about half of the global workforce is engaged in waged employment, but many do not work full time for a single employer’¹⁹¹, and that ‘[v]iewers are strongly divided about whether and how this matters for the attainment of decent work for all and, if so, what if anything should be done about it.’¹⁹²

2.4.2 The concept of non-standard work

Non-standard work arrangements, such as temporary work, fixed-term work, and part-time work, have taken centre-stage in research and writing on labour and employment relations.¹⁹³ In fact, they have become increasingly important ways of organising work.

How we currently describe non-standard work is precisely the opposite of the Fordist version of standard employment that reached its highest point in the 1950s. Non-standard employment, as the expression implies, is described by what it is not. It is not standard employment.¹⁹⁴ Edgell lists the characteristics of standard employment that sprung from the Fordist production system: job security, expectations of rising living standards through high wages, workplace participation of workers, the presence of strong trade unions, free collective bargaining, and a strong welfare state (ie welfare benefits provided by the state). Non-standard work is employment that differs from the conventional standard work relationship, where work is usually full-time and anticipated to continue until normal retirement age, or until either party gives notice of termination. The understanding of these non-standard employment arrangements has been restricted by ‘inconsistent definitions, often inadequate measures, and the

¹⁹⁰ *Non-standard Forms of Employment: Report for Discussion at the Meeting of Experts on Non-standard Forms of Employment* 6.

¹⁹¹ *Ibid.*

¹⁹² International Labour Organisation *Non-standard Forms of Employment* 13.

¹⁹³ Krahn *Non-standard Work Arrangements: Perspectives on Labour and Income* 35–45; Polivka (1996) 119(10) *Contingent and Alternative Work Arrangements, Defined* 3–9; Schellenberg & Clarke *Temporary Employment in Canada: Profiles, Patterns and Policy Considerations*; Vosko (1997) 19 *Comparative Labour Law and Policy Journal* 43–77; Fudge, Tucker & Vosko *The Legal Concept of Employment: Marginalizing Workers, Report for the Law Commission of Canada*.

¹⁹⁴ Theron *et al* *Keywords for a 21st Century Workplace* 62.

paucity of comparative research.¹⁹⁵ Researchers have embraced divergent terminology for this category of work arrangement, including, for instance, 'non-standard employment relations',¹⁹⁶ 'alternative work arrangements',¹⁹⁷ 'flexible staffing arrangements',¹⁹⁸ 'contingent work',¹⁹⁹ and 'precarious employment'.²⁰⁰ To some degree the various expressions used mirror various conceptions of the concerns to which the various forms of non-standard employment lead.

For example, one author made this comment with regard to the expression 'contingent' employment:

It would be tedious and confusing to discuss the protean forms of contingent employment one by one. It is more useful and manageable to discuss these forms of employment from the viewpoint of their deviation from, or denial of, the three basic characteristics of the dominant model of the employment relation.²⁰¹

In addition, insecurity has been classified as 'an essential aspect of the definition of non-standard work'.²⁰² There is no single and universally accepted terminology describing these emerging types of work. For the purposes of this study, non-standard employment refers to part-time workers, temporary workers, workers supplied by employment agencies or labour brokers, casual workers, workers in fixed-term contracts and workers engaged in a variety of contractual relationships.

Generally, non-standard work relationships are associated with the denial of entitlements and privileges, poor wages, lack of job security, dispossession of status, an uncertain future, and contract termination. These categories of workers are also often more vulnerable to exploitation, particularly the less skilled.²⁰³ Furthermore, they

¹⁹⁵ Kalleberg (2002) 26 *Annual Review of Sociology* 341–365.

¹⁹⁶ Ibid 341.

¹⁹⁷ Polivka (1996) 119(10) *Monthly Labour Review* 3–9.

¹⁹⁸ Abraham 'Flexible staffing arrangements and employers' short-term adjustment strategies' in Hart (ed) *Employment, Unemployment and Labour Utilisation* 288–311. See also Houseman *The Benefits Implications of Recent Trends in Flexible Staffing Arrangements* 2.

¹⁹⁹ Polivka & Nardone (1998) 12 *Monthly Labour Review* 9–16. See also Belous *The Contingent Economy: The Growth of the Temporary, Part-Time and Subcontracted Workforce National Planning Association*.

²⁰⁰ Treu (1990) 131 (4-5) *International Labour Review* 497–512.

²⁰¹ Summers (1997) 18 *Comparative Labour Law & Policy Journal* 503.

²⁰² Krahn *Non-standard Work Arrangements: Perspectives on Labour and Income* 36.

²⁰³ See the statement made by the Department of Labour in the *Green Paper on Labour: Minimum Standards Directorate Policy Proposals for a New Employment Standard Statute* 13 February 1996, available at <http://www.info.gov.za/greenpapers/1996/labour.htm#Executive> (Date of use: 10 November 2017).

are not always covered by collective agreements and usually have no trade union protection. Non-standard workers are more inclined to depend on statutory protection enacted to ensure basic working conditions. Although they may enjoy equal legislative protection in theory, in practice, the circumstances of their work make it very difficult to enforce their rights.²⁰⁴ According to the decision in *Mandla v LAD Broker (Pty) Ltd*,²⁰⁵ non-standard workers are at the mercy of statute passed by the legislature to shield primary working conditions. Notwithstanding the fact that non-standard workers may benefit from the same legislative protection in theory, in practice, the situation of their work makes it very difficult to enforce their rights.²⁰⁶

Bendapudi *et al* describe non-standard work arrangements as jobs that do not involve 'explicit or implicit contracts for long-term employment.'²⁰⁷ The features of this type of employment arrangement include lower remuneration and benefits, and disproportionate protection under the law.²⁰⁸ Various authors have described non-standard employment as work arrangements that do not fit the model of full-time employment, and history can offer many examples of peripheral work forces and flexible labour markets in which employment is unstable and temporary.²⁰⁹

Landau, Mahy and Mitchell define non-standard employment as follows:

'Non-standard employment' (also often referred to as 'atypical' or 'irregular' employment) does not have a fixed meaning, and the use and scope of the term often varies between countries, regions and academic disciplines. Broadly speaking, the term encompasses various ways in which workers are engaged in the labour market that deviates from the idea of the 'standard employment relationship', it is generally characterised by full-time continuous employment, with a direct employer, and where the work is performed under the direct supervision of that employer, on the employer's premises.²¹⁰

²⁰⁴ Gericke (2011) 14 *PER/PELJ* 1.

²⁰⁵ *Mandla v LAD Broker (Pty) Ltd* [2002] 9 BLLR 1047 (LC) 1051E–F.

²⁰⁶ Gericke (2011) 14 *PER/PELJ* 1 at 3.

²⁰⁷ Bendapudi *et al* (2003) 26(1) *Human Resource Planning* 26.

²⁰⁸ Vosko *Precarious Jobs: A New Typology of Employment* 19.

²⁰⁹ Summers (1997) 18(4) *Comparative Labour Law Journal* 503–22; see also Peck *Workplace: The Social Regulation of Labour Markets*.

²¹⁰ See Landau, Mahy & Mitchell *The Regulation of Non-standard Forms of Employment in India, Indonesia and Vietnam* 2.

In addition, Krahn²¹¹ defines non-standard employment as ‘employment situations that differ from the traditional model of a stable, full-time job. Under the standard employment model, a worker has one employer, works full year, full time on the employer’s premises, enjoys extensive statutory benefits and entitlements, and expects to be employed indefinitely’.²¹² Krahn describes non-standard employment in both a broad sense and a restricted sense. With regard to the broad sense, it is ‘the alternative to one full-time, permanent, 9 a.m. in the morning to 5 p.m. in the evening schedule where you are a paid employee. Non-standard work by this definition would include: part-time work, temporary work, multiple-job holders (moonlighting), and the self-employee.’²¹³ Shift work may also be considered an alternative work arrangement to the standard 9 a.m. to 5 p.m. arrangement. On the other hand, Krahn’s restricted sense of non-standard employment excludes the self-employed and multiple jobholders. It focuses mainly on part-time and temporary employment.²¹⁴ The reason why multiple jobholders are excluded is because not all these workers are in precarious financial or employment situations – one-third of those with multiple jobs also have a primary full-time job in professional or management occupations.²¹⁵

The ILO is of the view that there is no official definition for non-standard forms of employment. It states that ‘typically, non-standard forms of employment cover work that falls outside the scope of a standard employment relationship, which itself is understood as being work that is full-time, indefinite employment in a subordinate employment relationship’.²¹⁶ An ILO Workers’ Symposium on precarious work also set out a definition in an effort to collate factors that are common to most definitions of precarious work.²¹⁷ The definition includes ‘two categories of contractual arrangements characterised by four precarious working conditions’.²¹⁸

The two contractual arrangements are (1) the limited duration of the contract (ie uncertainty); and (2) the nature of the employment relationship (ie use of temporary

²¹¹ Krahn *Non-standard Work Arrangements: Perspectives on Labour and Income* 35–45.

²¹² Ibid.

²¹³ Ibid.

²¹⁴ Ibid.

²¹⁵ Webber *Le cumul d’emplois* Perspective, Catalogue 75-001F (Ottawa, Statistics Canada, 1998) 23–33.

²¹⁶ Ibid.

²¹⁷ ILO *From Precarious Work to Decent Work: Outcome Document to the Workers’ Symposium on Policies and Regulations to Combat Precarious Employment*.

²¹⁸ Ibid 4–7.

hiring agents and 'bogus' subcontracting).

The four precarious working conditions are: (1) low pay; (2) poor protection from termination of employment (ie lack of a defined contract); (3) lack of benefits and social protection; and (4) lack of or limited access of workers to exercise their rights at work (ie as members of a trade union).²¹⁹

As non-standard employment takes various forms, it is important to ask the question whether it is practical to combine these various forms in a single group. This is a policy question ie what is the policy goal of grouping various forms of employment?

Certain authors distinguish between 'non-standard work' and 'employment'.²²⁰ In terms of this approach, self-employment clearly falls under non-standard work in that there is no employer who is responsible for the circumstances in which an employee is employed. Theron, however, argues that the expression 'non-standard work' is 'nonsensical, in that there is not and never was such a thing as "standard work". It is only an employment relationship that can be said to be standard.'²²¹ For Theron, it makes more sense, in this context, to talk of 'contingent' or 'precarious' work.²²²

It is worth noting that the expressions 'contingent' and 'precarious' highlight the insecurity of the job or work arrangement; this points to a need for policy that establishes measures to enhance or protect job security. Such measures could apply to all citizens and advance job security (for example, a basic income grant). However, it appears trite that any measures targeting workers will need to distinguish between the self-employed, on the one hand, and workers in an employment relationship, on the other. Likewise, different forms of employment call for different measures. In light of the above, it appears preferable that the term 'non-standard employment' should be used to refer to workers in an employment relationship, and that a different term, tailored to their specific needs, is required for workers outside of an employment relationship but still in need of protection.

²¹⁹ Ibid 29.

²²⁰ See Krahn *Non-standard Work Arrangements: Perspectives on Labour and Income* 35–36. See also Heery *et al* 'Trade Union Responses to Non-standard Work' in Healy *et al* *The Future of Worker Representation*.

²²¹ Theron *et al* *Keywords for a 21st Century Workplace* 49.

²²² Ibid.

2.5 Defining various forms of non-standard employment

The preceding paragraphs explored the difference between standard and non-standard employment. It is necessary to describe the different categories of non-standard employment that are relevant to the subject matter of this study.

2.5.1 Defining temporary employment agencies (labour brokers)

'Temporary employment agency' and 'labour broker' are the terms that are usually used in South Africa to describe a person who procures or provides workers to work for a client (the core business) and who are paid by the agency or broker. The LRA defines 'temporary employment service' as 'any person who, for reward, procures for or provides to a client other persons who perform work for the client; and who are remunerated by the temporary employment service.'²²³

Correspondingly, there are three parties involved in the triangular relationship of agency work: the worker(s), the employment agency or labour broker, and the client or core business, for whom the worker(s) work. This thesis examines employment agencies – not recruitment agencies or placement agencies, which simply place a worker with an enterprise for a fee. In South Africa, the LRA and the BCEA utilise the term 'temporary employment service' (TES).²²⁴ The ILO employs the term 'private employment agency'²²⁵ and the European Union (EU) uses the term 'temporary employment agency'.²²⁶ For purposes of this study the term 'employment agency' is used, regardless of whether ILO or EU standards are being examined.

This study uses the term 'client' to refer to a person or enterprise that acquires agency workers from an employment agency to perform work for the client. This explanation is obtained from the definition of a TES in South Africa, where it is stated that 'placements are made with a client'.²²⁷ When referring to a client the ILO has embraced

²²³ Section 198(1) of the LRA.

²²⁴ Ibid.

²²⁵ See ILO Private Employment Agencies Convention 181 of 1997 (Private Employment Agencies Convention) and ILO Private Employment Agencies Recommendation 188 of 1997 (Private Employment Agencies Recommendation).

²²⁶ Article 3(1)(b) of the EU Directives on Temporary Agency Work 2008/104/EC (Temporary Agency Work Directives) defines a 'temporary work agency' as 'any natural person or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction'.

²²⁷ Section 198(1)(a) of the LRA.

the phrase ‘user enterprise’ but the concept has been given no particular definition by the ILO.²²⁸

For purposes of this study the term ‘agency worker’ refers to a worker who is placed by an employment agency (labour broker) to work at a client or the core business. In South Africa, in the recent ground-breaking Constitutional Court judgement of *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others*,²²⁹ the court dismissed Assign’s appeal and upheld the Labour Appeal Court (LAC) ruling. The majority of the court held that, for the first three months of employment, the TES is the employer of the placed worker, and thereafter the client becomes the ‘sole’ employer. The majority further held that section 198A must be read within the context of the right to fair labour practices in section 23 of the Constitution and all the objectives of the LRA.

The word ‘worker’ in terms of the ILO norms includes a ‘jobseeker’. In this study, nonetheless, the phrase ‘agency work’ excludes job seekers, except if clearly or otherwise stated. Furthermore, the phrase ‘temporary agency worker’ has been defined; as ‘a worker with a contract of employment or an employment relationship with a temporary work agency with a view of being assigned to a user undertaking to work temporarily under its supervision and direction’.²³⁰ It is worth noting that the phrase ‘temporary agency worker’ excludes a jobseeker in the Temporary Work Directive.

Temporary employment services or labour broking have different names in other countries in the world. In neighbouring Namibia, for instance, it is termed ‘labour hire’. Nonetheless, in most countries the term used highlights that the workers are supplied on a temporary basis. This term is ‘temporary agency work.’ In North America, for instance, the term used is ‘temporary help agencies’ or ‘temp agencies’. In South African labour legislation the term ‘labour broker’ is used in the BCEA, OHSA, COIDA and specific bargaining council agreements.

²²⁸ Article 1 of the Private Employment Agencies Convention 181 of 1997 uses the phrase ‘user enterprise’.

²²⁹ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others* (CCT194/17) [2018] ZACC 22; [2018] 9 BLLR 837 (CC).

²³⁰ Article 3(1)(c) of the Temporary Work Directives.

Namibia acknowledges the following group of private employment agencies: ‘agencies providing services matching the supply and demand for labour; agency work “consisting of engaging individuals with a view to placing them to work for an employer which assigns their tasks and supervises the execution of those tasks”; and “other services” pertaining to job seeking’.²³¹

2.5.2 Defining fixed-term workers

Fixed-term workers are a sub-group of non-standard workers and are important not only because their numbers are relevant, but also because they in particular are unequal bargaining parties in the employment relationship. The employment relationship in South Africa is fraught with legal responsibilities, and it is trite that employers treat fixed-term workers differently from workers who are employed indefinitely. Many employers use the fixed-term contract of employment to avoid their statutory responsibilities in terms of the BCEA, the LRA, and the EEA.

Temporary employment relationships are frequently related to the denial of rights and employment benefits, the absence of medical aid benefits, avoidance of the processes required for the termination of employment, the absence of job security, dispossession of status, and poor earnings. The employers, in turn, save money by denying their employees these benefits. Fixed-term workers – especially the less-skilled among them – are often left unprotected and open to exploitation.²³² Furthermore, they frequently do not benefit from trade union protection and are not sheltered by collective agreements. Accordingly, fixed-term workers are more predisposed to rely on the statutory protection that is available to safeguard basic working conditions. While they may benefit from equal legislative protection in theory, in practice, the conditions of their employment render it very difficult for them to enforce their rights.²³³ It is therefore important to prevent abuse in the use of fixed-term contracts of employment by restricting their renewal or overall duration, or by prohibiting fixed-term employment for permanent tasks. It is also necessary to provide equal conditions of work for

²³¹ Section 1 of the Employment Services Act 2011; see also s 8 of the Labour Amendment Act 2012.

²³² Particularly, certain fixed-term positions may need highly developed skills. For example, it is usual to appoint rectors of universities on fixed-term contracts of employment.

²³³ See also the statement made by the Department of Labour *Green Paper on Labour: Minimum Standards Directorate Policy Proposals for a New Employment Standard Statute* of 13 February 1996, available at <http://www.info.gov.za/greenpapers/1996/labour.htm#Executive> (Date of use: 17 November 2017).

workers in temporary employment when compared to workers in standard employment.

In broad terms, a fixed-term contract of employment is concluded between an employer and worker, and is linked to a determinable period or to the completion of a specific event that will bring the contract to an end.²³⁴ A fixed-term contract of employment is commonly concluded for a comparatively restricted period,²³⁵ but this may vary from a matter of hours, to a period of 12 months or more.²³⁶ The implication is that both parties must initially have agreed that the duration of the contract will be limited. Fixed-term contracts serve the need for temporary appointments. In terms of the common law, the termination of a fixed-term contract of employment is generally not unfair if the reason for which the employee was employed no longer exists.²³⁷ In addition, where the parties have declared that the contract will terminate on the occurrence of a particular event or on the completion of a particular task; the onus vests on the employer to prove that the event has occurred or that the task has in fact been completed.²³⁸

Section 198B(1) of the LRA provides a new definition of a 'fixed-term contract'. A fixed-term contract is a contract of employment that terminates on—

- (a) the occurrence of a specified event;
- (b) the completion of a specified task or project; or
- (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3).

This is the definition used for purposes of this thesis.

This definition may apply to the following three types of events. An election official's contract could, for instance, state that it comes to an end once the national election results have been made public. Further, a builder's contract could state that the contract ends once a building code official completes a final inspection and issues a

²³⁴ Grogan *Workplace Law* 41.

²³⁵ *National Union of Metalworkers of SA & others v SA Five Engineering (Pty) Ltd & others* (2007) 28 ILJ 1290 (LC) paras 39 and 42.

²³⁶ Bhorat & Cheadle *Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions* 22.

²³⁷ *Ibid.*

²³⁸ Note that the employer in *Bottger v Ben Nomoyi Film & Co Video CC* (1997) 2 LLD 102 (CCMA) failed to discharge this onus and the employee was held to have been unfairly retrenched prior to the expiry of the fixed-term contract.

certificate of occupancy. Lastly, a contract could state that it will continue until the expiry of a fixed term.

It is worth noting that policy makers have excluded numerous groups of employees from the safety net provided by section 198B.²³⁹ Those excluded are employees who earn above the earnings threshold determined by the Minister of Labour, employers who have between 10 and 50 employees and whose business has been in operation for less than two years, and employees whose fixed-term contracts are permitted by statute, collective agreement, or sectoral determination.²⁴⁰

2.5.3 Part-time work

Generally, it is difficult to distinguish the following groups of workers – ‘temporary’, ‘part-time’ and ‘casual’ workers – as they overlap. Nevertheless, it is essential to deal with these groups of non-standard workers individually, as their circumstances differ. Temporary workers are workers hired on a fixed-term contract of employment.²⁴¹ Casual workers, sometimes referred as occasional or irregular workers, are described as ‘employees hired on a periodic basis when the need arises’.²⁴² They are hired on individual fixed-term contracts usually for a day at a time.²⁴³ They frequently work irregular, long daily hours on weekends and holidays, and during the night.²⁴⁴ This category is the most vulnerable group. Part-time workers are described as those who work considerably less than the ‘normal’ working hours.²⁴⁵ They are usually hired on a frequent basis.²⁴⁶ It is submitted that part-time workers are comparatively better placed than their casual and temporary counterparts as their employment is often indefinite.²⁴⁷ ‘Part-time work allows employers greater flexibility in planning work,

²³⁹ Van Niekerk *et al Law@Work* 74.

²⁴⁰ Section 198B(2). The threshold amount presently stands at R205 433,30 per annum.

²⁴¹ Theron (2004) 25 *ILJ* 1250.

²⁴² *Ibid.*

²⁴³ Basson *et al Essential Labour Law* 32.

²⁴⁴ Mills (2004) 25 *ILJ* 1219.

²⁴⁵ *Ibid.*

²⁴⁶ *Ibid.*

²⁴⁷ Mills (2004) 25 *ILJ* 1219. The distinction between permanent full-time employees and part-time workers is in terms of hours worked per day or per week. However, part-time workers are still less well paid as they work fewer hours. They also do not benefit from collective bargaining as they are often not organised.

aligning schedules with peaks in customer demand, and retaining workers who are not in a position to commit to full-time work.’²⁴⁸

In South Africa, the LRA defines a ‘part-time worker’ as ‘someone who is remunerated wholly or partly by reference to the time that the worker is employed and who works less than a comparable full-time employee.’²⁴⁹ A full-time employee is, in turn, defined primarily ‘in terms of the custom and practice of the employer’,²⁵⁰ but does not include a full-time worker ‘whose hours of work are temporarily reduced for operational requirements as a result of an agreement’.²⁵¹ This is presumably intended to refer to situations where firms have to work short-time, as well as where a compressed working week is introduced in terms of the BCEA.²⁵²

Part-time workers normally work fewer hours than the norm established by a wage regulating measure, a collective agreement, or in terms of the contract of employment in respect of the employer’s other employees.²⁵³ This could, for example, include morning work, or the permanent domestic worker who works one day per week for five different employers. Workers who work for periods of short duration, as and when required by the employer, perform casual and temporary work. Here, both parties know that the workers have no expectation that the employment relationship will continue.²⁵⁴ In some instances, the employer places these workers in a pool from which workers are drawn depending on the needs of the business.

Part-time work is further described as regular wage employment in which the hours of work are less than ‘normal’.²⁵⁵ The ILO defines a part-time worker as an ‘employed person whose normal hours of work are less than those of comparable full-time

²⁴⁸ See ILO Non-standard Forms of Employment; available at www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/.../wcms_336934.pdf (Date of use: 13 May 2018).

²⁴⁹ Section 198C(1)(a) of the LRA.

²⁵⁰ Section 198C(1) of the LRA.

²⁵¹ Section 198C(1) of the LRA. It should be emphasised that this definition applies only in respect of workers earning below the threshold.

²⁵² Theron (2014) 1 *Monograph* 18.

²⁵³ In Baker & Holtzhausen *South African Labour Glossary* 109–110 the term ‘part-time work’ is the ‘employment of an individual for a fewer hours of work than statutory, collectively agreed or usual working hours, e.g. morning work. Part-time work can be performed on a regular basis and can last for an indefinite period of time, in which case it is called “permanent part-time employment”.’

²⁵⁴ In Baker & Holtzhausen *South African Labour Glossary* 21 ‘casual work’ is defined to mean ‘work performed by a temporary employee’.

²⁵⁵ Thurman & Trah (1990) 129(1) *International Labour Review* 23–40.

workers.²⁵⁶ This is a common legal definition of part-time work and is reflected, for example, in the European Union's Part-time Work Directive.²⁵⁷ For statistical purposes, however, 'part-time' is commonly defined as a specified number of hours. The threshold that determines whether a worker is full-time or part-time varies from country to country, but is usually 30 or 35 hours per week.²⁵⁸ For instance, in the United States, part-time work is generally defined as less than 35 hours a week.²⁵⁹ Canada and the United Kingdom normally use 30 hours as the cut-off period for part-time work.²⁶⁰ In France, part-time work is defined as at least 20 per cent below the statutory level of working hours (which was 35 hours on 1 January 2000), while in Germany it is less than 36 hours of work per week.²⁶¹ However, 'part-time work in Japan is clearly related to status within the enterprise and not to hours worked; indeed, recent Japanese surveys indicate that 20 to 30% of those categorised by their employers as "part-time" actually work as many hours as "full-time" employees'.²⁶²

Part-time, casual and temporary workers are all included under the definition of 'employees' for the duration of the period that they are performing work.²⁶³ They may even, in certain circumstances, be deemed party to an employment relationship while they are not actively performing work.

2.6 Employees, employers and labour relations

Employers and employees are vital in any description of employment relations. The definition of employment relations will hardly be complete without including 'employees' and 'employers'. The employment relationship requires the existence of

²⁵⁶ ILO Part-Time Work Convention 175 of 1994.

²⁵⁷ Part-time Work Directive 97/81/EC is one of three European Union Directives that regulate non-standard work. Alongside the Fixed-term Work Directive and the Agency Work Directive, its aim is to ensure that people who have not contracted for permanent jobs are nevertheless guaranteed a minimum level of equal treatment compared to full-time permanent staff.

²⁵⁸ Ibid.

²⁵⁹ U.S. Bureau of Labour Statistics *Labour force characteristics, full or part-time status*.

²⁶⁰ Kahne 'Part-time work a hope and a peril' in Warne, Lundy & Lundy (eds) *Working Part-Time: Risks and Opportunities* 295–309.

²⁶¹ Houseman (1995) 16(3) *Journal of Labour Research* 249–262.

²⁶² Houseman & Osawa 'What is the nature of part-time work in the United States and Japan?' in O'Reilly Fagan (ed) *Part-Time Prospects: An International Comparison of Part-time Work in Europe, North America and the Pacific Rim* 232–251.

²⁶³ Even if the relationship is temporary in nature, the employees still have the right not to be unfairly dismissed. See *Bezuidehout v Ibhayi Engineering Contractors (CC)* (2005) 26 ILJ 2477 (BCA) in this regard. However, in these circumstances, compensation rather reinstatement will be awarded.

the category of employers, on the one hand, and the category of employees, on the other hand. There can be no sound employment relationship without these two groups.

2.6.1 Who is an employer?

In order to understand the legal issues, it is necessary to define the term 'employer'. Ordinary, an employer is a person, an organisation, or the state, which hires workers. Employers offer remuneration or payment to the employees in exchange for the worker's services or labour, either on a fixed-term or a permanent basis. Although one might assume that it is obvious who the employer is, on many occasions this is not the case.

There are, for instance, circumstances in which labour law views an employee as having more than one employer, or where an employee is seconded to work for another person or temporarily assigned to work for another organisation. Externalisation has further caused much unpredictability concerning who the employer is, since it results in circumstances where employees work for someone who is not the employer, or is not considered as the employer, despite the fact that a person may in certain situations be liable to perform the duties of an employer.²⁶⁴

International labour is silent with relation to the definition of the concept of employer. The ILO Conventions concerning non-standard employment, such as the ILO Convention on Part-time Work,²⁶⁵ the ILO Convention on Homework,²⁶⁶ the ILO Convention on Domestic Work,²⁶⁷ and the ILO Convention on Private Employment Agencies,²⁶⁸ do not define an 'employer'. The South African labour law which was influenced by the ILO Conventions also did not define it.

Swanepoel states that an 'employer is a natural person or a juristic person who engages or employs the services of a natural person or a group of natural persons in exchange of remuneration'.²⁶⁹ Grogan notes that an employer may be a legal entity such as incorporated companies, close corporations, trusts, partnerships or entities

²⁶⁴ For further details see the discussion of externalisation in chapter 3 of this study.

²⁶⁵ ILO Part-time Work Convention 179 of 1994.

²⁶⁶ ILO Home Convention 177 of 1996.

²⁶⁷ ILO Domestic Work Convention 189 of 2011.

²⁶⁸ Private Employment Agencies Convention 181 of 1997.

²⁶⁹ Swanepoel *Introduction to Labour Law* 30.

resembling partnerships.²⁷⁰ These entities may also combine to form groups consisting of holding companies and subsidiaries. Van Niekerk *et al*,²⁷¹ nonetheless, argue that it seems logical to use the mirror image of the definition of ‘employee’ (and the statutory presumption of employment) to determine the identity of the employer.²⁷² Employers and employees stand in a reciprocal relationship in terms of the common-law contract of employment. A contractual duty to the employee, such as the duty to render services of an agreed nature, becomes the right of the employer to have those services rendered.

The Unemployment Insurance Act (UIA)²⁷³ defines an ‘employer’ as:

Any person, including a person acting in a fiduciary capacity, who pays or is liable to pay to any person any amount by way of remuneration, and any person responsible for the payment of any amount by way of remuneration to any person under the provisions of any law or out of public funds, excluding any person who is not acting as a principal.²⁷⁴

In terms of the Compensation for Occupational Injuries and Diseases Act (COIDA);²⁷⁵ the definition of ‘employer’ includes ‘any person controlling the business of an employer’ and a labour broker.²⁷⁶

COIDA also defines an employer as:

Any person, including the state, who employs an employee, and includes any person controlling the business of the employer; if the services of an employee are lent or let or temporarily made available to some other person by his employer, such employer for such period as the employee works for that other person; a labour broker who against payment provides a person to a client for the rendering of service or the

²⁷⁰ Grogan *Workplace Law* 25. See also *CAWU v Grinaker Civil Engineering* (2002) 25 ILJ 2366 (LC), in which it was held that a joint venture between several companies was an employer because it had all the characteristics of a partnership.

²⁷¹ Van Niekerk *et al Law@Work* 80.

²⁷² This principle was exercised in *Footwear Trading CC v Mdlalose* (2005) 5 BLLR 452 (LAC) para 24.

²⁷³ Act 63 of 2001.

²⁷⁴ Section 1 of the UIA.

²⁷⁵ Act 130 of 1993.

²⁷⁶ See section 1(a) to (c) of COIDA. The definition also includes a person to whom an employee is seconded.

performance of work, and for which service or work such person is paid by the labour broker.²⁷⁷

In terms of Swanepoel's definition above, employers may be natural or juristic persons. With the growth of multilateral companies in the South African economy, identifying the true employer may be more complicated. In *Buffalo Signs Co Ltd & Others v De Castro & Others*,²⁷⁸ the Labour Appeal Court explored the question of who the true 'employer' was in a case of the sale or transfer of business. In this case, the second appellant, a firm called Safetec, bought all the shares in Buffalo Signs. 'When it became clear to the Safetec board that Buffalo Signs' business was going from bad to worse, it was decided that Safetec would "withdraw" from the sale and that Buffalo Signs would be informally wound up.'²⁷⁹ Buffalo Signs then informed its employees that their contracts would be terminated and that, because of its uncertain financial position, no severance packages would be paid.

The court held that this was a deception. The true employer in this case was not Buffalo Signs, but Safetec, which was not in a poor financial position. Accordingly, Safetec should have carried out the retrenchment of the Buffalo Signs employees, and should have discharged its obligation as employer in that regard.

Further, the courts have sometimes examined schemes in terms of which one legal entity, normally an empty shell, accepts the administrative duties of an employer by paying wages and deducting statutory fees such as UIF contributions, while the related enterprise holds the assets and contracts with external clients.

A case in point is *Footwear Trading CC v Mdlalose*,²⁸⁰ where the Labour Appeal Court accepted the principle that substance and not form is the deciding factor in the employment relationship.²⁸¹ The court accepted that in the normal course of events the piercing of the corporate veil becomes relevant only when a corporation is the alter ego of a natural person and when the shareholders strive to hide behind the veil.²⁸² In

²⁷⁷ Section 1 of COIDA.

²⁷⁸ *Buffalo Signs Co Ltd & Others v De Castro & Others* (1999) 20 ILJ 1501 (LAC).

²⁷⁹ *Ibid.*

²⁸⁰ *Footwear Trading CC v Mdlalose* (2005) 5 BLLR 452 (LAC).

²⁸¹ The principle was obtained from the decision in *Camdons Realty (Pty) Ltd v Hart* (1993) 14 ILJ 1008 (LAC).

²⁸² This principle is corroborated in *Board of Executors v McCafferty* (1997) 7 BLLR 835 (LAC) para 31.

the *Footwear Trading* case the court was prepared to pierce the veil and accept that the two entities were in fact 'joint or co-employers'. The real effect of this decision is that the courts will not allow employers to hide behind the corporate veil or multiple-entity schemes as a way of circumventing their responsibilities as employers.²⁸³

The LRA aims to prohibit complicated schemes between multiple employers that are crafted to circumvent the duties established by labour legislation. The recently added section 200B in the LRA provides for joint and several liability for an employer's responsibilities when fake corporate structures are created to defeat the goals of the LRA or any other employment legislation.²⁸⁴

In Namibia, the term 'employer' means any person, including the State, who employs or provides work for an individual and who remunerates or expressly or tacitly undertakes to remunerate that individual, or permits an individual to assist that person in any manner in the carrying out or conducting of that person's business.²⁸⁵

2.7 Paradigms of work in Southern Africa

Globalisation has transformed the patterns of engagement in labour markets not only throughout the Southern African economies but in the world at large. Studies in Australia, Europe and North America published in the last ten years of the 20th century started indicating the changes occurring in the hiring of workers.²⁸⁶ In a study of employment trends in the 'New Economy' in the United States, Smith contended that 'uncertainty and unpredictability, and to varying degrees personal risk, have diffused into a broad range of post-industrial workplaces, services and production alike; opportunity and advancement are intertwined with temporariness and risk.'²⁸⁷ In about the same period, Osterman noted that in the United States, 'the ties that bind the workforce to the firm have frayed. ... New work arrangements, captured by the phrase "contingent work" imply a much looser link between firm and employee.'²⁸⁸

²⁸³ Van Niekerk *et al* *Law@Work* 81.

²⁸⁴ Section 200B of the LRA.

²⁸⁵ Namibian Labour Act 11 of 2007.

²⁸⁶ Cappelli *The New Deal at Work: Managing the Market-Driven Workforce* 17; Hacker *The Great Risk Shift: The Assault on American Jobs, Families, Health Care and Retirement and How You Can Fight Back*; Mitchell & Murray *Changing Workplaces Review: Special Advisors' Interim Report*.

²⁸⁷ Smith *Crossing the Great Divide: Worker Risk and Opportunity in the New Economy* 7.

²⁸⁸ Osterman *Securing Prosperity: The American Labour Market: How It Has Changed and What to Do about It* 3–4.

Cappelli argued 'the old employment system of secure, lifetime jobs with predictable advancement and stable pay is dead'.²⁸⁹ The opinion that employment relationships are becoming less secure is strengthened by another study. Hacker²⁹⁰ contends that the unpredictability of the labour market is increasingly carried by workers as employers retreat from long-term employment standards. In an in-depth study of economic reorganisation and changing corporate forms, Weil²⁹¹ contends that the growth of supply chains and the popularity of franchising have culminated in 'fissured' workplaces. This has led to a reduction in the pervasiveness of direct employment relationships, a growth in more non-standard categories of work, and an erosion of labour's capacity to bargain for better employment conditions. Standing²⁹² contends that a new category of workers, the 'Precariat', has become evident: these are workers in less secure employment who enjoy few employment benefits and minimal social protection.

There is evidence of significant changes in the Southern African labour markets and, in particular, the South African labour market during the last 20 years of the 20th century, including the meteoric increase of non-standard works relationships.²⁹³ The South African government investigated the need to amend the LRA in light of these developments, which led to the passing of the 2014 LRAA. At the heart of this Amendment Act is the understanding that work today is less secure. The amendments follow the position that the labour laws and regulations adopted in the decades following World War II, when the standard work relationship was more widespread, no longer serve the needs of South African workers.²⁹⁴

As mentioned earlier there is paucity of reliable data for most states in Southern Africa. However, it is fairly clear that each of these states confront challenges from three separate but related occurrences in the labour market, namely, informalisation, casualisation and externalisation.

²⁸⁹ Cappelli *The New Deal at Work: Managing the Market-Driven Workforce* 17.

²⁹⁰ Hacker *The Great Risk Shift: The Assault on American Jobs, Families, Health Care and Retirement and How You Can Fight Back*.

²⁹¹ Weil *The Fissured Workplace: Why Work Became so Bad for so Many and What can be Done to Improve It*.

²⁹² Standing *The Precariat: The New Dangerous Class*.

²⁹³ Department of Labour *Green Paper on Labour: Minimum Standards Directorate Policy Proposals for a New Employment Standard Statute*.

²⁹⁴ Mitchell & Murray *Changing Workplaces Review: Special Advisors' Interim Report*.

2.7.1 Informalisation of work

The growth in non-standard work often gives rise to informalisation²⁹⁵ and separation of the place of work. Features such as globalisation, socio-economic and technological changes, and amendments to legislation in order to adapt to the increasingly competitive surroundings have added to the informalisation of the workplace.²⁹⁶

This process of informalisation, by which workers are obliged to move from conventional employment to the informal economy in fact results in deregulation: workers move beyond the protective scope of labour law.²⁹⁷ Informalisation relates to the situation of 'employees who are *de jure* covered by labour law but who are *de facto* not able to enforce their rights, as well as to those employees that are *de jure* not covered by labour law because they are independent contractors.'²⁹⁸

There is little consensus about the definition of informality.²⁹⁹ Terms such as the 'informal sector' need to be distinguished from the 'informal economy' and 'informal employment'. This study distinguishes the informally employed from the informal sector. The informal sector relates to whether a firm is registered with the appropriate authorities (eg for tax purposes).

Informal employment relates to the protections and benefits afforded to workers. This means that informal employment can occur in both the informal and formal sectors. For instance, a worker could be working without a written contract – meaning they are informally employed – but for an enterprise that is registered for VAT, indicating it is a formal sector business. Informal employment, for instance, is applied using a broad range of measures, including the payment of tax and the existence of social security benefits, leave, pension benefits and medical aid.³⁰⁰

²⁹⁵ When secure indefinite employment is replaced by atypical employment, where employees have access to fewer benefits and job security, it is described as informalisation. It has been noted that in South Africa specifically, the increase of insecure atypical working relationships had the effect of decreasing permanent employment as evidenced by the statistics. In this regard, see Mills (2004) 25 *ILJ* 1203 at 1212.

²⁹⁶ See the introduction to Theron (2003) 24 *Industrial Law Journal* 1247.

²⁹⁷ Fenwick *et al* 'Labour law: A Southern African perspective' in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 20.

²⁹⁸ *Ibid.*

²⁹⁹ See Kanbur (2009) 52(1) *Indian Journal of Labour Economics* 33–42.

³⁰⁰ *Ibid.*

Statistics South Africa³⁰¹ states that the informal sector has the following two components:

- i) Employees working in establishments that employ fewer than five employees, who do not deduct income tax from their salaries/wages; and
- ii) Employers, own-account workers and persons helping unpaid in their household business who are not registered for either income tax or value-added tax.³⁰²

Informal sector businesses are generally small in nature, and are seldom run from business premises. Instead, they are generally run from homes, street pavements and other informal settings. Informal employment, according to Statistics South Africa,³⁰³ 'identifies persons who are in precarious employment situations irrespective of whether or not the entity for which they work is in the formal or informal sector.'³⁰⁴

Persons in informal employment therefore comprise all persons in the informal sector, employees in the formal sector, and persons working in private households who are not entitled to basic benefits such as pension or medical aid contributions by their employer, and who do not have a written contract of employment.³⁰⁵ Unless otherwise stated, the term 'informal' in this study means 'informally employed'.

The ILO defines the informal economy as referring to 'all economic activities by workers and economic units that are – in law or practice – not covered or insufficiently covered by formal arrangements.'³⁰⁶ It is therefore a definition that concerns both the status of the firm (or economic unit) and the status of workers.

The International Conference of Labour Statisticians (ICLS) pursued a similar approach in 2003. While previously it defined the informal economy with reference to firms that are not legally regulated, today it also includes employment relationships that are not legally regulated or protected.

For the purpose of this study, we will include workers with no written contract, pension and medical aid benefits (informal workers) and those self-employed in unregistered

³⁰¹ Statistics South Africa *Quarterly Labour Force Survey* (2008).

³⁰² Statistics South Africa *Quarterly Labour Force Survey* (2017).

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Ibid.

³⁰⁶ ILO Resolution concerning Decent Work and the Informal Economy.

enterprises in the definition of informal employment. Although, informalisation may be ascribed to numerous causes, a crucial influence has been the need for firms to attain flexibility in order to remain competitive in the global epoch.³⁰⁷

2.7.2 Casualisation of work

In ordinary terms, 'casual' is sometimes used to describe anyone who is not in standard employment, including part-time workers and temporary workers. Nonetheless, the term no longer has an exact legal meaning. The most sensible use of the term 'casual' is in reference to what in North America is called a 'day labourer' ie someone who is employed on a day-to-day basis.³⁰⁸

In terms of the old BCEA, a 'casual worker' was a day worker who was employed by the same employer for no more than three days in any week, but did not include a regular day employee.³⁰⁹ A regular day worker refers to someone who is employed on a regular basis for one day a week, such as a gardener. It is therefore clear that a casual worker was a temporary worker.

The definition in the old BCEA, or similar definitions, was adopted in certain Wage Determinations that remained in force after the repeal of the old BCEA. However, there is no precise equivalent of 'casual worker' in the new BCEA. Instead, the new BCEA distinguishes between workers who work less than 24 hours a month for an employer and those who work 24 hours or more a month.³¹⁰ Some commentators therefore regard a casual worker as someone who works less than 24 hours a month.

There are at least two criticisms one might level against the approach the new BCEA has taken. Firstly, it is not always easy for a worker to know whether he or she works 24 hours or more a month. Secondly, the part-time worker who is regularly employed but works less than 24 hours would not be covered.

There are, for example, considerable numbers of domestic workers who work for different employers, and may well be employed for less than 24 hours a month (the equivalent of 5.5 hours a week) for each employer. Such workers would not be

³⁰⁷ Theron 'Employment is not what it used to be' in Webster & Von Holdt (eds) *Beyond the Apartheid Workplace: Studies in Transition* 293–294.

³⁰⁸ Theron *et al* *Keywords for a 21st Century Workplace* 8.

³⁰⁹ See section 1(a) of the BCEA.

³¹⁰ Sections 6(1), 19(1) and 28(1) of the BCEA.

protected by provisions regulating hours of work, leave, and the provisions requiring an employer to provide his employee with particulars of employment.³¹¹

Casualisation is similar to the term 'casual', and this term has no exact meaning. In the literature about non-standard work, it is used as a 'catch all' term to describe the ways in which employment is changing, and can be used more or less interchangeably with the terms 'contingent' or 'precarious' employment.³¹² In South Africa, the term has been used by both organised labour and the Department of Labour in the above sense, to motivate for policy reforms.³¹³

Nonetheless, the term has also been criticised for conflating direct employment (whether part-time or temporary) and indirect or triangular employment, where employees are also commonly employed on a temporary basis, but through an agency or intermediary or service provider.³¹⁴ In the latter case the employment contract between a core business and its employees is replaced by a commercial contract between the core business and an agency or intermediary or service provider.³¹⁵ This is referred to as externalisation, which is discussed below.

An alternative usage of the term has been proposed, where casualisation has a more limited meaning, and refers only to direct employment that is part-time or temporary, and therefore not standard. The aim is thus to differentiate the policy applicable in respect of casualisation and externalisation.³¹⁶

2.7.3 Externalisation of work

Externalisation is an additional element that gives rise to increasing 'non-standard' employment in the Southern African region. The rate of externalisation is very high in South Africa, unlike other states in the Southern African region.³¹⁷ Fenwick *et al* are of the view that 'externalisation is more radical and complex than casualisation'.³¹⁸ The rationale behind externalisation is that enterprises want to concentrate on their core functions ie those activities in which they have gained comparative advantage or are

³¹¹ See, for instance, chapters 2, 3 and 4 of the BCEA.

³¹² Theron 'Employment is not what it used to be' in Webster & Von Holdt (eds) *Beyond the Apartheid Workplace: Studies in Transition* 293–294.

³¹³ *Ibid.*

³¹⁴ *Ibid.*

³¹⁵ *Ibid.*

³¹⁶ *Ibid.*

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*

competent.³¹⁹ Deregulation³²⁰ and privatisation are policies that emerged in the 1980s and 1990s. The predominant means by which deregulation has been achieved in South Africa is by a process of industrial restructuring which includes, and is at the same time broader than, what is conventionally understood to be outsourcing.³²¹

Collins is of the view that this process should be called vertical disintegration, which he differentiates from vertical integration, which he considers as having been the dominant trend in industrial organisation.³²² Collins describes this as the arrangement of features of production 'through subcontracting, franchising, concessions and outsourcing'.³²³

Theron *et al*³²⁴ argue that the term 'vertical disintegration' does not throw much light on the goal and result of this process. The most important goal is that the business driving the process, which they refer to as the core business, avoids accountability for the workers who work for it, so far as it is legally possible to do so. This must be understood as a response to labour regulation and trade union organisation.

One way for the core business to avoid accountability in terms of labour regulation is to engage workers as contractors. This may be a viable solution in certain limited circumstances, where, for example, a service can be rendered on a contractual basis as well as in an employment relationship.

Benjamin defines externalisation as follows: 'externalisation refers to a process of economic restructuring whereby employment is regulated by a commercial contract rather than a contract of employment'.³²⁵ In the case of externalised work, this includes situations where the nominal employer does not, in fact, control the employment relationship.³²⁶ In other words, these workers are seen as externals as they fall outside

³¹⁹ Ibid.

³²⁰ Literally, it implies the removal of government regulations, although it is not concerned with all kinds of government regulations, but rather with those regulations that affect how business is done. The idea behind deregulation is that regulations interfere with the free and unhindered operation of the market, and the markets should be left to regulate themselves.

³²¹ Theron *et al* *Keywords for a 21st Century Workplace* 18.

³²² Collins (1999) 10(3) *Oxford Journal of Legal Studies* 353–380.

³²³ Ibid.

³²⁴ Theron *et al* *Keywords for a 21st Century Workplace* 68.

³²⁵ Benjamin 'Beyond the boundaries: Prospects for expanding labour market regulation in South Africa' in Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law* 188.

³²⁶ Ibid.

the enterprise that is making use of their services.³²⁷ One of the main attributes of this type of employment model is that it diminishes the number of workers employed by the principal enterprise and, as such, restricts the implementation of labour legislation.³²⁸

Fenwick *et al* suggest that:

the supposition masked in a commercial contract is that the parties are on an equal footing and that the terms are reached by negotiation and agreement. In most cases, the nominal employer or the 'dependent contractor' is dependent on the goodwill of the core business, which decides the nature and quantity of work to be done and effectively the terms on which the work is done. Where a contract of employment exists between the nominal employer and the workers, this is usually a sham as the core business is in fact the real employer.³²⁹

Externalisation has been defined by Theron *et al*³³⁰ as a process in terms of which the conditions of employment are regulated or governed by a commercial contract, rather than by a contract of employment, which occurs in one of two ways:

- (a) a core business engages an employee as a contractor rather than an employee, to provide goods or services. This is regarded as the weak category.
- (b) a core business engages a contractor to provide workers who will provide goods and services for it. Such a contractor may also be regarded as a service provider or intermediary. This is seen as the strong category.

Theron *et al* are of the view that the 'weak category gives rise to the question whether in fact the relationship is one of employment, or whether the core business is in fact an employer seeking to disguise the true nature of the relationship.'³³¹ The strong category gives rise to a relationship in which there are at least three parties involved, namely, the worker, the contractor who is the legal employer, and the core business. However, where the contractor concerned in turn engages someone else to provide

³²⁷ Owen *et al* *Strategic Alliances and the New World of Work*.

³²⁸ Fenwick *et al* 'Labour law: A Southern African perspective' in Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 20.

³²⁹ *Ibid*.

³³⁰ Theron *et al* *Keywords for a 21st Century Workplace* 21–22.

³³¹ *Ibid*.

some or all the workers working for a core business, there will be more than three parties to the relationship.³³²

This in turn gives rise to the question whether, having regard to substance rather than form, the contractor is really the employer of the workers concerned, or whether the true employer is the core business for whom the worker actually works.³³³ The strong form of externalisation is far more important, both in terms of the numbers hired and in terms of its consequences. It can also take different forms, including the following: homework or outwork; the use of labour brokers; the use of service providers such as cleaning, security, and transport companies; subcontracting; franchising; and privatisation in the context of the public sector.

Some of its significant consequences include the following:

- (a) minimising the number of workers that are in an employment relationship with the core business, specifically unskilled workers, and maximising the number whose employment is governed by a commercial contract.
- (b) fragmenting the workforce within the same physical workplace, into at least two tiers, each having its own employer: a tier that is employed by the core business and a tier that is employed by contractors.
- (c) encouraging competition between contractors providing goods and services, thereby driving down wages, which results in so-called second-generation outsourcing.

Nevertheless, the real reason for externalisation is arguably to avoid the duties and risks associated with standard employment arrangements, such as the payment of social benefits, medical aid contributions, and the costs related to the payment of a living wage.³³⁴ Moreover, externalisation 'generally employs a task-based payment rather than a wage system of payment, thereby rendering the labour costs variable.'³³⁵

Externalisation may be realised in several ways, such as outsourcing, transferring assets to satellite firms, and the use of labour brokers. Although it is challenging to

³³² See for instance the triangular employment relationship.

³³³ Ibid.

³³⁴ Fenwick *et al* 'Labour law: A Southern African perspective' in Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 620.

³³⁵ Theron & Godfrey *Protecting Workers at the Periphery*.

differentiate clearly between the contrasting ways, because of the different practices and the contrasting definitions of different writers, the most common way of externalising is triangulation.³³⁶ An enterprise ('the client', 'core business' or 'true employer') enters into a commercial contract with a contractor, intermediary, satellite enterprise or labour broker ('the nominal employer') whereby the former pays the latter an agreed amount for services provided. The labour broker then hires the workers to do the work for the core business and remunerates them. One type of externalisation that does not necessarily include triangulation is the use of 'independent contractors', who are in fact dependent on the core enterprise.³³⁷

Externalisation may also occur through a process called 'outsourcing'. This may take place when a core enterprise retrenches workers performing non-core duties, and employs an external contractor to do the work. Theron notes that the core firm may or may not transfer the work to the external contractor.³³⁸ A classic example of outsourcing in South Africa is when large companies, such as hotels, and learning institutions, such as universities, outsource their protection services and hospitality and cleaning duties to external contractors.³³⁹ A further example of outsourcing is found in the textile industry, where a large number of local products are produced by home-based manufacturers. This type of arrangement involves a work relationship between the proprietors of the homework business and a supplier or broker, which is similar to an employment relationship.³⁴⁰

Externalisation also takes place when there is a transfer of assets to workers or former workers starting their own businesses. In South Africa, these types of arrangement are generally recognised as satellite firms. An example of this is the practice of lending trucks to truck drivers who, in turn, hire their own teams to help them with distribution.³⁴¹

³³⁶ Theron 'Employment is not what it used to be' in Webster & Von Holdt (eds) *Beyond the Apartheid Workplace: Studies in Transition* 293–294.

³³⁷ Fenwick *et al* 'Labour law: A Southern African perspective' in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 20.

³³⁸ *Ibid* 20–22.

³³⁹ *Ibid*.

³⁴⁰ Godfrey *et al* *On the Outskirts but still in Fashion* 20.

³⁴¹ Fenwick *et al* 'Labour law: A Southern African perspective' in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 22.

Externalisation is further manifested where a food producer sells its poultry farm to firms that were established by its workers.³⁴² The satellite firm is normally obliged to supply goods or services only to the core firm. Accordingly, this type of externalisation changes the status of certain former workers to that of employers of the new workers, thus reshaping the social relations in the context of employment.³⁴³ Additionally, externalisation can take place through the use of 'self-employed persons' or 'independent contractors', not requiring the participation of a broker employer or organisation.

Roving traders, hawkers, and street traders are used by huge formal retailers, wholesalers and producers to enlarge their markets to incorporate the low-income categories and those in the rural areas of South Africa.³⁴⁴ For example, Coca-Cola hires out kiosks, and most of these traders and retailers are women.³⁴⁵ In South Africa, numerous taxi drivers effectively rent taxis from their proprietors and are allowed to retain the balance between the cost of the rental and the fees that they earn.³⁴⁶

Another form of externalisation is 'franchising'. Franchising involves the franchisor permitting the franchisee to run an enterprise utilising the franchisor's trade mark; the franchisee, in turn, hires employees to help him or her to run the enterprise. The franchisor, nonetheless, has authority over the enterprise with regard to employment and labour-related issues. The hiring of employees, nevertheless, is the responsibility of the franchisee.³⁴⁷

2.8 Conclusion

The regulation of non-standard work is not only required by the South African Constitution but also by a number of international instruments. At the workplace, the regulation of non-standard work will allow workers to organise and defend their interests. Workers in non-standard employment, such as temporary workers (labour brokers), fixed-term workers and part-time workers, will be allowed to join trade unions. These workers, particularly those in non-standard employment, cannot enjoy the

³⁴² Ibid.

³⁴³ Ibid 20–21.

³⁴⁴ ILO *Decent Work and the Informal Economy*.

³⁴⁵ Ibid.

³⁴⁶ Ibid.

³⁴⁷ Theron 'Employment is not what it used to be' in Webster & Von Holdt (eds) *Beyond the Apartheid Workplace: Studies in Transition* 293–294.

benefits provided by labour law and other forms of social security protection if non-standard work remains unregulated.

Some Southern African states have chosen to broaden the definition of employee in order to protect those workers who fall outside the safety net. Other states, such as South Africa, have amended their legislation to accommodate non-standard workers. There is a close relationship between globalisation, informalisation, casualisation, and externalisation in the Southern African labour markets. The regulation of non-standard work must be viewed as crucial to the issue of social justice and the democratisation of the workplace, and must be advanced as such. This chapter reviewed the concepts of employee, worker, employer, standard employment, non-standard employment, globalisation and technological advancement, temporary workers (labour brokers), fixed-term workers, part-time work, informalisation, casualisation, and externalisation of work.

Thus, it is important to set the foundation of international legal principles which signatory states are to follow as guidelines. The International Labour Organisation (ILO) and regional Southern African standards play an important role in the advancement and protection of non-standard workers, especially those on fixed-term employment contracts. These standards continue to play this role even in the era of globalisation with its inherent challenges.

Accordingly, the next chapter deals with the role and application of the ILO standards, the ILO decent work agenda and the role played by the SADC regional standards in regulating and protecting non-standard workers.

CHAPTER 3

THE ROLE AND APPLICATION OF ILO STANDARDS TO NON-STANDARD WORKERS, THE DECENT WORK AGENDA, AND REGIONAL INSTRUMENTS IN SOUTHERN AFRICA

3.1 Introduction

An examination of the role and application of ILO standards to non-standard workers, the decent work agenda, and regional instruments is required for this study of the regulation of non-standard workers in Southern Africa: the case of South Africa with reference to several other SADC countries because it is relevant to the core theme of the study. This chapter set the foundation of international legal principles which signatory states are to follow as guidelines in addressing challenges facing non-standard workers in the region.

The theoretical concepts defined in Chapter 2 of this study are very important to the role and application of ILO standards to non-standard workers, the decent work agenda, and regional instruments in Southern Africa. The manner in which a particular concept is defined to a certain extent determines what amount of labour protection will be enjoyed in practice. For example, non-standard workers, as opposed to standard workers, may not have access to social protection, will have lower levels of employment security (contracts can be easily terminated) and will face greater risks with respect to workplace health and safety. They will also experience difficulties with exercising their right to collective bargaining or to join trade unions.

Southern African states have thus far accepted the ILO core standards as a basis for regulating minimum employment standards. The SADC Charter of Fundamental Social Rights strengthens the ILO international labour standards as the basis for the regional vision in the SADC Treaty, as described by the Treaty's goals, prime concerns and blueprints. The ILO has had a powerful influence on labour law policies in Southern African states and has encouraged member states to ratify and apply core labour standards. Today all member states in the region have ratified the eight ILO core labour standards.

The ILO has adopted specific Conventions and Recommendations to address concerns about particular categories of non-standard workers,³⁴⁸ establishing standards that provide international benchmarks for non-standard employment.

This chapter explores the historical evolution of the ILO from when it was founded by the Versailles Treaty. The chapter also examines the unique tripartite nature of the structures and mechanisms of the ILO in the UN system, in which employers' and workers' representatives – as 'social partners' – have an equivalent voice with those of governments to determine the ILO's guidelines and procedures. The ILO structure works through the International Labour Conference, the Governing Body, the International Labour Office and the ILO Supervisory Mechanisms, the unique tripartite structure of the ILO in the UN system, the ILO's supervisory systems and mechanisms, the Committee on Freedom of Association, Article 24 and Article 26 complaints, and the duty to report on non-ratified Conventions and Recommendations.

In addition, the chapter examines the decent work agenda and its significance for non-standard work in the Southern African labour market, and briefly discusses the relation between non-standard employment and labour migration in Southern Africa. This chapter also sheds light on regional standards, the challenges of unemployment, poverty and income inequality, and labour market transitions in Southern Africa.

It is worth noting that discourse on the social dimension of globalisation has emphasised the vitality of international labour standards, not only as a benchmark for the appraisal of domestic labour legislation, but also as a premise for regulating global trade.³⁴⁹ International instruments that give effect to international standards are expressly recognised by the South African Constitution as points of reference for the interpretation of labour law and other legislation.

As stated by Greenfield:

non-standard forms of employment are not new, but they have become a more widespread feature of contemporary labour markets. We need to make sure that all jobs, regardless of their contractual arrangement, provide workers with adequate and

³⁴⁸ Part-time Work Convention 175 of 1994 and Part-time Work Recommendation 182 of 1994. See also the Private Employment Agencies Convention 181 of 1997 and the Termination of Employment Convention 158 of 1982.

³⁴⁹ Hepple *Labour Laws and Global Trade* (2005).

stable earnings, protection from occupational hazards, social protection and the right to organise and bargain collectively.³⁵⁰

These words aptly capture the relevance of the ILO to non-standard workers, who often find themselves in vulnerable working circumstances. This chapter demonstrates that a meaningful study of laws pertaining to labour and non-standard employment in Southern Africa in particular is not attainable without at least an elementary understanding of the institutions that shape international labour standards, the basic content of those standards, and the relationship between them and domestic labour legislation. This chapter also discusses the role, application and relevance of international labour law standards in Southern Africa.

However, it is necessary to point out that employees in traditional full-time employment are well protected in some Southern African states. The currently available regulation is largely unable to protect non-standard workers, and in numerous instances workers are regarded as 'non-standard', due to the narrow interpretation of the word 'employee' discussed in chapter 2 of this work.

Casualisation and externalisation have resulted in the exclusion of numerous workers from the protection provided by labour legislation.³⁵¹ Union coverage for non-standard workers is very low. Social insurance structures and labour directives that protect non-standard workers can be realised only if workers are given a voice and representation in trade unions. The ILO has also embraced the concept of 'decent work', which has four goals: employment opportunities, workers' rights, social protection, and representation.³⁵² The ILO decent work agenda can be used to promote the improvement of the conditions of vulnerable non-standard workers.

3.2 The historical evolution of the International Labour Organisation

The ILO was founded in 1919 by the Versailles Treaty.³⁵³ The Versailles Treaty gave birth to the League of Nations. After the Second World War, the League of Nations

³⁵⁰ ILO *Report on Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects*.

³⁵¹ See the discussion in chapter 3 of this study.

³⁵² International Labour Conference *Workers in the Informal Economy: Platform of Issues*.

³⁵³ www.ilo.org/ilolex (Date of use: 24 May 2017).

was replaced by the United Nations (UN), and the ILO became the premier agency of the United Nations in 1946.³⁵⁴

The intentions and purposes of the ILO are presented in the Preamble to its Constitution, passed in 1919, which proclaims that ‘universal and lasting peace can be established only if it is based upon social justice.’ Thus, the primary intention of the ILO is to help advance social conditions throughout the globe. The following examples of tangible measures ‘urgently required’ are listed in the Preamble: regulation of working hours, including the establishment of a maximum working day and week; regulation of the labour supply; avoidance of joblessness; provision of a satisfactory living wage; protection of the worker against illness, disease, and injury as a result of his or her employment; protection of children, young persons, and women; provision for old age and injury; protection of the welfare of workers when employed in states that are not their own; acknowledgement of the standard of equal compensation for work of equal value; and acknowledgement of the principle of freedom of association.

Global action around these issues is required. The Preamble clearly states that ‘the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries.’ In addition, in submitting to the ILO Constitution, the member governments affirm in the preamble that they are ‘moved by sentiments of justice and humanity as well as by the desire to secure the permanent peace of the world.’³⁵⁵

Furthermore, the ILO assumes and executes an extensive variety of activities, from conducting research to broadcasting information on the domain of work. With its headquarters in Geneva, it also has regional head offices in a number of capital cities around the world. The ILO provides technical assistance and runs co-operation projects, which assist in building the capacity of employers and employees in organisations established in developing countries. It is worth noting that the first SADC member state to sign the Versailles Treaty was the Union of South Africa. Ultimately, all members of the League of Nations became founder members of the ILO.

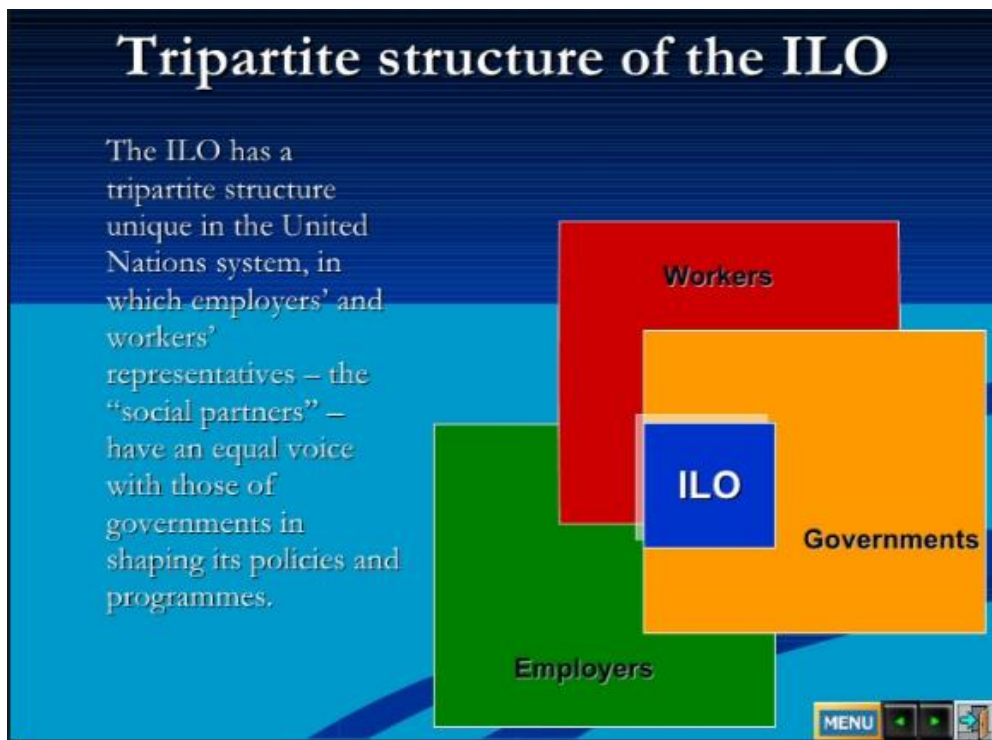
³⁵⁴ Blanpain & Colucci *The Globalisation of Labour Standards: The Soft Law Track* 10.

³⁵⁵ Preamble to the Constitution of the ILO.

3.3 The unique tripartite structure of the ILO in the UN system

The ILO is made up of three main bodies: the International Labour Conference, the Governing Body, and the International Labour Office.³⁵⁶ Figure 1 shows the unique tripartite structure of the ILO in the United Nations system, in which employers' and workers' representatives – the 'social partners' – have an equivalent voice with those of governments in developing the ILO's rules and procedures. Figure 2 shows the composition of the ILO and how it functions.

Figure 1: The unique tripartite structure of the ILO in the UN system

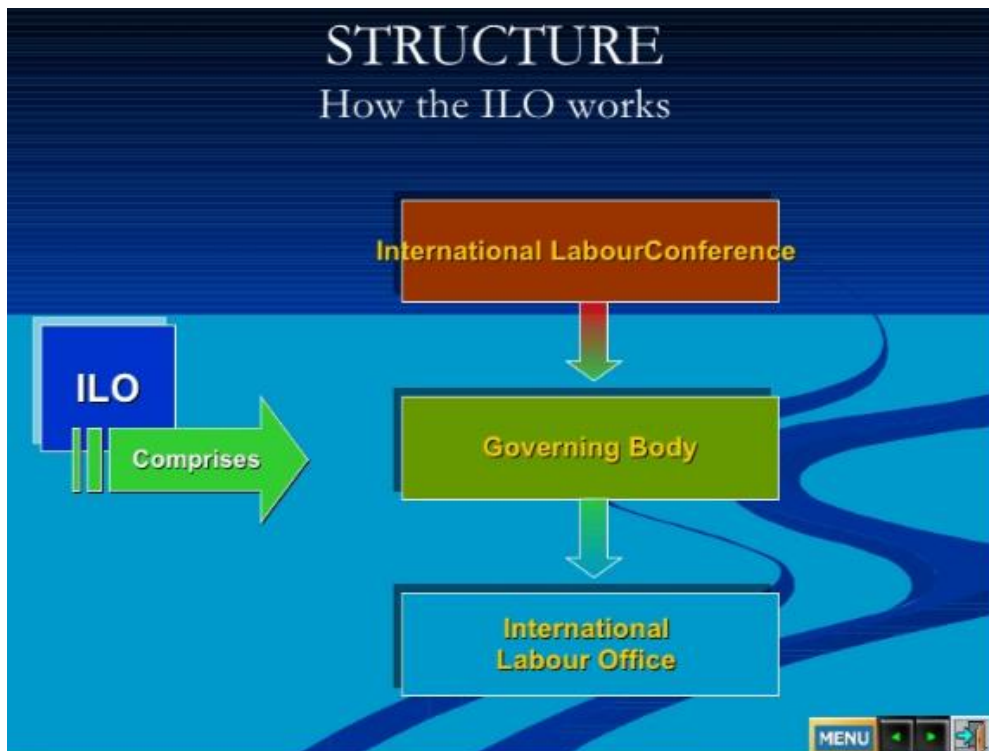


Source:

<https://www.google.co.za/webhp?sourceid=chromeinstant&ion=1&espv=2&ie=UTF-8#q=ilo%20structure%20in%20diagram> (Date of use: 19 May 2016).

³⁵⁶ See Figure 1: The unique tripartite structure of the ILO in the UN system.

Figure 2: The structure of the ILO and how it works



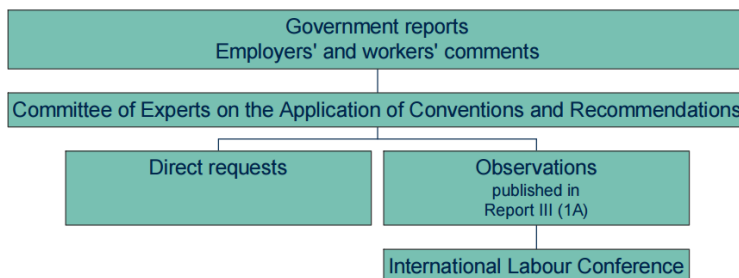
- (1) The ILO has empowered the Conference to be the leading policy-making body of the ILO. It assembles yearly in Geneva, and is attended by the national delegations of member states. The delegation consists of two individuals chosen by the government, one who speaks on behalf of employers and one who speaks on behalf of workers. These representatives are proposed by the most representative national employer body and national worker body. The main function of the Conference is to adopt new labour standards.
- (2) The Governing Body is responsible for the executive business of the ILO. It consists of 56 members: 28 from government, 14 from employer representatives and 14 from worker representatives. The Governing Body determines which matters are to be put on the agenda of the Conference, manages the budget of the ILO, and makes decisions on policy issues.
- (3) The International Labour Office is the ILO's bureaucracy, and performs the day-to-day work necessary to give effect to the ILO's mandate. The Director General, who is appointed by the Governing Body for a fixed term, heads the office.

3.4 The ILO's supervisory systems and mechanisms

When a state ratifies a Convention this gives rise to an obligation to apply its terms in national law and practice. The supervisory mechanisms established by the ILO's Constitution exercise regular supervision, in the form of the inspection of reports submitted by member countries to the various supervisory bodies. Figure 3 shows the supervisory bodies and mechanisms of the ILO, in terms of Article 22 of the ILO Constitution.

Figure 3: Supervisory bodies and mechanisms of the ILO

Supervisory mechanisms: Regular supervision (Article 22, ILO Constitution)



3.4.1 The Committee of Experts on the Application of Conventions and Recommendations

In 1926, the Committee of Experts was established in terms of a resolution adopted by the Conference. Its mandate is to examine reports made by member countries.

In terms of Article 22 of the ILO Constitution, member states are obliged to report in accordance with the required reporting cycle on measures taken to give effect to the terms of Conventions that they may have ratified. In terms of Article 19, reports may be requested from member states on unratified Conventions and Recommendations. Article 19 reports deal with the position of a member state's national law and practice in relation to Conventions that it has not ratified. The purpose of these reports is to reflect on the subject matter in national law and practice in relation to the subject matter in the Convention and Recommendation, and to enable the supervisory bodies to consider obstacles to the ratifications of Conventions.

The Committee of Experts meets in Geneva annually and its meetings are private. The documentation that is made available to the Committee includes information supplied by member states in their reports, or to the Conference Committee on the Application of Standards. The Committee can also examine legislation, collective agreements, court judgments, information on the results of inspections furnished by member states, comments made by employers' organisations and workers' organisations, and any conclusions reached by the ILO supervisory bodies, for example, the Committee on Freedom of Association.

The findings and conclusions of the Committee of Experts take the form of observations and direct requests, comments and surveys. Observations are usually made in more serious cases or cases of long-standing failure to implement international obligations, and are published in the Committee's report. Direct requests are not published, but are communicated to the government of the member state concerned by the International Labour Office on behalf of the Committee. Direct requests normally relate to technical matters, or seek clarification when the available information is insufficient.

Generally, surveys are conducted by the Committee of Experts based on reports from the International Labour Office on unratified Resolutions and Recommendations, selected for this purpose by the Governing Body. General surveys usually present a snapshot of national law and practice on the topic concerned. For example, a general survey on equality will review the extent to which national law and practice in member states reflect the terms of Conventions 100 and 111 (the standards relevant to the right to equality at work and equal pay). The Committee also examines obstacles to the ratification of any relevant Conventions, with a view to clarifying the nature and scope of the standards or to indicate ways of overcoming these obstacles. Although the Article (Article 24 and Article 26 Complaints) is not strictly a supervisory procedure (because it relates to unratified Conventions and Recommendations), the general surveys are an important source of reference on the standards that they examine.

3.4.2 The Conference Committee on the Application of Standards

The Conference Committee on the Application of Standards is a tripartite standing committee of the International Labour Conference. The Committee meets in June every year to discuss cases of non-compliance with ratified Conventions appearing in

the report of the Committee of Experts. Given time constraints, it is not possible for the Conference Committee to discuss all the cases, and a selection of cases is made. At the end of each discussion, in which representatives of the governments concerned are invited to participate, the Committee adopts Conclusions. More serious cases, usually those involving persistent non-compliance with international obligations, are noted in a special paragraph in the Committee's report to the plenary session of the Conference.

3.4.3 Article 24 complaints

Any employers' or workers' organisation may make a representation to the International Labour Office under Article 24 of the Constitution to the effect that a member state has failed to establish, in any respect, effective compliance with any Convention that it has ratified. The Governing Body may communicate the representation to the government concerned, and may invite the government to respond by making a statement.

Article 25 provides that, if no statement is received, or if any statement that is received is unsatisfactory, the Governing Body may elect to publish the representation, and any response to it.

3.4.4 Article 26 complaints

Article 26 of the ILO Constitution establishes a procedure that is legally enforceable, unlike other complaints-based procedures. The Article stipulates that 'any member of the ILO has the right to file a complaint with the International Labour Office if it is not satisfied that any other member is securing effective observance of any convention that both member states have ratified.'³⁵⁷ The procedure may also be initiated by the Governing Body of its own volition, or on the receipt of a complaint lodged by a representative to the Conference.

Furthermore, the Governing Body of the ILO may communicate with the government concerned in the same way as provided in the Article 6 procedure of the ILO Constitution, and may appoint a Commission of Inquiry to examine the complaint and file a report.³⁵⁸ Article 28 requires the Commission of Inquiry to report and make recommendations on the steps that should be taken to address the complaint. In terms

³⁵⁷ Article 26.

³⁵⁸ Article 26.

of Article 29, the Director-General is obliged to communicate the Commission's report to the Governing Body and the government concerned, and to publish it. The government is then given three months to inform the Director-General whether it consents to the recommendations contained in the report, or whether the matter is to be referred to the International Court of Justice.³⁵⁹ The International Court may support, vary or reverse any of the Commission of Inquiry's findings and recommendations. In terms of Article 31 of the ILO Constitution, the court's decision is final.

3.4.5 The Committee on Freedom of Association

The Committee on Freedom of Association (CFA) was established in 1951, by a resolution of the Governing Body. The CFA is tripartite and comprises nine members (three government representatives, three employer representatives and three worker representatives) and an independent chairperson. The CFA was established to consider breaches of the right of freedom of association, where complaints are submitted by an ILO member state, an employers' organisation or a workers' organisation. The CFA endeavours to reach unanimous decisions, and its responsibility is essentially to make recommendations to the Governing Body.

The CFA procedure differs from the procedures established by Articles 24 and 26 in that complaints may be made against member states that have not ratified the Conventions that concern the right to freedom of association.

In his Report to the 102nd Session of the International Labour Conference, the Director-General of the International Labour Office indicated that the 'classic stereotype of full-time permanent job, with fixed hours, and a defined-benefit pension on the completion of a largely predictable and secure career path with a single employer, however desirable it might appear, is increasingly infrequent reality.' He also noted that '[t]oday, about half of the global workforce is engaged in waged employment, but many do not work full time for a single employer' and that 'views are strongly divided about whether and how this matters for the attainment of decent work for all and, if so, what if anything should be done.'³⁶⁰

³⁵⁹ Article 29.

³⁶⁰ ILO *Towards the ILO Centenary: Realities, Renewal and Tripartite Commitment* 13.

In addition, most ILO mechanisms relate to all workers, irrespective of their position or rank, and are thus significant for regulating the numerous aspects of non-standard employment. Given the recognition that non-standard workers may be excluded from enjoying the fundamental principles and rights at work, specific fundamental Conventions are also reviewed in this section.

3.4.6 Constitutional obligations: Conventions and Recommendations

Member states of the ILO are greatly encouraged, but not forced, to ratify the Conventions adopted by the International Labour Conference. Article 19 of the ILO Constitution requires that when a new Convention or Recommendation is adopted by the Conference, all members must bring the instrument before the relevant national authorities within one year of the closing session of the Conference during which the Convention was adopted, so that the Convention can be considered for ratification and related action.³⁶¹ The member must then correspond with the Director-General of the International Labour Office on the measures taken to bring the instrument before the applicable domestic authorities, and of any action taken by those authorities.

3.4.7 The duty of members to report on ratified Conventions

In terms of Article 22 of the ILO Constitution, each member is enjoined to create a yearly report to submit to the International Labour Office on the processes which it has implemented to give effect to the terms and conditions of the Conventions of which it is a member. These reports shall be created in such form and shall encompass such particulars as the Governing Body may request.³⁶² Since 2012, reports on ratified Conventions have been required every three years for fundamental and governance Conventions, and every five years for other Conventions.³⁶³ The reports contain the responsibilities and requirements that members assume in ratifying Conventions. Article 19(5)(d) requires the member to ‘take such action as may be necessary to make

³⁶¹ For further details, see the Memorandum Concerning the Obligation to submit Conventions and Recommendations to the Competent Authorities, adopted as revised by the Governing Body, at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/--normes/documents/questionnaire/wcms_087324.pdf (Date of use: 14 July 2017). Exceptions may be made for states in which exceptional domestic circumstances made it impossible to bring the Convention to the attention of the relevant authorities within one year. Nevertheless, the maximum time lapse permitted is 18 months: Article 19(5)(b) of the ILO Constitution.

³⁶² Article 22 of the ILO Constitution.

³⁶³ For more details on reporting, see *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, available at http://www.ilo.org/wcmsp5/groups/public/ed_norm/normes/documents/publication/wcms_192621.pdf (Date of use: 27 May 2016).

effective the provisions' of the ratified Convention. This includes giving the provisions effect in law and applying them in practice, including in court judgements, arbitration awards and collective agreements.

3.4.8 Duties to report on non-ratified Conventions and Recommendations

In the case of a Convention that has not been ratified, Article 19(5)(e) of the Constitution requires the non-ratifying member to submit a report to the Director-General of the International Labour Office on the stance of its national law and practice with regard to the issues covered by the Convention, when asked to do so. The member must demonstrate the extent to which effect has been given to, or is anticipated to be given to, any of the terms and conditions of the Convention, through legislation, administrative action, and collective agreement or otherwise. The Member must also specify any complications that are affecting or postponing its ratification of the Convention.³⁶⁴

Article 19(6)(d) of the ILO Constitution requires all members to account for Recommendations, namely the extent to which effect has been given to or is planned to be given to the provisions of the Recommendation, and whether it was necessary to amend the provisions. For federal states, special provisions in Article 19(7) of the Constitution address ratification and reporting on unratified Conventions and Recommendations.

The provisions on reporting are indicated in Article 19(7)(b)(iv) and (v). The reporting obligations in Article 19 are not meant to be arduous: reports are submitted yearly on a topic selected by the Governing Body for the purposes of the annual General Survey.³⁶⁵ In order to avoid overburdening the national administrations that have to write the reports and the ILO's supervisory procedures, only a small number of instruments are chosen on a topic of contemporary interest.³⁶⁶ The General Survey allows the Committee of Experts to examine the effect of Conventions and

³⁶⁴ Article 19(5)(e) of the ILO Constitution.

³⁶⁵ For more details on reporting, see ILO *Handbook of Procedures Relating to International Labour Conventions and Recommendations*.

³⁶⁶ Since 2010, the topic of the General Survey with the Recurrent Discussion held by the Conference under the ILO Declaration on Social Justice for a Fair Globalisation (2008), available at http://www.ilo.org/wcmsp5/groups/public/--dgreports/cabinet/documents/genericdocument/wcms_099766.pdf (Date of use: 27 October 2017).

Recommendations, to investigate the complications noted by governments as obstructing their application, and to ascertain ways of addressing these obstacles.

3.5 ILO influence on the labour law systems of Southern Africa and other factors that affect non-standard work

The ILO has played a major role in influencing the labour law systems of Southern Africa. Fenwick and Kalula³⁶⁷ suggest that there are two ways in which the ILO has principally influenced labour law in the region. Firstly, by ratifying ILO Conventions, nations fall under the influence of the ILO standard supervision system.³⁶⁸ Since its inauguration in 1992, the SADC has encouraged member states to ratify and implement the core ILO standards. All the SADC member states, excluding Madagascar and Namibia, have ratified the entire ILO core Conventions.³⁶⁹

Table 1 The ratification of core ILO Conventions by countries covered by the ILO Southern Africa SRO, including month and year of ratification.

Country	Convention No.	Forced Labour		Free Association		Discrimination		Child Labour	
		C.29	C.105	C.87	C.98	C.100	C.111	C.138	C.182
1 Botswana		6/97	6/97	12/97	12/97	6/97	6/97	6/97	1/2000
2 Lesotho		10/66	6/2001	10/66	10/66	1/98	1/98	6/2001	6/2001
3 Malawi		11/99	11/99	11/99	3/65	3/65	3/65	11/99	11/99
4 Mozambique		6/2003	6/77	12/96	12/96	6/77	6/77	6/2003	6/2003
5 Namibia		1/95	1/95	11/2000	11/2000	-	11/2001	11/2000	11/2000
6 South Africa		3/97	3/97	2/96	2/96	3/200	3/97	3/2000	6/2000
7 Swaziland		4/78	2/79	4/78	4/78	6/81	6/81	10/02	10/02
8 Zambia		12/64	2/65	9/96	9/96	6/72	10/79	2/76	12/01
9 Zimbabwe		8/98	8/98	4/03	8/98	12/89	6/99	6/2000	12/2000

Source: ILO Sub-Regional Office for Southern Africa in Harare (SRO-Harare), cited by Kalula

³⁶⁷ Fenwick *et al* 'Labour law: A Southern African perspective' in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 7.

³⁶⁸ Fenwick and Kalula note that even 'before a country ratifies the ILO standard, it is likely to be subject to a range of regulatory activities by the ILO. These include negotiation and discussion between the ILO officials and representatives of countries, including ministers, responsible for labour matters, and senior officials of relevant government departments.' This might occur, for example, within the framework of campaigns to promote the ratification of the ILO's core labour standards. This 'informal' aspect of ILO regulatory activity, while well-known within certain circles, has not, as far as we know, been the subject of major academic study. For a brief consideration, see Panford *African Labour Relations and Workers' Rights* 130–41.

³⁶⁹ These are the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948; the Right to Organise and Collective Bargaining Convention 98 of 1949; the Forced Labour Convention 29 of 1930; the Abolition of Forced Labour Convention 105 of 1957; the Minimum Age Convention 138 of 1951; the Worst Forms of Child Labour Convention 182 of 1999; the Equal Remuneration Convention 100 of 1951; and the Discrimination (Employment and Occupation) Convention 111 of 1958. Madagascar has not ratified the Abolition of Forced Labour Convention 105 of 1957 and Namibia has not ratified the Equal Remuneration Convention 100 of 1951. See <http://www.ilo.org> (Date of use: 30 July 2015).

et al in *Labour Law Reforms that Support Decent Work: The Case of Southern Africa* (2008) 7.

The second way in which the ILO has influenced labour law in the region is by offering technical assistance. The ILO offers technical assistance to countries to re-orientate their labour law and labour relations systems. Currently, for example, the ILO, through its *In Focus Programme on Social Dialogue, Labour Law and Labour Administration*, is running at least two key projects that are tasked with the legal regulation of labour markets in the region.³⁷⁰ In general terms, these projects help countries to develop labour legislation in line with international standards, and to advance their capacity in key areas such as dispute resolution. In particular, the ILO has assisted most countries in Southern Africa, for instance Botswana, Lesotho, Malawi, Namibia, South Africa and Swaziland, to develop labour legislation that conforms to international standards.³⁷¹ In addition, the ILO has assisted in improving the capacity of key institutions and actors in the region, through technical collaboration, for example, in the ILO/SWISS projects entitled *Regional Conflict Management and Enterprise-based Development and Strengthening Labour Administration in Southern Africa* (SLASA).³⁷²

In 1999, an SADC labour conference was arranged with the support of its Employment and Labour Sector (ELS) in collaboration with the ILO/Swiss Project for the Prevention and Resolution of Conflicts and the Promotion of Workplace Democracy. The conference presented wide-ranging debates on three themes: minimum standards, collective bargaining, and dispute prevention and resolution.³⁷³

For instance, the ILO/Swiss Project for Regional Conflict Management and Enterprise Development in Southern Africa educated about 180 people on mediation and arbitration by offering a postgraduate diploma programme in dispute resolution.³⁷⁴ The countries included in the project were Botswana, Lesotho, Mozambique, Namibia,

³⁷⁰ These are the ILO/Swiss Project to Advance Social Partnership in Promoting Labour Peace in Southern Africa and the ILO/USDOL Project 011 Strengthening Labour Administration in Southern Africa. See ILO *Technical Co-Operation Projects: In Focus Programme on Social Dialogue, Labour Law and Labour Administration* available at <http://www.ilo.org/public/english/dialogue/ifpdial/publ/index.htm> (Date of use: 20 September 2015).

³⁷¹ For more details, see <http://www.ilo.org/public/english/region/afpro/mdtharare/about/index.htm> (Date of use: 4 September 2015).

³⁷² Fenwick *et al* 'Labour law: A Southern African perspective' in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 9.

³⁷³ See Communiqué of the Southern African Development Community (SADC) Labour Relations Conference 1.

³⁷⁴ ILO *Educating for Effective Dispute Resolution in Southern Africa*.

Swaziland and Zimbabwe. Each country delegation included its Ministry of Labour, national union federations, national employers' organisations and nominated universities. The project formed part of a broader vision of the ILO/Swiss Project to transform labour law and present modern and effective dispute resolution measures.³⁷⁵ The outcome of this project was a noteworthy improvement in dispute resolution capacity in the participating countries and a greater understanding of dispute resolution challenges in Southern African countries:

All participating countries experienced relatively volatile labour markets and poor dispute resolution capacity. All desired greater labour market stability, to attract investment and stimulate growth and create jobs. All recognised the importance of extending access to industrial justice through effective dispute resolution machinery. The creation of a skilled cadre of suitably qualified dispute resolution practitioners would make a material contribution to these objectives.³⁷⁶

An additional intervention under the ILO/Swiss Project for Regional Conflict Management and Enterprise Development in Southern Africa was the 'Dialogue-Driven Performance Improvement in the Clothing and Textile Sector in South Africa'.³⁷⁷ This project sought to advance the role of mediators and arbitrators so as to stimulate maintainable growth in the enterprises. This offered employment to the chiefly rural female workforce and so augmented access to health care in an area with a high prevalence of HIV and AIDS. The project revealed that performance improvement can be attained through a mixture of applying good practice and developing skills, buttressed by vigorous labour-management negotiation at enterprise level. This, in turn, assisted in shaping industrial policy regarding performance improvement.³⁷⁸ The report on the 'Project to Advance Social Partnership and Promote Labour Peace in South Africa' (another ILO/Swiss Project) noted that:

respect for procedure has increased dramatically and procedural industrial action has virtually been eliminated from the South African industrial relations landscape. Settlement of disputes by conciliation is in excess of 70% and arbitrations are completed on average within 120 days from date of referral to date of award.³⁷⁹

³⁷⁵ Ibid.

³⁷⁶ Fenwick *et al* 'Labour law: A Southern African perspective' 2.

³⁷⁷ Ibid.

³⁷⁸ ILO *Dialogue Driven Performance Improvement in the Clothing and Textile Sector in South Africa* 3.

³⁷⁹ ILO *The ILO Promoting Labour, Peace and Democracy in Southern Africa* 1.

Interventions such as the above-mentioned ILO/Swiss Project improve the ability of employment establishments to observe the law. They also nurture co-operation between commercial enterprises and employees, so as to achieve the protective and developmental objectives of the law. The dispute resolution mechanisms established in various Southern African countries, such as the Commission for Conciliation, Mediation and Arbitration (CCMA) in South Africa are now working together at local level to launch the Southern African Dispute Resolution Forum.

Major concerns, such as child labour, health and safety at work and dispute resolution, have been addressed in the anticipated labour law reforms.

3.6 ILO instruments pertinent to tackling the issue of non-standard work in Southern Africa

Over the past century, the ILO has played a very significant role in developing labour standards and Conventions. Non-standard employment has been acknowledged by the ILO, which covers workers external to the traditional employment relationship. The changes to the traditional perceptions of work have received the attention of the ILO, and since 1990 this subject has been addressed at yearly conferences. The ILO has acknowledged the upsurge in non-standard work and the need for the protection of non-standard workers by means of the following:

- (a) Conventions and Recommendations pertaining to particular categories of non-standard workers, such as part-time workers and homeworkers;
- (b) support for micro-enterprises in the informal economy;
- (c) programmes like Strategies and Tools against Social Exclusion and Poverty (STEP) to promote the extension of social protection to informal workers;
- (d) support for mutual health insurance schemes; and
- (e) the continuance of work at its social security department, commissioning research and investigating the extension of social security protection to non-standard workers.³⁸⁰

³⁸⁰ ILO adopts historic labour standard to tackle the informal economy, available at https://www.ilo.org/ilc/ILCSessions/104/media-centre/news/WCMS_375615/lang--en/index.htm (Date of use: 5 October 2017).

A number of ILO instruments contain precise provisions on the different forms of non-standard employment addressed in this thesis. In addition, most ILO instruments relate to all workers, irrespective of their position or rank, and are thus essential for regulating numerous facets of non-standard employment.

3.6.1 Standards that deal with particular categories of non-standard employment

The ILO Termination of Employment Convention³⁸¹ and Recommendation³⁸² control, and offer guidance on the use of fixed-term or temporary employment contracts. The Convention regulates the termination of employment at the discretion of the employer, and allows for certain exclusions from all or some of its provisions, which may relate to workers engaged under a contract of employment for a specified period of time or for a specified task, or to workers engaged on a casual basis for a short period.

Furthermore, the Convention specifies that 'adequate safeguards shall be provided against recourse to contracts of employment for a specified period of time, the aim of which is to avoid the protection resulting from this Convention.'³⁸³ The Recommendation, although not binding, requires member states that have ratified the Convention³⁸⁴ to take the necessary steps to prevent abuse in the context of job security.³⁸⁵ Article 2(3) of the Convention and Article 3(1) and (2) of the Recommendation require that member states should use 'adequate safeguards' to protect employees against the consequences of entering into fixed-term contracts as a mechanism to evade statutory protection against unfair dismissal.

The Preamble of the Private Employment Agencies Convention 181 of 1997 notes the role that private employment agencies may play in an operational labour market, whilst noting the need to protect employees. The Convention is, in principle, relevant to all private employment agencies, all categories of employees (with the exception of seafarers), and all branches of economic activity. Ratifying states are compelled to take measures to guarantee that workers hired by private employment agencies are not

³⁸¹ Termination of Employment Convention 158 of 1982.

³⁸² ILO Recommendation 166 of 1982.

³⁸³ Article 3 of the Termination of Employment Convention 158 of 1982.

³⁸⁴ South Africa has still not ratified the Convention.

³⁸⁵ This means that 'domestic policy and practice must comply with the ILO Constitution and ratified Convention.'

deprived of the right to freedom of association and the right to collective bargaining, and that the agencies do not discriminate against workers.

In addition, private employment agencies are not permitted to directly or indirectly charge workers any fees or costs, with some restricted exemptions. Additionally, ratifying states should guarantee that a system of licensing or certification, or other forms of governance, including national practices, controls the procedures and operations of private employment agencies. Ratifying states are also compelled to guarantee satisfactory protection and, where pertinent, to decide upon and allocate the particular responsibilities of private employment agencies and of user enterprises with regard to: collective bargaining, minimum wages, working time and other working conditions, statutory social security benefits, access to training, protection in the field of occupational safety and health, compensation for occupational accidents or diseases, compensation in the event of insolvency and the protection of workers' claims, and maternity and parental protection and benefits.

The Private Employment Agencies Recommendation 188 of 1997 acts as an add-on to Convention 181 by providing, among other provisions, that workers employed by private employment agencies and made available to employer enterprises should, where applicable, have a written contract of employment stipulating their terms and conditions of employment, with information on such terms and conditions provided at the very least, before the actual commencement of their assignment. Private employment agencies should avoid making employees available to employer enterprises if they are placed there to replace workers who are on strike.

The Employment Relationship Recommendation provides that member states should formulate and apply, in consultation with the most representative employers' and workers' organisations, a national policy for revising at suitable periods and, if required, clarifying and adjusting the scope of pertinent laws and regulations, in order to ensure active protection for workers in an employment relationship. Such a policy should include procedures: to give direction on establishing the presence of an employment relationship and on the difference between employed and self-employed workers; to contest hidden employment relationships that conceal the true legal standing of workers; to guarantee standards relevant to all forms of contractual arrangements, including those involving various parties, so that employed workers are

protected; and to guarantee that such standards state who is accountable for offering such protection. Likewise, national policies should ensure the effective protection of workers, particularly those affected by vagueness regarding the nature of an employment relationship, including women workers and the most vulnerable workers.

The Part-time Work Convention³⁸⁶ promotes access to productive, liberally chosen part-time employment that honours the needs of both employers and employees, and guarantees protection for part-time employees with regard to access to employment, working conditions, and social security. The Convention applies to all part-time workers – defined as employed individuals whose normal hours of work are less than those of equivalent full-time workers.³⁸⁷ The Convention attempts to ensure the equal treatment of part-time workers and equivalent full-time workers in a number of ways.³⁸⁸ Firstly, part-time workers are to be given the same protection as equivalent full-time employees with regard to: the right to organise, the right to bargain collectively, and the right to act as employees' representatives; occupational safety and health; and discrimination in employment.

Secondly, procedures must be followed to ensure that part-time workers do not, simply because they work part-time, receive a basic wage³⁸⁹ which, calculated consistently, is less than that of equivalent full-time employees. Thirdly, legislative social security schemes based on work-related engagements should be modified so that part-time workers are afforded working conditions equivalent to those of equivalent full-time workers. These working environments may be considered in the light of hours of work, contributions or earnings. Fourthly, part-time workers must also benefit from

³⁸⁶ The Part-time Work Convention 175 of 1994 came into force on 28 February 1998 and has 14 ratifications: Albania, Australia, Bosnia and Herzegovina, Cyprus, Finland, Guyana, Hungary, Italy, Luxembourg, Mauritius, Netherlands, Portugal, Slovenia and Sweden.

³⁸⁷ However, ratifying states may, after consulting the representative organisations of employers and workers concerned, exclude wholly or partly from its scope particular categories of workers or certain establishments 'when its application to them would raise particular problems of a substantial nature'.

³⁸⁸ The term 'comparable full-time worker' refers to a full-time worker who: (i) has the same type of employment relationship; (ii) is engaged in the same or a similar type of work or occupation; and (iii) is employed in the same establishment or, when there is no comparable full-time worker in that establishment, in the same enterprise or, when there is no comparable full-time worker in that enterprise, in the same branch of activity, as the part-time worker concerned.

³⁸⁹ Pursuant to Recommendation 182 of 1994, part-time workers should benefit on an equitable basis from financial compensation, additional to basic wages, which is received by comparable full-time workers.

equivalent conditions with respect to maternity protection, termination of employment, paid annual leave and paid public holidays, and sick leave.³⁹⁰

Convention 175 likewise requires the implementation of measures to expedite access to productive and freely chosen part-time work which meets the requirements of both employers and employees, so long as the essential protection, as mentioned above, is guaranteed. It also requires that procedures must be applied, where applicable, to ensure that a transfer from full-time to part-time work or vice versa is on a voluntary basis, in accordance with national law and practice. The Part-time Work Recommendation 182 of 1994 encourages employers to deliberate with the representatives of the workers concerned on the institution or extension of part-time work on a comprehensive scale and on the associated rules and procedures, and to offer information to part-time workers on their specific conditions of employment. Furthermore, the Recommendation explains the number and arrangement of hours of work, alterations in the fixed work schedule, work beyond scheduled hours, and leave, as well as part-time workers' training, career prospects and job-related flexibility.

The ILO has also inaugurated other standards of specific interest to workers in non-standard forms of employment.³⁹¹ Some additional ILO Conventions are relevant to non-standard employment. For instance, the Employment Policy Convention³⁹² commits States to adopting policies 'to promote full, productive and freely chosen employment'. In this respect the Committee of Experts on the Application of Conventions and Recommendation (CEACR) refers to 'measures implemented in consultation with the social partners to reduce labour market dualism'.³⁹³ Moreover,

³⁹⁰ Exclusions may be introduced for part-time workers whose hours of work or earnings do not reach certain thresholds. However, these thresholds must be sufficiently low in order not to exclude an unduly large percentage of part-time workers, and should be reduced progressively.

³⁹¹ This include the following: The Maternity Protection Convention 183 of 2000 expressly provides for its application to all employed women 'including those in atypical forms of dependent work' in recognition of the significant share of women found in non-standard forms of employment. The Workers with Family Responsibilities Convention 156 of 1981 applies to all branches of economic activity and to all categories of workers. It concerns men and women workers whose family responsibilities restrict their opportunities to prepare for, enter, participate in or advance in economic activity, and is therefore particularly relevant for workers who have entered non-standard employment arrangements in order to combine work and family responsibilities. The Social Protection Floors Recommendation 202 of 2012 can be of benefit to workers in non-standard forms of employment, particularly if they are excluded from social security coverage as a result of legal thresholds.

³⁹² Employment Policy Convention 122 of 1964.

³⁹³ Japan – CEACR, Direct Request, 2013, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR3147206,102729,Japan,2013. (Date of use: 6 January 2016).

the Labour Administration Convention³⁹⁴ requests states to broaden the tasks of labour administration to workers not presently considered employed – a concern that was also recently addressed by the CEACR.³⁹⁵ Also pertinent are the Labour Inspection Convention,³⁹⁶ on the need to uphold a system of labour inspection for workplaces, and its 1995 Protocol.

ILO standards have affected regional and national protocols on temporary work, temporary agency work, ambiguous and concealed employment relationships, and part-time work. Nonetheless, national regulations differ significantly, reflecting the specificities of the country, including the different legal systems and the different levels of economic development.

3.6.2 The decent work agenda and non-standard employment

Decent work has been described as follows:

Jobs of acceptable quality (constructive, profitable, and gainful work) both within the formal and the informal sectors; decent remuneration (to fulfil basic economic and family needs); fair working conditions; fair and equal treatment at work (no discrimination); safe working conditions; protection against unemployment; access to salaried jobs or self-employment promoting entrepreneurship and supporting small business by providing access to credit, premises, management training, business advisory services, and so on; training and development opportunities; and job creation.³⁹⁷

The main objective under the decent work agenda is ‘not just the creation of jobs, but the creation of jobs of acceptable quality’.³⁹⁸ Numerous aspects need to be addressed if the standard of prevailing employment and current jobs in Southern Africa is to become satisfactory.

In February 2015, the International Labour Organisation held a Tripartite Meeting of Experts on Non-Standard Forms of Employment that hosted experts selected after

³⁹⁴ Labour Administration Convention 150 of 1978.

³⁹⁵ Republic of Korea – CEACR, Observation, 2011, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:2700228,103123,Korea,%20Republic%20of,2011 (Date of use: 2 October 2014).

³⁹⁶ Labour Inspection Convention 81 of 1947.

³⁹⁷ McGregor (2006) 14(4) *Quarterly Law Review for People in Business* 150–154.

³⁹⁸ See ILO *Decent Work: Report of the Director-General* 4.

consultation respectively with governments, the Employers' Group and the Workers' Group of the Governing Body, to debate the obstacles to the decent work agenda that non-standard forms of employment may present. The Meeting requested member states, employers' organisations and workers' organisations to develop policy resolutions to address decent work deficits related to non-standard forms of employment, so that all workers – regardless of their employment arrangement – could profit from decent work. Specifically, governments and the social partners were entreated to collaborate to implement measures to address unsatisfactory working conditions, to support effective labour market changes, to promote equality and non-discrimination, to ensure sufficient social security coverage for all, to promote safe and healthy workplaces, to ensure freedom of association and collective bargaining rights, to improve labour review, and to address highly uncertain forms of employment that do not respect essential rights at work.³⁹⁹

3.6.3 Non-standard employment relations and the ramifications for the decent work agenda in Southern Africa states

Southern African states confront numerous similar obstacles in their globalised economies. They share similar attributes in their labour markets and encounter numerous problems in their relations with the international trade systems and financial organisations. Unemployment is a common denominator, as are the high rates of poverty. Southern African states have the same challenges of informal versus formal sector development, and share the same concerns and predicaments, such as skills development, flexibility and the restructuring of work, and so on.

In developing states like those in Southern Africa, which are afflicted by development hardships with a saturated labour market, the efforts of most employers to decrease labour costs have resulted in the proliferation of non-standard employment relations, such as temporary work, fixed-term work and part-time work, although workers in these groups have the required skills to be employed on a permanent basis. This phenomenon has varied implications for decent work.⁴⁰⁰

³⁹⁹ For more details, see the *Conclusions of the Meeting of Experts on Non-Standard Forms of Employment*, available at http://www.ilo.org/gb/GBSessions/GB323/pol/WCMS_354090/lang-en/index.htm (Date of use: 6 April 2017).

⁴⁰⁰ *Individual Observation Concerning Labour Inspection Convention 181 of 1947, Angola.*

Nevertheless, to implement the decent work agenda, the first goal is the creation of employment opportunities. This goal states that the economy should create opportunities for investment, entrepreneurship, skills advancement, job creation and sustainable livelihoods. It is the view of some scholars that the obstacle to employment opportunities emerges from the variety of employment types created by global production systems.⁴⁰¹ For employment to be decent, it should be indefinite, continual and secure in order to guarantee constant earnings for an employee. Furthermore, even within the same enterprise there may be employment that is flexible, insecure and informal. Within the context of the various Southern African states and their economic circumstances, the Southern African economies as currently structured and managed lack the capacity to create employment for their citizens.

The principal result of this is that people desperately looking for a means of survival will accept any kind of employment that they can find. Against this backdrop, nearly all employers often take advantage of these desperate circumstances and exploit people who are in non-standard employment.⁴⁰² If Southern African governments do not make an effort to create employment or an enabling environment for people to create their own jobs, non-standard employment relations will continue to proliferate, to the delight of employers who are motivated by profit. As a result, the decent work agenda championed by the ILO will simply remain an illusion in the context of non-standard employment relations in the Southern African sub-region.

Today, it is generally acknowledged that the decline of standard employment has gradually diminished labour protection. These workers become 'invisible for recruitment into trade unions or for the protection through law enforcement'⁴⁰³ although some of these employment relationships are perceived to fall within the safety net of labour law:

There is a growing body of international evidence that some of the changes, notably the growth of precarious or insecure employment, have profound implications for worker attitudes and commitment as well as minimum labour standards and working conditions, especially the health, safety and well-being of workers. In particular, the

⁴⁰¹ Barrientos *Modernising Social Assistance, In Proceedings World Conference on Social Protection and Inclusion: Converging Efforts from a Global Perspective* 7–24.

⁴⁰² Abideen & Osuji (2011) 30(9) *The Source* 20–21.

⁴⁰³ Cheadle *et al* (eds) *Current Labour Law* 698.

growth of elaborate supply chains and flexible arrangements (along with changes to regulatory regimes) has been linked to the emergence or expansion of low-wage sectors/working poor (with substantial hidden costs to the community) and more intensive work regimes.⁴⁰⁴

The second goal of the decent work agenda attempts to advance recognition and respect for worker rights in the workplace. All employees, and particularly vulnerable or poor workers, need a voice, representation, participation, and laws that promote their interests and resolve their concerns. The issue of workplace rights arises because of the difficulty in organising and representing these employees. In the absence of collective power to bargain with employers, as already pointed out in chapter 3, employees are not able to access or secure other rights. In most SADC member states, non-standard employees are denied several rights. Labour law organisations in Southern Africa have a restricted capacity to accomplish the tasks consigned to them by the industrial relations system.

Despite formal acknowledgement of the right to freedom of association in Southern African states, trade unions in some countries remain subjected to substantial government intrusion,⁴⁰⁵ either by law or by more informal means. The courts in most Southern African states play only a limited role in instituting and sustaining the principles of labour law. Finally, even where workers are formally covered by labour laws and there exist institutional measures for review and enforcement, a lack of qualified employees, resources and organisational capacity, as well as fraud, hinder the degree to which workers are in fact protected.⁴⁰⁶

Some Southern African states lack labour laws that allow non-standard workers to join a trade union, leaving them vulnerable to exploitation.⁴⁰⁷ Even when such legislation is present, enforceability is a problem. When employees are denied the right to join trade unions in their workplace then so many of their other rights may be refused. In such circumstances, the employers dictate the terms and conditions of work, with little

⁴⁰⁴ Quinlan 'We've been down this road before: Vulnerable work and occupational health in historical perspective' in Sargeant & Giovane (eds) *Vulnerable Workers: Safety, Well-Being and Precarious Work* 33.

⁴⁰⁵ Fenwick et al 'Labour law: A Southern African perspective' in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 1.

⁴⁰⁶ Fenwick et al 'Labour law: A Southern African perspective' 34.

⁴⁰⁷ Fourie (2008) *PER* 23.

resistance from the workers. Further, due to the inability to unionise, non-standard workers cannot bargain collectively with their employers, especially with regards to remuneration, the basic conditions of work, health and safety measures, and other related issues. In short, any employment relationship that does not allow for unionisation and the participation of employees in making choices that affect their work and advance their rights in the workplace is contrary to the decent work agenda.

The third goal of the decent work agenda focuses on expanding social protection. This goal seeks to stimulate both inclusion and productivity by allowing for a situation where women and men benefit from working conditions that are safe, allow sufficient free time and recreation, take family and social values into consideration, afford sufficient reimbursement in case of lost or reduced income, and allow access to suitable healthcare. Barrientos argues that the consequences of the lack of social protection are serious because many flexible and informal employees do not have access to a contract of employment and legal employment benefits. They are accordingly often deprived of access to other safeguards and social support by the state.⁴⁰⁸ In the South African context, non-standard workers do not have basic social protection. For example, these workers are not included in their employers' a neither pension schemes nor can they claim unemployment benefits from the state, even though the state can afford this. This leaves numerous employees very susceptible to economic setbacks, both in their places of work and in society as a whole. This state of affairs barely advances the decent work agenda.

The fourth goal is advancing social dialogue. This goal contends that the participation of strong and independent workers and employers' organisations is crucial to improving productivity, circumventing disputes at work, and building interconnected societies. According to Barrientos, 'the social dialogue challenge arises from the lack of effective voice or independent representation of such workers in a process of dialogue with employers, government or other stakeholders.'⁴⁰⁹ In the context of the prevalence of non-standard employment in Southern African states, these workers are deprived of a strong voice both within and outside the workplace, due to their inability

⁴⁰⁸ Barrientos *Modernising Social Assistance, in Proceedings 7–24.*

⁴⁰⁹ *Ibid.*

to unionise. Therefore, it is unlikely that they will participate in social discourse of any nature with their employers and other participants.

When employers abuse their workers because the workers are deprived of a choice, the performance and loyalty of such workers to their work organisation and their work will be questionable. This has grave consequences for productivity in both the workplace and in society.

In conclusion, decent work, as espoused by the ILO may be idealistic, but it is definitely not a reality for most non-standard workers. In a country like South Africa with a capitalist social formation driven by profit motives, and where the labour market is very saturated, local and foreign employers take advantage, and so decent work is very onerous to attain.

Non-standard employment relations are a global matter, however. In some states, it is driven by choice and not by a need to survive. In the case of most Southern African states, the practice is driven mainly by the need to survive and not by choice. But decent work is arguably a journey, not a destination; it is a benchmark that each state seeks to achieve. Nevertheless, to make decent work a reality in the SADC states, the labour legislation and the practice of industrial relations must be reviewed to protect this category of workers from unscrupulous employers who contravene the principles of labour law for personal gain.

Non-standard employment relations have become very common in most employment settings in Southern Africa. Nevertheless, the impact of this form of employment relations on the ILO decent work agenda is scarcely examined by industrial and social scientists. This study investigates non-standard work within the context of flexibility and the restructuring of work, limited contracts and outsourced employment, and argues that this type of employment relationship has been aggravated by the increasing prevalence of unemployment, poverty and inequality in the region. The study further argues that most employment enterprises in Southern Africa are using this form of employment to reduce labour costs and to increase profit in accordance with the dictates of the free market economy, to the detriment of temporary workers. The study contends that non-standard work leads to worrying contraventions of the decent work agenda in the region.

3.6.4 Non-standard employment and labour migration in Southern Africa

Another aspect that presents a challenge to the capacity of labour law to regulate non-standard employment in Southern Africa is extensive labour migration. The late 19th century saw a huge number of migrant workers in some economic sectors in South Africa, particularly in the mining and commercial agriculture sectors. Workers came from Botswana, Lesotho, Malawi, Mozambique, Zambia, Zimbabwe and Swaziland.

To some degree, Namibia, Zambia, Zimbabwe and Tanzania have also traditionally enticed labour migrants from nearby states. South Africa, nevertheless, remains Southern Africa's most powerful and diverse economy and continues to attract the main volume of both formal and informal labour migrants.

Since 1990, the number of labour migrants relocating to South Africa from adjacent states has increased dramatically. This is due to several factors, including growing unemployment in the transfer states and reduced government contributions to social services.⁴¹⁰ Currently, the main motives for migration include the huge differences between Southern African states in terms of incomes, standards of living and unemployment levels, and political instability.⁴¹¹ The effects of migration in Southern Africa are felt in numerous ways. One effect is that several households and communities in the region are dependent on the earnings of family members who have migrated to find employment.⁴¹² Another effect is that governments have crafted legal and institutional frameworks to ensure that migrants do not settle in the receiving states.⁴¹³

As observed by Mpedi and Smit, migrants may be divided into two main groups: documented migrants (permanent residents, temporary residents, refugees, and asylum-seekers) and undocumented migrants.⁴¹⁴

Documented migrants are those who enter the state lawfully and have the host state's official authorisation to work in the state. Consent to work is granted on the basis of an employment proposal from an employer who must motivate the need to appoint a

⁴¹⁰ ILO *Labour Migration to South Africa in the 1990s*.

⁴¹¹ Crush et al *Migration in Southern Africa*, available at http://www.sarpn.org/za/documents/d0001680/P2030Migration_September_2005.pdf (Date of use: 18 June 2017).

⁴¹² ILO *Labour Migration to South Africa in the 1990s*.

⁴¹³ Ibid.

⁴¹⁴ Mpedi & Smit *Access to Social Services for Non-Citizens and the Portability of Social Benefits within the Southern African Development Community* 3.

migrant on the strength of the latter's knowledge, abilities, skills and proficiency in a specific profession. Because host states closely scrutinise applications for permission to allow migrants to work, applications are made only by establishments that are lawfully registered and comply (at least on the face of it) with the legislation regulating employment relations. Therefore, it is likely that most documented migrant workers work under favourable conditions, which are similar to those of their indigenous colleagues. They have greater bargaining power and may implement the protection afforded by labour legislation. Nevertheless, apart from workers who have permanent resident status, migrant workers do not have access to state social security protection, such as disability benefits and unemployment insurance benefits.⁴¹⁵

Migration in the region is problematic as it challenges the ability of national labour legislative frameworks to protect undocumented migrant workers, who form the bulk of the migrant labour force. The latter are workers who enter and work in the state illegally, or enter legally (on a premise other than a work permit) and remain in the host state, and work without consent to do so. They usually do not have the education or skills that would validate the issuing of a work permit. They choose to work in jobs where they can escape the attention of the public authorities and, consequently, they have fewer choices available to them.⁴¹⁶ They are thus susceptible to exploitation and abuse, and will accept work where the circumstances and conditions are substandard, the wages are low and there is little or no job security.⁴¹⁷ In addition, undocumented migrants are always vulnerable to substandard living and working circumstances, live in fear of being deported, and are usually excluded from the social protection provided by the state.⁴¹⁸

There is a link between non-standard employment and vulnerable workers. The problems of non-standard work are worsened by the concentration of vulnerable workers in many of these jobs, including migrants, the youth, the elderly, and women. Migrants frequently work in the agricultural harvesting and construction labour forces, and do undeclared work in many states. The youth and undocumented immigrants are particularly at peril because of their economic dependence, the absence of assistance,

⁴¹⁵ Olivier *et al* *Social Security: A Legal Analysis* 23-47.

⁴¹⁶ ILO *Decent Work and the Informal Economy*.

⁴¹⁷ Fenwick *et al* 'Labour law: A Southern African perspective' in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 14.

⁴¹⁸ Dupper (2007) *Stellenbosch Law Review* 219 at 223.

and their fear of lodging complaints with the regulatory authorities.⁴¹⁹ Migrants usually do work that is not only hazardous but where non-standard employment arrangements are widespread.⁴²⁰ Many studies have failed to fully examine these correlations but there are exceptions, such as the study of hotel housekeepers.⁴²¹

Because of their perilous position, migrants cannot benefit from the protection afforded by labour laws. Southern African countries have acknowledged the need to work towards enabling the movement of citizens between member states and the steady harmonisation of migration policies.⁴²² Nonetheless, to date, there has been little progress with regional efforts to regulate labour migration. The region still does not have a coherent migration policy. Many migrant workers have no form of social protection while working in host states.⁴²³ Migrant workers, particularly those who are undocumented, thus find themselves in conditions akin to non-standard employment. Olivier is of the view that, notwithstanding the existence of AU instruments that regulate and protect migrants in general, 'the adoption, implementation and monitoring of international and regional standards ... appear to be problematic.'⁴²⁴

3.6.5 The socio-economic and legal realities of non-standard work in South Africa

As indicated in most chapters in this study, the socio-economic and legal realities of non-standard work in the Southern African region and particularly South Africa warrants regulation. These categories of workers are often associated with vulnerability and thus need protection.

Workers in non-standard categories of work, such as part time, fixed term or temporary work are often depicted as 'outsiders', with no time to engage in union activity, or as replacing workers with standard employment.⁴²⁵ These views show the

⁴¹⁹ McLaurin & Liebman (2012) 17(2) *Journal of Agromedicine* 186–196.

⁴²⁰ Rizvi *Safety and Health of Migrant Workers: Understanding Global Issues and Designing a Framework Towards a Solution* 125.

⁴²¹ Seifert & Messing (2006) 38(3) *Antipode* 557–578. See also Sanon (2014) 62(2) *Workplace Health & Safety* 86–95.

⁴²² Draft Protocol on the Facilitation of Movement of Persons in the SADC (1998), available at www.sadc.int (Date of use: 21 May 2017).

⁴²³ Olivier *et al Social Security: A Legal Analysis* 23-47.

⁴²⁴ Olivier (2012) 2(2) *SADC Law Journal* 129 at 138.

⁴²⁵ Crush *et al* 'Undermining labour: The rise of subcontracting in South African Gold Mines', in *Journal of Southern African Studies* 5-31; Hatton 'Temporary weapons: Employers' use of temps against organised labour'; in *International Labour Relations Review* 86-110.

fragile and vulnerable circumstances in which numerous workers with 'non-standard' work find themselves.

Some non-standard categories of work do not provide workers with decent work. Workers may not be allowed access to social protection, have diminished levels of job protection (agreements can be terminated more often without hesitation) and confront higher risks in respect of workplace accidents or illnesses.⁴²⁶ Workers in non-standard forms of employment may face numerous challenges, including job insecurity, restricted control over scheduling, bad income, uncertainty and fluctuations in wages, unpredictable and unfriendly working hours. Workers in part-time work, and in especially those with 'zero-hours' agreements, are often required to be on standby and ready for work at short notice. They rarely have any guarantee of a minimum remuneration and have diminished capacity to schedule their work and life.

Workers in non-standard forms of employment may also confront challenges with regard to exercising their organisational rights and the right to collective bargaining. They are unable to join a union, may fear retaliations for joining a union, or are unable to pay union membership because of their unstable remuneration. In this regard, it must be noted that collective bargaining can reduce the vulnerability of workers in non-standard categories of work and assist in making sure that work is decent. This can only be attainable where the right of these workers to freedom of association and collective bargaining is recognised and protected. Also, the endeavours of the social partners are significant in providing a framework that can encourage these innovative practices, as are the endeavours of the state to support collective bargaining.

⁴²⁶ For example, the majority of workers engaged in clean-up and decontamination work after the Fukushima accident in March 2011 were contract workers. According to the Japanese Nuclear Safety Agency, in 2009 contract workers were more likely to be exposed to high levels of radiation than regular workers Jobin 'Dying for TEPCO? Fukushima's nuclear contract workers', in *The Asia-Pacific Journal*, available at: <http://japanfocus.org/- Paul-Jobin/3523/article.html> (Date of use: 12 August 2018). In Illinois, data on occupational amputations for 2000-2007 show that of the ten employers recording the highest numbers of amputations, half were employment service companies or temporary employment agencies Friedman et al 'Occupational amputations in Illinois 2000-2007: BLS vs. data linkage of trauma registry, hospital discharge, workers compensation databases and OSHA citations', in *Injury* 2012.

It is important to note that non-standard employment is closely connected to the informal economy, but distinct from this category of workers. The informal economy alludes to those sectors in the economy where employment is unregulated and numerous descriptions thereof can be given. In the words of Smit,⁴²⁷ governments often view informality as an indispensable lifeline for the vulnerable and as a sign of economic vitality. However, informality has huge socio-economic costs. The majority of non-standard workers in developing states and in particular the Southern African states are not working informally by choice. This type of employment is often associated with uncertain working conditions and increasing employment insecurity. Some non-standard jobs for instance contract work often offer better salaries than standard work, while other categories of non-standard employment such as part-time and temporary work offer relatively poor wages.⁴²⁸ There is substantial consensus, though, that non-standard employment arrangements are associated with paucity of health insurance, pensions, and other fringe benefits.

Further, the consequences of triangular work relations on collective bargaining and unionisation in Southern Africa are particularly potentially devastating: The detachment of workers from their employers makes it onerous for unions to organise, and the existence of multiple employers provides them with advantage against unions. Collective bargaining is generally recognised as a vital tool for advancing employment conditions and labour relations.

Further, it is suggest that there is a significant lack of awareness among workers and employers concerning applicable rights and responsibilities in non-standard agreements. This included:

- a) Basic conditions of employment rights such as holiday entitlement, maternity rights, sick pay and other rights: workers and employers with low understanding of whether those in non-standard agreements are entitled to these statutory rights, and if so how to calculate the relevant details on pay or time off;
- b) Deductions from income, unpaid salaries and minimum wage: self-employed workers enquiring about protection against changes to their remuneration package, such as unexpected reductions in wages or the deduction of new fees or charges from

⁴²⁷ Smit & Fourie (2009) 3 *Journal of South African Law* 516–547.

⁴²⁸ Kalleberg *et al* (2000) 26 *Annual Review of Sociology* 341-365.

their wages. Others, notably delivery drivers and couriers, concerned that they earned less than the national living or minimum wage after accounting for necessary costs such as providing their own vehicle, insurance and fuel costs;

c) Variation of terms and conditions: uncertainty about whether there is a right to be consulted or to be given a minimum notice period of changes to working hours or other terms and conditions of work.

Even where there is clarity and understanding about applicable rights and responsibilities, a further issue that can undermine the reach of employment protections to these arrangements is the extent to which individuals have the confidence to question and assert their rights in practice.

In addition, the focus of labour law, as it has been advanced in the industrialised world, has been the formal employment sector, and to a large degree, this is true of Southern African labour laws, which have been 'borrowed and bent' (Thompson) or 'transplanted' (Kahn-Freund) from overseas.⁴²⁹ Thus, most of the employed population of Southern Africa, working in the informal sector and/or in agriculture, do not benefit from labour law as it is traditionally conceived. Another concern is the fact that the formal sector of the workforce is in a near-constant state of change, with a significant growth in casual workers, home-workers, and other forms of non-standard employment.⁴³⁰

Across the region, between 10 and 20 percent of the economically active population is engaged in the informal sector of the labour market, and a significant minority work in farming, usually in subsistence agriculture.⁴³¹ Thus the majority of the economically active population in Southern Africa work in the informal sector of the economy. Unsurprisingly, in many Southern African countries, governments vigorously promote the informal sector as a means of economic growth and development, because it solves joblessness and offers goods at competitive prices to those on very low wages.⁴³² Growth in the informal economy, as a percentage of the total GDP in sub-

⁴²⁹ Kahn-Freund (1974) 37 *Modern Law Review* 1.

⁴³⁰ Kalula 'Beyond borrowing and bending: Labour market regulation and labour law in Southern Africa' in Barnard, Deakin & Morris (eds) *The Future of Labour Law: Liber Amicorum Sir Bob Hepple* QC.

⁴³¹ Reports vary as to whether the correct figure is 10 per cent (Torres L) or 20 per cent: Harrison & Leamer (1997) 15 *Journal of Labor Economics* 20.

⁴³² Freund *The African Worker* 76.

Saharan Africa, increased from 30% in 1990 to 39% in 2003.⁴³³ According to Benjamin, in September 2005, total employment in the South African informal sector represented 22.8% of total employment. This figure increases to 29.8% if domestic workers are included.⁴³⁴

Olivier has briefly summarised some of the main characteristics of labour law in Southern African countries. First, there is a primary reliance on labour legislation borrowed from other jurisdictions, rather than developing labour law locally. Second, the underlying bipartite and tripartite corporatist structures have failed to contribute to labour market regulation. Third, there is a narrow focus on labour law in the small (and shrinking) formal sector of the labour market. Fourth, the ILO has had a relatively limited impact: many countries' laws fail to meet minimum standards. Finally, there is a tendency to concentrate on the legislative, judicial and executive functions within labour departments, particularly in relation to dispute resolution.⁴³⁵

A further characteristic of the region is that most social security schemes provide protection only to those in formal employment, despite the continuous growth of non-standard employment and the informal economy.⁴³⁶ The Charter of Fundamental Social Rights in SADC contains important provisions that are relevant to labour and social security protection for workers, such as harmonising working and living conditions, creating an enabling environment for ensuring health and safety, ensuring consultation with and the participation of workers, employment and remuneration, and educating and training workers. These rights apply to every employee irrespective of status and type of employment. It must nevertheless be noted that the Charter is not directly enforceable.

The recognition by the International Labour Conference that 'all those who work have rights at work, irrespective of where they work' is the premise of this study. Many states have become fully aware that the informal sector is a growing rather than a passing phenomenon, and that the extension of social protection is of crucial importance. Attempts have therefore been made to extend protection through legislation, for

⁴³³ Olivier 'Realising social security as a human right in South Africa: Some critical perspectives' in Van Langendonck (ed) *The Right to Social Security* 419.

⁴³⁴ Benjamin (2008) 29 ILJ 1579 at 1583.

⁴³⁵ Olivier & Kalula *Social Protection in SADC: Developing an Integrated and Inclusive Framework* 8.

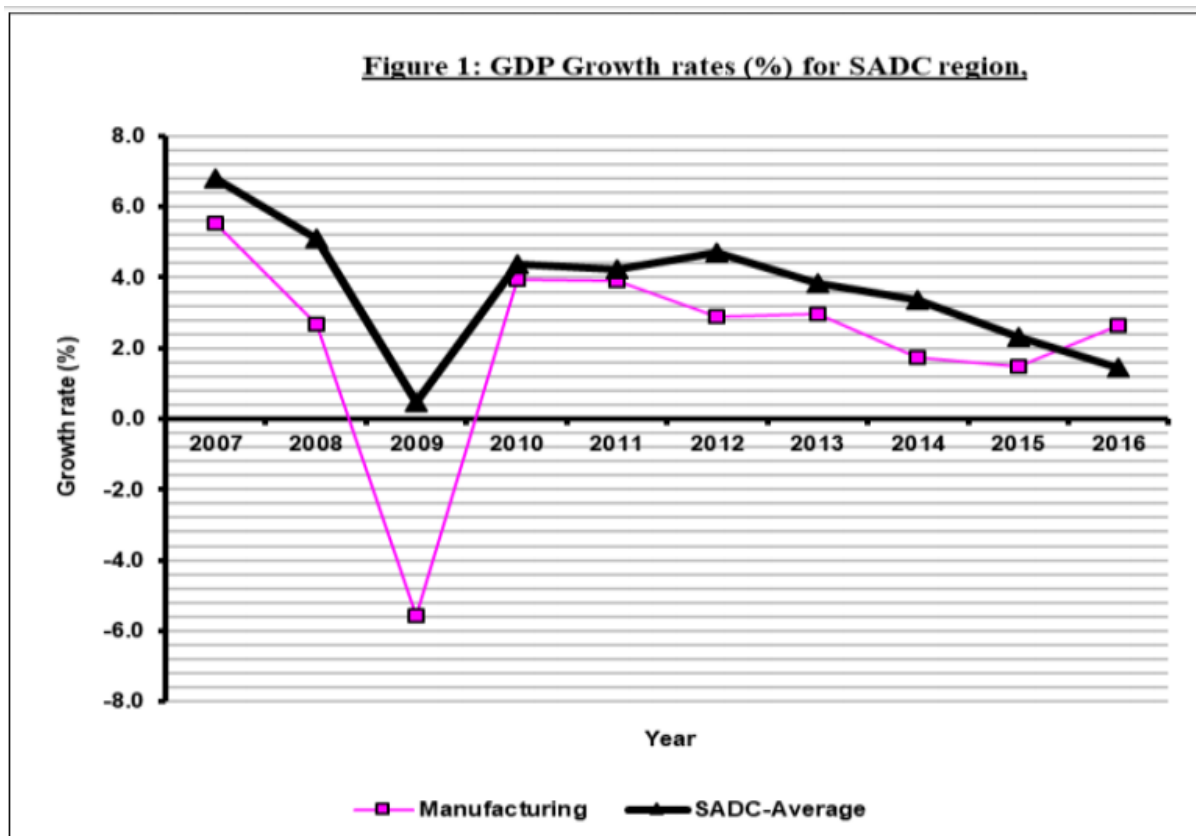
⁴³⁶ Smit 2007 TSAR 700.

example, the Unorganised Workers Social Security Act 33 of 2008 in India; the Social Security Bill, 2005 in Tanzania, and the Social Security Act 34 of 1994 in Namibia.

3.6.6 Unemployment, income inequality, and regional labour standards

Joblessness and disparities in income are prevalent in Southern Africa, due to the low rate of economic growth in the region, which was reported as averaging 1.4% in 2016 compared to 2.3% in 2015 as illustrated in Figure 1. The growth rates of individual states vary.

The Manufacturing sector, identified as the prioritized key engine of growth to drive the industrialisation process in Southern Africa for the coming decades, grew by 2.6% in 2016 compared to 1.5% in 2015. The region`s growth has been increasing at a decreasing rate since post global crisis in 2009 while the manufacturing sector exhibited decent growth in 2016.



Source: SADC selected Economic and Social Indicators, https://www.sadc.int/files/7315/0996/2411/SADC_-_Selected_Indicators_2016.pdf (Date of use: 13 April 2017).

At country-specific level (Table 3), Tanzania registered highest overall economic growth rate at 7.0% among the Member States followed by Botswana at 4.3 % in 2016. The rest of the Member States registered growth rates ranging between 0% and 3.8% except for Swaziland which recorded a decline of 0.6% during the same period.

Table 3: Annual Real GDP (at Market Price) Growth Rate in SADC (%), 2007 – 2016

SADC Member States	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Angola	13.9	10.5	0.8	5.2	4.1	8.8	5.0	4.0	0.9	0.0
Botswana	8.3	6.2	-7.7	8.6	6.0	4.5	11.3	4.1	-1.7	4.3
DRC	6.3	6.2	2.9	7.1	6.9	13.4	2.4	7.2	7.7	2.4
Lesotho	4.2	6.7	2.2	6.2	7.0	5.9	2.2	2.3	5.6	2.9
Madagascar	6.2	7.1	-4.0	0.3	1.5	3.0	2.3	3.3	3.1	4.1
Malawi	9.1	7.8	7.5	6.8	4.9	-0.6	6.3	6.2	3.3	2.7
Mauritius	5.7	5.4	3.3	4.4	4.1	3.5	3.4	3.7	3.6	3.8
Mozambique	7.4	6.9	6.4	6.7	7.1	7.2	7.1	7.4	6.6	3.8
Namibia	4.9	2.6	0.3	6.0	5.1	5.1	5.7	6.3	6.1	0.2
Seychelles	10.4	-2.1	-0.2	5.0	5.4	3.7	5.0	6.2	6.8	1.5
South Africa	5.4	3.2	-1.5	3.0	3.3	2.2	2.5	1.7	1.3	0.3
Swaziland	3.9	2.8	4.5	3.5	2.0	4.1	4.7	3.3	1.3	-0.6
Tanzania	8.5	5.6	5.4	6.4	7.9	5.1	7.3	7.0	7.0	7.0
Zambia	8.4	7.8	9.2	10.3	5.6	7.6	5.1	4.7	2.9	3.4
Zimbabwe	-3.3	-2.8	27.7	15.4	16.3	13.6	5.3	4.6	1.4	3.2
SADC Average	6.8	5.1	0.5	4.4	4.2	4.7	3.9	3.4	2.3	1.4

Source: SADC selected Economic and Social Indicators, https://www.sadc.int/files/7315/0996/2411/SADC_-_Selected_Indicators_2016.pdf (Date of use: 17 May 2017).

At the sub-regional level, the adoption of the Charter of Fundamental Social Rights in SADC in Dar-es-Salaam on 5 August 2003 was a key development. The Charter is a resolute document that plainly reinforces the need for protection, particularly of workers and vulnerable groups such as non-standard workers, and seeks to establish harmonised programmes of social security in the sub-region.⁴³⁷ Its provisions aim to extend social protection to both the employed and the unemployed. Article 10 provides that:

SADC member states shall create an enabling environment that every worker shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be able to receive sufficient resources and social assistance.

⁴³⁷ Article 2 of the Charter of Fundamental Social Rights in SADC (2003).

3.6.7 Labour market transitions in the Southern African region

A crucial obstacle to the ability of labour law to provide for decent work in Southern Africa is the orthodox, but now insufficient, dependence on the standard employment relationship as the linchpin of protective labour legislation. Casualisation and externalisation have produced different types of triangular employment that present a challenge to workers' protection in Southern Africa. As these phenomena change the nature of employment, numerous workers no longer have the protection of labour law.⁴³⁸

The ILO has four strategic goals: the promotion of rights at work; employment and income opportunities; social protection and social security; and social dialogue and tripartism.⁴³⁹ Nevertheless, there are some hurdles associated with these goals that apply to the circumstances in the region in relation to non-standard employment relationships.

The main goal of the ILO today is to advance opportunities for women and men to obtain decent and productive employment, in circumstances of freedom, equity, security and human dignity.⁴⁴⁰ This goal declares that the economy should generate opportunities for investment, entrepreneurship, skills development, employment and sustainable decent work. However, the world of work has changed as a result of globalisation. For employment to be decent it should be indefinite, conventional and secure, to ensure constant income for an employee.

In the context of Southern, where unemployment rates are very high and the region is struggling to create jobs, the result is that people desperately looking for employment may accept any type of employment. It is therefore not surprising that unscrupulous employers usually benefit by exploiting the circumstances of these desperate individuals, who are usually non-standard workers.⁴⁴¹ The author argues that if Southern African states do not implement serious measures to create jobs and an enabling environment for entrepreneurship, non-standard employment may become the norm and only unscrupulous employers will benefit. It is further submitted

⁴³⁸ Fenwick *et al* 'Labour law: A Southern African perspective' in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 19–22.

⁴³⁹ See <http://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-ihm> (Date of use: 15 April 2017).

⁴⁴⁰ *Ibid.*

⁴⁴¹ Fourie (2008) *PER* 23.

that if the Southern African states fail to take action, the ILO's decent work agenda will remain an illusion in the context of non-standard employment relationships in the region.

Another crucial ILO goal is the guaranteeing of employment rights in the workplace, and promoting acknowledgement of and respect for the rights of workers. It is contended that all workers, irrespective of their employment status, and especially those in unfavourable working conditions, need representation, participation, and legislation that can address their concerns. Barrientos is of the view that the obstacles with regard to employment rights are associated with the difficulty of organising and representing workers.⁴⁴² In the absence of the collective strength to bargain with employers, employees are not in a position to acquire other rights.

In most Southern African states, workers in non-standard employment do not have many rights. Most labour laws were originally crafted to protect employees in standard employment relationships and not those in non-standard work, who usually do not join a trade union. When workers find it difficult to join trade unions in their workplace, they fail to enjoy their employment rights. In such circumstances, the employer can stipulate the terms and conditions of employment with little or no opposition from employees. In addition, due to their inability to join trade unions, non-standard employees cannot bargain collectively with their employers, especially in the areas of remuneration, hours of work, health and safety measures, and other basic conditions of employment. In short, any employment relationship that does not afford its workers the right to join a trade union or does not allow the voice of the workers to be heard in decisions that affect their employment and promote their rights in the workplace arguably does not advance the ILO decent work agenda.⁴⁴³

A further goal of the ILO is to extend social protection. This goal encourages both inclusion and productivity by making sure that women and men benefit from working conditions that are safe, permit enough free time and rest, take account of family and social values, provide for sufficient compensation in situations of lost or diminished income, and allow affordable healthcare. Barrientos⁴⁴⁴ further argues that the lack of

⁴⁴² Barrientos *Modernising Social Assistance, in Proceedings* 7–24.

⁴⁴³ Okafor (2010) 8(1) *Ibadan Journal of the Social Sciences* 49–64.

⁴⁴⁴ Barrientos *Modernising Social Assistance, in Proceedings* 7–24.

social protection is a result of the fact that numerous workers in flexible working arrangements and informal workers do not have access to contracts of employment and employment benefits. They are thus often refused access to other types of protection and the social assistance offered by the government. In the Southern African context, non-standard workers seldom have any type of social protection, either from their employers or the state. For instance, these workers are excluded from pension schemes by their employers, and from unemployment benefits from the state. As far as social security is concerned, this group of workers is excluded, discriminated against and rejected by the state. This clearly goes against the ILO's decent work agenda, to which most Southern African states are signatories.

The ILO's goal of promoting social dialogue advocates that the participation of strong and independent employees' and employers' organisations is crucial to increasing productivity, avoiding disputes at work, and building united societies. However, the difficulty with social dialogue is the scarcity of powerful voices and the independent representation of employees in a process of dialogue with employers, the state or other participants. In the context of the prevalent nature of non-standard employment relationships in the Southern African region, this goal is very challenging, because these employees do not have a powerful voice either within or outside their workplaces, because often they are unable to join trade unions.

Accordingly, their prospects of participating in social dialogue of whatever nature with their employers and other interested groups are very limited. When employees are exploited by their employers because the employees are desperate and do not have an alternative, employees' commitment and loyalty is diminished. This has a serious effect on productivity in both the workplace and the region, which is currently struggling to deal with poverty, unemployment and inequality.

3.7 Conclusion

The aim of this chapter was to demonstrate policy development at the ILO and to identify the international benchmarks and regional standards relevant to the regulation and protection of non-standard workers.

There can be no social justice and workplace democracy if workers' rights are not recognised. The ILO's mandate is organised around four interrelated and mutually

reinforcing strategic objectives to achieve the decent work agenda: creating jobs, guaranteeing rights at work, extending social protection, and promoting social dialogue. However, like any other organisation, the ILO has its shortcomings, which include the ineffectiveness of the international standards in a changing world of work with a proliferation of non-standard workers.

The ILO has found ways of dealing with these shortcomings. With regard to the challenges facing non-standard workers, the ILO has introduced standards that address non-standard forms of employment, standards that address specific categories of non-standard employment, and standards that are of particular concern to non-standard workers.

Since it is necessary to know how the ILO functions, this chapter examined the bodies that assist the ILO with doing its work. The ILO carries out its supervisory role through three main bodies. The ILO monitors the implementation of ILO Conventions ratified by member states, through the Committee of Experts on the Application of Conventions and Recommendations, and the International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations.

This chapter further analysed the ILO influence on the labour law systems of Southern Africa, as well as unemployment, income inequality, and regional labour standards in the context of non-standard employment, and labour market transitions in the Southern African region. The ILO offers technical support to more than 100 states in order to achieve these goals, with the support of development partners.

Decent work as espoused by the ILO may be the ideal but not the reality for most workers in non-standard employment relationships. In Southern African states, where the labour market is highly saturated, employers take advantage of the situation and make the ideal of decent work very difficult to realise. The rise of non-standard work has been aggravated by labour migration in the region. The chapter also investigated whether labour law in the region is capable of protecting large numbers of labour migrants.

The regulation and protection of the rights of non-standard workers, such as the right to organise and bargain collectively requires the state, trade unions and employers to act on the framework provided by the ILO, democratic Constitutions and the labour

legislation of the various Southern African states, with a view towards securing a better Southern Africa. Labour law scholars and experts in Southern Africa should pay more attention to international law and jurisprudence as well as foreign law, to advance the rights of non-standard workers to organise and to bargain collectively, and to develop both legislation and jurisprudence.

Once again, even when the ILO has put in place standards to address, regulate and protect non-standard workers in Southern African states, the struggle must not end, and scholarly efforts should be sustained to ensure we move towards the better regulation and protection of non-standard workers.

The next chapter examines the reasonableness of fixed-term contract renewals as a form of non-standard employment in South Africa, and the protection that may be extended to vulnerable non-standard workers by the South African Constitution of 1996 and other legislative frameworks. It is important to identify the labour policies in place and reflect on the level of regulation and protection established for workers, particularly workers in non-standard employment.

CHAPTER 4

IS THE INTERPRETATION QUESTION OVER? UNRAVELLING THE REASONABLENESS OF FIXED-TERM EMPLOYMENT CONTRACT RENEWALS AND THE PROTECTION AFFORDED TO NON-STANDARD WORKERS BY THE SOUTH AFRICAN CONSTITUTION

4.1 Introduction

Chapter 4 explores fixed-term employment relationships as an example of a non-standard category of work in Southern Africa. This chapter analyses the lingering question of the failure to renew a fixed-term contract of employment in South Africa when there is a reasonable expectation of renewal, and the remedies available for the failure to renew. Like the the previous chapter which set the foundation of international legal principles which signatory states are to follow as guidelines, this chapter also explores the South African Constitution, with reference to the relevant provisions that may be used to protect non-standard workers. In this regard the following sections of the Constitution will be considered: section 9 – the right to equality, section 23 – the right to fair labour practices, and section 39 – the interpretation of the Bill of Rights.

It is submitted that regulating non-standard work and protecting vulnerable workers cannot be left entirely for the ILO and regional standards to resolve, as illustrated in the previous chapter. Alternative ways of regulating and addressing the concerns of these vulnerable workers must be found. The South African Constitution, the doctrine of legitimate expectation and other legislative instruments become relevant to the subject matter of the study.

The employment of workers using fixed-term contracts has been one of the dominant means of informalising work and is characterised by uncertainty. The interpretation difficulties are apparent from case law addressing the rights of fixed-term workers before the amendment of the LRA in 2014. South Africa under the 1995 LRA had no provisions regulating the position of workers who fell prey to repeated renewals of fixed-term contracts, where there was an objectively reasonable expectation that the contract of limited duration should be converted into one of permanent duration.⁴⁴⁵

⁴⁴⁵ Labour Relations Act 66 of 1995.

4.2 Fixed-term employment relationships

A fixed-term contract of employment, entered into between an employer and worker, is linked to a determinable period or to the completion of a particular job that will bring the contract to an end.⁴⁴⁶ Ideally both parties must initially have agreed that the duration of the contract will be limited. Fixed-term contracts exist to serve the need for temporary appointments.

In terms of the common law the termination of a fixed-term contract of employment is generally not unfair if the reason for which the worker was employed no longer exists.⁴⁴⁷ Where the parties have declared that the contract will terminate on the occurrence of a particular event or the completion of a particular task, the onus is on the employer to prove that the event has occurred or that the task has in fact been completed.⁴⁴⁸ This definition of a fixed-term contract of employment was expanded by the Labour Relations Amendment Act in order to improve the protection offered to non-standard workers. In terms of section 198B(1) of the LRA, a fixed-term contract of employment is defined as a contract that terminates on:

- (a) the occurrence of a specified event;
- (b) the completion of a specified task or project; or
- (c) a fixed date other than the employee's normal or agreed retirement age, subject to sub-section (3).

However, policy makers have ensured that this section does not apply to workers who are employed in terms of a statute, a sectoral determination or a collective agreement⁴⁴⁹ that permits the conclusion of a fixed-term contract. To accommodate new and small businesses, the section does not apply to an employer that employs fewer than 10 employees or an employer that employs between 10 and 50 employees and who has been in business for less than 2 years. Nevertheless, it will apply if the employer conducts more than one business or the business was formed by the division or the cessation of an existing enterprise.

⁴⁴⁶ Grogan *Workplace Law* 41.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ *Bottger v Ben Nomoyi Film & Co Video CC* (1997) 2 LLD 102 (CCMA).

⁴⁴⁹ Section 198B(2) of the LRA. The threshold amount currently stands at R205 433,30.

Workers hired under fixed-term contracts in South Africa form a distinct group of non-standard workers. These workers are separate from conventional South African employees, who enter into a contract where the parties do not specify a date of termination, and where the contract endures until it is terminated by agreement, by the giving of the contractually stipulated or reasonable notice of termination.⁴⁵⁰ Other grounds for termination are if either party elects to terminate because of a fundamental breach by the other, or on retirement at the agreed age, or on one of the other grounds accepted in law.⁴⁵¹

Further, it is common knowledge in labour law that the relationship between an employer and employee is one of inherent inequality in terms of bargaining, with the employee usually in the weaker position.⁴⁵² Accordingly, the legal protection of workers is paramount in the agenda of labour law. Fixed-term workers, like all non-standard workers, are especially weak bargaining parties in the employment relationship. The treatment of fixed-term workers is not the same as that of their counterparts who are indefinitely employed. Non-standard employment relationships are usually characterised by poor wages, job insecurity, and the denial of status and withholding of benefits. Moreover, fixed-term workers, particularly the unskilled, are usually exposed to exploitation.⁴⁵³ Some of these concerns were addressed by the Amendment Act.

In addition, fixed-term workers are usually not included in collective bargaining agreements and are not protected by trade unions. Thus, fixed-term employees turn to statutory protection to ensure that the fundamental employment conditions and rights are observed. While statutory protection is the same for fixed-term workers and indefinitely employed employees, the situation of fixed-term workers renders the implementation of their rights onerous.⁴⁵⁴

Section 186(1)(b) of the LRA refers to a situation where an employer fails to renew a fixed-term contract of employment and the employee had a reasonable expectation that it would be renewed on the same or similar terms, while the employer is only

⁴⁵⁰ *Malandoh v SA Broadcasting Corporation* (1997) 18 ILJ 544 (LC).

⁴⁵¹ *Ibid.*

⁴⁵² Kahn-Freund *Labour and the Law* 8.

⁴⁵³ Department of Labour *Green Paper: Policy Proposal for a New Employment Statute* (GG 23 February 1996).

⁴⁵⁴ *Ibid.*

prepared to offer the employee a renewal on less favourable terms, or no contract at all. The decision to end a fixed-term contract amounts to a dismissal. In *Biggs v Rand Water*,⁴⁵⁵ the Labour Court held that the goal of section 186(1)(b) of the LRA is to prevent unfair labour practices by employers who keep an employee on a temporary basis, without employment security and benefits, such as pension and medical aid. These employees work until such time that the employer dismisses them without complying with the obligations imposed by the LRA in respect of permanent employees. It is this type of dismissal that the legislature seeks to target: it intends to prevent unscrupulous employers from circumventing the LRA by keeping all their employees permanently on fixed-term contracts and terminating the contracts at will without following fair procedure and without reason.

Moreover, Vettori⁴⁵⁶ is of the view that:

a fixed-term contract is usually synonymous with the employment of an employee to complete a certain task or to act as a stand-in for another employee in his or her absence. Once that task has been completed or the employee is back, the employer will have no use for the employee who was employed in order to complete that task or to act as a stand-in.

Vettori also argues that ‘the employee on a fixed-term contract normally has very little prospect of promotion and is normally not given the same benefits, including medical aid or pensions, that other employees in that workplace are entitled to.’⁴⁵⁷ Most significantly, such a worker has very little security because a fixed-term contract automatically expires when the contract period ends, in the absence of a tacit term or legitimate expectation to the contrary.⁴⁵⁸

It is therefore evident that fixed-term contracts are often used by the employer to exploit and to acquire benefits from the worker without any intention of granting such a worker job security.⁴⁵⁹ Nevertheless, with section 186 (1)(b), the legislature is trying to compel the employer to renew a fixed-term contract on the same or similar terms in

⁴⁵⁵ *Biggs v Rand Water* (2003) 24 ILJ 1957 (LC).

⁴⁵⁶ Vettori 2008 *De Jure* 371.

⁴⁵⁷ Vettori 2008 *De Jure* 372.

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

circumstances where the employee has a reasonable expectation that the contract should be so renewed.

However, as far as workers in fixed-term employment (direct employment) are concerned, probably the most important amendment to an existing provision of the LRA concerned the grounds on which an employee can pursue a claim for dismissal. Generally, a worker whose contract ends is not regarded as dismissed. The only basis on which he or she could contend otherwise was if he or she 'reasonably expected' the contract to be renewed on the same or similar terms.

However, the amendment means that there is a new ground in terms of which a worker may challenge the termination of a contract: where the worker reasonably expects the employer to retain him or her 'on an indefinite basis on the same or similar terms as the fixed-term contract'.⁴⁶⁰ Theron is of the view that, in theory, any worker on a fixed-term contract can bring a claim of unfair dismissal to the CCMA. Arguably, it is the highly-paid employees that are likely to benefit most from this provision, because their contracts are generally of longer duration, and it will be easier to prove such an expectation in the circumstances. The likely outcome will thus be the increased use of the CCMA by highly-paid employees.

It is, on the other hand, debatable whether less well-paid employees will benefit much from this provision. The worker provided by a labour broker is employed on a fixed-term contract, which is typically defined in terms of a specified task. Although in theory he or she could bring such a claim, in this case the expectation of indefinite employment would be with the client. It is difficult to see how a claim against a client could succeed.⁴⁶¹ The worker provided by a service provider would face a similar difficulty. With regard to temporary workers who are directly employed and who earn below the threshold, the new section on fixed-term contracts introduces such a restrictive approach to the entering into and renewal of fixed-term contracts that it seems implausible that an expectation of indefinite employment could arise.⁴⁶²

Accordingly, an employer who offers to employ a worker on a fixed-term contract (or to renew a fixed-term contract) must do so in writing, stating why the employer

⁴⁶⁰ Section 186(b)(ii) of the LRA.

⁴⁶¹ Theron (2014) 1 *Monograph* 16.

⁴⁶² *Ibid.*

considers it justifiable to do so. In the event of a dispute being referred to the CCMA, the employer must prove that the reason was justifiable.⁴⁶³ Unless an employer has a justifiable reason for using fixed-term contracts, he or she may not employ workers on fixed-term contracts for longer than three months.⁴⁶⁴ If the CCMA should find that the reason cannot be justified, then the worker concerned will be deemed to be indefinitely employed.⁴⁶⁵ This will undoubtedly be a significant deterrent to employers who directly employ temporary workers.

4.3 What is reasonable expectation?

The concept of reasonable expectation, also known as legitimate expectation,⁴⁶⁶ has its beginnings in administrative law and natural justice. The doctrine of legitimate expectation is a relatively novel concept that has been crafted by the courts for the review of administrative action in England⁴⁶⁷ and has been adopted in South African law.⁴⁶⁸ The concept gained standing after it was introduced by Lord Denning in *Schmidt v Secretary of Home Affairs*,⁴⁶⁹ where he stated *obiter* that:

The speeches in *Ridge v Baldwin*⁴⁷⁰ show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say.

In *Breen v Amalgamated Engineering Union*,⁴⁷¹ his Lordship expanded upon the notion, stating that:

Seeing he had been elected to this office by a democratic process, he had, I think, a legitimate expectation that he would be approved by the district committee, unless there were good reasons against him. If they had something against him, they ought to tell him and to give him the chance of answering it before turning him down.

⁴⁶³ Section 198B(6) and (7) of the LRA.

⁴⁶⁴ Section 198B(3) of the LRA.

⁴⁶⁵ Section 198B(5) of the LRA.

⁴⁶⁶ In *Council of Civil Service Unions* [1984] 3 All ER 935 at 954G, Lord Roskill indicated that the phrases 'reasonable expectation' and 'legitimate expectation' have the same meaning.

⁴⁶⁷ *Schmidt & another v Secretary of State for Home Affairs* [1969] 1 All ER 904 (CA) 909C and 909F.

⁴⁶⁸ *Administrator Transvaal & others v Traub & others* 1989 (4) SA 731 (A) 756G.

⁴⁶⁹ *Schmidt v Secretary of Home Affairs* [1969] 1 All ER 904 (CA) 909C and 909F.

⁴⁷⁰ *Ridge v Baldwin* [1963] UKHL 2 (1964) AC 40.

⁴⁷¹ *Breen v Amalgamated Engineering Union* (1971) 2 QB 175 at 191.

The doctrine of legitimate expectation is similar to the German public law concept of *Vertrauensschutz*, which means ‘protection of legitimate confidence’.⁴⁷² Legitimate expectation is therefore significant in that it provides that an interest less than a legal right may warrant the protection of the rules of natural justice. Where a legitimate expectation can be shown, a decision maker may not act to defeat that benefit without the requirements of procedural fairness being met.⁴⁷³

The question whether workers on fixed-term contracts can claim to have been dismissed if they reasonably expected permanent employment has long been a controversial question, with judges holding different views in a range of cases.

This chapter explores the position of the doctrine of legitimate expectation in South Africa. Legitimate expectation is not defined in the LRA, or in any other legislation. However, in a general sense, legitimate means reasonable.⁴⁷⁴ Furthermore, it has been held that a ‘reasonable expectation’ should be equated with a ‘legitimate expectation’.⁴⁷⁵ The doctrine of legitimate expectation addresses the achievement of fairness.⁴⁷⁶ It is noteworthy that reasonable expectation has been recognised as ‘a principle of equity falling short of a right’.⁴⁷⁷ In *Foster v Stewart Scott Inc*⁴⁷⁸ Froneman J described ‘reasonable expectation’ as the best and most flexible measure that could be formulated to service the unfair labour practice jurisdiction because of the array of possible factual circumstances that may exist.

In terms of the doctrine the rules of natural justice are extended to cases where the affected party has no vested right, but does have a potential right or expectation.⁴⁷⁹ The first South African case in which the doctrine of legitimate expectation was raised was *Evette v Minister of Interior*.⁴⁸⁰ The court found that a person who has acquired a

⁴⁷² Section 48(2) of the German Administrative Procedure Act 1976 states that: ‘An unlawful administrative decision granting a pecuniary benefit may not be revoked in so far as the beneficiary has relied upon the decision and his expectation, weighed against the public interest in revoking the decision, merits protection.’ See also Singh *German Administrative Law in Common Law Perspective* 46.

⁴⁷³ *Haoucher v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 648 per Dawson J at 659.

⁴⁷⁴ *Attorney General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629; 2 All ER 346 (PC).

⁴⁷⁵ *Council of Civil Service Unions & others v Minister of the Civil Service* [1984] 3 All ER 935 at 944 A–E.

⁴⁷⁶ *Gemi v Minister of Justice, Transkei* 1993 (2) SA 276 (Tk) 288–290.

⁴⁷⁷ *Dierks v University of South Africa* (1999) 20 ILJ 1227 at 12471; Olivier (1996) 17 ILJ 1001 at 1023. See also *Administrator of the Transvaal & others v Traub & others* (1989) 10 ILJ 823 (A) 840A–J.

⁴⁷⁸ *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC).

⁴⁷⁹ *Ibid.*

⁴⁸⁰ *Evette v Minister of Interior* 1981 (2) SA 453 (C).

temporary residence permit cannot expect to remain in the country for longer than the stipulated period. Nevertheless, if that person is granted entry and residence for a specific period, and is then instructed to leave before the expiry of that period, he or she has acquired a 'right' consisting of a legitimate expectation of being allowed to stay for the permitted time. This concept was fully recognised by the Appeal Court in *Administrator of the Transvaal v Traub*.⁴⁸¹ The legal question was whether the application of the rules of natural justice (or the *audi*-principle) is restricted to cases where the finding 'affects the liberty, property, or existing rights of the individual concerned, or whether the impact is wider than this.'⁴⁸² Corbett J held that:

the legitimate expectation doctrine is sometimes expressed in terms of some substantive benefit or advantage or privilege which the person concerned could reasonably expect to acquire or retain and which it would be unfair to deny such person without prior consultation or a prior hearing; and at other times in terms of a legitimate expectation to be accorded a hearing before some decision adverse to the interests of the person concerned is taken.⁴⁸³

Furthermore, it has been suggested that legitimate expectations may include expectations that go beyond enforceable legal rights, provided they have some reasonable basis.⁴⁸⁴ The doctrine of legitimate expectation is 'construed broadly to protect both substantive and procedural expectations.'⁴⁸⁵ For instance, in *Eskom v Marshall and Others*,⁴⁸⁶ Landmann J held that: 'I find support for the view that a legitimate expectation to a benefit or advantage is sufficient to constitute a residual unfair labour practice (if unfairly refused) in the unfair labour practice relating to promotion.'

Furthermore, with the birth of democracy, the South African Interim Constitution referred to 'legitimate expectation' in section 24, which states that: 'Every person shall have the right to ... (b) Procedurally fair administrative action.' (This may include cases where the rights of individual or legitimate expectations are affected or threatened.)

⁴⁸¹ *Administrator of the Transvaal & others v Traub & others* 1989 (4) SA 731 (A).

⁴⁸² *Administrator of the Transvaal & others v Traub & others* 1989 (4) SA 731 (A) 748.

⁴⁸³ *Ibid.*

⁴⁸⁴ Burns & Beukes *Administrative Law under the 1996 Constitution* 218.

⁴⁸⁵ *Ibid.*

⁴⁸⁶ *Eskom v Marshall & Others* (2002) 23 ILJ 2259.

The concept of legitimate expectation has its origin in administrative law. In *Meyer v Iscor Pension Fund*⁴⁸⁷ the Supreme Court of Appeal (SCA) held that:

As appears from what I have said earlier, Meyer's contention in this regard was not that the fund was contractually bound to fulfil Iscor's promise, but that he was entitled to rely on the doctrine of legitimate expectation recognised in Administrative law. At the end of his argument in this court, Meyer relied on the doctrine of legitimate expectation not only to reinforce his objection based on unfair discrimination, but as the mainstay of his whole case. He was however immediately confronted with the fundamental difficulty that, in Administrative law, the doctrine of legitimate expectation has traditionally been utilised as a vehicle to introduce the requirements of procedural fairness and not as a basis to compel a substantive result ...

This case demonstrates that legitimate expectation is an instrument of administrative law, and it relates to procedural fairness only. Therefore, it cannot provide much assistance in substantive matters. This shortcoming led to the enactment of section 186(1)(b) of the LRA which sought to clarify the legislation on fixed-term contracts where the employee has a reasonable expectation of renewal.⁴⁸⁸

In terms of section 186(1)(b) of the LRA, where an employee can prove that he or she 'reasonably expected' the employer to renew a fixed-term contract on the same or similar terms, but the employer fails to renew the contract, such failure to renew constitutes a dismissal. In *Biggs v Rand Water*,⁴⁸⁹ Revelas J held that:

The purpose of section 186(1)(b) is to prevent the unfair practice of keeping an employee in a position on a temporary basis without employment security so that when the employer wishes to dismiss the employee the obligations imposed on the employer in terms of the LRA need not be adhered to.

4.3.1 Failure to renew a fixed-term contract when there is a reasonable expectation

Section 186(1)(b) of the LRA clearly tries to address the circumstances where an employer fails to renew a fixed-term employment contract when there is a reasonable

⁴⁸⁷ *Meyer v Iscor Pension Fund* [2003] 5 BLLR 439 (SCA).

⁴⁸⁸ *Ibid.*

⁴⁸⁹ *Biggs v Rand Water* [2003] 24 ILJ 1957 (LC).

expectation that it would be renewed. This means that an employee reasonably expected the employer to:

- (i) renew a fixed-term employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it; or
- (ii) retain the employee in employment on an indefinite basis but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.⁴⁹⁰

The definition makes it clear that not every termination of a fixed-term contract constitutes a dismissal. The employee must be able to establish that there was a reasonable expectation of renewal of the contract or of retention on an indefinite basis, and the employer refused to renew the contract or retain the employee on an indefinite basis, or there was an offer of renewal or retention on an indefinite basis but on less favourable terms.

This provision was incorporated into the LRA to prevent employers from circumventing unfair dismissal laws by entering into a series of fixed-term contracts, and then relying on the termination of one of them as an automatic termination of the contract consequent on the effluxion of time, rather than termination at the initiative of the employer (in other words, statutory dismissal). Different jurisdictions have adopted different methods to protect work security in these circumstances.⁴⁹¹ Some permitted the contract to be 'rolled over' a limited number of times before unfair dismissal law applies. In South Africa, the test of reasonable expectation of renewal appears to have its roots in the jurisprudence of the Industrial Court which, in terms of the 1956 LRA, extended protection to workers who had a 'legitimate expectation' of the renewal of a fixed-term contract.

Nevertheless, there is no single factor that defines what is reasonable in every case. Although the wording clearly refers to an expectation on the part of a worker who is party to the contract, the test applied to determine the existence of a reasonable

⁴⁹⁰ Previously, this provision stipulated that a dismissal meant that an employee had reasonably expected the renewal of a fixed-term contract on the same or similar terms, but that the employer had offered to renew the contract on less favourable terms or did not renew it. See Olivier (1996) 17 *ILJ* 1001.

⁴⁹¹ For further discussion, see chapter 5.

expectation is an objective one and requires an examination of all relevant factors. The wording of the contract is obviously of paramount importance, with the qualification that standard form disavowals of expectations of renewal obviously lose credibility with each renewal of the contract in which they are contained. Other factors external to the terms of the contract can also be taken into account in determining the existence or otherwise of any reasonable expectation of renewal.⁴⁹² In determining whether such a reasonable expectation exists or not, the courts and the CCMA have applied the principles of fairness or reasonableness. Vettori⁴⁹³ states that:

factors that were considered in deciding whether such a reasonable expectation is present include the fact that the work is necessary, that the money is available, that the fixed-term employees had performed their duties in terms of the fixed-term contract well, the renewal of the fixed-term contracts in the past and representations made by the employer or its agents.

Vettori also notes that ‘this list is not a *numerus clausus* and ultimately the existence or otherwise of a reasonable expectation requires a value judgment in the light of the surrounding circumstances.’⁴⁹⁴ Vettori argues that this value judgment is a reasonable test, and requires the judge or arbiter to decide whether a reasonable person in the circumstances of the worker would harbour a reasonable expectation of renewal, and that the enquiry proclaimed in section 186(1)(b) of the LRA is an objective one.

In *King Sabata Dalindyebo Municipality v CCMA & others*,⁴⁹⁵ the Labour Court upheld the CCMA’s decision that the renewal of the fixed-term contracts had created reasonable expectations that the workers’ contracts would be renewed, since the money was available and the work was necessary.

Where there is a reasonable expectation of renewal by an employer and the employer fails to renew, this constitutes a dismissal. The onus of proving a reasonable expectation rests on the employee who alleges this, as stated in *Ferrant v Key Delta*.⁴⁹⁶

⁴⁹² In *Joseph v The University of Limpopo & others* (2011)32 ILJ 2085 (LAC) the court held that s 19(2) of the Immigration Act 13 of 2002 did not prevent the employee from having a legitimate expectation.

⁴⁹³ See Vettori 2008 *De Jure* 373.

⁴⁹⁴ *Ibid.*

⁴⁹⁵ *King Sabata Dalindyebo Municipality v CCMA & others* [2005] 26 ILJ 474 (LC).

⁴⁹⁶ *Ferrant v Key Delta* [1993] 14 ILJ 464 (IC).

A further question is whether the test to determine if an employee had a reasonable expectation is objective or subjective. In *Fedlife Assurance Ltd v Wolfaardt*⁴⁹⁷ the court favoured an objective test. The court must find that the employer created an impression that the contract of employment would be renewed. The terms of the contract were held not to be decisive: the court stated that a reasonable expectation of renewal could exist even where a written contract expressly stipulates that the employee acknowledges that there is no expectation of renewal.⁴⁹⁸ The Labour Appeal Court, however, held that because the terms of the contract are clear, the onus on the employee will be heavier to provide objective evidence that gives rise to the alleged expectation.⁴⁹⁹ On the facts, none of the employees could do so.

In addition, where there is an express term in a fixed-term contract of employment to the effect that the worker entertains no expectation of renewal, this does not guarantee that no legitimate expectation in terms of section 186(1)(b) can be found to exist.⁵⁰⁰ In *Yebe v University of KwaZulu-Natal*,⁵⁰¹ the fixed-term contract of the worker was renewed 20 times over a period of approximately four and a half years, using 28 fixed-term employment contracts, while the permanent post that he could have filled remained vacant for five years. The worker rendered the same services as two permanent employees on the same campus would have done during the period of time. During this period the worker successfully upgraded his skills by doing various courses at the University of KwaZulu-Natal. The court held that this was a clear example of the series of renewals creating a reasonable expectation that the employment relationship would be renewed. Consequently, the court found that the employer's failure to renew the employment relationship was an unfair dismissal.

Furthermore, Vettori is also of the opinion that the words 'on the same or similar terms' were given a literal interpretation in *Dierks v University of South Africa*,⁵⁰² to the effect that a reasonable expectation in terms of section 186(1)(b) of the LRA can never

⁴⁹⁷ *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA).

⁴⁹⁸ *NUMSA v Buthelezi & others v LTR Appointment CC* (2005) 9 BALR 919 (MEIBC); *Brown v Reid Educational Trust* (2006) BALR 605 (CCMA).

⁴⁹⁹ *SA Rugby Players' Associations (SARPAR) & others v SA Rugby (Pty) Ltd & others; SA Rugby (PTY) Ltd v SARPU & another* (2008) 9 BLLR 845 (LAC) para 46.

⁵⁰⁰ *NUMSA v Buthelezi & others v LTR Appointment CC* (2005) 9 BALR 919 (MEIBC); *Brown v Reid Educational Trust* (2006) BALR 605 (CCMA); *Yebe v University of KwaZulu-Natal* (2007) 28 ILJ 490 (CCMA).

⁵⁰¹ *Yebe v University of KwaZulu-Natal* (2007) 28 ILJ 490 (CCMA).

⁵⁰² *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC).

include an 'expectation of permanent employment'.⁵⁰³ The court held that an entitlement to permanent employment cannot be based simply on the reasonable expectation in terms of section 186(1)(b); an applicant cannot rely on an interpretation by implication or 'common sense'. This would need a specific statutory provision to that effect.⁵⁰⁴

However, the relevant principles were summarised by an arbitrator in a dispute involving members of the South African Rugby Squad. In *SA Rugby (Pty) Ltd & others v CCMA*,⁵⁰⁵ three members of the squad claimed unfair dismissal after being told that their fixed-term contracts would not be renewed. The arbitrator confirmed that the existence of any reasonable expectation had to be objectively determined. In this case, the coach engaged the players in discussions regarding their future, and the players argued that they were entitled to rely on the expectation that he had created. South African Rugby argued that the contractual terms were definitive – in this case, it was specifically stated that the contract was for a fixed term and that there should be no expectation of renewal.

The Labour Court held in *SA Rugby (Pty) Ltd & others v CCMA*⁵⁰⁶ that for an employee to establish a reasonable expectation of renewal of a contract for the purposes of section 186(1)(b), the employee is required to establish at least the following:

- a) a subjective expectation that the employer would renew the fixed-term contract on the same or similar terms;
- b) the expectation was reasonable; and
- c) the employer did not renew the contract or offered to renew it on less favourable terms.⁵⁰⁷

In *Dierks v University of South Africa*,⁵⁰⁸ it was held that the following objective factors are relevant to the reasonableness of the expectation:

- a) the terms of the contract;

⁵⁰³ Ibid.

⁵⁰⁴ Ibid.

⁵⁰⁵ *SA Rugby (Pty) Ltd & others v CCMA* (2006) 1 BLLR 27 (LC).

⁵⁰⁶ Ibid.

⁵⁰⁷ Section 186(1)(b) of the LRA.

⁵⁰⁸ *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC).

- b) any past practice of renewal;
- c) the nature of the employment and the reason for concluding the contract for a fixed term;
- d) any assurance that the contract would be renewed (in other words, any undertakings giving by the employer); and
- e) any failure to give reasonable notice of non-renewal of the contract.

There was a debate as to whether an expectation of renewal extends to an expectation of permanent employment. In other words, must an employee's expectation be based on the further renewal of a fixed-term contract or is it sufficient that there is an expectation of appointment on a permanent position with the same employer? Does the refusal of permanent employment constitute a dismissal? In *Dierks v University of South Africa*⁵⁰⁹ a university lecturer engaged in a series of fixed-term contracts argued that he had a reasonable expectation of appointment to a permanent post when a vacancy became available. The Labour Court held that an employee could not rely on section 186(1)(b) in these circumstances. Oosthuizen J held that 'reasonable expectation' as expressed in s 186(1)(b) is not defined by the Act but its meaning includes the following considerations:

It essentially is an equity criterion, ensuring relief to a party on the basis of fairness in circumstances where the strict principles of the law would not foresee a remedy. The Act clearly envisages the existence of a substantive expectation, in the sense that the expectation must relate to the renewal of the fixed-term contract. The expectation is essentially of a substantive nature, vesting in the person of the employee. It is not required that the expectation has to be shared by the employer.⁵¹⁰

However, counsel for the respondent contended that the courts had to apply an objective test as to whether the applicant's employment had indeed become permanent and whether the applicant could reasonably expect continued employment.⁵¹¹ The Labour Court reached a different conclusion in *McInnes v Technikon Natal*⁵¹² where a lecturer was found to have had a reasonable expectation of permanent employment. In this matter, the Labour Court held that the ruling in the

⁵⁰⁹ Ibid.

⁵¹⁰ Ibid.

⁵¹¹ Ibid.

⁵¹² *McInnes v Technikon Natal* [2000] 21 ILJ 1138 (LC).

Dierks case was clearly wrong,⁵¹³ and disagreed with the literal interpretation employed in the case. The court held that an expectation in terms of section 186(1)(b) can lead to an expectation of permanent employment. The court was of the view that section 186(1)(b) clearly sought to deal with the circumstances where an employer failed to renew a fixed-term employment contract when it was reasonably expected that it would be renewed. Further, the employer created this expectation which now gave the worker the protection afforded by this section.⁵¹⁴

In *Auf der Heyde v University of Cape Town*,⁵¹⁵ the meaning of a reasonable expectation was confirmed. In this case the court addressed the issue of a dismissal in terms of section 186(1)(b) based on the employer's refusal to renew the applicant's fixed-term contract or to appoint the applicant in an indefinite position for which the applicant had applied. The court incorrectly adopted the same approach as in *Dierks*, stating that the applicant had a reasonable expectation that his contract would be renewed (albeit not through a series of fixed-term contracts between the same employee and employer), and therefore held that the applicant had been dismissed.

This discussion has now ended following the 2014 amendment of section 186, in terms of which the refusal to retain an employee on an indefinite basis, or an offer to retain the employee on less favourable terms both constitute a dismissal. In *Seforo v Brinant Security Services*,⁵¹⁶ it was held that where the employee continued working after the expiration of the fixed-term contract, this would be assumed to constitute a tacit renewal of the contract of employment on a permanent basis.

Previously, in cases where an employee continued to offer services after the termination of a fixed-term contract of employment, the contract was sometimes deemed to have been tacitly renewed, and such renewal was generally accepted to be on the same terms, but for an indefinite period.⁵¹⁷ This is not an absolute principle,

⁵¹³ The Labour Appeal Court passed up an opportunity to decide the point in *University of Cape Town v Auf v der Heyde* (2001) BLLR 1216 (LAC), where the judgement on appeal had upheld the ruling in *Dierks*. In *Yebe v the University of KwaZulu-Natal* (Durban) (2007) 1 BALR 77 (CCMA) the arbitrator followed the approach adopted in the *Technikon Natal* decision.

⁵¹⁴ *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC).

⁵¹⁵ *Auf der Heyde v University of Cape Town* (2000) 21 ILJ 1758 (LC).

⁵¹⁶ *Seforo v Brinant Security Services* (2006) 27 ILJ 855 (CCMA).

⁵¹⁷ *National Education Health & Allied Workers Union Obo Tati and SA Local Government Association* (2008) 29 ILJ 1777 (CCMA).

however. In some instances the facts of the particular matter may indicate that no such tacit agreement existed.⁵¹⁸

Another interesting case about reasonable expectation was *University of Pretoria v CCMA & others*,⁵¹⁹ where the University of Pretoria renewed Geldenhuys' fixed-term contract on a series of six-month fixed-term contracts for three years. The university refused her request of a permanent position but instead offered her another fixed-term contract on better terms than the previous one. Geldenhuys rejected the offer, left the university, and lodged a claim in the CCMA that she had been unfairly dismissed since she had acquired a reasonable expectation of permanent employment. The arbitrating CCMA commissioner ruled that if Geldenhuys was able to prove an expectation of permanent employment, she could claim to have been unfairly dismissed. The university took the preliminary ruling on review and the Labour Court dismissed the application, and granted the university leave to appeal.

Furthermore, the university contended that section 186(1)(b) did not cater for employees who claimed an expectation of permanent employment, even if their expectation was reasonable. Geldenhuys argued that section 186(1)(b) should be widely construed to bring within its terms situations in which employees on fixed-term contracts are denied permanent employment. The Labour Appeal Court (LAC) was more concerned with the phrase in section 186(1)(b) which states that the employee must reasonably expect renewal of a contract 'on the same or similar terms', which indicated that the legislature contemplated the renewal only on a fixed-term basis.

The LAC also rejected Geldenhuys' contention that once an employee has established a reasonable expectation of the renewal of a fixed-term contract, the employer is forced to renew the contract indefinitely on the same or similar terms, unless there is a fair reason for not doing so. This would be equivalent to deciding that, once a contract has been renewed because there was a reasonable expectation of renewal, the employee acquires a right to permanent employment. The LAC held that the wording of section 186(1)(b) does not support that idea, and that the distinction

⁵¹⁸ *Owen & others v Department of Health, Kwazulu-Natal* (2009) 30 ILJ 2461 (LC) 2466: 'The approach ... i.e. that a tacit renewal of the contract on the same terms but for an employment relationship of indefinite duration, is commendable at the level of principles but each case is fact and context specific and the application of principle must account for this ... This is a factual inquiry to be determined on the evidence before the court.'

⁵¹⁹ *University of Pretoria v CCMA & others* (2012) 32 ILJ 183 (LAC).

between fixed-term and indefinite contracts has a clear economic rationale, which was recognised by the legislature. The LAC noted the view that the 1995 LRA does not regard an employer's refusal to permanently employ an employee on a fixed-term contract as a dismissal.

Cheadle's reflection is very appropriate here. He states that 'rather than intensifying regulation in favour of those who least need it, labour law should be setting its sights on the extension of protection to those who most need it.'⁵²⁰ The amended LRA has clarified to some extent whether workers on fixed-term contracts can claim to have been dismissed if they reasonably expected permanent employment.

Furthermore, with regard to the definition of 'dismissal', the LRA has been broadened to include a situation where a worker employed in terms of a fixed-term contract of employment reasonably expects to be retained on an indefinite or permanent contract of employment but the employer fails to offer such employment.⁵²¹ Before the 2014 amendments, the most that a worker could hope for was a renewal of the fixed-term contract on the same or similar terms. Where the employee is able to prove a reasonable expectation of renewal on a permanent or indefinite basis, the employee may now be appointed permanently. There must be an expectation that is reasonable before a right to renewal or indefinite employment will be created. The amendment therefore introduces an expectation of permanent or indefinite employment, something that was missing in the 1995 LRA. This will undoubtedly be a notable deterrent to those employers directly employing temporary workers too.

4.3.2 Remedies for failure to renew a fixed-term contract

When one deals with remedies, regard must be had to sections 193 and 194 of the LRA. In terms of section 193(1) of the LRA, if a judge or an arbitrator finds a dismissal to be unfair, that is, where there is a failure to renew a fixed-term contract on the same or similar terms where there is a reasonable expectation of renewal, the judge or an arbitrator may order the employer to (a) reinstate the employee; or (b) re-employ the employee; or (c) pay the employee compensation.

⁵²⁰ *Cheadle (2006) 27 ILJ 663–704.*

⁵²¹ Section 186 of the LRA.

In terms of section 194 of the LRA, the award for compensation cannot exceed 12 months' salary unless the dismissal is automatically unfair. In the event of an automatically unfair dismissal, the award cannot exceed an amount of 24 months' salary. Given the damaging effect on the employer of section 194 of the LRA, the employers need to be wary of automatically unfair dismissals.

4.3.3 Global Recommendation on the Employment Relationship

The ILO has adopted the Employment Relations Recommendation,⁵²² which seeks to provide member states with guidance on how to establish the existence of the employment relationship. The Recommendation deals particularly with what it terms 'disguised employment', or agreements that are cast in terms that, on the face of it, establish a relationship other than employment.

Recommendation 197 provides that member states should clearly define, in their national law and practice, which workers are to be covered and protected by labour laws.⁵²³ It encourages members to define the concept of an employment relationship rather than the contract of employment.⁵²⁴

Recommendation 197 also suggests that member states should consider the possibility of adopting specific indicators of the existence of an employment relationship and should ideally provide in their domestic legislation for a statutory presumption that an employment relationship exists when one or more of the following indicators are present: whether the work is carried out under the instruction and control of another party; the worker is integrated into the organisation of the enterprise; the work is to be done mainly for the benefit of the other party; the work is carried out personally by the worker; the work is performed within specified working hours; and the work requires the provision of materials, machinery and tools by the party who requests the work to be done.⁵²⁵ It will become apparent that South African labour legislation has to a large extent incorporated the provisions of Recommendation 197.

⁵²² Employment Relations Recommendation 198 of 2006.

⁵²³ Article 1 of Recommendation 198 of 2006.

⁵²⁴ Bosch & Christie (2007) 28 *ILJ* 804–808.

⁵²⁵ Article 9 of Recommendation 197 of 2006.

4.3.4 The South African Constitution and non-standard employment

The 1996 Constitution created a society where 'everyone' is equally protected by the law, and the Constitution was adopted to improve the quality of life of all citizens, among other objectives.⁵²⁶ The intention of the Constitution is to transform our society by healing the divisions of the past and to establish a society which is based on democratic values, social justice and fundamental rights for the future.⁵²⁷ As stated by Klare, the South African Constitution is a 'transformative constitution'.⁵²⁸ Klare described this 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. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law.

Labour developments in South Africa have been characterised by strikes, fights for wage increases, racism, discrimination, unionisation and representative issues and social security concerns for workers. In 1977, a commission was appointed under the chair of Nic Wiehann, to report on and make recommendations concerning the existing labour legislation. In 1979 the commission issued a report that led to amendments to the Industrial Conciliation Act of 1956. The most important of these was the extension of trade union rights to black employees, the enactment of a definition of unfair labour practice, and the establishment of the Industrial Court. In 1994, one of the first legislative initiatives approved by Cabinet after the election was the revision of the 1956 Act. Halton Cheadle was appointed chair of a task team to provide the blueprint for a new Act. This transition led to the inclusion of labour rights in the Constitution.

⁵²⁶ The Preamble to the Constitution of the Republic of South Africa, 1996 provides that 'We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to: ... Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by the law ... Improve the quality of life of all citizens ...'

⁵²⁷ Preamble to the Constitution.

⁵²⁸ Klare (1998) 14 *SAJHR* 146–188 at 150; see also Langa (2006) 17 *Stellenbosch Law Review* 728 and Van der Walt (2004) 19 *SA Public Law* 253–255.

This ultimately led to a solid base for any debate concerning the role that labour law needed to play in an increasingly changing world of work. This has taken into consideration the ILO's goal of ensuring decent work for every worker irrespective of his or her status. Nevertheless, whether labour law still has the ability to attain its goals in the midst of remarkable challenges, such as the growing levels of non-standard employment, is another discussion. Remarkably, the main aim of labour law echoes the South Africa's transformative constitutionalism agenda. According to Kahn-Freund, labour law is traditionally concerned with social power, and it is therefore destined to serve as 'a countervailing force' to address the skewed and ever-skewing power relations that exist between employers and employees.⁵²⁹ Thus, labour law functions as an intervening instrument in markets to attain justice that will otherwise not be attainable, were the labour markets to remain unregulated.⁵³⁰

The labour relations context in South Africa will not be complete without underscoring the watershed constitutional changes that gave effect to the recognition of labour rights, their protection and their implementation.

4.3.5 The constitutional right to a fair labour practice

While there is no definition of 'labour practice' in the LRA, it is required at least that the practice must emerge within the employment relationship. Accordingly, protection does not extend to independent contractors. A labour practice relates to unfair conduct – either an act or an omission. This can be explained as a single act or omission. The fact that there must be an act or an omission suggests further that the conduct must have actually happened (either as an act or an omission) and not be merely expected in the future.⁵³¹ Importantly, the labour practice must in some way refer to the specific types of conduct that the Act has designated as unfair labour practices in section 186(2) of the LRA.

Section 186(2) of the LRA defines an unfair labour practice as follows:

⁵²⁹ Kahn-Freund *Labour and the Law*.

⁵³⁰ Hyde 'What is labour law?' in Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law* 37–61; Kalula 'Beyond borrowing and bending: Labour market regulation and the future of labour law in Southern Africa' in Barnard, Deakin & Morris (eds) *The Future of Labour Law* 275–289; Hepple (1995) 24 *Industrial Law Journal* 303–322.

⁵³¹ Van Niekerk *et al Law@Work*.

(2) 'Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving–

(a) unfair labour conduct by the employer, relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

(b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

(c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

(d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

4.5 Limits and content of section 186(2) of the LRA

The definition in section 186(2) of the LRA requires the existence of a labour practice between an employer and an employee, and that the conduct (whether an act or an omission) is unfair. The particular unfair labour practices in paragraphs (a) to (d) of section 186(2) must all take place throughout the currency of employment.⁵³² Unlike in the EEA, the definition of 'employee' does not extend to applicants for employment.⁵³³

However, the Constitution of South Africa has a safety net which is broad enough to cover non-standard workers, as will be demonstrated by certain constitutional provisions. Section 23(1) of the Constitution of the Republic of South Africa, 1996 provides that 'everyone' has a right to fair labour practices. Although some non-standard workers enjoy protection in terms of labour legislation, many of these non-standard employees may still not qualify as employees in terms of the legislation, and therefore fall beyond the net of protection. These non-standard workers can conceivably turn to the constitutional right to fair labour practices. Also, since National Intelligence and the Military are excluded from the ambit of the LRA, these workers

⁵³² Previous employees are covered for the purpose of that paragraph, as indicated in s 186(2)(c) of the Act.

⁵³³ See s 9 of the EEA.

may also conceivably turn to section 23(1) of the Constitution for relief. In addition, section 23(1) may possibly also be used for relief where the alleged unfair labour practice does not fall within the scope of the definition of an unfair labour practice in the LRA.

To begin with, section 23 of the Constitution provides an inclusive framework for the protection of employees' labour rights. It guarantees every employee protection against unfair labour practices. It is important to examine the meaning of 'everyone' because this has given rise to discussion as to whether this has extended the scope of the right beyond the employment relationship. Cheadle has argued that the emphasis ought to be placed on the words 'labour practices' rather than 'everyone':

Although the right to fair labour practices in subsection (1) appears to be accorded to everyone, the boundaries of the right are circumscribed by the reference in sub-section (1) to 'labour practices'. The focus of enquiry into its ambit should not be on the use of 'everyone' but on the reference 'labour practices'. Labour practices are the practices that arise from the relationship between workers, employers and their respective organisations. Accordingly, the right to fair labour practices ought to be read as extending the class of persons beyond those classes envisaged by the section as a whole.⁵³⁴

The reference to 'everyone' extends to employers. In *NEHAWU v University of Cape Town & others*⁵³⁵ the Constitutional Court held that fairness must be applied to both employees and employers. Ngcobo J held:

Where the rights in the section are guaranteed to workers or employers or trade unions or employers' organisations, as the case may be, the Constitution says so explicitly. If the rights in section 23(1) were to be guaranteed to workers only the Constitution should have said so. The basic flaw in the applicant's submission is that it assumes that all employers are juristic persons. That is not so. In addition, section 23(1) must apply to all employees or none.

This section gives an employee an inalienable right to fair labour practices. Therefore, the employer has to guard against offending the employee's inalienable right. Section

⁵³⁴ Cheadle 'Labour relations' in Cheadle, Davis & Haysom *South African Constitutional Law: The Bill of Rights* 18-3.

⁵³⁵ *National Union of Health and Allied Workers v University of Cape Town & others* (2003) 24 ILJ 95 (CC).

23(1) is becoming very dominant in labour legislation.⁵³⁶ While the exact content of this right has not been accurately defined,⁵³⁷ it can be used broadly and applies to both standard workers and non-standard workers in order to protect their legitimate concerns.⁵³⁸

The changing world of work has resulted in an increasing number of 'non-standard workers'.⁵³⁹ The high levels of unemployment and poverty⁵⁴⁰ in South Africa have led ordinary South Africans to engage in all sorts of unprotected employment which fall outside the orthodox forms of employment. These workers need some form of protection.

The Department of Labour and the legislature are conscious of this fact.⁵⁴¹ This recognition led to the 2002 amendments to the LRA, which stated that a person will be presumed to be an employee if one of the conditions in section 200A is met.⁵⁴² This amendment is also included in the BCEA.⁵⁴³ The Minister of Labour may broaden the provisions of BCEA to cover persons who do not meet the requirements of the definition of employees in terms of the legislation.⁵⁴⁴ Nevertheless, the legislature's

⁵³⁶ Le Roux 2002 *Contemporary Labour Law* 91.

⁵³⁷ *National Union of Health and Allied Workers Union v University of Cape Town & others* (2003) ILJ 95 (CC).

⁵³⁸ In fact, this right can even be used to protect employer interests: see *National Union of Health and Allied Workers Union v University of Cape Town*.

⁵³⁹ Thompson 2003 ILJ (SA) 1793; Webster (2005) 26(1) *International Political Review* 55–71.

⁵⁴⁰ Statistics South Africa *Poverty Trends in South Africa: An Examination of Absolute Poverty between 2006 and 2015* reveals that the proportion of the population living in poverty declined from 66,6% (31,6 million persons) in 2006 to 53,2% (27,3 million) in 2011, but increased to 55,5% (30,4 million) in 2015. The number of persons living in extreme poverty (ie persons living below the 2015 Food Poverty Line of R441 per person per month) in South Africa increased by 2,8 million, from 11 million in 2011 to 13,8 million in 2015. However, this is lower than in 2009 when 16,7 million persons were living in extreme poverty.

⁵⁴¹ In the Department of Labour *Green Paper: Policy Proposals for a New Employment Statute* (GG 23 February 1996) the legislature expressed itself as follows: 'The current labour market has many forms of employment relationships that differ from full-time employment. These include part-time employees, temporary employees, employees supplied by employment agencies, casual employees, home workers and workers engaged under a range of contracting relationships. They are usually described as non-standard or atypical. Most of these employees are particularly vulnerable to exploitation because they are unskilled or work in sectors with little or no trade union organisation or little or no coverage by collective bargaining. A high proportion of these employees are women. Frequently, they have less favourable terms of employment than other employees performing the same work and have less security of employment. Often they do not receive 'social wage' benefits such as medical and pension or provident funds. These employees therefore depend upon statutory employment standards for basic working conditions. Most have, in theory, the protection of current legislation, but in practice the circumstances of their employment make the enforcement of rights extremely difficult.'

⁵⁴² Section 200A. This presumption will operate only where an employee earns less than approximately R205 433,30 per annum.

⁵⁴³ Section 83A of the LRA.

⁵⁴⁴ Section 83(1) of the LRA.

attempt to broaden the safety net of protection to non-standard workers has not been completely effective. The administrative power of the Minister of Labour to widen the safety net of protection provided for in terms of the BCEA has never been used, and this has been ascribed to a 'lack of capacity within the Department of Labour'.⁵⁴⁵ Furthermore, the courts' orthodox approach to defining an employee has also been described as 'unimaginative' with the result that there is a certain degree of lack of protection for a 'significant proportion of the workforce'.⁵⁴⁶

The criteria that are depended upon to arrive at the presumption that someone is an employee are premised on the 'traditional tests' applied by the courts. In light of this, the disapproval⁵⁴⁷ of the courts' approach to determining who is an employee is applicable to the 2002 amendments of the LRA.⁵⁴⁸ In a nutshell, therefore, some non-standard workers find themselves in circumstances that make it difficult to benefit from the protection afforded in terms of the LRA, the BCEA and other labour legislation in South Africa. Many studies have been conducted on the scope of non-standard employment in South Africa.⁵⁴⁹ These categories of non-standard work have been identified: fixed-term work, part-time work, temporary work, outsourcing, subcontracting, homework, and self-employment. After collecting and examining all the data available in South Africa, Theron⁵⁵⁰ concludes that:

The extent and effects of the processes of casualisation, externalisation and informalisation cannot be measured quantitatively at this stage, nor is it realistic to expect to be able to do so. Yet the quantitative indicators are consistent with what is described in qualitative studies and trends that are well established in both developed and developing countries. It does not seem that there is any basis to argue that South Africa is an exception to these trends.

Even though numerous non-standard workers benefit from the protection afforded in terms of labour legislation,⁵⁵¹ some of them may still not meet the requirements of the definition of employees in the legislation. As a result, they do not enjoy protection in

⁵⁴⁵ Benjamin 'Who needs labour law? Defining the scope of labour protection' in Conaghan, Fishl & Klare (eds) *Labour Law in an Era of Globalisation* 91.

⁵⁴⁶ Benjamin 'Who needs labour law? Defining the scope of labour protection' 91.

⁵⁴⁷ Brassey 1990 (11) *ILJ* 528.

⁵⁴⁸ Section 200A of the LRA.

⁵⁴⁹ Theron 2003 *ILJ* 1247, where a summary of all the available studies and surveys undertaken in South Africa can be found.

⁵⁵⁰ *Ibid.*

⁵⁵¹ Section 200A of the LRA and s 83A of the BCEA.

terms of these Acts. These non-standard workers can perhaps turn to section 23(1) of the Constitution for protection against unscrupulous employers. Non-standard workers who are specifically denied access to the legislation⁵⁵² may also possibly turn to section 23(1) of the Constitution for relief. South Africa's Constitution is remarkable, because it includes the right to fair labour practices as a basic right. Malawi has emulated the language and supported the rights found in the South African Constitution.⁵⁵³ Section 23 of the Constitution was crafted to safeguard the dignity of all employees and to advance the principles of social justice, fairness and respect for all,⁵⁵⁴ including non-standard workers. Section 23(1) of the Constitution provides that 'everyone has the right to fair labour practices'. The word 'everyone' follows the wording of section 7(1) of the Constitution, which stipulates that the Bill of Rights enshrines the rights of all people in the country. This argues in favour of wide application.⁵⁵⁵ There are no internal restrictions to section 23 of the Constitution, save that it applies to an employment relationship or a relationship seen as 'akin to an employment relationship'.⁵⁵⁶ Accordingly, the right to fair labour practices applies even in the absence of a contract of employment.⁵⁵⁷ Even if the work that an employee does is illegal, he or she has the right to fair labour practices.⁵⁵⁸ As a result, this fundamental right applies to fixed-term workers who form part of the vulnerable group of non-standard workers.

It is noteworthy that the phrase 'unfair labour practice' is not defined in the Constitution.⁵⁵⁹ In the words of Vettori, unfairness implies a failure to meet an objective standard.⁵⁶⁰ It may be considered to include arbitrary, capricious or inconsistent conduct, whether negligent or deliberate.⁵⁶¹ In *NEWU v CCMA*⁵⁶² the Labour Court

⁵⁵² Section 2 of the LRA provides that it is not applicable to members of the National Defence Force, the National Intelligence Agency and the South African Secret Service.

⁵⁵³ Cheadle (2006) 27 ILJ 664.

⁵⁵⁴ *NEHAWU v UCT* [2003] 2 BCLR 154 (CC) paras 33–40.

⁵⁵⁵ Le Roux (2009) 30 ILJ 49. See also *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 111 and 'Kylie' v *CCMA & others* (2010) 31 ILJ 1600 (LAC) paras 16 and 22.

⁵⁵⁶ Vettori *The Employment Contract and the Changed World of Work* 162; Cheadle (2006) 27 ILJ 664 and *SANDU v Minister of Defence* 1999 (20) ILJ 2265 (CC) paras 28–30.

⁵⁵⁷ *Discovery Health v CCMA* (2008) 29 ILJ 1480 (LC) 1489. See also *Rumbles v Kwa-Bat Marketing* (2003) 24 ILJ 1587 (LC) and 'Kylie' v *CCMA & others* (2010) 31 ILJ 1600 (LAC) para 22.

⁵⁵⁸ Le Roux (2009) 30 ILJ 49 at 58.

⁵⁵⁹ *NEHAWU v University of Cape Town & others* 2003 (3) SA 1 (CC) 19. See also *Komane v Fedsure Life* [1998] 2 BLLR 215 (CCMA) 219. The word 'fair' is defined in the *Concise Oxford Dictionary* as 'just, unbiased, equitable'.

⁵⁶⁰ Vettori *The Extension of Labour Law Protection to Atypical Employees in South Africa and the UK*.

⁵⁶¹ Du Toit *et al* (eds) *The Labour Relations Act of 1995: A Comprehensive Guide* 443.

⁵⁶² *NEWU v CCMA* (2003) 24 ILJ 2335 (LC).

reflected on the scope of 'fair labour practices' as viewed in section 23 of the Constitution and found that labour practices should be both lawful and fair. However, 'lawful' and 'fair' are also not defined concepts. In the court's view, the flexibility conferred by the term was intentional in order to guarantee equitable protection to both employers and employees.⁵⁶³

In *Nakin v MEC, Department of Education, Eastern Cape Province & another*⁵⁶⁴ held that the coherence of labour law jurisprudence is determined by the degree to which it expresses the constitutional right to fair labour practices. Therefore, social justice must remain a precondition for creating a resilient economy. The regulatory framework should provide legal certainty. It should also abolish inequitable practices that are contrary to the constitutional mandate. The interpretation and application of legislation that protects the right to fair labour practices, which encapsulates the right not to be unfairly dismissed, is a constitutional matter.⁵⁶⁵ It is the court's duty to safeguard employees who are particularly vulnerable to exploitation because they are inherently economically and socially weaker than their employers.⁵⁶⁶

Furthermore, in *NEHAWU v University of Cape Town*⁵⁶⁷ the Constitutional Court noted that the content of the term 'fair labour practice' depends upon the circumstances of a particular case, and essentially involves making a value judgment. The legislature intended the term to gather meaning through decisions of the Labour Court and the Labour Appeal Court. The Constitutional Court emphasised that section 23(1) of the Constitution was primarily aimed at securing continuation of the employment relationship on terms that are fair to both the employer and the employee.⁵⁶⁸ Herein rests the right of the employer to exercise business prerogative.⁵⁶⁹

⁵⁶³ *NEWU v CCMA & others* [2004] 2 BLLR 165 (LC). See also Brassey 'Labour relations' in Chaskalson *et al* (eds) *Constitutional Law of South Africa* 30–33.

⁵⁶⁴ *Nakin v MEC, Department of Education, Eastern Cape Province & another* [2008] All SA 559 (Ck) para 30.

⁵⁶⁵ Bhorat & Cheadle *Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions* 9.

⁵⁶⁶ 'Kylie' v *CCMA & others* paras 29, 41, 43 and 52.

⁵⁶⁷ *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC) 110.

⁵⁶⁸ *NEHAWU v University of Cape Town* (2003) 24 ILJ 95 (CC) para 40. See also 'Kylie' v *CCMA & others* (2010) 31 ILJ 1600 (LAC) para 21.

⁵⁶⁹ *Wood v Nestlé SA (Pty) Ltd* (1996) 17 ILJ 184 (IC) 185F–I, 189D–F, 190I–191B and 191D.

Employers enjoy the right to organise their work operations in a way which they find most suitable to achieve their operational objectives.⁵⁷⁰ Employers are permitted to decide what posts to create and who should be appointed or promoted.⁵⁷¹ Since the Bill of Rights is capable of horizontal application,⁵⁷² it necessitates a process of the weighing up of rights by the courts. A balance needs to be struck between protecting the personal interests of employees and employers' right to exercise business prerogative without judicial interference.⁵⁷³ Currently there is no legislative provision specifically subjecting an employer's hiring and promotion decisions to judicial scrutiny. This prerogative is restricted only by the prohibition against unfair discrimination and by the fundamental right to labour practices.⁵⁷⁴

Due to the fact that the right to fair labour practices in the Constitution does not apply only to employees, it is necessary to weigh up the rights of employers against the rights of employees. A balance must be struck between the rights of fixed-term workers and employers' rights to autonomy and business prerogative.⁵⁷⁵

Job security and income security ensure that workers and their dependants have more certainty and security. The protection of job security is, however, not absolute. Employers should be able to terminate the employment relationship under certain circumstances, while workers should be provided with protection against arbitrary dismissals.⁵⁷⁶ Presiding officers seem to accept that employers should have the freedom to establish workplace rules. An enquiry into the fairness of employer conduct rarely interferes with employers' prerogative.⁵⁷⁷ Labour forums will not interfere in

⁵⁷⁰ Strydom (1998) 11 SA Merc LJ 40 at 42; *George v Liberty Life Association of Africa* (1996) 17 ILJ 571 (IC) 504.

⁵⁷¹ *Grogan Employment Rights* 107.

⁵⁷² *NEWU v CCMA & others* [2004] 2 BLLR 165 (LC) 2339.

⁵⁷³ Attaining fairness in labour relations means balancing the respective interests of employers and employees. See Vettori (2011) 22(1) *Constructive Dismissal and Repudiation of Contract: What must be Proved?* Stellenbosch Law Review 173-174; *Avril Elizabeth Home for the Mentally Handicapped v CCMA* (2006) 27 ILJ 1644 (LC) 1646.

⁵⁷⁴ Sections 9(4) and 7(2), read with s 9(1) and (2) of the Constitution. See also s 195 of the LRA.

⁵⁷⁵ Benjamin & Gruen *The Regulatory Efficiency of the CCMA: A Statistical Analysis* 6, available at http://www.commerce.uct.ac.za/Research_Units/DPRU/Employment_Promotion_Program/PDFS/Report_CCMA_Benjamin_Gruen.pdf (Date of use: 16 June 2017); *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC) paras 40–41.

⁵⁷⁶ Yemin *The Protection of Security of Employment – An International Perspective in Collective Bargaining and Security of Employment in Africa: English Speaking Countries* 114–115.

⁵⁷⁷ *Goliath v Medscheme (Pty) Ltd* [1996] 5 BLLR 603 (IC) para 4.2. See also the dissenting judgment by Conradie in *JDG Trading (Pty) Ltd t/a Price 'n Pride v Brunsdon* [2000] 1 BLLR 1 (LAC) para 71 and Zondo JP's remarks in *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* [2001] 9 BLLR 1011 at 1024 and 1029A.

management's decisions unless it is proven that an employer acted unreasonably or unfairly.⁵⁷⁸ The intention was that the legislature could, in terms of the unfair labour practice provision, regulate employer conduct by super-imposing a duty of fairness. The mere existence of discretion does not in itself deprive the CCMA of jurisdiction to scrutinise employer conduct.⁵⁷⁹

What must be assessed in such a case is whether or not the court should exercise discretion in favour of the employee in the particular circumstances because of the way in which the employer had exercised its business prerogative.⁵⁸⁰ Presiding officers should not have an unfettered discretion to rule that employers' actions are unfair, since this would result in extensive intrusion into the business prerogative.⁵⁸¹

The courts will scrutinise the process by which employers reach their decisions. Failure to follow policies and procedure could result in the procedure being declared unfair.⁵⁸² The scope of the duty to act fairly is dependent on several factors, including the nature of the decision, the relationship between the persons involved, and established procedures and practices.⁵⁸³

The scope of the constitutional right to fair labour practices is wide enough to encapsulate the right of fixed-term workers to basic minimum conditions outside the auspices of the legislative protection against unfair labour practices. The right to fair labour practices as set out in section 23 of the Constitution also encompasses the right not to be unfairly dismissed.⁵⁸⁴

Fixed-term workers do enjoy the right to fair labour practices and the right not to be unfairly dismissed. However, there is a difference between fixed-term worker and indefinite employees insofar as the unfair dismissal mechanism is concerned. This difference makes it more difficult for fixed-term workers to enforce their right to fair

⁵⁷⁸ *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ (LAC) paras 23–24.

⁵⁷⁹ *Apollo Tyres South Africa (Pty) Ltd v CCMA & others* [2013] 5 BLLR 434 (LAC) para 45.

⁵⁸⁰ *Cheadle* (2006) 27 ILJ 664.

⁵⁸¹ *Grogan Employment Rights* 97.

⁵⁸² For instance, *Gordon v Department of Health: KwaZulu-Natal* (2008) 29 ILJ 2535 (SCA) paras 22–23 and 29.

⁵⁸³ *Lloyd & others v McMahon* [1987] 1 All ER 1118 (HL) 1170F–G.

⁵⁸⁴ In *NEHAWU v University of Cape Town & others* [2003] 2 BCLR 154 (CC) paras 41–43 it was held that the right to be protected against unfair dismissal is firmly entrenched in the right to fair labour practices.

labour practices. Accordingly, it is suggested that this is clearly a constitutional predicament that must be addressed.

Further, section 23(1) may arguably also be used for assistance where the alleged unfair labour practice does not fall within the definition of an unfair labour practice as provided for in terms of section 186(2) of the LRA. Section 23(1) will also have an effect on how individual contracts of employment are interpreted by the South African courts. Contracts or provisions of contracts that are against the spirit of the Constitution or that hinder or constrain fundamental rights guaranteed in the Constitution may be nullified.⁵⁸⁵ Taking into consideration the global trend towards the individualisation of employment contracts, section 23 can play a very significant role in redressing the imbalance of power between employers and employees.⁵⁸⁶ Section 23(1) is available to all employees, including fixed-term workers and permanent employees.⁵⁸⁷

Cheadle reflects on the impact of 'labour reforms in the 1990', specifically 'on those aspects of the reforms that were intended but improperly realised in practice.' Lawfulness and fairness are two crucial elements in labour justice, but they are difficult to put into practice.⁵⁸⁸

Section 9 of the Constitution, states that everyone is equal before the law and guarantees everyone the right to the equal protection and benefit of the law. Section 9(4) prevents direct and indirect discrimination. Direct discrimination takes place when an employer treats some people less favourably than others because of their race, sex, marital status, religion, and so on (when someone is blatantly discriminated against on the basis of an arbitrary ground). Indirect discrimination occurs when criteria, conditions or policies that appear to be neutral adversely and unjustifiably affect a disproportionate number of a certain group. This is often disguised and/or hard to detect.⁵⁸⁹

⁵⁸⁵ Basson 'Labour law and the Constitution' 1994 *THRHR* 498 at 502.

⁵⁸⁶ Kahn-Freund *Labour and the Law* 6.

⁵⁸⁷ Cheadle (2006) 27 *ILJ* 663–704.

⁵⁸⁸ *Ibid.*

⁵⁸⁹ For more details, see the definition of 'discrimination' in the EEA.

Section 6(1) of the EEA prohibits discrimination in an employment policy or practice on a non-exhaustive list of 19 grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, colour, age, belief, disability, religion, HIV status, conscience, culture, language, family responsibility, birth and political opinion. In the case of discrimination on a listed ground, the burden of proof that the discrimination is fair is placed on the person who contravened the right to equality. Discrimination is assumed to be unfair unless it is proved that the discrimination is fair.⁵⁹⁰ Section 9 is subject to the general limitation clause in section 36 of the Constitution. This means that once the discrimination is determined to be unfair, it will be unconstitutional as long as it cannot be justified in terms of section 36.

In some parts of the economy non-standard workers are mainly female, black and unskilled,⁵⁹¹ and by denying them access to labour law protection, a certain category of people is adversely affected. Non-standard workers who are denied labour law protection can turn to the Constitution for protection.

The Constitution demands the application of international law when interpreting South African legislation and in particular the Bill of Rights. Section 232 of the Constitution states that, 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.' Section 233 regulates the application of international law, stating that:

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

Ultimately, the Bill of Rights must be interpreted in accordance with the particular injunction contained in section 39(1) of the Constitution, which provides:

- (1) When interpreting the Bill of Rights, a court, tribunal or forum:
 - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
 - (b) must consider international law;
 - (c) must consider foreign law.

⁵⁹⁰ Section 9(5) of the Constitution.

⁵⁹¹ See, for instance, homeworkers in the retail sector.

Section 39 places an obvious premium on the value of international law in relation to the interpretation of the Bill of Rights. While a court may have regard to comparable foreign case law, it must have regard to public international law.

One of the issues raised by section 39 is the nature of international law. Are the courts required to have regard only to those international instruments to which South Africa has specifically assented, or is the term 'international law' to be interpreted more broadly?⁵⁹² The Constitutional Court has affirmed that section 39(1) requires that both instruments that are binding on South Africa and those to which South Africa is not a party should be used as tools of interpretation. In *S v Makwanyane*⁵⁹³ the court stated that:

International agreements and customary international law provide a framework within which ... [the Bill of Rights] can be evaluated and understood, and for that purpose decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, and the European Court of Human Rights, and appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions.

Further, section 39(2) of the Constitution reflects on the courts' obligation to develop common-law principles and promote the spirit and objectives of the Bill of Rights in the interpretation of legislation. In addition, the broad terms used in section 23(1) of the Constitution in describing not only the rights accorded, but also the beneficiaries of the right to fair labour practices (namely 'everyone' and 'workers') have prompted the suggestion that an wide interpretation of the definition of these words is possible. Furthermore, if such an extensive interpretation were to be accepted, it would lay the foundation for the possibility of the Constitutional Court finding the exclusion of some employees from labour legislation to be unconstitutional.⁵⁹⁴ With regard to the interpretation of the Bill of Rights, section 39(1)(a) provides that when interpreting the Bill of Rights, a court, tribunal or forum 'must promote the values that underlie an open

⁵⁹² For a discussion of the statutory interpretation with reference to human rights, see Dugard *International Law: A South Africa Perspective* 60–64.

⁵⁹³ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁵⁹⁴ Conaghan, Fischl & Klare (eds) *Labour Law in an Era of Globalisation: Transformative Practices and Possibilities* 79–80.

and democratic society based on human dignity, equality and freedom.⁵⁹⁵ Section 39 of the Constitution is therefore very relevant to the protection of non-standard employees. Section 39(2) states further that ‘when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’

Given the large number of non-standard workers who are excluded from labour protection, a broad interpretation of the word ‘everyone’ in section 23(1) of the Constitution may be necessary to cover a broad range of non-standard workers. Furthermore, a wide interpretation of section 23(1) of the Constitution will also promote human dignity, equality, freedom and the spirit, purport and objects of the Bill of Rights, as required by section 39(1) and (2) of the Constitution.

In the first case⁵⁹⁶ in which a constitutional challenge was brought in terms of section 23 of the Constitution,⁵⁹⁷ the Constitutional Court referred to ILO standards. At issue was the constitutionality of a provision of the Defence Act⁵⁹⁸ that prohibited members of the permanent military force from forming and joining trade unions. It was argued by the Defence Force that members of the military enlist in the armed forces and that, in the absence of a contract of employment as ordinarily understood between them and the Defence Force, they were not ‘workers’ for the purpose of section 23 of the Constitution.

In its consideration of the meaning of ‘worker’ in section 23(2) of the Constitution, the Constitutional Court said this about the importance of ILO standards:

Section 39 of the Constitution provides that, when a court is interpreting Chapter 2 of the Constitution, it must consider international law. In my view, the Conventions and Recommendations of the International Labour Organisation (the ILO), one of the oldest existing international organisations, are important resources for considering the meaning and scope of ‘worker’ as used in section 23 of the Constitution.⁵⁹⁹

In this judgment the court specifically referred to Article 2 of Convention 87 and, in particular to its provision that workers and employers, without distinction, have the

⁵⁹⁵ Ibid.

⁵⁹⁶ *SA National Union v Minister of Defence & another* (1999) 20 ILJ 2265 (CC).

⁵⁹⁷ Section 23 of the Constitution establishes labour rights as fundamental rights.

⁵⁹⁸ Defence Act 44 of 1957.

⁵⁹⁹ *SA National Union v Minister of Defence & another* (1999) 20 ILJ 2265 (CC) 2278B–D.

right to establish and join organisations of their choosing without previous authorisation. The court also referred to Article 9 of the Convention, which extends these guarantees to the armed forces and the police, to the extent determined by national laws and regulations. On this basis, and having regard to the parallel provisions of Convention 98, the court concluded that the Convention included armed forces within its scope, and that the ILO had therefore specifically considered members of the armed forces to be workers for the purposes of the Convention. Although members of the armed forces did not have an employment relationship with the Defence Force in the strict sense, they nevertheless qualified as workers. The court struck down the statutory prohibition on union activity and membership in the Defence Force as unconstitutional. This demonstrates that non-standard workers can therefore use the broad constitutional protection provided by section 39 of the Constitution.

Cheadle notes that the concept of regulated flexibility may be put to good use in extending protection to those who most need it.⁶⁰⁰ In addition, equity in the workplace optimises equal access to employment opportunities for every worker. All employers must act (in accordance with section 5 of the EEA to ensure equal opportunities for every worker.⁶⁰¹

The fact that recent South African case law⁶⁰² places an emphasis on the employment relationship as opposed to the existence of a valid contract of employment provides some room for optimism about the extension of the concept of statutory employees. The scope of the broadly worded right to fair labour practices that is available to 'everyone' in the Constitution has the potential to be of great relevance not only in the development of rights for employers and employees, but also for the development of rights applicable to certain non-standard workers.

4.6 Conclusion

The preceding discussion gave a holistic perspective of the interpretation of section 186(1)(b) of the LRA, and particularly the different positions taken by the courts before the LRA was amended. It provided an opportunity to view developments in context

⁶⁰⁰ *Cheadle (2006) 27 ILJ 663.*

⁶⁰¹ *Gericke (2011) 14(1) PER/PEL 234.*

⁶⁰² *Rumbles v kwa-Bat Marketing (2003) 24 ILJ 1587 (LC); SABC v McKenzie (1999) 20 ILJ 585 (LAC).*

and to understand the underlying purpose of the drafters of the LRA with regard to section 186(1)(b) of the LRA.

It is submitted that South Africa has been a very unequal society from colonialism to apartheid. The legislators continue to take meaningful steps to undo the inequalities and prevent unscrupulous employers from keeping all their workers permanently on fixed-term contracts and terminating the contracts at will without following fair procedure and providing adequate reasons. Thus, the amendment of the LRA, which introduces a new ground in terms of which worker may challenge the termination of a contract of employment where the worker reasonably expects the employer to retain him or her 'on an indefinite basis on the same or similar terms as the fixed-term contract', has brought some certainty to the interpretation of section 186(1)(b) of the LRA.

The concept of legitimate expectation or reasonable expectation was explained in this chapter- its origins in England, the application of natural justice, and how it was adopted in South Africa's administrative law.

Furthermore, this chapter also acknowledges the international standards and the substantive notion of equality which has been built into the Constitution, and which prohibits inequality in the workplace. With the 2014 amendment to the LRA, South African workers, particularly non-standard workers, are now protected by legislation that is tantamount to the transformative vision which lies at the heart of the South African Bill of Rights, as well as the decent work agenda of the ILO. Non-standard workers may also turn to section 9 of the Constitution (the right to equality), section 23 of the Constitution (the right to fair labour practices) and section 39(2) of the Constitution, which states that 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

In addition, an investigation of non-standard workers in South Africa illustrates that most of them are those who suffered under the apartheid regime: women, black Africans, and workers with no skills.⁶⁰³ The denying of labour and social protection to these workers can be regarded as a type of discrimination. The Constitution grants

⁶⁰³ Fourie (2008) 11 *PER/PELJ* 4.

everyone the right to equality⁶⁰⁴ and the right to inherent dignity and respect,⁶⁰⁵ so it is crucial that further solutions be found to assist vulnerable non-standard workers.

As will be revealed in the next chapter of this study, the struggle to regulate non-standard work and achieve social justice and workplace democracy is closely related to the struggle for collective bargaining, which is central to the ILO, and has been accepted as a method for advancing and regulating the terms and conditions of employment and enhancing social justice and the role of trade unions in a globalised epoch.

⁶⁰⁴ Section 9 of the Constitution.

⁶⁰⁵ Section 10 of the Constitution.

CHAPTER 5

COLLECTIVE BARGAINING AND TRADE UNIONS IN A GLOBALISED EPOCH

5.1 Introduction

An examination of collective bargaining and trade unions in a globalised era is required for this study of the regulation of non-standard workers in Southern Africa because it is connected to the goals of the study. This chapter complements the preceding chapters from both a legal perspective and an historical viewpoint.

Accordingly, this chapter explores the challenges confronted by collective bargaining and trade unions in a globalised era and the factors that influence the growth of non-standard employment in Southern Africa. It defines globalisation and the rationale behind globalisation. Furthermore, this chapter investigates collective bargaining, trade unions and freedom of association as instruments that protect employees in general and non-standard workers in particular. The objectives of collective bargaining, bargaining levels, and bargaining essentials will also be examined.

In addition, this chapter interrogates the right to strike and non-standard workers, the importance of trade union membership, and trade union approaches to non-standard workers. The attempt to answer the lingering question of the failure to renew a fixed-term contract of employment in South Africa when there is a reasonable expectation of renewal, discussed in Chapter 4 of this study is very relevant to the role played by collective bargaining and trade unionism in protecting non-standard workers in a globalised context.

Globalisation and technological development pressures have intensified competition between enterprises and increased the need for business flexibility, resulting in changes to the global production system. These developments and new work operations have brought about the externalisation of enterprises, services and parts of production. Such economic and technological developments have created serious changes in the world of work, especially in the labour market, resulting in different categories of non-standard work arrangements and practices.

The increased use of non-standard workers has resulted in changes to labour market regulation, while powerful global rivalry has equally propelled numerous states toward

labour market deregulation. These circumstances have created additional and flexible non-standard types of work. These systemic changes in the organisation of work have, on the one hand, produced different work opportunities, with both workers and employers benefiting from different types of non-standard work arrangements.

On the other hand, the intensive use of non-standard work arrangements, which enables substantial flexibility, has created more doubt and vulnerability among the increasing number of workers who unwillingly engage in them. A crucial problem for many of these non-standard work arrangements is that they are not suitable for the conventional type of 'standard' job associated with full-time and indefinite employment, and legal regulation, industrial and employment relations have concentrated on this for a long time. The increased use of non-standard work arrangements has accordingly created challenges for the application of regulatory regimes and for the successful running of industrial relations systems in practice. Such structural and technological transformations, in turn, create challenges for the conventional procedures of representation and negotiation for both workers and employers.

Most states in the Southern African region have ratified the ILO Convention 87 on 'Freedom of Association and Protection of the Right to Organise' and Convention 98 on 'Right to Organise and Collective Bargaining'.⁶⁰⁶ Furthermore, the form and content of most labour laws in Southern African countries conform in large measure to the requirements of the core labour standards of the ILO. However, in numerous cases, important provisions of the laws that determine to whom they apply significantly limit the extent to which workers enjoy their protection.⁶⁰⁷

The ratification of the ILO core Conventions by some Southern African countries has not resulted in poverty alleviation, the reduction of unemployment and inequality, the advancement of workers' rights, and the protection of non-standard work. Little progress has been made in reducing working poverty and vulnerable forms of work, such as informal jobs and undeclared work.⁶⁰⁸ Labour market investigations by the ILO demonstrate the inability of the formal economic sector to create adequate decent

⁶⁰⁶ Fenwick *et al* 'Labour law: A Southern African perspective' in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 2–3.

⁶⁰⁷ *Ibid* 2.

⁶⁰⁸ ILO *Global Employment Trends for 2014*.

employment opportunities for the region's youth and women. Furthermore, the SADC region continues to experience gross violations of workers' rights.⁶⁰⁹

Freedom of association and collective bargaining are central to the ILO, which has been accepted as a mechanism for advancing and regulating terms and conditions of work and enhancing social justice.⁶¹⁰ The Freedom of Association and Protection of the Right to Organise Convention 87 of 1948, and the Right to Organise and Collective Bargaining Convention 98 of 1949, uphold basic rights and principles in the ILO's Declaration on Fundamental Principles and Rights at Work (1998). The Declaration states that all member countries have an obligation to respect, promote and realise the principles regarding basic rights, irrespective of the fact that they have not ratified the relevant Conventions.

It is noteworthy that the rights to organise and to bargain collectively are indivisible and mutually fortifying. The achievement of freedom of association is a necessary condition for the successful achievement of the right to bargain collectively. The ILO Declaration on Social Justice for a Fair Globalisation of 2008 also highlights the importance of the basic principles of freedom of association and the right to bargain collectively, because both rights are viewed as enabling conditions for realising the ILO's essential purposes, such as social protection, social dialogue, employment and employment rights. These basic rights have a bearing on all workers in theory, but excluding members of the South African armed forces, the police, and public servants engaged in the administration of the State, irrespective of their work arrangements or employment status.⁶¹¹ Increasing non-standard forms of work, nevertheless, create numerous challenges for the effective running of conventional industrial relations structures and collective bargaining processes.

⁶⁰⁹ For example, *Committee of Experts on the Application of Conventions and Recommendations (CEACR) Individual Observation Concerning Freedom of Association and Protection of the Right to Organise Convention 87 of 1948*, CEACR *Individual Observation Concerning Right to Organise and Collective Bargaining Convention 98 of 1949*.

⁶¹⁰ See ILO Promoting Collective Bargaining Convention 154.

⁶¹¹ The ILO supervisory bodies have affirmed that these fundamental rights apply to all workers. For more details, see Rubiano *Precarious Workers and Access to Collective Bargaining: Are there Legal Obstacles?* 4–7.

5.2 Significance of globalisation and factors influencing the growth of non-standard employment in Southern Africa

Globalisation is vital in defining any employment relationship today. Despite there being much literature on the subject of globalisation, and, more specifically, globalisation and Southern African nations, there are no comprehensive studies that have attempted to classify and categorise the experience of any individual developing state, in order to understand whether the experience has been positive or negative. However, the study of globalisation is very important to this research because globalisation, employees, workers, employers, informalisation, standard work and non-standard work are all inextricably linked and complementary. Furthermore, globalisation has also resulted in flexibility in employment, which has started to unravel standard employment relationships.⁶¹² In fact, when secure indefinite employment is replaced by non-standard work, where workers have access to fewer benefits and job security, it is described as informalisation. It has been noted, especially in South Africa, that the increase of insecure non-standard working relationships had the effect of decreasing permanent employment, as shown by the statistics.⁶¹³

In addition, these dynamics over the past decades have challenged what Vosko describes as the existing 'standard employment relationship'.⁶¹⁴ Reliance on a traditional relationship between employer and employee, structured in a permanent and full-time contractual engagement, proved no longer suitable for the new pressures and demands of the global economy. These include outsourcing production processes across borders and competitive pricing enforced by growing global competition. This has led to a decline in the importance of full-time and permanent work in favour of the expansion of 'non-standard' flexible forms of employment, such as temporary and part-time work.⁶¹⁵ There can be no modern debate on 'non-standard work' without exploring the ramifications of globalisation.

⁶¹² Kalleberg *Changing Employment Relations in the United States* 3.

⁶¹³ Mills (2004) 25 *ILJ* 1203 at 1212.

⁶¹⁴ Vosko *Managing the Margins: Gender, Citizenship and the International Regulation of Precarious Employment* 5.

⁶¹⁵ Vosko *ibid.* According to Vosko: 'The standard employment relationship enforced a "psychological contract" premised upon shared beliefs among employers and employees about the nature of the employment relationship and mutual obligation and risk-sharing, through which employers provided workers with long-term incentives, not only offering continuity and stability but deferred pay and career opportunities, in exchange for loyalty and productivity.'

Furthermore, Kalleberg⁶¹⁶ has argued that these changes in the global economy increased competition among firms, resulting in pressure on them to be more flexible in contracting with their workers and responding to consumers.⁶¹⁷ These changes have also led to an increase in non-standard categories of employment,⁶¹⁸ and non-standard employment often exposes workers to unsuitable working conditions and possible exploitation.⁶¹⁹ Accordingly, there are various insecurities associated with non-standard work, including labour market insecurity, job insecurity, skill reproduction insecurity, income insecurity, and representation insecurity. As noted by Standing,⁶²⁰ these insecurities characterise work in the era of informalisation. Generally, several labour market trends have referred to the numerical decline of the organised labour force, the expansion of the informal sector and the informalisation of work, which is often associated with inadequacy of social security coverage and weakening trade unions.⁶²¹ The above interconnection makes globalisation a relevant subject of this study.

5.2.1 Definitions and elements of globalisation

Throughout the past decades much literature⁶²² has emerged on the subject matter of globalisation. Globalisation has created some challenges for the ILO. Globalisation leads to more attention being paid to the competitiveness of states, rather than workers' rights and does not often support the ILO's orthodox objective of seeking social justice. The challenge of efficient monitoring has also been interrogated.

There is a lack of consensus about what globalisation is, when the most recent era of globalisation began, how the globalised era varies from other periods in economic history, and what its ramifications have been. The word 'globalisation' first entered an American English dictionary in 1961. The New Oxford Dictionary defines globalisation as 'to develop or be developed so as to make possible international influence or

⁶¹⁶ Kalleberg (2000) 26 *Annual Review of Sociology* 341.

⁶¹⁷ Ibid.

⁶¹⁸ Ibid.

⁶¹⁹ The Green Paper on Labour is also known as 'Minimum Standards Directorate Policy Proposals for a New Employment Standards Statute Green Paper' 13 February 1996.

⁶²⁰ Standing 'Human security and social protection' in Ghosh & Chandrashekar (eds) *Work and Well-Being in the Age of Finance*.

⁶²¹ Roy Chowdhury *Globalisation and the Informal Sector in South Asia: An Overview* Background Paper *Eradication of Poverty and Quality of AID; Eurostep South Asia Consultation, New Delhi, September 27-29, 2000*; Chowdhury 'Globalisation and labour' in Nayar (ed) *Themes in Politics: Globalisation and Politics in India*.

⁶²² See Webster's *Third New International Dictionary of the English Language Unabridged* 965.

operation', and a global village exists where the 'world is considered as a single community linked by telecommunications'.⁶²³ Globalisation has been defined in various ways by scholars.

McGrew states that:

globalisation constitutes a multiplicity of linkages and interconnections that transcends the nations, (and by implication of the societies) which make up the modern world system. It defines a process through which events, decisions and activities in one part of the world can come to have a significant consequence for individuals and communities in quite distant parts of the globe.⁶²⁴

Globalisation has also been defined as:

[an] increase in cross-border economic interdependency resulting from a greater mobility of factors of production and of goods and services that have established linkages over a broader geography of location. This trend is reflective of an increasing economic liberalisation and falling tariff barriers, modern communications, free flow of capital and modern technologies, integrated financial markets and corporate strategies of multinational companies that operate on the premises of homogenous world market.⁶²⁵

According to ILO studies, the growth in the number of unprotected workers can be connected to elements such as globalisation, technological change and modification in the organisation and working of firms, often mixed with restructuring in a very competitive milieu.⁶²⁶ The effect of these elements is the same and, in some states, they have invigorated labour markets and contributed to an increase in employment and new types of work. Businesses have organised their activities to use their workers in increasingly different and selective ways, including the use of diverse types of contracts and the use of sub-contractors, self-employed individuals and temporary employment agencies.⁶²⁷

⁶²³ See the New Oxford Dictionary of English; OHMAE *The Borderless World: Power and Strategy in the Interlinked Economy*.

⁶²⁴ McGrew 'A global society' in Hall, Held & McGrew (eds) *Modernity and its Futures*.

⁶²⁵ Harbrige *et al* 2002 *Employee Relations Journal* 424.

⁶²⁶ ILO *Firms' Demand for Temporary Labour in Developing Countries: Necessity or Strategy?* available at www.ilo.org/public/english/wcsdg/docs/rep2.pdf (Date of use: 25 January 2017).

⁶²⁷ *Ibid.*

Bendapudi *et al* describe non-standard work arrangements as jobs that do not involve 'explicit or implicit contracts for long-term employment'.⁶²⁸ The characteristics of this form of work arrangement include lower pay and benefits, and unequal protection under the law.⁶²⁹

Rosenau notes that:

globalisation is not the same as globalism, which points to aspirations for an end state of affairs wherein values are shared by or pertinent to all the world's five billion people, their environment, their roles as citizens, consumers or producers with an interest in collective action designed to solve common problems. Nor is it universalism—values which embrace all humanity, hypothetically or actually.⁶³⁰

Simon suggests that globalisation is a 'term in heavy current usage but one whose meaning remains obscure, often even among those who invoke it.'⁶³¹ Jan Aart Scholte states that 'globalisation stands out for quite a large public spread across the world as one of the defining terms of late twentieth century social consciousness.'⁶³²

The term globalisation is used to describe a recent era in global economic activity, beginning in the 1980s. Remarkably, there is no agreement about when the period of globalisation started, and when or whether it has ceased. Nevertheless, the period stipulated is when much of the literature on the subject of globalisation emerged, and is the period generally referenced in this literature.

There is a significant number of definitions of globalisation, to the extent that Hirst and Thompson⁶³³ contend that there is not one accepted model of the globalised economy and how it differs from economies in the past. Likewise, Bairoch and Kozul-Wright⁶³⁴ argue that 'most contemporary observers have differed in their description of the globalisation process, and have failed to construct a consistent theoretical explanation of what is driving it and where it might be going.'⁶³⁵

⁶²⁸ Bendapudi *et al* (2003) 26(1) *Human Resource Planning* 26.

⁶²⁹ *Ibid* 27.

⁶³⁰ James *The Dynamics of Globalisation: Towards an Operational Formulation* 1–4.

⁶³¹ Simon *What is Globalisation? Four Possible Answers* 3–4.

⁶³² Scholte *Globalisation and Modernity* 3.

⁶³³ Hirst & Thompson *Globalisation in Question: The International Economy and the Possibilities of Governance* 185.

⁶³⁴ Bairoch & Kozul-Wright *Globalisation Myths: Some Historical Reflections on Integration, Industrialisation and Growth in the World Economy* 2–3.

⁶³⁵ *Ibid*.

Most definitions of globalisation allude to openness, integration or flows. Openness relates to individual states engaging in, or being willing to engage in, global economic activity. Integration refers to combining or amalgamating elements across states, which mainly happens through cross-border activity and the global distribution of production.⁶³⁶ Flows as they relate to globalisation epitomise the movement of goods and services through trade, financial transactions through investment and foreign exchange markets, and the sharing of ideas, intellectual property and technology. While the focus of this study and analysis is on the economic aspects, globalisation is multidisciplinary and also extends to the areas of politics, sociology and anthropology.⁶³⁷

With reference to the more recent period of global economic activity, Hay and Marsh⁶³⁸ argue that globalisation developed gradually, rather than there being an abrupt change at any specific point in time, while Hirst and Thompson⁶³⁹ observe that what has emerged is not a truly global economy, but instead a high level of interaction between individual players within the global economy. It is also important to note that the economic elements of globalisation relate to production, trade, investment, finance, competition and demand. All these factors have displayed increased global integration over the past decades.

In general, most of the definitions of globalisation allude to international flows, whether these are flows of capital, goods and services, knowledge or people. Another common subject is that of time and space compression, whereby, as a result of technology and communication, exchanges can occur much more quickly. Globalisation is a multifaceted occurrence, including not only economics but also other fields of study such as politics and sociology. The economic components of globalisation include trade, investment, production, finance, competition and demand. The main focus of this study is trade and investment, although what is observed within these two areas is strongly influenced by the other economic areas. For instance, trade in components

⁶³⁶ Gundlach & Nunnenkamp *Globalisation of Production and Markets*.

⁶³⁷ Inda & Rosaldo 'A world in motion' in Inda & Rosaldo (eds) *The Anthropology of Globalisation*.

⁶³⁸ Hay & Marsh 'Introduction: Demystifying globalisation' in *Demystifying Globalisation*.

⁶³⁹ Hirst & Thompson *Globalisation in Question: The International Economy and the Possibilities of Governance* 185.

has been influenced by the production trend of a breakdown in value chains, while larger investment flows have been facilitated by new financial instruments.

One of the main areas of focus of globalisation literature has been the impact on developing countries, particularly Southern Africa. This is also an area where there are different perspectives and no clear consensus as to what the impact has been. Global economic changes have increased competition between enterprises, resulting in greater pressure for more flexibility in firms contracting with their workers and responding to customers.⁶⁴⁰ Labour market flexibility refers to all categories of non-permanent or non-standard work practices.⁶⁴¹ Blyton's analysis, quoted in Appiah-Mfodwa,⁶⁴² is informative for this study. He describes labour market flexibility with respect to 'recruitment, reward and utilisation of labour by capital.' He further classifies the flexible use of labour into 'functional or task flexibility, numerical flexibility, temporal flexibility and wage flexibility.'⁶⁴³ The changes in employment relationships resulted in a decline of job stability, and created little or no relationship between workers and the enterprises for which they work.⁶⁴⁴ This is the situation in many firms in SADC today, including those in the retail, clothing and the manufacturing industry.

In addition, the competitive pressures brought about by globalisation, and the consequent economic instability,⁶⁴⁵ have created a need for social protection for workers to protect them from the unfavourable effect of insecurity caused by the adoption of non-standard work arrangements by employers. However, some advocates of globalisation disagree with this contention. Flanagan⁶⁴⁶ argues that the opening up of economies and borders through globalisation and liberalised trade improves working conditions, rather than degrading them, as the sceptics say. Despite Flanagan's argument, externalisation and casualisation have had an adverse effect

⁶⁴⁰ Kalleberg (2000) 26 *Annual Review of Sociology* 341–365.

⁶⁴¹ Appiah-Mfodwa *et al* (2000) 31(1) *Asian Development Bank* 95–109.

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.*

⁶⁴⁴ Houseman *The Implications of Flexible Staffing Arrangements for Job Stability* 1.

⁶⁴⁵ Banks 'The impact of globalisation on labour standards: A second look at the evidence' in Craig & Lynk (eds) *Globalisation and the Future of Labour Law* 84.

⁶⁴⁶ Flanagan *Globalisation and Labour Conditions: Working Conditions and Worker Rights in a Global Economy* 177.

on workers' rights in Southern Africa, especially in the area of remuneration and benefits, and with regard to the right to organise.⁶⁴⁷

Another factor responsible for the rise in non-standard work arrangements has been the increasing competition and uncertainty in product markets, which in turn has added to the need for companies to attain greater flexibility in the running of their businesses.⁶⁴⁸ This has led numerous enterprises to embark on strategies enabling them to concentrate on their 'core activities' by creating, according to Carley, 'a "skilled" permanent labour force and a "peripheral" labour force of insecure and readily disposable employees'.⁶⁴⁹

Furthermore, it has been suggested that the development of a more flexible labour force is an essential aspect of many of the new approaches to management in a globalised economy today.⁶⁵⁰ Flexibility has become the employer's new frontier in the management of labour.⁶⁵¹ According to Baglioni, numerous employers and enterprises seeking ways to diminish labour costs have used globalisation as a justification for the use of non-standard work arrangements.⁶⁵² Numerous enterprises experience variations in their workload, and maintain full work practice by retaining a core labour force of skilled permanent employees, and having access to a peripheral labour force of general labour through casual labour.⁶⁵³ Numerous organisations use employment or recruitment agencies to supply them with temporary casual workers in order to save costs on screening, training, termination benefits and other factors.⁶⁵⁴

However, globally, the different nature and types of non-standard jobs makes it difficult to attribute the increase to specific factors, or to identify a common explanation for their increase, both in absolute and relative terms. Some researchers have associated this growth with massive unemployment, the impact of globalisation, the shift from the

⁶⁴⁷ Standing *Global Labour Flexibility: Seeking Distributive Justice* and Fudge 'The legal boundaries of the employer, precarious workers, and labour protection' in Davidov & Langille *Boundaries and Frontiers of Labour Law*.

⁶⁴⁸ Carley 'Non-standard forms of employment in Europe: Part-time work, fixed-term contracts and temporary work contracts' (2008) 3 *European Industrial Relations Review (EIRR) Report* 28.

⁶⁴⁹ Ibid.

⁶⁵⁰ Benson & Ieronimo (1996) 135(1) *International Labour Review* 59.

⁶⁵¹ Baglioni 'Industrial relations in Europe in the 1980s' in Baglioni & Colin (eds) *European Industrial Relations: The Challenge of Flexibility* 1–41.

⁶⁵² Ibid.

⁶⁵³ Ibid.

⁶⁵⁴ Ibid.

manufacturing sector to the service sector, and the development of information technology.⁶⁵⁵ The effect of all these factors is that a new economy that demands flexibility has caused a decline in standard employment relations and given rise to non-standard work, which benefits employers.

On the demand side, issues related to the desire for increased labour force flexibility arising out of the globalisation of the economy are predominant, as demonstrated above.⁶⁵⁶ On the supply side, on the other hand, there has been a considerable increase in the sectors of the labour force who are seeking alternatives to full-time work.⁶⁵⁷ Numerous individuals in developed economies, for instance, seek the flexibility of non-standard work arrangements for personal reasons, such as women taking care of family members and students working part-time in order to pay bills or earn extra income. In these instances, therefore, the flexibility offered by non-standard work arrangements is beneficial to this category of workers.

Feldman⁶⁵⁸ contends that to guarantee equal treatment of primary⁶⁵⁹ and secondary⁶⁶⁰ workers in an organisation there should be a distinction between 'justified cost reduction' attributed to flexibility and specialisation, and 'unjustified cost reduction' based on the exploitative arbitrary reduction of the remuneration and benefits of secondary workers,⁶⁶¹ such as casual workers employed through contractors. Nevertheless, in developing countries, such as those in Southern Africa, the circumstances described by Feldman are not applicable, as most of those working in non-standard jobs are exploited by employers, receiving low wages and no benefits. This situation can be seen as related to the fact that there is a high unemployment rate globally, with Southern African states having their fair share of unemployment. Accordingly, workers have little or no choice, and usually the alternative to casual or contract employment may be unemployment. In other words, many new jobs created in a number of sectors, including the retail and manufacturing industry, are non-standard jobs, which mean that the majority of workers are casuals.

⁶⁵⁵ Okafor (2012) 6(26) *African Journal of Business Management* 76–154.

⁶⁵⁶ Brosnan & Thornthwaite 'Atypical work in Australia: Preliminary results from a Queensland Study' in Callus & Schumacher (eds) *Current Research in Industrial Relations* 136–185.

⁶⁵⁷ Dawkins & Norris (1990) 16 *Australia Bulletin of Labour* 156–173.

⁶⁵⁸ Feldman (2009) 31(1) *Comparative Labor Law and Policy Journal* 29-66.

⁶⁵⁹ Indefinite employees employed directly by the enterprise.

⁶⁶⁰ Employees employed through agencies, such as contract and casual employees.

⁶⁶¹ *Ibid.*

While globalisation has brought about higher levels of trade and investment, numerous developing states have seen little change in their volumes of trade and investment, and, at times, have even experienced declines, as trade and investment are redirected to states that are more able to engage in the global economy. One of the most common arguments is that, as a result of the increased specialisation that has resulted with globalisation, many developing states have a more narrow export focus, which is centred on essentially unattractive products.⁶⁶² More specifically, exports from developing nations are largely commodities that have demonstrated declines in terms of trade and high levels of volatility, and have low growth prospects; as such, these products are not demanded within the international economy.⁶⁶³ Other key arguments pertain to the detrimental results when developing nations have participated in globalisation, which include a decline in labour and environmental standards, environmental degradation, and the application of unsuitable technologies.⁶⁶⁴

However, there is also the view that globalisation has been beneficial for developing nations, with respect to the general benefits of trade, such as providing access to capital, technology, managerial practices and production techniques, and bringing previously unemployed labour into production.⁶⁶⁵ One of the main arguments in support of this view is that the trends associated with globalisation, for instance, the breakdown of value chains, have afforded developing countries opportunities that would have otherwise not been presented. Such opportunities include participating in international trade, thereby earning export income and raising the national income, attracting foreign direct investment (FDI), and developing manufacturing sectors, which is recognised as a key step along the path to development.⁶⁶⁶

However, it is important to note the long history in the Southern African region of the subordination of labour law to political and economic goals. The concern with maintaining political stability and increasing productivity has often led to close controls

⁶⁶² *United Nations Conference on Trade and Development (UNCTAD) The Least Developed Countries Report 2002.*

⁶⁶³ *Ibid.*

⁶⁶⁴ Khor 'Global economy and the third world' in Mander & Goldsmith (eds) *The Case against the Global Economy*; Nayyar 'Globalisation: What does it mean for development?' in Jomo & Nagaraj (eds) *Globalisation versus Development.*

⁶⁶⁵ Gundlach & Nunnenkamp *Globalisation of Production and Markets.*

⁶⁶⁶ Arndt (1999) 8(3) *Journal of International Trade and Economic Development* 309–318.

over collective bargaining and industrial action.⁶⁶⁷ At present, the subordination of labour law is occurring in the context of globalisation. This occurrence, as already mentioned, consists of a number of processes, namely 'trade and the expansion in the volume and variety of cross-border transactions in goods and services; foreign direct investment (FDI) and a dramatic increase in international capital flows, the rapid and widespread diffusion of technology; and international labour migration.'⁶⁶⁸

As demonstrated above there are many definitions of globalisation by scholars, but no harmony about what the word really means. For the purposes of this study, globalisation is perceived largely as a system whose major attribute has been 'the liberalisation of international trade, the expansion of Foreign Direct Investment (FDI), and the emergence of massive cross-border financial flows. This resulted in increased competition in global markets.'⁶⁶⁹ It is further largely recognised that this has happened as a result of the combination of two underlying elements: policy resolutions to lessen national obstacles to international economic deals and the effect of new technology, particularly in the field of information and communications.⁶⁷⁰

One of the leading factors affecting the world of work, mainly by increasing competition between producers and/or service providers, is globalisation.⁶⁷¹ Enterprises have continued to turn to methods that permit them to be flexible in order to stay competitive in the market. Achieving this requires the constant use of flexible employment categories at a lower price.⁶⁷² This is in order to attract considerable foreign direct investment at the national level and to circumvent the movement of business away from their countries to other states.⁶⁷³

In developing countries, especially in most Southern African states, where informal sector employment is relatively high, most of the new jobs created in the past 20 years

⁶⁶⁷ Fenwick *et al* 'Labour law: A Southern African perspective' in Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 5.

⁶⁶⁸ ILO *Decent Work and the Informal Economy* 33.

⁶⁶⁹ World Commission on the Social Dimensions of Globalisation *A Fair Globalisation: Creating Opportunities for All* 24. Available at <http://www.presidentti.fi/netcomm/lmgLib/9/101/WCSDG%20report%20final.pdf> (Date of use: 25 January 2017).

⁶⁷⁰ *Ibid.*

⁶⁷¹ International Labour Office *Changing Patterns in the World of Work* 8.

⁶⁷² Rogerson *Globalisation or Informalisation? African Urban Economies*. Available at <http://www.unu.edu/unupress/unupbooks/uu26ue/uu26ue0q.htm> (Date of use: 27 January 2017).

⁶⁷³ *Ibid.*

were in the informal sector of the economy. Globalisation is said to have played a remarkable part in achieving this.⁶⁷⁴ However, unemployment levels and poor quality jobs, particularly in the informal sector, have also increased as a result of globalisation.⁶⁷⁵

5.2.2 Rationale for globalisation

Globalisation has mainly been driven by economic factors and, more particularly, the profit motives of corporate organisations, with these organisations seeking to attain competitive advantages. Firms have globalised by dividing into parts their production processes across national frontiers, in order to reduce costs, and have sought to attract customers from multiple markets in order to increase revenue.⁶⁷⁶ Profit motives have also influenced foreign investment decisions and decisions to globally outsource and enter into strategic alliances with foreign entities. Trends revealed in production, such as high sunk costs, rates of technological degeneration, and changing product life cycles have led to corporate organisations seeking lower production costs and multiple markets for their products.⁶⁷⁷

5.2.3 Facilitators of globalisation

Facilitators are elements that have changed within the global economy to allow for an increased level of integration or greater flows between states. Some of these elements have assisted in reducing the barriers to global activities that existed before. In general, the factors that have facilitated globalisation include the following: technology and innovation, advancements in transportation and communication, political developments, reduced protectionism, trends towards deregulation, and developments in financial markets. These elements are examined in detail below.

Furthermore, it is important to note that technological development is one of the main contributors to change in the workplace.⁶⁷⁸ New technologies have been introduced,

⁶⁷⁴ Clarke *Class and Identity in the Context of Labour Market Restructuring in Africa*. Available at http://www.yorku.ca/African_liberation/conference_papers/Clarke_print.html. (Date of use: 29 December 2017).

⁶⁷⁵ Ibid.

⁶⁷⁶ Banks 'The impact of globalisation on labour standards: A second look at the evidence' in Craig & Lynk (eds) *Globalisation and the Future of Labour Law* 84.

⁶⁷⁶ Flanagan *Globalisation and Labour Conditions: Working Conditions and Worker Rights in a Global Economy* 177.

⁶⁷⁷ Ibid.

⁶⁷⁸ Blanpain (1997) 18 *ILJ* 189.

which have also increased the ease of moving production facilities and have empowered buyers to understand and source products globally.⁶⁷⁹ As suggested by Blanpain, the evolution of our community has always been propelled by technology.⁶⁸⁰ In this age of globalisation, changes in information and communication technology have enormously influenced every feature of all communities in general and especially the labour market.⁶⁸¹ In 2006 the ILO report indicated that technological change in information and communication has influenced, amongst other factors, the flow of capital and labour, the operation of work and products, and the management structure. It has further increased the move towards services and their outsourcing internationally.⁶⁸²

In addition, improvements in transportation and communication have reduced perceptions of time and distance.⁶⁸³ More particularly, modernisation in transportation has reduced the cost of transporting and decreased the time it takes to move products. Developments in communication have resulted in advancements in consumer markets, for instance, by providing an understanding of the different items produced for sale, and have enabled knowledge sharing.⁶⁸⁴

There are two central political developments that have allowed globalisation: these include ideological shifts and growth in international institutions. The end of the Cold War and the collapse of communism⁶⁸⁵ have increased the strength of capitalism and free market forces within the global economy, which has in turn enabled the growth of private sector activity.⁶⁸⁶ Concurrently, multilateral institutions, such as the World Bank, the International Monetary Fund (IMF) and the World Trade Organisation (WTO), have strengthened in influence, and alliances between nations such as the Group of 20 (G20) and BRICS have emerged. Such developments have contributed to higher rates of integration within the global economy.

⁶⁷⁹ Van Hoesel & Narula 'Third world multinationals revisited: New developments and theoretical implications' in Dunning (ed) *Globalisation, Trade and Foreign Direct Investment*.

⁶⁸⁰ Ibid.

⁶⁸¹ International Labour Office *Changing Patterns in the World of Work* 6.

⁶⁸² Theron (2008) 29 *ILJ* 1–22.

⁶⁸³ Hoogvelt *Globalisation and the Post-colonial World*.

⁶⁸⁴ Naisbitt *Global Paradox: The Bigger the World Economy, the more Powerful its Smallest Players*.

⁶⁸⁵ Gernigon, Otero & Guido (2000) 139(1) *International Labour Review* 1.

⁶⁸⁶ Oman 'Globalisation and regionalisation: The challenge for developing countries'.

In the period preceding globalisation, trends of deregulation were visible across numerous economies, including the liberalisation of trade, foreign investment and financial markets. Barriers to trade, especially tariffs, progressively decreased during the four decades after the Second World War under the patronage of the General Agreement of Trade and Tariffs (GATT), thus supporting trade between nations.

In addition, states entered into regional trading bloc arrangements in order to facilitate and promote trade. In the Southern African region one major attribute of globalisation has been the unification of domestic markets into regional and global markets. There has been a growing move towards formal unification in the region. Regional economic consolidation is pursued through several means, including the Southern African Customs Union (SACU), SADC, the Common Market for Eastern and Southern Africa (COMESA), and the African Union.⁶⁸⁷ SACU⁶⁸⁸ provides for the free movement of goods and services between member states and the enforcement of a standard external levy when trading with other states. In the late 1990s, SADC decided to slowly put into effect a free trade area, with 100 percent liberalisation by 2012.⁶⁸⁹ Nine of the 14 SADC members also belong to COMESA.⁶⁹⁰ Finally, it should be recalled that the terms of the 1994 Treaty that established the African Economic Community provided a timetable for attaining a common market for all of Africa by 2025, under the auspices of the African Union. Beyond the region, Southern African states participate in a range of global trading systems.

Further, all SADC member states are World Trade Organisation (WTO) members.⁶⁹¹ SADC is also a partner in the New Partnership for Africa's Development (NEPAD). One of the key objectives of NEPAD is 'to stop the marginalisation of Africa in the globalisation process and enhance its full and beneficial integration into the global economy.'⁶⁹²

⁶⁸⁷ Fenwick *et al* 'Labour law: A Southern African perspective' in T Tekle (ed) *Labour Law and Worker Protection in Developing Countries* 15.

⁶⁸⁸ SACU is made up of Botswana, Lesotho, Namibia, Swaziland and South Africa.

⁶⁸⁹ SADC Trade protocol, available at www.sadc.int (Date of use: 17 June 2017).

⁶⁹⁰ These states include Angola, the DRC, Madagascar, Malawi, Mauritius, Namibia, Swaziland, Zambia and Zimbabwe.

⁶⁹¹ Seychelles was the last SADC member state to become a member of the WTO (in April 2015).

⁶⁹² See the New Partnership for Africa's Development (NEPAD) document, available at <http://www.nepad.org> (Date of use: 17 June 2017).

5.3 Collective bargaining and trade unions

Collective bargaining plays an important role in reducing the vulnerability of workers in non-standard employment. A review of literature on collective agreements reveals numerous innovative practices that shed light on the role that collective bargaining may play in ensuring decent work for non-standard workers.⁶⁹³ Not long ago, trade unions, employers and employers' organisations at various levels engaged in collective bargaining to deal with the specific concerns confronting workers in non-standard categories of work. They identified five areas of concerns where innovative provisions protecting non-standard workers have been developed and these included the following: 'securing regular employment; negotiating equal pay; guaranteeing working hours for workers with zero-hours contracts; extending maternity protection; and making the workplace safe.'⁶⁹⁴

Encouraging and promoting a just and equitable society, a more inclusive social discourse and collective bargaining is a crucial way to ensure there is an equal voice for all workers, irrespective of their status, particularly in Southern African states, where poverty, unemployment and inequality are rife. The challenge facing the Southern African states is how to unite non-standard workers, whose union representation and collective bargaining power is likely to be negatively impacted, and how to shift the workers towards a democratic and inclusive modern society, in a collective and unified way. This entails elevating the labour market status of non-standard workers by ensuring that industrial relations institutions and practices are more receptive to the need to bridge the present gap between non-standard workers and standard employees.

Freedom of association and collective bargaining are basic conditions of employment for the ILO. These elements have been recognised as a vehicle for advancing and regulating terms and conditions of work and strengthening social justice since the

⁶⁹³ This review was conducted for the preparation of a report for discussion at the ILO Meeting of Experts on Non-Standard Forms of Employment that took place in Geneva from 16 to 19 February 2015. It includes a review of the literature and a review of clauses on non-standard workers from 39 collective bargaining agreements in 18 countries.

⁶⁹⁴ Ibid.

establishment of the ILO in 1919.⁶⁹⁵ The contents of the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and the Right to Organise and Collective Bargaining Convention 98 of 1949 are acknowledged as basic rights and principles in the 1998 ILO Declaration on Fundamental Principles and Rights at Work.⁶⁹⁶ The 1998 Declaration notes that, by freely joining the ILO, all Member States are obliged to comply with, advance and fulfil the principles concerning fundamental rights, irrespective of whether they have ratified the relevant Conventions. It is also important to note that the two fundamental rights are indivisible and mutually fortifying: The achievement of freedom of association is an essential precondition for the effective achievement of the right to bargain collectively.

The ILO Declaration on Social Justice for a Fair Globalisation⁶⁹⁷ also highlights the importance of freedom of association and the right to collective bargaining, as both rights assist in achieving the ILO's strategic goals. These goals include employment, job security, social protection, workplace rights, and decent work for all. These fundamental rights apply to all workers, in theory, but excluding members of the armed forces, the police, and public servants active in the administration of the state, regardless of their employment arrangements or work status.⁶⁹⁸ Increasing rates of non-standard types of work, nevertheless, create numerous challenges for the efficient operation of the conventional industrial relations structures and collective bargaining processes. It is against this background that collective bargaining, freedom of association and trade unions are examined in relation to non-standard workers.

5.3.1 Defining collective bargaining

A collective agreement is defined as a written agreement concerning the terms and conditions of employment or any matter of mutual interest, concluded by one or more registered trade unions, on the one hand, and, on the other hand, one or more

⁶⁹⁵ [Fundamental Rights at Work and International Labour Standards \(ILO\) available at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/.../wcms_087424.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_norm/.../wcms_087424.pdf) (Date of use: 15 July 2017).

⁶⁹⁶ The ILO Supervisory Bodies have affirmed that these fundamental rights apply to all workers. For more details, see Rubiano *Precarious Workers and Access to Collective Bargaining: Are there Legal Obstacles?*

⁶⁹⁷ *ILO Declaration on Social Justice for a Fair Globalisation: Adopted in 2008 by the representatives of governments, employers and workers from all ILO member States*. The declaration expresses the contemporary vision of the ILO's mandate in the era of globalisation.

⁶⁹⁸ Bosch (2009) 148(4) *International Labour Review* 337–356. See also Nissen (ed) *Unions in a Globalised Environment: Changing Borders, Organisational Boundaries and Social Roles* 172.

employers, or one or more registered employers' organisations, or one or more employers and one or more registered employers' organisations.⁶⁹⁹

A collective agreement binds the parties to the agreement, as well as the members of every party to the agreement.

The right to bargain collectively is safeguarded by the Constitution, and one of the objectives of the LRA is to give effect to this right.⁷⁰⁰ The LRA gives effect to the right to bargain collectively by allowing for the registration of trade unions and employers' organisations, by permitting 'representative' trade unions to exercise certain organisational rights, and by allowing for the creation of a bargaining council. Nonetheless, the LRA does not impose a duty to bargain in South Africa.

The ILO defines the right to bargain collectively as a fundamental right. In Recommendation 91,⁷⁰¹ collective agreements are defined as:

all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.⁷⁰²

The text further states that collective agreements are binding on the signatories thereto and on those on whose behalf the agreements are concluded. Nevertheless, a provision in a contract of employment that is more favourable to a worker than those provisions prescribed by a collective agreement should not be regarded as contrary to a collective agreement.⁷⁰³

Collective bargaining may take place at various levels, namely: plant level; company (or enterprise) level, where there is more than one plant belonging to the same company or enterprise; and sectoral level, where there are different employers in the same industry or sector.

⁶⁹⁹ Section 213 of the LRA.

⁷⁰⁰ Section 27(2) of the Constitution.

⁷⁰¹ ILO Recommendation 91, para 2.

⁷⁰² ILO *International Labour Conventions and Recommendations* vol 1 (1919–1951) 656.

⁷⁰³ *Ibid.*

In the words of Davies and Freedland, ‘the importance of collective bargaining can be explained by the fact that it has value for employers as well as workers - for employers, as a means of maintaining “industrial peace”; for workers, primarily as a means of maintaining certain standards of distribution of work, of rewards and of stability of employment.’⁷⁰⁴

Furthermore, it is worth noting that collective bargaining has been affected by the ramifications of the major changes impacting the world over the past three decades: the growth of non-standard forms of work, the general acceptance of the market economy, the discourse on the role and structure of the State, economic restructuring and globalisation, the growing autonomy of trade unions from political parties, and numerous other factors.

However, collective bargaining in Southern Africa should not only be viewed in light of the proliferation of non-standard work, but in a context where the labour markets are characterised by extreme poverty, ‘stark income inequality’,⁷⁰⁵ 30 per cent to 40 per cent unemployment, extremely low skills levels, an HIV/AIDS pandemic, large-scale labour migration, and an extensive informal sector in which most working individuals eke out a living.⁷⁰⁶ Labour law therefore influences only a small proportion of the population, while the surrounding social realities, combined with a lack of effective enforcement, further diminish its influence.⁷⁰⁷ To be effective, it is argued, ‘labour law in Southern Africa needs to take into account the region’s particular socio-economic profile and develop an indigenous paradigm.’⁷⁰⁸ While emphasising that the traditional concerns and goals of labour law, as developed in the industrialised world, are by no means irrelevant to employees in formal employment, nor irrelevant for ensuring ‘flexibility and efficiency to compete in global economic markets’, some authors⁷⁰⁹ suggest that the ‘true and necessary domain of labour law is wider. Job creation,

⁷⁰⁴ Davies & Freedland *Kahn-Freund’s Labour and the Law* 69.

⁷⁰⁵ See Development Policy Research Unit (DPRU) *An Exploratory Look into Labour Market Regulation* 56.

⁷⁰⁶ Fenwick & Kalula (2001) 21(2) *International Journal of Comparative Labour Law and Industrial Relations* 193, drawing on the analysis developed in Cooney *et al* (eds) *Law and Labour Market Regulation in East Asia* 204–211.

⁷⁰⁷ For instance, mass unemployment undermines minimum wages and conditions of employment. Thus, the argument in favour of market liberalisation in its most extreme form implies that wages should be allowed to drop to levels that are acceptable to the poorest of the poor.

⁷⁰⁸ *Ibid.*

⁷⁰⁹ *Ibid.*

control of immigration, training and education of workers, and the provision of social security are all immediate concerns for the Southern African workforce.⁷¹⁰

5.3.2 The role of collective bargaining in employment relations

The development of the process of collective bargaining and the socio-industrial phenomenon called 'trade unionism' are closely related. Employment relations, as an area of study, developed later. These concepts have become synonymous for some individuals, but it is important that a distinction be made between them.⁷¹¹ The term 'employment relations' is frequently directly associated with trade unions, whereas collective bargaining is viewed as being concerned with remuneration negotiations only. Nevertheless, collective bargaining requires much more than this.⁷¹²

The area of employment relations is not only interested in the relationship and the interaction between institutional categories, but also with all the processes that arise from it. Some of these processes are collective bargaining, grievance and disciplinary procedures, and arbitration. Collective bargaining is therefore only one of the many processes that together comprise the area of employment relations.⁷¹³ Workers need to refer not only to the improvement of wages and conditions of service, but also to other factors related to workers and the work environment, for instance: the protection of craft status, security of employment, and controlling conflict by means of formalised procedures, such as grievance and disciplinary procedures.⁷¹⁴

The right to bargain collectively has been accepted globally. The ILO recognises this right, stating that procedures will be undertaken to encourage and promote the full development and use of a system for voluntary negotiation between employers or employers' organisations, as well as the trade unions, with a view to regulating terms and conditions of employment by means of collective agreements. South Africa, a member of the ILO, has given effect to this Convention by protecting this right in the South African Constitution,⁷¹⁵ as well as by providing extensively for collective

⁷¹⁰ As reflected, for example, in the policy of the South African Department of Labour. Its strategic objectives for 2004 to 2009 include: contribution to employment creation; enhancing skills development; promoting equity in the labour market; protecting vulnerable workers and strengthening social protection. See http://www.labour.gov.za/media/speeches.jsp?speechdisplay_id=5877 (Date of use: 17 March 2017). One important outcome of this approach has been the Skills Development Act 97 of 1998.

⁷¹¹ Nel *et al* *South African Employment Relations: Theory and Practice* 184.

⁷¹² *Ibid.*

⁷¹³ *Ibid.*

⁷¹⁴ *Ibid.*

⁷¹⁵ Section 23(5) of the Constitution.

bargaining through labour relations.⁷¹⁶ This is evident, for instance, in the LRA,⁷¹⁷ which states that one of its objectives is giving effect to, and effectively regulating, the fundamental rights conferred by the Bill of Rights.⁷¹⁸

5.3.3 The essence of collective bargaining

Collective bargaining is the process by which employers and organised categories of employees try to harmonise their contrasting concerns and objectives through reciprocal understanding. In the words of Grogan, the ‘dynamics of collective bargaining are demand and concession; the objective is agreement.’⁷¹⁹ Collective bargaining in the employment sector is very similar to collective bargaining that occurs in other areas of life. In the workplace, nonetheless, bargaining is regulated by the fact that employers and employees are mutually dependent. When all the facts are considered, the conflicting concerns of the employee and the employer must be reconciled to ensure the survival of the organisation.

The primary and most obvious feature of collective bargaining is that it is collective.⁷²⁰ Accordingly, bargaining occurs not at an individual level – between employers and particularly employees – but between employers and institutions and their officials who represent groups of employees.⁷²¹ It is a process focused on attaining consensus that binds employers to deal with the category of employees in a standardised manner. Collective bargaining essentially supersedes, but does not replace, negotiations.⁷²² Collective bargaining results in a collective agreement that binds employers and individual employees and supersedes individual contracts to the extent that they are in conflict.⁷²³

The second attribute of collective bargaining is that it requires bargaining. Bargaining falls between the two extremes of dictation and submission. In order to bargain, two parties must recognise each other as equals at least for that purpose and must be prepared to display more than sympathy for the other’s view. They must, as the Industrial Court put it, ‘haggle and wrangle so as to arrive at some agreement on terms

⁷¹⁶ Steenkamp *et al* (2004) 25 *ILJ* 943–944.

⁷¹⁷ Section 1(a) of the Labour Relations Act of 1995.

⁷¹⁸ Section 23 of the Constitution.

⁷¹⁹ Grogan *Collective Labour Law* 126.

⁷²⁰ *Ibid.*

⁷²¹ *Ibid.*

⁷²² *Ibid.*

⁷²³ *Ibid.*

of give and take',⁷²⁴ and 'confer with a view to compromise and agreement.'⁷²⁵ Willingness to compromise is an essential requirement of collective bargaining; once the parties assume fixed positions, bargaining comes to a halt, and acquiescence or warfare are the only remaining alternatives.⁷²⁶

5.3.4 Aims of collective bargaining

The aims of collective bargaining may be outlined as the following:⁷²⁷

- (i) The setting of working conditions and other matters of mutual interest between employer and employees in a structured, institutionalised environment;
- (ii) Conformity and predictability through the creation of common substantive conditions and procedural rules;
- (iii) The promotion of workplace democracy and employee participation in managerial decision-making;
- (iv) The resolution of disputes in a controlled and institutionalised manner.

The key duty of collective bargaining is the reaching of a collective negotiation that regulates the terms and conditions of employment.⁷²⁸ What makes the bargaining 'collective' is the existence of a trade union that acts or speaks on behalf of the concerns of employees, as a collective. The other participant to the collective agreement is customarily an employer. Nonetheless, there may be multiple employers or an employer's organisation.

Collective bargaining may be viewed in both a wider sense and a limited sense.⁷²⁹ In the wider sense, collective bargaining is seen as divergent kinds of binary and occasionally tripartite deliberations relating to employment and industrial relations that have an effect on a category of workers.⁷³⁰ The narrow view of collective bargaining is restricted to binary deliberations.⁷³¹

⁷²⁴ Ibid.

⁷²⁵ *MAWU v Hart Ltd* (1985) 6 ILJ 478 (IC) 493H-I.

⁷²⁶ Grogan *Collective Labour Law* 126.

⁷²⁷ Finnemore & Van Rensburg (eds) *Contemporary Labour Relations* 276.

⁷²⁸ Bamber & Sheldon 'Collective bargaining' in Blanpain *et al* (eds) *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* 1.

⁷²⁹ Ibid.

⁷³⁰ Ibid.

⁷³¹ Ibid.

5.3.5 Collective bargaining levels and essentials

The phrase 'bargaining level' defines the circumstances where bargaining takes place between unions and individual employers, which is called 'plant' or 'enterprise-level' bargaining, or between one or more unions and a group of employers, from a particular industry or occupation, which is called 'sectoral' or 'centralised' bargaining.⁷³² Summers' is of the view that multinational collective bargaining constitutes bargaining between trade unions or trade union federations and employers' organisations on an international level.⁷³³

Plant-level bargaining leads to collective agreements, which set wages and working conditions for individual employers' and their own employees in the relevant bargaining unit. Centralised bargaining prescribes remuneration and employment conditions evenly across the sector.⁷³⁴

Collective bargaining, at the central level, suggests that all employers and unions in the sector must stand together or fall together.⁷³⁵ Centralised bargaining is supported by larger and well-organised unions, and the LRA explicitly states that it is the preferred level,⁷³⁶ subject to the clause that the concerns of small firms should not be disregarded in the process.⁷³⁷ The main forum for sectoral bargaining is the bargaining council. Only those who were participants in council decisions are bound by such decisions, except where they are extended to non-parties by the Minister.⁷³⁸

Plant-level and centralised bargaining are not necessarily mutually exclusive.⁷³⁹ While bargaining councils' agreements are binding on all parties and on all persons to whom they have been extended, they are not essentially all-inclusive of all matters that might emerge in individual workplaces, and may stipulate only minimum conditions. The Industrial Court took the view that whether an employer party to centralised bargaining was compelled also to bargain at plant level depended on the circumstances. Therefore, an employer's refusal to bargain over funeral benefits and wages in excess

⁷³² Grogan *Collective Labour Law* 149.

⁷³³ Summers 1995 *Comparative Labour Law Journal* 467.

⁷³⁴ *Ibid.*

⁷³⁵ *Ibid.*

⁷³⁶ Section 1(d)(ii).

⁷³⁷ Grogan *Collective Labour Law* 150.

⁷³⁸ Sections 31 and 32 of the LRA.

⁷³⁹ *Vanachem v Vanadium Products Ltd v NUMSA and others* [2014] 9 BLLR 923 (LC).

of the prescribed council rates was held not to constitute an unfair labour practice.⁷⁴⁰ The fact that the employer already paid wages in excess of council rates was regarded as sufficient to warrant an order compelling the employer to bargain actual wages at plant level.⁷⁴¹ Where a matter is not covered by a council's main agreement, employees are entitled to bargain about it at plant level.⁷⁴²

Collective bargaining has, almost since its inception, been intimately related to the growth and development of trade unionism. This fact, added to events in Europe and Britain,⁷⁴³ has led to the common misconception that collective bargaining is the exclusive domain of trade unions.

Where the union represents the worker and acts on his or her behalf, it will, out of necessity, become the collective bargaining agent. In many instances, collective bargaining has become almost concurrent with trade unionism. However, it is important to realise that the existence of a union does not preclude management from bargaining collectively with its workers, or any other association representing them.

5.3.6 Freedom of association and collective bargaining in Southern Africa

In terms of Article 4 of the Charter of the Fundamental Social Rights in the SADC, member states are enjoined to create an enabling environment consistent with the ILO Conventions on Freedom of Association and the Right to Organise and Collective Bargaining so that:

- (a) Employers and workers of the region shall have the right to form employers' associations or trade unions of their choice for the promotion and defence of their economic and social interests;
- (b) Every employer and every worker shall have the freedom to join or not to join such employers, associations or trade unions without any personal or occupational damage being thereby suffered by him or her;

⁷⁴⁰ *MAWU v Hart Ltd* (1985) 6 ILJ 478 (IC) at 493H-I.

⁷⁴¹ *SAWU v Rutherford Joinery (Pty) Ltd* (1990) 11 ILJ 695 (IC).

⁷⁴² *Numsa/Defy Appliances Limited* [2005] 3 BALR 298 (MEIBC).

⁷⁴³ Originating in Great Britain, trade unions became popular in many countries during the Industrial Revolution. Trade unions may be composed of individual workers, professionals, workers, students, apprentices and/or the unemployed. Trade union density, or the percentage of workers belonging to a trade union, is highest in the Nordic countries.

- (c) Employers' associations and trade unions shall have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice;
- (d) The industrial disputes settlement machinery and method of operation shall be autonomous, accessible, efficient and subject to tripartite consultation and in agreement with guaranteed right of recourse to established appeals or review procedures;
- (e) The right to resort to collective action in the event of a dispute remaining unresolved shall:
 - (i) for workers, include the right to strike and to traditional collective bargaining; and
 - (ii) for employers, include traditional collective bargaining and remedies consistent with ILO instruments and other international laws;
- (f) Organisational rights for representative unions shall include:
 - (i) the right of access to employer premises for union purposes subject to agreed procedures;
 - (ii) the right to deduct trade union dues from members' wages
 - (iii) the right to elect trade union representatives;
 - (iv) the right to choose and appoint full time trade union officials;
 - (v) the right of trade union representatives to education and training leave; and
 - (vi) the right of the trade unions to disclosure of information;
- (g) Essential services and their parameters shall mutually be defined and agreed upon by governments, employers' associations and trade unions;
- (h) Due to the unique nature of essential services, appropriate and easily accessible machinery for quick resolution of disputes shall be put in place by governments, employers and trade unions; and
- (i) Freedom of association and collective bargaining rights shall apply to all areas, including export processing zones.⁷⁴⁴

It is clear from the SADC Charter of the Fundamental Social Rights that the region understands the paramount importance of the role played by the Conventions on Freedom of Association and the Right to Organise and Bargain Collectively in bringing

⁷⁴⁴ Charter of Fundamental Social Rights in SADC - Cornell Law School, available at www.lawschool.cornell.edu/.../SADC-Charter-of-Fundamental-Social-Rights-in-SADC (Date of use: 7 June 2016).

about social justice and fairness in the workplace. It is assumed that these provisions of the Charter are not restricted to workers with indefinite employment but that they also cover non-standard workers who are often vulnerable.⁷⁴⁵ Nevertheless, it remains to be seen how many states in Southern Africa actually implement these provisions, especially in relation to non-standard employment. This study argues that regional states need to do more to protect non-standard workers who are often victimised for demanding that their concerns be addressed. This may occur, for instance, in circumstances where non-standard workers are afraid to join a lawful strike for fear of losing their jobs or not having their employment contracts extended.⁷⁴⁶

Kahn-Freund states:

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination. However, much of the submission and subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'. The main object of labour law has always been, and we venture to say will always be, to be the countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.⁷⁴⁷

This well-known passage from Kahn-Freund provides a useful starting point for exploring the concepts of trade union and trade unionism. It is generally assumed that the employment relationship is inherently unequal. Furthermore, it is also assumed that the weaker party needs to be assisted by labour law. Throughout history, trade unions

⁷⁴⁵ Fourie (2008) 11(4) *PER* 1.

⁷⁴⁶ The ILO Supervisory Bodies highlighted how recourse to non-standard forms of work may have a detrimental impact on union rights and collective bargaining. For instance, the Committee of Experts on the Application of Convention and Recommendations (CEACR) reported that 'one of the main concerns indicated by trade union organizations is the negative impact of precarious forms of employment on trade union rights and labour protection, notably short-term temporary contracts repeatedly renewed; subcontracting, even by certain governments in their own public service to fulfil statutory permanent tasks; and the non-renewal of contracts for anti-union reasons. Some of these modalities often deprive workers' access to freedom of association and collective bargaining rights, particularly when they hide a real and permanent employment relationship. Some forms of precariousness can dissuade workers from trade union membership.' See CEACR *General Survey on the fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization* 386. The ILO Committee on Freedom of Association (CFA) observed how 'in certain circumstances, the renewal of fixed-term contracts for several years may alter the exercise of trade union rights,' See Chile – CFA, 368th Report, and Case No. 2884. Available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50002:0::NO:50002:P50002_COMPLAINT_TEXT_ID:3128139 (Date of use: 8 February 2017).

⁷⁴⁷ Kahn-Freund *Labour and the Law* 8.

have struggled for higher wages, security of tenure in the workplace (by shielding members from unfair dismissals), and safe and healthy working environments for their members. Trade unions in Southern Africa are no exceptions in the pursuit of these noble objectives. The principal instrument that has been used by trade unions, either at enterprise or national level, is collective bargaining. Trade unions are also increasingly engaging in lobbying government and their agencies for legislation that favours workers and their families.

The underlying motivation for forming or joining unions and undertaking collective bargaining is, therefore, to equalise or at least reduce the power imbalance between employers and workers. Unions are thus able to bring about equality, fairness, respect for human and workers' rights, and social and economic justice not only at the workplace but, equally importantly, in the broader society. In addition, there is an assumption that, individually, workers are too weak and not resourceful enough to demand their rights at the workplace. There is also recognition that there is strength in the unity and collectivism of workers.

Thus, trade unions emerged as a social response to the advent of industrialisation.⁷⁴⁸ Individual employees had to combine and consolidate their bargaining in order to influence employers and bargain for better wages and working conditions. Trade unions are the vessel for such collective power, and their main function has always been to bargain with employers in order to secure better working conditions for their members. As Adams states, '[i]ndeed collective bargaining is generally considered to be the major contemporary function of trade unions. The two institutions are so intimately linked that many writers speak of them as if they were a single interwoven phenomenon.'⁷⁴⁹

⁷⁴⁸ The ability of trade unions to properly fulfil this function in the post-industrial era began to be questioned as the 20th century was ending. As pointed in Wedderburn *et al Labour Law in the Post-Industrial Era* 87: 'In my view, the 20th century saw the rise and now sees the fall of the concept of collectivism. In the first decades of this century collectivises, unions, turned out to be a possibility to compensate for at least a great part of the inequality between employer and worker. Unions managed to bargain with employers and their organisations, and were able to reach more favourable working conditions than the worker could on his own. The blooming period of the unions lasted some decades during which workers themselves were very poorly trained, educated and skilled. In the meantime, however, the changing type of worker we meet now has less confidence in collectivises to defend his rights. A characteristic of the present time is the waning belief in the collective promotion of interests. The concept of collectivism is rapidly losing ground to that of individualism. The new type of worker thinks he can look after his own interests. He refrains from joining a union'

⁷⁴⁹ Adams (1993) 14 *Comparative Law Journal* 272.

Collective bargaining can take place at various levels and in different forms. It has been suggested that the systems of collective bargaining that have been adopted in different countries are a result of the historical and political influences present at the time that a particular country became industrialised.⁷⁵⁰ Where unions were organised along occupational or industrial lines, employers were forced to counter union power by joining forces. Multi-employer bargaining thus became the norm in Western Europe, Britain, Australia and New Zealand.⁷⁵¹ However, where larger employers' organisations emerged, these organisations were almost immediately able to counter union power at plant level without having to join forces with other employers. This was the case in the USA, Japan and Canada. Consequently, these countries have never possessed centralised systems of collective bargaining.⁷⁵² It is thus clear that the real importance of trade unions lies in their socio-economic and industrial power. They are, however, legal entities subject to the law and as such have a number of responsibilities as well as privileges.

5.3.7 Challenges in promoting collective bargaining for non-standard workers

One demanding challenge in advancing collective bargaining for non-standard workers is their restricted attachment to one workplace or employer, when compared with standard employees.⁷⁵³ When employees are employed by one employer for a long time, it is not difficult to represent their concerns collectively. Nevertheless, non-standard workers are either:

- (a) directly hired by employers but with unsteady and temporary employment, and as a result, association with a single employer is restricted, as in the case of part-time and fixed-term employees; or

⁷⁵⁰ Bamber & Sheldon 'Collective bargaining' in Blanpain *et al Comparative Labour Law and Industrial Relations in Industrialised Market Economies* 5.

⁷⁵¹ Bamber & Sheldon 'Collective bargaining' 130: 'In western Europe including Britain, and Australasia, multi-employer bargaining emerged as the predominant pattern largely because employers in the metal working industries were confronted with the challenge of national unions organised along occupational or industrial lines. In contrast, single employer bargaining emerged in the USA and Japan because the relatively large employers that had emerged at quite an early stage in both countries were able to exert pressure on unions to bargain at enterprise level'.

⁷⁵² *Ibid.*

⁷⁵³ Wills (2009) 34(4) *Labour Studies Journal* 443–444.

(b) not directly hired by the 'main' or 'actual' employer for whom services are provided, as in the case of a labour broker. In situations where employees move above sectors from one job to another, sectoral representation and unity become tough.⁷⁵⁴

Increasing numbers of workers presently engage in work, not as employees, but through individual commercial service contracts, including independent contractors. In developing states, particularly in the Southern African region, the size of the informal sector often renders it difficult for workers without any formal contractual relationships to work, as in the case of street vendors. Such attrition of orthodox direct employment has also led to a decrease in trade union membership and the fragmentation of collective bargaining.⁷⁵⁵ Some groups of workers are not protected by labour law or collective bargaining agreements, despite the fact that their rights appear to be guaranteed in theory; in practice, it is difficult for them to effectively exercise those rights.

Non-standard workers may also be reluctant to exercise their rights to organise and bargain collectively due to a fear of losing their jobs, even if they can exercise their rights in practice or in theory.⁷⁵⁶ Moreover, a fragmented workforce means that there are different divisions of workers in the same workplace, with different concerns and different contractual status, which can precipitate and heighten disputes among the workers, thereby hampering unity between workers. Furthermore, trade union members in standard employment may regard unorganised workers in non-standard employment as a peril.⁷⁵⁷ In some situations non-standard workers are simply beyond the scope of application of labour laws. As a result, legal frameworks are often unable to provide an effective enabling environment for non-standard workers to exercise collective rights.⁷⁵⁸

⁷⁵⁴ Bosch 337–356.

⁷⁵⁵ ILO *Policies and Regulation to Combat Precarious Employment: Background Paper, International Workers' Symposium on Policies and Regulations to Combat Precarious Employment* 4–11.

⁷⁵⁶ Service Employees International Union (SEIU) is a labour union representing almost 1.9 million workers in over 100 occupations in the United States and Canada. See <http://www.seiu1.org/2010/06/28/janitors%E2%80%99-new-contract-improves-jobs-strengthenshouston%E2%80%99s-economy/> (Date of use: 25 February 2017).

⁷⁵⁷ European Foundation for the Improvement of Living and Working Conditions (Eurofound) *Extension of Collective Bargaining Agreements in the EU*.

⁷⁵⁸ Industrial Relations in Europe (EIR) Commission Staff Working Paper, available at <http://www.eurofound.europa.eu/eiro/2002/12/study/tn0212102s.htm> (Date of use: 25 February 2017).

5.4 Freedom of association and non-standard workers

Freedom of association is a right in itself and is also an ‘enabling right’ as its exercise may be paramount in securing the effective discharge of other workers’ rights.⁷⁵⁹ Collective rights, such as the right to collective bargaining and the right to industrial action, are arguably some of the main instruments by means of which labour rights are protected. The right to strike, in particular, and especially when industrial activity is permitted for disputes of rights, may also be an important tool to implement employment rights.⁷⁶⁰ This is also the reason why particular awareness must be paid to the right to strike with regard to non-standard work. Undeniably, some non-standard workers, and particularly those in temporary relationships, regardless of the particular form of contract, may be unwilling to exercise some of the employment rights they could well be entitled to, for fear that their contract may not be renewed or extended when it terminates, should they participate in a strike.⁷⁶¹

This real or perceived threat of losing one’s employment may lead to serious disadvantages in the workplace, even when the applicable regulatory framework is not averse to non-standard workers.⁷⁶² The right to strike may be relevant in different and contrary ways in this regard. On the one hand, as a tool of the private implementation of rights, the right to industrial action can successfully ease the provision of employment rights for non-standard workers, without their having to return to individual implementation methods, such as complaints mechanisms.

⁷⁵⁹ O’Sullivan *et al* 2015 *ILJ* 222–245.

⁷⁶⁰ In jurisdictions where industrial action can be undertaken only to deal with conflicts of interests; however, a strike may be essential to secure rights for non-standard workers, such as ‘stabilisation’ plans.

⁷⁶¹ *Ibid.*

⁷⁶² See the discussion for cases in which unions had to reform their statutes to allow non-standard workers to join and had to adopt strategies to overcome hostility from existing members. See De Stefano *Smuggling-in Flexibility: Temporary Work Contracts and the ‘Implicit Threat’ Mechanisms: Reflections on a New European Path* 24, who argues that the first time Italian law meaningfully regulated parasubordinate relationships or ‘collaborazioni’, ‘only procedural rules were extended to them’. However, ‘the mere fact that the legislator mentioned them as self-employment relationships on a continuous and coordinated basis, distinct from traditional relationships of that kind, was interpreted by firms as the legislator’s consent to firm-integrated working activities not covered by the legal and collective protections of the employment relationship. In 1973, the first elements and practices of Post-Fordism were already starting to gain ground. This resulted in the ever-increasing use of “collaborazioni” as a cheaper alternative to permanent employment relationships [...] When, in 1995, modest social security contributions and employment tax were extended to “collaborazioni”, this, far from constituting a disincentive, fostered the idea that they were a low-cost substitute for employment, in consequence of which they became more popular than ever.’

On the other hand, ‘the right to strike and other collective bargaining rights, including the right to organise, in itself may be particularly affected by the “implicit threat” of losing one’s job.’⁷⁶³ This is an additional concern: while certain statutory redress may be available against dismissals emanating from industrial conflict, such redress may not be extended to non-standard workers in temporary work. This may also explain the difficulties in organising non-standard workers in trade unions, even though, in some instances, the failure to organise non-standard workers can be ascribed to acrimony and resistance of the ‘standard’ unionised labour force to permitting non-standard workers to join them or to represent them.⁷⁶⁴ In numerous countries,⁷⁶⁵ nonetheless, trade unions have taken measures to secure unionisation and protection, also through collective bargaining, for non-standard workers.⁷⁶⁶

However, perceived threats, potential flaws and problems in anti-retaliatory regulation can derail these attempts. The discourse on the need to reform existing regulations, so as to take into account the increased number of non-standard workers in labour markets, has commonly been regarded from an individual employment law viewpoint. In examining these limitations for the purposes of this study, we must take into account new trends in the economic landscape and important legal developments in the theoretical establishment of labour rights, especially the rights to collective bargaining and to take collective action.

5.4.1 The right to strike and non-standard workers

In South Africa, the LRA defines a strike as follows:

[A] strike means the partial or complete concerted refusal to work, or the retardation or obstruction of work by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between the employer and employee, and every reference to work in this definition includes overtime work, whether it is voluntary or compulsory ...⁷⁶⁷

⁷⁶³ Hatton (2014) 67 *ILR Review* 86–110.

⁷⁶⁴ Holdcroft *Meeting the Challenge of Precarious Work: A Workers’ Agenda* 120, reports that ‘the most important reason for precarious workers not joining trade unions stems from a legitimate fear of losing their job. Whenever unions conduct surveys to discover why such workers do not join unions, this is the principal reason given.’ See also Hatton (2014) 67 *ILR Review* 86–110.

⁷⁶⁵ For instance, South Africa, Namibia, Botswana, Swaziland, and Zambia.

⁷⁶⁶ Gumbrell-McCormick (2011) 42 *Industrial Relations Journal* 93–310.

⁷⁶⁷ Section 213 of the LRA.

In terms of South African law, the right to strike is viewed as a fundamental right.⁷⁶⁸ The Namibian Constitution provides for the right to strike as a fundamental right for the purpose of collective bargaining.⁷⁶⁹ In Malawi,⁷⁷⁰ the State shall take measures to ensure the right to withdraw labour and, in Mozambique, the right to strike is included in Labour Law No 8/98.⁷⁷¹ The ILO states that the right to strike can be derived from Conventions 87 and 98, which respectively regulate the rights to freedom of association and to bargain collectively. In the SADC region, Botswana,⁷⁷² Lesotho⁷⁷³ and South Africa,⁷⁷⁴ as members of the ILO, have ratified both Conventions 87 and 98. In all three states, their respective Constitution's guarantee the right to freedom of association and the right to organise and bargain collectively, subject to reasonable limitation. In this regard, the right to strike is a necessary means to advance social justice and the economic concerns of workers and trade unions, premised on the theory that trade unions should be free to organise their own activities and formulate their programmes to defend the concerns of their members.

Another debate in support of the right to strike is drawn from the institution of collective bargaining itself. Those who subscribe to this view argue that the right to strike is a necessary component of the collective bargaining process. The right of recourse to industrial action is regarded as a weapon that serves to maintain the equilibrium between labour and the concentrated power of capital. The exercise of the right to strike would necessarily have to be limited to the industrial action called for by the trade union, in support of a demand relating to the bargaining process.⁷⁷⁵ Furthermore, strike action is an essential element in the collective bargaining process because it ensures that an employer bargains more fairly.

Moreover, in the absence of a right to strike, unions have restricted bargaining power in the collective bargaining scenario.⁷⁷⁶ In *National Union of Metal Workers of SA & others v Bader Bop (Pty) Ltd*⁷⁷⁷ the Constitutional Court stated: 'The right to strike is

⁷⁶⁸ Section 23(2)(c) of the Constitution of the Republic of South Africa, 1996.

⁷⁶⁹ Namibian Labour Act of 2007.

⁷⁷⁰ Section 31(4) the Republic of *Malawi (Constitution) Act* 1995.

⁷⁷¹ See the Mozambican Labour Law No 8/98.

⁷⁷² Botswana ratified both Conventions on 22 December 1997.

⁷⁷³ Lesotho ratified both Conventions on 30 October 1966.

⁷⁷⁴ South Africa ratified both Conventions on 18 February 1996.

⁷⁷⁵ Myburgh (2004) 25 *ILJ* 962–976.

⁷⁷⁶ Bendix *Industrial Relations in South Africa* 522.

⁷⁷⁷ *National Union of Metal Workers of SA & others v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305.

essential to collective bargaining. It is what makes collective bargaining work. It is to the process of bargaining what an engine is to a motor vehicle.'

In *Stuttafords Departmental Stores Ltd v SA Clothing and Textile Workers Union*⁷⁷⁸ the purpose of a strike was described as follows:

The very reason why employees resort to strikes is to inflict economic harm on their employer so that the latter can accede to their demands. A strike is meant to subject an employer to such economic harm that he would consider that he would rather agree to the workers' demands than have his business harmed further by the strike.⁷⁷⁹

The author submits that this is a necessary right, particularly for non-standard workers. However, Basson contends that:

Once employees are organised in trade unions, they are able to conduct negotiations with the employer on a more or less equal footing. But effective collective bargaining can still take place only if the demands made by the trade union are accompanied by the capacity to embark upon collective action in the form of collective withdrawal of labour as a counterweight to the power of the employer to hire and fire employees or to close its plant.⁷⁸⁰

Some scholars⁷⁸¹ describe the right to strike as follows: 'The right to strike must not be seen in isolation but viewed and understood against the background and in the context of employees' right to associate and organise themselves and then to exercise the right to bargain collectively.'⁷⁸²

The Constitution of South Africa⁷⁸³ provides that every worker has the right to strike. Like any other constitutional right, the right to strike is not absolute. The LRA imposes a number of limitations on the right on strike, both substantive and procedural. These limitations are in general accordance with those recognised as legitimate by the ILO supervisory bodies.

⁷⁷⁸ *Stuttafords Departmental Stores Ltd v SA Clothing and Textile Workers Union* (2002) 22 ILJ (LAC) 422.

⁷⁷⁹ *Ibid.*

⁷⁸⁰ See Basson 1992 SA MercLJ 292.

⁷⁸¹ See Van Jaarsveld, Fourie & Olivier 'Labour law' in Joubert (ed) *The Law of South Africa*.

⁷⁸² *Ibid.*

⁷⁸³ Section 23(2)(c) of the Constitution.

The ILO has stated that although the right to strike is a fundamental or basic right, it is not an end in itself.⁷⁸⁴ Although Conventions 87 and 98 do not expressly recognise the right to strike, the ILO International Labour Conference has taken it for granted that the right exists, as indicated in the first reports on these Conventions dating as far back as 1947.

Accordingly, the right to strike is available to unions where the employer has refused to bargain collectively with the union or refuses to recognise the union, provided the strike is preceded by the normal procedures, in addition to an advisory award having been made.⁷⁸⁵ The right to strike is a very important negotiating tool for collective bargaining. In fact, collective bargaining would not be effective without the threat of strike action by workers.

However, non-standard workers are in a difficult situation as their ability to strike is limited by fear of retaliation in the form of dismissals. A strike involves a demand on the part of the strikers that the employer must do or refrain from doing something. When the employer does what is desired, the issue in dispute is resolved, and the rationale for the strike ends. Whether the rationale for a strike ends when the strike no longer serves the purpose of collective bargaining, and descends into mayhem designed to annihilate the employer, remains an open question.

The LRA clearly accepts the view that strikes are useful to collective bargaining and therefore the trustworthiness of the bargaining representatives is of prime importance. Thus strikers should benefit from considerable job security, provided they follow the rules laid down by the LRA which regulate collective bargaining. However, non-standard workers are often reluctant to exercise the right to strike.

5.5 Trade unionism defined

The term 'trade unionism' traditionally ascribes to worker organisations a particular philosophy and function for collective representation to protect and advance the interests of the workers as producers within the economic system.⁷⁸⁶ In turn, trade or labour unions can be described as 'organised groupings of wage and salary earners with the purpose of bringing to bear the economic, social and political interests of their

⁷⁸⁴ See ILO Freedom of Association and Collective Bargaining 61.

⁷⁸⁵ Section 64(2) of the LRA.

⁷⁸⁶ Millen *The Political Role of Labour in Developing Countries* 1.

members in labour relations and the political system'.⁷⁸⁷ The economic aspect has differed in different countries. In developed countries, for instance, political action is indirect and usually employed only as an extension of the economic function. Historically, however, European trade unions have developed political parties that purportedly represent the interests of the working class, such as the Labour Party in Britain or the Social Democratic parties in Europe. However, in African countries, political unionism is intense and consistent, often to a degree that seems to obscure the economic basis of their particular workplace concerns.⁷⁸⁸

The Webster International Dictionary defines a trade union as a voluntary association of people organised to further or maintain their rights, privileges and interests with respect to wages, hours and conditions of labour, efficiency, education, mutual insurance, customs and so forth.⁷⁸⁹ A trade union is an organisation whose principal objective is to regulate relations between employees and employers or employers' associations.

Webb defines a trade union as 'a continuous association of wage-earners for the purpose of maintaining or improving the conditions of their employment.'⁷⁹⁰ This definition, however, narrows the role of trade unions to collective bargaining; in fact, the role of a trade union goes beyond dealing with workplace issues and only representing wage earners. A trade union's influence in broader society is manifested in the power that they possess, which comes from collectivism.

Webster⁷⁹¹ identifies this power as structural power that workers have in the workplace. Webster contends that workers in the workplace can 'only improve their position if they can combine to put an end to the competition between themselves. Through combination they can turn their numbers, the source of their weakness, into a source of power. This is the essential purpose of a trade union.'⁷⁹² However, it should be noted that different circumstances call for different types of power, which may also dictate the different forms of unionism adopted by trade unions.

⁷⁸⁷ Schillinger *Trade Unions in Africa: Weak but Feared* 2.

⁷⁸⁸ Millen *The Political Role of Labour in Developing Countries* 1.

⁷⁸⁹ Webster *New International Dictionary/The English Language* 2684.

⁷⁹⁰ Webb *History of Trade Unionism* 1.

⁷⁹¹ Webster (1984) 9(8) *South African Labour Bulletin* 1-7.

⁷⁹² Webster (1984) 9(8) *South African Labour Bulletin* 29.

According to Salomon, trade unions may be defined as ‘any organisations whose membership consists of employees who seek to organise and represent their interests both in the workplace and society and, in particular, seek to regulate their employment relationship through the direct process of collective bargaining with management.’⁷⁹³

Trade unionism needs organisation. A trade union does not merely happen; it may be established by a few workers or interested persons but, thereafter, it must recruit members in order to strengthen its power base.

The involvement of trade unions in development is illustrated by the role that trade unions in developing countries played during the liberation struggles. Trade unions in developing countries that were previously colonised were key players in the democratisation process of their respective countries. Furthermore, some trade unions went beyond the fight for national liberation and became key developmental agents in their societies. The newly-elected governments expected the unions to continue with this role and to prioritise it after independence.⁷⁹⁴ It is within this context that the role of trade unions, by and large, has exceeded its initial limited scope, as defined by Webb.

5.5.1 Significance of joining a trade union

All around the world and throughout history, trade unions have fought for the protection and improvement of their members’ remuneration, workplace security, and health and safety. Trade unions in Southern Africa have also always pursued these goals. Collective bargaining has been the main tool used both at national level and industry level. Trade unions also continually engage in lobbying governments for laws that benefit workers.

The rationale for forming or joining trade unions and thus participating in collective bargaining is to balance or at least diminish the power inequality that exists between employers and workers. In this way, unions are able to uphold social and economic justice, equality, fairness and workers’ rights. This is premised on the acknowledgement that, individually, workers are weak and cannot demand their rights from their employer. There is further acknowledgment that workers will have power when they are unified and act as a collective.

⁷⁹³ Bendix *Industrial Relations in South Africa* 55.

⁷⁹⁴ Webster *Trade Unions and Political Parties in Africa: New Alliances, Strategies and Partnerships*.

Trade unions in Southern Africa have played a significant role in the socio-economic and political evolution of the region. Trade unions in Southern Africa were very active in the fight for independence in the region. These trade unions created the most vital platform for ordinary people to voice their concerns. After independence, trade unions in the Southern African region have been at the forefront of the fight for social and economic justice, democracy, equality, workers' rights, fairness and good governance. Nonetheless, the labour movement in Southern Africa has confronted many challenges in their endeavours to protect the rights of workers, mostly those who are vulnerable. This will be discussed in the paragraphs that follow.

As indicated above, the capacity of trade unions, especially in Southern Africa, to secure better remuneration and working conditions for their members is dwindling. This is linked to, among other things, the shrinking of the formal sector, from where unions have customarily drawn their membership, and the increasing numbers of informal employed workers.

Workers in non-standard forms of employment, such as fixed-term workers, temporary workers (hired through labour brokers) and part-time workers are often regarded as 'outsiders', who may not participate in union activity, or are viewed as a threat because they replace workers with standard jobs.⁷⁹⁵ Therefore, many non-standard workers find themselves in tenuous and vulnerable conditions. Non-standard workers may simply not be able to join a union, or they fear reprisal for joining a union, or they may not be able to afford union membership due to their unstable income.

However, in numerous countries, unions as social actors fight on behalf of the entire labour force and not only their members, and have become increasingly concerned with the situation of part-time, temporary and fixed-term workers. This is propelled by an interest in protecting vulnerable workers and a concern that the rise in non-standard work will undermine existing remuneration and working-time standards. Many unions have made it a priority to recruit such workers.⁷⁹⁶ For example, in the Netherlands, the Confederation of Dutch Trade Unions (FNV) identified sectors in which workers face particular risks as a consequence of non-standard forms of work, including 'the postal

⁷⁹⁵ Crush *et al* (2001) 27(1) *Journal of Southern African Studies* 5–31.

⁷⁹⁶ Gumbrell-McCormick 2011 *International Relations Journal* 293–310. See also Serrano (ed) *Between Flexibility and Security: The Rise of Non-standard Employment in Selected ASEAN Countries*.

sector, the cleaning sector, meat processing, domestic aid, the taxi sector, construction and temporary agency work, and actively recruited members in these sectors.⁷⁹⁷

Furthermore, new unions have emerged to represent the special concerns of non-standard workers. In some cases, they have subsequently joined national federations. For instance, in the Republic of Korea, the Korean Federation of Construction Industry Trade Unions (KFCITU) which 'represents construction machinery operators (tower crane operators, concrete mixer truck drivers and dump truck drivers, and so on) grew out of a merger between the specialized National Association of Construction Day Labourers Union (initially a union of day labourers) and the Korean Federation of Construction Trade Unions.'⁷⁹⁸

In West Africa, the refusal of employers in the oil industry to negotiate the terms and conditions of employment of contract workers with the regular union resulted in the creation of contract workers' branches to represent these workers.⁷⁹⁹ Despite the challenges involved in organising workers in non-standard work and representing their collective concerns,⁸⁰⁰ trade unions have developed strategies to deal with the specific vulnerabilities of these workers. These strategies include 'lobbying for changes in laws and policies; various forms of coordinated action involving the building of alliances with other organizations; and collective bargaining.'⁸⁰¹

Furthermore, job security is increasingly becoming a significant factor for joining a trade union. Presently, the orthodox full-time indefinite employment relationship is not always the standard form of employment. Today, the typical employment relationship includes part-time work temporary employment, subcontracting and 'independent contracting'.⁸⁰² In addition to this, unfavourable market conditions such as those that prevail in Southern Africa nowadays, together with unemployment, result in workers

⁷⁹⁷ Keune (2013) 5(1) *International Journal of Labour Research* 79–96.

⁷⁹⁸ Yun A Case Study of Precarious Workers in the South Korean Construction Industry.

⁷⁹⁹ Aye Combating Precarious Work in the Nigerian Oil and Gas Industry: 'NUPENGASSAN' and the Struggle for Transition from Informality to Formal Employment and Labour Relations.

⁸⁰⁰ Belkacem et al N° 83 - 2014/4 *La Revue de L' Ires* 3–28.

⁸⁰¹ Fine (2015) 154(1) *International Labour Review* 15–26.

⁸⁰² See ILO *Non-standard Employment around the World: Understanding Challenges and Shaping Prospects* Available at www.ilo.org/wcmsp5/groups/public/dgreports/.../wcms_534326 (Date of use: 17 January 2017).

turning to trade unions to effect a more secure job environment.⁸⁰³ As has been pointed out, the existence of a trade union increases the power base of employees. Some scholars⁸⁰⁴ have confirmed that the issue of job insecurity is significant enough to influence the propensity to unionise, and they further suggest that ‘the overall impact of trade unions is to reduce the proportion of workers who are insecure in their jobs.’⁸⁰⁵

It is clear that, apart from the legal rights of freedom of association and of trade unions to organise to acquire recognition in the workplace as representatives of the workers, the trade union mobilisation process is built on the principle of collectivism. Workers generally mobilise themselves because they believe that with a ‘collective voice’, in relation to their employer, they will have more power to address perceptions of injustice or feelings of dissatisfaction in their current employment situation.⁸⁰⁶

Workers also join trade unions because such a membership yields utility. If a worker does a cost/benefit analysis and finds that, in all probability, it will be worthwhile to join a trade union, he or she would almost certainly become a member. Part of this cost/benefit analysis entails an analysis of the personal benefits that may be derived from membership, which generally include the fact that the trade union will bargain for better wage increases and improved working conditions. The economic dimension is usually said to be at the heart of the utility theory, especially in Southern Africa, with its huge wealth discrepancies.

In addition, there is the question of the workers’ political ideologies. Haberfield⁸⁰⁷ is of the view that workers join a trade union because of their political convictions. In many countries, labour unions are affiliated to political parties. In Southern Africa, the beginnings of many trade unions can be traced back to their nations’ liberation struggle for national independence.⁸⁰⁸ In many instances, organised workers were the most visible and efficient social forces campaigning for independence and social transformation. The roles played by the National Union of Namibian Workers (NUNW)

⁸⁰³ Bender & Sloane describe job insecurity as a situation where employees experience a sense of powerlessness to maintain desired continuity in a job situation. See *Trade Union Membership, Tenure and the Level of Job Security* 123–124.

⁸⁰⁴ Ibid 134.

⁸⁰⁵ Ibid.

⁸⁰⁶ Nel *et al* *South African Employment Relations: Theory and Practice* 48.

⁸⁰⁷ Haberfield (1995) 48(4) *Industrial and Labour Relations Review* 658.

⁸⁰⁸ Jauch *Building a Regional Labour Movement: The Southern Africa Trade Union Co-ordination Council*.

and the Congress of South African Trade Unions (COSATU) must be noted in this regard. The close relationships between liberation movements and trade unions in certain parts of Southern Africa can still be seen currently – especially in those states that acquired their independence not too long ago, such as Namibia and South Africa.

In other cases, however:

[Trade unions that] once were close allies of liberation movements found themselves in the forefront of advocating for democracy and thus openly challenged the ruling parties of the day. Because of their large social base, trade unions in Zambia and Zimbabwe played a crucial role in forming political opposition parties that overthrew former liberation movements in power (as occurred in Zambia) or presented a serious political challenge (as in Zimbabwe).⁸⁰⁹

Moreover, trade unions in the SADC region are not identical and differ substantially in terms of organisational ability, membership base and discernment. In countries such as Botswana, Malawi and Mozambique, for instance, union federations were established at the initiative of the state and barely play the role of an autonomous working-class organisation. Nonetheless, trade unions are essential for the protection of non-standard employees because the concerns and voices of these vulnerable employees cannot be heard unless they are members of a trade union.

5.5.2 Unions and non-standard workers' attitudes and interest

The question that comes to mind is why union membership would be noticeably lower among non-standard workers compared to standard workers. One answer would be that the compositional shift in employment is related to a change in the attitude of workers, which makes them less willing to join a trade union.⁸¹⁰ Workers' attitudes towards trade unions, particularly among the youth, may have changed because of an increasing individualistic orientation, resulting in less interest in union representation, and thus eroding the basis for collective mobilisation and organisation. It is also argued that interests within unions are more diverse and divided nowadays than during the period when standard employees formed the core of union membership. Unions have

⁸⁰⁹ Ibid.

⁸¹⁰ Gallagher & Sverke (2005) 26(2) *Economic & Industrial Democracy* 195.

long been inclined to recruit and represent predominantly male manual workers who are employed in the manufacturing and public sectors.⁸¹¹

Trade unions are inclined to ignore or oppose numerous non-standard types of employment, especially 'own-account' self-employment, fearing that these types of employment will erode existing rewards and working conditions. Subsidiary employment and full-time work on indefinite contracts are regarded as the standard. Accordingly, non-standard workers have 'blamed' the unions for primarily representing the concerns of the 'insiders' and not considering their specific concerns in collective bargaining arrangements, employment regulations, or bargaining on social insurance coverage.⁸¹² Thus, because of the absence of comprehensive representation within the unions for non-standard workers, the conventional wisdom is that they are less concerned with union membership.

In addition, it is important to note that non-standard types of employment are not an entirely new phenomenon but might even 'be more representative of return to contractual conditions that were common both before and in the early stages of industrialisation.'⁸¹³ Trade unions have always had the onerous task of coordinating and reuniting the different concerns of opposing groups of workers as these arise from their various positions in the labour market. Presently, most unions have accepted, although to differing degrees, the specific needs of non-standard workers. They have also acknowledged, though somewhat unenthusiastically, that non-standard work may represent not only an employment opportunity but also a stepping-stone into regular employment, particularly for younger and female workers.

Furthermore, new studies cast serious doubts on the argument that non-standard workers are reluctant to join unions. For example, a huge majority of workers in the 'lower services', often related to non-standard work, recognise a strong need for trade unions to protect their welfare, while employees in 'higher service' occupations also maintain positive attitudes towards unions.⁸¹⁴

⁸¹¹ James 'Trade unions and non-standard employment' in Harcourt & Wood (eds) *Trade Unions and Democracy: Strategies and Perspectives* 82–104.

⁸¹² Ebbinghaus 'Trade union movements in post-industrial welfare states opening up to new social interests?' in Armingeon & Bonoli (eds) *The Politics of Post-Industrial Welfare States: Adapting Post War Social Policies to New Social Risks* 123–143.

⁸¹³ Gallagher & Sverke (2005) 26(2) *Economic & Industrial Democracy* 182.

⁸¹⁴ D'Art & Turner (2008) 29(2) *Economic and Industrial Democracy* 179.

On the whole, the positive attitudes of non-standard workers towards trade unions indicate that there is a significant demand for union membership that is unsatisfied, and therefore there is potential for an increase in membership. Moreover, one should bear in mind that some of these workers may have experienced collective organisation in the course of previous employment (on a standard contract basis) and are therefore likely to be more accepting of a collective orientation than others, among whom union membership is less well-known. Hence, the under-representation of non-standard workers in unions arguably mirrors, in the main, structural constraints or barriers encountered by trade unions in organising these workers.⁸¹⁵

Moreover, union organising costs are higher for non-standard workers. They are often more difficult to contact directly, compared to their counterparts in standard employment. However, in some economic sectors where large enterprises are dominant, non-standard workers are mainly confined to small workplaces, with a high rate of labour turnover, as is the case in some Southern African countries.

5.5.3 Trade union approaches to non-standard work

Trade union recruitment strategies have made little impact, especially where non-standard workers are not seen to be in direct competition with full-time, permanent workers.⁸¹⁶ Many formidable barriers impede the recruitment and retention of non-standard workers. These barriers include:

- (a) their varied, unsocial and limited hours of employment;
- (b) the distinctive, often unfamiliar problems associated with non-standard employment;
- (c) the extensive demands on the time of organisers make it almost inevitable that collective issues will gain precedence over individual complaints;
- (d) the reluctance by some non-standard employees to become union members for fear of victimisation by employers;
- (e) the divergence in the needs and interests of standard and non-standard employees;
- (f) an ambivalence towards trade unions due to their perceived reluctance to cater for the needs of non-standard workers;
- (g) union dues are often viewed as an excessive deduction from meagre wages; and
- (h) high labour turn-over undermines the continuity of union structures in the workplace.⁸¹⁷

⁸¹⁵ Mackenzie (2010) 30 *Economic and Industrial Democracy* 539.

⁸¹⁶ Klerck 'Trade union responses to the "flexible" workforce in Namibia' (2002) 6(2) *African Sociological Review* 114.

⁸¹⁷ *Ibid* 114–115.

The effective organisation and representation of non-standard employees raises a number of notable and broader concerns, which include the following:

- (a) the difficulties associated with the proper inspection of non-standard employment;
- (b) the creation of a second-class workforce undermines the foundations of collective industrial relations and dilutes the social values and legitimacy of labour law;
- (c) unfair competition from non-standard employment threatens formal employment;
- (d) the individualised forms of conflict associated with non-standard labour are not readily amenable to established dispute-resolution procedures;
- (e) traditional forms of employee representation are often inadequate to meet the distinctive needs of non-standard workers;
- (f) the established mechanisms for employee participation are usually unsuited to non-standard employment;
- (g) the social security systems designed to cover the risks inherent in regular, full-time employments are ill-suited to precarious and intermittent forms of employment; and
- (h) complications often arise in determining which employer is liable for the health and safety and other statutory entitlements of non-standard workers in cases that involve triangular employment relationships.⁸¹⁸

The different ways in which unions can address the challenges above include:

- (a) research and advocacy: give a voice to workers' experiences of non-standard labour through a serious research programme;
- (b) alternative conceptions of efficiency: challenge productivity measures that are defined purely by technical and market imperatives by reasserting the social purpose of work;
- (c) occupational health and safety: unions can reinforce their identity as collectives by highlighting the health and safety problems faced by non-standard workers;
- (d) career structures: mobilise union members to oppose the fragmentation of work and to develop strategies to ensure that workers are able to acquire training and experience and have career options;
- (e) staffing levels: since every job shed in the name of 'flexibility' is another source of division, unions need to redevelop their role as defenders of jobs through policies aimed at redistributing work, combating unemployment, and strengthening the social regulation of the labour market;

⁸¹⁸ Ibid 98–129.

- (f) industrial democracy: union campaigns against outsourcing, for example, would test the extent to which management's prerogative was genuinely open to joint regulation; and
- (g) union education and vocational training: through their own education work for members and through their involvement in training programmes, unions need to campaign for a wider definition of knowledge that extends beyond narrow technical requirements to include a critical reflection of the nature of work in a capitalist society.⁸¹⁹

There is clearly a need to move beyond the neat dichotomy of 'traditional' versus 'new' in accounting for the variety of trade union responses to the casualisation of work. Common to a great deal of the literature on non-standard employment is the claim that unions can adopt one of four approaches towards non-standard workers: (a) ignore them; (b) exclude and oppose them; (c) limit their numbers and regulate them; and (d) recruit and integrate them.⁸²⁰ This customary classification of union responses fails to account for the interaction between different approaches and cannot explain why a trade union adopts a particular strategic orientation. The implication that unions simply 'choose' a particular orientation or approach ignores the structural determination of viable options and downplays the contradictions that may arise between structure and strategy.⁸²¹

The 'traditional' trade union approach towards non-standard employment has been centred on the defence of full-time employment and hostility towards all non-standard forms of employment. This is because unions seek, among other things, to increase job quality and to protect the job security of their members.⁸²² Since most, if not all, unions consist of members who are engaged in standard employment contracts, the unions seek to resist the use of non-standard workers who are seen as a threat to unionised workers.⁸²³ Unions view the growth of flexible employment as a barrier to their efforts to improve the conditions of standard employees, and the rights and

⁸¹⁹ Ibid 114.

⁸²⁰ Ibid.

⁸²¹ Ibid.

⁸²² Olsen & Kalleberg 'Non-standard work in two different employment regimes: Norway and the United States' (2004) 18(2) *Work, Employment & Society* 328.

⁸²³ Ibid.

benefits that have been inherited by unions from past struggles are seen to be compromised.⁸²⁴ This poses a threat to the quality of working life in the workplace.

Furthermore, Klerck⁸²⁵ notes that since union membership experienced a decline with the expansion of a flexible labour market, the use of non-standard labour is seen as a symptom of employer greed, a threat to the numbers and conditions of permanent employment, and an attempt to undermine the unions. Therefore, all non-standard employment is in the first instance rejected, irrespective of its employment conditions, whether it is voluntary or not, and whether it is structured in terms of permanent or casual status.⁸²⁶ Non-standard workers may not feel represented by unions who reject flexible employment, and they will be discouraged from joining such unions. This has contributed to the decline in trade union membership across several labour markets globally.⁸²⁷

Generally, the way in which trade unions respond to non-standard employment can be categorised into the typologies of unions' strategic choices. These strategies are diverse and include such options as exclusion, where the union seeks to exclude non-standard workers from employment in organisations and workplaces where unions have representational rights.⁸²⁸ This strategy is not a new phenomenon since unions have historically opposed the growth of such employment forms.

Furthermore, the exclusion strategy reveals the presence of a fundamental belief of unions that non-standard work presents a threat to traditional jobs.⁸²⁹ This can be seen in the social distance that tends to exist between standard workers and non-standard workers.⁸³⁰ The defining feature of this social distance is the identification of opposing interests between standard workers and non-standard workers, and a determination to protect the jobs and pay levels of the standard employees. However, exclusion, as a strategy, may have the effect of weakening the unions. This is because employers

⁸²⁴ Campbell *Trade Unions and Temporary Employment: New Initiatives in Regulation and Representation*.

⁸²⁵ Klerck (2002) 6(2) *African Sociological Review* 110.

⁸²⁶ Ibid.

⁸²⁷ Campbell *Trade Unions and Temporary Employment: New Initiatives in Regulation and Representation*.

⁸²⁸ Gallagher 'Contingent work arrangements' in Blyton et al (eds) *The Sage Handbook of Industrial Relations* 485.

⁸²⁹ Ibid.

⁸³⁰ Heery & Abbot 'Trade unions and the insecure workforce' in Heery & Salmon (eds) *The Insecure Workforce* 158.

are increasingly leaning towards employing more non-standard workers, so the protected standard workforce is dwindling and is being replaced by unprotected, non-standard workers.

Unions may also adopt a strategy of recognising the representational needs of non-standard workers and may assist in providing collective access to benefits to non-standard workers. This is what Heery and Abbot⁸³¹ refer to as the servicing approach. Attempts of this kind, which are aimed at drawing non-standard workers into trade unionism through the provision of individual services, may, however, present some difficulties. This is because collective representation may be difficult to achieve for non-standard workers, due to the varied nature of their employment contracts and the differences in non-standard employment that exist in different sectors.

A third approach to non-standard employment and the insecurities that it presents is the formation of partnerships between unions and management. These are entered into in an attempt to provide existing union members with guarantees of future employment through 'labour - 24 management partnerships'.⁸³² The degree of employment security offered by partnerships is said to vary, and examples of such agreements include abolishing the practice of laying off employees during downturns and providing guarantees that workforce reduction will not be achieved by compulsory redundancies.⁸³³

Unions may also attempt to influence government policy and secure changes in employment law in order to conserve the jobs of existing union members and reduce the insecurities experienced by non-standard workers.⁸³⁴ Such changes are aimed at promoting worker security. The primary objective of this exercise is to extend the employment rights enjoyed by standard employees to non-standard workers.

Lastly, unions may adopt the approach of assuming the characteristics of a social movement,⁸³⁵ and maintain that a defining feature of social movements is that they seek to mobilise members and supporters in pursuit of justice. Thus a fifth response has been to mobilise union members, other workers and wider public opinion against

⁸³¹ Ibid 159.

⁸³² Ibid 160.

⁸³³ Ibid.

⁸³⁴ Ibid 161.

⁸³⁵ Ibid 163.

injustice at work. Social movement unionism is described as having two connected aspects: on the one hand, there are attempts to re-create trade unions as social movements, while on the other hand, there are attempts to submerge trade unions within a broader social movement.

The first aspect of social unionism can be seen in attempts to extend trade unionism to non-standard workers through aggressive organising campaigns.⁸³⁶ The second aspect is the development of labour community alliances that seek to draw upon the resources of the community in pursuing union goals, while simultaneously developing a broader notion of union purpose that embraces community and environmental objectives alongside improvements in the world of work.⁸³⁷

Regardless of the strategy that unions may adopt, the way in which they are structured and organised plays a significant role in determining whether they will be able to cope with the dramatic changes in the labour market. The structure of the union refers to the representation basis upon which the union is premised.⁸³⁸ This refers to the identification of unions as craft, industrial, or social unions. The organisation of a union refers to the institutions and processes that form a union's internal administrative, representative and authority systems.⁸³⁹

Representation refers to the extent that union members control their union directly or through representative government, such as union structures; administration refers to how efficient and effective unions are in achieving their goals.⁸⁴⁰ In terms of the representation debate, most trade unions are said to have a strong democratic tradition and members are able to influence the decisions taken at workplace or shop floor level, which are filtered through to the highest decision-making bodies. Given this scenario, one may assume that members should be able to lobby for the organisation and representation of non-standard workers. However, given the tensions between standard (and unionised) employees and non-standard (and un-unionised) workers, it may be difficult for the unions to decide to organise non-standard workers.

⁸³⁶ Ibid.

⁸³⁷ Ibid 164–165.

⁸³⁸ Fiorito & Jarley 'Trade union morphology' in Blyton et al (eds) *The Sage Handbook of Industrial Relations* 190.

⁸³⁹ Klerck (2002) 6(2) *African Sociological Review* 123; Fiorito & Jarley 'Trade union morphology' 193.

⁸⁴⁰ See De Stefano *Smuggling-in Flexibility: Temporary Work Contracts and the 'Implicit threat' Mechanisms: Reflections on a New European Path* 24.

In terms of the administration aspect of internal structure, trade unions can be regarded as having two goals: to represent the interests of their members (rationality of representation) and to develop an administrative system that is capable of carrying out their functions effectively (rationality of administration).⁸⁴¹ Rationality of administration is geared towards safeguarding the control and authority of the leadership and emphasises downward communication, while rationality of representation is geared towards safeguarding the control and authority of the membership and emphasises the upward communication of instructions.⁸⁴² What has been noted is that as unions grow numerically and ideologically, the administrative system tends to become more formalised and bureaucratic, while the representative system tends to have difficulties in ensuring that the views of the different groups of workers are represented in the decision-making processes.⁸⁴³

The idea of a privileged elite of working class leaders who use the unions to further their own sectional interests is reflected in Michel's notion of the 'iron law of oligarchy',⁸⁴⁴ which means that the leadership acquires dominance over the membership through their control of administration, a monopoly over technical expertise, and charismatic authority.⁸⁴⁵ This can lead to a situation where the union's bureaucracy develops interests separate from those of the membership, leading to conflict over what the goals and methods of the union should be.⁸⁴⁶ It is argued that in these circumstances the demands of administrative efficiency may override the requirements of democratic representation.⁸⁴⁷

Furthermore, in such circumstances, the rigid organisational model associated with the rationality of administration will always be an impediment to union change in the face of a rapidly evolving labour market. This may pose a challenge to unions operating in workplaces where there is a concerted effort to engage non-standard workers because of the fact that, as the numbers of workers on standard employment contracts decrease, so does union membership.

⁸⁴¹ Klerck (2002) 6(2) *African Sociological Review* 111.

⁸⁴² *Ibid.*

⁸⁴³ *Ibid.*

⁸⁴⁴ Michels *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy*, 1915.

⁸⁴⁵ Klerck (2002) 6(2) *African Sociological Review* 112.

⁸⁴⁶ *Ibid.*

⁸⁴⁷ *Ibid.*

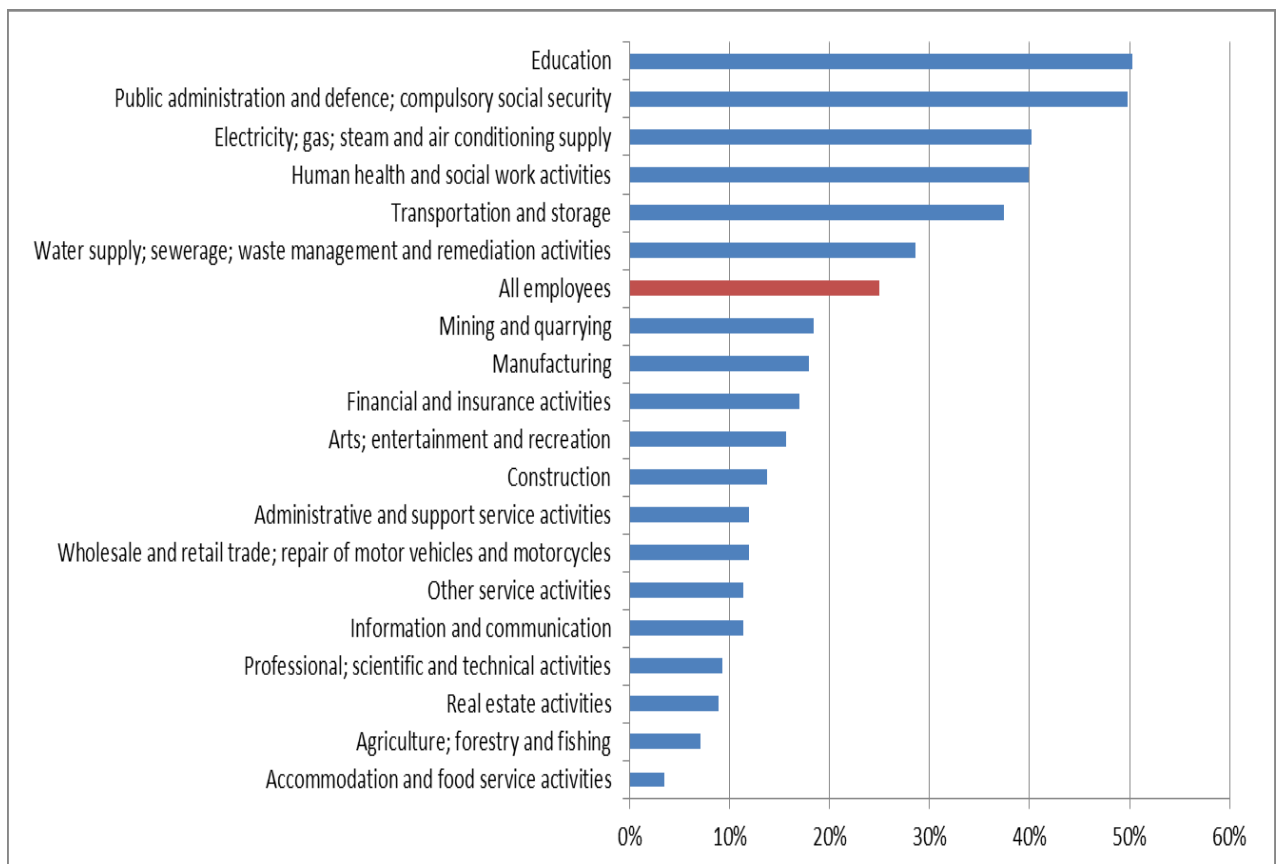
This notion of the iron law of oligarchy has been criticised as portraying an image of undemocratic, militant and politically motivated union leadership that forces ordinary members to accept radical policies that they do not actually support.⁸⁴⁸ Furthermore, an uncritical acceptance of the iron law of oligarchy theory entails a disregard of the importance of the democracy that unions seek to maintain throughout organisational structures.

The role of trade unions has changed significantly over the past three decades. Global competition, a growing outsourcing trend, legal constraints, and employer-sponsored forms of employee participation have combined to cause a significant fall in union membership and the use of collective bargaining. The coming decade promises to be equally challenging for the trade union movement. Nonetheless, how trade unions respond to the challenges and opportunities over the next few years will be crucial in determining their level of influence at work in the future.

Trade unions play a significant role in directly shaping people's working lives in Southern Africa and the world, although their influence in this respect has diminished in recent times. The recent decline in trade union membership is a worldwide phenomenon. The proportion of workers who are members of unions fell in the first decade of the 21st century. However, this decline was modest, and far less dramatic than the decline of the preceding two decades. For instance, in Britain, the following factors have all contributed to a sharp decline in membership: the exposure of firms and industries to greater market pressures, growing outsourcing trends, a growth in non-standard employment, employer-sponsored forms of participation and representation, and the imposition of legal constraints on unions to recruit, organise, collectively bargain and take industrial action.

⁸⁴⁸ Ibid.

Figure 4: Trade union density by industry, 2014: Percentage of UK employees who are trade union members



Source: Labour Force Survey, Office for National Statistics, page 12.

Figure 4 indicates that between 1995 and 2014, the likelihood of employees being trade union members has decreased or stagnated across all sectors, with the exception of the ‘wholesale, retail trade and motor repair’ sector, which rose 1 percentage point between 1995 and 2014 from 11% to 12%. Since 1995, the sharpest fall in trade union membership has been in ‘electricity, gas, steam and air conditioning supply’, down 32 percentage points from 72% in 1995 to 40% in 2014.

As Gladstone⁸⁴⁹ states:

The changing patterns of world production, the decline in the industrialised economies of basic manufacturing and extractive industries and the changed employment patterns between major economic sectors, as well as continuing and even more revolutionary technological developments, and a change in the nature, composition and aspirations

⁸⁴⁹ Gladstone ‘Reflections on the evolving environment of industrial relations’ in Blanpain & Weiss *Changing Industrial Relations and Modernisation of Labour Law* 151.

of the labour force are all exercising and will continue to exercise pressures and constraints on industrial relations systems. These pressures are considerable in respect of the industrial relations actors - in particular the trade unions.

These changes have a pivotal effect on the collective organisation of labour relations and on the legal mechanisms governing worker representation, action, and collective bargaining.⁸⁵⁰

As indicated above, there are numerous reasons for the global trend in trade union decline.⁸⁵¹ To a large extent, union power during the industrial era was a result of historically specific and socio-economic conditions. Conditions characterising the industrial era were particularly conducive to the establishment and success of centralised systems of collective bargaining.⁸⁵²

Nevertheless, globalisation and technological progress have changed all of this: the consequence is the diminished relevance of the previous rationale of trade unions, namely to bargain collectively.⁸⁵³ Accordingly, collective bargaining has been decentralised and the contract of employment individualised in numerous industrialised countries.⁸⁵⁴

5.5.4 Trade unions in Southern Africa

In Southern African labour law structures, tripartism takes central stage. The structures rely on the existence of comparatively successful and efficient trade union movements. Nevertheless, trade unions in many Southern African states suffer from the consequences of repression and control.⁸⁵⁵ A great number of trade unions have only recently been able to function and operate openly.

At present, despite the extensive formal acknowledgement of the importance of freedom of association, and trade unions, their policies remain under substantial

⁸⁵⁰ Supiot *Beyond Employment Changes in Work and the Future of Labour Law in Europe* 94.

⁸⁵¹ Ibid.

⁸⁵² Ibid.

⁸⁵³ Adams 1993 *Comparative Labour Law Journal* 272.

⁸⁵⁴ Vettori *Alternative Means to Regulate the Employment Relationship in the Changing World of Work* chapters 5 and 6.

⁸⁵⁵ Takirambudde and Molokomme, for example, attribute the 'underdeveloped' nature of the collective bargaining system in the United Republic of Tanzania to the legacy of a regime designed to minimise the independence of the social partners. See Takirambudde & Molokomme 'Employment and industrial relations law in Botswana' in Kalula & Woolfrey (eds) *Southern African Labour Legislation: Commentaries and Selected Statutes*.

government intervention. Many Southern African states, which have ratified the two core ILO Conventions regarding freedom of association and the right to bargain collectively, have however failed to meet the requirements of the ILO.⁸⁵⁶ Malawi has been criticised for its brutal repression of workers' protest marches and because it accepts employers' conduct that is in direct conflict with trade unions' policies.⁸⁵⁷

The circumstances in Malawi, without doubt, demonstrate the challenges faced by trade unions as a result of continuous state intrusion. Dzimbiri argues that the transition to democracy in Malawi in the 1990s, although leading to an increase in trade unions and improvement of the legal framework,⁸⁵⁸ has not, in practice, led to freedom of association. During the decades of dictatorship, the government controlled and marginalised trade unions through administrative, political and legal means. In the democratic era, it has adopted more 'diplomatic' forms of hostility towards trade unions.

Dzimbiri⁸⁵⁹ also argues that the current government's hostility towards the labour movement manifests itself in 'divide-and-rule' tactics: the state sponsors 'splinter unions', manipulates union leaders using bribes, promotes or transfers other union leaders to other parts of the country, and uses 'hide-and-seek' tactics, prevaricating between recognising trade union rights, on the one hand, and interfering in the labour movement and using the state apparatus to suppress labour rights, on the other.⁸⁶⁰ For Dzimbiri, the continuing violations of trade union rights in Malawi raise the question of how externally induced changes have become institutionalised and sustainable in practice. In this situation, it is unsurprising that trade unions struggle with limited

⁸⁵⁶ See the numerous individual observations of the CEACR, available at <http://www.ilo.org/ilolex/english/index.htm> (Date of use: 5 March 2016).

⁸⁵⁷ CEACR *Individual Observation concerning Freedom of Association and Protection of the Right to Organise Convention 87 of 1948, Malawi* (2006) and CEACR *Individual Observation concerning Right to Organise and Collective Bargaining Convention 98 of 1949, Malawi* (2006).

⁸⁵⁸ Dzimbiri (2005) 30(4) *Africa Development* 77. In Malawi, individual and collective labour rights are formally recognised in the 1994 Constitution, the Labour Relations Act, 1996 and the Employment Act, 2000.

⁸⁵⁹ *Ibid.*

⁸⁶⁰ This observation is supported by the conclusion of a human rights and employment study commissioned by the Ministry of Labour in 2000 to assess the effectiveness of freedom of association and collective bargaining. The study observed that the State constrained freedom of association because it 'took with one hand what the other gave': Ministry of Labour *Human Rights and Employment Report*, as cited in Dzimbiri *The State and Labour Control in Malawi: Continuities and Discontinuities between One-party and Multiparty Systems* 77.

organisational, financial and administrative capability, and with a lack of leadership and research skills.⁸⁶¹

In addition, a lack of capacity among trade unions limits the extent to which they can effectively protect and serve members' interests at the workplace level. There is evidence from Namibia that, despite the existence of a labour law framework that depends to a large extent on collective bargaining, parties are often not sufficiently familiar with the requirements of the labour laws.⁸⁶² The frequency of illegal strikes in Namibia in the 1990s suggests that trade unions may be ignorant of the legal requirements for industrial action.⁸⁶³ The limited capacity of trade unions also affects the extent to which they can perform their role within the formal peak-level tripartite structures, particularly in the formulation of labour laws and economic policy.⁸⁶⁴

Finally, a weak trade union movement also impacts on the enforcement of labour laws. Only trade unions with sufficient capacity can play an important role in monitoring compliance with labour laws. The capacity of trade unions to perform these various roles depends, in many respects, on whether they can achieve a sufficient level of union density to serve as a base from which they might have some influence.

However, unions frequently find it difficult to achieve significant levels of union density in Southern African labour markets. A key challenge for unions in this respect is the spread of informalisation, casualisation and externalisation: all lead to non-standard work relationships, and these workers are difficult to organise.⁸⁶⁵ The declining level of formal employment in most labour markets in Southern Africa poses further challenges, as do retrenchments and other structural factors that cause a loss of employment. Where unions do not adopt flexible strategies to respond to these labour market realities, their capacity to attract members and to represent them is significantly

⁸⁶¹ Bauer *Labour and Democracy in Namibia, 1971–1996*; Murray & Wood 'The Namibian trade union movement: Trends, practices and shop floor perception' in Klerck, Murray & Sycholt (eds) *Continuity and Change: Labour Relations in Independent Namibia*.

⁸⁶² Fenwick 'Labour law reform in Namibia: Transplant or implant?' in Lindsey (ed) *Law Reform in Developing and Transitional States*.

⁸⁶³ Olivier (2002) 18(4) *International Journal of Comparative Labour Law and Industrial Relations* 377.

⁸⁶⁴ Olivier & Kalula *Social Protection in SADC: Developing an Integrated and Inclusive Framework: South Africa* 8.

⁸⁶⁵ Fenwick *et al* 'Labour law: A Southern African perspective' in Tekle (ed) *Labour Law and Worker Protection in Developing Countries*.

diminished,⁸⁶⁶ particularly in relation to non-standard workers, who are often vulnerable.

Another institutional factor affecting the capacity of trade unions in some Southern African states is their close affiliation with ruling political parties. Such relationships are largely the legacy of co-operation between the two organisations during the struggle for independence. For instance, in Namibia, the National Union of Namibian Workers (NUNW) continues to be affiliated with the South-West People's Organisation (SWAPO), the ruling party. In South Africa, the Congress of South African Trade Unions (COSATU) is allied with the African National Congress (ANC) and the South African Communist Party (SACP), and in Mozambique, the Organisation of Mozambican Workers (OTM) is still closely associated with Frelimo. Being closely affiliated with the ruling party is not necessarily a problem for the trade union movement or for workers. Indeed, such alliances may facilitate union input into government and thus influence the policy-making process in favour of organised labour.⁸⁶⁷

However, these affiliations may also mean that workers' interests are easily subordinated to other priorities of the ruling party.⁸⁶⁸ In Namibia, NUNW-affiliated unions and union members have expressed concern over the fact that its close association with SWAPO has led the union movement to rely on this relationship to influence the government, rather than focusing on shop floor strength and trying to translate this into policy-making strength.⁸⁶⁹

Generally, despite the adoption of various internal strategies and the introduction of laws encouraging employers to recognise unions, the downward trend in union membership has continued in recent years, albeit at a slower pace. How unions respond to the challenges and opportunities presented to them by the changing nature of work and employment relations will be decisive in determining their level of influence in the workplace in the coming years.

⁸⁶⁶ Ibid.

⁸⁶⁷ Ibid.

⁸⁶⁸ Fenwick 'Labour law reform in Namibia: Transplant or implant?' in Lindsey (ed) *Law Reform in Developing and Transitional States*. Also see Bauer *Labour and Democracy in Namibia, 1971–1996*.

⁸⁶⁹ Ibid.

5.6 Conclusion

This chapter on collective labour law and trade unions in a globalised era is relevant to the appraisal of the regulation and protection of non-standard work in Southern Africa, because collective bargaining and trade unions are widely recognised as important tools for improving working conditions and labour relations. The objectives of this chapter are to contribute to the discourse on the need to apply and transform prevailing regulatory frameworks and policy strategies in order to address the increase in non-standard workforce in recent years, particularly in Southern Africa.

It is suggested that the role played by collective bargaining and trade unions in a globalised era, especially in Southern Africa, is crucial, since one of the major issues for non-standard workers is their inability to unionise and voice their concerns collectively. As indicated earlier in this chapter, unions have always depended on collective bargaining and on union fees to deliver services and benefits to members. Diminishing union membership, as examined above, is negatively impacting the finances of trade unions, thus they are unable to provide services and benefits outside of the collective bargaining structure. This study contends that social justice and the democratisation of the workplace are not achievable while workers in non-standard employment are excluded from collective bargaining and trade union structures.

This chapter also examined the role played by collective bargaining in employment, the employment relationship, and the essence of collective bargaining in a globalised context. It further investigated the objectives of collective bargaining, the essentials of collective bargaining levels, and freedom of association in the Southern African region. Moreover, it explored the challenges associated with promoting collective bargaining for non-standard workers.

This chapter analysed the significance of joining a trade union, and non-standard workers' attitudes and interests. The trade union approach to non-standard employment was examined, with particular attention being paid to trade unions in the Southern African region. In this regard, the chapter examined the repressive and interventionist labour regulation of the colonial and post-independence states, the non-interventionist approach adopted in pursuit of labour market 'deregulation', and the more recent move towards the protection and advancement of individual and collective labour rights.

Once again, as stated earlier, even when the regulation and protection of non-standard workers in states such as South Africa has been improved, the struggle must not end, and scholarly endeavours should be sustained to ensure we move towards the better regulation and protection of non-standard workers in the Southern African region. This chapter's study of collective bargaining and trade unions in a globalised era provides an excellent platform for developing recommendations suitable for Southern African states in particular South Africa, which will be done in the next chapter of this study.

CHAPTER 6

CONCLUSIONS AND RECOMMENDATIONS

This chapter concludes this study of the regulation of non-standard employment in

Southern Africa: the case of South Africa with reference to several other SADC countries. The chapter will summarise what was addressed in the previous chapters and contains some recommendations for further research on the protection and regulation of non-standard workers in Southern Africa, and to a certain degree on the entire African continent.

6.1 Research findings

Apart from the conclusion, the thesis consists of five chapters dealing respectively with the following: a general introduction; the theoretical background to non-standard work and paradigms of work in Southern Africa; the role and application of ILO standards to non-standard workers, the decent work agenda and regional instruments in the Southern Africa; and collective bargaining and trade unions in a globalised era; attempting to answer the interpretation question and examining the reasonableness of fixed-term employment contract renewals and the protection afforded to non-standard workers by the South African Constitution.

Chapter 1 offers a general introduction and background to the study, outlines the research problems and subject matter of the study, its aims and objectives, importance, limitations, scope and data collection. It includes a literature review and highlights the main research questions, assumptions and expected findings. The chapter also deals with the research methodology and offers a summary of the chapters. The author explains why the regulation of workers in non-standard employment in Southern Africa: the case of South Africa with reference to several other SADC countries was chosen as the subject matter of the study.

As far as the nature and prevalence of non-standard employment are concerned, two fundamental outcomes of the research are clear. In most Southern Africa countries in the study, workers who are engaged in non-standard forms of employment (through temporary employment services, fixed-term work, part-time work and other forms of work) comprise a huge proportion of the workforce, and this type of employment has been growing in recent years. The obvious outcome of this is that the majority of workers are engaged in work that is temporary, unstable and insecure, and their income is uncertain as well. As pointed out, social justice and the democratisation of the workplace cannot be achieved if non-standard workers are excluded from the

labour relations system. No serious study of labour market governance in general and workplace democracy in the era of globalisation can fail to explore the labour relations system. The amendments to the South African Labour Relations Act (LRA), for instance, could be the start of the inclusion of non-standard workers in the system. But this will not materialise without organisation, and the successful organisation of non-standard workers will not happen without an all-inclusive strategy that is perceived to deal with workers' needs. The regulation of non-standard employment will play a pivotal role in advancing social justice, the democratisation of the workplace and ultimately industrial peace, not only in Southern Africa but on the entire continent.

The study argues that the current labour laws in the Southern African region that guarantee the right to organise and bargain collectively are not being enforced with regard to workers in non-standard employment. The state must understand that this issue must be addressed to protect this category of workers from exploitation and the denial of their right to fair labour practices. This can be achieved only if national states are willing to enforce labour laws through their relevant agencies in favour of non-standard workers with regard to the right to organise and other rights in the workplace.

Moreover, close scrutiny of current labour law in the Southern African region in most cases exposes its inadequacy, because the law does not provide a definition of non-standard employment and also does not provide for the regulation and protection of these work arrangements. Accordingly, there is no legal framework that takes into account the concerns of non-standard workers in Southern Africa regional labour law. There is therefore a need for a clear definition that can form a basis for regulating this form of employment, protection from unfair labour practices, and assurance of the right to organise. While South Africa should be applauded for amending the LRA in 2014, to include provisions that protect workers in non-standard employment, much needs to be done in most Southern African states in this regard.

Chapter 1 also describes the significance of the regulation of non-standard employment and the rights associated with it internationally, which inspired Southern African labour law. At the international level, the regulation of non-standard employment is taken very seriously. Advancing the regulation of non-standard employment is one of the vital goals of the ILO, the world body that sets international labour standards in this era of globalisation. The ILO is required to 'organise a meeting

of experts, undertake research and support national studies on the possible positive and negative impacts of non-standard forms of employment on fundamental principles and rights at work and identify and share best practices on their regulation.¹⁸⁷⁰ This imperative also inspired the selection of the regulation of non-standard employment in Southern Africa as the subject of this study.

An essential part of chapter 1 is the literature review. The study seriously re-examined the research undertaken in the discipline, and the findings of this research, to reveal how the study planned to close the gaps and contribute to advancing the law, especially social security and labour laws, because of the serious concerns posed by the failure to regulate non-standard employment, which remains a challenge to legal scholars, sociologists, lawyers and judges. Chapter 1 also alludes to the methodological approach used, especially the legal, historical, and inclusive approach with reference to several other SADC countries by the author of this study, before providing an outline of the study and emphasising the research questions being addressed.

Chapter 2 deals with the theoretical background to non-standard work and paradigms of work in Southern Africa. The chapter also defines key concepts of the study. These include employee, worker, employer, standard employment, non-standard employment, globalisation and technological advancement, temporary employees (employed through labour brokers), fixed-term workers, part-time workers, informalisation of work, casualisation of work, and externalisation. The changing nature of employment and work relationships refer to those relations at the workplace involving two key groups of workers, one of which enjoys considerable labour law protection and the other less labour protection, because of the category of employment to which they belong. These parties are standard employees on the one hand and non-standard workers on the other hand. Under normal employment circumstances, the first enjoys a stable, secure job and all the benefits that flow from it, while the latter's job is insecure and unstable with few or no benefits.

The relationship between standard employees and non-standard workers depends on the law, especially the labour law. The state has to step in to ensure through labour

⁸⁷⁰ See http://www.ilo.org/wcmsp5/groups/public/---ed_norm/relconf/documents/meetingdocument/wcms_182951.pdf (Date of use: 12 December 2017).

legislation that no non-standard worker is exploited or denied labour protection. The regulation of non-standard employment will enable non-standard workers to claim their rights, improve their working conditions, and enjoy employment benefits like their counterparts in standard employment.

Wherever there are employees, there are employers. These two parties are key players in the workplace who enter into a legal binding contract whereby the employee provides his or her services to the employer for agreed remuneration. The relationship between employees and employers is also dependent on the law. Through labour legislation the government protects employees from exploitation by unscrupulous employers. The regulation of non-standard employment also protects employers' interests and will empower workers to exercise their rights and claim better working conditions.

Southern African states have realised that vulnerable non-standard workers must be protected from exploitation through labour legislation. For instance, South Africa amended the LRA in 2014 to include the protection of non-standard workers, a move which must be commended. Namibia, also, has struggled to deal with the ongoing issue of regulating labour brokers. Many jurisdictions in Southern Africa, including Botswana and Namibia, have decided to pursue an approach that broadens the definition of an 'employee' in their labour law in order to provide protection to those without a formal contract of employment.

The prevailing problems with regard to the various categories of non-standard employment are also examined. The issue with temporary employment services (TES) or labour brokers is that a worker is employed by the broker not to carry out work for the broker in the course of its business, but to work for the client of the broker. The relationship between the broker and its client is regulated in terms of a commercial contract setting out the terms and, significantly, the cost at which the labour required by the client will be supplied. Despite the fact that there are generally indications to the contrary, the TES is deemed to be the employer of the workers that it supplies to the client.

Until the 2014 amendment to the LRA in South Africa, for instance, there was no joint and several liability for unfair dismissal, which was a key reason it was attractive for a

client to use workers supplied by a TES.⁸⁷¹ The client is therefore given control and flexibility, with few of the associated duties. The TES is in effect the employer, but has few of the accompanying responsibilities. TES workers have found it problematic to identify the true owner when instituting claims for unfair dismissal and to demonstrate that they have been dismissed. Redress for unfair dismissals frequently lies against a comparatively poor respondent and reinstatement is rarely an option. The workers placed by the labour brokers are frequently paid much less than the employees of the client doing similar work,⁸⁷² and it is onerous for TES workers to engage in collective bargaining.

However, things have changed with the recent ground-breaking Constitutional Court decision in *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa & others*.⁸⁷³ The case concerned the interpretation of the amendment to section 198A(3)(b) of the LRA and whether this deeming provision⁸⁷⁴ resulted in a 'sole employment' relationship between a placed worker and a client, or a 'dual employment' relationship between a TES, a placed worker and a client. The Labour Appeal Court set aside the order of the Labour Court and held that a placed worker who has worked for more than three months is no longer performing a temporary service and the client, as opposed to the TES, becomes the sole employer of the worker by virtue of section 198A(3)(b) of the LRA.

Before the Constitutional Court's decision, employees were able to work for an employer but remained the employee of a TES (labour broker). But after the Constitutional Court decision employers have to insource such employees and make them permanent. The Constitutional Court dismissed *Assign's* appeal and upheld the LAC's decision. The majority of the court held that, for the first three months of employment, the TES is the employer of the placed worker, but thereafter the client becomes the 'sole' employer.

⁸⁷¹ Theron (2005) *ILJ* 618 at 630.

⁸⁷² Benjamin (2010) 31 *ILJ* 845 at 851.

⁸⁷³ *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa & others* (CCT194/17) [2018] ZACC 22; [2018] 9 BLLR 837 (CC).

⁸⁷⁴ The deeming provision in s 198A(3)(b)(i) of the LRA provides that an employee of a temporary employment service (TES) not performing a temporary service for the client is 'deemed to be the employee of that client and the client is deemed to be the employer.'

Cachalia AJ dissented, holding that the 'dual' employer interpretation applied, and found that this interpretation allow for greater protection of the placed employees. The majority held that section 198A must be placed in the context of the right to fair labour practices in section 23 of the Constitution and the objectives of the LRA as a whole.

As stated by the court, a TES's liability only lasts as long as its relationship with the client lasts, and while it (rather than the client) continues to pay the worker. Upon the triggering of section 198A(3) (b), and if the client elects to pay the employee directly, the TES will be completely removed from the employment relationship.

It should nonetheless be noted that while the Constitutional Court does not ban labour broking in its entirety, its objectives are to make sure that the provision of temporary services is genuinely temporary. The protection requires that placed employees are completely integrated into the workplace as employees of the client at the end of a three-month period. The employee automatically becomes hired on the identical terms and conditions of their counterparts (permanent employees), with the same employment benefits, the same prospects of internal growth, and similar job security.

According to the court, all that is required for the TES to constitute a statutory employer in terms of section 198 of the LRA is to effectively place workers with clients for a fee and remunerate those workers. Essentially the TES occupies the role of a pay roll administrator.

It is important to note that this decision applies only to employees earning below the threshold and employed after a period of three months. Nevertheless, given the unsettled matters raised in the dissenting judgment, we can anticipate more litigation.

Furthermore, fixed-term workers are clearly vulnerable because their jobs are restricted by agreement at the beginning. This becomes complicated when workers are kept on fixed-term contracts in circumstances where they are in fact working on a permanent basis. Another difficulty faced by fixed-term workers is that they are not granted the same benefits as their counterparts who are indefinitely employed, although they perform the same duties. Part-time workers too have been treated unfairly in respect of the remuneration and benefits that they receive compared to their counterparts who are indefinitely employed.

In addition, to have a better understanding of the challenges posed by non-standard employment, various paradigms of engagement in labour markets throughout Southern Africa have been identified: informalisation, casualisation and externalisation. However, it is clear that Southern African states confront obstacles from three separate, but related occurrences in the labour market. Informalisation, a process by which workers are obliged to move from formal employment to the informal economy, in fact results in deregulation, which means that workers move outside the protective net of labour law.

Informalisation has been attained to a large extent through the increased casualisation of the labour force. The eventual result of casualisation is a decrease in the number of permanent full-time workers. Externalisation is another element that causes increased levels of non-standard employment in the Southern African region. The occurrence of externalisation is especially serious in South Africa, but not as widespread in the rest of the Southern African region. Externalisation is more radical and complicated than casualisation. It is 'a process of economic restructuring in terms of which employment is regulated by a commercial contract rather than by a contract of employment.'⁸⁷⁵ Its distinctive feature is that it decreases the number of people hired by the business, thus reducing the extent of the application of labour law.⁸⁷⁶ Without the regulation of non-standard employment, no protection is afforded to vulnerable workers whose numbers are increasing as a result of globalisation.

While it is difficult to acquire data on the incidence of casualisation and externalisation throughout the Southern African region, the increased awareness it has received from observers and trade unions lately indicates that it is increasing. This supposition is reinforced by the advantages that it offers to employers, namely, increased flexibility, the capacity to work unsociable hours, less dedication to permanent staff, a decline in the demand for managing labour, and a focus on areas of competitive advantage. The challenge remains for labour law and the trade union movement to find innovative methods to protect and represent the distinctive concerns and needs of the casualised and externalised labour force.

⁸⁷⁵ Benjamin 'Beyond the boundaries: Prospects for expanding labour market regulation in South Africa' in Davidov & Langille (eds) *Boundaries and Frontiers of Labour Law* 181–204.

⁸⁷⁶ Theron & Godfrey *Protecting Workers at the Periphery*.

Notably, changes in the mid-1970s produced circumstances that led states, organisations, and employees to search for greater flexibility in employment. As a result, the standard employment relationship began to disintegrate.⁸⁷⁷ International economic changes intensified competition between enterprises and placed pressure on them to pursue huge profits and to ensure there was more flexibility when contracting with their workers and responding to customers. Slow economic growth precipitated soaring unemployment that made it obvious, particularly in Europe, that economies were unable to produce sufficient work to provide full-time employment for all workers.⁸⁷⁸ The adoption of non-standard employment was enabled by technological advancements in communication and information systems that made it easy for organisations to specialise their production, gather temporary workers rapidly for tasks, and depend more on external suppliers. Labour laws that were crafted to protect indefinite employees also contributed to the increase in non-standard employment by emboldening employers to circumvent the directives and costs of these laws.⁸⁷⁹

Furthermore, the increased use by business of both prevailing and emerging non-standard work categories has resulted in changes to labour market regulation, while powerful global rivalry has propelled numerous states toward labour market deregulation that enables additional flexible non-standard types of work. These systemic alterations in work organisation have on the one hand produced considerable choices and opportunities to work, with both workers and employers benefiting from different types of non-standard work arrangements.

On the other hand, nonetheless, the intensive use of non-standard forms of employment has created more doubt and vulnerability among the increasing number of workers who unwillingly engage in them. A crucial challenge is that industrial and employment relations have concentrated for a long time on full-time, indefinite employment. The expanded use of non-standard forms of work has accordingly created challenges for the application of regulatory regimes and the successful running of industrial relations systems in practice. Such structural and technological

⁸⁷⁷ Cappelli *et al* *Change at Work*; Rubin (1995) 14 *Research in Social Stratification and Mobility* 297–323.

⁸⁷⁸ Cordova (1986) 125(6) *International Labour Review* 641–657.

⁸⁷⁹ Lee (1996) 17(4) *Journal of Labour Research* 543–553.

transformations in turn create challenges for the conventional procedures of representation and negotiation for both employees and employers.

Chapter 3 deals with the role and application of ILO standards to non-standard workers, the decent work agenda, and regional instruments. The establishment in 1919 of the ILO stemmed from the political desire to create common international rules to avoid unhealthy competition between states on working conditions and terms. The tripartite system has proved its strength and viability. The principles of the ILO are based on the Declaration of Philadelphia. In today's global economy, these principles are even more relevant than they were 60 years ago.

From its very inception, the ILO showed its commitment to serve humanity by placing itself at the service of social justice. The ILO has a global role in promoting human rights and establishing safer social and working life norms. The core Conventions adopted by the ILO remain highly topical. The chapter demonstrates that a meaningful study of labour law, particularly non-standard employment, is not possible without at least an elementary understanding of the institutions that shape international labour standards, the content of those standards, and the relationship between these standards and domestic labour legislation in Southern Africa.

The form and content of most labour laws in Southern African states conform in large measure to the requirements of the core labour law standards of the ILO. However, the implementation of these core labour law standards remains a serious challenge. There is a continued need throughout the region to strengthen the capacity of labour administration and labour inspection systems so that they can play their role as key actors in the elaboration and implementation of economic and social policies, including in relation to the informal economy, in line with the governance Conventions,⁸⁸⁰ as well as the Labour Administration Convention.⁸⁸¹ In numerous cases, the resources granted to labour inspectors are inadequate to enable inspection functions to be carried out properly, leading to a vicious cycle of neglect of workers' rights, vulnerability and exploitation which are ultimately costly both in terms of poor profits for the business and for the economy as a whole.

⁸⁸⁰ Labour Inspection Convention 81 of 1947 and Labour Inspection (Agriculture) Convention 129 of 1969.

⁸⁸¹ Labour Administration Convention 150 of 1978.

The ILO has had a strong influence on the labour law systems of Southern Africa. As indicated, there are two ways in which the impact of the ILO has been particularly significant. Firstly, by ratifying ILO Conventions, countries fall within the ILO standard supervision system.⁸⁸² Since its inception in 1992, the SADC has encouraged member states to ratify and implement the core ILO standards. All SADC member states apart from Madagascar and Namibia have ratified the entire ILO core Conventions.⁸⁸³

The second way in which the ILO has influenced labour laws in the region is through the provision of technical assistance. The ILO has assisted most countries in Southern Africa, for instance, Botswana, Lesotho, Malawi, Namibia, South Africa and Swaziland, to develop labour legislation that is consistent with international standards.⁸⁸⁴ In addition, the ILO has helped to improve the capacity of key institutions and actors in the SADC region, through technical co-operation, for example, the ILO/SWISS projects entitled 'Conflict Management and Enterprise-based Development' and 'Strengthening Labour Administration in Southern Africa' (SLASA). This chapter also examines the development of regional labour standards, particularly the SADC Charter of Fundamental Social Rights (the Social Charter).

Chapter 3 also investigates decent work in these Southern African states. The sustained promotion of decent work needs the establishment of national institutions and sufficient capacity to assist with advancing employment so that there is compliance with labour norms, especially through labour inspections and tripartite consultations. This is particularly significant in the current context of globalisation and the risks it creates: greater unemployment, less protection for workers, and increasing

⁸⁸² Fenwick & Kalula note that, even before a country ratifies the ILO standard, it is likely to be subject to a range of regulatory activities by the ILO. These include negotiations and discussions between the ILO officials and representatives of countries, including ministers, responsible for labour matters, and senior officials of relevant government departments. This might occur, for example, within the framework of campaigns to promote the ratification of the ILO's core labour standards. This 'informal' aspect of ILO regulatory activity, while well-known within certain circles, has not, as far as we know, been the subject of major academic study.

⁸⁸³ These are the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948; the Right to Organise and Collective Bargaining Convention 98 of 1949; the Forced Labour Convention 29 of 1930; the Abolition of Forced Labour Convention 105 of 1957; the Minimum Age Convention 138 of 1951; the Worst Forms of Child Labour Convention 182 of 1999; the Equal Remuneration Convention 100 of 1951; and the Discrimination (Employment and Occupation) Convention of 111 of 1958. Madagascar has not ratified the Abolition of Forced Labour Convention 105 of 1957 and Namibia has not ratified the Equal Remuneration Convention 100 of 1951. See <http://www.ilo.org> (Date of use: 30 July 2015).

⁸⁸⁴ See, for more detail, <http://www.ilo.org/public/english/region/afpro/mdtharare/about/index.htm> (Date of use: 4 September 2015).

poverty. The 2008 ILO Declaration on Social Justice for a Fair Globalisation (the Social Justice Declaration) regards four Conventions that are relevant to tripartism, employment policy and labour inspection as the most important from the perspective of governance (the governance Conventions).⁸⁸⁵ Decent work generally responds to the challenges of poor working conditions, poor remuneration, representation and voice, and social insecurity. Globalisation has resulted in increasing informal and non-standard employment, and decent work is crafted to remedy this challenge by introducing new labour policies.

The ILO needs to work with government, business and labour in integrating the decent work objectives into national development plans. ILO instruments, including Conventions, Recommendations and Declarations are usually incorporated in national laws.

However, any attempt to appraise decent work in Southern Africa must ask a critical question: How far have Southern African states come in attaining the benchmark of decent work? This question is best addressed by evaluating Southern states' experiences and implementation under the four pillars of the ILO Decent Work Agenda, which includes fundamental rights, job opportunities, social protection, and voice or participation. Numerous Southern African states have, through constitutional provisions and labour law reform, formally demonstrated some dedication to the fundamental rights that create decent work. This is clear not only from the different constitutional Bills of Rights that entrench, for example, freedom of association, but also in the extensive ratification of core labour standards.

Furthermore, SADC itself has placed obligations on member states to ratify core labour standards through the Charter on Fundamental Social Rights. However, the attaining of basic rights has not been completely achieved in many Southern African states, because implementation remains a serious challenge in the face of limited resources, institutional weaknesses, and a scarcity of technical and human resource capacity. The same challenges apply in the area of social security. Many SADC states have followed the Social Charter by indicating their wish to improve social security, but

⁸⁸⁵ These are the Labour Inspection Convention 81 of 1947, the Employment Policy Convention 122 of 1964, the Labour Inspection (Agriculture) Convention 129 of 1969, and the Tripartite Consultation (International Labour Standards) Convention 144 of 1976.

not much has been achieved. The third pillar that of creating job opportunities; remains the most difficult in Southern Africa. Notwithstanding many projects and strategies, the number of jobs continues to decrease, especially in the formal sector. The rate of economic growth in most Southern African states is insignificant, which has a disastrous effect on job opportunities.

The fourth pillar of decent work, voice and participation, seems to be having more success. Many Southern African states have sought to increase voice and participation through different social dialogue mechanisms, for instance, the creation of institutions such as NEDLAC in South Africa. However, the full impact of these institutions remains to be seen.

While most labour law reform attempts in Southern Africa seem to conform to the wider expectations of the ILO Decent Work Agenda, much still need to be done to achieve its goals. In all Southern African countries, there is a difference between the laws adopted and implementation. This is the result of an inability to effectively observe and enforce standards and, in many cases; the laws adopted do not adequately comply with the international labour standards that have been ratified. Therefore, the attainment of the decent work agenda in Southern Africa can only be appraised, at best, as being an ongoing project.

Chapter 3 finally explored some of Southern Africa's regional instruments. Member states have concluded various instruments, including Charters, Protocols, and Codes, most of which seek to advance better social protection in Southern Africa. The Southern Africa social protection-related instruments include the Declaration and Treaty of the SADC (the SADC Treaty), the Charter of Fundamental Social Rights in the SADC (the Social Charter), the Code on Social Security, the Protocol on Gender and Development, the Protocol on Health, the Protocol on Education, and the Draft Protocol on Facilitation of Movement of Persons in the SADC. The SADC Treaty and Protocols to the Treaty,⁸⁸⁶ and the Social Charter, are legally binding instruments that must be implemented by SADC member states. However, the Code on Social Security is non-binding, and merely provides guidelines on the implementation of social

⁸⁸⁶ In terms of Article 1 of the SADC Treaty, a Protocol is an instrument of implementation of the Treaty, having the same legal force as the Treaty.

security.⁸⁸⁷ The goal of the social protection instruments is to set the benchmark at regional level and state level for the most basic social protection functions that a member state must accomplish.

Moreover, human rights instruments are the dominant tools for extending social security protection to workers in the informal economy. It must be noted that social security is a vital human right acknowledged in fundamental human rights instruments and enshrined in different international and regional legal instruments.⁸⁸⁸ Both the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) emphasise the general nature of social security.

Chapter 4 deals with a case study of non-standard employment in a Southern African country, the reasonableness of fixed-term contract renewals, the interpretation of the law relating to such contracts, and the protection afforded to non-standard workers by the South African Constitution. The reasonableness of the 1995 LRA renewal of a fixed-term contract of employment and the ongoing question whether workers on fixed-term contracts can claim to have been dismissed if they reasonably expected permanent employment is interrogated. The importance of workers who are treated unfairly is recognised and protected by the South African Constitution which provides that everyone has the right to fair labour practices,⁸⁸⁹ and by the ILO.

It is stressed that the employment of workers in terms of fixed-term contracts has been one of the dominant means of informalising work and is characterised by uncertainty. The interpretation imbalance is apparent from case law related to the rights of fixed-term workers, which suggests a lacuna in the unfair dismissal protection bestowed on vulnerable workers. Under the 1995 LRA there was no provision regulating the position of the worker who fell prey to constant renewals of fixed-term contracts, where there

⁸⁸⁷ Article 3 of the Code on Social Security aims to provide member states with strategic direction and guidelines in the development and improvement of social security schemes, in order to enhance the welfare of the people of the SADC region; to provide SADC and member states with a set of general principles and minimum standards of social protection, as well as a framework for monitoring at national and regional levels; and to provide SADC and member states with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region.

⁸⁸⁸ See *inter alia* Article 22 of the Universal Declaration of Human Rights of 1948 and Article 9 of the International Covenant on Economic, Social and Cultural Rights of 1966.

⁸⁸⁹ Section 23 of the Constitution.

was an objectively reasonable expectation in the circumstances for the conversion of the contract into one of permanent duration.⁸⁹⁰

The study also explores other sections of the Constitution of the Republic of South Africa, 1996 and especially those sections that can be used to protect non-standard workers. Section 9 (the right to equality) and section 39 (the interpretation of the Bill of Rights) are sections that can be used to extend fair labour practices to non-standard workers, who are often vulnerable. The outcome is that South African labour law in general and the regulation of non-standard employment in particular has benefited immensely from these influences.

Furthermore, it is important to note that in most Southern African states,⁸⁹¹ externalisation has resulted in a situation whereby the employment relationship is not regulated.⁸⁹² This is known as informalisation.⁸⁹³ The consequence is that many non-standard workers are excluded from the scope of legislation that is intended to protect the standard employees.⁸⁹⁴ However, the amended LRA in South Africa has introduced a new provision in terms of which a worker may challenge the termination of a contract on certain grounds. The study argues that while it appears that this amendment has brought some certainty, it is the relatively high earning workers who will probably benefit.

Chapter 5 therefore investigates the regulation of non-standard employment extensively to include collective bargaining involvement with the employer, the right to strike and the trade union movement in the globalised era. The goal of fortifying workers' organisations and collective bargaining is consistent, for instance, with the provisions of the Constitution of South Africa concerning labour relations, and the aims of the LRA and the ILO, which include social justice and the democratisation of the workplace. Without doubt social justice and the democratisation of the workplace

⁸⁹⁰ Ibid.

⁸⁹¹ Member states of SADC are *Angola, Botswana, Comoros, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.*

⁸⁹² Vettori *The Employment Contract and the Changed World of Work: Corporate Social Responsibility Series* 16.

⁸⁹³ Cheadle *et al Current Labour Law* 135.

⁸⁹⁴ Ibid.

cannot be achieved if workers in non-standard employment are excluded from the labour relations system.

Further, the extension of collective agreements, where there is a legal structure for such arrangements, is an alternative approach to offering assistance to unorganised non-standard workers, but its applicability inclines to be restricted to those who are in employment relationships. The results of collective agreements can also in practice be extended to non-bargaining parties as an outcome of mutual consensus at the workplace level. Such a move can advance more solidarity and more inclusive dialogue, which will probably encourage trade union membership among non-standard workers.

The 2014 amendments to the South African LRA could be seen as the start of the inclusion of non-standard workers in the system. However, this will not materialise without organisation, and the successful organisation of non-standard workers in SADC will not happen if vulnerable workers cannot form or join a trade union. The lack of regulation of non-standard employment has removed some of the most basic rights and benefits of many workers in Southern Africa, unlike their counterparts in standard employment who enjoy all the benefits and protection provided by labour law. A case study of one of the forms of non-standard employment is explored in the next chapter.

6.2 Recommendations for further research

Non-standard forms of employment can be advantageous to both employers and workers if they can meet the firms' needs for flexibility, while at the same time providing suitable employment that allows workers to balance work and personal duties. However, if non-standard forms of employment lead to increasing division in the labour markets, with consequences for workers' security, inequality in earnings and poor productivity, then there is reason for concern. Addressing these concerns requires more detailed examination of the impact of specific types of non-standard arrangements, the various reasons for their use and growth, the sectors and jobs most affected, and the policy options for advancing worker protection while providing for the needs of business. A greater understanding is needed of the interaction between regulation, incidence and impact, drawing on the experiences of different Southern African states.

Bearing in mind the information contained in this study, the following questions related to non-standard employment may be considered for further research and discussion:

(1) What have been the drivers of non-standard forms of employment in recent years? What effects do the different categories of non-standard forms of employment have on workers, enterprises and labour market performance in Southern Africa?

(2) What state involvement and creative practices, as well as regulatory reforms, judicial precedents and social and labour market policies, can provide useful guidance for addressing the possible weaknesses related to non-standard categories of work in Southern Africa?

(3) What should be the prime concern for Southern African states seeking to ensure fundamental principles and rights at work and other rights for non-standard workers?

(4) How can prevailing international labour standards be used in Southern African countries to manage non-standard categories of work and to deal with any gaps in this area?

(5) Which features of non-standard categories of work in Southern African countries in particular and the world at large necessitate further study and examination?

This thesis did not set out to address all the concerns related to the protection and regulation of non-standard employment in the Southern African region. There are certainly and unavoidably some concerns that have been intentionally disregarded or unwillingly overlooked, but these need further research. Some of these concerns are of a methodological nature. As indicated in chapter 1, the subject matter itself favoured legal, historical and inclusive (with reference to several SADC countries) approaches. It is clear that more legal and historical investigations will be required in any study of the regulation of non-standard employment in SADC or in other places. Nonetheless, the regulation of non-standard employment cannot be reserved for legal scholars and specialists, or historians. Social scientists, particularly political scientists, economists, and sociologists, should continue to be aware of the concerns related to labour and the regulation of non-standard employment. This is an area of research that is very appropriate for interdisciplinary study.

Furthermore, Southern Africa is part of the global village, a regional bloc in relation to other blocs, an inclusive (reference to several other SADC countries) approach, whether legal, sociological, historical or political, is necessary to understand how non-standard employment is regulated in other nations. It would also be useful to understand how the law of these nations is inspired and the extent to which it may be similar to legislation in some Southern African states, and how Southern African countries have been instrumental in regulating non-standard employment in the world in general and in Africa in particular. With regard to the goals of both Southern Africa and the AU, such an inclusive approach may be necessary to advance and unify African labour law to effectively regulate non-standard employment and to promote the rights of vulnerable workers in Africa.

The study of the regulation of non-standard employment will also help us to understand the relationship between workers' organisations and collective bargaining on the one hand and labour relations systems on the other. Workers' organisations would normally advance the regulation of non-standard employment and seek to achieve social justice and democratisation of the workplace. The absence of non-standard workers in the labour relation systems would be the opposite, making it onerous to achieve social justice and the democratisation of the workplace. The purpose of the South African LRA is to advance economic development, social justice, labour peace, and the democratisation of the workplace by fulfilling the primary objectives of the Act.

Recently, the state has been concerned about the growth of non-standard work and the insecurities and vulnerabilities associated with this form of work, and amended the LRA in 2014 to protect non-standard workers. As suggested by the author of this study, the goal of strengthening workers' organisations and collective bargaining is compatible with the stipulations of the Constitution of South Africa and the provisions of the ILO regarding labour relations, and furthers the purposes of the LRA, including social justice and the democratisation of the workplace. The challenge of developing an inclusive strategy on addressing workers' needs should be investigated further by scholars to evaluate whether amending legislation is a good development, or whether it might be better to explore other strategies to regulate non-standard work.

Further studies should also be conducted on work organisations, the structure, make-up and operation of organisations, and their relationships with other stake holders, the government of the day, and socio-economic and political forces in the state and the world at large. The judiciary plays a pivotal role as the protector of the laws of the state and the rights and obligations derived from international bodies such as the ILO. These rights also include the right to fair labour practices which is at the core of the regulation of non-standard employment. Regardless of how significant the role played by the Southern African labour courts has been, legal scholars should continue observing and evaluating the jurisprudence of our courts to ensure that they continue to protect and advance the regulation of non-standard employment.

Finally, a significant number of workers fall outside the protection of labour law throughout the world. Changing paradigms of production and work, the state's weakening regulatory role over the socio-economic domain, and the declining ability of trade unions to represent their workers have been recognised as serious obstacles to the protective role of labour law nowadays. Globalisation, with its socio-economic, political and ideological features, is regarded as a central factor in these obstacles. The effects of these developments for labour law are a topic of heated debate among scholars. The main challenge facing workers' organisations in this era of globalisation is ensuring that structural changes and adjustments are attained without undermining the goals of full employment, social justice and democratisation of the workplace.

While globalisation can arguably be both positive and negative for the socio-economic and political development of Southern Africa, scholars need to be aware of the implications for the life circumstances of citizens. There is an urgent need for research on the effects of globalisation on the regulation of non-standard work and the protection of workers' rights.

Even if the regulation of non-standard forms of engagement and the protection of these vulnerable workers improves, the battle should and scholarly endeavours should also persist to ensure that the shift continues towards the effective regulation of non-standard employment and the protection of these vulnerable workers.

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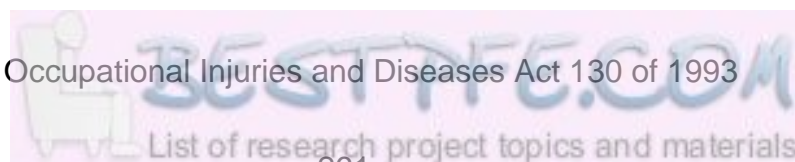
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