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Enforcement of laws regulating domestic  
work  
- A case study of South Africa

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# Summary

In June 2011, the Domestic Workers Convention was adopted in the ILO. The Convention establishes minimum conditions of employment and labour rights for domestic workers. In contrast to other types of work, domestic work takes place in private households, in isolation and hidden from public insight. This makes domestic workers vulnerable to abuse and exploitation. The Domestic Workers Convention obligates member states to realize its provisions through legislative measures. Considering the specific characteristics of domestic work, concern can however be raised regarding the ability of states to enforce national legislation regulating domestic work. The thesis sets out to examine the practical enforcement of already existing national labour legislation establishing rights and conditions of employment for domestic workers. In order to examine the matter, South Africa is used as the example. South Africa has since 1993 established a comprehensive framework of labour legislation providing conditions of employment and labour rights for domestic workers. South African labour legislation on domestic workers is enforced through the means of a labour inspection system, which includes a complaint mechanism system, and a labour dispute resolution system. A field study was conducted in South Africa in 2011 under which data was collected through interviews with relevant persons. Data obtained from the field study as well as data obtained from other materials indicate that the South African labour inspection system and the labour dispute resolution system face many obstacles in respect of enforcement of legislation regulating domestic work. These obstacles are connected to the specific characteristics of domestic work and the findings therefore have general applicability. The conclusion that can be drawn is that additional measures to labour inspection and labour dispute resolution must be taken in order to establish protection of domestic workers' labour rights and conditions of employment.

# Sammanfattning

I juni 2011 antog ILO konventionen om goda villkor för hushållsarbetare. Konventionen fastställer anställningsvillkor och arbetsrättigheter för hushållsarbetare. Hushållsarbete sker, till skillnad från andra former av arbete, i privata hem utan insyn från det offentliga och är ofta ett ensamarbete. Detta innebär att hushållsarbetare riskerar att bli utsatta för missförhållanden och exploatering. Konventionen om goda villkor för hushållsarbetare förpliktigar stater att realisera dess bestämmelser genom lagstiftning. Hushållsarbetets specifika karaktär väcker dock vissa frågor angående staters möjlighet att genomdriva nationell lagstiftning på området. Den här uppsatsen undersöker det praktiska genomdrivandet av redan existerande nationell lagstiftning som reglerar hushållsarbeters arbetsvillkor och arbetsrättigheter genom att undersöka exemplet Sydafrika. Sydafrika har sedan 1993 vittomfattande arbetsrättslagstiftning inom detta område och har etablerat mekanismer för arbetsinspektioner och arbetsrättslig tvistelösning för att genomdriva arbetsrättslagstiftning som reglerar hushållsarbeters arbetsvillkor och arbetsrättigheter. För att undersöka det praktiska genomdrivandet av sydafrikansk arbetsrättslagstiftning på området genomfördes våren 2011 en fältstudie i Sydafrika under vilken data inhämtades genom intervjuer med relevanta personer. Data som inhämtades under fältstudien samt data erhållen från annat material indikerar att det Sydafrikanska systemet för arbetsinspektioner och arbetsrättslig tvistelösning stöter på många hinder vad gäller genomdrivandet av arbetsrättslagstiftning som reglerar hushållsarbete. Dessa hinder beror på hushållsarbetets specifika karaktär och resultatet från undersökningen är därför generellt applicerbart. Den slutsats som kan dras är att alternativa åtgärder till arbetsinspektion och arbetsrättslig tvistelösning är nödvändiga för att säkerställa ett effektivt skydd av hushållsarbeters arbetsrättigheter och arbetsvillkor.

# Preface

I would like to thank the interviewees who participated in the field study and all who assisted me in accomplishing the study. I especially would like to thank Professor Darcy du Toit, lead researcher Fairuz Mullagee and Lauren Saal at the Domestic Workers Research Project at the University of the Western Cape for their generous support and assistance. I would also especially like to thank Myrtle Witbooi and Hester Stephens, general secretary and president respectively, of the South African Domestic Service and Allied Workers' Union for so generously giving me their time and energy in assisting me with my study.

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# Abbreviations

ANEX	Activists Networking against the Exploitation of Children
BCEA	Basic Conditions of Employment Act No. 75 of 1997
CCMA	Commission for Conciliation, Mediation and Arbitration
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child
DWRP	Domestic Workers Research Project
EEA	Employment Equity Act No. 55 of 1998
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Labour Conference
ILO	International Labour Organization
ILRIG	International Labour Research and Information Group
LRA	Labour Relations Act No. 66 of 1995
NCFAWU	National Certificated Fishing and Allied Workers Union
NGO	Non-Governmental Organisation
SADSAWU	South African Domestic Service and Allied Workers' Union
SD7	Sectoral Determination 7: Domestic Worker Sector
UIA	Unemployment Insurance Act No. 63 of 2001
UICA	Unemployment Insurance Contribution Act No. 4 of 2002
UIF	Unemployment Insurance Fund
UN	United Nations
ZAR	South African Rand

# 1 Introduction

## 1.1 Background

On 16 June 2011 a set of international labour standards on decent work for domestic workers were adopted by the International Labour Organization (ILO), a specialized organ of the United Nations (UN) responsible for drawing up and monitoring international labour standards.<sup>1</sup> The Domestic Workers Convention and the Domestic Workers Recommendation are the first set of international standards that establish a comprehensive legal framework specifically regulating the working life of domestic workers. The aim of these new instruments is to improve the working conditions of millions of domestic workers by setting minimum standards of employment for this occupational group.

Domestic workers are persons who work in the homes of individuals providing services such as cooking, cleaning and taking care of children, in return of remuneration. Some domestic workers live on the premises of their employer.<sup>2</sup> An overwhelming majority of domestic workers are women and girls and many are migrant workers.<sup>3</sup> The vast majority of all domestic workers are from the poorer sections of the society.<sup>4</sup>

The ILO estimates that there are around 53 million domestic workers worldwide. However, since domestic work often is unregistered and hidden, the total number of domestic workers can be as high as 100 million.<sup>5</sup> Domestic workers make up a significant portion of the overall workforce and constitute between four and ten percent of the total working population in developing states and between one and two point five percent of the total working population in industrialized states.<sup>6</sup>

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<sup>1</sup> See C189 Domestic Workers Convention, 2011, (hereafter the Domestic Workers Convention) and R201 Domestic Workers Recommendation, 2011 (hereafter the Domestic Workers Recommendation) at *ILOLEX Database of International Labour Standard*, <[www.ilo.org/ilolex/english/index.htm](http://www.ilo.org/ilolex/english/index.htm)>, visited on 1 August 2011.

<sup>2</sup> ILO, *Decent work for domestic workers: towards new international labour standards*, <[www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Feature\\_stories/lang-en/WCMS\\_140916/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Feature_stories/lang-en/WCMS_140916/index.htm)>, visited on 25 July 2011.

<sup>3</sup> ILO, *Decent work for domestic workers*, Report IV (1), International Labour Conference, 99<sup>th</sup> Session, 2010, Geneva, 1<sup>st</sup> edition, 2010, p. 6, <[www2.ilo.org/public/libdoc/ilo/2009/109B09\\_24\\_engl.pdf](http://www2.ilo.org/public/libdoc/ilo/2009/109B09_24_engl.pdf)>, visited on 18 June 2011.

<sup>4</sup> C. Bonner, *Domestic Workers Around the World: Organising for Empowerment*, (Women in Informal Employment: Globalizing and Organising (WIEGO), 2010) p. 3, <[www.dwrp.org.za/images/stories/DWRP\\_Research/chris\\_bonner.pdf](http://www.dwrp.org.za/images/stories/DWRP_Research/chris_bonner.pdf)>, visited on 18 June 2011.

<sup>5</sup> ILO, *100<sup>th</sup> ILO annual Conference decides to bring an estimated 53 to 100 million domestic workers worldwide under the realm of labour standards*, <[www.ilo.org/ilc/ILCSessions/100thSession/media-centre/press-releases/WCMS\\_157891/lang--en/index.htm](http://www.ilo.org/ilc/ILCSessions/100thSession/media-centre/press-releases/WCMS_157891/lang--en/index.htm)>, visited on 1 August 2011.

<sup>6</sup> ILO, *supra* note 3, p. 6.



The number of domestic workers is however increasing. An increase in rural poverty in several states has led many women to turn to the domestic labour market in search for job opportunities.<sup>7</sup> At the same time, the noticeable rise in overall female labour participation has resulted in a greater need for domestic workers when women to a lesser extent can combine unpaid care work with labour market participation. The ageing population has also increased the demand for paid domestic work. The increase is also due to a growing international migration of women migrating from poorer to more affluent states for the purpose of providing domestic services.<sup>8</sup>

Despite an increasingly significant role in economic and social development, domestic workers are frequently undervalued, overworked and unprotected. They are often subjected to poor working conditions under which they are forced to work long hours, for minimum or less than minimum wages and where they are vulnerable to exploitation and abuse.<sup>9</sup> There are numeral examples of domestic workers working under circumstances amounting to forced labour and children are frequently being exploited as domestic workers.<sup>10</sup>

The poor treatment of domestic workers is connected to the specific characteristics of paid domestic work which distinguish it from almost all other forms of employment. Domestic work does not take place in factories or other establishments but takes place in the intimate space of the employer's home.<sup>11</sup> In this intimate employment relationship the division between family and work and care and duty often gets blurred with the consequence that domestic work often is not considered as 'real work'.<sup>12</sup> Paid domestic work is also often associated with work women do in order to show affection for their families and this further add to the notion of domestic work as something different than work. The effect of domestic work not being regarded as real work is that domestic workers often are not considered as real employees. Instead, domestic workers are frequently considered as "members of the family". The use of the family metaphor however disguises the fact that there is an inherent unequal power relationship between the employer and the domestic worker, in which the domestic workers holds the disadvantaged position. When domestic workers are not considered as real employees the consequence is also that employers often not consider themselves as real employers with employer responsibilities.<sup>13</sup> Domestic work is also often considered as unskilled because women traditionally have been considered capable of performing that kind of work. This view further contributes to the

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<sup>7</sup> Bonner, *supra* note 4.

<sup>8</sup> ILO, *supra* note 3, p. 5.

<sup>9</sup> ILO, *supra* note 3, p. 1.

<sup>10</sup> J. Sunderland and N. Varia, *Swept Under the Rug: Abuses against Domestic Workers Around the World*, Volume 18, Number 7 (C), (Human Rights Watch, July 2010), <[www.hrw.org/sites/default/files/reports/wrd0706webwcover.pdf](http://www.hrw.org/sites/default/files/reports/wrd0706webwcover.pdf)>, visited on 25 July 2011.

<sup>11</sup> ILO, *supra* note 3, p. 1.

<sup>12</sup> J. du Preez *et al.* 'The employment relationship in the domestic workspace in South Africa: beyond the apartheid legacy', 36:2 *Social Dynamics* (2010) pp. 396-397.

<sup>13</sup> *Ibid.*

low value in monetary terms that is given to domestic work. Additionally, domestic workers perform their work in isolation from other workers and a domestic worker often has to negotiate her working conditions with her employer without the support of co-workers. Because of their work in isolation, it is difficult for domestic workers to organize. Working in isolation also makes domestic workers vulnerable to exploitation and abuse.<sup>14</sup>

Due to its specific characteristics, many states consider domestic work as something different from regular employment and domestic work is often considered as not fitting in under the general framework of existing labour laws. Domestic workers are therefore often excluded from the protection of many states' labour and social security laws which makes them vulnerable to unfair and abusive treatment.<sup>15</sup> Many states also exclude domestic workers from the scope of legislation on occupational safety and health because of the inaccurate perception that the household is a safe place.<sup>16</sup>

With the newly adopted Domestic Workers Convention and Domestic Workers Recommendation, the international community has recognized domestic work as decent work. The expectation is that the new instruments will guide states towards the recognition of domestic work as real work and the inclusion of domestic workers under national labour and social security laws.<sup>17</sup>

## 1.2 Purpose and research question

Besides including provisions establishing minimum standards of employment that member states are obligated to implement through national laws and regulations, the Domestic Workers Convention obligates member states to take certain measures to ensure that domestic workers will enjoy protection of such laws and regulations. Article 16 establishes the obligation for member states to ensure that domestic workers have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are no less favorable than those available to workers in general. Article 17 obligates member states to establish effective and accessible complaint mechanisms and means to ensure compliance with national laws for domestic workers. Member states are also obligated to develop and implement measures for labour inspection in order to ensure the protection of domestic workers' labour rights.

The specific characteristics of domestic work however raise concern regarding the practical ability for states to ensure effective protection of domestic workers' labour rights through these measures. How does, for

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<sup>14</sup> ILO, *supra* note 3, p. 1 *et seq.*

<sup>15</sup> ILO, *supra* note 3, p. 1.

<sup>16</sup> ILO, *supra* note 2.

<sup>17</sup> *Ibid.*, p. 95.

example, the fact that domestic work takes place in private homes affects the ability to carry out labour inspections in the sector? And what effect do the unequal employment relationship and the isolated nature of domestic work have on domestic workers access to workplace justice? In light of this concern and the provisions in article 16 and 17 of the Convention, this thesis sets out to examine the practical enforcement of already existing national labour law providing rights for domestic workers, through the means of dispute resolution, labour inspection and complaint mechanism system. In order to examine this matter, South Africa is used as an example.

South Africa is one of few states that specifically include domestic workers under national labour law. Domestic workers were included under national labour regulation for the first time in 1993 when the Basic Conditions of Employment Act<sup>18</sup> was amended.<sup>19</sup> Since then, domestic workers have been included under several other labour regulations. An act that specifically addresses domestic workers' conditions of employment has also been enacted. With these legislative measures, South Africa has made one of the most extensive efforts in the world to recognize domestic work as a form of employment.<sup>20</sup> Domestic workers also constitute the largest female occupational group in South Africa and the issue of establishing protection of domestic workers' labour rights and social security rights is a current topic in the political debate in South Africa. South African labour legislation on the issue has also provided inspiration for the creation of the new Domestic Workers Convention.<sup>21</sup> In order to monitor and enforce compliance with labour regulations, including regulations providing rights for domestic workers, South Africa has established a labour inspection system which includes a complaint mechanism system. Domestic workers in South Africa have also formal access to statutory labour dispute resolution systems.

The purpose of the thesis is to obtain knowledge on factors that hamper the effective enforcement of South African labour law on domestic work which can be applicable and useful to other countries when implementing the Domestic Workers Convention and also for the ILO when providing technical assistance on enforcement of national labour regulation on domestic workers. The thesis therefore sets out to examine the following research question:

What are the obstacles that South Africa is encountering in respect of the enforcement of labour law addressing domestic workers, through the means of dispute resolution, labour inspection and a complaint mechanism system?

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<sup>18</sup> Basic Conditions of Employment Act No. 137 of 1993.

<sup>19</sup> du Preez, *supra* note 12, p. 395.

<sup>20</sup> S. Ally, *From servants to workers: South African domestic workers and the democratic state* (Cornell University Press, New York, 2009) p. 3

<sup>21</sup> L. Ramutloa, *Adoption of Domestic Workers Convention by ILO – Oliphant*, <[www.labour.gov.za/media-desk/media-statements/2011/adoption-of-domestic-workers-convention-by-ilo-2013-oliphant](http://www.labour.gov.za/media-desk/media-statements/2011/adoption-of-domestic-workers-convention-by-ilo-2013-oliphant)>, visited on 5 August 2011.

## 1.3 Methodology and materials

In order to gain knowledge about obstacles to the enforcement of South African labour law on domestic workers, a field study was conducted in the Western Cape, South Africa, in 2011. The purpose of the field study was to gather data through interviews with persons with different perspectives on the enforcement of domestic workers' labour rights. A part of the thesis is hence based on data gathered through these interviews. The thesis uses a qualitative empirical approach and the purpose of the field study was therefore not to obtain data from which quantifiable conclusions can be drawn but to obtain data that can provide a comprehensive picture on the issue.

Interviews were conducted with different categories of persons including domestic workers, representatives for domestic service agencies, trade union representatives and union committee members, representatives of non-governmental organizations (NGO), public officials at the Department of Labour, public officials at statutory labour dispute resolution bodies and academic researchers. The purpose of the field study was also to conduct interviews with employers of domestic workers but due to difficulties in finding employers willing to participate in the study, no interviews were conducted with this category of persons. 18 persons were interviewed in the field study. However, not all interviews are used in the thesis due to lack of relevancy.

Instead of using a questionnaire with fixed questions, structured interviews were used under which the interviewees were asked to answer certain questions but were also free to elaborate around other topics. When using interviews as a method for gathering data, there is a risk for bias results. In order to obtain objective data, the interview questions were constructed in accordance with principal rules on interviewing including no leading questions and no unexpressed assumptions.<sup>22</sup> Interviews were based on integrity, voluntariness and confidentiality. Interviewees who are named in the thesis have consented to have their name published.

Other materials such as unpublished reports from the Department of Labour were also gathered during the field study and is analyzed and used in the thesis.

In addition to examining the enforcement of South African labour law on domestic workers, the thesis also looks into domestic workers' labour rights established under international law and South African national law. In respect of international law, legally binding UN human rights treaties and ILO conventions are researched. The thesis also looks into General Comments issued by the UN human rights treaty bodies which are committees of independent experts monitoring the implementation of UN

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<sup>22</sup> J. Bell, *Introduktion till Forskningsmetodik*, tredje upplagan (Studentlitteratur, Lund, 2000) p. 120.

human rights treaties. General Comments are not legally binding on states but express the views of the treaty bodies regarding the interpretation of the provisions in the treaties.<sup>23</sup> In addition, the thesis looks into non-legally binding ILO labour standards such as the Domestic Workers Recommendation which provides guidelines for the practical implementation of the Domestic Workers Convention and the ILO Declaration on Fundamental Principles and Rights at Work which expresses the commitment of governments, workers' and employers' organizations to maintain fundamental human values.<sup>24</sup>

South African labour law consists of a set of rules originating from both the common law and statute. Today, the employment relationship is to a large extent regulated through legislation and the common law of employment only applies to the extent that legislation is not applicable.<sup>25</sup> The most important source of labour law is the Constitution, followed by labour legislation and judicial precedents. In addition, labour legislation permits trade unions and employers to vary certain statutory minimum standards of employment through collective agreements and employees are allowed to vary an even more limited list of employment rights in their individual employment contracts. Collective agreements and individual employment contracts may override the statutory minimum to this extent.<sup>26</sup> Other sources of labour law are common law and custom and legal writing.<sup>27</sup>

The purpose of the thesis is to look into domestic workers' minimum labour rights and minimum standards of employment. The thesis therefore focuses on labour rights and minimum standards of employment established in the Constitution and labour legislation. Of specific importance is Sectoral Determination 7: Domestic Worker Sector (SD7) which is a legislative act that establishes minimum conditions of employment and minimum wages for domestic workers. The SD7 constitutes *lex specialis* in respect of domestic workers' conditions of employment and minimum wages and overrides the Basic Conditions of Employment Act<sup>28</sup> which is the general piece of legislation establishing minimum conditions of employment for employees in South Africa.<sup>29</sup> In addition to the Constitution and labour legislation, judicial precedents interpreting such legislation and legal writings are also being researched to some extent. Labour rights established in the Constitution bind all organs of the state as well as natural persons to

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<sup>23</sup> UN, Office of the High Commissioner for Human Rights, *Human Rights Bodies*, <[www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx](http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx)>, visited on 10 August 2011.

<sup>24</sup> ILO, *Programme for the Promotion of the ILO Declaration on Fundamental Principles and Rights at Work*, <[www.ilo.org/declaration/lang--en/index.htm](http://www.ilo.org/declaration/lang--en/index.htm)>, visited on 10 August 2011.

<sup>25</sup> J. Grogan, *Workplace Law*, 10<sup>th</sup> edition (Juta & Co Ltd, Cape Town, 2009) pp. 1-3.

<sup>26</sup> *Ibid.*, p. 12.

<sup>27</sup> U. Bhoola (ILO), *National Labour Law Profile: South Africa*, <[www.ilo.org/public/english/dialogue/ifpdial/info/national/sa.htm](http://www.ilo.org/public/english/dialogue/ifpdial/info/national/sa.htm)>, visited on 10 August 2011.

<sup>28</sup> Basic Conditions of Employment Act 75 of 1997.

<sup>29</sup> Grogan, *supra* note 25, p. 12.

the extent it is applicable considering the nature of the right and any duty imposed by the right.<sup>30</sup> Labour rights and minimum standards of employment established in labour legislation bind the employer. There are no established collective agreements in the sector.

In addition to the material collected through the field study and international and national legal sources, academic writings and research, official reports from South African state organs, reports from NGOs and the ILO and internet sources are used in the thesis.

A lot of what is written and researched regarding domestic work is done from a gender or sociological perspective. For the purpose of this study, however, the thesis focuses on academic writings and research that use a legal perspective on domestic work. These academic writings and research include studies examining the effect of South African labour legislation on domestic workers' conditions of employment and studies examining enforcement of labour legislation through labour inspections and labour dispute resolution. In South Africa, research on the enforcement of domestic workers' labour rights has been conducted by the Domestic Workers Research Project (DWPR).<sup>31</sup> The thesis also focuses on academic writings and research conducted under the framework of the ILO and in preparation of the adoption of the Domestic Workers Convention.

## **1.4 Delimitations**

The scope of the thesis is limited to the enforcement of labour related rights of domestic workers and does therefore not address domestic workers' rights in respect of other areas. Additionally, in South Africa, the use of temporary employment services, or so called labour brokers, is fairly common in the domestic work sector. In some aspects these temporary employment services are jointly and severally liable with their clients for contraventions of provisions in a labour statute. The thesis will however not address the enforcement of legal obligations of temporary employment services.

## **1.5 Structure of the thesis**

The thesis begins with looking into domestic workers' labour rights under international human rights law and international labour law in chapter two. Chapter three gives a brief background on the situation of domestic workers in South Africa and discusses the regulation of domestic workers' labour

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<sup>30</sup> Constitution of the Republic of South Africa Act No. 108 of 1996 (hereafter the Constitution), section 8.

<sup>31</sup> The Domestic Workers Research Project is launched under the Social Law Project, which is a research and training unit based in the Faculty of Law at the University of the Western Cape in Cape Town, South Africa, focusing on employment and social security law.

rights under South African national law. In chapter four, the mechanisms for enforcement of South African labour law on domestic workers are examined as well as obstacles to the effective enforcement of such law. Chapter five contains a discussion regarding the enforcement of domestic workers' labour rights in South Africa and what other states might learn from the South African experience on the subject. Chapter five also gives examples on additional measures to be taken in order to establish compliance with legislation in the sector and discusses possible implications of the Domestic Workers Convention for the situation of domestic workers' in South Africa as well as globally. Lastly, a conclusion is provided in chapter six.

# 2 Regulation of domestic workers' labour rights under international law

## 2.1 UN human rights law and ILO labour law

The international human rights treaties established under the framework of the UN contain provisions recognizing universal human rights granted to everyone. Some of these treaties include provisions establishing human rights which are specifically applicable to the working life of individuals, including domestic workers. These treaties include the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which are widely ratified by the UN member states. Other treaties that contain human rights specifically applicable to the working life are the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the two most ratified UN human rights treaties.<sup>32</sup>

Domestic workers are also covered by the scope of international labour standards adopted under the framework of the ILO. The ILO has declared that domestic workers are covered by ILO labour standards unless a Convention or Recommendation explicitly excludes domestic workers from its scope.<sup>33</sup> Most importantly, domestic workers fall under the scope of ILO's eight core conventions<sup>34</sup> which codify the principles of freedom of association and the right to collective bargaining, the elimination of all forms of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and remuneration.<sup>35</sup> According to the ILO Declaration on Fundamental Principles and Rights at Work, ILO member states are bound by the eight core conventions, regardless of ratification, from the mere fact of their membership in the ILO. Although the Declaration is not legally binding, it

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<sup>32</sup> See ratification status for CRC and CEDAW at UN, *United Nations Treaty Collection*, <<http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>>, visited on 18 July 2011.

<sup>33</sup> ILO, *supra* note 3, p. 16.

<sup>34</sup> These eight core conventions are C87 Freedom of Association and Protection of the Right to Organise Convention, 1949; C98 Right to Organise and Collective Bargaining Convention, 1949; C29 Forced Labour Convention, 1930; C105 Abolition of Forced Labour Convention, 1957; C100 Equal Remuneration Convention, 1951; C111 Discrimination (Employment and Occupation) Convention, 1958; C138 Minimum Age Convention, 1973 and C182 Worst Forms of Child Labour Convention, 1999

<sup>35</sup> ILO, *supra* note 3, p. 17.



is recognized as expressing the commitment made by ILO member states to fulfill these fundamental principles and rights.<sup>36</sup>

South Africa became an ILO member in 1919. In 1966, however, South Africa left the ILO due to the ILO's position regarding South Africa's apartheid policies. In 1994 South Africa rejoined the ILO. South Africa has ratified 21 conventions of which 18 are in force for South Africa. These include all eight ILO core conventions.<sup>37</sup> South Africa has also ratified all the abovementioned UN human rights treaties with the exception of the ICESCR, which is signed but not yet ratified.<sup>38</sup>

Below follows an account of rights under UN human rights treaties and ILO conventions that are of specific importance for domestic workers.

### **2.1.1 Protection against forced labour**

Domestic workers sometimes work under conditions amounting to forced labour and servitude. These conditions include forced confinements, restricted communications, abuse, work under threats and debt bondage. In Singapore and Malaysia for example, the Human Rights Watch has found examples of migrant domestic workers being looked up at their workplaces, having their passport and work permits taken from them and being forced to work without receiving wages.<sup>39</sup>

Forced labour, servitude and slavery is prohibited under international human rights law and labour law. Article 8 of the ICCPR gives everyone the right to be free from slavery, servitude and forced labour. The Human Rights Committee (HRC) which is the body that interpreters and monitors the implementation of the ICCPR, has recognized that domestic work in certain circumstances is a disguised form of slavery.<sup>40</sup> Forced labour is also prohibited under the ILO Forced Labour Convention<sup>41</sup> where it is defined in article 2 as work being extracted from any person by the threat of penalty and without consent, and the ILO Abolition of Forced Labour Convention.<sup>42</sup>

### **2.1.2 Protection against child labour**

The CRC includes a provision in article 32 which obligates states to prohibit child labour which is likely to be hazardous, interfering with the education of the child or harmful to the child's health or development. The ILO Minimum Age Convention further prescribes states to set a minimum age of

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<sup>36</sup> ILO Declaration on Fundamental Principles and Rights at Work, para. 2,

<sup>37</sup> Bhoola, *supra* note 27.

<sup>38</sup> See ratification status of UN human rights treaties for South Africa at UN, *supra* note 32.

<sup>39</sup> Sunderland, *supra* note 10, p. 24.

<sup>40</sup> Human Rights Committee, *General Comment No. 28*, para. 12.

<sup>41</sup> C29 Forced Labour Convention, 1930.

<sup>42</sup> C105 Abolition of Forced Labour Convention, 1957.

employment of no less than 15 years.<sup>43</sup> Additionally, the ILO Worst Forms of Child Labour Convention prescribes that certain forms of labour always are forbidden for persons under the age of 18. These worst forms of child labour include slavery, forced labour, debt bondage and work which is likely to harm the health, safety and morals of children.<sup>44</sup> According to the ILO, domestic work may be considered to be one of the worst forms of child labour due to hazards such as long working hours and abuse that children might face when performing domestic work. There are no reliable figures on how widespread the use of child domestic workers is globally but the ILO estimates that domestic work is the most common form of child labour for girls under the age of 16.<sup>45</sup>

### **2.1.3 Freedom of association and the right to collective bargaining**

The right of everyone to freedom of association, including the right to form and join trade unions, is one of the most important work related human rights and is recognized in both the ICCPR (article 22) and the ICESCR (article 8). Furthermore, the ILO Freedom of Association and Protection of the Right to Organise Convention confirms the universal right to freedom of association by stating in article 2 that “workers and employers, without distinction whatsoever, shall have the right to establish and to join organizations of their own choosing without previous authorization.”<sup>46</sup> The ILO Right to Organise and Collective Bargaining Convention obligates member states to protect workers against anti union-discrimination in respect of their employment.<sup>47</sup>

The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR), one of the supervisory bodies of the ILO, has frequently emphasized that domestic workers are included under the application of the abovementioned ILO conventions and has compelled several member states to extend their legal provisions regarding freedom of association and the right to organize to also include domestic workers.<sup>48</sup> Despite protection under international law, many states however exclude domestic workers from the right to form and join trade unions.<sup>49</sup>

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<sup>43</sup> C138 Minimum Age Convention, 1973, article 2(3).

<sup>44</sup> C182 Worst Forms of Child Labour Convention, 1999, article 2.

<sup>45</sup> ILO, *International Programme on the Elimination of Child Labour - Domestic Labour*, <[www.ilo.org/ipecc/areas/Childdomesticlabour/lang--en/index.htm](http://www.ilo.org/ipecc/areas/Childdomesticlabour/lang--en/index.htm)>, visited on 28 July 2011.

<sup>46</sup> C87 Freedom of Association and Protection of the Right to Organise Convention, 1948, article 2.

<sup>47</sup> C98 Right to Organise and Collective Bargaining Convention, 1949, article 1.

<sup>48</sup> ILO, *supra* note 3, p. 17.

<sup>49</sup> S. Grumlau, *Decent work for domestic workers*, Labour Education 2007/3-4, No. 148-149, (ILO Bureau for Workers' Activities, 2007) p. 36, <[www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---actrav/documents/publication/wcms\\_111439.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---actrav/documents/publication/wcms_111439.pdf)>, visited on 15 July 2011.

## **2.1.4 The right to decent working conditions, social security and non-discrimination**

Domestic workers also enjoy the right to fair and favorable working conditions as established in article 7 of the ICESCR. Fair and favorable working conditions include fair wages, equal remuneration for work of equal value without discrimination of any kind, safe and healthy working conditions, decent working hours and periodic holidays with pay.<sup>50</sup> Domestic workers also have the right to social security as recognized in article 9 of the ICESCR.

As the overwhelming majority of domestic workers are women, provisions in the CEDAW are also of relevance for domestic workers. Article 11 prescribes that member states are required to eliminate discrimination against women in the field of employment and obligates member states to ensure that women enjoy certain rights including the right to job security, equal remuneration with men, social security, paid leave, safe working conditions and maternity leave with pay.

In addition, the ILO Discrimination (Employment and Occupation) Convention obligates member states to declare and pursue a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation without discrimination of any kind.<sup>51</sup> The ILO Equal Remuneration Convention further obligates member states to promote and ensure equal remuneration for men and women workers for work of equal value.<sup>52</sup>

## **2.2 The Domestic Workers Convention**

Although domestic workers fall under the application of international human rights and labour law, international law has failed to establish sufficient protection of domestic workers' labour rights. Neither the UN human rights treaties nor the general ILO labour standards adequately address the specific characteristics of domestic work or provide adequate guidance for member states on the applicability of these instruments on domestic workers' conditions of employment.<sup>53</sup>

In order to redress the deficiencies of international law in respect of protection of domestic workers' labour rights and conditions of employment, the ILO in 2008 decided to put the issue of creating international legal instruments on decent work for domestic work on its agenda. Consequently, in June 2011, the Domestic Workers Convention and the Domestic Workers Recommendation were adopted at the 100<sup>th</sup> session

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<sup>50</sup> See article 7(a), 7(b) and 7(d), ICESCR.

<sup>51</sup> C111 Discrimination (Employment and Occupation) Convention, 1958, article 2.

<sup>52</sup> C100 Equal Remuneration Convention, 1951, article 2.

<sup>53</sup> ILO, *supra* note 2.

of the International Labour Conference (ILC) at the ILO.<sup>54</sup> The object of the recently adopted Convention and its supplementary Recommendation is to ensure that member states recognize and protect the human rights of domestic workers.<sup>55</sup> The Convention will come into force 12 months after it has been ratified by two states.<sup>56</sup> The ILO expects that two states will have ratified it by 2012.<sup>57</sup>

The Domestic Workers Convention has a wide application and applies to all domestic workers.<sup>58</sup> A domestic worker is defined as “any person engaged in domestic work within an employment relationship.”<sup>59</sup> With domestic work means work performed in or for a household or households.<sup>60</sup>

The purpose of the Convention is to ensure that domestic workers will have the same basic labour rights as those available to other workers. Under the Convention, domestic workers are therefore granted rights such as the right to enjoy decent working conditions, fair terms of employment and decent living conditions (article 6); the right to equal treatment in relation to other workers regarding hours of work, overtime compensation, daily and weekly rest and paid annual leave (article 10); the right to a minimum wage coverage (article 11); the right to a safe and healthy working environment (article 13); and an equal right in relation to other workers to social security (article 14).

The Convention also specifically reaffirms the protection domestic workers already enjoy under fundamental ILO conventions. Article 3 prescribes that member states must, in relation to domestic workers, take measures to respect, protect and realize the fundamental principles and rights at work codified in the ILO’s eight core conventions (see chapter 2.1).<sup>61</sup> In respect of child labour, the Convention reaffirms the protection domestic workers already have under the ILO Minimum Age Convention and the ILO Worst Forms of Child Labour Convention and obligates states to set a minimum age for domestic work which is in consistence with these conventions.<sup>62</sup>

In addition to obligating member states to ensure that domestic workers enjoy the same protection in respect of labour rights as other workers, the Convention also acknowledges specific areas of concern for domestic workers. Article 5 recognizes the risk of abuse, harassment and violence that domestic workers might face at work and obligates states to ensure that domestic workers are effectively protected against such acts. In respect of

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<sup>54</sup> ILO, *supra* note 5.

<sup>55</sup> See ILO, *supra* note 3, p. 16 and Domestic Workers Convention, article 3.

<sup>56</sup> Domestic Workers Convention, article 21(2).

<sup>57</sup> L. Schlein, ‘Landmark Convention Adopted to Protect Domestic Workers’, *Voice of America*, 16 June 2011, <[www.voanews.com/english/news/europe/Landmark-Convention-Adopted-to-Protect-Domestic-Workers-124019499.html](http://www.voanews.com/english/news/europe/Landmark-Convention-Adopted-to-Protect-Domestic-Workers-124019499.html)>, visited on 3 September 2011.

<sup>58</sup> Domestic Workers Convention, article 2.

<sup>59</sup> *Ibid.*, article 1(b).

<sup>60</sup> *Ibid.*, article 1(a).

<sup>61</sup> *Ibid.*, article 3(2).

<sup>62</sup> *Ibid.*, article 4.

domestic workers' right to be free from forced labour, article 9 explicitly obligates member states to ensure that domestic workers who reside in the household where they are employed are not obligated to remain in the household outside working hours. Member states must also ensure that domestic workers are entitled to keep their travel and identity documents in their possession.<sup>63</sup> The Convention also includes an important provision in respect of domestic workers who are recruited or placed by private employment agencies. As established in article 15, member states are obligated to ensure that domestic workers recruited or placed by these agencies are protected against abuse and debt bondage by taking measures that among other things ensure that fees charged by the agencies are not deducted from the salaries of domestic workers. Employment agencies that recruit, train and place domestic workers are especially common in Asia due to the large migration of domestic workers in the area. Many agencies tend to deduct the recruitment fee from the salaries of domestic workers resulting in that many domestic workers end up in situations amounting to debt bondage.<sup>64</sup>

The Convention is supplemented by a non-binding Recommendation providing practical guidance on how to give effect to the provisions in the Convention. The Recommendation contains for example specific provisions regarding domestic workers' enjoyment of fundamental principles and rights at work.<sup>65</sup> It also provides more detailed regulation regarding for example working hours, weekly and daily rest and annual leave.<sup>66</sup> More specified details in respect of living conditions for domestic workers who are provided accommodation and food by their employers are also set out in the Recommendation.<sup>67</sup>

The Convention and the Recommendation were adopted by a vast majority of the ILC delegates. 396 delegates voted for the adoption of the Convention while 16 delegates voted against. 63 delegates choose to abstain from voting. The Recommendation was adopted by a vote of 434 to eight with 42 delegates abstaining.<sup>68</sup> Governments that voted for the adoption of the Convention include the governments of the Gulf States, the United States, Indonesia, the Philippines, Uruguay and South Africa.<sup>69</sup>

Although it is difficult to predict how many states that will actually ratify the Convention, the vast numbers of delegates voting for its adoption indicate that there is an extensive international support for the Convention. Furthermore, a few states, including the Philippines, Uruguay, Namibia and South Africa have already indicated interest and intent in ratifying the new

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<sup>63</sup> *Ibid.*, article 9(b)-(c).

<sup>64</sup> Sunderland, *supra* note 10, p. 69.

<sup>65</sup> Domestic Workers Recommendation, paras. 2-5.

<sup>66</sup> *Ibid.*, paras 8, 10 and 13.

<sup>67</sup> *Ibid.*, para. 17.

<sup>68</sup> ILO, *supra* note 5.

<sup>69</sup> H. M. Neo, 'ILO passes landmark treaty to protect domestic workers', *Inquirer Global Nation*, 16 June 2011, <<http://globalnation.inquirer.net/4318/ilo-passes-landmark-treaty-to-protect-domestic-workers>>, visited on 5 August 2011, and Ramutloa, *supra* note 21.

Convention. Brazil has expressed that it would like to be the first state ratifying the new Convention.<sup>70</sup> Support for the Convention is also expressed by the European Parliament in a resolution adopted in May 2011 in which the Parliament urged European ILO member states to adopt the new Convention. The resolution also urges European Union member states to ratify and implement the new Convention and Recommendation.<sup>71</sup>

Malaysia, Singapore and Thailand were among the governments that abstained from voting on the adoption of the Convention and their abstention can be interpreted as an indication of unwillingness to ratify the Convention. According to the ILO, around 40 percent of all domestic workers are in Asia and the protection of domestic workers' labour rights is particularly low in this area.<sup>72</sup>

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<sup>70</sup> ILO, *Questions and Answers on the Convention Concerning Decent work for Domestic Workers*, <[www.ilo.org/ilc/ILCSessions/100thSession/media-centre/articles/WCMS\\_158371/lang--en/index.htm](http://www.ilo.org/ilc/ILCSessions/100thSession/media-centre/articles/WCMS_158371/lang--en/index.htm)>, visited on 5 August 2011; Neo, *supra* note 69; J. Bamat, 'New treaty aims to protect millions of domestic workers', *France 24*, 17 June 2011, <[www.france24.com/en/20110617-ilo-domestic-worker-treaty-convention-rights-geneva-labour-organisation-un](http://www.france24.com/en/20110617-ilo-domestic-worker-treaty-convention-rights-geneva-labour-organisation-un)>, visited on 5 August 2011; and S. P. Medenilla, 'ILO adopts its landmark convention', *The Manila Bulletin Newspaper Online*, 17 June 2011, <[www.mb.com.ph/articles/323131/ilo-adopts-its-landmark-convention](http://www.mb.com.ph/articles/323131/ilo-adopts-its-landmark-convention)>, visited on 5 August 2011.

<sup>71</sup> European Parliament Resolution of 12 May 2011 on the proposed ILO convention supplemented by a recommendation on domestic workers, <[www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0237&language=EN&ring=B7-2011-0296](http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0237&language=EN&ring=B7-2011-0296)>, visited on 5 August 2011.

<sup>72</sup> IRIN humanitarian news and analysis, 'Rights: ILO milestone for domestic workers', 17 June 2011, <[www.irinnews.org/Report.aspx?ReportID=93003](http://www.irinnews.org/Report.aspx?ReportID=93003)>, visited on 5 August 2011.

# 3 Regulation of domestic workers' labour rights under South African law

## 3.1 Brief background on domestic workers in South Africa

According to official statistical data there are 877 000 domestic workers in employment in South Africa and domestic workers amount to five percent of the total South African workforce. 96 percent of the domestic workers are women and domestic workers account for almost 15 percent of the total female workforce.<sup>73</sup> The numbers are however likely to be higher due to the hidden nature of domestic work and the difficulty in capturing undocumented migrant domestic workers and kin members working for food and accommodation, through labour force surveys.<sup>74</sup> It is however clear that domestic work is the single largest sector of employment for women in South Africa.<sup>75</sup>

Black<sup>76</sup> African women make up approximately 90 percent of the domestic work sector and domestic work is often the only labour opportunity for women in South Africa. During apartheid, African women were excluded from many occupational opportunities and were therefore often referred to take jobs in the domestic work sector. Moreover, the poor education offered to Africans during apartheid has led to high levels of illiteracy which hinders many African women from acquiring occupational skills.<sup>77</sup> High levels of income inequality and an employment rate of 25 percent also contribute to the creation of a large number of poor and unskilled persons willing to perform menial and poorly paid domestic work.<sup>78</sup> Domestic

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<sup>73</sup> Statistics South Africa. *Quarterly Labour Force Survey, Quarter 1, 2011*, Statistical Release P0211, p. 23, <[www.statssa.gov.za/publications/P0211/P02111stQuarter2011.pdf](http://www.statssa.gov.za/publications/P0211/P02111stQuarter2011.pdf)>, visited on 10 July 2011.

<sup>74</sup> Bonner, *supra* note 4.

<sup>75</sup> H. Schwenken and L. Heimeshoff (eds.), *Domestic Workers Count: Global Data on an Often Invisible Sector* (Kassel University Press GmbH, Kassel, 2011) p. 20, <[www.uni-kassel.de/upress/online/frei/978-3-86219-050-8.volltext.frei.pdf](http://www.uni-kassel.de/upress/online/frei/978-3-86219-050-8.volltext.frei.pdf)>, visited on 10 July 2011.

<sup>76</sup> The apartheid government divided people into four racial groups: African, Coloured, Indian and White depending on the ancestry. Today these terms are used for official purposes in for example labour force surveys but also to some extents in general discourse. The term "Black" here refers to Africans, Coloured and Indians collectively.

<sup>77</sup> du Preez, *supra* note 12, p. 397.

<sup>78</sup> D. Budlender and D. Bosch, *South Africa Child Domestic Workers: A National Report*, (ILO International Programme on the Elimination of Child Labour (IPEC), 2002) p. xii, <[www.anexcdw.org.za/attachments/039\\_CDW%20-%20SA%20REPORT.pdf](http://www.anexcdw.org.za/attachments/039_CDW%20-%20SA%20REPORT.pdf)>, visited on 10 July 2011. See also Statistics South Africa, *supra* note 73, p. 4.

workers are one of the most oppressed and vulnerable occupational groups in South Africa.<sup>79</sup>

## 3.2 Regulation of domestic workers' labour rights under the Constitution and main labour statutes

Domestic workers have been included under South African labour law since 1993. However it was not until after the democratization of South Africa that domestic workers were included under labour legislation to a larger extent.

In 1994, the South African constitutional system based on racial discrimination and sustained for over 300 years of colonialism and apartheid ended with the enactment of a new Constitution.<sup>80</sup> The Constitution<sup>81</sup> lays down the foundation for a new democratic South Africa founded on the values of equality, non-racism and human rights.<sup>82</sup> The Constitution includes an extensive Bill of Rights that establishes several rights of importance for the area of labour law, including the right of everyone to freedom from slavery, servitude and forced labour and the right of everyone to equality.<sup>83</sup> Section 23 of the Bill of Rights establishes the right of everyone to fair labour practices including the right to form and join trade unions, the right to strike and the right for trade unions and employers' organizations to engage in collective bargaining. The Bill of Rights applies to all law and binds the legislature, the executive and the judiciary organs as well as all other state organs. Provisions in the Bill of Rights also binds natural persons to the extent the provision is applicable taking into account the nature of the right and the duty imposed by the provision.<sup>84</sup>

In 1996 the Labour Relations Act<sup>85</sup> (LRA) was enacted in order to give effect to the constitutional right to fair labour practice and to fulfill obligations under relevant ILO conventions that South Africa had ratified after its reentering in the ILO in 1994.<sup>86</sup> The LRA regulates the right to

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<sup>79</sup>Social Law Project, *Enforcing the unenforceable? From enforcement to compliance*, Conference report, Chapter 2, (2010) p. 24, <[www.dwrp.org.za/images/stories/DWRP\\_Research/chapter\\_2.pdf](http://www.dwrp.org.za/images/stories/DWRP_Research/chapter_2.pdf)>, visited on 5 June 2011.

<sup>80</sup>J. de Waal and I. Currie, *The Bill of Rights Handbook*, 5<sup>th</sup> edition (Juta & Co Ltd, Cape Town, 2005) p. 2.

<sup>81</sup>Constitution of the Republic of South Africa No. 108 of 1996. The Constitution enacted in 1994 was an interim constitution and was replaced in 1996 with Constitution No. 108 of 1996 which is still in force.

<sup>82</sup>Constitution, section 1.

<sup>83</sup>*Ibid.*, sections 13 and 9.

<sup>84</sup>*Ibid.*, section 8.

<sup>85</sup>Labour Relations Act No. 66 of 1996 (hereafter the LRA).

<sup>86</sup>A.C. Basson *et al*, *Essential Labour Law*, 4<sup>th</sup> combined edition (Labour Law Publications, Cape Town, 2005) p. 13.



collective bargaining, the right to form and join trade unions, the right to fair labour practices and the right not to be unfairly dismissed.<sup>87</sup> Most importantly, with the enactment of the LRA in 1996 these rights were extended to all employees (including domestic workers) with only a few exceptions.<sup>88</sup>

The constitutional right to fair labour practice has also resulted in the enactment of the Basic Conditions of Employment Act<sup>89</sup> (BCEA) in 1997.<sup>90</sup> The purpose of the enactment of the BCEA was to replace statutes enacted during apartheid which had excluded many vulnerable groups of workers, including domestic workers.<sup>91</sup> The BCEA is the most comprehensive South African labour statute providing for minimum standards of employment and includes provisions regulating working hours, the right to paid leave and termination of employment. With the BCEA, virtually all employees in South Africa are covered by minimum standards of employment.<sup>92</sup> Since 1993 full time domestic workers had been included under a former version of the BCEA. With the enactment of the BCEA in 1997, the application was extended to also include part time domestic workers.<sup>93</sup>

The third major labour statute enacted in order to give effect to constitutional labour rights is the Employment Equity Act<sup>94</sup> (EEA) from 1998 which regulates the constitutional right to equality as applicable at the workplace. The EEA applies to all employees and employers, including domestic workers and their employers, with a few exceptions.<sup>95</sup> The first part of the EEA sets out provisions prohibiting unfair discrimination in the workplace on an extensive, but not limited list of grounds. The second part of the act regulates affirmative actions. This part is only applicable to certain designated employers such as employers employing a minimum of 50 employees and does therefore not apply in the domestic work sector.<sup>96</sup>

In the *Discovery Health v. the CCMA* case from 2008, the South African Labour Court held that an undocumented migrant worker or a foreigner without a valid work permit is an employee for the purpose of the LRA and therefore entitled to the protection offered to employees in terms of the act. The Labour Court drew its conclusion after deciding that a valid employment contract is not a prerequisite for the definition of 'employee' in the LRA. Neither does the constitutional right of everyone to fair labour

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<sup>87</sup> LRA, section 1.

<sup>88</sup> *Ibid.*, section 2.

<sup>89</sup> Basic Conditions of Employment Act 75 of 1997 (hereafter the BCEA).

<sup>90</sup> *Ibid.*, section 1.

<sup>91</sup> Social Law Project, *Advancing domestic workers' rights in a context of transformative constitution*, Conference report, Chapter 1, (2010) p. 11, <[www.dwrp.org.za/images/stories/DWRP\\_Research/chapter\\_1.pdf](http://www.dwrp.org.za/images/stories/DWRP_Research/chapter_1.pdf)>, visited on 12 June 2011.

<sup>92</sup> C. Thomson and P. Benjamin, *South African Labour Law (formerly de Kock's Industrial Laws of South Africa)*, vol. 1 (Juta & Co Ltd, Cape Town, 2003), pp. BB1-1

<sup>93</sup> du Preez, *supra* note 12, p. 395.

<sup>94</sup> Employment Equity Act No. 55 of 1998 (hereafter the EEA).

<sup>95</sup> *Ibid.*, section 4.

<sup>96</sup> *Ibid.*, section 1.

practice requires the existence of an employment contract in order to be applicable.<sup>97</sup> The constitutional right of everyone to fair labour practice does therefore not exclude illegally employed foreigners from its application. The implication of the case is that undocumented migrant workers and foreigners without valid work permits or valid contracts of employment are protected under South African labour law.<sup>98</sup>

### 3.3 Regulation specifically addressing domestic workers' labour rights

Although applicable to domestic workers, it became clear in the end of the 1990's that the main labour statutes enacted in order to give effect to labour rights contained in the Constitution, had not managed to sufficiently uphold domestic workers' labour rights. Domestic workers were still suffering from low wages, long and irregular working hours, low security of employment and abuse.<sup>99</sup> It was clear that the main labour statutes, constructed on the notion of labour as organized and formal and addressing workers in 'standard employments', were inadequate in addressing 'non standard' workers such as domestic worker whose work is mostly informal, unorganized and of special character.<sup>100</sup>

In order to redress some of the deficiencies of the BCEA, the Minister of Labour in 2002 issued the Sectoral Determination 7: Domestic Worker Sector (SD7), a legislative act which specifically regulates domestic workers' conditions of employment. The SD7 is issued in terms of section 51 of the BCEA which gives the Minister of Labour mandate to make sectoral determinations setting basic conditions of employment for specific occupational sectors.

The SD7 sets out minimum standards of employment that employers of domestic workers are obligated to comply with and includes provisions regulating working hours, minimum wage, leave and termination of employment as well as other conditions of work. The SD7 applies to the employment of domestic workers. A domestic worker is defined as a worker or independent contractor "who performs domestic work in a private household and who receive, or is entitled to receive, pay" and includes

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<sup>97</sup> Discovery Health Limited v. Commission For Conciliation, Mediation and Arbitration and Others (JR 2877/06) [2008] ZALC 24; [2008] 7 BLLR 633 (LC) ; (2008) 29 ILJ 1480 (LC) (28 March 2008), paras. 38 et seq., <[www.saflii.org/za/cases/ZALC/2008/24.pdf](http://www.saflii.org/za/cases/ZALC/2008/24.pdf)>, visited on 10 June 2011.

<sup>98</sup> D. Makanga, 'Decent work still a dream for South Africa's Domestic Workers', *Inter Press Service News Agency*, 11 May 2010, <<http://ipsnews.net/news.asp?idnews=51396>>, visited on 10 June 2011. See also A. J Steenkamp, judge at the Labour Court, Cape Town, interview 29 April 2011.

<sup>99</sup> C. Horton and M. Vilani, *Working Conditions of Domestic and Agricultural Workers*, Policy Memo, (National Labour and Economic Development Institute (NALEDI), 2001) pp. 3 – 4.

<sup>100</sup> Social Law Project, *supra* note 91, p. 12.

gardeners, persons employed as drivers in a household and persons who take care of children, sick and old persons.<sup>101</sup> The SD7 replaces the minimum standards of employment as established in the BCEA in respect of domestic workers. In respect of matters that are not regulated in the SD7 however, the provisions in the BCEA will apply.<sup>102</sup>

A deficiency of the SD7 is that it excludes domestic workers who work less than 24 hours per month for an employer from the application of the provisions in the determination except for the ones regulating minimum wage. The implication is that an employer who employs a domestic worker for less than 24 hours per month is obligated to pay minimum wage but not to comply with other minimum standards of employment as established in the SD7 in respect of that worker.<sup>103</sup>

### **3.4 Other important legislation**

In 2003, a year after the enactment of the SD7, domestic workers were also given the right to certain unemployment benefits when the Unemployment Insurance Act<sup>104</sup> (UIA) from 2001 was extended to also include domestic workers. The UIA gives, subject to various requirements, persons who for different reasons are not able to work the right to certain benefits including unemployment benefits and maternity benefits.<sup>105</sup>

### **3.5 Rights of specific importance**

Some labour rights are identified as especially important for domestic workers in South Africa. These will be discussed in the following subchapters.

#### **3.5.1 The right to minimum wage**

Probably the most important contribution of the SD7 is the establishment of a minimum wage for domestic workers. The introduction of the minimum wage provided a significant contribution to the improvement of domestic workers' conditions of employment since the minimum wage was set above the median hourly wage prevailing at the time.<sup>106</sup> The minimum wage

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<sup>101</sup> SD7, clause 31.

<sup>102</sup> *Ibid.*, clause 1(4).

<sup>103</sup> *Ibid.*, clause 1(3).

<sup>104</sup> Unemployment Insurance Act No. 63 of 2001 (hereafter the UIA).

<sup>105</sup> *Ibid.*, section 12.

<sup>106</sup> T. Hertz, *Have Minimum Wages Benefited South Africa's Domestic Service Workers? African Development and Poverty Reduction: The Macro-Micro Linkage*, Forum Paper, (Development Policy Research Unit, 2004) p. 1, <[www.tips.org.za/files/hertz\\_Minimum\\_Wages\\_for\\_Domestics.pdf](http://www.tips.org.za/files/hertz_Minimum_Wages_for_Domestics.pdf)>, visited on 10 June 2011.

differs depending on where and how many hours per week a domestic worker works. Domestic workers working in Area A, which includes all South African cities and certain towns, are entitled to a higher minimum wage than domestic workers working in Area B, which consists of areas not mentioned under Area A. Additionally, domestic workers who work 27 ordinary hours or less per week are entitled to a higher hourly minimum wage than domestic workers who work more than 27 ordinary hours per week.<sup>107</sup> In 2011, the minimum monthly wage for a full time domestic worker range from ZAR<sup>108</sup> 1256 to 1506 depending on area and weekly hours.<sup>109</sup>

In addition to setting a minimum wage, the SD7 also includes provisions regulating the payment of wages, the issuing of pay slips and provisions restricting wage deductions for accommodation and debts.<sup>110</sup>

### 3.5.2 The right to regulated working hours

In order to come to terms with the excessive hours of work in the domestic work sector the SD7 also regulates working hours and leave for domestic workers. The ordinary hours of work are set to 45 hours per week which is in consistency with general ordinary hours of work as established in the BCEA.<sup>111</sup> The SD7 also permits a maximum of 15 hours overtime per week.<sup>112</sup> Permitted ordinary hours per day vary depending on how many days per week the worker is employed.<sup>113</sup> The employer must however always ensure that the domestic worker gets a daily rest period of at least 12 consecutive hours and a weekly rest period of at least 36 consecutive hours.<sup>114</sup> In consistency with the BCEA, the SD7 also regulates work on Sundays and Public Holidays.<sup>115</sup>

South Africa is one of few countries that regulates and provides for compensation for standby time for domestic workers.<sup>116</sup> Standby is defined as “any period between 20:00 and 06:00 the next day when a domestic worker is required to be at the workplace and is permitted to rest or sleep but must be available to work if necessary.”<sup>117</sup> The SD7 prohibits employers

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<sup>107</sup> SD7, clause 3(1).

<sup>108</sup> South African Rand, ZAR 1 is equivalent to SEK 0,96 (15 August 2011).

<sup>109</sup> Department of Labour, *Wage Tables for the Domestic Work Sector 2010/2011*, <[www.labour.gov.za/legislation/sectoral-determinations/sectoral-determination-7-domestic-workers](http://www.labour.gov.za/legislation/sectoral-determinations/sectoral-determination-7-domestic-workers)>, visited on 10 June 2011.

<sup>110</sup> SD7, clauses 5-8.

<sup>111</sup> *Ibid.*, clause 10 and BCEA, section 9.

<sup>112</sup> SD7, clause 11.

<sup>113</sup> *Ibid.*, clause 10.

<sup>114</sup> *Ibid.*, clause 16.

<sup>115</sup> *Ibid.*, clause 17-18.

<sup>116</sup> A. King Dejardin, *Working hours in domestic work*, Domestic Work Policy Brief 2, (ILO Conditions of Work and Employment Programme, (TRAVAIL)) p. 2, <[www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_156070.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_156070.pdf)>, visited on 10 June 2011.

<sup>117</sup> SD7, clause 14.

from requiring a domestic worker to be on stand by more than five times a month or 50 times per year. The worker must be paid and is only permitted to do work which is required to be done without delay.<sup>118</sup>

The SD7 also entitles domestic workers to three weeks annual leave on full pay, sick leave and four consecutive months of maternity leave. These conditions are in accordance with conditions granted by the BCEA to workers in general.<sup>119</sup>

### **3.5.3 The right to social security**

Under the UIA domestic workers are entitled to unemployment benefits, illness benefits, maternity benefits, adoption benefits and dependents benefits.<sup>120</sup> The UIA applies however only to employees, who are employed for more than 24 hours a month with a particular employer, and their employers.<sup>121</sup>

The benefits under the UIA are claimed at and paid by the Unemployment Insurance Fund (UIF) which consists of compulsory contributions paid to the fund by employers and employees. Both employers and employees are required to contribute to the UIF on a monthly basis with an amount each that equals one percent of the employee's monthly salary. The employee's contribution is deducted from the employee's monthly salary and is paid in to the UIF by the employer together with the employer's contribution.<sup>122</sup> In order to administer the contributions to and payments from the UIF, every employer must register him or herself with the UIF. They must also register terminations of the employment of an employee as well as appointments of any employee made by the employer.<sup>123</sup>

### **3.5.4 Termination of employment and protection against unfair dismissals**

With the adoption of the LRA, employees, including domestic workers, were for the first time granted a right not to be unfairly dismissed. Employers are for example no longer allowed to dismiss their domestic workers without notice and at will, a conduct all too common before.<sup>124</sup>

The LRA divides unfair dismissals into automatically unfair dismissals and dismissals that in certain circumstances are unfair. Automatically unfair

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<sup>118</sup> *Ibid.*, clause 14.

<sup>119</sup> See SD7, clauses 19, 20 and 22 and BCEA, sections 20, 22 and 25.

<sup>120</sup> UIA, section 12.

<sup>121</sup> *Ibid.*, section 3(1)(a).

<sup>122</sup> Unemployment Insurance Contributions Act No. 4 of 2002 (hereafter the UICA). sections 5-7,

<sup>123</sup> *Ibid.*, section 10.

<sup>124</sup> Hester Stephens, president of the SADSAWU, Cape Town, interview 11 April 2011.

dismissals are dismissals that are impermissible in any circumstances because of the reason for the dismissal and include dismissals for the reason of an employee's pregnancy or membership in a trade union.<sup>125</sup> Other dismissals are unfair if the employer fails to prove that the reason for the dismissal is a fair reason related to the conduct or capacity of the employee or based on the employer's operational requirements. In addition, the employer must also prove that the dismissal was carried out in accordance with a fair procedure.<sup>126</sup>

Additionally, the SD7 includes certain provisions regulating termination of employment. The SD7 prescribes that a minimum notice period of one week must be given if the domestic worker has been employed for six months or less. If the domestic worker has been employed for more than six months, notice must be given at least four weeks before the termination of the employment.<sup>127</sup> The SD7 also prescribes that an employer of a live-in domestic worker that terminates a contract of employment before he or she was entitled to do so must provide accommodation for the live-in domestic worker for a period of one month.<sup>128</sup> This provision gives live-in domestic workers time to arrange with other accommodation when their employment relationship ends.

### **3.5.5 Prohibition of child labour and forced labour**

The South African Constitution does not prohibit child labour nor does it impose any age restrictions for employment of children.<sup>129</sup> Section 28 of the Constitution does however grant every child the right to be protected from exploitative labour practices and to be protected from performing work and services that are inappropriate for a person of the child's age or that pose a risk to the child's well-being, education, health or development.<sup>130</sup>

In year 2000, South Africa ratified the ILO Minimum Age Convention and specified the minimum age of permissible child labour to 15.<sup>131</sup> South Africa had however already in 1997 with the enactment of the BCEA, prohibited employment of children under the age of 15.<sup>132</sup> The SD7 also sets a minimum age of 15 for the employment of children as domestic workers.<sup>133</sup> Children in the age between 15 and 18 are however not unprotected. In consistency with the Constitution, the SD7 prohibits

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<sup>125</sup> LRA, section 187.

<sup>126</sup> *Ibid.*, section 188.

<sup>127</sup> SD7, clause 24.

<sup>128</sup> *Ibid.*, clause 26.

<sup>129</sup> de Waal, *supra* note 80, p. 615.

<sup>130</sup> Constitution, section 28.

<sup>131</sup> See South Africa ratification status of Minimum age Convention at ILOLEX, <[www.ilo.org/ilolex/english/newratframeE.htm](http://www.ilo.org/ilolex/english/newratframeE.htm)>, visited on 12 June 2011.

<sup>132</sup> BCEA, section 43.

<sup>133</sup> SD7, clause 23(1).

employment of a child in domestic work which is inappropriate for a child in that age or threatens the well being of the child as well as its education, health or social development.<sup>134</sup>

The Constitution also includes a provision in section 13 that prescribes that no one may be subjected to slavery, servitude or forced labour. The provision is realized for domestic workers through clause 23 of the SD7 which stipulates that all forced labour is prohibited subject to the Constitution.

Employing a child as a domestic worker in contravention with SD7 and causing, demanding or imposing someone to perform forced labour constitute criminal offences which may give up to three years of imprisonment.<sup>135</sup>

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<sup>134</sup> *Ibid.*, clause 23(2).

<sup>135</sup> *Ibid.*, clause 23(6) and BCEA, section 93.

# 4 Enforcement of domestic workers' labour rights in South Africa

South African labour legislation establishes different means and mechanisms for the enforcement of labour laws. For domestic workers, the main mechanisms are the labour inspection system, the Commission for Conciliation, Mediation and Arbitration (CCMA) and the Labour Courts.<sup>136</sup> The following chapters will discuss these three mechanisms in respect of the enforcement of domestic workers' labour rights and conditions of employment.

Child labour and forced labour constitute criminal offences and are enforced through criminal proceedings. Although constituting very serious violations of labour law, the enforcement of the rights not to be subjected to child labour and forced labour is not specifically addressed in the thesis.

## 4.1 The labour inspection system

The international obligation to maintain labour inspection systems is provided for in the ILO Labour Inspection Convention<sup>137</sup> from 1947. According to article 3, the main function of the labour inspection system is to secure enforcement of legal provisions relating to working conditions and protection of workers while at work.<sup>138</sup> South Africa has not ratified the Labour Inspection Convention but has however established a labour inspection system with labour inspectors under the BCEA. The labour inspection system is the primary mechanism securing compliance with provisions regulated in the BCEA and the SD7.<sup>139</sup> Other legislation that fall under the labour inspection system includes the UIA and the EEA.<sup>140</sup>

The role of the labour inspector is to promote, monitor and enforce compliance with South African labour law.<sup>141</sup> In doing so, the labour inspector may conduct inspections at workplaces, advice employees and employers regarding their rights and obligations regulated in labour legislation and investigate complaints from employees made to the labour

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<sup>136</sup> The Labour Courts have concurrent jurisdiction with the civil courts to hear certain labour related disputes. The thesis will however not discuss the dispute resolution system under the civil courts. Considering the nature of the obstacles domestic workers' face in respect of access to justice at the Labour Courts, it is likely that these obstacles also are applicable in respect of labour dispute resolution at the civil courts.

<sup>137</sup> C81 Labour Inspection Convention, 1947.

<sup>138</sup> *Ibid.*, articles 3 and 5.

<sup>139</sup> A. van Niekerk *et al.*, *Law@work*, 1<sup>st</sup> edition (LexisNexis, Durban, 2008) p. 403.

<sup>140</sup> See EEA, section 35 and UIA, section 38 and 39.

<sup>141</sup> BCEA, section 64(1).



inspector.<sup>142</sup> In order to be able to carry out these tasks the labour inspector has been given certain powers including the power to enter workplaces without notice and warrant, to inspect and question a person about matters related to labour law and performed work and to require a person to disclose information related to labour law.<sup>143</sup> If the inspector finds that an employer has failed to comply with any provision in the BCEA or a provision in other relevant labour legislation, the inspector must attempt to secure a written undertaking by the employer to comply with the provision.<sup>144</sup> The inspector may also issue a compliance order that describes the measures the employer must take in order to correct the non-compliance.<sup>145</sup> If the employer fails to comply with the compliance order, the Director General of the Department of Labour can apply to the Labour Court for the order to be made an order of the Court.<sup>146</sup>

Since 2005 the Department of Labour Inspectorate has conducted several so called domestic worker project inspections in which labour inspectors conduct inspections of households in certain designated areas during a certain time period in order to establish and ensure compliance with provisions in the SD7 and the UIA.<sup>147</sup> In addition to conducting domestic worker project inspections, labour inspectors also investigate employers' compliance with legislation on domestic work after receiving complaints about violations of domestic workers' labour rights and conditions of employment.<sup>148</sup>

The latest domestic worker project inspections conducted in the Western Cape took place in Cape Town and other towns in the Western Cape during five days in January 2011.<sup>149</sup> The labour inspectors inspected a total of 215 households employing domestic workers and found that only 103 households, or 48 percent, were fully compliant with the provisions in the SD7 and the UIA.<sup>150</sup> A month later, follow up inspections were conducted in order to follow up on written undertakings that had been secured from non-complying employers. In the follow up inspections, labour inspectors found that 84 out of the 93 employers that were subjected to the follow up inspections now were in full compliance. Nine employers had failed to honor their written undertakings and were served with compliance orders.<sup>151</sup> After the follow up inspections, 96 percent of all households inspected

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<sup>142</sup> *Ibid.*, section 64(1)(a-c).

<sup>143</sup> *Ibid.*, section 66.

<sup>144</sup> *Ibid.*, section 68(1).

<sup>145</sup> *Ibid.*, section 69.

<sup>146</sup> *Ibid.*, section 73.

<sup>147</sup> Social Law Project, *supra* note 79, p. 30.

<sup>148</sup> Anthony Rudman, Inspection and Enforcement Services, Department of Labour Western Cape, Cape Town, interview 16 March 2011.

<sup>149</sup> Department of Labour Western Cape, *Report on the domestic worker project inspections conducted from 17 to 21 January 2011 in the Western Cape*, (28 February 2011), (unpublished) p. 1.

<sup>150</sup> *Ibid.*, pp. 5-6.

<sup>151</sup> Department of Labour Western Cape, *Report on the domestic worker project follow up inspections conducted from 21 to 23 February 2011 in the Western Cape*, (28 February 2011), (unpublished) p. 2.

during the project inspections were in compliance with the SD7 and the UIA.<sup>152</sup>

## **4.1.1 Obstacles to effective labour inspections in the domestic work sector**

The positive outcome of the latest domestic worker project inspections suggests that labour inspections provide an effective mean of ensuring compliance with legislation regulating domestic work. However, there are several obstacles facing the labour inspection system in respect of the domestic work sector. These obstacles limit the effectiveness and relevancy of the domestic worker project inspections and the ability of the labour inspection system to enforce labour legislation regulating domestic workers' rights and conditions of employment.

### **4.1.1.1 Lack of awareness**

Since the promulgation of the SD7 and the inclusion of domestic workers under the UIA, the Department of Labour has conducted extensive media campaigns in order to raise public awareness about labour legislation in the sector.<sup>153</sup> Research conducted by the DWRP and the results from the field study however indicate that the awareness among domestic workers regarding their labour rights is still limited. Lack of awareness about legal rights and enforcement mechanisms presents an obvious obstacle to domestic workers' ability to claim their rights and report violations to the Department of Labour Inspectorate.

Evident lack of awareness among domestic workers was shown in a survey commissioned by the DWRP in 2009. 600 domestic workers took part in the survey of which 447 were non-unionized and 153 were unionized. The survey showed that 65.3 percent of the unionized domestic workers were aware of the existence of legislation regulating domestic work. However, as pointed out by the DWRP, unionized domestic workers amount to only five percent of all domestic workers in South Africa. Among the non-unionized workers, only 19.7 percent were aware of the existence of labour legislation applicable to domestic workers.<sup>154</sup> This indicates that a great majority of domestic workers are not yet aware about the existence of labour laws protecting them.

The survey also showed that the knowledge among domestic workers in respect of specific rights was very limited. The right most widely known was the right to annual leave which 21.7 percent of the unionized workers knew of but that only nine percent of the non-unionized workers had

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<sup>152</sup> Department of Labour Western Cape, *supra* note 149, p. 8.

<sup>153</sup> C. Marais, 'Labour Legislation in Emfuleni's domestic worker sector: awareness and compliance', 33:1 *South African Journal of Labour Relations* (2009) p. 67.

<sup>154</sup> Social Law Project, *supra* note 79, pp. 33-34.

knowledge about. The second most widely known right was the right to a minimum wage which unexpectedly was known to only 10.4 percent of the unionized workers while 20.3 percent of the non-unionized workers had knowledge about the right. Moreover, in a number of focus group discussions organized by the DWRP in 2009, a majority of the domestic workers that took part in the discussions were unaware of the mechanisms established for safeguarding their labour rights.<sup>155</sup>

That domestic workers have insufficient knowledge about their rights is also indicated by interviewees in the field study. According to Phelisa Nkomo, Advocacy Programme Manager at the Black Sash, a human rights NGO, it is especially younger domestic workers from the rural areas that are unaware of their rights. “South Africa has a younger branch of domestic workers who are 30 to 35 [years old], who couldn’t go to school, who have lost their husbands in the rural areas or the living conditions are not good at home, and [they] come to the cities and most of the time they don’t know their rights.”<sup>156</sup> Bernhard Reisner, who works as a labour consultant assisting employers and occasionally also domestic workers in legal matters, also experiences that domestic workers especially from the rural areas are unaware of their rights. “Domestic workers don’t know where to turn to. And in this country there are many domestic workers who come from the rural areas and got no idea of the law and the way they are protected.”<sup>157</sup>

According to Norah Juries, coordinator for the domestic and farm workers’ project at the National Certificated Fishing and Allied Workers Union (NCFAWU), illiteracy, language barriers and no access to television are the main obstacles against domestic workers’ access to information regarding labour legislation. “There are millions of people in South Africa, especially in the domestic and farm workers’ fields, that don’t know their rights (...) the thing is, most of these people are illiterate. They maybe can hear it on the TV. Again language is a problem. Some people can understand Xhosa, others can’t understand it. Others can understand Afrikaans, others can’t understand it. And it’s not all the people that have the privilege of having a TV. Radio yes, but not all the things come on the radio, the TV shows and everything. So I think there is still a very big lack in South Africa when it comes to bring information to people on grassroots level.”<sup>158</sup> Myrtle Witbooi, general secretary of the South African Domestic Service and Allied Workers’ Union (SADSAWU), the only national union organizing domestic workers, also points out that high illiteracy among domestic workers and domestic workers’ limited access to television and radio hinder

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<sup>155</sup> *Ibid.*

<sup>156</sup> Phelisa Nkomo, Advocacy Programme Manager at the National Advocacy Unit, Black Sash, Cape Town, interview 6 April 2011.

<sup>157</sup> Bernhard Reisner, Cape Labour and Industrial Consultants, Cape Town, interview 14 March 2011.

<sup>158</sup> Norah Juries, coordinator for the domestic and farm workers project at the NCFAWU, Somerset West, interview 10 March 2011.

domestic workers from accessing relevant information given through different media campaigns.<sup>159</sup>

#### 4.1.1.2 Limited access to private homes

Another major obstacle for the labour inspection system is the issue of getting access to domestic workers' workplaces, i.e. the private homes of the employers. While labour inspectors have the right to enter workplaces outside the domestic work sector without notice and warrant, article 65(2) of the BCEA stipulates that labour inspectors have the right to enter a private home only with the consent of the owner or the occupier.<sup>160</sup> This limitation presents labour inspectors with a difficult task of carrying out inspections in the domestic work sector.

In order to gain access to private homes for the purpose of conducting domestic worker project inspections, the Department of Labour Inspectorate's provincial office in the Western Cape uses a 'calling card system' whereby letters in which labour inspectors seek permission from the employers to gain access to their homes are distributed to mailboxes of private households. Before the latest domestic worker project inspections, 1600 calling cards were distributed in the designated areas. Inspectors also tried to secure appointments by carrying out a door-to-door campaign. With these measures, the labour inspectors managed to secure 154 appointments before the project inspections started. Additional appointments were secured during the project inspections.<sup>161</sup>

As the Department of Labour Inspectorate itself acknowledges, the response level to the calling cards distributed in the latest project inspections was very low. To some extent it can be explained by the fact that some households who received calling cards did not employ a domestic worker. That the inspections were carried out during the holiday season when many house owners might have been away and that they were carried out during a limited time period are other possible reasons for the low response level.<sup>162</sup> Another and perhaps more possible explanation is that employers for different reasons were not willing to give labour inspectors permission to enter their homes for inspections. It is from the example of the latest project inspections not possible to conclude if, or to what extent, employers rejected labour inspections for the reason of not wanting to be exposed as non-compliant with provisions in the SD7 or the UIA. However, when labour inspectors are compelled to seek permission from the employer in order to conduct an inspection, there is an obvious risk that employers not complying with the law will not consent to inspections. This makes it

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<sup>159</sup> Myrtle Witbooi, general secretary of the SADSAWU, Cape Town, interview 25 March 2011.

<sup>160</sup> BCEA, section 65(2).

<sup>161</sup> Department of Labour Western Cape, *supra* note 149, p. 2.

<sup>162</sup> *Ibid.*, p. 8.

difficult for labour inspectors to expose violations<sup>163</sup> of domestic workers' rights when conducting project inspections or when inspecting workplaces as a response to reported alleged violations of labour legislation in the sector.

The prohibition to enter private homes without consent has its foundation in the right to privacy in section 14 of the Constitution. However, the Constitution also provides for the right to fair labour practice, the right to freedom from slavery, servitude and forced labour and other work related rights.<sup>164</sup> The Constitution thereby gives rise to a conflict between employers' constitutional right to privacy at home and the obligation of the state to protect and ensure domestic workers' constitutional labour rights through the means of supervisory inspections.<sup>165</sup> This conflict can not be solved by letting one right prevail over the other. As held by the Constitutional Court in the *De Reuck* case, constitutional rights "are mutually interrelated and interdependent and form a single constitutional value system."<sup>166</sup> Section 36 of the Constitution however provides for a possibility to limit constitutional rights in terms of law of general application and to the extent that the limitation is reasonable and justifiable in a democratic society.<sup>167</sup>

In order to ensure that the South African state fulfills its obligations towards domestic workers in respect of their constitutional rights, the legislator has therefore included a provision in the BCEA that limits employers' right to privacy. According to section 65(2) of the BCEA, a labour inspector has a right to enter private homes after authorization by the Labour Court. Authorization may only be issued on a written application from a labour inspector who states under oath or affirmation, why there is a need for the inspector to enter the private home in order to monitor and enforce compliance with labour legislation.<sup>168</sup> According to Anthony Rudman at the Western Cape Department of Labour Inspectorate, this possibility is however very rarely used and will only be used in terms of major violations of labour rights.<sup>169</sup> It thereby seems like article 65(2) does not provide

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<sup>163</sup> In the latest domestic worker project inspections, almost all cases of non-compliance regarded employers' administrative duties such as issuing pay slips and written particulars of employment. Some were also not honoring their duty to contribute to the UIF. Only 2 employers paid below minimum wage.

<sup>164</sup> Constitution, sections 23 and 13.

<sup>165</sup> J.M. Ramirez-Machado, *Domestic work, conditions of work and employment: A legal perspective*, Conditions of Work and Employment Series No. 7, (ILO Conditions of Work and Employment Programme (TRAVAIL), 2003) p. 63, <[www.jalart.org/download/Domestic%20Work-Conditions%20of%20Work%20and%20Employment-A%20legal%20perspective-Jose%20Maria%20R-Machado-2002.pdf](http://www.jalart.org/download/Domestic%20Work-Conditions%20of%20Work%20and%20Employment-A%20legal%20perspective-Jose%20Maria%20R-Machado-2002.pdf)>, visited on 5 July 2011.

<sup>166</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* (CCT5/03) [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) ; 2011 (7) BCLR 651 (CC); BCLR 446 (CC) (15 October 2003), para. 55. <[www.saflii.org/za/cases/ZACC/2003/19.html](http://www.saflii.org/za/cases/ZACC/2003/19.html)>, visited on 5 July 2011.

<sup>167</sup> Constitution, section 36.

<sup>168</sup> BCEA, section 65(3).

<sup>169</sup> Rudman, *supra* note 148.

labour inspectors with a useful tool for monitoring and enforcing compliance with labour legislation in respect of less serious breaches of employers' legal obligations. Additionally, as pointed out by the DWRP, applying to the Labour Court for authorization to enter a private home might delay the inspection process, thereby making it possible for violations and abuses to prolong. However, in respect of the most serious violations of the SD7 such as forced labour and child labour which constitute criminal offenses, these can be dealt with by the police department irrespective of the labour inspection system and its regulations.<sup>170</sup>

It is evident that employers' right to privacy constitutes an obstacle to the ability of labour inspectors to carry out inspections in the domestic work sector. However, in addition to the possibility to enter private homes without consent after authorization by the Labour Court, the BCEA provides for a possibility for labour inspectors to carry out inspections in the domestic work sector without entering employers' homes. According to section 66 of the BCEA a labour inspector's power to question and inspect employers' compliance with labour legislation is not restricted to the workplace. In order to avoid the obstacle that employers' right to privacy constitute for labour inspections in the sector, labour inspectors in the Western Cape sometimes summon employers and domestic workers to come to a neutral venue in order for the inspection to take place. This possibility is usually not used in relation to the domestic worker project inspections but is more often used when labour inspectors investigate complaints issued to the Department of Labour Inspectorate.<sup>171</sup>

#### **4.1.1.3 Workers' fear of reprisals**

Another obstacle to the enforcement of labour legislation on domestic work through the mean of labour inspection is that many domestic workers have a fear of loosing their employment if they expose abuses committed by their employers. As pointed out by Nkomo, the fact that a domestic worker often is the only employee in the household make the domestic worker, who is already in a vulnerable and disadvantaged position vis-à-vis the employer, reluctant to expose her employer. "You have to have permission from the madam to go and inspect. So you can imagine when the inspector seeks permission, immediately the madam will say you called the inspector to come in to check my house, so the price for the domestic worker is much bigger."<sup>172</sup>

According to Rudman, inspectors often experience when conducting domestic worker project inspections that domestic workers, even when they find that the worker is alone in the house, are reluctant to speak to the inspectors because of fear of loosing their employment if the employer finds out that they have been talking to the inspector.<sup>173</sup> The fear of loosing the

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<sup>170</sup> Social Law Project, *supra* note 79, p. 35.

<sup>171</sup> Rudman, *supra* note 148.

<sup>172</sup> Nkomo, *supra* note 156.

<sup>173</sup> Rudman, *supra* note 148.

employment is also reflected in the low numbers of complaints reported to the Department of Labour. According to Rudman, it is very seldom that domestic workers lodge complaints to the Department of Labour Inspectorate regarding their working conditions while they are still in employment. Domestic workers instead seem to turn to the Department of Labour once the employment relationship has ended, with matters regarding for example non-payment of severance pay. In some of these cases it is then revealed that the domestic worker has suffered rights' violations during the employment, such as not getting paid for overtime or working long hours.<sup>174</sup>

The SADSAWU has tried to encourage domestic workers to turn to the Department of Labour Inspectorate when their employers are not complying with provisions regarding minimum standards of employment, however without success. "Years ago we tried but it didn't work because the worker is still afraid. So the worker won't do it out of herself" says Hester Stephens, president of the SADSAWU.<sup>175</sup>

Under South African labour law, employees have the right to non-victimization in using procedures and claiming rights.<sup>176</sup> If a domestic worker is dismissed due to her exercising her right to report her employer to a labour inspector she can refer a dispute about unfair dismissal to the CCMA. If she wins she has the right to be reinstated or to be compensated.<sup>177</sup> Considering the intimate employment relationship, reinstatement is however not always a possible or desirable remedy for the domestic worker.

#### **4.1.1.4 Limited capacity to monitor and enforce compliance**

Lastly, the Department of Labour Inspectorate disposes of only approximately 1000 labour inspectors nationwide.<sup>178</sup> These inspectors shall promote, monitor and enforce compliance with a number of labour statutes, including the BCEA, the EEA, the UIA and 14 sectoral determinations, at all workplaces in the whole South Africa. Considering that there are approximately 800 000 households that employ domestic workers in South Africa it is not plausible for the Department of Labour Inspectorate with its current capacity to enforce compliance with the SD7 and the UIA in the domestic work sector. It is also not likely that the South African state would, or even could, allocate enough financial means to the labour inspection system for the purpose of carrying out project inspections that would cover the whole domestic work sector.<sup>179</sup> The efficiency of the domestic worker

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<sup>174</sup> Ibid.

<sup>175</sup> Stephens, *supra* note 124.

<sup>176</sup> BCEA, section 79, *see also* The South African Labour Guide, <[www.labourguide.co.za/conditions-of-employment/employees-rights-312](http://www.labourguide.co.za/conditions-of-employment/employees-rights-312)>, visited on 3 August 2011.

<sup>177</sup> LRA, section 193.

<sup>178</sup> Rudman, *supra* note 148.

<sup>179</sup> Social Law Project, *supra* note 79, p. 34.

project inspections in order to enforce domestic workers' labour rights is therefore questionable.

## 4.2 The labour dispute resolution system

One of the objectives of the enactment of the LRA in 1996 was to establish simplified and more effective procedures for labour dispute resolution.<sup>180</sup> Three procedures for resolving labour disputes are established under the LRA: conciliation, arbitration and adjudication. Conciliation and arbitration are performed by the CCMA<sup>181</sup> while adjudication is performed by the Labour Courts.<sup>182</sup>

The CCMA is an independent body with national jurisdiction and is present in all nine provinces of South Africa.<sup>183</sup> The CCMA has jurisdiction to hear a range of matters including disputes regarding unfair dismissals in terms of the LRA, disputes regarding unfair discrimination in terms of the EEA and disputes regarding severance pay in terms of the SD7 and the BCEA.<sup>184</sup> The first step at the CCMA is the conciliation process, in which the employee and the employer are assisted by a CCMA commissioner whose role is to encourage the parties to settle the dispute by reaching an agreement.<sup>185</sup> The commissioner can use methods such as mediation or making a recommendation to the parties and must try to resolve the dispute in 30 days.<sup>186</sup> If a dispute remains unresolved after conciliation, the parties to the dispute can request that the dispute be resolved through arbitration.<sup>187</sup> The commissioner can choose to conduct the arbitration in any manner appropriate in order for the dispute to be determined fairly and quick. The parties may present any kind of evidence, call witnesses and make concluding arguments to the commissioner.<sup>188</sup> Subject only to review by the Labour Court, arbitration awards issued by the CCMA are final and binding and can be enforced as if they were orders of the Labour Court.<sup>189</sup>

The Labour Court is a superior court and has authority, inherent powers and standing in relation to matters under its jurisdiction.<sup>190</sup> It has national jurisdiction and is situated in Johannesburg, Cape Town, Durban and Port

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<sup>180</sup> Basson, *supra* note 86, p. 335.

<sup>181</sup> Bargaining councils are also established in terms of the LRA to perform conciliation and arbitration of labour disputes. There are however no established bargaining councils in the domestic work sector.

<sup>182</sup> Grogan, *supra* note 25, p. 426.

<sup>183</sup> LRA, section 114.

<sup>184</sup> *See Ibid.*, section, 191, EEA, section 10, BCEA, section 42(6) and SD7, clause 27(5).

<sup>185</sup> LRA, section 115.

<sup>186</sup> van Niekerk, *supra* note 139, p. 405 and LRA, section 135(1).

<sup>187</sup> LRA, section 136 (1).

<sup>188</sup> *Ibid.*, section 138.

<sup>189</sup> *Ibid.*, section 143.

<sup>190</sup> *Ibid.*, section 151.



Elisabeth.<sup>191</sup> The Labour Court has jurisdiction in respect of all matters in terms of the BCEA and sectoral determinations, except for matters regarding child labour and forced labour. The Labour Court has also concurrent jurisdiction with civil courts in any matters regarding a contract of employment.<sup>192</sup> Some disputes that are subject to conciliation at the CCMA, such as disputes regarding automatically unfair dismissals, may after conciliation has failed be referred to the Labour Court for adjudication, instead of being referred to arbitration at the CCMA.<sup>193</sup> The Labour Court has also jurisdiction to review arbitration awards issued by the CCMA.<sup>194</sup> Appeals against decisions of the Labour Court are heard at the Labour Appeal Court which is the highest court for labour appeals in South Africa.<sup>195</sup>

## 4.2.1 Domestic workers' access to justice at the CCMA

The CCMA has come to play a significant role in labour dispute resolution since its establishment and is now the most important statutory labour dispute resolution body in South Africa.<sup>196</sup> During the financial year of 2009/2010 a total of 153 657 disputes were referred to the CCMA with an average of 617 new referrals each working day. Disputes regarding unfair dismissals are the most common disputes at the CCMA and amounted to 81 percent of all referred disputes in the financial year of 2009/2010.<sup>197</sup>

The CCMA seems to have provided domestic workers with a fairly good accessibility to claim their labour rights.<sup>198</sup> In 1997, only a year after the establishment of the CCMA, domestic workers constituted the fifth largest category of workers referring cases to the CCMA.<sup>199</sup> Between 2003 and 2005, 12.1 percent of all referrals to the CCMA came from domestic workers.<sup>200</sup> During the financial year of 2009/2010, domestic workers accounted for nine percent of all the referrals to the CCMA.<sup>201</sup>

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<sup>191</sup> *Ibid.*, section 156, *see also* South African Labour Court, <[www.justice.gov.za/labourcourt/](http://www.justice.gov.za/labourcourt/)>, visited on 18 July 2011.

<sup>192</sup> BCEA, section 77.

<sup>193</sup> LRA, section 191 (5)(b).

<sup>194</sup> *Ibid.*, section 145.

<sup>195</sup> *Ibid.*, section 167(2).

<sup>196</sup> Grogan, *supra* note 25, p. 426.

<sup>197</sup> CCMA, *Annual Report 2009/2010*, p. 18,

<[www.ccma.org.za/UploadedMedia/CCMA\\_2009-2010\\_Annual\\_Report.pdf](http://www.ccma.org.za/UploadedMedia/CCMA_2009-2010_Annual_Report.pdf)>, visited on 20 May 2011.

<sup>198</sup> Social Law Project, *supra* note 79, p. 41.

<sup>199</sup> Ally, *supra* note 20, pp. 74-75.

<sup>200</sup> I. Macun *et al.*, *An analysis of Commission for Conciliation Mediation and Arbitration Awards*, Working Paper 08/134, (Development Policy Research Unit) p. 14, <[www.dpru.uct.ac.za/WorkingPapers/PDF\\_Files/WP\\_08-134.pdf](http://www.dpru.uct.ac.za/WorkingPapers/PDF_Files/WP_08-134.pdf)>, visited on 30 May 2011.

<sup>201</sup> CCMA, *supra* note 197, p. 18.

Disputes regarding alleged unfair dismissals stand for almost all reported matters from domestic workers. In fact, all matters reported from domestic workers to the CCMA between 2003 and 2005 regarded allegedly unfair dismissals.<sup>202</sup> At the CCMA Cape Town office almost all cases referred by domestic workers are cases regarding unfair dismissals, although the office has started to receive a few cases regarding discrimination from domestic workers.<sup>203</sup>

The high number of referrals from the domestic work sector suggests that the level of awareness among domestic workers regarding the possibility of referring cases to the CCMA is high.<sup>204</sup> This is also indicated by several interviewees taking part in the field study. According to Susan Jacobs, a SADSAWU committee member and domestic worker, domestic workers are in general aware of the possibility to seek remedy at the CCMA in cases of unfair dismissals.<sup>205</sup> Additionally, at a nanny training course held in Cape Town where almost all participants had already worked in the domestic work sector, most of the 25 participants had previous knowledge about the CCMA. Two had also referred cases regarding unfair dismissals to the CCMA.<sup>206</sup> Other interviewees taking part in the field study also indicated a high level of awareness among domestic workers in respect of the CCMA.<sup>207</sup> According to Nowethu Ndiki, commissioner at the CCMA Cape Town office, one of the explanations behind the high level of awareness among domestic workers is the great effort that the CCMA has put into public awareness rising.<sup>208</sup> Another possible explanation is that information about the CCMA has spread among domestic workers by word of mouth.<sup>209</sup>

Awareness of the accessibility of the CCMA is not only evident among domestic workers but also among employers. According to Clare Shuttleworth-Richardson, owner of the Marvellous Maids, one of the most well known domestic service agencies in South Africa, employers are well aware of the possibility to be taken to the CCMA by their domestic worker.<sup>210</sup> Over the years, domestic workers have been successful in many cases regarding unfair dismissals at the CCMA<sup>211</sup>. This has according to Shuttleworth-Richardson instilled fear among employers of being taken to the CCMA.<sup>212</sup> Noreen Whiting who has been training and placing nannies

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<sup>202</sup> Social Law Project, *supra* note 79, p. 41.

<sup>203</sup> Nowethu Ndiki, commissioner at the CCMA, Cape Town, interview 22 March 2011.

<sup>204</sup> Macun, *supra* note 200.

<sup>205</sup> Susan Jacobs, committee member of the SADSAWU, Cape Town, interview 30 March 2011.

<sup>206</sup> Noreen Whiting, Chilton training and Placements, Scalabrini Center, Cape Town, interview 14 April 2011.

<sup>207</sup> See Nkomo, *supra* note 156; Witbooi, *supra* note 159; Jan Theron, researcher at the Labour and Enterprise Project (LEP), University of Cape Town, interview 21 April 2011; and Steenkamp, *supra* note 98.

<sup>208</sup> Ndiki, *supra* note 203.

<sup>209</sup> Social Law Project, *supra* note 79, p. 41.

<sup>210</sup> Clare Shuttleworth-Richardson, owner of the Marvellous Maids, Cape Town, interview 14 April 2011.

<sup>211</sup> Social Law Project, *supra* note 79, p. 41.

<sup>212</sup> Shuttleworth-Richardson, *supra* note 210.

for the past three years, also experiences a high level of awareness regarding the CCMA among employers. According to Whiting “[t]hey all know about the CCMA and that they can be brought to court for major violations or anything like that so they are keen to stay inside the law. (...) They don’t want to get in trouble, they have heard of cases, and the CCMA has been quite successful.”<sup>213</sup>

Academic writers and practitioners are in agreement that the reason for the success of the CCMA is that the establishment of the CCMA has provided workers with an easy and effective mean for claiming labour rights. The less formal and simplified dispute resolution processes at the CCMA make it easier for vulnerable and unskilled workers, such as domestic workers, who often have no access to legal representation or the support of a union, to access workplace justice.<sup>214</sup> Conciliation and arbitration at the CCMA is also free of charge. As pointed out by Ndiki, the only expenses a domestic worker will have in taking a case to the CCMA, except for a possible loss of income for the time spent in conciliation or arbitration, is the possible expense of sending or delivering the copy of referral to the employer and the transport fare to and from the CCMA office.<sup>215</sup>

#### **4.2.1.1 Obstacles to domestic workers’ effective use of the CCMA**

Despite the relative success of the CCMA in respect of providing domestic worker access to workplace justice there are some factors that might present obstacles to domestic workers’ accessibility to justice at the CCMA. These will be discussed in the following subchapters.

##### **4.2.1.1.1 Lack of union support**

At the CCMA a party to a dispute is allowed to represent herself or to be represented by a member, an office-bearer or official of that party’s registered trade union or employers’ organization.<sup>216</sup> No representation of legal practitioners is allowed in conciliation. In arbitration however, representation of legal practitioners is allowed in most disputes.<sup>217</sup>

While it is common that employees from other sectors are represented by their unions in proceedings at the CCMA, almost all domestic workers that refer disputes to the CCMA in Cape Town represent themselves.<sup>218</sup>

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<sup>213</sup> Whiting, *supra* note 206.

<sup>214</sup> H. Bhorat *et al.*, *Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data*, (Development Policy Research Unit, 2007) p. 6, <[www.labour.gov.za/downloads/documents/research-documents/CCMA%20September%202007%20v7%20-%20FINAL.pdf](http://www.labour.gov.za/downloads/documents/research-documents/CCMA%20September%202007%20v7%20-%20FINAL.pdf)>, visited on 30 May 2011.

<sup>215</sup> Ndiki, *supra* note 203.

<sup>216</sup> LRA, section 135 (4).

<sup>217</sup> *Ibid.*, section 138 (4).

<sup>218</sup> Ndiki, *supra* note 203.

According to Stephens at the SADSAWU, the lack of union support can put domestic workers in a disadvantaged position vis-à-vis their employers at the CCMA. This is especially true in the arbitration process where employers in general can afford legal representation while domestic workers can not. Without the support from the union, the domestic worker has to face the employer and the employer's legal representative alone. According to Stephens, domestic workers might feel pressured in this situation to agree to terms that they are unsatisfied with. "It's quite difficult when the employer got a labour consultant and that worker goes there on her own. Because there is no one to support the worker (...) and the labour consultant is speaking to her, she gets nervous and then she just agrees with the amount of money that they should pay her. And then afterwards the worker will come to us and say that she is not happy."<sup>219</sup>

The lack of union support at the CCMA is due to the low level of unionization in the sector. The special characteristics of the domestic employment relationship imply great challenges for domestic workers' ability to unionize. The result is often weak unions and low levels of unionization in the sector.<sup>220</sup> As stated in a previous chapter, only five percent of South Africa's domestic workers are unionized. The SADSAWU which is the largest union<sup>221</sup> in the sector has 25 000 registered members.<sup>222</sup> However, only about 10500 of these are paying members.<sup>223</sup> In other sectors, such as the mining sector, a large number of the workers are members in a union. The National Union of Mineworkers, for example, organizes around 270 000 out of a total of 306 000 mineworkers in South Africa.<sup>224</sup>

In other occupational sectors, unions who want to recruit members often have access to a large number of workers at the same workplace. In the domestic work sector where workers work in private homes and in isolation from each other, it is very time consuming, costly and impractical to recruit members by visiting their workplaces.<sup>225</sup> In South Africa, unions are also restricted from accessing domestic workers' workplaces due to employers' right to privacy. According to section 17 of the LRA, a union official is only allowed to enter an employer's private home with the consent of the employer.<sup>226</sup> As experienced by the SADSAWU, domestic workers are also reluctant to join the union due to fear of losing their employment if their

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<sup>219</sup> Stephens, *supra* note 124.

<sup>220</sup> Grumlau, *supra* note 49.

<sup>221</sup> The LRA (section 95) allows any trade union to be registered if it meets four requirements: the name of the union may not resemble the name of another union; the constitution of the union must comply with certain requirements; the union must have an address in South Africa and the union must be independent. There is therefore no hinder against several unions organizing in the same sector. The SADSAWU is however the only national union organizing in the sector.

<sup>222</sup> Ally, *supra* note 20, p. 153.

<sup>223</sup> Witbooi, *supra* note 159.

<sup>224</sup> See Congress of South African Trade Unions, <[www.cosatu.org.za/contact.php?id=10](http://www.cosatu.org.za/contact.php?id=10)>, visited on 18 July.

<sup>225</sup> Grumlau, *supra* note 49.

<sup>226</sup> LRA, section 17.

employers find out that they are union members. Difficulties in recruiting members affect the economy of the union. The SADSAWU is to a large extent funded by the subscription fees that members pay into the union. Lack of union members therefore implies lack of financial means for the SADSAWU which prevents the union from performing its functions and its ability to grow. With only two full time employed organizers at the SADSAWU Cape Town office, the union has little opportunity to represent even its few members at the CCMA. The SADSAWU instead tries to resolve disputes between its members and their employers before they are referred to the CCMA.<sup>227</sup>

#### **4.2.1.1.2 Distrust and lack of understanding of the legal processes**

Data collected in the field study also indicates that distrust regarding the impartiality of the CCMA and a lack of understanding of the legal processes are obstacles against domestic workers' accessibility to justice at the CCMA.

In conciliation, commissioners sometimes use mediation as the method of resolving the dispute. In mediation it is not uncommon that the commissioner talks to the employer and the employee separately and without the presence of the other. As experienced by the SADSAWU, domestic workers' lack of knowledge of what takes place between the commissioner and the employer in these separate conversations makes some domestic workers suspicious about the impartiality of the commissioner. According to Witbooi at the SADSAWU, some domestic workers fear that employers use their financial advantages to bribe the commissioner in order to win the dispute at the CCMA.<sup>228</sup> This form of distrust is however not limited to domestic workers but appears also in other occupational sectors. According to Ndiki at the CCMA Cape Town Office, the distrust is due to a lack of understanding among domestic workers of the legal processes at the CCMA.<sup>229</sup> The distrust can possibly also be interpreted as another effect of the unequal power relationship between the employer and the domestic worker. One effect of the distrust of the CCMA is that domestic workers can be discouraged from seeking workplace justice at the CCMA.

There are also other examples of how domestic workers' lack of understanding of the legal processes at the CCMA might present a hinder to their accessibility to justice at the CCMA. According to Witbooi, domestic workers sometimes turn to the union after they have signed settlements agreements at the CCMA wanting to proceed further due to discontent with the outcome of the settlement. These domestic workers have however not understood, although it has been translated to them by an interpreter in the proceeding at the CCMA, that the settlement agreement is a final and full

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<sup>227</sup> Witbooi, *supra* note 159.

<sup>228</sup> *Ibid.*

<sup>229</sup> Ndiki, *supra* note 203.

settlement of the dispute and that they therefore are hindered from taking the dispute further after they have signed the settlement agreement.<sup>230</sup>

## **4.2.2 Domestic workers' access to justice at the Labour Courts**

The South African Labour Courts are very rarely used by domestic workers and this is partly due to the construction of the labour dispute resolution system.<sup>231</sup> The idea of the South African labour dispute resolution system is to keep simple disputes at conciliation or arbitration at the CCMA where they don't lead to costs and where the proceedings are suppose to be quick and simple.<sup>232</sup> In almost all labour disputes in terms of the LRA, conciliation at the CCMA is therefore the first step in the dispute resolution process.<sup>233</sup> If unresolved in conciliation, most disputes are referred to arbitration and only certain disputes will be subject to adjudication at the Labour Court.<sup>234</sup> Disputes regarding unfair dismissals, the overwhelmingly most common matter of dispute referred to the CCMA by domestic workers, will only very rarely reach the Labour Courts.

However, even regarding matters where the Labour Courts have far reaching jurisdiction, such as matters in terms of the SD7, domestic workers very rarely access the Labour Courts. The Labour Court in Cape Town receives very few cases from domestic workers.<sup>235</sup> Seeking justice at the Labour Courts was also not mentioned by any of the interviewees taking part in the field study as a way for domestic workers to access justice in terms of labour disputes. The few cases that the Labour Court in Cape Town does receive from domestic workers are cases regarding reviews of arbitration awards or disputes over contractual matters such as non-payment of salary, sick leave and annual leave.<sup>236</sup>

### **4.2.2.1 Obstacles to domestic workers use of the Labour Courts**

Lack of awareness and lack of financial and legal resources due to the difficulties in organizing in the sector are two obstacles to domestic workers' access to justice at the Labour Courts.

#### **4.2.2.1.1 Lack of awareness**

As evident from the research conducted by the DWRP and interviews with respondents taking part in the field study (see chapter 4.1.1.1) many

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<sup>230</sup> Witbooi, *supra* note 159.

<sup>231</sup> Steenkamp, *supra* note 98.

<sup>232</sup> *Ibid.*

<sup>233</sup> Basson, *supra* note 86, p. 336.

<sup>234</sup> Bhorat, *supra* note 214, pp. 7-8.

<sup>235</sup> Steenkamp, *supra* note 98.

<sup>236</sup> *Ibid.*

domestic workers are not aware about their legal rights established in the SD7 or what means and mechanisms they can use in order to enjoy these rights. The lack of awareness does not only prevent domestic workers from accessing the Department of Labour Inspectorate but also prevents them from accessing justice at the Labour Courts.<sup>237</sup>

#### **4.2.2.1.2 Lack of financial and legal resources**

Domestic workers are also prevented from accessing justice at the Labour Courts due to a lack of financial and legal resources. The average advocate's fee in South Africa is approximately ZAR 20 000 per day in Court.<sup>238</sup> For domestic workers this is in general an impossible sum to pay.

High costs for legal representation is however a heavy burden also for workers in other sectors. As experienced by Judge Steenkamp at the Labour Court in Cape Town, members of other occupational groups are however often assisted by their trade unions which will either carry the cost for legal representation or represent the worker themselves in proceedings at the Labour Court.<sup>239</sup> According to section 161 of the LRA, an office-bearer or an official of a trade union has the right to represent a union member at the Labour Courts.

In the domestic work sector union support at court proceedings is not possible. As stated in the previous chapter, an overwhelming majority of domestic workers in South Africa are not members of any union due to difficulties in organizing in the sector. The SADSAWU also lacks both financial means and personal capacity to offer legal representation to its few members.

It is possible for a party to a proceeding at the Labour Courts to represent her self. According to Judge Steenkamp, a few of the domestic workers that have referred cases to the Labour Court in Cape Town have also done so.<sup>240</sup> Proceedings at the Labour Courts are however often of a procedural and technical nature and not many parties would therefore institute proceedings at the Courts without legal representation.<sup>241</sup> Domestic workers that have taken cases to the Labour Court in Cape Town and not represented themselves have been represented by lawyers working pro-bono.<sup>242</sup>

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<sup>237</sup> *Ibid.*

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*

<sup>240</sup> LRA, section 161.

<sup>241</sup> Basson, *supra* note 86, p. 339.

<sup>242</sup> Steenkamp, *supra* note 98.

# 5 Discussion

## 5.1 The effect of legislation

Since the enactment of the SD7 and other relevant pieces of labour legislation there has been a certain improvement in domestic workers' conditions of employment. Domestic workers' wages increased for example with 23 percent between 2002, the year minimum wages were introduced in the sector, and 2003. During the same time period, the number of domestic workers registered with the UIF for unemployment benefits rose from three percent to 25 percent.<sup>243</sup> Domestic workers' conditions of employment have continued to improve also over a longer time period. In a study from 2006, researchers could establish that the average daily wage of domestic workers in one area<sup>244</sup> had increased with 11.4 percent between 2001 and 2006. The numbers of domestic workers in the area that had a written contract, a legal requirement under the SD7, rose from 30.3 percent to 75.8 percent during the same time period.<sup>245</sup> In another study from 2006 a fairly high level of compliance with provisions on domestic workers' conditions of employment could be established. All 68 employers participating in the study were for example in full compliance in regard of provisions regulating working hours and compensation for overtime. Additionally, 85 percent of the employers were in compliance regarding payment during sick leave and 68 percent of the employers had registered with the UIF.<sup>246</sup>

Nevertheless, although indications that domestic workers' conditions of employment have improved since the introduction of the SD7 and the UIA, many domestic workers still work under conditions which are below the statutory minimum. In the study conducted in 2009 by the DWRP (see chapter 4.1.1.1) 72.9 percent of the unionized workers and 62.6 percent of the non-unionized workers participating in the study worked five days or more per week and were therefore entitled to at least ZAR 1340 per month according to the minimum wage for that year. However, only 26.8 percent of the union members and 20.1 percent of the non-union members earned the statutory minimum or more per month. Of the 200 employers participating in the study, only 41 percent had registered their domestic worker with the UIF. Additionally, one point three percent of the employers required their domestic worker to work seven days a week.<sup>247</sup>

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<sup>243</sup> Hertz, *supra* note 106, pp. 1-2.

<sup>244</sup> The study was conducted among 130 employers in Langenhoven Park, a Bloemfontein suburb, in 2006. Results from the study were then compared with results from a previous study conducted in the same area in 2001.

<sup>245</sup> P.F. Blaauw and L.J. Bothma, 'The impact of minimum wages for domestic workers in Bloemfontein, South Africa', 8:1 *SA Journal of Human Resource Management* (2010), Art. #216, pp. 4-5, <[www.sajhrm.co.za/index.php/sajhrm/article/view/216](http://www.sajhrm.co.za/index.php/sajhrm/article/view/216)>, visited on 29 June 2011.

<sup>246</sup> Marais, *supra* note 153, pp. 73-78.

<sup>247</sup> Social Law Project, *supra* note 91, pp. 15-16.



There are also more recent examples of breaches of domestic workers' conditions of employment. According to Witbooi at the SADSAWU and Julayga Alfred, director of Activists Networking against the Exploitation of Children (ANEX),<sup>248</sup> it is common that domestic workers in financially stressed areas of Cape Town earn as little as ZAR 500 to 800 per month which is half or just more than half of the statutory minimum wage.<sup>249</sup> Additionally, in early 2011, the International Labour Research and Information Group (ILRIG) found when interviewing domestic workers in rural areas of the Western Cape that the majority of the domestic workers earned between ZAR 300 to 800 per month and did not receive pay for overtime work. Leftovers were instead the most common form of compensation for worked overtime. ILRIG also found examples of domestic workers working from Monday to Monday from seven a.m. to seven p.m.<sup>250</sup>

Many domestic workers are the sole breadwinners in their families. In a survey conducted in 2004 among 1100 female domestic workers in Johannesburg, it was found that 95 percent of the participants in the survey were fully or partially supporting other people, including their children, partners and extended family members.<sup>251</sup> Low wages, poor working conditions and abuses of domestic workers does therefore have a direct and indirect negative effect on their families as well as the society at whole.<sup>252</sup>

There are several reasons why employers do not comply with legal requirements regarding domestic workers' minimum conditions of employment and labour rights and non-compliance can not only be explained by difficulties regarding legal enforcement. Difficulties in enforcing domestic workers' labour right through labour inspections and difficulties for domestic workers to access workplace justice are however contributing factors in respect of non-compliance in the sector.

## 5.2 Lessons learned from the South African experience

The main mechanism for enforcing compliance with minimum standards of employment in South Africa is the labour inspection system established under the Department of Labour Inspectorate. As is evident, the South African labour inspection system faces several obstacles in respect of

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<sup>248</sup> ANEX is a national NGO working for the elimination of child labour. ANEX started as an organization solely focusing on child domestic workers in Cape Town but has recently widened its scope to also include other forms of child labour.

<sup>249</sup> See Witbooi, *supra* note 159, and Julayga Alfred, director of ANEX, Cape Town, interview 8 April 2011.

<sup>250</sup> N. Vanqa-Mgijima, 'Rural bosses and their domestic workers', No.63 *Workers World News* (ILRIG, Cape Town, 2011) pp. 6-7.

<sup>251</sup> N. Dinat and S. Peberdy, 'Restless world of work, health and migration: domestic workers in Johannesburg', 24:1 *Development Southern Africa* (2007) p. 193.

<sup>252</sup> Social Law Project, *supra* note 79, p. 24.

enforcing compliance with legislation in the sector. These obstacles are connected to the specific characteristics of domestic work.

One of the major obstacles to the effective exercise of labour inspections in its traditional execution is the circumstance that domestic work takes place in private households where employers have a right to privacy. The right to privacy does not only restrict the South African labour inspection system but does also restrict other states' labour inspection systems in respect of the domestic work sector.

The right to privacy is a fundamental human right codified in international human rights treaties such as the ICCPR. According to article 17.1 of the ICCPR "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence". Article 17.2 further prescribes that everyone has the right to enjoy the protection of the law against such interference. In respect of the home, every intrusion of the home without the consent of the person affected constitutes interference.<sup>253</sup> However, not all interference in the home is prohibited. As indicate in article 17, it is only interference which is unlawful or arbitrary that is prohibited. With the term 'unlawful' means that no interference can take place except in cases where it is prescribed by the law.<sup>254</sup> The permission of lawful interferences does however not mean that states can avoid its obligation under article 17 by enacting laws that gives the state an unreasonable discretion to interfere in individuals' homes. Such actions would violate the positive obligation states have to protect individuals from interference as prescribed in article 17.2.<sup>255</sup> According to the HRC, legislation permitting interference must specify in detail the specific circumstances in which interference is permitted and authorization to interfere must only be issued on a case-by-case basis by the authority designated under the law. Additionally, the term 'arbitrary' means that even interference permitted under the law must be in accordance with the provisions and aims of the ICCPR.<sup>256</sup>

The implication of article 17 is that states are hindered from enacting laws which grant labour inspectors free access to private homes. States can only allow labour inspections in private homes to be carried out on a case-by-case basis after a decision by a state authority (usually a court) which is empowered to do so by law.<sup>257</sup> The provisions in article 17 definitely limit the ability of states to carry out labour inspections in the domestic work sector but are however necessary for the protection of everyone's right to privacy. However, as the South African example show, alternative ways of conducting inspections can be taken which does not entail entering private homes. By summoning employers and employees to meet with the inspector

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<sup>253</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2<sup>nd</sup> revised edition (N.P. Engel, Published, Kehl am Rhein, 2005) p. 400.

<sup>254</sup> Human Rights Committee, *General Comment No. 16*, para. 3.

<sup>255</sup> Nowak, *supra* note 253, p. 382.

<sup>256</sup> Human Rights Committee, *supra* note 254, paras. 4-8.

<sup>257</sup> Nowak, *supra* note 253.

outside the workplace of the domestic worker, inspections can take place without interfering in employers' right to privacy. This method can especially be used in those circumstances where alleged violations of domestic workers' minimum conditions of employment are not of such serious nature that they would render authorization to interfere in private homes by the designated authority.

Although the latest domestic worker project inspections that took place in the Western Cape was deemed successful it can be questioned how effective such project inspections are in order to expose non-compliance in the sector, since employers, due to their right to privacy, can choose whether they want to participate in the inspections or not. If employers are not willing to participate in these projects, there is not much to do for the labour inspector than to move on to the next house. In the South African context, the Labour Courts will only authorize entry to private homes if the inspector has good reasons to suspect that a specific household is in breach with labour legislation on the issue. It is unlikely that a labour inspector will be able to show such reasons when conducting inspections in randomly chosen households. Considering the requirements for how authorization to enter private homes must be issued in respect of article 17 of the ICCPR, it is likely that other states will establish similar requirements for authorization as South Africa.

Furthermore, the special characteristic of domestic work being work performed in isolation implies that only one or a few domestic workers' labour rights and minimum conditions of employment can be safeguarded through each labour inspection. To try to ensure domestic workers' enjoyment of labour rights and minimum conditions of employment through domestic worker project inspections is therefore both very costly and time-consuming and it is likely that many states lack financial means to carry out wide reaching inspections in the domestic work sector.

In order to avoid the difficulties for labour inspectors to get access to domestic workers' workplaces, domestic worker project inspections could instead be carried out outside the workplace of the domestic worker. This measure would however not solve the problem with lack of financial means to carry out active inspections in the sector and is therefore not a very plausible solution. Instead of conducting domestic worker project inspections, South Africa and also other states could relocate resources to strengthening labour inspectors' reactive work of investigating complaints issued to them in respect of alleged violations of domestic workers' rights and to promote compliance among employers through different measures.

However, focusing on reactive inspections instead of active project inspections does not solve the issue of domestic workers' reluctance to expose their employers to the authorities. As showed in the field study domestic workers are reluctant to report violations of their labour rights to the labour inspector due to the fear that they will be dismissed if they expose their employers to the authorities. The fear of losing the

employment can be seen as another effect of domestic workers' vulnerability to abuse due to the hidden and isolated nature of domestic work and their disadvantaged position in the unequal employment relationship.<sup>258</sup> It is therefore likely that this fear can be found among domestic workers in other states as well. For domestic workers in South Africa, the situation is aggravated due to the high unemployment rate in the sector. Among Black South Africans who make up for most domestic workers the unemployment rate is 30 percent.<sup>259</sup> Several other states also struggle with high unemployment rates among low skilled workers.

In addition to establishing a labour inspection system for the safeguarding of minimum conditions of employment, the BCEA also grants the Labour Courts jurisdiction to settle disputes arising under the BCEA and the SD7. Domestic workers' access to justice at the Labour Courts is however highly limited due to a lack of financial means for legal representation and lack of union support to carry such costs.

In contrast to both the labour inspection system and the Labour Courts the CCMA seems to be successful in providing domestic workers with a fairly good accessibility to workplace justice. With the introduction of conciliation and arbitration as the main procedures for labour dispute resolution, vulnerable and unskilled workers have been provided with less costly, less formal and more simplified labour dispute resolution processes than court adjudication. Worldwide, domestic workers in general come from the poorer sections of the society and it is therefore important that domestic workers are provided with labour dispute resolution mechanisms that are affordable to them.<sup>260</sup> A more informal way of labour dispute resolution also makes it easier for domestic workers who often lack the support from the union to access workplace justice by representing themselves.

However, it seems like the unequal power relationship between the employer and the domestic worker also affects domestic workers outside the employment relationship. Lack of union support, poor education, and no financial means for legal representation at arbitration can put the domestic worker in a disadvantaged position vis-à-vis the employer. Free legal aid is of great importance for the access to justice by the poor.<sup>261</sup> The establishment of free legal aid programs could therefore provide an important contribution to domestic workers' access to justice regarding

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<sup>258</sup> Social Law Project, *supra* note 79, p. 37.

<sup>259</sup> Statistics South Africa, *Quarterly Labour Force Survey, Quarter 2, 2011*, Statistical Release P0211, p. 4, <[www.statssa.gov.za/publications/P0211/P02112ndQuarter2011.pdf](http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2011.pdf)>, visited on 10 August 2011.

<sup>260</sup> WIEGO (Women in Informal Employment: Globalizing and Organizing), *Informal workers in focus: domestic workers*, p. 1, <[http://wiego.org/sites/wiego.org/files/resources/files/WIEGO\\_Domestic\\_Workers\\_0.pdf](http://wiego.org/sites/wiego.org/files/resources/files/WIEGO_Domestic_Workers_0.pdf)>, visited on 10 August 2011.

<sup>261</sup> UN General Assembly, *Legal empowerment of the poor and eradication of poverty: Report of the Secretary General*, A/64/133 (2009), para. 14, <[www.lucsus.lu.se/lep/GA\\_Report\\_on\\_Legal\\_Empowerment\\_of\\_the\\_Poor1.pdf](http://www.lucsus.lu.se/lep/GA_Report_on_Legal_Empowerment_of_the_Poor1.pdf)>, visited on 10 August 2011.

labour disputes.<sup>262</sup> With free legal aid some aspects of the unequal power relationship between the employer and the domestic worker can be leveled out. It could also compensate for the lack of union support in the sector.

The relative success of the CCMA is however limited to disputes concerning unfair dismissals. This is partly due to the fact that the CCMA mainly has jurisdiction to hear disputes arising in terms of the LRA. However, considering that domestic workers are reluctant to report their employers to labour inspectors while they are still employed, it is uncertain if an extended jurisdiction of the CCMA to also include disputes regarding provisions in the SD7 would provide domestic workers with an effective mean of accessing justice in respect of provisions in this act. In fact, it can be argued that the success of the CCMA in respect of domestic workers is highly due to the fact that the CCMA has jurisdiction to handle dismissals. The high number of referrals from domestic workers, almost all about alleged unfair dismissals, imply that domestic workers after the employment relationship has ended has nothing to lose by referring a dispute to the CCMA. The fact that domestic workers to a large extent are willing to challenge their employers after they have been dismissed but reluctant to challenge their employers while they are still employed, further adds to the indication that domestic workers, an occupational group that evidently suffers from labour rights' violations during time of employment, are reluctant to expose their employers while still employed.<sup>263</sup>

The conclusion that can be drawn from the examination of the different mechanisms established for the enforcement of workers' labour rights, is that non of these mechanisms have succeeded in providing domestic workers with a satisfactory protection of their labour rights and minimum conditions of employment during the employment relationship.<sup>264</sup> It is therefore clear that also other measures must be taken in order to ensure compliance with labour legislation in the sector. This is true in respect of South Africa and considering the connection between difficulties in enforcing law in the sector and the characteristics of domestic work, presumably also for other states as well.

### **5.3 Additional measures to be taken**

An overall challenge for the safeguarding of domestic workers' labour rights is a lack of awareness among domestic workers about their rights and the mechanisms for claiming these. Despite public awareness campaigns in South Africa, many domestic workers are still ignorant about their legal entitlements in respect of minimum conditions of employment. In order to

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<sup>262</sup> In South Africa there is a legal aid programme called Legal Aid South Africa. However, Legal Aid South Africa does not generally provide legal aid for labour disputes. Legal aid is not given in arbitration processes but can in certain circumstances be given in proceedings at the Labour Court. See <[www.legal-aid.co.za/](http://www.legal-aid.co.za/)>, visited 13 August 2011.

<sup>263</sup> Social Law Project, *supra* note 79, p. 41.

<sup>264</sup> *Ibid.*

encourage and empower domestic workers to demand justice, efforts must be made to raise awareness among women, especially from the rural areas, about their legal entitlements.<sup>265</sup> In order to be efficient these efforts must take factors such as illiteracy, language barriers and lack of access to media sources, into consideration.

Organizing collectively is a mean for employees to gain strength in the unequal employment relationship. In addition to empowering workers to fight for better conditions of employment, trade union organization is vital for the implementation of workers' rights even where minimum standards of employment has been enacted.<sup>266</sup> Different factors, especially the circumstance that domestic workers are isolated from each other in private homes, make it difficult for domestic workers to organize. Without common employers, domestic workers are also hindered from fighting collectively for their rights and for better conditions of employment.<sup>267</sup> Despite these difficulties, domestic workers are however best in place to negotiate their own conditions of employment.<sup>268</sup> Different means for strengthening domestic workers' unions must therefore be developed.

Studies show that domestic workers' own sense of self-worth is a factor that affects the degree of exploitation in the employment relationship. Domestic workers with a strong sense of self-worth are more likely to demand fair conditions of employment than domestic workers with a low sense of self-worth. Measures aiming at the empowerment of domestic workers are therefore very important. In addition to rights education and awareness rising, one such measure could be to adopt programs for skills training for domestic workers. Trough the Domestic Workers Skills Development Project a small number of domestic workers in South Africa were provided skills training in 2005. Despite financial problems and other factors affecting the effectiveness of the skills training, research shows that such training had a positive empowering effect on the domestic workers that received the training.<sup>269</sup> Another possible measure could be to introduce different minimum wages in the sector in order to upgrade the status of domestic work. In South Africa there is only one minimum wage for domestic workers regardless of what tasks the worker performs. According to the DWRP, one single minimum wage continues to uphold the notion of domestic work as unskilled because it doesn't recognize that many domestic tasks such as child care and cooking may require high levels of skills.<sup>270</sup> On a higher level, there must also be structural changes in the South African

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<sup>265</sup> UN General Assembly, *supra* note 261, para.15.

<sup>266</sup> P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law*, 3<sup>rd</sup> edition (Stevens, London, 1993) pp. 18-21.

<sup>267</sup> Ramirez-Machado, *supra* note 165, p. 4.

<sup>268</sup> ILO, *supra* note 3, p. 77.

<sup>269</sup> T.S. Wessels, *The development impact of the Domestic Workers Skills Development Project on its participants*, Dissertation, (University of South Africa, Pretoria, 2006) p. 172, <<http://uir.unisa.ac.za/bitstream/handle/10500/1720/dissertation.pdf?sequence=1>>, visited on 10 August 2011.

<sup>270</sup> Social Law Project, *supra* note 79, p. 38.

society in respect of education, gender equality and poverty reduction in order to increase the opportunities for women.

Although undocumented migrant workers are protected by South African labour law, it is likely that undocumented migrant domestic workers are even more reluctant than a legally employed domestic worker to report abuses to the authorities. In addition to a fear of losing their employments, undocumented migrant domestic workers face the risk of expulsion from South Africa if they expose themselves to the authorities.<sup>271</sup> The establishment of so called 'hotlines' where workers can get free legal advice anonymously could be one measure to take in order to provide undocumented migrant workers relief. However, in order to protect undocumented migrant workers against abuse, legislative measures that ensure a possibility for undocumented workers to expose abuses without risking expulsion, must be taken. The likelihood that states will adopt such measures is however questionable.

In addition to adopting measures for the empowerment and strengthening of domestic workers, efforts must also be made to create and encourage compliance among employers with labour legislation on domestic work. Considering the difficulties in enforcing labour legislation in the sector, it is therefore of great importance to create a culture of compliance among domestic employers.<sup>272</sup> Research indicates that employers are fairly aware about the existence of labour legislation regulating domestic work but that they have a limited awareness in respect of the content of this legislation. In one of the previous mentioned studies that were conducted in 2006, it was measured that only 26 percent of the employers were aware of the stipulated minimum wage granted to domestic workers. 43 percent of the employers stated that they were not sure. Additionally, only 28 percent of the employers were aware about the maximum permissible numbers of working hours per day for domestic workers.<sup>273</sup> Information about legal obligations must therefore be made available to employers of domestic workers through different means. As indicated by interviewees taking part in the field study, employers often experience that it is difficult to receive proper and comprehensive information from the Department of Labour when they contact it for advice on their legal obligations.<sup>274</sup> Easier and more accessible information could help employers willing to comply with legislation to live up to their obligations. Information on legal obligations is however not enough in order to make employers comply with labour legislation. Other measures must be taken that aim at challenging the traditional notion of domestic work as not 'real work' in order to change employers' attitude towards domestic work. Other possible measures include the establishment of incentives for employers to comply with labour legislation.

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<sup>271</sup> South African immigration law aims at keeping undocumented migrant workers out of South Africa, see Makanga, *supra* note 98.

<sup>272</sup> Social Law Project, *supra* note 79, p. 42.

<sup>273</sup> Marais, *supra* note 153, p. 74 *et seq.*

<sup>274</sup> See Witbooi, *supra* note 159; Shuttleworth-Richardson, *supra* note 210; and Reisner, *supra* note 157.

In South Africa, exploitation and abuse do not only take place between white employers and black domestic workers. The structure of vast inequality that existed in the traditional 'white madam/black maid' relationship during apartheid now also exists between black employers and black employees.<sup>275</sup> Measures aiming at raising awareness among employers and challenging employers' mindset regarding domestic workers must therefore address all sectors of the society. However, in today's South Africa it is not only the economic privileged who can afford domestic services that employ domestic workers. Due to a lack of state funded child care and elderly care, persons with limited financial means, such as factory workers or even domestic workers themselves, have to employ a domestic worker to take care of their children and their elderly while they are at work. Many of these employers can not afford to pay their domestic worker the statutory minimum wage simply because they do not earn much more themselves.<sup>276</sup> The issue of non-compliance in respect of domestic workers' conditions of employment is therefore much more complex than a matter of ignorance, unwillingness or condescending attitudes to domestic work among employers.

## 5.4 The impact of the new Convention

South Africa has been supportive of the establishment of international labour standards on domestic work from the beginning of the ILO's work towards the creation of the new Convention and Recommendation.<sup>277</sup> In fact, the Domestic Workers Convention is to a large extent influenced by South African labour legislation and South Africa played an important role in the discussions that led to the inclusion of several provisions in the Convention, such as the right to education and protection against abuse.<sup>278</sup>

Most of the obligations set out in the Convention are obligations that South Africa already is fulfilling under national labour legislation. South Africa has for example provided legislative measures that fulfill the fundamental principles and rights at work in respect of domestic workers and established minimum conditions of employment for domestic workers which are no less favorable than for workers in general. However, while the provisions in the SD7, except the ones regulating the right to a minimum wage, only applies to domestic worker who work more than 24 hours per month for an employer, the Convention has a wider application and applies to all domestic workers. If ratifying the Convention, South Africa would therefore have to extend the application of the SD7 to also include these domestic workers. This would also be the case with the application of the UIA.

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<sup>275</sup> J.N. Fish, 'Engendering Democracy: Domestic Labour and Coalition-Building in South Africa', 32:1 *Journal of Southern African Studies* (2006) pp. 118-119.

<sup>276</sup> du Preez, *supra* note 12, pp. 403-406.

<sup>277</sup> ILO, *Decent work for domestic workers*, Report IV(2), International Labour Conference 99<sup>th</sup> Session, 2010, Geneva, 1<sup>st</sup> edition, 2010, p. 5.

<sup>278</sup> Ramutloa, *supra* note 21.



According to section 231 of the Constitution, an international treaty will only become binding on the South African state at the international level if it is ratified by the Parliament through a resolution. South Africa uses a dualist approach to international law and the Domestic Workers Convention will only be part of South African national law if it is enacted by the national legislator.<sup>279</sup>

Even if South Africa would not ratify the new Convention, or would ratify it but not implement it in national legislation, there is a possibility that the Convention can come to play a role in the application and interpretation of South African law.<sup>280</sup> According to section 39(1) of the Constitution, courts, tribunals and forums must consider international law when interpreting the rights contained in the Bill of Rights. As established by the Constitutional Court in *S v Makwanyane*, article 39(1) permits the use of both binding as well as non-binding instruments as interpretational references. Also reports from the ILO can be used to guide the application of the provisions in the Bill of Rights.<sup>281</sup> The implication of *S v Makwanyane* is that if there is a relevant international treaty that South Africa has not ratified, South Africa is bound to consider the treaty when interpreting provisions in the Bill of Rights. South Africa is however not bound to apply it. However, the Constitutional Court has so far been reluctant to go beyond the wording of the Bill of Rights in its interpretation and it is therefore uncertain how much consideration the Court will take to non-binding instruments in its interpretation of provisions in the Bill of Rights.<sup>282</sup>

Although some states already have expressed their interest in ratifying the Domestic Workers Convention, it remains to see which states that will actually ratify the Convention. The Convention will however not only have an impact on state conduct if ratified. The adoption process of the Convention has been closely followed by not only ILO constituencies but also human rights organization, trade unions and NGOs around the world. These organizations have now been provided with a legal framework of reference in respect of domestic workers' rights which can be used when putting pressure on governments to ratify the Convention and to include domestic workers under national labour legislation.<sup>283</sup> For the organizations working for the improvement of domestic workers' lives in South Africa, the new Convention and the expressed support of it by the South African state, give extra weight and legitimacy to their work and advocacy on the subject.

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<sup>279</sup> S. Woolman (ed.), *Constitutional Law of South Africa*, 2<sup>nd</sup> edition (Juta & Co Ltd, Cape Town, 2004) p. 30-4.

<sup>280</sup> de Waal, *supra* note 80, p. 160.

<sup>281</sup> *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996] 2 CHRLD 164; 1995 (2) SACR 1;; 2011 (7) BCLR 651 (CC) (6 June 1995), para. 35.

<sup>282</sup> Woolman, *supra* note 279, pp. 30-12 – 30-13

<sup>283</sup> ILO, *supra* note 70.

## 6 Conclusion

The specific characteristics of domestic work present several obstacles to the effective enforcement of South African labour law on domestic workers' rights and conditions of employment. In respect of the labour inspection system, the right to privacy in the home limits the ability of labour inspectors to conduct inspections in the sector. Domestic workers' fear of losing their employment if they report their employers to a labour inspector, as well as a lack of capacity of the labour inspection system to monitor and enforce compliance with legislation on domestic work also present obstacles to the effective exercise of labour inspections in the sector. Lastly, lack of awareness regarding rights and enforcement mechanisms hinders domestic workers from claiming their rights through the labour inspection system.

In respect of the labour dispute resolution system, the South African example shows that conciliation and arbitration as means for labour dispute resolution has provided domestic workers with a fairly high accessibility to workplace justice. In contrast to the more technical and legal complicated adjudication process at the Labour Courts, conciliation and arbitration are informal, cheap and simplified means for resolving labour disputes. For domestic workers who lack union support and means to finance legal representation, the CCMA has therefore proven to be accessible. There is however indications that lack of union support, lack of financial means for legal representation and lack of education might limit domestic workers' effective use of the CCMA. The CCMA does also not provide an effective mean for ensuring workplace justice for domestic workers during the employment relationship.

Considering the many obstacles facing the labour inspection system and the labour dispute resolution system, it is evident that additional measures must be taken in order to ensure that domestic workers enjoy decent conditions of employment and protection of their labour rights. Empowerment of domestic workers through the strengthening of domestic workers' unions, skills training and awareness raising campaigns are some measures that can be taken. Raising awareness among employers about employer responsibilities and encouraging and creating compliance with labour legislation in the sector through different means addressing employers are other measures that can be taken.

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