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**The World of Work:
Forms of engagement in South Africa**

Rochelle le Roux

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THE INSTITUTE OF DEVELOPMENT AND LABOUR LAW

University of Cape Town

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The Institute of Development and Labour Law

University of Cape Town

Private Bag

Rondebosch 7701

South Africa

Tel: 27-21-650 5634

Fax: 27-21-650 5660

Email: faldielah.khan@uct.ac.za

<http://www.labourlaw.uct.ac.za>

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**WORLD OF WORK:
FORMS OF ENGAGEMENT IN SOUTH AFRICA
Rochelle Le Roux**

ABSTRACT

In South Africa and elsewhere, It is now generally accepted that there is a need to redraw the boundaries of labour law. Many suggestions have been made in this regard. This monograph, while making some suggestions, does not intend to participate in this debate. However, it recognises that in order to redraw the boundaries of labour law, it is necessary to understand the meaning of work in its fullest sense. This monograph therefore attempts to understand the world of work in the South African context by considering forms of engagement from a number of different perspectives in the hope that it would provide some direction on the re-conceptualisation of the boundaries of labour law.

ABBREVIATIONS

BCEA	Basic Conditions of Employment Act 75 of 1997
CCMA	Commission for Conciliation Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Disease Act 130 of 1993
EEA	Employment Equity Act 55 of 1998
ILO	International Labour Organisation
LRA	Labour Relations Act 66 of 1995
OHSA	Occupational Health and Safety Act 85 of 1993
PDA	Protected Disclosures Act 26 of 2000
SDA	Skills Development Act 97 of 1998
UIA	Unemployment Insurance Act 63 of 2001

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1 Introduction

It is now generally accepted that remunerated work is not only engaged through employment contracts and that not all work is remunerated; consequently, there are many workers who fall beyond the reach of labour laws.¹ This is not necessarily because of their status as independent contractors, but simply because they are, for a number of reasons, either invisible to or beyond the reach of labour laws. Some of these forms of work have historically never been the concern of labour law, but other forms of work are a relatively modern and growing phenomenon to the extent that a commentator in 2000 remarked, with reference to the position in Europe, that 'the labour with which labour law has until now been concerned seems to be found less and less'.² Whether workers are excluded from the operation of labour laws for historical or modern reasons, we can nevertheless ask to what extent labour laws ought to be revised to include all or some of these workers.³ However, this question can only be answered once the meaning of work, in its fullest sense, is understood.

The aim of this monograph is therefore to consider the ways in which work is performed and to identify the differences between different workers;⁴ the extent to which the contract of employment is the paradigm within which the different forms of work are performed; the extent to which these forms of work are covered by labour and social security laws; and, to the extent that they are not, to consider whether there is a need for them to become the object of labour laws. This monograph therefore attempts to establish the shape of the world of work by discarding both the fixation with work as a contractual commitment to subordinated work only and the 'other' dichotomy of paid and unpaid work.⁵ In establishing the shape of the world of work, the focus will primarily be on the forms of engagement, but the status of workers and the processes of engagement will also be explored in order to ensure a complete picture. This is not to suggest that all these forms of work ought to be the subject of labour law, but labour law's boundaries can only be redrawn once the full range of work is surveyed. Furthermore, as a sub-theme, the nexus between the unitary concept of the contract of employment (that is the same or universal treatment of wage earners) and the rise of non-standard forms of employment will also be considered.

Much of what follows will therefore depend on what is understood by the concept 'work'. In the widest sense 'work', as suggested by *The Concise Oxford Dictionary* involves 'any expenditure of energy, striving, application of effort or exertion to a purpose',⁶ but using this as the baseline will result in an endless list of activities that could be regarded as work. Clearly what is required is a description of work that goes beyond the traditional understanding of employment, but falls short of including all activities. This monograph will therefore be premised on the following approach suggested by Supiot:

The only concept which extends beyond employment without encompassing life in its entirety is the concept of work, which is therefore the only concept that can provide the basis for occupational status. The distinction between work and activity should not be made by the nature of the action accomplished (the same mountain walk is a leisure activity for the tourist but work for the guide accompanying him). Work is distinguished from activity in that it results from an obligation, whether voluntarily undertaken or compulsorily imposed. This obligation may result from a contract (employed person, self-employed person) or from legal condition (civil servant,⁷ monk). It may be assumed against payment (employment) or without payment (voluntarily work, traineeship). But work always falls within a legal relationship.⁸

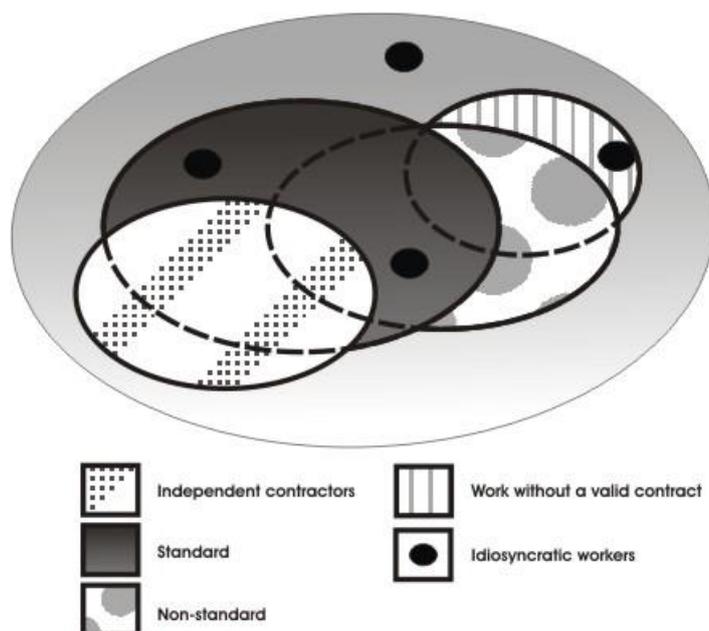
The only reservation in respect of this approach relates to the requirement of a legal relationship. As will be shown later, the position of illegal immigrants and sex workers presents great difficulty in the context of employment since, for the reason of illegality, no valid (or at least enforceable) contract of employment can be concluded by these persons.⁹ If too much emphasis is placed on this requirement (legal relationship) in the context of work, these persons will also fall beyond the parameters of work. For this reason it is preferred from the outset rather to emphasise the existence of an obligation, even if it is in common-law terms void or perhaps unenforceable, and to downplay the role of a legal relationship. The impact of illegality will be considered in more detail in the discussion of these forms of work.¹⁰

With this as the point of departure, it is clear the range will be broad and go beyond, for instance, the 'worker' concept that developed in England from the 1970s onwards.¹¹ Second, while it is conceded that the concept of work is universal, the focus will be on work in South Africa, taking cognisance of the peculiarities of the South African world of work. In this regard great reliance is placed on the empirical work of Jan Theron, Shane Godfrey and Marlea Clarke.¹² Comparative materials will be considered only for emphasis and clarification.

This investigation of work will commence with an analysis of standard employment and the benefits associated with such employment. On the basis that this type of employment is the core and represents the area where current labour and concomitant social security laws have maximum coverage, the investigation will then proceed towards the ('invisible') outer sphere of the world of work, escalating towards forms of work that resemble standard employment less and less. Conceding that the categories are extremely fluid and building on the typology of work suggested by Davies and Freedland,¹³ the following broad categories or spheres are envisaged: standard employment; non-standard employment; work without a valid contract; contractors for personal work and non-personal work (independent contractors); and idiosyncratic forms of work. These spheres should not be seen as consistently moving further and further away from the core, but rather as retrograding: in other words, waxing and waning in their distance from the core and always having characteristics in common with other spheres (forms of work).

The typology of work suggested by Davies and Freedland consists of moving from left to right on a horizontal axis: employees, employee-like, personal work and non-personal work. The scheme proposed in this work therefore differs because the category of employees is divided into two categories (standard and non-standard employment) and work without a valid contract is also treated separately. This is done because there are different, but specific consequences (as will be illustrated below) associated with standard and non-standard employment respectively. Contractors for personal and non-personal work are discussed under the heading of independent contractors. Further, in view of the high prevalence of (illegal) migrant labour,¹⁴ it is suggested that work without a valid contract is deserving of separate treatment (although other forms of work

without a valid contract will also be explored in this category). Finally, idiosyncratic forms of work should not be seen as a sphere furthest removed from the core. In fact, some of these idiosyncratic forms of work may well be a form of, for instance, standard employment, but because of their novel nature or because they have simply never been regarded as subjects of labour law, they, for the moment, should be seen as itinerants in search of categorisation. Visually, the world of work may be presented as follows:



The structure of this work will therefore be as follows: First, statistical data on the South African labour force will be considered briefly. Second, the various categories/spheres of work identified above will be analysed. Third, the relationship between these spheres of work and the informal labour market will be considered. This will be followed by a conclusion on the characteristics of the various spheres of work.

2 The size of the workforce

No attempt will be made to quantify the number of workers involved in the different forms of work. The most complete statistical data available on the national labour force is the Quaterly Labour Force Survey (QLFS) (previously the Labour Force Survey (LFS)) prepared by Statistics South Africa.

Originally, when this work was first researched, the LFS, published in September 2006¹⁵ was used. Although more recent surveys are now available, the broad trends identified in the September 2006 LFS and referred to in this monograph, have not changed significantly and for that reason it was decided use the more recent statistics.¹⁶

The September 2006 LFS estimates that the South African labour force (which includes the employed and the unemployed) is 17 191 000 persons, the unemployed being 4 391 000 persons and the employed representing 12 800 000 persons.¹⁷ On closer scrutiny it appears that the 'employed' category is not defined in the same way that an employee is defined for purposes of labour legislation. The 'employed' category is defined as '[p]ersons aged 15-65 who did any work or who did not work but had a job or business in the seven days prior to the survey interview'.¹⁸ Elsewhere in the LFS the 'employed' category is defined as 'those who performed work for pay, profit or family gain in the seven days prior to the survey interview for at least one hour or who were absent from work during these seven days, but did have some form of work to which to return'.¹⁹

Based on this it is suggested that, for instance, the genuinely self-employed person or the illegal foreigner working in South Africa (who would not be an employee for purposes of labour legislation) is regarded as employed for purposes of the LFS. The number of 12 800 000 is therefore more likely to represent those who work in the broadest sense of the word; in other words, those who are engaged in the forms of work that this monograph intends to capture and who are not employees in the (labour) legislative sense of the word.²⁰ This is confirmed by comparing the tables provided on workers and employees respectively.²¹ 'Workers' are defined to 'include the self-employed, employers and employees' and the total given is 12 800 000 which corresponds with the total given for the employed. The category 'employees' is not defined, but based on the definitions provided for the 'employed' category, it clearly excludes employers, but it is not obvious that it excludes the self-employed and other forms of work not covered by labour legislation.

Regardless of this 'disjuncture between the legal and statistical definition of employment',²² a few general trends can nonetheless be extracted from these tables.

It is estimated that 5 971 000 of the 12 800 000 *workers* do not make contributions in terms of the Unemployment Insurance Act (UIA).²³ Of the 10 195 000 *employees*, it is estimated that 7 199 000 persons are permanently employed (standard employment) and that 2 977 000 persons are employed on either fixed-term contracts or as temporary, casual or seasonal employees.²⁴ Only 3 895 000 *employees* are entitled to paid leave,²⁵ which implies that even some of those in standard employment do not get the benefit of paid leave. It is further estimated that 7 076 000 *employees* are not members of trade unions – that is, 70 per cent of those who are regarded as *employees*.²⁶

From these selected statistics²⁷ it is clear that most of the South African workforce is still in standard employment, but few can claim the benefit of collective bargaining and trade union membership. Also, a basic social security tool such as unemployment insurance is unavailable to almost 50 per cent of those who are regarded as *workers* and paid leave is not available to almost 40 per cent of those who are regarded as *employees*. Significantly, while there has been an increase in the number of persons permanently employed since the February 2001 LFS, the percentage of employees in standard employment has decreased from 77.27 per cent in February 2001 to 70, 6 per cent in September 2006.²⁸ While it is difficult to calculate the precise extent of the trend, it is nonetheless consistent with the pattern in, for instance, the EU.²⁹ It is, however, slightly at odds with the observation of Allan *et al*, published in 2001, that by the mid-1990s there was a trend towards standard employment in South Africa.³⁰

While the aforementioned statistics tell us very little about the different forms of work, they do, however, suggest, first, that many workers are invisible to labour law and concomitant social security laws and, second, that the percentage of workers in standard employment is decreasing.

3 Standard employment

Standard employment is premised on an open-ended and relatively secure (and long-term) employment relationship.³¹ While the above statistics suggest that there is a slow decline in standard employment, the latter still remains the most populated sphere in the world of work and is still the benchmark with which other forms of work are compared. Standard employment is typically full-time, the employee only has one employer, the work is generally performed at a single workplace subject to the control of the employer and it is characterised by the existence of a contract of employment.³²

Further, as a minimum, the employee's conditions of employment are regulated;³³ protection is provided against unfair dismissal and unfair discrimination;³⁴ retrenchments are regulated;³⁵ the safety and health standards at the workplace are monitored;³⁶ freedom of association, trade union organisation and channels for collective bargaining are relatively unimpeded;³⁷ and insurance is provided against unemployment³⁸ and the effects of occupational diseases and injuries.³⁹

On the face of it, if the world of work consisted only of standard employment as described above, labour and social security laws in their current forms would generally be delivering on the broad purpose of labour law; that is, to countervail the generally more powerful position of employers. Through the combined efforts of collective bargaining and protective legislation the sharpest edges of the employers' superior bargaining power are blunted and access to social security is ensured. However, while standard employment has been the model for certain core sectors, it has often not reflected the employment situation of the majority of employees. The contract of employment only became a unitary concept in South Africa fairly late in the twentieth century and the considerable exclusion that prevailed in respect of, for instance, industrial relations and social security laws denied the many workers forced to remain in non-standard employment the benefits associated with standard employment and denied them the opportunity to enter standard employment. It was only for a brief period of about two decades starting in the early 1970s that standard employment was truly the norm. As Clarke has indicated, the inclusion of black trade unions into the collective bargaining system under the Labour Relations Act 28 of 1956 (a statute premised on standard employment), the breakdown of the labour migrant

system, a rise of full-time employment in agriculture and the prohibition or limiting of outwork and the use of casual labour through Wage Determinations and Industrial Council agreements (to protect those who are covered by these determinations or agreements), are some of the reasons for the advent of standard employment in the 1970s and 1980s.⁴⁰ Prior to this period it would be wrong to assume 'the ubiquity of "permanent" labour and . . . as novel any deviations from the standard'.⁴¹ Efforts to deregulate and the advent of globalisation spurred the decline of standard employment and a return to employment patterns that prevailed during the early part of the twentieth century. However, this does not necessary imply a return to the same lack of (formal) protection that prevailed for these workers during the early twentieth century.

The following paragraphs will focus on the structure of work that cannot be regarded as standard employment.

4 Non-standard employment

Non-standard employment can be examined by focusing on the two broad processes associated with it, namely casualisation and externalisation.⁴² The former is regarded as a diluted version of standard employment and the latter involves workers providing goods and services to the end-user via a commercial arrangement, often, but not always, involving a satellite enterprise or an intermediary.⁴³

While a detailed analysis is beyond the scope of this work, it is important to understand the reasons for the growth of non-standard employment. In summary, the two most important reasons distilled by scholars appear to be, first, the need to have greater temporal and numerical flexibility to cope with varying demands⁴⁴ and, second, to reduce human resource management responsibilities and cost. In the latter regard, while not the only cause, the costs or risk associated with termination of employment is seen as an important consideration.⁴⁵ While the second reason presents moral difficulties (at least to some), one must accept that the first reason is an inevitable consequence of the changed contexts of the modern world of work.

4.1 Casualisation

Casualisation primarily concerns those workers who are in an employment relationship in the strict sense, but who are not in standard employment. In other words, not unlike those in standard employment, they generally only have one employer, work on the premises of the employer and their employment is regulated by a contract of employment.⁴⁶ The most important distinguishing factor is that they either do not work full time or, if they do work full time, they work on a fixed-term contract.

Typically, workers falling in this category consist of casuals (working less than 24 hours per month), part-time workers (working only a percentage of the time worked by the permanent employees and sometimes selected using a pool system), temporary workers (working a fixed term) and seasonal workers. The significance of the 24-hour requirement relates to the BCEA, in terms of which the provisions dealing with working time (including payment for overtime),⁴⁷ all forms of leave,⁴⁸ particulars of employment⁴⁹ and notice⁵⁰ do not apply to those employees who work less than 24 hours per month for an employer. The UIA also excludes employees employed for less than 24 hours per month by a particular employer from the application of the Act.⁵¹ No similar exclusion is found in the workmen's compensation legislation. However, these employees are covered by the OHSA.⁵² While the option of employing a casual for less than 24 hours per month is simply not practicable in many sectors and industries, anecdotal evidence suggests that it is a common in, for instance, domestic services.⁵³ These workers labour completely unprotected by the law.⁵⁴

Apart from those working less than 24 hours per month, there is in theory no reason why all casual workers should not be entitled to the same legislative benefits as those in standard employment, at least on a pro rata basis.⁵⁵ The BCEA, for instance, provides for proportionate (but similar) benefits for those who are not in standard employment and the LRA's dismissal provisions do not discriminate between temporary, part-time and permanent employees.⁵⁶ It is this 'sameness' that, so Theron and Godfrey argue, is possibly an incentive for

externalisation, the impact of which, they argue, is far worse for workers than the impact of casualisation.⁵⁷

Their argument can be summarised as follows: The previous BCEA (the Basic Conditions of Employment Act of 1983)⁵⁸ specifically defined a casual as a person employed for not more than three days (27 hours) per week.⁵⁹ In respect of these workers no unemployment insurance contribution was made and this resulted in payments being recorded differently. Also, unlike the casuals under the new BCEA, their daily maximum hours were limited to the same number of hours that applied to other employees, they were entitled to overtime, they had to be paid no less than the rate that applied to other employees, and the employer was obliged to keep a record of time worked and remuneration paid, but they were not entitled to benefits such as paid sick and annual leave.⁶⁰ Thus casuals under the old BCEA had less protection than other employees, but they were not completely without protection either. The point is that they were regulated differently.⁶¹ The inability of employers to treat certain employees differently under the new BCEA and the obvious limitations of using employees who are regarded as casuals under the new BCEA is possibly a stimulus for employers to seek alternatives which provide them with the flexibility similar to what the old BCEA provided (in respect of casuals as therein defined).⁶² The alternatives include the many manifestations of externalisation. Thus, while the new BCEA is instrumental in endorsing the contract of employment as a unitary concept, this unification is also responsible for the erosion of worker rights. In the words of Theron *et al*:

*. . . [this] exposes the fallacy of supposing that because labour legislation acknowledges no distinction between workers in standard and non-standard employment, workers in non-standard employment enjoy the same rights. In truth, both the growth of non-standard work, and the particular form it has taken in South Africa are exacerbating inequality.*⁶³

Whether it was by happenstance or design is not clear, but the reintroduction of the '27 hour per week casual', albeit in a more sophisticated form, by Sectoral Determination 9, which established conditions of employment and minimum wages for employees in the Wholesale and Retail Sector and

which came into effect from 1 February 2003, is an example of how this trend can perhaps be reversed by a process of diversification.⁶⁴ This determination provides that employees may by agreement be employed for 27 hours per week or less at an increased rate of pay, but the paid annual leave entitlement is reduced and the employer is not required to pay an allowance for night work or to pay paid sick leave or family responsibility leave.⁶⁵

There is also no reason, in theory, why casual workers should not benefit from collective bargaining and trade union membership. In practice, however, trade union recruitment is problematic, but this is caused by the nature of casualisation and not by casual workers' status as employees. The need for the publication of a sectoral determination in the wholesale and retail sector is testimony to this. A sectoral determination⁶⁶ is the means to provide basic conditions and minimum wages appropriate for a particular sector not regulated by collective bargaining, where the nature of the industry negates collective bargaining or where workers are extremely vulnerable.⁶⁷ Unions once had a strong foothold in the wholesale and retail sector, but the sector, now notorious for casualisation, currently has very weak union representation, to the extent that the main union in this sector is no longer recognised by some retail chains.⁶⁸

Casualised employees, since they are still employees, also have the protection offered by the LRA's unfair dismissal provisions. However, since casualised employees often work on relatively short fixed-term contracts, many employers, instead of following pre-dismissal procedures, simply opt not to renew the contract when it expires since termination of a contract of employment as a result of the effluxion of time is not defined as a dismissal in the LRA.⁶⁹ This practice is only partly addressed by the definition of dismissal in the LRA which provides that a dismissal also includes the failure to renew a fixed-term contract when an employee reasonably expected the employer to renew it on the same or similar terms, but the employer offered to renew it on less favourable terms, or did not renew it at all.⁷⁰ In any event, casual employment is often so transient that dismissal claims simply do not arise most of the time.

In conclusion, it is difficult to blame the limitations associated with casualised labour on the contract of employment as such, even in the case of, for

example, domestic workers. The contract of employment does not obfuscate the status of casual workers as employees. They are clearly employees and it is relatively easy to identify them as such.⁷¹ If anything is to blame, it is perhaps the unitary nature of the contract of employment and the sameness of regulation that applies to casualised labour (and the complete lack of regulation in the case of those who work for less than 24 hours per month for a specific employer). In this regard the diversification allowed for in Sectoral Determination 9 in respect of the Wholesale and Retail sector may be a useful tool to prevent externalisation.

4.2 Externalisation

Externalisation is a process that escapes precise definition, but it essentially involves the provision of services or goods in terms of a commercial contract instead of an employment relationship, thus placing a legal distance between the user of the services and the risk associated with the employment relationship. Externalisation can be divided into two broad categories. The first is the provision of goods and services to a core business via an intermediary, often at a workplace removed from the intermediary's premises. While the intermediary becomes the nominal employer of the workers, the terms and conditions of their employment are wholly determined by the terms of the commercial contract between the intermediary and the core business. The second category involves the substitution of the contract of employment between the employer and the worker with a commercial contract which attempts to convert the legal status of the worker to that of an independent contractor. Importantly, while casualisation merely dilutes the standard employment relationship, externalisation camouflages the employment relationship.⁷² In other words, while the worker may have a clearly identifiable employer (or may even, on the face it, be an independent contractor), the terms and conditions of employment (or work) are determined by the terms of the commercial contract to which the worker is often not a party.

One of the consequences of externalisation via an intermediary is that unskilled workers, in particular, are transferred from productive sectors to the services sector, where continuously increased competition places downward pressure on wages.⁷³

The finer manifestation of these two broad categories will be discussed below.⁷⁴

4.2.1 Intermediaries⁷⁵

4.2.1.1 Subcontracting, outsourcing and homeworking

Subcontracting, whereby a contractor is engaged to provide certain services, is a very popular method for the provision of cleaning and security services in South Africa. It is often achieved by outsourcing, involving former (retrenched) employees, but it is not uncommon for businesses to be established on this basis from the outset.⁷⁶ The significant feature of subcontracting is that the workers generally do not work on the premises of the nominal employer.⁷⁷

A peculiar form of subcontracting, which is prevalent in the South African clothing sector, is homework.⁷⁸ Homeworking has been described as ‘involving a chain of numerous . . . contracting parties that constitute a pyramid of interlocking contractual arrangements [which] permits the effective business controllers to profit from the use of cheap labour without any need to deal directly with those performing the labour’.⁷⁹ Van der Westhuizen explains in more detail:

[T]he development of informal, unprotected clothing manufacturers has provided virtually limitless flexibilisation of labour at no extra cost to the retailer or the intermediary. Neither the retailer nor the design house absorbs the costs created by the seasonal nature of the clothing industry. Rather, it is passed on to the worker-owner, who simply earns less or no money when demand has decreased. Social costs to the retailer and design house are non-existent as no social benefits are provided to the informal workers in home-based industries. The cost of overheads is also passed on. This includes needles, thread, electricity and the hiring and repair of machines.⁸⁰

Homework is obviously home-based⁸¹ and either involves a nominal employment relationship or ‘relationship of economic dependence on a supplier

or intermediary that is akin to an employment relationship'.⁸² Importantly, there is 'legal distance' between the workers and the end-users.⁸³ It is suggested that the following is a useful description of the graphic aspects of homeworking:

This "invisible industry" involves a chain of interlocking contracting arrangements for the production of clothing goods offsite. Typically, at the apex of this integrated system are major retailers that enter into arrangements with principal manufacturers for the latter to supply the retailers with clothing products. The principal manufacturer, with a substantial workforce, will give out orders for the production of clothing goods to a smaller manufacturer or offsite contractor or subcontractor. In some instances a fashion house, with a very small onsite workforce, will give out orders directly to the small manufacturer or offsite contractor. The orders for production from the principal manufacturer or the fashion house will then be successively handed down through a sequence of intervening parties, or "middlemen", until the goods are finally produced by a small factory sweatshop, which usually passes the order for the actual production of the clothing product to an outworker working at home. The finished goods are then delivered back up the chain of contractual arrangements until they arrive back at the original principal manufacturers or the fashion houses.⁸⁴

In South Africa homeworking typically has three forms.⁸⁵ a CMT (cut, make and trim) operation with a workforce of as many as 20 or more workers and with a clear distinction between the owner of the operation and the workers; a M&T (make and trim) operation, normally with a smaller work force than that of CMT operations, with the owner of the business often working alongside the other workers; and the 'survivalist' operations, which are very small operations, normally without cutting facilities, and with the homeowner working alongside a very small number of workers, who tend to take collective responsibility for expenses. However, generally, the conditions of employment are poor and job security is minimal.⁸⁶ The following observation on job security is quoted at length since it illustrates the extent to which the workers bear the risk in the homeworking environment:

Most workers reported that their working hours were determined by the contracts with suppliers: when there was work, they worked; when there wasn't enough work, they were told not to come in. In all but one enterprise, workers were only paid for the days they actually worked. Many, however, reported working regular hours. Most also indicated that they worked overtime (generally without overtime pay) and weekends, to meet contract deadlines. Workers nevertheless expressed high levels of anxiety about the duration of the contracts, with some complaining about the tight turn-around time to complete orders.

The pressure on the homeworkers was often intense. If the contract deadline was not met, payment from the retailer or design house was not made. Without payment, workers' wages would not be paid. As a result, hours of work were often dictated by the size of the order and the time required to complete the contract. Thus, in enterprises where there was a clearer distinction between the owner of the enterprise and homeworkers, the pressure and risks of the business were effectively placed upon workers.

In the M&Ts and survivalist operations, where the owner of the operation was often also a homemaker, the pressure was even more intense but was felt equally by everyone. During an interview with one homemaker, fellow workers scrambled to put together enough money to buy more electricity to keep the sewing machines running. The interviewee explained that they had not been able to buy groceries or electricity that month because payment from the design house for their last contract had not been received. Another homemaker reported that she sometimes had to borrow money from family members to purchase electricity to keep the sewing machines going in order to finish a contract and get paid.⁸⁷

A few more observations about homeworking are necessary. As in Australia, for example, homeworking in South Africa is primarily performed by female workers.⁸⁸ While there may be more than one intermediary, it is not uncommon for day-to-day supervision to be done by the end-user and/or one or

more of the intermediaries⁸⁹ and, certainly in the case of South Africa, homeworking 'displays the structural interrelationship of the formal and the informal economies'.⁹⁰ Furthermore, the homeworkers tend to be invisible to the structures and processes of collective bargaining.⁹¹ Importantly, inasmuch as the contract of employment remains central to the employment relationship, it obscures the true nature of the relationship between the end-user and/or many of the intermediaries, on the one hand, and the worker on the other.

It is noteworthy is that although many homeworkers were forced into homeworking by retrenchment, they are not necessarily averse to it, because it is convenient in terms of the work/life cycle.⁹² Also, because many homeworkers received training in the formal sector and tend to be older than 35, skills development and training in this sphere may eventually become a problem.⁹³ If one assumes that there is a place for homeworking – because it is still preferable to imports (in the sense that it provides employment)⁹⁴ – it is clear that it will require closer (and perhaps different) regulation and organisation that will recognise its peculiar nature.

4.2.1.2 Labour broking⁹⁵

Since engagement with the help of a labour broker often results in temporary employment, this form of engagement clearly intersects with casualisation on many levels. However, since it also involves engagement via an intermediary and on the basis that the statutory regulation of labour brokers creates 'legal distance' between the worker and the user of the service, it is suggested, although nothing turns on it, that it is more appropriate for purposes of this chapter to view it as a form of externalisation.

Essentially labour broking involves the supply by brokers of labour contracted to them to clients who pay an all-inclusive fee for the service to the broker who, in turn, pays the worker.⁹⁶ It was first formally regulated in South Africa by means of an amendment⁹⁷ to the Labour Relations Act of 1956.⁹⁸ The essential features of this amendment required the broker to register with the Department of Labour and deemed the labour broker to be the employer of the workers supplied by it to the client.⁹⁹ In terms of the 1995 LRA the registration of

labour brokers (now called temporary employment services (TES)) with the Department is no longer required, but their status as deemed employers is reinforced by s 198(2) which provides that:

For the purposes of this Act, a person whose services have been procured for or provided to a client by a temporary employment service is the employee of that temporary employment service, and the temporary employment service is that person's employer.

This peculiar situation ('one would be hard pressed to say in what respects a TES is the employer, other than that the TES remunerates the employee')¹⁰⁰ is complicated by a further provision that the TES and the client are jointly and severally liable if the TES contravenes a collective agreement concluded in a bargaining council that regulates terms and conditions of employment,¹⁰¹ a binding arbitration award that regulates terms and conditions of employment, or the BCEA.¹⁰² Based on the definition of the TES in the LRA it is clear that the workers must be provided to the client for reward; hence non-profit organisations providing such workers are not covered.¹⁰³ The definition further requires that the worker must be remunerated by the TES. The BCEA defines a TES in the same terms as the LRA does, and the TES must therefore observe the BCEA. COIDA, which defines an employer to include a labour broker,¹⁰⁴ requires the labour broker, as employer, to register in terms of the Act, and it is obliged to report an accident to the Compensation Commissioner. The client therefore has no liability in terms of COIDA, but remains delictually liable to the employee placed with it by the TES.¹⁰⁵ A case in point is the judgment of the SCA in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Rieck*.¹⁰⁶ An employee placed with Crown Chickens by a TES was injured due to the negligence of employees of Crown Chickens. The injured employee proceeded with a delictual claim against Crown Chickens who claimed that it was shielded against such action by the provisions of s 35 of COIDA. This section provides that no action by an employee injured during the course and scope of employment shall lie against the employer. Relying on the definition of an employer in COIDA, which includes labour brokers,¹⁰⁷ the SCA confirmed the client (Crown Chickens) remains delictually liable to the employee.

While those employed by TESs on the face of it seem to be well protected by legislation, the protection is more apparent than real. Despite being at least structurally part of the client's enterprise, the following conspire to create what Theron calls 'an underclass in the formal workplace':¹⁰⁸ the fact that an employee's terms and conditions (in particular wages, duration and notice) are wholly dependent on the terms of the commercial contract between the TES and the client, the fact that there is no obligation that workers placed by TESs are remunerated on the same basis as the client's employees¹⁰⁹ and the difficulties which the temporary nature of the placements present for trade union participation and collective bargaining. The following illustrates some of the predicament of workers placed by TESs:

*The notion that wages and minimum standards are amenable to a process of collective bargaining between an employer and its workers has no practical application, unless the TES is able to prevail upon the client to vary its contract with the TES. It will obviously not be easy to do so. On the contrary, it is more likely that one TES will displace another by offering the same service at a lower price, and will take over the workforce employed by the former TES.*¹¹⁰

The client, apart from delictual liability for injuries negligently caused by its employees, is legally removed from most of the risks associated with employment. However, on the basis that occupational injuries and diseases are taken care of by the Compensation Commissioner in terms of COIDA, the only real risk for the TES is unfair dismissal. While still awaiting critical pronouncement by the Labour Courts, no clear message is emanating from CCMA awards on the responsibility of the TES once a client terminates the placement of the employee. One view is that TES has no further responsibility.¹¹¹ Another view suggests that the TES has a duty to find alternative employment or to retrench the redundant employee.¹¹² While the latter appears to be consistent with what one would expect from an employer in terms of the LRA, the former view appears to be on firm common-law ground. The complication is the result of s 186(1)(a) of the LRA which defines a dismissal to mean termination of the contract of employment by the employer with or without notice. Termination because the term of placement has ended will thus not constitute a dismissal.

Normally the duration of fixed-term contracts is expressed in terms of time, but at common law it is possible to link the duration to the wish of the parties and the term of employment will simply end when the party so decrees.^{113 114}

There can be no doubt that the combination of casualisation and labour broking is one of the forces destabilising standard employment in South Africa and it has been called 'the motor for the development of externalisation'¹¹⁵ and that the reforms currently called for are long overdue. Not only does it promote job insecurity and erode basic standards, but it marginalises the potential balancing power of trade unions and collective bargaining. The solution may well be, as suggested by Theron *et al*, to address the lack of differentiation between the different forms of employment which appears to be an incentive to externalise.¹¹⁶ Furthermore, there seems to be nothing temporary about the placements made by TESs, and reinforcing the notion of temporary by limiting the duration of placements may also help to stem the destabilising tide of externalisation.¹¹⁷

4.2.1.3 Franchising

Remarkably little has been written in South Africa on franchising.¹¹⁸ Franchising is an opportunity to trade on a pre-packaged recipe and has been described in the following terms:

*[A]t the heart of a franchise relationship is an agreement which allows the franchisee to provide a service which has been pre-packaged by the franchisor with the proviso that the franchisee operates within the boundaries as established by the franchisor.*¹¹⁹

Usually the franchisee will be expected to pay an initial amount and to pay royalties on an ongoing basis. One of the distinguishing features of franchising is the extent of control that the franchisor retains over the running of the business, including pricing, sources of supply, ingredients, make-up, marketing, promotion, employment policy and uniforms. This enables the franchisor to protect the goodwill associated with the package that is the subject of the franchise agreement.¹²⁰ The control by the franchisor and the economic dependence of the

franchisee is not dissimilar to the standard employment relationship, but importantly all the risks are with the franchisee.¹²¹ Externalisation of labour thus occurs by either converting the employee to a franchisee (or by engaging him on this basis from the outset) or by creating a franchise that becomes the nominal employer of employees whilst the control remains with the franchisor. There is, however, some evidence suggesting that franchising is used internationally to achieve externalisation of the labour force.¹²² No empirical evidence is available on the extent to which franchising as a form of externalisation is prevalent in South Africa, but there is some case law and anecdotal evidence suggesting that it is occurring.

In *Rodgers and Assist-U-Drive*¹²³ the CCMA commissioner considered whether the termination of a franchising agreement constituted a dismissal. The franchisor operated a driving school and the franchisee obtained a franchising licence to operate under its name. The arbitrator, cognisant of the LAC judgment in *Denel*¹²⁴ that substance should trump form was, however, not satisfied that the control exercised by the franchisor and the economic dependence of the franchisee were of such a nature that the relationship constituted one of employment, and held that the franchisee was in fact an independent contractor. On the other side of the spectrum, Theron and Godfrey refer to the example of a hotel chain that obtained a franchise and, with a manager-owner in place, outsourced the rest of its operation, creating a business with no labour force.¹²⁵

While franchising is perhaps not yet as common as other forms of externalisation it is easy to see how, if unchecked, it can become yet another serious manifestation of externalisation, marginalising the social protection of individuals styled as franchisees and marginalising trade union recruitment.

4.2.2 Commodification of the individual employment relationship

This essentially involves an attempt to convert employees into independent contractors by presenting the relationship between the employer and the worker as a pure commercial arrangement. As will be explained in more detail below, independent contractors are generally not regarded as beneficiaries of the protection offered by labour legislation; hence the desire by employers to

convert the worker who would normally be an employee into an independent contractor.

The most graphic example of this is the retrenchment of (mostly unskilled and therefore vulnerable) employees and their immediate re-engagement (or even engagement from the outset) as independent contractors despite the fact that they continue to work under the same circumstances as before their retrenchment.¹²⁶ These sham practices, which enable employers to bypass protective legislation and collective agreements, have now been curtailed by the combination of the courts' insistence that substance should trump form,¹²⁷ and the presumption as to who is an employee. Even prior to the judgment in *Denel*, in which the LAC emphasised substance over form (even if the contract did not amount to a sham), the court intervened to negate such contracts 'designed to strip the workers of the protection to which they are entitled according to law and fair labour practice'¹²⁸ and held the workers in question to be employees. Another example is the practice of portraying workers as agents and thus independent contractors. In a recent judgment¹²⁹ concerning an estate agent characterised as an independent contractor in her contract, the court, following the *ratio* in *Denel*, held that the realities of the relationship suggested that she was in fact an employee despite the method of payment and the non-deduction of unemployment insurance contribution and Pay-as-you-earn (PAYE) as provided for in the contract.¹³⁰ Disturbingly, the evidence in this matter revealed that 50 agents were employed on the same basis,¹³¹ and presumably similarly deprived of access to, for instance, unemployment insurance contribution.¹³²

More difficult to curtail is the emergence of arrangements in the nature of owner-driver schemes. These schemes usually enable the former employee to own the tools of the trade (for instance, a vehicle) and to render his or her service to the former employer in terms of a commercial contract.¹³³ These workers are therefore no longer employees and not able to claim the benefits of protective labour legislation or collective agreements.¹³⁴ On the other hand, because of the incentives offered by productivity-based payments and because labour standards are no longer relevant, drivers work much longer hours than they did prior to the conversion to the scheme. However, they are not necessarily less dependent than before since the vehicle is either acquired from the former employer or

financed with its help.¹³⁵ The former employer not only benefits from the increased productivity, but also from the reduced costs of not having to maintain the vehicle and the reduced labour costs. The owner-driver, however, in reality no less dependent than before and with only some prospect of earning more, is saddled with the financial responsibility of ownership and is deprived of the protection offered by labour legislation.

4.2.3 Précis

In the context of externalisation via intermediaries it is still possible to identify an employer that is theoretically responsible for the risks of employment. However, the reality is that another party, by remote control from behind the façade of a commercial arrangement, dictates the employment relationship between that employer and the worker. This camouflaged employment relationship and the fact that this form of externalisation often occurs in association with casualisation¹³⁶ result in a workforce that is deprived of protective labour legislation and collective bargaining. Externalisation via the commodification of the individual employment relationship simply involves an attempt to change the status of the individual employee by restructuring the employment relationship with the help of commercial taxonomy. However, whether externalisation occurs through the use of intermediaries or by commodification of the individual relationship, for the worker, the result of externalisation is the same.

5 Work without a valid contract

5.1 Introduction

Traditionally the employment relationship for purposes of labour legislation is premised on the existence of a common-law contract of employment. In this paragraph, instances where work is performed in the absence of a valid contract will be considered. Lack of the required intent and illegality have emerged as two of the most common reasons for the absence of a valid contract, despite the obvious existence of an arrangement to work. Work without a valid contract will

be considered under the following headings: absence of required intent and illegality arising from a legislative prohibition.

5.2 Absence of required intent

Apart from all the other legal requirements for the creation of a valid contract, an agreement will only be regarded as a contract if the parties intended to create an enforceable obligation.¹³⁷

5.2.1 Clergy

This requirement has been the reason for the Labour Court refusing to provide protection to, for instance, clergy. In *Church of the Province of Southern Africa Diocese of Cape Town v CCMA & Others*¹³⁸ a priest's licence to practice was revoked for five years after he was found guilty of misconduct, effectively depriving him from any financial benefits attached to this office. The priest referred an unfair dismissal claim to the CCMA. The commissioner rejected the argument that the priest was not an employee and this finding was taken on review. The Labour Court found that the agreement between the church and the priest was a spiritual agreement aimed at regulating the priest's divine obligations and there was no intention on the part of the church or the priest to enter into a legally enforceable employment contract. Since Waglay J held that a contract of employment is necessary for purposes of establishing an employment relationship,¹³⁹ the priest could not be regarded as an employee for purposes of the LRA.¹⁴⁰ *Salvation Army (South African Territory) v Minister of Labour*¹⁴¹ concerned a declaratory order sought by the Salvation Army to establish whether their officers – clergy who are ordained and commissioned ministers of religion – are employees for purposes of a range of labour legislation. Maya AJ, for the same reasons advanced by Waglay J in *Diocese of Cape Town*, held that they are not employees for the purposes of this legislation. The implication of these judgments is clearly that where there is no intention to create an employment contract in the common-law sense, an employment relationship is not possible for purposes of labour legislation.¹⁴²

Some commentators¹⁴³ have questioned the continued validity of these judgments after the LAC's emphasis on substance rather than form in *Denel (Pty) Ltd v Gerber*,¹⁴⁴ but whether the language of this judgment goes far enough to suggest employment exists where there is no contract at all as opposed to concluding that employment exists where there is a valid contract, albeit not in the form of an employment contract, is doubtful.

For the moment the question is not whether the outcome of these judgments is correct and whether their *ratio* still stands. The point is that there can be no doubt that the clergy in question, relying on the view of work adopted earlier, were in fact *working*. What distinguishes their position from those in standard employment and most other forms of work is the absence of a contract in any form. However, while they may ultimately serve a divine employer, the manner in which they render their earthly labours, as emerged particularly from *Diocese of Cape Town*, hardly differs from any other standard secular employment.

5.2.2 Genuine volunteer workers

The position of clergy is also not dissimilar to that of volunteer workers. Only genuine volunteer workers,¹⁴⁵ who undertake work freely and without remuneration and who are not undergoing vocational training, are considered in this paragraph. Students undergoing vocational training, although their positions are not substantially different, will be discussed below under the heading of idiosyncratic forms of work.

Genuine volunteer workers include those who offer their services to religious, charitable, benevolent or sporting organisations. It may be one-off volunteer work or it may be an ongoing commitment. The actual numbers of volunteer workers in South Africa are difficult to estimate but the 2006 LFS suggests a number of 1 052 000 persons.¹⁴⁶ Following drives from national government,¹⁴⁷ particularly since 2002 that was declared the Year of the Volunteer, to promote a spirit of voluntarism, anecdotal evidence suggests that it is on the rise.

While genuine volunteer work may not require all the regulation associated with genuine employment, it has been suggested that at least those laws that regulate the workplace *per se*, such as anti-discrimination and workmen's compensation laws, ought to apply in the case of volunteers.¹⁴⁸

This is not the position in South Africa. On the basis of the Labour Court's judgment in *Diocese of Cape Town*, it would be difficult to classify volunteers as employees for purposes of most labour legislation,¹⁴⁹ because there is no intention to create a binding contract of employment. Moreover, the judgment of the SCA in *ER24 Holdings v Smith NO*¹⁵⁰ also militates against this. While this matter concerned an injury to a volunteer worker undergoing vocational training, the *ratio* applies equally to genuine volunteers. The volunteer in this matter, acting through a *curator ad litem*, sued ER24 on the basis that she sustained very serious injuries in a motor vehicle collision which occurred while she was accompanying an employee of ER24 in an ambulance to the scene of another collision. The negligence of the employee in causing the collision was not disputed. However, ER24 claimed that since the volunteer was an employee, and by virtue of the provisions of s 35 of COIDA,¹⁵¹ the volunteer's claim ought to be against the Compensation Commissioner.

The SCA considered the definition of an employee in s 1 of COIDA, which provides that an employee is a person who works under a contract of services and who receives remuneration in cash or in kind. The volunteer in this matter was not paid and since the court was not prepared to regard the opportunity to travel in the ambulance and to acquire experience and guidance at an accident scene as remuneration in kind,¹⁵² the volunteer was held not to be an employee for purposes of COIDA. ER24 was thus delictually liable for the volunteer's claim. The claim in this matter was substantial (R7 million) and while it was probably in the interests of the injured volunteer to allow the common-law claim against a 'deep-pocket' defendant such as ER24 rather than a notoriously limited claim against the Compensation Commissioner, the outcome is not necessarily in the interest of the broader volunteer community. More often than not they make their services freely available to organisations precisely because these organisations are cash-strapped and would otherwise be unable to offer their worthy services.

In such cases an injured volunteer would be deprived of a claim in terms of COIDA and left with a hollow common-law claim against the organisation.

In addition to the limited reach of COIDA in respect of genuine volunteer workers, s 3(1)(b) of the BCEA provides that the Act does not apply to unpaid volunteers working for an organisation serving a charitable purpose.

Returning to the central focus of this monograph, the question can be asked whether genuine volunteer work is really work. In *Diocese of Cape Town* it was easy to see how the clergy's position, but for its divine nature, resembles that of any other secular employee. But can it be claimed that the genuine volunteer worker who responds to a sense of communitarianism is working? Supiot, in his description of work quoted earlier,¹⁵³ had no doubt that voluntary work, on the basis that it creates obligations, is a form of work. But can it be said that it is work deserving of (some) labour market regulation? Borrowing from feminist scholarship on unpaid work (such as domestic duties and child-caring responsibilities),¹⁵⁴ the claim can be made that at least in some cases volunteers have a place in the labour market because they provide a service that must normally be paid for, they often work in the same workplace as those in paid employment, and their participation often impacts of the duties of those in paid employment.¹⁵⁵ In this regard Rittich comments as follows:

*On reflection, it is not obvious why only certain types of work should be of interest, while others – domestic work, volunteer work, subsistence work, or community work, for example – remain largely neglected. As non-controversial and deeply normalized as it seems, this state of affairs was rendered possible in part because mainstream labour agenda became consolidated around the concerns of workers for whom work simply meant paid work.*¹⁵⁶

Thus, unpaid work is not necessarily without value and it often impacts on paid work. On this basis there can be no doubt that volunteer work is at times a dynamic force in the labour market. The court in *ER24* was perhaps limited by the wording of COIDA, but the judgment does not even hint at this possible labour market significance of volunteer work.

5.3 Illegality arising from a legislative prohibition

At common law an agreement must be legal to constitute a contract. In some circumstances an illegal agreement will still constitute a contract, but will not be legally enforceable. In instances where the illegality is due to a conflict with legislation, the validity of the agreement must be sought from the wording of the legislation.¹⁵⁷ Unless the agreement is declared invalid by the legislation, a mere prohibition does not necessarily render it invalid.¹⁵⁸ While the imposition of only a penalty suggests that the contract is probably only unenforceable as opposed to invalid, the broader public purpose of the legislation may still render it invalid.¹⁵⁹ In this paragraph the focus will mainly be on foreigners working in South Africa without work permits (illegal foreign workers) and sex workers. In the former case the work performed is not the cause of the illegality, but rather the status of the worker. In the latter case it is the work performed that is illegal. Brief reference will also be made to child labour and other forms of illegal work.

5.3.1 Illegal foreign workers

Globally large-scale labour migration is one of the challenges of the new world of work. It is no different in South Africa. While precise data is not available, it has been estimated that undocumented migration to South Africa involves between 2,5 and 12 million foreigners. Department of Home Affairs estimates vary between 2,5 and 7 million.¹⁶⁰ Even when relying on the most conservative of the available data and based on anecdotal evidence,¹⁶¹ it must be assumed that many illegal foreigners are active in the South African labour market,¹⁶² ¹⁶³ but are they beyond the reach of protective laws? In this regard the provisions of the Immigration Act of 2002¹⁶⁴ are significant.

Section 38 of the Act provides that no person shall employ an illegal foreigner or a foreigner whose status does not authorise employment or employ such foreigner on terms and conditions or contrary to his or her status.¹⁶⁵ Section 49 of the same Act provides that it is an offence to knowingly employ an illegal foreigner in contravention of the Act. There is no indication, either expressly or by implication, in this Act, that employment contracts contrary to the prohibition in s

38 are invalid.¹⁶⁶ Arguments for accepting that the effect of the Immigration Act, properly interpreted, is that the contracts of employment concluded contrary to the Act are null and void. include the peremptory nature of the prohibition coupled with a criminal sanction, as well as the broader public purpose of the Act.¹⁶⁷

On the basis of the broader public purpose of the Aliens Control Act 1991¹⁶⁸ (predecessor of the Immigration Act of 2002), the labour courts and tribunals declined to intervene when foreigners, employed contrary to the provisions of that Act, had been dismissed, because the LRA cannot be seen to condone unlawful conduct.¹⁶⁹

This is consistent with the general approach followed by the common-law and industrial courts in respect of other prohibitive legislative provisions.¹⁷⁰

The CCMA directive issued on 27 February 2008 in which it instructed its commissioners that in the case of disputes involving illegal foreigners, the CCMA should accept all referrals for illegal foreigners; accept jurisdiction; order compensation only in successful disputes and should oppose any review application challenging this approach right up to the constitutional court as well as the judgment handed down in the Labour Court on 28 March 2008 in *Discovery Health Limited v CCMA and Others*,¹⁷¹ the latter not without criticism, reversed the traditional approach followed by the courts in dismissals concerning illegal foreigners.

Discovery concerned a foreigner who was dismissed for not being in possession of a valid work permit. The employer argued that since s 38(1) of the Immigration Act prohibits employment of an illegal foreigner, it could no longer employ the foreigner. The employer further argued that the CCMA did not have jurisdiction to arbitrate the matter because of the invalidity of the underlying contract of employment. The judge found that the provisions of the Immigration Act are such that they do not invalidate the contract of employment. Since the contract of employment was not invalid, the foreigner was held to be an employee as defined in s 213 of the LRA. The judge further concluded that '[e]ven if the contract concluded . . . was invalid only because the [employer] was

not permitted to employ [the foreigner] under s 38(1) of the Immigration Act, [the foreigner] was nonetheless an “employee” as defined by s 213 of the LRA because that definition is not dependent on a valid and enforceable contract of employment.’¹⁷²

However, despite these developments the application of the dismissal provisions of the LRA is still complicated by the definition of dismissal in the LRA, which is primarily premised on the termination of a contract of employment. Unless, as suggested by Bosch,¹⁷³ the courts are prepared (relying on s 23 of the Constitution which guarantees a right to fair labour practices to *everyone*) to ‘read into’ the definition of dismissal words to the effect that it also includes the termination of an employment relationship (and not only an employment contract), illegal foreign workers may remain unprotected against unfair dismissals. However, even if ‘reading in’ does take place, the remedies of reinstatement or re-employment will still not be available and the most prudent remedy will be compensation.¹⁷⁴

Moving beyond the LRA, the position of the illegal foreign worker with respect to basic conditions of employment, unemployment benefits, protection against unfair discrimination and workmen’s compensation is equally doubtful. It has been argued by Norton, despite her opposition to the interpretation followed by the Labour Court in *Discovery*, that this is the area where illegal foreign workers are perhaps the most in need of legislative protection.

This view is endorsed by evidence which suggests that most illegal foreigners are absorbed into informal employment where these statutes are simply not applied. Furthermore, unlike the LRA and BCEA, an employee is defined specifically in terms of a contract of service for purposes of COIDA and it is very unlikely that the courts will give effect to a contractual arrangement that is not valid at common law, particularly in view of the SCA’s recent narrow interpretation of this definition in the case of a volunteer worker.¹⁷⁵

Not only are these illegal foreign workers, but for possibly protection against unfair dismissal, almost certainly beyond the reach of protective legislation, but they are also unlikely to benefit from collective bargaining. It seems as if many of the foreign workers work in sectors where subcontracting is

prevalent: that is in the mining, agricultural and construction sectors, and workers in subcontracted positions in, for instance, the mining industry, fall outside trade union wage negotiations.¹⁷⁶

For the moment, the question is not whether this situation is correct or not, but it is clear that the need for a valid contract has a devastating effect in the context of illegal foreign workers. Ironically, those illegal foreign workers who do find formal employment appear to be beyond the protection that formal employment normally offers and, on the other hand, because they are not in a position to conclude valid contracts of employment, they are generally forced to take up informal employment which exposes them to exploitation and once again takes them beyond the reach of protective laws.

The issue of the appropriate labour regulation of illegal foreign workers is not pursued here, but one may well ask, first, whether subjecting illegal foreign workers to labour regulation will eliminate the aspects that encourage employers to exploit these workers. Second, is the answer to this particular illegality not in finding in a different interface between labour and immigration laws? Finally, why should the employer escape the wrath of labour law in the case of, for instance, unfair dismissal simply because of the status of the illegal foreign worker?¹⁷⁷

5.3.3 *Child labour*

Analogous to the position of illegal foreigner workers (in the sense that the illegality concerns the status of the worker and not the work performed) is the position of child labourers. Section 43(3) of the BCEA provides that it is an offence to employ a child who is under the age of 15 years. The only available data on child labour in South Africa, albeit dated and perhaps unreliable because of the subject area, suggests that in 1999 approximately 1 million children between the ages of 5 and 14 years were involved in an economic activity of three hours or more in duration.¹⁷⁸ While it is clear that this type of labour is illegal and that the court will be reluctant to give effect to any such arrangement for the policy reasons underpinning the prohibition of child labour, it is not clear how the courts will approach, for instance, a claim brought by a child (less than 15 years) in terms of COIDA. The point is that, quite apart from the worst forms

of child labour such as prostitution and involvement with criminal activity, it is known that many children perform work in contravention of s 43 of the BCEA.

5.3.3 Sex workers

Hitherto the discussion has concerned an illegality relating to the status of the person working. It appears, however, that the labour tribunals will observe the same principles where the illegality concerns the actual work performed. On the basis that prostitution still constitutes a criminal offence, the commissioner in *'Kylie' and Van Zyl t/a Brigittes*¹⁷⁹ proceeded on the basis that the contract was illegal because the work performed constitutes an offence in terms of the Sexual Offences Act of 1957.¹⁸⁰ Claiming that it is 'trite that the employment contract forms the basis of the employment relationship'¹⁸¹ and the common-law rule that illegal contracts are not enforceable, and further relying on a complete absence of any indication in the LRA that the legislature nonetheless intended the LRA to apply to illegal work, the commissioner declined jurisdiction.¹⁸²

On review¹⁸³ Cheadle AJ held that, although there '*can be little doubt that the relationship [between the prostitute and the brothel]. . . is an employment relationship,*¹⁸⁴ the statutory unfair dismissal provisions are not available to sex workers and that the tentacles of the illegality in the case of prostitution are so far reaching that '*the scope of the protection guaranteed by section 23(1) does not embrace, for so long as Parliament considers organised prostitution to be a crime, sex workers and brothel keepers.*¹⁸⁵ While Cheadle AJ explicitly stated that his judgment '*does not decide that a sex worker is not entitled to the protections under the BCEA*' and other protective legislation,¹⁸⁶ it is difficult to comprehend how the protections of these statutes could be available to workers if the constitutional provision which underpins, for example, the BCEA is not available to sex workers and if indeed, as emphasised by the judge, it was '*the intention that the Sexual Offences Act not only penalises the prohibited activity, but intend that courts will not recognise any rights or claims arising from that activity*' (emphasis added).¹⁸⁷

Although the subject of a South African Law Reform Commission discussion paper,¹⁸⁸ it therefore appears as if the employment of prostitutes

remains unprotected for the moment. However, despite this and the fact that the nature of the sex worker's work is extremely personal, the reality is that conceptually there is no difference between a sex worker and, for example, a hairdresser in standard employment. As in the case of clergy, the only tangible difference is the absence of a contract of employment valid at common law.

5.3.4 Other forms of illegal work

The judgment handed down by the LAC in *SITA (Pty) Ltd v CCMA and Others*¹⁸⁹ represents another form of illegal employment although this did not detract the court from providing protection.

In this matter an employee who worked for a front company of the SANDF was retrenched and given a severance package. In terms of the severance package and applicable laws and regulations, the employee could thereafter not be employed again by the SANDF. However, his services were still needed after all and he continued to provide it to the SANDF via the conduit of a close corporation. When the SANDF, for lack of funding, cancelled the project, the employee was effectively dismissed. Dismissal proceedings followed and the issue before the court was to determine the identity of the true employer, that is, the close corporation or the SANDF. Throughout the judgment the court, per Davis JA did not busy itself with the existence of a contract of employment, but with the question whether an *employment* relationship was established. In answering this question the court, in following *Denel*, ignored formal arrangements between the parties and held that when considering the question of an employment relationship, a court must work with the three primary criteria to which I have already referred to earlier.

Based on this, the court held that the relationship between the SANDF and the employee was an employment relationship. The fact that this finding actually perpetuates an otherwise unlawful relationship did not prevent the court from finding that an employment relationship existed or from ordering the payment of compensation. Referring to *Denel*, where a similar conduit was also used, the judge reminded us that in that matter '*the absence of clean hands did not prevent the court from*¹⁹⁰ finding that an employment relationship existed.

6 Independent contractors and the self-employed

Section 213 of the LRA, in the definition of employee, specifically excludes independent contractors from the definition of employee. This was not always the case. Industrial relations legislation in South Africa defined the meaning of employee in broad terms and it was only fairly late in the twentieth century that the industrial courts began to contrast an employee with an independent

contractor. Ever since, like elsewhere, the search has been on to find the decisive defining element of employment.¹⁹¹ For the moment the concern is not with identifying that defining element, but rather to acknowledge that there are people who work, but who are not employees as traditionally understood. Since the decisive element of employment has always been elusive, it is of course very difficult to describe this form of engagement. However, acknowledging that there is a grey area, independent contractors would typically include those who contract to produce a result (the plumber or the mechanic) and those who contract to render a personal service, but have an identifiable business of their own such as an attorney in private practice, a consultant¹⁹² or an agent.¹⁹³ The latter is often referred to as the 'genuinely self-employed'.¹⁹⁴ In both cases, the client base would be diverse and there would be no exclusive economic dependence on one client.¹⁹⁵ In other words, cancellation by one client, although perhaps not without financial implications, would not result in them not working at all.

This is not to suggest that an independent contractor may not be extremely vulnerable. De Jongh refers to pockets of the so-called 'Karretjie [donkey wagons] People of the Karoo' (a semi-arid region in South Africa). Their numbers are unknown, but they have no fixed abode and move from farm to farm in the Karoo by donkey cart, performing shearing duties on farms where they are sometimes allowed to camp for the duration of the shearing. While their labour law status has never been researched, they are by all accounts, in labour terms, independent contractors. They provide their own shearing tools, are paid by the number of sheep sheared, determine their own working hours and although they tend to work in teams, individuals are basically free to leave before the shearing has been completed. Their bargaining power is limited and the rate of payment is almost exclusively determined by the farmer. However, they are not dependent on a single farmer and will simply move to another destination if rates cannot be negotiated or will simply camp next to roads and literally live off the land until another shearing assignment is found.¹⁹⁶

Easier to identify as the genuinely self-employed are those who work for themselves in the sense that they create a product which is delivered to one or more clients. In its most rudimentary form it would include the person making or

producing something such as confectionery which he or she then sells once a week at the market. In other words there is no suggestion or sense of 'working for another', but the person clearly works on the basis of an obligation to him- or herself.

Once a worker is in fact an independent contractor or is genuinely self-employed, contrary to the position of the employee, he or she has no claim to the protection offered by labour and concomitant social welfare legislation, is excluded from the collective bargaining process, becomes a provisional taxpayer, and assumes the risks such as those associated with non-performance or with his or her negligence in performing the service or producing the result. The question, not pursued in this work, is at what point this exclusion becomes untenable.

7 Idiosyncratic forms of work

7.1 Worker co-operatives

The worker co-operative option is a form of self-help that resembles aspects of both self-employment and a partnership, without being either.¹⁹⁷ The worker co-operative is an entity created by the Co-operative Act of 2005,¹⁹⁸ which commenced on 2 May 2007. The Act allows a number of individuals to register a range of co-operatives, including worker co-operatives, which have juristic personality.¹⁹⁹ The members contribute the capital of the co-operative, which must have a constitution and must meet a number of co-operative principles,²⁰⁰ including mandatory establishment of reserves.²⁰¹ The essential object of the worker co-operative is to enable the co-operative to employ its members and to share its profits amongst its members. Importantly, the Act provides that in the case of a worker co-operative, a member is not an employee as defined by the LRA and the BCEA. However, for purposes of unemployment insurance, health and safety legislation and skills development, the worker co-operative is deemed to be the employer.²⁰² This ensures that the member has access to various forms of social security upon termination of his or her membership. Since the member is in effect working for him- or herself, protection is presumably not necessary in the areas of typical exploitation by employers,

namely, conditions of employment and dismissal.²⁰³ Furthermore, since the member will be productivity-driven, there are concerns that this (productivity-driven) environment may, as in the case of owner-driver schemes, prompt members to work longer and to take no leave, or during lean times may result in lower than minimum wages. The difference, however, is that in the case of owner-driver schemes, control is still located elsewhere, whereas worker co-operatives are democratic worker-owned entities.²⁰⁴ In other words the co-operative is not an intermediary in the sense discussed above.²⁰⁵ However, the following arbitration award, albeit decided under the now repealed Co-operative Act of 1981²⁰⁶ illustrates that there is potential for abuse.

In *National Bargaining Council of the Leather Industry of SA and Ballucci Footwear CC & Others*²⁰⁷ the bargaining council questioned the withdrawal of an employer from the council on the basis that it no longer had any employees. The (original) employer incorporated two co-operatives under the Co-operatives Act of 1981 and outsourced its entire production to one of the co-operatives, which, in turn engaged the second co-operative to execute the work. The employer basically forced all its previous employees to become members of the second co-operative or be dismissed. It appeared that unemployment insurance payments were still made but, despite promises that terms and conditions would not change, the employer showed very little regard for dismissal procedures and basically changed conditions of employment at will under the guise of its commercial arrangement with the two co-operatives. The arbitrator found that the arrangement was a sham and ordered the employer to re-register as a member of the council and to observe the provisions of the relevant collective agreement.

In another matter,²⁰⁸ also decided under the 1981 Act, the Eastern Cape High Court, in declining jurisdiction, held that members of the co-operative in question were in fact employees and that their expulsion should be regarded as a dismissal which is a cause of action which falls within the purview of the Labour Court to the exclusion of the jurisdiction of the High Court:

Clearly, the sole purpose of the respondents' membership of the cooperative was to obtain employment in order to receive remuneration. Their membership was the means whereby they achieved that purpose.

*The cooperative had no purpose other than providing remunerative employment for its members. It would negotiate with third parties for work to be done by its members. It would receive payment from the third party and in turn remunerate its members. The members worked for the cooperative, not for the third party. Furthermore, the statute declared that the members of the cooperative were persons who were willing and able to be employed by the worker cooperative and to whom the cooperative was able to offer employment. The relationship between the appellant and its members was essentially that of employer and employee.*²⁰⁹

Members of worker co-operatives are therefore clearly at least workers in the 'Supiot sense' of the word, but their formal status is probably best located somewhere in the gap between what are traditionally regarded as employees and independent contractors or self-employed workers. While it is simply too early to assess the new model, the access that it provides to post-employment social security for those who would otherwise (as self-employed workers) be deprived of such access certainly provides a strategy that could be usefully considered in respect of some other categories of the self-employed.

7.2 Partners and shareholding

A partnership is a legal contractual relationship between at least two and not more than 20 persons in which the parties agree to carry on a lawful enterprise in common, to which each, with the object of making and sharing profits, contributes something of commercial value.²¹⁰

It is easy to see how this commercial form can be abused to disguise an employment relationship, particularly since the contribution by a partner make take the form of labour, although the joint and several liability of the partners for partnership debts militates against such abuse (at least from the point of view of the worker).²¹¹ Nonetheless, even in the case of a *bona fide* partnership, it would be fair to say that services rendered by partners to the partnership are work as contemplated by Supiot, the origin of the obligation to work being the partnership agreement.

A partnership should be distinguished from shareholding by an employee. In *Hydraulic Engineering Repair Services v Ntshona & Others*²¹² the Labour Court held that, depending on the nature of the relationship between the company and the shareholder and the location of control, a shareholder of a company can still be an employee of that company.

7.3 Students undergoing vocational work

Reference was made above to the position of genuine volunteer workers.²¹³ They were distinguished from students undergoing vocational training on the basis that the former has an element of communitarianism, whereas the latter primarily serves an educational purpose and is often part of the requirements for a formal educational qualification. Another reason for making the distinction is that legislative attention is given to students undergoing vocational training and to contracts of learnership, albeit limited, as opposed to the position in respect of genuine volunteer workers.

Landman explains the need for protecting students in this context as follows:

Students are particularly vulnerable when confronted with the requirement that they perform practical work. The requirement is invariably non-negotiable. Students, when performing this work, may be disadvantaged by long hours, inadequate spreadovers, unreasonable overtime, and other unfavourable working conditions. The student may be reluctant to complain about these deficiencies. Like the conventional employee, they occupy a subordinate position in the workplace. Moreover students have an overarching desire to obtain the important certificate, diploma or degree. The possibility of victimization is an ever present insidious fear (if only in the mind of the student).²¹⁴

In the following paragraphs the legislation protecting those undergoing vocational training and learners will briefly be considered:

While the BCEA does not include students in its definition of employee,²¹⁵ the Act does apply to persons undergoing vocational training, except to the extent that any term or condition of their employment is regulated by the provisions of any other law.²¹⁶ In other words, the Act does not view them as employees, but still regards them as worthy of protection similar to that offered to employees. However, no similar provision is found in the LRA, the UIA or the EEA. 'Vocational training' is not defined in the BCEA and it is not at all certain whether someone outside formal educational structures, offering his or her services for the sake of gaining experience, will be covered by these provisions.²¹⁷ In one bargaining council arbitration²¹⁸ the arbitrator did not specifically consider the meaning of vocational training in the BCEA in his award, but held that a student undergoing vocational training in terms of a sponsorship agreement was not an employee for purposes of the BCEA. The student in this matter was sponsored by the 'employer' to undergo training at its training centre. It was a term of the agreement that on the successful completion of his training the employer would have the first option of offering the student employment. The sponsorship agreement required the student to render services in the laboratory and to perform other functions while undergoing training. He received a monthly allowance on which he paid PAYE. The student approached the tribunal on the basis that the employer's failure to offer him the same conditions of employment (such as hours of work and paid leave) as the other employees constituted an unfair labour practice in terms of the LRA. No reference is made in the award to the provisions in the BCEA dealing with vocational training. The commissioner's approach is, however, problematic since the student approached the tribunal in terms of the LRA, but the commissioner dealt with the issue in terms of the BCEA. Furthermore, the commissioner did not consider the presumption as to who is an employee at all provided for in s 200A of the LRA and s 83A of the BCEA. Reliance on the presumption may have been beneficial to the student's case.

The OHSA makes no specific reference to students and one can only speculate whether the definition of employee in s 1 as somebody 'who works under the supervision of an employer or any other person' may be regarded as broad enough to include students. Section 1(2), however, makes provision for the Minister of Labour to declare persons belonging to a specific category of persons

to be deemed employees and thus the person supervising them would be deemed to be the employer. Landman has suggested that this provision be used to bring students within the ambit of this Act.²¹⁹

The SDA provides for a learnership agreement, which is a tripartite agreement between a learner, an employer or group of employers, and an accredited training provider, offering the learner the combined benefit of working experience and training opportunities.²²⁰ The terms and conditions of learners under a learnership agreement who were not in the employment of the employer party at the time of the learnership agreement are regulated by Sectoral Determination 5 issued in terms of the BCEA. These learners are excluded from the application of the UIA.²²¹

COIDA does not refer to students undergoing vocational training, but the definition of employee in s 1 of COIDA includes 'a person who has entered into or works under a contract of service or of apprenticeship or learnership'. Learnership is not defined in the Act, and again one can speculate whether it is broad enough to include a student undergoing vocational training. In *ER24 Holdings v Smith NO*,²²² however, the SCA was not prepared to regard a student who was not a learner, but who was undergoing vocational training, as covered by COIDA.

On balance, both learners registered under contracts of learnership and students undergoing vocational training appear to be protected in respect of conditions of work. Students undergoing vocational training are, however, not covered in respect of employment equity, unemployment insurance and workplace injuries and diseases.²²³ Learners are covered by COIDA.

The above illustrates two things. First, there is need for the BCEA (and other legislation) to define more clearly what is meant by vocational training. Second, there is a danger that if employers are forced to observe the full suite of labour laws in respect of students it may discourage them from offering such training. This suggests that a more considered and, at the same time, a more diverse approach (such as has been suggested in the case of casual labour) via

a sectoral determination is perhaps required in respect of students undergoing vocational training.

7.4 Students (as students)

Can it be said students are working when they do what they are supposed to do, namely, study? Relying on the Supiot definition of work quoted at the start of this chapter, one may well argue that students are working when they are attending lectures, preparing for examinations or writing dissertations. Whether it can be claimed that this process of acquiring knowledge and skills and general self-promotion is a form of work that protective labour law should regulate is doubtful. However, in a recent judgment of the *Hoge Raad* in the Netherlands,²²⁴ the court was prepared to accept that a bursary holder at a university, by doing research, advances the core objective of the university and the bursary holder's activities therefore amounted to *arbeid* for purposes of the *arbeidsovereenkomst* as defined in the BW. There is South African case law that suggests that a school would be vicariously liable for damages arising out of unlawful assaults by duly appointed prefects as it would be for assaults by a teacher employed by the school, but it is doubtful whether these sentiments can be extended to protective labour legislation where the student or learner is not given any form of authority (like a prefect).²²⁵

7.5 Exclusions in the LRA and BCEA and other legislation

The LRA and the BCEA do not apply to the National Intelligence Agency and the South African Secret Service. The LRA also does not apply to the National Defence Force, but the BCEA does.²²⁶ COIDA does not apply to some members of the Defence Force and the Police Force.

It has, however, been held that although dedicated legislation fails to give effect to it, those who work for these services are still entitled to rely on the right to fair labour practices in s 23 of the Constitution. In *South African National Defence Union v Minister of Defence and Another*²²⁷ the Constitutional Court held that the position of enlisted soldiers is akin to an employment relationship and for that reason they are still workers for the purpose of s 23 of the

Constitution and entitled to form and join trade unions, but they are not entitled to strike. In addition, despite being specifically excluded from the processes and structures provided for in the LRA and BCEA, soldiers are still entitled to enforce their contracts of employment in the common-law courts.²²⁸

Due to the nature of these services and the constitutional imperative 'to defend and protect the Republic, its territorial integrity and its people in accordance with the Constitution and the principles of international law regulating the use of force'²²⁹ and to do so dispassionately,²³⁰ there may be good reasons to exclude them from mainstream labour legislation.²³¹ The point is that, despite the special nature of the services, it is still work that is being performed.

7.6 Presidential appointments, parliamentarians and ministerial appointments

The Constitution provides for a number of appointments by the President such as the appointment of cabinet ministers,²³² the commissioner of police²³³ and the head of the national intelligence services.²³⁴ While some of these appointees may find themselves covered by at least some labour legislation, it appears that the termination of their services is basically the prerogative of the President, provided that he or she does not act in bad faith, arbitrarily or irrationally. However, where such appointments are linked to a term and the dismissed person was not in breach, early termination still entitles that person to payment in respect of the remainder of the term.²³⁵

The position of parliamentarians concerns at least two work relationships: one with the political party that they represent and one with Parliament where they enjoy certain constitutional benefits. There can be no doubt that they are working when they serve either of these relationships, but their constitutional position and the nature of elected politics probably render these work relationships inappropriate for regulation by mainstream labour legislation. This was the argument before the Labour Court when the status of parliamentarians was considered in *Charlton v Parliament of the Republic of South Africa*.²³⁶ This matter concerned the Protected Disclosures Act of 2000 (PDA).²³⁷ The chief financial officer of Parliament was dismissed after making certain disclosures to

the secretary of parliament concerning certain members of parliament. He claimed that his disclosure was a protected disclosure as defined in s 1 of the PDA. The essence of a protected disclosure is that the disclosure made to the employer will only be protected if it concerns the conduct of the *employer* or *employees* of the employer. Parliament argued that since the disclosure concerned members of parliament who are not employees, the PDA did not apply. The PDA does not have a presumption in favour of employees similar to the one in the LRA and the BCEA but, nevertheless, defines employee in the same terms as do the LRA and the BCEA. The Labour Court, in finding that parliamentarians are employees, made it clear that this finding related to the PDA only and was therefore not authority for the broader application of labour legislation to parliamentarians:

I am satisfied that Parliament does have business, which is to legislate for the Republic of South Africa. I accordingly reject the submission that Parliament has no business.

The MPs fit into the definition of 'employee'. They perform duties for Parliament being an organ of the State. They are entitled to and do receive remuneration. . . They are not paid by the parties who elected them into Parliament. It is not a requirement that remuneration is only payable in terms of the employment contract. The payment to MPs is a reward for services rendered to Parliament.

The MPs assist in the legislation which is the business of Parliament. The second part of the definition of the 'employee' does not require that payment to be made to a person for him or her to qualify as an employee. What is required is that that person must be assisting in carrying on or conducting the business of an employer. I have mentioned that the business of the Legislature is the legislation. That is what the MPs are doing. That places them within the definition of employees. My conclusion is that the MPs are employees in terms of the PDA 26 of 2000.²³⁸

Despite this judgment, it is still suggested that it is inappropriate to regard parliamentarians as employees for purposes of mainstream labour legislation despite the fact that they are undoubtedly working. It is in any event doubtful whether it was necessary to approach the matter as the court in *Charlton* did.²³⁹ However, what is important is that in its consideration of the definition of employee, the court expressed views on the meaning of the common-law contract of employment consistent with those expressed in recent Labour Court judgments²⁴⁰ on the definition of employee in the LRA (which is exactly the same as the definition in the PDA).

Members of statutory boards, it has been held, are not employees, particularly when the board is required by statute to exercise its powers and functions independently and free from governmental, political or other outside influence.²⁴¹

7.7 Judicial officers

The status of judges in terms of employment law was considered by the Namibian Labour Court.²⁴² In this matter a judge of the High Court of Namibia made urgent application to the Namibian Labour Court for an order directing the government to desist from unilaterally altering his terms and conditions of employment by depriving him of his entitlement to the provision of water, electricity and refuse removal at no charge to himself. It held, correctly it is suggested, that a judge is not an employee of the state since it would compromise the independence of the judiciary. This does not negate the fact that judges are still working when they perform their judicial duties. A similar view was taken by the Labour Court in respect of magistrates.²⁴³

7.8 Unpaid work and caring responsibilities

The interface between market and non-market work, or the work/life cycle as it is commonly referred to, has received much attention, particularly from feminist scholars.²⁴⁴ While it is generally conceded that it does not exclusively concern women workers, the increasing feminisation of the labour market highlights the need for labour regulation to recognise the vulnerabilities of those

workers who enter the labour market with caring responsibilities of children, the infirm or the aged – responsibilities which, in South Africa, are expected to increase in view of the HIV/Aids pandemic.

The claim that that the labour market should address the work/life conflict is not pursued here, but the significance of this scholarship is the fact that it has highlighted the reality that these caring responsibilities also amount to work, albeit non-paid and more often than not arising from a family relationship.

Whether, in isolation, unpaid work of this nature should be regulated by labour law is doubtful, but the fact is that it is now generally accepted that it is a form of work.

8 The informal labour market

In the above discussion reference was made only in passing to work performed in the informal labour market (for example, by homeworkers and illegal immigrants). However, a review of the South African world of work will be incomplete and misleading without again referring to the existence and extent of the informal labour market which is a growing phenomenon here and elsewhere,²⁴⁵ despite, in the case of South Africa, it being almost non-existent in the apartheid labour market.²⁴⁶

There is strong evidence to suggest that both casualisation and externalisation promote informalisation. However, since informalisation is not only the result of these processes, it is more appropriate to address it separately.

The absence of a generally accepted definition appears to be one of the reasons for the difficulty in measuring the informal labour market.²⁴⁷ However, the September 2006 LFS²⁴⁸ estimates informal sector employment to be 18,7 per cent or 2 379 000 jobs.²⁴⁹ For purposes of the LFS domestic workers and agricultural workers are measured separately. The informal sector proper therefore includes those who work for an employer (or business, institution or private individual) who is not registered for that activity. The domestic sector was estimated to represent 886 000 jobs and agriculture to represent 1 088 000

jobs.²⁵⁰ The LFS also suggests that workers with the lowest income are found in the informal sector,²⁵¹ clearly illustrating the vulnerability of those in this sector.²⁵²

Much has been written about the need to find ways to extend mainstream labour regulation to the informal sector in South Africa and elsewhere.²⁵³ The point is that, but for the progress made in the domestic sector,²⁵⁴ those working in the informal South African labour market still find themselves beyond the reach of most protective labour laws.²⁵⁵ Importantly, as suggested above, the processes of casualisation and externalisation facilitate informalisation and the concomitant erosion of worker rights:

*Labour-only subcontracting [in the construction sector] therefore provides a very clear example of externalisation, casualisation and informalisation working in tandem, with externalisation being the main driving force and informalisation being the outcome . . . the externalisation results in non-compliance by the labour-only subcontractors, which means that the workers become part of the growing informal component of the construction sector.*²⁵⁶

As suggested by Benjamin, the regulation of the informal labour market is actually a contradiction in terms and the focus should rather be on strategies 'that will reduce the level of informality of inadequately protected workers.'²⁵⁷ Broadly speaking some of these strategies should, amongst others, include the following: First, protective legislation needs to be extended to at least some of those working in the informal labour market by either formalising these workers or by providing access to social security. The latter is in any event a constitutional imperative by virtue of s 27 of the Constitution, which not only provides that everyone has a right of access to social security, but also to appropriate social assistance if they are unable to support themselves.²⁵⁸ Second, some of the processes facilitating informalisation must be stopped. These include casualisation and externalisation, but the exclusion of, for instance, illegal foreign workers from protective labour legislation and lack of available jobs in the formal labour market are all contributory factors.²⁵⁹ The fact is that these workers are

excluded from protective labour legislation and the difficulty of organising in this market deprives them of a collective voice.²⁶⁰

9 Conclusion

From the above exploration of the world of work it is clear that work is not limited to engagement through a contract of employment. It is equally clear that all these forms of work are not suitable for regulation – at least not labour regulation. The reason for this is that the nature of the work is sometimes such that labour regulation will negate the fundamental essence of that work since its performance goes to the heart of a principle such as the separation of powers, for example, the work performed by a judge. In other instances the elements of control and discipline, which are not as such foreign to the employment relationship, are taken to such extremes that it is simply not compatible with an employment relationship, for example, the work done by soldiers.

Between these extremes, on the one hand, and the relationships which are traditionally covered by labour regulation, on the other hand, are many forms of engagement that are not regulated by the contract of employment, but nonetheless involve the performance of work that calls for labour regulation. This is not only because of their interrelationship with the broader labour market, but because labour law will fail in its purpose, as identified in Chapter 3, if regulation is not extended to these forms of work, particularly since more often than not these forms of work are performed by vulnerable workers who are not in a position to command protection without legislative support.

In reflecting on the role of the contract of employment in marginalising these workers, a distinction must be made between (A) those workers who lack protection because no discernible or valid contract of employment can be identified, and (B) those workers who actually work in terms of a contract of employment and for that reason are deprived of protection.

The former category (A), in turn, can be divided into two further sub-categories. First, there are those who work for another in terms of arrangements which are judged not to be contracts of employment (which represents what one

may term the traditional problem). In other words, the self-employed worker and independent contractor. This has become even more problematic in the context of externalisation through the commodification of the employment relationship by using commercial structures such as agency or franchising. As has always been the case, the challenge that remains is where to draw the line of protection and, more particularly, to find the point at which the legislature ought to desist from interfering with a truly entrepreneurial spirit prepared to take the associated risks. The second sub-category is those who work in the absence of a contract of employment. This category includes workers who concluded an arrangement to work, but not an arrangement to be employed (for example, the clergy, those undergoing vocational training and volunteers) and those who work under a contract that is invalid under common law (for example, illegal foreign workers and sex workers). This area, for as long as the contract of employment is equated to a common-law contract, will present insurmountable problems and may require legislative intervention to serve policy considerations.

The latter category (B) (those workers who work in terms of a contract of employment and for that reason are deprived of protection) primarily concerns externalisation through an intermediary. In such cases it is relatively easy to identify a contract of employment and a nominal employer. However, because the relationship is subjugated to a commercial arrangement between the nominal employer and a third party (or a number of third parties) and because of the weakness of the nominal employer, the employment relationship is hollow. The challenge is therefore to find ways to make the commercial entity (the third party) more directly accountable. This may require either a further evolution of the contract of employment or a development of the common law, or both. While, because of the way they have been dealt with by the legislature, the problems presented by TESs may admittedly require a slightly different approach, TESs are structurally consistent with other forms of externalisation and should, it is suggested, conceptually be approached on the same basis. Ultimately, in the case of this form of externalisation, the issue may well be reduced to the question of who the employer is.

It is difficult to blame the marginalisation of workers in the case of casualisation on the contract of employment (as the means delivering protection).

However, its unitary nature and the consequent 'sameness' of the protections available to various forms of casualised labour may be the incentive for externalisation, primarily through labour broking. In other words, if labour broking is the engine that drives externalisation, the unitary concept of the contract of employment is, it is suggested, the key that starts the engine. Accepting that there is a need for casualised labour, restructuring the various forms of casual labour by allowing for greater variation, as was done in Sectoral Determination 9 in respect of the wholesale and retail sector, may discourage the need to externalise.

By bringing some of the above forms of work into the protective net of labour legislation and by limiting casualisation, the growth of the informal labour market may be slowed down. However, it appears to be a trend that is here to stay and it may require innovative legislative steps, unrelated to the contract of employment and perhaps even beyond labour laws, to ensure that at least some protection is available to those working in this part of the world of work.

While there is a clearly a need to extend the coverage of labour legislation to more forms of work, in the case of some forms of work there may be merit in a diverse approach similar to the one followed in the case of worker co-operatives, where only some labour legislation is extended to the workers in question, particularly in the areas where they are most vulnerable.

Finally, the contract of employment is clearly responsible for the lack of protection in certain areas. In other areas it is difficult to blame the contract of employment for the predicament of the workers. The challenge is to find ways of making the contract of employment more efficient in delivering basic protection to the workers in the areas where it can. This will require the contract of employment to transform (once more) into a form that can accommodate the modern world of work, a process made so much easier by the evolutionary nature of the contract of employment and an understanding that the principles applicable to this contract are not cast in stone.²⁶¹

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Annexure

Annexure A: Key labour market indicators

	Apr-Jun 2008	Jan-Mar 2009	Apr-Jun 2009	Qrt to Qrt change	Year-on- year change
	Thousand				
Population 15-64 yrs	30 705	30 987	31 080	93	375
Labour force	17 844	17 820	17 495	-325	-349
Employed	13 729	13 636	13 369	-267	-360
Formal sector (Non-agricultural)	9 415	9 449	9 356	-93	-59
Informal sector (Non-agricultural)	2 340	2 150	2 109	-41	-231
Agriculture	790	738	710	-28	-80
Private households	1 185	1 299	1 194	-105	9
Unemployed	4 114	4 184	4 125	-59	11
Not economically active	12 861	13 166	13 585	419	724
Discouraged work-seekers	1 079	1 215	1 517	302	438
Other (not economically active)	11 783	11 951	12 068	117	285
Rates (%)					
Unemployment rate	23,1	23,5	23,6	0,1	0,5
Employed / population ratio (Absorption)	44,7	44,0	43,0	-1,0	-1,7
Labour force participation rate	58,1	57,5	56,3	-1,2	-1,8

Endnotes

- 1 Supiot, A *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (2001) at 1-21. Also see Taylor, RF 'Extending Conceptual Boundaries: Work, Voluntary Work and Employment' (2004) 18 (1) *Work, Employment and Society* 1 at 3.
- 2 D'Antona, M 'Labour Law at the Century's End: An Identity Crisis' in Conaghan, J; Fischl, RM and Klare, K (eds) *Labour Law in an Era of Globalization* (2000) 31-49 at 32.
- 3 See Davidov, G 'The Reports of My Death are Greatly Exaggerated: "Employee" as a Viable (Though Over-used) Legal Concept' in Davidov, G and Langille, B *Boundaries and Frontiers of Labour Law* (2006) 133-152 and Stone, KVV 'Rethinking Labour Law: Employment Protection for Boundaryless Workers' in Davidov, G and Langille, B *Boundaries and Frontiers of Labour Law* (2006) 155-179 at 155-162 for insights on the realities of the modern workplace.
- 4 Davidov (n 3) at 138-143, especially at 143.
- 5 Supiot (n 1) at 53 and Taylor (n 1) at 2.
- 6 Sykes, JB (ed) *The Concise Oxford Dictionary* 6ed (1977).
- 7 This example is not relevant in South Africa since most civil servants are regarded as employees and are covered by, for instance, the LRA. See *Chirwa v Transnet Ltd & Others* (2008) 29 *ILJ* 73 (CC).
- 8 Supiot (n 1) at 54.
- 9 For more on the consequences of illegal contracts generally in South African law see Van Der Merwe, S; Van Huyssteen, LF; Reinecke, MFB and Lubbe, GF *Contract General Principles* 2ed (2003) at 183-193.
- 10 § 5.3.
- 11 See The Trade Union and Labour Relations (Consolidation) Act 1992, Employment Rights Act of 1996, the National Minimum Wage Act 1998, Employment Relations Act 1999, Working Time Regulations 1998 and the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000. Also see Davidov, G 'Who is a Worker?' (2005) 34 *ILJ* (UK) 57.
- 12 The most important of these include Theron, J and Godfrey, S *Protecting Workers on the Periphery* (2000) Institute of Development and Labour Law Monographs, University of Cape Town 1/2000; Clarke, M 'Checking Out and Cashing Up: The Rise of Precarious Employment in the Retail Sector' unpublished paper presented at the TIPS Annual Conference, Johannesburg, South Africa, September 2000; Clarke, M; Godfrey, S and Theron, J 'Workers' Protection: An Update on the Situation in South Africa' (2002) report commissioned by the ILO accessed via <http://www.ilo.org/public/english/dialogue/ifpdial/downloads/wpnr/sa2002.pdf> (13 September 2007); Theron, J 'Employment is Not What it Used to Be' (2003) 24 *ILJ* 1247; Theron, J; Godfrey, S and Lewis, P *The Rise of Labour Broking and its Policy Implications* Institute of Development and Labour Law Monographs, University of Cape Town 1/2005; Godfrey, S; Clarke, M; Theron, J and Greenburg, J *On the Outskirts But Still in Fashion: Homeworking in the South African Clothing Industry: The Challenge to Organisation and Regulation* Institute of Development and Labour Law Monographs, University of Cape Town 2/2005; Theron, J 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (2005) 26 *ILJ* 618; Theron, J; Godfrey, S and Visser, M 'Globalization, the Impact of Trade Liberalization, and Labour Law: the Case of South Africa' Discussion Paper International Institute for Labour Studies DP/178/2007 and Theron, J 'The Shift to Services and Triangular Employment: Implications for Labour Market Reform' (2008) 29 *ILJ* 1. The same authors were also responsible for the Synthesis Report published by the Department of Labour in 2004 and published as 'Changing Nature of Work and "Atypical" Forms of Employment in South Africa' in Cheadle, H; Thompson, C; Le Roux, PAK and Van Niekerk, A *Current Labour Law* 2004 (2004) 135.
- 13 Davies, P and Freedland, M 'Employees, Workers, and the Autonomy of Labour Law' in Collins, H; Davies, P and Rideout, R (eds) *Legal Regulation of the Employment Relation* (2000) 267-286 at 271-274.
- 14 See § 5.3.1.
- 15 Statistical release PO210 (Labour Force Survey September 2006) accessed via <http://www.statssa.gov.za/publications/statsdownload.asp?ppn=P0210&SCH=3890> (14 August 2007).
- 16 See Appendix A for the the key labour market indicators published in the QLFS (Quarter 2, 2009).

- 17 See Statistical release PO210 (n 15) Table B.
- 18 See Statistical release PO210 (n 15) Table B note 1.
- 19 See Statistical release PO210 (n 15) at xxvii.
- 20 See Theron 'Employment is Not What it Used to Be' (n 12) at 1262.
- 21 See Tables 3.1-3.15 and Tables 4.1-4.1.5, Statistical release PO210 (n 15) at 12-39.
- 22 See Theron 'Employment is Not What it Used to Be' (n 12). For more on the shortcomings of the LFS methodology see Clarke *et al* 'Workers' Protection: An Update on the Situation in South Africa' (n 12). The collection of employment data is notoriously difficult. See, for instance, Burchell, B; Deakin, S and Honey, S *The Employment Status of Individuals in Non-Standard Employment* EMAR Research Series No 6 1999 at 24 for the shortcomings of the LFS data collection in Britain. Also see O'Donnell, A "'Non-Standard' Workers in Australia: Counts and Controversies' (2004) 17 *AJLL* 89 for the difficulties experienced in Australia.
- 23 Act 63 of 2001. See Table 3.15, Statistical release PO210 (n 15) at 34.
- 24 Table 4.1.2, Statistical release PO210 (n 15) at 36.
- 25 Table 4.1.3, Statistical release PO210 (n 15) at 37.
- 26 Table 4.1.4, Statistical release PO210 (n 15).
- 27 Statistics reflecting conditions of employment, trade union membership and UIF contributions were given preference, focusing on overall totals and ignoring industry-specific totals.
- 28 Cf Table 3.12.2, Statistical release P0210 (Labour Force Survey February 2001) accessed via <http://www.statssa.gov.za/publications/P0210/P0210February2001.pdf> (16 August 2007) and Table 4.1.2 Statistical release PO210 (n 15) at 36. This is also consistent with the pattern observed by Clarke in 2000 relying on statistics in respect of the retail sector. See Clarke 'Checking Out and Cashing Up: The Rise of Precarious Employment in the Retail Sector' (n 12). Also see 'Labour's Casualisation Cancer Spreads' (2005) 29(2) *SALB* 27 for a summary of the Department of Labour's report on non-standard employment.
- 29 The number of employees not in standard employment in the EU has increased from 36 per cent of the working population in 2001 to 40 per cent in 2005. See Verhulp, E 'The Employment Contract as a Source of Concern' in in Knegt, R (ed) *The Employment Contract as an Exclusionary Device* (2008).
- 30 See the introductory comments in Allan, C; Brosnan, P; Horwitz, F and Walsh, P 'From Standard to Non-standard Employment: Labour Force Change in Australia, New Zealand and South Africa' (2001) 22(8) *International Journal of Manpower* 748 at 748-750. It is doubtful whether this trend is still the case in South Africa. The survey was based on a questionnaire that was distributed in 1995 and it is doubtful whether it reflects current trends. Furthermore, the authors (at 762) concede that the results of the survey underestimate the size of the informal sector in South Africa.
- 31 See Stone (n 3) at 155-157.
- 32 See Theron 'Employment is Not What it Used to Be' (n 12) at 1249.
- 33 By the Basic Conditions of Employment Act 75 of 1997 (BCEA).
- 34 By the Labour Relations Act 66 of 1995 (LRA) and the Employment Equity Act 55 of 1998 (EEA).
- 35 By the LRA and BCEA.
- 36 By the Occupational Health and Safety Act 85 of 1993 (OHSA).
- 37 By the LRA.
- 38 By the UIA.
- 39 By the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).
- 40 Clarke 'Checking Out and Cashing Up: The Rise of Precarious Employment in the Retail Sector' (n 12) at 4-11.
- 41 Klerck, G 'Industrial Restructuring and the Casualisation of Labour: A Case Study of Subcontracted Labour in the Process Industries' (1994) 7 *SA Sociological Review* 32 at 32. Also see Kenny, B and Webster, E 'Eroding the Core: Flexibility and the Re-segmentation of the South Africa Labour Market' (1999) 24(3) *Critical Sociology* 216 at 218. Goldin, A 'South American Experiences Regarding Labour Law and the Informal Labour Market' paper presented at the 22nd Annual Labour Law Conference, Johannesburg, South Africa, August 2009 refers to these processes as 'delaborization' and 'desalarization'.
- 42 For the impact of these processes on the mining sector generally see Kenny and Webster (n 41). However, the research on which this article is based predates the implementation of the 1997 BCEA. For the impact of these processes on the mining,

- construction, household appliances and retail sectors in South Africa see Bezuidenhout, A; Theron, J and Godfrey, S 'Casualisation: Can We Meet It and Beat It?' (2005) 29(1) *SALB* 39. Although these terms are not used, see Quinlan, M 'The Global Expansion of Precarious Employment: Meeting the Regulatory Challenge' paper presented to the Australian Council of Trade Unions, 2003 accessed via http://actu.asn.au/public/ohs/reactivecampaign/1064473735_24238.html (11 October 2007) for a reflection on the impact of these processes on occupational health and safety and workmen's compensation globally.
- 43 Generally see Theron and Godfrey *Protecting Workers on the Periphery* (n 12); Theron 'Employment is Not What it Used to Be' (n 12); Synthesis Report (n 12) and Mills, SW 'The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility?' (2004) 25 *ILJ* 1203. The nomenclature of 'casualisation' and 'externalisation' was not always understood in these terms. For instance, subcontracting, which is now seen as a manifestation of externalisation, was in earlier writings often described as a form of casualisation. See, for instance, Klerck (n 41). It is also true that until relatively recently the term 'atypical' was preferred by some to describe both casualisation and externalisation and that no obvious distinction was made between the different policy considerations that casualisation and externalisation demand. In this regard see Mhone, G 'Atypical Forms of Work and Employment and Their Policy Implications' (1999) 19 *ILJ* 197.
- 44 Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 17-18.
- 45 See Theron *et al* 'Globalization, the Impact of Trade Liberalization, and Labour Law: the Case of South Africa' (n 12) at 8; Cheadle, H and Clarke, M 'Study on Worker's Protection in South Africa', unpublished country study commissioned by the ILO 2000 at 23-27, and Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 18-19.
- 46 See Theron 'Employment is Not What it Used to Be' (n 12) at 1250-1251. Generally see Clarke 'Checking Out and Cashing Up: The Rise of Precarious Employment in the Retail Sector' (n 12); Kenny, B 'The Casualisation of the Retail Sector in South Africa' (1998) 15 *Indicator SA* 25 and Du Toit, A and Ally, F *The Externalization and Casualization of Farm Labour in the Western Cape Horticulture* (2001) unpublished research report compiled for the Centre for Rural Legal Studies, Cape Town, South Africa.
- 47 Section 6.
- 48 Section 19.
- 49 Section 28.
- 50 Section 36.
- 51 Section 3(1).
- 52 Act 85 of 1993.
- 53 This refers to the so-called charlady or 'char-job' which is a term used for a domestic servant (including gardeners) who work no more than a few hours per week, mostly in domestic households (or gardens) and is a common phenomenon in South Africa. For more on the profile of domestic workers see Mills, SW 'How Low Can You Go? A Critique of Proposed Recommendations on Minimum Wages for Domestic Workers (2002) 23 *ILJ* 1210. Also see Fish, JN 'Engendering Democracy: Domestic Labour and Coalition-Building in South Africa' (2006) 32(1) *Journal of Southern African Studies* 107 at 116.
- 54 For instance, a domestic employee employed as such in a private household is excluded from the application of COIDA (see s 1) and those domestic servants who work less than 24 hours per month for an employer are subject only to the provisions regulating wages and wage increases in Sectoral Determination 7: Domestic Worker Sector, published under GN R1068 in GG 23732 of 15 August 2002. They are not subject to the BCEA and unemployment insurance legislation does not apply to them either.
- 55 See Olivier, M 'Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed' (1998) 19 *ILJ* 669 at 680. In practice, it is clear that 'true' casuals (those who work less than 24 hours per month) and temporary workers working for very short periods will find it very difficult to claim some of the benefits provided for in the BCEA. For instance, s 22 of the BCEA, which regulates sick leave, clearly assumes continuous employment and affords protection only while the employee is in employment. Those working from time to time on single self-standing contracts will find it difficult to claim sick leave benefits. Section 22(3) of the BCEA, for instance, provides that during the first six months of employment an employee is entitled to one day's paid sick leave for every 26 days worked, but for many it may take more than six months to work 26 days for the same employer. They are thus deprived of paid sick leave during this period. See Cheadle and Clarke (n 45) at 22. Furthermore, s 27 of the BCEA, regulating family

- responsibility leave, does not apply to those who have worked less than four months for the same employer and who work less than four days a week for that employer. (It has also been suggested, relying on s 45(c) of the BCEA, that annual leave not taken by a person who had been in employment for less than four months upon termination of the employment, need not be paid to the employee. It is doubtful whether this is a correct interpretation of the subsection, but anecdotal evidence suggests that this is the motivation for employing employees for less than four months in certain sectors.) This however, can be blamed on the regulation style and not on the contract of employment. See Olivier at 681. Also see the comments of Waglay J in *NUCCAWU v Transnet Ltd t/a Portnet* (2000) 21 ILJ 2288 (LC) at par 7.
- 56 See Olivier (n 55) at 681. In fact the LAC has held that fixed-term employees may not be retrenched. See *Buthlezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC).
- 57 Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 36-37. Cf the position of casuals in Australia, where they are excluded from annual leave, public holidays and sick leave entitlements. See O'Donnell (n 22) at note 16.
- 58 Act 3 of 1983.
- 59 Section 1(1).
- 60 Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 13-15. See in particular note 20.
- 61 See Kenny and Webster (n 41) at 228-235 for a description of casual labour under the previous BCEA.
- 62 Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 36.
- 63 'Globalization, the Impact of Trade Liberalization, and Labour Law: the Case of South Africa' (n 12) at 9.
- 64 GN R.68 published in GG No 28424 25 January 2006. Item 1(4) provides the rates of pay for those who work for 24 hours per month, but apart from the rate of pay the rest of Determination 9 does not apply to these workers.
- 65 Item 11 of Sectoral Determination 9.
- 66 Sectoral determinations are regulated by s 51 of the BCEA.
- 67 Du Toit, D; Bosch, D; Woolfrey, D; Godfrey, S; Cooper, C; Giles, G; Bosch, C and Rossouw, J *Labour Relations Law* 5ed (2006) at 555. A good example of a sector where such a determination is appropriate is the agricultural sector. The combination of racial policies, the legacy of the master and servant laws, and the traditional exclusion of farm workers from many protective labour laws marginalised farm workers in particular. This, as well as the fact that the often isolated location of farms in South Africa complicates trade union organisation, are the reasons why a sectoral determination is appropriate in this sector. The latest sectoral determination in this sector is Sectoral Determination 13: Farm Worker Sector, published under GN R.149 in GG 28518 of 17 February 2006.
- 68 See Bezuidenhout *et al* (n 42) at 42.
- 69 Section 186(1).
- 70 Section 186(1)(b).
- 71 Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 11.
- 72 Theron 'Employment is Not What it Used to Be' (n 12) at 1257.
- 73 Theron *et al* 'Globalization, the Impact of Trade Liberalization, and Labour Law: the Case of South Africa' (n 12) at 7.
- 74 Generally see 'Employment is Not What it Used to Be' (n 12) and Theron and Godfrey *Protecting Workers on the Periphery* (n 12) and Clarke *et al* 'Workers' Protection: An Update on the Situation in South Africa' (n 12) at 30.
- 75 In this regard some commentators refer to a triangular employment relationship. Because externalisation via intermediaries may involve an interconnected chain of several parties, such a nomenclature may be open to misinterpretation and is avoided in this paragraph. Also see Theron 'Employment is Not What it Used to Be' (n 12) at 1253.
- 76 See Mills (n 43) at 1216.
- 77 Ironically, the government's flagship public works programme, Working for Water, operates on the basis of externalised labour. While the programme claims to have employed 20 000 people at one stage, this is not a correct reflection of the legal position. The programme has identified 'emergent contractors' who in turn employ their own teams to work on the programme. The Working for Water programme prescribes a minimum wage that must be paid by the contractor to the team of workers, but other than that the contractor carries the risk of employment. See Theron, J 'Unions and the Co-operative Alternative (2)' (2005) 29(2) SALB 60 at 63.

- 78 The most complete South African study on this phenomenon is Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) and Van der Westhuizen, C 'Women and Work Restructuring in the Cape Town Clothing Industry' in Webster, E and Von Holdt, K (eds) *Beyond The Apartheid Workplace: Studies in Transition* (2005) 335-386. For earlier research on homeworking see Budlender, D and Theron, J 'Working from Home: The Plight of Home-Based Workers' (1995) 19(3) *SALB* 14 and Theron, J 'On Homeworkers' Occasional Paper, Institute of Development and Labour Law, University of Cape Town, 1996. Homeworking is by no means a unique South African form of engagement. At the international level it has received recognition in the form of ILO Homework Convention 177, 1996, but this convention has been ratified by only five countries, not including South Africa. On some Canadian homeworking estimates see Godfrey *et al* *On the Outskirts But Still in Fashion* at 31. On the position in Australia see Nossar, I; Johnstone, R and Quinlan, M 'Regulating Supply Chains to Address the Occupational Health and Safety Problems Associated with Precarious Employment: The Case of Home-Based Clothing Workers in Australia' (2004) 17 *AJLL* 137 and Rawling, M 'A Generic Model of Regulating Supply Chain Outsourcing' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 520-541. Rawling (at 526-527) concedes that while homeworking is most prevalent in the Australian clothing, textile and footwear industry, it is by no means limited to this industry. In South Africa no formal research is available that suggests it is significant in any other industry.
- 79 Rawling (n 78) at 523 and Van der Westhuizen (n 78) at 345-346.
- 80 Van der Westhuizen (n 78) at 349.
- 81 Home-based workers include workers carrying out work independently from their homes as well as dependent workers in an employment relationship (albeit nominal), but working from their own homes or that of the nominal employer. It should not be confused with unpaid housework or caring duties. See Carr, M; Chen MA and Tate, J 'Globalization and Home-based Workers' (2000) 6(3) *Feminist Economics* 123 at 127.
- 82 Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) at 7.
- 83 Rawling (n 78) at 523.
- 84 See Nossar *et al* (n 78) at 145.
- 85 Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) at 15-16 and Van der Westhuizen (n 78) at 342-343.
- 86 Van der Westhuizen (n 78) at 344.
- 87 Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) 19-20. Also see Morris, M 'The Rapid Increase of Chinese Imports: How Do We Assess the Industrial, Labour and Socio-economic Implications?' paper presented at the 20th Annual Labour Law Conference, Johannesburg South Africa, July 2007 at 11-12.
- 88 See Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) at 23-24 and Rawling (n 78) at 522. Generally see Carr *et al* (n 82).
- 89 Rawling (n 78) at 523. Also see Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) at 12.
- 90 Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) at 1.
- 91 Van der Westhuizen (n 78) at 352-353.
- 92 Van der Westhuizen (n 78) at 342 and Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) at 26.
- 93 Godfrey *et al* *On the Outskirts But Still in Fashion* (n 12) at 40.
- 94 In this regard Morris (n 87) at 11 estimates that as a result of Chinese imports, employment levels in the formal clothing sector have decreased by 16 per cent (representing approximately 20 000 jobs). However, while he concedes that it is difficult to measure their numbers, he claims that all evidence suggests that informal CMT enterprises are 'mushrooming and proliferating' and that because of their rise the decrease in employment in the clothing sector generally is much lower than in the formal clothing sector.
- 95 This must be distinguished from labour recruitment where an agency on payment of a fee recruits an employee for the employer, but then severs ties with the recruited employee. Labour recruitment is not considered in this monograph.
- 96 Research on labour broking in South Africa is limited. The most considered research available on the topic is Theron *et al* *The Rise of Labour Broking and its Policy Implications* (n 12) and Theron 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (n 12).

- 97 Labour Relations Amendment Act 2 of 1983. Also see Brassey, M and Cheadle, H 'Labour Relations Amendment Act 2 of 1983' (1983) 4 *ILJ* 34.
- 98 Act 28 of 1956.
- 99 International norms – as provided by ILO Private Employment Agencies Convention 181, 1997 (not ratified by South Africa) – follow the same structure. This is also the structure adopted by Germany and Australia. See Waas, B 'Temporary Agency Work in Germany: Reflections on Recent Developments' (2003) 19 *International Journal of Comparative Labour Law and Industrial Relations* 387 at 389 and Underhill, E 'The Role of Employment Agencies in Structuring and Regulating Labour Markets' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 282-304 at 290-292.
- 100 Theron *et al The Rise of Labour Broking and its Policy Implications* (n 12) at 5. Also see Cohen, T 'Placing Substance over Form – Identifying the True Parties to an Employment Relationship' (2008) 29 *ILJ* 863 at 871-873.
- 101 See *Bargaining Council for the Contract Cleaning Industry and Gedeza Cleaning Services & Another* (2003) 24 *ILJ* 2019 (BCA).
- 102 Section 198(4) of the LRA.
- 103 Theron *et al The Rise of Labour Broking and its Policy Implications* (n 12) at 7.
- 104 Section 1.
- 105 The following legislation is also relevant in relation to TESs: The Skills Development Act 97 of 1998 (SDA) does not refer to TESs as such, but requires that any person who wishes to provide employment services for gain must apply for registration. The broadness of the requirement, however, makes it clear that registration is not aimed only at TESs. Section 57(1) of the EEA provides that a person whose services have been procured by a TES will be deemed to be an employee of the client if the person is used by the client for longer than three months. The client will thus be liable if unfair discrimination against such worker is established, but if the TES commits an act of unfair discrimination against the employee on the instruction of the client, it will be jointly and severally liable. However, the OHS Act specifically excludes labour brokers. For more on the legislation covering TESs see Theron *et al The Rise of Labour Broking and its Policy Implications* (n 12) at 7-8.
- 106 [2007] 1 BLLR 1 (SCA).
- 107 Section 1.
- 108 Theron 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (n 12) at 626. Also see Synthesis Report (n 12) at 160-164 for an overview of the erosion of rights in the context of non-standard work generally and more specifically in the case of TESs.
- 109 This is unlike the position in Germany where, since 2002, employees placed by a labour broker must be remunerated on the same basis as the client's employees. See Waas (n 99) at 394-395. In Australia the position is similar to the position in South Africa. See Underhill (n 99) at 292.
- 110 Theron 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (n 12) at 629. See *Colven Associates Border CC / Kei Brick & Tile Co (Pty) Ltd* [2006] 6 BALR 644 (P) for an example of such a replacement.
- 111 See *Dick v Cozens Recruitment Services* (2001) 22 *ILJ* 276 (CCMA); *April and Workforce Group Holdings (Pty) Ltd t/a The Workforce Group* (2005) 26 *ILJ* 2224 (CCMA); *Smith / Staffing Logistics* [2005] 10 BALR 1078 (MEIBC); *NUMSA obo Daki / Colven Associates Border CC* [2006] 9 BALR 877 (MEIBC) and *National Union of Metalworkers of SA & Others v SA Five Engineering (Pty) Ltd & Others* (2007) 28 *ILJ* 1290 (LC). Also see Hutchinson, W 'Are the Provisions of Section 198 of the LRA Applicable to Temporary Employment Services?' (2007) 28 *ILJ* 90.
- 112 See *Buthlezi & Others v Labour for Africa (Pty) Ltd* (1991) 12 *ILJ* 588 (IC), decided under the 1956 Act; *LAD Brokers (Pty) Ltd v Mandla* [2001] 9 BLLR 993 (LAC); *Fourie & JD Bester Labour Brokers CC* (2003) 24 *ILJ* 1625 (BCA); *Jonas / Quest Staffing Solutions* [2003] 7 BALR 811 (CCMA) and *Mabena and Blue Pointer Trading 341 (Pty) t/a Immediate Response* (2009) 30 *ILJ* 222 (CCMA). This predicament was initially taken to heart by the Namibian legislature in the draft of the new Labour Bill. Article 128 of the Bill provided that the 'employment hire service' is the employer of an employee placed with a client, but both the employment hire service and the client would be jointly and severally liable if the employment hire service contravenes a number of provisions, including the dismissal provisions of the Bill. However, the legislature has now opted to forbid labour hire. See Jauch, H 'Namibia's Ban on Labour Hire in Perspective' *The*

- Namibian 3 August 2007. This was upheld by the Namibian High Court See *Africa Personnel Services (Pty) Ltd v Government of Namibia and others* Case No A 4/2008.
- 113 Christie, RH *The Law of Contract* 4ed (2001) at 164-166. A contrary view is expressed by Bosch, C in 'Contract as a Barrier to "Dismissal": The Plight of the Labour Broker's Employee' (2008) 29 *ILJ* 813. These views were endorsed in *Molusi and Ngisiza Bonke Manpower Services CC* (2009) 30 *ILJ* 1657 (CCMA).
- 114 Further practical problems concerning dismissals are the TES's difficulty to maintain discipline and to take action against the employee for disciplinary problems that occur at the workplace (see *National Union of Metalworkers of SA on behalf of Fortuin & Others and Laborie Arbeidsburo* (2003) 24 *ILJ* 1438 (BCA) and *Labuschagne v WP Construction* [1997] 9 BLLR 1251 (CCMA)); the role of the TES when the employee becomes medically incapacitated (*National Union of Metalworkers of SA on behalf of Swanepoel and Oxyon Services CC* (2004) 25 *ILJ* 1136 (BCA)) and the problems that dismissed employees experience in citing the correct employer. See Theron 'Intermediary or Employer? Labour Brokers and the Triangular Employment Relationship' (n 12) at 635-636 and 639-641.
- 115 Benjamin, P 'Beyond the Boundaries: Prospects for Expanding Labour Market Regulation in South Africa' in Guy Davidov and Brian Langille (eds) *Boundaries and Frontiers of Labour Law* (2006) 181-204 at 189.
- 116 *The Rise of Labour Broking and its Policy Implications* (n 12) at 45.
- 117 Benjamin (n 115) at 195. For instance, in the Netherlands once a fixed-term contract is renewed more than three times over a period of 36 months, it becomes an open ended contract. See art 688a of the BW. The same applies to a worker employed by a labour broker except that the provisions of art 668a do not apply to labour broking during the first 26 weeks of employment by the labour broker. See art 691 of the BW.
- 118 For a superficial overview of franchising in South Africa see Havenga, P; Garbers, C; Havenga, M; Schulze, WG; Van der Linde, K and Van der Merwe, T *General Principles of Commercial Law* 4ed (2000) at 233-239.
- 119 *Rodgers and Assist-U-Drive* (2006) 27 *ILJ* 847 (CCMA) at 853F.
- 120 Havenga *et al* (n 118) at 234.
- 121 Riley, J 'Regulating Unequal Work Relationships for Fairness and Efficiency: A Study of Business Format Franchising' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 561-578 at 565 and Veenis, J 'Franchising: "Window-dressing" van de Dienstbetrekking' (2000) 55(3) *SMA* 93 at 93. However, cf *Longhorn Group (Pty) Ltd v The Fedics Group (Pty) Ltd and Another* 1995 (3) SA 836 (W) where the court was not prepared to acknowledge these similarities. Admittedly, the franchisee in this matter was an established company and not a vulnerable individual. Also see Theron, J 'The Shift to Services and Triangular Employment: Implications for Labour Market Reform' (n 12) at 9.
- 122 See Riley (n 121) for the Australian experience and Veenis (n 121) for the position in the Netherlands. In *Harrods Ltd v Remick* [1998] 1 All E.R 52 the UK Court of Appeal, in a matter that concerned race discrimination, held that workers employed by a licensee, granted a licence to operate certain departments in Harrods, were also working for Harrods for purposes of the Race Relations Act 1976.
- 123 (2006) 27 *ILJ* 847 (CCMA).
- 124 (2005) 26 *ILJ* 1256 (LAC).
- 125 *Protecting Workers on the Periphery* (n 43) at 21.
- 126 Clarke *et al* 'Workers' Protection: An Update on the Situation in South Africa' (n 12) at 31 refers to the example of Confederation of Employers South Africa (COFESA) who in 2002 claimed that they have already converted 2 million employees into independent contractors. Also see Mills (n 43) at 1215 and Benjamin, P 'An Accident of History: Who Is (and Who Should Be) an Employee under South African Labour Law?' (2004) 25 *ILJ* 787 at 795-796. Also see *Building Bargaining Council (Southern & Eastern Cape) v Melmons Cabinets CC & Another* (2001) 22 *ILJ* 120 (LC).
- 127 See *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC). Also see Cohen (n 100) at 876-877.
- 128 See Naidu J *Motor Industry Bargaining Council v Mac-Rites Panelbeaters & Spraypainters (Pty) Ltd* (2001) 22 *ILJ* 1077 (N) at 1091J.
- 129 *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo & Others* (2007) 28 *ILJ* 1100 (LC).
- 130 Pars 17-26.
- 131 Par 4.

- 132 It is possible that this type of externalisation can occur by portraying the relationship as a lease agreement. Labour tenancy on farms is regulated by the Land Reform (Labour Tenants) Act 3 of 1996 and no case was found where employees (not on farm land) were portrayed as tenants.
- 133 Generally see Cheadle and Clarke (n 45) at 35-37; Theron and Godfrey *Protecting Workers on the Periphery* (n 12) at 21-22 and Mills (n 43) at 1214.
- 134 Attempts have been made to negotiate these schemes with unions. See Cheadle and Clarke (n 45) at 37.
- 135 It is not inconceivable that these schemes may also be operated through the use of intermediaries. Cheadle and Clarke (n 45) at 36 explain: '[M]anagement companies have been formed to administer owner-drive schemes. These companies approach large customers with a proposal on how to convert their employees (truck drivers) into owner-operators. A contract is then signed between the management company and the customer, and between drivers (usually the drivers who were employees of the company, although new drivers may also be recruited) and the management company.'
- 136 Bezuidenhout *et al* (n 42) at 41.
- 137 See Van der Merwe *et al* (n 9) at 8.
- 138 (2001) 22 *ILJ* 2274 (LC). For a discussion of this judgment see Grogan, J 'Workers of the Lord: The Church Versus the CCMA' (2001) 16(6) *EL* 12.
- 139 See pars 30 and 40.
- 140 Also see the finding of the Industrial Court in *Paxton v The Church of the Province of Southern Africa, Diocese of Port Elizabeth* (unreported case no NH11/2/1985 (PE)) referred to by Waglay, J at par 38. Also see *Mankatshu v Old Apostolic Church of Africa & Others* 1994 (2) SA 458 (Tka) and *Ndarha & Another and The Salvation Army (South African Territory) v Minister of Labour* (2005) 26 *ILJ* 126 (LC) at par 5. In *Schreuder v Nederduitse Gereformeerde Kerk, Wilgespruit & Others* (1999) 20 *ILJ* 1936 (LC) the court, however, was apparently satisfied that there was an intention to create a legally enforceable contract. Also see *Sajid v The Juma Masjid Trust* (1999) 20 *ILJ* 1975 (CCMA) and *Sajid v Mahomed NO & Others* (2000) 21 *ILJ* 1204 (LC) which concerned the position of an Imam. Neither the CCMA nor the Labour Court apparently doubted that he was an employee.
- 141 (2005) 26 *ILJ* 126 (LC).
- 142 For instance, in *Salvation Army* at par 16 it was declared that the officers of the Salvation Army are not employees as defined in the LRA, the BCEA, the EEA, the Unemployment Insurance Act 30 of 1966, the SDA, COIDA, and that the said Acts are not applicable to such officers.
- 143 Van Niekerk, A 'Personal Service Companies and the Definition of "Employee" – Some Thoughts on *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC)' (2005) 26 *ILJ* 1904 at 1909. In England the question regarding clergy now seems to be whether a contract existed and, if so, whether it was a contract of employment. If the relationship has many characteristics of employment – rights and obligations – these cannot be ignored simply because the duties are of a religious or pastoral nature. See *Percy v Church of Scotland* [2006] IRLR 195 and *The New Testament Church of God v Reverend S Stewart* [2007] IRLR 178.
- 144 (2005) 26 *ILJ* 1256 (LAC).
- 145 The phrase 'genuine volunteer worker' is borrowed from Murray, J 'The Legal Regulation of Volunteer Work' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 696-713 at 697-699. She contrasts genuine volunteer work with precarious volunteer work. In this monograph it is contrasted with vocational work which is discussed in § 7.3. Generally also see Taylor (n 1).
- 146 See Table 7.2 Statistical release PO210 (n 15).
- 147 See, for instance, Mbeki, T President's Freedom Day address, 27 April 2002 accessed via <http://www.info.gov.za/speeches> (5 October 2007) and the President's New Year's Message, 30 December 2002 accessed via <http://www.polity.org.za> (5 October 2007).
- 148 Murray (n 145) at 709. It is to be noted that volunteer workers, by virtue of s 9 of the OHSA, can at least claim protection from the 'employer' under this Act.
- 149 See note 142.
- 150 [2007] SCA 55 (RSA).
- 151 This section provides that damages for occupational injuries shall not lie against the employer, but against the Compensation Commissioner.

- 152 The court (at pars 7 and 8) argued that since compensation is calculated on the basis of the injured employee's remuneration, some monetary value had to be placed on remuneration in kind. The court held that this task was impossible in respect of the remuneration in kind in this matter suggested by ER24.
- 153 Note 8.
- 154 Credit for this insight must go to Murray (n 145) at 697.
- 155 Rittich, K 'Feminization and Contingency: Regulating the Stakes of Work for Women' in Conaghan, J; Fischl, RM and Klare, K (eds) *Labour Law in an Era of Globalization: The Transformative Practices and Possibilities* (2000) 117-136 at 124-125.
- 156 Rittich (n 155) at 125.
- 157 Van der Merwe *et al* (n 9) at 175 and 185.
- 158 *Metro Western Cape (Pty) Ltd v Ross* 1986 (3) SA 181 (A).
- 159 *Absa Insurance Brokers (Pty) Ltd v Luttig and Another* NO 1997 (4) SA 229 (SCA).
- 160 Waller, L 'Irregular Migration to South Africa During the First Ten Years of Democracy' Migration Policy Brief No 19 published by the Southern African Migration Project 2006 and accessed via <http://www.queensu.ca/samp/sampresources/samppublications/> (28 November 2007). Also see Fakier, K 'The Internationalization of South African Labour Markets: The Need for a Comparative Research Agenda', paper presented at a workshop 'A Decent Work Research Agenda for South Africa', Cape Town, South Africa, April 2007 at 18-19. Others, although conceding that it is impossible to determine, suggest that these numbers are overestimated. Peberby, S 'Nature and Modalities of Migration and their Impact on Social Security Needs and Labour Markets in SADC' presentation at the conference on Migration and Social Security in the SADC Region: Prospects and Challenges, Johannesburg, South Africa, October 2007.
- 161 See Honey, P 'Immigrants and Refugees. Deal with It' 16 February 2007 *Financial Mail* accessed via <http://fm.co.za/cgi-bin/pp-print.pl> (21 August 2007).
- 162 As in Australia, for instance, this assumption is based on the fact that these foreigners are unlikely to have resources of their own and are unable to access social welfare lawfully. See Orr, G 'Unauthorised Workers: Labouring Underneath the Law' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 677-695 at 680.
- 163 It is also likely that illegal foreign workers consist mainly of semi-skilled and unskilled workers. Generally only skilled workers qualify for permanent and temporary residence (the only exception being, in the case of temporary residence, contract mine and agricultural workers). Section 10 read with s 19 of the Immigration Act 13 of 2002.
- 164 Act 13 of 2002.
- 165 Cf the position in Australia where there is no specific offence of unauthorised hiring and the illegal foreign worker alone bears the risk of criminal prosecution. See Orr (n 162) at 686.
- 166 Bosch, C 'Can Unauthorized Workers be Regarded as Employees for the Purposes of the Labour Relations Act?' (2006) 27 *ILJ* 1342 at 1352-1353.
- 167 See Bosch (n 166) at 1346-1352. In this regard see the views of Norton, D 'In Transit: The Position of Illegal Foreign Workers and Emerging Labour Law Jurisprudence' (2009) 30 *ILJ* 66.
- 168 Act 96 of 1991.
- 169 *Dube v Classique Panelbeaters* [1997] 7 BLLR 868 (IC); *Mthethwa v Vorna Valley Spar* (1996) 7 (11) SALLR 83 (CCMA); *Moses v Safika Holdings (Pty) Ltd* (2001) 22 *ILJ* 1261 (CCMA). Also see *Georgieva – Deyanova / Craighall Spar* [2004] 9 BALR 1143 (CCMA) and *Vundla and Millies Fashions* (2003) 24 *ILJ* 462 (CCMA)
- 170 See *Havenga v Rabie* 1916 TPD 466 which concerned the employment of a driver without a licence as required by a road traffic ordinance; *Lende v Goldberg* (1983) 4 *ILJ* 271 which concerned employment contrary to influx control legislation in the form of the Black (Urban Areas) Consolidation Act 25 of 1945 and *Norval v Vision Centre Optometrists* (1995) 16 *ILJ* 481 (IC) which concerned employment of an optometrist contrary to the Medical, Dental and Supplementary Health Service Professions Act 56 of 1974. Also see Kaganas, FR 'Exploiting Illegality: Influx Control and Contracts of Service' (1983) 4 *ILJ* 254 and Jordaan, B 'Influx Control and Contracts of Employment: A Different View' (1984) 5 *ILJ* 61. For an English perspective see Mogridge, C 'Illegal Employment Contracts: Loss of Statutory Protection' (1981) 10 *ILJ* (UK) 23. This article also alludes to contracts which are illegal because they constitute efforts to defraud the taxation authorities. No South African judgment or arbitration award could be traced where an employment contract was held to be void for this reason. In *Hunt v ICC Car Importers*

- Services Co (Pty) Ltd* (1999) 20 *ILJ* 364 (LC) the court was prepared to find an unfair dismissal and order compensation despite the obvious effort to defraud the Receiver of Revenue by using an invoice scheme intended to give the impression that the employee was an independent contractor. This did not deter the court from finding an employment relationship. The court, however, directed that the Receiver be notified of its judgment. In *Denel (Pty) Ltd v Gerber* (2005) 26 *ILJ* 1256 (LAC), the court was prepared, relying on substance rather than form, to find that there was an employment relationship. The matter was referred back to the Labour Court for adjudication on the facts, but the possibility that the employee in this matter defrauded the Revenue Services once again did not deter the LAC from finding that there was an employment relationship and it merely instructed the employee to correct any possible misrepresentation to the Revenue Services. See par 204.
- 171 (2008) 29 *ILJ* 1480 (LC).
- 172 Par 42.
- 173 Bosch (n 166) at 1361-1362.
- 174 Bosch (n 166) at 1362-1364. Also see the views of Norton (n 167).
- 175 *ER 24 Holdings v Smith NO* [2007] SCA 55 (RSA). See the discussion by Orr (n 162) at 688-691 on the different approaches in Australia to the payment of workmen's compensation. Some courts see illegality as a complete bar, but in some states the courts have discretion to award compensation even if the contract of employment is void for illegality.
- 176 See Fakier (n 162) at 19.
- 177 See generally O'Donnell, A and Mitchell, R 'Immigrant Labour in Australia: The Regulatory Framework' (2001) 14 *AJLL* 269.
- 178 See 'An Overview of Child Labour in South Africa' accessed via <http://www.child-labour.org.za/south-africa/documents-and-laws/research-reports/survey-on-work-activities-of-children/> (12 September 2007). Also see Budlender, D and Bosch, D 'Investigation the Worst Forms of Child Labour No. 39 South Africa Child Domestic Workers: A National Report' (2002) accessed via <http://www.ilo.org/ipecinfo/product/searchProduct.do;jsessionid=0a038009cebdca6b4f43c3344578a079b5f8fcefa6e.hkzFngTDp6WImQuUaNaKbND3IN4K-xalah8S-xyIn3uKmAiN-AnwbQbxaNvzaAml-huKa30xgx95fjWta3elpkzFngTDp6WImQuxbNuLa3iSbxuP8OexhOaOgzX9i4j38QfznA5Pp7ftolbGmkTy?type=normal&title=&isbn=&project=&selectedMonthFrom=-1&productYearFrom=&selectedMonthTo=-1&productYearTo=&selectedCountries=150&selectedThemes=91&keywords=&userType=3&selectedFieldOfficeText=&selectedFieldOfficeId=-1&resultPerPage=-1&selectedSortById=4> (12 September 2007). Also see ILO Worst Forms of Child Labour Convention 182, 1999. An important new source on child labour in a global context is Nesi, G; Nogler, L and Pertile, M (eds) *Child Labour in a Globalized World – A Legal Analysis of ILO Action* (2008).
- 179 (2007) 28 *ILJ* 470 (CCMA). For a discussion of this award see Bosch, C and Christie, S 'Are Sex Workers "Employees"?' (2007) 28 *ILJ* 804.
- 180 Act 23 of 1957.
- 181 At 480E.
- 182 See the views of Bosch and Christie (n 179) on this award.
- 183 '*Kylie*' v CCMA & others (2008) 29 *ILJ* 1918 (LC). In this regard see Le Roux, R 'The Meaning of "Worker" and the Road Towards Diversification: Reflecting on *Discovery*, *SITA* and '*Kylie*' (2009) 30 *ILJ* 49.
- 184 Par 24.
- 185 Par 72.
- 186 Par 4.
- 187 Par 62.
- 188 Discussion Paper 0001/2009 Project 107
- 189 [2008] ZALC 31 (20 March 2008).
- 190 Pars 17 and 18.
- 191 Generally see Benjamin (n 126).
- 192 See *Felstein v Coléo Beauty Products International CC* (1991) 12 *ILJ* 399 (IC).
- 193 *SA Broadcasting Corporation v McKenzie* (1999) 20 *ILJ* 585 (LAC).
- 194 Davies and Freedland (n 13) at 273.
- 195 Unlike, for instance, the position of the estate agent in *Linda Erasmus Properties Enterprise (Pty) Ltd v Mhlongo & Others* (2007) 28 *ILJ* 1100 (LC) who was allowed to

- work for only one company. Cf *Bezer v Cruises International CC* (2003) 24 *ILJ* 1372 (LC); *Taljaard and Basil Real Estate* (2006) 27 *ILJ* 861 (CCMA) and *Borcherds v C W Pearce & F Sheward t/a Lubrite Distributors* (1991) 12 *ILJ* 383 (IC).
- 196 See De Jongh, M 'Itinerant and Sedentary: Karretjie People, Agency and "Karoo Culture"' (2000) 23(1) *S Afr J Ethnol* 1 and 'No Fixed Abode: The Poorest of the Poor and Elusive Identities in Rural South Africa' (2002) 28(2) *Journal of Southern African Studies* 441.
- 197 For more on co-operatives see Theron, J 'Unions and the Co-operative Alternative (1)' (2004) 28(4) *SALB* 33 and Theron (n 77). Also see the report 'Worker Co-operatives in the Western Cape' prepared by the Labour and Enterprise Project, Institute of Development and Sociology Department, University of Cape Town, September 2003 for the Department of Labour; Philip, K 'A Reality Check: Worker Co-ops in South Africa' (2007) 31(1) *SALB* 45 and Theron, J "'Remember Me, When it Goes Well for You": What Role can South African Worker Co-ops Play?' (2007) 31(4) *SALB* 13.
- 198 Act 14 of 2005. See Theron, J and Visser, M '*Remember Me When Your Ship Comes In: Cooperatives and the Need to Shift From a Wage Culture* Institute of Development and Labour Law Monographs, University of Cape Town 1/2009.
- 199 Section 2(1)(c). Other forms of co-operatives include financial services co-operatives and agricultural co-operatives.
- 200 Section 3.
- 201 Section 3(1)(e).
- 202 See item 6 of Part 2 of Schedule 1 of Act 14 of 2005.
- 203 Worker co-operatives may employ non-members in which case the full suite of labour legislation will apply. However, item 3(1)(c) of Part 2 of Schedule 1 to the Co-operative Act 14 of 2005 limits the number of employees that a worker co-operative may employ to 25 per cent of its membership. These employees are subject to all labour legislation.
- 204 Theron (n 77) at 63.
- 205 § 4.2.1.
- 206 Act 91 of 1981.
- 207 (2004) 25 *ILJ* 2107 (BCA).
- 208 *Nonzamo Cleaning Services Co-Operative v Appie & Others* (2008) 29 *ILJ* 2168 (E).
- 209 At par 8.
- 210 Bradfield, G 'Partnerships in Du Bois, F (ed) *Wille's Principles of South African Law* 9ed (2007) 1004-1016 at 1004-1005.
- 211 See *Purdon v Muller* 1961 (2) SA 211 (A) at 220C-E and *Oosthuizen v C A N Mining & Engineering Supplies CC* (1999) 20 *ILJ* 910 (LC) at par 8. Also see Cohen (n 100) at 869.
- 212 (2008) 29 *ILJ* 163 (LC). For a consideration of the position in the UK see Idensohn, K 'The Controlling Shareholders as an Employee: *Secretary of State for Business, Enterprise & Regulatory Reform v Neufeld & Howe*' (2009) 30 *ILJ* 1495.
- 213 § 5.2.2.
- 214 Landman, A 'Vocational Work – Basic Rights for Students' (2003) 24 *ILJ* 1304 at 1304.
- 215 Section 1.
- 216 Section 3(2).
- 217 Murray (n 145) refers to this person as the precarious volunteer worker. It can perhaps be argued that his or her position more closely resembles the position of the genuine volunteer worker.
- 218 *Dankie and Highveld Steel and Vanadium* (2005) 26 *ILJ* 1553 (BCA).
- 219 Landman (n 214).
- 220 Section 17.
- 221 Section 4(1)(b). The sectoral determination is published under GN 519 in GG 22370 of 15 June 2001.
- 222 [2007] SCA 55 (RSA).
- 223 Landman (n 214) at 1306 suggests that s 83(1)(a) and (b) which enables the Minister of Labour to extend the provisions of the EEA, the OHS Act, COIDA and the UIA to categories of persons such as students may not pass constitutional muster on the basis that it empowers the Minister to alter the BCEA which is the basis of many other statutes.
- 224 *Universiteit van Amsterdam/Lemmes NJ* 2007 447. Also see Verhulp, E note with *HR* 13 September 2007 *NJ* 2007/448.
- 225 *Hilsonian Society v Crofton* 1952 (3) SA 130 (A) and *Dowling v Diocesan College and Others* 1999 (3) SA 847 (C).
- 226 It is to be noted that the National Defence Force is not excluded from the application of the BCEA. See s 3 of the BCEA (as amended by s 40(1) of the Intelligence Services Act 65 of 2002). In *Bongo v Minister of Defence & Others* (2006) 27 *ILJ* 799 (LC) it was held

- that while the National Defence Force is excluded from the application of the LRA, the labour court, by virtue of s 77(3) of the BCEA, still has jurisdiction to adjudicate any matter concerning a contract of employment to which the National Defence Force is a party.
- 227 1999 (6) BCLR 615 (CC) at par 24.
- 228 *Murray v Minister of Defence* (2006) 27 ILJ 1607 (C).
- 229 Section 200(2) of the Constitution.
- 230 See s 199(7) of the Constitution. Also see *National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) at par 12 and *SA National Defence Union v Minister of Defence & Others* (2007) 28 ILJ 1909 (CC) at pars 86 and 98.
- 231 This is also consistent with ILO Conventions. In *National Defence Union v Minister of Defence and Another* 1999 (6) BCLR 615 (CC) O'Regan J at par 26 commented as follows in this regard: 'Article 2 of ILP Freedom of Association and Protection of the Right to Organise Convention 87, 1948, the first major Convention of the ILO concerning freedom of association, which South Africa ratified in 1995, provides that: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation." Article 9(1) of the same Convention provides: "The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws and regulations." It is clear from these provisions, therefore, that the Convention does include "armed forces and the police" within its scope, but that the extent to which the provisions of the Convention shall be held to apply to such services is a matter for national law and is not governed directly by the Convention. This approach has also been adopted in the ILO Right to Organise and Collective Bargaining Convention 98, 1949 which South Africa ratified in 1995. The ILO therefore considers members of the armed forces and the police to be workers for the purposes of these Conventions, but considers that their position is special, to the extent that it leaves it open to member states to determine the extent to which the provisions of the Conventions should apply to members of the armed forces and the police.'
- 232 Section 91.
- 233 Section 205.
- 234 Section 209.
- 235 *Masetlha v The President of the Republic of South Africa and 2008* (1) SA 566 (CC).
- 236 (2007) 28 ILJ 2263 (LC).
- 237 Act 26 of 2000.
- 238 At pars 21-23.
- 239 The court further found that parliamentarians are also employers in terms of the PDA and for that reason the disclosure would also have been protected. This finding, in isolation, is perhaps correct, but the finding that they are simultaneously employees and employers is less palatable.
- 240 Most notably *White v Pan Palladium SA (Pty) Ltd* (2006) 27 ILJ 2721 (LC).
- 241 *Miskey & Others v Maritz NO & Others* (2007) 28 ILJ 661 (LC). Also see Cohen (n 100) at 875.
- 242 *Hannah v Government of the Republic of Namibia* (2000) 21 ILJ 2748 (LCN).
- 243 *Khanyile v CCMA & Others* (2004) 25 ILJ 2348 (LC).
- 244 Generally see Rittich (n 155); Chapman, A 'Regulating Family through Employee Entitlements' in Arup, C; Gahan, P; Howe, J; Johnstone, R; Mitchell, R and O'Donnell, A (eds) *Labour Law and Labour Market Regulation* (2006) 454-482 and Conaghan, J 'Time to Dream? Flexibility, Families, and the Regulation of Working Time' in Fudge, J and Owens, R (eds) *Precarious Work, Women and the New Economy: The Challenges to Legal Norms* (2006) 101-151.
- 245 'The Informal Plague Goes Global' (2005) 29(1) SALB 44.
- 246 Spaza shops, tuck shops, hawker tables, craft markets, informal markets and traffic vendors are all places of trade associated with the informal retail sector and have increased significantly in post-apartheid South Africa. See Atkinson, D 'Spaza, Hawkers and Policy Challenges' 2006, unpublished paper. For case studies on the informal labour market see Philip, K 'Rural Enterprise: Work on the Margins' in Webster, E and Von Holdt, K (eds) *Beyond The Apartheid Workplace: Studies in Transition* (2005) 361-386. For a case study on informal urban street traders and their attempts at organisation see Webster, E 'New Forms of Work and the Representational Gap: A Durban Case Study' in

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- Webster, E and Von Holdt, K (eds) *Beyond The Apartheid Workplace: Studies in Transition* (2005) 387-405.
- 247 See Theron 'Employment is Not What it Used to Be' (n 12) at 1263 and Atkinson (n 246).
- 248 Statistical release PO210 (n 15).
- 249 For more on the size of the informal labour market see Clarke *et al* 'Workers' Protection: An Update on the Situation in South Africa' (n 12) at 21-28.
- 250 See Statistical release PO210 (n 15) Table K.
- 251 See Statistical release PO210 (n 15) Table 3.5.
- 252 See the example of the Karretjie people in note 196.
- 253 See Benjamin, P 'Informal Work and Labour Rights in South Africa' (2008) 29 *ILJ* 1579 for a very comprehensive overview of the informal labour market in South Africa. Also see, for instance, Atkinson (n 246); Quinlan (n 42) and Olivier, M 'Extending Employment Injury and Disease Protection to Non-traditional and Informal Economy Workers: The Quest for a Principled Framework and Innovative Approaches' paper presented at the 7th International Work Congress, Hong Kong, June 2006.
- 254 Domestic workers now qualify for employment insurance, but are not yet covered by COIDA.
- 255 Theoretically an employee in the informal sector would be able to pursue an unfair dismissal claim in terms of the LRA, but is unlikely to be visible to trade unions or to have any coverage from legislation addressing unemployment insurance, health and safety, workmen's compensation and skills development. In respect of the lack of skills development in the informal retail trade sector see the comments of Atkinson (n 246).
- 256 Bezuidenhout *et al* (n 42) at 41.
- 257 Benjamin (n 253) at 1601 and also at 590-1600 for a discussion of possible strategies.
- 258 Also see Olivier (n 253).
- 259 Research, however, suggests that while informal traders are primarily driven by unemployment (the survivalists), some respond to economic opportunities. See Atkinson (n 246).
- 260 For the difficulties associated with organisation in this market see Webster (n 246) and 'Informal Sector Union Faces Crunch Time' (2004) 28(4) *SALB* 49. Also see Horn, P 'Protecting the Unprotected. Can It Be Done?' (2004) 28(1) *SALB* 28.
- 261 See Merritt, AS 'The Historical Role in the Regulation of Employment – Abstentionist or Interventionist?' (1982) 1 *Australian Journal of Law & Society* 56 at 57.

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