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## **Realising the Right to Decent Work in South Africa**

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Daniel McLaren ‘Indicators to Monitor the Progressive Realisation of the Right to Decent Work in South Africa’ (2017) Studies in Poverty and Inequality Institute, Working Paper 15.

Margaret Sagan ‘Monitoring the right of access to social security and appropriate social assistance in South Africa’ (2017) Studies in Poverty and Inequality Institute, Working Paper 14.

Zukiswa Kota ‘Realising the right to a healthy environment: an analysis of the policy efforts, budgeting and enjoyment of the right to a healthy environment in South Africa’ (2016) Studies in Poverty and Inequality Institute, Working Paper 13.

Matshidiso Motsoeneng ‘Monitoring and Evaluating the Progressive Realisation of the Right to Water and Sanitation in South Africa’ (2016) Studies in Poverty and Inequality Institute, Working Paper 12.

McLaren, D, Moyo, B and Jeffery, J ‘The right to food in South Africa: An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to food’ (2015) Studies in Poverty and Inequality Institute, Working Paper 11.

Franklin, S and McLaren, D ‘Realising the Right to Basic Education: An analysis of the content, policy effort, resource allocation and enjoyment of the constitutional right to a basic education (2015) Studies in Poverty and Inequality Institute, Working Paper 10.

Hannah Dawson & Daniel McLaren ‘A Framework for Monitoring and Evaluating the Progressive Realisation of Socio-Economic Rights in South Africa’ (2015) Studies in Poverty and Inequality Institute.

Hannah Dawson ‘Public participation and citizen-based monitoring in realising socio-economic rights’ (2014) Studies in Poverty and Inequality Institute, Policy Brief 7.

Hannah Dawson & Daniel McLaren ‘Monitoring the right of access to adequate housing in South Africa’ (2014) Studies in Poverty and Inequality Institute, Working Paper 8.

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# 1. Introduction

*Emphasising the importance of work and productive employment in any society not only because of the resources which they create for the community, but also because of the income which they bring to workers, the social role which they confer and the feeling of self-esteem which workers derive from them.* International Labour Organisation, Preamble to ILO Convention No. 168 of 1988.

Access to decent work has been an ongoing struggle in South Africa for more than 300 years. Colonialism and apartheid brought many forms of deprivation to indigenous South Africans, including a loss of productive lands, the devastation of community and local economies, and the relegation of ‘non-whites’ to second class citizens. Punitive taxes, racist education and brute force combined to force Blacks to become low-paid labourers in the country’s white-owned industries, particularly mining. The establishment of a migrant labour system, a large reserve labour force and a two-tier employment system were key goals of both the colonial and apartheid systems of government. The democratic government thus inherited a highly unequal economy in which Whites inhabited the vast majority of positions of power and were able to command decent wages and conditions of employment, while the majority had little-to-no access to decent work.

Addressing high rates of unemployment, insecure employment, poor working conditions and historically embedded inequalities (in education, skills and wages among others) has thus been among South Africa’s greatest challenges since the transition to democracy. Despite the overhaul of labour legislation post-1994 and a plethora of government-led initiatives to increase and equalise access to decent employment, SPII’s research on indicators for the right to decent work<sup>1</sup> shows that unemployment has increased since the end of apartheid. 9.3 million South African’s were unemployed in the second quarter of 2017, representing 36.5% of the expanded labour force, the highest level in fourteen years.<sup>2</sup>

Alarmingly, the number of unemployed people who have become discouraged from looking for work due to a lack of employment opportunities more than doubled between 2008 and 2017, from 1.15 million to 2.32 million people.<sup>3</sup> In addition to these, the proportion of the unemployed who were unable to find any work after a full year of work-seeking – an indicator of long-term unemployment – rose from 59% in 2008 to 67% in 2017.<sup>4</sup>

## Key questions in the paper

- What is the right to decent work?
- What does the right to work entitle people to and what obligations does it place on government?
- Are current work-related policies, programmes in the country sufficiently geared towards the full realisation of this right?
- What further legislative and other measures should the government consider in order to ensure that the right to decent work becomes a reality for all in South Africa?

<sup>1</sup> These indicators are based on government statistics provided in the main by Statistics South Africa. See: McLaren ‘Indicators to Monitor the Progressive Realisation of the Right to Decent Work in South Africa’ (2017) Studies in Poverty and Inequality Institute, Working Paper 15. Available at [www.spii.org.za](http://www.spii.org.za).

<sup>2</sup> Ibid at 30. The expanded labour force includes all working-age people who want to work but cannot find employment (including discouraged work-seekers).

<sup>3</sup> Ibid at 35.

<sup>4</sup> Ibid at 34.

There were 2.7 million people employed in the informal sector (17% of the total employed) in 2017.<sup>5</sup> Informal sector employment grew faster than employment in the formal sector between 2008 and 2017.

Women remain less likely to be employed than men and access to work also remained divided along racial lines, with Black South Africans 5 times more likely to be unemployed, and Coloured South Africans 3.5 times more likely to be unemployed, than their White counterparts.<sup>6</sup> Youth<sup>7</sup> unemployment also increased, from 40% in 2008 to 49% in 2017, while almost 1 in 3 children live in households without an employed adult.<sup>8</sup>

The number of unemployed people with a tertiary education increased by 2.6 times between 2008 and 2017, from 250,000 to 650,000 people.<sup>9</sup> This is in part because private sector employment grew by only 7.5% over the previous decade, while public sector employment (including state-owned enterprises) increased by 30%.<sup>10</sup>

Of those employed in 2017:<sup>11</sup>

- 1 in 5 have no written contract of employment.
- 2 in 5 are employed on precarious contracts of a limited or unspecified duration.
- 1 in 3 are working excessive hours (more than 45 per week).
- 1 in 3 are not entitled to any paid leave (whether for sickness, maternity/paternity leave or leave for leisure).
- 40% have no access to unemployment insurance.
- 70% receive no medical aid benefits from their employer.
- More than 70% are not members of a trade union.

The wage structure in South Africa also remains highly unequal. In 2015, women earned a median wage of 77 cents for every R1 earned by men. Median monthly earnings for Whites were R12 000, compared to R6 500 for Indians, R3 000 for Coloureds, and R2 900 for Blacks.<sup>12</sup>

Wage inequality is growing. Between 2010 and 2015, median earnings for the top earnings decile increased by 16% in real terms, while median earnings for the bottom earnings decile decreased by 8%.<sup>13</sup> CEO pay increased fastest, from 291 times the median wage in 2010, to a startling 419 times the median wage in 2015.<sup>14</sup>

The failure to tackle the root causes of highly unequal access to decent employment continues to have negative consequences for the social and economic fabric of the country, resulting in an increase in poverty between 2011 and 2015. The latest data from Statistics South Africa shows that 30.4 million South Africans (55.5% of the population) were living below the upper-bound poverty line of R992 per month in 2015.<sup>15</sup> This is partly

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<sup>5</sup> Ibid at 49.

<sup>6</sup> Ibid at 43.

<sup>7</sup> Youth in this paper are all economically active persons aged 15-34.

<sup>8</sup> Ibid at 46-48.

<sup>9</sup> Ibid at 71.

<sup>10</sup> Ibid at 55.

<sup>11</sup> Ibid at 91-132.

<sup>12</sup> Ibid at 109-110.

<sup>13</sup> Ibid at 115.

<sup>14</sup> Ibid at 120.

<sup>15</sup> Statistics South Africa 'Poverty Trends in South Africa: An examination of absolute poverty between 2006 and 2015' (2017) Pretoria at 14.

due to the fact that 58% of South Africans rely on wages as their main source of income.<sup>16</sup> Black and Coloured households. Meanwhile, the bottom 40% of income earners shared only 8% of total income in 2015.<sup>17</sup> South Africa also remains the most unequal country in the world as measured by both the GINI coefficient and the Palma ratio.<sup>18</sup> One impact of this is that rates of property and violent crime are very high, with one in seven households in 2015/16 saying that they would not invest in or start a home business as a result of crime in their area.<sup>19</sup>

It is within this context that the government ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 2015, making the Covenant legally binding on the South African state with effect from April 2017. This means that the government must implement the provisions of the Covenant and if it fails to do so, can be challenged in court by any litigant who can demonstrate that their Covenant rights have been infringed.

Ratification of the ICESCR joined South Africa with 165 other nations (including 50 in Africa) who have committed to taking all necessary steps to ensure that their people enjoy access to the basic economic and social rights that are essential for a life of dignity. These include the rights to education, adequate housing, social security, sufficient food and the highest attainable standard of health. However, while all of the aforementioned rights were given recognition in the South African Constitution of 1996, the ICESCR recognises two key rights which are not expressly provided for in the Constitution. These are the right to an adequate standard of living in article 11<sup>20</sup> and the right to decent work in articles 6-8.

## 1.1 Research questions

This gives rise to several questions, which this paper will discuss:

- What is the right to decent work?
- What does the right to work entitle people to and what new obligations does it place upon the South African state?
- Are current work-related policies, programmes and budget allocations in the country sufficiently geared towards the full realisation of this right?
- What further legislative and other measures should the government consider in order to ensure that the right to decent work becomes a reality for all in South Africa?

## 1.2 SPII's right to decent work indicators

A further question that is tackled in our sister publication entitled 'Indicators to Monitor the Progressive Realisation of the Right to Decent Work in South Africa', is:<sup>21</sup>

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<sup>16</sup> McLaren (2017) at 128.

<sup>17</sup> Statistics South Africa (2017) at 23.

<sup>18</sup> The Guardian 'Inequality index: where are the world's most unequal countries?' 26 April 2017. Available at: [www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worlds-most-unequal-countries](http://www.theguardian.com/inequality/datablog/2017/apr/26/inequality-index-where-are-the-worlds-most-unequal-countries).

<sup>19</sup> McLaren (2017) at 139. A further 16% stated that local crime prevented them from walking to work or to town on their own.

<sup>20</sup> Inspired by the right to an adequate standard of living in the ICESCR, and the commitment to realise this right in South Africa's National Development Plan, Studies in Poverty and Inequality Institute has been conducting research into what would constitute a decent standard of living in South Africa. For more information see: [www.spii.org.za/index.php/decent-standard-of-living](http://www.spii.org.za/index.php/decent-standard-of-living).

<sup>21</sup> Available at: [www.spii.org.za/research-and-advocacy/the-socio-economic-rights-monitoring-tool/the-right-to-decent-work](http://www.spii.org.za/research-and-advocacy/the-socio-economic-rights-monitoring-tool/the-right-to-decent-work).

- Do people enjoy the right to work in South Africa? What kind of information and indicators would allow us to monitor and evaluate the extent of people's enjoyment of this right?

The indicators developed by SPII to answer this question drew upon guidance from the International Labour Organisation and other local stakeholders and research into decent work in South Africa.<sup>22</sup> The final indicators were categorised into the following areas:

**Access indicators** (rights to work):

- Unemployment
- Employment opportunities
- Government support for work-seekers
- Access to education, training and skills development

**Adequacy indicators** (individual and collective rights at work):

- Labour administration
- Stability and security at work
- Employment equity
- Adequate and equitable earnings
- Combining work, family and personal life
- Freedom of association and collective bargaining rights
- Social security

**Quality indicators** (outcomes of access/non-access to decent work):

- Poverty and inequality
- Food security
- Health
- Housing
- Crime

The full list of indicators, populated with data back to 2008 wherever possible, can be found at [www.spii.org.za](http://www.spii.org.za). The information generated by these indicators will be useful not only for evaluating government's current policies and programmes related to decent work, but also to the state in the development of its subsequent reports to the UN Committee on Economic, Social and Cultural Rights on the progressive realisation of the right to work, and to civil society and public interest litigants, organised labour, and oversight bodies such as the South African Human Rights Commission and Parliament.

### 1.3 Structure of the paper

This paper does not attempt to review every piece of labour and work-related legislation passed since 1994. Instead, it focuses on key pieces of the puzzle that make up South Africa's labour landscape with an emphasis on programmes and policies that deal most explicitly with the right to decent work. The paper concludes with

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<sup>22</sup> See, for example, Webster, Budlender and Orkin 'Developing a diagnostic tool and policy instrument for the realisation of decent work' (2015) *International Labour Review* Vol 154 No. 2.

a reflection on areas that require further analysis.

Chapter 2 offers an answer to the question: *what is the right to decent work?* by providing an overview of the key concepts that underpin this right. Chapter 3 discusses the *overarching obligations on the state to realise the right to decent work*. Our assessment of current work-related policies, programmes and budget allocations, in terms of whether they sufficiently provide for the right to decent work, will begin in Chapter 4 with an analysis of the state's effort to ensure *rights to work*. Similarly, Chapter 5 will analyse the state's effort in relation to *individual rights at work*, with recommendations for reforms to policies, programmes and budgets that could close gaps and promote access to decent work for all.

## 2. What is the right to decent work?

*The right to work is a fundamental human right ... [it] is essential for realizing other human rights and forms an inseparable and inherent part of human dignity ... The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.* UN Committee on Economic, Social and Cultural Rights, General Comment No. 18 on the Right to Work, 2006.

The right to work was first recognised in the Universal Declaration of Human Rights in 1948. The Universal Declaration – now signed by all 193 member states of the United Nations – included the right to work alongside other fundamental human rights, inspired by the recognition that “freedom from fear and freedom from want has been proclaimed as the highest aspiration of the common people.”<sup>23</sup>

While the key components of the right to work established in the Declaration remain at the core of the right to work today, the Declaration itself was non-binding on states. It was therefore important that this guiding Declaration was followed up by legally binding Treaties which would be negotiated and then ratified by states. This process of negotiating and building consensus on the fundamental human rights that should shape developmental processes across the globe resulted in the promulgation of two treaties by the United Nations General Assembly in 1966, one focusing on civil and political rights, and one focusing on economic, social and cultural rights.

The International Covenant on Economic, Social and Cultural Rights (ICESCR, or the Covenant) came into effect in 1976 and contained a fuller expression of the right to work. The Covenant also included provision for a treaty monitoring body: the Committee on Economic, Social and Cultural Rights (CESCR, or the Committee), which monitors and promotes the full implementation of the Covenant by States parties. The Committee also issues ‘General Comments’ on various aspects of the Covenant which provide guidance to states on how to interpret and fulfil their obligations under the Covenant. The Covenant has since been ratified by 165 nations, with South Africa finally becoming a State party in 2015. This made the Covenant legally binding on the South African government from April 2017.

Many of the socio-economic rights contained in the Constitution have come to play an important role in

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<sup>23</sup> Available at: [www.un.org/en/universal-declaration-human-rights](http://www.un.org/en/universal-declaration-human-rights).

shaping the nation's ongoing transition to a political and economic democracy.<sup>24</sup> However, this is not the case for the right to work, which until government's ratification of the ICESCR in 2015 (see below) was not recognised as a basic right in South Africa. An analysis of what this right entails, what steps the state should take to give effect to this right, and how citizens can hold the state to account for the fulfilment of the right to decent work, is therefore needed.

## 2.1 The right to work is a right to decent work

The right to work is expressed in three articles of the ICESCR, signalling that this right has three broad strands. Article 6 speaks to *rights to work*, whereas article 7 speaks to *individual rights at work* and article 8 covers *collective rights at work*. The full text of these articles is provided below:

### International Covenant on Economic, Social and Cultural Rights, 1976<sup>25</sup>

#### Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

#### Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.

#### Article 8

1. The States Parties to the present Covenant undertake to ensure:

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<sup>24</sup> Sandra Liebenberg 'The Interpretation of Socio-Economic Rights' in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2006) 2<sup>nd</sup> Ed, 647 at 33-2.

<sup>25</sup> Adopted 16 Dec 1966, entered into force 1976, GA Res 2200 A (XXI) UN Doc A/6316, 993. Available at: [www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx](http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx).

- (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;
- (c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;
- (d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

What is clear from articles 6-8 is that the right to work is a right to *decent work*. The Committee on Economic, Social and Cultural Rights in its General Comment No. 18 on the Right to Work, has confirmed this, by stating that:

Work as specified in article 6 of the Covenant must be *decent work*. This is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work.<sup>26</sup>

This recognition that work must be *decent* follows similar formulations for other socio-economic rights in both the Covenant and the Constitution. For example: the right to *adequate* housing, the right to *sufficient* food and water, or the right to a *healthy* environment.<sup>27</sup> In each case, it is clear that without some kind of qualification or standard for the right itself,<sup>28</sup> it would be uncertain what states should be ensuring and providing access to. The recognition that working conditions must be decent is also anticipated by the Constitution, which provides in Section 23(1) that “Everyone has the right to fair labour practices”.

It is therefore critical to understand the right to work as consisting of three components which complement and reinforce one another. The first is the right to gain ones living through work, which is contained in article 6. The second component is provided by article 7, which establishes that work must be decent, and breaks down the individual dimensions of decent work. The third is provided by article 8 of the Covenant, which establishes collective rights that are essential for workers to organise to demand and ensure that their rights to decent work are respected and fulfilled. These three strands or components to the right to decent work in the ICESCR are summarised in Table 1.

**Table 1:** Key components of the right to work in the ICESCR

<b>Article 6</b> <i>Rights to work</i>	<b>Article 7</b> <i>Rights at work (individual)</i>	<b>Article 8</b> <i>Rights at work (collective) / freedom of association and collective bargaining rights</i>
✓ The opportunity to work	Rights to just and favourable conditions of work, including:	✓ The right to associate freely
✓ The freedom to choose, accept or decline work	✓ Fair and equal wages (for work of equal value) which provide for an	✓ The right to form and join trade unions and

<sup>26</sup> Adopted 2005, Geneva, UN doc: E/C.12/GC/18 at para 7. Available at:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f18&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f18&Lang=en).

<sup>27</sup> Constitution of the Republic of South Africa, Sections 26(1), 27(1)(b) and 24(a).

<sup>28</sup> A standard which must be realised progressively, or over time. See section 3.1 below.



	adequate standard of living	other associations
	✓ The right not to be unfairly dismissed	
✓ The right to education, training, skills development and other forms of support to access decent work	✓ Equal opportunity to be promoted	✓ The right of trade unions to function freely
	✓ Protection from unemployment (and social security rights)	
	✓ Safe and healthy working conditions	✓ The right to strike
	✓ Rest, leisure and holidays with pay	

## 2.2 The right to decent work and the South African Constitution

Each of the components of the right to decent work listed in Table 1 will be explored further in the chapters which follow.

The one component in Table 1, however, which is not expressly recognised in the South African Constitution of 1996, is the right to the opportunity to gain one's living through work, in other words, *the opportunity to work*.

The decision not to include a positive right to work in the Constitution is a puzzling one, not least because the African National Congress (ANC) had long supported a right to work as a basic right and freedom. In its *Constitutional Guidelines for a Democratic South Africa (1989)*,<sup>29</sup> the then banned ANC set out the basic principles and rights which it saw as essential for a successful transition to a free, democratic and non-racial South Africa. The Guidelines included a right to work alongside other fundamental rights to education and social security. This is because the Guidelines were to a great degree drawn from the Freedom Charter, which since its adoption at the Congress of the People in 1955, had come to represent the demands of much of the South African liberation movement, including the ANC.

The Freedom Charter<sup>30</sup> (itself influenced by the Universal Declaration of Human Rights) had proclaimed that "The State shall recognise the right and duty of all to work, and to draw full unemployment benefits" and that "Men and women of all races shall receive equal pay for equal work".

However, the periods immediately before and after South Africa's transition in 1994 were marked by a rapid acceleration of economic globalisation. This was stimulated by the 'opening up' of key economies in China, East Asia, Russia and Eastern Europe, and was pushed vigorously by international finance and trade institutions including the World Bank, the International Monetary Fund and the World Trade Organisation. These institutions have made enormous efforts to promote (and in the case of Structural Adjustment Programmes in debt-laden developing countries, to force<sup>31</sup>) the adoption of a set of policies globally that became known variously as the 'Washington Consensus' or 'neo-liberalism'.

Neo-liberal economic policies include 'fiscal discipline' (a balanced budget and the priority payment of creditors), a continual lowering of the barriers to trade and foreign investment (including ending subsidies to domestic industries), a growing role for finance in the economy (and enhanced protections for foreign

<sup>29</sup> Available at: [www.anc.org.za/content/constitutional-guidelines-democratic-south-africa](http://www.anc.org.za/content/constitutional-guidelines-democratic-south-africa).

<sup>30</sup> Available at: [www.sahistory.org.za/article/freedom-charter](http://www.sahistory.org.za/article/freedom-charter).

<sup>31</sup> Sundaram et al 'Globalization and development in sub-Saharan Africa' (2011) UN/DESA at 2.



investors in particular), privatisation and a general diminution of the role of the state in guiding and ensuring sustainable development, and a push for more 'flexible labour markets', meaning in most cases a dilution of workers' rights (such as protection from unfair dismissal).<sup>32</sup>

This context has arguably made it more difficult for developing countries in particular to provide employment under conditions which are compatible with human rights standards and in indeed, with human dignity.<sup>33</sup> The negotiations which eventually led to the adoption of the final Constitution of South Africa in 1996 were undoubtedly influenced by these global trends,<sup>34</sup> with one result being that a positive right to work was eschewed in favour of a set of individual and collective rights and freedoms in Sections 13, 22 and 23.

## **Constitution of the Republic of South Africa, Bill of Rights, 1996**

### **13. Slavery, servitude and forced labour**

No one may be subjected to slavery, servitude or forced labour.

### **22. Freedom of trade, occupation and profession**

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.

### **23. Labour relations**

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right -

- (a) to form and join a trade union;
- (b) to participate in the activities and programmes of a trade union; and
- (c) to strike.

(3) Every employer has the right -

- (a) to form and join an employers' organisation; and
- (b) to participate in the activities and programmes of an employers' organisation.

(4) Every trade union and every employers' organisation has the right -

- (a) to determine its own administration, programmes and activities;
- (b) to organise; and
- (c) to form and join a federation.

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

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<sup>32</sup> Ben Turok 'The Evolution of ANC Economic Policy' (2008) Cape Town: New Agenda at 49.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

The Constitution therefore provides for a prohibition against forced labour and a right to choose one's trade, occupation or profession freely, the right to fair labour practices and collective rights to participate in employer or worker organisations and to strike. While these rights cover many of the dimensions of the right to work elaborated in the ICESCR, the key difference is the lack of a positive right to work, as well as a lack of specific obligations relating to fair labour practices (such as adequate remuneration or equal opportunity to be promoted), although subsequent legislation directed at ensuring fair labour practices has since been adopted by the state (see Chapters 3 and 4).

Conceptual misunderstandings driven by opposite interpretations of this right by the Soviet Union and the United States during (and in the case of the US, after) the Cold War have also been cited in conversations with Constitution drafters as a key reason behind their failure to expressly include a positive right to work in the Constitution. On the one hand, socialist-aligned governments had argued that the right to work required the government to guarantee employment to every individual, on the basis, if necessary, of limiting individual choice of work if this was necessary to ensure full employment.<sup>35</sup> On the other hand, the right to work has been interpreted and (miss)used in the United States as a means of undermining trade unions.<sup>36</sup> This has led to the development of "right to work State's" in the US where workers are able (and encouraged) to refuse to pay union dues even when they benefit from a collective bargaining agreement, with the result that many unions have diminishing resources and capacity to provide their essential services.<sup>37</sup>

Thus, while the negotiating parties at the second Convention for a Democratic South Africa (CODESA 2) were eventually able to agree that the state should have positive obligations to ensure access to education, housing, social security and even food and water, they did not accept that the state should have similar obligations to ensure access to work, for the reasons cited above. However, the misunderstandings and misgivings about the right to work which led to its exclusion from the Constitution now seem out of date. Not only has the world moved on from the bi-polar antagonism of the Cold War, but many countries have since embraced the right to work as a key part of their efforts to deal with poverty and unemployment, including most famously, India.<sup>38</sup> At the same time, social movements across the globe have also embraced the right to work and in many cases linked this right to the right to dignity, as well as to a livelihood and to participate in economic development (as with informal workers in Brazil<sup>39</sup>). The UN Committee on Economic, Social and Cultural Rights has also given much greater clarity on the content of this right since 1994.<sup>40</sup>

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<sup>35</sup> Matthew Craven 'The International Covenant on Economic, Social and Cultural Rights: a perspective on its development' (1992) PhD thesis, University of Nottingham at 196. Available at: <http://eprints.nottingham.ac.uk/11441/1/334858.pdf>.

<sup>36</sup> Fisk and Sachs 'Restoring Equity in Right to Work' (2014) *UC Irvine Law Review* Vol. 4, No. 2, at 859.

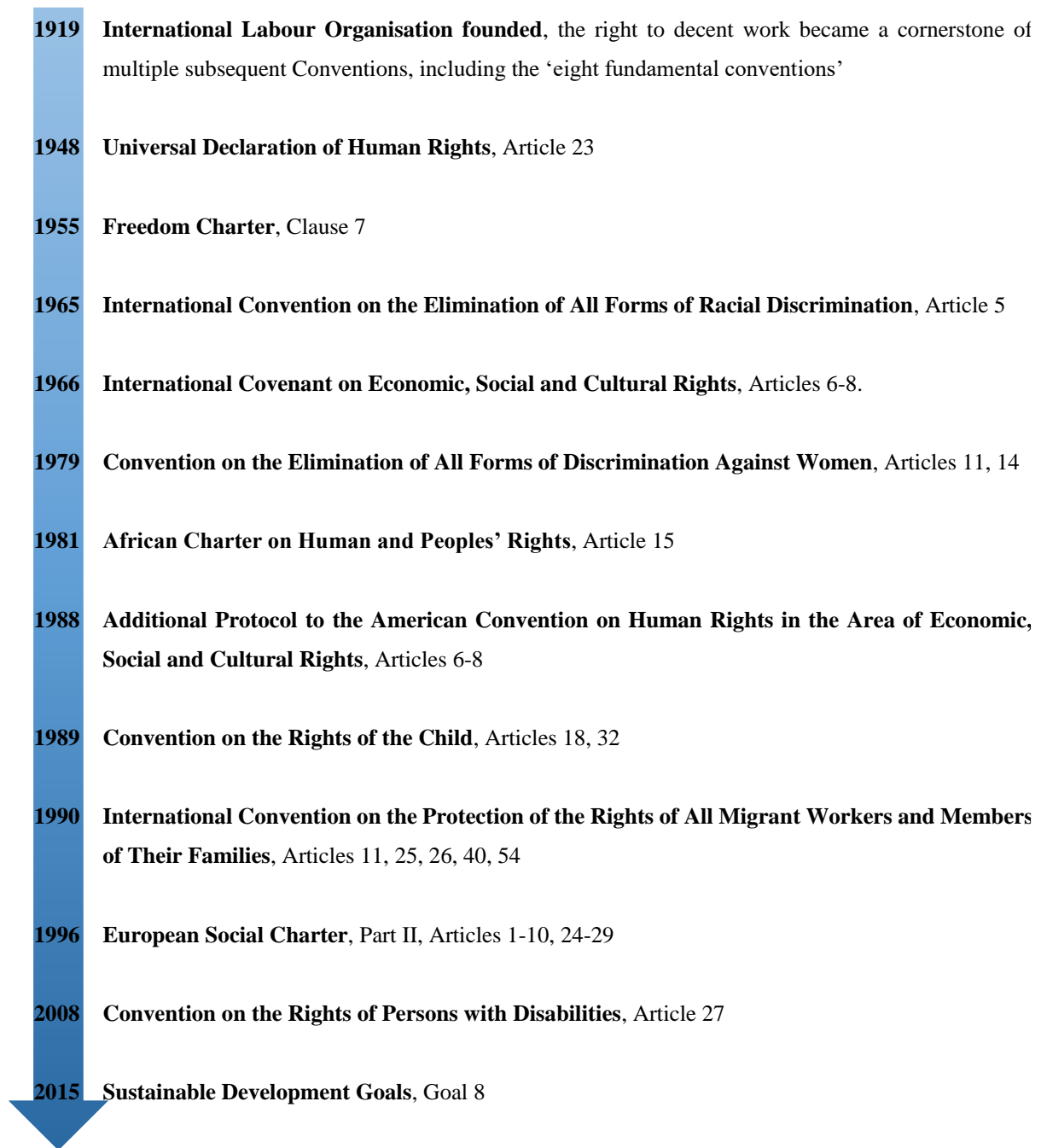
<sup>37</sup> Ibid.

<sup>38</sup> For brief background on India's right to work law, see Jenkins 'A grassroots revolution' *Hindu Business Line* 01 March 2016. Available at: [www.thehindubusinessline.com/opinion/a-grassroots-revolution/article8300813.ece](http://www.thehindubusinessline.com/opinion/a-grassroots-revolution/article8300813.ece).

<sup>39</sup> See Gaspar Garcia 'Informal Work and the Right to the City' (2012) Sao Paulo. Available at: <http://gaspargarcia.org.br/wp-content/uploads/2014/03/INFORMAL-WORK-AND-THE-RIGHT-TO-THE-CITY.pdf>.

<sup>40</sup> See 'General Comment No. 18: The right to work' Adopted 2005, Geneva, UN doc: E/C.12/GC/18. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f18&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f18&Lang=en).

**Figure 1:** Global timeline of right to decent work commitments



Even in South Africa, the Constitutional Court has recognised key components of the right to work. In *South African Informal Traders Forum and Others v City of Johannesburg and Others*,<sup>41</sup> for example, the Court found in favour of informal street traders who had been forcibly removed from their trading stations by the City of Johannesburg municipal government in a series of actions called ‘Operation Clean Sweep’ (for case studies on each of these examples, see Chapter 4). In its judgement, the Court emphasised that “the ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it [the traders] faced ‘humiliation and degradation’.” And at the *Unemployed Peoples Assembly for the Right2Work* in Johannesburg in August 2017, various movements of unemployed people

<sup>41</sup> (CCT 173/13 ; CCT 174/14) [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) (4 April 2014). Available at: [www.seri-sa.org/images/SAITF\\_Judgment\\_CC.pdf](http://www.seri-sa.org/images/SAITF_Judgment_CC.pdf).

came together to demand the right to work.<sup>42</sup>

Ratification of the ICESCR gives new impetus to government's efforts to ensure decent work for all, and brings South Africa in line with international norms which recognise the right to decent work. It also heralds a return to the original thinking and promises of the Freedom Charter. Politically then, there should not be significant resistance to taking on this new obligation. Indeed, viewing South Africa's perennial struggle to deal with high levels of unemployment from a rights-based perspective could open up this area of policy-making to new forms of scrutiny and accountability, as the next chapter of this paper will highlight.

### 3. Overarching obligations on the state to realise the right to decent work

*We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to - Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person.*

Preamble to the Constitution of the Republic of South Africa, 1996.

Although no significant jurisprudence has been developed in South African courts on the rights and obligations in the ICESCR, theoretically, the socio-economic rights enshrined in both the Covenant and the South African Constitution place a very similar framework of overarching obligations on the state. Developing policy and legislation to give effect to the right to decent work should therefore not be a challenge for South Africa in theory, as the same essential framework of obligations already applies to rights such as housing, social security, food and water. These overarching obligations will be the subject of this chapter:

- 3.1. The obligation of progressive realisation
- 3.2. The obligation to utilize the maximum of available resources to ensure the right to decent work
- 3.3. The obligation to achieve substantive equality in access to decent work and provide redress for past work-related discrimination
- 3.4. The obligations to respect, protect, promote and fulfil the right to decent work
- 3.5. The obligation to ensure that there is transparency, access to information and public participation in all efforts to realise the right to decent work
- 3.6. The obligation to ensure that there are remedies available to those whose right to decent work has been infringed, and that there is accountability for the implementation of this right
- 3.7. The obligation to ensure effective performance monitoring and evaluation of the progressive realisation of this right.

#### 3.1 Progressive realisation

Article 2 of the Covenant provides the broad obligation that States parties are under to ensure each of the socio-economic rights contained therein:

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<sup>42</sup> See <https://aidc.org.za/unemployed-peoples-assembly-right2work-2017>.

## ICESCR, Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Similarly, the Constitution requires the state to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”<sup>43</sup> The CESCR has said that “[t]he principle obligation of States parties is to ensure the progressive realization of the exercise of the right to work.”<sup>44</sup> This obligation is based on a recognition that it may not be possible, due to resource constraints, a particularly difficult context (such as an economic crisis), or other pressures, to provide or guarantee the right to work immediately. Instead, the government is under an obligation to ensure the full realisation of this right *over time*, and therefore has some room for discretion in deciding on the most optimum measures to take to achieve decent work for all.

However, the obligation of progressive realisation should not be seen as depriving the right to work of any meaningful immediate content. Rather, as the South African Constitutional Court stated in *Grootboom*, the state must be able to show that it is moving as “expeditiously and effectively” as possible towards ensuring the full realisation of socio-economic rights.<sup>45</sup> In applying the ‘reasonableness test’ to assess government policy in relation to housing (and by extension, other socio-economic rights), the Constitutional Court found that the state must strike a “balance” between immediate steps to protect those most in need while also catering to “short, medium and long term needs.”<sup>46</sup> Similarly, the CESCR has said that the progressive realisation of the right to work “imposes a duty on each State party to take whatever steps are necessary to ensure that everyone is protected from unemployment and insecurity in employment and can enjoy the right to work as soon as possible.”<sup>47</sup>

Likewise, in terms of demonstrating progressive realisation, the Constitutional Court said that “it may not be sufficient to meet the test of reasonableness to show that the measures [adopted by the state] are capable of achieving a statistical advance in the realisation of the right ... If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”<sup>48</sup> In other words, the state must be able to show that it has taken concrete measures to ensure the rights of those most in need, which in relation to work, would be the unemployed and under-employed and those in insecure, precarious employment with poor working conditions. Thus, even if the unemployment rate were to fall according to statistical measures, this would not necessarily be sufficient for the state to meet its obligations to such people. Moreover, the court found that programmes should not be adopted haphazardly or only in response to crisis, but should represent a systemic response to pressing social needs.<sup>49</sup>

The obligation of progressive realisation also goes hand in hand with the obligation of non-retrogression,

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<sup>43</sup> Constitution of the Republic of South Africa, Section 27(2).

<sup>44</sup> ‘General Comment No. 18: The right to work’ Adopted 2005, Geneva, UN doc: E/C.12/GC/18 at para 19.

<sup>45</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (1) SA 46 (CC). 2000 (I I) BCLR 1169 (CC) at para 46.

<sup>46</sup> *Grootboom* at para 43.

<sup>47</sup> ‘General Comment No. 18 on the Right to Work’ (2005) at para 37.

<sup>48</sup> *Grootboom* at para 44.

<sup>49</sup> *Grootboom* at para 54.

which bars the state from taking any deliberate measures which have the intent or the effect of diminishing or otherwise violating an individual's right to work. Any retrogressive steps can only be justified in a proven emergency and in the context of the full use of available resources. The state must also be able to demonstrate that such steps were taken only after all other available options were considered. A retrogressive step in relation to access to socio-economic rights, including decent work must therefore be:

1. Temporary in nature, to cover only a period of crisis or emergency
2. Proved as necessary and proportionate (any other steps taken or not taken would have been even more detrimental to peoples' access to decent work)
3. Not discriminatory (i.e. not targeted at minority's or other vulnerable or disadvantaged groups)
4. Taken in the context of the provision of a social protection floor which protects those affected from experiencing poverty and other negative consequences as a result of the measures introduced.<sup>50</sup>

Other measures which the state must take immediately to ensure the right to decent work include the utilization of the maximum available resources towards the implementation of the right; ensuring that all measures taken are designed to achieve substantive equality and promote redress for past discrimination; are based on the principles of respect, protection, promotion and the fulfilment of the right to decent work for all; are undertaken transparently, with access to information for the public and participation by the public in the development and implementation of measures to achieve the right to decent work; and include the adoption of legislation that guarantees the right to decent work and provides for remedies and accountability where the right to decent work has been infringed.

### 3.2 Maximum available resources

The obligation in the ICESCR to use the maximum of available resources to progressively realise socio-economic rights is also conceptually identical to the requirement in the Constitution for the state to realise rights "within its available resources". The key word in the phrase is 'available' and what underpins the obligation is the recognition that the resources available to a country need to be utilised in a way that ensures the progressive realisation of these rights. This implies that government must strike a balance between generating and allocating the maximum of its available resources towards the progressive realisation of rights on the one hand, and on the other, ensuring the sustainability of those resources over time. Governments may have different views on how to strike this balance best, but there are some general principles that all should adhere to. These relate to the governments core functions of *generating*, *allocating*, and *spending* funds through the budget.

For a start, the government must maximise the resources available to it for social spending, especially where there are widespread deprivations of socio-economic rights, as is the case in South Africa. This should be achieved through progressive forms of taxation and revenue generation that draw from those sections of society that are most able to pay (higher income earners, the wealthy and profitable businesses, for example). The government budget is perhaps the most important mechanism for distributing resources in the country, therefore the government must allocate the resources it has raised in an equitable and progressive manner (towards the protection and fulfilment of rights for those who lack access to decent work, quality education, adequate housing and so on). In relation to decent work, the CESCR has said that the obligation to use the maximum available resources requires the state to take "effective measures to increase the resources allocated

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<sup>50</sup> Blyberg and Hofbauer 'The Use of Maximum Available Resources' in *Article 2 and Governments Budgets* (2014). Available at: [www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf](http://www.internationalbudget.org/wp-content/uploads/Article-2-and-Governments-Budgets.pdf).

to reducing the unemployment rate, in particular among women, the disadvantaged and marginalized”.<sup>51</sup>

Finally, the government must spend those allocated funds as effectively as possible, so that they achieve their intended purpose.

The CESCR has said that “States parties that are unwilling to use the maximum of their available resources for the realization of the right to work are in violation of their obligations under Article 6 [of the Covenant]”.<sup>52</sup> These obligations apply at all times and should be read with the obligations of progressive realisation and non-retrogression (see above) and the obligation to achieve substantive equality and redress (see below). Therefore, even during times of economic crisis or recession, the government must do everything it can to avoid cutting the funds available for socio-economic rights related policies and programmes, unless it can demonstrate that this will not affect people’s current enjoyment of these rights or result in cuts to goods and services that people rely upon.<sup>53</sup> This may be achieved through the adoption of compensatory measures or efficiency savings that counter any potential negative impacts of cuts.<sup>54</sup>

### **3.3 Substantive equality and redress**

Human dignity, equality and freedom are founding values of the Constitution.<sup>55</sup> The achievement of substantive rather than merely formal equality is required in Section 9 of the Constitution. This means that it is insufficient for the government to pass laws that on paper promise equality for all people. The state must take positive measures and actions that ensure the actual achievement of equality over time.

#### **Constitution of South Africa, Section 9, Equality**

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

Due to South Africa’s history of sex, race and class oppression and resulting inequalities, the Constitution recognises that positive discrimination and redress is necessary to achieve substantive equality. Policies, programmes and budget allocations for the right to decent work must therefore have both the intent and the effect of equalising access to decent work for those individuals and groups who were marginalised under apartheid and colonialism.

A similar position has been taken by the CESCR, which has recognised that “economic growth has not, in itself, led to sustainable development, and individuals and groups of individuals continue to face socio-economic inequality, often because of entrenched historical and contemporary forms of discrimination”.<sup>56</sup> The

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<sup>51</sup> CESCR ‘General Comment No. 18 on the Right to Work’ at para 26.

<sup>52</sup> CESCR ‘General Comment No. 18 on the Right to Work’ at para 32.

<sup>53</sup> McLaren ‘Within its available resources: socio-economic rights and the national budget’ (2016) Studies in Poverty and Inequality Institute, at 4. Available at: [www.spii.org.za](http://www.spii.org.za).

<sup>54</sup> Ibid.

<sup>55</sup> Preamble to the Constitution of the Republic of South Africa (1996).

<sup>56</sup> CESCR General Comment No. 20 at para 1.



ICESCR therefore also requires affirmative measures which ensure the “effective enjoyment” of socio-economic rights by all people. “Economic policies, such as budgetary allocations and measures to stimulate economic growth, should pay attention to the need to guarantee the effective enjoyment of the Covenant rights without discrimination.”<sup>57</sup> In relation to decent work, this means that States parties must take steps to eliminate “discrimination and unequal treatment in the private and public sectors of disadvantaged and marginalized individuals and groups.”<sup>58</sup>

### 3.4 Respect, protect, promote, fulfil

The Constitution and the ICESCR also require the state to respect, protect, promote and fulfil socio-economic rights. The CESCR has provided specific guidance on how these obligations can be upheld by the state.<sup>59</sup>

*The obligation to respect* requires the state not to remove or diminish people’s existing access to decent work. This could include ending access to work opportunities provided by a public employment programme, without establishing whether there are alternative employment or work opportunities available. A recent example of this in South Africa is the termination of the ‘Jozi@Work’ programme in 2017 by a newly elected Mayor from the country’s official opposition, the Democratic Alliance. Justifying the move, Mayor Mashaba claimed that under the previous administration of the ANC, the programme had been tarnished by corruption. However, over a year later (at the time of writing), the Mayor’s promise to replace Jozi@Work with a ‘fairer’ programme had not materialised, likely resulting in thousands of job losses for the beneficiaries of the programme as existing work contracts were allowed to expire.<sup>60</sup>

A failure to respect existing rights to work could also result from limiting the rights of some workers unfairly (such as domestic or agricultural workers) as all workers are entitled to decent working conditions. This may be the case with the exclusion of domestic and agricultural workers from the full amount of the proposed national minimum wage, without an in-built mechanism to achieve the full amount over time (see section 5.2.2 of this paper).

Forced labour would clearly be a violation of the right to respect an individual’s choice to work. So too would the abrogation of legislation respecting an individual’s right not to be unfairly dismissed. The obligation to respect the right to work would also be violated if the state failed to uphold this right in multi or bilateral agreements with other states or with multinational companies and investors.<sup>61</sup> Policies to liberalise trade and foreign investment are a case in point. If such policies result in the diminution of labour rights in the country, they would not pass the obligation to respect the right to decent work.

*The obligation to protect* requires the state to ensure that people are protected from infringements of the right to decent work by third parties (whether public or private). The state must take legislative and other measures which both incentivise and punish any individual, group or organisation (such as a business) that violates the rights of its employees, including the right to be treated equally and the right not to be unfairly dismissed.

*The obligation to promote* speaks to the role of the state as a facilitator of decent work, in particular through

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<sup>57</sup> CESCR ‘General Comment No 20: Non-discrimination in economic, social and cultural rights’ (2009) E/C.12/GC/20 at para 38.

<sup>58</sup> Ibid at para 31.

<sup>59</sup> Ibid at paras 32-36.

<sup>60</sup> Tankiso Makhetha ‘We feel betrayed, say Jozi@Work workers’ *Independent Online* 6 February 2017. Available at: [www.iol.co.za/news/south-africa/gauteng/we-feel-betrayed-say-joziwork-workers-7632297](http://www.iol.co.za/news/south-africa/gauteng/we-feel-betrayed-say-joziwork-workers-7632297).

<sup>61</sup> Ibid at para 72.



the provision of education, training and skills development programmes and as a provider of employment services. Failure to take the steps necessary to ensure that workers have access to these services on an equal basis, could constitute a violation of the obligation to promote the right to decent work.

*The obligation to fulfil* requires the state to take all necessary steps to ensure that access to decent work is consistently expanded over time, especially to marginalised individuals and groups. Examples of a violation of this obligation include:

- the government failing to adopt or implement a national employment and decent work policy designed to ensure the right to decent work for everyone;
- insufficient allocation or expenditure of public funds intended to fulfil the right to decent work, especially for marginalised people;
- the failure to monitor the progressive realisation of the right to decent work and take corrective actions when necessary to ensure that access to decent work is continuously expanded.

### **3.5 CASE STUDY on the duty to respect the right to work:**

#### **The Right to Work and the Right to the City<sup>62</sup>**

##### **Gaspar Garcia Centre for Human Rights, Sao Paulo, Brazil**

Like many informal workers in the urban centres of South Africa, street vendors in Brazil face a number of challenges simply to survive. Gaspar Garcia describe the daily life of a street vendor in Sao Paulo as ‘marked by invisibility, precariousness, prejudice and violence’. This exclusion and marginalisation continued despite sustained GDP growth, increased formal employment, real wage increases and a general improvement in the protection of rights (including social rights) in Brazil in the 2000s. Yet, in 2009, almost half (48.2%) of the working age population in Brazilian cities remained informal workers. In Sao Paulo, it was estimated that there were 138 000 street vendors in 2011. Gaspar Garcia points to the absence of appropriate public policy for labour and housing, which has prioritised the interests of established businesses and middle-class residents over working-class and poor families. This skewed public policy environment has been a major driver of widespread evictions and an increase in precarious work.

The Gaspar Garcia<sup>63</sup> Centre for Human Rights (Gaspar Garcia, the Centre) is a non-profit organisation based in Sao Paulo, Brazil. Founded in 1988, Gaspar Garcia works with informal workers’ struggling to claim their rights to work and participate in policy-making.

In 2011, Gaspar Garcia launched the ‘Informal Work and Right to the City Project’, with support from Christian Aid and the European Union. The aim of this project is to improve the working conditions of street vendors by securing their right to work and their right to the city. To achieve this, Gaspar Garcia set out to build the capacity of the street vendors, organise public spaces for discussion, and improve the visibility of the traders in public policy processes, through raising awareness of informal workers and the human rights violations that they are subjected to, while also promoting their access to other basic rights and services.

<sup>62</sup> This case study is based on a book produced by Gaspar Garcia entitled ‘Street Vendors and the Right to the City’ (2014) Sao Paulo as well as an interview with the project team at Gaspar Garcia.

<sup>63</sup> Gaspar Garcia Laviana was a Spanish priest and poet who fought and died for the defense of human rights in Nicaragua.

Gaspar Garcia describes the main problems experienced by street vendors as:

violence by police and city inspectors, and ... harassment on the part of some commercial retailers. Furthermore, these workers suffer various types of health problems, such as high blood pressure, headaches, heart problems, stomach pains, physical trauma related to posture, including back and leg pain due to lengthy periods on foot. Also identified were problems suffered by the workers due to lack of access to personal hygiene, including public bathrooms during their workday. One noteworthy aspect are the various problems related to stress caused by fear of having their merchandise seized by police or city inspectors. (10)

This situation remains in part because only 5 137 of the estimated 138 000 street vendors in Sao Paulo in 2011 had been issued with licenses allowing them to trade (down from 23 000 in 2001). This means that around 96% of street vendors have no licence permitting them to conduct their trade. In this sense, participatory building of a public policy that can encompass this segment is a central factor in the struggle of informal workers' groups.

The Centre set out to build relationships with local street vendors, in particular women, with a view to building their levels of self-esteem, consciousness and organisation as a collective. The Centre viewed these tasks as an essential first step towards the traders being taken seriously as legitimate workers with a greater say in public policy debates and decision-making processes.

This advocacy was based partly on the right to work that is contained in the Brazilian Constitution.<sup>64</sup> This right ensures that “the practice of any work, trade or profession is free, observing the professional qualifications which the law shall establish”<sup>65</sup> and provides for a number of related rights for workers, including the right to “employment protected against arbitrary dismissal”.<sup>66</sup> In reality, “The existence of the right to work in the Constitution as a social right hasn’t guaranteed the universalisation of access to formal employment and adequate working conditions. Furthermore, this right is also a means through which other [rights] can be reached: right to adequate housing, quality health care, full education, etc. The future of these workers and their families is often compromised by the fact that they aren’t recognised as citizens deserving rights.”

The workers wanted to establish a link between the Constitutional right to work and the right to dignity, as well as the associated rights of occupation and use of urban public spaces for the purpose of conducting a trade, and the right to participate in processes of urban transformation. They refer to this in short as the collective ‘right to the city’.

In 2012, the City of Sao Paulo revoked all licenses for street vendors by annulling the existing regulatory framework for street vending. This was part of a broader attempt since at least 2011 to remove all street vendors from the city. The repressive move by the City led to a legal challenge by Gaspar Garcia with the State Public Defender based on the Constitutional right to work and the right to the city. The vendors were successful in court and those who had licenses before the repeal of the regulations were allowed to resume trading. In their majority ruling, the judges pointed to the socio-economic challenges faced by street vendors and the need to protect their rights to their livelihoods.

<sup>64</sup> 3<sup>rd</sup> Edition, as amended, 2010. Available at: <http://english.tse.jus.br/arquivos/federal-constitution>.

<sup>65</sup> Ibid, Chapter I, Article XIII.

<sup>66</sup> Ibid, Chapter III, Article 7 I.

In order to advocate for greater changes to the conditions of street vendors, a Street Vendors Forum was established in response to the City's crack-down, in partnership with Gaspar Garcia as well as other organisations and trade unions. Advocacy by the Forum included regular meetings, growing the membership of the forum, and holding weekly protests against the local government (which responded with police repression), while simultaneously pursuing dialogue with public officials and getting coverage of their struggle in the media.

Success in the courts gave the Street Vendors Forum the confidence to put together a 'Municipal Street Commerce Plan' for the City of Sao Paulo, which they presented to candidates in the 2012 municipal elections. In 2013, a new City Mayor from the Workers Party (PT) agreed to meet with the Forum and listen to their ideas in the plan. Subsequently, a Tripartite Working Group on Street Commerce was set up, composed of representatives of the street vendors, public authorities, and organised civil society. In the words of Gaspar Garcia: "After many years of persecution and repression, there was finally a channel for dialogue that brought hope."

However, it is important to note that the dialogue with progressive municipal governments, such as the Workers Party (2013 to 2016) was found to contribute to advancement of the rights of informal workers, only to the extent that these workers were organised at the grassroots level. In the absence of such organisation, these dialogues would have borne little fruit.

Gaspar Garcia also set up an Informal Worker Reference Centre where workers are given assistance and their demands are forwarded to the relevant public organs. Training was also conducted by the Centre, focusing on popular education and political organisation.

As the project progressed, it became clear that within this universe of work precariousness, women were the most vulnerable. Female workers were often exposed to sexism in the spaces they occupied, and constant harassment. Being primary care-givers also weakened their possibilities for self-organizing, compromising their participation in collective spaces.

In response to this challenge, in 2014, organising for the rights of female street workers became a priority. The work aimed at supporting women's understanding and capacity to tackle the different types of violence to which they were exposed in the streets, as well as to challenge sexist power relations, to catalyse women as active actors in the struggle for their rights, building new work paradigms, from a broader perspective.

Gaspar Garcia continues its work with these traders, strengthening dialogue spaces, and building a sense of belonging between informal workers and the city, based on their knowledge of the terrain in which they work and the services they provide to the population. While street vendors in Sao Paulo have not yet secured all of their rights, the improvements in their conditions that has resulted from their organising holds some important lessons which may be applicable to similar struggles in South Africa:

- **Importance of popular education.** Knowing about your Constitutional rights (including the right to work) is useful for building a campaign for realising those rights.
- **Organising as a collective** is crucial to amplify individual voices and defence mechanisms into a greater whole that is represented in a broader political process and can advocate for positive changes in laws, policies and attitudes.
- **Conducting a systematic campaign** that is based on evidence and includes protest and awareness

raising but can also utilise legal options, where necessary. In the case of the latter, the right to work, with its profound link to urban justice, the right to dignity, to livelihoods, to housing and to participation in public policy-making, provides a useful weapon for informal traders.

### **3.6 Transparency, access to information and public participation**

Section 195 of the Constitution provides the basic values and principles governing public administration in South Africa. These include:

- Transparency must be fostered by providing the public with timely, accessible and accurate information;
- People's needs must be responded to, and the public must be encouraged to participate in policy-making; and
- Public administration must be accountable.

The Constitutional Court confirmed these principles in *Grootboom*<sup>67</sup> and has stressed their importance on numerous other occasions. Similarly, the CESCR has emphasized that the “promotion of employment also requires effective involvement of the community and, more specifically, of associations for the protection and promotion of the rights of workers and trade unions in the definition of priorities, decision-making, planning, implementation and evaluation of the strategy to promote employment.”<sup>68</sup> The development and implementation of right to decent work policies and programmes that fail to meet these fundamental principles of good governance will therefore render those policies and programmes subject to challenge by those whose rights are affected, as well as risk failing to respond adequately to social needs.

### **3.7 Legislative measures, remedies and accountability**

Ratification of the International Covenant requires government to begin a process of ensuring the recognition of the right to decent work within the country's legislative framework and national development plans. This is necessary not only as part of the planning, coordination and implementation of the right to decent work, but also to ensure that remedial measures are available to rights-holders. Courts and other forums for adjudication or arbitration must be empowered through legislation to provide such remedies, which according to the CESCR, “may take the form of restitution, compensation, satisfaction or a guarantee of non-repetition.” For example, someone who is unfairly dismissed must be able to have their case heard by an independent forum that is capable of enforcing remedial orders, such as the restitution of the person's job or other compensation for the affected worker. Such legislation must meet the requirements set out in this chapter in order to ensure accountability for the implementation of the right to decent work.

### **3.8 Performance monitoring and evaluation**

Studies in Poverty and Inequality Institute (SPII) has consistently argued that effective monitoring and evaluation of the performance of the state in relation to its socio-economic rights obligations is critical to

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<sup>67</sup> See para 49.

<sup>68</sup> ‘General Comment No. 18 on the Right to Work (2006) at para 42.

ensure the progressive realisation of these rights.<sup>69</sup> Such monitoring must be based on a sound rights-based methodology that includes analysis of:

- the content of the right in question (i.e. the obligations it places on the state and the concomitant rights it entitles people to);
- the reasonableness of government policies and budget allocations towards the realisation of the right; and
- the development of outcome and impact indicators that provide information on the extent to which people enjoy access to the right and the quality of that access, and how this has changed over time.

The CESCRR also places great weight on the development of ‘right to work indicators’ both as a means of accountability for policy implementation and performance, but also as an essential part of the state’s reporting obligations under the Covenant. This requires reporting every five years to the CESCRR on the steps taken and progress made in realising the rights enshrined in the Covenant. Guidance by the CESCRR in relation to a performance monitoring and evaluation system for the right to decent work includes taking measures which:

- (a) establish national mechanisms to monitor implementation of employment strategies and national plans of action;
- (b) contain provisions on numerical targets and a time frame for implementation.
- (c) provide a means of ensuring compliance with the benchmarks established at the national level and;
- (d) ensure the involvement of civil society, including experts on labour issues, the private sector and international organizations throughout the planning, monitoring and evaluation process.<sup>70</sup>

### 3.9 Conclusion

Ratification of the ICESCRR in 2015 committed the South African government to implementing a right to decent work for all in South Africa. This commitment comes with overarching obligations that together aim to ensure that the right to decent work is effectively implemented and enforced in the country. These include the obligations to:

- Take legislative and other measures to ensure the progressive realisation of the right to decent work
- Utilise the maximum available resources towards the fulfilment of decent work for all
- Achieve substantive equality in access to decent work
- Respect, protect, promote and fulfil the right to decent work
- Ensure that there is transparency, access to information and public participation in all efforts to realise the right to decent work
- Provide remedies (including in legislation) to ensure accountability for failures to ensure the right to decent work
- Establish an effective performance monitoring and evaluation system which can identify both successes as well as challenges to the progressive realisation of this right.

The right to decent work includes a positive right to work, as well as individual and collective rights at work. The remaining chapters in this paper will consider whether current policies, programmes and budget

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<sup>69</sup> See Dawson and McLaren ‘A Framework for Monitoring and Evaluating the Progressive Realisation of Socio-Economic Rights in South Africa’ (2015) Studies in Poverty and Inequality Institute. Available at [www.spii.org.za](http://www.spii.org.za).

<sup>70</sup> ‘General Comment No. 18 on the Right to Work (2006) at para 38.

allocations are sufficiently geared towards ensuring that access to decent work in each of these areas is expanded and equally enjoyed.

## 1. Rights to work<sup>71</sup>

### Core obligations:

A guarantee of the right to decent work in national legislation, with positive measures designed to fulfil this right and remedies for those who have experienced an infringement of their rights

Positive measures to ensure that people affected by past discrimination (i.e. Black South Africans, women and people with disabilities) have equal access to employment opportunities and are equitably represented in the workforce, including affirmative action

Public participation, transparency and access to information for the public in the development, implementation and monitoring and evaluation of employment policies and programmes

A performance monitoring system that includes indicators and benchmarks for tracking and reviewing progress towards the achievement of universal access to work

### ✓ **A guarantee of the right to the opportunity to make a living through work which is freely chosen or accepted**

After a period of growth following the first democratic elections and the implementation of the Reconstruction and Development Programme (RDP), the government embarked on a macro-economic stabilisation programme known as GEAR<sup>72</sup> from 1996 onwards in order to ensure the payment of debt and other financial obligations inherited from the apartheid government.<sup>73</sup> While in the decade that followed rates of growth generally remained high, not enough jobs were created and policy-makers began to realise that unemployment in South Africa was structural and therefore would not be solved by economic growth and macro-economic stabilisation alone.

Attempting to distance himself from the policies which had led to ‘jobless growth’ during the Mbeki years, President Jacob Zuma said in his inaugural State of the Nation Address in June 2009 that “The creation of decent work will be at the centre of our economic policies.”<sup>74</sup> Shortly after in 2010, Minister for Economic Development, Ebrahim Patel, launched a ‘New Growth Path’.<sup>75</sup> This was to provide a framework for the

<sup>71</sup> In Chapters 4, 5 and 6 – unless otherwise stated – statistics are drawn from McLaren ‘Indicators to Monitor the Progressive Realisation of the Right to Decent Work in South Africa’ (2017) Studies in Poverty and Inequality Institute Working Paper 15. Available at: [www.spii.org.za/index.php/ser-monitoring-tool/the-right-to-a-decent-work](http://www.spii.org.za/index.php/ser-monitoring-tool/the-right-to-a-decent-work).

<sup>72</sup> Growth, Employment and Redistribution.

<sup>73</sup> Patrick Bond ‘From Racial to Class Apartheid: South Africa’s Frustrating Decade of Freedom’ (2004) *Monthly Review* Vol. 55 No. 10 (March). Available at: <https://monthlyreview.org/2004/03/01/south-africas-frustrating-decade-of-freedom-from-racial-to-class-apartheid>.

<sup>74</sup> President Jacob Zuma ‘2009 State of the Nation Address’. Available at: [www.sahistory.org.za/archive/2009-president-zuma-state-nation-address-3-june-2009-after-national-elections](http://www.sahistory.org.za/archive/2009-president-zuma-state-nation-address-3-june-2009-after-national-elections).

<sup>75</sup> <https://www.gov.za/about-government/government-programmes/new-growth-path> and <http://www.economic.gov.za/communications/51-publications/151-the-new-growth-path-framework>

“restructuring of the South African economy to improve its performance in terms of labour absorption as well as the composition and rate of growth.”<sup>76</sup> The framework identified public works programmes as being a key driver of job creation over the next decade.

President Zuma also appointed a National Planning Commission in 2010 to draft a national development plan that would guide the government’s activities towards transformation in the country. The first of the nine ‘primary challenges’ set out in the Commission’s *Diagnostic Report* was “Too few people work”. The final National Development Plan (NDP) was launched in 2011.<sup>77</sup> The NDP recognised that unemployment in South Africa was structural (rather than cyclical) and that it was necessary to tackle unemployment, poverty and inequality through a ‘developmental state’.

However, since the NDP became the focus of government action, unemployment has increased for both men and women, each of South Africa’s population groups except for Whites, and for all age groups. Only three out of the nine provinces – Eastern Cape, Limpopo and North West – managed to reduce their unemployment rate between 2013 and 2017. Yet these provinces experience outward migration of working-age people which can lower the number of people who would be counted in the labour force, thus lowering the unemployment rate.<sup>78</sup> With 9.3 million people out of work, of which 5.6 million have not worked in the past five years, unemployment clearly remains a major challenge for South Africa.

Key indicators					
	2013	2017		2013	2017
Employment-to-population ratio	42.7%	43.5%	Number of people employed	14.9 million	16.2 million
Unemployment rate (expanded)	35.3%	36.5%	Number of people unemployed	8.1 million	9.3 million
Percentage of the unemployed in long-term unemployment (1 year or more)	66.0%	66.5%	Number of work-seekers discouraged from looking for work due to a lack of employment opportunities	2.3 million	2.3 million
Eastern Cape unemployment rate	44.4%	44.0%	Limpopo unemployment rate	39.9%	37.6%
Free State unemployment rate	39.9%	41.1%	Northern Cape unemployment rate	35.6%	44.6%
Gauteng unemployment rate	29.7%	32.5%	North West unemployment rate	42.6%	41.8%
KwaZulu-Natal unemployment rate	37.7%	40.7%	Western Cape unemployment rate	24.7%	24.7%

This leaves major questions about what new policies are necessary to reverse this trend.

**The ICESCR requires a guarantee of the right to the opportunity to gain ones living through work which is freely chosen or accepted in national legislation, with positive measures designed to fulfil this right and remedies for those who have experienced an infringement of this right**

Though the Constitution recognises a number of socio-economic rights, a positive right to work is not one of them. The right to work is also not guaranteed in any legislation and since the ratification of the Covenant, no steps have been taken by the government to rectify this. This means that there is no legislated remedy available

<sup>76</sup> Department of Economic Development ‘The New Growth Path: Framework’ (2011) at 6. Available at: [www.economic.gov.za/communications/publications/new-growth-path-series/download](http://www.economic.gov.za/communications/publications/new-growth-path-series/download).

<sup>77</sup> At p121. Available at: [www.brandsouthafrica.com/wp\\_download\\_viewer.php?file=wp-content/uploads/brandsa/2015/05/02\\_NDP\\_in\\_full.pdf](http://www.brandsouthafrica.com/wp_download_viewer.php?file=wp-content/uploads/brandsa/2015/05/02_NDP_in_full.pdf).

<sup>78</sup> McLaren (2017) at 16.



to people who are unable to access decent work. .

The inclusion of justiciable socio-economic rights in the Constitution has led to the development of a rich and diverse socio-economic rights case law in South Africa. However, the courts have had much less experience adjudicating rights or obligations which are not expressly provided for in the Constitution (which is the supreme law) or in national legislation. One example where the Constitutional Court was asked to consider if the government could be held to international human rights law obligations that are not contained in the Constitution or in national legislation was in the *Grootboom*<sup>79</sup>. The applicants asked the court to consider whether the national Department of Human Settlements had ‘minimum core obligations’ under section 26 and section 28(1)(c) of the Constitution.<sup>80</sup> The concept of minimum core obligations was established by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 3: The Nature of States Parties’ Obligations.<sup>81</sup> The CESCR stated that “a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [in the Covenant] is incumbent upon every State Party.”<sup>82</sup> However, the Constitution Court was not convinced, finding in its judgement that “we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution. It is not in any event necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core content of a right.”<sup>83</sup> Instead, “the real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable.”<sup>84</sup> This established the court’s preferred method of adjudicating socio-economic rights known as ‘the reasonableness test’.<sup>85</sup>

The Court came to reject the argument for minimum core obligations for the right to adequate housing despite the requirement in Section 39(1) of the Constitution that “When interpreting the Bill of Rights, a court, tribunal or forum – (b) must consider international law; and (c) may consider foreign law.” However, at the time of the case (2000), South Africa had not ratified the ICESCR and was therefore not a State party to the Covenant. The rights in the Covenant were therefore not binding in South Africa: the courts had only to consider them.

Now that the ICESCR has been ratified, its provisions are binding. This means that, if presented with a litigant (such as a person in long-term unemployment) who wanted to claim their ‘right to work’, a determination would have to be made as to whether a) government’s failure to recognise the right to work in law or policy was consistent with its obligations under the Covenant, b) whether a right to work could be read into existing Constitutional provisions (such as human dignity), combined with its obligations under the Covenant, and/or c) whether provisions in national legislation and policy do in fact give effect to the government’s right to work obligations (they pass the reasonableness test, for example), even if the right itself is not explicitly recognised.

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<sup>79</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (1) SA 46 (CC). 2000 (1 I) BCLR 1169 (CC).

<sup>80</sup> Section 26 (1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. Section 28(1) Every child has the right ... (c) to basic nutrition, shelter, basic health care services and social services.

<sup>81</sup> Adopted 1990, UN Doc. E/1991/23. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4758&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCESCR%2fGEC%2f4758&Lang=en).

<sup>82</sup> Ibid at para 10.

<sup>83</sup> *Grootboom* at para 33.

<sup>84</sup> Ibid.

<sup>85</sup> Ray ‘Policentrism, Political Mobilization, And The Promise Of Socioeconomic Rights’ (2009) 45 Stan. J. Int’l L. 2009 at 159.



- Government's failure to recognise the right to work in national legislation is inconsistent with its obligations under the Covenant

On the first question, the CESCR is quite clear, stating that obligations to fulfil the right to work include “the obligation to recognize the right to work in national legal systems and to adopt a national policy on the right to work as well as a detailed plan for its realization.”<sup>86</sup> This is because legislation is required to support and ground government's policies and programmes to fulfil the right to work in law. Legislation is also an essential tool to promote and ensure the effective administration, coordination and budgeting for those policies and programmes. Moreover, “recognizing the right to work into the domestic legal order ... significantly enhances the scope and effectiveness of remedial measures”<sup>87</sup> without which, the justiciability of the right to work would be impaired. This is because the avenues open to potential litigants wishing to claim their positive right to work would be limited, and courts would have to read the right to work indirectly into South African law, rather than draw from and evaluate the right to work in terms of designated legislation.

A Decent Work Country Programme for South Africa covering the years 2010 to 2014 was launched at the National Economic Development and Labour Council (Nedlac)<sup>88</sup> in 2010. Discussions on the content of the programme between representatives of organised business, organised labour, government (through the Department of Labour) and civil society organisations represented at Nedlac were facilitated by the ILO. The programme outlined four overarching priorities which included the “Promotion of employment creation”.<sup>89</sup> However, the programme made no mention of the right to work. Moreover, its commitments in relation to promoting employment creation were limited to indirect actions such as strengthening macro-economic policy and enhancing national capacity to analyse data on decent work and loosely stated outputs such as “the adoption of labour intensive methods to implement sustainable employment-intensive programmes that also integrate rights, social protection and social dialogue”.<sup>90</sup> The programme expired in 2014 and no analysis has emerged at the time of writing from either Nedlac or the ILO on the extent to which the outcomes aspired to in the programme have been met. Neither have plans been announced on a follow-up to the programme. The programme thus falls short of a serious policy statement or commitment by government for implementing a right to decent work in South Africa.

The government has dealt briefly with the question of recognising the right to work in South Africa in paragraph 66 of its Initial Report to the CESCR.<sup>91</sup> However, the paragraph reveals only that government is undecided about what to do on this question, and may not yet have given significant thought or attention to the subject. The paragraph starts by recognising that there is no designated right to work in the Constitution and then expresses two concerns about taking steps now to recognise the right to work. The first is that “a constitutional right to work could permit individuals to utilise their freedom to contract in order to choose work at a standard below legislated basic conditions of employment or otherwise undermine legislation prescribing basic working conditions”. However, the ICESCR makes it clear that the right to work is a right to decent work which respects fundamental rights (see section 2.1 of this paper). Were the right to work to be

<sup>86</sup> General Comment No.18 on the Right to Work (2005) at para 26.

<sup>87</sup> Ibid at para 49.

<sup>88</sup> Nedlac is the nation's statutory body for social dialogue.

<sup>89</sup> ‘Republic of South Africa Decent Work Country Programme 2010 to 2014’ Nedlac/ILO (29 September 2010) at 23 . Available at: [www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis\\_ababa/---ilo-pretoria/documents/genericdocument/wcms\\_227655.pdf](http://www.ilo.org/wcmsp5/groups/public/---africa/---ro-addis_ababa/---ilo-pretoria/documents/genericdocument/wcms_227655.pdf).

<sup>90</sup> Ibid at 27.

<sup>91</sup> Government of the Republic of South Africa ‘Initial Report by South Africa to the Committee on Economic, Social and Cultural Rights’ (2017) UN Doc: E/C.12/ZAF/1. Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2f1&Lang=en).

legislated in South Africa as a right to work at a standard below basic conditions of employment, this would be immanently challengeable as inconsistent both with the content of the right to work established by the ICESCR as well as with the constitutionally prescribed rights to fair labour practices and substantive equality.

The second concern raised in the government's report is that "the advancements made with respect to the realisation of the right to have access to social security may be lost by virtue of the a (sic) constitutional focus on work." However, the paragraph continues by stating that "within a comprehensive social security framework, the right to work may not necessarily undermine the right to access social security" and that "[a] well-designed social security system will, by definition, complement the right to work".<sup>92</sup> The paragraph concludes by stating that, while "existing social assistance measures [are] meant to alleviate poverty among vulnerable groups ... a gap exists in relation to coverage of unemployed adults aged between the ages of 18 – 59." Recognition of this gap implies an understanding on the part of the state that the rights of millions of unemployed South Africans to work and to access social security are not presently protected or fulfilled. However, no commitment is made to recognise the right to work in national policy or legislation, or to develop a plan for the progressive realisation of the right to work (or to ensure that access to social security is expanded to those who currently lack social insurance or protection). This represents a violation of the state's obligations in article 2, 6 (and 9) of the Covenant read together with the CESCR's General Comment No. 18 on the Right to Work.

The state's report does go on to provide information on some of the legislation, policies and programmes which are designed to increase access to employment. These will be discussed below, after consideration of what position the South Africa's courts might take on the question of the recognition of a right to work in South Africa.

**South African courts would likely recognise a positive right to work if challenged to do so due to its provision in the Covenant and other international human rights law (such as the African Charter), foreign law (in particular, India) and because of its close relationship to human dignity**

*Dawood* provides evidence of the South African courts willingness to recognise rights even if they are not explicitly provided for the Constitution. In that case, the Constitutional Court found that the right to family life, although absent in the Constitution, is nevertheless a constitutionally protected right.<sup>93</sup> This was because the right to family life is recognised in multiple human rights law instruments (including the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples' Rights, both of which South Africa has ratified) as well as because the right to family life forms an inseparable part of the right to dignity contained in section 10 of the Constitution.

Another case, *South African Informal Traders Forum* adds further weight to the proposition that South African courts would be willing to recognise a right to work under certain conditions. In that case, the court found that "the ability of people to earn money and support themselves and their families is an important component of the right to human dignity".<sup>94</sup> Through this recognition, the court ordered the City of Johannesburg to allow informal traders to continue conducting their business (i.e. to respect their right to work). However, as the following case study illustrates, the court did not touch upon any positive obligations the state may have to promote and fulfil the more positive components of the litigant's right to work.

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<sup>92</sup> Ibid at para 66 and footnote 56.

<sup>93</sup> In *Dawood and Another v Minister of Home Affairs and Others* (2000) CCT35/99 at paras 29-36.

<sup>94</sup> *South African Informal Traders Forum and Others v City of Johannesburg and Others* (2014) ZACC 8 at para 31.

## ✓    **Towards a right to work in South Africa: CASE STUDY**

### **Operation Clean Sweep and street traders' struggle for rights in Johannesburg**

The South African Informal Traders Forum (SAITF) and the South African National Traders Retail Association (SANTRA) are two prominent street trader organisations in Johannesburg. Together, the two organisations used the courts to resist the eviction of street traders from their places of work. Their struggle, which is discussed briefly below, reflects both the advantages and shortcomings of attempting to secure the right to work through litigation.

As in many cities across the global south, antagonisms between local government and varying forms of informality are well established in Johannesburg. These antagonisms have conspired in recent years to exclude street traders, often violently, from the economic benefits of plying their trade in the inner city.

During the most notorious boiling over of these antagonisms, the City of Johannesburg evicted street traders from the sidewalks and markets of the inner city *en masse* in a mayoral campaign during September and October 2013 dubbed “Operation Clean Sweep”. The scale of the operation was reflected in the devastating costs, social and financial, incurred by street traders, as well as in the tremendous institutional effort and cooperation operationalised by the City.

While there are no authoritative figures, most estimates suggest that between 6000 and 8000 street traders were evicted during the operation and were stopped from returning to their businesses for three months (Webster 2015), forcing many of them into debt in order to meet their and their households' needs (SERI 2016). The evictions and subsequent closure of trading spaces were coordinated and carried out by a multi-disciplinary team consisting of the Department of Public Safety, the Johannesburg Metro Police Department (JMPD), Johannesburg Roads Agency (JRA), City Power, Joburg Water, the Department of Environmental Health, the Johannesburg Property Company (JPC), the national Department of Home Affairs (in order to process any undocumented foreign national street traders) and the national South African Revenue Service (SARS) (in order to address the issue of any counterfeit goods being sold on the streets) (Pernegger 2016: 194).

The first seeds which would eventually germinate into Operation Clean Sweep were buried in a development planning report published on 26 October 2012 by the office of the Member of the Mayoral Committee (MMC) responsible for Development Planning and Region F (Johannesburg's inner city) and discussed at the City's Mayoral Lekgotla, under the then ANC mayor Councillor Parks Tau. The report was titled ‘Report on the Status of the Inner City (Region F) and the Proposed Initiative and Programme to Address Current Challenges’, and had the “strategic thrust” of “a well-governed, managed and liveable City of Johannesburg” (Office of the MMC 2012: 1).

The report was born of a series of visits to the inner city by MMCs of various City departments, which had been conducted in “response to complaints from pedestrians, formal businesses and other members of the public in the Inner City” (Pernegger 2016: 194). The MMC, “mov[ing] forward into the new financial year, armed with business plans and a forward looking approach” sought to embark on a strategy to “combat lawlessness, educate and collaborate with... citizens and finally change the face and aesthetics of the Inner City for the better” (Office of the MMC 2012: 1).

The City operationalized the largely punitive strategies contained in the report a year later during Operation Clean Sweep, clearing the inner city of the thousands of street traders who made a living there, and keeping them from their businesses for three months. After numerous failed engagements with the City, SAITF and SANTRA enlisted the courts in their struggle to have their members returned to their places of work. The former approached a public interest litigation NGO, the Socio-Economic Rights Institute of South Africa (SERI), for assistance, and the latter enlisted the services of private lawyers.

After the High Court initially claimed that the traders' case did not satisfy the conditions for an urgent hearing, the Constitutional Court, South Africa's apex court, extraordinarily heard the case on an urgent basis. The court lambasted Operation Clean Sweep as an act of "humiliation and degradation", which it brought to an end by interdicting the City from interfering with traders at their places of work. Traders were allowed to return to their stalls immediately.

Despite the right to work not being contained in the Constitution, the judgment went some way to embedding the ability to make a living in other rights in the Constitution. The court suggested that "the ability of people to earn money and support themselves and their families is an important component of the right to human dignity" and that traders' being removed from their businesses had "a direct and on-going bearing on the rights of children, including their direct rights to basic nutrition, shelter and basic health care services."

However the judgment largely missed the opportunity to develop a more robust content to a right to work. The court limited its pronouncements largely to the legality of the City's actions instead of the intentions of Operation Clean Sweep. The judgment made regular references, for instance, to the concessions which the City made during the hearing, such as the City's recognition that it "had gone about achieving its objectives in flagrant disregard of the traders' rights". The court held that "the City's new scheme to relocate the traders was, in any event, unlawful because it had not followed the steps required of it" by the relevant legislation.

The judgment thus empowered street traders in that it ended Operation Clean Sweep, facilitating their return to their places of work after months without income. It also compelled the City to engage with traders regarding any future plans for the inner city which might affect them. But by engaging primarily with *how* rather than with *why* Operation Clean Sweep was conducted, the Constitutional Court did not bolster the precarious rights of informal street traders. Indeed, we are left to assume that if thousands of street traders were evicted legally, i.e. in line with the existing legislation – which is hardly inconceivable – the City would not be infringing on their rights.

During Operation Clean Sweep, the City's approach saw space, the built environment, physical amenities, and the ability of private business to utilise them effectively redeveloped at the expense of people's livelihoods. Similar approaches elsewhere in the global south have been called the "aestheticisation of poverty" (Roy 2004), and is an articulation of "high modernism": the search for rational order in aesthetic terms, the belief that an efficient city is one that looks regimented and orderly (Scott 1998). The City's approach, both preceding and during Clean Sweep, was informed by a concession to formal businesses and property owners, equating urban upgrading to aesthetic improvement rather than the improvement of livelihoods (Webster 2015).

Since Operation Clean Sweep, the likelihood of the City pursuing any inclusive and progressive approaches to the management of informal street trade seem unfortunately slim. In the long term, the City is still intent

on ridding the inner city's sidewalks of street traders. The consultation demanded by the Constitutional Court's judgment has also calcified what were already strained relationships between street trader organisations and the municipality. While the turn to litigation ended months without work for Johannesburg street traders, which drove many of them into debt, and guaranteed them a theoretical seat at the table when the City is planning for the management of informal street traders, the Constitutional Court missed a crucial opportunity to bolster the rights to public spaces for the purposes of informal livelihoods.

Beyond South Africa, the right to work has also been legislated in India and has played an important role in the struggles of informal traders for rights in Brazil (see the Case Study in the previous chapter). For now it is important to note that section 39(1) of the Constitution also requires that "When interpreting the Bill of Rights, a court, tribunal or forum – (c) may consider foreign law." These examples, coming as they do from countries with which South Africa has been building stronger relations over the past two decades through, in particular, participation in the 'BRICS'<sup>95</sup> forum, would likely provide persuasive arguments that the right to work is a crucial component not only in human rights law, but in developmental processes more broadly.

*Is a positive right to work established by any legislation, policies or programmes?*

Although the government does not argue in its Initial Report to the CESCR that a positive right to work is effectively established by the range of positive interventions it has undertaken to promote and fulfil access to work, it does suggest that these represent a comprehensive response to the ongoing challenge of high unemployment.<sup>96</sup> Among the legislation, policies and programmes mentioned are the:

- Labour Relations Act of 1995
- Basic Conditions of Employment Act of 1997
- Commission for Conciliation, Mediation and Arbitration (CCMA)
- Labour Courts
- Employment Tax Incentive Act of 2013
- Further Education and Training Colleges Act of 2006
- Skills Development Act of 1998
- Employment Service Act of 2014
- Expanded Public Works Programme
- Community Works Programme

Some of these interventions are considered in the following sections of this paper. The programme which most closely provide a positive right to work, however, is the Expanded Public Works Programme.

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<sup>95</sup> BRICS stands for Brazil, Russia, India, China and South Africa.

<sup>96</sup> Government of the Republic of South Africa (2017) UN Doc: E/C.12/ZAF/1 at para 69.

## ✓ Towards a right to work in South Africa: the Expanded Public Works Programme (EPWP)

### Origins and objectives

The EPWP emerged at the Growth and Development Summit of 2003 hosted by President Thabo Mbeki and convened by the social constituencies of Nedlac. The Summit Agreement adopted four ‘themes’ with the first being “more jobs, better jobs, decent work for all”.<sup>97</sup> Within that theme, Expanded Public Works Programmes (EPWPs) were identified as one of seven priority immediate interventions for the government.<sup>98</sup>

EPWPs would provide “income relief through temporary work for the unemployed to carry out socially useful activities” while ensuring that participants benefited from “training and work experience, which should enhance their ability to earn a living in the future.”<sup>99</sup> In line with the Summit Agreement pledge to halve unemployment by 2014, EPWPs were to be “large enough to have a substantial impact on unemployment”.<sup>100</sup>

The three main objectives of EPWPs have thus remained as follows:<sup>101</sup>

- **Labour absorption**, by:
  - Providing temporary paid work for unemployed people; and
  - Ensuring that EPWP workers also benefit from training which enhances their skills thus improves their employability.
- **Poverty alleviation**, by providing access to a source of income (a stipend) for unemployed people, who would otherwise have little or no access to social security or protection.
- **Support national development** in the following sectors:
  - **Infrastructure**: by contributing to government funded infrastructure projects
  - **Environment and culture**: by contributing to public environmental and culture programmes
  - **Social**: by creating work opportunities in public social programmes, particularly Home Community Based Care and Early Childhood Development, including for existing volunteers who may not be receiving any payment for their existing work.
  - **Non-state**: by creating work opportunities in non-profit organisations and in community’s through the Community Works Programme (CWP).

The programme has been rolled out by the Department of Public Works (DPW) in three five-year phases. Phase one began in 2004/05 and created a cumulative total of about 1.7 million work opportunities.<sup>102</sup> Phase two commenced in 2009/10 and created a cumulative total of about 4.1 million work opportunities. The programme entered phase three in 2014/15, with the objective of creating 6.4 million work opportunities by

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<sup>97</sup> Growth and Development Summit Agreement (7 June 2003) at 1.4. Available at: [https://sarpn.org/documents/d0000370/P355\\_Nedlac\\_Agreement.pdf](https://sarpn.org/documents/d0000370/P355_Nedlac_Agreement.pdf).

<sup>98</sup> Ibid at 2.1. The other interventions identified were: public investment initiatives; sector partnerships and strategies; local procurement; small enterprise promotion; support for co-operatives; and, jobs impact and monitoring.

<sup>99</sup> Growth and Development Summit Agreement (7 June 2003) at 2.3.1.

<sup>100</sup> Ibid at 2.3.4.

<sup>101</sup> Department of Public Works ‘EPWP Sectors’. Available at: [www.epwp.gov.za](http://www.epwp.gov.za).

<sup>102</sup> Department for Planning, Monitoring and Evaluation (DPME) ‘Development Indicators 2015/16’. Available at: [www.dpme.gov.za/publications/Pages/Reports-and-Other-Information-Products.aspx#](http://www.dpme.gov.za/publications/Pages/Reports-and-Other-Information-Products.aspx#).

## EPWP budget analysis

Funds for the EPWP are voted for by the National Assembly and appropriated by the Department of Public Works (DPW), which is responsible for managing and coordinating the programme. EPWP is a core programme of the department, taking up 36% of its total budget in 2016/17.<sup>103</sup>

This budget analysis tracks the allocations and expenditure performance of the EPWP over a five-year period between 2013/14 and 2017/18. It uses real figures based on 2017/18 prices that take the effect of inflation into account, thereby equalising the value of each Rand allocated and spent on the programme for each financial year. Figure 2 provides the tool used to make these nominal-to-real calculations.

**Figure 2:** CPI data and tool used for converting nominal to real figures

	2013/14	2014/15	2015/16	2016/17	2017/18
Example nominal amount	R100.00	R110.00	R120.00	R130.00	R140.00
Example real amount	R124.94	R129.90	R134.19	R138.19	R140.00
CPI Inflation <sup>104</sup>	5.8%	5.6%	5.2%	6.3%	5%
CPI Index (2017/18)	0.80038	0.8468121	0.8942336	0.940733	1

This tool allows us to convert nominal amounts provided in annual reports to 2017/18 Rands, which allows us to compare the allocations and expenditure of the EPWP in real terms over time.

**Table 2:** Real EPWP allocations and expenditures, 2013/14 – 2017/18.<sup>105</sup>

R'000 (thousands)	Final allocation				Revised Estimate
	2013/14	2014/15	2015/16	2016/17	2017/18
Allocation	R2,420,418	R2,298,597	R2,184,406	R2,465,629	R2,407,583
Annual increase/decrease		-5.0%	-5.0%	+12.9%	-2.4%
Expenditure	R2,413,437	R2,273,916	R2,169,354	R2,446,437	-
Under expenditure	R6,980	R24,681	R15,052	R19,191	-
Percentage of funds spent	99.7%	98.9%	99.3%	99.2%	-

Table 2 shows that the allocation for the EPWP was reduced in real terms in 2014/15 and 2015/16, before receiving a large increase in 2016/17, and then a decrease again in 2017/18. Overall, the budget for the EPWP decreased by 0.5% during the five-year period in real terms. Almost 99% or more of the budget has been spent in each year, with the highest underspending occurring in 2014/15, of R24.7 million.

<sup>103</sup> Department of Public Works '2016/17 Annual Report' at 29.

<sup>104</sup> Provided by National Treasury, last updated using the October 2017 Medium-Term Budget Policy Statement.

<sup>105</sup> Figures based on DPW Annual Reports, National Treasury reports and own calculations.

Table 3 looks at the make up the EPWP budget in terms of expenditure by economic classification.

**Table 3:** Percentage of EPWP budget allocated per economic classification, 2013/14 – 2017/18

	2013/14	2014/15	2015/16	2016/17	2017/18
Current payments	14.0%	12.8%	13.6%	11.8%	12.8%
Transfers and subsidies	85.9%	87.1%	86.3%	88.1%	87.1%
Capital and financial assets	0.1%	0.1%	0.1%	0.1%	0.1%

Table 3 shows that current payments have reduced as a percentage of the total EPWP spend, with the extra going to transfers and subsidies. More than 85% of the EPWP budget is transferred to provinces, municipalities and non-profit institutions who implement (or partner with other agents who implement) EPWP projects. Table 4 breaks down the amounts transferred to provinces, municipalities and non-profit institutions.

**Table 4:** Funds transferred to provinces, municipalities and non-profit institutions and the annual percentage change, 2013/14 – 2017/18

R'000 (thousands)	2013/14	2014/15	2015/16	2016/17	2017/18
Provinces	R763,055	R715,915	R617,544	R810,418	R781,162
Annual % change		-6.2%	-13.7%	31.2%	-3.6%
Municipalities	R764,439	R702,794	R657,812	R706,486	R691,447
Annual % change		-8.1%	-6.4%	7.4%	-2.1%
Non-profit institutions	R548,100	R564,387	R598,635	R638,673	R623,904
Annual % change		3.0%	6.1%	6.7%	-2.3%

Table 5 shows how the transfers and subsidies made by through the EPWP have been shared between provinces, municipalities and non-profit institution.

**Table 5:** Share of EPWP transfers going to provinces, municipalities and non-profit institutions, 2013/14 – 2017/18

	2013/14	2014/15	2015/16	2016/17	2017/18
Provinces	36.8%	36.1%	32.9%	37.6%	37.3%
Municipalities	36.8%	35.4%	35.1%	32.8%	33.0%
Non-profit institutions	26.4%	28.5%	31.9%	29.6%	29.8%

Tables 4 and 5 show that there has been a trend towards allocating more of the EPWP budget to non-profit institutions and less to provinces and municipalities between 2013/14 and 2015/16, but this trend was then reversed in 2016/17. Compared to 2013/14, in 2017/18, provinces were receiving a slightly higher share of transfers, municipalities slightly less, and non-profit institutions were receiving a slightly higher share.

**Table 6:** Average cost of each work opportunity provided by the EPWP, 2013/14 – 2017/18. \* indicates a target rather than a result.



	2013/14	2014/15	2015/16	2016/17	2017/18
Allocation	R2,420,418	R2,298,597	R2,184,406	R2,465,629	R2,407,583
No. of work opportunities created	1,017,265	1,103,983	741,540	779,251	1,406,736*
Cost per work opportunity	R2,372	R2,060	R2,925	R3,139	R1,716*

By dividing the total EPWP budget by the number of work opportunities created each year, we can look at how the cost of each work opportunity has changed over time. A number of factors could determine the cost per work opportunity, including the amount of stipends paid to EPWP workers and the amount of co-financing secured for EPWP projects.

The cost of each work opportunity provided by the EPWP has fluctuated in line with fluctuations in the number of work opportunities provided, as the budget has remained roughly the same. The reason for the drop in work opportunities created is examined in the following section under ‘data collection challenges’. However, what can be said from table 6 is that the targets for 2017/18 look very ambitious, given that the department will have to create work opportunities at a much lower cost than they have been able to in previous years.

**Table 7:** Comparison of EPWP funding compared to other selected government priorities, 2017/18<sup>106</sup>

Billions	Amount	Percentage of total
Social development	R234.2	14.9%
Basic education	R230.8	14.7%
Health	R189.6	12.1%
Post-school education and training	R76.7	4.9%
Agriculture and rural development	R26.5	1.7%
South African Airways (recapitalisation)	R10.0	0.6%
EPWP	R2.4	0.2%

The budget for the EPWP is very small compared to other major government priorities, making up only 0.2% of consolidated government expenditure in 2017/18. The scope of the programme and its impact on millions of people therefore demonstrates a high level of impact relative to its budget.

#### *Budget analysis conclusion*

The EPWP has become a flagship government initiative, heralded in Presidential speeches and government reports alike for creating millions of work opportunities that otherwise would not have existed.<sup>107</sup> The EPWP is achieving this despite having a much smaller funding stream than many other government priorities. This suggests that it would be possible to begin scaling up and improving the impact of EPWP on beneficiaries further with relatively small additional investments by the state over time.

Instead, the budget for the EPWP has been effectively stagnant in real terms for the past five years. Although this reflects the difficult economic environment of the period, government may be missing an opportunity to fund a programme that clearly has a lot of potential to impact on poverty and unemployment, even as these are on the rise. The DPW has shown that it can spend EPWP funds fully and effectively and would therefore justify an increased allocation.

#### *Data collection challenges*

However, a major issue which has plagued the programme and which makes analysis of its impact difficult is the poor quality of data collection by implementing agents. The Auditor General of South Africa concluded in its 2015/16 report on the programme that “while the EPWP performance information is useful, it was not reliable when compared to the source information.”<sup>108</sup> Information on the programmes performance should therefore be read as such (useful but not perfectly accurate).

A second issue relates to the kinds of data and information that are produced and made public by the DPW on the EPWP. Among the chief concerns are what exactly is described by a ‘work opportunity’ (WO). The high

<sup>106</sup> National Treasury ‘Medium Term Budget Policy Statement’ (25 October 2017) at Table 4.2.

<sup>107</sup> President Jacob Zuma: 2017 State of the Nation Address (9 Feb 2017). Available at: [www.gov.za/speeches/president-jacob-zuma-2017-state-nation-address-9-feb-2017-0000](http://www.gov.za/speeches/president-jacob-zuma-2017-state-nation-address-9-feb-2017-0000). See also, Government of the Republic of South Africa (2017) UN Doc: E/C.12/ZAF/1 at para 68.

<sup>108</sup> Department of Public Works ‘2015/16 Annual Report’ at 18. Available at: [www.publicworks.gov.za/docsreports.html](http://www.publicworks.gov.za/docsreports.html).

number of WOs created by the EPWP are frequently used to demonstrate the programme's strong performance. Yet, few WOs are the same. For example, a WO may be one month's part-time work, or it could be six months full-time work. When all of these WOs are lumped together into a single figure, it is difficult to tell just how much work has been created by the programme. It is also difficult to compare results over time based on this figure alone (an increase in WOs may look good, but is actually the result of more part-time WOs or WOs of a shorter duration being created, for example). An EPWP worker can also take advantage of more than one WO, so it is difficult to assess the number of people who are actually benefiting from the programme overall.

A much better statistic is the number of Full-Time Equivalent (FTE) years of work created by the EPWP. This is because FTE years add up all the work opportunities created into FTE years of work, defined as 230 paid working days. As each FTE year of work is the same, this allows for a more accurate analysis of how much work the programme has created in any given year. However, DPW and other government reports often focus only on the number of WOs created and often do not provide information on the FTE years of work.

The quality of each WO (for example, how much training a WO provides) is also not reflected in the total number of WOs. Again, an increase in the number of WOs created could have gone hand in hand with a deterioration in working conditions for EPWP workers (see below for more on EPWP working conditions).

In 2015, a new reporting system was introduced with the aim of overcoming these challenges. The new system includes improved data collection and validation and is based on updated EPWP working conditions set out in Ministerial Declaration 4: Expanded Public Works Programmes, Notice No. 347 of 2012 (of which, more below).<sup>109</sup> However, poor implementation in the first year of the new systems operation has led to EPWP "projects either not being reported or reported but remains (sic) on the EPWP Reporting system as invalid due to non-compliance with the new reporting requirements."<sup>110</sup> The uneven implementation of the new reporting system in 2015/16 was blamed for a drop in work opportunities reported during that year.

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<sup>109</sup> Gazette No. 9745. Declaration issued by the Minister of Labour in terms of the Basic Conditions of Employment Act, 1997.

<sup>110</sup> Department of Public Works '2015/16 Annual Report' at 17.

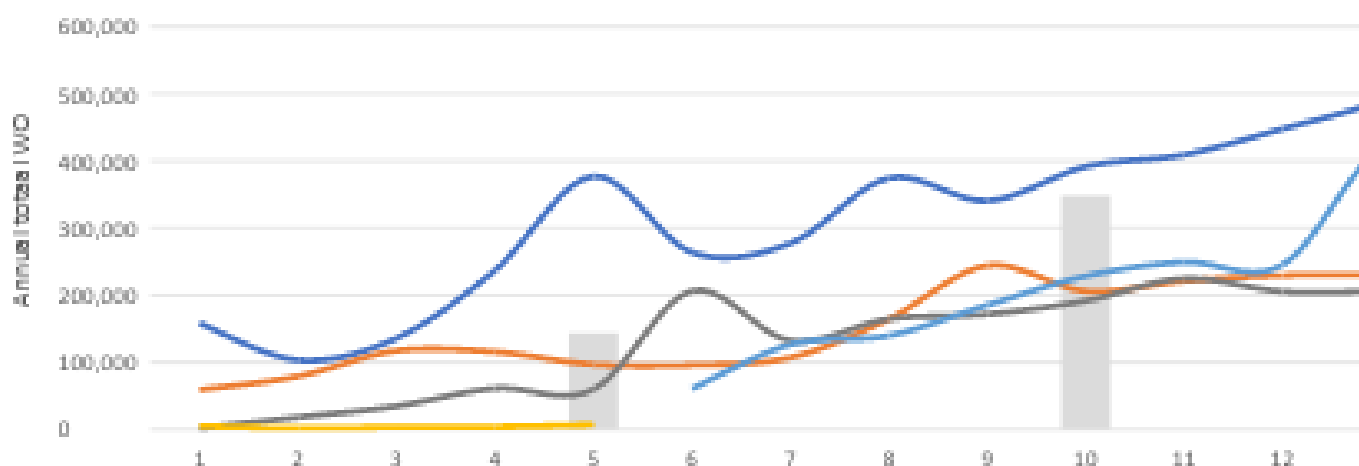
## *Recommendations*

The quality of data collection and information provided by the DPW on the implementation of the EPWP must improve drastically in order to allow for proper analysis of the programmes performance to take place. This is essential if successes, gaps and challenges are to be identified and acted upon by DPW as well as to allow Parliament, civil society and other interested parties to monitor and hold the state to account for the programme's performance. A programme as far-reaching and complex as the EPWP must have proper oversight if it is to achieve its objectives.

Reforms to data collection and presentation should include:

- Working closely with public and reporting bodies to improve data collection and reporting.
- Always providing the number of FTE years of work created alongside information on the number of work opportunities created.
- Providing this information for multiple years, rather than only one year at a time (with the effect on the numbers of multi-year projects accounted for).
- Providing additional information on, for example; the average or median length of a work opportunity, the percentage of opportunities that were full or part-time; the total and average number of days of training received by EPWP workers; the average number of opportunities worked per EPWP worker.
- How many individuals have benefited from WOs during each financial year.

**Figure 3:** Number of work opportunities created by the EPWP, 2004/05 to 2018/19<sup>111</sup>



An example of the issue of data collection and presentation is provided by Figure 3 above. In this figure, numbers of WOs calculated by the DPME have been used rather than DPW figures from annual reports or presentations. This is because the DPME figures are more consistent than the figures provided by the DPW in its annual reports. Moreover, the DPME has put all of this information together into a time series which takes account of the effect of multi-year projects on the numbers, whereas the DPW presents only one year's worth of data at a time (and does not state in its reports if the number of WOs provided includes overlaps between multi-year projects or if it is giving the number of *new* WOs created per year).

<sup>111</sup> DPME 'Development Indicators 2015/16'.

This is problematic, however, as the DPME has only calculated performance up to 2014/15 (the year before the introduction of the new reporting system). The DPW urgently needs to rectify its data collection challenges so that performance information for the 2015/16 and 2016/17 years (and future years) can be analysed.

Figure 3 above shows that the number of WOs created per year has been increasing in each of the implementation sectors. As a result, each phase of the EPWP has produced more WOs than the last and targets for the number of WOs created have been made more ambitious over time. The latest target is to provide 6.4 million WOs as a cumulative total for phase three of the programme.

Infrastructure has always provided the highest number of WOs (409,209 in 2014/15), although the planned increase in the number of WOs provided by the non-state sector will bring this sector close to the WOs provided by the infrastructure sector. The number of WOs provided in the environment and culture and social sectors is planned to remain stable at between 200,000 – 230,000 WOs per year for the remainder of phase three.

What Figure 3 does not provide is the number of FTE years of work provided by the EPWP over time. This information is provided by the DPME per province for 2014/15.

**Figure 4:** Number of work opportunities and full-time equivalent (FTE) years of work (including training) created per province by the EPWP, 2014/15

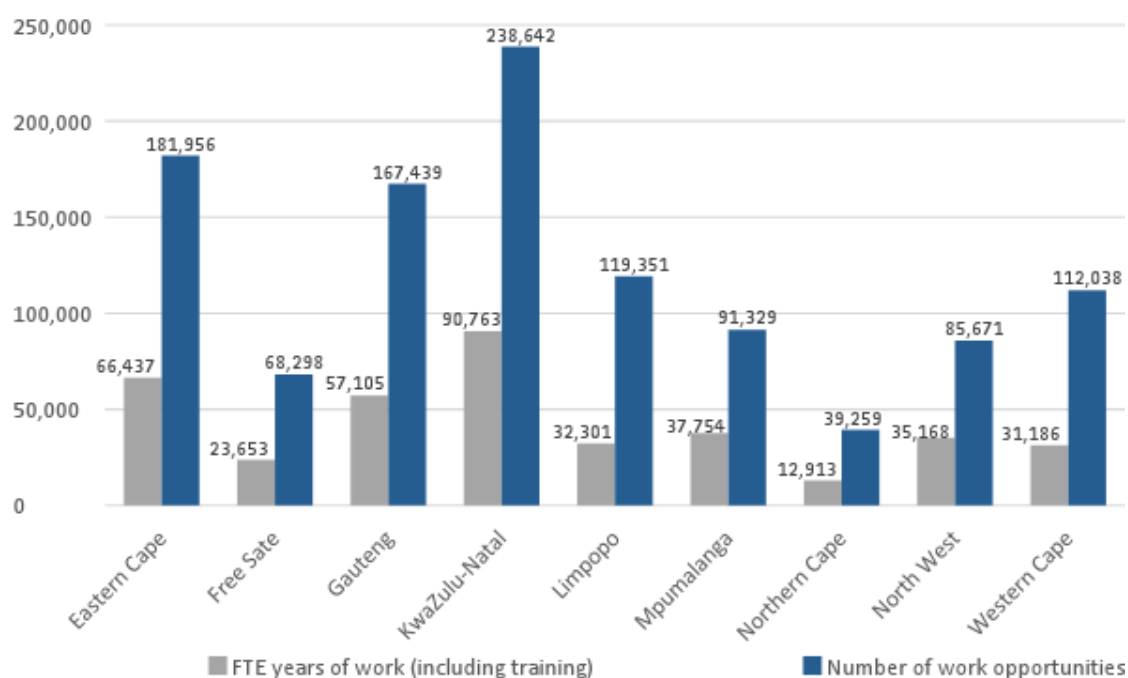


Figure 4 shows that in most provinces, it takes about three WOs to add up to one FTE year of work, suggesting that the average length of a WO may be around four months. The most amount of work opportunities were created in KwaZulu-Natal and Eastern Cape, which are among the most rural and economically disadvantaged provinces. However, a more accurate analysis of the impact of the EPWP on labour absorption can be shown by dividing the number of people who are unemployed in each province by the number of FTE years of work (including training) and the number of WOs created.

**Figure 5:** FTE years of work created (including training) and number of work opportunities created as a percentage of each provinces unemployed population, 2014/15<sup>112</sup>

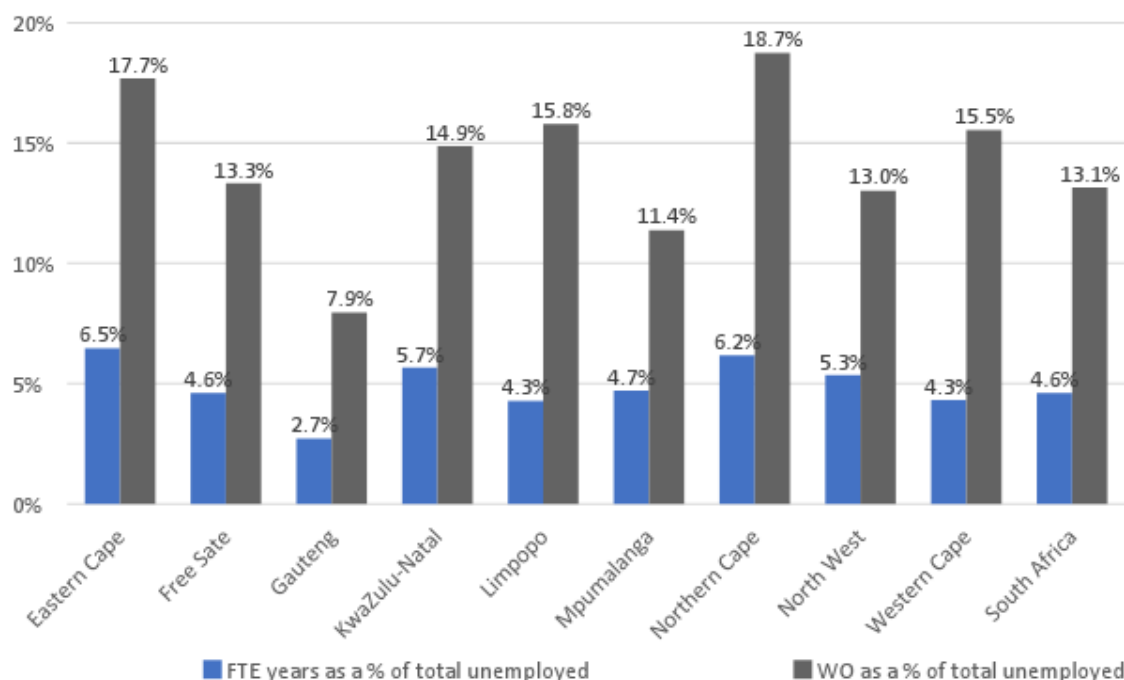


Figure 5 provides an indication of the percentage of each province's unemployed who could potentially benefit from EPWP work opportunities *if EPWP workers were not able to take advantage of more than one WO in a year*. EPWP workers may work on more than one EPWP project in a given year, so the actual percentages of each province's unemployed population that has benefited from a WO generated by EPWP will be different. However, in the absence of data on the number of individual workers who have participated in EPWP projects, this is the most accurate assessment we can provide of the impact of the EPWP on labour absorption, in terms of the percentage of each province's unemployed population that could potentially benefit from the EPWP.

Figure 5 shows that, if no EPWP worker undertook more than one WO in 2014/15, the EPWP would have reached between 7.9% and 18.7% of each province's unemployed population. EPWP is potentially reaching the largest portion of the unemployed in the Northern Cape, followed by the Eastern Cape and Limpopo. The reach of the EPWP is by far the least in Gauteng, with a maximum of only 7.9% of the unemployed benefiting from the programme. Another way of saying this is that the EPWP currently does not provide WOs for at least 80% of the unemployed population in each province.

When we use the number of FTE years of work (including training) as a measure, we can see that the EPWP can currently provide a maximum of one year's worth of full-time work to around 4.6% of the unemployed population nationally.

It is critical for the EPWP's contribution to labour absorption that WOs do not replace existing jobs, or create temporary EPWP jobs when permanent or better-paid formal jobs could or would have been created instead. The DWP must constantly assess in each of its projects whether this is likely to be the case. Evidence either way of this is limited, however. An evaluation of the EPWP-Social Sector programme implementation between 2009/10 and 2013/14 found that "EPWP-SS is likely to have created new job opportunities" as well

<sup>112</sup> DPME Development Indicators, 2015/16 and Stats', QLFS, 2014-15

as providing the means (funds) to “absorb community volunteers into formal positions.”<sup>113</sup> However, the report noted that a full impact evaluation on whether EPWP was replacing existing jobs had not yet been conducted.<sup>114</sup>

### *Conclusion and recommendations*

Comparing the number of WOs and FTE years of work provided by the EPWP with the number of people who are unemployed shows that the impact of the EPWP on labour absorption is currently quite small, with a maximum of only 13.1% of the unemployed potentially benefiting from a WO. However, this percentage is likely to be smaller as many EPWP workers take advantage of more than one WO per year (the exact number of EPWP workers who do this is not provided by the DPW). This means that at least 80% of unemployed people are not directly benefiting from the programme. The EPWP is therefore quite far from being a ‘work guarantee’ scheme. Nonetheless, it does provide a strong starting point for a right to work in South Africa that can be expanded over time to reach more people who lack access to work opportunities. The question is: can EPWP be expanded further to provide longer and better work opportunities that create an effective right to work for the majority, or even for all, of South Africa’s un and under-employed?

### *Impact on historically disadvantaged and other marginalised groups*

In its latest annual report, the DPW provided information on the percentage of EPWP workers who were women, youth and people with disabilities.

**Table 8:** Percentage share of women, youth and people with disabilities benefiting from EPWP work opportunities, 2016/17<sup>115</sup>

	<b>Target</b>	<b>Achievement</b>
Women	55%	66%
Youth	55%	45%
People with disabilities	1.7%	2%

These percentage shares are promising, reflecting that a disproportionate share of EPWP WOs are going to women and youth, and that the programme is also reaching out to people with disabilities. These results compare very favourably to the representation of these groups in the overall labour force.<sup>116</sup> Targeting of EPWP WOs towards these groups thus appears to have been successful to date.

### *Impact on skills*

With EPWP unable to provide WOs to more than 80% of South Africa’s unemployed, it is critical that those who do benefit from a WO also receive some training that improves their chances of finding employment once their EPWP contract comes to an end. The EPWP website hosted by the DPW states that:

In EPWP, training is a cross-cutting function which supports all EPWP Sectors: namely: Infrastructure,

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<sup>113</sup> Implementation Evaluation of EPWP in the Social Sector: Phase Two (2009/10 – 2013/14), conducted by the Economic Policy Research Institute for the DPME and the Department of Social Development, 2015 at 81.

<sup>114</sup> Ibid at 67, footnote 117.

<sup>115</sup> Department of Public Works ‘Annual Report: 2015/16’ at 64.

<sup>116</sup> See Commission for Employment Equity 2016/17 Annual Report.



Social, Non-State and Environment & Culture. It is implemented in all the provinces and its nature and types of courses are informed by the various sectors and provincial training needs. It ensures that beneficiaries gain skills while they work on EPWP projects with the aim of enhancing their chances of being placed on other viable programmes upon exit from EPWP projects.<sup>117</sup>

Training is provided in the form of occupationally-directed skills programmes, structured learnerships for specific industries, and a technical trade-orientated training programme called ‘artisan development’.<sup>118</sup> The website states further that a Memorandum of Agreement has been concluded between the Department of Higher Education and Training and the DPW for the training of EPWP beneficiaries as well as partnerships with Sector Education and Training Authorities (SETAs) and others.<sup>119</sup>

The following figure shows how many FTE years of training were provided to EPWP workers in 2014/15 compared to the number of FTE years of work that EPWP workers worked.

**Figure 6:** Number and percentage of FTE years of work and FTE years of training provided by the EPWP in 2014/15<sup>120</sup>

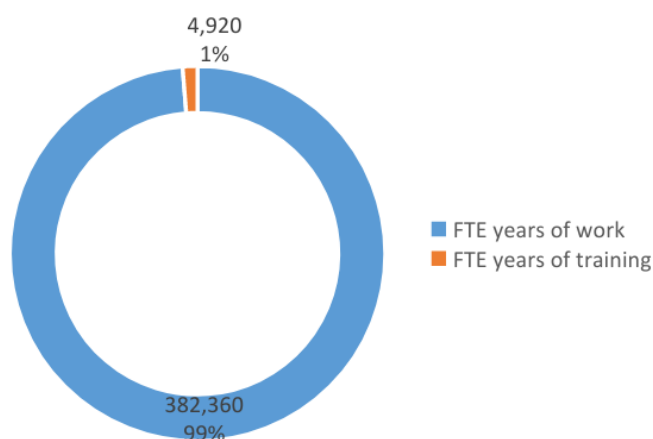


Figure 6 shows EPWP workers undertook 382 360 FTE years of work in 2014/15, but received only 4 920 FTE years of training. This means that on average, EPWP workers received only 1 day of training for every 100 days of work. This equates to about 2.3 days training for each year of full-time work. Such a low amount of training is clearly incompatible with the EPWP goal of making EPWP workers more employable, and suggests that providing training to workers is not presently being achieved in EPWP projects.

The working conditions of EPWP are established by the Minister of Labour in Ministerial Declaration No. 4 Ministerial Declaration 4: Expanded Public Works Programmes, Notice No. 347 of 2012.<sup>121</sup> In the Ministerial Declaration (MD), employers of EPWP workers are required to provide a copy of the conditions of employment (i.e. a contract) to employees before they start work. This contract must provide details on, among others, “the training that the worker will receive during the EPWP.”<sup>122</sup> However, in the section of the MD that

<sup>117</sup> Department of Public Work ‘Training’. Available at: [www.epwp.gov.za/cross\\_training.html](http://www.epwp.gov.za/cross_training.html).

<sup>118</sup> Ibid.

<sup>119</sup> Ibid.

<sup>120</sup> DPME Development Indicators 2015/16.

<sup>121</sup> Gazette No. 9745. Declaration issued by the Minister of Labour in terms of the Basic Conditions of Employment Act, 1997.

<sup>122</sup> Ministerial Declaration No. 4 (2012) at 11.1(e).

deals with the records that employers must keep, no requirement is made that any records are kept on the training that is provided to EPWP workers.<sup>123</sup> Moreover, while there is a penalty for workers who do not attend required training events (automatic termination of their contract), no such penalty exists for employers who fail to provide training for their EPWP workers. EPWP workers are, however, entitled to a ‘Certificate of Service’ which provides information on “any training received by the workers as part of the EPWP”.<sup>124</sup>

With no strict requirement for employers to actually provide training and no penalty for employers who do not provide any training, the only conclusion that one can take from the MD is that training of EPWP workers is considered as optional by the Department of Labour and the DPW, and is therefore not a priority. This is reflected in the fact that EPWP workers typically spend 99% of their time working and only 1% of their time in training (see figure 6 above).

### *Recommendation*

The Ministerial Declaration No. 4 that sets out the working conditions of EPWP workers should be amended to ensure that training forms a central part of an employer’s obligations, including providing for a penalty for employers who do not provide training for their EPWP workers.

### *Impact on poverty*

The main factors that determine the direct impact of EPWP on poverty are the level of the stipend that EPWP workers receive, the length of their employment contract, and the number of unemployed people who benefit from the programme. The main indirect impact of the EPWP on poverty depends on whether EPWP workers are able to access further employment after they exit the EPWP. This in turn is determined in part by the quality of the work experience and training they receive on the EPWP.

The EPWP stipend (also known as the EPWP Minimum Wage) for the 2016/17 year was set by the DPW at R83.59 per day. For a worker working 5 days per week (22 days per month) this would equate to R1838.98 per month. The stipend is adjusted annually in accordance with the Ministerial Determination in line with inflation.

The following table compares the EPWP stipend with the proposed new National Minimum Wage (NMW)<sup>125</sup> and the upper-bound poverty line.<sup>126</sup>

**Table 9:** Monthly value of the EPWP Minimum Wage compared to the proposed National Minimum Wage and the upper-bound poverty line<sup>127</sup>

<sup>123</sup> See Ministerial Declaration No. 4 (2012) at 12.

<sup>124</sup> Ministerial Declaration No. 4 (2012) at 18.1(e). The MD does not say whether this certificate must be provided by the employer or by the DPW.

<sup>125</sup> National Minimum Wage Panel ‘A National Minimum Wage for South Africa: Report to the Deputy President’ (2016) at 9. Available at: <http://new.nedlac.org.za/wp-content/uploads/2016/11/NMW-Report-Draft-CoP-FINAL1.pdf>. Although the amount of the National Minimum Wage proposed by the Panel to the Deputy President has not yet been legislated, a draft Bill is under way.

<sup>126</sup> Statistics South Africa ‘Poverty Trends in South Africa’ (2017) at 8. Available at: [www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf](http://www.statssa.gov.za/publications/Report-03-10-06/Report-03-10-062015.pdf). The upper-bound poverty line (UBPL) represents the absolute minimum amount of income necessary for an individual to be able to afford the most basic food and non-food items each month.

<sup>127</sup> Both the National Minimum Wage and the EPWP Minimum Wage are based on workers working 8 hours per day, 5 days per week. The National Minimum Wage is due to come into effect in 2019, while the EPWP Minimum Wage was last set on 01

National Minimum Wage	R3 440
EPWP Minimum Wage	R1 839
Upper-bound poverty line	R1 077

The EPWP minimum stipend provides EPWP workers with enough income to be able to afford to live above the poverty line. This means that participating in the EPWP may allow unemployed individuals to escape poverty for the duration of their employment contract. A study of average EPWP wages conducted in 2016 found that the average daily stipend paid to EPWP workers was in fact R99 per day, slightly above the minimum.<sup>128</sup>

In reality, an EPWP stipend may be shared with other family members, which would dilute the final amount available to the individual worker. If two or more people are reliant on an EPWP stipend as their sole source of income, they would fall below the poverty line.

The minimum stipend is however around half (53%) of the proposed national minimum wage (NMW). The NMW was calculated to “maximise the benefits to the poor and minimise any possible disemployment effects.”<sup>129</sup> In so doing, the National Minimum Wage Panel recommended that certain sectors of workers who would be particularly vulnerable to disemployment should be excluded from the NMW for a period of time to be determined by national legislation, including EPWP workers. Deputy Minister for the DPW, Jeremy Cronin, has estimated that, if the NMW were to be applied to EPWP workers immediately without an increase in the programme’s budget, the Department would have to reduce the number of WOs offered by 300,000.<sup>130</sup> However, the stated vision of the NMW is that it ultimately applies to all workers and all work conducted in South Africa. The DPW should therefore seek an increase to the EPWP budget so that it can afford to pay EPWP workers the NMW.

### *Conclusion*

Without knowing the number of unemployed people who have benefited from EPWP WOs and the length of those opportunities, it is difficult to assess the extent of the EPWPs impact on poverty. Given that such a large proportion of the population lives in poverty (55.5% according to the latest StatsSA data<sup>131</sup>), an evaluation of the EPWP that looked at its impact on poverty concluded that “EPWP is relatively small in scale compared to poverty and unemployment levels in South Africa”<sup>132</sup>.

### *Recommendations*

The Department of Public Works should argue for a mechanism in the NMW Bill which ensures that the wages of EPWP workers are progressively increased to a value that is much closer to the NMW than the current 53%.

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November 2016. The UBPL is based on the 2016 figure provided by Statistics South Africa (see n47 above).

<sup>128</sup> Vetten (2016) cited in National Minimum Wage Panel (2016) at 52.

<sup>129</sup> National Minimum Wage Panel (2016) at 9.

<sup>130</sup> Moatshe ‘Minimum wage hobbles expanded public works programme’ (6 March 2017) *IOL Cape Times*. Available at: [www.iol.co.za/capetimes/news/minimum-wage-hobbles-expanded-public-works-programme-8071682](http://www.iol.co.za/capetimes/news/minimum-wage-hobbles-expanded-public-works-programme-8071682).

<sup>131</sup> Statistics South Africa (2017) at 12.

<sup>132</sup> Implementation Evaluation of EPWP in the Social Sector: Phase Two (2009/10 – 2013/14) at 67.

## Conclusion

The EPWP is South Africa's largest public works programme and is currently providing work opportunities to up to 13% of the unemployed. However, if the programme is to be transformed into something that begins to offer a 'right to work' for the majority of the unemployed, the programme will have to be expanded much further. In taking the EPWP forward as a key intervention of government, it will be beneficial to consider international experience with right to work or work guarantee schemes in other countries with similar profiles to South Africa (high levels of poverty, inequality and unemployment).

## ✓ Measures to ensure that people affected by past discrimination have equal access to employment opportunities - The Employment Equity Act

### Background

The history of labour laws in South Africa is one of separate and unequal rules and regulations for Whites and other population groups. The Master and Servants Act of 1856 determined that the employment relationship between colonists and indigenous people was to be based on a 'master and servant' relationship, while the Mines and Works Act of 1911 formerly established labour reservation, whereby various kinds of work were reserved for Whites only. This resulted in highly unequal access to work on the basis of race and sex that has proved difficult to transform since 1994.

The Equality clause in Section 9 of the 1996 Constitution is the starting point for much of the post-apartheid state's efforts to redress past discrimination. Section 9(2) provides that "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." The Constitution thus recognises that affirmative action measures are necessary and that crucially, it is not enough merely to 'promote' equality, but that substantive equality (equal enjoyment of all rights and freedoms) must be achieved in practice.

The CESCER and ILO Conventions also require that states promote and achieve equality. The CESCER has said that "The labour market must be equally accessible to all"<sup>133</sup> and ILO Convention No. 111 requires states to "pursue a national policy designed to promote ... equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating discrimination."<sup>134</sup>

### Summary of the Employment Equity Act

It is in this context that the first democratic government enacted the Employment Equity Act (EEA) of 1998<sup>135</sup> and the Employment Equity Amendment Act of 2013.<sup>136</sup> The preamble to the Act recognises that:

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<sup>133</sup> CESCER 'General Comment No. 18 on the Right to Work' at para 12.

<sup>134</sup> ILO Convention No. 111 concerning Discrimination in Respect of Employment and Occupation (15 Jun 1960), Article 2.

<sup>135</sup> Act No. 55, 1998.

<sup>136</sup> Act No. 47 of 2013.

as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.

The purpose of the Act is stated in section 2 as:

- (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

### *Designated groups and employers*

Designated groups means black people (broadly defined as Africans, Coloureds and Indians), women and people with disabilities who are citizens of the Republic of South Africa.<sup>137</sup> The Act requires all employers to eliminate unfair discrimination in any employment policy or practice and to promote equal opportunity for designated groups.<sup>138</sup> It then establishes 'designated employers' who must implement affirmative action measures for people from designated groups. A designated employer is any employer that:

- (a) employs 50 or more people
- (b) employs less than 50 people but has an annual turnover beyond a certain amount (determined by regulations)
- (c) is an organ of state, with the exception of local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service
- (d) is bound by a collective agreement which appoints it as a designated employer.

Any employer can, however, appoint itself as a designated employer and thus be bound to the provisions of the Act.<sup>139</sup>

### *Core obligations*

The obligations of designated employers include the preparation of an employment equity plan and the submission of regular reports on implementation of the plan to the Director-General of the Department of Labour. All plans are considered to be public documents and must be provided to employees.<sup>140</sup> Affirmative action measures that must be undertaken by designated employers include:

- (a) identifying and eliminating employment barriers which affect designated groups;
- (b) making reasonable accommodation for people from designated groups to ensure that they enjoy equal opportunities and are equally represented in the workforce

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<sup>137</sup> EEA, Section 1, as amended. Citizens means citizens by birth or descent or people who became citizens by naturalisation prior to 27 April 1994 or who would have been entitled to naturalisation but were precluded from doing so by apartheid policies.

<sup>138</sup> EEA, Section 5.

<sup>139</sup> EEA, Section 14.

<sup>140</sup> EEA, Section 25. Section 13 requires public companies to publish a summary of the report in their annual financial reports while the reports of organs of state must be tabled in Parliament.

- (c) ensure the equitable representation of suitably qualified persons from designated groups in all occupational categories and levels and implement appropriate training measures to promote the retention and development of people from designated groups.<sup>141</sup>

Designated employers are to use preferential treatment of designated groups with numerical targets to guide and assess progress, but are not allowed to use quotas.<sup>142</sup> Importantly, the Act places emphasis and specific obligations on designated employers to consult with their employees on a number of matters, including the development and implementation of their employment equity plan.<sup>143</sup>

Significantly, section 27 of the Act requires designated employers to report on the remuneration and benefits received in each occupational category and level and to take measures to progressively reduce income differentials (see section 5.2.1 of this paper).

### *Monitoring and evaluation of the implementation of the EEA*

The Act provides for the establishment of a Commission for Employment Equity (CEE) with a mandate to advise the Minister of Labour on policy and other matters concerning the Act, including the setting of norms and benchmarks and codes of good practice for different issues and sectors of the economy.<sup>144</sup> The CEE must also provide an annual report to the Minister which monitors and evaluates the progress made towards the achievement of the objectives of the Act.

The EEA also empowers labour inspectors employed by the Department of Labour with the authority to enter, question and inspect any designated employer for compliance with the Act.<sup>145</sup> Labour inspectors must request and obtain a written undertaking to comply with the Act from any designated employer who the inspector believes may have failed to implement any provision of the Act.<sup>146</sup> An employer who refuses to provide such an undertaking, or fails to comply with any other obligation under the Act, may be issued with a compliance order by the labour inspector. This compliance order must be displayed prominently within the employer's workplace and must be complied with within a given amount of time. If the employer fails to comply, an order of the Labour Court may be obtained. The Act further allows for employers to dispute or appeal the compliance order in full or in part. Such disputes are then handled by a labour court.

Finally, the Act sets out the jurisdiction of the Commission for Conciliation, Mediation and Arbitration (CCMA) and the labour courts to arbitrate and determine disputes arising from the Act. Fines in excess of R1.5 million or a percentage of annual turnover may be levied on employers who fail to comply with the Act.<sup>147</sup>

### **Analysis of the implementation of the Act**

Labour inspectors thus play a crucial role in monitoring and enforcing the EEA. The ILO recommends that

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<sup>141</sup> EEA, Section 15(2).

<sup>142</sup> EEA, Section 15(3).

<sup>143</sup> EEA, sections 16 and 17.

<sup>144</sup> EEA, sections 28-33.

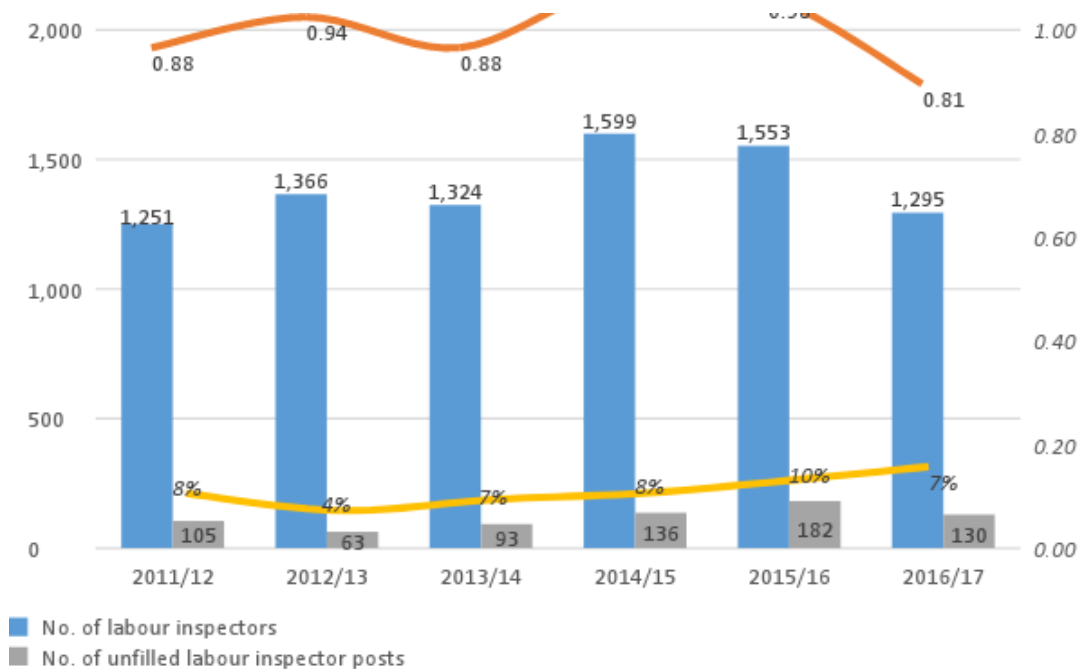
<sup>145</sup> EEA, section 35.

<sup>146</sup> EEA, section 36.

<sup>147</sup> EEA as amended, Schedule 1.

states have 1 labour inspector per 10,000 employees in the country. Between 2011/12 and 2014/15, the Department of Labour (DoL) increased the number of labour inspectors from 0.88 to 1.05 per 10,000 employees. However, in 2015/16 and 2016/17 the vacancy rate for labour inspector posts spiked and the number of posts allocated was reduced, bringing the ratio back down to 0.81 inspectors per 10,000 employees, the lowest in more than five years.<sup>148</sup> The Department had more than 7% of its labour inspector posts – 130 posts – unfilled in 2016/17.<sup>149</sup> This hampers the Department’s ability to carry out the number of inspections planned for each year.

**Figure 7:** Number of labour inspectors per 10,000 employees<sup>150</sup>



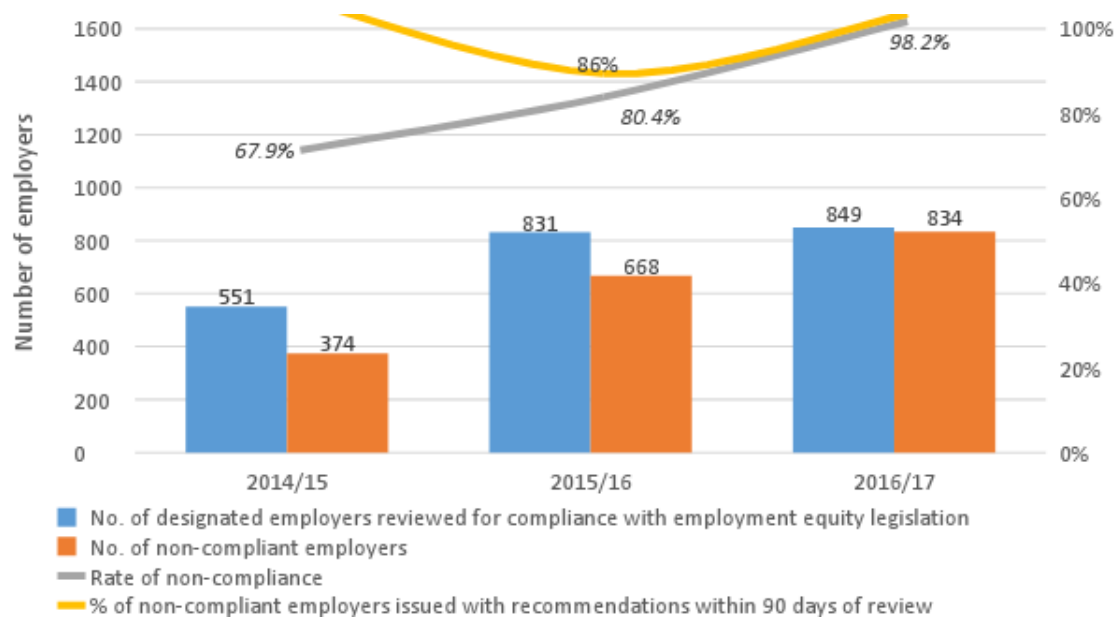
The 1,295 labour inspectors employed by the DoL (in 2016/17) must monitor and enforce compliance with several pieces of legislation, including the Basic Conditions of Employment Act, the Labour Relations Act, the Occupational Health and Safety Act, the Unemployment Insurance Fund Act as well as the Employment Equity Act. The Department therefore provides disaggregated data on the inspections and reviews that have taken place for each of these pieces of legislation. In addition to physical inspections, labour inspectors, (through the Director-General) can undertake reviews of designated employers to determine their level of compliance with the EEA. If a designated employer is found to be non-compliant, a recommendation must be issued within 90 days to the employer stipulating what must be done to achieve compliance and what the penalty will be for ongoing non-compliance. Figure 8 provides a summary of this information for the years 2014/15 – 2016/17.

**Figure 8:** Number of designated employers reviewed for compliance with the EEA, the compliance rate, and the percentage of non-compliant employers issued with recommendations within 90 days.

<sup>148</sup> Department of Labour ‘2016/17 Annual Report’ at 98 and Stats’ Quarterly Labour Force Survey, 2017 Q2, own calculations.

<sup>149</sup> Ibid.

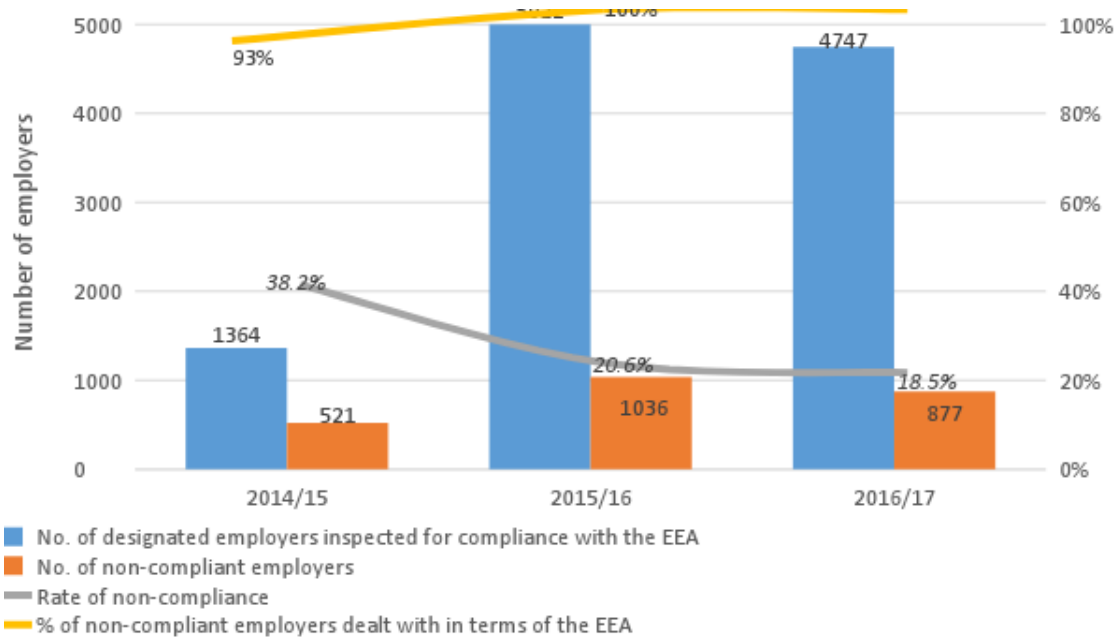
<sup>150</sup> Ibid.



Despite the falling number of inspectors per 10,000 employees, EEA reviews have increased over the past three years and non-compliance with the EEA has increased to almost 100% of employers reviewed by 2016/17. In that year, 100% of non-compliant employers were issued with recommendations within 90 days. The extremely high rate of non-compliance with the EEA, twenty years after the Act entered into force, is a cause for great concern. It may also reflect a higher level of stringency that is being applied by the DoL when reviewing employers.

The DoL also *inspects* designated employers for compliance with the EEA. Figure 9 looks at how many employers have been inspected per year and the rate of non-compliance for those employers who have been inspected.

**Figure 9:** Number of designated employers inspected for compliance with the EEA, the compliance rate, and the percentage of non-compliant employers dealt with in terms of the Act

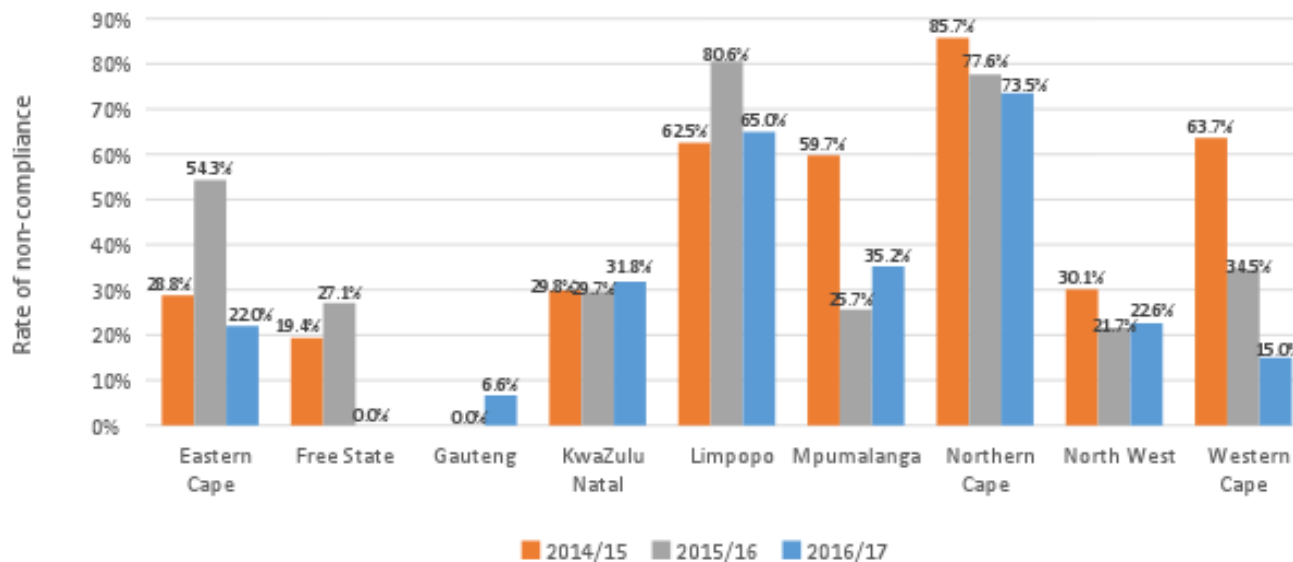


The DoL increased the number of EEA inspections four-fold between 2014/15 and 2015/16, resulting in twice



the number of employers being declared non-compliant, despite a decline in the rate of non-compliance to around one fifth of employers. This push was largely sustained in 2016/17, though with a slight reduction in the number of employers inspected, the number of non-compliant employers and the non-compliance rate. 100% of non-compliant employers were dealt with in each of the previous two years.

**Figure 10: Rate of non-compliance per province, 2014/15 – 2016/17**



Non-compliance with the EEA has been highest in Northern Cape and Limpopo provinces over the past three years. Although the Northern Cape appears to be reducing its non-compliance rate gradually, it still remains extremely high at almost three-quarters of designated employers in 2016/17. The Western Cape has substantially reduced its non-compliance rate over the past three years. The overall average rate of non-compliance is brought down significantly by Gauteng, which has the largest number of inspections carried out and the lowest non-compliance rate.

### Analysis of the impact of the Act

To what extent has the implementation of the EEA eliminated unfair discrimination in the workplace and ensured a more equitable representation of designated groups in various occupational categories and levels?

Key indicators (2016/17) <sup>151</sup>					
Group	Percentage of the working-age population	Percentage of the employed	Percentage of the unemployed	Unemployment rate (expanded)	Percentage of top management positions
Women	50.8%	44.1%	51.6%	40.2%	22.0%
Men	49.2%	55.9%	48.4%	33.3%	78.0%
Black	80.1%	74.4%	89.4%	40.9%	14.4%
Coloured	9.0%	10.3%	7.4%	29.4%	4.9%

<sup>151</sup> Data for this section is from Statistics South Africa and the Commission for Employment Equity Annual Reports (available at: [www.labour.gov.za/DOL/documents/annual-reports/Commission%20for%20Employment%20Equity%20Report.](http://www.labour.gov.za/DOL/documents/annual-reports/Commission%20for%20Employment%20Equity%20Report.))

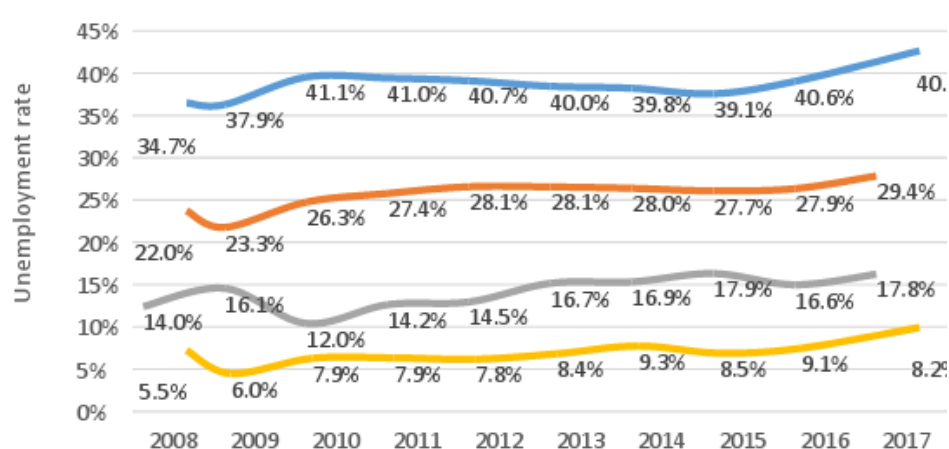
Indian/Asian	2.8%	3.3%	1.2%	17.8%	8.9%
White	8.1%	12.0%	1.9%	8.2%	68.5%

SPII's indicators for the right to decent work included a section dedicated to employment equity indicators for the period 2008-2017, from which the following information is drawn.<sup>152</sup>

### *Overall employment and unemployment indicators for designated population groups*

Unemployment increased for all population groups between 2008 and 2017. However, the burden of unemployment continues to fall heaviest on Black and Coloured South Africans in particular, for whom unemployment rates increased by 6.2% and 7.4% respectively, while the unemployment rate increased by 3.8% for Indian/Asians and 2.7% for Whites.

**Figure 11:** Unemployment rate (expanded) by population group<sup>153</sup>



As of 2017, Black South Africans were four times more likely to be unemployed than Whites, Coloureds were almost three times more likely to be unemployed and Indian/Asians twice as likely to be unemployed compared to Whites. The decline in economic conditions between 2015 and 2017 was also felt most harshly by Black and Coloured South Africans, whose unemployment rates increased while the rates for Indian/Asian and White South Africans decreased slightly.

**Table 10:** Difference and percentage change in the number of people unemployed, per population group, 2008- 2017<sup>154</sup>

	2008	2017	difference	% change
Black	5,500,745	8,316,124	+ 2,815,380	+ 51.2%
Coloured	443,775	692,165	+ 248,390	+ 56.0%

<sup>152</sup> See McLaren (2017) at 96-107.

<sup>153</sup> Ibid at 43.

<sup>154</sup> Ibid at 44.

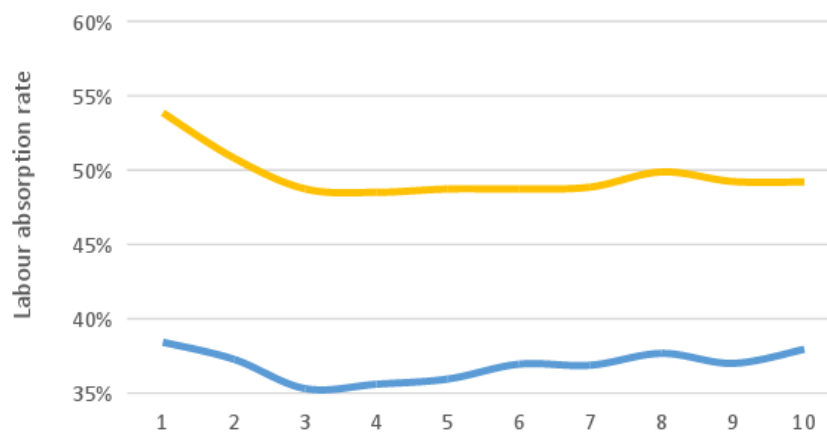
Indian/Asian	77,897	115,809	+ 37,912	+ 48.7%
White	127,662	173,270	+ 45,608	+ 35.7%

Table 10 shows that unemployment increased fastest for Coloured South Africans between 2008 and 2017, although all groups have seen an increase. As a result, there appears to have been few gains made in equalising access to work. The share of the unemployed that were Black was the same in 2008 as in 2017, at 89.4%, while the share that is Coloured increased slightly and the share that is Indian/Asian or White decreased slightly. Access to employment remains starkly unequal between the designated population groups and White South Africans.

#### *Overall employment and unemployment indicators for women and men*

While racial inequality in access to employment remains exceptionally high, the gaps between the sexes on *some* indicators have narrowed in recent years. This appears to be partly because men have been more likely to lose their jobs than women, as figure 12 below demonstrates.

**Figure 12:** Employment-to-population ratio (labour absorption rate) for women and men<sup>155</sup>



The employment gap (the difference in the percentage of working-age women employed compared to men) narrowed between 2008 and 2017, from 15.5% to 11.2%. While this represents some progress, the gap remains large. Moreover, the reasons for the gap closing may be negative rather than positive, as men have been losing their jobs faster than women.

**Table 11:** Number of women and men employed and unemployed, difference and percentage change between 2008 and 2017<sup>156</sup>

	difference	% change
Women employed	+ 853,015	+ 13.6%
Women unemployed	+ 1,412,633	+ 41.8%

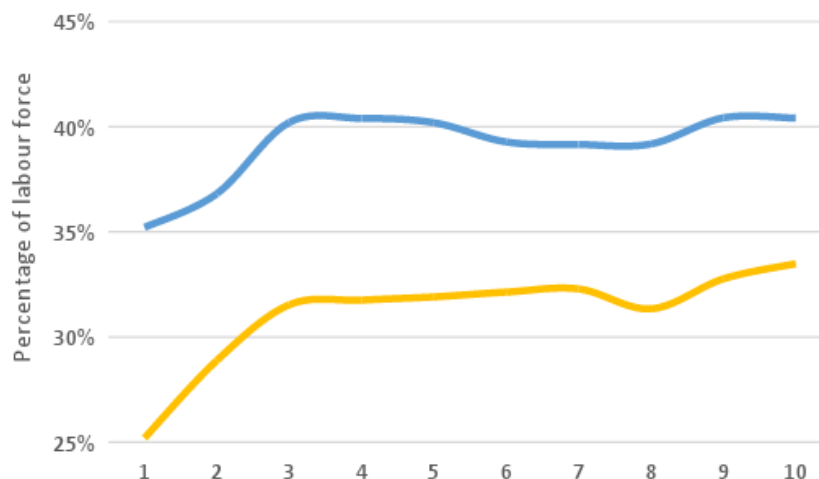
<sup>155</sup> Ibid at 41.

<sup>156</sup> Ibid at 42.

Men employed	+ 718,103	+ 8.6%
Men unemployed	+ 1,734,656	+ 62.7%

Table 11 shows that the number of men unemployed increased by 62.7% between 2008 and 2017, while the number of women unemployed increased by 41.8%. Employment of women also grew faster than for men, at 13.6% compared to only 8.6%. However, unemployment for both sexes increased during the period.

**Figure 13:** Unemployment rate for women and men, 2008-2017<sup>157</sup>



By 2017, four out of every ten women and three out of every ten men were unemployed. The faster increase in unemployment for men means that the proportion of the unemployed that are women and men now more closely corresponds to their proportion in the working-age population (WAP), as the following table shows:

**Table 12:** Proportion of the working-age population and of the unemployed that are women and men, 2017<sup>158</sup>

	Proportion of the working-age population	Proportion of the unemployed
Women	50.8%	51.6%
Men	49.2%	48.4%

#### *Employment of women and men by industry and occupation*

**Table 13:** Proportion of women in the workforce, per industry<sup>159</sup>

	2008	2017
Private households	78.1%	76.7%
Community, social and personal services	57.6%	61.3%

<sup>157</sup> Ibid at 41.

<sup>158</sup> Ibid at 43.

<sup>159</sup> Ibid at 98.

Trade	49.1%	48.7%
Finance, real estate and business services	43.8%	42.1%
Manufacturing	31.1%	34.3%
Agriculture, hunting, forestry and fishing	32.3%	31.7%
Electricity, gas and water supply	26.3%	21.3%
Transport, storage and communication	19.5%	19.2%
Mining and quarrying	10.5%	13.7%
Construction	9.4%	12.9%

The representation of women has increased in only four out of ten industries during the past decade. These are: Community, social and personal services, Manufacturing, Mining and Quarrying, and Construction. In the remaining six industries, women made up a smaller proportion of the workforce in 2017 than in 2008. Women remain under-represented (below 50.8%) in eight of the ten industry's. The sharpest decline in women's participation in the workforce has come in the Electricity, gas and water supply industry, despite this industry being dominated by state-owned companies, whose levels of oversight and democratic accountability to Parliament and the Executive means that they should be at the forefront of promoting and ensuring employment equity. Moreover, the two industry's where women make up the bulk of the workforce – private households and community, social and personal services – often have poorer working conditions and wages than most other industries.

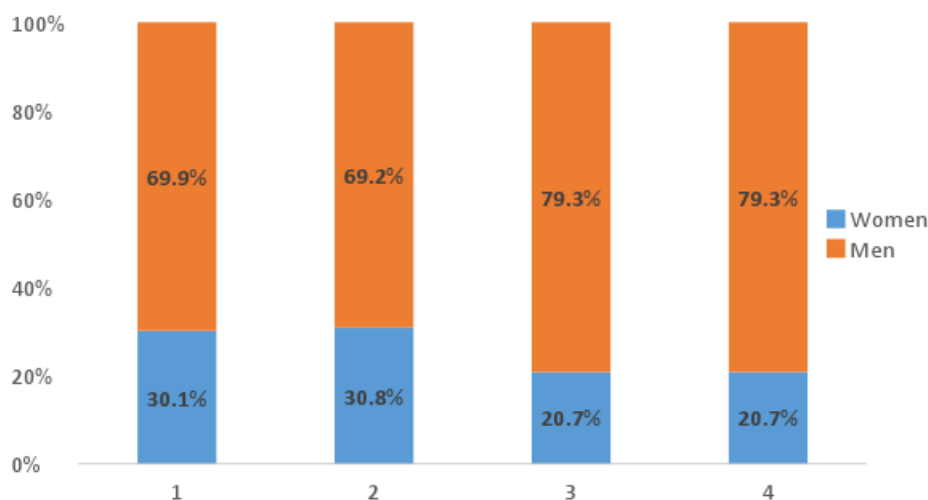
**Table 14:** Proportion of women in the workforce, per occupation

	2008	2017
Domestic worker	96.2%	95.9%
Clerk	67.9%	72.4%
Technician	54.3%	54.4%
Professional	45.9%	50.3%
Sales and services	46.5%	48.6%
Elementary	40.9%	42.5%
Manager	29.8%	32.8%
Skilled agriculture	25.8%	16.5%
Plant and machine operator	14.0%	12.6%
Craft and related trade	14.3%	10.0%

There does seem to have been a slightly greater level of gender transformation at the occupational level, however. Women have increased their representation in five out the ten overarching occupations (Clerk, Technician, Professional, Sales and Services and Manager). Nonetheless, women remain under-represented in seven out of ten occupations. This includes making up less than a third of all managers. Domestic work, which is associated with relatively low pay and insecure working conditions, remains dominated by women.

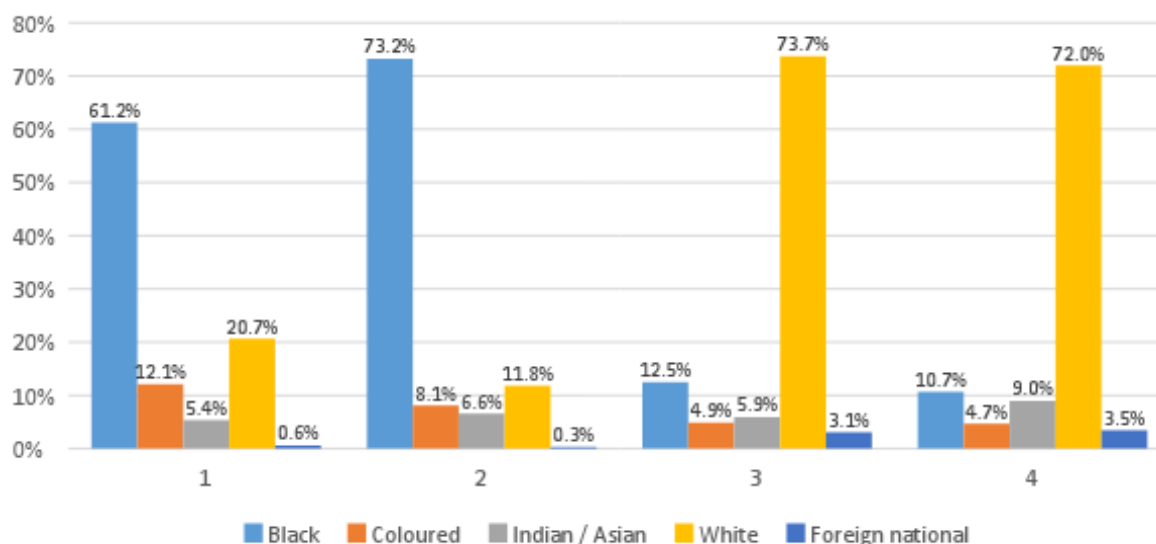
#### *Representation of designated groups at different occupational levels*

**Figure 14:** Representation of women and men in top management positions in the public and private sectors<sup>160</sup>



A critical indicator of the extent to which employment equity has been achieved is the representation of designated groups at various occupational levels within organisations. At the top level of management, where the most far-reaching decisions are taken, there has been little to no increase in gender equality over the past decade. In the public sector, women held only 30.8% of top management positions in 2016 while in the private sector it was even less at 20.7%. The very little progress that has been made in this regard calls into question both the commitment of public and private sector organisations to achieve gender parity in their top management, as well as the efficacy of the Department of Labour's oversight processes.

**Figure 15:** Representation of population groups in top management positions in the public and private sectors



The representation of population groups at top management level is very different in the public and private

<sup>160</sup> Ibid at 100.

sectors, with much greater levels of transformation having taken place in the former compared to the latter over the past decade. By 2017, top management in the public sector corresponded quite closely to that of the population, with Black and Coloured South Africans slightly under-represented and Indian/Asian and White South Africans slightly over-represented. However, far more work needs to be done in the private sector, where the proportion of top management that is Black or Coloured has declined from an already extremely low base since 2008. The only population group to increase its share of top management positions is Indian/Asians, who are now over-represented at that level. White South Africans continue to hold almost three out of every four top management positions in the private sector, despite making up less than one tenth of the working-age population.

Table 15 below breaks down the representation at top management level by race and sex and calculates an employment equity gap for each group. The employment equity gap (EEG) represents the factor by which a group is under (-) or over (+) represented at top management level (this table includes all sectors of the economy). An EEG of 1 represents perfect representation (with that group's representation in the WAP), while anything below 1 signals under-representation and anything above 1 signals over-representation.

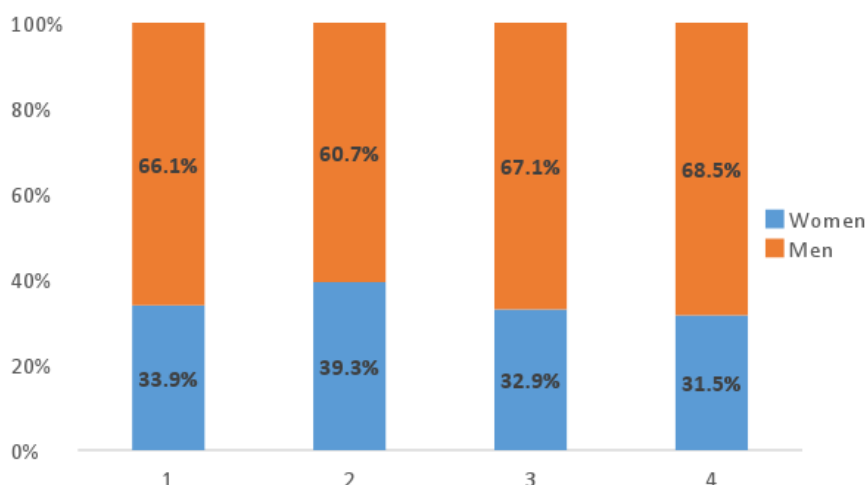
**Table 15:** Employment equity gap in top management positions by sex and population group

	2008			2016		
	Percentage of WAP	Percentage of top management	Employment equity gap	Percentage of WAP	Percentage of top management	Employment equity gap
Black women	40.0%	3.8%	- 10.5	40.7%	4.5%	- 9.0
Black men	37.8%	8.7%	- 4.3	39.2%	9.8%	- 4.0
Coloured women	4.8%	1.5%	- 3.2	4.7%	1.7%	- 2.7
Coloured men	4.5%	3.4%	- 1.3	4.4%	3.2%	- 1.4
Indian/Asian women	1.4%	1.3%	- 1.1	1.3%	2.3%	+ 1.7
White women	5.1%	13.8%	+ 2.7	4.2%	12.9%	+ 3.1
Indian/Asian men	1.4%	4.6%	+ 3.3	1.4%	6.5%	+ 4.5
White men	5.4%	59.9%	+ 11.0	4.4%	55.6%	+ 12.5

When representation at top management is broken down by both race and sex, we can see that the most advantaged group by far is White men. Astonishingly, the EEG gap for White men increased since 2008 as the proportion of the working-age population that are White males decreased at a faster rate than the small decline in White men at top management level. This meant that by 2016 there were 12.5 times more White men in top management positions than there would be under perfect employment equity. At the other end of the scale, Black women continue to be by far the most under-represented, holding only 4.5% of top management positions in 2016, despite making up 40.7% of the WAP. Black men held almost twice as many top management positions as Black women, but remained the second most disadvantaged group at this level. The final group that is significantly under-represented is Coloured women. For all of these three groups, there was an improvement in their representation at top management level between 2008 and 2016, albeit a very slight one. Coloured men are also slightly under-represented. All Indian/Asian and White women and men are over-represented at top management level. However, in both cases, men fare better than women at this level.

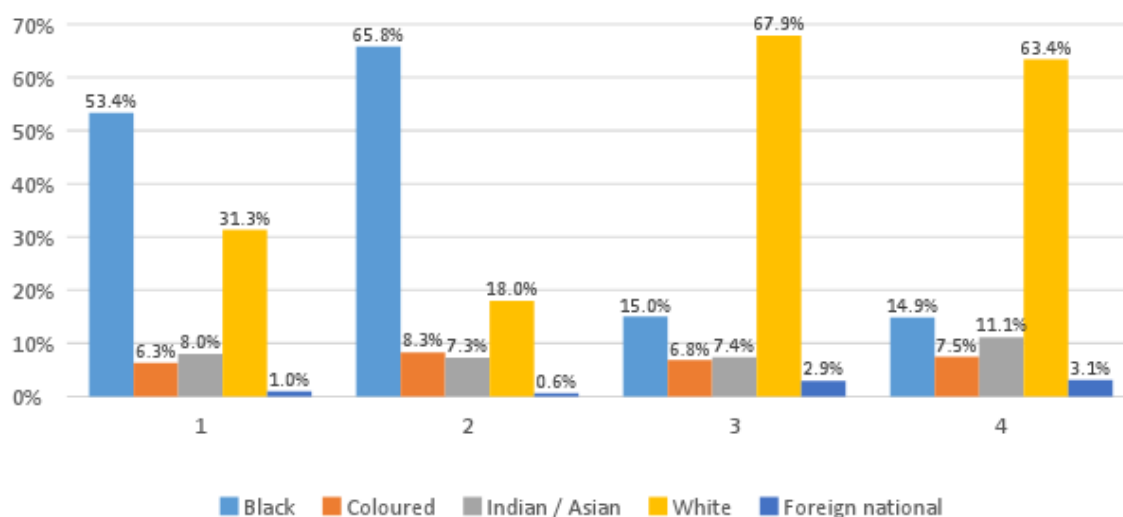
At the level of senior management, a very similar story prevails, though the EE gaps are not quite as pronounced.

**Figure 16:** Representation of women and men in senior management positions in the public and private sectors<sup>161</sup>



Overall, women remain vastly under-represented at the senior management level, though as with top management, there has been more progress in the public than the private sector. In fact, women's representation at senior management in the private sector *decreased* between 2008 and 2016. This raises serious questions about the extent to which the private sector is genuinely committed to gender transformation.

**Figure 17:** Representation of population groups in senior management positions in the public and private sectors



The private sector is also lagging very far behind when it comes to the representation of designated population groups at the level of senior management, with slightly fewer Black senior managers in 2016 than in 2008. As with the decline in the representation of women, it is clear that far too little is being done to bring the private sector into compliance with the EEA. Again, while the proportion of private sector senior managers that are White has decreased slightly, the main beneficiary of this drop has been Indian/Asian South Africans. In the

<sup>161</sup> Ibid at 103



public sector, on the other hand, there has been a significant increase in the representation of Black and Coloured South African at senior management level, while the proportion that is Indian/Asian or White has decreased towards a more equitable level. However, there are relatively more Black top managers than senior managers in the public sector.

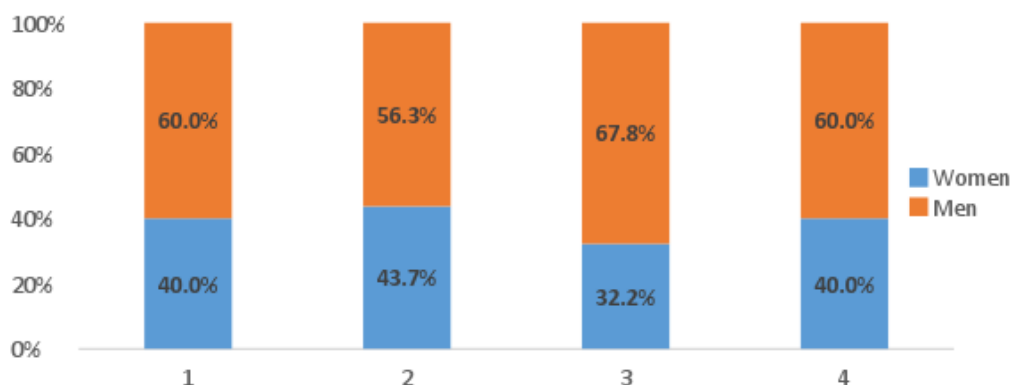
**Table 16:** Employment equity gap in senior management positions by sex and population group, 2008-2016

	2008			2016		
	Percentage of WAP	Percentage of senior management	Employment equity gap	Percentage of WAP	Percentage of senior management	Employment equity gap
Black women	40.0%	5.4%	- 7.4	40.7%	7.8%	- 5.2
Black men	37.8%	11.9%	- 3.2	39.2%	13.9%	- 2.8
Coloured women	4.8%	2.3%	- 2.1	4.7%	2.9%	- 1.6
Coloured men	4.5%	4.6%	1	4.4%	4.7%	+ 1.1
Indian/Asian women	1.4%	2.3%	+ 1.7	1.3%	3.6%	+ 2.7
White women	5.1%	17.8%	+ 3.5	4.2%	18.3%	+ 4.3
Indian/Asian men	1.4%	6.0%	+ 4.3	1.4%	6.9%	+ 4.8
White men	5.4%	47.4%	+ 8.7	4.4%	39.0%	+ 8.8

Employment equity gaps at senior management are high for all groups except Coloured men, for whom there is close to equity. The only change compared to top management level is that the gaps are generally lower. Nevertheless, Black women have 5.2 times too few senior management positions than they should, while White women had 4.8 times more and White men held 8.8 times more senior management positions than they would have under perfect employment equity, in 2016.

As alluded to at the beginning of this section, colonial and apartheid governments were not only concerned with skewing the availability of work opportunities at the top of the ladder towards Whites, they also strove constantly to ensure that the only jobs that Black people were educated for were unskilled and low paid. Indeed, as the White middle class grew bigger and utterly dominant in management positions, Whites almost moved out of unskilled workforce completely, leaving these jobs almost entirely to Blacks. A more equal workforce distribution would therefore see not only larger numbers of Black people in senior and top management positions, but also a more representative balance of sexes and races in unskilled positions, a subject to which figure 18 turns.

**Figure 18:** Representation of women and men in unskilled positions, public and private sector



Men continue to dominate unskilled work in both the public and private sectors. In both cases however, women have taken a slightly larger share of the work since 2008, especially in the private sector. Nonetheless, approximately six out of every unskilled workers in each sector is male.

**Figure 19:** Representation of population groups in unskilled positions, public and private sector

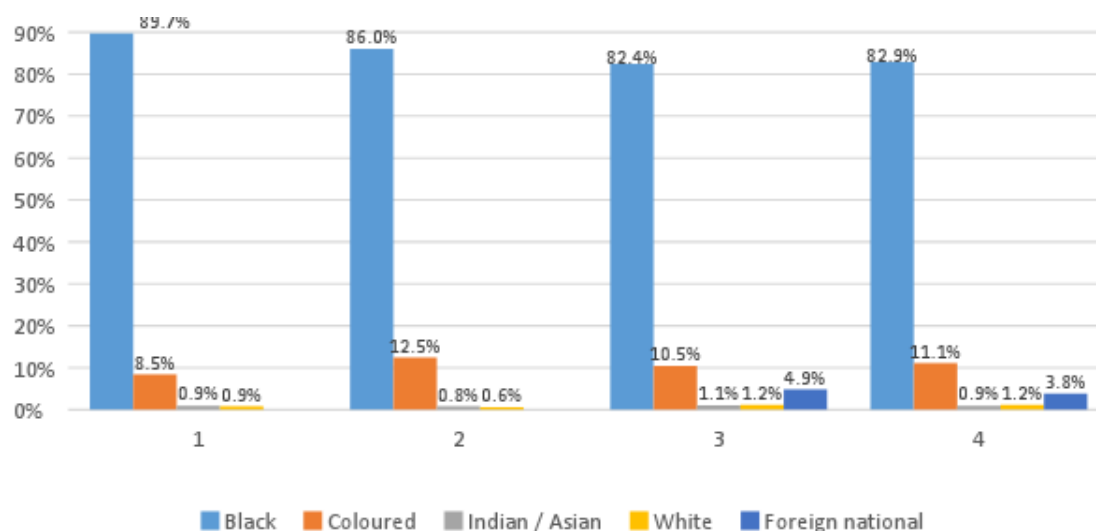


Figure 19 shows that the vast majority of unskilled work in the country is done by Black people. This is more so in the public sector, although there has been a slight reduction in the proportion of Black people that has been taken up by Coloured people. The increase in the proportion of unskilled work undertaken by Coloureds has occurred in both the public and the private sector. At the same time, the proportion of Indian/Asians and Whites in the unskilled workforce has reduced very slightly in both sectors from an already very low base.

**Table 17:** Employment equity gap in unskilled positions by sex and population group, 2008 and 2016

	2008			2016		
	Percentage of WAP	Percentage of unskilled workers	Employment equity gap	Percentage of WAP	Percentage of unskilled workers	Employment equity gap
White women	5.1%	0.4%	- 12.8	4.2%	0.4%	- 10.6
White men	5.4%	0.8%	- 6.8	4.4%	0.8%	- 5.6
Indian/Asian	1.4%	0.4%	- 3.5	1.3%	0.3%	- 4.4

women						
Indian/Asian men	1.4%	0.6%	- 2.4	1.4%	0.5%	- 2.9
Black women	40.0%	27.3%	- 0.7	40.7%	33.9%	- 1.2
Coloured women	4.8%	5.0%	1	4.7%	5.5%	+ 1.2
Black men	37.8%	56.0%	+ 1.5	39.2%	49.4%	+ 1.3
Coloured men	4.5%	5.3%	+ 1.2	4.4%	5.9%	+ 1.3

The Employment Equity Gap in the unskilled workforce is therefore almost the opposite of the gap at senior and top management levels. Here, the most under-represented group is White Women, who make up only 0.4% of unskilled workers. They are followed by White men, who are under-represented by a factor of -5.6. Table 17 also shows that the percentage of unskilled workers that are Black men has declined from 56.0% in 2008 to 49.4% in 2016, although they still remain over-represented at this level.

### *People with disabilities*

People with disabilities (PWD) are also a designated group under the EEA. In 2016, the CEE produced updated Technical Assistance Guidelines on the employment of people with disabilities,<sup>162</sup> which unpacks the Disability Code provided by the Department of Labour<sup>163</sup> and is aligned to the government's obligations under the Convention on the Rights of Persons with Disabilities. The South African Human Rights Commission has also produced a 'disability toolkit' for private sector employers.<sup>164</sup>

**Table 18:** Representation of people with disabilities in the WAP, top management, senior management and unskilled positions in 2008 and 2016

Year	Percentage of the WAP (2011)	Percentage of top management positions	Percentage of senior management positions	Percentage of unskilled positions
2008	5.5%	1.1%	0.8%	0.9%
2016		1.2%	1.1%	0.8%

Despite being recognised as a designated group with specific guidelines for employers on how to ensure that PWD are fairly represented in the labour force, PWD remain greatly under-represented. Indeed, there are approximately five times more PWD in the working-age population than there are in the labour force. Moreover, in both 2008 and 2016, more than 50% of PWD at top and senior management level were White.

## **Conclusion**

Transforming the demographics of the work force has proved a major challenge for the democratic government since 1994. Though some gains have been made, progress has been extremely slow. This is reflected in a comment made by the CEE in its 2008/09 Annual Report that still holds true today:

<sup>162</sup> Available at: [www.labour.gov.za/DOL/downloads/documents/useful-documents/employment-equity/tagdisability2017.pdf](http://www.labour.gov.za/DOL/downloads/documents/useful-documents/employment-equity/tagdisability2017.pdf).

<sup>163</sup> Available at: [www.labour.gov.za/DOL/downloads/legislation/notices/employment-equity/disabilitycode\\_nov2015.pdf](http://www.labour.gov.za/DOL/downloads/legislation/notices/employment-equity/disabilitycode_nov2015.pdf).

<sup>164</sup> Available at: [www.sahrc.org.za/home/21/files/20170524%20SAHRC%20Disability%20Monitoring%20Framework%20and%20guidelines%20Draft%205.pdf](http://www.sahrc.org.za/home/21/files/20170524%20SAHRC%20Disability%20Monitoring%20Framework%20and%20guidelines%20Draft%205.pdf).

White males continue to dominate the top echelons in the private sector followed by White females and the Indian population. Africans and Coloureds continue to languish at the bottom with a few Africans sprinkling on top. Data also shows that even in the disability group White people are still being disproportionately preferred.<sup>165</sup>

The Department of Labour has the main role to play in monitoring and enforcing compliance with the EEA, which is a critical piece of legislation in the post-apartheid labour landscape. However, high vacancy rates for labour inspector posts (of 7% and more over the past four years) and a reduction in the post allocation for labour inspectors hampers the department's capacity to perform this crucial task, and should be immediately attended to. Vacant posts represent a failure to utilise the maximum available resources at the department's disposal to fulfil its obligations under the Act.

Nonetheless, the department has managed to increase the number of reviews and inspections carried out under the EEA over the past three years and has also found an increasing number of employers to be non-compliant. Moreover, the department has dealt with 100% of non-compliant employers in the last financial year. Despite this seeming increase in enforcement of the Act, workplaces – especially in the private sector – remain largely untransformed and access to decent work remains highly inequitable.

This poses the question: are the powers conferred on the department and the mechanisms available for enforcement provided by the Act sufficient to ensure employment equity? The answer to this question requires further research that is beyond the scope of this paper.

## **2. Rights at work (just and favourable conditions of work)**

Decent work is work which takes place under *just and favourable conditions* which respect the fundamental rights of workers. The ICESCR defines these conditions in article 7:

### **ICESCR, Article 7**

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

- (a) Remuneration which provides all workers, as a minimum, with:
  - (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;
  - (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;
- (b) Safe and healthy working conditions;
- (c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;
- (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as

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<sup>165</sup> CEE, '2008/09 Annual Report' at 49.

well as remuneration for public holidays.

It is crucial to note that these rights are applicable to *all workers*, not just formal or permanent employees. This includes formal and informal workers, young and old workers, migrant and refugee workers, domestic workers, agricultural workers, self-employed workers, and disabled workers. With regards to the latter, the CESCR has recognised that specific measures will be necessary to ensure that workers with disabilities enjoy the same rights as other workers.<sup>166</sup>

This chapter will focus on parts (a) and (d) of article 7, with links drawn to the indicators provided in our sister publication *Indicators to Monitor the Progressive Realisation of the Right to Decent Work (2017)* where possible. Part (c) has been looked at extensively in the previous chapter, while part (b) will require further future engagement both in relation to the development of indicators and the analysis of current policies. It should be noted however that the Occupational Health and Safety Act (Act 85 of 1993, as amended) exists to provide for the rights to safe and healthy working conditions envisaged by the ICESCR.<sup>167</sup>

### **Core rights:**

Balanced work, family and personal life

Adequate and equitable earnings

## **✓ Balanced work, family and personal life**

Article 7(d) of the ICESCR provides that everyone has the right to “Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.” These rights are essential for workers to have a balanced work, family and personal life and must be enforced in law.

General Comment No.23 of the CESCR breaks down article 7(d) into several components:

- Limits on daily and weekly hours of work
- Daily and weekly rest periods
- Paid annual leave and public holidays
- Other leave (maternity, paternity, parental, family leave and sick leave)

In South Africa, the Basic Conditions of Employment Act (BCEA, Act 75 of 1997, as amended)<sup>168</sup> overseen by the Department of Labour (DoL) seeks to give effect to section 23(1) of the Constitution by ensuring fair labour practices and just and favourable conditions of work. The BCEA applies to all workers except for members of the national defence force, intelligence and secret services and unpaid volunteers working for a

<sup>166</sup> CESCR General Comment No. 23 on the right to just and favourable conditions of work (2016) at para 47(c). Available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f23&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f23&Lang=en).

<sup>167</sup> For a useful overview of this Act, see Joubert ‘[Occupational Health Challenges and Success in Developing Countries: A South African Perspective](#)’ International Journal of Occupational and Environmental Health Vol 8 Issue 2 (2002).

<sup>168</sup> Available at: [www.labour.gov.za/DOL/legislation/acts/basic-conditions-of-employment/read-online/amended-basic-conditions-of-employment-act](http://www.labour.gov.za/DOL/legislation/acts/basic-conditions-of-employment/read-online/amended-basic-conditions-of-employment-act).

charitable purpose.<sup>169</sup>

Chapters 2 of the BCEA provides for the regulation of working time. The chapter applies to all workers except for senior managers, travelling sales staff who regulate their own time, and employees who work less than 24 hours per month.<sup>170</sup> The chapter also makes for flexibility in working hours in accordance with the ICESCR,<sup>171</sup> including work that must be done immediately owing to circumstances that could not have been envisaged by an employer.<sup>172</sup>

### *Limits on daily and weekly hours of work*

The CESCR and the ILO recommend that as a general principle, daily working hours should not exceed eight working hours in any given day<sup>173</sup> or on average 40 hours over the course of a week.<sup>174</sup> Section 9 of the BCEA limits ordinary working hours to 45 hours in any week and nine hours in a day if the employee works for five or fewer days in a week, and eight hours if any employee works more than five days in a week.<sup>175</sup> This is slightly more than the ILO and CESCR recommends. However, Schedule 1 of the Act provides procedures for the progressive reduction of these maximum working hours, with a view to achieving a 40 hour working week and an eight hour working day through, inter alia, collective bargaining, investigations by the Employment Conditions Commission and the DoL and the publication by the DoL of sectoral determinations on working hours.<sup>176</sup>

What impact have the BCEA and this schedule had on limiting working hours to 45 hours per week and progressively reducing the average number of hours worked per week to 40 hours?

**Figure 20:** Percentage of workers working excessive hours (more than 45 hours per week)<sup>177</sup>

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<sup>169</sup> Basic Conditions of Employment Act (BCEA), No. 75 of 1997, as amended at 3.1.

<sup>170</sup> Ibid at 6(1).

<sup>171</sup> See CESCR General Comment No. 23 at para 35.

<sup>172</sup> BCEA at 6.2.

<sup>173</sup> CESCR General Comment No. 23 at para 35.

<sup>174</sup> ILO, “Working time in the twenty-first century”, report for discussion at the Tripartite Meeting of Experts on Working-time Arrangements (17-21 October 2011).

<sup>175</sup> BCEA at 9(1).

<sup>176</sup> BCEA at Schedule One, 1.

<sup>177</sup> SPII (2017) at 121.

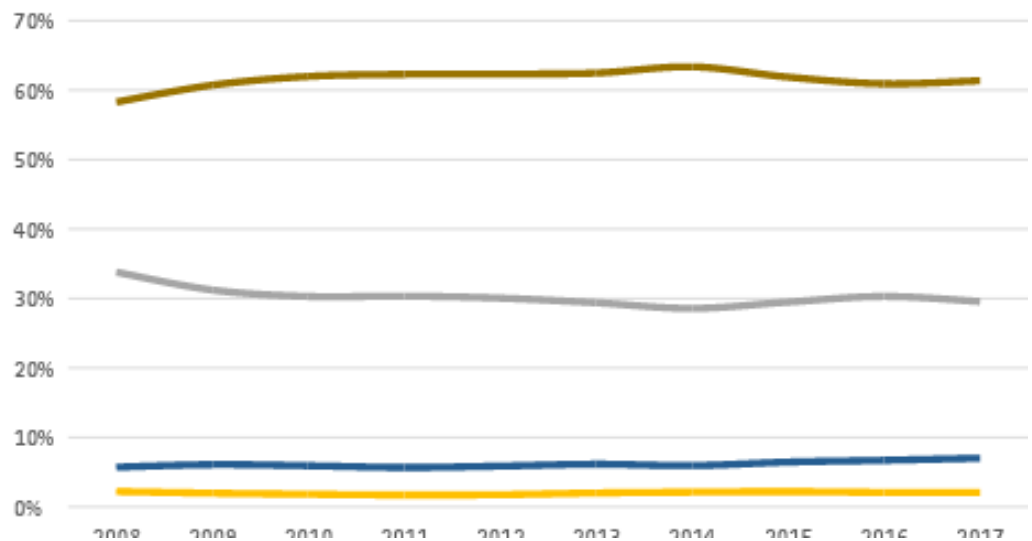


Figure 20 shows that there was a gradual decrease in the percentage of workers working more than 45 hours per week, commensurate with a gradual increase in the percentage of workers working 30-45 hours per week between 2008 – 2014. However, this trend reversed briefly as economic conditions in the country deteriorated between 2014 and early 2017. Nonetheless, the overall trend is towards a gradual reduction in the percentage of workers working excessive hours. At 29.6% in 2017, this still remains a relatively large section of the workforce, which could lead to the conclusion that while progress is being made, it is not being made quickly enough, as almost 1 in 3 workers continues to work more hours per week than the maximum provided for in the BCEA.

**Table 19:** Number and percentage of people working excessive hours that are women and men, 2008 and 2017

More than 45 hours	2008		2017		2008 to 2017	
	No. of people	% of total	No. of people	% of total	difference	% change
Women	1,725,676	35.0%	1,628,940	34.1%	- 96,736	- 5.6%
Men	3,202,741	65.0%	3,147,175	65.9%	- 55,566	- 1.7%

Almost two-thirds of workers working more than 45 hours per week are men, with almost 100 000 fewer women working excessive hours in 2017 compared to 2008. This shows that reducing the number of workers working excessive hours has a positive gender impact. Government may now want to consider implementing specific measures targeted at men in order to reduce the much larger number (3.2 million in 2017) of men who continue to work more than 45 hours per week.

In relation to overtime, the CESC provides that workers should receive additional pay for overtime worked, although it does not stipulate how much this should be.<sup>178</sup> The BCEA provides in section 10 that employers may not require employees to work more than 10 hours overtime in a week and that overtime must be paid at one and a half times the worker’s usual wage.<sup>179</sup> However, an agreement may be entered into between the employee and employer that allows the employee to accrue additional paid leave as a result of working overtime, rather than receive additional pay.<sup>180</sup>

<sup>178</sup> CESC General Comment No. 23 at 37.

<sup>179</sup> BCEA at 10(1) and (2).

<sup>180</sup> Ibid at 10(3).

### *Daily and weekly rest periods*

Rest is vital to ensure the health and safety of all workers. The CESCER recommends that all workers are entitled to at least 24, but ideally 48 consecutive hours of rest every seven days in addition to mandatory daily rest periods.<sup>181</sup> The BCEA provides that workers are entitled to a one hour lunch break during a shift of five hours or longer.<sup>182</sup> It also provides for daily rest periods of at least 12 consecutive hours and weekly rest periods of at least 36 consecutive hours,<sup>183</sup> thereby straddling the recommendation of 24 hours provided by the CESCER.

Section 16 of the BCEA provides that employers must pay an employee who ordinarily works on a Sunday one and a half times their normal wage for that day, and double the wage of employees who do not ordinary work on a Sunday.

### *Paid annual leave and public holidays*

The ICESCER requires that all workers (including temporary and part-time workers) are entitled to paid annual leave.<sup>184</sup> The BCEA takes a similar position in Chapter Three, Section 19, excluding only workers who work less than 24 hours (three days) per month. The BCEA is more generous than the CESCER, as it provides for at least 21 days annual leave on full remuneration during each annual leave cycle,<sup>185</sup> whereas the CESCER only provides for at least three weeks (15 working days).<sup>186</sup> Moreover, the BCEA allows employees to take accrued leave up to six months after the end of a leave cycle.<sup>187</sup> In line with the CESCER, the BCEA ensures that employees who work part-time hours are entitled to an equivalent amount of leave which accrues at 1 day for every 17 days worked, or 1 hour for every 17 hours worked.<sup>188</sup>

Section 18 of the BCEA provides that when a public holiday falls on a day ordinarily worked by an employee, the employer must pay them their normal wage for that day. If an employee does work on the public holiday, they are entitled to receive at least double their normal wage.

To what extent do workers in South Africa enjoy their rights to paid leave?

**Figure 21:** Percentage of workers who report being entitled to *any* paid leave<sup>189</sup>

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<sup>181</sup> CESCER General Comment No. 23 at 38-39.

<sup>182</sup> BCEA at 14.

<sup>183</sup> BCEA at 15.

<sup>184</sup> CESCER General Comment No. 23 at 41.

<sup>185</sup> BCEA at 20(2).

<sup>186</sup> CESCER General Comment No. 23 at 41.

<sup>187</sup> BCEA at 20(3).

<sup>188</sup> Ibid at 20(2)(b) and (c).

<sup>189</sup> SPII (2017) at 123.



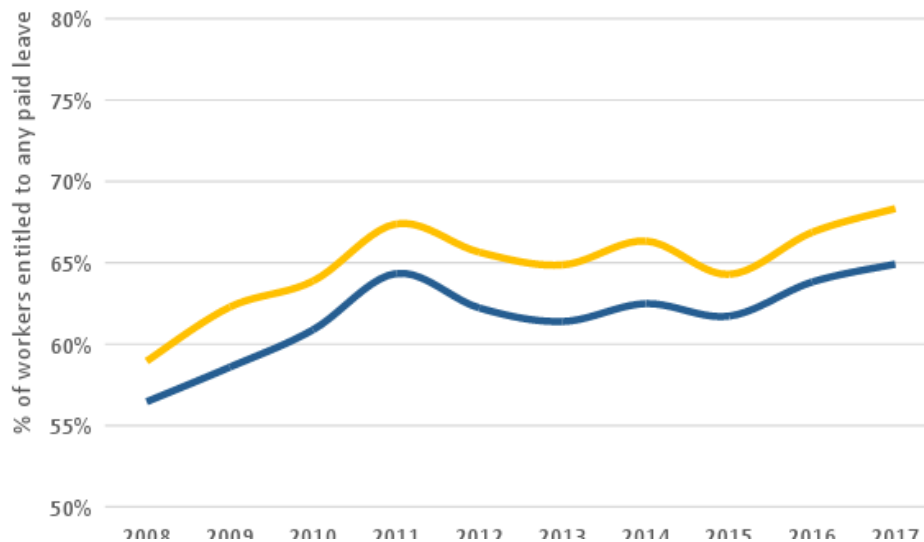


Figure 21 shows that, despite a gradual increase in the percentage of workers who report being entitled to any paid leave, almost one third of workers are still unable to take any paid leave from work. This shows that many workers remain excluded from the rights and protections afforded to them under the BCEA. Moreover, there remains a gender bias in who has access to paid leave from work, with men more likely than women to enjoy this right.

#### *Maternity, paternity, parental, family and sick leave*

The CESCRR recommends that legislation be enacted which guarantees entitlements to maternity, paternity and parental leave, to leave for family reasons and to paid sick leave.<sup>190</sup>

In relation to maternity, paternity and parental leave in particular, the CESCRR has stated that “Measures aimed at assisting workers to reconcile work with family responsibilities should not reinforce stereotyped assumptions that men are the main breadwinners and that women should bear the main responsibility for the household. If substantive equality is to be achieved, both male and female workers with family responsibilities should benefit from the measures on an equal footing.”<sup>191</sup> While the CESCRR does not make any particular recommendations about paid sick leave, it does assert that this leave is “critical for sick workers to receive treatment for acute and chronic illnesses and to reduce infection of co-workers.”<sup>192</sup>

Women are entitled to at least four months maternity leave under Section 25 of the BCEA and must remain away from work for at least six weeks after the birth of their child. However, the BCEA does not require that this is paid leave. Men, on the other hand, are entitled to three days’ paid family leave when their child is born.<sup>193</sup> The fact that women can take four months leave, and men only three days, and that there is no requirement for the former to be paid, is clearly reinforcing of gender stereotypes. The assumption in the legislation seems to be that employers should not be under an obligation to ensure that a pregnant woman or recent mother has access to any income during her maternity leave, but that she will have a male partner who will continue to earn income during this period as the main breadwinner. Moreover, there is no provision made in the BCEA for parental leave for adoptive parents beyond the three days’ paid family responsibility leave.

<sup>190</sup> CESCRR General Comment No. 23 at 44.

<sup>191</sup> CESCRR General Comment No. 23 at 36.

<sup>192</sup> CESCRR General Comment No. 23 at 30.

<sup>193</sup> BCEA at 27(2).

**Figure 22:** Percentage of workers who report being entitled to maternity/paternity leave<sup>194</sup>

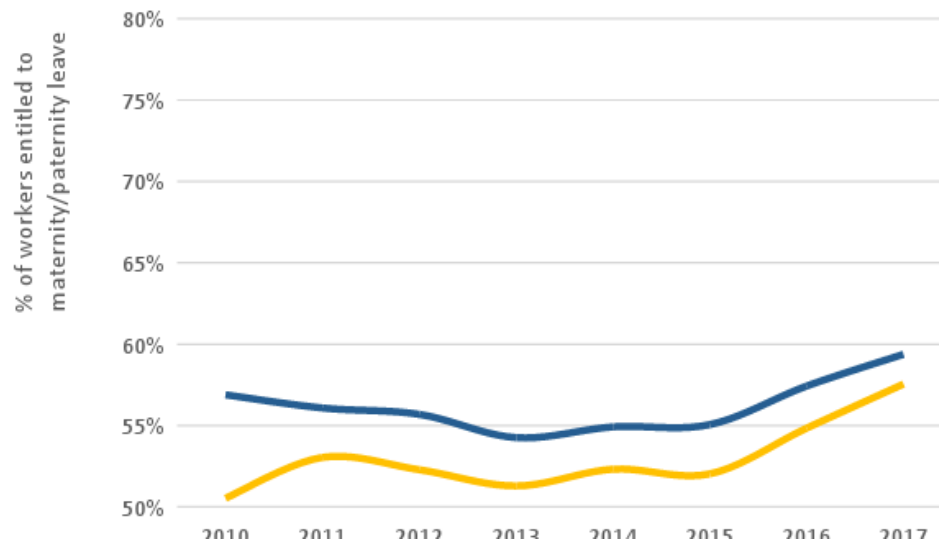


Figure 22 shows that more than 40% of the workforce does not have any entitlement to maternity/paternity leave, despite the provisions of the BCEA. While women are slightly more likely to enjoy this right than men, the percentage for both sexes is similar, indicating that there is a general implementation gap by many employers who are failing to ensure this right for workers. These workers face a very difficult situation in the event that they have children. If their employer denies them their right to maternity/paternity leave and their right to return to work after the birth of their child, they are likely to face intense financial hardship that will affect the resources they have available to raise and care for their child.

### ✓ Adequate and equitable earnings

Article 7(a) of the ICESCR provides that everyone has the right to “Remuneration which provides all workers, as a minimum, with: (i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; (ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant”.

- Equal remuneration for work of equal value

The achievement of equal remuneration for work of equal value is an important principle in the ICESCR that is necessary for addressing inequalities in earnings between women and men in particular, but also between other groups, based on historical advantage and disadvantage. In South Africa, this is especially true at the level of race, as well as sex and disability, as a result of apartheid policies which created deliberate inequalities in wages for White, male and able-bodied workers over other groups.

Determining the value of work is a complex exercise. At the simplest level, employers must ensure that people performing the same function with the same job title receive the same or very similar pay, with any differences

<sup>194</sup> SPII (2017) at 123.

based on objective criteria (such as length of service) and not on arbitrary differences such as sex, race or nationality, for example. However, employers should develop more complex objective criteria for evaluating the value of each workers work which also includes the level of skill and responsibility that is required for a worker to perform her or his function.<sup>195</sup> The CESCRC therefore recommends that “States parties should adopt legislation and other measures to promote equal remuneration for work of equal value, including in the private sphere, for example, by encouraging the establishment of a classification of jobs without regard to sex; fixing time-bound targets for achieving equality, and reporting requirements designed to assess whether targets have been met; and requiring progressive decreases in the differentials between rates of remuneration for men and women for work of equal value.”<sup>196</sup>

The Employment Equity Act was amended in 2013 (Act No. 47 of 2013) to further regulate the prohibition of unfair discrimination and ensure equity in employment practices and conditions. A key amendment was made to Section 6 of the Act by the insertion of two sub-sections which provide:

- that a difference in the terms and conditions of employment (including remuneration) between employees who perform work of equal value that is based on sex, race or any other arbitrary ground, is unfair discrimination, and
- that the Minister of Labour, on advice from the ECC, may prescribe the criteria and methodology for assessing work of equal value.<sup>197</sup>

The Minister subsequently developed and published such criteria and methodology in the Employment Equity Regulations of 2014.<sup>198</sup> The regulations provide that the work performed by an employee is the same as the work of another employee if their work is identical, interchangeable or sufficiently similar.<sup>199</sup> If the two employees are in different jobs, however, the regulations establish a methodology for how those jobs could be determined to have equal value. This methodology requires an objective assessment of:

- (a) the responsibility demanded of the work, including responsibility for people, finances and material;
- (b) the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
- (c) the physical, mental and emotional effort required to perform the work; and
- (d) to the extent that it is relevant, the conditions under which work is performed, including the physical environment, psychological conditions, time when and geographic location where the work is performed.<sup>200</sup>

Any other factor that can be shown to be relevant to the evaluation of the value of the work can also be considered.<sup>201</sup> These regulations thus provide for the objective classification of jobs required by the CESCRC.

The regulations also identify several factors which can justify unequal terms and conditions for work of equal value, including especially the length of service, qualifications, performance (including the quantity and quality of work performed) and whether the employee is temporarily in a position in order to gain experience

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<sup>195</sup> CESCRC General Comment No. 23 at 12.

<sup>196</sup> CESCRC General Comment No. 23 at 16.

<sup>197</sup> Employment Equity Amendment Act (Act No. 47 of 2013) at 3(b).

<sup>198</sup> Available at: [www.labour.gov.za/DOL/downloads/legislation/regulations/employment-equity/amendment/2014eereg1aug.pdf](http://www.labour.gov.za/DOL/downloads/legislation/regulations/employment-equity/amendment/2014eereg1aug.pdf).

<sup>199</sup> Employment Equity Regulations, 2014 at 4(1) and 4(2).

<sup>200</sup> Employment Equity Regulation, 2014 at 6(1).

<sup>201</sup> Ibid at 6(2).

and training.<sup>202</sup> However, any difference in terms and conditions justified by the above grounds must be shown to be unbiased against any designated group and applied in a proportionate manner.<sup>203</sup>

Section 27 of the Employment Equity Act (as amended) deals specifically with income differentials and discrimination. It provides that designated employers must submit a statement to the Employment Conditions Commission in their employment equity reports that provides details of the remuneration and benefits received in each occupational category and level of its workforce.<sup>204</sup> Further, it provides that where disproportionate income differentials or unequal pay for work of equal value are reflected in the statement, the employer must take steps to progressively reduce such differentials subject to guidance as may be given by the Minister, on advice from the ECC.<sup>205</sup> Such steps may include collective bargaining, compliance with sectoral determinations and applying the norms and standards set by the ECC.

In 2015, on advice from the EEC, the Minister of Labour gazetted a Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value<sup>206</sup> which provides practical guidance to employers and employees on how to apply the principle of equal pay in their workplaces.<sup>207</sup> The guide provides further detail on evaluating jobs and how unfair discrimination through unequal pay for work of equal value can be determined. This provides employers and employees with a means of both assessing and reversing unequal pay for work of equal value. However, at the time of writing, the Employment Conditions Commission had not issued norms and benchmarks either at a sectoral or a general level. This gap makes it difficult for employers to know what targets to set themselves and specific steps to take to reduce wage differentials. In the absence of guidance on norms and benchmarks for wage differentials, it is also difficult to hold employers to account for having differentials that are too high.

### *Recommendation*

The Employment Conditions Commission must undertake research to identify norms and benchmarks for wage differentials which can be used to hold employers accountable in terms of section 27 of the EEA.

### *Do workers in South Africa enjoy their right to equal pay for work of equal value?*

Indicators developed by SPII based on data from Statistics South Africa looked at the trends in median wages for different sexes and races in South Africa between 2010 and 2015.<sup>208</sup> The indicators found that earnings inequality remains high and while some levelling appears to be occurring between the sexes, at the level of race and occupational level (closely related to class), disparities seems to be getting even wider.

Overall, median monthly earnings increased by 7% in real terms between 2010 and 2015. However, these gains accumulated mainly at the top end of the earnings scale, with workers at the bottom experiencing real terms wage decreases during this period.

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<sup>202</sup> Ibid at 7(1).

<sup>203</sup> Ibid at 7(2).

<sup>204</sup> Employment Equity Act (Act No. 55 of 1998) at 27(1).

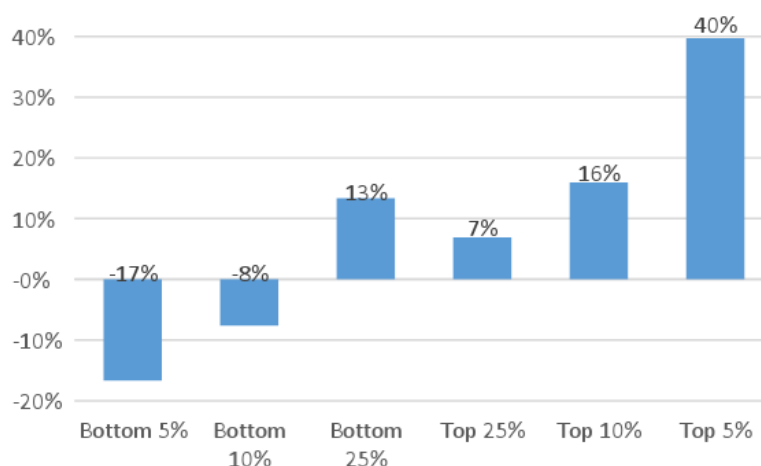
<sup>205</sup> Ibid at 27(2).

<sup>206</sup> Available at: [www.labour.gov.za/DOL/downloads/legislation/notices/employment-equity/codeofgoodpractice2015.pdf](http://www.labour.gov.za/DOL/downloads/legislation/notices/employment-equity/codeofgoodpractice2015.pdf).

<sup>207</sup> Employment Equity Act (Act 55 of 1998): Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value at 1.1.

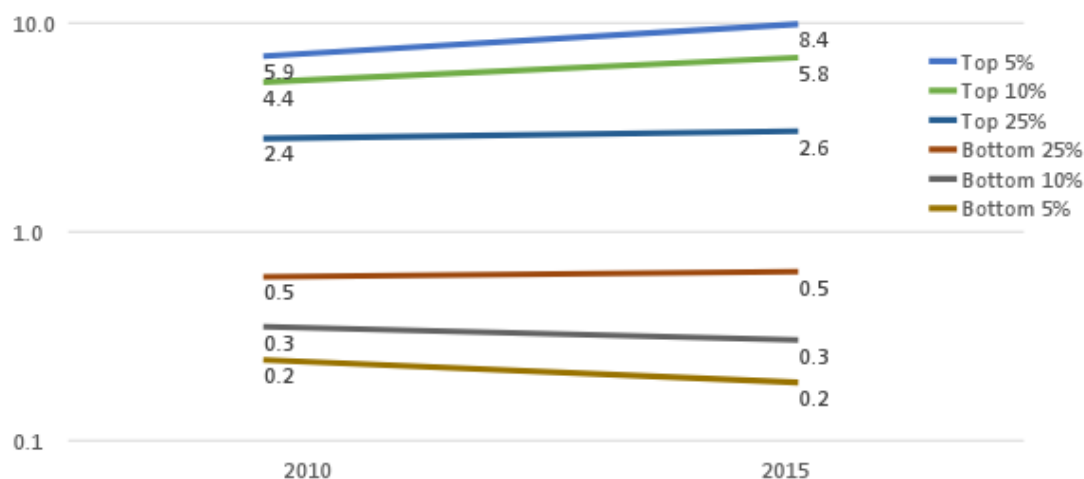
<sup>208</sup> SPII (2017) at 108-121.

**Figure 23:** Percentage change in median earnings, 2010 to 2015<sup>209</sup>



Workers at the bottom and the top of the median earnings scale have experienced very different wage changes in recent years. Although the bottom 25% of earners claimed an increase of 13% over the five-year period, those in the bottom 5% and bottom 10% experienced real terms wage declines. This contrasts with massive gains of 16% real terms increases for the top 10% of earners and a gain of 40% for the top 5% of earners. As a result, earnings inequality increased over the period, with the highest earners increasing their wages to 8.4 times the median in 2015, from 5.9 times the median in 2010, while the lowest earners received a slightly smaller portion of the median wage in 2015 compared to 2010.

**Figure 24:** Ratio of median earnings for people in different earnings bands compared to the overall median, 2010 and 2015<sup>210</sup>



This earnings inequality has gendered elements. For the bottom 50% of earners, women have made some inroads into earnings equality with men, while for the top 50% of earners, men have increased their advantage.

**Figure 25:** Ratio of median earnings for men compared to women, in different earnings bands, 2010 and 2015

<sup>209</sup> SPII (2017) at 115.

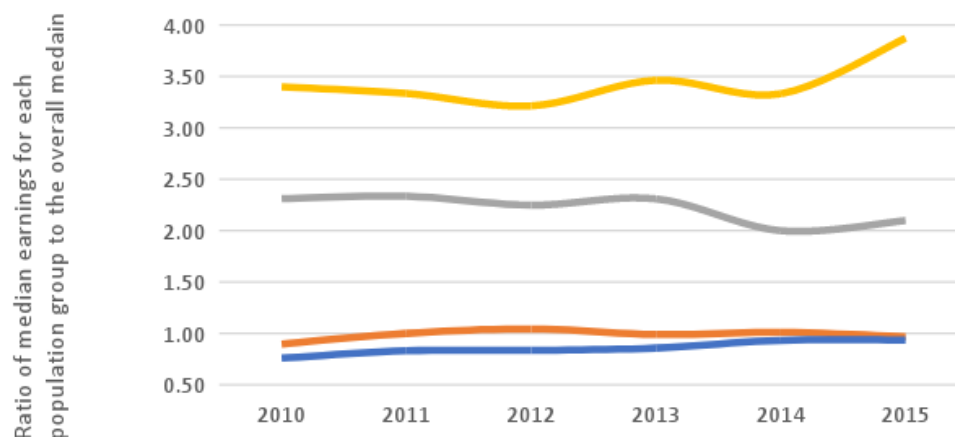
<sup>210</sup> SPII (2017)



Women achieved parity with men in the bottom 5% earnings band in 2015, and the disparity between men and women in the bottom 10%, bottom 25% and median earnings bands was reduced between 2010 and 2015. Nonetheless, the median wage for women still represented 77 cents for every R1 earned by men. However, men increased their earnings advantage over women in the top 25%, 10% and 5% earnings bands. This uneven progress undermines any gains that have been made for lower income earners.

Earnings inequality between Black, Coloured, Indian/Asian and White workers also remains high.

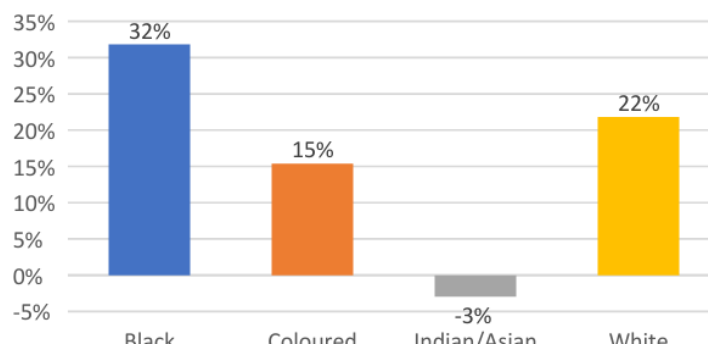
**Figure 26:** Ratio of the median earnings for each population group to the overall median for all groups, 2010-2015<sup>211</sup>



In 2010, Whites earned 3.40 times the median wage but by 2015 this had increased to 3.87 times. At the same time, median wages for Black workers increased to 94% of the overall median wage. Looked at in terms of the overall median earnings growth for the period, Black workers saw their median wages increase fastest, followed by Whites, while median wages for Indian/Asians declined.

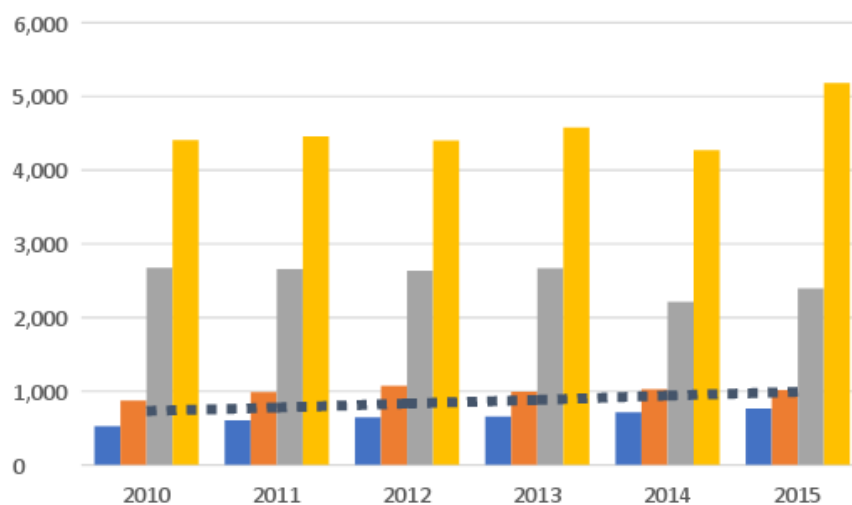
<sup>211</sup> SPII (2017) at 111.

**Figure 27:** Median monthly earnings growth from 2010 to 2015, by population group<sup>212</sup>



However, wage inequality between different race groups in South Africa is exacerbated by unequal access to employment and the average number of dependents that rely on each workers wage. The effect of this can be shown by dividing median earnings by the wage dependency ratio for each population group. Black South African wage earners have to ensure that their earnings support a higher number of people than other population groups (3.8 people in 2015). They are followed by Coloured South Africans (3 dependents), Indian/Asian South Africans (2.7 dependents) and White South Africans (2.3 dependents). By dividing the median earnings of each population group by this amount plus 1 (to account for the wage earner as well), we can get a picture of what the real spending power is for each population group, when those earnings are divided amongst an average number of dependents.

**Figure 28:** Median monthly earnings for population groups divided by the wage dependency ratio for each group, and a comparison with the upper-bound poverty line (UBPL)<sup>213</sup>



When the wage dependency ratio is accounted for, we find that the majority of Black and Coloured workers earn poverty wages that are insufficient to bring them above the UBPL. This is a result of historical

<sup>212</sup> SPII (2017) at 110.

<sup>213</sup> SPII (2017) at 112. The upper-bound poverty line (UBPL) is calculated by Statistics South Africa, most recently in their 2017 Poverty Trends Report. The UBPL is based on the absolute minimum amount of Rands that is necessary for an individual to afford to purchase essential food and non-food items each month.



undermining of Black wages that post-apartheid policies have thus far been unable to address.

The long-awaited introduction of a national minimum wage aims to transform this historical disadvantage mainly by improving the wages paid to the lowest earners. However, it is clear that as well as improving wages at the bottom end of the scale, much more needs to be done to control wages at the top of the scale if greater income equality is to be achieved. This remains an under-explored policy area in South Africa and as a result, earnings inequality looks set to continue and worsen in future.

- Remuneration that provides all workers, at a minimum, with a decent living for themselves and their families

Article 7(a) of the ICESCR provides that States Parties recognise the right of everyone to remuneration which provides (ii) a decent living for themselves and their families. The CESCR considers that a national minimum wage is an essential tool for ensuring this right. The Committee has stated that states “should prioritize the adoption of a periodically reviewed minimum wage, indexed at least to the cost of living, and maintain a mechanism to do this. Workers, employers and their representative organizations should participate directly in the operation of such a mechanism ... The minimum wage should apply systematically, protecting as much as possible the fullest range of workers, including workers in vulnerable situations.”<sup>214</sup>

South Africa adopted a system of sectoral minimum wage determinations post-1994 established by the Minister on advice from the Employment Conditions Commission. By 2015, these sectoral determinations covered about 4 million workers, or about 15% of the workforce.<sup>215</sup> While these workers enjoyed consistent real-terms increases in minimum wages in their sectors, the low baselines inherited from the past and a lack of independent research capacity within the ECC meant that wage increases tended towards caution and thus had limited transformative impact.<sup>216</sup>

However, negotiations between social partners at the National Economic Development and Labour Council (Nedlac) began in 2014 on the possible introduction of a national minimum wage in South Africa. For more than two years, representatives of government, business, organised labour and community organisations debated research and perspectives on the potential objectives, Rand value and modalities for the introduction of a national minimum wage (NMW).<sup>217</sup> In late 2016, a Panel of experts presented a detailed report<sup>218</sup> based on these deliberations to the Deputy President and in 2017 a National Minimum Wage Bill was published by the Minister of Labour in Parliament for public comment.<sup>219</sup>

The Bill recognises that South Africa is one of the most unequal societies in the world and sets the overriding

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<sup>214</sup> CESCR General Comment No. 23 at 20 and 23.

<sup>215</sup> Seeking ‘Minimum wage-setting by the Employment Conditions Commission in South Africa, 1999-2015’ (April 2016) CSSR Working Paper No. 375 at 2 n1. Available at: [https://open.uct.ac.za/bitstream/item/24242/Seekings\\_Working%20Paper%20375\\_2016.pdf?sequence=1](https://open.uct.ac.za/bitstream/item/24242/Seekings_Working%20Paper%20375_2016.pdf?sequence=1).

<sup>216</sup> Seekings (2016) at 3.

<sup>217</sup> A National Minimum Wage Research Initiative was launched at the University of Witwatersrand in 2015 which undertook substantial research on multiple aspects of the NMW, which provided crucial to the negotiations and is available at: <http://nationalminimumwage.co.za>.

<sup>218</sup> Available at: [www.treasury.gov.za/publications/other/NMW%20Report%20Draft%20CoP%20FINAL.PDF](http://www.treasury.gov.za/publications/other/NMW%20Report%20Draft%20CoP%20FINAL.PDF).

<sup>219</sup> Available at: [www.parliament.gov.za/storage/app/media/Docs/bill/8038e752-7014-4b25-806a-8854b859c8e5.pdf](http://www.parliament.gov.za/storage/app/media/Docs/bill/8038e752-7014-4b25-806a-8854b859c8e5.pdf).



purpose of the NMW as:

- (a) improving the wages of lowest paid workers;
- (b) protecting workers from unreasonably low wages;
- (c) preserving the value of the national minimum wage;
- (d) promoting collective bargaining;
- (e) supporting economic policy.<sup>220</sup>

The Bill sets the minimum wage at R20 per hour for all workers but has a tiered minimum for the following workers:

- Farm workers are entitled to a minimum wage of R18 per hour (90% of the total)
- Domestic workers are entitled to a minimum wage of R15 per hour (75% of the total)
- EPWP workers are entitled to a minimum wage of R11 per hour (55% of the total)

The amount of the minimum wage falls within the levels recommended by the National Minimum Wage Research Initiative and the Report of the Panel of Experts to the Deputy President. The Bill also follows international best practice by excluding non-basic wage payments from the calculation of the minimum wage. The basic universality of the NMW, with limited exceptions and a defined procedure for waivers, should maximise the coverage of the NMW in the country.

However, there are some elements of the Bill which run counter to the recommendations of the aforementioned research that was conducted for the deliberative process preceding the Bill. Chief among these is the definition of a ‘worker’ that is applied in the Bill.

The Bill refers to section 1 of the BCEA which specifically excludes ‘independent contractors’ from its definition of an ‘employee’, which is the term used to define a ‘worker’. This is despite a recent CCMA finding – in line with international trends – that “the line between who is employed and who is not is increasingly blurred” as a result of global and local trends towards part-time employment, outsourcing and casual work in the ‘gig-economy’.<sup>221</sup> In its verdict on whether Uber drivers should be considered as employees under the BCEA (and thus entitled to its protections) the CCMA found that the relationship between Uber and its drivers is indeed an employment relationship because the relationship is indefinite rather than temporary and because the drivers are under the control of Uber in multiple ways.<sup>222</sup> Moreover, the ILO policy guide to the implementation of national minimum wages produced in 2016 found that “Minimum wages should also apply to workers in non-standard forms of employment ... and exclusions should be kept to a minimum, particularly in relation to vulnerable categories of workers”.<sup>223</sup>

The exclusion of independent contractors from the NMW thus not only bucks the growing global and local recognition that the world of work is changing and labour law needs to be applied as broadly as possible in order to avoid excluding vulnerable workers and workers in non-standard employment relationships. It also risks excluding large numbers of workers, who as a result may continue to face low-wages with little protection

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<sup>220</sup> National Minimum Wage Bill published in the Government Gazette No. 41257 of 17 November 2017, at 2.

<sup>221</sup> Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Morekure and Others, ZACCMA 1 (7 July 2017). Available at: [www.saflii.org/za/cases/ZACCMA/2017/1.html](http://www.saflii.org/za/cases/ZACCMA/2017/1.html).

<sup>222</sup> Ibid at 43 and 44.

<sup>223</sup> ILO ‘Minimum Wage Policy Guide’ (2016) at 32.

from the new law. A submission to Parliament on the Bill by the National Minimum Wage Research Initiative (NMW-RI) also notes that this exclusion may also violate Section 9(1) of the Constitution which requires that “Everyone ... has the right to equal protection of the law.”<sup>224</sup> The submission recommends that “we should not leave the matter to the courts to include such workers as “employees” and should rather take proactive measures to expand the definition of workers, where logical as is the case for the NMW.”<sup>225</sup>

A further issue raised by the NMW-RI is the failure to mention in the Bill the plan laid out in the Report of the Expert Panel to gradually increase the percentage of the NMW that domestic workers, farm workers and EPWP workers are entitled to over time. Failure to stipulate that this will be the case, while not providing a mechanism to increase these tiered wages towards the full NMW over time, risks leaving these workers languishing on below-minimum wage remuneration for the foreseeable future.<sup>226</sup>

Finally, as the negotiations towards the NMW were both an empirical and a political exercise, the final amount of R20 per hour (with farm workers, domestic workers and EPWP workers tiered below this) bears little relation to an assessment of the actual cost of living. Nonetheless, it does provide a starting point for a national minimum wage which can be progressively increased over time to ensure that it provides workers and their families with an income sufficient to ensure a decent living level. However, the National Minimum Wage Commission that is created in Chapter 3 of the Bill is only required in Clause 7 of the Bill to “promote” the reduction of wage differentials and the alleviation of poverty and to “consider” inflation, the cost of living and the need to retain the value of the NMW. If income inequality is in fact to be reduced through the NMW, the wage will have to be increased above the inflation rate experienced by the lowest paid workers as well as in line with a broader understanding of a decent living level.

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<sup>224</sup> Constitution of the Republic of South Africa (1996) at section 9(1).

<sup>225</sup> National Minimum Wage Research Initiative (University of the Witwatersrand) ‘Submission with regards to National Minimum Wage and related Bills’ (2017) at 15.. Available at: <http://nationalminimumwage.co.za>.

<sup>226</sup> Ibid at 28-35.