Critical analysis of the failure of labour law to adequately protect atypical workers and its impact on human rights and fair labour practice

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Abstract

In the workplaces, the work force being employed by private entities and contract workers are facing various unfair labour practices and as such excluded from labour protection law. Instances of human rights abuses abound, and these have severe socioeconomic implications on atypical workers. This paper examines how atypical workers face inhuman treatment, discrimination and denial of basic labour rights and benefits in the workplace. The paper also looks at whether there is any semblance of labour protection extended to atypical workers. It is observed that such interventions have not provided strong protection for atypical workers hence they are still exposed to various labour vulnerabilities, discrimination, mistreatment, abuses and denial of benefits and socio and economic securities.

Keywords*: unfair labour practice, atypical workers, labour protection, socio and economic securities, South Africa.*

EL Classification: K30, K33, K38

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1. Introduction

In South Africa, fair labour practice is a right that is granted to everyone in terms of Section 23 of the Constitution of South Africa 1996.[3] Surprisingly the labour statutes in place enacted to give effect to this Constitutional right only extends its protection to certain group of workers, to the exclusion of others. This discrimination is also embedded in legislation that see to discriminate and segregate workers that ought to be generally protected from all sorts of unfair labour practices. The Basic Conditions of Employment Act 75 of 1997 (BCEA) was enacted to give effect to Section 23 of the Constitution.[4] This Constitutional provision grants everyone the right to fair labour practice, as it uses the phrase "everyone". However, realistically speaking, this legislation only applicable to employees[5] as defined in the

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[3] S 23 of the Constitution.
[4] The preamble of the Basic Conditions of Employment Act 75 of 1997.
[5] S 3 of the Basic Conditions of Employment Act 75 of 1997.

Labour Relations Act 66 of 1995 (LRA). The contributing factor to this is found in section 213 of the LRA, the definition of an employee which leaves out some workers from the labour protection.[6] Such a marginalised definition of an employee is then used by employers to their advantage by engineering a new form of work relationship that leaves out workers from falling within the definition of an employee as defined in the LRA for purposes of ensuring that the labour protection as offered by the LRA and other prominent labour statutes would not be applicable

The Employment Equity Act 55 of 1998 (EEA) was enacted to eliminate all forms of discriminations in the workplace.[7] This piece of legislation also follows the LRA's definition of an employee, and only extends its protection to those that are defined as employees.[8] For the BCEA, EEA and the LRA to effectively give effect to this constitutional provision, then a shift from the ordinary definition of an employee is required. It is therefore imperative for these pieces of legislation also extend labour protection to everyone in order to cover and protect atypical employees in the workplace. Currently, failure to extend labour protection to atypical employees is tantamount to violation of their human rights to labour rights and protection. To this end, discrimination and exclusion have bearing, dire socioeconomic consequences and major implications on various human rights of atypical employees and they are discussed in the following.

2. Rights to equality

This right to equality is guaranteed in terms of Articles 1 and 7 of the Universal Declaration of Human Rights 1948 (UDHR). It is also guaranteed in in terms of section 9 of the Constitution and the EEA. From the Constitution, this right is granted by the provision in section 9, and section 2 in the EEA. The purpose of this right in labour relations is to ensure that no discrimination takes place in the workplace, either during the pre-employment stage, during the employment stage and after employment stage. Equality is imperative in order to provide labour protection and rights to all workers so that no one is left behind. However, socioeconomic inequalities continue to be experienced by the workers in the workplace.[9]

This right to equality seeks to place every worker or any person seeking employment on the same level without any favour. The Canadian Union of Public Employees submits that atypical workers do not have job security, are being subjected to inferior protection, and reduced career development opportunities when it comes to training and promotion.[10] In South Africa, workers who are not defined

[6] S 213 of the Labour Relations Act 66 of 1995(LRA)
[7] Employment Equity Act 55 of 1998.
[8] Ss 1 and 4(1) of the Employment Equity Act 55 of 1998.
[9] Sampie Terreblanche, *A history of inequality in South Africa*, University of Natal Press, Sandton, 2002, p. 57.
[10] The Canadian Union of Public Employees "The facts", 1984.

as employees do not fully enjoy this right, as it is not extended to them by virtue of being excluded in the definition of an employee in the LRA.

These excluded workers often suffer the fate of unfair discrimination in the workplace, mainly in the form of religion, sexual orientation and race. Consequently, they do not have any labour recourse from the current labour legislation as it excludes them.

These inequalities being experienced and suffered by atypical workers are common in the aspects of equal work for equal payments, salary raise, and promotions. It is also prevalent in the aspects relating to dismissal wherein workers who have been charged with the same offence were not being given the same treatment. To this end, atypical workers are burden with various unfair labour practices while typical workers' labour rights are still protected while facing disciplinary charges.

In such unfortunate circumstances, atypical workers often suffer the fate, and unfortunately, they cannot have a labour remedy in that regard. This is the dilemma because the CCMA does not have jurisdiction on matters of workers that are not in the definition of employees. Denine argues that a labour dispute can only be resolved if such a dispute arose between an employer and an employee.[11] Van Niekerk admits to witnessing jurisdictional points being raised on the CCMA and considered, particularly those concerned with whether the referring party is an employee as defined in the LRA.[12]

It is submitted that such an exclusion of atypical workers, more especially dependant contractors from such definition in the LRA amounts not only to violation of section 9 of the Constitution, but also to Articles 1 and 7 of the UDHR in that such a definition only affords protection of the labour law only to those defined, which is contrary to the provision of the UDHR that all people are equal before the law and must be given equal protection of the law.[13]

Sadly, persons who are at the receiving end of such discrimination are mostly the black and in particular women, they are the ones who are engaged in atypical forms of employments. Against this backdrop, Nyamjoh asserts that one's skin pigmentation or gender may be a social identifier of relationships which are historically predicated on relationships of inequality.[14]

The implementation of legislation on the type of work being done defeats the purpose of Section 9 of the Constitution.[15] The Constitution is viewed as a pivotal

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[11] Denine Smit, Voet Du Plessis, *Kylie' and the Jurisdiction of the Commission for Conciliation, Mediation and Arbitration,* „South African Mercantile Law Journal", vol. 23, no. 3, 2011, pp. 476-487.

[12] *SABC v CCMA and Others* [2019] ZALCJHB 318, para 11.

[13] Articles 1 and 7 of the Universal Declaration of Human Rights of 1948.

[14] Anye Nyamjoh, *The phenomenology of Rhodes must fall: Student activism and the experience of alienation at the University of Cape Town*, „Strategic Review for South Africa", Vol. 39, Iss. 1, May 2017, pp. 256-277.

[15] Right to equality as contained in Section 9 of the Constitution of South Africa, 1996.

tool of transformative constitutionalism which is aimed at ending the historical barricades to ensure that equality permeates across all social interactions.[16]

In the case of *President of RSA v Hugo,*[17] it was held that the prohibition of unfair discrimination seeks to not only to avoid discrimination against people who are members of disadvantaged groups, it also seeks to establish a society in which all human beings will be accorded equal dignity and respect regardless of their membership within different groups. Atypical workers are also human beings and must be afforded the same dignity that those in conventional employments are receiving under legislative labour protection. To protect their right to equality, the labour legislation must be developed in such a way that it also extends labour protection to atypical workers. This can be achieved through amending the definition of an employee as contained in in the LRA to cover workers engaged in atypical work. By so doing, jurisdictional points will be avoided in CCMA hearings involving workers in atypical work.

3. Rights to life

In interpreting the right to life, it should be extended to giving an individual social security, or at least an emergency to claim on society for sustenance.[18] Poverty is a threat to life, and social security's role is to prevent poverty which threatens this right to life.[19] This inter-relation of rights enshrined in the Constitution is further confirmed in the Grootboom's case wherein it was held that all rights in the bill of rights are inter-related and mutually supporting.[20] It's unfortunate that such a sustenance cannot be said to be claimable by atypical workers as they have no guaranteed subsistence because they are excluded from labour protection. Labour rights are there to protect and grant employees social security. Social security guarantees survival in the form of access to daily necessities that supports life, such as being paid accordingly in order to continue allow the employee to earn liveable wage and afford to maintain quality standard of living; and also, to be able to care and support his dependants. Denied of social security is essentially tantamount to the denying a person from affording the necessities of life, as such the right to life is also threatened, implicated, and affected.

Locke describes a civil society as an association for the mutual preservation of lives, liberties, and properties, endowed with certain inalienable rights, amongst

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[16] Pius Langa, *Transformative Constitutionalism*, „Stellenbosch Law Review" 17, no. 3(2006): 351-360.

[17] *President of the Republic of South Africa v. Hugo* (CCT11/96) [1997] ZACC 4;1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997).

[18] Crane Brinton, *Natural Rights*, „Encyclopedia of social science", 1993.

[19] Edwell Kaseke, *The role of social security in South Africa*, „International Social Work", Volume 53, Issue 2, March 2010, pp. 159–168.

[20] *Government of the Republic of South Africa and Others v. Grootboom and Others* (CCT 11/00) [2000] ZACC 19;2001(1) SA 46; 2000(11) BCLR 1169 (4 October 2000) para 23.

those is the right to life and liberty.[21] Denying atypical workers social security in terms of labour protection amounts to a deprivation of life and liberty as the most fundamental rights a person can have. In the case of *S v. Makwanyane* it was held that the right to life and dignity are the most important of all human rights and the source of all other personal rights contained in the Constitution.[22] To protect the right to life of atypical workers, they must also be included in the labour protection afforded to their typical counterparts in such a way that will guarantee them social security.

4. Freedom and security of the person

The right to be free from all forms of violence from either public or private sources is not extended to atypical workers. Imbusch submits that the concept of violence is not only limited to physical, but also extends to psychological damage.[23] Being excluded from labour protection exposes one to harsh treatment in the form of unfair labour practice which may result in psychological damage. Failure to provide and guarantee subsistence is tantamount to denial of basic necessities required by a worker. Although Du Plessis submits that this right is limitable in certain circumstances,[24] atypical workers do not have the right to freedom and security at all, in that should their employment end unjustly so, they will be faced with brandishing hunger should presumptive measures fail, which is a form of violence which is inevitable and can in no way be policed. Hunger and poverty are a form of psychological violence that can only be healed by the alleviation of such poverty, and no other means. To protect this right, atypical workers must be afforded job security by being extended labour protection.

5. Freedom of religious belief and opinion

In *S v Lawrence* the freedom of religion was described as the right to entertain such religious beliefs as a person chooses the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and observance.[25] Most atypical employees are made to work whenever the employer requires them to. Most of the time, they are even deprived leave/off on religious days and holidays without being compensated with the prescribed tariff of working on Sunday and on public holidays. This amounts to being denied with the right to religious belief as they are not afforded with the time to engage with their spirituality and religion, moreover

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[21] John Locke, *Social contract theory*, in *Encyclopedia of philosophy*, 2013, available at https://plato.stanford.edu/entries/locke/

[22] *S v. Makwanyane* 1995(3) SA 391 (CC), para 144.

[23] Peter Imbusch, *The concept of violence*, in *International handbook of* ***violence*** *research*, 2003 https://link.springer.com/chapter/10. 1007/978-0-306-48039-3_2.

[24] Lourens M. Du Plessis, *The rights to freedom and security of the person in South Africa's transitional constitution?*, „African Journal of Criminal Justice", 1994, 7, p. 267.

[25] *S v. Lawrence 1997* 10 BCLR 1348 (CC) [100], para 92.

without any extra compensation to thank their availability at work on a religious day (Sunday). Raj is of the view that religious freedom means the right to express one's religious belief or philosophical convictions in the form of teaching, practice, worship, and observances.[26] In the case of *Prince* it was held that illegalising weed for private use deprives Rastafarians their freedom of religion as denying them dagga usage is depriving them the right to practise their religion.[27]

The fundamental question that cannot be avoided is whether there is a compelling legitimate reason to demand workers to offer labour on religious days. Kearney describes religious freedom as the right to express one's religious belief, both in private and in public, freely in the form of teaching, practise, worship, and observance.[28] Working on religious days is a deprivation to freedom of religion as it deprives one an opportunity to engage their spirituality in the form of observance and worship.

It is acknowledged that a business that operates on the days that are not prescribed working days, driven by barbarian ambition of maximising profit is placed at an advantageous position as compared to its competitors competing for the same market. It must also be noted that such an advantage is only valid, provided that sits competitors are not operating on such days, therefore the market or demand shall only be met by it. However, such an advantage is lost if the competitors are also operating on such days as market shall be shared amongst them, accordingly, like on any other business day.

Therefore, it is hereby submitted that depriving such workers a day off on religious days is not necessary when competing businesses are also operating on such a day. If an employer has ambitions of operating on such days, then it must in no way be compulsory to compel workers to abstain from engaging their various spiritualties and religious events to come to work. Workers must be provided with a choice to choose between attending to their religions or work, and for those that choose work, a bonus for availing themselves at work premises and rendering their services on such days must be provided. They must not be compensated in terms of normal working day tariffs.

6. Freedom of expression

Paul holds that freedom of expression is central to effective working of a democratic society.[29] Freedom of expression is the pillar of democracy.[30] Atypical employees seldom have a voice on matters pertaining to their employment. Anything

[26] Raj Mestry, *The Constitutional right to freedom of religion in South African primary schools*, „Australia and New Zealand Journal of Law and Education", Vol. 12, No. 2, 2007, pp. 57-68.

[27] *Prince v. President, Cape Law Society, and Others* 2000(3) SA 845 (SCA); 2000 (7) BCLR 823 (SCA).

[28] M. Robertson, *Human rights for South Africa*, Cape Town: Oxford University, 1990, p. 123.

[29] Paul Sturges, *Limits to freedom of expression? Considerations arising from the Danish Cartoons Affair,* „IFLA Journal", Volume 32, Issue 3, 2006, pp. 181-188.

[30] W.J. Van Vollenhoven, *The right to freedom of expression: the mother of our democracy*, „Potchefstroom Electronic Law Journal", vol. 18 n. 6, 2015, pp. 2299 -2327.

the employer wants goes without saying. Should an employee attempt to raise a voice against any decision the employer intends to take, they get threatened with being fired, and at some time, some do in fact get fired.

Atypical workers are not at liberty of having a union that will collectively bargain and conclude a collective agreement on their behalf. They do not have a voice at the workplace, and consequently the basic conditions of their employment are determined by their employer solely. They exist in a dictatorial work environment which lacks democracy. Du Toit defines democracy as a rule by the people wherein all citizens must participate on equal basis in decision making on vital aspects of common affairs, including social life, the economy, and morality.[31]

Atypical workers on the other hand do not have a say on matters pertaining to the affairs of their employment. Whatever their employer says goes without being open for discussion, which goes contrary to the view of Coetzee that democracy is a system of governance wherein the ruling power is legally vested in the people.[32]

7. Freedom of assembly

According to the Open Government Partnership Report, the right to assembly is the fundamental right to collectively express, pursue, promote, and defend a common interest for whatever reason or motivation without fear of retribution.[33] In the case of *South African Transport and Allied Workers Union and Another v. Garvas and Others*[34] Mogoeng Mogoeng held that the right to freedom of assembly is central to our constitutional democracy. It exists primarily to give a voice to the powerless, furthermore it was held that this right will in many cases be the only mechanism available to them to express their legitimate concerns.[35]

Although granted by the Constitution to every workers,[36] this right is seemingly not available to atypical workers. The LRA only extends this right to only those defined as employees in terms of the Act.[37] Thus a worker not falling within the definition of an employee cannot be protected under the labour law that protects strikes should they raise their concerns regarding matters of mutual interest against their employer. Therefore, impliedly they are denied the right to embark on a strike against their employer, and should they decide to strike, such strike will not be a protected strike in terms of the LRA, and sadly the employer may decide to dismiss them without any recourse hence perpetrating impunity.

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[31] A. Du Toit, *The meaning of democracy*, „Suid Afrikaan", 5, 1993, pp. 3-6.
[32] Daniella Coetzee and Anda Le Roux, *Democratic principles and education in South Africa*, „Tydskrif vir christelike wetenskap", 1998, Volume: 34, Issue: 1/2, pp. 1-18.
[33] Open government partnership global report "democracy beyond the ballot".
[34] *South African Transport and Allied Workers Union and Another v. Garvas and Others* (2012) 33 ILJ 1593 (CC); 2013 (1) SA 83 (CC) (13 June 2012), para 61.
[35] Ibid.
[36] S 23 (2)C of the Constitution.
[37] S 64(1) of the Labour Relations Act 66 of 1995.

8. Freedom of association

Freedom of association in the scope of labour relations plays a vital role in insuring that the workers can have a say in the affairs of their workplace. It is essentially the mouthpiece of the working masses which is used to fulfil the Constitutional right of freedom of expression. Alexis asserts that no one, and no legislator may attack the freedom of association without impairing the very foundations of society.[38] At times it is not easy for workers to express their legitimate views to their employers pertaining to their employment conditions as they fear it might be detrimental to the relationship they have with their employers in the long run. As such it is through this freedom of association that the views of the employees can be raised via an independent third party. that way the employer will not know exactly which employee raised such points thus not affecting their relationship with the employer.

This right assists greatly in achieving fair labour practice. It also entails those workers are free to associate themselves with any person, organisation, or trade union, and even form or be part of such a trade union.[39] It is through these Unions that employees can have a voice as they represent employees. This freedom was adopted from international standards, incorporated in the Constitution then given into effect by the LRA.

This right goes hand in hand with the right to freedom of assembly,[40] as when such joined associations by the employees have expressed their concerns with regards to the workers they represent, but the employer fails to reach an agreement with them, they through this right of assembly gather and demonstrate. This is done to improve the labour conditions in their work environment as it is through labour that guarantees subsistence and access to health care, food and water. That is the major reason why people wake up every day to go to work, to have independent social security.

Atypical workers are not explicitly denied this right but are however structurally deprived off this right given the hardships that are present in finding and grouping such workers for purposes of finding a Union that can be their mouthpiece, and by virtue of them having fluctuating wages since most are compensated by their productivity instead of actual honours spent at work rendering services. As such Unions are reluctant to represent such employees since at times some would not be having anything to contribute to the union levies as a fixed amount monthly, in terms of the right to stop order facilities.[41]

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[38] Alexis de Toqueville, *Democracy in America*, 1835, https://www.gutenberg.org/files/815/815-h/815-h.htm.
[39] S 4 of the Labour Relations Act 66 of 1995.
[40] S 18 of the Constitution.
[41] S 13 of the Labour Relations Act 66 of 1995.

9. Labour relations

The Constitution provides that everyone has the right to fair labour practice.[42] Attention must be given to the wording of the section, "everyone". Moodley asserts that despite a transition into democracy, the plethora of laws, policies, and other measures, one of the main challenges faced by South African labour workforce is the high prevalence of gender inequality which contributes towards women's lack of career progression.[43] By now it is a known fact that atypical forms of works are mostly saturated with women. By the façade of our LRA that was enacted to give effect to this Constitutional right to fair labour practice, it is failing to extend labour protection to all workers.

The labour protection granted in terms of the LRA is only focused specifically to workers who are defined as employees. The Constitution which provides for the right to fair labour practice to everyone is enacted to heal the injustices of the past.[44] The major injustice of the past that was suffered because of the apartheid regime was segregation. Segregation in that certain categories of people as classified by race where only granted Bantu education. A type of education that only gave them enough skills to become indecent workers. Today in the days of democratic dispensation that is rooted upon the principle of equality, we still have workers that are not covered within the scope of labour relations.

This exclusion from the labour protection amounts to unfair discrimination based on the decency of work one is engaged in. sadly, the atypical employment sector is predominantly occupied by the previously disadvantaged groups. The waiters, domestic workers, and farm workers as typical examples are in majority the black people and essentially women. They are still left without protection contained in Section 23 the Constitution.

10. Rights to health

The BCEA provides for a guideline that regulates working hours.[45] This was drafted taking into consideration the health of workers, not to over work them. Since atypical workers are not covered by the Act, they are over worked, and this places their health at risk. It is hereby agreed with the view of Elzuway that health is an important matter for both individuals and states.[46]

Such an overworking is done expressly, but impliedly in the terms of the contract of the work. Most atypical workers are compensated not for hours spent at

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[42] S 23(1) of the Constitution.

[43] Therusha Moodley, *Progression of South African women in the workplace: A study of the right to development and relevant legal framework that underpins the eradication of gender disparity in the workplace*, University of KwaZulu Natal, 2018, https://research space.ukzn.ac.za/ bitstream/handle/10413/18437/Moodley_Therusha_2018.pdf?sequence=1&isAllowed=y.

[44] The preamble to the Constitution.

[45] S 9 and 10 of the Basic Conditions of Employment Act 75 of 1997.

[46] Saleh M. Elzuway, *The right to health care in international law*, University of Glasgow, 2013, https://theses.gla.ac.uk/4293/1/2013 elzuwayphd.pdf.

work, but for progress made. Should such a worker not reach adequate progress on a given day, they remain behind and work a few extra hours to generate a more descent income. Such overtime worked is not done at the command of the employer but done voluntarily as the worker saw a need to push a little more progress to increase his salary. This affects their health in the long run as they work prolonged periods.

Benjamin argues that some labour legislation such as the Compensation of Occupational Injuries and Dieses Act (COIDA), and the LRA together with some judicial decisions such as the one rendered in the case of *Smit v. Workmen's Compensation Commission* case which held that a person who is not subject to control and supervision is not an employee,[47] has led to situations wherein the perimeters of labour law are poorly defined and as a result an increasing number of workers are refused labour protection of labour law.[48] This view shared by Benjamin is correct as some atypical forms of works such as working from home, self-employment and digital work lack control and supervision to a certain extent.

It is submitted that such marginalisation of workers must be dealt with without grouping workers in terms of categories of work being done, but for the purpose of true realisation of the Constitutional right to fair labour practice as granted to everyone in the Constitution,[49] and not to a selected group of workers while leaving out others.

11. Social security

Kaseke submits that the role of social security is reduction and prevention of poverty while promoting integration.[50] The Constitution grants every person the right to social security.[51] It further places an obligation on the state to provide legislative and other means within its available resources to ensure the realisation of such a right. On the other hand, the White Paper defines Social Security as policies that ensure that every person receives economic and social protection, to alleviate poverty.[52] It is however acknowledged that the state is trying to provide social grants in that regard to the needy, however the number of dependents on social grants are many, and the extent to which such aid can be provided is dependent on the availability of resources at the state's disposal. A legislative measure that can extend labour protection to all workers is a need.

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[47] *Smit v. Workmen's Compensation Commissioner* 1979 (1) SA 51 (A).

[48] Paul Benjamin, *An Accident of History: who is (and who should be) an employee under South African labour law*, „Industrial Law Journal" 25 (2004), pp. 787-804.

[49] S 23 of the Constitution.

[50] Edwell Kaseke, *op. cit.*, p. 162.

[51] S 27 of the Constitution.

[52] María Dalli, *The content and potential of the right to social assistance in light of Article 13 of the European Social Charter*, „European Journal of Social Security", Volume 22, Issue 1, 2020, pp. 3-23.

The White Paper for Social Welfare holds that social security covers different private and public measures which provide cash or benefits in kind.[53] Such measures take place in the event wherein a person's earning power cease, is disrupted or never develops leading to failure to evade poverty by such a person.[54] Which other measure can be more effective for poverty alleviation than extending labour protection to all workers?

Atypical workers survive by the grace of each day. They are not having a guaranteed earning power, and a secured means of social security. will ensure that there is guaranteed subsistence to most workers, before government intervention, thus minimizing the number of dependants on the state social grants, and consequently the state will have enough resources to focus such aid on other spheres. It is argued that the more this unprotected sector of workers grow day by day, the more people will depend on the state for social assistance. There will come a time wherein the state will no longer be having enough funds to cater social assistance adequately, and the right to social security will be impacted, as the state's ability to cater for minimum core obligations is dependent on the availability of resources.[55]

12. Considering whether there is any semblance of any labour protection for atypical workers

Over the years many prolific scholars such as Odeku, Tshoose, Rapatsa, Maloka and others have been scrutinising the labour protection afforded to atypical workers with constructive critiques. Odeku is of the view that extending labour protection to all workers against unfair labour practice is fundamental to job security.[56] On the other hand, Tshoose argues that the use of atypical work such as labour broking has far reaching repercussions to workers.[57] It is submitted that indeed Rapatsa was correct to say that the dimensions of atypical work are diminishing the realisation of human rights in the work place, as such workers are not treated as humans but as commodity.[58]

All these is caused by the evolving new forms of works that fall outside the scope of conventional employment. Such new forms of works are confusing as they do not fall within the definition of an employment. Maloka submits that '*abantu badidekile'* which is a Xhosa expression meaning people are confused.[59] Indeed the

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[53] The White Paper on South African Welfare Policy of 1997.

[54] María Dalli, *op. cit.,* p. 20.

[55] *Grootboom* case.

[56] Kola O. Odeku, *Labour broking in South Africa: Issues and prospects*, „Journal of Social Sciences", Volume 43, Issue 1, 2015, pp. 19-24.

[57] Clarence Tshoose, Benjamin Tsweledi, *A critique of the protection afforded to non-standard workers in a temporary employment services context in South Africa*, „Law, Democracy & Development", vol. 18, 2014, pp. 334-346.

[58] Mashele Rapatsa, *Atypical or non-standard work: A challenge to workers' protection in South Africa*, „Mediterranean Journal of Social Sciences" 5(27), 2014, pp. 1067-1072.

[59] Tumo Charles Maloka, Chuks Okpaluba, *Making your bed as an independent contractor but refusing to lie on it: Freelancer opportunism*, „South African Mercantile Law Journal", Volume 31 Issue 1, 2019, pp. 54-75.

definition of an employee contained in the LRA is leaving workers confused when faced with labour issues they want to resolve with the CCMA when a point *in limene* begins to be raised.

Every developing state is characterised with high unemployment rate, as such third world countries have an urgent need to ensure that the working mases have job security for the betterment of socio-economic development. Odeku further submits that decent working conditions are a component of socio-economic development frameworks around the world.[60] It was in 2014 when the legislature had to succumb to the critiques raised by scholars about labour protection afforded to atypical workers that it decided to pass a law amending the LRA to extend labour protection to atypical workers. This was done through the Labour Relations Amendment Act 6 of 2014. Amongst other things, this amendment regulates Temporary Employment Services (TES), fixed term contracts, part time employment and employees that earn bellow the prescribed threshold of R211, 565.30 per annum.

12.1 Temporary employment services

TES is commonly classified as labour broking. With such form of work relationship, a worker is hired by and is registered under a TES. TES employment is also a form of atypical work. The TES undertakes to deploy such a registered worker on a temporary basis to its client to render services for such a client at the exchange of an agreed amount. From such an amount, the TES will deduct its portion and paying the reminder to the worker. From the eye of a person who is not aware of such labour broking transaction, it appears on the façade of it that the worker is employed by the client, while in actual reality this is not true, hence it is called triangular employment as the worker is employed in a triangular arrangement by virtue of having two masters, the client, and the TES.

Over the past 20 years, businesses have turned traditional full-time employment into triangular labour broking network.[61] This form of triangular employment presents some issues to workers. A worker employed in terms of TES is not placed on the same footing as a worker employed directly by the client. They tend to be given employment conditions less favourable compared to those employed by the client directly although rendering the same services and placed in the same position.

Such an unequal treatment will subsist for as long as the client still requires the services of such workers. In such a triangular employment, there is no contractual relationship between the client and the worker, although the worker provides services for the client, and is supervised by such a client which in turn shows a certain level of authority and control by the client over the worker. On the other hand,

[60] Kola O. Odeku, *op. cit.*, p. 20.

[61] Van Eck, *Temporary Employment Services (labour brokers) in South Africa and Namibia*, „Potchefstroom Electronic Law Journal", Vol. 13, No. 2, 2010, pp. 107-126.

employment is perceived widely as a relationship wherein the employee works for an employer, and the employer is the person in actual control of the employee.[62]

This indeed holds true for a binary employment relationship as opposed to a triangular employment relationship. Van Der Burg holds that employment relationship must be full-time and the employee must have one employer, that employee works on employer's premises, the employment must be on going and an employment must be in place.[63] Triangular employment is supposed to be temporary in nature, but labour brokers were using it permanently, the worker does not work on the premises of the employer, but instead work on that of the client, and such workers are given less benefits for equal work done by those employed by the client directly, which is gross inequality.

Employers prefers to use labour broking as it is an elusive way to evade labour responsibilities. This place worker employed under such forming part of atypical work and being denied the right to fair labour practices. It was due to this reason that the legislature saw it fit to amend the LRA. Amongst others, this amendment regulates triangular employment.

Section 198A of the amendment Act speaks to the use of TES. This provision puts an end to the permanent usage of TES. It provides for the acceptable use of TES.[64] This section defines what is temporary employment services. It holds that temporary service is work rendered by an employee to a client for a period not exceeding 3 months, as a substitute for an employee of the client who is temporarily absent or in a category of work and for any period which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination, or a ministerial notice.

Such a provision is aimed towards limiting the exploitation of workers engaged in TES on a long-term basis in avoidance of the costs of permanent employment. It further imposes a sanction should a client use a TES in circumstances that fall beyond the definition of a temporary service. Such a sanction is composed of two parts. Firstly, such a worker assigned to a client for periods exceeding the prescribed 3 months and is earning below the prescribed salary, then such a client is deemed to be the employee of the client for purposes of the LRA and is employed on a permanent basis. Secondly, this provision demands that such a worker be treated by the employer on terms on the whole not less favourable than an ordinary employee who performs the same or similar work, unless there is a justifiable reason not to do so.

Such a deeming provision is only applicable provided the worker is contracted in a TES to a client for a period more than three months and is earning below the prescribed threshold by the minister in terms of section 6(3) of the BCEA 75 of 1997. To avoid this, labour broker must either engage such a worker in a TES

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[62] Jan Theron, *Prisoners of a paradigm: Labour broking, the new services and non-standard employment*, „Acta Juridica". Special Edition, 2012, pp. 58-83.

[63] A. Van Der Burgh, *Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw*, Stellenbosch: Centre for Rural Legal Studies and Women on Farms Project, 2009, p. 57.

[64] Labour Relations Amendment Act 6 of 2014.

for a period not greater than three months or pay the worker a salary in greater than the prescribed threshold. Does this amount to a forfeiture of the right to fair labour practice for those earning more than the prescribed threshold? It is hereby submitted that although this amendment is directed to protecting those that are in need, however the Constitution makes use of the notion "everyone" when it grants the right to fair labour practices, as such, those earning more are deprived of this right.

The interpretation of such a deeming provision was a bit blurry until it was laid down in the case of *Assign Services (Pty) Limited*.[65] In this case, workers were placed on TES for more than three months and on a fulltime basis. Assign argued that section 198A (3)(b) created a dual employer relationship, on the other hand NUMSA argued that a sole employer relationship resulted from the section. The matter was taken to the CCMA, and the CCMA held the view of NUMSA of sole employer interpretation and issued an award to the effect that the section resulted in the client being the sole employer for the purposes of the LRA.

The matter was then appealed to the labour court. The court held that the commissioner in his finding committed an error of law. The court considered the contract of employment entered between the TES the worker as the source of control in the employment relationship. It further held that the TES retains control regardless of the new relationship between the client and the worker created by statute. The court ruled that the client is only becomes an employer for the purpose of the LRA, while the contract of employment between the worker and the TES remains effectively in force. The court found the rights of workers being best protected by the dual employer interpretation. It reviewed and set aside the commissioners of the LRA. The matter was then taken to the labour appeal court. The appeal court found sole employer interpretation to be best protecting the rights of placed workers.

In the constitutional court, the majority judgement was of the view that the purpose of section 198A must be contextualised within the right to fair labour practices in section 23 of the Constitution and the purpose of the LRA. The court further held that on the interpretation of the provision, the first three months the TES is the employer, and then subsequently the client becomes the sole employer.

This deeming provision is a remedy towards the elusive use of TES. Although the provision does not ban labour broking, it ensures that temporary services are truly temporary, and that workers placed under TES are fully integrated into the workplace as employees of the client after the three months' time with similar employment benefits and prospects of staff development together with job security.

12.2 Fixed-term contracts

Fixed term contracts of employment refer to contracts of employment that terminate on a specific date, the happening of a certain event or the completion of a

[65] *Assign Services (Pty) Limited v. National Union of Metalworkers of South Africa and Others* [2018] 9 BLLR 837 (CC).

specific task.[66] This form of employment presents its own challenges as well. A permanent employment contract offers job security, whereas a fixed term contract of employment does not. This method of employment is also being exploited by employers to evade labour responsibilities as instead of following strict guidelines prescribed by the LRA when dismissing employees, they can just evade the LRA requirement of dismissal by just giving their employees fixed-term contracts and not renew them upon their expiry. This way when an unfair labour practice claim is brought against them, they can easily use the expiry of such a contract to deny claims of such a dismissal.

This form of employment is regulated by section 198B of the Amendment Act. This provision provides for the requirements of fixeded-term contracts. According to the requirements, the offer of employment must be in writing, the nature of work must be of a limited duration and the contract must specify a justifiable reason for fixing the term. However, this provision does not apply to workers who earn above the prescribed threshold, to an employer who employs less than 10 employees, an employer who employs less than 50 employees and whose business has been in operation for a period of less than two years, together with employees employed on fixed-term contracts that are permissible by any statute, sectoral determination, or a collective agreement.

This provision clearly protects atypical workers from employers who overuse fixed-term contracts for evasive purposes as it limits the use of fixed-term contracts. Employers are only allowed to use this form of employment only if they have a justifiable reason for doing so. The Act further provides for such justifiable reasons to use fixed-term contracts for a period over three months in section 198B(4). It is submitted that this amendment is a positive step towards the extension of labour protection towards atypical workers as it deters employers from misusing such employment relationship to evade the necessary substantive and procedural steps required for dismissing an employee.

According to this amendment, should an employer decide to terminate the services of a worker as if the contract was a legally valid fixed-term contract while it was not, this can be termed as an unfair dismissal. The provision brought changes such that an employee who works for a period exceeding 24 months and is employed to work only on a specific project which has a defined duration, will be entitled to severance pay at the termination of the contract, unless the employer procures another alternative employment with another employer on the same or similar terms and conditions. This provision grants some form of job security as employers are reluctant to give out severance pay. Furthermore, should an employer create a reasonable expectation that he will renew a fixed-term contract but fails to do so, the provision declares such an act to be unfair dismissal as envisaged in section 186(1)(b) of the LRA.

The amendment Act does not just regulate fixed-term contracts; it also provides two types of remedies for any fixed-term contracts that contravenes it.

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[66] Aadila Mohamed, *Fixed-term contracts and the reasonable expectation of renewal and the effect of the labour Relations Amendment Bill 2012*, University of Kwazulu Natal, 2014, p. 45.

Firstly, being deemed as indefinite, meaning being declared to be a permanently employed.[67] Secondly, being afforded parity, which means the employee must be treated no less favourably than the permanent employees, doing the same work.[68]

12.3 Part-time employees

The term part-time employee refers to the class of atypical workers who are remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable full-time employee.[69] Part-time work is classified with lack of job security, less working hours, and reduced pay, above all, being treated less favourable as compared to those that are permanently employed.

The amendment Act extends protection to atypical workers who work part-time through section 198C. According to the Amendment Act, a worker engaged in part-time work must be treated the same way as a full-time employee performing the same work, be granted access to training and skills development like those of full-time workers and be provided with the same access to opportunities concerning vacancies the same way the employer provides full-time employees with. This conforms with the standards of decent work. Ahmed holds that there is a clear link between decent work and human development.[70] Work that does not seek to develop an individual is indeed not a decent work. The provision of section 198 Act extends decent work to part-time workers.

13. Conclusions

The primary purpose of labour law is to protect human rights at work. The current labour legislation although rooted in Section 23 of the Constitution, it is not fulfilling the labour obligations imposed by the Constitution. Such a deficit in the extension of labour protection to every worker result in unprotected workers being prone to victimisation in the form of violation of various rights such as equality, life, freedom of assembly, freedom of association, fair labour practice, religious belief, health and social security.

Affording a particular group of workers labour protection to the exclusion of others questions the issue of equality. Equality, which is fundamental to, and intertwined with the right to dignity. To make matters worse, such excluded worker from labour protection remain vulnerable to being treated in an undignified way in the workplace by the employer and other and employees.

Being denied labour protection is seemingly being denied guaranteed subsistence and consequently denied the right to make a living. The right to life is one of the non-derogable right in our legal system, it must be protected by any means

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[67] S 198B(5) of the Labour Relations Amendment Act 6 of 2014.
[68] Ibid.
[69] S 198C(1)(a) of the Labour Relations Amendment Act 6 of 2014.
[70] Iftikhar Ahmed, *Decent work and human development*, „International Labour Law Review", vol. 142, No. 2, 2003, pp. 263-271.

necessary. For us to can legitimately say that right to life is protected in our legal system, every person must first be afforded with guaranteed subsistence, and this can be achieved by extending labour protection to every worker, atypical workers included.

This gross human rights violation can only be avoided if the application of the three fundamental legislations, the LRA, BCEA, and the EEA is amended in such a way that allows flexibility of the protection contained in them to be extended to every worker. This will also be filling the gap that makes such legislation to fall short of protecting every worker, as stated in the wording of section 23 of the Constitution.

A failure to fill such gap results in an adverse threat to social security which then bares an impact on the economy.

It is indeed vivid that the voices of scholars on the notion "atypical work" is slowly starting to be heard. The Amendment Act signals a change in the positive direction towards the extension of labour protection to atypical workers. The provision clearly hinders employers from using labour brokers, fixed term contracts and temporary work to avoid the statutory obligations presented by the labour legislation. To do so, one must compensate beyond the prescribed amount, use TES for a period not in excess of 3 months, and use fixed term contracts only when there is a justifiable ground to do so. Those utilising part-time work have no other option but to offer the same treatment as granted to those who are permanently employed, unless if it can so be justified.

It is pertinent to point out that work is not only a source of income, but of personal dignity, stability in the community and family, peace, economic growth and the expansion of opportunities for productive jobs and enterprise development. Not only does the Amendment Act deters the abuse of the forms of atypical works mentioned herein, it also offers job security, protection of labour rights and social security while advancing decent work for those engaged in such works.

Decent works entails; the creation of jobs, employment and income opportunities, the guarantee of fundamental rights at work, the extension of social protection and social security and the promotion of social dialogue and tripartism. Arbuckle submits that the granting of fundamental rights at work is an objective which must be attained regardless of levels of disadvantage or impoverishment,[71] on the other hand Anker is of the view that extending social security and social protection is a pivotal aspect of decent work which ensures workers attainment of human dignity and the stability of their families together with the community at large.[72]

It is indeed safe to submit that the Amendment Act fulfils the objectives of social security and the extension of rights at work by virtue of extending labour

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[71] Michelle Lisa Arbuckle, *Decent work in South Africa: An analysis of legal protection offered by the state in respect of domestic and farm workers*, University of KwazuluNatal, 2013, https://researchspace.ukzn.ac.za/bitstream/handle/10413/10892/Arbuckle_Michelle _Lisa_2013.pdf?sequence=1&isAllowed=y.

[72] Anker, R., Chernyshev, I., Egger, P., Mehran, F., & Ritter, J. A., *Measuring Decent Work with Statistical Indicators*, „International Labour Review", 142, 2003, pp. 147-178.

protection to atypical workers contained in section 198 of the Act in such a way that ensures job security for those engaged in TES and fixed term contracts, equality of treatment between fulltime workers and part time workers, together with the protection of human rights and dignity at work. The Act further provides a platform for human development for temporary workers by virtue of compelling employers to also offer training and skills to them the same way they offer the permanently employed stuff.

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