CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 306/19

In the matter between:

SYLVIA BONGI MAHLANGU	First Applicant
SOUTH AFRICAN DOMESTIC SERVICE AND ALLIED WORKERS UNION	Second Applicant
and	
MINISTER OF LABOUR	First Respondent
DIRECTOR-GENERAL FOR THE DEPARTMENT OF LABOUR	Second Respondent
ACTING COMPENSATION COMMISSIONER	Third Respondent
and	
COMMISSION FOR GENDER EQUALITY	First Amicus Curiae
WOMEN'S LEGAL CENTRE TRUST	Second Amicus Curiae

Neutral citation:	*Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Victor AJ (majority): [1] to [131] Jafta J (dissenting): [132] to [182] Mhlantla J (concurring): [183] to [196]

Heard on: 10 March 2020

Decided on: 19 November 2020

Summary: Compensation for Occupational Injuries and Diseases Act 130 of 1993 — constitutionality of section 1(xix)(v) — provision is unconstitutional

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ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria:

1. The declaration of constitutional invalidity of section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 made by the High Court of South Africa, Gauteng Division, Pretoria is confirmed.
2. The order is to have immediate and retrospective effect from 27 April 1994.
3. The first respondent must pay the applicants' costs in this Court.

JUDGMENT

VICTOR AJ (Mogoeng CJ, Khampepe J, Madlanga J, Majiedt J, Theron J, Tshiqi J concurring):

Introduction

[1] Domestic workers are the unsung heroines in this country and globally. They are a powerful group of women[1] whose profession enables all economically active members of society to prosper and pursue their careers. Given the nature of their work, their relationships with their own children and family members are compromised, while we pursue our career goals with peace of mind, knowing that our children, our elderly family members and our households are well taken care of.

[2] Many domestic workers are breadwinners in their families who put children through school and food on the table through their hard work. In some cases, they are responsible for the upbringing of children in multiple families and may be the only loving figure in the lives of a number of children. Their salaries are often too low to maintain a decent living standard but by exceptional, if not inexplicable effort, they succeed. Sadly, despite these herculean efforts, domestic work as a profession is undervalued and unrecognised; even though they play a central role in our society.[2]

[3] At issue here is social security for domestic workers. The cornerstone of any young democracy is a comprehensive social security system, particularly for the most vulnerable members of society. Although passed before the advent of our constitutional democracy, the Compensation for Occupational Injuries and Diseases Act[3] (COIDA) partially contributes to our country's social security system. Unfortunately, 26 years into our democracy and despite the constitutional promise and aspirational expectations, in the event of injury, disablement, or death at the workplace, domestic workers do not enjoy the protection under COIDA.[4] By stark contrast, all other employees are.

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[1] In a report by the International Labour Organisation titled *Domestic Workers Across the World: Global and Regional Statistics and the Extent of the Legal Protection* (2013) (ILO Report) it points out that in South Africa, more than three quarters of domestic workers are women.

[2] See further Clarke "Domestic Work, Joy or Pain? Problems and Solution of the Workers" (2002) 51 *Social and Economic Studies: Vulnerability and Coping Strategies* 153.

[3] 130 of 1993. COIDA was enacted on 24 September 1993 and commenced on 1 March 1994.

[4] This despite there being an opportunity to bring COIDA in line with the Constitution. The South African Law Reform Commission (Law Reform Commission) published a report in which it detailed the outcome of its review of national legislation with a view to align it with the right to equality entrenched in section 9 of the Constitution.

[4] Section 1 of our Constitution, which sets out our founding values, provides that:

> "The Republic of South Africa is one sovereign, democratic state founded on the following values:
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms;
>
> (b) Non-racialism and non-sexism."[5]

[5] Arising from the founding values, one of the aims of the Constitution is to heal the divisions of the past, improve the quality of life of all citizens and free the potential of each person.[6] Unfortunately domestic workers have not basked in the fulfilment of this constitutional promise. Instead, their fate has been blighted as a result of being excluded from statutory protections.

[6] This Court is required to consider the constitutionality of section 1(xix)(v) of COIDA, which expressly excludes domestic workers from the definition of an "employee", thus excluding them from the social security benefits provided for under COIDA.[7] This case turns on the social security system enshrined in section 27(1)(c) of

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Despite the Law Reform Commission's mandate, it unfortunately left in place this most egregious exclusion of domestic workers from the definition of "employee" in COIDA. The reason for this exclusion was ascribed to policy considerations and that this "*exclusion is not necessarily discriminatory or unfair*". It vaguely promised that sometime in the future a review of the exclusion of domestic workers would be considered.

[5] Section 1(a) and (b) of the Constitution.

[6] Preamble of the Constitution. Notably this Court has stressed that this principle in the Preamble imposes a constitutional obligation to eradicate all systems of subordination and oppression inherited from South Africa's colonial and apartheid past. In *Tshwane City v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at para 8 this Court remarked on this obligation as follows:

> "As a people who were not only acutely divided but were also at war with themselves primarily on the basis of race, *one of several self-imposed obligations is healing the divisions of the past. The effects of the system of racial, ethnic and tribal stratification of the past must thus be destroyed and buried permanently.* But the healing process will not even begin until we all make an effort to connect with the profound benefits of change. *We also need to take steps to breathe life into the underlying philosophy and constitutional vision we have crafted for our collective good and for the good of posterity*."

[7] Section 1 of COIDA defines an "employee" as follows:

> "'employee' means a person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, oral

the Constitution and its application to domestic workers who are not currently protected in the event of injury, disablement or death in the workplace. In addition, the rights to equality and dignity are also at the heart of this matter.

Background

[7] Ms Mahlangu was employed as a domestic worker in a private home at the time of her death. She was employed by the same family for 22 years in Faerie Glen, Pretoria. On the morning of 31 March 2012, Ms Mahlangu drowned in her employer's pool in the course of executing her duties. Her body was found floating in the swimming pool by her employer who had been present in the home at the time of the incident, but asserted that he heard no sounds of a struggle. It is alleged that Ms Mahlangu was partially blind and could not swim, which resulted in her drowning.

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or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind, and includes—

(a) a casual employee employed for the purpose of the employer's business;

(b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;

(c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work, and for which service or work such person is paid by the labour broker;

(d) in the case of a deceased employee, his dependants, and in the case of an employee who is a person under disability, a curator acting on behalf of that employee;

but does not include—

(i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force;

(ii) a member of the Permanent Force of the South African Defence Force while on 'service in defence of the Republic' as defined in section 1 of the Defence Act, 1957;

(iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act, 1958 (Act 7 of 1958), on 'service in defence of the Republic' as defined in section 1 of the Defence Act, 1957;

(iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work;

(v) a domestic employee employed as such in a private household."

[8] Following Ms Mahlangu's death, her daughter, the first applicant, who was financially dependent on her mother at the time, approached the Department of Labour (Department) to enquire about compensation for her mother's death. She was informed that she could neither get compensation under COIDA, nor could she get unemployment insurance benefits for her loss which would ordinarily be covered by COIDA.

[9] Assisted by the second applicant, the South African Domestic Service and Allied Workers Union (SADSAWU),[8] she launched an application in the High Court of South Africa, Gauteng Division, Pretoria (High Court) to have section 1(xix)(v) of COIDA declared unconstitutional to the extent that it excludes domestic workers employed in private households from the definition of "employee". The Commission for Gender Equality[9] (Gender Commission) and the Women's Legal Centre Trust[10] were granted leave to intervene as first and second amici curiae, respectively, in these proceedings. Both amici work tirelessly to advance the rights of women.

Litigation history

[10] On 23 May 2019 the High Court declared section 1(xix)(v) of COIDA invalid to the extent that it excluded domestic workers employed in private households from the definition of "employee", thereby denying them compensation in the event of injury, disablement or death in the workplace.[11] The High Court failed to provide reasons for

[8] SADSAWU has advocated for domestic workers over many years and was active in the process in South Africa for the adoption in 2011 of the International Labour Organisation (ILO) Convention Concerning Decent Work for Domestic Workers, No. 189, 16 June 2011 (Domestic Workers Convention).

[9] The Commission for Gender Equality is a state institution established in terms of section 187 of the Constitution. The Gender Commission's mandate is "to promote respect for gender equality and the protection, development and attainment of gender equality" and to do so through, *inter alia*, legislative initiatives, effective monitoring and litigation.

[10] The Women's Legal Centre Trust is a juristic person created in terms of a Trust Deed dated 3 August 1998. Clause 4 of its Trust Deed provides that the Women's Legal Centre Trust's core objective is to advance and protect the human rights of women and girls in South Africa, particularly those women who suffer multiple and intersecting forms of disadvantage, so as to contribute to redressing systematic discrimination and disadvantage. The Trust fulfils its main objective by providing free legal assistance to women, advocacy, education and outreach, and through public interest litigation, which includes amicus submissions to assist courts in constitutional and public interest matters that concern women's rights and gender equality.

[11] Section 172(1)(a) of the Constitution provides:

its declaration of constitutional invalidity. The issue of retrospectivity of the order of constitutional invalidity was postponed by the High Court to allow the parties to file further submissions on this aspect.

[11] On 17 October 2019 the High Court, having considered the submissions from the parties on retrospectivity, handed down a second order declaring that the declaration of invalidity must apply retrospectively and with immediate effect to provide relief to domestic workers who were injured or who had died at work prior to the granting of the order.

[12] Before us is an application for confirmation of that declaration of constitutional invalidity.

The High Court's failure to furnish reasons

[13] The High Court granted an order declaring section 1(xix)(v) of COIDA unconstitutional, but unfortunately did not furnish any reasons for making such an order. The High Court merely made its orders on the basis of draft orders prepared by the parties, who had "settled" the issue of the unconstitutionality of section 1(xix)(v) of COIDA. This failure to furnish full reasons is regrettable as this Court does not have the benefit of the High Court's reasoning. This Court has held on numerous occasions that it is always helpful to consider the reasoning of the court of first instance.[12] Reasons provide a window into the basis of the judgment and are a valuable tool as they highlight

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"(1) When deciding a constitutional matter within its power, a court—

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency."

[12] In *Tiekiedraai Eiendomme (Pty) Limited v Shell South Africa Marketing (Pty) Limited* [2019] ZACC 14; 2019 JDR 0719 (CC); 2019 (7) BCLR 850 (CC) at para 20 Cameron J held that—

"[r]elated is the respect this Court pays to the views of the High Court and for the Supreme Court of Appeal. Our precedents say that this Court functions better when it is assisted by a well-reasoned judgment (or judgments) on the point in issue".

See also *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 39; *Carmichele v Minister of Safety and Security* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 55; and *Amod v Multilateral Motor Vehicle Accidents Fund* [1998] ZACC 11; 1998 (4) SA 753 (CC); 1998 (10) BCLR 1207 (CC) at para 33.

the process of reasoning in a transparent way.[13] This gives members of the public insight into and understanding of their constitutional rights.

[14] Section 167(5) of the Constitution provides that this Court makes the final decision whether "an Act of Parliament, a Provincial Act . . . is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force". It follows that in doing so the reasoning of the High Court or the Supreme Court of Appeal is of fundamental importance. The same section also provides that such an order will not come into force unless this Court confirms the order.

[15] Section 172(2)(a) of the Constitution provides for confirmation proceedings. In *Von Abo*[14] Moseneke DCJ held as follows:

> "This Court is the highest court on all constitutional matters and is clothed with both exclusive and concurrent jurisdiction. It enjoys exclusive jurisdiction in regard to specified constitutional matters and makes the final decision on other constitutional issues that are also within the jurisdiction of other superior courts and in particular, the Supreme Court of Appeal and the High Court. The exclusive and supervisory jurisdiction of this Court may be properly gathered by three constitutional provisions. They are sections 172(2)(a) and 167(5) of the Constitution, which regulate concurrent jurisdiction with the High Court and the Supreme Court of Appeal, and section 167(4) which carves out jurisdictional exclusivity for this Court."[15]

[16] *Von Abo* makes it clear that in respect of confirmation proceedings, this Court exercises its supervisory jurisdiction on orders of constitutional invalidity made by the High Court and the Supreme Court of Appeal. Our supervisory task becomes more challenging when the High Court, as in this case, does not provide well-reasoned

[13] The Supreme Court of Canada in *R v Shephard* [2002] 1 SCR 869 stated that "[j]ustice cannot be seen to be done if Judges fail to articulate the reasons for their orders".

[14] *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC).

[15] Id at para 27.

judgments but merely rubber stamps draft orders prepared by parties. This renders this Court a de facto (in fact) court of first and last instance.

[17] Furthermore, in *Mphahlele*[16] Goldstone J held that if courts of first instance fail to furnish reasons for their decisions, this may amount to a violation of a constitutional duty.[17] In *Strategic Liquor Services* this Court stated that "[i]t is elementary that litigants are ordinarily entitled to reasons for a judicial decision following upon a hearing".[18] It is important to stress that the High Court ordinarily bears a constitutional duty to provide reasons for its decisions. Failure to do so is an abdication of this constitutional duty.[19]

In this Court

[18] The applicants and amici submit that the exclusion of domestic workers amounts to unfair discrimination and impairs the fundamental dignity of domestic workers. They submit that, because domestic workers are predominantly Black women, this means that the discrimination against them constitutes indirect discrimination on the basis of race and gender. Both the applicants and amici describe the intersectional impact of discrimination on domestic workers as a result of a breach of their rights to equality and dignity on grounds of social status, gender, race and class. They also argue that the effect of patriarchy and lack of access to education has equally had an impact on their

[16] *Mphahlele v First National Bank of South Africa Limited* [1999] ZACC 1; 1999 (2) SA 667 (CC); 1999 (3) BCLR 253 (CC).

[17] Id at para 18. See also *Stuttafords Stores (Pty) Ltd v Salt of the Earth Creations (Pty) Ltd* [2010] ZACC 14; 2011 (1) SA 267 (CC); 2010 (11) BCLR 1134 (CC) (*Stuttafords Stores*) at para 10 where the Court held as follows:

> "This Court has stated that furnishing reasons in a judgment—
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> > 'explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions.'"

[18] *Strategic Liquor Services v Mvumbi N.O.* [2009] ZACC 17; 2010 (2) SA 92 (CC); 2009 (10) BCLR 1046 (CC) at para 15.

[19] This concern was recently echoed by Khampepe J in *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (6) SA 14 (CC); 2020 (10) BCLR 1173 (CC) at paras 18-20. Khampepe J heeded a warning that "[t]his duty to provide reasons is a vital strut to the Judiciary's legitimacy in our constitutional democracy, which is based on a culture of justification".

rights and lived realities. In order to conclude that their exclusion from COIDA is indirect discrimination on the basis of gender and race, the amici submit that an analysis within an intersectional framework is appropriate because it leads to a nuanced, purposive and socio-contextual consideration when interpreting the implementation and amendment of COIDA. The cumulative effect of intersectional discrimination exacerbates the already compromised position of domestic workers in society and marginalises them further.

[19] The applicants and amici assert that domestic workers are one of the most vulnerable groups in society.[20] They suffer past and present disadvantages on the basis that their work is not taken seriously. The fact that they are deprived of the benefits of social insurance provided under COIDA is an apt example of this. They also argue that the exclusion of domestic workers under COIDA means that the only remedy currently available to domestic workers is a common law delictual claim for damages which is fault-based. On the other hand, those employees covered by COIDA are afforded a remedy, regardless of fault and independent of the financial means of their employer. It also precludes domestic workers from equal access to social security protection.

[20] They further argue that the exclusion cannot be justified under the limitation clause in section 36 of the Constitution. There is no apparent legitimate governmental purpose for any of the provisions of COIDA that justifies this impairment of the rights of domestic workers. The applicants assert that the exclusion of domestic workers from COIDA is not rationally connected to the ends sought to be achieved by COIDA, which are to afford social insurance to employees who are injured, contract diseases, or die in the course of their employment.

[20] In the ILO Report above n 1 it records Africa as the third largest employer of domestic workers, after Asia and Latin America. Approximately 5.2 million domestic workers are employed throughout the region, of which 3.8 million are women. Domestic workers account for at least 4.9% of wage employment, and women domestic workers represent 13.6% of all female paid employees. In Southern Africa domestic work is more common than in other parts of the continent, with South Africa having the highest number of domestic workers in the region. More than three-quarters of all domestic workers in South Africa are female. It further records that the racial distribution of domestic workers is highly uneven, with the vast majority classified as "black" (91%) and the remainder as "coloured" (9%).

[21] The Gender Commission relies on the Domestic Workers Convention, which emphasises that—

> "[d]omestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights."[21]

[22] The Gender Commission argues that Article 14 requires South Africa, as a state party to the Domestic Workers Convention, to ensure that domestic workers enjoy equal protection and have access to social security. Article 14 obliges member states to take appropriate measures—

> "in accordance with national laws and regulations and with due regard for the specific characteristics of domestic work, to ensure that domestic workers enjoy conditions that are not less favourable than those applicable to workers generally in respect of social security protection."

[23] These considerations apply equally to this Court's decision in respect of constitutionality and retrospectivity. The Women's Legal Centre Trust submits that women who are employed as domestic workers are also often the financial heads of their families. These families, within an African context, often include extended family, where domestic workers provide for the financial needs of their children. They also provide for the financial needs of their grandchildren, as well as the children of other relatives within the broader family unit. Cycles of generational poverty are difficult to break. Women have long been viewed as matriarchs, whose indomitable strength ensures that both their immediate and extended families are able to respond to hardships. Ms Mahlangu is an example of such a woman.

[24] The Women's Legal Centre Trust submits that the generational impact of South Africa's apartheid history on Black women is also relevant. The values in the

[21] Preamble to the Domestic Workers Convention above n 8.

Preamble of the Constitution recognise the injustices of our past and that respect should be shown to those who have worked to build and develop our country, such as domestic workers. It further submits that historically the occupation of domestic work has been stigmatised and that stigma continues to this day. The Women's Legal Centre Trust's argument continues that the fact that domestic workers were viewed as unworthy of receiving social protection in the workplace, and that this remains unchanged, is an example of how this stigma continues to permeate within our constitutional dispensation.

[25] The respondents initially contended that it is unnecessary to challenge the constitutionality of COIDA through a court application on the basis that the relief sought by the applicants would only be of academic value, because the Minister is spearheading the drafting of amendments to COIDA in order to include domestic workers. In oral argument, the respondents concede that the provision should be struck from COIDA.

[26] Furthermore, the respondents concede that the exclusion of domestic workers limits their rights under sections 9, 10 and 27(1)(c) of the Constitution. Given the absence of any justifiable purpose for the limitation which would satisfy the requirements of section 36 of the Constitution, the respondents do not oppose the application for the confirmation of the order of invalidity.

[27] The Department has the capacity to successfully administer COIDA in the domestic sector, following its successful administration of the Unemployment Insurance Act[22] in the sector.

[22] 63 of 2001.

Issues

[28] The applicants contend that section 1(xix)(v) is irrational and infringes a number of constitutional rights: the right to equality,[23] the right to human dignity[24] and the right to have access to social security.[25] The applicants and amici also raise the effect of intersecting forms of discrimination on these rights, referred to in more detail below. The respondents accepted in the High Court and accept in this Court that the provision is unconstitutional on the bases listed by the applicants.

[29] In *Phillips*[26] this Court explained that it will not merely confirm an order of constitutional invalidity made by the High Court and the Supreme Court of Appeal; this Court must satisfy itself that the impugned provisions are indeed inconsistent with the Constitution.[27] Despite the respondents' concessions, it remains necessary for this Court to analyse all the issues raised prior to confirming the High Court's order.

[30] A further issue is that of an appropriate remedy. Should the order of constitutional invalidity have immediate and retrospective effect?

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[23] Section 9 of the Constitution, in relevant parts, provides:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (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."

[24] Section 10 of the Constitution provides:

> "Everyone has inherent dignity and the right to have their dignity respected and protected."

[25] Section 27(1)(c) of the Constitution provides:

> "Everyone has the right to have access to . . . social security."

[26] *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC).

[27] Id at para 8.

Legislative history of COIDA

[31] On 1 March 1994 the enactment of COIDA repealed the Workmen's Compensation Act. COIDA made several significant changes to the system of statutory compensation for employees involved in occupational accidents or who contract occupational diseases, regardless of their earnings level.

[32] In *Jooste*[28] Yacoob J described this compensation as follows:

> "[COIDA] is important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large. The state has chosen to intervene in that relationship by legislation and to effect a particular balance which it considered appropriate."[29]

An analysis of how COIDA achieves its objectives

[33] The Director-General is entitled in terms of section 15 of COIDA to collect levies from employers, the amount of which is determined by the actuarial risk profile of the relevant sector in which these employees are employed. The levies collected from employers form one part of the contributions to the Compensation Fund.[30] The Compensation Fund consists of assessments and other payments (including penalties paid by employers), interest on investments, amounts transferred from the Reserve Fund[31] and contributions by individually liable employers and mutual associations.[32]

[34] Section 16 of COIDA describes how money in the Compensation Fund must be applied. The Compensation Fund is the central institution for the financial

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[28] *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour Intervening)* [1998] ZACC 18; 1999 (2) SA 1 (CC); 1999 (2) BCLR 139 (CC).

[29] Id at para 9.

[30] The Compensation Fund is established by section 15 of COIDA. The purpose of the Compensation Fund is to provide compensation to employees who are injured, disabled or die during the course and scope of their employment. The Compensation Fund has several sources of revenue including levies, assessments and penalties.

[31] The Reserve Fund is established by section 19 of COIDA.

[32] Section 15 of COIDA.

administration of COIDA. It is administered by the Director-General who receives all monies payable to the Compensation Fund and is responsible to account for their receipt and utilisation.

[35] Section 19(3) of COIDA states that the object of the Reserve Fund is to provide for unseen demands on the Compensation Fund and to stabilise the tariffs of assessment. Section 22(1) provides that if an employee meets with an accident resulting in disablement or death, that employee (or in the event of death, their dependent) *shall* be entitled to benefits provided by COIDA. The exclusion of domestic workers from the definition of an "employee" means that they and/or their dependents are not entitled to claim compensation under this section.

South Africa's obligations in respect of social security

[36] Social security is recognised as a human right in the Universal Declaration of Human Rights (Declaration).[33] Article 22 of the Declaration provides that "[e]veryone, as a member of society, has a right to social security". Article 25(1) of the Declaration provides that "[e]veryone has the right . . . to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond [their] control". In addition, Article 9 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[34] provides that "[t]he state parties recognise the right of everyone to social security, including social insurance".

[37] Article 13 of the Maputo Protocol[35] entitled "Economic and Social Welfare Rights" requires states parties to—

[33] Universal Declaration of Human Rights, 10 December 1948.

[34] International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

[35] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol), 11 July 2003.

> "adopt and enforce legislative and other measures to guarantee women equal opportunities in work and career advancement and other economic opportunities. In this respect, they shall:
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> . . .
>
> (f) establish a system of protection and *social insurance for women working* in the informal sector and sensitise them to adhere to it."

[38] Furthermore, the Southern African Development Community (SADC) requires states parties to recognise the provision of social security as a human right. Article 10 of the Charter of Fundamental Social Rights in SADC provides:[36]

> "Member states shall create an enabling environment so that every worker in the Region shall have a right to adequate social protection and shall, *regardless of status and the type of employment*, enjoy adequate social security benefits."

[39] The Women's Legal Centre Trust submits that South Africa's obligations go further. South Africa has committed itself to the eradication of extreme poverty and the implementation of appropriate social protection systems for all in terms of the United Nations Sustainable Development Goals (SDGs). SDG 8 seeks to promote the protection of labour rights including safe and secure working environments. In the face of SDG 8, there is no basis for COIDA's exclusion of domestic workers from the definition of "employee" in section 1(xix)(v).[37]

[40] Because South Africa is a signatory to these international instruments, the exclusion of domestic workers from COIDA benefits is inexplicable. The provisions of these international instruments call for domestic workers to benefit from the same protections as other employees.

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[36] Charter of Fundamental Social Rights in SADC, 1 August 2003.

[37] By amending our legislation to ensure that there is no discrimination against domestic workers, this will demonstrate that South Africa is one of the countries in Africa that is already taking steps to implement the ambitions articulated in the 2030 Agenda into tangible outcomes for their people and also integrating the SDGs into their national visions and plans.

[41] When interpreting rights in the Bill of Rights, courts must prefer an interpretation which is consistent with international law.[38] Evidently, the various instruments alluded to above would regard benefits in terms of COIDA as a component of the fundamental right to social security. This is based on the interdependence of rights and how such an interpretation will further South Africa's international obligations to advance gender equality and just and favourable conditions of work for vulnerable groups. As will be seen from the analysis below, international and regional benchmarks must be attained for domestic workers, and their continued exclusion as employees under COIDA means that South Africa is not compliant with these obligations.

South Africa's international law and regional law obligations

[42] The applicants and the amici urge this Court, when considering the constitutional challenge of unfair discrimination against domestic workers, to consider South Africa's international and regional legal obligations. Section 39(1)(b) of the Constitution requires this Court to have regard to international law when interpreting the rights in the Bill of Rights. This applies to the interpretation of the right of access to social security guaranteed in section 27(1)(c) of the Bill of Rights: in other words, do the COIDA benefits constitute social security as envisaged in section 27(1)(c)? It is important and helpful in assessing discrimination against a group or class of women of this magnitude that a broad national and international approach be adopted in the discourse affecting domestic workers.

[43] South Africa has ratified various conventions to eliminate all forms of discrimination against women. These include the Convention on the Elimination of All

[38] See section 233 of the Constitution which states:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

Forms of Discrimination Against Women[39] (CEDAW), ICESCR,[40] the Convention on the Elimination of All Forms of Racial Discrimination[41] and the Convention on Domestic Workers.[42] Article 2 of CEDAW requires states parties to adopt appropriate legislative measures to protect women against discrimination. Article 11(f) of CEDAW makes specific provision for equality in the workplace.

[44] Article 2 of ICESCR requires states to introduce legislative measures in a manner that does not result in discrimination on grounds of race, sex or social origin. Article 3 of ICESCR provides for equal enjoyment of economic and social rights by men and women.[43] It is noteworthy that in the first report of the Concluding Observations to

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[39] Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979.

Notably, CEDAW adopts an intersectional vision of gender equality by referencing the relationship between racism and gender equality. This is recognised in its Preamble as follows:

> "Emphasising that the eradication of apartheid, all forms of racism, racial discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of men and women."

[40] To this end, in expanding on the meaning of the obligations under the ICESCR, the Committee on Economic, Social and Cultural Rights adopted General Comment No. 23 on the right to just and favourable conditions of work on 27 April 2016. Notably, regarding domestic workers, at para 47(h), the Committee stresses the following:

> "The vast majority of domestic workers are women. Many belong to ethnic or national minorities or are migrants. They are often isolated and can be exploited, harassed and, in some cases, notably those involving live-in domestic workers, subject to slave-like conditions. They frequently do not have the right to join trade unions or the freedom to communicate with others. Due to stereotyped perceptions, the skills required for domestic work are undervalued; as a result, it is among the lowest paid occupations. Domestic workers have the right to just and favourable conditions of work, including protection against abuse, harassment and violence, decent working conditions, paid annual leave, normal working hours, daily and weekly rest on the basis of equality with other workers, minimum wage coverage where this exists, remuneration established without discrimination based on sex, and social security. Legislation should recognise these rights for domestic workers and ensure adequate means of monitoring domestic work, including through labour inspection, and the ability of domestic workers to complain and seek remedies for violations."

[41] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965. Notably, the Committee on the Elimination of Racial Discrimination has emphasised the gendered implications of racism in its General Recommendation No. 25 on the gender-related dimensions of racial discrimination, 20 March 2020. It is also noteworthy that the Special Rapporteur on Contemporary forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance has also called for an intersectional approach in addressing racial discrimination. See for example her following reports: UN Doc A/HRC/38/52; UN Doc A/74/321; and UN Doc A/HRC/41/54.

[42] Domestic Workers Convention above n 8.

[43] Notably, the Committee on Economic, Social and Cultural Rights found that this Article calls for an intersectional vision of gender equality. See for example, General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights, 11 August 2015 at para 5 which states the following:

South Africa submitted in terms of ICESCR, the Committee on Economic, Social and Cultural Rights pointed out that "domestic workers . . . often labour under exploitative conditions."[44] To this end, the Committee recommended that South Africa strengthen the legislative framework applicable to domestic workers by extending the benefits of COIDA to this class of workers.[45] In its view, this would be consistent with ensuring just and favourable conditions of work in terms of the ICESCR.[46]

[45] The Domestic Workers Convention recognises the vulnerabilities of domestic workers and Article 3 places a duty on the state to promote and protect them. Article 13 of the Convention further provides that states must ensure the health and occupational safety of workers.

[46] At a regional level, it is necessary to consider the impact of African-based initiatives on the treatment of women in employment. In terms of Article 66 of the African Charter on Human and Peoples' Rights (African Charter), to which South Africa is a signatory, special protocols may be adopted to supplement its provisions. In line with Article 66 of the African Charter, the Maputo Protocol was adopted.[47] Today, the Maputo Protocol constitutes a model framework and an endless

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> "Women are often denied equal enjoyment of their human rights, in particular by virtue of the lesser status ascribed to them by tradition and custom, or as a result of overt or covert discrimination. *Many women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage*."

[44] Concluding observations on the initial report of South Africa, UN Doc E/C12/ZAF/CO/1.

[45] Id.

[46] Id.

[47] Portions of the Preamble of the Maputo Protocol provide as follows:

> "Considering that Article 2 of the African Charter on Human and Peoples' Rights enshrines the principle of non-discrimination on the grounds of race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status;
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> . . .
>
> Further noting that the African Platform for Action and the Dakar Declaration of 1994 and the Beijing Platform for Action of 1995 call on all Member States of the United Nations, which have made a solemn commitment to implement them, to take concrete steps to give greater

source of inspiration for women in Africa. It aims to put an end to gender stereotypes and discrimination against women and bring about the economic emancipation of women in the fields of civil, political, and reproductive health rights.

Social Security Challenge

[47] The Constitution brought with it fundamental reforms to social security. Section 27(1)(c) and (2) of the Constitution provide:

> "(1) Everyone has the right to have access to—
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> . . .
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

[48] This right covers social security assistance for those in need of support and sustenance due to an injury or disease that is work-related or the death of a breadwinner as a result of such injury or disease.[48] Economic, social and cultural rights, of which the right of access to social security is a part, are indispensable for human dignity and equality. It is important to note that although COIDA predates the Constitution and that this may steer COIDA away from social security as envisaged in section 27 of the

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> attention to the human rights of women in order to eliminate all forms of discrimination and of gender-based violence against women;
>
> Recognising the crucial role of women in the preservation of African values based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy;
>
> . . .
>
> Concerned that despite the ratification of the African Charter on Human and Peoples' Rights and other international human rights instruments by the majority of States Parties, and their solemn commitment to eliminate all forms of discrimination and harmful practices against women, women in Africa still continue to be victims of discrimination and harmful practices."

[48] I explain this shortly.

Constitution, item 2 of Schedule 6 makes it clear that "old order legislation" continues in force subject to its consistency with the Constitution.[49]

[49] COIDA therefore must be interpreted through the prism of the Bill of Rights and the foundational values of human dignity, equality and freedom. To interpret COIDA as a mere enactment of the common law would constrain the objectives of the Constitution and have anomalous results. This Court has warned that to limit the reach of the Constitution because law or conduct took place before its enactment would negate its fundamental objectives and aspirations.[50] In interpreting COIDA through the prism of the Bill of Rights, it is noteworthy that in *Khosa*[51] this Court considered the now repealed Social Assistance Act[52] against the provisions of section 27(1)(c) and (2); even though that Act also predated the Constitution. This Court found that the denial of access to social grants to permanent residents did not constitute a reasonable legislative measure as contemplated by section 27(2) of the Constitution.[53]

[50] What is the reach or scope of the right of access to social security? Does it include social security assistance for those in need of support and sustenance due to an injury or disease that is work-related or the death of a breadwinner as a result of such injury or disease?

[51] In answering these questions, one must first consider whether COIDA is social security legislation as envisioned by section 27(1)(c) of the Constitution. In *Jooste* this

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[49] Item 2 of Schedule 6 of the Constitution provides that:

> "(1) All law that was in force when the new Constitution took effect, continues in force, subject to—
>
> (a) any amendment or repeal; and
>
> (b) consistency with the new Constitution."

[50] *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 8.

[51] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC).

[52] 59 of 1992.

[53] *Khosa* above n 51 at para 82.

Court described COIDA as "important social legislation".[54] It went on to describe COIDA's objectives as follows:

> "Section 35(1) of the Compensation Act is therefore logically and rationally connected to *the legitimate purpose of the Compensation Act, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.*"[55]

[52] The definition of "social security" in the Bill of Rights expressly includes social assistance to provide support to persons and their dependents when they are unable to support themselves.[56] In circumstances such as these, where a breadwinner has died or cannot work due to injury or illness, her dependents may be left destitute and unable to support themselves. Evidently in these circumstances, the benefits provided to those dependents by COIDA serve a similar purpose to the social grants which are provided in terms of the now Social Assistance Act[57] insofar as they intend to ameliorate the circumstances of those who would otherwise be condemned to living in abject poverty. To regard COIDA only as a statutory mechanism to address former common law claims between employers and employees is, in my view, unduly restrictive. To divorce COIDA from social security because it amounts to "compensation" misses the wide net of social security, which section 27 provides for and seeks to address. For the reasons that follow, COIDA must now be read and understood within the constitutional framework of section 27 and its objective to achieve substantive equality.

[53] In determining the scope of the right to social security, one must have regard to section 39(1)(a) of the Constitution which requires that an interpretation of the Bill of Rights must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.

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[54] *Jooste* above n 28 at para 9.

[55] Id at para 17.

[56] See section 27(1)(c) of the Constitution.

[57] 13 of 2004.

[54] In *Khosa* this Court held that equality is a foundational value which must inform the interpretation of the Bill of Rights, including the right to have access to social security.[58] The Constitution itself makes it clear that socio-economic rights must be bestowed on an equal footing by declaring that those rights are held by "everyone".[59]

[55] The approach to interpreting the rights in the Bill of Rights and the Constitution as a whole is purposive and generous and gives effect to constitutional values including substantive equality.[60] So, when determining the scope of socio-economic rights, it is important to recall the transformative purpose of the Constitution which seeks to heal the injustices of the past and address the contemporary effects of apartheid and colonialism.[61]

[56] It is unassailable that the inability to work and sustain oneself, or the loss of support by dependents as a result of the death of a breadwinner subjects the worker or dependents to a life of untold indignity. The interpretative injunction in section 39(1)(a) of the Constitution demands that this indignity and destitution be averted. Surely then, social assistance that seeks to heed this injunction falls within the ambit of that right.[62]

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[58] *Khosa* above n 51 at para 42.

[59] Id.

[60] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC) at para 15 and *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 9.

[61] *Minister of Health v Treatment Action Campaign* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*TAC*) at para 24 and *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) (*Grootboom*) at para 25.

[62] Underscoring the importance of coming to the aid of the needy and vulnerable, Mokgoro J said in *Khosa* above n 51 at paras 52 and 74:

> "The right of access to social security, including social assistance, for those unable to support themselves and their dependents is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational.
>
> . . .
>
> There can be no doubt that the applicants are part of a vulnerable group in society and, in the circumstances of the present case, are worthy of constitutional protection. We are dealing, here, with intentional, statutorily sanctioned unequal treatment of part of the South African community. This has a strong stigmatising effect."

[57] More importantly, the amici submit that the exclusion of domestic workers from COIDA's reach traps both them and their dependents in a cycle of poverty which is a direct legacy of the country's colonial and apartheid past. It is that very system of racialised and gendered poverty that the Constitution seeks to undo.

[58] Lastly, this Court is enjoined to interpret rights in the Bill of Rights consistently with international law. The international instruments alluded to above certainly demand that the type of benefits provided by COIDA be considered a component of the right to social security.

[59] For all these reasons, I find that social security assistance in terms of COIDA is a subset of the right of access to social security under section 27(1)(c) of the Constitution. But that is not the end of the enquiry.

[60] Section 27(1)(c) and 27(2) must be read together.[63] Section 27(1)(c) guarantees everyone a right to have access to social security. Section 27(2) enjoins the state to take reasonable legislative and other steps to progressively realise this right. It is clear that these sub-sections are inextricably linked: section 27(2) is an internal limitation which qualifies the section 27(1) right.[64] COIDA is an example of the very type of legislation that the Constitution envisages as a "reasonable legislative measure, within its available resources, to achieve the progressive realisation of [the] right". The fact that COIDA predates the Constitution does not take it outside of the state's obligation to enact legislation and take other measures. Nor does it allow that legislation to be immune

[63] In *TAC* above n 61 at para 39, this Court held:

> "We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). *Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to "respect, protect, promote and fulfil" such rights*. The rights conferred by sections 26(1) and 27(1) are to have "access" to the services that the state is obliged to provide in terms of sections 26(2) and 27(2)."

[64] *Khosa* above n 51 at para 83.

from the section 27(2) requirement of reasonableness. The question, therefore, is whether the exclusion of domestic workers from the definition of "employee" in COIDA is reasonable.

[61] In *Grootboom* this Court expounded upon the reasonableness standard of judicial review that applies to measures taken to give effect to socio-economic rights.[65] Notably, in both *Grootboom* and *Khosa* this Court remarked on the interdependence of rights in the Bill of Rights and the task of evaluating the reasonableness of a policy against its impact on the rights to dignity and equality.[66] To that end, a core aspect of the reasonableness enquiry is whether a law or policy takes cognisance of the most vulnerable members of society and those in most desperate need.[67] A law or policy that fails to do so would be considered unreasonable.

[62] In *Khosa* this Court was faced with a similar exclusion to that found in COIDA, also in respect of the right of access to social security. There, this Court pointed out that context is indispensable in determining the reasonableness of such an exclusion. Mokgoro J expounded upon this as follows:

> "In dealing with the issue of reasonableness, context is all-important. We are concerned here with the right to social security and the exclusion from the scheme of permanent residents who, but for their lack of citizenship, would qualify for the benefits provided under the scheme. In considering whether that exclusion is reasonable, *it is relevant to have regard to the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose*."[68]

[63] The purpose of social security is to ensure that everyone, including the most vulnerable members of our society, enjoy access to basic necessities and can live a life

[65] *Grootboom* above n 61 at para 39.

[66] Id at paras 23-4 and *Khosa* above n 51 at paras 40 and 44.

[67] *Grootboom* above n 61 at para 44 and *TAC* above n 61 at para 68.

[68] *Khosa* above n 51 at para 49.

of dignity.[69] Moreover, social security legislation serves a remedial purpose: namely, to undo the gendered and racialised system of poverty inherited from South Africa's colonial and apartheid past.

[64] In the present matter, it is clear that no legitimate objective is advanced by excluding domestic workers from COIDA. If anything, their exclusion has a significant stigmatising effect which entrenches patterns of disadvantage based on race, sex and gender. The amici have highlighted the lived experiences of domestic workers, the majority of whom are Black women, and the structural barriers which they and their dependents continue to face.

[65] In considering those who are most vulnerable or most in need, a court should take cognisance of those who fall at the intersection of compounded vulnerabilities due to intersecting oppression based on race, sex, gender, class and other grounds. To allow this form of state-sanctioned inequity goes against the values of our newly constituted society namely human dignity, the achievement of equality and *ubuntu*. To exclude this category of individuals from the social security scheme established by COIDA is manifestly unreasonable.

[66] For all these reasons, I find that the obligation under section 27(2) to take reasonable legislative and other measures, within available resources, includes the obligation to extend COIDA to domestic workers. The failure to do so in the face of the respondents' admitted available resources constitutes a direct infringement of section 27(1)(c), read with section 27(2) of the Constitution.

[67] Section 27(2) contains an internal limitation whereby the state may defend its failure to give effect to a socio-economic right listed in section 27(1) based on a lack of available resources to do so. I consider this at the end of this judgment where I discuss the appropriate remedy, the actuarial report and the issue of retrospectivity.

[69] Id at para 52.

[68] This leads me to consider the right to equality that the applicants also rely on in their constitutional challenge to section 1(xix)(v) of COIDA.

Equality challenge

[69] The Constitution, through its founding values and section 9 makes it peremptory for both racial and gender equality to be advanced. Section 9 provides:

> "(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.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[70] The respondents correctly concede that there is no basis for the differentiation between "employees" and the disadvantaged group of domestic workers. The applicants submit that failing to include domestic workers under the protection of COIDA constitutes unequal treatment in breach of section 9(1). While the constitutional attack is based on both sections 9(1) and 9(3), the attack on section 9(1) was not strongly pressed by counsel for the applicants or the amici. It is necessary, however, to consider section 9(1) briefly within the context of these facts.

Section 9(1) challenge

[71] In *Prinsloo*[70] Ackermann J stated that:

> "It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as 'mere differentiation'. In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate government purpose for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner."[71]

Prinsloo was concerned with section 8 of the interim Constitution. What I have quoted applies equally to section 9(1) of the Constitution. For completeness, let me add only that part of the "*Harksen* test"[72] that is relevant to the present enquiry. In *Harksen* this Court held:

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[70] *Prinsloo v Van Der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC).

[71] Id at para 25.

[72] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC). The full *Harksen* test is as follows:

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government I purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
>
> (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
>
> (i) Firstly, does the differentiation amount to 'discrimination? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
>
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

> "Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination."[73]

Yet again, this finds application to section 9(1) of the Constitution.

[72] A question that arises then is whether the differential treatment of not affording domestic workers benefits under COIDA serves any rational government purpose. In their submissions the applicants correctly answer this question in the negative. As indicated, the respondents who are conceding the challenge understandably do not proffer a basis for the differentiation. In these circumstances, the differentiation between domestic workers and other categories of workers is arbitrary and inconsistent with the right to equal protection and benefit of the law under section 9(1). As such, even on the first stage of the *Harksen* test, COIDA would be constitutionally invalid.

Section 9(3) challenge and the application of intersectionality

[73] In this case however, the differentiation between domestic workers and other categories of workers also amounts to discrimination albeit indirectly. I say indirectly because, as the applicants and amici submit, domestic workers are predominantly Black women. This means discrimination against them constitutes indirect discrimination on the basis of race, sex and gender. Section 9(3) proscribes unfair discrimination by the state on certain specified grounds, which include race, sex and gender. Clearly the race, sex and gender of domestic workers is woefully apparent in the discrimination against them. In terms of section 9(5), which is quoted above, these grounds are presumptively unfair. As I will demonstrate below, with these grounds

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> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."

[73] Id at para 54.

intersecting, not only is the discrimination presumptively unfair but the level of discrimination is aggravated.

[74] In their written submissions, the applicants contend that "section 1(xix)(v) of COIDA discriminates on the grounds listed in section 9(3) of the Constitution, specifically the grounds of race, sex and/or gender". They also include social origin. As such, they argue that the exclusion discriminates against domestic workers both directly (as a class of workers) and indirectly on numerous listed grounds. They contend further that the section 9(3) analysis should consider how the implicated grounds intersect. Section 9(3) defines the grounds of discrimination by enumerating a defined list which is by no means a *numerus clausus* (closed list) of grounds of discrimination. This proscribed discrimination can be direct or indirect, but importantly, it also provides that there may be more than one ground of discrimination,[74] thus anticipating multiple grounds of discrimination simultaneously converging. It is in this notion of multiple grounds of discrimination that the importance of an intersectionality analysis becomes unavoidable.

[75] In my view, even though COIDA is invalid on a section 9(1) analysis alone, it is in the interests of justice to also deliberate on the unfair indirect discrimination challenge. In light of the unique circumstances of domestic workers, this case provides an unprecedented opportunity to expressly consider the application of section 9(3) through the framework of intersectionality. This Court has also had the benefit of hearing full oral argument on the benefits and implications of the intersectional approach.

[76] There is nothing foreign or alien about the concept of intersectional discrimination in our constitutional jurisprudence. It means nothing more than acknowledging that discrimination may impact on an individual in a multiplicity of ways based on their position in society and the structural dynamics at play. There is an

[74] Section 9(3) also states "on one or more grounds".

array of equality jurisprudence emanating from this Court that has, albeit implicitly, considered the multiple effects of discrimination.

[77] At the early stages of our constitutional dispensation, Sachs J pertinently invoked it in so many words in *National Coalition for Gay and Lesbian Equality* where he explained:

> "One consequence of an approach based on context and impact would be the acknowledgement that *grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit constitutional intervention.* Thus, black foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and [Black people] as a rule, are not; it could in certain circumstances be a fatal combination. The same might possibly apply to unmarried mothers, or homosexual parents, where nuanced rather than categorical approaches would be appropriate. *Alternatively, a context rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination. A notorious example would be African widows, who historically have suffered discrimination as [Black people], as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently amongst the lowest paid workers*."[75]

[78] Although this was a concurring judgment, the majority judgment by Ackermann J concurred in by all other Justices expressed agreement with it.[76]

[79] Furthermore, in *Hassam*[77] this Court looked at sameness and difference in group disadvantage on the question of intestacy between Muslim women in polygamous

[75] *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 113.

[76] Id at para 78.

[77] *Hassam v Jacobs N.O.* [2009] ZACC 19; 2009 (5) SA 572 (CC); 2009 (11) BCLR 1148 (CC).

marriages and other women. Such textured analysis in relation to discrimination is an indispensable legal methodology and, using the intersectionality framework as a legal tool, leads to more substantive protection of equality. Adopting intersectionality as an interpretative criterion enables courts to consider the social structures that shape the experience of marginalised people. It also reveals how individual experiences vary according to multiple combinations of privilege, power, and vulnerability as structural elements of discrimination. An intersectional approach is the kind of interpretative approach which will achieve "the progressive realisation of our transformative constitutionalism".[78]

[80] Two further examples stem from *Van Heerden* and *Brink*.[79] Here is how Moseneke J in *Van Heerden* recognised the intersectional effects of different forms of disadvantage:

> "This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but situation sensitive approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society."[80]

[81] O'Regan J in *Brink* in dealing with the dynamic of sameness and difference in patterns of group disadvantage and discrimination, did not characterise it using the word "intersectionality", but nevertheless described multiple and intersecting forms of harm:

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[78] Id at para 28.

[79] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (*Van Heerden*) and *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC).

[80] *Van Heerden* id at para 27.

> "Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in our society. The drafters realised that it was necessary both to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of section 8 and, in particular, subsections (2), (3) and (4)."[81]

[82] Recently, albeit in different contexts, this concept was endorsed in the concurring judgment of Khampepe J in *Tshabalala* in the context of the causes and effects of rape on Black women.[82] In the majority judgment in *Centre for Child Law,* when discussing agency and stigma, Mhlantla J noted the presence of "intersecting axes of discrimination".[83]

[83] The intersectional approach is evident in other jurisdictions. For instance, in 2012 the European Court of Human Rights introduced for the first time an intersectional interpretation of discrimination in the case of *BS v Spain*.[84] Analysing discrimination within the framework of intersectionality proved to be a useful tool in determining the presence and extent of the discrimination. That Court considered ways in which gender intersects with other identities and how these intersections contribute to unique experiences of oppression and privilege. A single-axis comparison by contrast, may not yield the full extent of the discrimination. For example, assessing discrimination against women in general does not consider the differing impacts of certain discrimination on Black women as compared to that experienced by White women.

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[81] *Brink* above n 79 at para 42.

[82] *S v Tshabalala* [2019] ZACC 48; 2020 (5) SA 1 (CC); 2020 (3) BCLR 307 (CC) at paras 68-9 and fn 38.

[83] *Centre for Child Law v Media 24 Ltd* [2019] ZACC 46; 2020 (4) SA 319 (CC); 2020 (3) BCLR 245 (CC) at para 86.

[84] *BS v Spain* no 47159/08, ECHR 2012-III.

[84] It is undisputed between the parties that domestic workers who are in the main Black women, experience discrimination at the confluence of intersecting grounds. This simultaneous and intersecting discrimination multiplies the burden on the disfavoured group. It is now apt to consider how scholars have developed and grappled with the intersectional lens and how it is a helpful framework in determining the nature of the discrimination in the current matter.

[85] Crenshaw,[85] who coined the concept of the "intersectional" nature of discrimination, writing as a Black feminist on women studies, recognised and demonstrated how overlapping categories of identity (such as gender, sex and race) impact individuals and institutions. Intersectionality aims to evaluate how intersecting and overlapping forms of oppression result in certain groups being subject to distinct and compounded forms of discrimination, vulnerability and subordination.[86] As such, at times Black women may experience compounded forms of discrimination as compared to Black men or White women. In other cases, they may experience forms of discrimination and vulnerability that are qualitatively different from both these groups.[87] The power of an intersectional approach lies in its capacity to shed light on the experiences and vulnerabilities of certain groups that have been erased or rendered invisible. Unless there is recognition and an articulation of intersectional discrimination, the enormous burden experienced by, in this case, domestic workers will not be sufficiently acknowledged.

[86] Intersectionality has been described as one of "the most important theoretical contributions that women studies has made thus far".[88] Intersectionality is an approach

[85] Crenshaw "Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory, and Anti-Racist Policies" (1989) *University of Chicago Legal Forum* 139. Crenshaw is a pioneer and leading scholar on intersectionality. Intersectionality as a concept has been used and developed by legal scholars and lawyers in the field of discrimination law.

[86] Id at 149. See also Crenshaw "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43 *Stanford Law Review* 1241 at 1249-50.

[87] Id at 148.

[88] McCall "The Complexity of Intersectionality" *Signs: Journal of Women in Culture and Society* (2005) 30 at 1771.

that recognises that different identity categories can intersect and co-exist in the same individual thus creating a qualitatively different experience when compared to that of another individual. These overlapping burdens can lead to excessive hardship for an individual.[89]

[87] The discrimination in this case illustrates what Albertyn posits as the need for the concept of equality to be developed beyond the idea of *equal concern and respect*. In discussing the plasticity of the concept of equality, she reminds us that—

> "the goal of equality . . . is to remove systemic barriers to substantive freedom and actively to create conditions of equality, including attention to restructuring relations of equality at individual, institutional and societal inequalities. It is also to take account of the intersectional nature of inequalities in comprehending the problem and identifying its solutions".[90]

[88] By including domestic workers in the definition of "employee" under COIDA, the goal of substantive equality is advanced at a structural level by granting the remedy sought. To this end, it empowers domestic workers and brings them closer to the kind of "substantive freedom" that Albertyn persuasively argues should be the main object of equality jurisprudence.

[89] Atrey explains that intersectionality consists of several strands, such as sameness and difference of experiences within the context of multiple forms of discrimination.[91] This is the notion that individuals within the same group may simultaneously experience discrimination in the same way, and also differently. One cannot generalise. The applicants and amici submit that not recognising these patterns of intersecting grounds of discrimination, exacerbates patterns of group disadvantage. The outcome of an

[89] Smith "Intersectional Discrimination and Substantive Equality: A Comparative and Theoretical Perspective" *The Equal Rights Review* (2016) 16 at 73.

[90] Albertyn "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" (2018) 34 *SAJHR* 441 at 462.

[91] Atrey *Intersectional Discrimination* (OUP, United Kingdom, 2019) at 36. Atrey discusses sameness and difference as well sameness and difference in group disadvantage.

intersectional analysis, on the other hand, results in a transformative outcome which addresses systemic disadvantage. This will hopefully remove, rectify and reform the disadvantage suffered as a result of intersectional discrimination.

[90] This brings to the fore the need to consider patterns of group disadvantage and discrimination along intersectional lines. Multiple axes of discrimination are relevant to the case of domestic workers. Domestic workers experience racism, sexism, gender inequality and class stratification. This is exacerbated when one considers the fact that domestic work is a precarious category of work that is often undervalued because of patronising and patriarchal attitudes.[92] The application of an intersectional approach helps us to understand the structural and dynamic consequences of the interaction between these multiple forms of discrimination.

[91] Atrey, in referring to the concept of group disadvantage as raised by O'Regan J in *Brink*, explains that this phrase requires some analysis:

> "First of all, intersectionality conceives of 'disadvantage' broadly, including every kind of harm, oppression, powerlessness, subordination, marginalisation, deprivation, domination and violence. Moreover, the disadvantage is defined not by isolated or stray incidents but by systemic or structural nature. It represents a pattern of historic motifs of disadvantage which have been entrenched over time. Such disadvantage is also not personally towards random individuals but suffered by individuals because of their membership to a social group."[93]

[92] Some may contend that because COIDA only excludes certain categories of workers such as domestic workers, this only amounts to an irrational differentiation, as opposed to unfair discrimination in terms of section 9(3). I disagree. First, this Court has already established that a seemingly benign or neutral distinction that nevertheless

[92] See for example, Mantouvalou "Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour" (2012) 34 *Comparative Labour Law & Policy Journal* 133 at 138.

[93] Atrey above n 91 at 41.

has a disproportionate impact on certain groups amounts to indirect discrimination.[94] Secondly, this Court has established that for the purposes of a section 9(3) enquiry, there is no qualitative difference between discrimination that occurs directly or indirectly.[95] Once indirect discrimination on a listed ground has been established, then the law or conduct in question is presumed to be unfair.[96]

[93] In the present case, the uncontested evidence is that the overwhelming majority of domestic workers are women, and Black women for that matter. It is also noteworthy that the domestic work sector is the third largest employer of women in the country.[97] In addition, as I will demonstrate below, these various grounds of discrimination intersect, thus rendering domestic workers amongst the most indigent and vulnerable members of our society. In my view, there is no doubt that although the distinction in COIDA could be said to refer to a category of worker which, on the face of it, would not trigger a section 9(3) enquiry, the same cannot be said of the historical and contemporary marginalisation of domestic workers, and the various listed grounds of discrimination that intersect where discrimination is made between domestic workers and other workers.

[94] While it is true, as pointed out by my brother Jafta J in the second judgment, that COIDA also excludes members of the South African National Defence Force (SANDF) and the South African Police Service (SAPS) from its provisions, this omits to take into account that, because domestic workers are predominantly Black women, their exclusion indirectly discriminates against them on grounds of sex, gender and race. In terms of section 9(5) that discrimination is presumptively unfair. That is all that is relevant. It is noteworthy that the omission of members of the SANDF and SAPS is not

[94] *Pretoria City Council v Walker* [1998] ZACC 1; 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC) (*Walker*) at paras 31-2.

[95] Id at para 35.

[96] Id.

[97] ILO Report above n 1 at 33.

the same as that of domestic workers. Section 57 of the Defence Act[98] establishes a fund for SANDF members to claim compensation for death or injury. In the case of the SAPS, a special medical scheme has been established of which only members of the SAPS can become members.[99] In terms of this scheme, SAPS' members can lodge claims for death, injury or disability to this scheme the way they would have lodged claims under COIDA. Hence, it is only domestic workers who are in a legislative vacuum without any coverage whatsoever. In addition, the historical exclusion domestic workers have faced, which I outline below, demonstrates that an analogy between them and members of the SAPS or the SANDF is inapposite.[100]

[95] Intersectionality requires that courts examine the nature and context of the individual or group at issue, their history, as well as the social and legal history of society's treatment of that group. Thus, this Court is required to consider the particular history of social security in South Africa, as it relates to domestic workers. Furthermore, this Court must consider the historical disadvantage that Black women have faced as a group.

[96] It is often said that Black women suffer under a triple yoke of oppression based on their race, gender and class.[101] The racial hierarchy established by apartheid placed Black women at the bottom of the social hierarchy.[102] During apartheid, Black women were oppressed both by codified apartheid laws and a patriarchal form of customary

[98] 42 of 2002.

[99] South African Police Service Medical Scheme (POLMED) is a closed medical scheme registered under the Medical Schemes Act 131 of 1998. Only employees of the SAPS, appointed under the South African Police Service Act 68 of 1995 and their dependants are eligible to be members of POLMED. "POLMED" available at http://www.polmed.co.za/about-us/. Also see sections 34 (1)(f) and (g) of the South African Police Service Act 68 of 1995.

[100] To the extent that the exclusion of labour brokers is similar to that of domestic workers, this Court need not make any pronouncement on it, because the question of its constitutionality is not properly before this Court.

[101] Nolde "South African Women Under Apartheid: Employment Rights with Particular Focus on Domestic Service and Forms of Resistance to Promote Change" (1991) *Third World Legal Studies* 203 at 204.

[102] Wing and de Carvalho "Black South African Women: Toward Equal Rights" (1995) 8 *Harvard Human Rights Journal* 57 at 60.

laws and norms, which rendered them perpetual minors who were at the mercy of White men and women as well as Black men.[103]

[97] This Court has on a number of occasions stressed the importance of "the need to make a decisive break from the ills of the past".[104] This constitutional imperative stems from the Constitution's commitment to establishing a non-racist and non-sexist society based on human dignity, equality and freedom. At the heart of the constitutional project is an aspiration to achieve substantive equality and undo the burdens of our past.[105]

[98] But ensuring that the vestiges of our racist past are eradicated, also requires an exploration of the lingering gendered implications of apartheid's racist system.[106] The combination of influx control laws and the migrant labour system also had a particularly onerous effect on Black women.[107] Taken together, they restricted the ability of Black women to seek and obtain employment opportunities, thus rendering them dependent on absent husbands or sons.[108] Essentially, this all sedimented a gendered and racialised system of poverty, that was particularly burdensome for Black women.

[99] Being at the bottom of the social hierarchy meant that Black women were often required to do the "least skilled, lowest paid and most insecure jobs".[109] The case of domestic workers was particularly severe. Domestic workers, the majority of whom

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[103] Id.

[104] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) at para 5 and see further *Tshwane City* above n 6 at para 6.

[105] *Minister of Justice and Constitutional Development v SA Restructuring and Insolvency Practitioners Association* [2018] ZACC 20; 2018 (5) SA 349 (CC); 2018 (9) BCLR 1099 (CC) at para 61.

[106] See for example Poinsette "Black Women Under Apartheid: An Introduction" (1985) 8 *Harvard Women's Law Journal* 93 at 105 where she discusses the implications of the Immorality Act for Black women. Amongst other things she points out that that most prosecutions under the Immorality Act were against White men having sex with Black women. Also, because White men were often Black women's employers, Black Women were effectively pressurised into these sexual relationships.

[107] Andrews "From Gender Apartheid to Non-Sexism: The Pursuit of Women's Rights in South Africa" (2001) 26 *North Carolina Journal of International Law and Commercial Regulation* 693 at 695.

[108] Id at 696.

[109] Wing and de Carvalho above n 102 at 67.

were – and still are – Black women, were denied both a family life and social life.[110] They lived in poor conditions devoting more time to caring for the children of their employers, than their own.[111]

[100] The marginalisation that domestic workers currently face is therefore historical. During apartheid, domestic workers had a tenuous form of employment which was excluded from fair labour standards including compensation for workplace injuries, minimum wage standards and unemployment insurance.[112] Their employment conditions were not formalised and their lives were often based on the whims of their White employers.

[101] Poinsette captures the tragic lives of domestic workers during apartheid with the following remarks:

> "Black women who work as servants in white homes sometimes describe themselves as 'slaves'. Their typical living conditions are restricted, bare, and cramped. Amenities basic to any white home are often denied to the servants who work in such homes. One commentator tells of a domestic servant who was forced to wash in the toilet in her servant's quarters."[113]

[102] Because Black women found themselves at the intersection or convergence of multiple oppressions, some argue that the indignities they face can tell us something about the "grand design" or brutality of apartheid.[114] Intersectionality indeed becomes a useful analytical tool to understand the convergence of sexism, racism and class stratification and the discriminatory logic embedded in these systems. Unravelling the multiple layers of discrimination that Black women faced and still face might aid us in

[110] Poinsette above n 106 at 116-7.

[111] Id. Poinsette goes on to argue that the state targeted Black women to destabilise African families and undermine their "procreative capacity" in order to keep the black population under control.

[112] Wing and de Carvalho above n 102 at 68.

[113] Poinsette above n 106 at 116.

[114] Id at 118.

the quest to make a decisive break from our past towards the establishment of a democratic, compassionate and truly egalitarian society.[115] An intersectional framework therefore enables this Court to shift its normative vision of equality and the "baseline" assumptions embedded in anti-discrimination law.[116] The marginalisation that domestic workers and Black women in general faced during apartheid has regrettably been extended to the present day.

[103] The exclusion of domestic workers from the protections under COIDA has resulted in a situation where domestic workers have for decades into our democracy, had to bear work-related injuries or death without compensation. They are a category of workers that have been lamentably left out and been rendered invisible. Their lived experiences have gone unrecognised. It took the tragic death of Ms Mahlangu to bring this egregious form of discrimination into vivid focus.

[104] Much like their apartheid counterparts, domestic workers today remain in an unenviable position. Domestic work is a circumstance-driven employment decision, driven by financial need. Domestic workers remain shackled by poverty, because the salaries they earn are low and not nearly enough to take care of all their daily needs and those of their families. In some instances, they are single parents who do not have an additional salary to help support them and their children.

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[115] See *Makwanyane* n 60 at para 262 where Mahomed J describes the transformative nature of the Constitution as follows:

> "In some countries, the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."

[116] For a more comprehensive discussion on how intersectionality shifts the normative vision of anti-discrimination law by interrogating its baseline assumptions see Crenshaw (1989) above n 85 at 145 and further Carbado and Crenshaw "An Intersectional Critique of Tiers of Scrutiny: Beyond Either/or Approaches to Equal Protection" (2019) 129 *Yale Law Journal Forum* 108.

[105] Section 1(xix)(v) of COIDA differentiates between employees as defined and domestic workers employed in private households who are excluded from that definition. It is evident from the above discussion that the state has discriminated against domestic workers indirectly in ways already referred to. They are a critically vulnerable group of workers. It is this very right to equality that the state has violated. If the equality breach is analysed through an intersectional lens with all the multi-axes of indirect discrimination taken into account, this can have an impact on achieving structural systemic transformation.

[106] The Constitution serves a transformative purpose that is advanced through our equality and dignity jurisprudence. It recognises that the values of equality and human dignity, although linked, each serve as independent rights and constitutional values which must be given specific content. Section 1(xix)(v) of COIDA does not advance the material well-being of domestic workers. Declaring that section invalid will fulfil the transformative mandate set by our Constitution, at both an individual and a group-based level.

[107] To conclude on equality, the exclusion of domestic workers and, therefore, their dependents from deriving benefits under COIDA limits the rights to equality before the law and equal protection and benefit of the law under section 9(1) and the right not to be discriminated against unfairly guaranteed in section 9(3).

Human dignity challenge

[108] It is undisputed in this case, that the dignity of domestic workers is being impaired by their exclusion from the definition of "employee" in COIDA. Section 10 of the Constitution provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected". The exclusion of domestic workers from benefits under COIDA has an egregious discriminatory and deleterious effect on their inherent dignity. The exclusion demonstrates the fact that not only is domestic work undervalued, it is also not considered to be *real work* of the kind performed by workers that do fall within the definition of the impugned section of COIDA. One can only

imagine the pain of these women who work graciously, hard and with pride only for their work and by consequence them, to go unrecognised. This amounts to domestic workers themselves not being treated with dignity.

[109] Counsel for the respondents properly concede the constitutional values and principles that apply in this case and that these include the dignity of domestic workers. Mogoeng CJ in *Freedom of Religion South Africa*[117] dealt with the right to human dignity and explained:

> "There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J correctly points out, the role and stressed importance of dignity in our Constitution aim 'to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past'. Unsurprisingly because not only is dignity one of the foundational values of our democratic state, it is also one of the entrenched fundamental rights."[118]

[110] Historically, in varying contexts across the world, domestic work has generally not been regarded as *real work* and has been undervalued for that reason.[119] In the American context, it has been argued that the historical undervaluation of domestic workers stems primarily from the gendered and racialised nature of those who have traditionally done this work, namely African-American women.[120] To this end, domestic work there has been undervalued for two reasons. First, it has been described as work done by a "despised race".[121] Second, it has been regarded as "women's work" or a "labour of love" having no economic currency.[122] In my view, the same rings true

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[117] *Freedom of Religion South Africa v Minister of Justice and Constitutional Development* [2019] ZACC 34; 2020 (1) SA 1 (CC); 2019 BCLR 1321 (CC).

[118] Id at para 45.

[119] See for example, Mantouvalou above n 92.

[120] Shah and Seville "Domestic Worker Organizing: Building a Contemporary Movement for the Dignity and Power" (2011) *Albany Law Review* 413 at 416.

[121] Id.

[122] Id.

in the South African context, where domestic work has been undervalued precisely because of who performs this work: poor Black women. The injury to dignity hence stems from the same intersectional harms elaborated upon above.

[111] The reasons for undervaluing this work and not according it the necessary dignity are deeply gendered and reflect the patriarchal values which inform what counts as *real work*. In one of its reports, the International Labour Organisation captures this point succinctly:

> "Domestic work, however, is still undervalued. It is looked upon as unskilled because most *women have traditionally been considered capable of doing the work, and the skills they are taught by other women in the home are perceived to be innate.* When paid, therefore, the work remains undervalued and poorly regulated."[123]

[112] The idea that the duties performed by domestic workers do not constitute *real work,* and that they are merely engaging in an inherently feminine endeavour is deeply sexist and has a significant stigmatising effect on their dignity.

[113] The often exploitative relationship between domestic workers and their employers is also relevant to the dignity enquiry. This exploitative relationship, coupled with the undervaluation of their work demonstrates how the labour of domestic workers has been commodified and how they have been objectified to that end.[124] But, the Constitution's commitment to human dignity prohibits the idea that people can be reduced to objects and treated as a means to achieve an end.[125] The Constitution

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[123] International Labour Organization Report: "Decent Work for Domestic Workers" Report IV (1) International Labour Conference 99th session (2010).

[124] Mantouvalou above n 92 at 161.

[125] Steinmann "The Core Meaning of Human Dignity" (2016) 19 *Potchefstroom Electronic Law Journal* 1 at 17. This particular understanding of human dignity is neatly summed up in the following quote in *Prinsloo* above n 70 at para 31 where this Court said the following:

> "We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. *They were treated as not having inherent worth; as*

unequivocally confers self-worth on and demands respect for each individual, which must be protected and jealously guarded by courts.

[114] It is apparent that the exclusion of domestic workers from COIDA calls for a re-examination of the legal and moral foundations of the discrimination against them. The multiple intersecting forms of discrimination illustrate the indignity domestic workers have endured for so long. When this case is measured along an intersectional framework, it is plainly evident that there are still disadvantaged groups who have not benefitted from democracy, or from the transformative constitutional project and whose dignity remains impaired and unprotected.

[115] For all these reasons, it is clear that the exclusion of domestic workers from COIDA is an egregious limitation of their right to dignity, alongside its infringements on their other constitutional rights. It extends the humiliating legacy of exclusion experienced during the apartheid era into the present day, which is untenable.

Justification analysis

[116] The limitation of the rights I have dealt with is quite egregious and far-reaching in nature. No reasons were tendered to justify it pursuant to a section 36 limitation analysis.[126] The intersectional discrimination could not be objectively justified by the state on any criteria. This is understandable because the state is conceding

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> *objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth.* In short, they were denied recognition of their inherent dignity."

[126] Section 36(1) of the Constitution provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

unconstitutionality. That notwithstanding, this Court must satisfy itself that the limitation of the affected rights is not justified.[127]

[117] Unquestionably, the right to equal protection of the law, the right not to be discriminated against unfairly and the right to dignity are of singular importance in our constitutionalism. Unsurprisingly they even feature in our Constitution's founding values.[128] Equally, the right of access to social security is important. It seeks to uplift the vulnerable and marginalised from destitute conditions and for that reason, it is also closely linked to the value of and right to dignity.

[118] On the other hand, the limitation serves no governmental purpose whatsoever. That much has been conceded by the state. All the state has said is that the continued exclusion of domestic workers from the enjoyment of benefits under COIDA was simply a matter of timing. It explained that it needed to prepare itself for handling the increased numbers of beneficiaries that would result from an extension of the benefits. Without suggesting that this was an acceptable reason, the state contends that it is now prepared to handle the numbers.

[119] The justification analysis must end here. The limitations on the fundamental rights outlined above are neither reasonable nor justifiable in terms of section 36(1).

Conclusion

[120] The invalidation of section 1(xix)(v) of COIDA will contribute significantly towards repairing the pain and indignity suffered by domestic workers. It should result in a greater adjustment of the architectural focus as to their place and dignity in society. Not only should this restore their dignity, but the declaration of invalidity will hopefully have a transformative effect in other areas of their lives and those of their families, in the future.

[127] *Phillips* above n 26 at para 20.

[128] See [4].

Remedy

[121] The starting point on the issue of an appropriate remedy is found in section 172 of the Constitution. Section 172(1)(b) empowers this Court, when deciding a constitutional matter within its power, to declare any law or conduct that is inconsistent with the Constitution invalid to the extent of its inconsistency. This Court is further empowered to make any order that is just and equitable, which may include an order limiting the retrospective effect of the declaration of invalidity or its suspension with the aim of allowing Parliament to correct the defect.[129]

[122] The applicants seek an order confirming the High Court's order of constitutional invalidity of section 1(xix)(v) of COIDA with immediate and retrospective effect.

[123] Jafta J held in *Mvumvu*:[130]

> "Unless the interests of justice and good government dictate otherwise, the applicants are entitled to the remedy they seek because they were successful. Having established that the impugned provisions violate their rights entrenched in the Bill of Rights, they are entitled to a remedy that will effectively vindicate those rights. The court may decline to grant it only if there are compelling reasons for withholding the requested remedy. Indeed, the discretion conferred on the courts by section 172(1) must be exercised judiciously."[131]

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[129] Section 172(1) provides:

> "When deciding a constitutional matter within its power, a court–
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including–
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any condition, to allow the competent authority to correct the defect."

[130] *Mvumvu v Minister for Transport* [2011] ZACC 1; 2011 (2) SA 473 (CC); 2011 (5) BCLR 488 (CC).

[131] Id at para 46.

[124] The default position in the law is that a declaration of constitutional invalidity will apply retrospectively. When the declaration is made in relation to a statutory provision, it will be retrospective from the date that the Constitution came into effect, or in the case of post-constitutional legislation, from the date that the statutory provision came into force. This principle is based on the doctrine of objective constitutional invalidity.[132] The question then is whether the declaration of constitutional invalidity should be qualified to limit the retrospective effect of the order or whether this order of invalidity should be effective from the date the Constitution took effect.

[125] The respondents concede that the applicants are entitled to effective relief. While they do not oppose the relief sought by the applicants in respect of retrospectivity of any order this Court may make, they faintly put up two justifications in support of limiting the retrospective effect of the order being: the administrative and financial burdens this may have on the Compensation Fund. Without any evidence, the respondents claim that such burdens will arise from old injuries or diseases. In particular, if claims arising from old injuries or diseases are to be met, that will impact on the Compensation Fund's ability to meet future claims.

[132] Id at para 44, where Jafta J held as follows:

> "In terms of the doctrine of objective constitutional invalidity, unless ordered otherwise by the court the invalidity operates retrospectively to the date on which the Constitution came into force. But if the legislation in question was enacted after that date, as was the present Act, the retrospective operation of invalidity goes back to the date on which the legislation came into force."

See also *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) where this Court stated at para 28:

> "A pre-existing law which was inconsistent with the provisions of the Constitution became invalid the moment the relevant provisions of the Constitution came into effect. The fact that this Court has the power in terms of section 98(5) of the Constitution to postpone the operation of invalidity and, in terms of section 98(6), to regulate the consequences of the invalidity, does not detract from the conclusion that the test for invalidity is an objective one and that the inception of invalidity of a pre-existing law occurs when the relevant provision of the Constitution came into operation. The provisions of section 98(5) and (6), which permit the Court to control the result of a declaration of invalidity, may give temporary validity to the law and require it to be obeyed and persons who ignore statutes that are inconsistent with the Constitution may not always be able to do so with impunity."

Actuarial Report

[126] The respondents filed an abbreviated actuarial report, dubbed a high-level assessment. A more detailed actuarial report would have been helpful. The respondents are in possession of their own financial information and this would have assisted the actuary in producing a full report on the effect of the retrospectivity of the order. It is incumbent on the respondents to place cogent evidence before this Court on why this Court should limit the retrospectivity of the order of constitutional invalidity.

[127] Reverting to the abbreviated actuarial report on the question of retrospectivity, the actuary states that her mandate was limited to simply perform a high-level consideration report.[133] No basis was laid as to why the actuary was given this specific and very limited mandate. The state is not a naïve, inexperienced and impecunious litigant that had to limit the actuarial report to a high-level assessment for costs or other reasons which has resulted in an unhelpful report full of unsupported generalisations. This chosen approach is a curious one when it comes to the state assisting the Court on something as important as domestic workers' rights. Its presumed intention was to assist the Court regarding the practical realities faced by the state, and to assist it in determining a viable way forward on the important issue of domestic workers' rights under COIDA. The respondents tender no evidence which suggests that the Reserve Fund would be unable to meet the demand should there be no limiting of retrospectivity. Importantly, one of the objects of the Reserve Fund is to provide for unforeseen demands on the Compensation Fund.[134]

[128] The fact that this case concerns intersectional discrimination is a relevant factor in determining whether a retrospective order should be granted.[135] As discussed above,

[133] High-level means "general" or "big picture". Some may consider a "high-level overview" to be redundant, like saying "brief summary". A "high-level overview" is one that does not cover details. It provides a very basic and general explanation or presentation of the material/subject.

[134] Section 19(3)(a) of COIDA.

[135] In this case a retrospective order will address the systematic disadvantage faced by domestic workers and their dependents. Crenshaw (1991) above n 87 at 1250 argues that intersectional discrimination cannot be addressed unless the remedy is designed to address the "intersectional location" of the affected women.

I am hopeful that the inclusion of domestic workers in the definition of "employee" under COIDA will contribute towards the amelioration of systemic disadvantage suffered by these women and contribute to breaking the cycle of poverty they suffer. The above discussion dismisses any argument that the state is unable to include domestic workers based on a lack of available resources.

[129] I conclude that a just and equitable order is to not limit the retrospective effect of the declaration of invalidity. The impugned provision has been in place since before the advent of our constitutional democracy. During the hearing, the parties agreed that in the event of the retrospective effect of the order not being limited, the cut-off date should be the date of the interim Constitution which took effect on 27 April 1994. I agree with that cut-off date.

Costs

[130] The applicants have been successful, and costs must follow the result.

Order

[131] The following order is made:

1. The declaration of constitutional invalidity of section 1(xix)(v) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 made by the High Court of South Africa, Gauteng Division, Pretoria is confirmed.
2. The order is to have immediate and retrospective effect from 27 April 1994.
3. The first respondent must pay the applicants' costs in this Court.

JAFTA J (Mathopo AJ concurring):

Introduction

[132] This matter concerns the validity of a statutory exclusion in the COIDA,[136] of domestic workers from receiving compensation for injuries sustained in employment. The background against which the claim arises is the following. The mother of Ms Sylvia Bongi Mahlangu was a domestic worker and Ms Mahlangu was her dependant. Ms Mahlangu's mother sadly died in an accident that occurred in the course of her employment. Consequently, Ms Mahlangu lost the financial support she had received from her mother.

[133] Following this loss, Ms Mahlangu duly submitted a claim for compensation to the Director-General for the Department of Labour. The claim was lodged in terms of COIDA. She was advised that her claim was not successful because she was not eligible to claim compensation on the ground that domestic workers and their dependants were excluded from compensation payable in terms of COIDA. Dissatisfied with this decision, Ms Mahlangu and the trade union, South African Domestic Service and Allied Workers Union instituted proceedings in the Gauteng Division of the High Court. They challenged the validity of the exclusion. The Minister of Labour, the Director-General for the Department of Labour and the Compensation Commissioner were cited as respondents.

[134] By agreement between the parties, the High Court issued an order declaring the impugned provision invalid, without rendering a judgment. The Court merely converted the parties' draft order into a court order.

[135] I have had the benefit of reading the judgment of my colleague Victor AJ (first judgment). I agree that the impugned provisions are inconsistent with the

[136] Above n 3.

Constitution and invalid for reasons that differ materially from those contained in the first judgment. First, I do not think that the socio-economic right guaranteed by section 27(1) of the Constitution is at all violated[137]. Second, I do not think that in this matter it has been shown that denying domestic workers the COIDA benefits enjoyed by other workers impairs the right to dignity. It is not shown how the denial, of itself alone, degrades domestic workers or lowers their dignity, especially because the exclusion applies to police, soldiers and other workers.

[136] Third, although the first judgment invokes section 9(3) of the Constitution[138] to decide the equality claim, it does not follow the test laid down in *Harksen*[139]. And since the applicants did not rely on a ground listed in section 9(3) for their unfair discrimination claim, the unfairness of the discrimination could not be presumed. The failure to apply the *Harksen* test makes it difficult to determine whether the applicants have established that the impugned provision constitutes unfair discrimination.

[137] It was incumbent upon the applicants to prove by way of evidence that the discrimination was indeed unfair. The first judgment mentions that the impugned provision violates the equality right of domestic workers under section 9(3) and proceeds to conclude that "the State has discriminated against domestic workers indirectly . . .".[140] The actual act of discrimination is the Director-General's failure to

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[137] Section 27(1) provides:

> "Everyone has the right to have access to—
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

[138] Section 9(3) of the Constitution provides:

> "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."

[139] *Harksen* above n 72.

[140] See the first judgment at [105].

compensate domestic workers for injuries sustained at work on the basis that COIDA does not authorise him or her to pay compensation. It is not clear to me how this constitutes indirect discrimination.

[138] But I think there is a simpler and straightforward pathway to the outcome reached in the first judgment. That is section 9(1) of the Constitution which guarantees equality before the law and equal protection and benefit of the law[141]. But before illustrating how the impugned provision breaches section 9(1), I must address the process followed by the High Court in declaring the impugned provision invalid.

Process in the High Court

[139] The High Court followed an unusual and impermissible procedure in disposing of this matter. At the hearing of the matter, it appears that the High Court was presented with a draft order, declaring the impugned provision invalid. That Court approved and granted the order requested by consent by the parties and postponed the determination of whether the declaration of invalidity should operate retrospectively, to a date approximately six months later. The Court failed to render a judgment on the matter.

[140] Therefore, it is not clear from the record which sections of the Constitution the High Court had found the impugned provision to be inconsistent with. It will be recalled that the applicant had invoked sections 9, 10 and 27 of the Constitution as the benchmark against which the impugned provision was to be tested. Consequently, there is no indication whatsoever why the High Court has declared the provision in question invalid. This is unacceptable, more so in view of the fact that the High Court was alert to the principle that its order could not be effective until confirmed by this Court[142].

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[141] Section 9(1) provides:

> "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[142] Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act

This is so because this Court occupies a special place in our constitutional order and is at the apex of the Judiciary arm of the state. The orders that have to be confirmed by it under section 172 relate to decisions of the highest organs in the other arms of the state.

[141] In *Pharmaceutical Manufacturers* this Court stated:

> "This is the context within which s 172(2)(a) provides that an order made by the [Supreme Court of Appeal], a High Court or a Court of similar status 'concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President' has no force unless confirmed by the Constitutional Court. The section is concerned with the law–making acts of the legislatures at the two highest levels, and the conduct of the President who, as head of state and head of the Executive, is the highest functionary within the State. The use of the words 'any conduct' of the President shows that the section is to be given a wide meaning as far as the conduct of the President is concerned. The apparent purpose of the section is to ensure that this Court, as the highest Court in constitutional matters, should control declarations of constitutional invalidity made against the highest organs of State."[143]

[142] Declaring an Act of Parliament invalid is a serious intrusion into the domain of Parliament but that intrusion is permitted by the Constitution. However, it remains a serious matter which must be done only where a competent court is persuaded that the impugned legislation is inconsistent with the Constitution and a declaration of invalidity should be limited to the extent of the inconsistency. It is the duty of the court itself and not the litigants, to determine whether an inconsistency with the Constitution has been established. A court may not abdicate this responsibility to litigants, as happened here. It is explicit from section 172(1) that it is the court which is vested with the power to decide whether a law is inconsistent with the Constitution[144].

> or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[143] *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 56.

[144] Section 172(1) of the Constitution provides:

> "When deciding a constitutional matter within its power, a court—

[143] Although procedurally it is permissible to cite only the Minister responsible for the administration of the impugned law, the consent order presented to the High Court here was not shown to have been supported by Parliament. Yet the order struck down an Act of Parliament. Without reasons being furnished by the High Court, Parliament and other parties affected by that order would have no knowledge of reasons why the Act was declared invalid. This Court has emphasised that reasons in a judgment explain to the parties and the public at large why a particular decision in a case was taken[145]. Those reasons are also helpful to a higher court which is called upon to consider the decision of the court of first instance, either on appeal or in confirmation proceedings. Without those reasons it is impossible for the higher court to determine whether the decision of the court of first instance was correct. Here this Court was driven to approach the matter as if it is a court of first instance.

[144] In *Stuttafords Stores*[146] this Court also pointed out that the discipline of furnishing reasons prevents arbitrary judicial decisions. It was stated that reasons reveal whether the decision taken was correct.[147] If the High Court had given reasons, it probably would have realised that the application has not established the inconsistency between the impugned provision and some of the sections of the Constitution relied on by the applicants. I illustrate this below.

[145] The High Court erred in failing to furnish reasons for the order it issued. As the declaration of invalidity was granted, which could not come into effect unless confirmed

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(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including—

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[145] *Mphahlele* above n 16.

[146] *Stuttafords Stores* above n 17.

[147] Id at paras 10 and 11.

by this Court, we must consider the matter and determine whether a proper case has been made out for the declaration. Otherwise the validity of the impugned provision would be left in limbo and this would generate considerable uncertainty.

Invalidity

[146] After the death of her mother the first applicant, Ms Sylvia Bongi Mahlangu, who was the deceased's dependant at the time of her accidental death, sought compensation from the compensation fund under the control of the Director-General for the Department of Labour. The Director-General rejected her request because her mother was a domestic worker in a private household. The Director-General is mandated to pay compensation from the Fund in respect of damage suffered by employees or their dependants as a result of injuries sustained at the workplace or during the course and scope of employment. Ms Mahlangu did not accept the Director-General's decision. She challenged the validity of the statutory provision on which that decision was based.

[147] The attack mounted against that provision in the High Court was three-pronged. The first ground on which the provision was impugned was based on section 9 of the Constitution. The applicants contended that the provision was irrational and that it authorised unfair discrimination against domestic workers. The second ground was that the impugned provision violated the dignity of domestic workers in breach of section 10 of the Constitution. Lastly, it was contended that the provision concerned infringed domestic worker's right of access to social security enshrined in section 27(1)(c) of the Constitution.

[148] It is necessary to consider the terms of the impugned provision with a view to determining whether it unjustifiably limits the rights on which the applicants rely.

Impugned provision

[149] In declining to compensate Ms Mahlangu for her loss, the Director-General relied on section 1 of COIDA. Section 1 defines an employee and tabulates categories of workers which constitute employees as defined in COIDA. It goes further to list classes of workers who are excluded. The exclusion mentions the following:

> "(i) a person, including a person in the employ of the State, performing military service or undergoing training referred to in the Defence Act, 1957 (Act 44 of 1957), and who is not a member of the Permanent Force of the South African Defence Force;
> (ii) a member of the Permanent Force of the South African Defence Force while on 'service in defence of the Republic' as defined in section 1 of the Defence Act, 1957;
> (iii) a member of the South African Police Force while employed in terms of section 7 of the Police Act, 1958 (Act 7 of 1958), on service in defence of the Republic' as defined in section 1 of the Defence Act, 1957;
> (iv) a person who contracts for the carrying out of work and himself engages other persons to perform such work;
> (v) a domestic employee employed as such in a private household…"

[150] The effect of this exclusion with regard to domestic workers is that they do not enjoy the statutory entitlement to compensation for injuries sustained during the course and scope of employment. In so doing, COIDA differentiates between domestic workers, members of the South African National Defence Force and members of the South African Police Service, on the one hand and other workers on the other. It also differentiates between domestic workers who are not employed in private households and those who are so employed. The question that arises is whether that differentiation is consonant with the three sections of the Constitution on which the applicants rely. The answer to this question requires consideration of the relevant sections of the Constitution. The first is section 9.

Equality Claim

[151] Section 9 of the Constitution provides:

> "(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.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[152] This is one provision of the Constitution which has frequently received the attention of our courts, including this Court, on numerous occasions. Almost all of its terms have been interpreted and here ours is to apply those constructions to the present matter. Importantly, in *Harksen* this Court laid down the test to be applied in determining whether the impugned provision amounts to unfair discrimination[148]. That test applies to every claim based on unfair discrimination.

[153] In the context of an equality claim, the rationality test is sourced from section 9(1) of the Constitution. This section guarantees three distinct rights. First, the right to equality before the law. This right has been construed by this Court in *Prinsloo*[149] as meaning that everybody is entitled to equal treatment by our courts of law. The second one is the right to equal protection under the law and the third is the right to equal benefit of the law.

[148] *Harksen* above n 72 at para 43.

[149] *Prinsloo* above n 70 at para 22.

[154] This Court had to determine quite early in its existence that not every differentiation should be the subject of judicial scrutiny. Otherwise courts would be "compelled to review the reasonableness or the fairness of every classification of rights".[150] In *Prinsloo*, it was held that the State must act in a rational manner:

> "It should not regulate in an arbitrary manner or manifest naked preferences that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner".[151]

[155] Consequently this Court concluded that for an equality claim to succeed, the claimant must prove either that the differentiation is irrational in the sense that there is no rational link between the differentiation and a legitimate governmental purpose or that the differentiation amounts to unfair discrimination. It is not enough to show that the differentiation constitutes discrimination, for section 9(3) proscribes unfair discrimination only. Having identified these two types of constitutionally objectionable differentiation, this Court proceeded to lay down the test for determining unconstitutional differentiation. The test has sequential stages and in *Prinsloo* it was stated:

> "Accordingly, before it can be said that mere differentiation infringes s 8, it must be established that there is no rational relationship between the differentiation in question and the governmental purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8. But while the existence of such a rational relationship is a necessary condition for differentiation not to infringe s 8, it is not a sufficient condition; for the differentiation might still constitute unfair discrimination if that further element . . . is present".[152]

[150] Id at para 17.

[151] Id at para 25.

[152] Id at para 26.

[156] Later in *Harksen*, this Court laid down a more detailed test for determining an equality claim. The Court proclaimed:

> "[I]t may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on s 8 of the interim Constitution. They are:
>
> (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
> (b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
> (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
> (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).
> (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 33 of the interim Constitution)".[153]

[153] *Harksen* above n 72 at para 54.

[157] It bears emphasis that this test applies in full where the claim for equality is based on both subsections (1) and (3) of section 9. Where the claim is limited to section 9(3) the first stage relating to rationality would be inapposite. This is because section 9(3) is dedicated to anti-discrimination claims. In *Walker* this Court said:

> "I am satisfied that the differentiation in the present case was rationally connected to legitimate governmental objectives. Not only were they measures of a temporary nature but they were designed to provide continuity in the rendering of services by the council while phasing in equality in terms of facilities and resources, during a difficult period of transition. This is, however, not the end of the enquiry as differentiation 'that does not constitute a violation of section 8(1) may nonetheless constitute unfair discrimination for the purpose of section 8(2)'".[154]

Applying the Harksen test

[158] As mentioned here the applicants relied on section 9(1) and (3) of the Constitution. This means that the entire test including rationality is applicable. It will be recalled that in sequence the rationality test applies at the very first stage. And it is important to recall what this test requires. In *Law Society of South Africa*[155] we are reminded of what rationality entails. There it was stated:

> "It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad".[156]

[154] *Walker* above n 94 at para 27.

[155] *Law Society of South Africa v Minister of Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC).

[156] Id at para 35.

[159] Here the differentiation arising from excluding domestic workers from compensation and benefits payable to employees and their dependants for injuries sustained at work has no rational link to any government purpose. Let alone any legitimate one. This is because no purpose has been identified by the respondents as the objective of the exclusion. On the contrary, the respondents have conceded, rightly so, that the exclusion serves no purpose. Accordingly, the impugned provision fails the rationality standard and as a result it is inconsistent with section 9(1) of the Constitution. For this reason alone it should be declared invalid to the extent of the inconsistency.

Other grounds of invalidity

[160] For various reasons it is not necessary to determine whether the other grounds on which the applicants relied, for challenging the validity of the impugned provision, were established. First, the conclusion on rationality is sufficient for striking the provision down. Second, the respondents have conceded that the provision is invalid. Third, the rationality issue which is the easiest of them all to determine, shows that the impugned provision is indeed inconsistent with the Constitution. Fourth, in the context of an equality claim, rationality falls to be determined first under the *Harksen* test. Fifth, there are no reasons compelling that the unfair discrimination claim and the other two grounds also be adjudicated in this matter. If these issues were not addressed in the first judgment, I would not mention or consider them.

Unfair Discrimination

[161] As mentioned, it is not clear from the first judgment whether this claim was based on the discrimination against domestic workers, as a class of workers or not. This is important as it determines how the *Harksen* test should be applied. For example, as 'domestic worker' is not one of the grounds listed in section 9(3), it does not trigger the presumption in section 9(5). The effect of this is that the burden was on the applicants to establish not only that the differentiation rises to discrimination but also that it amounts to unfair discrimination.

[162] The fairness of the discrimination would have to be assessed in the context of COIDA. COIDA abolishes the employees' common law claim against employers for compensation for injuries suffered in the course and scope of work. The abolished claim is replaced with a statutory claim against the compensation fund controlled by the Director-General. Classes of workers excluded from COIDA, retain their common law right but they do not enjoy the COIDA statutory right. Domestic workers are not the only class excluded. The exclusion also applies to members of the South African National Defence Force and members of the South African Police Service, Black and White. In addition, it applies to labour brokers, regardless of their race just as it covers all domestic workers in private households, Black and White. The true position is that COIDA creates two categories of employees who enjoy compensation for injuries sustained at work. One category benefits from the statutory right and the other is entitled to compensation under the common law.

[163] It is in this context that it must be established whether the differentiation constitutes discrimination and if it does, whether that discrimination is unfair. The first judgment overlooks this inquiry which entails the application of the *Harksen* test. In the view I take of the matter, it is not necessary to evaluate the evidence to determine whether the unfair discrimination claim has been proved. The breach of the rationality requirement suffices for declaring the impugned provision invalid.

Right to Dignity

[164] The first judgment finds that domestic work is undervalued. Proceeding from this premise, it holds that the failure to recognise domestic work as real work in the impugned exclusion amounts to "domestic workers themselves not being treated with dignity".[157] This is mistaken. The dignity of domestic workers is not bound up with the type of work they do. If that work is not recognised as real work, it does not follow as a matter of course that the dignity of those who perform the work is undervalued.

[157] First judgment at [108].

Dignity attaches to individuals regardless of the work they do which is not a personal attribute of an individual.

[165] But even if it is true that domestic workers are undervalued, this does not flow from the exclusion from COIDA benefits. It is difficult to appreciate how COIDA, by the exclusion alone, can be regarded as impairing the dignity of domestic workers. The real issue is that the exclusion treats domestic workers and other workers, including members of the South African National Defence Force and the South African Police Service, differently to other workers who receive statutory compensation. It may well be that the advantages of the statutory compensation outweigh those of the common law claim. But this does not lower or degrade the dignity of the soldiers, the police, labour brokers and domestic workers.

[166] The exclusion does not target domestic workers on the basis of human attributes. Instead, they are excluded on the ground of their occupation just like members of the South African National Defence Force, South African Police Service and labour brokers. Of itself, the exclusion does not have a dehumanising or degrading effect on the groups of workers to whom it applies. Nor does it reduce their worth as human beings.

[167] With regard to members of the South African National Defence Force, the exclusion is apparently justified because they enjoy the same right under a different statute. Consequently, the COIDA exclusion has no impact on them. This illustrates the simple point that the impugned exclusion does not inherently have an effect that impairs the dignity of those it excludes from the COIDA benefits. Therefore, the exclusion in these circumstances may impair the dignity of domestic workers only if there is proof that it accords them a status inferior to the one enjoyed by the workers entitled to COIDA benefits. In other words, it must be established that the common law claim retained by the excluded groups is inferior to the COIDA statutory right.

[168] All this has not been established here. Instead, what we have is that employers undervalue domestic workers. But as mentioned the employers' conduct in this regard does not stem from the impugned exclusion. If employers violate the domestic workers' dignity, this can be stopped by enforcing the workers' right to dignity against employers. The removal of the exclusion cannot protect domestic workers from the employers' abuse. More so because under COIDA it is not the employers who pay benefits. Therefore, there is no correlation between the abuse and the benefits concerned.

Right of access to social security

[169] The first judgment holds that the impugned provision infringes section 27(1)(c) of the Constitution. It reasons that by failing to extend the benefits of COIDA to domestic workers employed in private households, the impugned provision violates section 27(1)(c).[158] The reasoning is based on the proposition that section 27(1)(c) read with (2) requires the state to take reasonable legislative and other measures to achieve progressive realisation of access to social security, including appropriate social assistance.

[170] In determining whether COIDA is legislation contemplated in section 27(2) of the Constitution, the first judgment holds that COIDA benefits payable to dependants of a deceased employee serve a similar purpose to social grants. Therefore, the first judgment concludes from this that COIDA provides for social security envisaged in section 27 of the Constitution[159].

[171] I disagree. This reasoning proceeds from an incorrect premise. The question whether COIDA regulates the section 27(1)(c) right may be determined with reference to the text of section 27. There is nothing in the language of the section suggesting that

[158] Id at [67].

[159] Id at [53].

some of the conditions to enjoying the right guaranteed by section 27(1)(c) are that there must be harm suffered as a result of bodily injuries sustained by an employee in the course of her employment[160]. The section confers on everyone the right of access to social security which includes access to social assistance if the person concerned cannot support herself and her dependants. The condition for social assistance is the right bearer's inability to support herself and nothing else.

[172] Incorporating COIDA into section 27 of the Constitution leads to new and further conditions being introduced for the enjoyment of the right in section 27(1)(c). In addition, that interpretation is not supported by the text of the section. But more importantly, that interpretation creates a separate right of access to social security which is limited to only employees and their dependants. This is contrary to the express provision that the right is available to everyone unable to support themselves and their dependants.

[173] Moreover, a claim for compensation under COIDA is not subject to limitations in section 27(2)[161]. The enforcement of the statutory right in COIDA is not subject to a progressive realisation requirement. Nor is it contingent upon available resources. Once it is established that an employee is injured at work, the Director-General of the Department of Labour must pay compensation. All this illustrates the distinction between the statutory right in terms of COIDA and the constitutional right in section 27(1)(c).

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[160] Section 27(1) of the Constitution provides:

> "Everyone has the right to have access to—
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance."

[161] Section 27(2) of the Constitution provides:

> "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

[174] As the facts on record show that Ms Mahlangu depended solely on financial support from her late mother, it appears that she cannot support herself and this alone qualified her for social assistance from the State. And if she had demanded such assistance, the State would have been obliged to provide it. The State could not have resisted her claim on the ground that she does not meet COIDA requirements or that her mother, as a domestic worker, was excluded from having access to COIDA benefits. COIDA has no bearing on the enforcement of the right in section 27(1)(c) of the Constitution. Consequently, it cannot be inconsistent with that section.

[175] Ms Mahlangu's right which was contingent upon her mother's death, is her claim for loss of support. That is her common law right which she still has. Because it was her mother who lost the right to life as a result of the accident, no constitutional right under section 27(1) of Ms Mahlangu was affected. This means that she retained all her rights under this section which she could enforce without any reference to her mother's death.

[176] When an employee sustains an injury in the course of her employment, the constitutional rights affected are those of the employee alone. One of them is the right to security of the person, which includes freedom from all forms of violence guaranteed by section 12(1)(c) of the Constitution[162]. In *Mankayi*, Khampepe J held that COIDA implicates this right:

> "The issue that the High Court was required to decide was whether section 35(1) of COIDA extinguishes the common law claim of an employee, who is not entitled to

[162] Section 12(1) of the Constitution reads:

> "Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

> claim for compensation under COIDA but only under [Occupational Diseases in Mines and Works Act]. If AngloGold's contention is correct then this provision extinguishes Mr Mankayi's common law right to sue it for negligence. This issue ineluctably implicates the right to freedom and security of a person as enshrined in section 12 of the Constitution. The right in section 12(1)(c) confers on everyone the right to be free from all forms of violence from either public or private sources."[163]

[177] And after referring to *Law Society of South Africa*, my colleague proceeded to say:

> "The protection of the right to the security of the person may be claimed by any person and must be respected by public and private entities alike. Neither counsel addressed specific argument on whether the alleged extinction of a common law right infringed upon section 12(1)(c). Despite the absence of pointed argument on this issue, in my view the question whether this Court entertains jurisdiction to decide a case does not depend on counsels' approach. What is evident is that the right to security of the person is engaged whenever a person is subjected to some form of injury deriving from either a public or a private source. This is because the common law right to claim damages for the negligent infliction of bodily harm constitutes an effective remedy required by section 38 of the Constitution in order to protect and give effect to the section 12(1)(c) right, as in *Law Society*."[164]

[178] The conclusion reached in the first judgment is at odds with the decisions in *Mankayi* and *Law Society of South Africa*. In the latter case, Moseneke DCJ observed:

> "A plain reading of the relevant constitutional provision has a wide reach. Section 12(1) confers the right to the security of the person and freedom from violence on 'everyone'. There is no cogent reason in logic or in law to limit the remit of this provision by withholding the protection from victims of motor vehicle accidents. When a person is injured or killed as a result of negligent driving of a motor vehicle, the victim's right to security of the person is severely compromised. The state, properly

[163] *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at para 13.

[164] Id at para 15.

> so, recognises that it bears the obligation to respect, protect and promote the freedom from violence from any source."[165]

[179] The rights to security of the person and freedom from violence entrenched in section 12 of the Constitution also exist under the common law. These rights have received statutory protection in COIDA and its predecessors. The history of that legislation is comprehensively set out in *Mankayi* and as a result, there is no need to repeat it here[166]. Unlike the socio-economic rights which were introduced by the Constitution, the right to have compensation for bodily injuries has been part of our law since time immemorial. This illustrates that the right regulated by COIDA differs from the socio-economic rights in section 27(1) of the Constitution.

[180] The approach preferred in the first judgment would also lead to anomalies. The first anomaly is that, having concluded that COIDA was legislation envisaged in section 27(2) of the Constitution, the first judgment holds that section 27(1)(c) is infringed. This is at variance with our jurisprudence which states that measures adopted in compliance with section 27(2) may be challenged only on the ground of reasonableness.[167] If a legislative measure is found to be unreasonable, it constitutes a violation of section 27(2) and not 27(1).

The other anomaly is that under COIDA, compensation is payable on demand and under section 27 social security assistance is not. With regards to payment of compensation under COIDA, if the Director-General fails to compensate a claimant who is entitled to compensation, a court of law may intervene, determine the amount payable and order the Director-General to pay with immediate effect. This is not the position in relation to socio-economic rights. This was made plain in *Mazibuko*:

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[165] *Law Society of South Africa* above n 155 at para 63.

[166] *Mankayi* above n 165 at paras 41-55.

[167] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 59-67.

> "Secondly, ordinarily it is institutionally inappropriate for a court to determine precisely what the achievement of any particular social and economic right entails and what steps government should take to ensure the progressive realisation of the right. This is a matter, in the first place, for the legislature and executive, the institutions of government best placed to investigate social conditions in the light of available budgets and to determine what targets are achievable in relation to social and economic rights. Indeed, it is desirable as a matter of democratic accountability that they should do so for it is their programmes and promises that are subjected to democratic popular choice."[168]

[181] Evidently, payment of compensation under COIDA is not subject to the reasonableness of measures taken by the state. Nor is it contingent upon available resources. Yet, it cannot be gainsaid that the right in section 27(1)(c) is subject to all these constitutional conditions, including progressive realisation of socio-economic rights.[169] Therefore, the COIDA claim for compensation for bodily injuries does not constitute a socio-economic right enshrined in section 27(1) of the Constitution. And a failure to pay compensation does not amount to a breach of that section.

[182] With regard to remedy, I embrace the first judgment's analysis and for all these reasons I support the order proposed in the first judgment.

[168] Id at para 61.

[169] *Grootboom* above n 61.

MHLANTLA J:

Introduction

> "What amazed me as a worker is that she is a woman just like me. But when she want[s] to shout at me, she will shout at me. Then it seems to me that I am a child. And one day I stood up and I said to her that she must remember and she must also respect me as a worker and as a *woman*, because I am a woman just like she is."[170]

[183] I have had the pleasure of reading the two judgments by my colleagues, Victor AJ (first judgment) and Jafta J (second judgment). I agree that the impugned provision is unconstitutional and thus support the order. I support the judgment of my sister Victor AJ when it comes to her reasoning on equality, unfair discrimination and dignity. However, I depart from her approach and support my brother Jafta J when it comes to the particular issue of social security for the reasons he gives. I agree that, based on the plain reading of the section coupled with other key differences between the statutory right juxtaposed against the constitutional right, one cannot merely incorporate COIDA into section 27(1)(c).[171]

[184] I write this concurrence to underscore the historical significance of this matter coupled with its intersectional nature. Importantly, it is to recognise the fundamental role domestic workers play in building and nurturing our society that has often gone unacknowledged due to the informal and private nature of their role.

[170] Fish "Engendering Democracy: Domestic Labour and Coalition-Building in South Africa" (2006) 32 *Journal of Southern African Studies* 107 at 112 quoted from a domestic worker interview, February 2001.

[171] See second judgment at [171] to [173].

Historical perspective

[185] The role of the domestic worker, and failure to deem them – by *them*, predominantly Black women[172] – worthy of COIDA's protection, is a manifestation of our past that seeps through to our present. This is a complex history entrenching racism, sexism and social class.

[186] I accept the warning lamented by Cameron J in *Daniels* that "it is not within the primary competence of judges to write history".[173] An attempt to write history or overcome the "perils of writing history"[174] is not the aim of this concurrence. Rather, this concurrence wishes to "give voice to history"[175] and afford "recognition of the historical injustice that underlies"[176] the plight of domestic workers in this matter. Considering this issue through a historical lens is particularly relevant – and necessary – given the injustices experienced by domestic workers, and that they are labelled as a ghost;[177] "invisible";[178] plagued with "historical silence";[179] and rendered "powerless".[180] But, why is this so?

[172] In South Africa, domestic work represents a sizeable segment of the employment base. Of those employed in this sector, the majority are female. See Department: Statistics South Africa *Quarterly Labour Force Survey* (P0211, February 2020). It is worth noting that the inescapable cycle that has led to black women making up the majority of domestic workers comes from the fact that some black women were and are systematically excluded from contributing to the economy, and as a result, are left to take up domestic responsibilities in their own homes. See further Department: Women *The Status of Women in the South African Economy* (1 August 2015).

[173] *Daniels v Scribante* [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) at para 150.

[174] Id at para 152.

[175] Id at para 147.

[176] Id at para 116.

[177] Baderoon "The Ghost in the House: Women, Race and Domesticity in South Africa" (2014) 1 *Cambridge Journal of Postcolonial Literary Inquiry* 173 at 179.

[178] Cock *Maids and Madams: A Study in the Politics of Exploitation* (Ravan Press Johannesburg 1980) at 278.

[179] Gaitskell et al "Class, Race and Gender: Domestic Workers in South Africa" (1983) 27/28 *Review of African Political Economy* 86 at 107.

[180] Gwynn "Overcoming Adversity from All Angles: The Struggle of the Domestic Worker during Apartheid" *South African History Online* (10 June 2015), available at https://www.sahistory.org.za/article/overcoming-adversity-all-angles-struggle-domestic-worker-during-apartheid-bennett-gwynn. See further Cock above n 178 at 232.

[187] The reasons originate from the grinding together of the tectonic plates of racism, sexism, and social class, which are all exacerbated by the private nature of their place of work – the household. This intersectional picture of discrimination is not novel. It was also painted by the scholar Cock. In the 1980s, she reported that "domestic workers are situated at the convergence of three lines along which social inequality is generated: sex, class and race".[181] She went on to state that domestic workers' experiences typify "ultra-exploitation" and that:

> "Domestic service in South Africa is a social institution that has a special significance, firstly in the sense that it constitutes the largest single source of employment for Black women after agriculture. Secondly, domestic service constituted an initial point of incorporation of Black women into colonial society . . . while domestic service until 1890 was a kaleidoscopic institution [that involved various races], men as well as women, it has gradually been transformed into a predominantly black female institution. As such, it reflects changing patterns of sexual and racial domination. Thirdly, domestic service is a microcosm of the existing pattern of inequality in South Africa, and contributes to these inequalities in important ways. Fourthly, domestic service is significant in that it is an important route of incorporation into urban-industrial society for many Black women."[182]

[188] It is worthwhile to further unpack the patterns of race, sex, gender and class from a historical perspective. First, there is the discriminatory notion that domestic work, with its low wages and poor working conditions, should be performed in most instances by black people, as a form of slavery, servitude, subordination and oppression.[183] Through white settlers and colonialism, the role of the domestic worker shifted from

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[181] Id at 263.

[182] Id at 307. See also Women in Informal Employment: Globalizing and Organizing (WIEGO) "Domestic Worker's Laws and Legal Issues in South Africa" (November 2014), available at http://www.wiego.org/sites/default/files/resources/files/Domestic-Workers-Laws-and-Legal-Issues-South-Africa.pdf.

[183] Gaitskell et al above n 179 at 88 states that:

> "[A]s has already become clear, domestic service, especially in colonial societies, has a racial character. Almost everywhere in the world it is performed by 'socially inferior' groups: immigrants, blacks, and ethnic minorities. In South Africa, from the turn of the century, household-based domestic service has been above all a black institution".

white women to women of colour, again with the majority being Black women. Initially, black men conducted domestic services and in certain areas, black men dominated the domestic services space.[184] However, over time the domestic work has increasingly been done by a black female-dominated workforce. This has been attributed to black male labour being absorbed by growing industrial sectors such as mining and manufacturing,[185] coupled with the concomitant increase in the demand for domestic workers.[186]

[189] This is where the intersection of sex, gender and class is pertinent. It is said that "domestic service for [Black women] above all meant access to a wage" and that "[Black women] stayed in domestic service because of a lack of alternative job opportunities".[187] The disparities in the relationship between domestic workers and their employers were formalised and further entrenched by the apartheid regime.[188] In addition, the plight of domestic workers is ignored because the work these women perform is seen as inferior and not as challenging as a traditional man's job.[189] That view perpetuates the gendered character of domestic work and the notion that household work – such as washing, cleaning, cooking and child-care – is naturally women's work, and is not as psychologically challenging, physically strenuous, and socially productive as men's work. It also fails to acknowledge the long-hours, quiet monotony, and close

[184] Id at 100, in which Gaitskell et al note that "the labour of African so-called 'houseboys' was in great demand and well-paid".

[185] Id at 101. Gaitskell et al state that:

> "In the context of a racially segregated job market, domestic service for African women above all meant access to a wage. They got a foothold in the domestic service market when women of other races were not available or had escaped its low wages and poor conditions; or when employers found men more expensive to employ or hard to recruit, or when men were considered unsuitable".

[186] Id at 100.

[187] Id at 101.

[188] See Lund and Budlender "Research Report 4: Paid Care Providers in South Africa: Nurse, Domestic Workers, and Home-Based Care Workers" *United Nations Research Institute for Social Development* (April 2009), available at https://www.unrisd.org/unrisd/website/document.nsf/8b18431d756b708580256b6400399775/57355f8bebd70f8ac12575b0003c6274/$FILE/SouthAfricaRR4.pdf.

[189] Gwynn above n 180.

supervision that domestic work entails. All these cruel injustices tend to go unnoticed simply because they operate in the private sphere.[190]

Post-apartheid

[190] Let us consider the plight of domestic workers since the advent of the Constitution. While domestic workers have achieved unionisation, minimum wages, and are included in the Basic Conditions of Employment Act,[191] according to a study many domestic workers report that despite ongoing and abundant regulation to secure their rights the reality in their lived-experiences at work is that they are yet to see any fundamental and tangible changes.[192] They claim that some employers "remain uninformed about domestic labour laws" and others are defiantly reluctant to abide by them.[193] One of the reasons may stem from the "severe power asymmetries that continue to privilege employers and to protect the private household employment space".[194] This is experienced despite the fact that our post-apartheid households have changed, and domestic workers are employed in households of diverse races, religions, cultures and varying socio-economic classes.

[191] The impact of this judgment must go beyond a symbolic victory for domestic workers, and should also, practically speaking, cement their rights and place in our society. Domestic workers have for many years reported being unable to vindicate rights through legislative protection;[195] this may, to an extent, be attributed to traditional attitudes towards domestic workers. Generally speaking, women have been expected to shoulder cooking and cleaning as well as caring for children, the elderly, and the disabled, among others. And this has notoriously come without real recognition under

[190] See further Cook *Human Rights of Women: National and International Perspectives* (Penn Press, Pennsylvania 2016) at 70.

[191] 75 of 1997.

[192] Fish above n 170 at 117.

[193] Id. One interviewee reported that: "after employing the same woman for over eighteen years . . . she had no knowledge of the labour legislation nor any intention of implementing it in her household work context".

[194] Id at 117.

[195] Id at 116.

the women's own household and a similar lack of acknowledgement in the professional sphere. The perceptions about the innate nature, as opposed to the formal acquisition, of skills and competencies required to perform these tasks persist. In turn, this feeds into the reason why the exclusion of domestic workers from COIDA has gone unremedied for far too long.

[192] That domestic workers are afforded protection by COIDA is critical for various reasons. Women conducting domestic work are often the financial head of their families. In our African context, this is often an extended family where one provides for her children, grandchildren, other relatives and, at times, others who are not even relatives. Whilst they deserve to be lauded as family matriarchs who respond to situations of hardship by providing aid, they remain stuck in the historical cycle of poverty.[196] To add to their plight, apartheid, and further discrimination, resulted in Black women being historically and generationally impacted, such women were often singlehandedly providing the foundation to their family, and, collectively, to millions of families.[197]

[193] Furthermore, the working hours for domestic workers have been described as long and unpredictable. In reality, this class of Black women dedicates a substantial amount of time to provide support to another family while being away from their own

[196] In addition, female-headed households suffer a greater incidence of poverty than male-headed households and the women in the former tend to be the main earner despite earning significantly less than men. See Nwosu and Ndinda "Female Household Headship and Poverty in South Africa: An Employment Based Analysis" *Economic Research Southern Africa* (August 2018), available at https://econrsa.org/system/files/publications/working_papers/working_paper_761.pdf.

[197] Gywnn above n 180. Further, this trend is seen in other countries as well, where women commonly from comparatively lower socio-economic statuses are the ones who gravitate towards domestic work. Thus, having a large and crucial yet silent role in being foundational to supporting the progression of the economy in countries all over the world. See ILO Report above n 1: in Asia, domestic work is one of the most important sources of employment for Asian women, comprising predominantly women (at 82%) and up to 7.8% of all women in paid employment. In the Middle East, domestic work, often taken up by migrant workers, accounts for almost 6% of employment, but in specific countries accounts for up to 21%. The gender demographic differs, however, as men make up a third of domestic workers. This is in part due to the low employability of women; 32% of all female wage workers in the Middle East are domestic workers. Africa has 5.2 million domestic workers employed throughout, with 3.8 million being women. Figures in European nations vary drastically with women in countries such as France, Italy and Spain making up 80-90% of the sector, versus 60% in the United Kingdom. Still the trend dictates that it is a highly female-saturated field, where many are "migrants or members of historically disadvantaged groups" at 28-39.

children.[198] Cock aptly captures this tragic bind as follows: "cheap, black, domestic labour is the instrument whereby white women [today, women of any colour]" escape from some of the constraints of their domestic roles. They do so at a considerable cost to Black women, especially mothers.[199] This pattern, largely created by the apartheid system that perpetuated migrant labour, is said to have dismantled the family unit. The tragic consequence is felt to this day. This lived reality of predominant time spent in their employers' households coupled with the pressure of being the breadwinner, demonstrates the importance of COIDA's protection and the assurance of safe and decent working conditions.

[194] The plight of domestic workers has a unique and entrenched history in the South African context and these battles persist to this day. Yet, this problem transcends our borders. It is a global phenomenon fought by many women of vulnerable, disadvantaged and minority backgrounds.[200] The International Labour Organisation, through the Domestic Workers Convention,[201] recognises that part of what lends to vulnerability and the precarious situation is the private and informal nature of the job.[202] The International Labour Organisation further recognises that domestic work is work like no other and that it has special characteristics which lead to domestic workers facing particular vulnerabilities, warranting specific responses to ensure the vindication of their rights.[203]

Concluding remarks

[195] Domestic workers – despite the advent of our constitutional dispensation – remain severely exploited, undermined, and devalued as a result of their

[198] Cock above n 178 at 75.

[199] Id at 259.

[200] See further United Nations Sustainable Development Goals; CEDAW above n 39; and ICESCR above n 34.

[201] Domestic Workers Convention above n 8.

[202] Id.

[203] Id at 43 states that "[e]xtending the reach of labour law is a means of bringing domestic workers within the formal economy and into the mainstream of the Decent Work Agenda".

lived experiences at the intersecting axes of discrimination. Yet, these Black women are survivors of a system that contains remnants of our colonial and apartheid past. These Black women are brave, creative, strong, and smart. They are committed mothers and caretakers and have the ability to perform work in conditions that are challenging both psychologically and physically. These Black women are not "invisible" or "powerless". On the contrary, they have a voice, and we are listening. These Black women are at the heart of our society. Ensuring that they are afforded basic rights, and an avenue to vindicate these rights, is central to our transformative constitutional project.

[196] Therefore, I support the order proposed in the first judgment.

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