

Atlantic Fellows

FOR SOCIAL AND
ECONOMIC EQUITY

WORKING IN THE SHADOWS WHEN THE LIGHT IS NOTHING BUT A TORCH



By Gabriella Razzano



The Atlantic Fellows for Social and Economic Equity (AFSEE) programme, based at the International Inequalities Institute (III) at the London School of Economics and Political Science (LSE), is building a catalytic, values led global community of Fellows who are committed to using collective leadership to work towards social and economic justice for all. Drawing on the insights of academic research, innovative social-change strategies and the Fellows' own experience and expertise, the Atlantic Fellows for Social and Economic Equity programme is empowering a new generation of change-makers, including practitioners, activists, researchers, policymakers and campaigners, to work together across disciplines, backgrounds, and borders.

This project was funded by AFSEE's **COVID-19 Rapid Response Fund (CRRF)**, which was launched in May 2020 to fund research with the potential to respond quickly to the global impact of the coronavirus pandemic and its connections to global inequalities.

For further information about the Atlantic Fellows for Social and Economic Equity programme, please contact afsee@lse.ac.uk or visit our website: afsee.atlanticfellows.lse.ac.uk

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Design: LSE Design Unit

Copyediting: Jo Johnston

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Abstract

This report uses interdisciplinary analysis and qualitative research methods to centre the experiences of four South African informal^a and formal workers, with a particular focus on lived experiences and storytelling.

Focusing on structural influences for defining context and for explanatory purposes (social, political, legal and economic), the research uses the COVID-19 period and the resulting economic shocks to South Africa to consider how structural inadequacies in the approach to work negatively impact precarious and informal workers. This is both a result of inequality, but further exacerbates that inequality.

The incredible vulnerability of the majority of South African informal and casual workers is revealed by their stories, and the literature and data reviews. Instead of improving circumstances, policies and laws are often inadequate and even exacerbate these harsh conditions. While policy suggestions are made across stakeholder groups, such as employers and labour institutions, and interventions are proposed for potentially improving the outcomes for informal workers, the main proposition of the research lies in the realm of influencing public discourse. An important narrative shift must occur in the South African landscape that acknowledges that the ultimate reality of informal work is one of precarity. Interventions must be designed around this reality. And workers themselves, through the centering of their lived experiences, should be seen as able to provide significant guidance on the potential solutions to South Africa's complex informal work challenges.

a The International Labour Organisation defines informal work as "...all remunerative work (in other words, both self-employment and wage employment) that is not registered, regulated or protected by existing legal or regulatory frameworks, as well as non-remunerative work undertaken in an income-producing enterprise. Informal workers do not have secure employment contracts, workers' benefits, social protection or workers' representation".



Introduction

The social world can be one of human design, even though the biological world may not be. When the COVID-19 pandemic hit, it offered a lens not just into health and healthcare, but in fact also into work and labour in South Africa, and the particular inequalities that mar that landscape. COVID-19 and the resulting economic shocks may have occurred in a context of already existing inequalities, but it was also an accelerant of many of its impacts as well.

The pursuit of waged, employed work has remained a central political ambition in South Africa's historical "...social and political imaginary" of what work is.¹ This trend is largely a trend of capitalism, where the political pursuit of employment (read only as waged employed labour) has persisted in spite of the fact "...more people have always been wage-less than waged".² A preoccupation with the pursuit of waged labour is out of sync with the broader realities of informalisation and precarity of work, but also grossly under acknowledges how earnings for households from wages in the bottom percentile have not risen in real terms since Apartheid.^{3 4} Consider, too, the devastating impact that underemployment (when work doesn't make use of people's full skills) has on the lived reality of waged workers in South Africa.⁵ And labour market incomes are a driver of South African inequality. An understanding of what should be considered just labour practice (and just labour outcomes) needs to be contextualised within this inequality, with the realities of the work experience being ripe for reform.⁶

Yet appreciating the intersections between inequality and work is not enough; new strategies need to be developed to advance work for the benefit of informal workers in South Africa. The COVID-19 crisis makes this need even more urgent. This research aims to adopt interdisciplinary methods and analysis, including lived experiences and storytelling, to examine the impacts of COVID-19 on informal work issues in South Africa and specifically the challenges that workers face in the precarious economy.

There is a cross section of research on the modern South African labour environment which deals with the metaphysical – from zombies to ghosts.^{7 8} Within this literature there is an interesting recurring emphasis on the spiritual and otherworldly, or activity that occurs "out of bounds". The realities derived from this research demonstrate that, while some informal work occurs in the "shadows" – outside the formal bounds of how the legal and economic communities seek to constrain and define work – rather than being the exception, it is this kind of work that dominates the South African landscape.



Inequality and modernity as phenomenon existing together present wicked problems, and complexity must be embraced in the study of any social phenomenon. While the report presents the legal, political, and structural frameworks and policies, it also focuses on the compelling stories of the individual workers who try to live within these systems. By focusing on the actions of these workers, this report offers a powerful opportunity to unpack and understand the aforementioned complexity. This is embedded within a law and political economy discipline, as a critical approach to considering the relationships between informal workers, society, the state and markets.

The research seeks to centre worker stories, but also place them in context before turning to solutions. In 2021 four different types of informal workers in South Africa were interviewed, who had all been impacted by the COVID-19 pandemic. Moja is a woman based in Cape Town who has been working as a sex worker for 20 years^b; Mbili is a 34-year-old former taxi driver who served prison time for unpaid taxi fines, and now informally trades; Nne is a 53-year-old Zimbabwean domestic worker; and Tatu was a 32-year-old taxi driver who also owned an Uber van. Their stories, as well as significant desktop research in the fields of law, politics and economics, can be used to demonstrate inadequacies in South Africa's current informal work environment. They also show the often negative role that current law and policy can play.

This report has four main parts with several sub-sections. Part I focuses entirely on the selected stories of the four South African workers.

Part II shows the structural and contextual background that can lay the foundations for exploring why these workers experience work as they do. This is done by focusing on social, economic, political and legal conditions (with the legal conditions looking particularly at labour law). Then, using the COVID-19 crisis as a temporal “looking glass”, key impacts of the pandemic (largely economic and political) are explored in relation to work, employment and social protection, and environment. The responses to these impacts are outlined from the perspectives of policy, law, institutions and the informal workers.

Part III explores and analyses themes and lessons arising from the data collection and background literature. This highlights key themes and realities as a kind of “myth-busting” in relation to some typical forms of discourse on South African informal work. Section four is the conclusions, which offer solutions that might mitigate some of the harms described, but also progress outcomes for informal workers. Some quick recommendations are made for different stakeholders based on the research.

Before continuing, we are saddened to share that the research has been dedicated to the memory of Tatu, who tragically died at the age of 32 in 2022 after taking his own life.^c He was a South African informal worker whose story deserves to be told, and whose work deserves respect and consideration. We hope that this research can help to bring about better working conditions and environments for people like him in the future.

b These names have been selected randomly. Although respondents have all given consent to be interviewed and have their stories shared, given the nature of some of their disclosures I have elected to preserve their privacy in this way.

c This research has been completed in consultation with his family.



Part I – Stories

Introduction

The stories described in this report are from interviews that sought to unpack the realities of working conditions for Nne, Mbili, Moja and Tatu, and the influence of COVID-19 on their working conditions.^d The stories of these four were chosen because they demonstrate a different kind of precarity in their conditions, while also demonstrating an interesting spectrum: some engage in “formal” employment, some “informal” and some a combination. They also cover the gamut of domestic, transport and sex work – not as an indication that these are representative of work delineation, but to provide a varied perspective of industries and tasks that workers in South Africa pursue. Specifically though, gig work in the e-hailing and e-delivery industry was included to consider future work trends, and domestic work was selected due to its vital role in women’s labour participation in South Africa.^e

Each story is structured similarly to reflect first on how these workers came to their work, then on the nature of the work in general, the environment and industry for that work, and then considering specific impacts from the COVID-19 period. Finally each story ends with the key needs and demands of each worker for improving their work environment.

MOJA: UNDERCOVER AND UNCOVERED IN THE SEX INDUSTRY

Moja is an African woman who has been a sex worker for 20 years. She is also the national coordinator of an organisation advocating for the decriminalisation of sex work in South Africa. She has two children and became a sex worker after feeling exploited as a domestic worker.

“So what [people] see, if you ask them, it’s kind of irritating. They always have a picture of a sex worker in a mini skirt and high heels, and long nails with a bag. I don’t understand where they get that picture from. They always see sex workers as street-based. It’s like any other job, there is a cleaner, there is a clerk, there is HR, there [are] managers, so you need to understand, [the] sex work industry is like that.”

^d As described in the methodology, these pseudonyms were just selected from Swahili words for one, two, three and four.

^e E-hailing services are digitally called taxi services, and e-delivery services are digitally ordered food and product services for home delivery.



Becoming a sex worker

“My dream was I always wanted to be a lawyer. I used to see myself as a lawyer and I used to see myself like in court. I remember, I even used to wear my father’s jackets, trying to be a lawyer in the mirror. And enjoying these series on TV, it was my dream. The reason I wanted to be a lawyer, it was the anger. It was coming from an anger perspective. My mother left me when I was young and my stepmother was abusive. So I always wished to arrest the people who abuse young children. That was my passion.

I was living with my dad, because my mom and dad had divorced. When my father married another woman, we stayed with that woman, and then my father died. That woman brought another man. The children that I have, I was raped by that man several times, and I keep on reporting that this man is raping me. I was the age of 13 to 14 years, so I’ve been complaining and they said I’m lying, I’m sleeping with the guys outside. I’m telling them it’s this man. They keep on saying I’m lying.

And then I went to the police station. My friend escorted me when I was pregnant with the second child. They said no this man needs to be punished, let’s go to the police station. They kick us out, they said we are young and that young children always lie. So I didn’t have anywhere to run to so I left the kids and ran away.

When I ran away, someone encouraged me – you can’t leave the innocent children there, they don’t know anything. So I went to fetch them because I wanted to check my aunt, and when I was there I found a boyfriend. They were so friendly, the family. They loved me to the moon. They accepted those children like their own. Even when I was coming to Cape Town, they said leave these kids here. I left my kids there. They were taking very good care, and taking them to school. It wasn’t a fancy life, they were in the farm, but there was love. Even the mother was very friendly and they loved me and the kids so much. They said no, you are carrying already a lot of things, leave the kids here and just go and find your family.

That’s when I came to Cape Town to look for my mother. When I found my mother, she was married to a white guy. Eish, life became so difficult. I used to stay in the boys’ quarters. They had two children. I wasn’t allowed to be seen by her husband, so I go straight to my room and then my plate of food is there.

I got a job as a sales assistant in Sea Point (suburb of Cape Town). I used to come home late sometimes. When I come home late, the gate is locked. There was a small shack in front of their house where there was security. I used to sleep in that security [shack] seated. When I see the husband is leaving in the morning, I enter and shower quickly, then I go. One day my boss kick me out. The way I lose my job is because my boss found me sleeping in the shop.



Then my brother decide for me to come and stay with him. When I stayed with my brother, life become also so hard. My brother didn't want me to get a job. My brother wanted me to go to school and I was so excited. My dream fell because of his wife. She was no longer working, so I end up saying to them "I don't want you guys to divorce. I found you with a beautiful home, let me just leave". And then I got this job as a domestic worker.

My boss was the wife. She was the one who hired me. I was just getting R1,000 a month^f. So I saw this is not a job for me. I cannot work like that. Then her husband was interested in me and asked for sexual favours and he gave me like R500 or R700^g, so it was worth it to have sex with the husband.

One day, we got caught, so I had to leave the house. And the husband said "I'm so sorry I put you into this mess, I'll rent you an apartment". So he rented me an apartment in Cape Town [but] when he rented the apartment, he was controlling my life because he was coming any time, telling me what to do, where to go. I was still like a slave being controlled by him because he's paying this room and he's giving me money for food.

Then one day, I was going to the shop and I met these girls. They were running away from the police and then they asked me to hold their bags for them. When they came back to fetch the bags, me and the one girl Margaret, she was white, we became close friends. One day she asked me about my life, who I am and where do I stay. So I told Margaret my boyfriend is paying. And the Margaret say to me "That guy is using you. Come to visit my house tomorrow."

The sex work business

I went to visit Margaret's house. It was such an amazing house. Margaret said "I'm a sex worker". So I asked her "do you buy all these properties with the money from the street?" and she said yes. She said the reason she called me to her house is to show me her house and tell me that that guy is using me. That I can do better than that. She said she is even saving money to buy her own house. I was like a sex worker have money to buy houses? And Margaret says "yes, if you are focused, you know what you want, you can buy a house".

We became friends and later on I left that guys house and stayed with Margaret. Margaret teach me the real business, how to make money. But the problem with Margaret, she was taking like 20 per cent from me when I make money because I'm staying in her apartment. So I felt like it's not working for me. I started to save my own money because now I know the business very well. Two years later, Margaret managed to buy a house in Table View (west coast suburb of Cape Town). I rented my own apartment and started to make more money. She kept on telling me "we move to a brothel, we move online", she keep on telling me where the business is booming, what is happening.

^f This is the equivalent of around £54.

^g This is the equivalent of £27 or £38.



We moved online and started to advertise in the international pages. When we advertise in the professional websites then the client books you with the US dollars. They book you like one night, for when they're here, then they deposit the money into your account, so when they come here, you have already been paid. It was going very well.

So this is how I've been surviving. I managed to raise my money and buy my house in Parow (suburb of Cape Town). Then I thought that I'm no longer busy into sex work like before, so I decide to take my kids from their grandfather. So now I'm staying with my kids and we are a happy family. We have got everything. But I'm still doing sex work and if a client book me like two weeks, I travel the whole two weeks and I tell the kids I'm going for work purpose. This is how I'm operating now the new business.

Since I started sex work, I found the freedom of my life. Independence. It's the only job that gave me a job without a CV. Without education. And the money I'm making – I can say even I'm working [at the non-governmental-organisation] it's not enough. I'm here because of passion, not because of the money. The money I'm making here is too little for the money I'm making outside.

One thing I want to tell you about the sex work industry, there is different types of sex workers. There is street-based sex workers, there is bar sex workers, there is indoor sex workers, which are brothels. There is also strippers, although they don't identify [as sex workers]. Some they identify as sex workers because they end up stripping with a happy ending. So people who look at the industry from outside they don't understand what the industry is all about. And then there is online sex workers and then like me and my gang, what we are doing, we are not just online, we are international sex workers.

The best part of my work is that I make more money, which is very important because I entered the industry to make money. The other thing is that I am in control. I am my own boss. I run my own business. In my industry, if I don't feel like anything today, I can control it. If I don't feel like doing sex then I don't feel like doing sex and no one will force me, even if I negotiate with a client and I see this is what he wants, and I'm not interested over the phone, I'll tell him that. Because this is my body, I'm in charge of this body and this is why I believe I'm a feminist woman.”

Sex work in the environment

“Sex work is illegal because South Africa is a moral country. They believe sex work is taboo. It's a cultural country so they believe sex work is a taboo. But funny enough, it can confuse you. We go to churches and I'm a youth leader in my church. I pay tithe (an amount of money paid to the church regularly), like other people. The money I'm getting is the sex work money, but I pay tithe and I pay offering, and that money is being used to build the church, the house of God. And even when there is anything that needs to be done, if I buy groceries and stuff and take home, no one will say no. Everyone will take those groceries and use them and the money. So I don't think the money is taboo, but sex work is taboo.



But this is not a moral issue, this is a human rights issue and if they focus on human rights, they will be decriminalising the sex work. I don't get it, why are we still using the 1957 laws. Because sex work was criminalised in 1957 before I was born. It was passed during the years where they were saying a Black woman mustn't sleep with a White man, it's taboo. Now we are married to White people, it's no longer a problem. Why I am I still living under those laws?

I don't want to lie, [the fact that sex work is illegal] makes my job very difficult, because now there was an issue that they were removing our posters and targeting us online. The police would call you as a client and they use the marked money and arrest you. It did affect me a lot. They were closing some of the websites, and there was an issue of New York. As always, when America sneezes, everyone gets flu. So these laws they were passing in America that they need to close all the websites where sex workers are making money, this is what happened.”

Lockdown

“Covid affected me a lot because I'm dealing with international clients and the borders were closed, so they couldn't come and my money just dropped off. I was surviving through the webcam. Sometimes you are busy trying to make money, the children, they are knocking by your door and stuff, so it's so distracting.

Most of the sex workers, especially the brothel sex workers, they lost their accommodation, their income, everything. The brothels were closed down due to the restrictions. And the street sex workers couldn't work anymore because if you were seen on the street, you'd be arrested. So there was a lot that was going on. Most of the sex workers lost income.

And then there was an issue that they were working undercover. The landlords were taking advantage of those who were still working undercover. If you brought a client, the landlord would say you must pay double. And sex workers were being targeted in the street as well. Because you are a sex worker, you cannot even go to the shop, because they will tell you that you are sex worker and you are going to do sex work. The street-based sex workers who were well known by the police were even arrested during the restrictions, even though Ramaphosa said people mustn't arrest.

And then the homeless sex workers, they were taken from the street and forced to go to those camps. We had a couple of cases where the transgender sex workers were raped in those camps, because it was like putting a man and woman together. So many things happened.

Sex workers did not apply for any relief. Speaking from my perspective, I don't need the government to open the door. That R350^h cannot change my life, that R350 is nothing. The only thing I need is the decriminalisation of sex work. But others who did need it didn't get the R350 at all. They didn't qualify as there was a lot of requirements like payslips, and sex workers don't have those kind of things. Only two sex workers managed to get the R350, and I don't know how.

^h This is the equivalent of around £16.



The same applies when you are opening a bank account. They request all those types of things. That's why sex workers end up living with the money under their mattresses. People think sex workers are useless, they are not useless. Because now you have R10,000ⁱ in the house. You don't know what to do. You end up spending it anyhow, anywhere, because you can't take it to the bank. You are not allowed to bank it because they will ask a lot: proof of address, this and that, your payslips, and you don't have that kind of supporting documents so you can't open an account."

Needs and demands

"Decriminalisation will help to benefit the labour laws because right now, I am Moja, I am 35 years old, I will be 65 years old soon. I'm old. I need a pension fund. I cannot work anymore, anywhere. We don't benefit from those things. For example, during the lockdown, there was also the Unemployment Insurance Fund (UIF), we didn't benefit from UIF. We also can't benefit from the tax returns, because sex work is not recognised as work.

Even the decriminalisation won't be a golden opportunity. But at least you'll be recognised and protected by the laws of South Africa. It's like the [gay communities], even though it's decriminalised, the stigma and discrimination of the LGBTQI community is still there. But when you call them those [discriminatory] kind of things and they go to court, the law will protect them. That's why we say decriminalisation is not going to bring a golden opportunity but what we are asking for is we can be protected and recognised by the laws."

ⁱ This is the equivalent of around £550.



MBILI: DANGEROUS AND DRIVING IN THE TAXI SECTOR

Mbili is a Coloured 34-year-old man from Cape Town, South Africa. He has two children and alternates between living with his mother and fiancé. He worked as a taxi driver for over two years and stopped after the first national lockdown. He now stays home buying and selling goods to make an income.

“If you’re asking should taxi drivers get more rights, I would say yes because taxi drivers don’t get any rights at all. Even the police and traffic cops treat you like shit because they just take it that you think you own the road, that you just drive whichever way you want to drive and if there are accidents, most times it’s the taxi. It’s like everyone’s against you, people don’t like taxi people. They regard taxis as chaos and ruthlessness. Even if you go to court, that judge doesn’t have much empathy or sympathy for you. They just lock you up and throw away the key. You don’t feel human the way people treat you, like traffic cops, they think you’re just a taxi driver, you’re scum, you’re worth nothing.”

Becoming a taxi driver

“Growing up, I thought I would eventually take over my father’s business and become an entrepreneur. My first job after school was in retail at Truworths in Canal Walk^j. I worked in a couple of different places in Canal Walk.

At some point, I had a business with my fiancé, a catering business and tuck shop for almost a year. Then business just died down and we lost quite a bit of money. I was at home and a friend of mine came and said there was a taxi available and asked if I want to drive it, and that I could make money every day. I didn’t think I’d ever be driving [a] taxi, but I took it because I lost a lot of money in the business and had nothing. At the time, I was just looking for something to do to feed my family.

When I started out I thought I’m going to drive well, be different. And you do that in the beginning, but then it all goes out the window because you fall behind, and the gaartjie^k doesn’t want to work with you because you’re not willing to take those risks. Before I was on the taxi, I also used to think taxi drivers were bad, but once I drove the taxi, I realised what they need to do and that if you’re not going to drive bad, you’re not going to make money.

Some people think it’s a degrading job, but I have respect for taxi drivers, because of what they need to go through. It’s not like they want to drive like that. They have to drive like that. Personally, I felt judged by people.”

^j This is a South African clothing retailer based in a shopping centre in Cape Town.

^k This is a South African slang term for taxi conductor.



The taxi business

“The taxi business was cool in the beginning because you don’t really answer to anybody. They only choose your target [to pay the taxi owner] but how you make that target and what you do during the day doesn’t matter, as long as you bring in the target at the end of the day.

Different owners have different targets. It could be R1,200^l, some owners ask R1,100, some R1,000 and the least you have to give is R800^m. That’s a daily target and anything over that is yours to keep and to pay your gaartjie. I wouldn’t go home with less than R500ⁿ a day. The money was probably the best part of it.

The worst part of the job is what you have to go through to make the money. The industry is fierce and tough. There are gangsters on the road, traffic cops and fines. If your gaartjie doesn’t come to work but you’ve already fetched the van, at the end of the day the owner wants the money from you. If you don’t have a gaartjie and you’ve worked the whole day, but you only made [the] target, it means you only pay the owner and you make nothing for yourself. That’s happened to me many times. You get angry about it obviously, because you expect to get paid that day.

I think that when you drive [a] taxi, you deal with a lot, and sometimes you think it’s not worth it, and after paying the fines, you weigh it down to see how much money you really make. Then in that regard, I wouldn’t think it’s worth it. But if you didn’t have to pay those fines, but if you taking every cent for yourself, if you not paying much fines, which is impossible, then ...”

The taxi industry in the environment

“The biggest risk in driving [a] taxi is going to jail. Taxi drivers get a lot of fines, on a daily basis for various stuff, like overloads, driving without a professional driving permit (PDP) licence, stopping on a no-stopping zone, people jump robots^o, jump stop streets, travel with the door open, driving on the yellow line.

But what you put in is what you get out in the taxi business. If you are going to be sluggish, you’re not really gonna make a lot of money. You’ll probably go home with a R200^p or so. It’s all of the risks that you’re willing to take at the end of the day. It’s a competitive, fierce and fast industry. You can’t be slow because time is money.

l This is the equivalent of around £65.

m This is the equivalent of around £44.

n This is the equivalent of around £27.

o A South African slang term for traffic light.

p This is the equivalent of around £10.



There are two different kind of fines they can issue: a fine straight to you or issue a fine to the taxi's owner. Fines about the van, like not having a fire extinguisher or too little thread on the tyre will be issued to the owner. But most of the fines are related to driving and are issued to the driver.

If you have too many fines that you can't pay, it becomes warrants and traffic officers can get you at a road block. They take you to the court and the judge will say you need to pay X amount, and if you can't pay, then they take you to jail. This is what happened to me. Over two years, my fines added up to R70 or R80,000^q (£4,000) and I didn't have the money to pay it.

Everyone is in different circumstances and some can afford to pay the fines. But if you're in circumstances where you need every cent that you make, then there's no money to pay fines and your fines will accumulate. And if that happens, they send you to prison, like me. I was in prison for six months. When you get out, your fines are wiped clean.

And you see, the no-stopping zones is where people usually wait for a taxi, where it's busy. So there is regulation to a certain extent. You want us to drive people to work, but everywhere we stop is wrong [and] there hasn't been provision made. If we're there legally, then how can it be illegal everywhere we stop if you haven't made provision for that? Then you shouldn't have taxis, then it should be illegal.

I think a couple of taxi stops would be great. The taxi industry is there, it's been allowed, and there is no provision for stops. So why penalise us for stopping where we stop. There wasn't provision made for taxis to stop.”

Lockdown

“I stopped driving [a] taxi when lockdown was instituted. Fortunately, my fiancé was still working at the time, so we were still okay. I managed to make money as an entrepreneur, although some people will say you're just a hustler. But whichever way you want to look at it, you bring home the cash at the end of the day. I sold cigarettes and alcohol during lockdown when it was banned so I made money.

I know the taxi drivers were going through a lot of stress during lockdown. It was hectic. If you are a taxi driver and you're low level, then you never got anything or any assistance during lockdown, but the high level guys – in the association or in the ranks – got something. The low level guys who are on the road every day, they never got anything.”

q This is the equivalent of around £4,000.



Needs and demands

There are no rules in taxi industry. They will even let you drive with no licence or a PDP. The fine for driving without a PDP is R3,000^r for the driver. Even if the owner knows you don't have a PDP and lets you drive, he'll just say he didn't know.

There's also no [formal] terminology or benefits or anything like that, you drive the taxi and at the end of the day, that's it. If you don't come with the target, there are owners who will abuse you, rough you up or take your phone. The taxi industry is also controlled a lot by the gangs, so you're too afraid to report them or make a case because you know you'll just be taken out or you'll lose your job. The boss wants his money at the end of the day, no questions asked.

It's hard to say whether taxi driving should be recognised as formal labour. Right now there's no tax paid so government thinks we're pocketing every cent, so what more help do [we] want? We're letting you operate so take it or leave it. You're not helping the government so why would they want to help you. [But] you are being a bit exploited in a sense. If you're asking should taxi drivers get more rights, I would say yes because taxi drivers don't get any rights at all.

For example, I knocked a lady over once. She didn't look across the road. She saw me coming but she froze. And I wasn't speeding, but I couldn't miss her, or I'd drive into another car. I flicked her, but with that impact she fell over. So I phoned the ambulance and I put my top under her head. When the ambulance came, they looked at her, sorted her hand out and she was fine. But when the police came there, they just handcuffed me and threw me in the back of the van because...jy's a [you are a] taxi driver. But if it's a normal motorist, I don't think they would have done that. They didn't even ask questions. I mean, I called the police, I was waiting for them, I wasn't running away. They could have asked me to come to the police station or asked me to follow them, instead of just arresting me and locking me up.”

^r This is the equivalent of around £165.



TATU: PRECARIOUS GIGS AND “NEW” WORK

Tatu was a 32-year-old Coloured man, who drove Uber for four years between 2016 and 2020. He left school in Grade 9^s, and when interviewed owned one Uber car, which he outsourced to a driver, and one taxi van, which he drove himself. He has been survived by his two young children.

“[Driving] is [a] very risky. You’re not protected at all. It’s not fair hey. I think Uber, that should be their department, to take care of the people, make sure they’re covered, make sure they’re protected. But it is very dangerous also with what has been going on. The hijacks, the killing, even raping with this Taxify (another car hiring app), Uber. It’s not nice and I don’t know what the way forward is or what these people are planning on doing for the future to better it. I guess we’ll just have to wait and see.”

Becoming a driver

“I always wanted to be a traffic cop because it looked nice. But then I left school in Grade 9 and I went to work. I just wanted to get money, I wanted to be able to live, because at that specific time in my life I was just at home, and it wasn’t very nice at all.

The money wasn’t good. It was hard labour, you know. I think at that time when you’re at school, you just believe that everything is going to fall into place, and that everything will work out, but at the end of the day it doesn’t go that way.

My first job was at a panel beating company and then from there, I went to work at Willouw Industries, they were making refrigeration frames. From there I went to study, which I didn’t finish. I worked in a bar once and after that I drove [a] taxi. After that, I went to drive Uber until 2020. And now I’m driving [a] taxi again.

Taxi driving is good and bad. Dangerous, but nice. It was also very tiring, a lot of hours you have to put in. You have to be on the road in order to make money. If you’re not working, you’re losing, so you’re very tired at night. It’s stressful also at times, but it’s all right. Just the [traffic] fines also is another thing – bad, bad.”

s In South Africa, a child will tend to be 16 to 17 years of age.



The business of e-hailing

“I drove [Uber] for my sister first. As soon as she received a slot, I registered myself as a driver and then from there I drove for a year. And then I received a slot and got my own vehicle.

Uber was okay. There were no fines involved. You’re basically very flexible and that’s what I really liked about it, but also you have to be very disciplined when driving Uber because if you’re not, you’ll just be wasting your time.

There are standard [payment] rates for the trips and Uber takes 10 per cent off every trip. You don’t actually see them taking it, because whatever money you see on the dashboard – that’s where you see your daily and weekly earnings – that’s the money you get, because they deduct their 10 per cent immediately. So whatever money you see there, is your money, and that’s something I liked about Uber. But all that money that you see there is not your money. The [Uber] owner would also give you a weekly target, maybe R2,000^t or R2,500, so if you make that, whatever above is all yours. It’s like you’re renting the vehicle to make money, and that target you pay is like the rental for the week.

This is how it’s been going all the years, the taxi industry, it’s been going like that. You give a driver your van or cab, he must bring you a target. Whether it’s fair? Honestly I don’t see any other way to do that kind of business. With contract driving and driving staff in the evening, you can get a salary, but that’s also very little money.

With Uber, you feel like you’re your own boss, but at the end of the day when you’re driving a target for someone, you’re obviously not your own boss. The boss will take his money and he will pay you at the end of the week. You don’t really see or hear from your boss that much. You just call him and let him know that the vehicle needs servicing, or the vehicle needs brakes or tires. He won’t call you unless the tracker notifies him about something. As long as you’re making his money and he’s getting his money then he’s all right. But you do feel, when you’re working, no one is there to watch you and you just need to do your work, so you’re basically are your own boss.

People do have contracts when driving Uber. The contract is signed by both the owner and the driver, and we get it stamped by the police station. We don’t get any sick leave, holidays or anything like that. If you need time off, you park the car [at the owner] because you can’t be sick and be driving around. The owners have trackers on the vehicle, so they’re watching you. You also have rent-to-own contracts, where for a certain period of time, if you pay a certain amount of money, by that time, the vehicle will get put onto your name.

^t This is the equivalent of around £110.



There's also a rating system on the app for drivers and riders. You can get rated depending on the treatment you give, and the treatment the riders give you, because you as the driver can rate them also. So if they're giving me bad treatment, I can give them a bad rating. It does kind of feel like some sort of protection, but I mean that is also just to keep the Uber person, the Uber app, the business, happy, because at the end of the day, how does that protect me? It just keeps the people using it happy. That's what I think because if I were to get hijacked or killed or anything and then what? Who protects me?"

E-hailing in the current environment

"I think there are ways that the system could be made more fair, but at the end of the day, it's on Uber to partner with these kinds of people, like law firms, to give us that kind of protection if anything happens to us.

And for the owners, the treatment, because you get some owners they treating the drivers very badly – not physical abuse that I know of, but they're rude. Even medical aid and stuff like that, it would also be a big help for the drivers to even put their kids on and stuff like that.

Also, the impounding [of Uber vehicles]. The government is actually making money off the Uber with the impounding and stuff because Uber is letting us drive, they're giving us the app, but the city is not issuing permits. So now the city's taking it as an advantage for them to impound and make money. The city was issuing permits first, but then they saw there's a loophole for them to start making money, so they stopped issuing permits to allow us to operate. So now they're just impounding left right and centre.

You need to understand that when they impound that vehicle, it's R7,000^u and R2,500^v fine for the driver that needs to be paid when the vehicle is collected from the impound. So you need to pay that whole R9,500^w to get your car back. Uber pays the impound fee to get the car out, but the other apps like Bolt and Taxify don't."

Lockdown

"Covid affected my work very bad. No work, no money. A friend of mine had [essential] staff that I was driving, so I was very grateful for that. These people had about three shifts and I was driving them, drop off and pick up and take home. That was very helpful and brought in something. But other than that, where using any type of apps was concerned, no work there.

u This is the equivalent of around £384.

v This is the equivalent of around £137.

w This is the equivalent of around £522.



I applied for some relief, because I had a vehicle I'm paying off and it was a three month relief payment from the bank for the vehicle of mine. And the SASSA. I used to get that money and that also helped me, you know. That was R350^x per month. A lot of other drivers applied for grants too and got them.

I think the government could have done more. They could have handed out masks and sanitiser to the people, but no, you had to pay for it. I think that was also a big problem in my industry. It was a huge cost when we got back on the road. You had to always have your sanitiser and your masks. Another thing was to have your shield behind you that separates the riders from the driver – that also cost money. So they could have given us those kinds of things just to make things a little easier.”

Needs and demands

“If they can just issue the permits, that would be a big help for everybody, because now you're driving around and you don't know what's around the corner and you're driving into these cops and they're taking your vehicle. And it's not nice because you know, for a lot of us, that's our only income, so now we need to wait on Uber to pay this money and so now what do you do – you sit at home, you have no other income. It's bad. So for me, the only thing I would request is to be more lenient, start issuing more permits to the vehicles and let the vehicles operate.”

NNE: FEAR AND LONGING IN THE DOMESTIC CARE SECTOR

Nne is Zimbabwean, 53 year old, and has lived and worked in South Africa for 10 years as a domestic worker and nanny, with employers often expecting her to do both for the same compensation. Nne first entered the country via recruitment for farm labourers. She has five adult children, whom she still partly supports, and an older mother in Zimbabwe.

“There is no work in Zimbabwe. It's going worse and worse since the time I came here. Everybody in Zimbabwe is not working, even those with certificates or diplomas. They're just in the streets. If you work, there's no money but you just have to be in the street, buying and selling. If we go back to Zimbabwe, I think it will be difficult for us because we've been here for a long time and we don't know how to exchange those monies in Zimbabwe like the people who are already there. I remember the last time I went there, the whole week I didn't make even one dollar because the unemployment there is just too high. So we don't even think of going back to Zim now because we don't have anything to do there.”

^x This is the equivalent of around £16.



Becoming a domestic worker

“After my husband died, I started doing buying and selling in Botswana, taking some stuff in Botswana and taking to sell in Zimbabwe. From there I went to Namibia, which was taking stuff from Zimbabwe and going to sell in Namibia. That is [how] I managed to raise my kids, putting them into secondary education. By that time, my first son had come to South Africa so he was also trying to work here so he called me and said “Mummy, you must come over this side and try something else”, because that side in Namibia was full loaded with Zimbabweans selling so the business was very down.

I talked to one lady who was working in De Doorns^y so we came together. We were dropped in De Doorns and I called my son that I came. When I told him it's De Doorns he said it's far from where he us, which was Parklands, Cape Town. I told him I already have some job here, I'm already working.

So I worked in the grape farm. The payment was very, very small. They gave us something like R350^z. I can remember, I've got some payslips which I've kept for my grandchildren to show them, because we were given that R350 for a week and the hours were very, very long. I remember the truck came 5 o'clock to fetch us. It will be very early, then it will be an open truck. Sometimes it's raining, but we didn't have any choice.

So we got there to the farm, we work and we were only given 30 minutes break. I experienced a tough life there, but just for a R350. It didn't feel like work, it felt like ...it was just too much to me like a punishment. I didn't enjoy it, I was suffering, but I didn't have any choice because I wanted my kids to go to school. I was saving something like R200^{aa} (£11) every week so that my kids can get school fees, and the other R150^{ab} (£8), that was for my food and my rent.

So I spent the whole season working there, which starts the end of October and finishes in May. After that is when my son said, “When you're finished that season of the grapes there, I'm coming to fetch you”. He came and fetched me and we were staying in Parklands. He was married and had a wife and they didn't have a big house. I stayed with them for about two months while looking for a job.

I was going to the market there in Parklands, which you go to in the mornings and sometimes you get a job and sometimes you don't get. You just wait the whole day there, sometimes the whole day until four o'clock. The jobs you would get is domestic jobs. Mostly there are these bosses who come, they want their houses to be cleaned, so it would be just for the day or so.

So I was lucky, when I was there on the market, sometimes you will spend the whole week without any job, just going every day and you don't get anything but I was lucky after two months or so, that's when I got a 'permanent' job.”

y This is a small town in the Western Cape of South Africa.

z This is the equivalent of around £16.

aa This is the equivalent of around £11.

ab This is the equivalent of around £8.



The business of domestic work

“My first job [as a domestic worker] was for a married couple. They didn’t fetch me at the market, but they got my number from another Zimbabwean who was working at their shop. He just told them I got my mum, she came from Zimbabwe, she is looking for a job. So they asked for my number and they called me and I was sitting at that market and asked me to come the next day to their shop in town for an interview.

I borrowed money for transport and went for the interview and she said she is happy with me and that I could come on Saturday when she is home. So I went on the Saturday and I started working full time, although they didn’t make me sign a contract. They said it was a full time but there was no contract, there was no bonuses, there was just when they give me money end of month.

There was no leave, there was just working. Only on Christmas days they will give you maybe 25 and 26 December off for Christmas. So I worked with them almost like four or five years until their daughter gave birth to a child. And because she knew me she asked “Mummy, can’t you give me your maid, because I know Nne very well so can you give her to look after the baby rather than I find someone whom I don’t really know”.

So from the parents, I went to their daughter. I was working there every day being a nanny and of course they will just say you are a nanny but you’ll be doing everything like cleaning. I worked with them nicely until the little boy was grown up and gone to school. From there I got another job from her friend, so I went there to look after her child. He was big by then, but she wanted someone to babysit because she was always out.

Then I left that job [because] she just said she no longer needs me. So I found another job in Melkbosstrand^{ac}, looking after another boy there, and that lady was not nice with me at all. She gave me a lot of work and always complained that I’m not doing anything, but it’s just because I was looking after that child and the child was very small and needed attention from me. So for me to do the housework sometimes when the baby is crying, to me it didn’t make sense. So I was concentrating on the baby, but when she comes then she’ll complain the house is not clean. That house was very, very big, it was a double story, and she expected me to clean that house every day with thorough cleaning, moving things, at the same time with the baby.

Then I got another job and then I just left her and didn’t give her notice. From there I looked after a little girl and that was great until she went to school. And now I am working for another lady, a Zimbabwean lady. I started when the baby was three months and now the baby is two years and I am still there.

ac This is a town on the south-west South African coast.



I feel [domestic work] is just something you can do because you don't have anything else you can do. In the moment we are struggling. Because otherwise, if you are not a foreigner I don't think you will do [this work]. Because the way these people whom we work for, we work for different people, some they just feel like you are not a person, you just have to drop everything for them, you pick up after them, they can just throw their clothes down. Even like ladies whenever they are [getting] their monthly periods, I've gone to a house where she can just leave everything there, like dirty pads. And I hear a lot of people say they always take a plastic with them to pick up those things. So sometimes I feel the way they do it, I don't know if they do it to all domestic workers, even the South African domestic workers, or just because we are foreigners. It's not a nice job but if you get someone who is okay, who is fine, who treats you like you are a person or like family, I think that will be a good job. But if you find someone who doesn't treat you well, I think that's the difference. That's why domestic work isn't really a good work, because of how people will treat you."

Domestic work in the environment

"When I first came to the border [for the De Doorns job], my passport was clean because I never came in South Africa before. They gave me some days, I think it was three months, but I was coming here to stay because I was looking for a job. After the three months, [my status] was illegal because the season is six months.

People were saying after three months you must give your passport to the bus drivers to send it to the border so they can stamp it, but the money which they wanted was R1,000^{ad}. So for me because I was still new and I had a lot of things to do with that money, I couldn't give that R1,000. So I just stayed with that passport without being stamped for years.

It became a problem when I wanted to go back to Zimbabwe to see my family because of my passport. When you go there, they will say you overstayed, so they ask for money, they want you to pay something like R1,500^{ae}. But some they will just take the passport and stamp it and penalise you and you are no longer able to come back.

I didn't want my passport to be penalised, so we have to take money which we had saved and give it to the drivers for me to go out. So I didn't [have to] give my passport to be stamped, while going and coming out.

After I worked two or three years, I raised some money and went to the border, to immigration, to fix that passport. I remember the first time it was R2,500^{af} so I was fine to travel. But it only works once because I don't go to Zim every year, so obviously the passport becomes overstayed again.

ad This is the equivalent of around £55.

ae This is the equivalent of around £82.

af This is the equivalent of around £137.



There was a time when I [had] asylum and that was very good. Every time you go to renew it, every three months. You wake up early in the morning like 4 o'clock to go and the queues will be long but they were renewing it. So later I think they didn't want to give us this thing, they started rejecting those asylums.

You just go there and then nothing happens and if you are working for somebody, then you are asking "I am going to the Home Affairs to renew" and you take a day off and you go there, then it's not renewed. Then you come back to your boss and ask "Can I have a day again, it didn't work yesterday", and then those bosses say no, I don't think you are serious about working here. So that's when I stopped the asylum thing.

They say that you can get a working permit but I heard that it's all about money and the money is just too much. Somebody told me you can get that paper for R15,000^{ag}. I think you can get a straight one from the office, but still it is a lot of money. It's not that affordable."

Lockdown

"The lockdown did affect me. [My bosses] were being paid but they said their salaries were cut. And I was at home [during lockdown]. I was not working because of Covid. At first [my bosses] asked if I can stay with them, but because I am alone, I am not married, and the place where I am staying, Du Noon^{ah}, is very full of crime and people breaking in houses, I told them I can't because I don't know when this Covid is going to finish.

Because my stuff is there, and remember when my husband passed away, everything was taken away from me, so I am starting now to buy pots and [stuff] so that when I go back to Zimbabwe, I have something. So I am just putting it in that room so if someone breaks in and takes that stuff then I...I ...I worked for all these years and I don't have anyone to come and stay in my room.

So they said they do understand, but they were giving me salary, but also half. Every month they would put something on my phone. At least I could pay my rent because our landlords were not nice to us. They said 'If you don't have money, you must just move, you must leave'. We tried to sit down with my landlord to say 'you know what, if you say we must just go and leave this place, if we go there, we are new there, they can't understand us, that I don't have money to pay rent, it's Covid, it's lockdown, but at least you can understand us, because we have been staying here for years and we're giving you your rent money'. But he didn't understand so I thank God cos that half money I was receiving I was now paying the rent.

ag This is the equivalent of around £824.

ah This is an informal settlement in Cape Town.



I couldn't even support my mom cos the money was just too little. So the lockdown was not nice at all. I spent the whole year without even sending my mum a packet of sugar or any money. I was also selling my stuff, like my clothes. I remember when I needed some money to buy veggies, I would sit in front of my house with my old clothes and people would just buy for R5^{ai} or R10^{aj} and then I get to buy something.

We also tried to register to that people who were giving food. People were registering, for us foreigners it took long. We went and we followed the procedure, they said we must go to those people who were the South Africans. We went with our IDs and they said they would call us. Some people said they were called but I didn't get any call. I tried another group again but I didn't get any parcels at all. I thank God for my church because they were getting some parcels for the church and they always remember me.”

Needs and demands

“I am back at my job now and getting my full salary. The people I work for now seem to be good people and I don't have any problems with them, but only it's been two years and we never signed a contract. I don't feel secure in my job because I should have signed a contract. If anything happens, now there's no contract, so that means they can just fire you and you can just go without anything.

When you have a contract, they can't just [fire you], like that baby is now two years old, and then they will just put the baby in school and tell you they don't need you anymore. But to me, sometimes I don't think that contract will work for us foreigners because sometimes you will be scared even to go with that contract to labour because we don't have enough papers. So one way or another, I don't really know what to do.

Because I would think if you have a contract and you are a South African, you can go to any office and they will recognise you. But for us now, for me as a foreigner, and I am here illegally because I don't have a permit, I only have my passport without a permit, so that's one I always think even if I say I'm going to fight for that contract, even if I sign that contract, maybe it won't work because it won't help me because I'm scared to go to that offices because they won't recognise me. So that's why we feel to be a foreigner is always very tough because you don't have rights in that country.

I hear people say if you have a contract, you can take some leave, but I've never done that. I think for protections [from a contract], you can see how many years you worked for the people. Like that means one day you are leaving that job and you had a contract, that means you must also get something, I don't know if you can call it a pension, because I heard of one day and she was having a contract and then she became sick and they paid her money when she left that job. So that contract helped her to get that lump sum and she went home with something. So I think it will be more fair because you'll be thinking I'll be working all these years and at least I'll be getting something.”

ai This is the equivalent of around 27p.

aj This is the equivalent of around 55p



Part II – Context

When we seek to establish the impact of the COVID-19 pandemic, it is important to establish the structural baseline in which the phenomenon has occurred. This helps to provide an explanatory bases for the themes that are revealed. This research seeks to examine data through a political economy and historic lens, and so the South African context will consider social factors, followed by key economic, political and legal factors. These are contextualised through the revelatory stories of Moja, Mbili, Tatu and Nne from Part I, whose lived experiences expose the lack of equality within South Africa’s society and economy.

SOCIAL

South Africa suffers from significant social and income inequality, with its Gini coefficient measured at a startling 0.63 in 2014^{ak}. A consequence of this inequality is the need for a significant social protection network. Statistics South Africa released the results of its General Household Survey in 2018 indicating that 45.2 per cent of households interviewed depend on social grants, which renders over 17 million people reliant on these grants from the state.⁹ This inequality also exists in a social context of dramatic unemployment rates. The most recent labour survey statistics, which reflect the fourth quarter of 2021, demonstrate that there are 7.9 million unemployed South Africans, creating an employment rate of 35, 3 per cent.^{10 11} And intersections of age and gender dramatically impact these figures further. Unemployment rates vary drastically by age: the average unemployment rate at the national level was 29.7 per cent in 2011, whereas youth unemployment, that is for persons between the ages of 15 and 24, sat at 52.4 per cent.¹²

A large gender gap is also evident: for the population as a whole, the average female unemployment rate was 34 per cent, whereas the corresponding figure for males was 25 per cent.¹³ This gap was even larger within youth demographics, with female unemployment standing at 58 per cent for the country, and male unemployment significantly lower at 47 per cent.¹⁴ Additionally, there is a marked paradox within the data. While less female youth are “employed” than their male counterparts, female youth are more likely to achieve particular levels of education, in spite of the conventional wisdom that suggests having a higher level of educational attainment is more likely to lead to employment.¹⁵

ak The Gini coefficient is a widely used statistical measure of economic inequality within a population through household income. The number is according to the World Bank’s most current figures.



This turns our attention to how definitions (both official and popular) of “work” tend to exclude the forms of informal work, or labour, atypically done by women. Young South African women are productive, just not productive in a way that is recognised. And even when it is recognised, it is undervalued, which is a recognition driven by the emerging volumes of academic research on care work.¹⁶ We can consider Nne’s context of domestic work. Even South African law has sought to emphasise how it is the very nature of domestic work as being work typically done by women that renders it socially and economically undervalued. In the Mahlangu judgement (which will be discussed again later under the “Case law” section in this Part II) the Constitutional Court noted in considering the rights of domestic workers:

“Historically, in varying contexts across the world, domestic work has generally not been regarded as real work and has been undervalued for that reason. 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. To this end, domestic work has been undervalued for two reasons. First, it has been described as work done by a ‘despised race’. Second, it has been regarded as ‘women’s work’ or a ‘labour of love’ having no economic currency. In my view, the same rings true 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...

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”. [References omitted] (paras 110, 112).

We can also consider, perhaps more controversially but no less relevantly, Moja’s sex work too. Although with some controversial applications, Hakim’s book *Honey Money* sought to emphasise how it is the inherent femininity of “erotic capital” which is why the exchange of sexual value for money is criminalised.^{17 18} These examples of engendered discriminations demonstrate how *social* value impacts *economic* valuation of work. This is why it is so vital to consider other underlying social assumptions about work in South Africa.



Important too are the social *constructions* of work, and its associations with value. The steady refrain in politics is of the promotion of employment for development, and a focus on *unemployment* has remained a central political ambition for some time. During his 2020 budget speech, the Minister of Finance announced that “...unemployment is [South Africa’s] single greatest challenge”.¹⁹ This was a reflection of the jobs bloodbath that has resulted from the economic fallout of the COVID-19 crisis (during the hard lockdown between February and April 2020 around 3 million people were found to have lost their jobs), but is not out of step with South Africa’s historical political prioritisation.²⁰

There are many arguments to suggest the value of labour extends beyond income, with much of its value often contextualised in the risks of its absence: unemployment is cited to contribute to psychological damage, loss of motivation, loss of self-esteem, increase of illnesses, disaggregation of family and social life, social exclusion, increase of xenophobia and gender asymmetries.²¹ Recent data emerging from the COVID-19 crisis has highlighted rising numbers of South African workers experiencing depressive symptoms resulting from job losses or work uncertainty. Importantly, for reframing our notions of work, those rates of symptoms did not differ between formal and informal workers.²²

The Constitutional Court itself has pronounced broadly on the value of work:

“One’s work is part of one’s identity and is constitutive of one’s dignity . . . And there is a relationship between work and the human personality as a whole. ‘It is a relationship that shapes and completes the individual over a lifetime of devoted activity, it is the foundation of the person’s existence’”.²³

Whether or not the advancement of waged labour is a sufficient barometer for the advancement of labour and employment justice is an idea that will be returned to later on in this report. But the association between waged work and human value is a dangerous one – a form of social value that has arisen to exclude the un-, under-, and precariously employed. As Friedrich Engels and Karl Marx poignantly noted in “The Communist Manifesto”:

“[Capitalism] has resolved personal worth into exchange value, and in place of the numberless indefeasible chartered freedoms, has set up that single, unconscionable freedom — Free Trade. In one word, for exploitation, veiled by religious and political illusions, it has substituted naked, shameless, direct, brutal exploitation.”



The associations of economic value and social value leave South Africa with the vast majority of persons unemployed or underemployed, who live as an underclass, with real experiences of pain. Think back to the experience of Mbili, who noted of his taxi work:

“You don’t feel human the way people treat you, like traffic cops, they think you’re just a taxi driver, you’re scum, you’re worth nothing.”

Associations with unemployment and laziness are another social dimension that comes to mind – an association that has been adopted by the political narrative. The demonisation of the “lazy youth”, for example, has been preached by former president Jacob Zuma. In 2015 he pontificated what he’d focus on if a dictator and not a democratically elected leader, which he said would be changing the culture of “laziness” especially among the “idle youth”.²⁴

A frequent neoliberal criticism of “welfare” is in line with this kind of philosophy, in spite of South Africa’s actual dramatic youth unemployment figures clearly demonstrating that it is structural economic impediments that deprive youth of employment opportunities in the country.²⁵ We can see the expediency of this kind of narrative for policymakers – it lays the blame for unemployment at the foot of the individual, and not the system. But the demonisation is a social dynamic too. Research in South Africa among unemployed or marginally employed young Black South African men revealed this understanding as adopted in the very populations that may be served by a universal basic income grant untied to labour: a belief that “...posits both that income must be deserved through work, and that the hard-working deserve income”.²⁶ The research identified different types of “lazy” discourse, which include the “lazy” cash grant recipient. The idea of the “lazy” grant recipient ties to the discourse of the “fraudulent” (or undeserving) grant recipient; a perceived threat that historically impacted a significant amount of the Department of Social Development Affairs’ approach to grants distribution (and the vetting of registers).²⁷ Ominously too, the “lazy” discourse adopted by the unemployed demonstrated aggressive attitudes to foreigners who “accept any job” for “low wages”. It’s an extension of attribution of fault to the individual workers for their differently perceived failures.²⁸



Value, work and employment therefore have direct connections to how approaches are taken in relation to grants. Those who are able to work, *should* work in a world in which an individual's value is connected strongly to their economically productive value. South Africa has an expansive social protection system. Yet there has been a glaring gap in the social protection network, which is built on false assumptions of our “work reality”:

“[Our social protection framework] is built on the foundational assumption that ‘support is needed only for ‘dependent’ categories such as the elderly, those caring for children, and the disabled’. Able-bodied, prime-aged men, ‘in contrast, are all counterfactually presumed to be able to support themselves through their labor’ and are thus excluded from receiving cash grants. However, as Ferguson points out, this social democratic view neglects the fact of mass, structural unemployment among prime-aged adults in South Africa” [References omitted].²⁹

Social protection is designed to explicitly exclude those physically capable of work. If you do not work, there is an implicit underlying social assumption that it is because you “do not want to”. These social values find expression in social protection policy, and within labour policy, as well.

ECONOMIC

Much of work in South Africa happens largely in the shadows. Essentially, the real labour market can be defined as a shadowland. As an introduction to South Africa's labour force, it is worth highlighting that a third of that force is either employed in the informal sector or is in formal employment that is *unprotected*. While the country's number of informal workers is substantially lower than the global average of 67 per cent for informal employment for middle-income countries, unprotected and precarious work provides a broader definition of insufficiency of work.³⁰ The number for informal employment being *less* than other similar countries is surprising given the high levels of unemployment in the country. South Africa's exceptionalism in this regard has been attributed to a combination of our large formal sector, but also the “informalised” employment within it.³¹ There have been steady increases in self-employment within the formal and informal sector.³² And these increases have been responsive to the changes within the labour market itself, with the decline in permanent, full-time jobs (fully protected by labour law) and growing “flexible” forms of employment. The proportion of workers with casual jobs (seasonal, temporary, casual or fixed-term contract work) rose from 22 per cent to 28 per cent between September 2001 and March 2006 and the proportion of those employed in informal work increased from 15.9 per cent to 20 per cent between 2002 and 2005.³³

Diagram A: the flexible worlds of work³⁴

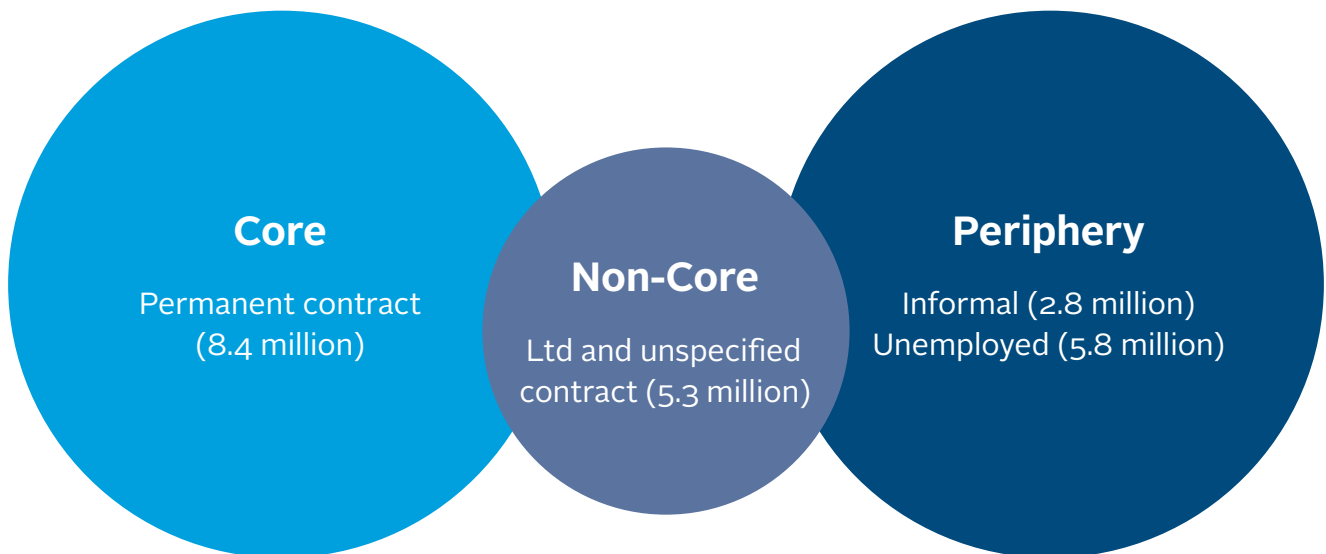


Image based on Webster and Francis (2019).

An important contextualisation for this form of labour market is to note how trends demonstrate increasing shifts of “employment” to those types outside of the ordinary bounds of labour protection. And the future of work only exacerbates these realities, with market disruptions from the gig economy and platform work creating “...a new ‘precariat’, a group whose labour conditions are undermined by these changes”.³⁵

And while there has been a general trend toward inequalities in earnings, the one sector that has bucked the trend is the public sector. In 2017, figures show public-sector workers earn 31 per cent more than their private-sector colleagues, with low levels of wage dispersion across earnings too.³⁶

POLITICAL

As a preliminary political force for exploration, trade unions have a significant historical legacy in helping to shape the South African labour context.³⁷ Trade unions originated in the mining sector (with unionisation of mining workers still standing at the highest sector in South Africa at 80 per cent), with African unions emerging in the 1940s.³⁸ The unions were very politically active in the 1970s and 1980s in the fight against Apartheid, but the tripartite alliance meant the surrender of direct political contestation by the unions over to the African National Congress (ANC) .



Unions were nevertheless central in negotiations for establishing our modern labour system apparatus, and the development of the new labour rights and laws introduced by the new government in 1994. The Labour Market Chamber within the National Economic Development and Labour Council (NEDLAC) led the process for the development of a new Labour Relations Act (LRA), 1995 and its subsequent structural influence.

The role of trade unions in mainstream politics has continued into the 21st century. The replacement of former president Thabo Mbeki by Jacob Zuma as the head of the ANC in 2007 was due to the support of the Congress of South African Trade Unions, which rallied against Mbeki due to the perceived sidelining of the labour agenda in economic policy.³⁹ Not only did that of course have a significant impact on South Africa's political trajectory, but the sidelining of labour interests in the face of the ANC's "leader-driven" policymaking is an important economic reality.⁴⁰ The trends in economic policy were strongly neo-liberal from the 2000s, with little demonstration of any reformist influence from labour movements.⁴¹

This does not mean labour's interests weren't necessarily present in relation to the more traditional labour apparatus and labour relations more broadly, but this uncomfortable political position in terms of policy is an important consideration for understanding the nature of their role. In terms of labour relations gains though, union activity was heavily influential in the institution, for instance, of the National Minimum Wage (NMW).⁴² Yet despite a net gain in union membership since independence, there have nevertheless been trends in declining union membership figures.⁴³ While there have been continual increases in public-sector unionisation since the 1990s, in contrast private-sector unionisation has seen a decline from 28 per cent to 20 per cent by 2019.⁴⁴ Union rates are higher for skilled workers than unskilled workers.⁴⁵ Elitism and inequality seems to entrench itself within union participation, as well. And interestingly, possibly in outcomes too. Some economic research has suggested that while union participation *generally* has the greatest impact on premia for lower income wage groups, the higher levels of union membership at higher income levels in South Africa (through the public-sector union) means the net effect may actually be a marginal increase in inequality outcomes.⁴⁶

After reflecting on the realities of the current labour market, how then are trade unions responding to the realities of precarious and vulnerable work forms? The Congress of South African Trade Unions (COSATU) has demonstrated a desire to bring the agenda of different kinds of workers to the table. For instance, establishing the COSATU Vulnerable Workers Task Team.⁴⁷ However, this Task Team has seemingly derailed due to internal issues. The Nation Union of Metal Workers of South Africa – another significant South African union – has squarely included the rights of temporary workers within its mandate.⁴⁸ These demonstrate slow shifts in the traditional membership base of unions, which would include adopting forms of broader worker categories than seen in formalised labour.



Importantly too, vulnerable and precarious workers are exploring their own methods of self-organisation, through “associations, platforms, umbrella organisations, NGOs and so on”.⁴⁹ For example, the association of street traders is represented by the South African Informal Traders Alliance (SAITA), which engages in some labour structures. The recent nationwide three-day e-hailing strike in South Africa demonstrated the capacity to organise workers across platforms, with drivers across e-hailing platforms making demands under the umbrella of “Unity in Diversity”.⁵⁰ And these unique forms of organisations, also show unique demands. Webster and Forrest reflected on this in relation to street traders:

“Their demands too are not those associated with formal unions. They are not demanding higher wages, but a secure space, infrastructure and facilities which will allow them to earn a living income. Their demands are not to an employer but to local and national state authorities...Vendors are demanding too that they be considered as both traders and workers. This is a radical assertion with which unions and state authorities are still grappling. It entails new ways of viewing vendors with implications for the amendment of a range of labour and other laws, and the implementation of rights and responsibilities which assert the dignity of informal work... Bargaining is a two-way process with benefits for both sides.”⁵¹

This focus on forms of flexible, but formal, recognition are an important part of the reality of South African workers. It is a specific type of visibility – partial but beneficial.

In terms of policy more broadly, South Africa’s first governing party, like many of the parties that led independence movements in Africa, was nationalist in character: and the ANC has democratically held power in the country since its first democratic elections in 1994. This has meant a prioritisation that has seen the “social question” as secondary to the “national question” in historical policy decisions, a reality that has marred labour policymaking too.⁵² As economist Mkandawire noted:

“...nationalism will tend to favour forms of redistribution that underplay the growing social differentiation within the nation while stressing differences or inequalities between citizens and foreigners or groups that have lorded over them in the past”.⁵³



Mkandawire reflects on how this has contributed to a policy environment that has contributed to South Africa's incredible inequality levels. It also creates another policy reality, one that is significantly centrist and leader-driven, as was noted in the reflections on the sidelining of trade unions.⁵⁴ As Basset and Clarke noted:

“Fairly early in the ANC's first term of office, Mbeki, then deputy president, began to control policy development through the office of the deputy president. The venues designed to facilitate civil society and parliamentary participation exercised little clout.”⁵⁵

That centrism has often been at the exclusion of multistakeholderism^{al} in policy development, with the limited role of the NEDLAC's influence in economic and labour policy through history standing as such an example. An interesting demonstration of some of these policy drafting tensions which sway to a form of executive authoritarianism was demonstrated by Kader Asmal, a former minister, who was quoted during the drafting of early forms of transparency legislation as saying:

“On the one hand, people must not feel powerless at the hands of those who temporarily or permanently control their destinies. On the other, the duly elected democratic government must not be rendered powerless in carrying out its mandate. Lord Acton, as we all know, said that power corrupts. It is necessary to adapt Acton and to point out that powerlessness is equally corrupting, for individuals and for the state. The former leads to individual frustration and helplessness. The latter causes governmental drift leading to chaos – with the state unable to perform the functions expected of it.”⁵⁶

^{al} Multistakeholderism is a form of global governance where different groups are brought together to address and work on policy goals and challenges.



There is a comparison in technology policymaking here that has relevance for labour policy. The recent draft National Data and Cloud Policy (by the national Department of Communications and Digital Technologies) demonstrated a grand vision for central, government data infrastructures. It echoed former grand “panopticon”-style centralisation of digitalised, national identity ambitions like the Department of Home Affairs National Identification System (HANIS) (and the subsequent development to the Automated Biometric Identification System (ABIS), and much of its technocentric emerging visions in the area of identity management.⁵⁷ Policy centrism echoes then to infrastructural centrism. Yet as Klaaren highlighted in the context of the Draft Cloud Policy, the “over-reliance on state capability in South Africa” is a position that does not bode well for success.⁵⁸ There are strong indications too that the state, in its centrist vision of social development, extends its machinations to employment and job creation. The South African government is the single largest employer in the country, with that dominance reflected in the trade union membership discussions that we highlighted earlier on in the report.

The narrative adopted in policy in relation to what constitutes “work” matters – particularly in how policy is envisioned as the main vehicle for social change. These reflections are not to be determinist about the future for policy, but it is important to note that there are strong historical and political dynamics that have led to the adoption of many current position. Political ideologies that form the foundations of labour and economic policy are particular and not incidental.

LAW, LABOUR LAW AND INSTITUTIONS

South African labour law exists within an apparently highly regulated and institutionalised labour relations apparatus. However, the history of labour law specifically arose from the “master and servant” laws of British occupiers, which sought to first organise “employment” relations.⁵⁹ The centrality of the contract of employment as the defining feature for establishing and regulating labour relations has in many ways brought echoes of this history into our present.⁶⁰ The employment contract, defined by the employer, renders the employee as the subject of the employment relationship. And so, as le Roux notes, while modern labour laws have shown tendencies toward broader inclusion of employee types, a central tenet for organising labour relations remains the distinction between independent contractors and employees.

In terms of Apartheid history, South Africa’s first comprehensive labour law was passed in 1924 not long after a mineworkers’ strike in 1922, which demanded collective bargaining for employees.⁶¹ This law, the Industrial Conciliation Act of 1924, excluded Black workers from its ambit and set the course for a labour protection regime that would have a profound impact on South Africa’s majority workforce largely through that exclusionary practice. As the apartheid government consolidated its power through various means, including the formalisation of job reservations for White workers only, various resistance movements sprung up, including the trade union movement (as outlined briefly in the consideration of union history earlier).⁶²



The Labour Relations Act 1996, in its establishment (and per its preamble), sought broadly to support collective bargaining processes, and is aimed at various progressive objectives including the advancement of economic development, social justice, labour peace and the democratisation of the workplace. The two key features of the Labour Relations Act were first, that it brought employees into *a single* industrial relations system, in which bargaining takes place in Bargaining Councils (extending to domestic, public sector, and agricultural workers); and, second, it promotes *collective* bargaining by guaranteeing certain organisational rights.⁶³ The new labour structure included the creation of additional rights and obligations through laws such as the Basic Conditions of Employment Act, 1997; the Employment Equity Act, 1998; the Compensation for Occupational Injuries and Diseases Act, 1993 (COIDA); and the Skills Development Act, 1998.

The labour regime supplemented these rights and obligations with *institutional* mechanisms for driving them, such as the NEDLAC for multipartite dialogue; and for realising the resolution of disputes relating to the rights regime, such as in the Commission for Conciliation, Mediation and Arbitration (CCMA). These structures are designed not just to organise labour, but draw labour into economic policy. In addition, the LRA itself has been amended to deal with shifting economic realities. In its foundations, the regulation of labour and the policy of labour have recognised broader structural dynamics of import to labour outside of just the direct employer-employee relationship. Yet still, what is noteworthy about South Africa's early labour regulation is the preference for the traditional model of employment adopted from the Apartheid systems (though seeking to de-racialise it), which did not cater adequately for casual and informal employment, self-employment, independent contractors, and (unsurprisingly) the disruption by technology of the traditional employer-employee relationships, as demonstrated by platform economics. Reflecting on the work of Nattras, this exclusion is not just a consequence of definition (or oversight), but rather – in relation to informal employment – a consequence of the type of strong regulatory role South Africa has elected to take in relation to labour (and tax).⁶⁴

From the early 2000s, there were adjustments proposed to promote deregulation of the labour regime, particularly for small businesses.⁶⁵ Yet much of these political plans were shelved as the social realities of labour were shown not to improve – and instead, South Africa has emerged as:

“... a ‘lean’ social democracy in which labour market regulation has tended to encompass the constitutional and legal rights of employees at the expense of direct transfers of income and security benefits”.⁶⁶



It is worth noting variety in regulation however, with Kerr et al. observing:

“[There is] some variation within different aspects of regulation. For example, Borat and Cheadle note that South Africa scores highly (ie, is more regulated) in the areas of firing costs, trade union power and the provision of unemployment insurance in the 1997 data, although the overall score is at the thirtieth percentile of labour regulation. By 2006, the CDB data suggest that the South African labour market had become more regulated, although the country’s position was still only at the fifty-eighth percentile in overall employment regulation. Interestingly, in the CDB survey, South Africa had relatively high rankings in firing and hiring regulations” [References omitted].⁶⁷

There have been ad hoc amendments that have tended toward broadening the scope of certain labour protections applicability, through both lawmaking and adjudication. Significant amendments to the LRA in 2002 provided a rebuttable presumption of who an employee is, yet numerous realities of precarious employment remained excluded.⁶⁸ Another significant amendment in 2014 sought to minimise the impact of labour brokers as an instrument for reducing the labour protection of workers.⁶⁹ Section 198 seeks specifically to help regulate “non-standard employment”, and limit the amount of time an employee could be “brokered” to three months: after three months, the law considers a worker a permanent employee of the client company. Yet the reality has seen different labour brokers seeking to circumvent the extension of these provisions by seeking to distribute their labour product as “service providers”.⁷⁰

This broader labour apparatus sought to establish laws that would outline the framework for collective agreement in employee relations, provide workers with workplace rights and protections, and establish the institutional support to makes these a reality. Yet, this seemingly revolutionary structure hasn’t resulted in improved social conditions – not least of all because of a context which sees most unemployed, or precariously employed, falling outside their bounds. This raises a question of realities: what is the role of labour law in facilitating economic conditions that are conducive to employment itself, and what is the role of labour law in seeking to contribute to social conditions more broadly? South Africa has labour legislation that is broadly perceived as highly progressive, but this is coupled with significant realities of social and income inequality; this, the “South African inequality paradox”, remains the constant caveat for understanding policy, law and regulation.⁷¹



Part II – COVID-19 in South Africa

The COVID-19 pandemic offers a crisis point for examining not only the realities of how South Africa’s current political, social and economic approaches impact work, but also to highlight the most urgent shifts needed to meet the realities of work here.

While in some ways it was an accelerant of different inequality outcomes, these inequalities arose from structural deficiencies strongly associated to pre-existing political and economic trajectories.⁷² Although somewhat artificial, in examining the COVID-19 “looking glass”, the research will first consider impacts, and then move to different kinds of responses instituted, or undertaken, by South African stakeholders in response to the crisis.

It must be acknowledged that the pandemic in South Africa has catastrophic health and social impacts. Recent official data put the death toll of South Africans dying from COVID at 102,194^{am} – some analysis of excess death data suggesting that the numbers may have been over 300,000 lives lost.⁷³ This research, however, has elected not to engage on those impacts, while noting how devastating they have been.

IMPACTS

Work

The lockdowns associated with the COVID-19 epidemic, but also broader restrictions on behaviour and trade in efforts to control the pandemic, resulted in significant contractions to South Africa’s gross domestic product, a ballooning debt ratio, and massive economic downturns across sectors.^{74 75}

am This data was correct for 5 October 2022.



This unsurprisingly had a significant impact too on the labour market (and on labour). The National Income Dynamics (NIDS) Coronavirus Rapid Mobile Survey (CRAM) Wave 1 data demonstrated that after the first hard lockdown at the beginning of 2020, about a third of people who had been employed prior to COVID-19 lost their jobs.⁷⁶ By October 2020 there were indications of some job recovery, though these continued to be experienced in waves in response to different lockdown levels that continued into 2022.⁷⁷ The National Treasury at its most pessimistic had forecasted an eventual loss of 7 million jobs.⁷⁸ And a reflection on both the CRAM data and national data from the national quarterly Labour Survey, notes that jobs recovery has to be read in the context of indications that employment rates are still not at their previous levels, “remaining at approximately 10 per cent below pre-pandemic levels for the population as a whole”.⁷⁹ Another significant impact on work has been the reality of staff turnover. Almost 25 per cent of people employed in February 2020 were not employed a year later, and 30 per cent of those without employment in February 2020 had instead found employment by March 2021.⁸⁰ Looking at the respondents for the full five waves of the NIDS-CRAM survey as a whole, the data showed that “...the average number of waves that members of the panel were employed in from April 2020 to March 2021 was 3.8 out of 5 for those who were employed in February 2020, compared to 1.2 out of 5 for those who were not employed in February”.⁸¹ The patterns of impermanence and precarity have only grown.

It is important to reflect too on the specific *dynamics* of the COVID-19 impact on the labour market as well. Women, Black/Africans, the young and uneducated were disproportionately represented in early job losses.⁸² Emerging data from the COVID-19 crisis shows that informal workers experienced a disproportionate negative impact of the regulatory measures in place to limit the spread of COVID-19 in South Africa. The factors for this include the precarious nature of informal work, the low and erratic wages received, as well as the absence of effective social protections for loss of employment.⁸³ Looking at differences between formal and informal workers’ outcomes during the first wave of the COVID-19 crisis lockdown, it was found that between April and June 2020, wages among formal workers declined by 68 per cent while the decline for informal workers was 120 per cent.⁸⁴ This is especially pertinent considering the role the informal economy plays as a buffer for protecting families from falling below the poverty line, *particularly* in moments of economic distress.⁸⁵ At a time when it was needed most, the informal economy was unable to provide emergency support.



And women's employment has been particularly negatively impacted: women lost more jobs, and were slower to recover their jobs. Reflections on the NIDS CRAM data noted:

“The data suggest that women suffered a large and disproportionate effect in the labour market as a result of the initial very strict lockdown in April 2020, both in terms of net job losses and a reduction in hours worked. When lockdown regulations were progressively relaxed, there was a substantial recovery for both women and men in jobs and hours worked, although the recovery was slower for women. When lockdown regulations were tightened once more in response to the second wave of the pandemic, employment declined again, and at a faster rate for women. As at March 2021, when the country was in its least restrictive lockdown phase, women still remained behind men in terms of reaching their pre-COVID levels.

Compared to February 2020, women's employment in March 2021 was still down approximately 8 per cent, while men's employment was back to pre-COVID levels, according to the NIDS-CRAM data. Among the employed, hours worked per week for women were down 6 per cent on average in March 2021 (or 2 hours per week) compared to February 2020, while for men hours worked per week were back to pre-COVID times”.⁸⁶



Even within informal work in particular, women were more likely to have lost work.⁸⁷ Economic shocks can particularly cruelly highlight axes of inequality, impacting people across their differing forms of vulnerabilities. Think for instance of Nne's COVID experience, when she reflected:

“At first [my bosses] asked if I can stay with them, but because I am alone, I am not married, and the place where I am staying, Du Noon, is very full of crime and people breaking in houses, I told them I can't because I don't know when this Covid is going to finish.

Because my stuff is there, and remember when my husband passed away, everything was taken away from me, so I am starting now to buy pots and [stuff] so that when I go back to Zimbabwe, I have something. So I am just putting it in that room so if someone breaks in and takes that stuff then I...I ...I worked for all these years and I don't have anyone to come and stay in my room.

So they said they do understand, but they were giving me salary, but also half. Every month they would put something on my phone. At least I could pay my rent because our landlords were not nice to us. They said 'If you don't have money, you must just move, you must leave'...

I couldn't even support my mom cos the money was just too little. So the lockdown was not nice at all. I spent the whole year without even sending my mum a packet of sugar or any money”.



Employment and social protection

The key form of “original” social protection provided was through the COVID-19 relief grant – a R350 (£16) grant social relief grant (SRD) that was available to those persons not receiving other social grants or unemployment relief. But there were a variety of categories of other relief provided, all with differing levels of implementation and outcome success. In table 1 researcher Gronbach et al. neatly summarises these types as:⁸⁸

Table 1: Gronbach et al. Summary of COVID-19-related social protection.

Programme	Amount Per Month	Beneficiaries	Duration
Special COVID-19 Social Relief Grant (SRD)	R350 (£16)	Unemployed adults (18–59 years old) not supported by any other social security scheme and not cared for in a state institution. First round: 6 million beneficiaries. Second round: 13 million applications received and 8.3 million approved (as of October 2021).	First round: 1 year (May 2020–April 2021) Second round: 8 months (August 2021–March 2022)
Top-up of Old Age Pension, Disability Grant, Foster Care Grant, Care Dependency Grant and War Veterans Grant	R250 (£12)	Recipients of South Africa’s regular social grant programme (excluding the CSG and the Grant In-Aid). Approx. 5.2 million beneficiaries.	6 months (May–October 2020)
Top-up of Child Support Grant	R300 (£14)	Beneficiaries of the Child Support Grant (ie, the child, but paid to the caregiver). 12.78 million beneficiaries, 7.2 million recipients (caregivers).	1 month (May 2020)
Child Support Grant “Caregiver Allowance”	R500 (£24)	Caregivers receiving the Child Support Grant for one or several eligible children. 7.2 million beneficiaries.	5 months (June–October 2020)



Programme	Amount Per Month	Beneficiaries	Duration
Relief Fund for Artists and Athletes	First cycle: R20,000–R75,000 (£964 to £3,600) (one-off) Second cycle: R2,200 (£106) Third cycle: R10,000 (£482)	Individuals and projects in the sports and arts sector who had been affected by the lockdown, eg, through cancelled events and restrictions on gatherings. Approx. 20,000 beneficiaries.	First cycle: 1 month to apply, pay-outs over several months (April–August 2020). Second cycle: 3 months (September to November 2020, paid once-off). Third cycle: 1 month (February 2021, one-off)
Relief Fund for Registered Tourist Guides	R1,500 (£72)	Freelance tourist guides registered with the Provincial Registrars of Tourist Guides and unable to work due to the lockdown. Approx. 6,000 beneficiaries.	3 months (announced in May, first payments in August, no specified period)
COVID-19 Temporary Employer/Employee Relief Scheme (TERS)	Sectoral minimum wage, up to R17,712 (£854)	Employees registered with the UIF and who have been laid off or were being paid less following the implementation of lockdown measures. 5.4 million beneficiaries.	16 months (April 2020–July 2021)
Presidential Employment Stimulus	Varied. For example, R3,500 for school assistants (£169)	Mostly young people. Some jobs saved through a wage subsidy; some small farmers through vouchers for farm inputs. 0.5 million beneficiaries under Phase 1.	Varied: school assistants were employed for 5 months under Phase 1 (Dec 2020 to April 2021) and for 5 months under Phase 2 (from Nov 2021).



These social protections were on top of an expansive pre-existing social protection system.⁸⁹ Yet some of the inadequacies embedded within the existing system impacted COVID relief, too. For instance, the COVID-19 Temporary Employer/Employee Relief Scheme (TERS) was unemployment relief – a contributory social insurance, managed through the UIF.⁹⁰ This relief naturally excluded informal workers, who were already disproportionately impacted by job losses.⁹¹ In fact, at one point only 7 per cent of job “losers” were covered under UIF protections, because of the transitory and informalised nature of work.⁹² For instance, one of the groups that consistently disproportionately benefited from TERS relief were those with “written contracts”.⁹³ As Nne’s story noted, this seemingly bizarrely low threshold of formality is still missing from many supposedly formal employment relationships like domestic work:

“The people I work for now seem to be good people and I don’t have any problems with them, but only it’s been two years and we never signed a contract. I don’t feel secure in my job because I should have signed a contract. If anything happens, now there’s no contract, so that means they can just fire you and you can just go without anything.

TERS sought to try and prevent retrenchments – something that was demonstrated, at least prior to the re-opening of the economy, to have been partially successful. It was relatively expansive, with over 5.4 million workers receiving a total of R63 billion (approximately £3 billion) in financial support through the TERS scheme.^{94 95}

There were provisions made to top up existing social grants, but also the creation of a new, temporary COVID-19 SRD grant of R350^{an} a month covered unemployed people not receiving any other type of grant. And while early data demonstrated the SRD grant was successful in helping to combat poverty outcomes (though these statistics should be read alongside the papers caveats), the fact that two in every three recipients of the SRD were male is a concern when two-thirds of individuals that lost employment between February and April 2020 were women.^{96 97} The grant top-ups – given their strong association to child support grant top-ups were, however, beneficial for women.⁹⁸ And the SRD relief grant became a staple of COVID disaster alleviation, even if for such a small amount of money, with data demonstrating that for 10 per cent of South African households the only government grant received by the household was this R350 SRD grant. It provided urgent relief to the real threats of hunger for many households.⁹⁹ Yet these needs should always be contextualised within the understanding of how *little* R350 is within the context of a household’s needs.

an This is the equivalent of around £16.



As Moja noted:

“Speaking from my perspective, I don’t need the government to open the door. That R350 cannot change my life, that R350 is nothing”.

In April 2022, an index that monitors the costs of an average food basket (based on around 44 commonly bought items, although in significant portion sizes) as being R4,542.93^{ao, 100}

Space

The consideration of spatial dynamics of COVID-19 impacts are an additional consideration of interest.¹⁰¹ Employment was not just impacted because of general job loss, but also because of a particular response to the policing of space. A significant reason for the disproportionately negative impact of COVID-19 on the urban poor in particular were the attempts to constrain informal work expressly as form of public hazard:

“Employment levels among urban shack dwellers fluctuated widely and they fared worst of all settlement types over the [entire COVID-19] period..

One important reason for this was that many shack dwellers engage in informal trading, given its low barriers to entry and the shortage of jobs in the formal economy. However, informal traders were prohibited from operating early on during the pandemic to minimise the risk of spreading the virus. The Cabinet decision to ban informal trading was widely criticised as unreasonable and socially damaging. The restriction hit informal traders particularly hard because they lack the legal and financial protections generally available to formal workers operating in regulated parts of the economy, such as contributory social insurance. Restrictions were also imposed on charities and other non-profit organizations distributing emergency food parcels in townships and informal settlements” [References omitted].¹⁰²

ao This is the equivalent of around £219.



Policy responses to COVID-19 were heavily focused on constricting movement and access to public space under the auspices of health. Yet of course, this disproportionately impacts those forms of informal and formal work that tend to be exercised through public spaces. Moja's work highlighted these intersections:

“Most of the sex workers, especially the brothel sex workers, they lost their accommodation, their income, everything. The brothels were closed down due to the restrictions. And the street sex workers couldn't work anymore because if you were seen on the street, you'd be arrested. So there was a lot that was going on. Most of the sex workers lost income”.

RESPONSES

Policies

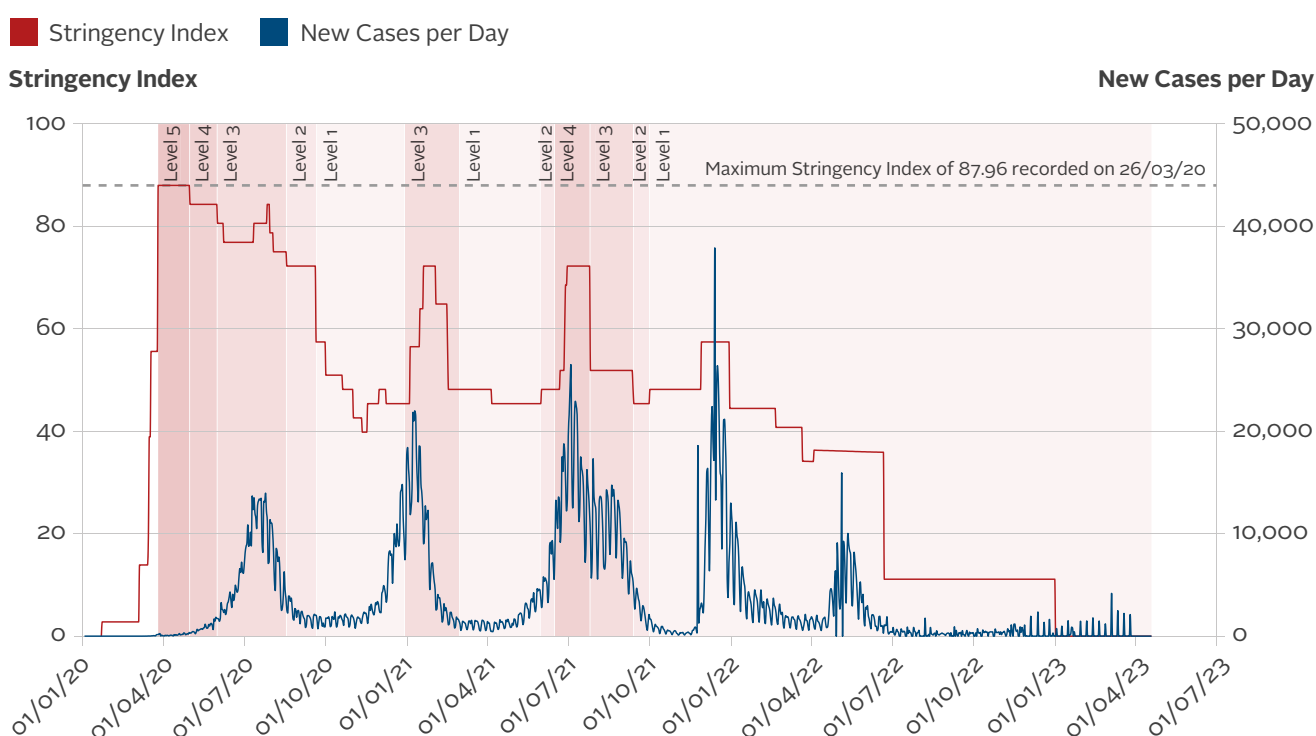
While the social and employment protections outlined earlier were a form of policy response, it is worth noting broader policy realities. During COVID-19, there were around 20 extensions to South Africa's National State of Disaster declarations, seeing South Africa experience 750 days of declared “disaster hood”.¹⁰³ Under a declaration of a “National State of Disaster”, the Disaster Management Act, 57 of 2002 permits the Minister of Cooperative Governance and Traditional Affairs – in consultation with the responsible Cabinet Member – to issue directives (or authorise the issuing of directives) in relation to alleviation efforts, though only to the extent necessary for:

- assisting and protecting the public
- providing relief to the public
- protecting property
- preventing or combating disruption
- dealing with the destructive and other effects of the disaster.¹⁰⁴



As can be seen in the Annexure A: non-exhaustive timeline, South Africa was swift in its declaration, which was announced 10 days after the first case was confirmed. Even before a COVID-19 death had been registered, a “hard” lockdown was announced. Recent assessments of this response have classified South Africa as one of the 30 countries worldwide to have imposed the “most stringent measures”.¹⁰⁵ Looking at “stringency” as a measure, allows for a degree of quantitative analysis of policy responses in COVID-19. Interestingly, when South Africa’s stringency is compared to new COVID-19 cases, there is a clear waning of policy assertiveness even as case numbers have re-surged over time.

**Table 2: Chart generated by Carl Jacobs of OpenUp.
Government Stringency Index & New Daily COVID-19 Cases, South Africa**



Source: OWID • Levels refer to South Africa's alert levels that determined the level of restrictions applied during the national state of disaster

The early policy responses frequently directly impeded informalised work either through omission or indirectly through exaggerated impact. Informal workers were originally excluded from the classification of “workers” engaged in essential services. It took the efforts of civic activism to reverse regulations that would have denied thousands of informal workers access to livelihoods during the lockdown period in South Africa.¹⁰⁶ This devastating impact of the COVID-19 lockdowns is more profound when weighed against the South African context where informal workers mostly live in poor households.¹⁰⁷ Yet, when the government unveiled a social benefit for small businesses which would have covered some informal workers, the benefit was limited to UIF-registered businesses (which, as a contributory social insurance, naturally excluded informal workers).¹⁰⁸ There was some evidence in later data that TERs benefits were able to reach those without written contracts, which improved its ability to reach informal workers, but that would have been limited in scope.¹⁰⁹



These regulatory problems extended to migrant workers who faced unemployment during the COVID-19 pandemic and could only access social benefits after the introduction of exemptions to allow asylum seekers in particular to access these benefits.¹¹⁰ Of course those without papers were the subjects of further (intentional) exclusions, with Nne noting:

“We also tried to register to people who were giving food. People were registering, for us foreigners it took long. We went and we followed the procedure, they said we must go to those people who were South Africans. We went with our IDs and they said they would call us. Some people said they were called but I didn’t get any call. I tried another group again but I didn’t get any parcels at all. I thank God for my church because they were getting some parcels for the church and they always remember me.”

The regulations exposed that, in moments of significant economic shock, regulatory relief attempts were marred and instead excluded some people from social and economic protection.

There were other immediate policy responses to try to intervene in the jobs catastrophe, such as the “Presidential Employment Stimulus” plan which sought to do targeted stimulus activities. Yet, even at its most ambitious, it had a target of creating or “supporting” 800,000 jobs.¹¹¹ Current data on the stimulus plan demonstrates it has assisted 857,833 beneficiaries at a cost of R23.6 billion (£1 billion).¹¹² It “created” 673,514 jobs. The vast majority of which were jobs in the Department of Basic Education in the role of general and education assistants and, while in both phases and in both positions the majority of beneficiaries were women, the positions were largely *temporary*.¹¹³ The ability of the state to be a rapid employer in the face of a crisis is clearly constrained by a number of factors, not least of all fiscal constraints and bureaucracy.

Case law

The courts were obviously a site for a challenge in response to different regulatory aspects of COVID-19. In the South African context, as a constitutional democracy, the decisions of the executive and legislature are frequently challenged in court through constitutional review and other forms of challenge. There are multiple levels of judicial decision-making, with Labour Courts and the Labour Court of Appeal being of particular relevance to the work environment. However, the Constitutional Court as the apex court offers an interesting site for consideration of how judicial decision-making as an aspect of lawmaking, and in relation to work and jobs, played out in the COVID-19 period. Two cases will be considered: one which was decided just before the institution of lockdown measures in January 2020, and the other decided after in November 2020.¹¹⁴ These cases have been selected given their association to longer-term labour challenges, as well.



The Association of Mineworkers and Construction Union (AMCU)

The *Association of Mineworkers and Construction and Others v Royal Bafokeng Platinum Limited and Others* [2020] ZACC 1 (AMCU II) sought to decide on the fairness of a retrenchment agreement reached between the majority union and the employer for a group of workers, who consisted of both the majority union members, but minority union members as well. Ostensibly in line with the majoritarian principles of the LRA, the minority union (AMCU) were not consulted in reaching the terms of the retrenchment agreement. The AMCU sought to challenge the retrenchments by challenging the constitutional validity of section 189(1) of the LRA (which deals with consultations in retrenchments) and section 23(1)(d) of the LRA (which entrenches majoritarianism). The majority in the Constitutional Court granted the AMCU leave to appeal the High Court judgment, but dismissed the substance of the appeal. The judgment also had three dissenting judgements, with the main dissent by Justice Ledwaba (with Justice Mogoeng, Justice Jafta and Justice Madlanga concurring) declaring the challenged section of s 189(1) constitutionally invalid.

The social and political risks in majoritarianism are obvious, when we consider Marikana Massacre^{ap} and how – as the Court noted – “the winner takes all” approach to labour relations puts a strain on existing social and political tensions.^{115 116} As the minority judgment noted: “[m]ajoritarianism is no longer seen as the panacea it once was”.¹¹⁷ But in the majority judgment, the Court essentially held that requiring consultation outside of the majoritarianism principle would be creating a right to individual consultation that does not exist in the LRA, and is not implicit directly in the Constitutional protection of labour relations.¹¹⁸ Justice Froneman (who penned the majority judgment) noted that the “...principle of majoritarianism [is] a policy decision and grundnorm (grounding value) of the LRA”.¹¹⁹ The special sanctity given to the legitimacy of labour relations legislation relates to a perceived history of collaboration through the NEDLAC process.¹²⁰ This should be read though in a critically historical reflection:

“However dramatic and comprehensive recent labour legislation is, these changes took place in a historical context in which state and corporate control of employment relations was extensive and remains stubbornly pervasive under new, cloaked guises”.¹²¹

ap The Marikana Massacre was the horrific killing of protesting miners. On 12 August 2012, the Marikana Massacre saw 34 miners killed by the South African Police Services while protesting their wage and living conditions (78 people were injured). The “wildcat” strike demonstrated the limits of collective agreement, the limits in efficacy of political power exerted by trade unions, and how the social and economic realities of workers remain completely disconnected from the labour relation complex ambitions for worker protection.



Froneman continued to note that this didn't leave minority unions unprotected, as substantive fairness challenges to dismissal were still available. Individual rights actions could be pursued so the argument went, but collective political action was uniquely majoritarian. In essence, the Court was deferring to the LRA as the dictator of what constitutes fair or unfair labour relations and acknowledging that the policy decision to implement these largely in the context of majoritarianism was sound.

The interpretative deviation in the judgment of Justice Ledwaba arose largely from a separation of section 189 (and the rights of consultation) from section 23 (majoritarianism in agreements). It sought to hold that strengthening the obligations for a more expansive consultation would better support notions of procedural fairness.¹²² The minority judgment, and academic criticism of the majority judgment, stressed that obliging individual consultation did not detract significantly from majoritarianism *agreements*, and was not onerous.¹²³ Underscoring these positions is an appreciation of the role of dialogue, and facilitating that dialogue, for assisting the political solution of workplace tensions. As the minister of labour confirmed:

“[R]etrenchments must be the last resort...We encourage employers to *consult broadly* when it comes to major decisions with an impact on job security such as intentions to lay-off workers” [Emphasis added].¹²⁴

In a sense, though the majority judgment sought to defer to a certain type of political solution through policy choice, the minority judgment sought to actively encourage political solutions through facilitated political space.

The deference of the main judgment can be seen as twofold: policy deference to the LRA, and to a degree, operational deference to the majority political actors in the employer-employee relationship – understood as the key decision-makers within the economic space. On the second point, the Constitutional Court had in an earlier judgment reiterated:

“The function of a court in scrutinising the consultation process is not to second guess the commercial or business efficacy of the employer's ultimate decision (an issue on which it is, generally, not qualified to pronounce upon), but to pass judgment on whether the ultimate decision arrived at was genuine and not merely a sham...”¹²⁵



Yet labour laws' partial function as a regulator of power relations could be seen to support the prioritisation of expanded consultation, as far as practicable. The transformative constitutional agenda is not read as expanding obligations on employers to *employ* – and the operational deference is understandable. Yet what the minority judgment of Justice Ledwaba more readily acknowledges is a shifting labour reality in which majoritarian trade unions as the ultimate political representative of the labour force are increasingly irrelevant.

In a critique of the majority judgment, Botha and Fourie note that a purposive interpretation of the LRA sees its purpose as *the promotion of social justice* (while acknowledging that trade unions, especially majority trade unions, should be regarded as the primary vehicles through which social justice is achieved).¹²⁶ They also point out that facilitating dialogue could strengthen union stability.¹²⁷ It is becoming clear that the role of unions, and the definitions of unions, are needing to become as flexible as work itself.

In a simplistic sense, the friction inherent in the interpretation of LRA may rise from a perspective of the LRA which views it largely as a mechanism for the collective regulation of power relations between employer and employer, ahead of any social justice imperative. Further, turning to the LRA as a whole, the interpretation supported by the majority means members of minority unions in a no-fault dismissal have less rights than an individual subject to an at-fault dismissal, who will have rights to consultation.¹²⁸ So Botha and Fourie submit, the exclusion constitutes a violation of the right to equality (rather than necessarily fair labour practice). They did however contextualise their critique with the following:

“COVID-19 not only affects economies, but it places concerns regarding retrenchments – particularly large-scale retrenchments – in the spotlight...[T]he law only governs so much [and] creates a framework for parties to manoeuvre in; it does not prescribe all avenues of behaviour of parties during consultations and negotiations. There is room for economic and social partners within the domain of labour relations to dictate deviations that will ensure that the most vulnerable workers are not left outside in the cold”.¹²⁹



This speaks significantly to some of the limitations of law as a true tool of transformation. While seeking to facilitate political participation of unions (including minority unions) through procedural fairness may be a worthwhile pursuit, from a rights perspective it has been noted that:

“Greater legal rights to organise may be of little real value to a new labour force of temporary, part-time and ‘self-employed’ workers under ‘personal contracts’, working in the shadow of structural unemployment, the shrinkage of the welfare state, derecognition and general hostility to trade unions”.¹³⁰

Before moving on, it is worthwhile reflecting on the facts of the retrenchments that were only cursorily dealt with in the judgment:

“On 30 September 2015, during the early hours of the morning, the applicants and various other employees, arrived at the mine to begin their workday. Their attempts to clock in for work were unsuccessful. To their surprise, the access system at the mine no longer afforded them entry. The employees were instructed to wait outside the mine entrance until a time at which the respondent’s human resources personnel could address them.

A human resource assistant arrived at approximately 06h15 and instructed the applicants to board buses that would transport them to the mine’s protection services department. Upon arrival, the employees were queued and issued with notices of their retrenchment. These were dated 18 September 2015, just under two weeks earlier”.¹³¹

If we are to comply with even the simplest standards of justice, South Africa should reflect if labour justice (with both its economic, political and social dimensions) can be said to exist in a context where this is how workers are lawfully deprived of their work.

Mahlangu

Mahlangu and Another v Minister of Labour and Others [2020] ZACC 24 (Mahlangu) in contrast dealt not with the LRA, but with the provisions of COIDA. The case has been cited as a major victory for domestic workers after the Constitutional Court issued a declaration of invalidity of the Act to the extent that it excluded domestic workers from its protections.



The outcome of *Mahlangu* certainly appears respectful of the realities of labour, and importantly goes to great lengths not just to describe the intersectional inequalities experienced by domestic workers which make them especially vulnerable (and especially worthy of protection), but goes to great lengths to contextualise *why* domestic work is economically undervalued (and that is because of who does the work). As the judgment itself poignantly notes:

“Historically, in varying contexts across the world, domestic work has generally not been regarded as real work and has been undervalued for that reason. 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. To this end, domestic work there has been undervalued for two reasons. First, it has been described as work done by a ‘despised race’. Second, it has been regarded as ‘women’s work’ or a ‘labour of love’ having no economic currency. In my view, the same rings true in the South African context, where domestic work has been undervalued precisely because of who performs this work: poor Black women” [References omitted].¹³²

In extending the social protection afforded by the COIDA the Constitutional Court utilised a powerful mechanism for challenging workplace inequality – and that is the power of recognition.¹³³ The acknowledgement that certain kinds of work are actively undervalued for social and political, rather than just economic reasons, is a vital disruption of ideas on market rationalities, and an important reconfirmation of how transformative justice (in an equality context) will necessitate active redistribution.

It appears that legal adjudication in seeking to exercise its power to “...draw (and redraw...) the boundaries of inclusion (and exclusion)”, did so in a manner that imagined protections for a broader, and legitimate, group of workers.¹³⁴ This kind of creativity is required in policy as well. The judgment noted that the achievement of equality in our society goes beyond treating people with equal concern and respect, to actively seeking to remove social and economic barriers to substantive freedom and empowerment. In teasing the bounds of law through recognition, Constitutional Court adjudication was able to acknowledge, and try and manage, structural impediments because they resulted in *exclusion*. Yet, it is noticeable that these extensions were not politically resisted in principle – instead, the minister of labour only wanted more time in which to legislate.¹³⁵ It is perhaps unsurprising that the Court has been expansive in situations where the political impetus was in place, even if delayed or not prioritised.



The normative value of law, exercised through recognition, is extraordinarily relevant in a labour reality in which the majority of work being performed is not adequately recognised by policy and legislation (reflected in COVID-19 regulations and practices). Through recognition the law will, in essence, be able to “create jobs” by enforcing the positive labour obligations and protections for waged labour to a broader array of the jobs that exist in reality (to the extent practicably possible).

Expanding protection through recognition will have relevance to “new labour”. Self-employment and flexibility often result in weakened job security.¹³⁶ As the world of work becomes more flexible, employees are expected to shoulder growing responsibility, and the law should try to ensure that these forms of precarious employment are not unduly burdened as employers (though not so self-identified) continue to reap the benefits of that labour.¹³⁷ In the past, social security relating to unemployment, retirement, occupational disability or illness has mainly been tied to employment structures. New structures will be required to provide social security, a reality *Mahlangu* was seeking to acknowledge.

Equality cases

Outside the labour context, Albertyn reviewed equality case law that emerged during the COVID-19 period. Her analysis demonstrates how equality jurisprudence was successful on an *ad hoc* basis at extending grounds of protection (fulfilling that potential for recognition discussed above).¹³⁸ Her continuing critique of socio-economic jurisprudence focuses on the failures to advance redistributive justice; yet, she notes that a significant source of that redistributive failure lies in government policy and practice.¹³⁹ Importantly though, jurisprudence from the COVID-19 pandemic seems to indicate a growing potential for the equality clauses within South Africa’s Constitution:

“Perhaps the most important takeaway from these [COVID-19] cases, however, is the idea that [the equality clause] *might be more than a defence* for the state’s positive measures, and can foster mandatory positive action. Read with Adonisi, these cases suggest that a failure to develop and implement equality-related constitutional and legislative objectives might lead courts to impose positive duties on government to act in a manner to achieve them. Here, s 9(2) grounds a principle of positive action that strengthens our ability to hold government to account to act in pursuit of substantive equality” [Emphasis added].¹⁴⁰

What should be considered then, is how these equality concepts might then be adapted to inform approaches to labour and work challenges in the future.

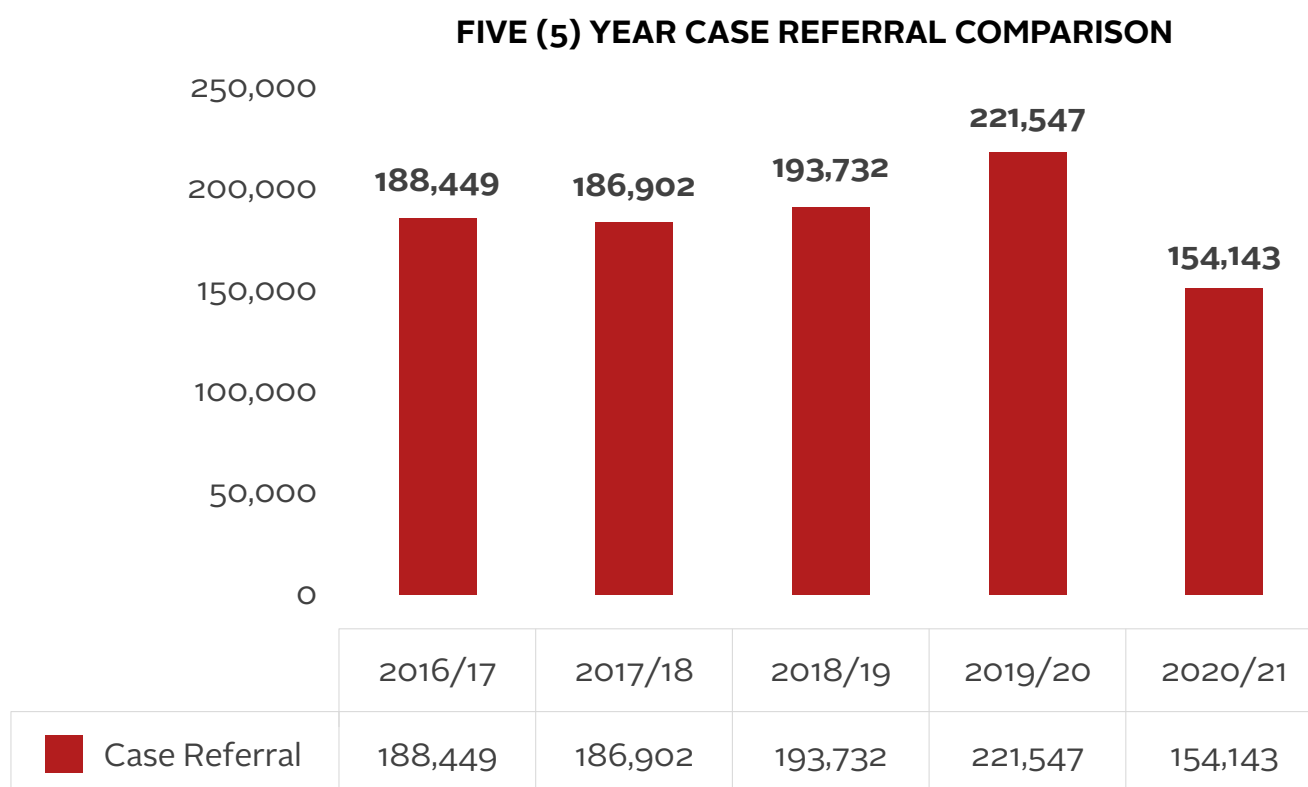


Institutions

Considering the political economy requires consideration of institutions. Though there are many institutions of relevance to labour in South Africa (outlined under “Context” on pages 35-37), the CCMA is a particularly interesting institution to examine given its intersections between labour and law. The CCMA, which sits under the Department of Labour, is a recourse avenue for workers in labour disputes, and its ability – or inability – to manage the shocks of the COVID-19 pandemic provide a useful insight into the reality of institutional support to workers.

Even before the hard lockdown was announced (although admittedly only by three days), the CCMA had barred walk-in clients. It in fact only reopened its doors to walk-in clients on 1 May 2022.¹⁴¹ The CCMA’s own annual report demonstrated almost immediately the impact access restriction may have had on case handling:¹⁴²

Graph 1: CCMA case referral numbers.





This 30 per cent reduction is directly attributed to less walk-ins by the CCMA itself.¹⁴³ It received by its own description in the 2020-2021 period “...an extraordinary number of both small-scale (Section 189) and large-scale (Section 189A) retrenchment referrals”. These were of course attributed to the economic impacts of the pandemic. Midway through 2020, the CCMA was publicly reporting that 1800 retrenchment cases had already been referred during the nationwide lockdown between 1 April and 25 June (with 323 being defined as large-scale retrenchments).¹⁴⁴ This was a 156 per cent increase of workers subject to s 189A retrenchments (dismissals for operational reasons) from the previous year. And with additional budget cuts to the CCMA, workers’ organisations quickly raised concerns about the CCMA’s ability to support labour protection activities.¹⁴⁵

Though case referrals were reduced, the CCMA, through its adapted processes, cited success in its pursuit of “job saving”:

“Despite the hike in large-scale retrenchment referrals, the concerted efforts by CCMA facilitators and stakeholders in large-scale retrenchment processes has once again resulted in the CCMA exceeding its job-saving target. S189A processes facilitated by the CCMA resulted in 42 per cent of jobs saved 58,165 against the 2020/21 APP target of 20 per cent, of those employees likely to be retrenched (138,816). Actual retrenchments were recorded at (74,747). The highest number of job losses were recorded in the Mining sector (15,293), followed by the Retail (8,156) and Metal (6,330) sectors. National office has recorded...unfortunately, the CCMA recorded the largest actual number of job losses due to retrenchment than previous years due to the spike in retrenchment matters”.¹⁴⁶

The CCMA, in response to the COVID-19 pandemic crisis, instituted online and digital services. Between 30 July 2020 and 26 April 2022 (almost the entire lockdown period) the CCMA stated it had received 29,566 referrals through its digital platforms and had heard 6,269 cases digitally.¹⁴⁷

Yet understanding CCMA’s institutional capacity in response to COVID-19 requires consideration of the preceding conditions, as well. In the early days of the pandemic, the CCMA was already reporting a 25 per cent increase in cases as a result of the passing of the Minimum Wage Act, 2018.¹⁴⁸ In its own strategic plan, the CCMA raises concerns of a “growth” in the informal economy putting further strain on the CCMA. This is because, without union representation, there would be an increase in individuals approaching the CCMA for assistance, and for the CCMA to institute social and educational programmes. Instead, as the statistics showed earlier, there is a growth in “flexible” forms of employment that would also have the attendant problem of less union representation given our traditional union structures.¹⁴⁹



While there's not necessarily evidence of a *growth* in the informal economy, it is an important acknowledgement by the CCMA of the realities of the economy requiring a different emphasis in services of our labour institutions. It also noted a desire to emphasise increased dispute management practices – this acknowledges an important limiting of the role of judicial and quasi-judicial institutions in “improving” workplace relations.¹⁵⁰ Yet the ambitions for its dispute resolution programme cannot apparently be met by its existing operations budget.¹⁵¹

All of these constraining factors aside, it is interesting to reflect on how the CCMA has contextualised employee-employer relationships, within the parameters of the pandemic. An example of a decision is seen in *Beck v Parmalat SA (Pty) Ltd* [2021] 2 BALR 131 (CCMA). The case dealt with the dismissal of an employee because of their absence from work during the pandemic for 21 days. The employee had not come to work, even though the work had been deemed an essential service because she was afraid of contracting COVID-19. Her requests for unpaid leave had been refused. In terms of her personal circumstances, she lived with an asthmatic child and older parent and so was concerned about the risks of infection to the family (noting poignantly that this was in a context where the business did not provide person protective equipment to its staff apart from hand sanitisers). The Commissioner determined the dismissal unfair because the request to ask the employee to return to work was “unreasonable”. In so doing, the Commissioner noted:

“What strikes me as odd is that the respondent showed no willingness to consider the applicant's request on its merits, check how much time she needed to be away, whether that would cause disruptions to the operations in the Lab where she worked, and whether the respondent could tolerate the applicant's absence for that long. Evidence led by the respondent is that there were 16 employees employed in the Lab. It simply stopped her in her tracks and told her to continue working and was not willing to engage on her request... I find that the applicant had a reasonable excuse for her absence from work, even though she was contractually obligated to work.”¹⁵²

As the Commissioner noted, “...the principle that *each case is based on its own merits*, is a very important one. That is why courts sit daily to hear merits of cases and decide cases on their own unique facts”. Trite as it may seem, that simple tenet of interpretation allows for contextual analyses that are not just specific to the parties, but to the country context as a whole. And the *protective attitude* of the CCMA to work is very clear.



Consideration of the CCMA as an institution focused on employer-employee relations allows consideration of the more atypical influences of the LRA during COVID-19 (and the creation and adjudication of obligations in relation to the private sector). One consideration is what the existing obligation exerted by the law is in terms of *prevention* of retrenchment. The LRA has been interpreted to impose a positive duty on employers to take all steps to avoid dismissals for operational requirements (retrenchments).¹⁵³ As the Labour Appeal Court has said:

“A dismissal that could have been avoided but was not avoided is a dismissal that is without a fair reason”.¹⁵⁴

These positive obligations on the private sector to avoid retrenchments can be read alongside the CCMA’s reports on its job-saving functions. Yet it is worthwhile turning back again to the practice of the Institution. Access to information requests revealed in the period between 01 April 2020 to 31 October 2020 (the initial lockdown periods) there were 87,945 referral types (recalling again for that whole financial year 154,143 referrals were eventually captured). A sample of these referrals can be created by tabling the “referral issues” that had 100 or above referrals, as offering an insight into the breakdowns of the most popular referral issues during this snapshot of the COVID-19 period. This is captured in the table 3.



Table 3: A breakdown of the most popular referral issues to the CCMA during the COVID-19 period.

Number of Referrals Issue	Regions										Grand Total
	EC	FS	GA	HO	KZN	LP	MP	NC	NW	WC	
Dismissal related to misconduct	261	191	703	2	459	114	191	70	184	271	2,446
Reason for dismissal not known	229	211	681	2	422	119	150	81	69	283	2,247
Claims for failure to pay any amount owing (NOT National Minimum Wage Act related)	242	124	494	2	324	88	148	42	150	246	1,860
Dismissal related to operational requirements	114	67	482	1	215	66	81	24	82	201	1,333
Severance pay	85	87	324	1	175	37	82	19	69	168	1,047
Unfair conduct – promotion/demotion/probation/training/benefits	111	81	359	5	110	34	90	28	69	147	1,034
Unfair suspension or disciplinary action	104	64	327	7	190	43	52	26	48	115	976
Constructive dismissal	56	55	251	2	98	28	44	18	38	109	699
Termination of contract with or without notice	33	27	212	1	69	20	43	17	195	48	665
Dismissal related to incapacity	40	28	179	1	101	28	25	11	27	68	508
Organisational rights – establishment	27	35	147	4	83	32	38	15	38	59	478
Operational requirements facilitation (more than 50 employees)	40	14	152	27	73	16	29	4	23	66	444
Prohibition of unfair discrimination – arbitrary ground	43	17	121	1	48	12	16	13	18	76	365
Application to make a S69(1) (a) Compliance Order an Arbitration Award	10	22	102		60	47	60	1	14	21	337
Unilateral change to terms/conditions of employment	16	24	100	6	43	13	28	7	24	55	316
NMWA – claim for failure to pay any amount owing in terms of the NMWA	42	35	55		62	19	21	11	25	12	282
Wages (picketing rules)	12	11	71	9	57	18	17	7	10	39	251
Other mutual interest issues	17	17	77		31	10	33	4	22	22	233



Number of Referrals	Regions										Grand Total
	Issue	EC	FS	GA	HO	KZN	LP	MP	NC	NW	
Unilateral changes to terms and conditions of employment (NMWA)	40	16	43		38	23	9	4	4	34	211
Refusal to bargain (picketing rules)	15	11	45	2	37	6	20	5	12	23	176
Request to make a written undertaking an arbitration award	9	0	12		14		15	35	31	49	165
Equal pay for work of equal value – arbitrary ground	24	10	49		26	7	5	5	8	17	151
Dismissal related to probation	9	2	60		17	12	12	5	7	21	145
Collective agreement – interpretation or application	9	12	43	4	20	8	13	6	8	16	139
Non-renewal of fixed-term contract	21	3	49	1	14	10	4	3	7	21	133
Deduction of trade union subscription or levies	2	10	30		49	1	11	5	3	17	128

Grand Total **1,611 1,174 5,168 78 2,835 811 1,237 466 1,185 2,204 16,769**

Table 3 gives some insight into the types of issues referred and the provincial distribution of the issues concerned during initial lockdowns. As seen earlier, the small-scale and large-scale retrenchments are dealt with elsewhere (though the disputes in relation to severance of course support the high numbers in those processes reflected earlier). Table 3 gives more of an insight into the kind of individual complaints brought for adjudication. It’s unsurprising of course given the level of conflict inherent in such processes that misconduct dismissals top the table. Given the economic climate though, it does bring into question firms perhaps using disciplinary procedures more readily to reduce staff numbers – though data over a long preceding period would be needed to establish any pattern of such behaviour. The significant number of disputes about trade union levies and seeking to establish organisational rights, alongside picketing-related referrals, also support a picture of precarious, contested and disgruntled work conditions and a time of hardship for formal employees, as much as the informal tenuity that has been discussed.

Institutional capacity has been strained, not just because of the COVID-19 crisis but also as a result of a historical pattern of institutional weakness in the country. Adjudicatory mechanisms focus significantly on providing individualised forms of recourse and relief – a limitation for individuals who face structural impediments to accessing justice. This has only been exacerbated when physical access to institutions has been constrained as well. Adding to this, digital inequalities mean that digital access is lacking for the very groups that are most impacted by job insecurity or a lack of resources. Yet, the other obvious limitation to the current institutional apparatus created to foster employer-employee relations is that



they remain strongly predicated on collective action (despite declining membership in trade unions for those who would most benefit from increased wage premia, and the realities of both precarious and inflexible work that negate trade union membership). There are two solutions to this problem: one is the growth of new forms of trade union membership that can participate in employer-employee relations (which is a political question rather than a legal one), and the other is facilitating greater access to justice and recourse for more vulnerable individuals to try and exert labour rights. This second solution highlights how the collapsing of the institutional capacity to facilitate such recourse greatly inhibits the capabilities of workers to enact their rights and freedoms.

Workers

Workers themselves, across the spectrum of work, have not been passive agents of the pandemic. There have been shifts and adjustments in response to markets and climates that demonstrate the inherent resourcefulness of labour in response to a crisis. Resourcefulness – the ability of individuals and families to use both external and internal resources – is a feature of the South African landscape. Some reflections on living conditions data seem to confirm this:

Table 4: Statistics South Africa’s average annual household income by settlement type.¹⁵⁵

Source of income	Percentage (%)										Total
	Lower	2	3	4	5	6	7	8	9	Upper	
Income from work	13.9	22	32.6	45.2	59.6	64.5	75	78.3	79.3	75.3	72.6
Income from capital	0.3	0.5	0.5	0.8	0.6	1	0.8	0.7	0.8	2.6	1.8
Pensions, social insurance, family allowances	60.9	52.9	43.1	32.9	21.4	18.8	9.3	5.9	3.8	4.1	8.2
Income from individuals	7.6	9.2	8.6	6.1	5.2	3.8	3.3	1.9	1.5	0.7	1.8
Other income	1.9	2	1.8	2.3	1.4	1.2	1.1	1.4	1.3	1.4	1.4
Imputed rent on owned dwelling	15.4	13.4	13.4	12.6	11.8	10.7	10.6	11.7	13.3	15.9	14.2
Total	100	100	100	100	100	100	100	100	100	100	100

The lowest three deciles receive over 40 per cent of their income from grants and pensions, but also show significantly larger percentages of their income from individuals (compared to the other deciles) and the lowest four deciles all demonstrate noticeably higher percentages of “other income”. There are clear patterns in more *variance* than in income for lower-income households (particularly if you simply exclude “income from capital” as essentially being relevant only to the upper decile).

Another form of resourcefulness has been demonstrated in the choices people have made in relation to work, with reorientations in the services offered in response to new behaviours and needs. A significant example has been the exponential growth during COVID-19 of the number of food-hailing service drivers.¹⁵⁶ Facilitated by platforms and also directly by certain service providers, this form of gig work has benefited by both the growth in app-based food services (both ready-made and groceries), and from the relatively low barriers of entry into the field for the workers themselves.^{157 158} In a stunning photographic essay by James Oatway, the precarious conditions of this work are profoundly highlighted. This builds on recent reporting which has highlighted both the physical dangers of the job and the pronounced participation of migrant and refugee workers in the field as well.¹⁵⁹



Photo: by James Oatway, 2021.¹⁶⁰



Alongside adapting to new work conditions, workers are also adapting their forms of organisation, “...experiment with new forms of representation”.¹⁶¹ South Africa’s tripartite labour institutions have meant that precarious workers have “...access to policy-making and influence but also acts as a barrier to established unions crossing the divide, as it lends them a vested interest in the labour relations status quo”.¹⁶² The participation of South African Informal Traders Alliance and other forms of informal worker mobilisation within the NEDLAC has in fact contributed to NEDLAC’s policy utterances of the role of algorithms in the future of work, demonstrating policy influence. As one activist, who acts as a representative in NEDLAC, noted:

“The informal sector is way in advance of other sectors at NEDLAC in terms of thinking through possibilities... The ILO takes us seriously and in whatever forums we are in, we are lead contributors”.¹⁶³

These processes gave rise to informal worker participation in negotiations on an economic recovery plan in response to the pandemic:

“...where it was agreed that excessive permit requirements for workers in the informal sector be waived; township and village economies be supported through better access to markets and finance; government support services for formal and informal SMEs, start-ups and cooperatives be reviewed and integrated; emerging platform work be recognized and supported; and access to affordable and universal health care be promoted. However, none of the proposals agreed between the NEDLAC parties that had a direct bearing on informal workers were included in the final document presented to parliament. These clauses were replaced with general commitments that fail to address how economic exclusion and inequality can be remedied”.¹⁶⁴

Informal worker participation in NEDLAC led to engagement on issues relating to public space management and behavioural change among informal traders and their customers, taxi drivers and passengers, and relief and loan guarantee schemes as well.¹⁶⁵ In other words, their participation has brought to the fore many of the issues that will emerge under discussions in the “Analysis” sections from page 64.

Part III – Analysis

The impact of the pandemic laid bare the realities of South Africa’s work context, challenging some traditional myths in understanding what work is. It also provided a lens to examine key areas for reform or rethinking to improve conditions for South African workers. These themes are analysed in more detail in part III.

REDEFINING WORK

There are a variety of categories of work that are used across policy and research. The functional role of these definitions cannot be disputed. However, it is also important to understand that they are not neutral. Naming and taxonomy are powerful, and sometimes underappreciated determinants of how we respond to phenomena (for instance, dictating how we solve perceived challenges).¹⁶⁶

For law, definitions are profoundly important – determining the scope within which obligations and duties arise. In research, specificity ensures the validity of both data and its analysis. There are differences between work types in labour theory, as seen in Diagram A on page 31, that look at work as core (on permanent contract), non-core (limited and unspecified contract), and periphery (informal or unemployed) which looks to work in terms of legal status.¹⁶⁷ Precarious work, instead of relying on contractual status, is a term used to describe employment that offers compensation, hours, or security inferior to a “regular” job – and because this definition focuses strongly on lived experiences, it has been used extensively in this research so far. Yet of course, many categories of work, both formal and informal, fall under the definitions of precarious work. As do many sectoral definitions of work, such as platform work, gig work and (again) informal work.

Yet even economic examinations of South Africa’s labour force are grappling with the precarity and uncertainty of the labour market in the very definition of labour.

COVID-19 has led to even more precarity, and yet that is only visible when we expand the definition to considering data on “...those in employment – at work and not at work (with known job attachment and uncertain job attachment), and those who are not employed (unemployed – narrow (searching) and broad (discouraged), plus not economically active)”.¹⁶⁸



Economists have long debated not just on definitions of work, but also its opposite - unemployment. South Africa's Statistics Agency has a definition of unemployment, *and* an expanded definition (typically preferred by researchers):

1 Unemployed persons according to the official definition are those (aged 15–64 years) who:

- were not employed in the reference week
- actively looked for work or tried to start a business in the four weeks preceding the survey interview
- were available for work, ie would have been able to start work or a business in the reference week
- had not actively looked for work in the past four weeks, but had a job or business to start at a definite date in the future and were available.

2 Unemployed persons according to the expanded definition are those (aged 15–64 years) who:

- were not employed in the reference week
- were available to work but did not look for work either because they are discouraged from looking for work (see definition of discouraged work-seeker) or did not look for work for other reasons other than discouragement.

You can see very clearly how expanded definitions of unemployment seek to manage structural impediments to work. Yet of course, “clear” definitions in themselves don’t assure accuracy for unemployment statistics.¹⁶⁹

And it is interesting to consider how many of these supposedly rational or “scientific” definitions mask assumptions of value and morality. The simple point here is that definitions of what is work and what isn’t matter. It matters not only because it can create the bounds for legal obligations (it both “draws (and redraws) the boundaries of inclusion (and exclusion)”), and it influences the very economic description of the landscape, but also it provides social value as to what constitutes valuable and invaluable work.¹⁷⁰

When we consider the stories of the workers in part I, all of them describe the labour exerted to put food on their tables as “work”. As Moja noted:

“So what [people] see, if you ask them, it’s kind of irritating, they always have a picture of a sex worker in a mini skirt and high heels, and long nails with a bag. I don’t understand where do they get that picture from? They always see the sex workers as street-based. It’s like any other job, there is a cleaner, there is a clerk, there is HR, there is managers, so you need to understand, sex work industry is like that...The best part of my work is that I make more money, which is very important because I entered the industry to make money. The other thing is that I am in control.”



While the nature of both law, policy and research will of course always use significant energy on creating borders (and recreating borders can be an act of profound empowerment as will emerge as a consistent theme herein), the call here is simply to value work primarily for what it provides to the worker – and from there define boundaries.

THE ROLE OF LAW

To understand what the role of work can be in transforming approaches to work, it is worth considering more broadly what the transformative role of law can *ever* be. From the outset, it should be noted how removed much of the discussion is from the lived experience of workers. Yet jurisprudential questions are important for understanding the potential scope of law's role. Simply, human rights are naturally reinforcing, and inter-connected. One of the many values underscoring the normative capacity of human rights is its ability to keep our focus on human-centred and social considerations when addressing economic questions.¹⁷¹ This is of course predicated on an understanding of human rights that views them not primarily as a juridical matter (in other words, a tool for the courts alone), but as related to the dignity of individuals, and necessary for ensuring the respect and protection of individuals and communities.¹⁷²

Development economics can help provide some additional perspectives on the role of rights. The “capabilities approach” assumes that development, understood as freedoms, are not impeded just because of the deprivation of opportunity, but also due to the deprivation of the means for realising those opportunities (and these means can be composed of a number of resources).¹⁷³ This capability (a composite of the opportunity and the process/means) for individuals bears some similarity to the foundations of ideas of social justice based on fairness in both process and substantive opportunity.¹⁷⁴ What is useful for understanding the parameters of the role of human rights law is that the capability of individuals to enact their rights can be impeded not just by lacking the opportunity to enact them (so not just through limited access to justice, or simply the absence and/or direct contravention of the right itself), but also by being deprived of the “means” to do so. Applied to the labour context, pursuing social and economic justice chiefly through the creation and enforcement of rights is inadequate for a full realisation of well-being without redistribution, because the environment is otherwise not conducive to the real use of rights for an individual's benefit.



This also means a call for economic inclusion as a necessary component of social justice. This is confirmed by South Africa's rich academic jurisprudence on substantive equality:

“[T]he 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”.¹⁷⁵

Yet the law of course has another direct role in intervening in economic concerns through its regulatory power, rather than normative function, and this enables the distribution of goods and services, benefits and resources within and across groups.¹⁷⁶ It has been poignantly noted that:

“...a significant feature of law's role in relation to group-based inequality is that it draws (and redraws) the boundaries of inclusion (and exclusion) in both regulatory and normative/ideological terms, and this affects — in concrete and normative ways — patterns of both recognition and redistribution. Of course, law does not do so as some abstract concept, but as the product of the exercise of political and/or judicial power by executives, parliaments and courts”.¹⁷⁷

Human rights provide the normative foundations for the freedoms we value and provide recourse for the deprivation of opportunities. Yet South Africa's constitutional order goes beyond calling for the mere protection of rights, demanding of the state that it both protect, promote and fulfil the enshrined rights.¹⁷⁸

Unpacking some specific related rights gives some practical constitutional framings to the discussion. The right to fair labour practices is enshrined in section 23 of the Constitution. Yet there is no specific right of course to employment or work *per se* (though there is the right to freedom of trade, profession and occupation in section 22). Discussions on the “right to work” generally contextualise such a right as being embodied in the right not to be discriminated against in work, which the South African right to equality engages in in relation to the workplace.¹⁷⁹ In other words, rather than being the “right to a job” it is the right of equal opportunity to “pursue a job of one's choosing”.¹⁸⁰ It stands as an amalgamation of different aspects of workplace fairness, whose incongruence can present challenges.¹⁸¹



Perhaps unsurprisingly emerging from an inequalities analysis of labour law, a description of the right to work has been described as rather needing to be defined as:

“... *the right to income* [which] involves the right to engage in productive work [that] improves the living standards of the community, and to have such work valued according to its worth”.¹⁸²

In considering the theoretical notion of the “right to work” in the South African context, some research has proposed that it is instead the right to social security that acts as the salve to deal with inadequate employment.¹⁸³ In other words, the right is to not fall outside of a net of protection rather than to receive remuneration.

The transformative agenda of the Constitution – at its most simple, that aspect of the Constitution which seeks not only to maintain the Constitutional order but actively transform the social, economic and political reality to give it real expression – is realised through having justiciable socio-economic rights.¹⁸⁴ One of the foundational, historical reasons for doing so is the active pursuit of disrupting the Apartheid structures that sought to entrench cheap, Black labour at the expense of human well-being: “[T]he policy of apartheid had essentially sought to maintain Black people as an economic under-class and source of labour for the advancement of White economic interests...The effects of these policies and others was to create a situation where the vast majority of Black people had a limited education and were living in conditions of poverty. One important rationale for the inclusion of socio-economic rights was, therefore, what might be said to be a concern for ‘corrective justice’: the need to address this shocking legacy of the past”.¹⁸⁵

These rights are both of incredible relevance during an economic crisis such as that now being experienced. They remain enforceable without needing a justification from a human-centred perspective on harm.¹⁸⁶ Yet the early adjudication of socio-economic rights felt compelled by socio-economic conditions to reinforce the internal limitations of reasonable legislative action, resource availability and progressive realisation. While there has been significant criticisms of these limitations, and particularly the centrality of “reasonableness” which supposedly puts paid to a fully transformative agenda as famously seen in *Grootboom*, it has been telling that central to the adjudication of socio-economic rights is the emerging centrality of *meaningful engagement* as a constitutional review standard for determining procedural fairness.¹⁸⁷ The assessment of meaningful engagement is seen in adjudication as a mechanism for respecting separation of powers and the institutional expertise of government actors, but can also be described as an intentional limitation on the courts exercising a redistributive function.^{188 189} For others, it is a mechanism which is overly deferent to government action on realising socio-economic rights.¹⁹⁰



Either way, it may be best viewed as the court's recognition of the limits of socio-economic progress through court action, and its attempts to encourage the expansion of the political spaces for doing so. In assessing their impact, commentators have noted:

“Despite the constitutionalisation of these [socio-economic] rights, however, masses of South Africans still do not have access to adequate housing, health care and a quality basic education. [But] litigation has forced the adoption of policies where none existed, helped address a significant health crisis and forced the implementation of policies where government has been dragging its feet. It has also strengthened the hand of civil society groups in negotiating with the government”.¹⁹¹

But of course, these broader considerations of socio-economic constitutional frames don't detract from the civil-political foundations of the right to fair labour practice. Section 23 (1) states that: “[e]veryone has the right to fair labour practices”, and the right includes the right to join a union, participate in strike action and to collective bargaining. These rights are given effect to through the LRA, and it has become important to remember (in the consideration of the adjudicatory landscape) that rights that now commonly form our understanding of fair labour practice, such as the right to not be unfairly dismissed, have their origins in that statute rather than directly from the Constitution itself.¹⁹²

The labour law environment is its own ecosystem of influences. A critical view on the purpose of labour law has been offered by Judge Davis as:

“The true function of labour law can be described as the preservation of the social and economic structures prevailing in society at any given moment by the confinement and containment of the basic conflict of interests inherent in the relationship between employer and employee”.¹⁹³



This critique noticeably reflects on the inability of labour law to adequately challenge structural impediments in the economic and social order that naturally seems to impede transformative constitutional goals. Collins has argued that:

“...employment law functions with other aspects of government policies to reduce or minimise social exclusion consequent upon unemployment in order to prevent a breakdown in order or social cohesion”.¹⁹⁴

Examining the South African context – and understanding our labour reality as one such as that displayed by the savagery of the Marikana massacre – there is certainly a societal need for labour law to both help improve employment quality and contribute to bettering social conditions. The courts have certainly recognised this too. Legislation is happy to intervene in the relationship between employer and employee for social reasons, with Justice Yacoob noting expressly that COIDA (originally an extension of workers compensation), best be understood as:

“...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”.¹⁹⁵

If the role of law is to contribute to better outcomes (to transform), it is required to coexist in a broader political (and policy) reality which:

“...span[s] the divide between labour law and areas such as social security, as well as the traditional institutional divides within labour law, most significantly that between social insurance and skills development”.¹⁹⁶



This begins to consider labour law not only as primarily vested in managing a power relationship between employee and employer, but rather as contributing to achieving better economic and social outcomes.¹⁹⁷ This expansive vision seems a natural progression of the acknowledgement of the interconnection between rights. How to realise these social and economic outcomes however becomes the central challenge in a broader labour law reality.

That rights and law can have a role in transformative justice – particularly in the context of recognition – does not overcome some of the functional impediments to justice in action. If we want the law to respond to lived realities, the *responsiveness* is of course implicated, particularly in the intersections between technological “progress” and work. The Collingridge Paradox explains that efforts of law to influence or control the further development of technology face a “double-bind”: an information problem (because in emerging technologies the real impacts can’t yet be wholly predicted), and a power problem: because control or change is difficult when the technology has become entrenched before regulation or law is in place.¹⁹⁸ This is associated too with the law’s “pacing problem”, which refers to the notion that technological innovation is increasingly outpacing the ability of laws and regulations to keep up.¹⁹⁹ As Larry Downes noted: “...technology changes exponentially, but social, economic, and legal systems change incrementally”.²⁰⁰ This is not, however, a prescription of law’s role, but simply a challenge to be considered when assessing its strategic value in different contexts. One can think of a very practical example in the South African labour context: the National Minimum Wage Act. The law became effective on 1 January 2019 (although there had been sectorally determined minimum wages), though political engagements in setting the minimum wage began in the late 1990s. And in spite of supposedly setting a significant bar, the impact in early economic analysis has demonstrated negligible impact:

“The [National Minimum Wage] required a substantial wage increase for a large group of workers – we estimate that almost half of all employees (46 per cent), or 5.2 million workers, earned hourly wages below the NMW in the period prior to its introduction. This relatively high level of the NMW, resulting in widespread coverage, pointed toward a policy intervention that was likely to have substantial labour market impacts. What the data from our analysis suggests, however, is that in fact the effects of the law, at least in the short term, have been much more moderate than expected. For the majority of workers, hourly wages do not appear to have increased substantially.”²⁰¹



CRIMINALISATION

There are both forms of direct and “indirect” or *de facto* criminalisation of relevance to South Africa’s work context. The way that policy and regulation are enacted and implemented in South Africa results in forms of *de facto* criminalisation of many types of work, where offences or penalties tend to impede only *certain* worker types. The example of given by Mbili shockingly highlights this, after he served jail time for outstanding fines:

“The biggest risk in driving taxi is going to jail. Taxi drivers get a lot of fines, on a daily basis for various stuff, like overloads, driving without a (PDP) license, stopping on a no-stopping zone, people jump robots, jump stop streets, travelling with the door open, driving on the yellow line...But what you put in is what you get out in the taxi business. If you are going to be sluggish, you’re not really gonna make a lot of money...There are two different kind of fines they can issue: a fine straight to you or issue a fine to the taxi’s owner. Fines about the van, like not having a fire extinguisher or too little thread on the tyre will be issued to the owner. But most of the fines are related to driving and are issued to the driver...If you have too many fines that you can’t pay, it becomes warrants and traffic officers can get you at a road block. They take you to the court and the judge will say you need to pay X amount, and if you can’t pay, then they take you to jail. This is what happened to me. Over two years, my fines added up to R70 or R80,000 and I didn’t have the money to pay it...I was in prison for six months. When you get out, your fines are wiped clean...And you see, the no-stopping zones is where people usually wait for a taxi, where it’s busy. So there is regulation to a certain extent. You want us to drive people to work, but everywhere we stop is wrong [and] there hasn’t been provision made. If we’re there legally, then how can it be illegal everywhere we stop if you haven’t made provision for that? Then you shouldn’t have taxis, then it should be illegal.”

When the ordinary functions of a form of work are subject to penalisation as in Mbili’s story, the conditions for *de facto* criminalisation are created. In many ways, the state (in these cases through local government and policing structures) bemoans the lack of regulation of the taxi and Uber industries, while simultaneously regulating it in a way that most disadvantages the *worker* rather than the employer. This is true of other aspects of the taxi industry, which regularly flouts labour laws and provides poor working conditions for workers – while behaving as unregulated, uncompetitive cartels chiefly to the benefit of a cohort of owners.²⁰²



Moving to the gig work and e-hailing more specifically, these patterns continue. As Tatu noted:

“[The impounding of Uber vehicles is another challenge]. The government is actually making money off the Uber with the impounding and stuff because Uber is letting us drive, they’re giving us the app, but the city is not issuing permits. So now the city’s taking it as an advantage for them to impound and make money. The city was issuing permits first, but then they saw there’s a loophole for them to start making money, so they stopped issuing permits to allow us to operate. So now they’re just impounding left right and centre...You need to understand that when they impound that vehicle, it’s R7,000 and R2,500 fine for the driver that need to be pay when the vehicle is collected from the impound. So you need to pay that whole R9,500 to get your car back. Uber pays the impound fee to get the car out, but the other apps like Bolt and Taxify don’t... If they can just issue the permits, that would be a big help for everybody, because now you’re driving around and you don’t know what’s around the corner and you’re driving into these cops and they’re taking your vehicle. And it’s not nice because you know, for a lot of us, that’s our only income, so now we need to wait on Uber to pay this money and so now what do you do – you sit at home, you have no other income. It’s bad. So for me, the only thing I would request is to be more lenient, start issuing more permits to the vehicles and let the vehicles operate.”

The COVID-19 policy responses that were enacted can be seen as a continuation of these trends. Even when political statements were made supposedly focused on easing informal work conditions in recognition of how disproportionately impacted informal workers were by the essential “criminalisation” of public space, and despite direct commitments by the minister of cooperative governance to the issuing of the necessary temporary permits during the hard lockdown, traders across the country reported the reality as being:

“... [that nevertheless] traders across the country reported metro police harassing fresh food traders as they lawfully returned to work. Traders were left to their own devices to work out how to trade with appropriate social distancing and to have access to water for sanitizing. A prominent trader leader said: ‘If we depend on officials we will get nowhere. They are ducking and diving’”²⁰³



These become examples of the active devaluing of particular kinds of work through statute, and even an extension of how South African laws sometimes elects directly to “penalise poverty”.²⁰⁴ There is of course a very direct criminalisation of work types, as well. Sex work is for instance still criminalised in South Africa. As Moja states:

“But this is not a moral issue, this is a human rights issue and if they focus on human rights, they will be decriminalising the sex work. I don’t get it, why are we still using the 1957 laws. Because sex work was criminalised in 1957 before I was born. It was passed during the years where they were saying a Black woman mustn’t sleep with a White man, it’s taboo. Now we are married to White people, it’s no longer a problem. Why I am I still living under those laws?”

Criminalisation and *de facto* criminalisation then become another mechanism through which the work that helps South Africans survive is actively vilified by structural mechanisms.

REGULATION AND EMPLOYMENT

As seen in the contextual analysis, the South African labour landscape is regulated through different intersections; here we seek to unpack some of the more thematic relationships between regulation and its result on employment practice. The realities of work in South Africa are of course not independent phenomena, and there are structural impediments to attaining work that are born from agents of power, like law and regulation that are *also* embedded in our history. Within the South African lean social democracy, regulation has been used to expand definitions of work, but the law’s tenuous acceptance of different kinds of work manifests is well demonstrated in the context of gig work. As the latest Fairwork ratings noted:

“The majority of South African gig workers continue to be classified as ‘independent contractors’ rather than ‘employees’. Thus, where these workers fit into the spectrum between high-quality formal jobs and low-quality informal jobs remains problematic. Across contexts, our research has shown that gig work skews to the latter end of the spectrum: gig workers face low pay (frequently earning below minimum wages), dangerous work conditions, opaque algorithmic management structures, and an inability to organise and bargain collectively.”²⁰⁵



The labour regulatory context still sees a reality for drivers like Tatu where they are “estranged” from the production processes as companies like Uber circumvent the traditional (and in the South African context progressive) responsibilities of the employer, while benefiting from their labour.²⁰⁶ Yet the reality of South African workers goes even further – where often arrangements replicate the traditional taxi industry, with Uber drivers subletting vehicles from fleet owners. This leads to yet another form of employer-employee sub-dependency, with Tatu noting:

“People do have contracts when driving Uber. The contract is signed by both the owner and the driver, and we get it stamped by the police station. We don't get any sick leave, holidays or anything like that. If you need time off, you park the car [at the owner] because you can't be sick and be driving around. The owners have trackers on the vehicle, so they're watching you. You also have rent to own contracts, where for a certain period of time, if you pay a certain amount of money, by that time, the vehicle will get put onto your name.”

Even where regulation is supposedly posited a method for improving human rights fulfilment and advancements of socio-economic conditions, exclusions from regulations (like gig workers) or flagrant contraventions of regulations (like the taxi industry) seem to leave the average person that works precariously protected. Continuing from the brief discussion on the impact of the National Minimum Wage Act, 2018, it is worth considering how independent research undertaken on the Statistics South Africa Quarterly Labour Force Survey data revealed that:

“...70 per cent of taxi drivers earned less than the national minimum wage of R20 an hour and 75 per cent work more than the legal maximum of 55 hours per week. If all drivers earning below the minimum wage were paid the minimum wage but worked the same number of hours as they did before, the estimated taxi driver yearly wage bill would increase by about 30-40 per cent. So, ignoring labour laws substantially reduces the cost of operating taxis.”²⁰⁷



So, while a traditional trope of neo-liberal economics is that regulation of labour results in higher costs to companies that will ultimately negatively impact employment numbers, it seems starkly clear that this is in no way a feasible risk in a climate where compliance is low with respect of many types of vulnerable workers. In fact, recent analysis of the impact of the National Minimum Wage Act, 2018 also discovered (with the caveat of the limited nature of the study data given the period) that:

“Notably, we find no evidence of an associated decrease in employment [due to the introduction of the National Minimum Wage Act]”.²⁰⁸

A claim that de-regulation more broadly better serves the economy (of course begging the question what *kind* of economy?), and that deregulation of labour more specifically promotes job hiring, must be confronted with evidence.²⁰⁹ This is an important foundational debate for thinking about labour not just in terms of a transformative agenda, but as a transformation focused on enhancing equality. Studies have demonstrated that unemployment levels in South Africa have tended to remain unaffected by the implementation of any specific labour regulation. In other words, shifts in the strength of labour laws have not contribute positively or negatively to unemployment in the data.²¹⁰ In fact, there is limited evidence to back up the claim that firms are reluctant to increase the number of people they employ due to the negative impact of the country’s labour laws, which are described as “inflexible” regarding the hiring and firing of employees, or “onerous” in the prescription for minimum wage (though there are notably particular disincentives for small- to medium-sized-enterprises that should be recognised).²¹¹ However, the same research does posit a contribution to another form of inequality outcome: there are indications that attempts to circumvent the increased costs imposed by labour laws has contributed to the rise in precarious forms of work, a condition which results in unequal outcomes the results of which have been discussed throughout this research.²¹² This must to be contextualised though within the broader reality that the increased precarity of work is a global phenomenon, with 55 per cent of all jobs created since 2008 being part-time, and it is in a way of course a historical consistency too:

“[C]apital has always striven to free itself as far as possible from a dependency on labor”.²¹³



Of course, the objective of labour regulation is not necessarily to foster increased employment, but rather to improve the conditions for existing employment. We could in fact still envision a more expansive role for labour regulation, noting that if the inequality outcomes are the chief challenge, the circumvention of labour law doesn't point to its redundancy, but instead indicates the need to work on improving compliance, and access to redress. This provides further support for the need for law to be seen within its social and political context if implementation is to be ensured, and for the institutional and political foundations to remain supported, and functioning, as part of a sufficient rights and labour regime.

Interestingly, some European research has indicated that deregulation of labour (law) not only results in inequality for workers, but can contribute to inefficiencies in productivity, negatively impacting long-term growth.²¹⁴ The European research is important, because it indicates how both in contexts with strong labour law, and without, the tendencies toward increased precarity and diminished wage outcomes for workers seems a reality. There also appears immediate indications in the recent data on the impact of COVID-19 that supports the role of labour law in directly combatting inequality, through its ability to encourage job retention (though obviously not job creation). Within the data outlining the jobs recovery, while 70 per cent of the jobs were “new” jobs, “...14 and 15 percentage points were respectively due to the net decreases in temporary layoffs and the prevalence of adults reporting being in paid leave”. In other words, the increases were associated to mechanisms created by the LRA to protect employment by facilitating mechanisms that only temporarily relieve employees of work.²¹⁵

While the immediate impact of many COVID-19 regulations resulted in negative outcomes for workers, labour regulation itself should not be viewed to strongly negatively impacting employment levels. When regulations seek to intervene in relation to labour in different industries, such regulations should focus on the realities of the industries themselves with the fundamental goal being a “...transition to address inequality and socioeconomic exclusion”.²¹⁶ Precarity can be viewed in some senses as a historical reality of capital seeking to dispossess itself of labour costs and protections. Law and regulation will also need to engage with institutional and political structures for ensuring compliance, when regulations are well-designed for ensuring the socio-economic inclusion of workers.



PROTECTION

Discussions on laws, regulations and policy and how they relate to the worker bring to the fore the role of rules in the pursuit of protection. As Tatu noted:

“[Driving] is very risky. You’re not protected at all. It’s not fair hey. I think Uber, that should be their department, to take care of the people, make sure they’re covered, make sure they’re protected. But it is very dangerous also with what has been going on. The hijacks, the killing, even raping with this Taxify, Uber. It’s not nice and I don’t know what the way forward is or what these people are planning on doing for the future to better it. I guess we’ll just have to wait and see.”

This protection may be prohibitions against certain kinds of conduct, but it is also the provision of certain kinds of economic protection against negative conditions – such as the economic shock wrought by COVID-19, or even more traditional knocks like retirement or retrenchment, etc. When we complain about definitions of workers falling outside the realm of law, we are in significant part complaining about swathes of vulnerable people falling outside state protection mechanisms. The dramatic shock of COVID-19 did bring a degree of recognition to this “gap” (although that “gap” is in fact multi-faceted and reminiscent of a chasm). The minister of labour noted in his address to NEDLAC as a priority area:

“Plugging the holes in the social protection safety net – so clearly exposed during the pandemic lockdowns – for the informal sector, gig workers and the vulnerable workers in general. This will require that we take an in depth look at present provision, and would include a discussion about the very definition of what constitutes a ‘worker’ and an ‘employee’”.²¹⁷



The borders of employment protection are navigated by the definitions of worker and employee. And the borders of social protection are navigated by its own definitions, too. These definitions tend to exclude, more than include – with groups like informal workers occupying the policy gap which “...falls between social assistance and insurance”.²¹⁸ In a crisis, the scale of protections was notably insufficient – with many excluded from state *and* employer protections. As Tatu noted:

“I think the government could have done more. They could have handed out masks and sanitizer to the people, but no, you had to pay for it.”

Gig workers struggled to access benefits from platforms, given their status as “independent contractors”, with available “insurance schemes” being insufficient.

As Paul Benjamin states: “[T]hese kinds of insurance policies are not actually designed to make the benefits accessible to people.”²¹⁹ Yet, how might we reconsider what inclusion looks like for South Africa’s workers?

BENEFICIAL VISIBILITY

To be included for protection under any umbrella requires visibility – essentially, visibility and exposure are prerequisites for access to services. This of course has pragmatic benefits, controlling the extent to which resources or services are distributed to avoid duplication. Yet, the way such numeration of people results in exclusions for those deemed “unworthy” should be interrogated. As one of our other respondents, Nne, noted:

“We also tried to register to that people who were giving food. People were registering, for us foreigners it took long. We went and we followed the procedure, they said we must go to those people who were the South Africans. We went with our IDs and they said they would call us. Some people said they were called but I didn’t get any call. I tried another group again but I didn’t get any parcels at all. I thank God for my church because they were getting some parcels for the church and they always remember me.”



A call then might be for more for inclusion, but to what extent? There is a pursuit of “beneficial visibility” for many precarious South African workers – being visible *to the extent* that it benefits worker outcomes. The need for this partial visibility of course extends from the intersections of vulnerabilities that exist for many workers. As Nne describes it:

“Because I would think if you have a contract and you are a South African, you can go to any office and they will recognise you. But for us now, for me as a foreigner, and I am here illegally because I don’t have a permit, I only have my passport without a permit, so that’s one I always think even if I say I’m going to fight for that contract, even if I sign that contract, maybe it won’t work because it won’t help me because I’m scared to go to that offices because they won’t recognise me. So that’s why we feel to be a foreigner is always very tough because you don’t have rights in that country.”

Of course, there are larger implications for an economy created by Nne’s legal status, but when the goal is advancement of an economy that can expand on the positive aspects of work that in fact exist, vulnerability has to be considerably imagined. As Moja describes her own position:

“Even the decriminalisation won’t be a golden opportunity. But at least you’ll be recognised and protected by the laws of South Africa. It’s like the [gay communities], even though it’s decriminalised, the stigma and discrimination of the LGBTQI community is still there. But when you call them those [discriminatory] kind of things and they go to court, the law will protect them. That’s why we say decriminalisation is not going to bring a golden opportunity but what we are asking for is we can be protected and recognised by the laws.”



Workers are trying to navigate the forms of visibility that may be beneficial for their conditions. Determining that for different contexts is challenging, but the perspective of workers themselves is instructive. As Tatu noted:

“It’s hard to say whether taxi driving should be recognised as formal labour. Right now there’s no tax paid so government thinks we’re pocketing every cent, so what more help do [we] want? We’re letting you operate so take it or leave it. You’re not helping the government so why would they want to help you. [But] you are being a bit exploited in a sense. If you’re asking should taxi drivers get more rights, I would say yes because taxi drivers don’t get any rights at all.”

And workers are not placid in their pursuit of suitable visibility, even when traditional structures may be unknown to them. The resourcefulness of workers can express itself in non-traditional action outside political structures:

“For example, gig workers rely on personal networks to get by in their daily lives while also attempting to resist unscrupulous clients and platforms’ system of control through unique resistance strategies. [An example of a] strategy of resistance is gig workers’ use of their mobility power. In remote gig work, this relates to workers’ threat of cancelling the contracts and exiting the work arrangements... Ben, a virtual assistant in Nairobi, for example, considers himself as belonging to a ‘middle-class’ family. He was educated in a private school and has an undergraduate degree in business studies. His first job was posting ads on Facebook for US\$3 an hour. His first major contract was for a Canadian client as a virtual assistant. He gained the trust of his Canadian client over a year by handling his diary and appointments well. His client refused to increase his hourly wage. So, on two occasions Ben cancelled the contract with this client. Both times, the client hired him back on higher wages, a key aspect of workers’ enhanced bargaining power – though his hourly wage rate was only increased by half a dollar an hour.” [References omitted].²²⁰

This action is interestingly expressed (just in this example of course and not generally) as wilful negotiations of the worker’s literal visibility. The challenge for both worker advocacy, and policymakers, becomes determining the “how much” and “when” of visibility, the boundaries of which will be a distinct ground for contestation.



COMPLEXITY AND ECOSYSTEMS

When considering the context and the worker's stories, it becomes clear that there is a complexity to the systems and structures that both exist for workers, but also that *should* exist for workers to meet their needs for protection and promotion. There are new forms of complexity that must be embraced to promote a variance beyond "traditional" notions of work. Some of the demands that have been made under alternative forms of precarious worker organisation provide an example:

"[Street trader] demands...are not those associated with formal unions. They are not demanding higher wages, but a secure space, infrastructure and facilities which will allow them to earn a living income. Their demands are not to an employer but to local and national state authorities...Vendors are demanding too that they be considered as both traders and workers. This is a radical assertion with which unions and state authorities are still grappling. It entails new ways of viewing vendors with implications for the amendment of a range of labour and other laws, and the implementation of rights and responsibilities which assert the dignity of informal work."²²¹

What is demanded, no less, is a re-envisioning of what work is and a flexibility in the application of legal boundaries. How workers organise, and in relation to who they organise against, needs to be reimagined. Multistakeholderism was the vision for institutions like NEDLAC, but the demands for this multistakeholderism are only appearing more urgent. The ability of institutions to respond to this complexity is a question for both policy and practice, because of the changing shape of necessary stakeholders *and* the way political power is organising in response to shifting conditions. The CCMA in considering its environmental analysis noted specifically that:

"It is...anticipated that labour will reposition itself at all costs to retain membership and its role in the labour market that could contribute to protracted wage disputes".²²²

In the same strategic plan, it noted that inter-union rivalry was only set to increase and was already impacting labour peace and stability.

Part V – The future

The consideration of worker stories and context gave rise to some notable themes. What must be considered now is what these realities mean for the future of South African work.

CENTRE THE WORKER (A FRAMEWORK)

When worker stories are centred, it helps provide a particular perspective for designing solutions. A framework can be constructed for helping to do this.

Diagram B: A framework for considering key worker outcomes (Razzano 2022, to be published).





Diagram B presumes the worker sits in the centre, with key positive outcomes surrounding them. While obviously not exhaustive, the diagram seeks to highlight key outcome areas to be:

- Establishing security – for instance through unemployment insurance, retrenchment protections and social protections like pensions.
- Ensuring or improving workplace conditions – for instance health and safety related to COVID-19 compliance, or protection against discrimination.
- Establishing and asserting power – such as in starting trade unions, or co-operatives.
- Securing and increasing income – for instance through a minimum wage Act, or attainments through bargaining councils.
- Accessing opportunities – for instance access to job opportunities, license to trade.

These outcomes can be sought by using different levers and strategies to help secure them, such as politics and representation, institution-building, judicial recourse, access to information, community-building, funds and subsidies, policy, law and regulation. Of course, how each lever might be successfully manifested to achieve an outcome will depend on social, political, and economic context factors at any given point. Again, the intent of this diagram is not to be exhaustive, but rather seeks to provide some indication of how a worker-centred perspective might inform the design of solutions (policy and otherwise) for achieving particular worker outcomes in South Africa. Often when the mechanism or lever is centred in solution descriptions, gaps remain. As an echo of the work of other social and legal academics, breaking down barriers between “labour law” and other strategies for forwarding aims of workers is an important step to move beyond a lean social democracy.²²³

This kind of framework is useful, because there is so much to learn from centring worker voices. When Nne was confronted by gaps in protections and opportunities during COVID-19, she describes her personal strategies for survival:

“I was also selling my stuff, like my clothes. I remember when I needed some money to buy veggies, I would sit in front of my house with my old clothes and people would just buy for R5 or R10 and then I get to buy something.”



Borrowing techniques from user-centred design poses a multiplicity of benefits by revolving around the perspectives of those who we are seeking to “solve” for.²²⁴ It allows consideration of how people actually behave, but also has an important normative value: by solving for workers through listening to them, we appreciate they are part of the solution rather than the “problem” to be solved. In practice, it changes the way we not only understand different worker’s needs, but how we understand work itself through reference to what it means to workers. As Tatu stated:

“I always wanted to be a traffic cop because it looked nice. But then I left school in Grade 9 and I went to work. I just wanted to get money, I wanted to be able to live, because at that specific time in my life I was just at home, and it wasn’t very nice at all. The money wasn’t good. It was hard labour, you know. I think at that time when you’re at school, you just believe that everything is going to fall into place, and that everything will work out, but at the end of the day it doesn’t go that way.”

Work has value for people that is economic and otherwise; it can serve people’s needs rather than extract from them. When we centre the worker perspective in both the problem solving but also the problem analysis – as seen in the contextual reviews of quantitative and qualitative data – a question emerges: how can we leverage on their resourcefulness already demonstrated by workers in South Africa?

BENEFICIAL VISIBILITY

While beneficial visibility emerged as a thematic idea to describe some perspectives on worker needs, there may be different ways of actioning the idea in order to realise potential outcomes. One possible avenue is expanding the remit of action available to different workers to participate in protection systems. The possibility of electing to participate in forms of expanded unemployment protections, for instance, could be a solution when people are working, even if on a contract. Such voluntary participations in state-subsidised forms of protections might close some of the gaps revealed by the fact that only 7 per cent of job losers during COVID-19 lockdowns were able to access UIF relief. Changes in relation to the TERS system are an immensely positive step in this regard:

“The change in the TERS system, whereby employers do not have to be previously registered and employees can apply directly, is useful for informal workers. Concerted efforts need to be made not only to publicize these changes among informal workers but to ensure the system is genuinely accessible.”²²⁵



However, there are urgent requirements in terms of COIDA – particularly in relation to e-hailing delivery drivers, who are incredibly vulnerable to injury.

Strongly associated with the idea of beneficial visibility is that of identity. Moja raised the issue strikingly:

“[These problems apply] when you are opening a bank account. They request all those types of things. That’s why sex workers end up living with the money under their mattresses. People think sex workers are useless, they are not useless. Because now you have R10,000 in the house. You don’t know what to do. You end up spending it anyhow, anywhere, because you can’t take it to the bank. You are not allowed to bank it because they will ask a lot: proof of address, this and that, your payslips, and you don’t have that kind of supporting documents so you can’t open an account.”

The exclusion from formal economic apparatus like banking leads to a variety of vulnerabilities. How can workers negotiate their visibility to formal structures to the extent necessary to derive benefit? This is a question not just for institutions to consider, but for workers themselves as they design their own political agendas.

FOSTERING INNOVATION AND EMPLOYMENT

With precarious employment and the further rise of the “alienation of the worker from the production process and fellow human beings” witnessed in the modern economy,²²⁶ the question becomes how to create an enabling environment for work that already exists. Fostering entrepreneurship and the development of small- to-medium-sized enterprises is frequently addressed in South African policy, but the practical requirements for that fostering can be given specific focus here. Workers require not just the protection facilitated by laws and social policy as described, but also active promotion to pursue opportunities and access the work they need, and which can help them thrive. Yet this promotion is not just about supporting existing work, but also about contributing to the growth in actual job opportunities for people:

“[D]e-industrialisation in South Africa, [sees] fewer larger firms are providing employment, and more people are employed in medium and small companies...[The] informal sector should be a focus for policy that seeks to leverage skills opportunities and support the development of businesses.”²²⁷



Forms of subsidy and promotion in this area already exist, for instance through the Township and Rural Enterprise Programme. Yet frequently, high levels of bureaucratic constraints for participation impede broad viability.²²⁸ And this pattern of bureaucracy as a limitation for small-scale innovation is consistent through both the literature and lived worker experiences. Academic literature reflects:

“There is an onerous bureaucratic process that self-employed operators are required to go through, with long time lags that augment business costs.”²²⁹

And it is this context, which left Tatu imploring:

“If they can just issue the permits, that would be a big help for everybody, because now you’re driving around and you don’t know what’s around the corner and you’re driving into these cops and they’re taking your vehicle. And it’s not nice because you know, for a lot of us, that’s our only income, so now we need to wait on Uber to pay this money and so now what do you do – you sit at home, you have no other income. It’s bad. So for me, the only thing I would request is to be more lenient, start issuing more permits to the vehicles and let the vehicles operate.”

Bureaucracy acts as an impediment to registering for benefits, accessing permits to trade, but also to impeding the ability of people to work which is particularly risky and debilitating for those precariously employed. As Nne noted:

“You just go there and then nothing happens and if you are working for somebody, then you are asking ‘I am going to the Home Affairs to renew’ and you take a day off and you go there, then it’s not renewed. Then you come back to your boss and ask ‘Can I have a day again, it didn’t work yesterday’, and then those bosses say no, I don’t think you are serious about working here.”



This takes the issue back to challenges of ecosystems. The ability to work cannot be divorced from the context of needs for efficient and effective government and e-government service delivery. And this gives rise to even more complexity. The need not just for improved service delivery and governance, but also even for improved co-operative governance (an issue for the further emerging multistakeholder landscape as well). It is not enough that government and the private sector cooperate, but also that government departments co-operate as well:

“The protests in the [e-hailing] industry are fuelled by policy incoherence and weak responses to digital business models. Local and provincial authorities are advised to introduce measures, which will improve efficiencies in permits and licensing systems. These systems have a huge bearing on sector competitiveness and the costs of doing business.”²³⁰

INDIVIDUAL FIRMS

One clear gap in a framework for analysis which centres workers, is that there is a strong omission throughout the research on perspectives of individual employers. That can be a topic for further research. Yet, clear opportunities from the literature still emerge, particularly given the focus on multistakeholderism in the worker ecosystem. Naturally, many of the regulatory discussions are of direct impact on employers. Yet, outside of vital rallying cries for compliance with laws and regulations – which include requiring acknowledgements of actual employment even in platform contexts (we think here of COIDA and other injury protections for e-hailing drivers)²³¹, there are proactive forms of support for work already being demonstrated:

“Whilst it is generally acknowledged that increased automation displaces labour, the auto companies interviewed for this study rarely reduced their total employment as a result of increased automation...[South African] firms appeared to be highly sensitive to the labour market in which they operate, characterised by endemic unemployment. Some companies chose strategically to automate some plants while deliberately maintaining others on a labour-intensive mode, in order to avoid job losses. Companies appear to be doing that to retain employment with increased automation, often opting to relocate employees within the company, and engaging in retraining”.²³²



Yet of course relying on goodwill along to contribute to broader improved conditions for workers will be insufficient. It is not just about regulations; it is also about ensuring the political will to *enforce* these regulations. For instance, the failure of the state to compel full regulation of the taxi industry and enforce existing competition regulation leaves not just the consumer, but the taxi drivers too at almost chronic disadvantage.²³³ Considering how else employers might be compelled to participate in creating a more positive environment for workers, then implicates the organising of labour.

ORGANISING

The organisation of labour is being challenged by both the nature of work, and the space of work. The rise of informal and precarious work, as well as other significant political realities, has seen declining union membership (though not for public sector unionisation). Yet there are some demonstrations of a willingness in South African unions to potentially embrace informal and precarious workers – a central factor explaining some trade union membership gains in the broader African region in recent years.²³⁴ Often, technology is being effectively incorporated into these new forms of union activity and organisation. There is the possibility of a more progressive, inclusive agenda for South African unionisation:

“Labour unions’ organisational strategies can shift to favour employment creation and the retention of work over wage structures that only improve the conditions of unionised workers and discourage employment for unskilled workers.”²³⁵

Yet of course, alternative forms of political organising will also be an important avenue for continuing to advance workers’ rights.

Another important notion in the context of political organisation is that of space. What is emerging as an increasingly dominant phenomena – exacerbated by the COVID-19 pandemic – which sees the challenge of organisation and solidarity without coordinated physical space. When COSATU were still working on the Vulnerable Workers Task Team, it sought to amend its perspective on union rights to expand *where* workers organise in an acknowledgement that a central “factory floor” vision is no longer the reality of the workplace, which is increasingly digital (or even public). As Webster & Forrest noted:²³⁶



“Work in standard employment usually occurs in defined built spaces such as factories, offices or shops, at certain fixed times. The regulated work-place is crucial for organizing workers into unions. In contrast, precarious work – whether formal or informal – takes place in a variety of spaces (some invisible), such as streets or workers’ or employees’ homes.”

While workers have sought to adapt to these new conditions (for instance through the e-hailing strike discussion earlier), there are strong indications from the COVID-19 data (and experiences) that structural elements have constantly impeded these adaptations.

LAW AND REGULATION

The law struggles to express socio-economic justice imperatives, although the South African constitutional landscape is exceptionally progressive in this regard compared to other constitutional jurisdictions. Further, law and regulation suffer from their pacing problem, leaving modern workers facing novel conditions unimagined for protection, or at least with no mechanism for recourse.²³⁷ Though high levels of inequality, like those seen in South Africa, beg for redistribution, the laws redistributive power is often not realised in practice – in spite of the potential seen in the drafting of existing socio-economic clauses of South Africa’s Constitution.²³⁸

However, there is an unprecedented role for law. The law can *create* work, at least to the degree that it *recognises* work (and kinds of work) as worthy of protection. This is partially a normative function. The *Mahlangu* judgement for instance is a vital step to recognising the vital, yet maligned, role of domestic workers in our economy. It also provides direct benefits for workers: compelling obligations for the benefit and protection of workers in different ways. Strategic litigation, particularly in a transformative constitutional democracy environment like South Africa, could be used to include different kinds of workers within structures through recognition. But even strategic litigation implies political organisation – communities of workers must be brought together to define their needs for further advocacy.

When the law intervenes in economic spheres, there is the potential for redistribution, but work on the NMW has already begun to identify the limitations of such ambitions. The law may try and compel political impetus, but there is always a limitation to that influence. South African regulatory regimes at least seem ambitious in their drafting – a part of the preamble of the Competition Act, 1998 is “...to promote employment and advance the social and economic welfare of South Africans”.²³⁹ There is a written statutory landscape that tries to move beyond protection, to active promotion and prioritisation for work. Yet there is still insufficient, good work available for people.



Leveraging existing labour institutions as creatively as many informal worker organisations have already begun to do in South Africa reinforces the value of multistakeholderism in the realm of regulation. Representation matters in the establishment of obligations and constraints, and institutions must facilitate this, because it also facilitates adapting to the technical and other conditions of the work itself. As former Chief Justice Pius Langa when speaking on transformative justice noted:

“[T]ransformation is not the responsibility that must be borne by the courts alone.”²⁴⁰

Ecosystems must be developed to drive positive outcomes for workers, and these cannot be achieved within the confines of law in isolation.

POLICY

Aligning policy with socio-economic transformation should be a vital step in creating an ecosystem that works for the majority of workers.²⁴¹ The reality of COVID-19 saw policy responses that either excluded the most vulnerable, or failed to address the most vulnerable. Looking at the most current Presidential Employment Stimulus data, while it was able to benefit 85 per cent youth and 63 per cent women, it created 673,514 jobs, supported 143,920 livelihoods and helped retain 40,399 jobs.²⁴² This in an economic climate that saw 2.9 million jobs lost as a result of the first lockdown.²⁴³ The state is not able to truly stimulate the jobs climate in a crisis independently. While COVID-19 highlighted how valuable the protection of existing jobs is, and how labour regulation that discouraged retrenchment had some positive impacts on jobs retention, the crisis in the long-term remains one of creating and promoting quality work.

There have been some important long-term impacts in the world of protection through policy. There is a growing political discourse in support of a Basic Income Grant to plug the gaps in the protection landscape that were again highlighted (academics and activists in South African had been highlighting this gaps already for many years), with the minister of social development stating:

“We have also highlighted that the Special COVID-19 SRD grant should ideally be a stepping stone to a Basic Income Grant. We are currently working on the policy aspects surrounding this, including the implementation and resource mobilisation aspects related to this Grant, working with various stakeholders through a series of consultations and will provide updates on same accordingly.”²⁴⁴



These social grants must continually be contextualised in terms of their amount (it cannot be forgotten that the SRD grant was R350 a month). Looking back at Diagram B, and the stories of workers, grants and social protection are only a part of what is needed to help workers thrive.

As a general reflection on policy, what is clear is that the law has been used to expand inclusion within policy, and reactive changes have been made in response to activism, resistance, or simply clear inefficiencies in policy. This reactivity will not be good enough to drive a transformative agenda that promotes (and recognises) the realities of work. While policy is frequently cited as the key influence area in relation to a number of demands, the *creation* of that policy should not just include multistakeholderism, but be responsive to that multistakeholderism. The voices of workers must be centred – and not the idolised “employee” that doesn’t feature at all significantly in the true landscape of work.



Research conclusions

The world of South African work is not one of employment. The reality is one of precarity and exclusion from policy and benefit. The majority of the work which helps people survive lies outside the bounds of protective policy, but even outside the bounds of political and social discourse. These differing forms of invisibility are a result of inequality, and expand the negative impacts of inequality. Yet the stories of our workers demonstrate that they should not be ghosts within a system, but rather central protagonists in the story of South African work.

The COVID-19 crisis – and the economic shocks it rendered – did not necessarily create new inequalities, but it did highlight and exacerbate them. When we listen to the stories of South African workers, and how they were compelled to navigate the crisis and disadvantaged on multiple intersections, it demands that new approaches to law, policy and strategy be created to improve the quality of work available to South Africans; and that this quality needs to be improved across a number of measures (see Diagram B).

Precarious work, and its different components, need protection, promotion and prioritisation in policy. Yet given the predominance of inequality in South Africa, the failings of either law or policy to offer real redistributive functions remains an exceptional challenge. Promoting innovation and entrepreneurship is important for increasing opportunities for work in a context where jobs are not readily available, but these solutions cannot be considered in isolation from redistribution strategies.

That so many workers fall outside the existing systems of protection and promotion is not an indictment of the workers. Rather, it is an indictment of poorly designed systems. It is not just that different forms of law, policies and interventions may not benefit precarious workers; it is also that they frequently intentionally undermine such workers. An example of this is how informal work, an important mechanism for absorbing economic shock even if not an ideal one, was actively prevented from playing this role given a number of intersecting conditions. The resourcefulness demonstrated by South African workers should be viewed as a learning opportunity – an opportunity to promote and expand on strategies that serve workers, when systems otherwise failed. This is again why centring worker stories is such an important necessity.



As much as these inadequacies are born of political and economic realities, the social valuing of what is and isn't valued work is significantly influential. Yet the stories of our workers demonstrate how valuable their work is for themselves, and their families, even when it is by no means their ideal. The dreams of our workers are not beyond the realm of imagining – and can be realised through proper policy and law, but also through the encouragement of political organisation to help drive worker demands. It is appropriate to end centring the dreams of Tatu, in respect of his memory, and in acknowledgement of the innate humanity of all the workers that COVID-19 impacted:

“I always wanted to be a traffic cop because it looked nice. But then I left school in Grade 9 and I went to work. I just wanted to get money, I wanted to be able to live, because at that specific time in my life I was just at home, and it wasn't very nice at all.

The money wasn't good. It was hard labour, you know. I think at that time when you're at school, you just believe that everything is going to fall into place, and that everything will work out, but at the end of the day it doesn't go that way.”



Key recommendations

For workers

- Organisation of labour should be responsive to the realities of work. Workers should organise in relation to shared interests, leveraging new technologies to facilitate engagement now rendered difficult given the changing “space” of the workplace.
- Traditional trade unions will need to reimagine their definitions for workers, or else risk being undermined by naturally emerging grassroots forms of organisation and their own declining relevance.
- Existing institutional arrangements should be leveraged, with examples already emerging in relation to NEDLAC.
- Workers will need to navigate the realm of beneficial visibility – determining in each case to what extent their visibility to systems is required to derive benefit. This visibility is an important component of their political power.
- The effective utilisation of legal mechanisms for recourse and advancement would be well focused on issues of recognition.

For policymakers

- Policy should be framed in the context of the fact that the majority of South African work is marked by various forms of precarity.
- The design of policy on work should centre workers, but all interests can be represented through forums and mechanisms established to engage multiple stakeholders into policy design.
- Policy must respond to the realities in which workers find themselves, and expand the remit for self-protection mechanisms for workers to help alleviate against the risks born of non-compliance with regulations by employers (both acknowledged or not acknowledged).
- Policy needs to actively promote innovation and entrepreneurship for communities and workers.



For institutions related to work

- Institutions must adapt to the precarious worker as the dominant worker reality. This should influence their internal policies, but also the manner in which they reach out to worker communities and provide assistance. For institutions like the CCMA and even NEDLAC, this is not just important for worker outcomes but important for the institutions to maintain their credibility and relevance.
- Institutions will need to facilitate multistakeholderism, in consideration of an increasingly complex work ecosystem. This will increase their efficiency and relevance.
- Given the precarity of most workers, a significant focus needs to be given to accessibility of services, and the efficiency of service delivery to those seeking to access institutions and their benefits.
- Institutions must be appropriately capacitated, in terms of both economic resources and technical skills.

For lawmakers

- Protections should consider the real breadth of work in South Africa in its definitions.
- Labour protections and fair labour law can play an important role for helping to ensure job retention in the face of economic shocks.
- There should be a general principle for the decriminalisation of unharmful work practices.
- The implications for *de facto* criminalisation are that the design of legislation should ensure multistakeholder engagement and the facilitation of public participation to mitigate against unintended consequences in the creation of offences through law.
- Appreciating the realities of work is required both for designing solutions, but also for compelling obligations where they exist (for example, the enforcement of labour protections within the taxi industry).



For employers

- Employees in practice should be employees in fact. In other words, employers should recognise the rights of employees – rather than seeking to circumvent labour obligations through temporary contracting, and other avoidance techniques.

For future research

- Explore employer stories that can be used to buttress these findings, particularly from small- to-medium-sized enterprises (given the other innovation recommendations from the research).
- Explore simple tooling and resources creation that can action the research findings, outside the narrative and discourse findings.



Annexure A: non-exhaustive timeline

- 5 March 2020: First positive COVID-19 case in South Africa announced (entered country 1 March 2020).
- 15 March 2020: National State of Disaster declared and first local transmission case announced.
- 17 March 2020: National Coronavirus Command Council established.
- 18 March 2020: Minister for Cooperative Governance and Traditional Affairs, Nkosazana Dlamini Zuma signed a government gazette limiting the number of patrons at pubs, clubs, and restaurants to 50. Also, CCMA cancelled all scheduled cases and prevented walk-ins.
- 23 March 2020: 21-day lockdown announced.
- 26 March 2020: Lockdown came into effect, vague regulations on contact tracing.
- 8 April 2020: Revised directive on TERS benefit.
- 9 April 2020: Two-week extension of lockdown announced.
- 21 April 2020: R500 billion “stimulus” announced.
- May 2020: COVID Relief grant implemented.
- 1 May 2020: Alert level decreased to “level four”.
- 1 June 2020: Alert lowered to “level three”.
- 15 August 2020: Announcement for “level two”.
- 18 August 2020: Alert lowered to “level two”.
- 30 April 2021: Original COVID Relief Expiry (“first phase”).
- August 2021: COVID SRD Grant “second phase” initiated.
- 4 April 2022: South Africa’s National State of Disaster was terminated.
- March 2023: COVID SRD Grant expired (no more new grant applications were accepted from April).



Annexure B: acronyms

ANC	African National Congress
AMCU	Association of Mineworkers and Construction Union
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
LRA	Labour Relations Act
NEDLAC	National Economic Development and Labour Council
NMW	National Minimum Wage Act
SAITA	South African Informal Traders Alliance
SRD	Social Relief of Distress Cash Grant
TERS	Temporary Employer/Employee Relief Scheme
UIF	Unemployment Insurance Fund

Annexure C: research team and contributors

Gabriella Razzano:	Primary Researcher
Dr Fola Adeleke:	Secondary Researcher
Lenina Rassool:	Secondary Researcher (Interviewer)
Lyatitima Mate:	Research Support
Nino Rodda:	Research Support
Dr Araba Sey:	Content Review
Dr Jonathan Klaaren:	Content Review



Annexure D: methodology

Research ethics

The start of the methodological outline begins with ethics, given the importance of trust, ethics and humanity in the design and implementation of the research overall. Research ethics were the primary concern in the research methodology. A shared research ethics policy was collaboratively designed and shared by the lead researcher with the interviewer and secondary researchers, which included measures designed specifically in line with the mandates of the Protection of Personal Information, 2013 (the South African legislation was selected as the main site of drafting). All interviewees participated completely voluntarily, with no financial inducements or incentives. Their consent to participate was received after full information was provided to them about the nature of the research, and all were provided the option of anonymity, and unconditional withdrawal or refusal to respond to questions. The safety and interests of our interview subjects was paramount.

While consent was obtained to name the four main interviewees whose stories forefront the research, a decision was taken by the lead researcher not to provide their names as it may present unintended risks to the interviewees that are not necessary for the research. Engagement with Tatu's family was on-going, and will continue to be on-going.

This research was funded by the Atlantic Fellows for Social and Economic Equity COVID-19 Rapid Response Fund.

RESEARCH QUESTIONS

In the preliminary stages of the research, the following research questions lay the framework for the original data collection which were defined and collected by the lead researcher and secondary researcher:

Broad

- 1 How can labour law in South Africa better respond, and encourage both protection and employment, in a post-COVID world marked by a growing digital economy?
 - How do we project labour outside of law?



- 2 How can we package knowledge on existing labour protections for the short-term as a rapid response to COVID-19-related challenges?
 - How much is COVID, and how much is existing?
- 3 How can user-centred design in research (focusing on both the employer and employee) be used to design policy recommendations that can balance the needs and incentives of both groups to inform policy recommendations on labour protections?

Discrete

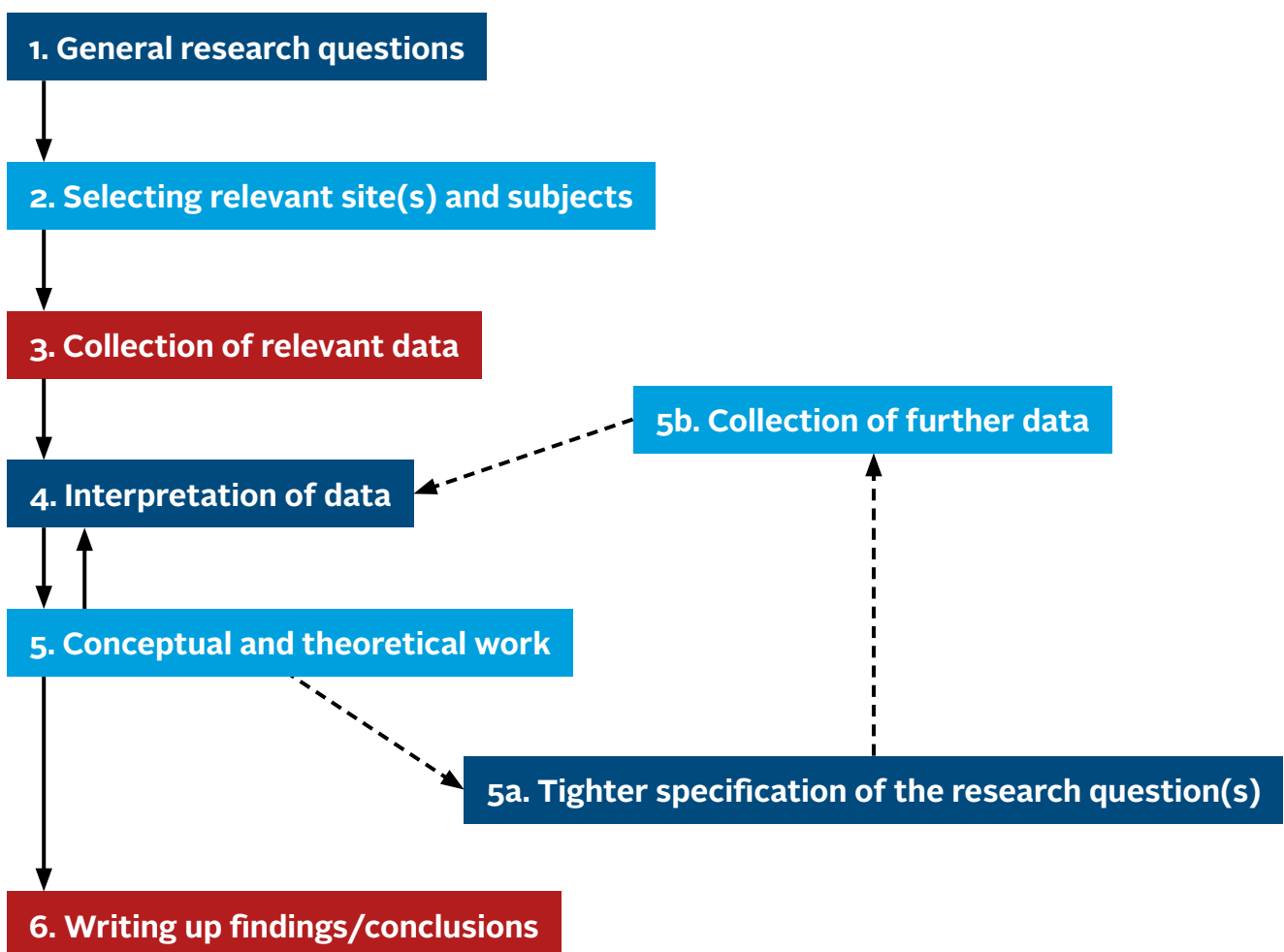
- 1 What role can law play in improving, or contributing to, positive economic outcomes? (Theory)
- 2 How should the realities of South Africa's labour market impact the design of policy responses to COVID-19? (Prioritisation)
 - What have the differing impacts been in relation to formal versus informal sector employment as a result of COVID-19, and how should that inform policy responses?
 - What are key vulnerabilities in labour dynamics in South Africa, and how do they relate to inequalities (gender, race, digital, and others)?
 - What is the particular relevance of precarity in South Africa's labour market, and how should this inform protection and promotion?
- 3 What has the impact of COVID-19 been on the practice of retrenchments in South Africa? (Protection)
- 4 How can the existing realities for obligations of employers be leveraged as an immediate response to COVID-19-related priorities in terms of protection and promotion?
- 5 What has been the impact of TERS on employment "retention", and what does this imply for broader policy responses? (Promotion)
- 6 How do social protection and labour protection co-exist in the South African context to inform future labour policy interventions? (Promotion)

RESEARCH DESIGN

Process design

Research is really an act of exploration. This research was designed iteratively and used a combination of both academic and commercial research methods. In terms of structure, the research was informed by the qualitative process outlined by Bryman:²⁴⁵

Diagram C: Bryman's summary of a qualitative research process.



→ Advised process pathways - - → Context dependent pathways

While that informed the undertaken progression, the method (which resulted in a later pivot in primary data collection addressed in the brief on page 103) was also informed by innovation design, wherein “user-centred” design is a gold standard for developing products (and solutions).²⁴⁶ That user-centred principle influenced the primary data collection (and the focus on worker stories). Participatory action methods were also involved in preliminary stages.



Data collection

Initial data was collected through background research collated in direct response to the original research questions. This was done by the lead researcher and the secondary researchers. This extensive literature review was then used to refine the data collection strategy for the next phase of the research. Leveraging the outline seen in Diagram C, the second phase of data collection was then designed (see steps 5a and 5b). An analysis of the preliminary data saw a need for more significant worker-centred content, recognising the incredible value of understanding perspectives and behaviours to design responsive policy (and other) solutions for identified problems.²⁴⁷

After a workshop to design a broad framework, questions for semi-structured interviews (designed leveraging the first round of data) were created in partnership with a journalist and storyteller who acted as a supplementary researcher for the project. Centring research ethics and Protection of Personal Information Act, 2013 (South African privacy law) concerns, four long-form interviews were then conducted with voluntary respondents who had been identified by the supplementary researcher once the scope of the interviews had been finalised. The interviews were conducted in single sittings with each respondent in April and May of 2021. Four respondents were identified by the supplementary research through her journalism and personal networks, two male and two female. Their names are withheld from the research as a risk mitigation measure. The stories outlined in Part I were largely verbatim from tape recordings, but underwent two main editorial processes. The first was the restructuring of transcripts undertaken by the secondary researcher and interviewer when she transcribed the tapes, which included some minor speech edits for flow, but no substantive edits to content. The second was done by the primary researcher, when structuring the stories into the final report, but any changes to wording were indicated by the use of square brackets (again some restructuring of paragraphs was done).

Additional primary data was sourced by making information requests using the Promotion of Access to Information Act, 2000 to the CCMA for records relating to:

- CCMA/Busa Webtool usage statistics
- List of Bargaining Councils as at December 2020
- Referrals for period 1 April 2020 to 31 October 2020.



In addition, a variety of secondary data was used to support analysis. This included:

- Secondary data, such as the demographic and work data provided for on Youth Explorer (<https://youthexplorer.org.za/>) and Africa Data Hub (<https://www.africadatahub.org/>)
- Review of academic literature
- Legislative and statutory review
- Case law review
- Parliamentary documentation review (including Hansards)
- Government documentation review (including policy and performance documents).

Additional data was sourced at attendance of relevant workshops and meetings.

Structure

Given the variety of methods for data collection, structural decisions were guided both by an appreciation for narrative flow, but also again leveraging certain inter-disciplinary tactics. The Context sections considered that there are many methods for doing such exercises, with strengths, weaknesses, opportunities, strengths analyses and STEEP (Sociological, Technological, Economical, Environmental and Political) analyses being popular versions.²⁴⁸ Given the desire of this research to examine data through both a political economy and historic lens, an adapted STEEP framework was used to outline the context, which includes an outline of law and institutions as a separate area of enquiry, but also excluded environmental considerations.

Analysis

Given the centrality of inequality for explaining the social and political phenomena explored in the research, analysis was heavily influenced by a law and political economy lens as disciplines strongly rooted in unpacking forms of power relations between actors and structures. The worker stories were then used to provide significantly more individualised insight into lived experiences.



RESEARCH LIMITATIONS

As case study research, it was clearly not representative. This method nevertheless allows for a depth of analytics, well suited to the intentions of the project.

The multidisciplinary focus of the research impacts its traditional disciplinary rigour – but a broad consideration of disciplines is required to give insight into the ecosystems of South African work (see further the Analysis section above).

A significant gap in the research is in relation to employers and workplaces. The centring of workers was, however, fundamentally central to the research design. There are of course many dimensions of “employer” that add complexity to the environment for workers (for instance, how many precarious workers engage in their own forms of employment, or how labour law obligations may disproportionately impact the sustainability of small- to-medium-sized enterprises). These issues are relevant, but should be the subject of additional, associated research.

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