



**INTERNATIONAL  
LAWYERS ASSISTING  
WORKERS NETWORK**

**TELEWORKING IN SOUTH AFRICA:  
LAWS AND CHALLENGES IN AN UNEQUAL SOCIETY**



DAVY RAMMILA  
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## ABOUT THE AUTHOR

Davy Rammila is a researcher from South Africa. He writes and publishes on subjects in labour law with a particular interest in unfair discrimination and broader employment equity matters. He is currently a lecturer in the Department of Mercantile Law at the University of South Africa where he teaches undergraduate and postgraduate modules in labour law and commercial law, in addition to the supervision of LLM candidates within the LLM in Labour Law programme. He holds LLB and LLM (cum laude) degrees from the University of Johannesburg. He is currently a Doctor of Laws (LLD) candidate at the University of Johannesburg.

## CONTRIBUTORS AND ACKNOWLEDGMENTS

Research and legal analysis: Jacqueline Wambui Wamai and Cassandra Waters

Layout and design: Scalegate

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## ABSTRACT

In South Africa, telework and remote work in general, is a relatively recent phenomenon. Prior to the outbreak of the COVID-19 pandemic, many had never even heard of the term “telework” beyond academic and some sector-specific circles. However, the changes eventuated in 2020 by the pandemic forced millions of South Africans to begin working from home, as employers attempted to continue operating while limiting the spread of the COVID-19 virus. Up until that point, no laws, including legislation, regulations, codes of good practice or any other policy specifically addressed the issue of telework and remote work.

This study attempts to describe the concept of telework before proceeding with an exploration of the regulatory framework in South Africa, in an attempt to locate the position of telework within the existing legal architecture. It considers the general provisions of the Labour Relations Act (LRA), Employment Equity Act (EEA), Basic Conditions of Employment Act (BCEA) and the Occupational Health and Safety Act (OHSA). The study further focuses on telework-specific challenges arising consequent to provisions in these particular statutes.

- With respect to the LRA, the study concludes that teleworkers fit the statutory definition of “employee.” However, it observes that given the nature of telework -- in that teleworkers normally work in remote places away from employers’ premises -- there may be a challenge in reconciling the judicial interpretation of “workplace” with the remote, often private workplace of a teleworker.
- It further considers the issue of voluntariness under South African common law and posits that in the context of telework, it is essential for workers to be imbued with the power to determine the appropriate working arrangements.
- The study proceeds to explore the legal provisions regulating the prohibition of unfair discrimination under the EEA. It discusses the Code of Good Practice on the Prevention of Harassment in the Workplace, which expressly includes modes of work associated with telework within its provisions.
- The BCEA is explored from two aspects, namely, working hours and costs associated with performance of the work. The study finds that remote work in general has resulted in a blurring of the line between employees’ working hours and rest periods, with employers often requiring employees to make themselves available outside of traditional working hours. To this end, the study argues that employees are already entitled to a right to a limitation of their working hours and ought not to be expected to be available during rest periods. In relation to costs, the study observes that though common, there is no specific provision in the BCEA imposing a duty on employers to bear the costs of an employee’s carrying out of their work-related tasks. It notes that during the pandemic, employees were often expected to pay for costs associated with the performance of their work-related tasks, instead.
- With regard to the OHSA, telework presented a much more complicated challenge due to issues of worker privacy coming to the fore where health and safety assessments pursuant to the Act are concerned. In this respect, privacy remains paramount, and employees should have the final say on granting access to their private residences or not.

The study further considers the nature of telework against the socioeconomic backdrop of South African society. It observes that telework may not be available to everyone, often on the basis of their economic status and geographic location. It argues that due to unequal access to ICT infrastructure, many poor people would find it difficult to access telework. This is due to potential data costs or charges associated therewith, particularly because of lack of duty on the employer to provide necessary equipment.

The study proposes various legal and policy reforms, in order to not only fully accommodate telework within the domestic labour law framework, but to potentially enable access to this mode of work for the wider South African labour market.

## INTRODUCTION

The incidence of employees working away from their employer's business premises saw a drastic increase in 2020 as a consequence of government attempts to bring the deadly SARS-Cov-2 virus under control.<sup>1</sup> Teleworking entails the practice of employees performing their work away from their designated workplaces by means of technological platforms, such as internet-connected computers and mobile phones.

Telework raises challenges with respect to employment regulation and worker rights. On the one hand, it offers workers and employers greater flexibility in work and task scheduling, more than would be possible in a conventional workplace. It allows workers to save on daily costs associated with travelling to work and creates opportunities to balance work and other responsibilities. However, it also runs the risk of passing critical expenses inherent in running a business onto workers. In many instances, teleworkers are not provided with tools that are necessary to the work and have to shoulder the costs attendant to the performance of their contractual duties, such as internet access. This mode of work has also resulted in employees being expected to perform occupational health and safety measures, such as creating ergonomically appropriate work stations, that would normally be performed by their employers. Many workers report a blurring of work and leisure time, making it more difficult to track and remunerate overtime work. Remote work in some cases results in workers being required to work longer hours and being required to always be reachable. Isolation presents psychosocial risks, including an enhanced risk of discriminatory violence and harassment at work. Information and communications technology (ICT) may enable new, invasive forms of sexual harassment and other forms of gender-based violence and harassment. Moreover, telework possesses characteristics that could be associated with, or are capable of being construed as, those of independent contractors, causing workers who are in fact employees to be misclassified and denied core labour protections.

It is perhaps unsurprising that telework as an employment arrangement has, until recently, been uncommon in South Africa. That notwithstanding, it has become a growing trend and its place within South African employment law needs to be established and understood. Telework is likely to grow in the future, and without clear regulations and careful implementation, it risks exacerbating existing societal inequities, including those based on class, gender, race and geographic location.

## METHODOLOGY

This study adopts both a doctrinal as well as qualitative research approach. It explores the legislative framework in South Africa through an examination of existing legislation, codes of good practice and other regulations. The study is further supported by data obtained through surveys and virtual interviews that engaged employees, trade union representatives, academics and labour lawyers.

## DEFINITION FOR TELEWORK

There are a number of definitions that attempt to capture the meaning of the concept of telework. The International Labour Organisation has defined the term as entailing the provision of work in an employment context that is performed away from the conventional workplace, on a regular basis, through the aid of information and communications technology (ICT) and "typically includes mobile and work from home."<sup>2</sup> Similarly, the European Union Framework Agreement on Telework, defines telework as "a form of organising and/or performing work" within the context of an employment relationship and relying on the use of ICT, "where work, which could also be performed at the employers premises, is carried out away from those premises on a regular basis."<sup>3</sup> Another definition is provided by Gray, Hudson and Gordon who argue that telework involves "a flexible way of working which

1 According to a study by the employment agency Michael Page, only about 26% of the respondents had freedom to work remotely prior to the pandemic. In contrast, 79% of all respondents indicated that they worked remotely. *Dramatic Increase in Remote Working in South Africa*, MICHAEL PAGE: LATEST INSIGHTS, <https://www.michaelpageafrica.com/advice/insights/latest-insights/dramatic-increase-remote-working-south-africa> (last visited June 13, 2022).

2 INTERNATIONAL LABOUR ORGANIZATION, TELEWORKING DURING THE COVID-19 PANDEMIC AND BEYOND A PRACTICAL GUIDE 1 (2020), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/instructionalmaterial/wcms\\_751232.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/instructionalmaterial/wcms_751232.pdf).

3 Framework Agreement on Telework art 2., July 16, 2002, [https://resourcecentre.etuc.org/sites/default/files/2020-09/Telework%202002\\_Framework%20Agreement%20-%20EN.pdf](https://resourcecentre.etuc.org/sites/default/files/2020-09/Telework%202002_Framework%20Agreement%20-%20EN.pdf).

covers a wide range of work activities, all of which entail working remotely for an employer, or from a traditional place of work, for a significant proportion of work time.” They note further that this may be “on either a full-time or part-time basis” and they too suggest that the work would necessarily involve the “electronic processing of information, and always involves using telecommunications to keep the remote employer and employee in contact with each other.”<sup>4</sup> As Ramguttty-Wong notes, “the definitions do not investigate the levels and intensity of ICTs used as well as the technological complexity.”<sup>5</sup> However, she does note that the usage of ICT is widely accepted as an essential aspect to the performance of telework.<sup>6</sup>

The main principles that can be derived from the definitions of telework above are that telework involves geographic or locational differences between the employer and the employee and that the work itself is performed through the use of ICT. Firstly, when looking at the geographic aspect of the definition, a teleworker is located in a different place from that of their employer. Additionally, teleworkers are expected to employ ICT in their work, although the extent of such usage remains unclear.

While telework is not per se “home work” as defined under article 1 of the Home Work Convention (“Convention 177/1996”), the ILO suggests that guidance can be found therefrom. Article 1 defines home work as:

*“... work carried out by a person ... referred to as a homeworker, in [their] home or in other premises of [their] choice, other than the workplace of the employer for remuneration and which results in a product or service as specified by the employer, irrespective of who provides the equipment, materials or other inputs used.”<sup>7</sup>*

## CONCEPTUALISING TELEWORK IN SOUTH AFRICA

Telework as an employment practice is a relatively recent phenomenon in mainstream South African employment discourse, seen from both an employment law and practical perspective. Prior to the economic disruptions caused by the COVID-19 global pandemic, telework was comparatively uncommon as an employment arrangement. The rarity of the practice is perhaps better reflected in the legal and regulatory environment where employment is concerned. From this standpoint, the prior discourse concerning telework has been so inconspicuous as not even to exist. While teleworkers, as alluded to above, are (were) in no way nonexistent, the practice has only recently gained mainstream attention within South Africa because of the aforementioned disruptions. Baard and Thomas, in their 2010 study, observe that telework in South Africa at the time remained largely underdeveloped.<sup>8</sup> They further note that because of this relative lack of prevalence, policy documents discussing telework were hard to find.<sup>9</sup> Before the vagaries of the COVID-19 pandemic, this status quo had remained almost uninterrupted.

The relative unfamiliarity of telework in the country is further replicated outside of the confines of legal regulations and scholarship. A database publication search for research documents dealing with telework in South Africa conducted by Baard and Thomas turned up only four research documents between 2000 and 2010.<sup>10</sup> Partially relying on work done by Joseph Morrison for his Master of Commerce studies dissertation, Baard and Thomas found a total of fourteen South Africa-specific peer-reviewed journal articles or conference papers that had been written during the preceding thirty years prior to the 2020 pandemic discussing either telework, remote or home working which are listed in Table 1 below.<sup>11</sup> Interestingly, none of the research engages the legal aspect or status of telework as a form of employment. Instead, they investigate perceptions of employees and organisations in relation to the practice and challenges to the implementation thereof.

In the 2016 Global Dialogue Forum on the Challenges and Opportunities of Teleworking for Workers and Employers in the ICTS and Financial Services Sectors, convened under the auspices of the International Labour Organisation,<sup>12</sup>

4 Lars Qvortrup, *Making Sense of Teleworking Concepts and Contexts*, in TELEWORKING: NEW INTERNATIONAL PERSPECTIVES FROM TELECOMMUTING TO THE VIRTUAL ORGANISATION 26 (Paul J. Jackson & Jos M. van der Wielen eds., 1998) at 26.

5 RAMGUTTY WONG, ILAW NETWORK, AN ASSESSMENT OF THE LEGAL TELEWORKING FRAMEWORK IN THE REPUBLIC OF MAURITIUS (forthcoming 2022) (manuscript at 12).

6 *Id.* at 11.

7 Home Work Convention, n. 177, art. 1, June 20, 1996, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C177](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C177). South Africa is not a signatory of the Home Work Convention and is thus not legally bound by its provisions.

8 Nicholas Baard & Adèle Thomas, *Teleworking in South Africa: Employee Benefits and Challenges*, 2010 S. African 8 J. HUM. RES. MGMT./ SA TYDSKRIF VIR MENSLIKEHULPBONBESTUURAT, no. 1, 2010, at 1,7, <https://doi.org/10.4102/sajhrm.v8i1.298>.

9 *Id.* at 5.

10 *Id.* at 2.

11 Joseph Morrison, *Explaining the Intention of IT Workers to Telework: A South African Perspective* (Mar. 2, 2017) (M. Comm. Dissertation, University of Cape Town), <https://open.uct.ac.za/handle/11427/25502>.

12 Global Dialogue Forum on the Challenges and Opportunities of Teleworking for Workers and Employers in the ICTS and Financial Services Sectors (24–26 October 2016).

one of the South African government representatives, on numerous occasions, stressed the fact that South Africa, at the time, was yet to “experience significant prevalence of telework” in the industries that were under consideration.<sup>13</sup>

Indeed, it was only following the government lockdown measures necessitated by the rapid spread of the deadly COVID-19 virus in April 2020, imposed on almost every sector of the South African economy, that remote, virtual working environments became an inescapable norm. This so-called “new normal” has prompted a re-think of working arrangements globally. In South Africa, the number of studies conducted concerning remote work, including telework, have rapidly increased, with as many studies conducted in 2020 and 2021 as in the previous 10 years combined.

As teleworking has not been broadly embraced in South African employment arrangements prior to the pandemic, this has led to the current legislative framework not specifically or expressly accommodating such a working arrangement. Consequently, there are no statutory regulations nor discussions for potential statutory changes being held at the highest echelons of politics in South Africa, at the time of writing, aimed at regulating telework. Telework remains undefined in any regulatory document or collective agreement in South Africa. Although some believe that remote work is here to stay, the current legislative posture seems to suggest that once things go back to “normal,” the practice of virtual workplaces will eventually diminish and those that remain will have to be accommodated within the existing employment law architecture. Whether this is to be accepted without challenge is open to question. As this study shows, telework has as many supporters as it does sceptics.

## THE REGULATORY FRAMEWORK

### THE CONSTITUTION

Employment relationships in South Africa are highly regulated under a labour rights framework that has been hailed as among some of the world’s most progressive institutions.<sup>14</sup> Many of the rights that South Africans are entitled to today are the product of several years of judicial activism, under the erstwhile Apartheid regime, whose underlying ILO-adopted values were captured in the South African Constitution’s Bill of Rights.<sup>15</sup> Section 23 of the Constitution provides the base from which all labor rights in South Africa arise, and it is the main standard against which labor laws, policies and practices can be tested.<sup>16</sup> Insofar as it concerns individual workers, the provision reads as follows:

#### 23. Labour relations

- (1) Everyone has the right to fair labour practices.
- (2) Every worker has the right:-
  - (a) to form and join a trade union;
  - (b) to participate in the activities and programmes of a trade union; and
  - (c) to strike.<sup>17</sup>

The Bill of Rights contains a body of socioeconomic and political rights which apply to all workers by virtue of their being in the territory of the Republic of South Africa:<sup>18</sup>

- Section 23 establishes the right to fair labor practices.

<sup>13</sup> Global Dialogue Forum on the Challenges and Opportunities of Teleworking for Workers and Employers in the ICTS and Financial Services Sectors, International Labour Organization, *Final Report* 10 (Mar. 13, 2017), [https://www.ilo.org/sector/Resources/publications/WCMS\\_547099/lang--en/index.htm](https://www.ilo.org/sector/Resources/publications/WCMS_547099/lang--en/index.htm).

<sup>14</sup> Tavonga Jordan Zvobgo, *Collective Bargaining and Collective Agreements in Africa* 22 (Int’l Training Ctr., Int’l Lab. Org., Working Paper No. 11, 2019) [https://www.itcilo.org/sites/default/files/inline-files/WP%2011\\_TJ%20Zvobgo.pdf](https://www.itcilo.org/sites/default/files/inline-files/WP%2011_TJ%20Zvobgo.pdf).

<sup>15</sup> Davy Rammila & Marius Van Staden, ‘No-fault’ dismissal: An appraisal of the historical role of the International Labour Organization in reforming South African law, in *Celebrating the ILO 100 Years on: Reflections on Labour Law from a Southern African Perspective* 293, 308-14 (Stefan Van Eck et al. eds., 2020), [https://www.up.ac.za/media/shared/29/ZP\\_Files/celebrating-the-ilo-100-year-on-eisbn-9781485137634-1.zp197071.pdf](https://www.up.ac.za/media/shared/29/ZP_Files/celebrating-the-ilo-100-year-on-eisbn-9781485137634-1.zp197071.pdf).

<sup>16</sup> “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. S 8(1) of the Constitutes provides that “the Bill of Rights applies to all law.” S. AFR. CONST., 1996., sec. 2, <https://www.gov.za/documents/constitution/chapter-1-founding-provisions#2>.

<sup>17</sup> *Id.* at sec. 23, <https://www.gov.za/documents/constitution/chapter-2-bill-rights#23>.

<sup>18</sup> *Kaunda and Others v. President of the Republic of South Africa* 2004 (10) BCLR 1009 (CC) para. 32, 36 and 37 (indicating that, in general, the Bill of Rights applies to all people in South Africa).



- Section 10 protects the right to inherent human dignity.<sup>19</sup>
- Section 9 provides for the right to equality before the law, including the “full enjoyment of all rights and freedoms,” in addition to protection against unfair discrimination by anyone, irrespective of whether the offender is a private person or the state.<sup>20</sup>
- Section 12 provides for freedom and security of the person,<sup>21</sup>
- Section 13 protects the right to not be enslaved or forced into servitude or forced labour,<sup>22</sup>
- Section 24 establishes the right to an environment that is not harmful to health and wellbeing.<sup>23</sup>

Every person in South Africa is entitled to the rights contained in the Constitution. The Constitution does not, in any respect, delimit the beneficiaries of fundamental rights in the Bill. Apart from political rights and the right to freedom of trade and occupation, whose application is limited to citizens, no person present in the Republic, and irrespective of their immigration or citizenship status, may be deprived of any fundamental right.<sup>24</sup> In an employment context, this expansive constitutional application entails that any worker, irrespective of their employment arrangement, generally enjoys the rights in the Bill of Rights. Rights in the Constitution are broad and general. As a result, they are given effect through legislation. Direct reliance on a constitutional right is therefore not possible where legislation giving effect to the said right exists,<sup>25</sup> except where such legislation is inconsistent with the Constitution.

## COMMON LAW

Much like its regional neighbours, South Africa’s legal system is a “hybrid” system that is extensively based on Roman-Dutch and English legal traditions. These traditions are collectively referred to as the “common law.” Until the introduction of labour reforms in the latter years of the twentieth century, the common law of contract was the main source of law governing employment relationships. Today, the Constitution forms the basis of all labour laws and rights in South Africa. As the basic law of the Republic, the Constitution sits at the apex of the legal system. All laws must be consistent with its values.<sup>26</sup> If not, such law can be struck down for its unconstitutionality.<sup>27</sup> The common law, as a result, is now subject to the application of the Constitution and may be developed to bring it in line with the “spirit, purport and object” of the Bill of Rights.<sup>28</sup> The common law nevertheless remains a vital part of South African employment law, regulating issues such as voluntariness and aspects of unfair discrimination.

## LEGISLATION

Legislation is the primary source of labour and employment law in South Africa. These statutes give effect to the rights in the Constitution. Broadly speaking, “legislation” includes the regulations, directions and codes that may be promulgated in accordance with specific empowering provisions contained in the respective parliamentary act. The key labour legislative acts in South Africa today include, *inter alia*, the Labour Relations Act 66 of 1995 (“LRA”),<sup>29</sup> the Basic Conditions of Employment Act 75 of 1997 (“BCEA”),<sup>30</sup> the Employment Equity Act 55 of 1998 (“EEA”),<sup>31</sup>

19 S. AFR. CONST., 1996.

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 Except in terms of the section 36 limitation clause. S. AFR. CONST., 1996.

25 In the landmark administrative law case of *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC), the Constitutional Court established the principle that where legislation is enacted to give effect to a provision in the Constitution, any matter covered thereunder should be dealt with in terms of said legislation. In *Mazibuko and Others v. City of Johannesburg and Others* 2010 (3) BCLR 239 (CC), the Court was unambiguous in affirming *Bato Star*, holding that “[t]he answer to this raises the difficult question of the principle of constitutional subsidiarity. This Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.”

26 *Supra* note 19.

27 *Id.*

28 S. AFR. CONST., 1996, sec. 39(2).

29 Labour Relations Act 66 of 1995 [hereinafter LRA], [https://www.gov.za/sites/default/files/gcis\\_document/201409/act66-1995labourrelations.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/act66-1995labourrelations.pdf).

30 Basic Conditions of Employment Act 75 of 1997, [https://www.gov.za/sites/default/files/gcis\\_document/201409/a75-97.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/a75-97.pdf).

31 Employment Equity Act 55 of 1998, <https://www.labour.gov.za/DocumentCenter/Acts/Employment%20Equity/Act%20-%20Employment%20Equity%201998.pdf>.

the Occupational Health and Safety Act 85 of 1993 (“OHS Act”),<sup>32</sup> and the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (“COIDA”).<sup>33</sup> Because there is no specific legislation or case law expressly dealing with telework, each of these statutes will be discussed generally in respect of their potential to affect or apply to telework.

## CASE LAW

These are binding judicial decisions of the national courts of South Africa irrespective of whether they are specialised labour courts or the civil courts. South African courts follow the principle of *stare decisis* (doctrine of precedent) which entails that courts should respect their previous decisions, unless they were wrong, and follow decisions of superior courts. The Constitutional Court is the highest court of appeal on all matters in South Africa. Its decisions and those of the Supreme Court of Appeal (SCA) and Labour Appeal Court (LAC) bind all courts and tribunals below them. The Labour Court serves as the court of review for awards of the Commission for Conciliation, Mediation and Arbitration. The judicial decisions of the High Court are also binding in matters arising from employment within the defined provincial boundaries of that respective division of the High Court. In practice, however, divisions in other “provincial jurisdictions” tend to follow or consider the decisions of other divisions.

## INTERNATIONAL LAW

The Constitution makes it compulsory for any tribunal interpreting the Bill of Rights to consider international law. The use of the absolute instructive “must” indicates that international law was pivotal to what the Framers envisioned of South African law going forward. Section 233 amplifies this importance that international law enjoys in the current constitutional dispensation, by providing that: “every court must prefer any reasonable interpretation of ... legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

International agreements must be approved by resolution of the National Assembly, but such agreements do not become law in South Africa under Section 231(4) until enacted into law by national legislation. Approval by Parliament of an international agreement binds the Republic only in the international sphere.<sup>34</sup> Thus although South Africa is duty-bound to respect the provisions of an approved international agreement, a South African home worker, for example, cannot invoke or rely on the **substantive provisions** of an agreement such as the Violence and Harassment Convention, 2019 (No. 190) in a South African court if it has not been incorporated by national legislation. This principle was restated in the dissenting opinion of Justice Jafta delivered in the 2021 Constitutional Court rescission application in *Zuma v. Secretary of the Judicial Commission of Inquiry*.<sup>35</sup>

It should, however, be reiterated that although international agreements that South Africa has not ratified do not automatically become law in South Africa, courts can still have regard thereto.

As far as the treatment of international law in South Africa is concerned, South Africa thus exhibits features of both monist and dualist systems.

## COLLECTIVE AGREEMENTS

Agreements dealing with conditions of employment and any other matters of mutual interest concluded between one or more employers and one or more registered trade unions or employers’ organisations or both, bind all parties thereto. Save for a resolution made by the Congress of South African Trade Unions (COSATU) to pursue alignment of labour laws to digitalization, the author is not aware of any collective agreements that have included provisions on telework.

<sup>32</sup> Occupational Health and Safety Act 85 of 1993, [https://www.gov.za/sites/default/files/gcis\\_document/201409/act85of1993.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/act85of1993.pdf).

<sup>33</sup> Compensation for Occupational Injuries and Diseases Act 130 of 1993, [https://www.gov.za/sites/default/files/gcis\\_document/201409/act130of1993.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/act130of1993.pdf).

<sup>34</sup> *Glenister v President of the Republic of South Africa and others* 2011 (7) BCLR 651 (CC) para. 182; *Government of the Republic of Zimbabwe v Fick and Others* 2013 (10) BCLR 1103 (CC) para. 30.

<sup>35</sup> The learned justice *correctly* affirmed: “[a]lthough the ratification and signing by South Africa of these instruments do not make them enforceable in domestic courts, they remain binding and enforceable against South Africa, **at an international level**. This means that where domestic courts construe the South African Constitution in a manner dissonant with international law, South Africa may be held liable at the level of international law, if its actions violate international law despite the fact that she would have acted in compliance with her Constitution” (*Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and others (Council for the Advancement of the South African Constitution and another as amici curiae)*).

## RULES IN THE WORKPLACE

Workplace rules issued by employers are another source of law. For example, section 7 of the Code of Good Practice: Dismissal requires that in the determination of whether the dismissal of an employee was unfair, any person making such determination must consider whether the employee offended a rule or standard regulating conduct in the workplace.<sup>36</sup> Accordingly, workplace rules are a source of law whose application binds both the employer and employee.

## LAWS AND POLICIES FOR TELEWORK

### TEMPORARY REGULATIONS RELATED TO COVID-19

The COVID-19 pandemic has spawned the widespread, global phenomenon of people working from their homes. As governments around the world moved to curb the spread of the COVID-19 virus, many employers were forced to scale down their operations. On March 15, 2020, the Minister of Cooperative Governance and Traditional Affairs (“COGTA”) officially declared a state of national disaster in South Africa under section 27(1) of the Disaster Management Act (DMA). This effectively introduced a hard lockdown which resulted in businesses being shuttered and employees required to stay at home and not go to work, save for those deemed to be “essential.” Subsequent regulations introduced tiered alert levels and the eventual easing of the hard lockdown, which allowed for the return of other workers back to their workplaces. The DMA Regulations, issued *mutatis mutandis*, contained a specific paragraph providing for employers to allow employees to work from home. Despite numerous amendments, said paragraph remained relatively unchanged and read as follows:

- (8) [a]ll employers must adopt measures to promote physical distancing of employees, including-
- (a) enabling employees to work from home or minimising the need for employees to be physically present at the workplace;
  - (b) the provision for adequate space;
  - (c) restrictions on face to face meetings;
  - (d) special measures for employees with known or disclosed health issues or comorbidities, or with any condition which may place such employees at a higher risk of complications or death if they are infected with COVID-19; and
  - (e) special measures for employees above the age of 60 who are at a higher risk of complications or death if they are infected with COVID-19.<sup>37</sup>

The language of the provision was not permissive. The regulations placed an obligation upon all employers to take steps to promote physical distancing, inclusive of the enablement of employees to not have to come to the workplace or, at the very least, minimising the need to come in. From this, one could have argued that home or remote work, including telework, was somewhat formally recognized under South African law. However, such a view would have been imprudent, if not wholly incorrect. This is because the DMA Regulations were only valid for a limited duration.<sup>38</sup> Section 27(3)(a) of the DMA specifically provides for an *ex lege* extinguishment of any regulation that has been made in terms of section 27(1). After three months, a regulation promulgated under section 27 automatically lapses.<sup>39</sup>

The limitations on the applicability of COVID-19 regulations, as far as their terms of application are concerned, were made even more evident by other regulations and directions issued in support of the core regulation.<sup>40</sup> Virtually every one of the complementary regulations contained a time limit that was pegged against the subsistence of the national state of disaster, in some way or form. The Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces, for example, expressly stated that “[t]hese Directions apply for the duration of

<sup>36</sup> Codes of Good Practice are not per se laws but failure to apply them is tantamount to a reviewable defect.

<sup>37</sup> Alert level 2 during Coronavirus COVID-19 lockdown, § 51(8), GN R.869 of GG 45115 (12 Sept. 2021), [https://www.gov.za/sites/default/files/gcis\\_document/202109/45156rg11337gon869s.pdf](https://www.gov.za/sites/default/files/gcis_document/202109/45156rg11337gon869s.pdf).

<sup>38</sup> Disaster Management Act 57 of 2002, sec. 27(3)(a), <https://www.gov.za/documents/disaster-management-act>.

<sup>39</sup> Although a lapsed regulation may nevertheless be renewed, for a period not exceeding a month’s time each, prior to *ex lege* termination or any stated expiration date.

<sup>40</sup> This being the regulations relating to the declaration and classification of the COVID-19 pandemic as a national disaster.

the national state of disaster” except where a provision itself states otherwise.<sup>41</sup> Similar provisions were to be found in, *inter alia*, the ICT regulations,<sup>42</sup> the Banking Sector Exemption regulations,<sup>43</sup> Export Control Regulations,<sup>44</sup> and Healthcare Sector Exemption regulations.<sup>45</sup> If the Minister of COGTA ended or failed to renew the national state of disaster, all these regulations would have ceased to apply. The regulations were drafted as emergency measures to address a disaster of national concern, whose eventual resolution would likely signal the end for the regulations. Indeed, when the President of the Republic of South Africa<sup>46</sup> announced the termination of the Declaration of a National State of Disaster, every one of these regulations ceased to have any legal effect.

### Codes of Good Practice on Managing COVID-19 Exposure in the Workplace

Notwithstanding the termination of the abovementioned Declaration, the Minister of Employment and Labour has promulgated the Code of Good Practice: Managing Exposure to SARS-CoV-2 in the Workplace (COVID-19 Code). Codes of good practice are not law and no right arises from them. However, this does not mean that their importance in relevant matters is reliant on the discretion of the person handling the issues related thereto. The Labour Court has confirmed, in the context of dismissal, that compliance with the codes, while not technically obligatory, is *nevertheless expected* and a *failure to comply therewith will likely lead to an adverse finding* before the labour tribunals.<sup>47</sup> The COVID-19 Code seizes an employer with the responsibility to conduct a risk assessment to determine risk of exposure to COVID-19 and to develop a new, or amend an existing, risk assessment plan. According to section 6 of COVID-19 Code, the risk assessment plan *may* also include “social distancing measures including minimising the number of workers in the workplace through rotation, staggered working hours, shift and *remote working arrangements*” (emphasis added). The Code provides a legal basis for telework by giving employers the ability to implement working arrangements that would not otherwise accord with traditional working arrangements. Be that as it may, the scope of the Code is limited to the management of COVID-19 exposure beyond the subsistence of the Declaration of a National State of Disaster.

## THE LABOUR RELATIONS ACT

Considered the cornerstone of labor rights in South Africa, the LRA is the legislative measure intended to give effect to the right to fair labor practices contained in section 23 of the Constitution. The LRA states that its purpose is to promote “economic development, social justice, labour peace and the democratisation of the workplace by fulfilling [its] primary objects.” The adoption of the LRA includes giving effect to the constitutional mandate in section 23 and the country’s obligation assumed as a member state of the ILO, and to create a regulatory framework for collective bargaining.<sup>48</sup> The Act regulates both individual labour rights, such as the formation and termination of the employment relationship, as well as collective labour rights, including freedom of association, protest action, strikes and collective bargaining.

Although rights in the Bill of Rights are expansive and all-encompassing, the scope and application of the right to fair labour practices and accordingly conceived as “unfair labour practice”, in the LRA is limited. For a person to rely on the provisions of the LRA, they must be considered an “employee.” The term *employee* means that one must work for another person or the state, be entitled to receive any remuneration or if they “in any manner assist in carrying out or conducting the business of an employer.”<sup>49</sup> This definition excludes independent contractors, members of statutory bodies, magistrates and judges and, according to section 2, members of the intelligence service and the armed forces.<sup>50</sup>

41 Consolidated Coronavirus COVID-19 Direction on Occupational Health and Safety Measures in Certain Workplaces, §4, GN R.639 of GG 43400 (4 June 2020), [https://www.gov.za/sites/default/files/gcis\\_document/202006/43400rg11128gon639.pdf](https://www.gov.za/sites/default/files/gcis_document/202006/43400rg11128gon639.pdf). In no other instance, does any provision of the Direction provide for an alternative term of application.

42 Information and Communications Technology COVID-19 National Disaster Regulations, §10, GN R.238 of GG 43207 (6 Apr. 2020), <https://www.icasa.org.za/legislation-and-regulations/ict-covid-19-national-disaster-regulations>.

43 COVID-19 Block Exemption for the Banking Sector, §11, GN R.335 of GG 43217 (23 Mar. 2020), <https://www.gov.za/documents/competition-act-expansion-scope-coronavirus-covid-19-block-exemption-banking-sector-5-may>.

44 COVID-19 Export Control Regulation, preamble, GN R.424 of GG 43177 (27 Mar. 2020), [https://www.gov.za/sites/default/files/gcis\\_document/202003/43177rg11070gon424.pdf](https://www.gov.za/sites/default/files/gcis_document/202003/43177rg11070gon424.pdf).

45 COVID-19 Block Exemption for the Healthcare Sector, §13, GN R.349 of GG 43114 (19 Mar. 2020), [https://www.gov.za/sites/default/files/gcis\\_document/202003/4311419-3dti.pdf](https://www.gov.za/sites/default/files/gcis_document/202003/4311419-3dti.pdf).

46 His Excellency Matamela Cyril Ramaphosa.

47 *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd & another* 1998 19 ILJ 635 (LC) at 640E-I.

48 LRA §1.

49 *Id.* §213.

50 *Id.* §2. Furthermore, members of the judiciary and members of parliament are also not considered employees under employment law. See *Van Rooyen and Others v S and Others* 2002 (8) BCLR 810 (CC) at para. 139 and *Parliament of the RSA v Charlton* [2010] 10 BLLR 1024 (LAC) at para. 27-29.

## Are Teleworkers Employees?

The LRA in general should apply to work arrangements such as telework. The application of the LRA generally depends on the relationship between a teleworker and the employer. A teleworker who falls within the definition of employee under the LRA will be entitled to the rights consequent upon the application of the Act. South African courts have long recognized that employment arrangements can be manipulated to weaken worker rights.

Telework presents a ripe opportunity for abusive practices by employers who may wish to limit their responsibilities or liabilities in relation to their employees. Employees enjoy a broad scope of important workplace rights. For example, an employer does not have the right to terminate the employment relationship with an employee without cause or reason. The LRA provides for grounds upon which termination would be automatically invalid, for any reason whatsoever,<sup>51</sup> and those upon which an employer may dismiss.<sup>52</sup> In addition, it further imposes the requirement of fairness of the procedure through which dismissals may be implemented.<sup>53</sup> Where an employer fails to comply with either the substantive or procedural requirements as required by the Act, such a dismissal will amount to an unfair dismissal, thus entitling the employee to reinstatement and compensation.<sup>54</sup>

In addition, employers in South Africa incur tax obligations arising from their relationship with their employees. Employers are required to make social security contributions for their respective employees pursuant to the Unemployment Insurance Act. They are responsible for withholding income tax which is due to the South African Revenue Services (“SARS”), from their employees’ income. These provisions present legal and administrative responsibilities that employers could avoid by eliminating employer-employee relationships.

Telework has characteristics that could easily render an employee to appear, at least on the surface, as if they were an independent contractor. The distance between the employer and employee created by virtualization of work could suggest the absence of, among other things, a designated workplace and control over the work and conduct of an employee. Some unscrupulous employers may seek to take advantage of teleworking arrangements to effectively alter their relationship with a person who would normally have qualified as an employee. This is often done by concluding agreements to the effect that the employee carries out work for the employer, not as an employee of that employer but as an independent contractor. Independent contractors have no rights other than those specifically agreed upon in their contract of work (known at common law as a *locatio conductio operis*). To that end, the employee would undertake those responsibilities that would have fallen on the employer.

However, South African courts are circumspect to accept the employer’s word when determining the existence of an employment relationship. Rather than accept contract terms on their face, a tribunal must inquire into the true nature of the relationship between the worker and the employer. In the 1979 Appellate Division decision of *Smit v. Workmen’s Compensation Commissioner*, the Court established a test to distinguish between a contract of service (i.e. an employment contract or *locatio conductio operarum*) and a contract of work.<sup>55</sup> On appeal to the former Appellate Division (now the Supreme Court of Appeal), the court noted that a contract of service is distinguishable from a contract of work for the following reasons:<sup>56</sup>

- The rendering of personal services (or provision of labour) is the object of the contract of service.
- The *locator operarum* (employee) is subject to the control of the *conductor operarum* (employer) and must thus render services personally.
- The *conductor operarum* controls the time and manner by which the locator operarum exercises his labour and may choose whether such services should be rendered or not.
- The *locator operarum* is subject to the *conductor operarum*’s will and thus is obligated to follow lawful commands or instructions from their supervisor on how their work should be performed.
- A *locator operarum*’s death terminates a contract of service, whereas this is not the case for a contract of work.
- The contract of service terminates upon an agreed upon date, whereas a contract of work terminates upon the completion of the work or achievement of a specified result.<sup>57</sup>

51 LRA §187.

52 *Id.* §188.

53 LRA §188(1)(b).

54 *Id.* § 193.

55 1979 (1) All SA 152 (A) at 158.

56 *Smit* at 158-159.

57 *Id.*



This so-called “dominant impression” test was accepted and applied with approval by the Labour Appeal Court (LAC) under the new LRA in *SABC v McKenzie* and remains a relevant test for employment.<sup>58</sup> Like the common law position advanced in the *Smit* and *McKenzie* matters, the LRA also makes provision for a statutory presumption of employment. According to section 200A of the LRA, any person who works for or renders services to another is presumed to be an employee of that person regardless of the form of contract concluded between the parties, if any of the following factors are present:<sup>59</sup>

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person’s hours of work are subject to the control or direction of another person;
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependant [sic] on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.<sup>60</sup>

The application of the section 200A presumption is limited to employees who earn less than R211 596.30 per annum (adjusted in 2021) as determined by the Minister of Employment and Labour in terms of section 6(3) of the Basic Conditions of Employment Act.<sup>61</sup> Accordingly, those who earn in excess of the determined amount will not benefit from the presumption, and tribunals will have to resort to the common law dominant impression test. However, this does not mean that the factors in section 200A are not applicable. According to section 44 of the Code of Good Practice: Who is an Employee, the restriction to vulnerable employees in section 200A(2) does not entail a complete inapplicability of the factors to employees earning more than the limit. The factors are still relevant and useful guides when determining whether or not a person is an employee.<sup>62</sup>

Despite the possibility that teleworkers risk appearing similar to independent contractors, it is evident that the manner in which South African courts approach the question of employment status means that teleworkers *should not* find themselves bound to sham contracts depriving them of their rights.<sup>63</sup> Provided that their relationship with an employer possesses any one of the factors in section 200A, a teleworker will be presumed to be an employee of that employer and will enjoy the labour rights contained in the LRA, and by extension, any other labour legislation.<sup>64</sup> For teleworkers earning above the earning threshold, the common law and the Code of Good Practice will apply. Accordingly, despite its relative unfamiliarity, telework falls within the scope of application of the LRA.

In certain circumstances, employers may look to take advantage of the flexibility a working arrangement like telework offers, but may not wish to fully onboard a person as a full-time employee. The LRA regulates this form of employment arrangement under chapter IX and stipulates that no person earning less than the specified earnings threshold can be employed in such a capacity for a period exceeding three months.<sup>65</sup> From the onset of the fourth month, such a person will have to be treated no less favourably than the employer treats a comparable full-time employee,<sup>66</sup> unless such treatment is in part informed by the “seniority, experience and length of service of the comparable full-time employee, merit, quality or quantity of work done or any other criteria of a similar nature.”<sup>67</sup> This equality of treatment also extends to access to training and skills development.<sup>68</sup>

58 *SABC v. McKenzie* 1999 (1) BLLR 1 (LAC).

59 LRA §200A.

60 A similar presumption is found under section 83 of the BCEA.

61 Determination: Earnings Threshold, GN R.77 of GG 44137, [https://www.gov.za/sites/default/files/gcis\\_document/202102/44137gon77.pdf](https://www.gov.za/sites/default/files/gcis_document/202102/44137gon77.pdf).

62 Code of Good Practice: Who is an Employee, §20, GN R.1774 of GG 29445 (1 Dec. 2006).

63 The Code of Good Practice: Who is an Employee notes the following: “[o]ur courts have frequently noted that the inequality of bargaining power within an employment relationship may lead employees to agree to contractual provisions that do not accord with the realities of the employment relationship. This is particularly important in the case of low paid workers who may have agreed to be classified as independent contractors because of a lack of bargaining power.”

64 One cannot be an employee for purposes of the LRA and then not be an employee under any other legislation. The LRA is the foundational legislation for labor rights in South Africa. Other pieces of legislation may expand the scope of the definition employee to cover persons not covered by the LRA, but such persons do not necessarily become employees for purposes of the LRA.

65 LRA §§ 198C(2)(a) & (d).

66 *Id.* §§ 198C(2)(d) & 198C(3)(a); see LRA § 198C(2) for the meaning of “comparable full-time employee.”

67 *Id.* § 198D(2).

68 *Id.* § 198C(3)(b).

In general, the posture of South African legislation does not seem to make a distinction between employees on the basis of their working arrangements. Although widespread teleworking was eventuated by the COVID-19 pandemic and the existing regulations are directed towards managing it, there is no legislative basis to exclude teleworkers under the definition of employee as is. In other words, teleworkers are not per se without legal protection or statutory recognition. However, the unique nature of their mode of work creates other challenges that, as discussed in detail below, make them potentially vulnerable to misclassification and other abusive tactics under the current legislative dispensation.

Like any other South African employee, teleworkers may still find themselves deprived of their rights despite the LRA through exploitative contractual arrangements. Sometimes employees may be unaware that they are not in fact independent contractors as per their contracts. In other cases, the issue may only arise during labour disputes where neither party agrees on the exact nature of their relationship. With the former, it is up to labour inspectors,<sup>69</sup> to ensure that employers comply with the LRA. With respect to disputes over employment status, the Code of Good Practice: Who is an Employee tasks a tribunal dealing with such matters to enquire into such a relationship in order to uncover its true nature.

### Voluntariness and Reversibility

Voluntariness under South African employment law is not recognized. As the discussion on the determination of employment status above shows, the relationship between employer and employees necessarily turns on the exercise of control over the employee by the employer. This fact finds judicial confirmation in the recent Commission for Conciliation Mediation and Arbitration (CCMA) decision *Botha v TDR Distribution*, where the commissioner reaffirmed the common law principle that employees owe the employer a duty under the employment contract to render their services according to the employer's direction.<sup>70</sup> A failure to do so could justify a dismissal. In this matter, the employee had refused to return to work during the COVID-19 lockdown. This fact is further confirmed in the COVID-19 regulations for workplace health and safety, wherein the employee is only given the right of election to refuse to return to the designated workplace, if "circumstances arise which, with reasonable justification, appear to that employee or health and safety representative to pose imminent and serious risk of their exposure to [the COVID-19] virus infection."<sup>71</sup>

Although negotiations ordinarily have to occur before an employer can amend the terms and conditions of employment, it is currently the employer who has the power to decide whether an employee can telework or not. Likewise, if a worker starts a job that is advertised as telework, the employer would potentially be able to unilaterally require the worker to switch to working at the employer's premises. Unlike other jurisdictions, in South Africa an employee seeking to telework cannot notify the employer that they intend to work away from the workplace and expect the former to consider their request. Nor is there an explicit recourse if the employer unilaterally switches work to telework or reverses a teleworking arrangement. The nature of an employment relationship under the current South African employment law regime essentially entitles only the employer with the right to implement any working arrangement it deems fit, and which does not offend the law.

Studies show that telework can have both positive and negative impacts on workers. Often employees report increases in productivity when working from home or teleworking.<sup>72</sup> According to one such study, which surveyed about 2000 "white-collar" professionals, two-thirds reported increased productivity since the start of the pandemic and also a greater focus on their wellbeing.<sup>73</sup> Notwithstanding, the study also recognizes that the practical value of these findings is, frankly, unknown.

It is important to note that telework also has the potential to negatively impact workers. Telework entails work that is done away from the employer's premises, often done in isolation. Isolation can have negative psychological consequences. Although experiencing psychological detachment is important in that it allows employees to pause and detach themselves from their work, continued work in isolation limits or may even eliminate social interactions. A study conducted by the American Psychiatric Association notes that people who worked remotely experienced

69 Appointed in terms of the BCEA.

70 *Botha v. TVR Distribution* 2020 (12) BALR 1282 (CCMA) para. 22.

71 Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces, §14, GN R.639 of GG 44700 (11 June 2021), <https://www.gov.za/documents/disaster-management-act-direction-minister-employment-and-labour-terms-regulation-4-10>.

72 Mathe, Tshegofatso, *Remote Working: Bosses Want 'Bums On Seats'*, *The Mail & GUARDIAN*, Feb 28, 2021, <https://mg.co.za/business/2021-02-28-remote-working-bosses-want-bums-on-seats/>.

73 *Id.*

various mental health challenges including depression, feelings of isolation and loneliness, as well as an inability to achieve meaningful work-life or work-family balance.<sup>74</sup> In imposing telework, employers effectively refuse to provide workers with a working space, which pushes the costs of creating such a space onto the worker. Workers may face a range of situations in their home, everything from inadequate space to domestic violence, that could make working from home practically impossible or dangerous.

Telework can have positive or negative impacts on workers. This was reflected by the teleworkers who responded to this study, who expressed mixed attitudes towards telework. On the one hand, some workers found the elimination of the commute a welcome change, especially in terms of physical wellbeing. Some respondents found the isolated nature of remote work to be demoralising and distracting, while others found that it minimised negative social issues that would arise in a workplace, such as office politics and gossip. Some reported that it enabled them to transition from their work responsibilities to responsibilities with families and households with ease, while others found this placed increased demands on their time. Some respondents noted the problematic impacts arising from the fact that women tend to be the ones responsible for household responsibilities. One respondent found working from home difficult, as she needed to balance the expected responsibilities of the family home with her work and, as a result, her job performance often suffered. Another noted that the issue of family responsibilities could potentially be a sore point of telework for female workers, as many of these societal expectations made it more onerous. This aspect of telework, the respondent noted, “piled on more work” for women.

Considering the potential for impacts on mental and physical health, overwork and increased costs arising as a consequence of imposed telework, one ought to question the wisdom of giving an employer the power to introduce remote working arrangements unilaterally. It seems problematic to expect employees to work remotely simply because an employer deems it economically sound for its business. Employees are the ones who have to experience both the positive and negative aspects of remote working. It is arbitrary if not downright unreasonable to essentially force employees to work under a working arrangement that could prove deleterious to their health, safety and wellbeing simply for the sake of the employers’ economic interests.

Many jurisdictions have recognized this issue, and have placed limits on when employers can order workers to telework outside of emergency situations. Many require that telework arrangements only be made through a voluntary agreement between workers and employers, or through collective bargaining.<sup>75</sup> Thus workers have a right to refuse telework, and either continue working from the employers’ premises or, failing that, be entitled to severance payment.

Some respondents identified a need to understand the impact of telework on overall employment. South Africa currently has an extremely high unemployment rate and respondents expressed a general sense of uncertainty in

74 American Psychiatric Association, *As Americans Begin to Return to the Office, Views on Workplace Mental Health Are Mixed*, AMERICAN PSYCHIATRIC ASSOCIATION – NEWS RELEASES, May 20, 2021, <https://www.psychiatry.org/newsroom/news-releases/as-americans-begin-to-return-to-the-office-views-on-workplace-mental-health-are-mixed>.

75 See, e.g. Argentina – Law No. 27555, July 30, 2020, B.O. No. 34.450 at 3 (Aug 14, 2020), <https://www.boletinoficial.gob.ar/detalleAviso/prime-ra/233626/20200814> (on telework and its regulation); Belgium Loi du 5 mars 2017 concernant le travail faisable et maniable [Law of 5 March 2017 on Occasional Telework], Mar. 15, 2017, [http://www.ejustice.just.fgov.be/doc/rech\\_f.htm](http://www.ejustice.just.fgov.be/doc/rech_f.htm); Spain – Ley 10/2021, de 9 de julio, de trabajo a distancia [law on teleworking of Spain] (B.O.E. 2021, 11472), <https://www.boe.es/dias/2021/07/10/pdfs/BOE-A-2021-11472.pdf> and Ley del Estatuto de los Trabajadores [Spanish Workers’ Statute] (B.O.E. 2015, 255), <https://www.boe.es/buscar/act.php?id=BOE-A-2015-11430>; Law 1221/2008, Colombia – L. 2121/32, uadro 3, 2021, DIARIO OFICIAL [D.O.], <https://dapre.presidencia.gov.co/normativa/normativa/LEY%202121%20DEL%203%20DE%20AGOSTO%20DE%202021.pdf>; Costa Rica – Ley para regular el teletrabajo no. 9738 del 18 septiembre 2019 [Law to Regulate Telework], LA GACETA, DIARIO OFICIAL [L.G.], Sept 30, 2019, [http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm\\_texto\\_completo.aspx?param1=NRTC&nValor1=1&nValor2=89753&nValor3=129957&strTipM=TC](http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=89753&nValor3=129957&strTipM=TC); Panama – Ley 126, de 18 febrero 2020, que establece y regula el teletrabajo, GACETA OFICIAL [G.O.], Feb. 9, 2020, [https://www.gacetaoficial.gob.pa/pdfTemp/28965\\_A/77434.pdf](https://www.gacetaoficial.gob.pa/pdfTemp/28965_A/77434.pdf); Peru – Ley 30036, que regula el teletrabajo, EL PERUANO DIARIO OFICIAL, June 5, 2013, 496509, <https://busquedas.elperuano.pe/normaslegales/ley-que-regula-el-teletrabajo-ley-n-30036-946195-3/>; France – Accord National Interprofessionnel du 19 juillet 2005 relatif au télétravail [ANI] [National Interprofessional Agreement of July 19, 2005 on Telework], <https://www.anact.fr/file/3903/download%3Ftoken%3DJhHuOV5l+&cd=3&hl=pt>; Loi 2013-387 du 22 mars 2012 relative à la simplification du droit et à l’allègement des démarches administratives [of March 22, 2012 on the Simplification of Legislation and Reduction of Administrative Procedures], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 23, 2012, no. 1, <https://www.legifrance.gouv.fr/jorf/jo/2012/03/23/0071>; Loi 2012-347 du 12 mars 2012 relative à l’accès à l’emploi titulaire et à l’amélioration des conditions d’emploi des agents contractuels dans la uadron publique, à la uad contre les discriminations et portant diverses dispositions relatives à la uadron publique [Law 2012/347 of Mar. 12, 2012 on Civil Service], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Mar. 13, 2012, No. 4, <https://www.legifrance.gouv.fr/jorf/jo/2012/03/13/006>; and Décret 2016-151 du 11 février 2016 relatif aux conditions et modalités de mise en œuvre du télétravail dans la uadron publique et la magistrature [Decree 2016-151 of Feb. 11, 2015 on telework in public service], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 12, 2016, no. 63, <https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000032036983>; Italy – Accordo interconfederale 9 giugno 2004 per il recepimento dell’accordo uadro europeo sul telelavoro concluso il 16 luglio 2002 tra UNICE/UEAPME, CEEP e CES [National Interconfederal Agreement on Telework of June 9, 2004 between UNICE/UEAPME, CEEP and CES], <https://www.ebinter.it/allegati/cd3/contenuti/articoli/app3.htm>; Mauritius – Workers’ Rights (Atypical Work) Regulations 2019, GOV’T GAZETTE, No. 113, Oct. 26, 2019, LEGAL SUPP., Gov’t Notice 234, at 2245, [https://labour.govmu.org/Documents/Legislations/THE%20WORKERS%20RIGHTS%20Act%202019/The%20Workers%20Rights%20\(Atypical%20Work\)%20Regulations%202019.pdf](https://labour.govmu.org/Documents/Legislations/THE%20WORKERS%20RIGHTS%20Act%202019/The%20Workers%20Rights%20(Atypical%20Work)%20Regulations%202019.pdf); Poland – KODEKS PRACY [LABOR CODE], Div. 2, Chap. II, Sec. 7, Chap. Iib, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/45181/91758/F1623906595/The-Labour-Code%20consolidated%201997.pdf>; Portugal – CÓDIGO DO TRABALHO [LABOR CODE], Book I, Title II, Chapter II, Section IX, Subsection V, [https://files.dre.pt/diplomastraduzidos/7\\_2009\\_CodigoTrabalho\\_EN\\_publ.pdf](https://files.dre.pt/diplomastraduzidos/7_2009_CodigoTrabalho_EN_publ.pdf).

South Africa regarding the continued operations of businesses. Indeed, according to figures from Statistics South Africa, about 997 businesses were liquidated in the first half of 2021 alone.<sup>76</sup> These closures contribute towards an apprehensive mood. One union respondent stated that in circumstances where it is financially beneficial for employers to convert all their workers into teleworkers, it would be unwise to prevent those employers from doing so, granted that they continue treating their employees no less favourably than before.

Universally, trade union respondents were favourable to the idea that if employees can telework without any notable negative effect or influence on the business of the employer, they should be allowed to. Several jurisdictions have codified this idea, requiring employers to give due consideration to requests to telework and grant them when it does not impact the business.<sup>77</sup>

It is important to note that employers should not wield the sole right to introduce telework unilaterally. Involving employees is recommended as they are in the best position to both know and understand the state of their own health, wellbeing and their private environments. Accordingly, only they can determine if remote work is preferable and safe in their respective cases or not. As noted above, remote work does not only provide benefits. There are downsides that must actively be accounted for during the continued usage of this type of work arrangement. Each of these positive and negative aspects of remote work may influence the choice or preference of an employee to perform their work remotely or otherwise and at any point in time. These preferences ought to be respected and should in fact take precedence over the non-essential economic needs of the employer. Much is said by employers about the importance of their employees' mental health and wellbeing, yet studies continue to confirm that these often amount to nothing more than empty platitudes.<sup>78</sup>

### Freedom of Association

South Africa is a signatory of the International Covenant on Civil and Political Rights (ICCPR) which extends a universal right to freedom of association, including the right to form and join trade unions.<sup>79</sup> Article 22 of the ICCPR is given expression under Sections 18 and 23 of the South African Constitution.<sup>80</sup> The right is further given extensive expression and protection under Sections 4 and 5 of the LRA. Section 4 and 5 also give effect to provisions of the Freedom of Association and Protection of the Right to Organise Convention, (No. 87) 1948, Workers' Representatives Convention, 1971 (No. 135) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

Section 4 provides that "every employee has the right to form a trade union ... and to join a trade union, subject to [the trade union's] constitution."<sup>81</sup> From the right to form or join a trade union flows a variety of other trade union-related rights, including the right to participate in the lawful trade union activities, to elect trade union leaders, to stand for and hold office within a trade union and the duties of these offices.

Section 5 establishes and entrenches protections against conduct that may jeopardise employees' exercise of these rights. The Act also extends protections under Section 5(2) and 5(3) to seekers of employment. For purposes of the immediate discussion, the term 'employee' should be interpreted to include jobseekers.

76 STATISTICS SOUTH AFRICA, STATISTICS OF LIQUIDATIONS AND INSOLVENCIES (PRELIMINARY) 4 (2021), <http://www.statssa.gov.za/publications/P0043/P0043June2021.pdf>.

77 See, e.g. Loi du 5 mars 2017 concernant le travail faisable et maniable [Law on Feasible and Manageable Work], M.B., Mar. 15, 2017 (Belg.), <https://www.ejustice.just.fgov.be/eli/loi/2017/03/05/2017011012/moniteur>. Other examples are the Employment Rights Act 1996, §47E (U.K.), <https://www.legislation.gov.uk/ukpga/1996/18/section/47E> (flexible working); Workers' Rights (Atypical Work) Regulations 2019, GOV'T GAZETTE, No. 113, Oct. 26, 2019, LEGAL SUPP., Gov't Notice 234, at 2245 (Mauritius), [https://labour.govmu.org/Documents/Legislations/THE%20WORKERS%20RIGHTS%20Act%202019/The%20Workers%20Rights%20\(Atypical%20Work\)%20Regulations%202019.pdf](https://labour.govmu.org/Documents/Legislations/THE%20WORKERS%20RIGHTS%20Act%202019/The%20Workers%20Rights%20(Atypical%20Work)%20Regulations%202019.pdf); and R.D.L. 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores [Approval of the revised text of the Workers' Statute Law], B.O.E. 2015, 11430 (Spain), <https://www.boe.es/boe/dias/2015/10/24/pdfs/BOE-A-2015-11430.pdf>.

78 John Egan, *CEOs and Workers Don't See Eye to Eye on Mental Health Assistance*, SHRM (Apr. 6, 2021), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/ceos-and-workers-dont-see-eye-to-eye-on-mental-health.aspx> (accessed 16 April 2022); see also Kelly Greenwood et al., *Research: People Want Their Employers to Talk About Mental Health*, HARVARD BUSINESS REVIEW (Nov. 22, 2019), <https://hbr.org/2019/10/research-people-want-their-employers-to-talk-about-mental-health>.

79 International Covenant on Civil and Political Rights art. 22, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], [https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch\\_IV\\_04.pdf](https://treaties.un.org/doc/Treaties/1976/03/19760323%2006-17%20AM/Ch_IV_04.pdf).

80 S. AFR. CONST., 1996., §§ 18 & 23.

81 Although the Constitution endorses a wider audience (i.e., 'everyone'), under its right to fair labour practices dispensation, one should not presume the LRA is in consonance with the Constitution. Even though the right encompasses 'everyone,' it is a right to 'fair labour practices,' which necessarily demands the existence of a labour or work relationship that resembles that which exists between an employer and employee. It does not accommodate any relationship that does not fall within the confines of 'fair labour practices.' See DEBBIE COLLIER ET AL., *LABOUR LAW IN SOUTH AFRICA: CONTEXT AND PRINCIPLES* 7-8 (4th ed. 2020).

Under Section 5(1) employees are given protection from discrimination for exercising any of their rights in terms of the LRA. This right is enforceable against anyone who may infringe it, irrespective of whether that person is the state or an agent thereof, the employer or the trade union itself. The Labour Court in *FAWU & others v. Pets Products (Pty) Ltd* confirms that when an employee establishes that an act of discrimination within the meaning of the LRA has occurred, such discrimination is presumed unfair until otherwise proven.<sup>82</sup> In the court's view, discrimination under Section 5(1) of the LRA is comparable to discrimination on one of the listed grounds in Section 9 of the Constitution, which have the effect of impairing the inherent dignity of the person, whereby such discrimination necessitates a presumption of unfairness.

Section 5(2) prohibits anyone from penalising employees exercising their trade union rights by either requiring them to not become members, or cease their membership, of a trade union or by preventing them from participating in any proceedings in terms of the LRA or exercising their LRA rights. This prohibition of employee penalisation extends to any act that may prejudice employees for their past, present or anticipated trade union membership, participation in trade union formation or potential establishment of workplace forums or for participation in the lawful activities of a trade union.<sup>83</sup> No one may prejudice an employee for a past, present or anticipated failure to do something in accordance with an instruction of which the employer has no lawful authority to give to the employee; for disclosure of information that the employee is/was required or entitled to give to another person or for the exercise of any right conferred by, or participating in any proceedings in terms of, the Act.<sup>84</sup>

In *FAWU & another v. The Cold Chain*, the Labour Court held that no one's employment status should be subject to their trade union membership,<sup>85</sup> and that the dismissal of the employee based on their refusal to renounce a trade union position was automatically unfair.<sup>86</sup> The court emphasised that employees, whatever their position, have an absolute right to join trade unions and participate in trade union activities.<sup>87</sup> This appreciation of the primacy of trade union rights was further confirmed in *Kroukam v. SA Airlink (Pty) Ltd*,<sup>88</sup> where the LAC found a dismissal automatically unfair where it stemmed in part from the employee's trade union activities.<sup>89</sup> Where it can be shown that trade union activities were the dominant reason for a dismissal, it is irrelevant that other valid grounds are also present.<sup>90</sup>

Section 5(3) prohibits advantaging or promising to advantage employees for not exercising their rights or participating in proceedings in terms of the LRA. Under Section 5(4), no provision in a contractual agreement, whether concluded prior to or post the commencement of the LRA, that attempts to limit employee rights to freedom of association and the statutory protections thereof, is valid unless such provision is permitted under the Act.

### Collective Bargaining

Attendant to the right to freedom of association, including the right to join trade unions, are the organisational rights of those trade unions. Generally, the LRA does not make a distinction between registered and unregistered trade unions. Irrespective of their status, all trade unions have access to the dispute resolution mechanisms of the LRA, are protected from civil action for organisation of protected strikes, enjoy further protection from victimisation and have the right to represent their members in legal proceedings. However, section 200(2) of the LRA permits only registered trade unions to be a party to any legal proceeding.

Be that as it may, the LRA extends organisational rights to trade unions to enable them to effectively represent the interests of their members. In this respect, the legislation also makes a distinction between registered trade unions and unregistered trade unions. Trade union representation is normally majoritarian, although minority trade unions may still engage in collective bargaining under certain conditions. However, the Act defines a representative trade union in broad terms. Under Part A of the Collective Bargaining chapter, the Act states that a representative trade

82 2000 (7) BLLR 781 (LC) para. 20.

83 LRA, § 5(s)(c)S.

84 *Id.*

85 2007 (7) BLLR 638 (LC).

86 *The Cold Chain* para. 36.

87 *The Cold Chain* para. 26. The court reiterated the analysis of an earlier decision of the Labour Court, wherein Brassey AJ stated that: "protections conferred by the victimization rights clauses give employees, whatever their status, the absolute right to join trade unions and take part in their activities. By so doing, they victimization acts that might otherwise constitute a breach of the employee's duty of fidelity, prohibit victimisation and outlaw rules of the sort that the respondent laid down in the present case. Beyond that, they do nothing to exempt employees from their duties under the contract. The employee must still do the work for which he is engaged and observe the secondary duties by which he is bound under the contract. If he does not, he can be disciplined for misconduct or laid off for incapacity."

88 2005 (12) BLLR 1172 (LAC).

89 *Kroukam v. SA Airlink* para. 85.

90 *Id.*



union refers to “a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed by an employer in a workplace,” thus promoting cooperation between trade unions.<sup>91</sup>

Subject to conditions relating to time and place and which are reasonable to protect life, property and prevent unwarranted operational disruptions,<sup>92</sup> officials of a representative trade union have a right to enter the employer’s premises in order to recruit members, and to hold meetings outside working hours.<sup>93</sup> Members are entitled to vote in any trade union election on the employer’s premises.<sup>94</sup> Members are also entitled to choose and vote, from among themselves depending on their numbers in a workplace, for a trade union representative in accordance with the constitution of their trade union.<sup>95</sup>

Section 14(4) provides that a trade union representative has the right to perform certain functions including assisting and representing employees in grievance and disciplinary proceedings and monitoring compliance with LRA workplace-related provisions, any laws that regulates conditions of employment or a collective agreement, as well as to report breach of these rules to “the employer, ... representative trade union ... and any responsible authority or agency.” The Act also provides under Section 16 for disclosure by an employer of all relevant information to either a trade union representative or a representative trade union, in order to allow them to participate effectively in collective bargaining.<sup>96</sup>

Trade unions are empowered, together with employers, to conclude collective agreements to regulate different matters of interest to the parties including regulation of organisational rights. Collective agreements concluded between the parties have binding effect on the parties thereto and their members and non-members if said class of persons are identified in the collective agreement.<sup>97</sup>

Section 199 prohibits an employer from concluding an employment contract that undercuts the prescriptions of a collective agreement by either allowing an employee to be paid at a rate lower than that prescribed by a collective agreement. Such a contract may also not waive the application of the collective agreement, wholly or in part, nor can it allow the treatment of, or extend a benefit to, an employee that is less favourable than that prearranged under a collective agreement.<sup>98</sup>

Section 64 grants every employee the right to strike when, having referred a matter in dispute to a bargaining or statutory council or the CCMA, the matter remains, and is certified to be, unresolved. Employees may also strike where the issue in dispute is an employer’s refusal to bargain. A refusal to bargain includes a refusal to establish a bargaining council, to recognize a trade union as an agent for collective bargaining, withdrawal of recognition of a bargaining agent, withdrawal or resignation from a bargaining council or a dispute about the appropriate bargaining units, bargaining levels or subjects.<sup>99</sup> Employers also have a corresponding recourse to lock-out in order to compel employees to accept a demand in respect of a matter of mutual interest.<sup>100</sup>

To sum, freedom of association and collective bargaining in South Africa is guaranteed under section 23 of the Constitution and regulated under the Labour Relations Act which provides for the following entitlements:

- An absolute right to join or form a trade union
- To participate in the lawful activities of the trade union
- To not be discriminated against in respect of the exercise of their right to freedom of association
- To bargain collectively and conclude collective agreements
- To strike over matters of mutual interest

91 LRA § 11.

92 *Id.* § 12(4).

93 *Id.* § 12(1)-(2).

94 *Id.* § 12(3).

95 *Id.* § 14.

96 An employer need not disclose legally privileged information or information that it cannot disclose without breaching a prohibition placed on it by any law or court order. It can also not disclose private personal information of employees unless they consent to the disclosure, although an employee may permit such disclosure.

97 LRA § 23(1).

98 *Id.* § 199(b)-(c).

99 *Id.* § 64(2).

100 *Id.* § 64(1) read with § 213 definition of “lock-out.”

## LRA and Telework

Although applying the entitlements in the LRA to teleworkers should not in itself be problematic, there are certain practical difficulties that should be considered. This is because the exercise of some aspects of the right to freedom of association and collective bargaining are linked to an existing workplace, such as recruitment of members by trade union officials in an employer's workplace. On the surface, this difference may seem benign, since an employee who works away from the employer's designated premises would instead have whichever place in which they operate as their workplace. However, this may not be sustainable under the LRA. The LRA defines a workplace as

the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation.<sup>101</sup>

This definition of workplace in the LRA entails a plurality of employees within a given workspace. The Constitutional Court, the final court of appeal in the Republic, discussed the meaning of 'workplace' in the LRA in detail in *Association of Mineworkers and Construction Union and others v. Chamber of Mines of South Africa and others*. In this case, the court stressed that "workplace" in the LRA was given a distinct "special" meaning.<sup>102</sup> It was tailored specifically for the provisions of the Act which promoted the orderly bargaining by employees *collectively*.<sup>103</sup> As far as the meaning of workplace is concerned, the court stated that:

'workplace' is **not the place where any single employee works – like that individual's workshop or assembly line or field or desk or office**. It is where **'the employees of an employer', collectively, work**. The statute approaches the concept from the point of view of those **employees as a collectivity**. This accords with the role the term 'workplace' plays in the LRA. This sees workers as a collectivity, rather than as isolated individuals. (Emphasis added.)<sup>104</sup>

From the perspective of a teleworker, the places from which they work are unlikely to accord with the definition. Though the court notes that geographical and locational factors are of little relevance, the challenge comes with the first part of the definition which suggests that a workplace necessarily needs to have more than one employee. Teleworkers often work at home or in other places in isolation from their colleagues. Since the definition implies a collectivity of employees constituting a workplace, a person's home office, desk or a coffee shop table where they carry out their responsibilities, may not constitute a workplace as conceived both in the LRA and by the Constitutional Court.

Despite the decision in *AMCU*, digital workplaces such as collaboration and videoconferencing platforms do, however, comply with the definition. As the Constitutional Court noted in *AMCU v. Chamber of Mines*, geographic or locational factors are not relevant to the actual existence of the workplace. What is key to a workplace is the collectivity of employees doing work for an employer in whichever place they may collectively be (and, arguably, on whatever platform they may be working). Since the pandemic started, many organisations have been using software like Microsoft Teams, Outlook and other digital platforms on which employees meet and collaborate. These platforms have somewhat replaced boardrooms and other staff meeting places that would have been used in a traditional work setting. One could even say that they have become more than just the next meeting room but also the virtual water cooler in the corridor. In other words, work that would have been done in a normal workplace can now be done on these digital platforms. The mere fact that the performance of work and, indeed the meeting of employees, is virtual, does not render any of these platforms as being less of a workplace under the LRA than a physical building or factory.

Respondents representing trade unions, when answering the question of regulation of telework, express concern that it is not sufficiently accommodated within the confines of existing labour legislation. One union respondent observes that remote work has led to employees being required to work longer hours and being required to always be reachable. This change, the respondent further notes, has indirectly contributed to the limitation of the time employees have to engage in other activities including the exercise of their trade union rights. With respect to trade union activities, none of the worker respondents belonged to trade unions. As shown later in this study, workers who tend to, or can, telework in South Africa are more likely to occupy higher-paying professional services positions, which tend to have limited trade union penetration. Accordingly, none of the workers surveyed responded to the question of whether or not they were able to partake in trade union activities.

<sup>101</sup> LRA § 213.

<sup>102</sup> 2017 (7) BLLR 641 (CC) para. 29.

<sup>103</sup> *AMCU v. Chamber of Mines* para. 25.

<sup>104</sup> *Id.*

According to union respondents, relying on their experience with COVID-19 lockdown measures, remote working wrought upon the labour market restrictions on employee availability. As such, there is a consensus in the responses on the inability of trade unions to efficiently organise in respect of employees working from home. Issues such as the cost of data, rolling power cuts, limited technological education and unequal access to telecommunications infrastructure were cited as reasons that made even the holding of meetings online difficult. Requirements that employers provide access to digital spaces, just as they would the physical workspace, and provide digital meetings spaces in the same manner they would be required to provide space within an employers' premises could be a starting point to address these discrepancies.

Concerning these issues, it is suggested that this is an issue that straddles various factors including conditions of employment, the employer's common law managerial prerogatives and the pandemic.

## EMPLOYMENT EQUITY ACT

### Unfair Discrimination

The Employment Equity Act (EEA) deals with discrimination in the workplace. Given the checkered discriminatory history of South Africa, the Constitution under Section 9 provides for a right to equality.<sup>105</sup> The EEA gives effect to the right to equality and its attendant benefits in the workplace. Like the LRA, the EEA is strictly applicable to employees.<sup>106</sup> The relevant topics that are covered by the EEA are as follows:

- Prohibition of Unfair Discrimination (Chapter II)
- Employer Liability (Section 60)

Section 5 of the Employment Equity Act obliges every employer to take steps to "promote equal opportunity in the workplace by eliminating *unfair discrimination in any employment policy or practice*." An employment policy or practice is said to include, *inter alia*, job classifications and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, recruitment procedures, advertisements and selection criteria, training and development, promotion, demotion, disciplinary measures short of dismissal.<sup>107</sup> This is not an exhaustive list.

While the EEA does not define unfair discrimination, it lists grounds upon which discrimination will be unfair. Under section 6(1) of the EEA, discrimination based on any one or more of the listed grounds of race, gender, sex, HIV status, religion, sexual orientation, birth, political opinion, belief, culture, language, marital status, family responsibility, ethnic or social origin, color, age, disability, conscience or any other arbitrary ground, is prohibited.

However, section 6(2) provides that discrimination will otherwise not be unfair if it is made to effect affirmative action measure recognized and promoted by the EEA or such distinction is made based on an inherent requirement of the job.<sup>108</sup>

If an employment policy is found to unfairly discriminate against any employee on the basis of any one of the listed grounds (which are akin to those grounds listed in section 9 of the Constitution), the Constitutional Court has held that such discrimination will be presumed unfair until proven otherwise.<sup>109</sup> Unfair discrimination may also occur based on a non-listed or otherwise arbitrary ground.<sup>110</sup> For unfair discrimination to be found based on a non-listed, said grounds must be analogous to those listed grounds in section 6(1).<sup>111</sup> In other words, the execution of the alleged discrimination must have the effect of impairing the inherent dignity of the employee as a person.

<sup>105</sup> S. AFR. CONST., 1996, § 9.

<sup>106</sup> Non-employees have recourse under Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000, <https://www.gov.za/documents/promotion-equality-and-prevention-unfair-discrimination-act>.

<sup>107</sup> Employment Equity Act 55 of 1998, § 1 [hereinafter EEA].

<sup>108</sup> The latter has been interpreted very restrictively by South African courts. See, e.g. *TDF Network Africa (Pty) Ltd v. Faris*, 2019 (2) BLLR 127 (LAC) para. 37.

<sup>109</sup> *Harksen v. Lane No and Others* 1997 (11) BCLR 1489 (CC) para. 45.

<sup>110</sup> In *Larbi-Odam and others v. Member of the Executive Council for Education (North-West Province) and another* 1997 (12) BCLR 1655 (CC) para. 35, the Constitutional Court found discrimination in employment based on citizenship, an unlisted ground under section 8(2) of the Interim Constitution, to be purely discriminatory.

<sup>111</sup> *Khosa and Others v. Minister of Social Development and Others; Mahlaule and Another v. Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) par 72.

## Harassment

Protection from harassment is dealt with specifically in terms of section 6(3) of the EEA, which provides that harassment of an employee based on any one or a combination of the grounds listed in section 6(1) is a form of unfair discrimination.<sup>112</sup>

Being the most common form of harassment, sexual harassment was, until March 2022, specifically subject to the consideration of the 2005 Amended Code of Good Practice on the Handling of Sexual Harassment Cases. It is now handled under the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (hereinafter Harassment Code)<sup>113</sup> whose draft and final form are discussed below. The Harassment Code deals with harassment more generally and was enacted to give effect to South Africa's obligations under International Labor Organization Convention 190 on Violence and Harassment<sup>114</sup> which South Africa ratified in November 2021.<sup>115</sup> Under the 2005 Sexual Harassment Code, the Labour Court held that failure to consider the Code by a CCMA Commissioner was a defect that could be reviewed.<sup>116</sup>

The Harassment Code defines harassment under item 4 as

unwanted conduct which impairs dignity; which creates a hostile or intimidating work environment for one or more employees or is calculated too, or has the effect of, inducing submission by actual or threatened adverse consequences; and is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA. Harassment includes violence, physical abuse, psychological abuse, emotional abuse, sexual abuse, and racial abuse. It includes the use of physical force or power, whether threatened or actual, against another person or against a group or community.

Sexual harassment is now defined as unfair discrimination which is prohibited on the basis of gender, sex and sexuality. The definition now expressly includes sexual harassment that occurs between people of the same sex. Conduct tantamount to sexual harassment need not be sustained over a period of time.<sup>117</sup> In *Campbell Scientific Africa (Pty) Ltd v. Simmers*, the LAC held that a single unwelcome advance which fell within the scope of the definition of "sexual harassment" was enough to impair the inherent dignity of the victim and therefore justify a dismissal of the harasser.<sup>118</sup> There are various forms of sexual harassment that are recognised including *quid pro quo* sexual harassment.<sup>119</sup>

Convention 190 obligates states to protect all workers regardless of their contractual status, including workers in the informal economy, from violence and harassment in the world of work.<sup>120</sup> The final Harassment Code adopts detailed requirements with respect to employees, including explicitly employees of employers operating within the informal sector, as well as jobseekers and volunteers. These requirements include a clear obligation on employers to adopt measures to prevent violence and harassment, including by creating policies, implementing effective complaint procedures and ensuring access to remedy. However, the self-employed and independent contractors remain outside the scope of these protections. The Harassment Code attempts to address this shortcoming by including an explicit statement that the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA) applies where the EEA does not, but does not adopt clear language ensuring that the more detailed obligations on employers to prevent harassment shall be applied.

Convention 190 also requires governments and employers to address the impact of domestic violence on the world of work,<sup>121</sup> but the Harassment Code removed any reference to domestic violence, which had been included in earlier drafts. Thus, any potential clear duty on the employer to provide reasonable accommodations or leave to employees who are victims of domestic violence has been lost. ILO Recommendation No. 206 contains guidance

112 *Shoprite Checkers (Pty) Ltd v. Samka and others* [2018] 9 BLLR 922 (LC) par 33.

113 Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, GN R.1890 of GG 46506 (18 Mar. 2022)[hereinafter Harassment Code], [https://www.gov.za/sites/default/files/gcis\\_document/202203/46056reg11409gon1890.pdf](https://www.gov.za/sites/default/files/gcis_document/202203/46056reg11409gon1890.pdf).

114 (June 21, 2019)[hereinafter C190 or Convention 190], [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C190](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C190).

115 *International Labour Standards on Equality of Opportunity and Treatment*, INT'L LAB. ORG.: VIOLENCE AND HARASSMENT (Dec. 16, 2021), [https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/equality-of-opportunity-and-treatment/WCMS\\_832079/lang--en/index.htm#:~:text=On%2029%20November%202021%2C%20South,to%20have%20ratified%20the%20Convention](https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/equality-of-opportunity-and-treatment/WCMS_832079/lang--en/index.htm#:~:text=On%2029%20November%202021%2C%20South,to%20have%20ratified%20the%20Convention).

116 *SA Metal Group (Pty) Ltd v. Commission for Conciliation Mediation and Arbitration and Others* 2014 (35) ILJ 2848 (LC) para. 22-24.

117 *Campbell Scientific Africa (Pty) Ltd v Simmers and others* [2016] 1 BLLR 1 (LAC) para. 11-17, 26-27.

118 *Campbell Scientific Africa (Pty) Ltd v. Simmers and others* 2016 (1) BLLR 1 (LAC) para. 22.

119 *University of Venda v. Maluleke and Others* 2017 (38) ILJ 1376 (LC) para. 76-77.

120 C190, art. 1, *supra* note 114.

121 C190 art. 10, *supra* note 114.

for governments and employers to implement the requirements of Convention 190, including how to address the impact of domestic violence on the world of work. Recommendation 206 calls on governments and employers to provide paid leave to address the impact of domestic violence, such as moving out of a shared residence, obtaining a restraining order or attending medical appointments. It also states employers should provide flexible working arrangements and accommodations, and referrals to public mitigations measures. Governments are called on to enact protections against dismissal or other adverse job actions related to being an actual or perceived victim of domestic violence; a measure necessitated by the unfortunate reality that victims of domestic violence are often fired for reasons connected to their abuse.<sup>122</sup>

The Harassment Code is a significantly valuable document insofar as employment equity issues concerning teleworkers are concerned. Sub-section 2.3 of the Code is especially interesting. It provides that employees are protected against harassment in any situation wherein the employee is working, “or which is related to their work.”<sup>123</sup> It goes further to state that the term workplace includes, *inter alia*, both public and private spaces where people carry out their work and work-related communications, including ICT and internet-enabled communications. Importantly, at 2.3.8, the Code expressly states: “in the case of employees who work virtually from their homes, or any place other than the employer’s premises, the location where they are working constitutes the workplace.”<sup>124</sup> The Harassment Code’s explicit recognition of virtual workplaces as equivalent to physical workplaces is a welcome development.<sup>125</sup> Should a teleworker experience harassment at work, in whatever form, as defined in the Code, the fact that it occurred within their private residence or a coffee shop or even on a digital platform will not disqualify their claim. The Code confirms that they are covered.

Section 60 of the EEA imposes an obligation on employers to take steps to remedy conduct that offends the Act. The failure by an employer to take such steps will result in the employer also being deemed guilty of contravening the Act’s provisions.<sup>126</sup> The Harassment Code requires employers to develop clear procedures for the resolution of problems “in a gender-sensitive, confidential, efficient, and effective manner.” It further requires that employers counsel the parties and take necessary steps to address the complaint and eliminate the harassment. These necessary steps include: advising complainants of the procedures available to deal with the harassment; offering advice; counselling and assistance; and following procedures set out in the Code in a substantively and procedurally fair manner. The Code outlines that these procedures include responding to harassment from third parties, such as members of the public, clients and customers. Employers can be liable where they should have anticipated such conduct and failed to take steps to prevent it.<sup>127</sup>

Despite the statutory provisions offered by the EEA, employers are nevertheless still vicariously liable *in delict* (common law) for the unlawful conduct of their employees carried out in the course of their employment. This liability extends to conduct such as sexual harassment by a colleague of the victim. The SCA confirmed this fact in *Media24 v. Grobler* when it held that employers have a common law duty to take reasonable care of the safety of their employees and that the duty extended to protection of employees against psychological harm from their co-employees.<sup>128</sup> This appeal decision confirmed the decision of the Cape Division of the High Court in *Grobler v. Naspers* which reaffirmed that the mechanism in section 60 of the EEA available to the employee did not preclude the employee from pursuing a claim for damages in delict on the same facts.

The seriousness to which the courts are willing to attach to claims against employers who fail in their duty to protect employees from workplace violence or harassment is also notable. In the 2021 case of *PAE v. Dr Beyers Naude Local Municipality and another*, the Eastern Cape Division, Grahamstown awarded almost R4 million in damages against an employer, in favor of an employee who had been sexually assaulted by a colleague and whereby the employer had failed to take reasonable steps to remedy the situation.<sup>129</sup>

122 SOLIDARITY CENTER, DOMESTIC VIOLENCE IS A WORKER RIGHTS ISSUE (2022), [https://www.solidaritycenter.org/wp-content/uploads/2022/02/DV-is-a-Worker-Rights-Issue-Fact-Sheet\\_2-2022.pdf](https://www.solidaritycenter.org/wp-content/uploads/2022/02/DV-is-a-Worker-Rights-Issue-Fact-Sheet_2-2022.pdf).

123 Harassment Code § 2.3.

124 *Id.* § 2.3.8.

125 “Workplace” under the EEA is generally accepted as being the same as defined under the LRA.

126 EEA §60(3).

127 Harassment Code, § 4.6.2.

128 *Media 24 Ltd & another v. Grobler* 2005 (7) BLLR 649 (SCA) 65-69.

129 *PAE v. Dr Beyers Naude Local Municipality and another* 2021 (2) All SA 839 (ECG).



## Applicability of the EEA to Telework

Teleworkers that fall within the scope of employee under the LRA, will also fall under the scope of the EEA.<sup>130</sup> In fact, nothing in the EEA excludes teleworkers, provided that their status is that of an employee. South Africa's ratification of Convention 190 and the promulgation of the Harassment Code are the most significant policy moves toward affording explicit recognition and protection for all workers outside of a traditional workplace, including teleworkers in South Africa.

The new Code expressly states that the term "workplace" includes spaces created by ICT and private spaces, extending the EEA's scope of coverage against unfair discrimination to teleworkers in a clear and unambiguous manner. This is especially important because telework and the use of ICT presents the opportunity for new and invasive forms of harassment that employers should be clearly obligated to prevent and address. A 2021 United States survey found that during the COVID-19 pandemic, when many workers were teleworking, more than one-quarter of workers experienced unwelcome sexual behavior online, via Zoom, email or other platform, with the report noting the phenomenon of people feeling emboldened to say and do things in virtual spaces that they would not do in person.<sup>131</sup> In the United Kingdom, at least one worker that had shifted to remote work reported that a perpetrator of harassment at their work obtained their home address and showed up there.<sup>132</sup> Teleworkers in occupations that expose them to third parties, such as journalism, may face increased risks of online violence and harassment. Isolation may make it more difficult for workers to report these cases and reduces the likelihood of others witnessing misconduct.<sup>133</sup> Employers, working in consultation with unions, must intentionally address these risks. Unfortunately, because independent contractors and the self-employed fall outside the scope of the EEA, it is even more critical to ensure that teleworkers are not misclassified.

Most respondents supported protections against all forms of violence and harassment in the world of work,<sup>134</sup> including measures to address the impacts of domestic violence on the world of work, with many noting this disproportionately impacted women workers. One union respondent stressed that it was time to move away from old notions that eliminating domestic violence is the exclusive responsibility of law enforcement. She notes that although employers may not be held liable for failing to deal with domestic violence affecting their employees, at the very least they should endeavour to accommodate victims of domestic violence and to educate by providing training and educational materials about their rights and how to report abuse. This, she states, should come in part as a result of their expectation for good performance from their employees and their social responsibility as a key stakeholder in the community. Others however were of the view that domestic violence was too far removed a responsibility for an employer. The study disagrees with the dissenting respondents.

Although the employer is not responsible for creating the conduct of their employees' domestic abusers, they can and should nevertheless be liable for failing to provide reasonable accommodations to allow workers to remain in employment, or for discriminating against workers for reasons connected to the abuse. This would especially be the case in teleworking arrangements where the employer expects employees to work away from the office. If as a result of their working from home, an employee experiences abuse, the employer ought to take measures to mitigate the impact of the abuse on the employee if such conduct is brought to its attention thereby, especially if the employee's work performance would suffer and dismissal follow as a consequence. Reasonable accommodations in this instance could include allowing the employee to come to the employer's designated workplace, an alternative place to work or providing paid leave to move residences or obtain a restraining order. Conversely, if a worker who usually works at an employers' premises has left their abuser, and work is the only place their abuser knows to look for them, it would be reasonable for the employer to allow the worker to telework to ensure the safety of that worker and their coworkers. That what is now the final Harassment Code wholly ignores domestic violence is unfortunate. Domestic violence, especially intimate partner abuse, in South Africa is far too common. With highly

130 Also note that both the EEA and the BCEA define employee much like the LRA defines the term.

131 Caitlin Mullen, *As Work Shifted Online During Pandemic, Harassment did, too*, *BIZWOMEN* (July 29, 8:00 AM), <https://www.bizjournals.com/bizwomen/news/latest-news/2021/07/as-work-shifted-online-during-pandemic-harassment.html?page=all>.

132 Sian Norris & Claudia Torrisi, *COVID-19 Hasn't Killed Sexual Harassment at Work – It's Just Moved Online*, *OPENDEMOCRACY*: 50.50: NEWS (Sept. 23, 2020, 12:00 AM), [https://www.opendemocracy.net/en/5050/covid19-sexual-harassment-work-online/?utm\\_source=50.50&utm\\_campaign=5728aca5e5-EMAIL\\_CAMPAIGN\\_2019\\_09\\_10\\_12\\_48\\_COPY\\_01&utm\\_medium=email&utm\\_term=0\\_89d6c-8b9eb-5728aca5e5-408071349&\\_\\_cf\\_chl\\_tk=ejm32.qvtVJYZObaiAg6farCpQCQIIQccrhnGdPuWho-1651245124-0-gaNycGzNCDD0](https://www.opendemocracy.net/en/5050/covid19-sexual-harassment-work-online/?utm_source=50.50&utm_campaign=5728aca5e5-EMAIL_CAMPAIGN_2019_09_10_12_48_COPY_01&utm_medium=email&utm_term=0_89d6c-8b9eb-5728aca5e5-408071349&__cf_chl_tk=ejm32.qvtVJYZObaiAg6farCpQCQIIQccrhnGdPuWho-1651245124-0-gaNycGzNCDD0).

133 Anna Patty, *Working From Home can Stifle Sexual Harassment Complaints*, *SYDNEY MORNING HERALD* (July 6, 2020), <https://www.smh.com.au/business/workplace/working-from-home-can-stifle-sexual-harassment-complaints-20200702-p558hb.html>.

134 The respondents included: three trade union personnel; eight employees working in the professional and financial services sector, as well as regulatory institutions; three labor law academics; and two labor law practitioners/attorneys.

publicised cases of abusers following their victims to their workplaces, going as far as grievously assaulting them,<sup>135</sup> the decision to dispense within any regulation of domestic violence is a missed opportunity. This, not only to provide vulnerable employees, most of whom are women, with mechanisms to prevent their unfair indirect discrimination, but also provide them with avenues to cope with, and perhaps even report or escape, abusive personal relationships.

## BASIC CONDITIONS OF EMPLOYMENT ACT

The Basic Conditions of Employment Act gives effect to the right to fair labour practices, and South Africa's ILO obligations, by regulating the basic conditions of employment. It governs many aspects of the terms and conditions of employment, including working time, remuneration and leave. Like the other labour legislation discussed, the BCEA's application is limited to employees.

### Working Time

Chapter two of the BCEA deals with issues relating to working time of an employee. Section 6(1) precludes senior managerial employees, employees engaged in sales travelling to customer's premises and who regulate their own working hours as well as those who work less than 24 hours per month for the employer, from coverage under Chapter Two, except for section 7. People earning in excess of the earnings threshold of R211 596.30 gross pay<sup>136</sup> are also not covered by Chapter Two.<sup>137</sup>

The employer is required to regulate the employee's working time in terms of legislation regulating health and safety and with due regard to the employees' safety and health, the Code of Good Practice on the Regulation of Working Time, and their attendant family responsibilities.<sup>138</sup> Employees may not be required to work more than 45 hours per week.<sup>139</sup> Where the employee works for five days or less in a week, the employee may not work for more than 9 hours a day in that week.<sup>140</sup> In the instance where the employee works for five or more days in a week, they may not work more than 8 hours on any day in that same week.<sup>141</sup> Working hours can be increased by agreement beyond the stipulated maximum of 45 hours by up to 15 minutes per day but the increase should not exceed 60 minutes per week.<sup>142</sup> The Act also regulates working shifts and night work.<sup>143</sup>

If employers do not comply with any provision of the BCEA, labour inspectors are empowered to secure a written undertaking to comply with the relevant provision. Should the employer fail to comply, a labour inspector can issue a compliance order to the effect that the employer has failed to comply with the provision of the Act and stipulate the amount the employer is liable to pay and the steps the employer must take to remedy the violation.

### Overtime

The BCEA limits overtime to a maximum of 10 hours per week, and no employee may be asked to perform overtime work without a prior agreement to that effect.<sup>144</sup> The overtime agreement may not require an employee to work for more than 12 hours a week and will lapse after one year if concluded at the commencement of employment or within the first three months thereof.<sup>145</sup> A collective agreement may increase overtime to a maximum of 15 hours per week. Still, such overtime requirement may not be in effect for a period exceeding two months within any 12-month period.<sup>146</sup> Section 10(2) requires the employer to pay the employee at least 1.5 times the wage of the employee for overtime work unless there is an agreement, which may stipulate that the employee will not be paid less than his

135 Iavan Pijoo, *Soweto Pastor will Plead Guilty After Being Caught on Camera Viciously Attacking Ex-Girlfriend*, NEWS24 (Feb. 18, 2022), <https://www.news24.com/news24/southafrica/news/soweto-pastor-will-plead-guilty-after-being-caught-on-camera-viciously-attacking-ex-girlfriend-20220218>.

136 Gross pay excludes overtime pay. See *Mondi Packaging (Pty) Ltd v. Director-General, Labour & others*

[2010] 11 BLLR 1131 (LAC).

137 There is no legislation that covers people earning above the BCEA threshold with respect to matters dealt with in chapter two of the BCEA. Whether this is reasonable or not is open to question, but nevertheless falls outside the scope of this report.

138 BCEA, § 7.

139 *Id.* § 9(1)(a).

140 *Id.* § 9(1)(b).

141 *Id.* § 9(1)(c).

142 *Id.* § 9(2).

143 *Id.* § 17.

144 *Id.* § 10(1).

145 *Id.* § 10(1A) & (5).

146 *Id.* § 10(6).

ordinary wages and give the employee 30 minutes off with full pay for every overtime hours that the employee has worked or, alternative, grant the employee 90 minute's time off with full pay for every overtime hour worked which must be paid within a month of the employee's entitlement thereto, unless otherwise provided for by agreement.<sup>147</sup>

### The Right to Disconnect?

South African law does not recognize a specific right to disconnect. However, through the operation of provisions regulating overtime and working hours, some employees are given entitlements to detach themselves from their work responsibilities. These do not apply to employees who earn more than the stipulated maximum earnings threshold.

Section 14 of the BCEA entitles an employee who works for more than 5 consecutive hours to a meal interval of one hour, reducible by agreement to 30 minutes, which may only be interrupted for performance of duties that only that person can perform, and which cannot be left unattended. An agreement may also obviate the need for a meal interval for an employee who works a total of six hours per day<sup>148</sup>

Section 15(1) obligates the employer to afford the employee a daily rest period of a minimum of 12 consecutive hours rest between the end of their work and the start thereof as well as a minimum total of 36 consecutive hours weekly rest period which must include Sunday, unless otherwise agreed in terms of section 15(3).

Work from home during the COVID-19 pandemic has brought to the fore the substantial insufficiency of these restrictions on working time. According to a recent Remchannel employee wellness and performance report, employers reported that 88% of their employees worked longer hours and about a third expected their employees to answer emails outside their working hours.<sup>149</sup> It is not clear whether these employees include those protected by the BCEA or not, but even if that is not the case, it remains both concerning and undesirable.

The right to disconnect is not a right per se that exists independently under international law.<sup>150</sup> As such, it could be difficult for a South African court to import it into South African employment law. Nevertheless, it is an essential right that needs to be considered and possibly adopted, especially considering the evidence that many South Africans have had the separation between their work and private lives encroached upon by their employers. That some even go as far as requiring employees to avail themselves to respond to work emails outside working hours, whatever the circumstances, is essentially an abuse of technology with no regard as to the wellbeing, personal and family responsibilities of their employees.

Article 7(d) of the International Covenant on Economic, Social and Cultural Rights, 1966 obligates state parties to recognize the right of every person to "[r]est, leisure and reasonable limitation of working hours and periodic holidays with pay."<sup>151</sup> Although the right does not refer to a person's entitlement to not have to respond to work-related communications, which is the content of the contended right to disconnect, it does specifically provide that a person has the right to have his working hours limited. When an employee is expected by his employer to respond to work-related communications outside their normal working hours, one ought to ask whether that employee is actually doing work for their employer or merely responding to electronic communications. When discussing the scope of the definition of the term workplace, above, it was argued that digital platforms have essentially become conduits through which work, for the benefit of employers, can be done. Thus, when an employee responds to electronic communications whose origin or purpose is linked to an employer, that employee is carrying out obligations owed to the employer. There is no difference between this activity of responding to a work-related communication during the course of one's working day and the act of responding to the same communication outside working hours. The same purpose -- being the carrying out of obligations owed to the employer -- is fulfilled; work is being done on behalf of the employer. Thus, it is submitted, when an employer expects an employee to avail themselves to answer work communications outside working hours, they are essentially commanding the employee to "clock in" at their workplace and perform their work obligations. In other words, the employee's right to have their working hours limited is actively being infringed. Workplaces can no longer be considered to only be physical spaces determined by employers. The platforms through which employers and their employees engage in the execution of their respective duties have now become workplaces in their own right. Thus, the right to disconnect should not be seen as an

<sup>147</sup> *Id.* § 10(3).

<sup>148</sup> *Id.* § 15(5).

<sup>149</sup> Londiwe Buthelezi, *Employees are 'Burnt out' as They Work Into the Night, Skip Leave*, News24 (Oct. 28, 2021) <https://www.news24.com/fin24/companies/employees-are-burnt-out-as-they-work-into-the-night-skip-leave-report-20211028>.

<sup>150</sup> ICCPR, *supra* note 79.

<sup>151</sup> A similar human right exists under article 24 of the Universal Declaration of Human Rights. G.A. Res. 217 (III)(Dec. 10, 1948).

anomalous development in labour law but rather as a modern understanding of an existing right that is now being brought into a 21<sup>st</sup> century reality.

### Costs of Maintaining office, Equipment and Connection

There generally is no express legal obligation on the employer to cover the cost for expenses incurred by an employee in the performance of their work. However, it appears to be standard practice for employers to provide tools and equipment to the employee in order to enable them to perform their duties. Some employment contracts may include a clause providing that it will be the employer's responsibility to provide the employee with tools and equipment for the job.<sup>152</sup> Tools and equipment could include things such as mobile phones, computers, stationery, vehicles, fuel and, if the employee works virtually from home, an internet connection, which are necessary for the performance of the employee's work. While the BCEA does not obligate the employer to assume the cost of tools and equipment for an employee's trade, it nevertheless recognizes, under section 83A, that the provision of tools and equipment by an employer is a factor that indicates one's status as an employee. The SARS Interpretation Note 17<sup>153</sup> echoes this indication and suggests that provision of stationery, tools and office material to the person by an employer is a persuasive indicator of a lack of investment by the employee, which may indicate that an employment relationship exists.<sup>154</sup>

Since the start of the COVID-19 pandemic, the SARS has extended tax benefits to employees working from home. Provided the employee has a particular area of their house converted into an office wherein they exclusively and regularly perform at least 50% of their work (except if such employee earns 50% of their remuneration as commissions), employees can claim home office expenses in terms of Section 23(b) of the Income Tax Act 1962.<sup>155</sup> Home office expenses include rent of the premises, (which is calculated on a pro-rata relative to the total area of the house), cost of repairs of premises and other expenses connected to the premises. Stationery, phones, internet, cleaning, wear-and-tear, office equipment and rates and taxes are also typical forms of home office expenses under Section 23(m) of the Income Tax Act.<sup>156</sup>

While this could certainly be beneficial for the teleworker, it is nevertheless problematic as it takes a duty that should normally be performed by an employer and places it on the worker's feet. Furthermore, SARS claim processes are not known for their swiftness. This, in addition to the possible financial burdens that workers can incur as they now assume extra financial responsibilities related to their work which can limit their ability to service other financial needs. Ideally, employers should be responsible for payment of the costs of work-related expenses incurred by employees in their remote workplaces.

### BCEA and Teleworkers

Much like the EEA, the BCEA does not contain any provisions that would render teleworkers falling within the definitional boundaries of "employee" under the LRA ineligible for coverage. Other than the exclusion of employees earning above a certain threshold, the BCEA's regulations of working hours, overtime, mealtime, rest periods and other issues of concern and relevance under chapter two will apply to a teleworker.

The problem arises with respect to the practical implementation of the BCEA in cases where the employee works from home or away from the employer's premises. It may be difficult for an employer to monitor if an employee working from home is taking the required time away from work provided to such an employee by the BCEA. An employer may, however, provide an employee with the equipment for performing the work, such as a computer, on which the employer can install monitoring software, with the employee's prior knowledge, to monitor whether the employee works beyond the permitted working time or not. In such a situation, however, the extent to which an employer may attempt to monitor the activities of an employee can lead to serious violation of privacy, a right which the workers are entitled to under section 14 of the Constitution.

<sup>152</sup> Some employers may require the employee to have their own equipment for the job.

<sup>153</sup> S. Afr. Revenue Serv., Interpretation Note 17 (Issue 5) 16 (Mar. 5, 2016), <https://www.sars.gov.za/wp-content/uploads/Legal/Notes/LAPD-Inter-IN-2012-17-Employees-Tax-Independent-Contractors.pdf>.

<sup>154</sup> For taxation purposes, when an employer does not pay an employee's taxation on their behalf, including the attendant contributions that the employer must pay equal to the employee's own contribution to the SARS, the SARS can determine if a person is an independent contractor or an employee and decide if an employer is liable to pay the UIF and deduct the pay-as-you-earn tax.

<sup>155</sup> S. Afr. Revenue Serv., *Home Office Expenses* (July 9, 2021), <https://www.sars.gov.za/types-of-tax/personal-income-tax/tax-season/home-office-expenses>.

<sup>156</sup> *Id.*

The way to best deal with the issue of working time would be by adoption of laws or regulations specifically extending the right to disconnect to employees and prohibiting conduct by employers that would force employees to avail themselves outside their normal working hours.

It is worth noting that other countries have already tried to regulate this behaviour by establishing explicit rights to disconnect. Ireland adopted the right to disconnect in a Code of Good Practice. Under Ireland's Code of Practice for Employers and Employees on the Right to Disconnect, the right to disconnect provides employees with the following protections, along with the duty to respect other employees' right to disconnect:<sup>157</sup>

- The right not routinely to work outside normal working hours.
- The right not to be penalised for refusing to work outside normal working hours.<sup>158</sup>

Employers are also obligated to provide employees with detailed information regarding their working time, making them aware that they need not work outside their determined working hours, ensuring that they take rest periods and not penalising employees for exercising their rights.<sup>159</sup>

A major issue of concern that respondents expressed with regards to conditions of employment is that telework blurs the line between work responsibilities and personal and family life. Many note that working from home led to employers imposing stricter requirements on employees to always be available to respond to work-related communications. This, they observe, has led to the intrusion of work into employees' home life and essentially done away with the differentiation between working hours and rest periods. Important to note is that some respondents expressed that a gender bias existed in respect of the requirement by the employer for employees to always be available. Respondents noted that women were especially likely to be forced to neglect family responsibilities to avail themselves at the whim of their employers.

Other respondents noted that due to the unique nature of telework, inspection for compliance with the BCEA cannot be done. Barriers that were identified include the impracticality of inspecting every single residence from which employees are working and the fact that inspectors do not have a right to inspect people's homes without their permission. This same sentiment is expressed in respect of occupational health and safety below.

Overall, respondents opine that the issue of working hours must specifically and urgently be addressed to do away with the unfair and unhealthy practice of requiring employees to always be available or reachable at every moment. One respondent, a teleworker, suggests that the Department of Employment and Labour (DoEL) should create private, open channels to allow teleworkers to report abuse of working hour restrictions by employers. The respondent believes this to be advisable as employees are unlikely to openly report violation of the BCEA for fear of reprisal. The study acknowledges this suggestion and recommendation. Despite the legal protections that exist in theory, employees are still penalised or even dismissed for whistleblowing even for protected disclosures.

Notwithstanding, a most telling example with regard to the possible efficiency of such a system should be taken from specific narration of events given by a leading trade union respondent who described labour inspection in South Africa as both "hopeless" and severely lacking in capacity. The respondent described an incident that had occurred in the hospitality industry whereby the employer paid its employees from their tips with no basic salary stipulated. Despite the issue having been brought to the attention of the relevant inspection agency of the DoEL, no inspection has ever been done, months later. A situation like this should make one wonder whether a responsible government agency that is unable to act on tips volunteered to it can sufficiently monitor complaints of teleworkers who find themselves in exploitative working time arrangements, at all.

A further point of concern associated with the advent of home or remote work, the respondents expressed, relates to cost allocation. There is universal agreement among trade union respondents that costs or bills that would normally be carried by the employer when employees were working in their normal workplaces, are now being covered by the employee at their own expense. They state that the problem results due to the lack of factoring of the costs into the employees' remuneration by employers. In addition, many employers do not have systems to reimburse employees for costs incurred in the course of their work. Consequently, it seems that employers are benefitting through cost-cutting at the employees' expense.

However, some union respondents also said that employees are also getting certain benefits from working from

<sup>157</sup> Workplace Relations Act 2015 (Workplace Relations Commission Code of Practice on the Right to Disconnect) Order 2021, § 3, (SI 159/2021), <https://www.irishstatutebook.ie/eli/2021/si/159/made/en/pdf>.

<sup>158</sup> Id.

<sup>159</sup> Id.



home including significant reductions in their respective monthly expenses. One respondent suggested that by cutting the need to commute, employees can save thousands of rands in monthly transport expenses in addition to avoiding physical and psychological fatigue that may result from time spent commuting.

## OCCUPATIONAL HEALTH AND SAFETY ACT

Health and Safety in South Africa is largely regulated by the Occupational Health and Safety Act, the Basic Conditions of Employment Act with respect to working time and, in the case of the mining industry, the Mines Health and Safety Act (MHSA).<sup>160</sup>

### Occupational Health

The primary purpose of the Occupational Health and Safety Act is, *inter alia*, to “provide for health and safety for persons at work,” and to protect members of the public against health and safety hazards stemming from work activities.<sup>161</sup> The OHS Act applies to all work activities except for the mining industry (which is regulated under the MHSA), load line ships, fishing, sailing and whaling boats, floating cranes and independent contractors.<sup>162</sup> The employer owes independent contractors and other people who do work for it a duty to provide a safe environment for as long as they are on the employer’s premises. The definition of employee under the OHS Act is wider than in the LRA and includes any person “who works under the direction or supervision of an employer or any other person.” The effect of this is that workers who are placed under the employer’s supervision but do not have an employment relationship with that employer, such as employees of temporary employment services or labour brokers, are still covered under the Act as if they were employees of that employer. Accordingly, reference to “employee” in the context of the OHS Act also refers to other persons placed in the employer’s workplace.

An employer has a duty to provide, “as far as is reasonably practicable, a working environment that is safe and without risk to the employees’ health.”<sup>163</sup> Section 7(2)) provides that the duties referred to in subsection (1) include, as far as reasonably practicable:

- Providing and maintaining work systems, plant and machinery that do not pose risks to health and which are safe.
- Taking steps to eliminate or alleviate any hazard or potential hazard to health before access is provided to personal protective equipment.
- Adopting measures to ensure the safe and risk-free production, processing, usage, handling, storage or transportation of articles or substances.
- Identification of potential health hazards and risks associated with the work and taking precautionary measures.
- Provision of information and supervision
- Taking all necessary measures to ensure compliance with requirements of the OHS Act by all persons on premises controlled the employer.
- Enforcement of necessary measures in the interest of safety and health.
- Making sure that work is performed under the supervision of persons trained to understand the hazards associated with such work.
- Ensuring employees are aware of the extent of their authority.<sup>164</sup>

Other employer duties include, as far as is reasonably practicable:

- Informing employees of the risks associated with their work.
- Informing the responsible health and safety representative (“SHE Rep”) of inspections, inquiries or

<sup>160</sup> Which bears little relevance to telework and will not be discussed.

<sup>161</sup> Occupational Health and Safety Act 85 of 1993 preamble [hereinafter OHS Act], [https://www.gov.za/sites/default/files/gcis\\_document/201409/act85of1993.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/act85of1993.pdf).

<sup>162</sup> Id. § 1(3).

<sup>163</sup> Id. § 7(1).

<sup>164</sup> Id. § 7(2).

investigations by an inspector prior to such inspection being carried out.

- Informing designated SHE Rep of any incident at the workplace or section to which they are assigned.<sup>165</sup>

According to section 1 of the OHSA, “reasonably practicable” means practicable with respect to:

- The severity and scope of the hazard or risk concerned.
- Knowledge reasonably available concerning the hazard and means of preventing same.
- Availability and suitability of means to remove or mitigate that hazard or risk.
- The cost of removing or mitigating the hazard.<sup>166</sup>

Employees at work are expected to take reasonable care for their own health and safety and that of others who might be affected by their conduct, to cooperate with employers or other persons in respect of any duty imposed by the Act, to follow any lawful order and obey workplace health and safety rules and procedures, report any hazard or risk to the an employer or representative, report to the employer any incident the employee was involved in which may affect their health or any injury which the employee suffered no later than the end of the shift in which the incident occurred or as soon as reasonably practicable thereafter if doing so immediately would be impossible.<sup>167</sup>

The Act further provides for the appointment of a SHE Rep for every employer with at least 20 employees.<sup>168</sup> Employers are required to provide the facilities, assistance and training a SHE Rep may reasonably require, and the latter may not incur civil liability for failure to perform any duties required by the Act.<sup>169</sup> SHE Reps are empowered by section 18 to do the following:<sup>170</sup>

- Review the effectiveness of health and safety measures.
- Identify hazards and major incidents in the workplace
- Examine causes of incidents in collaboration with the employer
- Investigate health and safety complaints from employees
- Make representations to the employer or a committee in respect of the matters immediately above, or to an inspector where envisaged representations fail
- Make representations to employer regarding matters related to health and safety
- Inspect the workplace after giving reasonable notice of intention to carry out such inspection
- Consult and accompany inspectors at workplace
- Receive information from inspectors
- Attend meetings of the committee

Sections 27 to 35 deal with the appointment of and powers and functions of health and safety inspectors. Health and safety inspectors have the right to enter an employer’s premises and conduct inspections, investigations or formal inquiries without any prior notice. Section 37 provides for offences that the employer or users of machinery may incur if they fail to comply with provisions of the Act, including the sections dealt with above. Sanctions for offences in terms of the OHSA include either fines ranging, from R5 000 to R100 000, and imprisonment for periods not exceeding one or two years, depending on the offence. It includes liability for the acts of employees, unless it can be proved that the employee was “acting without the connivance or permission of the employer;” it was not within the scope of authority of the employee and the employer took “all reasonable steps” to “prevent any act or omission of the kind in question. The fact that employers issue instructions forbidding the act or omission in question is not, in itself, sufficient proof that the employer took reasonable steps.

<sup>165</sup> *Id.* § 13.

<sup>166</sup> *Id.* § 1.

<sup>167</sup> *Id.* § 14 .

<sup>168</sup> *Id.* § 17(1).

<sup>169</sup> *Id.* § 18(3).

<sup>170</sup> *Id.* § 18(1).

## Social Insurance for Injury or Illness

Under the Compensation for Occupational Injuries and Diseases Act (COIDA), statutory social insurance is extended to employees who suffer injuries in the course of their work. An employee is entitled to compensation under the COIDA when they get involved in an accident and suffer disablement, whether total or temporary, or death. In the case of death, an employee's dependents are entitled to claim compensation.<sup>171</sup> The employee will be entitled to compensation even in the commission of an unlawful act, provided that such an act was done in the advancement of the interests of the employer.<sup>172</sup> No payments will be made for disablement that lasts under 3 days.<sup>173</sup> Unless the employee suffers serious disablement or dies and leaves behind a dependent who is entirely financially dependent on them, such employee will not be entitled to compensation from the fund if the cause of such injury or death was due to the serious and willful misconduct of that employee.<sup>174</sup> Provided the employee does not spend a period of 12 consecutive months outside the Republic, if an employee meets with an accident outside the Republic, such injury will be deemed to have occurred in the Republic and compensation, calculated on the employee's domestic earnings, can be claimed.<sup>175</sup>

## Occupational Health and Safety and Telework

Health and safety in the workplace perhaps best expose the difficulty in applying the existing labour law framework to telework. The OHS's conception of "workplace" is broad enough to include any premises of any nature whereby the employee performs work, including the employee's home. If an employee suffers an injury while working at home, such employee should be able to claim the benefits provided by the COIDA. Health and safety risks linked to telework include the risk of physical ailments caused by prolonged computer work, such as musculoskeletal damage and eye strain, particularly when the worker is not provided proper equipment or trained on ergonomics; the mental health impact of isolation and stress; and violence and harassment enabled by ICT.<sup>176</sup>

However, the OHS seizes the employer with duties that could be difficult to implement in the context of telework or home work. The unique nature of telework means that the employer is never at any point in direct control of the premises where the employee performs work. This presents questions about how liability for an employer under Section 37 would be applied in practice. The employer has no right of access to the employee's private home to perform an in-person health and safety assessment to mitigate or prevent any hazard or risk that may be present therein. Employers can provide information regarding general safety measures that the employee may take, and conduct virtual inspections and instructions around issues like ergonomics, but cannot verify they are being implemented. This might on the surface appear to make it impossible for the employer to ensure compliance, but whether it is practically different from workstations where managers are not always present is debatable. It may be more difficult for workers to prove that injuries that occurred in the course of work are in fact work-related, when often a critical factor is simply that they occurred on the employers' premises.

Additionally, health and safety inspections, investigations and formal inquiries, whether conducted by SHE Reps or health and safety inspectors, are not readily executable in the private home of an employee in-person, and would potentially also need to be conducted remotely. While both have a right to access the workplace without prior notice, neither have such a right in respect of the private property of the employee without their consent. Merely working in one's private home and designating an area of their house as a "home office," does not denude the person of their constitutional right to privacy, at least not in the manner by which the rights of access and entry given to representatives and inspectors are presently couched. This is also true with respect to labour inspectors appointed to enforce the BCEA.

It was noted that occupational health and safety were seen as the most difficult to enforce among all responses given. Regarding labour inspection under the BCEA, respondents state that even in the event of inspection, it is difficult to get the employer to comply with health and safety rules. This is the case because neither the employer nor health and safety inspectors can verify that employees are complying with health and safety rules in their workplaces.

<sup>171</sup> Compensation for Occupation Injuries and Diseases Act 130 of 1993, § 22 [hereinafter COIDA], <https://www.gov.za/documents/compensation-occupational-injuries-and-diseases-act>.

<sup>172</sup> Id. § 22(4).

<sup>173</sup> Id. § 22(2).

<sup>174</sup> Id § 22(3).

<sup>175</sup> Id. § 23(1).

<sup>176</sup> INTERNATIONAL LABOUR ORGANIZATION & WORLD HEALTH ORGANIZATION, HEALTHY AND SAFE TELEWORK (2021), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_dialogue/---lab\\_admin/documents/publication/wcms\\_836250.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/publication/wcms_836250.pdf)

Furthermore, some respondents state bluntly that they do not want their employers or labour inspectors in their private homes. Interestingly, the union respondents also take a similar stance to that of the worker respondents, noting that the privacy of the teleworker must prevail.

Workers could be granted the right to invite inspections by government OSH inspections, as well as invite the employers or SHE Reps to engage in in-person inspections where that is desired by the worker. Employers and government officials should develop virtual risk assessment and management tools to identify and mitigate physical and psychosocial risks related to telework. Additional measures may be necessary to ensure that teleworkers are compensated for physical and psychological harm incurred in the course of work.

## SOCIOECONOMIC CHALLENGES TO THE IMPLEMENTATION OF TELEWORK

South Africa has one of the most spatially and economically unequal societies in the world. Despite the inroads made since the dawn of the democratic order in 1994, the problem of inequality remains one of the sorest points in South African society. Even with the relatively decent growth of the economy in the early 2000s, the benefits have never truly reached those who most needed them—the poor. Like other countries with a history of legalised and systematised structural racism, such as the United States and Australia, inequality in South Africa is entrenched along racial lines. The economic fault lines in South Africa, as a result, are impacted not only by a gap between the rich and poor, which is the highest in the world, but also a racialized hierarchy.<sup>177</sup>

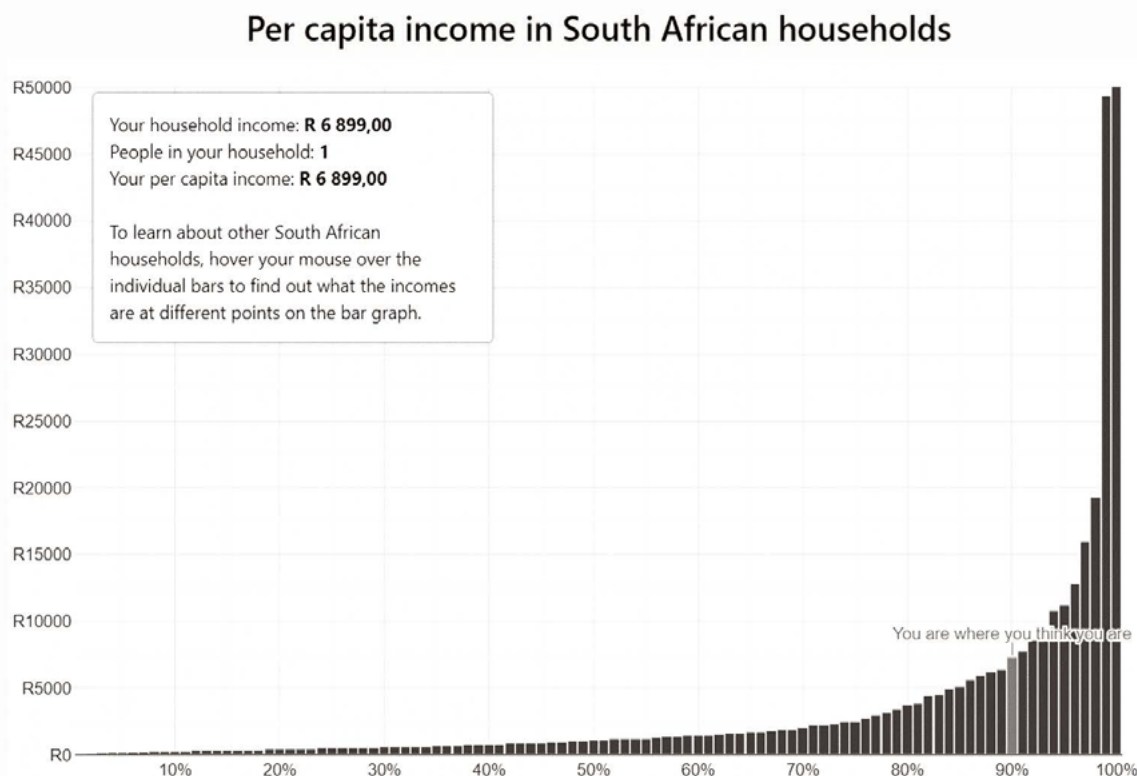
According to statistics published by Statistics South Africa (Stats SA) for the period between 2011 to 2015, white households earned on average 3.5 times more income than the average Black household and had seven times more in expenditure. In real terms, using 2015 Rands, the average Black household generated roughly about R6 899 per month in 2015 contrasted with R24 646 for white households in the same period.<sup>178</sup> The annual average expenditure in the same year was R18 291 (R9 186 median) for a Black household versus R131 198 (R100 205 median) for a white household.<sup>179</sup> It is important to note that the Stats SA data is not an exact household-per-household determination. It merely aggregates the income of employees who identify as belonging to a particular racial group and divides it by the number of households available. Consequently, the exact value of income for households or individuals in South African households are unknown. Research conducted by the Southern African Labour and Development Research Unit (SALDRU), based at the University of Cape Town (UCT), suggests that the picture is bleaker than what the Stats SA data proposes. According to research done by the unit, 50% of South Africans are chronically poor. An income comparison using the SALDRU-developed Income Comparison Tool shows that one individual earning about R6 899 per month is, on average, better off financially than approximately 90% of individuals in South African households (see Figure 1 below).

177 OXFAM SOUTH AFRICA, RECLAIMING POWER: WOMXN'S WORK AND INCOME INEQUALITY IN SOUTH AFRICA, 40-41 (2020), <https://www.oxfam.org.za/wp-content/uploads/2020/11/oxfam-sa-inequality-in-south-africa-report-2020.pdf>; See also Niéma Davids, *Inequality in South Africa Is A 'Ticking Timebomb'*, UNIVERSITY OF CAPE TOWN NEWS (May 21, 2021), <https://www.news.uct.ac.za/article/-2021-05-21-inequality-in-south-africa-is-a-ticking-timebomb>.

178 5 Risenga Maluleke, Statistics South Africa, INEQUALITY TRENDS IN SOUTH AFRICA: A MULTIDIMENSIONAL DIAGNOSTIC OF INEQUALITY 61 (2019) [hereinafter Inequality Report].

179 INEQUALITY REPORT, *supra* note 178 at 27. Note: Although the statistics used are for Black Africans, the legal meaning of the term 'Black' includes Coloured, Indian and Asian South Africans.

FIGURE 1: Estimated Monthly Income Per Individual (SALDRU)



Source: Data generated using Southern African Labour and Development Research Unit research data.<sup>180</sup>

The Q2 2021 Quarterly Labour Force Survey (QLFS) also reveals a consistent and concerning trend with respect to race and class. According to the report, 38.2% of all Black African and 28.5% of Coloured people of working age (15–64 years) were unemployed in terms of the narrow<sup>181</sup> definition of unemployment.<sup>182</sup> Considering the expanded definition, which includes people who for whatever reason are not actively looking for work, the numbers increase to 48.7 and 36.7 respectively.<sup>183</sup>

The problems do not end at an economic level; spatial issues abound. The Apartheid and colonial regimes fostered spatial inequalities by forcing Black communities to live in areas that were removed from urban centers. Although it has been nearly three decades since the advent of the much lauded, so-called “non-racial and non-sexist democracy,” South African society remains spatially segregated, with the vast majority of Black communities still living in informal settlements outside the boundaries or on the peripheries of urban centres and in rural areas. Among the many socioeconomic challenges that plague these communities are high levels of violent crime, poor education outcomes and high unemployment rates.

One disadvantage that comes with living outside of urban centres is the possible lack of access to efficient ICT infrastructure. Urban centres tend to have superior access to ICT infrastructure such as standard 4G broadband and fibre network coverage and ready or easier access to ICT hardware or devices. In many parts of South Africa, access to the internet remains unsatisfactory with 3G broadband coverage being predominant. Despite having the highest internet penetration in Africa, at 53% in 2017,<sup>184</sup> many regions of the country still lack the infrastructure to facilitate reliable access to the internet. Moreover, many South Africans’ access to the internet tends to be by mobile phone

<sup>180</sup> *Income Comparison Tool*, SALDRU: SOUTH AFRICA LABOUR & DEVELOPMENT RESEARCH UNIT, <https://www.saldru.uct.ac.za/income-comparison-tool> (last visited June 22, 2022).

<sup>181</sup> The narrow definition of unemployment is used by Stats South Africa to determine the official unemployment rate by considering only those people who are actively seeking employment, while not accounting for those who are, for whatever reason, not doing the same.

<sup>182</sup> Statistics South Africa, QUARTERLY LABOUR FORCE SURVEY QUARTER 2: 2021 28 (2021)[hereinafter QLFS], <https://www.statssa.gov.za/publications/P0211/P02112ndQuarter2021.pdf>.

<sup>183</sup> *Id.* at 46.

<sup>184</sup> ALISON GILLWALD ET AL., *THE STATE OF ICT IN SOUTH AFRICA* 102 (2018), [https://researchictafrica.net/wp/wp-content/uploads/2018/10/after-access-south-africa-state-of-ict-2017-south-africa-report\\_04.pdf](https://researchictafrica.net/wp/wp-content/uploads/2018/10/after-access-south-africa-state-of-ict-2017-south-africa-report_04.pdf).



(96%).<sup>185</sup> The Statistics South Africa 2019 General Household Survey reveals that only one-fifth of households owned one or more computers, with urban and ‘metropolitan’ (i.e., *urban* areas categorised as metropolitan municipalities) households having a computer penetration of 23.2% and 31.3%.<sup>186</sup> In comparison, rural households had a computer penetration of 9.1%.<sup>187</sup>

Even if access to reliable ICT infrastructure were to be fully met, the economic dimension of access nevertheless comes into play. The study conducted by Research ICT Africa in 2018 reveals that one of the consistent barriers to access to ICT are internet data prices. Until recently, people who relied on prepaid data, most of whom are the poor, were more likely to pay more for data than wealthier users. Gillwald *et al.* suggest that users who rely on contract data pay less per megabyte than those who pay for data upfront.<sup>188</sup> In addition, they posit that high-volume data costs more to purchase than low-volume data and tends to be greatly discounted in comparison. Since the intervention by the Competition Commission against the pricing of data by mobile operators, data prices have since dropped. Data from Cable.co.uk confirms this fact and ranks South Africa 136<sup>th</sup> out of 230 countries worldwide for pricing of mobile data in 2021. According to the data, the average cost of 1 gigabyte of SIM-only data was \$2.67,<sup>189</sup> with the cheapest being \$0.12 and the most expensive at \$34.95.

The survey considers a wide variety of data plans from across different providers which do not really explain price access barriers. As Professor Gillwald *et al.* above note, those with limited disposable income are less likely to purchase high-volume mobile data which at face value is more expensive, even though that data may be significantly discounted. This means that they are likely to opt to pay for a much more expensive lower-volume plan than if they had bought the pricier option.

Table 2 below shows the current monthly prepaid non-recurring 1GB data plan offered by the three major mobile operators as of September 1, 2021. Table 3 then shows the largest prepaid (non-recurring) data plan offered by each operator and sets out the cost-per-gigabyte (CPG) and the estimated discount from the Table 2 price. The data used to compile these tables is publicly available.

**TABLE 1: Cost of Prepaid 1GB non-Recurring 30-Day Mobile Data Plan (1GNR30) on Sept. 1, 2021**

Operator	Market Share (2019) <sup>190</sup>	Data Plan (GB)	Price Per Gig (R)
Vodacom	43.2	1	89.00
MTN	30	1	85.00
Cell C	17.2	1.6 <sup>191</sup>	50.00

Source: see footnote.<sup>192</sup>

**TABLE 2: Cost of Largest Prepaid Non-Recurring Mobile Data Plan on 01 Sep 2021**

Operator	Data Plan	Total Price (R)	CPG <sup>193</sup> (R)	Discount on 1GNR30 (%)
Vodacom	20	699	34.95	60.73
MTN	100	999	9.99	88.25
Cell C	200+200 Nite <sup>194</sup>	1699	8.50	83

Source: see note 192.

The data in the tables above show that the so-called “poverty premium,” whereby poorer people pay more for data,

<sup>185</sup> *Id.* at 23.

<sup>186</sup> STATISTICS SOUTH AFRICA, GENERAL HOUSEHOLD SURVEY 2019 56 (2020), <https://www.statssa.gov.za/publications/P0318/P03182019.pdf>.

<sup>187</sup> *Id.*

<sup>188</sup> GILLWALD ET AL., *supra* note 184, at 71-72.

<sup>189</sup> This is a decrease from the 2019 price of \$4.40 and \$7.7 in 2020 and 2019 respectively. *Worldwide Mobile Data Pricing 2021*, CABLE.CO.UK, [https://www.cable.co.uk/mobiles/worldwide-data-pricing/2021/mobile\\_data\\_price\\_comparison\\_data.xlsx](https://www.cable.co.uk/mobiles/worldwide-data-pricing/2021/mobile_data_price_comparison_data.xlsx) (last visited June 16, 2021.).

<sup>190</sup> *Mobile Market Share 2019: Vodacom Vs MTN Vs Cell C Vs Telkom*, BUSINESSSTECH (May 28, 2019), <https://businesstech.co.za/news/mobile/319378/mobile-market-share-2019-vodacom-vs-mtn-vs-cell-c-vs-telkom/>.

<sup>191</sup> This data plan is available online but not through the unstructured supplementary service data (USSD) option.

<sup>192</sup> *Prepaid Data Bundles: All Your Data Needs*, VODACOM SOUTH AFRICA, <https://www.vodacom.co.za/vodacom/shopping/data/prepaid-data> (last visited June 15, 2022); *Buy Data Bundles and Recharge Online*, CELL C, <https://www.cellc.co.za/cellc/get-databundles> (last visited June 15, 2022); *Get More Data for Less*, MTN, <https://www.mtn.co.za/Pages/Reduced-bundles.aspx> (last visited June 22, 2022).

<sup>193</sup> Cost-per-gigabyte of mobile data.

<sup>194</sup> This data plan provided by Cell C is valid for 180 days.

is still a problem despite the CompCom intervention. The entry prices for mobile data are still very expensive and not conducive towards ease of access to ICT. A consumer's decision to buy lower volume data does not seem to be entirely driven by a lack of understanding of the pricing strategies of mobile operators. Logically, if one earns R6 899 or less per month, it does not make much sense for that person to expend, *arguendo*, R699—or over 10% of their monthly income—to take advantage of higher-volume mobile data prices that will expire after 30 days. And if the SALDRU data is to be accepted, then the actual comparison more than justifies a decision not to purchase such a bundle as it would be virtually unaffordable for most individuals, irrespective of the good discounts. Access to ICT thus will likely remain curtailed by costs of data even in the event of excellent ICT infrastructure coverage.

Because telework necessarily entails ICT use, questions ought to be raised about its broader applicability. In a society as unequal as South Africa, it is questionable whether such a flexible working arrangement, if ever implemented permanently, would be available to every South African who desires to benefit from it. Depending on the nature of the job and attendant responsibilities, it could be that access to reliable ICT and economic conditions may play a significant role in the unfortunate determination of which South Africans would be eligible or able to perform work remotely efficaciously through ICT. There is also the reality that people living in poverty may face spatial challenges at a primary level. When one, for example, considers the requirements for claiming home office expenses from the South African Revenue Service, an employee is expected to designate an area of their private residence wherein they exclusively and regularly perform 50% of their work. For health, safety and/or ergonomic purposes, a teleworker may similarly need to designate an area in their private residence wherein they intend to work. In a country where 26% of the urban population is estimated to be living in informal settlements,<sup>195</sup> one wonders how people living in such conditions would have enough space in their homes to comply with OHS standards. Put differently, the locational, structural and socioeconomic inequalities in South Africa are likely to be replicated within a virtual working environment. Given the fact that economic and structural inequality in South Africa takes a racial character, it is open to question whether broad implementation of telework in South Africa would create an indirect discriminatory work arrangement system that favors those in already advantaged economic positions over those who are not.

Given the above, it is perhaps unsurprising that most workers who worked from home in the second quarter of 2021 held more financially rewarding positions. This is confirmed by the Q2 2021 QLFS, which indicates that approximately 6.9% of workers worked from home in Q1 and Q2 of 2021.<sup>196</sup> Of that total, 18.9% were those working in the professional sector and 15.2% were managers.<sup>197</sup> The third largest group were skilled agricultural workers who saw an unexplained jump from 4.4% the previous quarter to 11.8%, while technicians also saw an increase from a Q1 rate of 8.3% to 9.7% in Q2.<sup>198</sup> An analysis by Andrew Kerr and Amy Thornton from DataFirst,<sup>199</sup> of the feasibility of home or remote work amongst South African employees, suggests that 63% of all employees would not be able to work from home, whereas 61% of employees positioned within the top 10% earners could.<sup>200</sup> Occupations that are poorly compensated were the least likely to work from home. Benhura and Magejo, relying on the broader National Income Dynamic Study - Coronavirus Rapid Mobile Survey (NIDS-CRAM) dataset which includes informal workers, confirm that “overall, 68 percent of workers in South Africa were unable to work from home.”<sup>201</sup>

One trade union respondent noted that poor access to ICT infrastructure meant that some of their members were often unable to attend online meetings and therefore could not participate in their planned union activities. She further noted that another problem was the cost of mobile data. In respect thereof, she pointed out that the so-called large, discounted data prices are designed to disadvantage the buyer since many of them expire within a 30-day period. Even as they are discounted, the price does not justify the period for which they remain valid. Another respondent noted that immediately after the COVID-19 pandemic lockdown measures were eased, he found that he needed to move back to his rented residence in Johannesburg from his home in rural Eastern Cape Province, because he could not work due to poor mobile, let alone internet, coverage. Another noted that even though she does have mobile internet coverage where she lives, it sometimes gets very expensive, and she is unable to install the somewhat cheaper fiber alternative because there is no fiber coverage where she lives.

195 *Population Living in slums (% of urban population) – South Africa*, WORLD BANK DATA (2018), <https://data.worldbank.org/indicator/EN.POP.SLUM.UR.ZS?locations=ZA>.

196 QLFS, *supra* 182 at 10.

197 *Id.*

198 *Id.*

199 DataFirst is a data research unit based at the UCT.

200 Andrew Kerr & Amy Thornton, *Essential Workers, Working from Home and Job Loss Vulnerability in South Africa 2-3* (DataFirst, U. Cape Town, Technical Paper No. 41, 2020), [https://www.datafirst.uct.ac.za/images/docs/DataFirst-TP20\\_41.pdf](https://www.datafirst.uct.ac.za/images/docs/DataFirst-TP20_41.pdf).

201 MIRACLE BENHURA & PRUDENCE MAGEJO, WHO CANNOT WORK FROM HOME IN SOUTH AFRICA? EVIDENCE FROM WAVE 4 OF NIDS-CRAM 8 (2021), [https://cramsurvey.org/wp-content/uploads/2021/05/2.-Benhura-M.-\\_Magejo-P.-2021-Who-cannot-work-from-home-in-South-Africa\\_-Evidence-from-wave-4-of-NIDSCRAM..pdf](https://cramsurvey.org/wp-content/uploads/2021/05/2.-Benhura-M.-_Magejo-P.-2021-Who-cannot-work-from-home-in-South-Africa_-Evidence-from-wave-4-of-NIDSCRAM..pdf).

## LEGISLATIVE AND OTHER DEVELOPMENTS

As already indicated in the introduction to this report, there are no legislative measures that have been undertaken by policymakers with the express intention of recognizing telework as a working arrangement. For the time being, the statutory landscape in this respect remains relatively unchanged.

This lack of legislation does not mean that there has not been any development addressing, or at least attempting to address, issues unique to people working in atypical work arrangements such as home workers and teleworkers. The Code of Good Practice on the Prevention of Harassment in the Workplace casts a wider net over its scope of application and accounts for a variety of working environments including those enabled by ICT.<sup>202</sup> This moves the needle by establishing a legal acknowledgement of the existence of, and need to recognize and cater to, other atypical forms of work that have long been left at the periphery of the legislative and policy discourse.

This is especially significant taking into account the DataFirst analysis of the South African labor market which suggest that the percentage of South Africans able to work from home is higher than the 6.9% who were working from home in the second quarter of 2021.<sup>203</sup> According to Kerr and Thornton, 13.8%, or approximately 2 million employees, were able to feasibly work from home including 65% of managers and 56% of professionals.<sup>204</sup> As noted above, they further note that 63%, or 10.5 million, employees occupied positions that were either non-essential or incapable of remote work.<sup>205</sup> Benhura and Magejo, relying on the broader National Income Dynamic Study - Coronavirus Rapid Mobile Survey (NIDS-CRAM) dataset which includes informal workers, confirm that “overall, 68 percent of workers in South Africa were unable to work from home.”<sup>206</sup>

The Boston Consulting Group’s survey *DECODING GLOBAL WAYS OF WORKING* suggests that 87% of surveyed knowledge-based workers worked from home at some point during the pandemic.<sup>207</sup> This specific BCG survey included more than 1,000 South African participants but no more than 4,999.<sup>208</sup> This is contrasted with 49% who say they had previously worked from home prior to the pandemic. Interestingly, South African respondents were the second-most enthusiastic about working completely from home and overall, the respondents preferred a flexible working arrangement.<sup>209</sup>

If the results of these studies are to be taken as broadly representative of the professions involved, then these are important developments. Two million of the employed population is more than significantly prevalent to justify a regulation or policy in some form. That many of the surveyed workers preferred retaining their new working arrangements instead of reverting to the status quo is also encouraging as it shows an appetite for this form of work amongst workers themselves.

This study’s own survey has also gauged a general sense of support for the retention of remote working arrangements among the respondents. Significantly, there is greater consensus among trade union respondents. Many respondents say that there are many benefits for employees in remote working arrangements, including the cost savings and reductions in stress as a result of eliminating the commute.

That general support notwithstanding, it is important to emphasize that caution is needed when approaching the question of recognition of telework in a South African context. Unless the underlying socioeconomic and structural disparities are addressed including through specific obligations placed on employers, telework in formal employment will likely benefit a very specific and homogenous group. In other words, the gross levels of inequality that are characteristic of South African society will be replicated within a virtual working environment. This is not a desirable outcome.

<sup>202</sup> Which states that the Draft Code applies “in any situation in which the employee is working, or which is related to their work.”

<sup>203</sup> Kerr & Thornton, *supra* note 200, at 2.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> BENHURA & MAGEJO, *supra* note 201, at 8.

<sup>207</sup> RAINER STRACK ET AL. BOSTON CONSULTING GROUP, *DECODING GLOBAL WAYS OF WORKING 6* (2021), <https://web-assets.bcg.com/74/33/14077446434fa8685891ba0e2e69/bcg-decoding-global-ways-of-working-mar-2021.pdf>.

<sup>208</sup> The exact number is not known to the writer. *Id.* at 2.

<sup>209</sup> *Id.* at 11.

## RECOMMENDATIONS

The recommendations in this study are made taking into account the various responses provided by the respondents who participated in this study, as well as laws and policies adopted in other jurisdictions. While telework is not per se regulated within the South African employment law framework, this study is nevertheless cognizant of the fact that the immediate, needed changes in legislation need not be drastic as the existing laws already covers employees working at home. The major issues of concern include occupational health and safety and the allocation of costs related to tools and equipment.

### Defining Telework in the LRA

The concept of telework is, in and of itself, a foreign concept within the framework of South African law. The LRA does not per se recognize the concept and neither is it comfortably accommodated therewithin. It is accordingly important to define telework in both the Act's conceptions of "employee" and its very uncomfortably couched definition of "workplace." The Harassment Code expressly providing that the workplace includes ICT and internet-enabled spaces as well as private spaces, but only with respect to workplace discrimination under the EEA.<sup>210</sup> However, the term within the LRA remains controversial insofar as it is to be applied to teleworkers and other remote workers. It is proposed that the following amendments be made:

Insert:

1. "including a teleworker and" in the definition of "employee" so that the amended definition reads as "*employee*" means –
  - (a) any person, **including a teleworker** and excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
  - (b) any other person who in any manner assists in carrying on or conducting the business of an employer."
2. "a workplace includes, at the employee's initiative after consultation with the employer, any other place, chosen by the employee, including spaces created through the use of technology for work-related purposes, where employees of an employer work" so that the amended definition reads as "*workplace*"
  - (a) in all other instances means the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation;
 

**a workplace also includes, at the employee's initiative after consultation with the employer or their representatives, any other place, chosen by the employee, including spaces created through the use of technology for work-related purposes, where employees of an employer work."**

Define:

**Telework** means the organisation and/or performance of work which, within the framework of an employment contract or relationship, a person performs at home, or at any other alternative location other than the employer's premises, through the use of information and communication technologies. The alternative location is decided by the worker.

Due consideration must be given to preventing efforts by employers to misclassify teleworking employees as independent contractors. Virtually all labour protections that apply to teleworkers apply only where an employment relationship exists, and employers may seek to escape these obligations by constructing contracts that takes away different forms of employer liabilities.

### Voluntariness and Reversibility

Telework presents potential hazards associated with employee health and well-being. Workers may not be in a position to work remotely for a variety of reasons.

It is important that employers are not given the unfettered power to enforce remote working arrangements.

<sup>210</sup> Wherein the term is not expressly defined and is generally accepted to be the same as under the LRA.

Unless negotiated and agreed upon beforehand with employees or their representatives, an employer should not be able to enforce telework or any other remote working arrangement. In fact, this study suggests that the introduction of such arrangements should, where such working arrangements are feasible, instead be conferred upon employees. And even in the instance that an employee elects to work remotely, they should not be precluded from reverting back to the traditional mode of performing their duties should they need to in future. Employees must wield the power to both elect to work remotely and to revert back to the normal means of carrying out their duties. It is therefore important that any future regulation of telework or remote work in general accommodates employee wellness and safety in its provisions as far as possible. The best way to make that accommodation is by arming employees with the right to choose whether they intend to perform their duties through remote working arrangements like telework, where feasible, and the power to reverse that decision. This right should also include the entitlement of the employee to refuse any such arrangement should an employer wish to have employees work remotely. Given the potential for introduction of terms that may attempt to limit if not wholly defeat the effect and purpose of the right proposed above in contracts of employment, it is also important to ensure that such measures are also expressly prohibited. Ultimately, the employer's right to implement a remote working arrangement should be limited to instances where the employer's economic needs necessitate a working arrangement of this nature to safeguard the continued operation of its enterprise.

### **Preventing Violence and Harassment Against Teleworkers**

The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace represents an important step towards the expansion of Employment Equity Act coverage to a unique set of workplaces and a wider group of beneficiary workers. However, the omission of domestic violence is a critical oversight that may particularly impact teleworkers who work out of their residences, and leaves South Africa out of compliance with its obligations under ILO Convention 190. Measures to ensure access to accommodations for victims of domestic violence can include the ability to temporarily shift work to telework or back to an employers' premises. Government measures should ensure access to paid leave to enable teleworkers to move residence or obtain a restraining order. Further, workers that fall outside the definition of "employee" are not subject to process under the EEA, but under PEPUDA, which may not clearly result in employer liability for failure to take appropriate measures to prevent violence and harassment in the world of work. This gap in protection should be explored and rectified, as Convention 190 requires that all workers including independent contractors and the self-employed be covered. This is particularly critical for teleworkers whose physical distance from the employer may be used to disguise an employment relationship.

### **Tools of Work**

The BCEA does not contain a provision specifically requiring the employer to provide the employee with the necessary tools for carrying out their duties. Although the revenue service has attempted to ease the financial burden stemming from office stationery and maintenance costs on employees, the process may itself prove cumbersome as opposed to placing such an obligation on the employer. It is proposed that the BCEA be amended with the insertion of a provision expressly obligating employers to provide employees with all the necessary tools of work, including coverage for the cost of maintenance of home offices and, especially data, where necessary. This cost benefit should not only accrue to employees in telework arrangements but to every other employee in the Republic.

### **Working Hours**

The nature of remote work makes labour inspection difficult and even more so, determining whether vulnerable employees are working outside the legally permissible working hours. Employers should be proactive in looking after the wellbeing of their employees by adopting that restrict work-related communications beyond certain hours of the day and ensure manageable workflow. However, employers thus far have often failed to do this.

Thus, it is proposed that binding regulations in terms of section 86 of the BCEA specifically recognize the right of employees to disconnect from their workplace responsibilities. The right should determine that employees have the right to refuse to work outside their normal working hours and restrict the powers of the employer to penalize the employee for exercising this right. Employees already enjoy a right to have their working hours limited under domestic and international law. Such a change would thus not be novel, anomalous nor unexpected, but a realignment of the right to meet modern day challenges.

Furthermore, the suggestion that anonymous channels be opened to enable workers to report employer violations



of the BCEA is a sound one. In spite of the challenges affecting labour inspection, having such a mechanism in place for employees to alert the relevant authorities can go a long way in ensuring compliance and respect of the provisions of the BCEA by employers, in the long term.

### Occupational Health and Safety

Despite the importance and centrality of workplace health and safety, this study has shown there are attendant practical difficulties that make it challenging for both employers and inspectors to ascertain that their employees are complying with health and safety protocols when working remotely. Yet with privacy being at the centre of the controversy with respect to work within private residences, it may indeed appear difficult to see how an employer should still be responsible for ensuring compliance with health and safety regulations and liable for violations even in the event that an employee works from his private residence. Key to maintaining the status quo of section 37 of OHS Act is ensuring that employers do not shirk their responsibilities to ascertain that their employees' home offices are OHS Act-compliant. There are obvious practical difficulties where work from private residences is concerned. Yet, these should not be disabling, and a fair balance can still be achieved. Regulations in terms of section 43 of the OHS Act may be promulgated by the Minister. Issues to be addressed should include:

- In the event that health and safety assessments are to be done, the employee should be enabled to permit access to their private residence in order for a labor inspector or the employer to do the requisite assessments or inspections. Trade union representatives should be empowered to accompany the worker, at their request.
- It is important to safeguard the employee's inherent right to privacy, and attendant dignity, by not introducing mechanisms that compel employees to allow such access against their wishes. The worker must be able to deny entry into their homes.
- A workplace located in the private residence of an employee is laden with practical challenges whose effect on the employer's responsibilities cannot realistically be ignored. It may be necessary to issue regulations clarifying how employers can comply with their core obligations to ensure the health and safety of teleworkers while acknowledging privacy concerns and logistical barriers. Employers should create checklists and other self-assessment tools, online training on issues such as ergonomics and how to access complaint mechanisms and legal remedies regarding workplace discrimination, violence and harassment. These must be developed in consultation with union representatives where they exist. These issues should address psychosocial risks and hazards including risks arising from working in isolation and adopt measures to mitigate them.
- Labour inspectors should also develop assessment and inspection tools that take into account needs for privacy, including virtual assessment tools and virtual interviews with workers.

### Socio-Economic Challenges

The most difficult issue that was identified in this study is itself a barrier to the wider implementation of telework. In South Africa, and indeed throughout the world, telework has the potential to perpetuate socioeconomic disparities amongst workers. Without appropriate safeguards and regulations, it will favor people who, by machination of historic advantages associated with racial exclusion and discrimination,<sup>211</sup> live in areas with better access to ICT infrastructure in the country. People that live in areas that are poorly serviced, would likely need to relocate to effectively telework.

As telecommunications and the regulation thereof is the province of the national government, the government may have a means of directly influencing ICT infrastructure development in poorer, rural areas by telecommunications companies. Through the Independent Communications Authority of South Africa (ICASA),<sup>212</sup> the government annually sells radio spectrum to telecommunications companies through its spectrum auction process. Through this process, the government can leverage its position by implementing a policy requiring potential bidders to commit to ICT infrastructural development in rural areas as a condition for eligibility to register and partake in the spectrum auction.

<sup>211</sup> That is, Apartheid.

<sup>212</sup> ICASA is the regulatory body responsible for telecommunications in South Africa.

The effect of inequality of access to ICT infrastructure has been that other areas have to be serviced, albeit poorly, by mobile network operators which sell their internet data at very high prices. Accordingly, it is proposed that the ICASA seek to further its efforts in getting mobile operators to lower their data prices. Although the agency has done so in the past, data prices remain unaffordable and more needs to be done. Charging employers with providing all necessary equipment, including internet access would lessen the burden on individual workers.

### Specific Legislation for Teleworkers

Although it is recognized that the amendment of the existing suite of laws would be the easiest and quickest solution to extending coverage to teleworkers, it is suggested that a separate legislation that directly addresses the idiosyncrasies of telework would be most appropriate. Tailored legislation will help eliminate the uncertainty in interpretation that can arise from the reading by courts of statutes that were not enacted with this form of working in mind.

In defining the scope of the legislation, one ought not to make the mistakes of being focused only on a present reality but also be forward-looking. Any legislation that is to regulate telework should also seek to cover other remote and home workers. Teleworkers are not the only workers who can perform work away from a given workplace. What makes them unique is their use of ICT to perform their job tasks. With rapid developments in technology distinct from ICT, it may be possible for other workers to work for extended periods of time away from a given workplace. One can look at examples of manual workers who produce physical products for, or render services on behalf of, an employer such as seamstresses, upholsterers, workers who create products employing additive manufacturing and many others, who may be able to work from home and need not use ICTs in the performance of their duties. In support of this goal, it is further proposed that the government also explore the possibility of ratification and implementation of the Home Work Convention, including ensuring that homeworkers and other outworkers are recognized as employees and gain attendant rights.

## CONCLUSION

Telework is not widely known or understood in South Africa and has only become the focus of attention following the unprecedented effects of the COVID-19 pandemic. Specific regulation of telework in the Republic does not per se exist and telework therefore had to be assessed in the context of existing legislation. The preliminary discussion focused on whether telework could be said to be regulated given the provisions of the lockdown regulations decreed via the Disaster Management Act. However, those regulations were stop-gap measures put in place to cope with the vicissitudes wrought by a public health disaster.

The second part of the study focused on the legislative framework in place that dealt with issues affecting teleworkers. The Labour Relations Act is capable of accommodating teleworkers under its definition of “employee,” as well as under its statutory presumption of employment. Where challenges may arise in this respect, the courts were equipped to successfully establish the true employment position of workers, including teleworkers, under the common law. A challenge that teleworkers might encounter is with respect to the judicial interpretation of the term “workplace.” The study’s analysis of the Constitutional Court’s interpretation of the term concluded that the chosen workplaces of teleworkers would not themselves be covered due to their not being capable of complying with the interpretation. However, the study argued that the fact that the Court noted that physical or geographic locations were not essential to the definition, virtual platforms, which teleworkers use, were themselves capable of complying with the interpretation. However, it was also noted that the exercise of rights to freedom of association under the Act could be curtailed in a teleworking arrangement.

The Employment Equity Act provided coverage for teleworkers against unfair discrimination (including harassment and violence). At the time of writing, South Africa had ratified the Violence and Harassment Convention and had adopted a new Code of Good Practice which includes many other places of work and workers, but however fell short in recognizing other sources of harassment and violence, especially domestic violence.

Although the Basic Conditions of Employment Act provided for safeguards on working hours and overtime, this study noted that the nature of telework meant that their working hours could not readily be monitored without raising issues of privacy. The same was found to be true with respect to labor inspection. Consequently, it was noted further that this raised the potential for exploitation of employees’ permitted working time by employers. The study further commented on the fact that the BCEA did not place an obligation on employers to provide employees with the necessary tools of work. Employees could at times be expected to cover costs associated with their paid work and to also confer with the tax authority, should they wish to recoup their expenses, instead of the employer doing so.

Another observation made in this study was with respect to occupational health and safety. It was indicated that occupational health and safety was difficult to implement in the context of a teleworking arrangement. This was because of the same privacy considerations that made inspection of conditions of employment practically untenable.

Inequality in access to ICT infrastructure and high data prices were found to be key barriers to broader access to telework in South Africa. It was noted that due to the best ICT infrastructure being concentrated in historically (racially) privileged areas, the effect of the widespread implementation of telework would mirror the same racialized economic disparities that inform said access. The study also touched on the problem of high data prices and pricing strategies which ensured that the full enjoyment and access to the internet by poorer South Africans remained limited. Accordingly, access to telework too would be limited for these members of the South African population.

That telework can be accommodated under the various statutes is nothing more than a small mercy. As was noted the issue relating to the meaning of “workplace” under the LRA, the exact scope and meaning of terms in legislation can often be defined to include, or exclude, certain groups of workers depending on the person responsible for such interpretation. The fact that telework is not defined in any South African statute places teleworkers in the crosshairs of such an unfair possibility. In addition, the unique circumstances of teleworkers make it so that existing laws and the protections they provide cannot be fully applied to them.

Accordingly, this study proposed the following statutory amendments, policy changes and other measures:

- In the interim, amendment of the LRA to include teleworkers under the definition of “employee,” broadening the definition of “workplace” to include a place and defining the term telework.”
- Revision of the Code of Good Practice on the Prevention and Elimination of and Harassment in the Workplace to include domestic violence.
- Amendment of the BCEA to create a duty for employers to provide tools of work to employees.
- Adoption of regulations in terms of section 86 of the BCEA expressly recognizing the right to disconnect.
- Adoption of regulations in terms of section 43 of the OHS Act indicating the range of measures that employers can take to ensure their employees’ compliance with health and safety rules while working remotely and reaffirming employees right to permit or disallow such checks in their private residences.
- Adoption of a spectrum auction policy requiring telecommunications companies to commit to rural infrastructure development as a necessary precondition for eligibility to participate in spectrum auctions.
- Ultimately, eventual adoption of legislation specifically designed for teleworkers and remote workers, which consider their unique sets of challenges, workplaces and needs.

Although government policy does not seem to acknowledge or appreciate that telework may be here to stay, myriad other studies seem to point to this real possibility. As such, it is advisable that South Africa immediately moves to position itself to accommodate those workers who end up permanently working in atypical workplaces. These workers will need a robust legislative framework that caters to their unique situations as well as extend the same core benefits and protections that traditional employees have under the existing employment law framework. Importantly, it is the state’s duty to ensure that everyone in the territory of the Republic of South Africa can enjoy the rights that they are entitled to under the Constitution. To this end, the state must endeavor to take those legislative and other measures to enable the enjoyment of these rights. Failure to do so will likely expose vulnerable workers to exploitation and abusive practices by unscrupulous employers, even though the state was in a position to prevent it from occurring.

## APPENDIX A

TABLE 1: Telework Research in South Africa (1990 – 2019)

Year	Author(s)	Title	Publication
2019	Conradie and De Klerk	To Flex or not to Flex? Flexible work Arrangements Amongst Software Developers in an Emerging Economy	SOUTH AFRICAN JOURNAL OF HUMAN RESOURCE MANAGEMENT
2018	Jackson and Fransman	Flexi Work, Financial Well-Being, Work–Life Balance and Their Effects on Subjective Experiences of Productivity and Job Satisfaction of Females in an Institution of Higher Learning	SOUTH AFRICAN JOURNAL OF ECONOMIC AND MANAGEMENT SCIENCES
2018	Hill and Blunn	Personality and Work-Home Interaction Among Dual-Earner Couples in South Africa: Testing an Actor-Partner Interdependence Model	JOURNAL OF PSYCHOLOGY IN AFRICA
2016	Dancaster and Baird	Predictors of the Adoption of Work –Care Arrangements: A Study of South African Firms	THE INTERNATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT
2015	Ferreira and Strydom	Ergonomics and Technologies: Regulatory Compliance in the Virtual Office in South Africa	ERGONOMICS SA: JOURNAL OF THE ERGONOMICS SOCIETY OF SOUTH AFRICA
2015	Robberts, Engelbrecht and van der Poll	A Framework for the Support of Mobile Knowledge Workers in South Africa	2015 INTERNATIONAL CONFERENCE ON COMPUTING, COMMUNICATION AND SECURITY
2014	Tustin	Telecommuting Academics Within an Open Distance Education Environment of South Africa: More Content, Productive, and Healthy?	THE INTERNATIONAL REVIEW OF RESEARCH IN OPEN AND DISTRIBUTED LEARNING
2014	Van der Merwe and Smith	Telework: Enablers and Moderators when Assessing Organisational Fit	PROCEEDINGS OF THE SOUTHERN AFRICAN INSTITUTE FOR COMPUTER SCIENTIST AND INFORMATION TECHNOLOGISTS ANNUAL CONFERENCE 2014
2010	Grobler and de Bruyn	Flexible Work Practices (FWP) – An Effective Instrument in the Retention of Talent: A Survey of Selected JSE-Listed Companies	SOUTH AFRICAN JOURNAL OF BUSINESS MANAGEMENT
2010	Baard and Thomas	Teleworking in South Africa: Employee Benefits and Challenges	SOUTH AFRICAN JOURNAL OF HUMAN RESOURCE MANAGEMENT
2004	Nortjé, Van Brakel, and Rensleigh	Information Environment of Teleworkers in South Africa	SOUTH AFRICAN JOURNAL OF HUMAN RESOURCE MANAGEMENT

2003	Langa and Conradie	Perceptions and Attitudes with Regards to Teleworking Among Public Sector Officials in Pretoria	COMMUNICATIO: SOUTH AFRICAN JOURNAL FOR COMMUNICATION THEORY AND RESEARCH
2002	Odendaal and Roodt	Australian and South African Perspectives on the Implementation of Flexible Work Practices (fwp): An exploratory study	SOUTH AFRICAN JOURNAL OF INDUSTRIAL PSYCHOLOGY
2002	Hoffman	Information and Communications Technology, Virtual Offices and Telework	SOUTH AFRICAN JOURNAL OF INFORMATION MANAGEMENT

Source: Partially based on Joseph Morrison, Explaining the Intention of IT Workers to Telework: A South African Perspective (Mar. 2, 2017) (M. Comm. Dissertation, University of Cape Town), <https://open.uct.ac.za/handle/11427/25502>.



## APPENDIX B

## TELEWORKING IN SOUTH AFRICA: REPORT ON THE LAWS AND CHALLENGES IN AN UNEQUAL SOCIETY (SURVEY)

## QUESTIONS: For People Working from Home

Name &amp; Surname : \_\_\_\_\_

Occupation : \_\_\_\_\_

Organisation : \_\_\_\_\_

Industry (e.g., Financial Services) : \_\_\_\_\_

Questionnaire Form 1— for People Working from Home

1. Telework is currently not defined in any labour legislation in South Africa. Are you familiar with the concept of telework?

Yes		No	
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2. If answered in the affirmative, please briefly describe what you understand by telework. Otherwise, write N/A.

3. In your opinion, is the practice of home or remote work, including telework, fully accommodated within the existing suite of labour regulations (LRA, BCEA, OHS, EEA etc.)?

Yes		No	
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What is the reason for the conclusion above?

4. Do you belong to a trade union?

Yes		No	
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5. If answered in the affirmative, have you been able to attend trade union meetings and participate in trade union activities while working from home?

Yes		No	
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6. How do you think working from home affects the exercise of trade union rights by employees?

7. The successive COVID-19 Regulations issued in terms S 27(1) of the Disaster Management Act (DMA) require employers to make arrangements to allow employees to work from home or at least limit the need to be physically present in the workplace. In your opinion and experience with the COVID-19 Pandemic, should this sort of working arrangement be made permanent and why is that?

8. Save for the COVID-19-related exceptions under Direction 14 of the Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces, do employees *who can work from home* have a right to refuse the employer's demand for them to return to work, if the employer complies with the regulations in respect of their return thereto?

Yes		No		Unsure	
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- a. If answered in the affirmative, is this right related to the DMA COVID-19 Regulations requirement that employers must take measures to allow employees to work from home? Otherwise, write N/A.

9. The Occupational Health and Safety Act (OHSA) requires employers to provide employees with a safe working environment.

- a. Are you aware of any labour and health and safety inspections that have been done by the Department of Labour in respect of employees working from home?

- i. If answered in the affirmative, what have been the key challenges to labour and health and safety inspections in respect of employees working from home and what can be done to better ensure health standards are complied with?

- ii. Otherwise, what do you think are the barriers to labour and health and safety inspections in respect of employees working from home and what can be done to better ensure health standards are complied with?

10. What do you think has been the effect of working from home on women with family responsibilities (including children)?

- a. How can the issues identified above be addressed? (*optional*)

11. In your opinion, which employees, male or female, benefit most from working from home or remotely? What is the reason for your answer?

12. The Minister of Labour has published the **Draft Code of Good Practice on the Prevention of Harassment and Violence in the World of Work** for comment, which includes domestic violence and harassment impacting the world of work, as well as intimate partner violence, family violence and domestic abuse as a form of violence and harassment that employers must help eliminate.

**In your opinion, are employers supposed to provide assistance to employees who experience domestic or intimate partner violence while working at home, as part of their duties to combat harassment and bullying in the workplace under the EEA?**

Yes	<input type="checkbox"/>	No	<input type="checkbox"/>
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**Why do you think so?**

Taking the above into consideration, together with the Draft Code, do you, in your opinion, think employers should be liable for failure to assist an employee who experiences domestic violence and abuse and why?

13. Do you agree with the inclusion of informal workers in the definition of worker under the EEA Draft Code?

Yes		No	
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14. Why do you agree, or do not agree?

15. The Basic Conditions of Employment Act (BCEA) requires that employees earning below R211 596.30:

- a. work no more than 45 normal working hours per week and no more than 10 overtime hours per week.
- b. Get a rest period of at least 12 hours between commencement of work and end of work.

Are you aware of any attempt or measures taken by the Department of Labour to ensure that vulnerable employees working from home are not forced or expected to work (including by answering work emails, phone calls and messages) outside their normal working hours; or are at least paid for overtime hours worked?

Yes		No	
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In your opinion, what can be done to ensure compliance with the above BCEA requirements in respect of employees working from home / How can labour inspection be done to ensure that workers are not expected to work beyond the designated working hours?

Thank you for your participation.

## APPENDIX C

## TELEWORKING IN SOUTH AFRICA: REPORT ON THE LAWS AND CHALLENGES IN AN UNEQUAL SOCIETY (SURVEY)

## QUESTIONS: For Trade Union or Labour Organisations

Name & Surname : \_\_\_\_\_

Occupation : \_\_\_\_\_

Organisation : \_\_\_\_\_

Industry (e.g., Financial Services) : \_\_\_\_\_

**Questionnaire Form 1— for Trade Union Officials**

1. Telework is currently not defined in any labour legislation in South Africa. Are you familiar with the concept of telework?

Yes  No

2. If answered in the affirmative, please briefly describe what you understand by telework. Otherwise, write N/A.

3. In your opinion, is the practice of home or remote work, including telework, fully accommodated within the existing suite of labour regulations (LRA, BCEA, OHSA, EEA etc.)?

Yes  No

What is the reason for the conclusion above?

4. Have member trade unions been able to organise and exercise their rights where their respective members are working from home?

Yes  No  Unsure

5. How do you think working from home has affected the exercise of trade union rights by employees in the workplace?



6. What has been the greatest challenge for your members who work from home in exercising their trade union rights?

7. The successive COVID-19 Regulations issued in terms S 27(1) of the Disaster Management Act (DMA) require employers to make arrangements to allow employees to work from home or at least limit the need to be physically present in the workplace. In your opinion and experience with the COVID-19 Pandemic, should this sort of working arrangement be made permanent and why is that?

8. Save for the COVID-19-related exceptions under Direction 14 of the Consolidated Directions on Occupational Health and Safety Measures in Certain Workplaces, do employees *who can work from home* have a right to refuse the employer's demand for them to return to work, if the employer complies with the regulations in respect of their return thereto?

Yes		No		Unsure	
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- a. If answered in the affirmative, is this right related to the DMA COVID-19 Regulations requirement that employers must take measures to allow employees to work from home? Otherwise, write N/A.

9. The Occupational Health and Safety Act (OHS Act) requires employers to provide employees with a safe working environment.

- a. Are you aware of any labour and health and safety inspections that have been done by the Department of Labour in respect of employees working from home?

- i. If answered in the affirmative, what have been the key challenges to labour and health and safety inspections in respect of employees working from home and what can be done to better ensure health standards are complied with?

- ii. Otherwise, what do you think are the barriers to labour and health and safety inspections in respect of employees working from home and what can be done to better ensure health standards are complied with?

10. What do you think has been the effect of working from home on women with family responsibilities (including children)?

- a. How can the issues identified above be addressed? (*optional*)

11. In your opinion, which employees, male or female, benefit most from working from home or remotely? What is the reason for your answer?

12. The Minister of Labour has published the **Draft Code of Good Practice on the Prevention of Harassment and Violence in the World of Work** for comment, which includes domestic violence and harassment impacting the world of work, as well as intimate partner violence, family violence and domestic abuse as a form of violence and harassment that employers must help eliminate. The code also states that workers under the Code include informal economy workers.

**In your opinion, are employers supposed to provide assistance to employees who experience domestic or intimate partner violence while working at home, as part of their duties to combat harassment and bullying in the workplace under the EEA?**

Yes

No

Why do you think so?

Taking the above into consideration, together with the Draft Code, do you, in your opinion, think employers should be liable for failure to assist an employee who experiences domestic violence and abuse and why?

13. Do you agree with the inclusion of informal workers in the definition of worker under the EEA Draft Code?

Yes		No	
-----	--	----	--

14. Why do you agree, or do not agree?

15. The Basic Conditions of Employment Act (BCEA) requires that employees earning below R211 596.30:

- a. work no more than 45 normal working hours per week and no more than 10 overtime hours per week.
- b. Get a rest period of at least 12 hours between commencement of work and end of work.

**Are you aware of any attempt or measures taken by the Department of Labour to ensure that vulnerable employees working from home are not forced or expected to work (including by answering work emails, phone calls and messages) outside their normal working hours; or are at least paid for overtime hours worked?**

Yes		No	
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**In your opinion, what can be done to ensure compliance with the above BCEA requirements in respect of employees working from home / How can labour inspection be done to ensure that workers are not expected to work beyond the designated working hours?**

Thank you for your participation.

INTERNATIONAL LAWYERS ASSISTING WORKERS NETWORK  
1130 CONNECTICUT AVE, NW 8TH FLOOR  
WASHINGTON, DC 20036