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REGULATORY INNOVATION IN THE GOVERNANCE OF DECENT WORK FOR DOMESTIC WORKERS IN SOUTH AFRICA: Access to Justice and the Commission on Conciliation, Mediation and Arbitration

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IDRC Research Project: Regulatory Innovation in the Governance of Decent Work for Domestic Workers in South Africa: Access to Justice and the Commission on Conciliation, Mediation and Arbitration*

Adelle Blackett¹ & Thierry Galani Tiemeni²

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Introduction

Eve,³ the ‘*African Mother*’,⁴ even the ‘*fairy godmother maid*’⁵: Romanticized, caricatured portrayals of domestic workers remain prevalent in South African popular culture, and offer all too relevant insights into historical legacies and contemporary dynamics of the domestic work relationship. Although the regulatory and socio-political landscape has changed significantly in the post-apartheid period in South Africa, there is a troubling constancy in the lived experiences of the approximately one million domestic workers.⁶ Ethnographic studies chronicle the persistence of challenging

³ *Eve the maid* is a character of the popular South African satirical comic strip *Madam & Eve* created by Stephen Francis and Rico Schacherl. See also Gail Smith, “Madam and Eve: A Caricature of Black Women's Subjectivity?” (1996) 12:31 *Agenda: Empowering Women for Gender Equity* 33.

⁴ Popularised by Catherine Winter in her 1999 documentary *My African Mother*, this expression depicts the widely observed phenomenon, in South Africa, of black domestic workers having to raise their employers’ white children, progressively becoming the mother figure for - sometime generations of - family children.

⁵ Shireen Ally coined this expression in an article analysing the iconic South African OMO advert that portrays a domestic worker as a magically appearing black ‘fairy godmother’ maid. See Shireen Ally, “Ooh, eh eh . . . Just One Small Cap is enough! Servants, Detergents, and their Prosthetic Significance” (2013) 72:3 *African Studies* 321 [Ally].

⁶ The official number of domestic workers in South Africa is 1,013,000 although the actual number might be considerably higher, given the prevalence of irregular migrant domestic workers from neighbouring countries. Statistics South Africa, *Quarterly Labour Force Survey: Quarter 2, 2016*, (Pretoria: Statistical release P0211, 2016). At times case law bears witness to the appalling extent of some of the abuse, stigmatization and preconceptions lived by domestic workers. Consider that in *Sindane v. The State*, (510/10) [2010] ZASCA 157 (1 December 2010) an employer, after being convicted for the rape of his teenage domestic worker,

working conditions, inequalities, discrimination and abuses linked to migration status.⁷ And while in the post-apartheid era, the demography of the employer has changed to span all of the racial demarcations so central to apartheid's hierarchical order,⁸ in the South African domestic work sector⁹, domestic workers are invariably black, and overwhelmingly (94%) female.¹⁰ Domestic workers amount to a full 6.5 % of the total South African workforce.¹¹

appealed his sentence to the Supreme Court of Appeals with the argument that he could not have raped his domestic worker because the victim did not know nor did she understand the meaning of the word 'rape'.

⁷ See Pamhidzai Bamu, "Nurturing a culture of compliance with domestic workers' rights in South Africa" in Darcy Du Toit, ed, *Exploited, undervalued - and essential: Domestic workers and the realisation of their rights* (Pretoria: Pretoria University Law Press, 2013) 157 [Bamu]. See also Monica Kiwanuka, Zaheera Jinnah & Becca Hartman-Pickerill, *MiWORC Policy Brief No.4- Getting the house in order: Precarity, migration and domestic work in South Africa* (Johannesburg: African Centre for Migration & Society -University of the Witwatersrand, 2015) [Kiwanuka, Jinnah & Hartman-Pickerill].

⁸ Debbie Budlender relies on the Time Use Survey conducted by Statistics South Africa in 2010, which included a question asking which persons in the household did the most housework. The question included a special code for households in which a non-member did the most housework, considering it to be a proxy indicator of households employing one or more domestic worker. Based on that proxy indicator, she estimates that 6% of South African households employ domestic workers, with 32% in the much smaller population of white households, 2% in African households, 5% in coloured households, and 2% in Indian households. Based on 2000 statistics, Budlender suggests that although the indicators are crude, they suggest that little has changed in 10 years. See Debbie Budlender, *The introduction of a minimum wage for domestic workers in South Africa*, ILO Conditions of Work and Employment Series No. 72 (Geneva: ILO, 2016) at 6 [Budlender].

⁹ The ILO Decent Work for Domestic Workers Convention, 2011 (No. 189) defines domestic work as 'work performed in or for a household or households'; a domestic work being an individual who regularly and continuously is engaged in domestic work within employment relationships. (See Article 1 of ILO C189).

The South African legislative framework however differentiates between 'domestic work' as an occupation and 'private households' as a broader sector. (See Statistics South Africa *Quarterly Labour Force Surveys*). Section 31 of Sectoral Determination 7 of 2002 provides that is domestic worker: "any domestic worker or independent contractor who performs domestic work in a private household and who receives, or is entitled to receive, pay and includes - (a) a gardener; (b) a person employed by a house hold as a driver of a motor vehicle; and (c) a person who takes care of children, the aged, the sick, the frail or the disabled; (d) domestic workers employed or supplied by employment services."

This definition therefore excludes rural domestic workers employed in farms; and despite including professional occupations mostly held by men (such as drivers and gardeners) has not had an impact on statistical figures showing clear domination of the sector by female workers who account for 95 % of the total workforce.

¹⁰ Statistics South Africa, *Quarterly Labour Force Survey: 2nd Quarter, 2016*, (Pretoria: Statistical release P0211, 2016). The South African policy and legal framework officially recognizes three categories of previously disadvantaged individuals: black (the official definition of 'black' includes Blacks, Coloureds, Indians, and Chinese), women and disabled individuals as per the Preamble and Section 1 of the Employment Equity Act 55 of 1998. Although the Quarterly Labour Force Survey does not indicate precisely what proportion of the domestic work population is considered to be "Blacks" or "coloured", it does report that only 3, 3 of Indian/Asian Men and 5, 2 of Indian/Asian women are employed in any 'low-skilled' occupations. See also Darcy Du Toit, "Situating domestic work in a changing global labour market" in Darcy Du Toit, ed, *Exploited, undervalued - and essential: Domestic workers and the realisation of their rights* (Pretoria: Pretoria University Law Press, 2013) at 5-6; Jennifer Natalie Fish, *Domestic Democracy: At home in South Africa* (New York: Routledge, 2006) [Fish]. It is important to underscore Paul Benjamin's important apartheid-era reflection entitled "The

Contemporary South Africa is characterized by a robust labour governance framework, within a conducive constitutional environment and a state supportive of decent work for domestic workers internationally. After contributing significantly to the development of new international labour standards on domestic work, South Africa is one of the 22 ILO Members¹² that has ratified the ILO Decent Work for Domestic Workers Convention, 2011 (No. 189).¹³ Domestic workers' basic rights as workers are within the ambit of mainstream labour instruments, including the Labour Relations Act 66 of 1995 (LRA) and the Basic Conditions of Employment Act 75 of 1997, which improved the protection initially afforded to domestic workers in 1993 by recognizing employment contracts and the particulars of employment and termination, regulating working time, and stipulating minimum leave periods. Domestic workers are entitled to employment discrimination protection,¹⁴ and coverage for skills development and training.¹⁵ Social protection, through unemployment insurance legislation,¹⁶ provides coverage for maternity leave.¹⁷ South African jurisprudence even

Contract of Employment and Domestic Workers (1980) 1 Industrial Law Journal (Juta) 187, concerned, as he frames it from the outset “with the most neglected area of a very neglected body of law” and amongst other things, later arguing that “courts ought to adopt a restrictive approach in deciding whether the summary dismissal of a domestic worker is justified.” (at 191). One interviewee stressed the extent to which some domestic workers organizers relied on invocations of the common law - beyond rather than through the courts - to extract concessions from employers for reasonable notice on termination of employment. Interview with domestic workers' representative 3B, March 2014.

¹¹ Statistics South Africa, *Quarterly Labour Force Survey: 2nd Quarter, 2016*, (Pretoria: Statistical release P0211, 2016)

¹² As of September 2016, although 22 ILO Members from around the world had ratified ILO C189, representing both the global North and the global South, South Africa and Mauritius are the only African countries to have ratified the convention. See http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:25_51460.

¹³ By virtue of Section 231(1) – (5) of the Constitution of the Republic of South Africa, 1996 [*Constitution of South Africa*].

¹⁴ In terms of the Employment Equity Act 55 of 1998.

¹⁵ The Skills Development Act 97 of 1998 facilitated the establishment in 1999 of the Domestic Workers Skills Development Project. For further reading on the Domestic Workers Skills Development Project, see Budlender, supra note 8 at 27-29.

¹⁶ The Unemployment Insurance Act 63 of 2001 (sec 1) and the Unemployment Insurance Contributions Act 4 of 2002. It is also to be noted that domestic workers have to work for at least 24 hours a month in order to qualify for sickness benefits and UIF.

¹⁷ Section 22 of Sectoral Determination No. 7 provides that domestic worker are entitled to at least four consecutive months of maternity leave. Paid maternity leaves are however not statutorily enforced and are left to the discretion of employers, thus only few domestic workers are able to receive paid maternity leaves and have to rely on UIF payments. Unemployment Insurance Fund payments for maternity leaves are only destined to formally registered domestic workers, therefore adding another hurdle for unregistered domestic workers. Domestic workers working for an employer for fewer than 24 hours a month are also not covered by UIF legislation and are therefore not entitled to payments. See Kitty Malherbe, “Implementing domestic workers' social security rights in a framework of transformative constitutionalism” in Darcy Du Toit, ed, *Exploited, undervalued - and essential: Domestic workers and the realisation of their rights* (Pretoria: Pretoria University Law Press, 2013) at 127-128.

extends the scope of legal employment protection to workers with irregular immigration status;¹⁸ this jurisprudence has considerable potential in a sector in which cross-border migrants constitute a sizeable proportion of the workforce.¹⁹ Mostly, the landmark, specific regulatory text embodied in South Africa's Sectoral Determination No. 7 of 2002 on domestic workers, and established under the Basic Conditions of Employment Act, was largely expected to introduce and implement labour market transformations into the domestic sector. The framework is embedded in the institutional structure of the Commission for Conciliation, Mediation and Arbitration (CCMA), which offers an innovative mechanism that aims to render labour dispute resolution accessible to a range of low wage workers, including domestic workers.²⁰ That institution has the concrete potential to disrupt and contribute to the redress of the asymmetrical relationship between domestic workers and employers, at least incrementally, on a case-by-case basis, as well as shape broader public consciousness.

Few commentators would deny that this framework – entirely enviable in comparative perspective - has increased rights consciousness in the domestic work relationship, and has had a meaningful impact on domestic workers' lives.²¹ Moreover, the available studies of Sectoral Determination 7 have so far tended to suggest that despite limited state inspection capacity²², there has been a clear increase in wages since its introduction²³, with some displacement effect for employment.²⁴ However, there are persisting questions about the extent to which the “democratic statecraft”²⁵

¹⁸ See *Discovery Health Limited v. Commission For Conciliation, Mediation and Arbitration and Others* (JR 2877/06) [2008] ZALC 24; [2008] 7 BLLR 633 (LC); (2008) 29 ILJ 1480 (LC) (28 March 2008). This jurisprudence is one amongst a series of courts decisions having established the superseding effect of the right to fair labour practice (Section 23.1) the South African constitution affords ‘everyone’, including individuals whose employment contracts would normally be deemed illegal. On the nuances of its application and limits in practice, see Jennifer N. Fish, “Rights across borders: policies, protections and practices for migrant domestic workers in South Africa” in Darcy Du Toit, ed, *Exploited, undervalued - and essential: Domestic workers and the realisation of their rights* (Pretoria: Pretoria University Law Press, 2013) 213.

¹⁹ See Kiwanuka, Jinnah & Hartman-Pickerill, *supra* note 7 at 5-6.

²⁰ The CCMA was established by Chapter 7 (Dispute Resolution), Part A (Commission for Conciliation, Mediation and Arbitration) of the Labour Relations Act 66 of 1995. The CCMA operates in terms of the Rules for the Conduct of Proceedings before the CCMA (CCMA Rules) published by the CCMA Governing Body in terms of Section 115 of the Labour Relations Act 66 of 1995.

²¹ See Paul Benjamin, “Informal work and labour rights in South Africa” (2008) 29 Industrial Law Journal 1579 at 1591-1595. See also Shireen Ally, *From Servants to Workers: South African Domestic Workers and the Democratic State* (Ithaca: Cornell University Press, 2009) at 67-71.

²² There has been real creativity in public outreach efforts, including to reach employers. The principal investigator was struck to see huge banners, in South African airports, specifying the updated minimum wage for domestic workers on arrival in March 2014.

²³ See Budlender, *supra* note 8 at 27. For an early study, see Tom Hertz, “The Effect of Minimum Wages on the Employment and Earnings of South Africa's Domestic Service Workers.” Upjohn Institute Working Paper No. 05-120 (2005).

²⁴ See Budlender, *ibid* at 28-29. For Budlender, the overall welfare result, from an econometric perspective, is characterized as at best tentatively beneficial. Budlender distinguishes this from the moral benefit of higher wages and lower working hours, which she agrees are an important part of any policy debate. *Ibid* at 27 (fn 31).

²⁵ Ally, *supra* note 5 at 85.

associated with legislating workplace citizenship²⁶ actually redresses domestic workers' historic exclusion. Consider that the South African Domestic and General Workers Union (NCFAWU – SADAGWU), in its own historical account entitled *Crawling through the history of common law and BCOA of Vulnerable Workers in South Africa* situates the challenge of migrant domestic work within the broader framework of regulation in a context of prevalent unemployment, contractualization, and regional migration.²⁷

This work acknowledges the persistence of social stratification faced by domestic workers, despite the significance of the contemporary legislated rights. The South African constitutional and legislative framework is rightly hailed as progressive and labour-friendly, and was the basis of significant, optimistic theorizing on the potential of a transformative constitutionalism,²⁸ including as it relates to domestic workers.²⁹ Yet domestic workers continue to face poor working conditions, impoverishment and isolation. In a generation of “born free” South Africans, the labour regulatory framework's ability to redress persisting structural inequalities observed in South African society is increasingly called into question.

This study seeks to provide a close and textured inquiry into the assessment of domestic workers' rights, in context. This compels an assessment of the role and impact not only of the specific regulatory instrument, Sectoral Determination 7, but of the enforcement of labour rights by the labour administration and judicial structure. The focus is particularly placed on an institution that has been at the core of regulatory innovation on labour law enforcement, the CCMA. This study seeks to complement rather than duplicate the important legal and statistical analyses that have emerged about the CCMA's functioning, drawing on qualitative, participant interviews and observations of domestic work conciliations undertaken in Cape Town in March 2014.

The study of the CCMA is a study in contrasts. On the one hand, the CCMA is a mechanism that is swift and accessible, the envy of many jurisdictions³⁰ in its ability to mediate, conciliate or arbitrate

²⁶ For further literature on citizenship at work, see Judy Fudge, "After Industrial Citizenship: Market Citizenship or Citizenship at Work?" (2005) 60:4 *Industrial Relations* 631. See also Michel Coutu & Gregor Murray, "Towards Citizenship at Work?: An Introduction" (2005) 60:4 *Industrial Relations* 601.

²⁷ Unpublished booklet provided to the principal investigator during interviews, March 2014. The precise quote is as follows:

More educated youth are entering the domestic sector due to unemployment we also had competitions with our brothers from Zimbabwe that will work for less than what the wage act says, Employers employ man because they can drive work in side and do gardening for woman that a very bitter struggle, Domestic workers prefer char or daily employment working for 10 employers per week. This increase the unemployment in this sector, because they work 2-4 hour per house no respect for the labor laws because there is no deduction...

²⁸ See Karl E Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 146.

²⁹ See Wessel le Roux, "Advancing domestic workers' rights in a context of transformative constitutionalism" in Darcy Du Toit, ed, *Exploited, undervalued - and essential: Domestic workers and the realisation of their rights* (Pretoria: Pretoria University Law Press, 2013) 31.

³⁰ See Adelle Blackett "Decolonizing Labour Law: A Few Comments" (2016) 92 *Bulletin of Comparative Labour Relations* 89 at 92 [Blackett].

cases concerning some of the most marginalized, low waged workers,³¹ nationally and across the Southern African region.³² As Paul Benjamin affirms, the ‘CCMA’s procedures are now extremely well known among the South African workforce.’³³ The CCMA seems to have acquired a legitimacy, credibility and broad societal support, highly respected and scarcely attacked in a context in which some other institutions face serious legitimacy challenges.³⁴ Moreover, the domestic sector provides one of the highest numbers of referrals to the CCMA. The simplicity and efficiency of the CCMA process enable domestic workers to seek justice when faced with labour disputes.³⁵

This study is concerned, however, to look beyond swift enforcement in its appraisal of the CCMA, to assess the quality of the justice rendered. The preliminary findings of this study suggest that the high degree of respect enjoyed by the institution in the domestic work sector is linked at least in part to its attentiveness to bringing the “rule of law” to the home workplace, and to the mediating role played by its commissioners.

On the other hand, this study forces attention to the CCMA’s limits. It questions how much the CCMA manages to shift the domestic work framework, in a context in which broad societal redistribution may be blocked. The qualitative research methods provide a unique opportunity to explore how those limits are experienced.

Background to the IDRC Study

Decent work for domestic workers has moved from the margins of sustained international solidarity work to the centre of historic international prioritization. The ILO built on innovative regulatory practices in a growing number of countries worldwide to adopt the Decent Work for Domestic Workers’ Convention (No. 189) and Recommendation (No. 201), 2011. No longer servants, or “like one of the family”, domestic workers received international validation of their status as workers. The promise of international standard setting is that it will galvanize actors locally and transnationally to promote implementation in a broad cross-section of states. The international standard setting took a

³¹ Haroon Bhorat, Kalie Pauw & Liberty Mncube, *Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data*, DPRU Working Paper 09-137 (Cape Town: University of Cape Town/Development Policy Research Unit, 2009) at 7 [Bhorat, Pauw & Mncube].

³² ‘Its institutional architecture has already had a significant impact on labour law reforms in the Southern African region with countries such as Lesotho (2000), Swaziland (2000), Botswana (2004), Tanzania (2004) and Namibia (2007) establishing specialist labour dispute resolution institutions that promote the role of mediation and arbitration as the primary mechanism for the prevention and settlement of labour disputes.’ See Paul Benjamin, *Assessing South Africa’s commission for conciliation, mediation and arbitration (CCMA)*, Dialogue Working Paper No. 47 (Geneva: ILO, 2013) at 45 [Benjamin]; see also Pamhidzai H. Bamu & Rutendo Mudarikwa, “Social regionalism in the Southern Africa Development Community: The international, regional and national interplay of labour alternative dispute resolution mechanisms” in Adelle Blackett & Anne Trebilcock, eds, *Research Handbook on Transnational Labour Law* (Cheltenham: Edward Elgar Pub, 2015) at 463.

³³ See Benjamin, *ibid* at 15.

³⁴ William Gumede, “Marikana: a crisis of legitimacy in the institutions that form the foundations of South Africa’s 1994 post-apartheid political settlement” (2015) 41:2 *Social Dynamics* 327 (Taylor & Francis) at 334.

³⁵ Bhorat, Pauw & Mncube, *supra* note 31 at 7.

crucial first step, in that it renders visible many of these dynamics and calls for a regulatory response. The peril is that it will simply superimpose a layer of law without reaching the places where domestic work norms are mediated.

There is a troubling gap in the existing legal knowledge of the regulation of domestic work. This gap is perhaps masked by the abundant literature on the exploitation faced by this particularly marginalized category of workers, compellingly elucidating the North South dimension of domestic work, and the extent to which the global economy depends on transnational, subsidized care extraction. The transnational character is belied by the ‘everydayness’ of the personal interactions of the South in the North in individualized households. A premise of this IDRC project of which the South African CCMA study is a part, is that assessments of implementation must go far beyond compiling state laws, particularly those of general application; they mask the informal norms that are pervasive in domestic work, and that govern the home workplace with starkly unequal, but mediated power relationships often beyond the gaze of state regulation and enforcement.³⁶ The South African context provides poignant examples of the interplay of power between domestic workers and employees, deeply entrenched in the underlying racial and economic asymmetries that define the South African society.

This IDRC project has sought to evaluate the burgeoning development of innovative, specific regulatory initiatives by multiple state and non-state actors to address regulatory and compliance challenges in domestic work. Many of these initiatives have emerged from the global South, with domestic workers themselves as the catalysts. They creatively redress some of the worst employment practices, bringing domestic workers within the scope of labour and social security protections, infusing human rights into migration practices, and fostering worker self-organization. A sophisticated approach to social exclusion and legal regulation is required to ensure that the root causes of the social undervaluation of domestic work are addressed through innovative regulatory responses. This IDRC project looks to the African continent, the third largest employer of domestic workers, where approximately 10 % of domestic workers worldwide are distributed,³⁷ to offer a close look at emerging innovation on decent work for domestic workers.

Methodology

In South Africa, domestic work has been the subject of ethnographic studies of singular importance, both during apartheid³⁸ and in the post-apartheid era.³⁹ Several key works focus upon the legal

³⁶ See Adelle Blackett, “Introduction: Regulating decent work for domestic workers” (2001) 23 *Canadian Journal of Women and the Law* 1 at 22-23.

³⁷ ILO, *Domestic workers across the world: Global and regional statistics and the extent of legal protection*, Geneva, 2013, at 21, 33. It is recognized that the statistical base is extremely low in both West and East Africa, to the point where the ILO hypothesizes that the workers may not actually have been counted as workers in labour force surveys. (*Ibid* at 35).

³⁸ See Jacklyn Cock, *Maids and madams: a study in the politics of exploitation* (Johannesburg: Ravan Press, 1980). See also Jacklyn Cock, “Trapped Workers: The Case of Domestic Workers in South Africa” in Sharon Stichter & Jane L. Parpart, eds, *Patriarchy and class: African women in the home and the workforce* (Boulder & London: Westview Press, 1988).

regulation of domestic work.⁴⁰ This microstudy seeks to build upon that insightful literature, to take a qualitative snapshot of the functioning of a legal institution at the centre of the enforcement of domestic workers' rights, the CCMA. Thus, in addition to a classic review of existing legislation and secondary sources on labour law generally, and the regulation of domestic work specifically, this study is built around seven (7) semi-structured qualitative interviews, ranging from approximately 40 – 70 minutes in duration, conducted by the principal investigator in March 2014 in Cape Town. Interviews were undertaken with members of the Ministry of Labour - including the labour inspectorate, and several commissioners of the CCMA. The principal investigator also interviewed a representative of the International Domestic Workers' Federation and the South African Domestic and General Workers Union (SADSAWU), which became in 1986 the first affiliate of the newly launched COSATU⁴¹; and a representative of the South African Domestic and General Workers Union, affiliated with the National Certificated Fishing and Allied Workers Union (NCFAWU-SADAGWU). The principal investigator interviewed an employer consultant specialized in representing employers of domestic workers. The study also includes small scale participant observations of randomly selected CCMA conciliation hearings,⁴² involving both male and female domestic workers and their employers. She exchanged at length with the initial chair of the Employment Conditions Commission, Professor Evance Kalula, and its then current chair, Professor Ingrid Woolard. The executive director of the University of Western Cape's Social Law Project provided continuous support to the project, convened a roundtable discussion with members of the UWC's research team, and invited the principal investigator to present and validate preliminary research findings in a lecture at UWC to participants in a Post Graduate Diploma in Labour Dispute Resolution Practice for prospective CCMA commissioners on 19 September 2015.

Despite the range of respondents for this research project, it remains important to bear in mind that this is a microstudy, based on a small interview sample conducted over a short timeframe. It offers a snapshot into regulatory possibilities, rather than a definitive overview.

Situating domestic workers in regulatory context

Domestic work in the post-apartheid constitutional dispensation

As mentioned above, the post-apartheid era led to significant transformations of South African labour and employment relations law and practices. These reflect faith in the potential of constitutional transformation, emblematic not only of expansive rights to dignity,⁴³ equality and

39 See e.g. Ally, *supra* note 5; Jennifer Natalie Fish, *supra* note 10.

40 See e.g. Paul Benjamin, *supra* note 32; Darcy Du Toit, ed, *Exploited, undervalued - and essential: Domestic workers and the realisation of their rights* (Pretoria: Pretoria University Law Press, 2013).

41 See Budlender, *supra* note 8 at 7. Budlender's study offers a useful synthesis of some of the organizing initiatives undertaken and challenges faced by domestic workers' associations in South Africa, as well as the differing statements of membership numbers reported in scholarly publications.

42 Regrettably due to the limits of the microstudy and the availability of hearings during the time of the visit, it was not possible to attend an arbitration hearing. A study of longer duration would necessarily include a broader sampling of hearings.

43 *Constitution of South Africa*, *supra* note 13 at section 10.

protection against unfair discrimination⁴⁴ that are also constitutionally entrenched, but also strong institutional protections through court litigation. The regulatory mechanisms in labour law are also comprehensive and relatively robust.⁴⁵ In addition to structural changes to the labour code and broadened fair labour practices, the democratic state introduced mechanisms to promote equality in the workplace including robust employment equity measures.⁴⁶ Domestic workers were understood to constitute an important dimension of this post-apartheid constitutional and regulatory landscape, despite limits to the regulatory imagination on vehicles to promote domestic workers' collective autonomy.⁴⁷

A review of relevant cases suggests that South African courts generally strive to ensure that domestic workers are able to benefit fully from a broad panoply of protections that the constitution affords to others, even beyond the strict employment law context. Consider, for example, that the Constitutional Court adopted this approach in *Stratford and others v Investec Bank*,⁴⁸ a case dealing with domestic workers' rights as 'employees' in the context of the insolvency of a businessperson, who happened also to be the domestic workers' employer. Rejecting previous jurisprudence by the Supreme Court of Appeal in *Gungudoo and Another v Hannover Reinsurance Group Africa (Pty) Ltd and Another*,⁴⁹ the Constitutional Court unanimously found that despite the fact they are not employed by an insolvent business but rather by the business owner as an individual, that business owner's domestic workers benefit from the same protections available to employees of the insolvent business.⁵⁰ Adopting a purposive approach, the Constitutional Court found that the word

⁴⁴ *Constitution of South Africa*, *ibid* at section 9.

⁴⁵ Indeed, sometimes the mechanisms may lead to highly mediatized dramas, as in the recent case of a prominent Member of Parliament (MP) and Chairperson of the Portfolio Committee on Labour, who allegedly flouted the country's labour laws despite having engaged in a very personal campaign against unruly employers. In May 2016 she - now infamously - tweeted "employers who are still exploiting workers the inspectors of labour will be at your doorstep soon". The MP was brought before the CCMA by a domestic worker she allegedly summarily fired, on Valentine's Day. At the CCMA, the domestic worker claimed that she was severely ill-treated by the MP who, during the course of their employment relationship, allegedly disregarded her labour and employment rights. The dispute was resolved during the conciliation phase and a confidential settlement was reached between the parties. See the following news report from South Africa <http://www.timeslive.co.za/sundaytimes/stnews/2016/06/05/Parliaments-labour-committee-chair-is-the-madam-from-hell>, and <http://ewn.co.za/2016/06/06/DA-reports-Lumka-Yengeni-to-Parly-ethics-committee>

⁴⁶ See Sandra Fredman, "Facing the Future: Substantive Equality Under the Spotlight" in Ockert Dupper & Christoph Garbers, eds, *Equality in the workplace: reflections from South Africa and beyond* (Cape Town: Juta & Co, 2009). See also Darcy du Toit, "Affirmative Action of Positive Action in the Employment Context: Comparing the Interpretation of Equality by the European Court of Justice with That of the South African Constitutional Court" (2014-2015) 36 *Comp. Lab. L. & Pol'y J.* 423.

⁴⁷ See Darcy du Toit & Thierry Galani T, "Do Cooperatives Offer a Basis for Worker Organisation in the Domestic Sector? An Exploratory Study" (2015) 36 *Industrial Law Journal* 1677 [du Toit & Galani]. See also Thierry Galani T & Darcy du Toit "Domestic workers' cooperatives: Organisational and regulatory possibilities" (2015) Paper at the ILO's 4th Conference on Regulating for Decent Work: Developing and Implementing Policies for a Better Future at Work (RDW), 8-10 July 2015 in Geneva [Galani & du Toit].

⁴⁸ *Stratford and others v Investec Bank Limited and others*, Case No: CCT62/14, 2015 (3) BCLR 358 (CC) [*Stratford*].

⁴⁹ *Gungudoo and Another v Hannover Reinsurance Group Africa (Pty) Ltd and Another* [2012] ZASCA 83.

⁵⁰ The issue revolved around the definition of "employees" in section 9(4A) of the Insolvency Act 24 of 1936; this provision requires a notice of an employer's provisional sequestration application to be given to his employees.

“employees” in section 9(4A) of the Insolvency Act also includes domestic employees, as such an interpretation best ‘promotes the spirit, purport and objects of the Bill of Rights’.⁵¹

That the courts remain attentive to the historical status markers associated with domestic work can be seen in the *Standard Bank of SA Ltd v Caster Transport CC*⁵² decision about the manner in which “returns of service” were made to several defendants, employed as domestic workers. The decision of the North Gauteng High Court of Pretoria begins poignantly: “This judgment arises from my disquiet”. Judge Makgoka found that it was undignified, demeaning and in violation of Section 10 of the Constitution for the sheriffs’ “return of service” to be addressed to several of the defendants by referring to them merely as ‘Bongiwe, a domestic helper’, or by first name without a last name, or as “the domestic faith” or “Eliza, domestic worker.” Judge Makgoka wrote as follows:

From these returns of service, reference to the recipients stands out. There is no mention of their marital status or surnames. One thing is clear, though all of them are indigenous African women. ... As a nation, we emerge from a disgraceful and painful past, where an irrational system of institutionalized racism was visited upon indigenous African people, where adult African women and men were contemptuously (and still are, in some instances) referred to as ‘girls’ and ‘boys’. The contents of the returns of service in these matters are reminiscent of that era, and conjure up deeply painful memories for the majority of the citizens of our country. It does not help that in two of the present matters, the deputy sheriffs who served the documents appear to be white men.

I have in the past raised this issue in court, and expressed my detestation for it. Without fail, each time I had sat in the motion court, I have encountered similar returns of service. From my experience, it is mostly indigenous African people who are the subject of such mode of address in returns of service. I have yet to come across a return of service referring to a nonindigenous African person in the manner reflected in the returns of service under consideration. ...

The mindset discernable in the returns of service referred to above, has no place in an open and democratic society premised on the foundational values of human dignity and respect. The sheriffs perform a critical task in the administration of justice, and thus have an abiding duty to treat everyone with dignity, irrespective of their race or social standing.⁵³

Judge Makgoka’s decision focuses plainly on the lack of respect in the address, contrasted with addresses to other litigants that refer to their title, family name, and occupation or relationship to the household, even if that status might be that of “the husband”. The judge’s decision is poignant, in that it seeks to extricate the laden racialized history of domestic servitude, rendered invisible because of its ubiquity, from the occupation of domestic work. The decision does not call “domestic work” undignified, although it does come close to articulating the unease that surrounds an entire work category that is embodied by black, usually black female, workers. There is a consistency here, with

⁵¹ *Stratford*, *supra* note 48 at para 19.

⁵² See *Standard Bank of SA Ltd v. Caster Transport CC and Others (13700/2012, 4444/2014)* [2014] ZAGPPHC 314(4 June 2014).

⁵³ *Ibid* at paras. 3-6. Further challenging the view that this decision was somehow pedantic or form over substance, (at para 7) the high court judge ordered a written apology to each defendant as part of the remedy.

broader regulatory initiatives – internationally and within the South African context – in that the decision seeks to affirm the social citizenship, the equality of those “indigenous African persons” employed in domestic work, by insisting that they be formally addressed with dignity by officers of the court. At one level symbolic, and imbued with an ethos of transformative constitutionalism, the High Court decision may even be said to be inscribed in the “decent work for domestic workers” narrative that is alive to the relationship between those indignities that are taken for granted, and the everyday indignities that impede the necessary structural change to proceed from the status of servant to the status of a worker like any other...

Sectoral Determination No. 7 of 2002

Sectoral determinations are issued by the Minister of Labour, pursuant to the Basic Conditions of Employment Act (BCEA), and with a view to setting minimum wages.⁵⁴ In 2002, Sectoral Determination No. 7⁵⁵ was introduced to create a regulatory framework specific to the domestic sector.⁵⁶ Regulating domestic work via a sectoral determination created opportunities for the formalisation of the employment relationship between domestic workers and employers, and has certainly played a part in improving working conditions in the sector.⁵⁷ Sectoral Determination No. 7 contains a deeming provision, which appropriately includes domestic workers employed or supplied by employment services, as well as those employed as independent contractors, in its scope of application.⁵⁸ As a result, it decisively attenuates the negative impact on working conditions of temporary employment services and labour brokering practices as observed in other industries.⁵⁹ However, it may create difficulties for domestic workers employed by several different employers.⁶⁰ It should also not be forgotten that Sectoral Determination No. 7 provides for a lower floor of minimum wages for domestic workers, as compared to workers in other industries, except for

⁵⁴ See generally Budlender, *supra* note 8 at 7ff.

⁵⁵ The domestic work sector is regulated by Sectoral Determination 7: Domestic Worker Sector; Sectoral Determination 13: Farm Worker Sector is also relevant to domestic workers as it provides for domestic workers employed in farms.

⁵⁶ Sectoral Determination 7 introduced sector specific rules pertaining to core labour issues, including wages, leaves, working time and written particulars of employment.

⁵⁷ Haroon Borhat et al, “Minimum Wages and Youth: The Case of South Africa” (2016) 25: AERC Suppl 1 *Journal of African Economies* i61 provides an econometric assessment of the impact of minimum wages introduced by sectoral determination on employment, wages and non-wage benefits in various sectors, including domestic work.

⁵⁸ Section 1(1) of Sectoral Determination 7 of 2002.

⁵⁹ Employers’ attempts to escape their legal obligations by resorting to temporary employment services and labour brokers often resulted in employment insecurity and instability and lack of adequate social protection for affected workers. South African jurisprudence is however evolving toward eliminating the legal fiction in the triangular relationship between employer, employee and labour broker, taking a strong stance against the use, by employer, of TES for the core purpose of evading the statutory protection afforded to vulnerable workers. See *Dyokhwe v De Kock No & Others* (2012) 33 ILJ 2401 (LC).

⁶⁰ See Section 1(3), taking into account the fact the “informality” of many of these arrangements, particularly for migrant “day” workers from neighbouring countries. See e.g. Laura Griffin, “Unravelling Rights: Migrant Domestic Workers in South Africa” (2011) 42 South African Review of Sociology 83.

farmworkers.⁶¹ Minimum wages for the domestic sector are determined by the Minister of Labour and regularly recalculated and amended.⁶²

The overall impact of Sectoral Determination No. 7 is therefore recognized to be more limited than might initially have been hoped,⁶³ and key observers have argued that the overall regulatory picture for employment regulation is fairly mitigated.⁶⁴ In part, this is due to the limits on labour enforcement.

The Labour Administration

The Department of Labour is entrusted with the task of monitoring and enforcing compliance with basic conditions of employment, including minimum wages, as established by Sectoral Determination No. 7. The role of the Department's labour inspectors is especially important in ensuring that domestic workers' labour and employment rights are effectively monitored and implemented in the workplace. Labour inspections also provide the department with the opportunity to intervene upstream such as to ensure that domestic workers' key labour rights are consistently improved, especially as pertains to pressing issues, such as occupational health and safety, as well as live-in domestic workers living conditions and working time.⁶⁵

This has proven an arduous task for a Department already facing severe logistical constraints.⁶⁶ The Department of Labour has been struggling to keep up with these responsibilities, its resolve to accomplish its mission at times effectively inhibited by a lack of personnel and resources, amongst others constraints.⁶⁷ Significant sector-specific challenges are also frequently raised as hampering the activities of the state labour inspectors⁶⁸ available to service the domestic sector, notably their restricted access to domestic workers workplaces.⁶⁹

⁶¹ Farmworkers and domestic workers minimum wages are set are a lower than minimum wages in other industries - even those covered by sectoral determinations – as a result of the 'two-tier solution' adopted during negotiations by COSATU for the purpose of ensuring that minimum wages are raised in other sectors. Eddie Cottle, "An Overview of the Living Wage and the National Minimum Wage in South Africa" in Eddie Cottle et al, eds, *Bargaining Indicators 2014 : Twenty Years - A Labour Perspective*, Vol 14 (Cape Town: Labour Research Service, 2014).

⁶² Usually determined on a yearly basis, the current minimum rates for the domestic sector were issued for the period running from the 1st December 2015 to the 30th November 2016.

⁶³ See Budlender, *supra* note 8 at 22-23 for discussion.

⁶⁴ See Darcy Du Toit, "Extending the frontiers of employment regulation: The case of domestic employment in South Africa" (2010) 14 *Law, Democracy & Development* 205.

⁶⁵ See Sandra Fredman, "Home from Home: Migrant Domestic Workers and the International Labour Organization Convention on Domestic Workers" in Cathryn Costello & Mark Freedland, eds, *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford: Oxford University Press, 2014) at 418-419.

⁶⁶ Budlender, *supra* note 8 at 5.

⁶⁷ Bamu, *supra* note 7 at 196-7.

⁶⁸ In March 2014, we were informed that the number was at 105 inspectors, servicing 12 labour centres in the Western Cape provincial office of the Ministry of Labour. 25 of the 105 inspectors service all of Cape Town. Interview, Ministry of Labour, Western Cape provincial office, March 2014.

⁶⁹ In relation to labour inspection in households, the labour inspector is required to seek either the homeowner or occupier's consent or a Labour Court's written authorization before conducting a household

That is different from stating that labour inspections do not occur in the domestic work sector in South Africa, as is often assumed. Representatives of the Western Cape provincial office of the Ministry of Labour affirmed in interviews that domestic sector blitz inspections take place occasionally, it would seem at best once per year, during which the resources of approximately one third of the province's inspectors are dedicated to visiting targeted neighbourhoods for a week to speak with employers and domestic workers. The expectation during those blitzes, which are planned ahead of time, is that approximately 600 households would be visited. The inspectors literally knock on doors in affluent, middle and lower income neighbourhoods, to provide legislation and contact information in the form of a pamphlet on conditions of employment in the domestic work relationship, including the particulars that need to appear in writing. They set appointments so that they may return, sit down first with the employer to work through legislative requirements, and subsequently with the domestic worker, alone, albeit in the same dining area or lounge space.⁷⁰ From the few households that actually have attendance registers that are provided to the inspectors for their review, to the small number of households that are adamant that their privacy rights are at stake and insist on setting a meeting with inspectors at a separate mutually convenient place, our informant described a process that covers a vast gamut of practices, misgivings and preconceptions about a process that emphasizes the fostering of compliance through information. In this process, we were told that discrepancies, at least on working conditions, were relatively easy to find:

It's fairly easy to find because the worker would mention something like sick leave, for example, and say that they refused, declined to give sick leave or something and leave a letter. It's really easy when we talk to them and we find the discrepancies. The contract or the particulars where you say one thing, they - my sense is also their hours of work.... Being a private house, they tend to slowly encroach on the private time of a domestic worker. The contact would say, work please 'til four, five o'clock of an evening, but you find they will use their evening, as well.⁷¹

We were also informed that the inspector would go back to the employer, immediately after the meeting with the worker, if a discrepancy were found. The employer would be afforded a few weeks

workplace visit in relation to domestic workers. See Ziona Tanzer, *Domestic Workers and Socio-Economic Rights: A South African Case Study* (Washington DC: Solidarity Center/Global Labor Program, 2013) at 19-22.

⁷⁰ Our informant insisted that inspectors are quite firm about the need to ensure the confidentiality of the meetings. However, there appears not to be a practice of verifying domestic workers' living conditions.

⁷¹ Interview, Ministry of Labour, 5 March 2014. We were informed that even in situations in which a domestic worker might be in an irregular migration situation, "We still apply the law to it, to the relationship. We choose not to go maybe to another government department and say there's an illegal person there, but there have been instances where we would tell the worker maybe they should look at their eligibility." Our informant acknowledged further:

It's not the policy of the department. I have had instances when I meet with inspectors, they're quite clear that they would [lodge] the information with the Government department so that something can be done about that worker. We're not saying they mustn't, they shouldn't do it, because I think they do. But we're not advocating it. We're not saying it must be done. It's difficult.

(typically three) to rectify the situation. Far from suggesting a concern about reprisals,⁷² our informant stated that employers were typically

Very accommodating if they realize that they've got three weeks to do it, and it's mainly technical things. There could be a problem if there's an underpayment of wages. Then they may say, if I have to pay the back pay for three years or whatever, please allow me a longer period of time within which - but they're really quite accommodating. They know that if they fail to do it within the three-week period, we will then go to the labour court and make sure.⁷³

Moreover, our informant did acknowledge later, that “[t]here is a challenge there because it's to do with the fact that they're thinking that they may lose their job. The difference is in the factory work, they can be concealed, they can be hidden if you talk to two or three workers.”⁷⁴

And later still, on broader rights consciousness and awareness of other remedial options, our informant in the Ministry of Labour affirmed:

Yeah, we have had workers that are conversant with the processes and their rights, but there is a gap there. We need to improve that. A worker may know, if they dismiss me, I'm going to the CCMA because they cannot dismiss me on those grounds. So we have had cases where workers stand their ground and say, fine, this is the case. But many of them choose not to because of the fact that they may lose their job.⁷⁵

There might be some limited follow up to ensure compliance, therefore, but the very nuance emerging from the significant qualitative detail about the blitzes from the Ministry of Labour coexists alongside a broader perception that very little is happening. The lack of frequency and small number of inspections together constitute one of the reasons why commentators tend to underscore enforcement challenges. A further dimension of the concern is that the same inspection process that is applied to factories is essentially applied in the household, with minor modifications. Our informant stated the following about the difficult prospect of regulatory change:

We are aware that the worker is not revealing everything while we are there at the place. We need to find a way to get that worker out of the home so that we can deal properly with her. Remember, she has spoken to the client services person, but my inspector doesn't know that. So there must be a way that we can work privately with the domestic worker to get to the bottom of what is happening there.⁷⁶

⁷² It would be surprising for reprisals not to be a live concern, given the high degree of unemployment and the growing prevalence of largely undocumented migrant domestic work in South Africa.

⁷³ Interview with an Official in the Ministry of Labour, March 2014. In the event of non-compliance, a compliance order would be sought and served.

⁷⁴ Interview with an Official in the Ministry of Labour, March 2014.

⁷⁵ Interview with an Official in the Ministry of Labour, March 2014.

⁷⁶ Interview with an Official in the Ministry of Labour, March 2014.

A final challenge raised lies in the fact that the Ministry of Labour’s “reactive work”⁷⁷ implementing Sectoral Determination No. 7’s conditions, depends on domestic workers coming forward and lodging a complaint at a labour centre. Those kinds of complaints tend to come forward when the worker is unemployed, even though the Ministry of Labour would be responsible for dealing with issues like unemployment insurance applications, maternity claims, sick benefits, ordinary benefits, and other statutory entitlements. But if the matter also entails unfair dismissal, the claimant is likely also to be sent to the CCMA, to seek relief pay or notice pay alongside their alleged unfair dismissal complaint...⁷⁸

Engaging the Commission for Conciliation, Mediation and Arbitration: A Preliminary, Qualitative Reflection

Overview of the CCMA in Judicial Context

Creating the CCMA was one of the key and most significant provision of the LRA; the CCMA was innovatively established as an independent body providing alternative dispute resolution mechanisms (as opposed to formal litigation) targeting labour and industrial disputes.⁷⁹ The CCMA is run and managed by a Governing Body that encompasses representatives of all three social partners, namely workers, employers and the government.⁸⁰ In a South African context characterized by strikingly adversarial industrial relations, the holistic purpose of the CCMA seeks to diffuse tensions and achieve social justice and peace by offering an egalitarian platform for the resolution of labour dispute in a less-litigious manner.⁸¹

When a labour dispute is brought before the CCMA, the parties to the dispute are led by a CCMA Commissioner throughout a sequential process of conciliation, mediation and ultimately arbitration. Section 191(5A) also provides for a relatively speedy and continuous process combining both conciliation and arbitration (con-arb). Con-arb proceedings may be applied for in disputes involving individual claims of unfair labour practices and unfair dismissals, including disputes pertaining to probation, dismissal for misconduct or incapacity and constructive dismissals. Combining both procedures in a one-day continuous procedures has its advantage for domestic workers who often are unable to proceed with disputes due to various reasons, including finances (money for taxi), distance, and time constraints.

Based on data from the Western Cape office for the period April 2014 – March 2015, obtained by the Social Law Project, domestic workers, farm workers, health care workers and call centre workers used the CCMA extensively to resolve employment disputes. Of 1143 cases involving domestic

⁷⁷ Interview with an Official in the Ministry of Labour, March 2014.

⁷⁸ Interview with an Official in the Ministry of Labour, March 2014.

⁷⁹ Benjamin provides a helpful overview of the legislative framework for dispute resolution, including the CCMA. See “*Figure 1: Legislative framework for dispute resolution*” in Benjamin, *supra* note 32 at 5.

⁸⁰ *Ibid* at 10-11.

⁸¹ *Ibid* at 46-47.

workers, 718 were settled at the conciliation stage. Of those that proceeded to arbitration, 86% of awards were issued in favour of employees.⁸²

The CCMA is the frontline jurisdiction for conflicts between domestic workers and employers. When not resolved at the CCMA, disputes may be brought before higher, specialized labour jurisdictions. The Labour Court reviews CCMA rulings or awards, and directly adjudicates matters relating to specific labour disputes between domestic workers and employers.⁸³ The Labour Appeal Court is the highest specialist court for labour appeals, on decisions of the Labour Court.⁸⁴ If a dispute persists, unresolved issues may enter the regular court system, potentially reaching the Supreme Appeal Court and the Constitutional Court.⁸⁵

The regular court system may also be directly solicited by domestic workers seeking remedies for work-related issues and incidents found to be out of the CCMA jurisdictional scope. In such instances, specific issues arising from the relationship between domestic workers and employers may also be directly brought before regular courts, namely Magistrate and High Courts. This entails civil and criminal matters arising from the employment relationship between domestic workers and employers, including civil actions for damages, allegations of rape, violence, harassment and abuses. For instance, while the CCMA might provide remedies for labour-related aspects of gender, racial and sexual abuses between domestic workers and employers, the regular court system offers a wider range of recourses for victims seeking further remedies, including reparation and retribution.

Specialized and dedicated courts also exist, including the Equality Court,⁸⁶ Small Claims Court,⁸⁷ and even the Sexual Offence Court.⁸⁸ Some of these specialized institutions hold the potential to redress specific forms of racial and sexual harassment and violence against domestic workers. Consider the highly mediatized case of Nomasomi Gloria Kente, a domestic worker in Cape Town who suffered

⁸² See Social Law Project, University of Western Cape, Report: Organising and Empowering Precarious Workers: Common Problems and Shared Solutions, 15 – 16 May 2015, at 15 [Social Law Project].

⁸³ Labour Relations Act 66 of 1995 [LRA], ss. 151 – 166 .

⁸⁴ LRA, ss. 167 -183.

⁸⁵ See Paul Benjamin, Haroon Borhat & Halton Cheadle, “The cost of ‘doing business’ and labour regulation: The case of South Africa” (2010) 149:1 International Labour Review 73 at 82.

⁸⁶ Established by the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). See Chapter 4 of the PEPUDA.

⁸⁷ Established by the Small Claims Courts Act 61 of 1984. The Small Claims Court has formally declined to hear matters that might be heard by the CCMA. Labour issues are in fact excluded from the jurisdiction of the Small Claims Court, with the exception that the court may decide to hear certain labour-related cases in very few and specific instances, as established by the Department of Justice and Constitutional Development in the *Guidelines for the Commissioners of Small Claims Courts* (2010) at 31-33; and the *Guidelines for the Clerks of Small Claims Courts* (2010) at 27-29.

⁸⁸ The first Sexual Offence Court was introduced, in 1993, as a pilot project at the Wynberg Regional Court in Cape Town. From there, Sexual Offence Courts were progressively rolled out to various parts of the country, but their evolution had stagnated until the Judicial Matters Second Amendment Act 43 of 2013 formally re-established them throughout the country.

racial abuse and harassment at the hands of her employer.⁸⁹ Kente was grabbed by her pyjamas on her way to take a shower, was spat upon and racially abused.⁹⁰ The Magistrates Court in this case resolutely reaffirmed the domestic worker's right to dignity and equality.⁹¹ Underscoring the need to address hate speech and violence against women in the domestic work sector and in South African society in a decisive manner, the Equality Court awarded the domestic worker a substantial amount in damages. The process was also, in relative terms, swift and efficient.⁹²

Swift and efficient access to justice is a hallmark of the CCMA. This is now increasingly true also for the enforcement of CCMA monetary awards. Prior to a decision rendered on 28 June 2016, unless an employer voluntarily expedited the payment of a monetary award, the affected domestic worker would normally have been faced with stringent and complex procedures to follow, including having the CCMA certify the award,⁹³ and then having the Registrar of the Labour Court issue a warrant of execution or writ; only then could the aggrieved employee have the CCMA's award enforced by contacting the Sheriff of the Court for the employer belongings to be seized.⁹⁴ For the average domestic worker, these procedures would entail both fees⁹⁵ and delays. The upshot is that the prohibitive procedures might lead to justice denied.⁹⁶ However, two cases taken to the Labour Court were recently appealed by the CCMA, and the Labour Appeal Court set them aside. The new state of the law is that arbitration awards certified by the Director of the CCMA are fully enforceable without the need for a writ to be issued by any court.⁹⁷

⁸⁹ *Nomasomi Gloria Kente v. Andre van Deventer (EqC)* 2014, Unreported Case no EC 9/13, 24-10-2014, Cape Town Magistrates Court (Judgment by Magistrate Jerome Koeries) [*Nomasomi*].

⁹⁰ These facts also led to the prosecution of the domestic worker's employer; for calling Ms Kente a 'kaffir' he was thus sentenced to two years' house arrest and was required to complete 70 hours of community service in the service of black women. See *The State v. Andre van Deventer* (unreported case no 17/1430/2013, 6-02-2015, Cape Town Magistrates Court) (Magistrate Alta Le Roux)

⁹¹ *Nomasomi*, *supra* note 89.

⁹² Although such exemplary efficiency was partly due to the media attention this incident attracted and that generated accrued public interest and ultimately led to the involvement of the South Africa Human Rights Commission. In terms of the Section 16(10)(a) of the PEPUDA, all High Courts are Equality Courts for their area of jurisdiction. In terms of Section 16(10)(c) of the PEPUDA, the Department of Justice and Constitutional Development has also designated all magistrates' courts to serve as equality courts in all the 9 provinces. The racial incident involving Gloria Kente led to two different court actions. The first case was heard at the Equality Court (normally located in Magistrate and High Courts) by a magistrate of the Cape Town Magistrate Court officiating as an Equality Judge, this case led to an award for damages. A criminal procedure also saw the employer being prosecuted and subsequently sentenced for racial abuse at the Cape Town Magistrate Court.

⁹³ *LR4*, s.143.

⁹⁴ See e.g. two unopposed applications: *MBS Transport CC v. CCMA* and *Three Others and Bheka Management Services v. Kekana and Two Others*, Johannesburg Labour Court (LC) Case No: J 1807/2015 (6 November 2015)(unreported).

⁹⁵ The Sheriff may require a deposit to cover his costs pending successful collection of amounts owed by the employer.

⁹⁶ Benjamin, *supra* note 32 at 25.

⁹⁷ The Labour Appeal Court found that "a certified award should not only be assumed to be an order of the Labour Court but it must also be assumed that a writ has been issued in respect of that order". See *CCMA v. MBS Transport CC and Others, CCMA v. Bheka Management Services (Pty) Ltd and Others* (J 1807/2015, J1706/2015, JA94/2015) [2016] ZALAC 34 (28 June 2016) at para. 39.

Importance of the CCMA: Rule of Law in the Home Workplace

Interviews suggested that there is significant support in South Africa for the CCMA, across a broad range of constituents. Both domestic workers' union representatives and the employer consultant offered praise. For example, one of the two interviewed trade union representative affirmed the following:

The CCMA is one of the best labour protection laws that could be – have been in South Africa for workers. Why I'm saying that, the moment you send an employer (a letter), tomorrow you will get an answer. Can we talk?⁹⁸

The employers' consultant added that “[b]efore the CCMA existed there was a different system that I don't think was as organised and well run as the CCMA.”⁹⁹

Domestic workers are identified by the CCMA as a “vulnerable” sector, prioritized regionally by the CCMA in Cape Town.¹⁰⁰ All interviewees reaffirmed the seriousness of the regulation and enforcement of disputes involving domestic workers, and affirmed in one way or another the reality of exploitation that this category of workers faces. Interviewees tried to convey the significance of the most basic starting point, in a tangible, embodied manner; that is, they sought to clarify that the domestic work relationship is an employment relationship, even if the person is casual.¹⁰¹

Paul Benjamin affirms that although workers make extensive use of the CCMA, the cases tend to be mostly “downstream” in that they concern dismissals, or suspensions.¹⁰² The University of Western Cape's Social Law Project has come to similar results for the period from April 2014 – June 2015, reporting that 89% of referrals in that period alleged unfair dismissal with the remainder relating to discrimination, unilateral changes to the terms and conditions of employment, and unfair labour practices as defined by the Labour Relations Act.¹⁰³ Interviewees all concurred, noting the bifurcated enforcement role shared with the Ministry of Labour. Examples of other types of decisions were therefore less frequently referenced than unjust dismissal cases.

None the less, one CCMA commissioner related a case of discrimination/ victimization, which was not filed as a constructive dismissal case even though the domestic worker subsequently left her job. The Commissioner drew on the potential jurisdictional and procedural anomalies, as a lever to arrive at a settlement. Through that example, the Commissioner also related the complexity of cases relating to domestic work, and the complexity of cases relating to sexual harassment:

⁹⁸ Interview with domestic workers' union representative 3B, March 2014.

⁹⁹ Interview with employer consultant, March 2014.

¹⁰⁰ Interview with CCMA Commissioner 2A, March 2014.

¹⁰¹ Interview with CCMA Commissioner 2A, March 2014.

¹⁰² See Paul Benjamin, “*Table 1: Principal categories of disputes referred*” in Benjamin, *supra* note 32 at 13. After analyzing CCMA data covering a 10 year period (2002-2012), Benjamin finds that roughly 80 per cent of CCMA referrals each year have been dismissal cases.

¹⁰³ Social Law Project, *supra* note 82 at 15.

sexual harassment cases on their own are hard to deal with. In a domestic situation for one I dealt with was particularly hard, because both the husband and wife were cited as the employer. The husband was the person being - alleged to have sexually harassed the domestic worker and the wife wouldn't have any of it ... my husband would never do that kind of thing.

...[The domestic worker] very specifically kept notes of it in a diary...

I felt like I was being a marriage counsellor. Because then in the caucus til I deal with the emotions happening between the wife realising oh my goodness there's a possibility that he's doing that. ... you're then also dealing with that kind of issue....

That case apparently settled, and as the Commissioner stated, quickly. Not surprisingly, the employers both wanted to settle, with some urgency, and to include within the settlement that it constitutes a full and final settlement of all the issues arising out of the complaint, thereby foreclosing any subsequent constructive dismissal claim. The Commissioner considered, however, that it was her responsibility to explain separately to the domestic worker that she could bring a constructive dismissal claim, but would need to refer the case again, preventing a conclusion of the conciliation currently in progress:

look, she would have referred the matter for constructed dismissal, waited two to three weeks... They all had to come again, sit exactly opposite each other and the same thing, talk about the same thing, talk and then I would have just went through the one.

The domestic worker accepted a settlement of only 6 months salary and benefits but with a written reference. The Commissioner added that the reference letter would not have been ordered in an arbitral award. The Commissioner further opined that even if the claimant might have gained a larger award had the matter continued on to be litigated, the matter could have taken over 18 months to be resolved.

This related case and the range of participant interviews all confirmed how the CCMA provides mass access to justice by reducing financial constraints,¹⁰⁴ simplifying otherwise complicated procedures,¹⁰⁵ and significantly alleviating time and delay factors.¹⁰⁶ But what comes across further,

¹⁰⁴ CCMA procedures are free and the parties do not incur direct cost to the parties; representation has typically not automatically been allowed, except in specific instances as established by the CCMA Rules and the LRA. However, a case was recently brought by an individual applicant and three organizations, namely the Casual Workers Advice Office, the historic anti-apartheid and contemporary human rights organization, Black Sash, and the Maokeng Advice and Resource Centre. The Johannesburg Labour Court rendered a decision, dated 20 September 2016, interpreting CCMA Rule 25 (representation before the Commission) as read with Rule 35 (condonation for failure to comply with the rules and form), finding that a commissioner has the discretion to authorize any party to CCMA proceedings to be represented by any other person, on good cause shown. Case No. J 645/16.

¹⁰⁵ The CCMA has simple referral forms and the procedures are simple, with no formal legal pleading. Proceedings are led by a commissioner whose duty entail ensuring that each parties are aware of their duties and obligations, and are provided the relevant information on the CCMA functioning and procedures.

¹⁰⁶ Procedures are speedy and duration from referral to the resolution of the conflict is often reasonable, when compared to matter before regular courts.

is the manner in which the CCMA engages with and speaks to the domestic work relationship, in all of its specificity, to reshape it.

Consider the following comment from one of the commissioners, distinguishing the expectation that parties, in particular employers, might have about the process as one of seeking compliance with technical violations under Sectoral Determination No. 7, from the commissioners' focus on understanding the domestic work relationship, as an employment relationship, and how it was terminated:

With domestic workers it's definitely unfair dismissals... [T]he relationship at that point [doesn't allow] further room for a discussion, or a meeting, or a conversation about you hurt my feelings because - a lot of the time it's about you hurt my feelings, how could you have done that? But you almost need a third party that you feel can assist you and a lot of the times the employer unfortunately feels that the CCMA's calling on behalf of the applicant to sort this situation out, because of compliance levels being so low. So they think we want to bring them in to rap them over knuckles for not complying with the sector determination, but it's more about looking at the nature of the relationship and how it was terminated.

... We probably will say something about that, but it's more about, okay, so what happened? Why was the relationship terminated? On what base - what procedure took place, what was the reason? You kind of get into that conversation with - in conciliation on a very basic level, a very, very basic level. I must say that a lot of the times the process allows you to actually just exclude yourself from it sometimes.¹⁰⁷

The attentiveness of the approach to understanding why the relationship was terminated speaks to the specificity of domestic work. Commissioners repeated that it is work undertaken in a household, involving a relational dimension that cannot be overlooked in the decision-making process. The CCMA structure and the Commissioners' own positionality captured an active process of mediation of the relationship to resolve the dispute in relation to the state labour law framework. This entails challenging inequitable assumptions, including the law of the home workplace that may assume the invisibility of the domestic workers' needs and perspective. And in their very actions, in the fact of holding a hearing itself, and inquiring into the reasons for termination, the CCMA also recognized the incredible importance of affirming the requirement that dismissal cannot be wrongful. Indeed, it affirms the importance substantively, and of appropriate procedures at termination of employment. The process and substance of adjusting the law of the home workplace – the domestic work relationship – to a more accessible and inclusive labour law framework and process – is part of what it means to affirm that domestic work is at once work like any other, and work like no other. In other words, it is through the attentive mediation of the employment relationship offered by the CCMA, that South African regulation of the work relationship accepts the importance not simply of choosing one or the other side of the binary, but inhabiting its necessary intersections.

¹⁰⁷ Interview, CCMA Commissioner 2A, March 2014.

Consider the following example, related by one commissioner, on the conduct of a mediation that might well have continued on to arbitration by a husband and wife team who had both worked as domestic workers in an employer's household, albeit in an agricultural context,¹⁰⁸ for many years:

it was a situation where they were both dismissed, the husband and wife. ... it was the weekend off, everyone had a bit too much to drink, there was a fight and it spilled over into the employer's premises and ... some things damaged. Anyway they were both eventually just dismissed for it, because it was quite serious. The police were involved...

... The farmer was quite sick about it, that yes they do parties on the weekends and it's their time and they can do what they want to, but they still ... live on the property.

The notions of working time, living space, and what actually should constitute serious misconduct warranting dismissal in the domestic work relationships were intertwined in this case that related to activity outside of the work, but on the work premises – which happened to be the employees' living space. Those issues were ultimately not tackled, at least directly, in the mediation. The Commissioner recognized how many other issues surrounded the understanding of what it meant to be summoned to appear before the CCMA, on the basis of the dismissed workers' complaint:

Then there was this all to and fro-ing about but you know I've been so good for your family and this was just the first time it happened. We are sorry, because we have no issues and we've sorted it out and it won't happen again. We're really sorry, but we appreciate our work and you've been good to us and we've been good to you. If you want me to work til 10 o'clock I'll work it, that sort of thing. Then the farmer being upset, because - but now you've already brought me to the CCMA, I'm already going to have to pay, because people think the CCMA just wants us to employ us, wants you to pay money to the workers, even if they've done something wrong.

You've brought me here and you've already put in complaints. I'm already - they think this is like a black listing ... Yes, we must just go through with this thing now and see how I must pay you, because I don't want you back. We've been so good to you and we've given you the fridge, the TV and then that starts coming out, send your children to school and how can you bring me here? So they're upset because you dismissed us, because we had a bit of an issue and we're really sorry, we know it was wrong. Then the employer is upset, because you brought me to the CCMA, what were you thinking?

The Commissioner of course recognized the likely violations of the relevant Sectoral Determination 13, including on working time. They are not trivial, although they would chiefly be perceived as enforcement issues for the Ministry of Labour. But crucially, the Commissioner explained the portrait of the broader relationship – including employer maternalism or paternalism¹⁰⁹ – that surrounds this specific relationship as part of a structure of relationships in

¹⁰⁸ Domestic workers employed in the agricultural sector are in fact excluded from the scope of Sectoral Determination 7, but are covered by Sectoral Determination 13: Farm Worker Sector. Section 1(3(a) of Sectoral Determination 13 extends its scope of application to all workers on a farm, including domestic workers employed in a home on a farm.

¹⁰⁹ Indeed, several interviewees mentioned the prevalence of a maternalism/paternalism that surfaced as employers' talked about the domestic work relationship. One informant stated the following:

domestic work in South Africa, and beyond.¹¹⁰ What is distinct in the observation of this relationship in this context, is the interposition of a dispute resolution mechanism whose very existence and availability clarifies that domestic work is a recognized employment relationship, subject to the “rule of law” in the workplace..

The Commissioner decided to let the parties speak, left them a bit of time, and made some tea.

On the Commissioner’s return, the parties were separated. The Commissioner proceeded to foreground a labour law notion that has been central to introducing the rule of law in the workplace, progressive discipline. Progressive discipline became the basis for a voluntary settlement that led to the workers’ reinstatement:

At the end of the 10 minutes, after I had some tea...

You separate the parties, make sure that the employees understand that it's not about those hurt feelings and everything you've done before. That if we're going to be arbitrating, so your reality is - that is what we need to answer; these are the tests we need to apply. Not because I don't like you and I prefer them, but because that's what the law says, that's what laws say. Then having a minute with the employer about the fact that whether they [the employees] brought you here or not, it's actually to assist both parties. So what's happened? What is effect - you can - do you see yourself working with them again? Can they come back to work, is there anything else?

Progressive discipline, has it been considered, because of arbitration that's going to be a problem if you know, for example, that there's a drinking problem maybe, then it becomes - by those sorts of things, was it taken into account? Was there a disciplinary hearing, was there - you kind of go through this whole reality testing, which you obviously see in your observations as well. Eventually the employer is thinking, okay, so there's no black list. They just brought me here, I can they maybe still get away with possibly a warning, because it is quite serious, especially since the police, the hospitals and all that was involved. They were then reinstated on a final written warning, valid for six months.

It is far from insignificant that the Commissioner adds the following:

Nine out 10 times in domestic cases, but I gave you the keep, I gave you the fridge and all the children’s clothing and I paid for your daughter’s school fees... (CCMA Commissioner 2A, 3 March 2014).

¹¹⁰ See .e.g Pierrette Hondagneu-Sotelo, *Doméstica* (2001) (discussing the notions of maternalism and paternalism in the domestic work relationship in the United States.

They [the employees] would have - I think they would've taken a final warning valid 25 years if you they had to.¹¹¹

The statement speaks volumes about life options in a structural economic context in which high unemployment and stark income inequality prevail.¹¹² The statement offers one window into how easy it could be for the CCMA's work ultimately to reinforce, rather than fundamentally challenge, the relational status quo.

Benjamin rightly affirms that the CCMA levels the field between employees and employers in the domestic sector, by offering workers 'enhanced and expedited access to dispute resolution'.¹¹³ The interviews underscored the extent to which the leveling extends beyond this vision of access to justice. Commissioners were alive to the unequal bargaining power of the parties in a context of high unemployment, rampant informality, poor housing, and minimal social safety nets. The settlement of course leaves many labour law issues untouched – based on the Commissioner's invariably fraught but necessary appraisal of what seems possible. But reinstatement alone was highly significant. The Commissioner focused on the domestic work relationship, and helped the parties to see it as an employment relationship.

CCMA commissioners readily admitted that their role was often misunderstood by the parties. Employers might have the impression that to be summoned to a hearing by the CCMA is to be put on a list of excluded employers. They might consider the CCMA to be an institution that pressures them to pay up, even small sums of money, even when they have done nothing wrong.¹¹⁴ According to an employer consultant, at the outset, employers considered that individual employees were more than likely to win any case. The consultant noted, however, that the perception amongst clients had changed to the point where employers currently consider that they stand a better chance of winning than they might have in the past.¹¹⁵

Paying attention to apparently shifting perceptions takes on some importance in part because of the extent to which studies of the CCMA have tended to focus on statistical analyses of the character of cases before the labour dispute resolution institution. This micro-study of regulatory innovation has been concerned to open a scholarly conversation about the extent to which the shift in perception reflects greater knowledge of the law by employers themselves, and of their ability to shift their employment practices in domestic work, to conform to the law. The size of the study is too small to make firm generalizations. It is relevant, though, that actors with different institutional roles and social location tended to note shifts in perceptions over time. For example, it matters that some employers may have been – or may have been perceived to be - initially reactive when faced with a summons to appear at the CCMA. It is important if, over time – perhaps because of the counselling

¹¹¹ Interview, CCMA Commissioner, March 2014.

¹¹² See e.g. Bob Hepple, *Labour Laws and Global Trade* (Hart, 2005) at 12 (offering a vignette on the relationship between flexibility and the exercise of the right to strike in the context of mass youth unemployment, as well as concerns to attract and retain foreign investment).

¹¹³ Benjamin, *supra* note 32 at 45.

¹¹⁴ Interview with CCMA Commissioner 2A, March 2014.

¹¹⁵ Interview with Employer Consultant, March 2014.

services they have received from actors with experience at the CCMA – they learn what they may need to do to reduce the likelihood of future disputes, and to better manage disputes should they occur. Others, of course, do not. In part, this raises the serious question of whether the CCMA’s resolutions are themselves sufficiently dissuasive, a matter on which there was some ambivalence amongst the respondents but to which the employer consultant affirmed that when 12 – 24 months salary is at issue, the amounts can in fact be quite dissuasive.¹¹⁶

However, dissuasion may not be sufficient, and here the broader structural inequality may remain a factor in whether the CCMA is even, actually invoked:

Well, you know, the type of person is not going to be told what to do by the individual employee or the system in this country because if an employer feels aggrieved and acts hastily and acts unlawfully on the spur of the moment the employer does whatever they want to and accepts repercussions and the repercussions are not necessarily always result in a CCMA dispute. It could be that the person just leaves the employ and does nothing about it because, in fact, one thing is if the employer is not educated in their rights the employee is sometimes less educated.¹¹⁷

The kind of thorough, often qualitative work on implementation by employers of workplace equity norms that characterizes some of the recent scholarship on the implementation of employment standards¹¹⁸ and equality principles¹¹⁹ in the workplace, is needed here. This microstudy shines a spotlight of its potential and importance.

CCMA Commissioners as Legal Actors in the Mediation of Disputes in the Home Workplace

CCMA commissioners underscored the professional ethics attached to their role, as both conciliators, and then arbitrators – potentially in the same case - in individual workplace disputes. They recalled the real time pressure associated with a tight case management process that places a premium on the institution’s ability to resolve matters expeditiously, in order to hear over 100,000 cases per year.¹²⁰ In this sense, the CCMA may be a victim of its own success, which quickly translated into a growing number of referrals that put its case management abilities under strain.¹²¹

¹¹⁶ Interview with Employer Consultant, March 2014.

¹¹⁷ Interview with Employer Consultant, March 2014.

¹¹⁸ See notably Lizzie Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford, 2015).

¹¹⁹ See e.g. Iyiola Solanke, *Black Women Workers and Discrimination: Exit, Voice, and Loyalty ... or ‘Shifting?’* in Cathryn Costello & Mark Freedland, eds., *Migrants at Work: Immigration & Vulnerability in Labour Law* (Oxford, 2014) at 303 (focusing through doctrinal analysis on the importance of social location in framing workplace alienation and options).

¹²⁰ See Benjamin, *supra* note 32 at 15.

¹²¹ See Paul Benjamin & Carola Gruen, *The Regulatory Efficiency of the CCMA: A Statistical Analysis of the CCMA’s CMS Database*, DPRU Working Paper 06/110 (Cape Town: University of Cape Town/Development Policy Research Unit, 2006).

In response, the CCMA has progressively streamlined its procedures and processes.¹²² As informants described it, parties are met for conciliation within only a few weeks of filing a case; one hour hearings are close to the average.¹²³ As one Commissioner attests, sometimes there is particular time pressure:

So this conciliation took about an hour-and-a-half, con-arb of out of town I normally set two hours apart. So it was quite pressured, but I wouldn't have let it go on – if you're out of town you have 30 minutes to assess whether it's going to settle or not.¹²⁴

CCMA commissioners none the less underscored the real flexibility – indeed latitude – afforded by their work to consider a range of factors, particularly at conciliation, to encourage a settlement. To the principal investigator, this desire to foster settlement seemed strong, framed in a desire to “understand the relationship” rather than to caricature it. They seemed highly aware that relationships could not necessarily be repaired, at least not by them. Nor did they seem to have a bifurcated sense of the space between relationships, and justice. Indeed, if an overarching concern can be named, it seemed to be to enable the parties to depart with a sense that some degree of justice had been rendered.

The justice of the situation is in part a function of the process, of the setting, of its relative formality and informality. In a typical conciliation hearing, the employer and employee sit across a table from each other in a standard size conference room. In addition to the commissioner, likely to sit at the head of the table, there is often a CCMA appointed interpreter, who speaks the domestic worker's language. There is also meaningful societal diversity amongst the CCMA commissioners themselves. An important dimension of justice in its own right, racial inclusion may also – as one informant mentioned – lead to racism and generalized disrespect toward the commissioner.¹²⁵ The reality of persisting racial discrimination is not denied or ignored by the CCMA, and the principal investigator

¹²² See Benjamin, *supra* note 32 at 15ff (including telephone ‘preconciliation’ techniques).

¹²³ An early assessment of the first three years of the CCMA's existence provides an indication of the impact of the tight timeframes on conciliation and arbitration:

In order to deal with the pressure of case volume, commissioners have often been forced to cut corners in order to get through their case load. CCMA figures indicate that the average duration of a conciliation is two hours for individual disputes, two to four hours for mass dismissals, one to three days for wage disputes and three hours for other disputes. The average duration of an arbitration is half a day for individual dismissals, one day for mass dismissals and one day for other disputes. Therefore, commissioners are required to handle up to three conciliations per day and two or three arbitrations per day as well as to write reasoned awards for each arbitration within 14 days.”

John Brand, "CCMA: Achievements and Challenges - Lessons from the First Three Years" (2000) 21:1 *Industrial Law Journal* 77 at 83-84. See also Jan Theron & Shane Godfrey, CCMA and Small Business - The Results of a Pilot Study (2000) 21:1 *Industrial Law Journal* 53 at 67 (“It was found that the average length of time spent in arbitration was 5 hours and 24 minutes. The time is much shorter for firms with fewer than 50 employees (two hours and 43 minutes), compared with six hours and 38 minutes for firms with 50 or more employees.”)

¹²⁴ Interview with CCMA Commissioner 2A, March 2014.

¹²⁵ Interview with CCMA Commissioner 7D, March 2014.

was informed that commissioners are taught to anticipate this kind of reaction in their training, and receive training on how to engender respect while learning to challenge their own biases.¹²⁶ Commissioners underscored the need to command and treat parties with professionalism and respect, remaining self-aware of the importance and integrity of their role in the administration of justice.

The issue of relative power and the commissioner's role in mediating it could hardly be overstated. In the small number of randomly selected hearings that the principal investigator had the opportunity to observe, the arm's length, across the table as equals set up had a slight unfamiliarity, even awkwardness to it. In one case, the domestic worker barely made eye contact with the employer, but she did with the commissioner. The commissioners were acutely aware of the disparities between the parties, and as a result, the extent of the power, and scope of the responsibility that remained in their hands. Indeed, one commissioner baldly stated:

“I hate it when they say but Commissioner, what would you do?”¹²⁷

It is therefore not surprising that domestic workers' representatives underscored the importance of being present alongside the domestic worker, to explain the situation and offer guidance.¹²⁸ Although the practice apparently remains relatively infrequent, this is poised to change in light of the recent Johannesburg Labour Court decision that commissioners have the “discretion to authorise any party to CCMA proceedings to be represented by any other person, on good cause shown”.¹²⁹ Informants spoke both about the deregistration of an organization of domestic employers run by a consultant, and the deregistration of a domestic workers trade union. The viability of existing representational structures in the domestic work context in South Africa has been the subject of serious scholarly inquiry.¹³⁰ And of course, there is not necessarily a justification for parallel representation of the parties, which may accompany lengthier processes with greater opportunities for delays.

However, the challenge to access to justice in the absence of safeguards to ensure that processes are effectively understood was underscored by informants. One interviewed domestic workers' representative mentioned that based on her experiences accompanying domestic workers, she decided to contact the CCMA independently, and explain that the *ex parte* meetings were being misunderstood by domestic workers, fostering a climate of distrust.¹³¹ Interviewed commissioners indicated that they make a real effort to explain to domestic workers the reason for the *ex parte* meetings, pre-arbitration, and are especially careful to explain what the legal tests will be if the

¹²⁶ Interview with CCMA Commissioner 7D, March 2014.

¹²⁷ Interview with CCMA Commissioner 2A, March 2014.

¹²⁸ Interview with domestic workers' representative 3B, and domestic workers' representative 2C, March 2014. See also Affidavits of Labour Court challenge to CCMA Rule 25 (on file with the authors).

¹²⁹ *Supra* note 104, para. 2. See also Shireen Ally, “Domestic Worker Unionisation in Post-Apartheid South Africa: Demobilisation and Depoliticisation by the Democratic State” (2008)35:1 *Politikon* 1.

¹³⁰ See du Toit & Galani, *supra* note 47.

¹³¹ Interview with domestic workers' representative 3B, March 2014.

matter goes to arbitration. If conciliation is flexible, arbitration is framed as the place where the commissioners act based on “that’s what the law says”...¹³²

Conclusion: The Domestic Work Relationship in the Broader Context of Weak Social Redistribution

In the post-apartheid context, the CCMA has been seen to serve as an essential ‘social safety valve’¹³³ both by ‘limiting social tensions and in creating and preserving a deliberative labour policy.’¹³⁴ This OECD’s framing of the CCMA’s role hints at the broader context within which the CCMA’s decision making is rooted. Does this thesis hold true specifically for domestic workers, who in the post-Marikana Massacre context are not the workers whose “industrial” action commentators tend to think about? Does it extend at all to workers who – although they have been extremely militant in challenging apartheid and in claiming better futures for themselves and their children, including in the international campaign for decent work for domestic workers – have faced significant hurdles organizing themselves into representative trade unions to defend their rights and seek more transformative change in their workplace relations within South Africa?

This working paper began with an acknowledgement of the persistence of social stratification. Nothing about the study challenges that starting point. The microstudy has instead been able to point to firm indicia that the CCMA structure, procedures and accessibility have helped to reinforce, over time, a recognition that domestic work is a form of employment to which labour law principles apply. The institution, its structure, its attempt at inclusion, play a crucial mediating role, underscoring that there is a rule of law applicable to the household as a workplace. That mediation is part of the aspiration of decent work for domestic workers. While critically important, and rare worldwide, it remains only part of the promise of labour law’s “citizenship at work”.

This closer reflection on labour law’s broader transformative goals was inspired in part by the informant interviews. Interviewees recalled that for a domestic worker, even the cost of taxi fare might be relevant, influencing whether a claim might be brought before the CCMA, and more likely, whether a small but otherwise unsatisfactory settlement might be accepted.¹³⁵ Commissioners, alive to this dynamic, might interact with real subtlety, but must react. For example, one informant suggested that rather than saying the sum offered is too low, a commissioner might stress that there

¹³² Interview with CCMA Commissioner 2A, March 2014.

¹³³ OECD, *OECD Territorial Reviews: The Gauteng City-Region, South Africa* (Paris: OECD Publishing, 2011) at 175 [OECD] (adding that the CCMA “now performs functions that go well beyond the terms of reference one would expect from its name”). Benjamin points to the significant decrease, since 1996, in the rate and extent of industrial actions over individual dismissal disputes. See Benjamin, *supra* note 26 at 46.

¹³⁴ OECD, *ibid* at 175.

¹³⁵ CCMA Commissioner 2A, March 2014

is another level of dispute resolution.¹³⁶ Ultimately, though, they – like the employer - know that a destitute unemployed domestic worker, with children to feed back home in precarious housing, will likely accept a small settlement.¹³⁷

Regulatory responses that extend social protection to domestic work are of course urgently needed. The result of an absence of a statutory obligation for workers to join and contribute to a retirement fund, the absence of a positive duty for employers to establish or contribute to retirement funds for their employees, and low wages and incentive structures for occupational fund members to preserve their savings, is that domestic workers are likely to lack adequate savings on retirement.¹³⁸

Historically in labour law the scope for more transformative distributive changes for workers has been understood to come through workers' collective action. There is sustained inquiry into whether the CCMA model holds the potential to operationalize collective relations for domestic workers, or whether other models should be considered. Proposals of this order are beyond the scope of this microstudy. It is instructive, though, that interviewees, and in particular domestic workers' representatives, seemed persuaded that

the sectoral determination is not enough. We need to make money to make our people's lives better, because if you see all these bargaining councils a lot of people are coming somewhere, they are getting very good training and they are going up in the labour departments because of having a house where they can go...¹³⁹

In a settler colonial context, redistribution unavoidably takes on a broader frame.¹⁴⁰ Post-apartheid labour relations are built on legacies of colonial dispossession. Domestic work literally embodies those legacies. That is why the constitutional decision in *Standard Bank of SA Ltd*, at least symbolically, is so important. Arguably, that is also why change to the reliance on paid domestic work performed almost exclusively by women of African descent, needs to remain part of the construction of meaningful alternative futures, 20 years after the advent of the post-apartheid state, remains so urgent. As one interviewee said,

¹³⁶ Interview with CCMA Commissioner 7D, March 2014.

¹³⁷ Blackett, *supra* note 30 at 92-93.

¹³⁸ It is common for corporations to register their employees with retirement and or provident funds; voluntarily, as the outcome of a negotiated agreement with organised labour, or due to labour market incentives. It is however less usual for employers to register their domestic workers with retirement and or provident funds; certainly because of a lack of incentive or compelling factors, such as, labour market pressure, collective action or regulation. See Mpedi LG, "The evolving relationship between labour law and social security" (2012) *Acta Juridica* 270 at 276-277. See also OECD/International Social Security Association/IOPS *Complementary and Private Pensions throughout the World 2008* (Paris; OECD Publishing, 2008) at 55-57.

¹³⁹ Interview with domestic workers' representative 3B, March 2014.

¹⁴⁰ See in particular Nancy Fraser, "A Triple Movement?" (2013) 81 *New Left Review* 119.

domestic workers have brilliant minds ... there will always be domestic work... [but with alternative training,] “when she goes back to her own environment, she’ll be able to do things *for herself*” (emphasis added).¹⁴¹

This microstudy has tried to shine a spotlight on some of these qualitative concerns. With attention to the specificity of South Africa, it is also concerned to ensure that South African experience is not exceptionalized, but rather continues to be an important part of the international and comparative discussions on regulating decent work for domestic workers. The microstudy contains anything but a claim to comprehensiveness, but rather a pleas for ongoing attention to the qualitative dimensions of regulatory innovation. The CCMA is an institution through which it is possible to catch a glimpse of how regulatory change is lived. It offers a site through which a range of actors converge, to assess whether state law may be mediated to help to shift the governance of domestic work, including the law of the home workplace, toward social justice. In this regard, the study has sought to inflect public policy discourse on decent work for domestic workers with a sensibility for the relational dimensions of regulatory change, nationally and transnationally.

¹⁴¹ Interview with domestic workers’ representative 2C, March 2014.