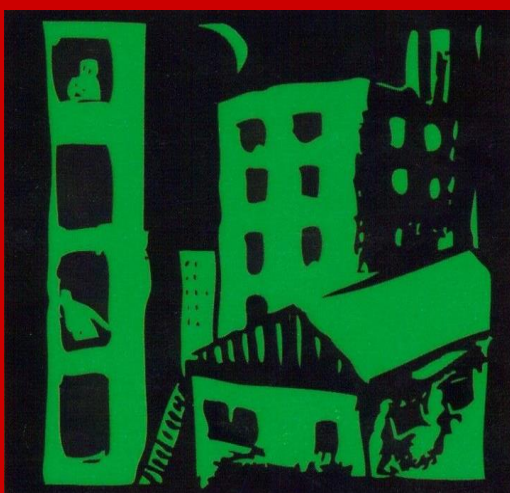


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**An analysis of
informal workers
and the coverage of
South Africa's Covid-
19 Temporary
Employee/Employer
Relief Scheme
(TERS)***

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ABSTRACT

The Covid-19 pandemic required states worldwide to take action to contain it and, as part of this effort, adopt measures to mitigate its socio-economic impacts. In South Africa, these measures include the enactment of lockdown regulations in terms of the Disaster Management Act 53 of 2005. This article focuses on one of the measures, namely the Covid-19 Temporary Employee/Employer Relief Scheme (TERS), a system created in terms of the Unemployment Insurance

* Parts of this article emanate from the author's LLM dissertation, "Evaluating the exclusion of certain categories of workers from the coverage of the Unemployment Insurance Act 63 of 2001 and the consequences thereof" (LLM thesis, University of Fort Hare, 2020).

Act 63 of 2001. TERS aimed to provide support to employers who were in distress at the height of the pandemic and unable to pay their employees. TERS falls under the scope of social security law because it is a measure that finds expression under the unemployment insurance system, which is an element of social insurance. This article argues, however, that temporary schemes such as TERS provide no solution to the long-standing problems of the unemployment insurance system and perpetuate its exclusionary practice of not covering informal workers. This is evident in the definitions of an employee and contributor in terms of the Unemployment Insurance Act (UIA). The two definitions lean towards offering coverage to workers in formal employment but not to informal workers. This leaves such workers destitute and vulnerable, as they have no protection; for instance, they became on furlough owing to the effects of Covid-19. This article proposes that the UIA's definition of employees be amended to include informal workers and thereby afford them unemployment protection as well.

Keywords: informal workers; Covid-19; Unemployment Insurance Act 63 of 2001; Unemployment Insurance Contributions Act 4 of 2002; Unemployment Insurance Fund; Temporary Employee/Employer Relief Scheme

1 INTRODUCTION

On 5 March 2020, South Africa recorded its first Covid-19 case. In response, the government had to intervene and put measures in place to prevent the spread of the pandemic.¹ To this end, it declared a national lockdown in terms of the Disaster Management Act 53 of 2005 and its regulations, which restricted movement and public gatherings.² Notably, the regulations prohibited the opening of all businesses except those deemed to be providing “essential” goods and services.³ This had dire financial consequences, and so, to aid employers in distress, the Department of Employment and Labour issued directives in terms of section 10(8) of the Lockdown Regulations.⁴ The directives introduced the Covid-19 Temporary Employee/Employer Relief Scheme (TERS), a scheme aimed at providing financial assistance for employers who were in distress and unable to pay the salaries of their employees.⁵ This temporary relief scheme operated under the unemployment insurance system, and hence makes reference to the provisions of the Unemployment Insurance Act 63 of 2001 (UIA).

¹ Stiegler N & Bouchard JP “South Africa: Challenges and successes of the COVID-19 lockdown” (2020) 178(7) *Annales Médico-Psychologiques Revue Psychiatrique* 695.

² Disaster Management Act 53 of 2005. Regulations made in terms of section 27(2) by the Minister of Cooperative Governance and Traditional Affairs of 29 April 2020 (GN 480 in GG No 43258).

³ Regulation 11A of the Disaster Management Act 53 of 2005: Amendment of the Regulations issued in terms of section 27(2) of 27 June 2021 (GN 564 in GG No 11299).

⁴ Consolidated COVID-19 Temporary Employee/Employer Relief Scheme (C19 TERS), 2020: Directive by the Minister of Employment and Labour in terms of Regulation 10(8) issued by the Minister of Cooperative Governance and Traditional Affairs in terms of section 27(2) of the Disaster Management Act (Act No. 57 of 2002).

⁵ Section 2(1)(1)(a) of the Directives of COVID-19 Temporary Employee/Employer Relief Scheme.

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Unemployment insurance resorts under social insurance, which is an element of social security.⁶ The South African social security system comprises various elements, such as private savings, social assistance, social relief, and social insurance.⁷ The focus of this article is on social insurance, which relates to contributory and risk-based schemes: these give rise to fixed benefit payments aimed at income maintenance based on the insurance principle.⁸ Unemployment insurance in the South African context may be described simply as payment that employees receive from the Unemployment Insurance Fund (UIF) for any of the contingencies covered by the UIA.⁹

The South African unemployment insurance system provides for different types of benefits, including adoption benefits, illness benefits, maternity benefits, benefits relating to the death of a breadwinner, parental benefits, and unemployment benefits.¹⁰ The unemployment insurance system is regulated in terms of the UIA and Unemployment Insurance Contributions Act 4 of 2002 (UICA).¹¹ The UIA makes provision for the establishment of the UIF, which administers and manages contributions made by both the employee and employer for purposes of pay-out in times when the employee is temporarily unemployed as a result of any of the contingencies mentioned above.¹² For a person to be able to claim unemployment benefits, he or she must be regarded as an employee as per the definition of an employee.

To this effect, the UIA defines an employee as “any natural person who obtains remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person”, but the definition excludes an independent contractor.¹³ A “contributor” is another concept used by the UIA and UICA. For one to be a contributor, one must qualify as an employee. The UIA defines a contributor as a person who is or was employed and to whom section 3 of the UIA applies, or a person who can convince the Unemployment Insurance Commissioner that he or she has made a contribution.¹⁴

⁶ Getz WS, Davis DM & Gordon G *Gordon and Getz on the South African law of insurance* 3rd ed Cape Town: Juta (1983) at 78.

⁷ Ncamane N “The administration of social security in the midst of COVID-19: A need for a specialised and independent social security adjudication system in South Africa”(2022) 43(4) *Obiter* 812 at 815.

⁸ MP Olivier & ER Kualula “Legal framework and scope of coverage” in Oliver MP, Smit N, Kalula ER & Mhone GCZ (eds) *Introduction to social security* (2004) at 36.

⁹ Preamble of the Unemployment Insurance Act 63 of 2001 (UIA).

¹⁰ Preamble of the Unemployment Insurance Act 63 of 2001 (UIA).

¹¹ The Unemployment Insurance Contributions Act 4 of 2002 (UICA) provides for the imposition and collection of contributions for the purposes of the Unemployment Insurance Fund.

¹² Preamble of the Unemployment Insurance Act 63 of 2001 (UIA).

¹³ Section 1 of the UIA.

¹⁴ Section 1 of the UIA.

The scope of coverage of the UIA has long been an issue in the unemployment insurance system, as the UIA does not cover informal workers, who do not always fall within the ambit of the concepts of an employee and contributor.¹⁵ This stems from the fact that the concept of the contributor is closely linked to that of the employee, which poses a challenge for informal workers because these two concepts are used to refer to “standard formal sector workers”.¹⁶ This means that informal workers are excluded from making contributions to the UIF and making any claim should they become unemployed as a result of any previously mentioned contingency.

Significantly, this also extends to the TERS system. The latter compounded the plight of informal workers by limiting its application only to persons regarded as contributors, which does not include them. As such, this article argues that informal workers are precarious and vulnerable should they become unemployed. It is on this basis that the article proposes that they should be covered in terms of the UIA and measures such as the TERS directives.

The article begins with an overview of South Africa’s unemployment insurance legal framework, with a focus on the application and scope of the UIA and UICA. Thereafter, it evaluates the TERS system, and proceeds to examine its exclusion of informal workers. The final section proposes solutions for addressing the plight of informal workers.

2 THE REGULATORY FRAMEWORK FOR UNEMPLOYMENT INSURANCE

It is apposite to commence this discussion with an outline of the legal framework for unemployment insurance in South Africa. This sets the scene for the TERS system. The Constitution, as the supreme law of the land, makes provisions for social security rights in section 27, where it states as follows:

(1) Everyone has the right to have access to – (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment.¹⁷

The right to access to social security enshrined in section 27(1)(c) is central to the discussion of this article. At the outset, what is noteworthy is that internal limitations are placed on this right by section 27(2). The Constitutional Court has, in a number of cases, determined what the phrase “reasonable legislative measures” means.¹⁸ For instance, in *Government of the Republic of South Africa v Grootboom*, the Court held that there should be a balance between the desired goal and available means. It held,

¹⁵ Section 3 of the UIA.

¹⁶ Smit N & Mpedi LG “Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?” (2010) 14 *Law, Democracy & Development* 1.

¹⁷ Section 27 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

¹⁸ Section 27(1)(b) of the Constitution.

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furthermore, that calculations should be done to determine the availability of means so as to achieve the desired goal expeditiously. However, the Court emphasised that the availability of means plays a crucial role in determining what is reasonable.¹⁹

At this juncture, it is useful to offer some perspective on the concept of social security. Although there is no universal definition of it,²⁰ social security may be said to consist of measures aimed at offering income security to families and individuals who have become destitute due to eventualities such as sickness, unemployment, old age, and the death of a breadwinner.²¹ The International Labour Organization (ILO) provides a general definition of social security as “the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner”.²² In South Africa, the Department of Welfare’s White Paper for Social Welfare defines social security as follows:

Social security covers a wide variety of public and private measures that provide cash or in-kind benefits or both, first, in the event of an individual’s earning power permanently ceasing, being interrupted, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children. The domains of social security are: poverty prevention, poverty alleviation, social compensation and income distribution.²³

Social protection focuses largely on basic social support that is not connected to the employment relationship, and is based on the notion that society is responsible for the social protection of its members.²⁴ This article will use the social security concept as it is defined and regulated in the context of South Africa. To this effect, social security consists of two primary elements, namely social assistance and social insurance.²⁵ Social

¹⁹ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at para 46.

²⁰ Mosito KE “A panoramic view of the social security and social protection provisioning in Lesotho” (2014) 17(4) *Potchefstroom Electronic Law Journal* 1572.

²¹ Olivier M & Mpedi L *Understanding social security law* Cape Town: Juta (2015) 1.

²² International Labour Organisation “International labour standards on social security” available at <https://www.ilo.org/topics/social-protection> (accessed 19 October 2022).

²³ Department of Welfare *White Paper for Social Welfare* (1997) available at https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf (accessed 9 December 2022).

²⁴ Moore V “The concept of social security” in Olivier, MP et al. (eds) *Introduction to social security* Durban: LexisNexis Butterworths (2004) at 15.

²⁵ See Strydom E “Introduction to social security law” in Strydom E et al. (eds) *Essential social security law* 2nd ed Cape Town: Juta (2006) 9–16. He defines social assistance as non-contributory and income-tested benefits provided by the state to groups such as persons with disabilities, older persons, and unsupported parents and children who are unable to provide for their own minimum needs. In South Africa, social assistance has taken the form of social grants. Government may also contribute to social

assistance is entirely dependent on state funds, meaning that social assistance beneficiaries do not need to contribute in order for them to be paid their social assistance benefits.²⁶ By contrast, social insurance is described as the “joint contributions by employers and employees to a pension or provident fund, or any other social insurance fund covering other unexpected events”.²⁷ The regulation of social insurance is made possible by, amongst others, the UIA and the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA). The focus of this discussion is on unemployment insurance as regulated by the UIA.

One of the purposes of the UIA is to establish the UIF, to which the employer and employee contribute so that employees or their dependants can make claims for benefits for which they qualify in order to mitigate the social and economic effects of unemployment.²⁸ The UIA applies to all employers and employees except employees who work less than 24 hours a month,²⁹ members of Parliament, cabinet ministers, deputy ministers, members of provincial executive councils, members of provincial legislatures, and municipal councillors.³⁰ Bhorat and Tseng describe the UIF as a crucial role-player in the South African “welfare” system for those in formal employment.³¹ The fund consists of contributions, made both by the employer and by the employee, which are collected by the Unemployment Insurance Commissioner or Commissioner of the South African Revenue Service in terms of section 15 of the UICA.³²

3 AN EVALUATION OF THE TERS SYSTEM

With an overview having been presented of South Africa’s unemployment insurance system, this section outlines the TERS system so as to give context to the arguments that will be made later. In response to the restrictions imposed in the context of the Covid-19 pandemic, the President announced that R500 billion was reserved for the protection and creation of jobs. R40 billion was announced as an amount set aside to assist employers who were not able to pay the salaries of their workers.³³ Accordingly, TERS

insurance covering accidents at work. Strydom further defines social relief as a short-term measure to tide people over a particular individual or community crisis. This is also non-contributory and needs-tested. Lastly, he explains that in the case of private savings, people voluntarily save for contingencies such as disability, retirement, and chronic diseases.

²⁶ Strydom EML *Essential social security law* 2nd ed Cape Town: Juta (2006) at 7–8.

²⁷ Department of Welfare *White Paper for Social Welfare* (1997) available at https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf (accessed 2 June 2023).

²⁸ Section 4 of the UIA.

²⁹ Section 3(1) of the UIA.

³⁰ Section 3(2) of the UIA.

³¹ Development Policy Research Unit “Working paper on the newly unemployed and the UIF take-up rate in the South African labour market 2012” at 7.

³² Section 15 of the UICA.

³³ South African Government “President Cyril Ramaphosa: Escalation of measures to combat coronavirus COVID-19 epidemic, Union Buildings, Tshwane” (23 March 2020) available at

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was created to mitigate the effects of the national lockdown on workers and businesses and enable workers to claim benefits in terms of TERS.³⁴ Its aim was to reduce the loss of income occasioned by the Covid-19 pandemic and the resultant lockdown.³⁵

Under TERS, employees who were regarded as contributors could claim a portion of their salaries. The directives do not define a contributor, but implicitly it is the same contributor referred to in the UIA. In terms of the UIA, a contributor is defined as a natural person who either is or was employed and can satisfy the Unemployment Insurance Commissioner that he or she has made contributions in terms of the UICA.³⁶ This in essence means that for one to be considered for TERS benefits, one should have contributed to the UIF.

Apart from the TERS directives seeking to minimise economic hardship, they also sought to combat the spread of the virus by ensuring there was no contact of employees when applying for their benefits.³⁷ At the height of the pandemic, the number of people who were infected increased, and fatalities continued to rise. To avoid contact and the rapid spread of the virus, the directives permitted the employer to apply for TERS benefits only if the employer closed its business for a period of three months or less, which subsequently affected its employees as well.³⁸

For the purposes of TERS payments, the TERS system was independent of the UIF system to the extent that the benefit was de-linked from the UIF's normal benefit accrual system.³⁹ Therefore, the normal rule that for every four days worked the employee accumulates a one-day credit, and that the maximum credit days payable are 365 for every four years, did not apply. Moreover, for an employer to qualify to claim TERS benefits on behalf of its employees, the employer had to be registered for UIF.⁴⁰

The latter was one of the provisions of the directives which precluded informal workers from receiving any claim from the TERS system. This is due by the fact that employees in the informal sector are either not registered, or do not qualify to be registered, for

<https://www.gov.za/news/speeches/president-cyril-ramaphosa-escalation-measures-combat-coronavirus-covid-19-pandemic-23> (accessed 15 September 2021).

³⁴ Nxesi TW "Labour on temporary employer-employee relief scheme during coronavirus COVID-19 lockdown" (27 March 2020) available at <https://www.gov.za/speeches/labour-temporary-employer-employee-relief-scheme-during-coronavirus-covid-19-27-mar-2020> (accessed 12 April 2022).

³⁵ Section 2(1)(1)(b) of the Directives of COVID-19 Temporary Employee/Employer Relief Scheme (TERS Directives).

³⁶ Clause 1(c) of the UIA.

³⁷ Clause 2.1.1(c) of the TERS Directives.

³⁸ Clause 3.1 of the TERS Directives.

³⁹ Clause 3.2 of the TERS Directives.

⁴⁰ Clause 3.7.1 of the TERS Directives.

UIF, which debars them and their employers from contributing to the UIF scheme.⁴¹ For the UIF to process an application made by an employer on behalf of its employees, the employer had to be in compliance with the TERS application procedure⁴² and the employer's closure had to be on account of Covid-19.⁴³

In addition, the directives permitted an individual employee to apply for TERS benefits if the employee had lost income or taken leave due to the Covid-19 pandemic.⁴⁴ Further to this, the directives allowed for an employee to apply by him- or herself if there were no bargaining council, if the employee's employer had not concluded a memorandum of understanding with the UIF,⁴⁵ or if the employee's employer had failed or refused to apply for TERS benefits on behalf of the employee.⁴⁶ The directives provided for illness benefits where an employee had been in quarantine for at least 14 days.⁴⁷ Where an employee was in quarantine for 14 days on account of Covid-19, a confirmation letter from both the employee and employer confirming that both the employee and employer had agreed to a precautionary self-quarantine for 14 days was required.⁴⁸ The directives also stated that if the employee had been quarantined for more than 14 days, a medical certificate by a medical practitioner was required.⁴⁹

Owing to several extensions, TERS was operational for two years.⁵⁰ According to the Minister of Employment and Labour, the UIF paid an amount of R65 billion to 5.7 million employees across the country; the UIF was commended for this, as numerous jobs were saved and many employers remained afloat during the hardships of Covid-19.⁵¹ Notwithstanding the progress made by the UIF on TERS claims, the Auditor-General's office flagged a number of challenges that hindered the objectives of the TERS system. Among these were miscalculations of benefits to employees, as well as irregular payments to people not eligible for payment. In this regard, TERS benefits were received by "people who [were] below the legal age of employment, deceased, working

⁴¹ The UICA defines an employer as a person defined in paragraph 1 of the Fourth Schedule to the Income Tax Act 58 of 1962.

⁴² Clause 3.7.2 of the TERS Directives.

⁴³ Clause 3.7.3 of the TERS Directives.

⁴⁴ Clause 3.9.1 of the Consolidated COVID-19 Temporary Employee/Employer Relief Scheme (C19 TERS), 2020.

⁴⁵ Clause 3.9.2 of the Consolidated TERS Directives.

⁴⁶ Clause 3.9.3 of the Consolidated TERS Directives.

⁴⁷ Clause 4.1 of the Consolidated TERS Directives.

⁴⁸ Clause 4.2 of the Consolidated TERS Directives.

⁴⁹ Clause 4.4 of the Consolidated TERS Directives.

⁵⁰ South African Government "Two-year anniversary of the UIF's COVID-19 TERS" available at <https://www.gov.za/blog/two-year-anniversary-uif%E2%80%99s-covid-19-TERS> (accessed 12 January 2023).

⁵¹ South African Government "Two-year anniversary of the UIF's COVID-19 TERS" available at <https://www.gov.za/blog/two-year-anniversary-uif%E2%80%99s-covid-19-TERS> (accessed 12 January 2023).

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in government, receiving social grants or students funded by the national student financial aid scheme”.⁵²

In addition to these challenges noted by the Auditor-General, another major challenge was that the TERS system provided no solution to the precarious situation of informal workers. As previously stated, this statutory exclusion was occasioned by the limited definition of who qualifies as an employee and contributor. The informal economy comprises about 4.8 million workers⁵³ and accounts for roughly 18 per cent of the country's GDP.⁵⁴ Even so, workers in the informal economy are excluded from making contributions to the UIF, and hence were not eligible to claim for TERS benefits.

During the Covid-19 era, the exclusion of workers in the informal economy from the scope and application of the TERS system left them destitute since most economic activities were barred from functioning and some businesses had to close shop due to the economic effects of the pandemic. Formally employed workers could claim and enjoy TERS benefits, unlike informal workers, who could neither claim nor enjoy these benefits.

3.1 Exclusion of informal workers by TERS

This section examines a long-standing, deep-rooted problem in South Africa's unemployment insurance system, namely the exclusion of informal workers from the scope and application of the UIA and, recently, that of the TERS system. This examination demonstrates both that the problem existed before the Covid-19 outbreak and that the pandemic exacerbated the challenges faced by this category of workers.

Over the years, the primary legislation regulating unemployment insurance has been amended to extend coverage to certain categories of workers who were previously excluded from the application of the UIA, namely domestic workers, seasonal workers, and high-income earners.⁵⁵ However, no allowance was made for informal workers: the position of these workers has remained the same – even though they are not expressly excluded, they are not covered in terms of the definition of an employee and contributor. Informal workers are highly vulnerable should they become unemployed,

⁵² Auditor General South Africa “Media Release: Auditor-general says the multi-billion rand COVID-19 relief package landed in an environment with many control weaknesses” available at <https://www.agsa.co.za/Portals/0/Reports/Special%20Reports/Covid-19%20Special%20report/2020%20Covid-19%20Media%20Release%20FINALISED.pdf> (accessed 7 February 2022).

⁵³ Statista “Number of people employed in the informal sector in South Africa from 2010 to 2020” available at <https://www.statista.com/statistics/1296024/number-of-informal-sector-employees-in-south-africa> (accessed 12 January 2023).

⁵⁴ Laframboise N “The informal economy in South Africa” (2019) available at <https://borgenproject.org/the-informal-economy-in-south-africa> (accessed 12 January 2023).

⁵⁵ Dupper O, Olivier M & Govindjee A “Extending coverage of the unemployment insurance system in South Africa” (2010) 21(3) *Stellenbosch Law Review* 438 at 439.

as they are adversely affected by the repercussions of unemployment in view of the low earnings they receive in the informal sector;⁵⁶ given these low earnings, it is difficult for them to plan and save for future contingencies. Smit and Fourie note that the reason that informal workers are excluded from the definitions of an employee and contributor as stipulated by the UIA and UICA, respectively, is that the legislation caters for the needs of employees in the formal sector.⁵⁷

Indeed, formal workers are well protected by labour law and enjoy social protection,⁵⁸ including TERS, unlike informal workers, who do not enjoy the same protection as formal workers. This meant that, in the face of the economic repercussions of the pandemic, workers in informal employment had no form of unemployment insurance protection, unlike formal workers. At the moment, there are no unemployment insurance interventions for informal workers, a situation which was perpetuated during the TERS era when informal workers were not eligible to make a claim for TERS benefits.

At most, they were eligible to claim the Covid-19 Social Relief of Distress (SRD) grant.⁵⁹ The SRD was created in terms of the Social Assistance Act 2004: Regulations Relating to Covid-19 Social Relief of Distress, which were issued in terms of section 32 of the Social Assistance Act read together with section 13 of the same Act.⁶⁰ The grant was meant to be a temporary measure for those seeking financial assistance during the lockdown period and who had no alternative grant or income. It is worth noting that the SRD did not change the vulnerable position of informal workers as the amount of the SRD was not adequate to cover their basic needs.⁶¹

At the international level, the ILO has demonstrated commitment to guiding member states to afford informal workers social protection, including unemployment

⁵⁶ Olivier MP & Govindjee A “A critique of the Unemployment Insurance Amendment Bill, 2015” (2014) 18(7) *Potchefstroom Electronic Law Journal* 2739 at 2751.

⁵⁷ Smit N & Fourie E “Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries” (2009) 26(3) *Journal of South African Law* 516.

⁵⁸ Govindjee A, Olivier M & Dupper O “Activation in the context of the unemployment insurance system in South Africa” (2011) 22(1) *Stellenbosch Law Review* 205 at 211 .

⁵⁹ South African Government “Social relief of distress” available at <https://www.gov.za/services/social-benefits/social-relief-distress> (accessed 1 February 2023).

⁶⁰ Social Assistance Act 2004: Regulations Relating to COVID-19 Social Relief of Distress issued in terms of section 13 and 32 Social Assistance Act 9 of 2004.

⁶¹ Khambule I “The effects of COVID-19 on the South African informal economy: Limits and pitfalls of government’s response” (2020) 34(1) *Loyola Journal of Social Sciences* 95 at 104. This statement is based on the fact that the SRD was and still is R350.00. See also J Kgaphola & CI Tshoose “Unpacking the Issue of Progressive Realisation of the Basic Income Grant: A South African Perspective” (2023) 38 (2) *Southern African Public Law* 1 at 20.

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insurance.⁶² Of particular relevance is the ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988. The Convention requires that member states ensure that there are unemployment benefits for workers who face partial, involuntary or permanent unemployment owing to any of the contingencies covered by the Convention.⁶³ Unfortunately, however, South Africa has not ratified this instrument.

The other relevant international standard is the ILO Recommendation Concerning the Transition from the Informal to the Formal Economy 204 of 2015. The recommendation encourages member states to monitor the transition from the informal economy to the formal economy⁶⁴ and promote social protection.⁶⁵ It also enjoins them to enact, adopt, and enforce national laws and regulations to ensure coverage for all categories of workers.⁶⁶ The recommendation requires member states to extend social security to informal workers;⁶⁷ this includes the extension of unemployment insurance protection to such workers.⁶⁸

In South Africa, section 39(1)(b) of the Constitution states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.⁶⁹ Similarly, section 233 of the Constitution provides that “[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law”.⁷⁰ Jansen van Rensburg and Olivier note the importance of considering international law, explaining that there are several reasons for doing so in regard to access to social security.⁷¹ First, South Africa has voluntarily obligated itself as a party to international treaties. Secondly, even in cases where South Africa is not a party to certain treaties, section 39(1)(b) of the Constitution is still applicable. Thirdly,

⁶² ILO Social Security (Minimum Standards) Convention 102 of 1952, ILO Social Protection Floors Recommendation 202 of 2012, ILO Income Security Recommendation 67 of 1944; ILO Employment Promotion and Protection against Unemployment Recommendation 176 of 1988.

⁶³ Article 11 of the ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988.

⁶⁴ Article 1(a) of ILO Recommendation 204 of 2015.

⁶⁵ Article 1(b) of ILO Recommendation 204 of 2015.

⁶⁶ Article 10 of ILO Recommendation 204 of 2015.

⁶⁷ Article 18 of ILO Recommendation 204 of 2015.

⁶⁸ Article 20 of ILO Recommendation 204 of 2015.

⁶⁹ Section 39(1)(b) of the Constitution.

⁷⁰ Section 233 of the Constitution.

⁷¹ Jansen van Rensburg L & Olivier MP “International standards” in Olivier MP, Smit N, Kalula ER & Mhone GCZ (eds) *Introduction to social security* (2004) at 164.

“there is substantial and developing jurisprudence and persuasive commentary available on the scope and content of socio-economic rights”.⁷²

In regard to the sources of international law, treaties are binding instruments for states that are members of them. The ILO Constitution, accordingly, makes conventions of the ILO binding, while the recommendations of the ILO are regarded as non-binding guidelines for member states – the ILO conference is eligible to adopt resolutions as conventions or recommendations. Member states are expected to incorporate the ILO international standards into domestic law. In South Africa, this is provided for in Chapter 14 of the Constitution, which bestows the responsibility to sign and negotiate international agreements on the national executive.⁷³ The international agreement needs to be tabled in the National Assembly and National Council of Provinces,⁷⁴ save when the international agreement is of a technical, administrative or executive nature, or when the agreement does not require ratification by the national executive.⁷⁵

Despite the existence of the ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988 and the Recommendation Concerning the Transition from the Informal to the Formal Economy 204 of 2015 referred to above,⁷⁶ South Africa to date has not adhered to these international standards, given that informal workers are still left destitute and in a precarious position when unemployed because they have no unemployment insurance coverage – this is so mainly because they do not fall within the definition of an employee or contributor as per the UIA. Therefore, the persistent marginalisation of informal workers is against the spirit of the ILO convention and recommendation.⁷⁷

4 RECONFIGURING THE UNEMPLOYMENT INSURANCE AND TERS SYSTEM TO PROVIDE COVERAGE FOR UNEMPLOYMENT PROTECTION TO INFORMAL WORKERS

The opacities in both the current unemployment insurance system and the TERS system arise from the divide between formal and informal social security. In this regard, calls have been made for the adoption of two fundamental approaches. The first involves extending or reshaping existing formal social security measures to allow for the coverage of those who have been excluded, meaning informal workers.⁷⁸ As regards the

⁷² Jansen van Rensburg L & Olivier MP “International standards” in Olivier MP, Smit N, Kalula ER & Mhone GCZ (eds) *Introduction to social security* (2004) at 164.

⁷³ Section 231(1) of the Constitution.

⁷⁴ Section 231(2) of the Constitution.

⁷⁵ Section 231(3) of the Constitution.

⁷⁶ Employment Promotion and Protection against Unemployment Convention 168 of 1988 (C168) and ILO Recommendation Concerning the Transition from the Informal to the Formal Economy 204 of 2015.

⁷⁷ Articles 1(a), 1(b), 10, 18, and 20 of the ILO Recommendation Concerning the Transition from the Informal to the Formal Economy 204 of 2015.

⁷⁸ Smit N & Mpedi LG “Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?” (2010) 14 *Law, Democracy & Development* 1 at 23.

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second approach, Smit and Mpedi propose that the state formalise the informal social security measures that exist in the informal sector⁷⁹ and provide financial assistance to persons and organisations that are operating in this arena.⁸⁰ Behrendt and Nguyen submit in this vein that universal social protection is a basic measure to close gaps and adapt to newly emerging ways of working, such as those within the gig economy. To a large extent, a social protection system needs to be responsive to the prevailing circumstances and needs of workers; this would enable social protection – in particular, unemployment insurance for all workers of different categories, including workers in the informal sector⁸¹ – to play a pivotal role in reducing poverty and inequality.

However, social protection for informal workers remains a challenge, one that leaves them vulnerable to the risks associated with unemployment.⁸² As stated earlier, the scope and application of the UIA and UICA is narrow and serves to exclude informal workers, thus perpetuating the division between workers in the informal and formal sectors. This divide was fortified by the TERS system, which allowed the employers to make claims on behalf of the contributors against the UIF, with no solution for workers in the informal sector.

To curb this statutory exclusion, the definition of an employee and contributor needs to be amended to allow for the inclusion of workers in the informal sector. For example, the Basic Conditions of Employment Act 75 of 1997 (BCEA) makes provision for the Minister of Employment and Labour to determine who qualifies as an employee. In terms of Chapter 8 of the BCEA, the Minister is empowered to make a sectoral determination for the employees of a specific sector or area,⁸³ with such determinations to be published in the Government Gazette.⁸⁴ The Minister's prerogative to make such determinations could have been used in favour of informal workers so that, in times of need, they can be regarded as employees and be able to make contributions to and claims for unemployment protection either through the UIA or TERS directives.

⁷⁹ Smit N & Mpedi LG "Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?" (2010) 14 *Law, Democracy & Development* 1 at 23. Dekker AH "Mind the gap: Suggestions for bridging the divide between formal and informal social security" (2008) 12(1) *Law Democracy & Development* 117 at 119 describes informal social security as a "particular form of social security provided by family and/or community members which can be compared to the benefits which one would normally obtain from as a result of formal social security".

⁸⁰ Smit N & Mpedi LG "Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?" (2010) 14 *Law, Democracy & Development* 1 at 23.

⁸¹ Behrendt C & Nguyen QA "Ensuring universal social protection for the future of work" (2019) 25(2) *Transfer: European Review of Labour and Research* 205 at 216.

⁸² Behrendt C, Nguyen, QA & Rani U "Social protection systems and the future of work: Ensuring social security for digital platform workers" (2019) 72(3) *International Social Security Review* 17 at 35–36.

⁸³ Section 51(1) of the BCEA.

⁸⁴ Section 51(2) of the BCEA.

Indeed, the Constitution makes provision for the protection of all workers despite their status or the type of work they do, stating as follows:

(1) Everyone has the right to fair labour practices. (2) Every worker has the right— (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike.⁸⁵

Notably, the Constitution uses the word “worker” instead of the limiting term “employee”, as found in the UIA. To this extent, the Constitution protects everyone against unfair labour practices, and guarantees workers the right to form and join trade unions. The Constitution hence obliges the legislature to enact legislation to regulate collective bargaining at the workplace and related matters.⁸⁶ Certainly, the purpose of section 23 was to provide protection for all workers, despite their status. However, section 23 of the Constitution could not cover all labour relations related matters, hence it made provision for the legislature to enact statutes that would give effect to the purpose and intent of section 23 of the Constitution. Surprisingly, then, the unemployment insurance legislative framework⁸⁷ limits its coverage by virtue of the definition of an employee, as is the case with the UIA, UICA and TERS.⁸⁸ Olivier argues that the exclusion of certain categories of workers, including informal workers, can raise a constitutional challenges because section 27 of the Constitution guarantees everyone the right to have access to social security, including social insurance.⁸⁹

Moreover, throughout the history of labour relations in South Africa, trade unions have been advocates of workers’ rights and protection. The Constitution solidifies their relevance by bestowing a right on everyone to form and join a trade union and partake in its activities and programmes.⁹⁰ The Constitutional Court, in the case of *National Union of Metal Workers of South Africa v Lufil Packaging*,⁹¹ noted that the right to freedom of association is important as a positive right in that it allows individuals to mobilise under an issue of concern, as part of which it enables workers to engage in

⁸⁵ Section 23 of the Constitution.

⁸⁶ Section 23(5) of the Constitution.

⁸⁷ The LRA gives effect to section 23 of the Constitution; there, the word used is “employee” rather than “worker”.

⁸⁸ One may argue that the legislation mentioned constitutes social security rather than labour legislation and that, as such, it cannot find resonance within the ambit of section 23 of the Constitution. However, some scholars regard social insurance as dependent on labour law in that social insurance legislation is applicable in the workplace for the purpose of providing social protection – and, more particularly, unemployment protection – to employees. See Mpedi LG “The evolving relationship between labour law and social security” (2012)1 *Acta Juridica* 270.

⁸⁹ Olivier M “Revisiting the social right policy framework in South Africa” (2000) 4(1) *Law, Democracy & Development* 101 at 104. See also Ncamane N “Evaluating the exclusion of certain categories of workers from the coverage of the Unemployment Insurance Act 63 of 2001 and the consequences thereof” (LLM thesis, University of Fort Hare, 2020).

⁹⁰ Section 23(2) of the Constitution.

⁹¹ *National Union of Metal Workers of South Africa v Lufil Packaging (Isithebe) and Others* [2020] CC 7.

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contestation with their employers.⁹² Botha suggests that the role of trade unions is not confined to the political terrain but extends to the social and economic terrain, and argues that trade unions play a pivotal role in the welfare of workers and in the decision-making process.⁹³

In view of the above, a reconsideration of trade unions' participation in the informal sector would undoubtedly be beneficial for informal workers and assist in ameliorating their plight. For instance, trade unions are members of key labour decision-making bodies such as the National Economic Development and Labour Council (Nedlac)⁹⁴ and the general collective bargaining process. Through such bodies, trade unions could escalate discussion on extending the definition of an employee and amending the UIA to give effect to the inclusion of informal workers so that they could be regarded as employees for the purposes of contributing to the UIF and claiming from it. Trade unions need to adopt a holistic approach and not only be vocal in wage negotiations but engage with stakeholders to ensure better protection for workers in the informal sector.⁹⁵

South Africa is a member state of the ILO⁹⁶ and to date has ratified 28 of its conventions.⁹⁷ As previously noted, the ILO's international instruments are made up of Conventions and Recommendations, with the former being binding on member of states that have ratified them and the latter serving as non-binding guidelines.⁹⁸ South Africa, as a member state, is required to strive to implement ILO international instruments, specifically the Transition from the Informal to the Formal Economy Recommendation

⁹² ILO Transition from the Informal to the Formal Economy Recommendation 204 of 2015 available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204 (accessed 22 July 2023).

⁹³ Botha M "Responsible unionism during collective bargaining and industrial action: Are we ready yet?" (2015) 48(2) *De Jure* 328 at 334.

⁹⁴ The National Economic Development and Labour Council (Nedlac) is the vehicle by which government, labour, business and community organisations seek to cooperate, through problem-solving and negotiation, on economic, labour and development issues and related challenges facing the country.

⁹⁵ Fourie E "Perspectives on workers in the informal economy in the SADC region" (2017) 4 *Revue de droit comparé du travail et de la sécurité sociale* 76 at 93.

⁹⁶ South Africa was a member of the ILO from 1919–1966 and rejoined in 1994.

⁹⁷ ILO "Conventions and recommendations" available at <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (accessed 30 July 2023).

⁹⁸ ILO "Conventions and recommendations" available at <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (accessed 30 July 2023).

204 of 2015.⁹⁹ Thus, the legislature should take steps to comply with this recommendation; as article 19(6) of the ILO Constitution indicates, a recommendation can be given effect by way of national legislation. Domestically, this could be achieved by amending and extending the definitions of an employee and contributor so as to allow informal workers to make contributions to the UIF and thereby circumvent their current exclusion, one which is detrimental to them.

That being said, it is worth delving into possible counterarguments to the proposals made in this article. These would relate chiefly to the “how” part of the equation – that is, to the implementation of an expanded unemployment insurance system that includes workers in the informal sector. It is anticipated that this proposed inclusion of informal workers would pose various financial and administrative challenges for the state.

In the formal sector, the payment of unemployment benefits to employees is made possible by contributions by both the employee and employer to unemployment insurance, which becomes accessible should the employee become unemployed and qualify to make a claim as per the requirements outlined in the UIA. In the informal sector, it can be impractical for the workers to contribute to the UIF due to their fluctuating remuneration and lack of guaranteed remuneration. These are some of the impediments that would make it difficult for informal workers to contribute regularly to the UIF.¹⁰⁰

This article provides no conclusive solution to the dilemma; it does, however, offer some useful suggestions of steps the state could take in order to move towards extending the coverage of unemployment insurance to include workers in the informal sector.

The first option is to subsidise the contributions of informal workers. This could be achieved by allowing these workers to be deemed as contributors by the Minister of Labour and Employment in terms of section 69(1) of the UIA. This would enable informal workers to be contributors, with the state bearing the cost of being a contributor and thus subsidising the other part of contribution, given that the unemployment insurance system is contributory in nature. The current contribution of the employee is 1% of wages,¹⁰¹ which could be lowered for informal workers to enable

⁹⁹ ILO Transition from the Informal to the Formal Economy Recommendation 204 of 2015 available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R204 (accessed 22 July 2023).

¹⁰⁰ Smit N & Mpedi LG “Social protection for developing countries: Can social insurance be more relevant for those working in the informal economy?” (2010) 14 *Law, Democracy & Development* 1 at 26.

¹⁰¹ Section 6(1)(a) and (b) of the UICA. However, subsection 1 is not applicable if the paid or payable remuneration “by [the] employer to the employee during any month ... exceeds an amount determined from time to time by the Minister of Finance” in consultation with Minister of Labour and the Unemployment Insurance Commissioner, this being done by way of notice in the Government Gazette. The Government Gazette indicated that an employee contribution is 1 per cent for an employee with the maximum earning ceiling of R17,712 per month or R212,544 annually. This was revoked by the Minister of Finance in terms of Government Gazette 44641 of 28 May 2021.

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them to contribute to the UIF. Furthermore, during the pandemic, the state introduced the Covid-19 SRD grant as temporary unemployment protection for those who were unemployed and had not received any social grant or UIF.¹⁰² This measure could be revisited and made available to informal workers.¹⁰³

A further option is to allow voluntary UIF contributions from, and coverage to, those informal workers with steadier or more regular monthly income than others.¹⁰⁴ Although voluntary participation might be viable, the contribution needs to be low because if it is high, this target group of possible contributors might decide not to participate in the unemployment insurance system.¹⁰⁵ In addition, the UIF could consider investing some of the funds of the contributions made by employers and employees in the formal sector; the interest accrued on the investment could then be used to fund the unemployment benefits of workers in the informal sector.¹⁰⁶ This will not be foreign to the UIF; for instance, in 2022 its portfolio of investment with the Public Investment Corporation (PIC) performed well, gaining returns of 12.34 per cent over 12 months.¹⁰⁷ According to the UIF's 2021/22 annual report, the subsequent withdrawal of the investment from the PIC was used to fund TERS, which paid out billions of rands to qualifying employees. The investment option is thus economically viable as a means to secure the inclusion of workers in the informal sector.

¹⁰² South African Government "Statement by President Cyril Ramaphosa on further economic and social measures in response to the COVID-19 epidemic" (2023) available at <https://www.justice.gov.za/events/coivd19/20200421-PresidentMessage.pdf> (accessed 22 July 2023).

¹⁰³ The Social Relief of Distress (SRD) Grant was meant to be available for six months, but has been extended over the past years. There is, however, no guarantee from the President or Minister of Finance as to whether this grant will be made permanently available to those who are unemployed. In the event that the grant becomes unavailable, a similar arrangement can be made available to informal workers. This proposal is made against a backdrop in which the SRD Grant is still available for anyone, including an informal worker, who meets the means test and is unemployed.

¹⁰⁴ Cichon M & Cichon D "Financing of social protection for informal sector workers in Asia: Challenges and opportunities" in Handayani SW *Social protection for informal workers in Asia* (2016) at 90.

¹⁰⁵ Sabatini C "Developing social insurance schemes for informal and 'gig' workers: Adapting to post-COVID-19 realities" (2021) 10 available at <https://www.chathamhouse.org/sites/default/files/2021-03/2021-03-23-developing-social-insurance-informal-workers-sabatini.pdf> (accessed 28 July 2023).

¹⁰⁶ Section 7(1) of the Unemployment Insurance Act. The Director-General may deposit the money of the Fund to the Public Investment Commissioners in terms of the Public Investment Commission Act 45 of 1984. However, the Public Investment Commissioners Act was repealed by the Public Investment Corporation Act 23 of 2004, which made provision for the establishment of the Public Investment Corporation. Therefore, the existing institution is the latter, and the legislature should amend the UIA to cater for such.

¹⁰⁷ South African Government "Unemployment Insurance Fund receives funds investment portfolio report" (2022) available at <https://www.gov.za/speeches/uif-receive-report-performance-fund%E2%80%99s-investment-portfolio-ending-june-2022-6-sep-2022-0000> (accessed 1 August 2023).

Another factor is the need for the UIF to guard against the misappropriation of funds that occurred in the TERS system and thereby ensure that funds are available to cover benefits for informal workers. For instance, the Special Investigative Unit has managed to recover R71.4 million that had been paid out unduly during the TERS era.¹⁰⁸ Similarly, arrests have been made by the Hawks in connection with a R2 million fraud case against the UIF.¹⁰⁹

Lastly, since South Africa is a developing country, international financial institutions (IFIs) could play an important role in financing the measures to include informal workers in the unemployment insurance system. IFIs such as the World Bank, International Monetary Fund, New Development Bank (formerly the BRICS Development Bank), and African Development Bank could be approached by the government in this regard.

5 CONCLUSION

The article has alluded to the importance of social security in defining the concept of social security and its relevant streams such as social assistance and social insurance. However, social insurance was the focus of the article, with unemployment insurance taking centre-stage in the discussion.

To this end, the article noted that in South Africa, unemployment insurance is regulated through two statutes, the UIA and UICA. The former makes provision for the coverage of employees should they become unemployed or lose income owing to illness, maternity, adoption, or the death of the breadwinner; it also provides for parental and commissioning parental benefits. The UIA establishes the UIF to administer and manage contributions made by employees and employers.

When the country was hit by Covid-19 and its social and economic consequences, the state adopted directives for instituting the Covid-19 TERS system, which enabled employers in financial distress and unable to pay the salaries of the employee to submit claims on behalf of their employees to the UIF. The directives outlined the process and procedures to which employers and employees were required to adhere.

However, South Africa's unemployment insurance system has for long catered only to workers who qualify as employees and contributors in terms of the criteria of the UIA and UICA; this notion was inherently extended to the TERS. As a result, informal workers were not covered by the UIA, UICA and TERS directives: they were not employees according to the definition of an employee, and hence were not permitted to make contributions to the UIF and subsequently make claims from TERS. Their lack of

¹⁰⁸ Special Investigative Unit "SIU recovers R71.4 million linked to TERS claims" (2023) available at <https://www.siu.org.za/siu-recovers-r71-4-million-linked-to-ters-claims/> (accessed 1 August 2023).

¹⁰⁹ South African Government "Unemployment Insurance Fund welcomes arrests of six suspects arrested for R2 million fraud in North West Province" (2023) available at <https://www.gov.za/speeches/unemployment-insurance-fund-welcomes-arrests-six-suspects-arrested-r2-million-fraud-north> (accessed 2 August 2023).

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unemployment protection had dire effects on them during the pandemic, leaving them vulnerable, destitute, and in a precarious situation.

It is for these reasons that the article proposes an extension of the definition of employee and contributor that would allow informal workers to contribute to the UIF and make claims in cases where they are unemployed. It thus recommended that the UIA and UICA be amended so as to address the plight of informal workers, noting that the statutory exclusion of this category of workers was the primary reason why they could not claim from TERS during the Covid-19 era.

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