

# Interpreting the Right to Work and its Application in the South African Legal Framework

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## Abstract

The article discusses the right to work within the context of South Africa. South African law, at present, does not provide for a right to work as provided for by the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Implementing the right to work might address the high unemployment rate in South Africa and it is concerning that the right to work has not yet been considered as potential solution. The aim of the article is to interpret the right to work through the interpretive lens of the United Nations Committee on Economic, Social and Cultural Rights. The article discusses the obligations created by the ICESCR and the progress the government of South Africa has made to meet the state obligations relating to the right to work as provided by the ICESCR. The article concludes with a comprehensive definition of the right to work and suggests that the government of South Africa, adopt the right to work immediately as a means to avoid further hardship partially caused by the lack of a rights framework guaranteeing the right to work in South Africa.

## Keywords

Right to work; state obligations; decent work; discrimination; minimum wage; social assistance.

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## 1 Introduction

It is concerning to note that the unemployment rate in South Africa has reached 32.9 per cent in the first quarter of 2023, despite the implementation of progressive policies and legislation aimed at creating more job opportunities.<sup>1</sup> The steady increase in unemployment is alarming and highlights the need for further action to be taken to address this issue. The implementation of the right to work could be a potential solution to address unemployment and issues with foreign labour in South Africa. It is interesting that the right to work has not been progressively realised in South Africa when this is required of the South African state.

Article 23 of the *Universal Declaration of Human Rights* states that each person has the right to work, which includes the right to choose his or her employment and every person has the right to protection against unemployment.<sup>2</sup> The government of South Africa ratified the International Covenant on Economic, Social and Cultural Rights (hereafter ICESCR) in January 2015, thus the government of South Africa is bound to fulfil the state obligations created by the ICESCR. Article 6 of the ICESCR is perhaps the most descriptive of all other international instruments regarding the right to work.

Any serious discussion regarding the ICESCR cannot be without reference to the United Nations Committee on Economic, Social and Cultural Rights (hereafter CESCR). The general comments of the CESCR create a jurisprudential structure for the rights articulated in the ICESCR.<sup>3</sup> The CESCR interprets the ICESCR and while the comments of the CESCR are non-binding, the comments are widely regarded as authoritative in the interpretation of the ICESCR.<sup>4</sup>

The South African legal framework does not expressly provide for a right to work but since the government of South Africa has ratified the ICESCR, it becomes necessary to question the progress that it has made in fulfilling the

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<sup>1</sup> Stats SA 2023 <https://www.statssa.gov.za/?p=16312#:~:text=South%20Africa's%20unemployment%20rate%20in,the%20fourth%20quarter%20of%202022>.

<sup>2</sup> *Universal Declaration of Human Rights* (1948) Art 23(1); Forere 2011 *AHRLJ* 596.

<sup>3</sup> Sarkin and Koenig 2011 *Hum Rts Q* 13.

<sup>4</sup> Vonk and Olivier 2019 *EJSS* 227.

state's obligations in relation to the right to work and whether implementing the right to work will help to reduce unemployment in South Africa.<sup>5</sup> The right to work is currently vague and conceptually unclear, however, a definition of the right to work is submitted at the end of the article.<sup>6</sup> The question arises whether the right to work implies protection against unemployment, whether a state is required to provide any type of employment even if such employment is exploitative, senseless or unavailing and whether in the absence of sufficient employment states are required to provide social support to those who are unemployed.<sup>7</sup> The article discusses: (1) the right to work in accordance with the ICESCR; (2) state obligations created by the right to work; and (3) an assessment of South Africa's legal framework against the state obligations created by the right to work. The discussion of the right to work in the South African context is unprecedented, and as such, the article provides comprehensive information on the subject. Moreover, the article also addresses whether section 22 and 23 of the *Constitution of the Republic of South Africa, 1996* (hereafter the *Constitution*) may be interpreted to claim the existence of the right to work in South Africa. The article concludes with a comprehensive definition of the right to work which encompasses that which is already provided in the ICESCR along with the interpretation of the right to work as put forward by the CESCR in the South African context.

## **2 *International Covenant on Economic, Social and Cultural Rights: the right to work***

Subject to the supremacy clause,<sup>8</sup> when interpreting any legislation, courts must also prefer an interpretation consistent with international law to one which is not.<sup>9</sup> As a state party to the ICESCR, the government of South Africa must submit reports on the progress it has made and measures adopted in accordance with the obligations created by the ICESCR.<sup>10</sup> State party reports are assessed by the CESCR and other specialised bodies.<sup>11</sup> While the *Constitution* "contains an elaborate catalogue of economic, social

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<sup>5</sup> CESCR *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa* UN Doc E/C.12/ZAF/1 (2017) para 66.

<sup>6</sup> Mantouvalou *The Right to Work* 23.

<sup>7</sup> Mantouvalou *The Right to Work* 23.

<sup>8</sup> Section 2 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) states that "[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

<sup>9</sup> *Constitution* s 233.

<sup>10</sup> *International Covenant on Economic, Social and Cultural Rights* (1966) (the ICESCR) Art 16(1).

<sup>11</sup> ICESCR Art 16(2)a-b.

and cultural rights", the government of South Africa has not ratified the Optional Protocol to the ICESCR.<sup>12</sup> If the Optional Protocol is ratified by a number of states, it may be used as a significant tool to increase oversight in economic policy making, however the nature of the complaints forwarded to the CDESCR needs to be clarified and what is considered a violation of the right to work will also have to be developed.<sup>13</sup>

Interpreting the right to work is necessary as it acts as an enabler for many other rights.<sup>14</sup> The ICESCR stipulates that the right to work is "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and [states] will take appropriate steps to safeguard this right".<sup>15</sup> The CDESCR recognises the above quote to be the definition of the right to work.<sup>16</sup> The normative context to define the right to work is best described by the CDESCR as follows:

The right to work is an individual right that belongs to each person and is at the same time a collective right. It encompasses all forms of work, whether independent work or dependent wage-paid work. The right to work should not be understood as an absolute and unconditional right to obtain employment. Article 6, paragraph 1, contains a definition of the right to work and paragraph 2 cites, by way of illustration and in a non-exhaustive manner, examples of obligations incumbent upon States parties. It includes the right of every human being to decide freely to accept or choose work. This implies not being forced in any way whatsoever to exercise or engage in employment and the right of access to a system of protection guaranteeing each worker access to employment. It also implies the right not to be unfairly deprived of employment.<sup>17</sup>

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<sup>12</sup> The purpose of the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (2008) (the Optional Protocol) is to create a complaints procedure to enforce the ICESCR at an international level and until the Optional Protocol is ratified, the ICESCR remains judicially unenforceable at an international level. OHCHR date unknown <https://indicators.ohchr.org/>; Chirwa and Chenwi "Protection of Economic, Social and Cultural Rights in Africa" 9; Chirwa and Chenwi "Direct Protection of Economic, Social and Cultural Rights in International Law" 34.

<sup>13</sup> Before the Optional Protocol was adopted, allowing the United Nations Committee on Economic, Social and Cultural Rights (the CDESCR) to enforce rights and provide remedies for victims, the implementation of the provisions of the ICESCR was monitored through state reporting. The Optional Protocol created a complaints procedure at the international level for economic, social and cultural rights. Sarkin and Koenig 2011 *Hum Rts* Q 41; Ssenyonjo 2017 *NILR* 281; Vonk and Olivier 2019 *EJSS* 227; Chirwa and Chenwi "Direct Protection of Economic, Social and Cultural Rights in International Law" 63-64, 67; Scheinin "Indirect Protection of Economic, Social and Cultural Rights in International Law" 73.

<sup>14</sup> Govindjee and Dupper 2011 *Stell LR* 792; Sarkin and Koenig 2011 *Hum Rts* Q 3.

<sup>15</sup> ICESCR Art 6(1).

<sup>16</sup> CDESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 6.

<sup>17</sup> CDESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 6.

Importantly, the right to work does not imply "an absolute and unconditional right to obtain employment".<sup>18</sup> The right to work implies that everyone has the right to earn a living, doing an occupation of his or her choice<sup>19</sup> and that this right must be protected.<sup>20</sup> The right to work provides protection against unemployment and allows the aspiration for full employment.<sup>21</sup> Anyone may also refuse an opportunity to work, the CESCR has taken a conservative approach, rather than requiring states to guarantee a right to work, the CESCR takes the approach that the right to work is only able to be implemented if work is available, state parties must therefore aim to make work available over time.<sup>22</sup> The CESCR has also emphasised the importance and need of compensation mechanisms in the event of the loss of employment.<sup>23</sup>

The right to work as stated in Article 6 of the ICESCR is developed through and along with article 7 and 8 of the ICESCR.<sup>24</sup> Article 6 of the ICESCR is more concerned with the value of employment itself but<sup>25</sup> Articles 6, 7 and 8 of the ICESCR are interconnected and interdependent. Article 7 of the ICESCR provide for the right to the enjoyment of just and favourable working conditions and Article 8 provides for the right to establish and join trade unions. Articles 6, 7 and 8 are connected, in order for fulfil the objectives of the ICESCR in relation to work, working conditions must be regulated and workers must be protected.<sup>26</sup>

### 3 State obligations created by the right to work

The ICESCR aims to "protect human dignity by establishing both negative and positive obligations for States".<sup>27</sup> The ICESCR provides states with general, specific and core obligations.<sup>28</sup> The key obligations implicit in Article 2(1) of the ICESCR are: (1) state parties must take appropriate steps;

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<sup>18</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 6.

<sup>19</sup> ICESCR Art 6(1).

<sup>20</sup> PWESCR *ICESCR Handbook* 37.

<sup>21</sup> Morsink *Universal Declaration of Human Rights* 162.

<sup>22</sup> Sarkin and Koenig 2011 *Hum Rts* Q 16.

<sup>23</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 26.

<sup>24</sup> Article 7 of the ICESCR: everyone has the right to the enjoyment of just and favourable working conditions. Art 8 of the ICESCR provides for the right to form and join a trade union. Gomes "The Right to Work" 231; CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 8.

<sup>25</sup> Sarkin and Koenig 2011 *Hum Rts* Q 13.

<sup>26</sup> Gomes "The Right to Work" 231.

<sup>27</sup> UN *Transitional Justice 7; Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 27.

<sup>28</sup> Ikawa "The ICESCR and the Optional Protocol" 18.

(2) to progressively realise economic, social and cultural rights; (3) to the maximum of their available resources; (4) which is the individual duty of each state party and a collective duty achieved through international assistance and cooperation.<sup>29</sup> States must also show that the state has made every effort to use all its available resources to realise the minimum core of rights in the ICESCR.<sup>30</sup> In the instance of the minimum core obligations, state parties are to ensure, at the very least, satisfaction to the minimum essential levels of each right.<sup>31</sup>

The ICESCR also creates general obligations that state parties are to "ensure the progressive realisation of the exercise of the right to work".<sup>32</sup> While the CESCR acknowledges that constraints caused by a limitation in states' available resources may impact a state's ability to fully realise article 6 of the ICESCR, the ICESCR also provides immediate obligations in relation to the right to work, *inter alia*, the right to work is to be exercised without discrimination of any kind and states must immediately take steps to the full realisation of the right to work.<sup>33</sup> While states are to progressively realise the right to work, state parties must move effectively and expeditiously to fully realise the right to work.<sup>34</sup> The three specific obligations of state parties are to respect, protect and fulfil the economic, social and cultural rights of persons within their jurisdiction.<sup>35</sup> The obligation to respect, protect and fulfil the right to work are discussed below as they serve as the international benchmarks to assess state actions in terms of the right to work.

To take appropriate steps, state parties must take measures (legislative, administrative, social and other remedies such as judicial remedies) within a reasonably short period after the ratification of the ICESCR to realise

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<sup>29</sup> ICESCR Art 2(1); Chirwa and Chenwi "Direct Protection of Economic, Social and Cultural Rights in International Law" 48.

<sup>30</sup> *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 30.

<sup>31</sup> CESCR *General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant)* UN Doc E/1991/23 (1990) para 10.

<sup>32</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 19.

<sup>33</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 19.

<sup>34</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 20.

<sup>35</sup> UN *Economic, Social and Cultural Rights of Migrants* 33; Ikawa "The ICESCR and the Optional Protocol" 18.

social, economic and cultural rights, steps must be deliberate, concrete and targeted.<sup>36</sup>

South Africa's courts have developed useful jurisprudence on the justiciability of economic, social and cultural rights.<sup>37</sup> What is considered as appropriate is analogous to reasonableness as articulated in *Government of the Republic of South Africa v Grootboom*. It may be argued what is considered as appropriate is not defined but rather reasonable review as set in *Government of the Republic of South Africa v Grootboom* may be used to determine the extent to which the South African state has satisfied their obligations in terms of the ICESCR.<sup>38</sup>

Progressive realisation of economic, social and cultural rights, allows state parties to give effect to rights over time and has qualitative (existing services are to be improved) and quantitative (access is provided for more people) elements.<sup>39</sup>

State parties are to use their available resources, including financial; human; technological; infrastructural resources and resources from international cooperation and assistance.<sup>40</sup> Even when there is a shortage of resources, state parties still have the obligation to ensure the widest enjoyment of the right possible and to protect the marginalised and disadvantaged groups, state parties must adopt low-cost programmes.<sup>41</sup> The theoretical framework with respect to the specific obligations created by the right to work are discussed below.

### **3.1 Minimum core obligations of the right to work: non-discrimination and equal protection**

The core obligation in the context of the right to work "encompasses the obligation to ensure non-discrimination and equal protection of employment".<sup>42</sup> The Constitutional Court has consistently rejected<sup>43</sup> the

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<sup>36</sup> Chirwa and Chenwi "Direct Protection of Economic, Social and Cultural Rights in International Law" 49.

<sup>37</sup> Ssenyonjo 2017 *NILR* 278.

<sup>38</sup> Chirwa and Chenwi "Direct Protection of Economic, Social and Cultural Rights in International Law" 49.

<sup>39</sup> Chirwa and Chenwi "Direct Protection of Economic, Social and Cultural Rights in International Law" 51-52.

<sup>40</sup> Chirwa and Chenwi "Direct Protection of Economic, Social and Cultural Rights in International Law" 53.

<sup>41</sup> Chirwa and Chenwi "Direct Protection of Economic, Social and Cultural Rights in International Law" 53.

<sup>42</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 31.

<sup>43</sup> The Constitutional Court provided many reasons for the rejection of minimum core obligations: a) the first reason is that socio-economic rights flow from the

notion of minimum core obligations on state parties and has opted instead for reasonableness as the constitutional yardstick for assessing measures taken to give effect to economic, social and cultural rights.<sup>44</sup> Despite the useful jurisprudence, the courts clearly do not intend to apply the notion of the minimum core rights as expressed in the ICESCR.<sup>45</sup> The persistent refusal by the courts is questionable, since the government of South Africa has ratified the ICESCR, which clearly articulates the minimum core approach in respect to state party obligations.<sup>46</sup>

### **3.2 Specific obligations: respect, protect and fulfil the right to work**

State parties are required to refrain from directly or indirectly interfering with the enjoyment of the right to work.<sup>47</sup> The obligation to respect the right to work obliges states to prohibit compulsory or forced labour.<sup>48</sup> The obligation to respect the right to work also obliges states to refrain from limiting or denying "equal access to decent work for all persons", particularly marginalised and disadvantaged groups such as migrant workers.<sup>49</sup>

The obligation to protect the right to work obliges states to put measures in place that prevent third parties from interfering with workers from enjoying the right to work.<sup>50</sup> The obligation to protect the right to work requires : *inter alia*, states to pass legislation or other measures to ensure equal access to training and work; that worker rights are not undermined by privatisation measures; increased flexibility of labour markets which does not cause work to be less stable or reduce the protection of the worker and state parties are

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Constitution; b) "for a proper understanding of the true role of the courts in our constitutional democracy" (Majiedt 2022 *LDD* 6) or in other words because of the separation of powers principle; c) socio-economic needs differ depending on the context; d) "a lack of information to determine the content of minimum-core obligations" (Majiedt 2022 *LDD* 7); e) "consideration of resource constraints and, consequently, of the progressive realisation limit pertaining to these rights" (Majiedt 2022 *LDD* 7); f) the impact will be impractical in the sense that unrealistic demand would be created for everyone who would be able to claim the core delivery of the right; g) the imposition of the obligation would be incompatible with the role and function of the courts. *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) paras 31-33, 35; *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) paras 35, 37-38.

<sup>44</sup> Vonk and Olivier 2019 *EJSS* 236.

<sup>45</sup> Ssenyonjo 2017 *NILR* 278.

<sup>46</sup> Vonk and Olivier 2019 *EJSS* 236.

<sup>47</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 22.

<sup>48</sup> Gomes "The Right to Work" 231.

<sup>49</sup> Gomes "The Right to Work" 231.

<sup>50</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 22; Gomes "The Right to Work" 231.



also required to "prohibit forced or compulsory labour by non-State actors".<sup>51</sup>

In terms of the obligation to fulfil the right to work, state parties are to provide, facilitate and promote the right to work, which implies that state parties are obliged to adopt legislative, budgetary, judicial and other measures that ensure the full realisation of the right to work.<sup>52</sup> It is thus mandatory for states, in accordance with the obligation to fulfil the right to work, to recognise the right to work in legislation, policies and plans for the realisation of the right to work.<sup>53</sup> Employment policies are to be formulated and implemented which give effect to a national employment policy that: stimulates economic growth; stimulates development; increases standards of living; meets manpower requirements; overcomes unemployment and underemployment.<sup>54</sup>

### **3.3 Decent work**

Work in the context of the ICESCR must be decent work.<sup>55</sup> Decent work respects and protects the fundamental rights of the workers; provides an income which is enough to support the worker and their families as per article 7 of the ICESCR and respects the mental and physical integrity of the worker.<sup>56</sup>

### **3.4 Right to gain a living by work and social support where work is not available**

The ICESCR further stipulates that the right to work includes "the right of everyone to the opportunity to gain his living by work ...".<sup>57</sup> An obligation is thus created for states to generate job opportunities, while simultaneously improving existing employment and ensuring that all work is decent work.<sup>58</sup>

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<sup>51</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 25.

<sup>52</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 22; Gomes "The Right to Work" 231.

<sup>53</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 26.

<sup>54</sup> Theron "What is Decent about 'Decent Work'?" 188; Gomes "The Right to Work" 231.

<sup>55</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 7.

<sup>56</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 23.

<sup>57</sup> ICESCR Art 6(1).

<sup>58</sup> International Commission of Jurists 2018 <https://www.icj.org/wp-content/uploads/2018/08/SouthAfrica-ICJSubmissionCESCR-Advocacy-Non-legal-submission-2018-ENG.pdf> 7.

## 4 Assessing South Africa's legal framework against the state obligations of the right to work

### 4.1 *Minimum core: non-discrimination*

The core obligation in the context of the right to work "encompasses the obligation to ensure non-discrimination and equal protection of employment".<sup>59</sup> As mentioned previously, South African courts use reasonableness as the test to determine whether actions taken by the state are progressive in terms of the rejected minimum core obligations. The core obligations of the ICESCR require state parties to ensure the right to access employment; to avoid any measure resulting in discrimination and unequal treatment and implement a national employment strategy geared at ensuring that the right to work is progressively realised, the plan should also include indicators and benchmarks to measure progress which is to be reviewed periodically.<sup>60</sup>

State parties are required to introduce legislation in a manner which does not result in discrimination.<sup>61</sup> Section 9 of the *Constitution* provides for the right to equality in South Africa, entailing that everyone in South Africa is equal and deserving of equal protection and benefit of the law. In South Africa, affirmative action measures may be taken to eradicate barriers of injustice deriving from South Africa's past of inequality.<sup>62</sup> While employed foreign nationals form part of everyone in South Africa for the purpose of labour legislation, discrimination against foreign nationals are remarkable.

The *Promotion of Equality and Prevention of Unfair Discrimination Act*,<sup>63</sup> prohibits unfair discrimination, implements section 9 of the *Constitution* and provides for the designation of equality courts.<sup>64</sup> It is unclear whether the *Promotion of Equality and Prevention of Unfair Discrimination Act* will be of any assistance to a foreign national who seeks relief in a claim of unfair discrimination. Section 34(1) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* states that the Minister of Justice and Constitutional Development must consider including nationality as a

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<sup>59</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 31.

<sup>60</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 31(a)-(c).

<sup>61</sup> *Mahlangu v Minister of Labour* 2021 2 SA 54 (CC) para 44.

<sup>62</sup> CESCR *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa* UN Doc E/C.12/ZAF/1 (2017) para 48.

<sup>63</sup> *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.

<sup>64</sup> CESCR *Concluding Observations on the Initial Report of South Africa* E/C.12/ZAF/CO/1 (2018) para 47.

prohibited ground upon which a claim of unfair discrimination may be based.<sup>65</sup> The CESCR has thus expressed a concern that the *Promotion of Equality and Prevention of Unfair Discrimination Act* imposes an obligation on all members of society to promote equality which has not yet been implemented thus violating article 2.2 of the ICESCR.<sup>66</sup> The *Employment Services Act*<sup>67</sup> seeks to facilitate and regulate the employment of foreign nationals.<sup>68</sup> The purposes of the *Employment Services Act* in relation to foreign nationals are to:

facilitate the employment of foreign nationals in the South African economy, where their contribution is needed in a manner— (i) that gives effect to the right to fair labour practices contemplated in section 23 of the Constitution; (ii) that does not impact adversely on existing labour standards or the rights and expectations of South African workers; and (iii) that promotes the training of South African citizens and permanent residents.<sup>69</sup>

The minister of Labour may make additional regulations to facilitate and regulate the employment of foreign nationals. While section 8(2) of the *Employment Services Act* is not peremptory, as inferred by the wording of the section which states that the minister may make certain regulations to regulate the employment of foreign nationals. Section 8(2)(a) may still serve as a deterrent to a skilled foreign national who may consider working in South Africa, while it also has the impact of discouraging employers from employing foreign nationals. It is not clear how employers are to satisfy themselves that "there are no other persons in the Republic with suitable skills to fill a vacancy, before recruiting a foreign national".<sup>70</sup> Section 8(2)(a) has led to complications relating to the processing of application for work permits which has resulted in protracted delays and the rejection of work permits.<sup>71</sup>

## **4.2 Specific state obligations**

### **4.2.1 Specific state obligation to respect the right to work: freedom from slavery and freedom to choose**

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<sup>65</sup> *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 s 34(1)(a); Mubangizi 2021 *IJD* 146.

<sup>66</sup> CESCR *Concluding Observations on the Initial Report of South Africa* E/C.12/ZAF/CO/1 (2018) para 21.

<sup>67</sup> *Employment Services Act* 4 of 2014.

<sup>68</sup> *Employment Services Act* 4 of 2014 Preamble.

<sup>69</sup> *Employment Services Act* 4 of 2014 s 2(1)(h).

<sup>70</sup> *Employment Services Act* 4 of 2014 s 8(2)(a) states that "The Minister may, after consulting the Board, make regulations to facilitate the employment of foreign nationals, which regulations may include the following measures: The employers must satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy, before recruiting a foreign national"; Mubangizi 2021 *IJD* 148.

<sup>71</sup> Mubangizi 2021 *IJD* 148.

The *Constitution* entrenches the right not to be subjected to slavery, servitude or forced labour, thus guaranteeing the obligation to respect through section 13 of the *Constitution*.<sup>72</sup> The far more contentious issue is the freedom to choose an occupation that is limited to citizens in South Africa, while the ICESCR extends this right to everyone within a state's territory. Section 22 of the *Constitution* provides that every "citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law".<sup>73</sup> Section 22 of the *Constitution* should be interpreted as a right which guarantees citizens the opportunity to occupational freedom, not the delivery thereof. By implication, section 22 of the *Constitution* cannot be interpreted as containing a right to work but it is argued that while the section 22 in its entirety does not match with the interpretation of the right to work as per the ICESCR, the first element of the section may represent a part of the right to work.<sup>74</sup>

Section 22 contains two interpretive elements, the first element is the choice, and the second element is the practising of the trade, occupation or profession.<sup>75</sup> The choice element of section 22 may be limited by laws prohibiting certain individuals from entering certain trades or professions.<sup>76</sup> The freedom to choose a vocation as per section 22 of the *Constitution* is fundamental to a society which values and finds its foundation in the respect for human dignity.<sup>77</sup> Although section 22 of the *Constitution* is based upon the right to human dignity, the freedom to choose a vocation may be limited, provided that the limitation is justifiable.

Limitations of section 22 of the *Constitution* are not to be tolerated lightly.<sup>78</sup> When reading section 22, with section 36 of the *Constitution*, the right to choose an occupation, trade or profession is not limited or cannot be limited to citizens, but rather the practise thereof may be limited and regulated by law for both citizens and foreign nationals.<sup>79</sup> Although other barriers may prevent people from choosing a certain vocation, legal limitations or

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<sup>72</sup> Constitution s 13.

<sup>73</sup> Constitution s 22; Bellace and Ter Haar "Perspectives on Labour and Human Rights" 4.

<sup>74</sup> Currie and De Waal *Bill of Rights Handbook* 468.

<sup>75</sup> *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 10 BCLR 1303 (CC) para 65; Currie and De Waal *Bill of Rights Handbook* 463.

<sup>76</sup> *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 10 BCLR 1303 (CC) para 68.

<sup>77</sup> *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) para 59.

<sup>78</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 657.

<sup>79</sup> *Chundrakumar v MEC for Transport, Kwazulu-Natal* (1671/10) [2012] ZAKZPHC 15 (22 March 2012) para 37.

impediments may only be imposed when it is justified in the broader public interest.<sup>80</sup> Such as in *Rafoneke v Minister of Justice and Correctional Services (Makombe Intervening)*,<sup>81</sup> the Constitutional Court confirmed that protection for the choice of employment as anticipated in section 22 of the *Constitution* is not afforded to foreign nationals.<sup>82</sup>

In terms of the specific obligation to protect the right to work, states are to ensure that everyone has the right to equal access to work and training. The *Employment Equity Act*<sup>83</sup> is supposed to promote fair treatment and equal opportunity in employment through affirmative action and eliminating unfair discrimination.<sup>84</sup> Foreign nationals are excluded from affirmative action measures.<sup>85</sup> According to the report submitted to the CESCR, it was stated that Article 2 of the ICESCR (non-discrimination) applies to all rights in the *Constitution*.<sup>86</sup> According to Ngandwe, while the *Constitution* guarantees equal treatment, regardless of nationality, in practise, to a large extent, migrants are marginalised in relation to what are perceived as national interests.<sup>87</sup>

The *Employment Equity Act* was drafted with the purpose of giving effect to the equality clause in the *Constitution*.<sup>88</sup> According to Kavuro, it is concerning that certain laws and policies restrict socio-economic benefits to vulnerable people who are citizens or permanent residents only.<sup>89</sup>

While the aim of the *Employment Equity Act* is to promote fair treatment and equal opportunity in employment through affirmative action and eliminating

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<sup>80</sup> The case concerned is a leave to appeal against an order dismissing certain aspects of a licensing scheme which prevents medical practitioners from dispensing medicines unless the medical practitioner has been issued with a licence to dispense medicines. The powers of the director-general to prescribe conditions for the issuance of licences, link the dispensing of medicine to certain premises and factors to be considered in an application for a dispensing licence were challenged. *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) paras 1, 60.

<sup>81</sup> *Rafoneke v Minister of Justice and Correctional Services (Makombe Intervening)* 2022 6 SA 27 (CC) para 76.

<sup>82</sup> *Rafoneke v Minister of Justice and Correctional Services (Makombe Intervening)* 2022 6 SA 27 (CC) para 73.

<sup>83</sup> *Employment Equity Act* 55 of 1998.

<sup>84</sup> *Employment Equity Act* 55 of 1998 ss 5 and 15.

<sup>85</sup> CESCR *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa* UN Doc E/C.12/ZAF/1 (2017) para 51.

<sup>86</sup> CESCR *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa* UN Doc E/C.12/ZAF/1 (2017) para 42.

<sup>87</sup> Ngandwe 2013 *PELJ* 432.

<sup>88</sup> Du Toit and Sirkhotte "Human Rights in the Evolution of South African Labour Law" 175.

<sup>89</sup> Kavuro 2015 *LDD* 249.

unfair discrimination, notwithstanding the Act's purpose, it causes a direct interference of the right to work for persons who are not regarded as designated groups.<sup>90</sup> It begs the question whether the provisions of the *Employment Equity Act* and more specifically, whether affirmative action is a violation of the specific state obligation to protect the right to work.

#### 4.2.2 *Specific state obligation to fulfil the right to work*

The ICESCR was adopted in 1966. South Africa's current *Constitution* was finally adopted in 1996. While the *Constitution* is liberal in its provision of socio-economic rights, the right to work has not been included. Was the exclusion of the right to work intentional? While this question falls outside of the scope of this article, it is certainly a point of interest supported by the fact that similar states, such as Botswana have deliberately excluded socio-economic rights with the intention of avoiding the creation of a rights framework that places more demands on the resources of the state.<sup>91</sup> Those in South Africa do not have a right to work, if such a right were in existence, the state would be under immense pressure to create sufficient jobs and be more generous with respect to their social assistance measures in the instance where employment is not available.

In order to meet the specific obligation of fulfilling the right to work. States are required to generate employment opportunities and improve their existing employment opportunities and working conditions.<sup>92</sup> By 2017, South Africa spent more than R100 billion on employment programmes.<sup>93</sup> In 2018, the Youth Employment Service was launched to create 1 million jobs for unemployed youths, however, only 55,361 job opportunities were created.<sup>94</sup>

The unemployment rate in South Africa is remarkably high.<sup>95</sup> According to the *CESCR*, the amendment of the *Skills Development Act*<sup>96</sup> and the

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<sup>90</sup> Designated groups for the application of the Act means "black people, women and people with disabilities". *Employment Equity Act* 55 of 1998 ss 1 and 13(1).

<sup>91</sup> *The Attorney General v Dickson Tapela; The Attorney General v Gift Brendan Mwale* (Court of Appeal) (unreported) case numbers CACGB-096-14 and CACGB-076-15 of 26 August 2015 para 73.

<sup>92</sup> International Commission of Jurists 2018 <https://www.icj.org/wp-content/uploads/2018/08/SouthAfrica-ICJSubmissionCESCR-Advocacy-Non-legal-submission-2018-ENG.pdf> 7.

<sup>93</sup> *CESCR Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa* UN Doc E/C.12/ZAF/1 (2017) para 68.

<sup>94</sup> Gen N 640 in GG 41975 of 12 October 2018; CDE *South Africa's NEETs Crisis* 7.

<sup>95</sup> Strauss *et al Rapid Country Assessment: South Africa* 26.

<sup>96</sup> *Skills Development Act* 97 of 1998.

*Employment Services Act*<sup>97</sup> have allowed for the development of skills, registration and the placement of employees thereby fulfilling some of the state's duty to facilitate job creation of which skilled migrant workers are included.<sup>98</sup> The CESCR has also expressed concerns regarding the high unemployment rate,<sup>99</sup> the South African state must as an imperative secure that more people have access to jobs and better quality jobs.<sup>100</sup> To meet the obligation to fulfil the right to work, South Africa will also have to include the right to work in legislation and implement the right accordingly.

#### 4.2.3 Decent work

Work, in the context of Articles 6, 7 and 8 of the ICESCR must: be decent work, respect fundamental human rights and enable workers to earn a living which is enough to support themselves and their dependents.<sup>101</sup> Section 23(1) of the *Constitution* envisages legislation to give effect to the provisions of the section.<sup>102</sup> One statutory instrument created for this purpose is the *Labour Relations Act*.<sup>103</sup> The *Labour Relations Act* regulates the right to fair labour practices<sup>104</sup> and fulfils the objects of the right to fair labour practices.<sup>105</sup> The *Labour Relations Act* does this by creating legal procedures by which rights can be enforced.<sup>106</sup>

Section 23 of the *Constitution* makes it clear that everyone in South Africa has the right to fair labour practices,<sup>107</sup> any discussion of the right to work must as an imperative, begin with section 23 of the *Constitution*. While section 23 of the *Constitution* is very comprehensive,<sup>108</sup> the term fair labour practises is not defined by the *Constitution* as it is not capable of being

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<sup>97</sup> *Employment Services Act* 4 of 2014.

<sup>98</sup> CESCR *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa* UN Doc E/C.12/ZAF/1 (2017) para 69.

<sup>99</sup> CESCR *Concluding Observations on the Initial Report of South Africa* E/C.12/ZAF/CO/1 (2018) para 28.

<sup>100</sup> CESCR *Concluding Observations on the Initial Report of South Africa* E/C.12/ZAF/CO/1 (2018) para 29.

<sup>101</sup> Gomes "The Right to Work" 233.

<sup>102</sup> *Kylie v Commission for Conciliation Mediation and Arbitration* 2010 7 BLLR 705 (LAC) para 16.

<sup>103</sup> *Labour Relations Act* 66 of 1995; *Chirwa v Transnet Limited* 2008 4 SA 367 (CC) para 106.

<sup>104</sup> *Majola v Cricket South Africa* 2013 12 BLLR 1236 (LC) para 41.

<sup>105</sup> *National Union of Metalworkers of South Africa obo Its Members in the Employ of the Respondent v Transnet SOC Ltd* 2019 2 BLLR 172 (LC) para 148.

<sup>106</sup> *Denel Informatics Staff Association v Denel Informatics (Pty) Ltd* (J1330/97) [1998] ZALC 38 (24 June 1998) para 19.

<sup>107</sup> *Constitution* s 23.

<sup>108</sup> Du Toit and Sirkhotte "Human Rights in the Evolution of South African Labour Law" 173.

defined precisely.<sup>109</sup> Although section 23 of the *Constitution* may be limited, limitations must be reasonable and justifiable.<sup>110</sup>

An interpretation of the word everyone as used in section 23(1) of the *Constitution* applies to employees and employers.<sup>111</sup> Not everyone who works is protected by section 23, for instance: business owners; independent contractors; persons who are self-employed; judges; partners and cabinet ministers.<sup>112</sup> Therefore, "not everyone who works is a worker for the purposes of section 23".<sup>113</sup>

According to the CESCR, while the *Constitution* is progressive concerning economic, social and cultural rights, the *Constitution* has not fully incorporated the right to work as per the ICESCR.<sup>114</sup> Section 22 and 23 of the *Constitution* contains some aspects of the right to work as per the ICESCR.<sup>115</sup> Section 23 of the *Constitution* has not been interpreted to claim the existence of a right to work in South Africa.<sup>116</sup> Section 23 of the *Constitution* may rather be considered as rights at work.<sup>117</sup>

Moreover, work, as understood within the context of the right to work, must be decent work.<sup>118</sup> "The South African Decent Work Country Programme supports initiatives aimed at promoting the decent work agenda."<sup>119</sup> The South African Constitutional Court has held that the "ability of people to earn money and support themselves and their families is an important

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<sup>109</sup> *National Entitled Workers Union v Commission for Conciliation Mediation and Arbitration* (JR 685/02) [2003] ZALC 177 (6 October 2003).

<sup>110</sup> *South African National Defence Union v Minister of Defence* 2007 8 BCLR 863 (CC) para 93.

<sup>111</sup> *Mbatha v University of Zululand* 2014 2 BCLR 123 (CC) para 57; *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 1 SA 390 (CC) para 34.

<sup>112</sup> *Kylie v Commission for Conciliation Mediation and Arbitration* 2008 9 BLLR 870 (LC) para 54.

<sup>113</sup> *Kylie v Commission for Conciliation Mediation and Arbitration* 2008 9 BLLR 870 (LC) para 54.

<sup>114</sup> CESCR *Concluding Observations on the Initial Report of South Africa* E/C.12/ZAF/CO/1 (2018) para 4.

<sup>115</sup> CESCR *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa* UN Doc E/C.12/ZAF/1 (2017) para 66.

<sup>116</sup> Govindjee and Dupper 2011 *Stell LR* 793.

<sup>117</sup> International Commission of Jurists 2018 <https://www.icj.org/wp-content/uploads/2018/08/SouthAfrica-ICJSubmissionCESCR-Advocacy-Non-legal-submission-2018-ENG.pdf> 5; Theron 2014 *ILJ* 1834.

<sup>118</sup> CESCR *General Comment No 18: The Right to Work* UN Doc E/C.12/GC/18 (2006) para 7.

<sup>119</sup> CESCR *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa* UN Doc E/C.12/ZAF/1 (2017) para 72.



component of the right to human dignity".<sup>120</sup> This would imply that although the right to work has not been recognised in legislation, decent work requires that the right to human dignity is respected, promoted and protected at work.<sup>121</sup> This has also been acknowledged by the Department of Labour which stated that decent work is based on the understanding that work is a source of income but more importantly, it is a source of dignity, family stability as well as economic growth.<sup>122</sup>

While human dignity is guaranteed in the *Constitution*, its attainment is limited due to the high unemployment rate;<sup>123</sup> gender inequality;<sup>124</sup> poverty affecting the black African population,<sup>125</sup> discrimination against women and,<sup>126</sup> youth and other vulnerable groups.<sup>127</sup> Migrants are often exploited and despite education and experience, many find work with great difficulty.<sup>128</sup> Furthermore, the International Labour Organisation has also noted that South Africa's thriving informal economy poses a significant threat to the attainment of decent work for both nationals and migrant workers.<sup>129</sup>

#### 4.2.4 Right to gain a living by working: minimum v living wage

The ICESCR further stipulates that the right to work includes "the right of everyone to the opportunity to gain his living by work".<sup>130</sup> Member states must establish a national minimum wage to provide all workers with the

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<sup>120</sup> *South African Informal Traders Forum v City of Johannesburg: South African National Traders Retail Association v City of Johannesburg* 2014 4 SA 371 (CC) para 31.

<sup>121</sup> Constitution s 10.

<sup>122</sup> PMG 2013 <https://pmg.org.za/committee-meeting/15931/>.

<sup>123</sup> The unemployment rate in SA is 35.3 per cent. Stats SA 2022 <http://www.statssa.gov.za/publications/P0211/Media%20release%20QLFS%20Q4%202021.pdf>.

<sup>124</sup> Cohen and Moodley 2012 *PELJ* 335.

<sup>125</sup> ILO 2018 [https://www.ilo.org/wcmsp5/groups/public/---ed\\_mas/---program/documents/genericdocument/wcms\\_674579.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_674579.pdf) 7.

<sup>126</sup> Cohen and Moodley 2012 *PELJ* 335.

<sup>127</sup> ILO 2018 [https://www.ilo.org/wcmsp5/groups/public/---ed\\_mas/---program/documents/genericdocument/wcms\\_674579.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_674579.pdf) 7.

<sup>128</sup> Kalitanyi and Visser 2010 *SAJEMS* 381.

<sup>129</sup> The informal economy often encompasses unregulated work in unsafe working conditions; little or no access to social security; low pay; long working hours; lack of or very little labour inspections; absence of representation rights such as collective bargaining and trade unions and employment relationships which are non-compliant with the labour and social security framework. On the other hand, the informal economy poses certain advantages, such as: the development of the economy and keeping many households above the poverty-line, although there is still no guarantee that the work in these instances will amount to decent work. Rogan and Skinner 2019 <https://www.news.uct.ac.za/article/-2019-09-12-in-defence-of-sas-informal-economy>; ILO 2018 [https://www.ilo.org/wcmsp5/groups/public/---ed\\_mas/---program/documents/genericdocument/wcms\\_674579.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_674579.pdf) 11.

<sup>130</sup> ICESCR Art 6(1).

chance to have a decent living for themselves and their dependents.<sup>131</sup> Even in developed countries, the majority of state parties to the ICESCR have a minimum wage which is far below the requirements as articulated in the ICESCR.<sup>132</sup> The regulations to the *National Minimum Wage Act*,<sup>133</sup> provides that the current minimum wage in South Africa is set at R23.19 per hour,<sup>134</sup> which is also applicable to foreign nationals who are employees.<sup>135</sup> In 2017, in response to South Africa's report to the CESCR, the CESCR noted concerns regarding the fact that the minimum wage of R20 at the time was not sufficient and that the minimum wage is not applicable across all sectors.<sup>136</sup>

While it is early to speculate what the CESCR may find in terms of the new minimum wage in South Africa, already the regulations to the *National Minimum Wage Act* still do not apply the minimum wage across all sectors, most notably, domestic workers and public works programme workers are only entitled to a minimum wage which is the same as the national minimum wage since this year. Generally, employees in South Africa may not work more than 45 hours per week.<sup>137</sup> Calculating the minimum wage with the maximum number of hours, it amounts to a mere R4174.20, far below the estimated decent living wage of R 7043 per person per month.<sup>138</sup>

According to Sarkin and Koenig, to fully recognise the right to work, there must be rights to safety at work.<sup>139</sup> Benefits for death, illness or injury out of and in the course of employment are regulated by the *Compensation for Occupational Injuries and Diseases Act*.<sup>140</sup>

#### 4.2.5 Social support for unemployment

Social assistance programmes in South Africa provide for those who are not expected to work, still do not cover those who are unemployed, save for those who are eligible for negligible grants, further, those who are transitioning between work, the self-employed and those employed

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<sup>131</sup> ICESCR Art 7.

<sup>132</sup> Gomes "The Right to Work" 235.

<sup>133</sup> *National Minimum Wage Act* 9 of 2018.

<sup>134</sup> Reg 1 in GN 76 in GG 44136 of 8 February 2021.

<sup>135</sup> Except for those employees who are employed in the South African National Defence Force, the National Intelligence Agency and the South African Secret Service. *National Minimum Wage Act* 9 of 2018 s 3(1).

<sup>136</sup> CESCR *Concluding Observations on the Initial Report of South Africa* E/C.12/ZAF/CO/1 (2018) para 39.

<sup>137</sup> *Basic Conditions of Employment Act* 75 of 1997 s 9(1)(a).

<sup>138</sup> Studies in Poverty and Inequality Institute 2021 <http://spii.org.za/wp-content/uploads/2022/01/2021-Decent-Standard-of-Living-Colloquium-Report.pdf> 3.

<sup>139</sup> Sarkin and Koenig 2011 *Hum Rts* Q 19.

<sup>140</sup> *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 s 23(1).

informally are not covered by social assistance programmes in South Africa.<sup>141</sup>

While South Africa has social security protection, it is not aligned well with the dynamics of the labour market, most notably, social insurance schemes still operate on a voluntary basis, excluding many workers.<sup>142</sup> In South Africa, social insurance schemes are divided into mandatory and voluntary insurance funds, both are contributory in nature.<sup>143</sup> Mandatory social insurance schemes are regulated through the *Unemployment Insurance Act*<sup>144</sup> and the *Compensation for Occupational Injuries and Diseases Act*.<sup>145</sup>

Qualifying employees are able to claim unemployment and other benefits in terms of the *Unemployment Insurance Act*,<sup>146</sup> and the *Unemployment Insurance Amendment Act*<sup>147</sup> provided that the employee is employed longer than 24 hours per month.<sup>148</sup> The CESCR has noted that in South Africa "coverage of the Unemployment Insurance Fund benefits remains low" and has thus recommended that the government of South Africa expand benefits to all regardless of status.<sup>149</sup>

In accordance with the recommendations of the CESCR,<sup>150</sup> the government of South Africa introduced a basic income grant of R350 per month for each unemployed person between the ages of 18 to 59 in South Africa. This amount falls far short of being considered liveable income support and even far below the food poverty line.<sup>151</sup>

In the wake of the Covid-19 pandemic, it is important for the compliance criteria of the ICESCR to be revived.<sup>152</sup> More specifically, marginalised and disadvantaged individuals and groups, including migrants and unemployed

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<sup>141</sup> ILO 2018 [https://www.ilo.org/wcmsp5/groups/public/---ed\\_mas/---program/documents/genericdocument/wcms\\_674579.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_674579.pdf) 14.

ILO 2018 [https://www.ilo.org/wcmsp5/groups/public/---ed\\_mas/---program/documents/genericdocument/wcms\\_674579.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_674579.pdf) 14.

<sup>143</sup> Govindjee and Van Der Walt *Labour Law in Context* 277.

<sup>144</sup> For "employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful economic and social effects of unemployment". *Unemployment Insurance Act* 63 of 2001 s 2.

<sup>145</sup> *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 s 23(1).

<sup>146</sup> *Unemployment Insurance Act* 63 of 2001 s 3.

<sup>147</sup> *Unemployment Insurance Amendment Act* 10 of 2016.

<sup>148</sup> *Unemployment Insurance Amendment Act* 10 of 2016 s 3(1); Govindjee *Social Protection and Vulnerable Workers* 125.

<sup>149</sup> CESCR *Concluding Observations on the Initial Report of South Africa* E/C.12/ZAF/CO/1 (2018) paras 47(d) and 48(e).

<sup>150</sup> CESCR *Information Received from South Africa on Follow-Up to the Concluding Observations on Its Initial Report* UN Doc E/C.12/ZAF/FCO/1 (2021) para 7.

<sup>151</sup> SAHRC 2021 [https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT\\_CESCR\\_NGS\\_ZAF\\_46640\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT_CESCR_NGS_ZAF_46640_E.pdf) para 4.7.3.

<sup>152</sup> Desierto 2020 <https://www.ejiltalk.org/calibrating-human-rights-and-necessity-in-a-global-public-health-emergency-revive-the-un-ohchrs-icescr-compliance-criteria/>.

persons are considered to be severely affected by the Covid-19 pandemic, South Africa should therefore adopt targeted measures to mitigate against the impact of the pandemic on vulnerable groups.<sup>153</sup>

## 5 Conclusion

As the South African courts has rejected the minimum core obligation, there is no minimum floor for the protection of social, economic and cultural rights. It is clear that while South Africa's legal framework supports the principle of non-discrimination for its citizens, it most certainly does not provide for equal protection of the right to work for all within its territory. Most notably, foreign nationals are excluded from the equal protection of the right to work and may be prevented from working in terms of the *Employment Services Act*. While jurisprudence embraces fair discrimination, the *Promotion of Equality and Prevention of Unfair Discrimination Act* does not prohibit unfair discrimination on the grounds of nationality and this implies that the Act does not provide a remedy for those who may be discriminated against unfairly on the grounds of nationality. Section 22 of the *Constitution* is only extended to citizens, the implication is that foreign nationals do not have equal opportunities with citizens with respect to employment opportunities.

The obligation to respect, protect and fulfil the right to work in South Africa has only been partially satisfied, firstly in the sense that South African law does not provide for the right to work.<sup>154</sup> Sections 22 and 23 of the *Constitution* contains some aspects of the right to work as per the ICESCR<sup>155</sup> but sections 22 and 23 have not been interpreted to claim the existence of the right to work in the South African context.<sup>156</sup> Section 23 of the *Constitution* is, therefore, best described as rights at work rather than containing a right to work.<sup>157</sup> The rights at work as expressed by section 23 of the *Constitution* apply similarly to citizens and foreign nationals, with only a few exceptions.

The minimum wage in South Africa is a far cry from what is considered a liveable or decent living wage. Many in South Africa still suffer from severe

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<sup>153</sup> CESCR Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights UN Doc E/C.12/2020/1 (2020) paras 5 and 15.

<sup>154</sup> Theron 2013 [https://www.upf.edu/documents/3298481/3410076/2013-LLRN\\_Conf\\_Theron.pdf/84f9e81a-17f6-47a7-9de6-173c02c28fe2](https://www.upf.edu/documents/3298481/3410076/2013-LLRN_Conf_Theron.pdf/84f9e81a-17f6-47a7-9de6-173c02c28fe2) 2.

<sup>155</sup> CESCR *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa* UN Doc E/C.12/ZAF/1 (2017) para 66.

<sup>156</sup> Govindjee and Dupper 2011 *Stell LR* 793.

<sup>157</sup> CESCR *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa* UN Doc E/C.12/ZAF/1 (2017) para 66.

poverty and live far below the bread line as a result of insufficient jobs. The government of South Africa must immediately create more jobs or commit to providing income for those who are able to work but cannot due to the unavailability of suitable employment. In the absence of work, social assistance should be adequate to alleviate severe poverty. Sadly, South Africa's social assistance framework is wholly insufficient to provide a decent liveable income. The hesitancy of the South African government to provide decent liveable wages may be rooted in its desire to avoid becoming a total welfare state where its people become totally dependent upon it, but herein lies the irony, if more jobs are created, people will be able to secure a decent living wage for themselves and require less social assistance. The more comprehensive right to work as submitted in this article is as follows: The right to work is defined as the right of all persons in a state to gain an opportunity to work for a decent standard of living; which he or she freely chose or accepted; it is applicable without discrimination of any kind; and in the absence of work opportunities, states should provide social assistance on par or with decent living standards.<sup>158</sup> As a state party to the ICESCR, South Africa has not made satisfactory progress in meeting the state obligations of the ICESCR. To prevent further social ills, South Africa must make haste to create a rights framework which includes the right to work or at the very least, put plans into place to progressively realise the right. Adopting the right to work into law would imply that the State would be required to create jobs and people who are unemployed will have the right to enforce the right to work in instances where work is not available.

## Bibliography

### Literature

Bellace and Ter Haar "Perspectives on Labour and Human Rights"  
Bellace JR and Ter Haar B "Perspectives on Labour and Human Rights" in  
Bellace JR and Ter Haar B (eds) *Research Handbook on Labour, Business  
and Human Rights Law* (Edward Elgar Cheltenham 2019) ch 1

CDE *South Africa's NEETs Crisis*

Centre for Development and Enterprise *South Africa's NEETs Crisis: Why  
We are Failing to Connect Young People to Work* (CDE Johannesburg  
2021)

Chirwa and Chenwi "Direct Protection of Economic, Social and Cultural  
Rights in International Law"

Chirwa DM and Chenwi L "Direct Protection of Economic, Social and  
Cultural Rights in International Law" in Chirwa DM and Chenwi L (eds) *The  
Protection of Economic, Social and Cultural Rights in Africa: International,*

---

<sup>158</sup> ICESCR Art 6(1).

*Regional and National Perspectives* (Cambridge University Press New York 2016) 33-71

Chirwa and Chenwi "Protection of Economic, Social and Cultural Rights in Africa"

Chirwa DM and Chenwi L "The Protection of Economic, Social and Cultural Rights in Africa" in Chirwa DM and Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press New York 2016) 3-30

Cohen and Moodley 2012 *PELJ*

Cohen T and Moodley L "Achieving 'Decent Work' in South Africa?" 2012 *PELJ* 320-344

Currie and De Waal *Bill of Rights Handbook*

Currie I and De Waal J *The Bill of Rights Handbook* 6<sup>th</sup> ed (Juta Cape Town 2013)

Du Toit and Sirkhotte "Human Rights in the Evolution of South African Labour Law"

Du Toit D and Sirkhotte M "Human Rights in the Evolution of South African Labour Law" in Bellace JR and Ter Haar B (eds) *Research Handbook on Labour, Business and Human Rights Law* (Edward Elgar Cheltenham 2019) ch 10

Forere 2011 *AHRLJ*

Forere M "The Relationship between the Right of Access to Education and Work, and Sub-regional Economic Integration in Africa" 2011 *AHRLJ* 588-607

Gomes "The Right to Work"

Gomes VB "The Right to Work and Rights at Work" in Dugard J *et al* (eds) *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Cheltenham 2020) ch 12

Govindjee *Social Protection and Vulnerable Workers*

Govindjee A *Social Protection and Vulnerable Workers in South Africa* in Westerveld M and Olivier M (eds) *Social Security Outside the Realm of the Employment Contract: Informal Work and Employee-like Workers* (Edward Elgar Cheltenham 2019)

Govindjee and Dupper 2011 *Stell LR*

Govindjee A and Dupper O "Constitutional Perspectives on Unemployment Security and a Right to Work in South Africa" 2011 *Stell LR* 775-803

Govindjee and Van Der Walt *Labour Law in Context*

Govindjee A and Van Der Walt A (eds) *Labour Law in Context* 2<sup>nd</sup> ed (Pearson Cape Town 2017)

Ikawa "The ICESCR and the Optional Protocol"

Ikawa D "The International Covenant on Economic, Social and Cultural Rights and the Optional Protocol" in Dugard J *et al* (eds) *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Cheltenham 2020) ch 2

Kalitanyi and Visser 2010 *SAJEMS*

Kalitanyi V and Visser K "African Immigrants in South Africa: Job Takers or Job Creators?" 2010 *SAJEMS* 376-390

Kavuro 2015 *LDD*

Kavuro C "Refugees and Asylum Seekers: Barriers to Accessing South Africa's Labour Market" 2015 *LDD* 232-260

Majiedt 2022 *LDD*

Majiedt S "'Dreams and Aspirations Deferred?' The Constitutional Court's Approach to the Fulfilment of Socio-Economic Rights in the Constitution" 2022 *LDD* 1-31

Mantouvalou *The Right to Work*

Mantouvalou V (ed) *The Right to Work: Legal and Philosophical Perspectives* (Hart Oxford 2015)

Morsink *Universal Declaration of Human Rights*

Morsink J *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (University of Pennsylvania Press Philadelphia 1999)

Mubangizi 2021 *IJDL*

Mubangizi JC "Xenophobia in the Labour Market: A South African Legal and Human Rights Perspective" 2021 *IJDL* 139-156

Ngandwe 2013 *PELJ*

Ngandwe PJ "The Paradox of Migration and the Interests of the Atomistic Nation-States: The Southern African Perspective" 2013 *PELJ* 427-449

PWESCR *ICESCR Handbook*

Programme on Women's Economic, Social and Cultural Rights *International Covenant on Economic, Social and Cultural Rights: A Handbook* (PWESCR New Delhi 2015)

Sarkin and Koenig 2011 *Hum Rts Q*

Sarkin J and Koenig M "Developing the Right to Work: Intersecting and Dialoguing Human Rights and Economic Policy" 2011 *Hum Rts Q* 1-42

Scheinin "Indirect Protection of Economic, Social and Cultural Rights in International Law"

Scheinin M "Indirect Protection of Economic, Social and Cultural Rights in International Law" in Chirwa DM and Chenwi L (eds) *The Protection of*

*Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (Cambridge University Press New York 2016) 72-88

Ssenyonjo 2017 *NILR*

Ssenyonjo M "The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa" 2017 *NILR* 259-289

Strauss *et al Rapid Country Assessment: South Africa*

Strauss I *et al Rapid Country Assessment: South Africa: The Impacts from a COVID-19 Shock to South Africa's Economy and Labour Market* (ILO Geneva 2020)

Theron 2014 *ILJ*

Theron J "Decent Work and the Crisis of Labour Law in South Africa" 2014 *ILJ* 1829-1850

Theron "What is Decent about 'Decent Work'?"

Theron J "What is Decent about 'Decent Work'? An Argument for the Right to Work in South Africa" in Busby N, Brodie D and Zahn R (eds) *The Future Regulation of Work: New Concepts, New Paradigms* (Palgrave Macmillian London 2016) 167-192

UN *Economic, Social and Cultural Rights of Migrants*

United Nations *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation* (UN New York 2014)

UN *Transitional Justice*

United Nations *Transitional Justice and Economic, Social and Cultural Rights* (UN New York 2014)

Vonk and Olivier 2019 *EJSS*

Vonk G and Olivier M "The Fundamental Right of Social Assistance: A Global, a Regional (Europe and Africa) and a National Perspective (Germany, the Netherlands and South Africa)" 2019 *EJSS* 219-240

### **Case law**

*Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC)

*Chirwa v Transnet Limited* 2008 4 SA 367 (CC)

*Chundrakumar v MEC for Transport, Kwazulu-Natal* (1671/10) [2012] ZAKZPHC 15 (22 March 2012)

*Denel Informatics Staff Association v Denel Informatics (Pty) Ltd* (J1330/97) [1998] ZALC 38 (24 June 1998)

*Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2009 1 SA 390 (CC)



*Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC)

*Kylie v Commission for Conciliation Mediation and Arbitration* 2010 7 BLLR 705 (LAC)

*Kylie v Commission for Conciliation Mediation and Arbitration* 2008 9 BLLR 870 (LC)

*Mahlangu v Minister of Labour* 2021 2 SA 54 (CC)

*Majola v Cricket South Africa* 2013 12 BLLR 1236 (LC)

*Mbatha v University of Zululand* 2014 2 BCLR 123 (CC)

*Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC)

*Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC)

*National Entitled Workers Union v Commission for Conciliation Mediation and Arbitration* (JR 685/02) [2003] ZALC 177 (6 October 2003)

*National Union of Metalworkers of South Africa obo Its Members in the Employ of the Respondent v Transnet SOC Ltd* 2019 2 BLLR 172 (LC)

*Rafoneke v Minister of Justice and Correctional Services (Makombe Intervening)* 2022 6 SA 27 (CC)

*South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 10 BCLR 1303 (CC)

*South African Informal Traders Forum v City of Johannesburg: South African National Traders Retail Association v City of Johannesburg* 2014 4 SA 371 (CC)

*South African National Defence Union v Minister of Defence* 2007 8 BCLR 863 (CC)

*The Attorney General v Dickson Tapela; The Attorney General v Gift Brendan Mwale* (Court of Appeal) (unreported) case numbers CACGB-096-14 and CACGB-076-15 of 26 August 2015

## **Legislation**

*Basic Conditions of Employment Act* 75 of 1997

*Compensation for Occupational Injuries and Diseases Act* 130 of 1993

*Constitution of the Republic of South Africa*, 108 of 1996

*Employment Equity Act* 55 of 1998

*Employment Services Act* 4 of 2014

*Labour Relations Act 66 of 1995*

*National Minimum Wage Act 9 of 2018*

*Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*

*Skills Development Act 97 of 1998*

*Unemployment Insurance Act 63 of 2001*

*Unemployment Insurance Amendment Act 10 of 2016*

### **Government publications**

Gen N 640 in GG 41975 of 12 October 2018

GN 76 in GG 44136 of 8 February 2021

### **International instruments**

*CESCR Concluding Observations on the Initial Report of South Africa E/C.12/ZAF/CO/1 (2018)*

*CESCR Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa UN Doc E/C.12/ZAF/1 (2017)*

*CESCR General Comment No 18: The Right to Work UN Doc E/C.12/GC/18 (2006)*

*CESCR General Comment No 3: The Nature of States Parties' Obligations (Art 2, Para 1, of the Covenant) UN Doc E/1991/23 (1990)*

*CESCR Information Received from South Africa on Follow-Up to the Concluding Observations on Its Initial Report UN Doc E/C.12/ZAF/FCO/1 (2021)*

*CESCR Statement on the Coronavirus Disease (COVID-19) Pandemic and Economic, Social and Cultural Rights UN Doc E/C.12/2020/1 (2020)*

*International Covenant of Economic, Social and Cultural Rights (1966)*

*Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (2008)*

*Universal Declaration of Human Rights (1948)*

### **Internet source**

Desierto 2020 <https://www.ejiltalk.org/calibrating-human-rights-and-necessity-in-a-global-public-health-emergency-revive-the-un-ohchrs-icescr-compliance-criteria/>

Desierto D 2020 *Calibrating Human Rights and Necessity in a Global Public Health Emergency: Revive the UN OHCHR's ICESCR Compliance Criteria* <https://www.ejiltalk.org/calibrating-human-rights-and-necessity-in-a-global-public-health-emergency-revive-the-un-ohchrs-icescr-compliance-criteria/> accessed 19 July 2021

ILO 2018 [https://www.ilo.org/wcmsp5/groups/public/---ed\\_mas/---program/documents/genericdocument/wcms\\_674579.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_674579.pdf)  
International Labour Organisation 2018 *Decent Work Country Programme 2018–2023* [https://www.ilo.org/wcmsp5/groups/public/---ed\\_mas/---program/documents/genericdocument/wcms\\_674579.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_mas/---program/documents/genericdocument/wcms_674579.pdf) accessed 26 July 2021

International Commission of Jurists 2018 <https://www.icj.org/wp-content/uploads/2018/08/SouthAfrica-ICJSubmissionCESCR-Advocacy-Non-legal-submission-2018-ENG.pdf>

International Commission of Jurists 2018 *Submission to the Committee on Economic, Social and Cultural Rights in Advance of the Examination of South Africa's Initial Periodic Report under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: Switzerland, 64th Session of the UN Committee on Economic, Social and Cultural Rights* <https://www.icj.org/wp-content/uploads/2018/08/SouthAfrica-ICJSubmissionCESCR-Advocacy-Non-legal-submission-2018-ENG.pdf> accessed 12 December 2021

OHCHR date unknown <https://indicators.ohchr.org/>  
Office of the United Nations High Commissioner for Human Rights date unknown *Status of Ratification Interactive Dashboard* <https://indicators.ohchr.org/> accessed 8 July 2021

PMG 2013 <https://pmg.org.za/committee-meeting/15931/>  
Parliamentary Monitoring Group 2013 *Decent Work; Cooperatives: Department of Labour Involvement in their Support* <https://pmg.org.za/committee-meeting/15931/> accessed 10 October 2019

Rogan and Skinner 2019 <https://www.news.uct.ac.za/article/-2019-09-12-in-defence-of-sas-informal-economy>  
Rogan M and Skinner C 2019 *In Defence of SA's Informal Economy* <https://www.news.uct.ac.za/article/-2019-09-12-in-defence-of-sas-informal-economy> accessed 20 March 2020

SAHRC 2021 [https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT\\_CESCR\\_NGS\\_ZAF\\_46640\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT_CESCR_NGS_ZAF_46640_E.pdf)  
South African Human Rights Commission 2021 *National Human Rights Institution Parallel Report to South Africa's Responses to the Concluding*

*Observations and Recommendations Follow-Up Procedure Issued by the Committee on Economic, Social and Cultural Rights*  
[https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT\\_CESCR\\_NGS\\_ZAF\\_46640\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/ZAF/INT_CESCR_NGS_ZAF_46640_E.pdf) accessed 19 April 2022

Stats SA 2022 <http://www.statssa.gov.za/publications/P0211/Media%20release%20QLFS%20Q4%202021.pdf>

Statistics South Africa 2022 *Quarterly Labour Force Survey (QLFS) – Q4:2021*

<http://www.statssa.gov.za/publications/P0211/Media%20release%20QLFS%20Q4%202021.pdf> accessed 28 April 2022

Stats SA 2023 <https://www.statssa.gov.za/?p=16312#:~:text=South%20Africa's%20unemployment%20rate%20in,the%20fourth%20quarter%20of%202022>

Statistics South Africa 2023 *Beyond Unemployment – Time-Related Underemployment in the SA Labour Market*

<https://www.statssa.gov.za/?p=16312#:~:text=South%20Africa's%20unemployment%20rate%20in,the%20fourth%20quarter%20of%202022>  
 accessed 12 November 2023

Studies in Poverty and Inequality Institute 2021 <http://spii.org.za/wp-content/uploads/2022/01/2021-Decent-Standard-of-Living-Colloquium-Report.pdf>

Studies in Poverty and Inequality Institute 2021 *Decent Standard of Living Colloquium Report 2021* <http://spii.org.za/wp-content/uploads/2022/01/2021-Decent-Standard-of-Living-Colloquium-Report.pdf> accessed 26 April 2022

Theron 2013 [https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf\\_Theron.pdf/84f9e81a-17f6-47a7-9de6-173c02c28fe2](https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_Theron.pdf/84f9e81a-17f6-47a7-9de6-173c02c28fe2)

Theron J 2013 *Decent Work and the Crisis of Labour Law in South Africa*  
[https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf\\_Theron.pdf/84f9e81a-17f6-47a7-9de6-173c02c28fe2](https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_Theron.pdf/84f9e81a-17f6-47a7-9de6-173c02c28fe2) accessed 11 November 2021

## List of Abbreviations

AHRLJ	African Human Rights Law Journal
CDE	Centre for Development and Enterprise
CESCR	United Nations Committee on Economic, Social and Cultural Rights
EJSS	European Journal of Social Security
Hum Rts Q	Human Rights Quarterly
ICESCR	International Covenant on Economic, Social and Cultural Rights

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IJDL	International Journal of Discrimination and the Law
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LDD	Law, Democracy and Development
NILR	Netherlands International Law Review
OHCHR	Office of the United Nations High Commissioner for Human Rights
PELJ	Potchefstroom Electronic Law Journal
PMG	Parliamentary Monitoring Group
PWESCR	Programme on Women's Economic, Social and Cultural Rights
SAHRC	South African Human Rights Commission
SAJEMS	South African Journal of Economic and Management Sciences
Stats SA	Statistics South Africa
Stell LR	Stellenbosch Law Review
UN	United Nations