

# The application of the Mahlangu case on the COIDA and other safety legislation: A legal analysis

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## ABSTRACT

The Compensation for Occupational Injuries and Diseases Act 139 of 1993 (hence COIDA) provides compensation for any disablement caused by an occupational injury or disease that an employee sustains or contracts in the course of employment. This inter alia includes the death of an employee that resulted from an occupational injury or disease. Until recently, domestic workers in South Africa have been excluded from COIDA. In *Mahlangu and Another v Minister of Labor and Others*, the Constitutional Court considered the present-day exclusion of domestic workers in South Africa from social security benefits associated with occupational injuries and diseases, notwithstanding other workers benefitting from comparable social benefits. The article, therefore, presents an overview of how the judgment in the *Mahlangu* case impacts the lives of domestic workers involved in workplace incidents. In light of the judgment, the authors reviewed the current legal framework associated with workplace injury claims and considered how the judgment stands to develop the legal framework and contribute towards the social benefits of domestic workers. Therefore, the judgment's importance must be considered against the background that the judgment confirms and assesses the rights of domestic workers, whereby they, too, must be able to claim compensation in terms of COIDA. The authors also provide further insight into the significance of the invalidity of section 1 (xix) (v) of COIDA and why excluding domestic workers in terms of COIDA cannot be justified. This paper will examine and analyze the impact and relationship of the *Mahlangu* case on legislation.

**Keywords:** COIDA, domestic workers, employers, occupational health and safety; social security

## Introduction

Employees in South Africa have a common law right to a safe working environment and without health risks. This common law right is entrenched in different legislation.<sup>1</sup> The Occupational Health and Safety Act 85 of 1993 (OHSA) and the Mine Health and Safety Act 29 of 1996 (MHSA) are legislated to protect employees from injuries and diseases in the workplace.<sup>2,3</sup>

Governance of occupational health and safety (hence OHS) in South Africa is shared mainly between three government departments, namely the Department of Labor and Employment (hence

DoLE), which administers the OHSA, the Department of Mineral Resources (DMR) administers the MHSA and the Compensation for Occupational Injuries and Diseases Act 139 of 1993 (COIDA) and finally the Department of Health (hence DoH).<sup>4</sup> In terms of OHSA and MHSA, the employer is responsible for providing health and safety in the workplace, which includes the cost of identifying hazards and the mitigation of hazards identified (aim of the OHSA and aim of the MHSA).<sup>2,3</sup> It follows that mitigation of hazards in the workplace is primarily done to protect

employees in the workplace. Mining legislation in South Africa often lagged and is normally only further developed as a consequence of major incidents involving death and workplace injuries.<sup>3</sup> The main feature of the MHSAs is that it allows the employer to bear the primary responsibility for a healthy and safe working environment, including different risk management approaches to address health and safety hazards in the workplace.<sup>4</sup> Since the MHSAs do not specifically contribute any further relevance in the context of the article, an in-depth discussion will not be conducted of the MHSAs.

However, injuries and diseases do occur in the workplace, and a specific compensation system, established in terms of the COIDA, has been created to assist employees affected by injuries and diseases in the workplace.<sup>5</sup> Therefore, employees who sustain injuries on duty (hence IOD) are compensated in terms of COIDA and are classified under broader social insurance in South Africa.<sup>1</sup> The labor laws of South Africa are also evident in terms of IODs. For example, every employee who is employed by a business entity on a contractual basis, whether verbal or written and who receives compensation is covered in terms of COIDA (Section 1 (xix) and Section 80(6) of COIDA).<sup>6</sup> Compensation as a social support system in terms of COIDA can, therefore, be broadly classified as a form of social security in the broader classification of social security.

Social security in South Africa is regulated under section 27 of the Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).<sup>7</sup> A social security system is generally regarded as a safety net to cater to the vulnerable in our society and a social safeguard to brace the economically exposed portion of the population against economic fluctuations and turbulence.<sup>8</sup> Social grants provided by the government can ensure social assistance to the most vulnerable of the population, whereas social insurances provide benefits to workers or employees.<sup>8</sup> The objective of this study is, therefore, to review and provide an overview of current workplace legislation

associated with compensation of injuries and diseases and to interpret the current legal framework in relation to the scope of application of COIDA, as contextualized in *Mahlangu and Another v Minister of Labor and Others* judgment.<sup>9</sup> The authors conclude the study by expressing their legal comments in light of the legislation and case law currently in South Africa.

### Legislative interpretation: The Constitution

To understand the larger concept of social security, however, one must consider the difference between social security, social protection, and social assistance. Social security, as defined by the *White Paper for Social Welfare, 1997*, addresses the developmental aspects of social security that form part of a safety net, including contributory forms of social insurance and social assistance funds received by the public.<sup>10,11</sup> Social protection encompasses the welfare functions of the government as well as the developmental strategies and programs offered by the government to provide the minimum acceptable standards for all South African citizens. It follows that the purpose thereof is emancipatory. Social assistance is government-funded and is also termed as 'social grants'. These social grants offered by the government are regarded as a safety net for the survival of people in the event of incapacity or the inability to work and earn remuneration.<sup>11</sup>

The Constitution states in section 27(c):

"Everyone has the right to have access to (c) social security, including if they are unable to support themselves and their dependents, appropriate social assistance."<sup>7</sup>

This obligates the government to provide a clear plan of action to achieve the progressive realization of social security through measures such as legislation within the available resources.<sup>7</sup> The Constitutional Court in the case of *Government of the Republic of South Africa and Others v Grootboom and Others* (here forth the Grootboom-case) and *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* stated that the socio-

economic rights specific to social security must be restituted.<sup>12,13</sup> The discretion is left to the government unless it is tested in court. It was further stated in the Grootboom-case that those not equipped financially or educationally to apply for social security and to contest the exclusion from the social security system.<sup>10</sup>

Section 23 of the Constitution provides for socio-economic rights and includes the rights associated with labor relations matters in South Africa.<sup>7,12</sup> These specific rights deal with the right to fair labor practices, the right to form, join, and act together in trade unions, and the right to strike, which are directed to regulate the relationship between employers and employees.<sup>14</sup>

### **The interrelationship between equality and socio-economic rights**

Similarly, section 7(1) of the Constitution contains the fundamental values of South Africa, including the attainment of equality and the advancement of human rights, including socio-economic rights.<sup>7</sup> Equality is seen as the foundational value of the Constitution and must form the basis of the interpretation of all rights in Chapter 2 of the Constitution.<sup>15</sup> Section 9 of the Constitution provides that "(1) everyone is equal before the law and has the right to equal protection and benefit of the law."<sup>7</sup> Section 9(2) of the Constitution provides for the relationship of equal rights and freedoms to all rights as enshrined in the Constitution.<sup>7</sup> Liebenberg and Goldblatt argue that this is substantive equality and requires dismantling structural inequality. It follows that socio-economic rights must, therefore, also be implemented to prevent socio-economic discrimination against individuals.<sup>15</sup>

In light of the necessitated advancement of these socio-economic rights, the Constitutional Court focuses on impact, context, purpose and values to determine unfair discrimination. Therefore, the awareness of socio-economic deprivations should consider the groups' position and individuals who suffered past patterns of disadvantage and prevent unfair discrimination. To further determine whether the right is unfair, the effect of

the conduct that constitutes discrimination and omissions of the rights or interests of the members and human dignity should be considered. Hereto, our courts have previously alluded to Chaskalson's extra-curial references to human dignity in that dignity must also be understood as the implied respect for a person's autonomy and the right not to be devalued or degraded as a human being (para 65).<sup>16</sup> It follows that the Court must, therefore, also include the consideration of the discrimination on socio-economic grounds and an analysis of the extent to which the discrimination prejudices the socio-economic disadvantaged and marginalized affected groups.<sup>15</sup>

Section 9(3) of the Constitution states that "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds such as race, gender, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth."<sup>7</sup> Therefore, section 9(3) could be used by claimants to underpin and improve their position, which is relative to a better social and economic position. If such a right to benefits is incorporated into socio-economic rights (social security), the equality and socio-economic rights claims will be reinforced.<sup>15</sup> The section 9(3) right includes 'social origin', which may apply to claimants who may define themselves based on their disadvantaged class position.<sup>7</sup>

The above discussion provides an analysis of the socio-economic rights of social security and equality as contained in the Constitution, and further consideration must also be applied in the context of the current legislative framework.

### **Legislative framework**

#### **Occupational Health and Safety Act 85 of 1993**

Companies use OHS to create a sound working environment that is healthy and safe for their employees and minimizes the risk of accidents and injuries. It should be noted that this obligation to provide a healthy and safe environment is the responsibility of the company's management and

the employees.<sup>17</sup>

Employee, according to section 1 of OHSA, includes a person employed by or who performs work for an employer, performs the functions and direction of the employer or any other person, and in return receives or is entitled to any remuneration.<sup>2</sup> The description of the term "employee" does not distinguish between different employees; therefore, it can be interpreted that a domestic worker is included in this definition.<sup>2</sup>

This interpretation is consistent with the Republic of South Africa's obligation as a signatory to the Domestic Workers Convention, 2011 (No. 189), in which article 13 of the Convention confirms that: *"Every domestic worker has the right to a safe and healthy working environment. Each Member shall take, in accordance with national laws, regulations and practice, effective measures, with due regard for the specific characteristics of domestic work, to ensure the occupational safety and health of domestic workers."* (Article 13.1)<sup>18</sup>

It therefore follows that the employer is *inter alia* responsible for employees' overall health and safety, including domestic workers.<sup>2</sup> This means that the employer of a private household must also provide a healthy and safe environment to domestic workers in order to fulfill the provisions determined by statute.<sup>2</sup> In return, it is also the employee's responsibility, more specifically domestic workers, to adhere to section 14 of the OHSA.<sup>2</sup> The following functions are directly applicable to employees and, therefore, also relevant to a domestic worker:

- When at work, take reasonable care and operate safely as well as of any other person who may be affected by the employee's act or omissions (section 8);<sup>2</sup>
- When at work, together with his/her employer, adhere to the requirements of the OHSA and make sure that all the objectives of the OHSA are achieved and promoted (section 8);<sup>2</sup>
- Shall whilst at work, carry out any lawful order given to him/her and obey all the rules and procedures that are laid down by the OHSA

and his/her employer or by a person authorized by his/her employer, which will be in the interest of health and safety (section 8);<sup>2</sup>

- If and when a situation endangering the health or safety of the employee or domestic worker comes to his/her attention, the employee or domestic worker must report the situation to his/her employer (section 8).<sup>2</sup>
- If the employee or domestic worker is involved in an incident or serious illness that may affect his/her health, he/she must report the incident immediately. (section 24(4)).<sup>2</sup>

Human, social and economic costs of occupational accidents, injuries, and diseases are a cause of concern for all parties.<sup>19</sup> Employers must introduce, prioritize, and implement measures and strategies to prevent, control, reduce, or eliminate occupational hazards and risks.<sup>19</sup> However, notwithstanding the implementation of these improvements, measures, and strategies, occupational accidents and diseases still occur that frequently negatively and indirectly discriminate against women. Burton states that "Women's safety and health problems are frequently ignored or not accurately reflected in research and data collection".<sup>20</sup> Hence, the importance of this article about the Mahlangu case, which also indirectly amplifies women's safety and not only those of domestic workers. It should be noted that statistics reveal that mainly women are employed as domestic workers. However, it is not limited to only women.<sup>21</sup> It follows that the above functions and responsibilities ensure that both the employer and the employee are aware of and understand their responsibilities to protect women's safety in the workplace.

#### **Labor Relations Act 66 of 1995**

Every worker or domestic worker's right to a safe and healthy working environment can, however, not be implemented in isolation and must be applied in context with the support of the employer; therefore, a proper workplace relationship must be developed: "... in consultation with the [most] representative organizations of employers and workers and,

where they exist, with organizations representative of domestic workers and those representative of employers of domestic workers.” (Article 13.2)<sup>18</sup>

Important in the context of this article are amendments that were made from the original 1956 LRA, which include promoting employee participation in the decision-making process and, therefore, establishing *inter alia* workplace forums.<sup>22</sup> The LRA of 1995 provides in section 84(5) for workplace forums (committees of employees who the employees in the workplace elect), which play an imperative role in health and safety-related issues and problems in the workplace.<sup>23</sup>

Section 84 is one provision of the LRA of 1995 that seeks to give effect to employee participation in the decision-making process.<sup>23</sup> Section 84(5) stipulates that "Subject to any applicable occupational health and safety legislation, a representative trade union and an employer may agree—

- (a) the employer must consult with the workplace forum with a view to initiating, developing, promoting, monitoring, and reviewing measures to ensure health and safety at work;
- (b) That a meeting between the workplace forum and the employer constitutes a meeting of a health and safety committee required to be established in the workplace by that legislation; and
- (c) That one or more members of the workplace forum are health and safety representatives for that legislation."<sup>23</sup>

Evident from the above multilateral relationship, the employee-employer interface has always been regarded as essential to regulate and enforce occupational health and safety in the workplace. The relationship is however not only regulated from a statutory perspective but also in terms of contractual law which includes service contracts negotiated between an employer and employee. The contractual interface must therefore also be considered from the perspective of domestic workers; whereby a significant portion of the employees in this group often face an array of

contractual challenges that leave them vulnerable in terms of social security.

In this respect, domestic workers are often classified into three groups:

1. Those employed by the employer under a verbal or written contract, their social security investments are normally deposited by the employer.<sup>24</sup>
2. Those who are employed in an agency or a company and provide part-time service at home under the responsibility of this company. Their investments are generally made by the agency they are affiliated with.<sup>24</sup>
3. Those who are employed on a part-time basis and hold multiple employment obligations, without being affiliated with any institution.<sup>24</sup>

These matters form the basis of the safety-specific issues that may be discussed between the employer and employees. Based on the discussion, it is evident that the LRA can't be read in isolation but rather in conjunction with other OHS legislation that includes the COIDA. The nature of compensation is a perfect reference to the provision of social security, as discussed previously.

### **Compensation for Occupational Injuries and Diseases Act 139 of 1993**

COIDA provides a compensation fund, and the Compensation Commissioner is appointed to administer the Compensation Fund and approve/refuse claims from employees.<sup>6</sup> To minimize expenses and legal costs, compensation is paid to an employee who sustains an occupational injury or disease. The compensation is paid directly from the Compensation Fund and not by the employer.<sup>6</sup> In this instance, COIDA is, however, only applicable to:

- Injuries obtained by an employee during an accident at the workplace refer to accidents during the course and scope of the employee's employment.<sup>6</sup>
- Diseases caused during the course and scope of employment are called occupational diseases.<sup>6</sup>
- An employee's dependants (if the employee died from an occupational accident or

disease).<sup>25</sup>

According to the current COIDA provisions, the following employees do not benefit/are excluded from claiming compensation for the Compensation Fund:

- Domestic employees working in private households,<sup>6</sup>
- Member of the South African National Defense Force and South African Police Service (their employees are covered by their compensation funds),<sup>6</sup>
- An employer in his/her own right, who contracts to carry out the work themselves and who is not under the control and supervision of an employer,<sup>6</sup> and
- Employees who work outside of South Africa for periods longer than 12 months at a time unless special agreements are made with the Compensation Commissioner (section 1 (xix)).<sup>6</sup>

COIDA also distinguishes between compensation payments and the categories related to them. These payment categories include:

- Compensation for temporary disability; and
- Permanent disability.

Compensation for temporary disability is when the employee's health improves and must return to work to perform the same occupation. Only a medical doctor can determine whether an employee should be booked off from work.<sup>6</sup> It should be considered that compensation will only be paid if the employee is booked off work for at least three (3) days.<sup>6</sup> However, if the employee is booked off for more than three (3) days, the employee will receive compensation, which also covers the first three (3) days. With regards to temporary disability, compensation may be paid either in total or partial (section 22).<sup>6</sup>

However, when an employee is permanently disabled, the employee will never fully recover from the occupational injury or disease.<sup>6</sup> A medical doctor will compile a medical report of the related disability sustained by the employee and file the report with the Compensation Commissioner (section 22).<sup>6</sup> Together with a panel

of doctors, the Compensation Commissioner determines the degree of permanent disability, which will determine the compensation to be paid. In receiving compensation with permanent disability, it may be paid to the employee either as a monthly pension or as a lump sum (section 22).<sup>6</sup> Hereto, compensation may be claimed by the widow/widower or the dependants of the employee if the employee died as a result of an occupational accident or disease.<sup>6</sup>

If an employee has medical expenses, the Compensation Fund will pay the medical expenses for a maximum period of two (2) years from the accident date (section 72).<sup>6</sup> It should be considered that if an employee is injured, dies or contracts an occupational disease due to the negligence of the employer, or there is any defect in the machinery or equipment provided to the employee, an additional compensation for permanent or temporary disablement may be claimed (section 72).<sup>6</sup>

As deduced from the above legislative framework applicable to employers and employees, it is evident that the employer and employee have a statutory duty to provide a healthy and safe environment. The subsequent paragraph will now focus on litigation to remedy any prejudice associated with social security rights and how South African courts interpret the legislation.

### **Understanding the notion of litigation**

From a general perspective, litigation typically refers to the action between two opposing parties to enforce or defend a legal right in the interest of one of the parties. The judge may determine the final resolution in terms of litigation settled in court. The litigation includes the action during a case and the actions that need to be taken before and after the lawsuit has been concluded to enforce the legal right - social security.<sup>25,26</sup>

To enforce the rights contained in Chapter 2 of the Constitution (the Bill of Rights) and to fulfill the specific right in Section 7 of the Constitution, court cases are often used to seek and advance the related constitutional right, which includes social security. Different individuals may bring litigious

action with a specific problem or activist seeking to hold the government accountable for social security obligations.<sup>27</sup>

The government is entrusted with the authority to exercise control over its national resources regarding social security and, therefore, must justify its delegated power exercised and be held accountable for the resources expended in accordance with the budget and approvals by parliament.<sup>27</sup> This mandate extends further with governments' responsibility, as implementing agents, to realize the right to social security. It follows that the government holds power on behalf of its citizens to respect, protect, promote, and fulfill social security rights, and hence, it needs to realize these rights. However, in the absence of the power being realized, the courts are geared to adjudicate any misuse of powers and the consequent enforcement of legislation on an ongoing basis.<sup>27</sup> It follows that litigation can, therefore, contribute towards holding the government accountable with respect to the discrimination that exists and its implementation.<sup>27</sup> According to Brand, the courts can protect socio-economic rights through their judicial powers when interpreting legislation and the development of common law rules and by adjudicating constitutional and other challenges to state measures promulgated to advance socio-economic rights.<sup>28</sup> To stipulate the responsibility to hold legislative commitments, the article will focus on the constitutional judgments of *Soobramoney v Minister of Health, Grootboom-case*, *Minister of Health and Others v Treatment Action Campaign and Others* and the *Khosa-case*.<sup>12,13,29,30</sup>

In terms of the *Soobramoney* case, which involved the application for a court order that directs the government hospital to provide *Soobramoney* with the ongoing treatment of dialysis and to interdict the Minister of Health of KwaZulu-Natal from the refusal to admit *Soobramoney* admission to the renal unit.<sup>29</sup> In the Constitutional Court judgment, the Constitutional Court held that *Soobramoney* could not succeed in his claim, and

the denial of his treatment did not breach the socio-economic rights of section 27(1), which guarantee access to health care services and section 27(3) which guarantees emergency medical treatment.<sup>29</sup> However, this case did not provide guidelines for interpreting socio-economic rights.<sup>14</sup>

The remainder of the paper will outline the social responsibility of the government to uphold the legislative commitments created in terms of the Constitution, as well as the interpretation thereof in terms of the *Mahlangu* case. The discussion of the government's responsibility to uphold the right to social security serves as the basis for the decision made by the Constitutional Court.

### **The responsibility of the government to keep to legislative commitments**

The subsequent three cases provide more certainty in interpreting and applying socio-economic rights. In the *Grootboom* case, a group of citizens, including adults and children, were evicted from their informal dwellings on private land for which low-cost housing was planned. This left the citizens homeless. The citizens applied for an order that redirected the municipality to provide the citizens with temporary shelter, adequate basic nutrition, health care, and other social services.<sup>12</sup> Contrary to the *Soobramoney* case,<sup>29</sup> the Constitutional Court held that the government failed to meet the basic obligations that are placed by section 26 of the Constitution and that the government's housing program was inconsistent with the obligation confirmed by section 26(1) of the Constitution which states that everyone has the right to have access to adequate housing.<sup>14</sup>

The Constitutional Courts explicitly stated in para 23-24:

"...There can be no doubt that human dignity, equality and freedom, the foundational values of our society, are denied those who have no food, clothing, or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realization of these rights is also key to the

advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential... Socio-economic rights must all be read together in the setting of the Constitution as a whole. The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. Their interconnectedness needs to be considered in interpreting the socio-economic rights, and in particular, in determining whether the state has met its obligations in terms of them."<sup>12</sup> The Grootboom case, therefore, confirms the government's responsibility in terms of socio-economic rights and the citizens' rights to it.

Another example of successful litigation to enforce socio-economic obligations in the context of constitutional commitments is the Treatment Action Campaign case.<sup>30</sup> In the Treatment Action Campaign (TAC) case, the TAC (a non-governmental organization) applied to force the government to provide anti-retroviral drugs under the public health care system. The TAC demanded that the drug Nevirapine, which may reduce the HIV transmission from mothers to babies by half, be freely distributed to women who are infected by HIV.<sup>30</sup> The Constitutional Court held that the government's policy and measures that are available to prevent the transmission from a mother to a child do not comply with section 27(1), which states everyone has the right to access health care services and section 27 (2) which states that the government must take all reasonable legislative and other measures which are available within its resources to progressively realize the right in terms of the Constitution.<sup>14,30</sup>

In the Khosa-case, legislation excluded permanent residents and their children from access to social assistance.<sup>13</sup> This case was the first to explore the connection between equality and socio-economic rights.<sup>15</sup> The Constitutional Court stated that the legislation is inconsistent with section 27(1)(c), which provides the right to have access to social security, which includes the fact that if the residents cannot support themselves and their

dependents, to appropriate social assistance.<sup>14</sup> The case further illustrated that where the government provides social benefits, the state can be forced to extend the social assistance grants to exclude disadvantaged groups. In the judgment, the Court stated that equality was "implicit" and that the word "everyone" in the social security right meant that the government could not result in the exclusion of any group.<sup>15</sup> The Court stated that "Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance" (para 42).<sup>13</sup>

When a disadvantaged group is deprived of access to basic social or economic resources as determined in section 26 and section 27 of the Constitution, as well as when the deprivation is severe, the Courts should interpret the justifications from the government.<sup>15</sup> This scrutiny was applied in terms of the Khosa-case<sup>13</sup>, where the complainants' groups were denied access to social grants with the effect that these complainants were forced into dependence on their community, which took into consideration the state's policy and budgetary justifications.<sup>15</sup>

As seen in the discussion of the above cases, it is evident that the judiciary has played an important role in enforcing the government's constitutional and legislative commitments. In return, the Court also considered where the government demonstrated that it did not have adequate resources to supply everyone's basic needs. In these circumstances where the government provides the necessary evidence to indicate that the government can't provide the basic needs, the Courts will then prioritize the urgent needs of those claimants who are disadvantaged or vulnerable.

### **The Mahlangu case: The facts**

Domestic workers in South Africa are seen as unsung heroines, an influential group of women (para 1).<sup>9</sup> The Gender Commission, as seen in the Domestic Workers Convention, emphasized that:

"Domestic work continues to be undervalued and invisible and is mainly carried out by women and girls, many of whom are migrants or members of



disadvantaged communities and who are particularly vulnerable to discrimination in respect of conditions of employment and of work, and to other abuses of human rights.”<sup>18</sup>

Ms. Mahlangu was a domestic worker employed in a private household. On the 31st of March 2012, Ms. Mahlangu drowned during the course of employment in her employer's swimming pool while executing her duties as a domestic worker. Ms. Mahlangu's employer was present during the drowning but did not hear any sounds of struggle when Ms. Mahlangu drowned. It is further alleged that Ms. Mahlangu, who was partially blind, could not swim, which resulted in her drowning. Ms. Mahlangu's daughter, who was financially dependent on her mother, approached the DoLE to enquire about compensation for her mother's death. She was, however, informed that she could not claim compensation under COIDA nor the unemployment insurance benefits for her mother's loss, which is normally covered by COIDA (para 7 and 8).<sup>9</sup>

Before the judgement of the Mahlangu case, domestic workers in South Africa were excluded from receiving social security and benefits from COIDA. Since COIDA partially contributes to South Africa's social security system (para 3),<sup>9</sup> this is regarded as discrimination against domestic workers.<sup>31</sup>

The matter of *Mahlangu v the Minister of Labor* was heard in the Constitutional Court of South Africa, where the legal question focused on why and how the South African government can justify the exclusion of domestic workers from social security benefits in terms of an occupational health and safety disease or injury obtained during the course of the employee's employment. The purported discrimination is set out in terms of COIDA based on the exclusion of domestic workers.<sup>31</sup>

The Constitutional Court found that the wording of section 1(xix) (v) of COIDA is unconstitutional due to the exclusion of domestic workers from the protection under COIDA.<sup>9</sup> The Constitutional Court also stipulated that the order of invalidity of

COIDA should take effect immediately and should be applied retrospectively from the 27th of April 1994.<sup>9</sup> The Constitutional Court relied on the racial inequality and discrimination of domestic workers and the extent of the financial contribution and support that these domestic workers make to their families and extended families.<sup>31</sup>

#### Authors' view

The development of social security rights litigation has the potential to grow awareness and develop socio-economic rights; however, the authors are doubtful as to whether litigation has the potential, as a solitary strategy, to hold the government accountable for upholding social security rights, not only for individual citizens but also for the population at large. Hence, the obligation associated with social security rights may be more effectively pursued through broader social reform strategies. To understand the conditions - legal, political, and social - litigation may advance the right to social security generally, as well as for disadvantaged groups as seen above (domestic workers). Still, it is also from a social security reform and activism perspective.

The broader importance of social security reform and activism is explicitly advocated in the context of domestic workers, as seen in the Domestic Workers Convention, 2011 (No. 189),<sup>18</sup> South Africa consequently ratified on the 20<sup>th</sup> of June 2013. Hereto, by means of ratification of the Domestic Workers Convention, 2011, the Republic of South Africa must embark on broader social security reform and activism in terms of domestic workers. In lieu of the aforementioned Convention, South Africa must ensure that national laws and regulations are implemented to provide domestic workers to enjoy conditions equivalent to those of other workers in terms of social security protection (Article 14).<sup>18</sup>

Similarly, COIDA, as seen as a measure to interpret social security in South Africa, must be seen through the prism of the Bill of Rights (enshrined in Chapter 2 of the Constitution) with the values of dignity, equality, and freedom.<sup>7</sup> If

COIDA is not interpreted through the prism of the Constitution, it will not promote the objectives of the Constitution. As to the question of whether COIDA must promote social security, the authors also considered that "Section 35(1) of the Compensation Act is therefore logically and rationally connected to the legitimate purpose of the Compensation Act, namely a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment." (para 9).<sup>32</sup> Therefore, it can be interpreted that the aim of COIDA is to provide social assistance even to dependants where the breadwinner died.

More importantly, the authors also considered that the Bill of Rights refers to "everyone" when interpreting the Bill of Rights as it applies to everyone. This means that domestic workers are included in the term "everyone", and the fact seen in the Jooste-case that COIDA should be interpreted within the scope of the Bill of Rights.<sup>32</sup>

Section 9 of the Constitution makes it peremptory for both racial and gender equality to be advanced and promoted.<sup>7</sup> Therefore, there must be no differentiation between "employees" in terms of COIDA and the exclusion of domestic workers as employees since it constitutes discrimination and the unequal treatment of domestic workers.

It should be considered if the differential treatment between employees and domestic workers constitutes rational government purpose. When interpreting, section 9(1) of the Constitution states that everyone is equal and has equal rights to protection and benefits of the law.<sup>7</sup> This means the domestic workers fall under the ambit of everyone and therefore also to the benefits of COIDA. Section 9(3) of the Constitution states that the government may not unfairly discriminate directly or indirectly against anyone, including gender, race, or sex.<sup>7</sup> Because black women are predominately seen as domestic workers (para 72),<sup>9</sup> there is indirect discrimination based on these facts. Considering the facts mentioned above and the discussion, it can be interpreted that the

Constitutional Court, in deciding the case of Mahlangu, considered all the elements and provisions as determined by the Constitution.<sup>9</sup> Therefore, the declaration to declare section 1(xix) (v) of COIDA unconstitutional was correctly interpreted and applied.<sup>9</sup>

However, the authors are reluctant to provide an opinion based on the fact that the order was declared retrospective from the 27th of April 1994, which may cause other problems. Not only will the retrospectivity potentially create cost implications, but it also means that affected legislation should be amended, which is time-consuming and begs the question of whether it is reasonably justifiable and realistically achievable.

### Conclusion

It should be noted that the OHS Act and the MSHA are important statutory resources for employers and employees alike in providing a safe and healthy environment.<sup>2,3</sup> In terms of various previous important judgments of the Constitutional Court, specific consideration and guidance are provided on the interpretation of rights of equality or related socio-economic rights. Applying the Constitutional cases discussed in this article advances the application of socio-economic rights as contained in the Constitution. From a judicial perspective, South Africa interprets socio-economic rights, which influence economic development equally. Therefore, the right to social security impacts the different dimensions of the requisite needs of society. Consequently, the Constitution also requires that the right must be progressively realized.<sup>7</sup>

The courts are similarly required to guard against the inherent perils and defects contained in the statute, noting the states' significant resource constraints. Further temptation be guarded against to seek refuge and inadvertently create different categories of vulnerability of claimants to attain specific realization of the rights. Where the government has a social benefit program or legislation such as COIDA, which unfairly discriminates against or excludes a particular group (such as domestic workers) on prohibited

grounds, litigation may be initiated to secure adequate redress where equality and socio-economic rights are involved.

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