

EXTENDING COVERAGE OF THE UNEMPLOYMENT INSURANCE-SYSTEM IN SOUTH AFRICA*

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1 Introduction

The Unemployment Insurance Act 63 of 2001 (“UIA”)¹ and Unemployment Insurance Contributions Act 4 of 2002 (“UICA”)² are applicable to all employers and employees except for those specifically excluded. Unless specifically excluded, participation in the unemployment insurance scheme is compulsory.³ The UIA scope of coverage is narrow as it continues to exclude the atypically employed (particularly independent contractors, so-called dependent contractors and those who are self-employed or informally employed), public servants in the national and provincial spheres of government, learners, and certain categories of migrant workers from its purview.⁴ Given the vulnerable position of these groups, it is arguable that South Africa should, as a matter of principle, broaden the scope of coverage to include them. Furthermore, these exclusions may be susceptible to constitutional challenge in the context of the right to access to social security.

* This is the first in a series of three articles which addresses areas of potentially required reform of the Unemployment Insurance Fund (UIF) in order to ensure an improved unemployment insurance mechanism, and to affect meaningful alignment with the other available social security interventions. The second contribution (forthcoming in the *Stellenbosch Law Review* 2011 (1)) will address the concept of ‘activation’ in the context of UIF reform, while the final contribution in the series will examine selected issues impacting upon the current legal framework (including contractual interfacing, dispute resolution and adjudication) (forthcoming in the *Stellenbosch Law Review* 2011 (2)). This contribution is based on work done by the authors for the Unemployment Insurance Fund of South Africa in relation to the reform of the South African unemployment insurance system. The authors wish to acknowledge the research assistance provided by Adriaan Wolvaardt, doctoral candidate and researcher of the International Institute for Social Law and Policy (IISLP).

¹ The Act provides for unemployment, sickness, adoption, maternity and survivor benefits in respect of workers and their dependants.

² Employers and employees contribute equally to the Unemployment Insurance Fund (“UIF”).

³ Van Kerken & Olivier “Unemployment Insurance” in Olivier, Smit & Kalula (eds) *Social Security: A Legal Analysis* (2003) 415-435.

⁴ Van Kerken & Olivier “Unemployment Insurance” in *Social Security: A Legal Analysis* 436-437.

While the UIA has extended its scope of coverage over time, much more could be done to reduce exclusion and marginalisation in the unemployment insurance system. The UIA, unlike its predecessor, widened its scope of coverage to include domestic workers, seasonal workers and so-called high-income earners. The inclusion⁵ of domestic workers⁶ and seasonal workers,⁷ despite the scepticism expressed prior to their inclusion, appears to be progressing satisfactorily.⁸ Apart from extending the right to unemployment benefits to domestic workers generally, the 2003 amendments to the UIA⁹ provided for specific modalities of benefit extension, namely to a domestic worker whose contract of employment is terminated by the death of his or her employer,¹⁰ and also to domestic workers who are employed by more than one employer.¹¹ This is an expression of the rationale that the provision of benefits in the case of partial unemployment provides the affected person with an opportunity to remain in the labour market. Following the inclusion, in principle, of seasonal workers in the UIA in 2001, it was found not necessary to provide specific modalities for their inclusion (as was the case with domestic workers). This means that seasonal workers are covered by the UIA on the same basis as other employees. As regards high-income earners, this category of employees was excluded from the scope of coverage of the previous UIA since it was regarded as a group which was unlikely to suffer from unemployment and its effects. The current UIA removes that exclusion, thereby ensuring that more persons have financial protection when they become unemployed and, importantly, strengthening the financial base of the UIF.¹² Finally, it is important to note that the Minister of Labour has been granted the power to

⁵ S 3(2) of the UIA, when it entered into force, provided that the Act “will only apply to domestic and seasonal workers and their employers 12 months after this Act takes effect” Arrangements were made for these two categories to be included, with the effect that since the adoption of the Unemployment Insurance Amendment Act 32 of 2003 domestic and seasonal workers are now covered by the UIA

⁶ A “domestic worker”, as defined by s 1 of the UIA and s 1 of the UICA, is:
“an employee who performs domestic work in the home of his or her employer, and includes a gardener, person employed by a household as a driver of a motor vehicle, and person who takes care of any person in that home, but does not include farm worker”

⁷ Prior to the Unemployment Insurance Amendment Act, s 1 of the UIA and s 1 of the UICA defined a “seasonal worker” to mean:
“any person who is employed by an employer for an aggregate period of at least three months over a 12 months period with the same employer and whose work is interrupted by reason of a seasonal variation in the availability of work”

This definition has been deleted by s 1 of the Unemployment Insurance Amendment Act The rationale behind this deletion is, as the *Memorandum on the Object of the Unemployment Insurance Amendment Bill 35 of 2003* states, “to treat seasonal workers the same as other employees” See para 1 2(a) of RSA *Unemployment Insurance Amendment Bill B35 of 2003* in GG 25234 of 2003-07-22

⁸ For example, the Department of Labour reported in 2006 (three years after the inclusion of domestic workers under the ambit of the UIA) that 657 000 domestic employers had been captured on the UIF database and that more than 500 000 domestic workers had been registered Minister Mdladlana viewed this as “a clear vindication of the Department’s resolve to extend coverage to the most vulnerable sector” See Department of Labour “Even More Domestic Workers Benefit from UIF” (2006-08-10) Press Release para 9 <http://www.labour.gov.za/media-desk/media-statements/2006/even-more-domestic-workers-benefit-from-uif> (accessed 12-11-2010)

⁹ Unemployment Insurance Amendment Act

¹⁰ S 16(1)(a)(iv) of the UIA

¹¹ S 12(1A) of the UIA

¹² Van Kerken & Olivier “Unemployment Insurance” in *Social Security: A Legal Analysis* 435

deem any category of persons, by notice in the Government Gazette, to be contributors for purposes of the whole or any part of the UIA.¹³

Despite the abovementioned inclusions, the South African unemployment insurance laws still exclude certain groups and categories of persons from their unemployment protection coverage. Widening the net of the current system to include the excluded categories will be the focus of this paper. Before considering the broadening of the social insurance system in more detail, part 2 of the article will contain a short overview of varying unemployment insurance funds and systems from countries around the world. It focuses mainly on countries in the OECD, but also discusses some aspects of unemployment insurance in South America, Eastern Europe and Central Asia, and briefly reflects on the possible inclusion of the informal sector and self-employed. It concentrates on a variety of aspects concerning the design of the systems discussed, including whether they cover members of the informal sector and those that are self-employed, how they are integrated with other parts of the social security system, whether they include social assistance, and whether the payments are dependent on searching for employment or training.

Part 3 of the article will contain a detailed discussion of certain currently excluded categories. It considers principled arguments for the inclusion of these categories and raises specifically the question whether the continued exclusion of some of these categories can be legally justified. Part 4 contains concluding remarks and some recommendations.

2 Comparative perspectives: a brief excursus

2 1 OECD countries

There are some general trends in the development and implementation of unemployment insurance in different regions of the world. These regions can generally be grouped together by the economic status of those regions, ie whether the countries are classed as developed, developing or considered to be transition economies.

Most unemployment insurance schemes in OECD countries cover all employed people, whilst commonly omitting the self-employed. The latter are excluded either through the design of the schemes or by occupation groups or are based on other conditions. Some countries, such as Ireland, Japan, Portugal, Spain, and the United States, omit casual workers and domestic workers. While the duration of benefits differs across countries and is normally between three to twelve months, there are some European countries which have benefits of long duration, such as 60 months in France, 48 months in Denmark, 36 months in Norway, 32 months in Germany and benefits of unlimited duration in Belgium. Most countries expect individuals who receive unemployment insurance payments to report to employment offices regularly, to be willing to work and to be actively searching for

¹³ S 83(1)(b) of the Basic Conditions of Employment Act 75 of 1997 (“BCEA”), inserted by s 20 of the Basic Conditions of Employment Amendment Act 11 of 2002 (“BCEAA”)

employment.¹⁴ Recipients can also often be disqualified from payments if they are unwilling to undergo training, if they unjustifiably refuse an offer of employment, or fail to fulfil the expectations of searching for employment. Periods of disqualification typically range from one to four months.

As a rule, individuals are not forced to take a job which does not fit their criteria early in their phase of receiving unemployment payments. However, the longer an individual receives unemployment insurance, the more pressure on that individual to take other reasonable job offers. Most programmes in OECD countries are financed by both the employees and employers, with more funding coming from employers and the state covering any deficit. Unemployment insurance is funded solely by the employer in the USA, Iceland and Italy. Contribution rates are normally about 3%, but some are as high as 8%.¹⁵

2 2 Latin America and the Caribbean¹⁶

2 2 1 Introduction

Latin American countries tend to have underdeveloped unemployment insurance schemes which typically only cover wage workers in the private sector. In Argentina, unemployment insurance only covers salaried workers in the private sector and excludes those in the public sector, domestic workers and the self-employed. In 2000 coverage was only 10%. Brazil's unemployment insurance only covers workers who are dismissed involuntarily. Members receiving unemployment payments have them terminated immediately if they reject a job offer. In 2001, 11.8% of workers were covered by unemployment insurance. Uruguay's unemployment insurance only covers private sector workers. Members that are receiving payments can receive training to equip them for further employment. In 2001, 14.7% of Uruguayan workers were covered. In Venezuela, unemployment insurance covers salaried workers and employees from the public and private sectors who are faced with involuntary unemployment. They must belong to the social insurance scheme in order to be eligible for payments. In 1999, 7.2% of the working population in Venezuela was covered. In Barbados, unemployment insurance is for salaried workers, and those receiving payments must participate in training courses. Entitlement periods in these countries vary between three to twelve months with contribution rates varying between 0.75 to 2% with both employers and employees contributing.¹⁷

¹⁴ See the second article in this series, entitled "Activation in the Context of the Unemployment Insurance System in South Africa" (forthcoming)

¹⁵ Vodopivec "Introducing Unemployment Insurance to Developing Countries" 2009 *Policy Paper No. 6 Institute for the Study of Labor* 34

¹⁶ The following paragraph draws its data primarily from a study by Miranda-Munoz *Globalization and Protection against Unemployment Risk in the Americas* (2007) unpublished paper presented at 5th *International Research Conference on Social Security Warsaw* hosted by the Social Insurance Institution of Poland, 05-03-2007 www.issa.int/fre/content/download/39476/774621/file/2miranda.pdf 27-30 (accessed 12-11-2010)

¹⁷ Vodopivec 2009 *Policy Paper No. 6 Institute for the Study of Labour* 36 The paragraph drew its data primarily from a study by Miranda-Munoz *Globalization and Protection against Unemployment* 27-30

2 2 2 Chile: innovative approaches

In 2002, Chile approved the Unemployment Insurance Law which made unemployment insurance compulsory for workers whose employment contract started after the enactment date, which was October 2002, and voluntary for employees whose contracts had started before then.¹⁸ The system has two innovative features. The first is the use of *individual savings accounts*. This involves a fixed amount of the worker's salary, about 0.6%, and a contribution from the employer, about 2.4%, being paid into a savings account in the worker's name. The money in this account can be withdrawn according to a predetermined schedule: between 30% and 50% of the previous wage. The second feature of unemployment insurance in Chile is a *common fund* (Solidarity Severance Fund (SSF)) which is sourced from direct contributions from the state and payments made by the employer, amounting to 0.8% of earnings. The government's annual contribution is fixed at about US\$14.5 million (2009). The purpose of the common fund is to share the risk, as well as ensuring that newer members of the unemployment insurance scheme and members who are in low-paying employment or unstable employment can receive payments to the pre-determined amount should they become unemployed. Members must have been making payments into their individual savings accounts for more than twelve months in order to benefit from the common fund, and the normal length of payout is five months. Employees who were previously employed full-time receive 50% on their first payment, which then diminishes by 5% each month until only 30% is received in the last month. Temporary employees are also covered by unemployment insurance. Employers pay 2.8% of the temporary employees' wage directly into their private savings account and 0.2% into the SSF. Payments can then be accessed for two months, but at a lower rate than is the case with open contract employees. The payments have recently been adjusted to take into account the extended length of time that it may take to get a job in times of high unemployment. This has been done by creating a system whereby "for every month the national unemployment rate is one percentage point higher than the national four-year average, all beneficiaries who are due to receive their final monthly unemployment payment will be eligible to receive two additional months of benefit at a replacement rate equal to 25 per cent of their previous earnings".¹⁹ Any payments that are not claimed by employees are made available for them when they retire, contributing to their pension payments. This helps to serve as a disincentive to claim unemployment benefits.

The unemployment insurance fund is managed by a private firm, which has six main tasks: "to collect contributions, credit individual savings accounts, invest the resources in the financial market, verify eligibility criteria, pay benefits, and pursue debtors".²⁰ Managing the fund has three important

¹⁸ Acevedo, Eskenazi & Pagés "Unemployment Insurance in Chile: A New Model of Income Support for Unemployed Workers" (2006) *World Bank SP Discussion Paper 0612 2*

¹⁹ *ISSA Unemployment insurance in Chile: Reform and Innovation, ISSA Feature* (2009) <http://www.issa.int/News-Events/News2/Unemployment-insurance-in-Chile-Reform-and-innovation> (accessed 12-11-2010)

²⁰ Acevedo et al *World Bank SP Discussion Paper 0612 18*

aspects. The first is that the fund which could offer the lowest administrative fees for the first ten years was successful in gaining the tender. The second is that both the common fund and the saving accounts are separate from the managing fund's assets, protecting the Unemployment Insurance funds from economic problems. Thirdly, the fund is separated from the state, ensuring that the state cannot hijack the fund for its own political or economic gain.²¹

The unemployment insurance scheme covers all private sector employees above the age of eighteen – both full-time and temporary – receiving a salary, excluding members of the informal sector, public servants and the self-employed. In December 2008, 60% of the working population was covered by the Unemployment Insurance scheme, with the abovementioned categories of workers excluded.²²

A positive point that can be taken from the Chilean experience for developing countries and the implementation of unemployment insurance is that the single savings account reduces the disincentive of seeking employment while receiving unemployment insurance payments. This is because the payments only last for a maximum of five months and these payments diminish the longer unemployment lasts. Another incentive for not claiming the unemployment payments is that if they remain unclaimed by the time that the individual retires, they are added to the individual's pension payments.

It is difficult to measure the success of the Chilean unemployment insurance system. What became clear initially was that a large number of workers in Chile (about 44% of contributors to the insurance scheme) were employed on fixed-term contracts or temporary contracts. Within this group of people, there are high levels of unemployment or employment uncertainty. The unemployment insurance is not successful at covering such individuals as their payments are limited to two months and are not particularly high. This is at least an improvement on the original scheme which did not give fixed-term contract workers access to the SSF and only gave a once off payment.

It was found that people with well-paid and stable jobs in the formal sector are successfully and effectively covered by the new scheme as they can accumulate enough money in their individual savings accounts and are less likely to face regular unemployment. Workers with low income and precarious jobs, particularly those in the informal sector as well as those with temporary contracts, would barely be covered at all by the insurance scheme. This essentially means that the most vulnerable workers remain vulnerable during unemployment.²³

2.3 Eastern Europe and Central Asia

In the transition economies of Eastern Europe and Central Asia, the majority of programmes cover employed workers, with domestic, self-employed and casual workers normally excluded. The duration of payments vary from 6 to

²¹ 18-19

²² ISSA *Unemployment Insurance in Chile*.

²³ Sehnbruch "Privatised Unemployment Insurance: Can Chile's New Unemployment Insurance Scheme Serve as a Model for Other Developing Countries?" (2004) *CLAS Working Paper 12 27*

24 months, with the duration sometimes reliant on length of employment or contribution periods. The responsibilities on those receiving payments are very similar to those in OECD countries. Most countries expect individuals who receive unemployment insurance payments to report to employment offices regularly, to be willing to work and to be actively searching for employment. Recipients can also often be disqualified from payments if they are unwilling to undergo training, if they unjustifiably refuse an offer of employment, or fail to fulfil their expectations of searching for employment. The funding of the scheme is typically from the employer, with some countries also having employee contributions. Contribution rates are lower than OECD countries, with employee contributions between 0.06% (Slovakia) and 1% (Slovak Republic) and employer contributions varying between 0.06% (Slovenia) and 6% (Albania). As is the case in all OECD countries, the government makes up for any deficits.²⁴

2.4 Informal Sector

Workers in the informal sector, especially those in the developing world, are in a precarious position regarding income. In many cases they live from hand to mouth and do not have a constant stream of income. This makes it difficult for many of them to save money or plan for the future, leaving them particularly vulnerable to unemployment. The sector also has some inherent complexities when it comes to attempting to create appropriate unemployment insurance schemes. These include the following:

- Many schemes rely on dual payments from both the employer and employee, meaning that often only workers in the formal and private sector, or those with a traditional employment contract, can be successfully covered. Workers in the informal sector do not have such a contract and it is also difficult to ascertain whether they have an employer.
- Furthermore, the low level of income and inconsistent revenue streams received by many members of the informal sector make it difficult to encourage them to make monthly payments into an unemployment insurance scheme, and periods of unemployment may be quite common.
- Further difficulties which are faced when attempting to extend coverage of unemployment insurance to informal sectors include the difficulty of monitoring members of the informal sector who could receive payments. The informal sector has low barriers to entry and exit, making it expensive to monitor and administer unemployment insurance to members of the sector.

Unemployment insurance funds invariably do not cover members of the informal sector, and this is especially the case for developing countries that have large informal sectors.²⁵ With this being the case, it is suggested that there are some changes which can be brought about to traditional unemployment

²⁴ Vodopivec (2009) *Policy Paper No. 6 Institute for the Study of Labour* 35

²⁵ Vodopivec (2009) *Policy Paper No. 6 Institute for the Study of Labour* 4

insurance schemes which could be considered to extend unemployment insurance coverage to the informal sector.

Countries with large informal economies may adopt different approaches to unemployment insurance. These include:²⁶

- While many unemployment schemes cease payments to individuals once they have accepted a new job, it is suggested that this would prove to be a major disincentive to members of the informal sector to seek employment or accept employment in that sector. It is therefore suggested that members of the informal sector should be allowed to take employment in the informal sector, without having to give up unemployment insurance payments.
- Another change which is suggested is that members of the informal sector and those in developing countries should rely on worker and employer contributions for financing of the unemployment sector, as is the case in the Chilean example. This would eliminate the disincentives to seeking employment as well as providing a degree of self-monitoring.
- The final suggestion, and which again can be seen in the Chilean example, is to lower the payment rates over time, and also to make sure the level of payment is lower than the wage that people can receive when employed.

These changes will ensure that payments from unemployment insurance are unlikely to be manipulated. Whilst these suggestions appear relevant to the extension of unemployment insurance to the informal sector, and to developing countries specifically, as can be seen from the Chilean example, it remains to be seen whether such changes actually provide suitable cover to members of the informal sector or to people in the developing world who do not have stable, formal sector employment.

2.5 Self-employed workers

Few unemployment insurance schemes cover the professionally self-employed. This is especially the case with unemployment insurance in developing countries, but also the position in the majority of developed countries, although there are some examples of schemes in OECD countries which cover the self-employed, with coverage for the self-employed being voluntary and being open to restrictions.

Two such countries are Sweden and Denmark. In both countries, unemployment insurance is voluntary and the funds are administered by organisations similar to trade unions.²⁷ Denmark, for example, has two separate, voluntary funds specifically for self-employed workers, while Sweden also has a fund specifically aimed at the self-employed. In Sweden, the qualifying conditions are the same for the self-employed as for regular employees. These conditions include being employed for a minimum of six months during the course of the last twelve months. A self-employed person

²⁶ See generally 12-17

²⁷ Clasen & Viebrock "Voluntary Unemployment Insurance and Trade Union Membership: Investigating the Connections in Denmark and Sweden" 2008 *Jnl Soc Pol* 433 433-434

in Sweden is considered unemployed if their business activity comes to an end, not only in the case of a temporary break.²⁸ In Denmark,

“membership contributions to an unemployment insurance fund consist of a variable contribution toward financing the fund (rates vary according to fund), a mandatory fixed contribution toward payment of unemployment insurance, and a voluntary fixed contribution toward payment of early retirement pay. A self-employed person pays 8% of gross salary or earnings toward the Labor Market Fund to cover state expenditure on unemployment insurance benefits and voluntary early retirement pay”.²⁹

Since the beginning of 2009, self-employed workers in Austria have been allowed to opt into unemployment insurance. The self-employed must opt in before the end of 2009 if they have been self-employed before 2009, or within six months of becoming self-employed. These restraints are placed on registration in order to ensure that individuals do not join unemployment insurance fund when their business begins to struggle. The self-employed can choose their own contributions:

“[They can] now choose to have their 6% contribution calculated on 25%, 50% or 75% of the social security payroll tax cap, which corresponds to monthly unemployment payments of €555, €870 or €1,200”.³⁰

It is too early to see if this system will be effective at covering the self-employed or whether it will be attractive to entrepreneurs.

3 South Africa: persons or categories of persons currently excluded from unemployment insurance

3.1 Employees who resign or suspend their employment

Employees who resign may not claim benefits under the Act.³¹ While this was introduced to stop abuse, a consequence is that employees who leave employment for reasons such as further education or training, or to establish their own businesses, cannot claim benefits. Employees who become self-employed effectively forfeit past contributions. The impact of this on job mobility and the pursuit of training activities needs to be considered.

In a recent study, Paul Benjamin identifies a number of trends in regulatory regimes aimed at protecting workers who are either unprotected or inadequately protected by labour (and social security) rights.³² Of particular relevance is the development of “transitional labour markets” to provide

²⁸ United States Social Security Administration (SSA) *Social Security Programs Throughout the World: Europe, 2008 - Sweden* (2009) <http://www.socialsecurity.gov/policy/docs/progdesc/ssptw/2008-2009/europe/sweden.html> (accessed 10-10-2010)

²⁹ SSA *Social Security Programs Throughout the World: Europe, 2008 – Denmark* (2009) <http://www.socialsecurity.gov/policy/docs/progdesc/ssptw/2008-2009/europe/denmark.html> (accessed 10-10-2010)

³⁰ Widner “Self-employed Eligible for Unemployment Benefits” (2009) <http://www.internationalaffairs.com/newsletters/detail.aspx?g=81b55049-b800-4c46-b462-74a44a729403> (accessed 12-11-2010)

³¹ See s 16(1) of the UIA

³² Benjamin *Informal Work and Labour Rights in South Africa* (2008) paper presented at a conference on *The Regulatory Environment and its Impact on the Nature and Level of Economic Growth and Development in South Africa* hosted by the Development Policy Research Unit at the University of Cape Town, 27-10-2008 http://www.commerce.uct.ac.za/Research_Units/DPRU/Conference2008/Conference2008_Papers/Paul_Benjamin_INFORMAL%20WORK%20AND%20LABOUR%20RIGHTS%20IN%20SOUTH%20AFRICA.pdf 11 (accessed 12-11-2010)

greater security to workers during transition phases in their working life. This approach identifies the major life course transitions such as those between education and employment, (unpaid) caring and employment, unemployment and employment, retirement and employment, and precarious and permanent employment. An institutional reform associated with this approach is the notion that *unemployment insurance* should be transformed to *employment insurance* to provide income security during transitions between education, training and employment.³³ Active labour market policies that promote the re-training and reintegration of unemployed workers back into the workforce provide “protected mobility” which enhances the security of individuals when they are not in work. Benjamin refers to studies which indicate that the provision of social insurance during initial periods of self-employment can promote entrepreneurship.³⁴ This approach is helpful in providing guidance on which group of contributors should be excluded from the general principle that those who voluntarily leave their employment may not claim benefits under the Act. It is suggested that exceptions should specifically be allowed for the following three categories of employees:

- (i) Employees who leave their employment *to undergo further education or training*. This would create a crucial link between unemployment benefits scheme and the promotion of skills development and training in terms of the Skills Development Act 97 of 1998. In this way, further training and education could be viewed as part of the “activation” measures described in more detail in part 2 of this article.
- (ii) Employees who resign in order to become *self-employed*. It has already been indicated that there is a strong link between the provision of social insurance during initial periods of self-employment and entrepreneurship.
- (iii) Employees who resign or suspend their employment for any *compelling family reason*. One of the major life course transitions identified above is that between (unpaid) caring and employment. It is therefore suggested to extend unemployment benefits to employees who resign to take care of children or to care of a terminally ill family member (a so-called “*carer’s benefit*”). Unlike maternity benefits, however, the contributor’s benefits are not restored after making use of this benefit.

Making provision for these three exceptions would necessitate the introduction of a set of new definitions into the UIA:

- “Compelling family reasons” could be defined to include both the care of children (natural or adopted) and that of a terminally ill family member.
- “Family member” could be defined to include a list of family members, including a common-law partner. The compassionate care benefit in

³³ Benjamin *Informal Work and Labour Rights* 12

³⁴ Hessels, Van Stel, Brouwer & Wennekers “Social Security Arrangements and Early-Stage Entrepreneurial Activity” 2007 *Comp Lab L & Pol’y J* 743 771-772, as cited in Benjamin *Informal Work and Labour Rights* 12

Canada³⁵ is even extended to someone caring for a gravely ill person who considers the claimant to be akin to a family member (for instance a close friend or neighbour).³⁶

- “Common-law partner” could be defined as a person who has been living in a conjugal relationship with that person for at least a year.

In order to prevent abuse, it will be necessary for the person claiming a “carer’s benefit” to provide proof showing that care is taken of children and that the ill family member needs care or support and is at risk of dying within a short period of time.³⁷ Similar verification measures would also have to be developed for the extension of unemployment insurance to those resigning to undergo education or training to become self-employed.

Furthermore, it is envisaged that the “carer’s benefit” for “compelling family reasons” (that would provide benefits in the case of caring for one’s own children plus adopted children) would eventually be removed from the UIA and provided for in a separate scheme that would also include maternity benefits and adoption benefits. In addition, if the proposed Health Insurance Fund were to make provision for sickness benefits, it would mean that the sickness benefit could eventually also be removed from the UIA. This would mean that the Fund could in the medium- to long-term become a Fund that caters purely for the contingency of unemployment, which would result in a financially strong fund that will provide better benefits and eventually possibly even extended benefits. This reason makes the inclusion of a “carer’s benefit” even more compelling.

3 2 Persons who do not fall within the definition of “employee”

3 2 1 Introduction

The UIA defines an employee as “any person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor.”³⁸ This definition, which apart from focusing solely on the formal sector employment relationship, is narrower than that contained in labour laws³⁹ and excludes

³⁵ Compassionate care benefits are payable to a maximum of six weeks to claimants who provide care to a gravely ill or dying family member and fall under the Employment Insurance Scheme

³⁶ It is not suggested that the UIA go this far

³⁷ In Canada the period is 26 weeks

³⁸ S 1 of the UIA

³⁹ The definition of “employee” contained in s 1 of the BCEA and s 213 of the Labour Relations Act 66 of 1995 (the “LRA”), for example, covers “any other person who in any manner assists in carrying on or conducting the business of an employer” In addition, s 83A of the BCEA and s 200A of the LRA (as amended) make provision for a rebuttable presumption as to who is an employee as follows:

“A person who works for, or renders services to, any other person is presumed, until the contrary is proved, to be an employee, regardless of the form of the contract, if any one or more of the following factors is present: the manner in which the person works is subject to the control or direction of another person; the person’s hours of work are subject to the control or direction of another person; in the case of a person who works for an organisation, the person is a part of that organisation; the person has worked for that other person for an average of at least 40 hours per month over the last three months; the person is economically dependent on the other person for whom that person works or renders services; the person is provided with tools of trade or work equipment by the other person; or the person only works for or renders services to one person ”

a variety of vulnerable groups from the UIA's scope of coverage. These excluded groups are largely comprised of certain categories of atypical workers (for example, independent contractors, dependent contractors, and the self-employed), informal economy workers and the long-term unemployed. South Africa could consider the following general measures for extending unemployment protection to these three vulnerable groups. As unemployment insurance by its very nature invariably provides benefits for a limited period of time to those who were or are working and who contributed to⁴⁰ an unemployment insurance scheme and to their survivors, it would hardly be possible to cover the long-term unemployed through such a scheme – particularly in view of the numbers involved in a country such as South Africa. The long-term unemployed group should therefore not benefit from unemployment insurance, but could benefit from the possible introduction of a new (conditional) social grant.⁴¹ Therefore, this group will not be discussed any further here. However, attention should be given to the progressive extension of access to unemployment insurance to the self-employed and those in the informal economy.⁴²

The extension of coverage of statutory social insurance programmes to the self-employed raises a number of difficulties. These include the reluctance of the self-employed to pay both the employer's and the worker's contributions as well as a lack of understanding of the importance of social security and how the system works. To this could be added the difficulty in determining the level at which contributions should be made and to prevent the under-declaration of income from the self-employed.⁴³ In this regard, it is submitted that much can be learned from the Tunisian experience in extending social insurance coverage to the self-employed and informally employed.

3 2 2 *The Tunisian experience*

Using a variety of initiatives, Tunisia has succeeded in raising social security coverage – for health care, old age pensions, maternity and employment injury – from 60% to 84% of its workers and their families in just ten years. Nearly all Tunisians who work in the public and private non-agricultural sectors are now covered. And, while coverage rates are still below 50% in the agricultural sector and among the self-employed, the government hopes that all workers will be covered in the years to come. How has the

However, this presumption as well as “the resultant shift in the burden of proof to employers to rebut the presumption, has not been incorporated into the structures of the UIA” (Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 415 436)

⁴⁰ Or in respect of whom contributions were paid

⁴¹ See the proposals contained in Department of Social Development *Creating Our Future: Strategic Considerations for a Comprehensive System of Social Security (Discussion Paper)* (2008) 19-20. These are discussed in more detail in part 2 of this series of articles

⁴² See Beattie “Social Protection for All: But How?” 2000 *Int Lab Rev* 129 139-142; Bailey “Extending the Range of Social Protection” in International Labour Organization (ILO) *Reflections on Reform Strategies for Social Protection in English-Speaking African Countries* (2000) 33 68-70; Van Langendock “The Social Protection of the Unemployed” 1997 *International Social Security Review* 29 34

⁴³ ILO *Extending Social Security and Fighting Poverty: Experiences from around the World* (2002) 4 <http://www.ilo.org/public/english/protection/socsec/pol/campagne/files/countryexp.pdf> (accessed 11-10-2010)

extension of coverage occurred so rapidly? In 1996, Tunisia implemented a social security system which combined proper enforcement with the creation of a more accurate income estimation system for the self-employed. These two aspects, combined with education programmes, have significantly raised the levels of coverage.⁴⁴

In order to determine contribution levels, and to prevent under-reporting of income, income scales have been developed for various occupational groups, and these are used to calculate contributions. The scales determine the lowest income bracket relevant to the occupation of the insured person (physician, architect, shopkeeper, etc.) and the size of the firm or farm. Through the application of this scale, each insured person must contribute an amount equal to the bracket employed on the scale, unless they can prove that their real income is lower, while they are free to contribute on a higher scale. These changes to the social security system have had a positive impact on coverage extension.⁴⁵

Although the extension of coverage to the informal economy in Tunisia has been less successful than the extension of social security coverage to the self-employed,⁴⁶ it has nevertheless resulted in significant increases in the number of informal economy workers covered by social security schemes. This is particularly the case regarding schemes that provide income protection for old age, offer protection against illness, and compensation for industrial injury and occupational diseases.⁴⁷

It is submitted that it is possible to apply the innovative approach of the Tunisian experience to other social security institutions, including unemployment insurance in South Africa. There is no reason why the employment of a realistic income scale cannot be implemented in South Africa. The existence of sectoral determinations and bargaining council agreements that set minimum wages in specific sectors could greatly assist in the determination of the occupation or industry specific income scales for purposes of determining contributions. The Tunisian experience illustrates the importance of the size of the contributory payments (it must be small enough to be affordable) as well as the importance of the flexibility of the payments (if it can be shown that the contributor is earning lower than the base income for the particular type of job then contributions will be paid on the lower scale). What the Tunisian example also demonstrates is that the different groups within the same sector should not be too small as this can restrict the scope and level of benefits available, as well as appearing unattractive for potential members.⁴⁸

⁴⁴ Olivier "Informality, Employment Contracts and Extension of Social Insurance Coverage" (2009) *International Social Security Association Working Paper 9 54* <http://www.issa.int/content/download/91354/.../2-paper9-Olivier.pdf> (accessed 12-11-2010)

⁴⁵ Olivier (2009) *International Social Security Association Working Paper 54*

⁴⁶ For example, an adapted system was also unsuccessful at achieving high levels of coverage of fishermen. There have also been lower levels of social security extension in rural areas due to the difficulties of administering the system in rural zones and fishing ports. Olivier (2009) *International Social Security Association Working Paper 9 55*

⁴⁷ Olivier (2009) *International Social Security Association Working Paper 9 55*

⁴⁸ 56

An alternative method to determine the income levels of the self-employed would be to link the contribution to the previous year's income determined according to the income declared to the South African Revenue Service (should the self-employed person be registered as a taxpayer). Should the income during the current year be less than that declared to SARS during the previous financial year, the onus will be on the contributor concerned to verify the lower amount. This would require a direct link between the UIF and SARS, which would enable SARS to deduct the contribution automatically and pay it over to the UIF.

What is also of vital importance is that the extension of coverage to the self-employed should be accompanied by a strong education and consultation programme. Although certain quarters of the Tunisian workforce had been reluctant to fully embrace social security for a variety of reasons, the education programmes and societal changes in the perceptions towards social security meant that changes to the system were more readily embraced. This should take place alongside a consultative approach.

What the Tunisian example further illustrates is the complexity of extending coverage to the informal sector, suggesting that it is necessary to attempt implementing systems which are specific to the actual needs of the targeted group. In the South African context, it would require both the classification of certain sectors within the informal economy (for example, fishermen) and the registration of contributors within those sectors. Contributions would be based on similar principles to those of the self-employed, namely varying contributions per sector based on deemed income.

Finally, in situations where it would be difficult to determine what the income of the worker in the informal sector is in order to determine the value of the benefit, the possibility of creating a scheme in which equipment required for work would be replaced instead of income, should be considered. The inclusion of insurance for work equipment is an important feature as workers in the informal sector are dependent on their tools for their income, and struggle to afford replacement tools if theirs are stolen or damaged. An example of this type of scheme can be found in India. The Self-employed Women's Association (SEWA) set up the Integrated Social Security Scheme which covers health care (with a small maternity care component), life insurance in the form of both death and invalidity and insurance against the loss or deterioration of work equipment or the home. Members pay an annual premium which is then passed on to a formal sector insurance company who take most of the risk. Members also have the option of making a once off payment into a SEWA bank account with the interest being used as the yearly insurance premium.⁴⁹

⁴⁹ 57

3 3 Employees employed for less than 24 hours per month

The UIA does not apply to employees employed for less than 24 hours per month under a particular employer, and their employers.⁵⁰ The basis of this exclusion, it appears, is “to avoid cumbersome and cost-ineffective administration of contributions.”⁵¹ The disadvantage of this provision is that a person who works for various employers for short monthly periods, remains excluded even though he or she may be fully, or nearly fully, employed.⁵² It is therefore suggested that the restriction limiting coverage to those working more than 24 hours per month be lifted.

3 4 Learnerships

Employees under a contract of employment contemplated in section 18(2) of the Skills Development Act 97 of 1998 are not covered by the UIA and UICA.⁵³ The exclusion of this group is retrogressive since they fell under the ambit of the previous Unemployment Insurance Act.⁵⁴ Furthermore, this group is generally employed for a fixed-term duration of some length.⁵⁵ While their exclusion is said to be justified on the basis of encouraging job creation,⁵⁶ it remains inconsistent with the inclusion generally of fixed-term employees within the framework of the South African unemployment insurance scheme.

The inclusion of learners would have the dual benefit of including a greater portion of the youth into the Fund at a very early stage of their working lives and contributing to the appeal of learnerships, thereby improving the role that learnerships can play in improving skills levels in the country.

It is therefore recommended that learners engaged under a contract of employment in terms of the Skills Development Act be included under the ambit of the UIA. Should the contract of employment be terminated at the expiry of the period of duration specified in the learnership agreement, the learner concerned should benefit from unemployment insurance like any other contributor under the UIA. If a learner was in the employment of the employer who was a party to the learnership agreement concerned when the agreement was concluded, the learner will merely continue to contribute to the UIF during the duration of the learnership agreement.⁵⁷ If the learner is permanently employed by the employer with whom he or she concluded the learnership agreement, upon expiry of the learnership agreement he or she would merely continue contributing the Fund.

⁵⁰ S 3(1) of the UIA

⁵¹ Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 443

⁵² 443

⁵³ S 3(1)(b) of the UIA; s 4(1)(b) of the UICA

⁵⁴ See s 2 of the UIA

⁵⁵ Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 438

⁵⁶ According to the Minister of Labour: “As government we are encouraging employers to take on new learners hence we have not included them into the provision of the UIF” (Department of Labour “Pensioners and Employers taking on New Learners get UIF Exemption” (31-12-2003) Press Release)

⁵⁷ This is already provided for in the most recent Unemployment Insurance Bill See Unemployment Insurance Amendment Bill (B 35-2003) in GG 25234 of 2003-06-22

3.5 Public servants

Employees in the national and provincial spheres of government who are officers or employees⁵⁸ and their employers are excluded from the UIF.⁵⁹ The exclusion of these employees is based on the assumption that the risk of unemployment for public servants is either low or non-existent.⁶⁰ This assumption may be challenged, both legally and factually.⁶¹ The job security afforded to South African public servants is not as adequate as it is assumed to be. The risk of unemployment for private sector workers is often not greater than that of public servants in South Africa.⁶² In addition, it is doubtful if the exclusion of public servants from the UIF is constitutionally tenable.⁶³

⁵⁸ As defined in s 1 (read with s 8) of the Public Service Act 103 of 1994. In terms of s 41 of the Public Service Amendment Act 30 of 2007 all references to “officer” in the Public Service Act were replaced with references to “employees”

⁵⁹ S 3(1)(c) of the UIF (as amended)

⁶⁰ See, for example, Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 438

⁶¹ As Van Langendock 1997 *International Social Security Review* 33-34 puts it:

“[The exclusion of public servants] seems reasonable enough, since those persons usually enjoy lifetime appointments, so that the risk of unemployment seems to be non-existent for them. It should be pointed out, however, that guarantees against dismissal also exist in the private sector for certain categories of workers. Why should the same not apply to the public sector? Moreover, a lifetime appointment is not a 100 per cent guarantee against loss of employment. In the public sector, one can still be dismissed, e.g. for disciplinary reasons, following a prescribed procedure. This may be rare, but the persons concerned should certainly be protected against the loss of earnings and the loss of social protection which could result from it. And finally, public-sector workers should enjoy, in the same way as their fellows in the private sector, the right to leave their job if they have good reason to do so. Nobody should be compelled to stay in the same occupation for life, not even in the public service. This right would be of a theoretical nature for all but those enjoying independent means of existence if, by leaving, people risked losing their income and their social protection for an indefinite period. For that matter, unemployment protection is necessary as a matter of principle, including in the public sector”

⁶² There is no significant difference between the employment protection afforded to public servants and other employees as both are largely subject to the same dismissal law contained in Chapter VIII of the LRA (Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 438). It could be argued that, at least in the past, public servants enjoyed the protection of administrative law. However, in two recent Constitutional Court judgments it was held that this protection is, generally speaking, no longer available to public servants, in view of their coverage in terms of the LRA: see generally *Chirwa v Transnet Limited* 2007 ZACC 23; 2008 2 BLLR 97 (CC); *Gcaba v Minister of Safety and Security* 2009 ZACC 26; 2009 ILJ 2623 (CC). Furthermore, the administrative law protection which was available to public servants does not contribute much to their protection since it is primarily focused on principles of natural justice and validity (Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 438).

⁶³ As Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 439-440 point out:

“There are, constitutionally speaking, several fundamental rights which come into play when the exclusion of public servants from the UIF is considered – for example, the right to fair labour practices, the right to equality, and the right to have access to social security. The Constitutional Court already made it clear [in *SA National Defence Union v Minister of Defence* 1999 20 ILJ 2265 (CC)] that the exclusion of (a particular category of) public servants from a specific law would still entitle them to challenge the statutory restrictions constitutionally, on the basis that a fundamental right has allegedly been infringed. The implication is that the limitation of any of the fundamental rights referred to above must satisfy the limitation criteria contained in s 36 of the Constitution. In terms of this the limitation must be contained in a law of general application; the limitation must also be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. One of the issues that a court must consider in this regard, is the question whether a legitimate (governmental) purpose of sufficient importance is being served by the limitation. The argument that by not including/covering public servants the state will be able to do more in terms of social security for the poor, does not, in itself, constitute a legitimate government purpose of sufficient importance. Such an approach mixes and confuses the role of the state as employer and its role as provider of social security for the indigent. It also creates all sorts of unnecessary imbalances”

Furthermore, there are unemployment protection instruments (such as the Employment Promotion and Protection against Unemployment Convention of the ILO)⁶⁴ which permit the exclusion of public servants from the ambit of the unemployment insurance scheme. However, the exclusion of public servants is permitted (for example, by the aforesaid instrument) only in a situation where these employees have their employment guaranteed up to normal retirement.⁶⁵ Several mechanisms for extending unemployment insurance coverage to public servants exist. South Africa could, for example, consider incorporating public servants into the current unemployment insurance scheme, allowing public servants to contribute on their own (even though this may be subject to constitutional challenge), or making an arrangement (like in Belgium) whereby civil servants contribute 1% of their salaries to the UIF while the state compensates the Fund for benefits paid out.⁶⁶

Including public servants in the beneficiary population without contributing would not be sustainable. The benefits would quickly outgrow contributions. The suggestion of providing the contribution a claimant would have made only when claimed would not improve sustainability. This is because the remainder of the public servants not claiming would not have contributed and therefore the element of pooling risks does not apply. However, it is acknowledged that the State may feel unable on fiscal grounds to contribute to the scheme at the same rate as private employers. Finally, a scenario in which only the public servant contributes to the Fund would naturally reduce both the contribution rate as well as the benefit rate.

It is therefore recommended that the coverage of public servants by the UIA be prioritised on the basis of an equal employer and employee contribution. Their inclusion, as the Department of Social Development noted in a recent report “is a matter of national solidarity”.⁶⁷ The Consolidated Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa recommended that government workers (at least) be allowed the option, via their representative organisations, of whether or not to become contributors to the UIF.⁶⁸ On this basis, public servants who contribute to the Fund could receive restricted benefits limited to their own contributions.

3.6 Partial unemployment

Contrary to the preceding Act, the UIA provides for benefits only in the case of full unemployment (except in the case of domestic workers). The current UIA therefore abandoned the position whereby a contributor who was employed by two employers simultaneously and lost one employment

⁶⁴ ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988

⁶⁵ This international law framework is crucial in the light of s 39(1)(b) of the Constitution which directs courts, tribunals and other forums to consider international law when interpreting fundamental rights contained in the Constitution

⁶⁶ Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 441

⁶⁷ Department of Social Development *Creating Our Future* 50

⁶⁸ Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Consolidated Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa “Transforming the Present – Protecting the Future”* (2002) 72

while he/she retained the other, was allowed to claim unemployment benefits for the lost job.⁶⁹ It also abandoned the position according to which an unemployed contributor, who accepted employment at less than 50% of his average weekly rate of earnings which he received during the three months immediately preceding his unemployment, was entitled to receive a special weekly allowance for a maximum period of thirteen weeks. This enabled an unemployed person to retain whatever integration he or she had in the labour market, and enabled him or her to proceed to full integration from there. In providing for benefits only for full unemployment the current legislation loses sight of the policy consideration that a person who is allowed to retain benefits while starting some (part-time) employment will, hopefully, gradually again become independent of the Fund. It is also contrary to ILO Convention 168 of 1988 on Employment Promotion and Protection against Unemployment which specifically requires the provision of benefits in circumstances of partial unemployment⁷⁰ and the Employment Guidelines adopted by the European Union, all of which are aimed at re-integrating the unemployed into the labour market.⁷¹

This exclusion also has a disproportionate impact on women. In South Africa, as appears to be the general position world-wide, women are heavily represented in part-time, low-income, intermittent and precarious jobs, which often fall outside the coverage of social security.⁷² Moreover, most women often assume the greater part of parental responsibility and therefore have less time to build up their social security entitlements.⁷³ In light of the *dicta* in *Government of the Republic of South Africa v Grootboom*,⁷⁴ the state has an obligation to formulate policies and legislative measures – also in the area of unemployment protection – that take into account the vulnerable position women hold in society regarding employment.

It is therefore recommended that the UIA should make those contributors who become partially unemployed eligible for benefits. The basis for calculating the benefit payable should be the same as for domestic servants, namely, that a contributor who is employed by more than one employer and whose employment is terminated by one or more employers is, despite still being employed, entitled to benefits in terms of this Act if the contributor's total income falls below the benefit level that the contributor would have received if he or she had become wholly unemployed.⁷⁵ In addition, it should reintroduce a provision that would allow a person who accepted employment at less than 50% of his or her average weekly rate of earnings which he or she received during the three months immediately preceding his unemployment to receive a special weekly allowance for a maximum period of thirteen weeks. This

⁶⁹ See Olivier & Van Kerken "Unemployment Insurance" in *Social Security: A Legal Analysis* 448-449

⁷⁰ See, amongst others, arts 2 and 10 of the ILO Employment Promotion and Protection against Unemployment Convention

⁷¹ Olivier & Van Kerken "Unemployment Insurance" in *Social Security: A Legal Analysis* 448

⁷² ILO *World Labour Report 2000: Income security and social protection in a changing world* (2000) <http://www.ilo.org/public/english/protection/socsec/wlrblurb.htm> 15 (accessed 10-10-2010)

⁷³ ILO *World Labour Report 2000* 15

⁷⁴ 2000 11 BCLR 1169 (C) 44

⁷⁵ See s 12(1A) of the UIA

would improve the ability of the UIA to prevent and combat unemployment, and to reintegrate those who have become unemployed in the labour market.

3.7 Migrant workers

Excluded from the scope of the UIA and UICA are persons who enter South Africa for the purpose of carrying out a contract of service, apprenticeship or learnership within the Republic if upon the termination thereof the employer is required by law or by contract of service, apprenticeship or learnership, as the case may be, or by any other agreement or undertaking, to repatriate that person, or that person is so required to leave South Africa.⁷⁶ The exclusion of this group of persons as found in the present UIA can be traced to the previous UIA.

The exclusion of this category of workers raises problems of both a constitutional and international law nature. The UIA treatment of different categories of fixed-term contract workers is inconsistent. On the one hand, fixed-term contract workers are covered under the unemployment insurance scheme.⁷⁷ On the other hand, non-citizen fixed-term contract workers, who are required to return to their home countries at the end of their contracts of employment, are excluded from the ambit of the UIA. This differential treatment of non-citizens could be challenged as discriminatory on the basis of nationality.⁷⁸

It is arguable that the exclusion of non-citizen fixed-term contract workers could be in breach of certain ILO Conventions.⁷⁹ The ILO Conventions require member states to treat lawfully residing non-citizens on the same basis as citizens in social security matters, including unemployment insurance.⁸⁰ More specifically, South Africa has ratified the Unemployment Convention.⁸¹ This Convention requires South Africa to make arrangements with other ratifying countries to ensure that non-citizens from such countries who are employed in South Africa are eligible for the same rate of (unemployment

⁷⁶ S 3(1)(d) of the UIA. As Olivier & Guthrie *Extending Employment Injury and Disease Protection to the Non-formal Sector and Non-citizen Workers: The Quest for Innovative Approaches* unpublished paper presented at the 7th International Conference on Work Injuries Prevention, Rehabilitation and Compensation in Hong Kong, 29-06-2006 (copy on file with the authors) point out, it should be kept in mind that:

“national laws, and often also international instruments, invariably differentiate between permanent residents, temporary residents, migrant workers, refugees, asylum-seekers and illegal non-citizens. The interplay between immigration, termination of service and social security laws is crucial to the understanding of the status of non-citizen workers...The overall conclusion to be drawn is that the stronger the immigration status, the better the access to social security”

⁷⁷ S 16(1)(a)(i) of the UIA

⁷⁸ See Olivier, Khoza, Jansen van Rensburg & Klinck “Constitutional Issues” in Olivier, Smit & Kalula (eds) *Social Security: A Legal Analysis* (2003) 49 98-99. Also see, generally, *Larbi-Odam v Member of the Executive Council for Education (North West Province)* 1997 12 BCLR 1655 (CC)

⁷⁹ Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 442; Mpedi *Resigning the South African Unemployment Protection System: A Socio-legal Inquiry* LLD thesis UJ (2006) 84

⁸⁰ See, for example, ILO Migration for Employment (Revised) Convention 97 of 1949; ILO Equality of Treatment (Social Security) Convention 118 of 1962

⁸¹ ILO Unemployment Convention 2 of 1919

insurance) benefit as that available to local workers.⁸² The absence of such arrangements in South Africa means that South Africa is in violation of its international obligations in this regard.⁸³

In order to ensure consistency and that South Africa is in compliance with its obligations under the relevant ILO Convention, provision should be made for the inclusion under the ambit of the UIA of migrant workers on fixed-term contracts who are required to return to their home countries at the end of their contracts of employment.

This of course raises a number of difficulties of a practical nature. Should migrant workers on fixed-term contracts be included under the ambit of the UIA, their contributions will have to be paid out while they are either in their countries of origin or in another country. In addition, verification of the continued unemployment of the migrant worker will have to be monitored. However, some precedent for the payment of social security benefits to beneficiaries who are outside South Africa already exists. Section 16 of the Social Assistance Act 13 of 2004 read with Regulation 31 makes provision for the payment of a social grant to a beneficiary who will be absent from South Africa for a period not exceeding 90 days under certain circumstances.⁸⁴ Should such circumstances exist and payment be made, the beneficiary has to regularly report to a mission abroad or to any other designated office for purposes of identification and verification.⁸⁵ This model could be adapted to cover the situation of the payment of unemployment insurance to migrant workers.

It is therefore recommended that migrant workers on fixed-term contracts who have to leave South Africa upon the expiry of their contracts be allowed to contribute to the UIF. This would ensure consistent treatment of all fixed-term employees under the UIA. In the absence of a bilateral agreement which arranges for verification by authorities of the relevant country, a specific form should be developed for completion by the beneficiary that would verify his or her identity and his or her continued unemployment. The form must be certified by a commissioner of oaths in the country concerned and submitted to the relevant South African mission or other office designated for that purpose. Such information must be communicated to the UIF by the mission or office concerned.

⁸² Art 3 of the Unemployment Convention, 1919 provides as follows:

“The Members of the International Labour Organisation which ratify this Convention and which have established systems of insurance against unemployment shall, upon terms being agreed between the Members concerned, make arrangements whereby workers belonging to one Member and working in the territory of another shall be admitted to the same rates of benefit of such insurance as those which obtain for the workers belonging to the latter”

⁸³ Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 442

⁸⁴ Where the beneficiary is outside the Republic to receive medical attention, or is unfit to travel back to South Africa, or where for reasons beyond the control of the beneficiary he or she is unable to return to South Africa. See Regulation 31(1)(a)-(c) of the Social Assistance Act

⁸⁵ Regulation 31(2)

3 8 Irregular migrants

Apart from some exceptions for foreigners with permanent residence status or who have attained South African citizenship on a dual citizenship basis, non-nationals are generally excluded from social security protection in South Africa.⁸⁶ In general, irregular migrants are excluded from social insurance schemes in South Africa. This includes both unemployment insurance as well as workers compensation. The reason is that a person who is not in possession of a work permit as required by section 19 of the Immigration Act 13 of 2002 is not an employee for labour law and, one could add, social security law purposes (for purpose of bringing a case before the labour law adjudicating institutions),⁸⁷ as no valid contract of employment exists and such a person cannot be understood to be “an employee”. Both the Unemployment Insurance Act 63 of 2001 as well as the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA) extends benefits only to those who qualify as “employees”.⁸⁸

However, in light of the recent Labour Court decision in *Discovery Health Limited v CCMA*⁸⁹ (“*Discovery Health*”), this unqualified position is no longer tenable. In *Discovery Health*, the court extended labour rights to a foreign national whose work permit had expired. The court noted that, although the Immigration Act 13 of 2002 prohibits the employment of foreign workers without work permits, the only consequence of doing so is that the employer is guilty of a criminal offence. This position rejects a line of decisions that held that a contract is void even if only one party is subject to a criminal penalty.⁹⁰ What are the implications of this judgment as far as unemployment insurance is concerned?

In general, there seems to be some differentiation between schemes funded entirely from employer contributions where employers are under an obligation to make such contributions even if they employ irregular migrant workers (in particular schemes covering occupational injuries and diseases) and schemes where the contributions are drawn from both the employer and employee, and where the benefits are explicitly linked with lawfully performed work (such as unemployment insurance schemes).⁹¹ In the case of the former, workers (irrespective of their status) should be entitled to the benefits. In the case of the latter, international and regional instruments support at least a limited

⁸⁶ For example, non-citizens with permanent resident status are entitled to workers compensation in the event of an accident or disease (see the Compensation for Occupational Injuries and Diseases Act 130 of 1993). In terms of the UIA, they will be entitled to benefits, if they are retrenched, become ill or pregnant, or adopt young children.

⁸⁷ See generally *Moses v Safika Holdings (Pty) Ltd* 2001 22 ILJ 1261 (CCMA); *Vundla v Millies Fashions* 2003 24 ILJ 462 (CCMA); *Lende v Goldberg* 1983 2 SA 284 (C); *Georgieva-Deyanova v Craighall Spar* 2004 9 BALR 1143 (CCMA); *Maila v Pieterse* 2003 12 BALR 1405 (CCMA). Also see, however, *Mackenzie v Paparazzi Pizzeria Restaurant obo Pretorius* 1998 BALR 1165 (CCMA).

⁸⁸ Or a similar term used, such as “contributor”: see s 2(1) of the Unemployment Insurance Act 30 of 1966 and the similarly worded provision in the Unemployment Insurance Act 63 of 2001. See also s 1 of the Compensation for Occupational Injuries and Diseases Act 130 of 1994.

⁸⁹ 2008 7 BLLR 633 (LC).

⁹⁰ See, for instance, *Standard Bank v Estate Van Rhyn* 1925 AD 266; *Lende v Goldberg* 1983 4 ILJ 271 (C).

⁹¹ See Cholewinski *Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights* (2005) 42.

entitlement.⁹² In practice, this amounts to the return of the contributions that the irregular migrant may have made. The import of these international and regional guidelines is that irregular migrants who have made contributions to unemployment insurance in South Africa should at least be entitled to the return of their contributions.⁹³ While there are certainly legitimate reasons for differentiating between irregular migrants and those in a regular situation, and for extending fewer benefits to the former, it will be difficult, in light of the international and regional instruments referred to above, to justify depriving irregular migrants of the contributions they have actually made while employed. While this would have no cost implications for the Fund, it would bring South Africa in line with international instruments.

It is therefore recommended that irregular migrants who have made contributions to the UIF during their period of regular employment, or who made contributions while not being entitled to do so due to the irregularity of their situation, should at least be entitled to the return of their (but not their employers') contributions. This is in line with international and regional instruments, including ILO Convention No 143 and ILO Recommendation 151.

4 Concluding remarks and recommendations

The UIA and UICA are applicable to all employers and employees except for those specifically excluded. The UIA scope of coverage is narrow as it continues to exclude the atypically employed (particularly independent contractors, so-called dependent contractors and those who are self-employed or informally employed), public servants in the national and provincial spheres of government, learners, and certain categories of migrant workers from its purview. Given the vulnerable position of these groups, it is arguable that South Africa should, as a matter of principle, broaden the scope of coverage to include them. Furthermore, these exclusions may be susceptible to constitutional challenge in the context of the right to access to social security.

⁹² This view corresponds with the position adopted by the Council of Europe and one which they invite all their member states to implement, Committee on Migration, Refugees and Population "Human Rights of Irregular Migrants" *Council of Europe No 10924* (04-03-2006) [www.http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10924.htm](http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10924.htm) para 70 (accessed 11-10-2010) Support for this can also be found in Article 27(2) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) (adopted by General Assembly resolution 45/158 of 18 December 1990) Even though the provision in the latter instrument is weakly worded on the whole, it appears that the intention was to extend some social security protection to irregular migrants, at least those benefits to which they have contributed Article 9(1) of the ILO Convention No 143 Migrant Workers (Supplementary Provisions), 1975 protects the social security rights of migrant workers arising out of "past employment" It appears that the wording "past employment" refers to past periods of legal as well as illegal employment Finally in this regard, ILO Migrant Workers Recommendation 151 of 1975 stipulates in para 34(1)(c)(ii) that all migrant workers who leave the country of employment should be entitled to "reimbursement of any social security contributions which have not given and will not give rise to rights under national laws or regulations or international arrangements"

⁹³ A recent bilateral agreement between the United States and Mexico has even gone one step further In order to facilitate claims by irregular Mexican migrants in the wake of the conclusion of the agreement, the US Congress passed legislation which granted anyone who had made contributions to the US Social Security Administration prior to 2004 a legal entitlement to benefits associated with these contributions, independent of residence status and work permit status

In this article, the importance of extending coverage to currently excluded groups is highlighted. While the importance of including all the currently excluded groups cannot be denied, it is acknowledged that it will not be financially feasible to include all the groups at once. In prioritising the groups most urgently in need of inclusion, two important factors are taken into consideration. The first factor is of a legal nature, while the second is a financial one. In the first place, the exclusion of certain groups may be vulnerable to constitutional challenge. The exclusion of, in particular, public servants and migrant workers fall into this category. This article proceeds from the standpoint that priority should be given to the inclusion of those currently excluded from the UIA where the exclusion raises concerns of a constitutional nature. Second, including some groups may possibly have no or negligible financial impact on the financial viability of the Fund, and their inclusion should therefore be supported. In this regard, the return of contributions to undocumented migrants, the inclusion of learners and the inclusion of the partially unemployed come to mind. However, this article also recognises that some of the recommendations made may have a noticeable impact on the solvency levels of the Fund, and that it may not be possible to accommodate all of them immediately. This relates in particular to the introduction of unemployment benefits to employees who resign to take care of children or to care for a terminally ill family member (the so-called “carer’s benefit”).

Against this background, the following recommendations are made to broaden the scope of coverage of the UIF (in order of priority):

- Recommendation 1: It is recommended that the coverage of public servants by the UIA be prioritised, on the basis of an equal employer and employee contribution. Their continued exclusion raises serious constitutional concerns. Their inclusion is also a matter of national solidarity.
- Recommendation 2: Migrant workers on fixed-term contracts who have to leave South Africa upon the expiry of their contracts should be allowed to contribute to the UIF. This would ensure consistent treatment of all fixed-term employees under the UIA and bring South Africa in line with its obligations under ILO Convention 2 of 1919. In the absence of a bilateral agreement which arranges for verification by authorities of the relevant country, specific verification modalities as indicated in this article should be developed.
- Recommendation 3: Learners engaged under a contract of employment in terms of the Skills Development Act should be included under the ambit of the UIA. Should the contract of employment be terminated at the expiry of the period of duration specified in the learnership agreement, the learner concerned should benefit from unemployment insurance like any other contributor under the UIA. If a learner was in the employment of the employer party to the learnership agreement concerned when the agreement was concluded, the learner will merely continue to contribute to the UIF during the duration of the learnership agreement (this is already provided for in the most recent Unemployment Insurance Bill). If the learner

- is permanently employed by the employer with whom he or she concluded the learnership agreement upon expiry of the learnership agreement, he or she would merely continue contributing the Fund.
- Recommendation 4: Irregular migrants who have made contributions to the UIF during their period of regular employment, or who made contributions while not being entitled to do so due to the irregularity of their situation, should at least be entitled to the return of their (but not their employers') contributions. This is in line with international and regional instruments, including ILO Convention No 143 and ILO Recommendation 151, and international best practice.
 - Recommendation 5: The UIA should make those contributors who become partially unemployed eligible for benefits. The basis for calculating the benefit payable should be the same as for domestic workers, namely, that a contributor who is employed by more than one employer and whose employment is terminated by one or more employers is, despite still being employed, entitled to benefits in terms of the Act if the contributor's total income falls below the benefit level that the contributor would have received if he or she had become wholly unemployed.⁹⁴ In addition, it should reintroduce a provision that would allow a person who accepted employment at less than 50% of his or her average weekly rate of earnings which he or she received during the three months immediately preceding his unemployment to receive a special weekly allowance for a maximum period of thirteen weeks. This would improve the ability of the UIA to prevent and combat unemployment, and to reintegrate those who have become unemployed in the labour market.
 - Recommendation 6: The restriction limiting coverage to those working more than 24 hours per month should be removed from the UIA.
 - Recommendation 7: In keeping with some international practice, the UIF should consider alternative arrangements for inclusion of the self-employed and for those working in the informal economy. This could take the form of the development of one or more special schemes or the accommodation of these categories within branches of the existing scheme. Such coverage extension may have to be gradual, beginning with pilot projects in specific sectors already subject to regulation in the form of either sectoral determinations or bargaining council agreements. It is suggested that participation initially be voluntary. This could be extended over the medium- to long-term. As an important first step, the possibility of ensuring the retention of benefits by employees who become self-employed or move into informal work should be considered.
 - Recommendation 8: Finally, the UIA should be amended to allow benefits to be paid to contributors who resign or suspend their employment for a "compelling family reason". "Compelling family reasons" include both the care of children (natural or adopted) and that of a terminally ill family member. Consideration could be given to extend this exception to also

⁹⁴ See s 12(1A) of the UIA

cover employees who resign to undergo further education and training and to employees who resign in order to become self-employed.

Extending coverage to the above categories of persons would serve a fourfold purpose. In the first place, it will ensure that the coverage provisions of South Africa's unemployment insurance laws are aligned to constitutional prescripts and international standards. Secondly, it will address inconsistencies created and coverage gaps left by the retrogressive provisions of the unemployment insurance legislation of 2001. In the third instance, it will extend coverage to workers in the informal economy whose position is for all intents and purposes precarious. Finally, it will make the unemployment insurance responsive to the need to extend coverage on the basis of important humanitarian grounds.

SUMMARY

The scope of the Unemployment Insurance Act (UIA) is narrow as it continues to exclude the atypically employed (particularly independent contractors, so-called dependent contractors and those who are self-employed or informally employed), public servants, learners, and certain categories of migrant workers from its purview. Given the vulnerable position of these groups, it is arguable that South Africa should, as a matter of principle, broaden the scope of coverage to include them. While the importance of including all the currently excluded groups cannot be denied, it is acknowledged that it will not be financially feasible to include all of the groups at once. In prioritising the groups most urgently in need of inclusion, two important factors are taken into consideration. Firstly, the exclusion of certain groups may be vulnerable to constitutional challenge. The exclusion of, in particular, public servants and migrant workers fall into this category. This article proceeds from the standpoint that priority should be given to the inclusion of those currently excluded from the UIA where the exclusion raises concerns of a constitutional nature. Secondly, including some groups may possibly have no or negligible financial impact on the financial viability of the Fund, and their inclusion should therefore be supported. In this regard, the return of contributions to undocumented migrants, the inclusion of learners and the inclusion of the partially unemployed come to mind. However, this article also recognises that some of the recommendations made may have a significant impact on the solvency levels of the Fund, and that it may not be possible to accommodate all of them immediately. This relates in particular to the introduction of unemployment benefits to employees who resign to take care of children or to care for a terminally ill family member (the so-called "carer's benefit").