

ACTIVATION IN THE CONTEXT OF THE UNEMPLOYMENT INSURANCE SYSTEM IN SOUTH AFRICA*

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1 Introduction

This is the second in a series of three articles which address the key question as to how the Unemployment Insurance Fund (“UIF”) should be reformed in order to ensure an improved unemployment insurance mechanism, and to effect meaningful alignment with the other available social security interventions in South Africa. While the first contribution specifically addressed the existing gaps in coverage¹ and the final contribution in the series examines selected issues impacting upon the current legal framework (including contractual interfacing, dispute resolution and adjudication),² this particular contribution addresses the concept of “activation” in the context of UIF reform.

In essence, active labour market policies aim to influence the employment prospects of the unemployed by encouraging or mandating participation in job-search assistance programmes and skills training, or by directly increasing the returns to labour (for example, through wage subsidies).³ Active labour market policies can form part of a comprehensive unemployment protection system comprising unemployment insurance and unemployment assistance initiatives, and may be linked to both unemployment insurance and unemployment assistance benefits so that participation in, for example, skills

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¹ O Dupper, MP Olivier & A Govindjee “Extending Coverage of the Unemployment Insurance-system in South Africa” (2010) 3 *Stell LR* 438

² M Olivier, O Dupper & A Govindjee “Redesigning the South African Unemployment Insurance Fund: Selected Issues” forthcoming in (2011) 2 *Stell LR*

³ C Smith *International Experience with Worker-side and Employer-side Wage and Employment Subsidies, and Job Search Assistance Programmes: Implications for South Africa* (2006) 6

development or public works programmes becomes a pre-condition for receipt of available unemployment benefits.

There are a number of principled objections which challenge the use of activation mechanisms in South Africa. For example, increased activation in the country is still attempted in the absence of a proper legal framework.⁴ There is also an ongoing debate, centred in human rights discourse, which tests the merits of activation against the human rights of work-seekers. From a practical perspective, the potential for greater use of activation mechanisms in South Africa is limited by the lack of jobs into which the unemployed can be “activated” and the inadequacy of human and other resources with respect to available employment services. From an institutional perspective, the transfer of skills development controlling authority from the Department of Labour (“DL”) to the Department of Higher Education and Training raises a range of further difficulties. This paper focuses on these principled and practical considerations as being core “building blocks” for potential reform. Nonetheless, the appropriate role of the UIF in the establishment of activation in South Africa will be the key issue addressed in this paper.

This paper will be structured as follows: in part 2, it is argued that the limited and short-term impact of the UIF, its strong labour market orientation and its inability (due to the current inadequate legislative framework) to appropriately contribute to preventing and combating unemployment or to reintegrate the unemployed into the labour market all point to the urgent need to reform the UIF. The concepts of “activation” and “active labour market policies” are introduced in part 3. Particular focus is placed upon their potential link to future social security policy-making in South Africa. In part 4, the Skills Development Act 97 of 1998 (hereafter the “SDA”) and the draft Employment Services Bill are examined as examples of measures embracing active labour market policies in South Africa. The gaps in the current unemployment insurance system as well as the need to enhance the relationship between the unemployment insurance system and (appropriate) activation measures are highlighted. In particular, the absence of a link between those excluded from the UIF and the activation mechanisms introduced by the SDA is underscored. In parts 5 and 6, we examine the problems associated with three important pillars of any activation strategy, namely, the provision of public employment services, the creation of work opportunities and the establishment of a consolidated database linking job seekers to potential work opportunities. Finally, part 7 of the paper contains concluding remarks as well as various proposals for reform.

2 Background: the need to reform the Unemployment Insurance Fund

The Unemployment Insurance Act 63 of 2001 (“the UIA”) establishes an unemployment insurance fund to which employers and employees contribute

⁴ As indicated below, proposed “Employment Services” legislation is still in draft form and the Skills Development Act 97 of 1998 does not regulate activation comprehensively

and from which employees who become unemployed (or their dependants, as the case may be) are entitled to benefits in order to alleviate the harmful economic and social effects of unemployment.⁵ Subject to the provisions of this Act, a contributor (or a dependant in certain cases) is entitled to certain benefits. A “contributor” is defined as a natural person who is or was employed, to whom the Act applies and who can satisfy the Unemployment Insurance Commissioner that he or she has made contributions for purposes of the Act.⁶ An unemployed contributor is, briefly put and subject to certain conditions, entitled to unemployment benefits for any period of unemployment lasting more than fourteen days, if the reason for the unemployment is listed as a reason in section 16(1)(a);⁷ application is made in accordance with the prescribed requirements; the contributor is registered as a work-seeker with a labour centre established under the SDA;⁸ and, generally, the contributor is capable of and available for work.⁹ An unemployed contributor is not entitled to the benefits if such contributor fails to report at the times and dates stipulated by the claims officer, or the contributor refuses without just reason to undergo training and vocational counselling for employment under any scheme approved by the Director-General in terms of this Act or any other law.¹⁰

It has been observed that despite numerous amendments, the current UIA still reflects its origins as an Act designed to deal with cyclical unemployment in the 1940s.¹¹ According to the Taylor Report, the Act retains the form of a Fund designed to cater for the limited requirements of a historically privileged workforce not seriously threatened by unemployment.¹² Although it is questionable whether a fund based upon employer and employee contributions should be expected (or, indeed, was ever intended) to address large-scale problems related to unemployment, many have criticised the UIA for its failure to appropriately contribute to preventing and combating unemployment as well as for its inability to reintegrate those who have become unemployed in the labour market. Its primary focus, critics argue, is to arrange for measures dealing with the short-term unemployment of those who worked as “employees”

⁵ S 2 of the UIA

⁶ S 12, read with s 1 of the UIA

⁷ In terms of this subsection, the right to unemployment benefits exists if the reason for the unemployment is: (i) the termination of the contributor’s contract of employment by the employer of that contributor or the ending of a fixed term contract; (ii) the dismissal of the contributor; (iii) insolvency; or (iv) in the case of a domestic worker, the termination of the contributor’s contract of employment by the death of the employer of that contributor. Unemployment benefits in this context exclude the benefits to which an employee is entitled in the event of illness, maternity or in the case of adoption benefits. See AC Basson, MA Christianson, A Dekker, C Garbers, PAK le Roux, C Mischke & EML Strydom *Essential Labour Law* 5 ed (2009) 404

⁸ S 23(2) of the SDA. In terms of the SDA, labour centres have a range of employment services-related functions, including the registration of work-seekers, the registration of work placement opportunities and assisting work-seekers to access such opportunities

⁹ S 16(1) of the UIA

¹⁰ S 16(2) of the UIA

¹¹ P Benjamin *Labour Market Regulation: International and South African Perspectives* (2005) 39

¹² Taylor Committee *Taylor Committee Report “Transforming the Present – Protecting the Future (Committee of Inquiry into a Comprehensive System of Social Security for South Africa Consolidated Report)”* (2002) ch v <<http://www.sarpn.org.za/CountryPovertyPapers/SouthAfrica/taylor/report5.pdf>> (accessed 19-11-2010)

in the formal sector, and not to impact directly on the comprehensive context of mass and long-term structural unemployment in the country.¹³ In essence, the current UIA focuses on compensation (ie paying benefits) to some (workers) who become unemployed, while not paying adequate attention to the preventive and re-integrative role of an unemployment protection system, in particular an unemployment insurance system.

The coupling of reintegration measures with compensation (as compared to compensation in isolation) would enhance the prospect of lasting change for the presently unemployed. Despite this, perusal of the UIA leaves one with a clear impression that there is little innovative attempt to link entitlement to unemployment benefits with reintegration into the labour market. For example, in contrast with the previous legislation,¹⁴ benefits are no longer available in the event of partial unemployment¹⁵ and temporary suspension of work. Although it is required¹⁶ of an applicant for benefits to register as a work-seeker with a labour centre,¹⁷ and despite the fact that the refusal, without just reason on the part of an employee, to undergo training and vocational counselling for employment under any approved scheme is visited with disqualification to unemployment benefits,¹⁸ there is no further evidence of support for labour market integration in the UIA. The limitations of the current system when it comes to reintegration in employment are compounded by institutional challenges, human rights difficulties and general problems of implementation. The cumulative effect of these factors complicates the ability of the UIF to act as a catalyst for employment activation. In addition, the UIA contains little in terms of a statutory framework for comprehensive unemployment policy-making, in particular in the area of preventing and combating unemployment. As has been noted:

“The UIA itself contains little in terms of a statutory framework for comprehensive unemployment policy-making. Broader unemployment policy objectives^[19] are not reflected in the purpose provision of the UIA, which restricts itself to the unemployment insurance fund provided for by the Act.^[20] It

¹³ See, for example, MP Olivier & ET van Kerken “Unemployment Insurance” in MP Olivier, E Kalula & N Smit (eds) *Social Security: A Legal Analysis* (2003) 415 458

¹⁴ Unemployment Insurance Act 30 of 1966

¹⁵ For example, unlike the previous Act and except for the position of domestic workers, the UIA does not contain a provision that a contributor employed by two employers simultaneously, who lost one employment and continues in the other, does not lose his or her entitlement in respect of the lost employment simply because he or she retained the other employment: s 35(11) of the Unemployment Insurance Act 30 of 1966

¹⁶ S 16(1)(c) of the UIA

¹⁷ Established under the SDA (see n 7 above)

¹⁸ S 16(2)(b) of the UIA

¹⁹ In s 48 it lists as one of the powers and duties of the Unemployment Insurance Board (established by the Minister of Labour in terms of s 47) the obligation to advise the Minister on unemployment insurance policy (s 48(1)(a)(i)), policies arising out of the application of the Act (s 48(1)(a)(ii)), policies for minimising unemployment (s 48(1)(a)(iii)), and the creation of schemes to alleviate the effects of unemployment (s 48(1)(a)(iv)) The Board must also make recommendations to the Minister on changes to legislation in so far as it impacts on policy on unemployment or policy on unemployment insurance (s 48(1)(b))

²⁰ S 2 of the UIA states:

“The purpose of this Act is to establish an unemployment insurance fund to which employers and employees contribute and from which employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful economic and social effects of unemployment”

is also significant that the Act, unlike its predecessor,^[21] does not empower the Minister to introduce schemes to combat unemployment. It is doubtful whether the Unemployment Insurance Fund itself could be employed to serve the wider ambit of minimising unemployment and the creation of unemployment alleviation schemes, as the purposes for which the Fund could be used are strictly confined to the unemployment insurance functions foreseen by the Act.^[22] Similarly, in its description of the use to which any surplus in the Fund could be put, this is restricted to give effect to the purposes of the Act^[23] which, as indicated, is confined to the unemployment insurance framework.²⁴

The UIA can, in sum, be described as a policy instrument that provides so-called passive labour market measures (that is, measures aimed at providing income security in the form of unemployment benefits) and the fund created by the UIA is essentially a short-term benefit social insurance institution, targeted at income protection. Very little attention is paid to prevention and reintegration mechanisms. In addition, while the unemployment protection system in South Africa currently favours social insurance by means of contributions in the case of formal employment, it completely neglects to provide for unemployment protection by means of social assistance in the form of an “unemployment assistance” social grant. Although it is accepted that the UIA was never intended to serve as a social assistance measure, considering the extremely high levels of unemployment currently being experienced in South Africa,²⁵ there is an urgent need for some sort of unemployment assistance for the unemployed who have either exhausted their unemployment insurance benefits or who have never contributed to the unemployment insurance system.²⁶ There is, in other words, currently no coverage by way

²¹ Unemployment Insurance Act 30 of 1966

²² S 5, which stipulates that the Fund must be used for: the (a) payment of benefits in terms of the Act; (b) reimbursement of excess contributions to employers; and (c) payment of (i) remuneration and allowances to members of the Unemployment Insurance Board and its committees, and (ii) any other expenditure reasonably incurred and relating to the application of the Act

²³ S 10: it includes specifically the objective of improving the administrative efficiency and capacity of the Board and the Fund; and the establishing of a Reserve Fund

²⁴ Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 418

²⁵ South Africa’s unemployment rate is one of the highest in the world, and significantly higher than those of other middle income economies See H Bhorat “Unemployment in South Africa: Descriptors and Determinants” (2009) *Development Policy Research Unit, University of Cape Town* 2 <http://www.commerce.uct.ac.za/Research_Units/DPRU/OtherPDFs/Unemployment_in_South_Africa4.pdf> (accessed 23-02-2011) When using the narrow ILO definition of unemployment (meaning the person must be unemployed and actively seeking employment), South Africa’s unemployment rate currently stands at 25.3%. If the broad definition of unemployment is used (which includes discouraged work seekers), the unemployment rate swells to 38%. See Statistics South Africa “Quarterly Labour Force Survey, Quarter 3, 2010” (10-2010) *StatsOnline* <<http://www.statssa.gov.za/publications/P0211/P02113rdQuarter2010.pdf>> (accessed 23-02-2011) While urban unemployment rates are already very high, particularly striking and unusual are the higher rural unemployment rates (particularly in the so-called former “homelands”), which are far higher than anywhere in the developing world (see S Klasen & I Woolard “Surviving Unemployment without State Support: Unemployment and Household Formation in South Africa” (2008) 18 *J Afr Econ* 12) Also noteworthy is that these unemployment rates differ greatly by race and age. Africans have much higher (official or narrow) unemployment rates (29.8% in 2010), compared to Coloureds (22.3%), Indians (8.6%) and Whites (5.1%). Age is also a major determinant of unemployment. Unemployment disproportionately impacts on the youth, affecting about 35% of those below the age of 25. There is also a noticeable gender differential with females suffering from higher unemployment rates among each age and race group (see Statistics South Africa “Quarterly Labour Force Survey, Quarter 3, 2010” *StatsOnline*; also see Department of Social Development *Creating Our Future: Strategic Considerations for a Comprehensive System of Social Security (Discussion Paper)* (2008) 7)

²⁶ MP Olivier & LG Mpedi *Preventing Unemployment and Reintegrating the Unemployed in the Labour Market: Recent Perspectives from South Africa* (2007) paper presented at the 5th ISSA (International Social Security Association) International Research Conference on Social Security on the theme “Social Security and the Labour market: a Mismatch?” at Warsaw (05-03-2007 – 07-03-2007) 23

of unemployment benefits for those who are, for example, involved in the informal economy²⁷ or for those who have never had a job²⁸ or have been unemployed for long periods of time (and have consequently exhausted any unemployment insurance to which they may have been entitled).²⁹ This deficiency in the social security system currently in operation, while being primarily an issue of insufficient coverage, adversely impacts upon the limited activation initiatives currently being attempted, as indicated below.

Unemployment protection measures must make provision for both short-term and long-term needs, taking into account those whose needs are most urgent. A system which succeeds in shepherding unemployed people towards long-lasting employment opportunities has the potential to make a significant contribution to the alleviation of poverty in South Africa.³⁰ While the UIF cannot be expected to bear sole responsibility for addressing the current unemployment crisis in South Africa, it is undeniable that urgent attention is also required in this regard. The question at hand is how the UIF system, given the particular (passive) orientation of the Fund, should contribute to such ends. Adding impetus to this debate is the fact that the UIF currently has a fund surplus several times in excess of what is actuarially required for a fund of its nature.³¹ The holding of such a large surplus effectively restricts the financing of additional redistributive measures which could make some difference in the situation of unemployed people in South Africa, such as the introduction of a limited-duration continuation benefit in instances where an unemployed contributor has exhausted his or her unemployment benefits without sourcing new employment.³² However, it is unlikely that the

²⁷ Considering the extent of unemployment in South Africa one would expect the percentage of those engaged in the informal economy to be fairly large, while in reality it is relatively small by international standards as far as the developing world is concerned. In 2008 it was estimated that about 26% of the economically active population were engaged in informal employment. See M Leibbrandt, I Woolard, H McEwen & C Koop "Employment and Inequality Outcomes in South Africa" (2010) 16 *South Africa Labour and Development Research Unit (SALDRU) & School of Economics, UCT* <<http://www.oecd.org/dataoecd/17/14/45282868.pdf>> (accessed 20-11-2010)

²⁸ For example, in 2007, slightly more than half (55%) of the unemployed reported that they had never worked and therefore had not contributed to the UIF. See Leibbrandt et al "Employment and Inequality Outcomes in South Africa" *SALDRU & School of Economics, UCT* 36

²⁹ It is reported that slightly less than half (44%) of the unemployed in South Africa have been unemployed for more than a year. See Leibbrandt et al "Employment and Inequality Outcomes in South Africa" *SALDRU & School of Economics, UCT* 36. Also see LG Mpedi *The Recent Financial and Economic Crisis: Social Security Lessons for the Southern African Development Community* paper presented at the 6th ISSA (International Social Security Association) International Policy and Research Conference on Social Security on the theme "Emerging Trends in Times of Instability: New Challenges and Opportunities for Social Security" at Luxembourg (29-09-2010 – 01-10-2010) 11; see also, Olivier & Mpedi *Preventing Unemployment and Reintegrating the Unemployed in the Labour Market: Recent Perspectives from South Africa* 22-23

³⁰ When a \$2 00 a day baseline is used, a staggering 30% of all South Africans live in poverty. This is nevertheless down from 33.9% in 1993. See Leibbrandt et al "Employment and Inequality Outcomes in South Africa" *SALDRU & School of Economics, UCT* 21

³¹ The surplus currently amounts to approximately R18 billion rand, which is immediately available to address the gaps in the system. See International Expert Panel *Consultation Report: Observations on Social Security Reform in South Africa* (2008) 5 <<http://www.blacksash.org.za/docs/consultationreport.pdf>> (accessed 18-11-2010)

³² The UIF recently recommended a widening of the net of beneficiaries covered by the UIA. The fund proposed that public servants, legal migrants and those in learnerships be included under its umbrella and that the size of the income replacement rate be increased from 38% to 45% of monthly salary. L Ensor "Strong Finances may widen UIF Beneficiary Net" *Business Day* (13-09-2010) 1

surplus could ever fulfil a more comprehensive role as the panacea for the unemployment situation in the country. While this article expresses no opinion on the best way to utilise the current surplus, the question as to whether or not expanded unemployment benefits should be linked to activation measures is addressed.

3 Introduction to the concept of “activation” and related human rights issues

Activation schemes typically make benefit receipt conditional upon job search activities, acceptance of available job offers and participation in active labour market policy schemes such as training activities.³³ The main aim of activation policies is to bring jobless people from unemployment or inactivity into work or, at the very least, to influence the employment prospects of the unemployed positively.

Activation schemes have become more widespread in recent times. Eichhorst, Kaufmann and Konle-Seidl recently noted:

“The normative philosophy of recent labour market reforms is one of reciprocal obligations. Hence, participation in enabling schemes is made mandatory. This is the most important difference between pre-activation labour market policies and current settings. To establish a more formal link between demanding and enabling schemes as well as benefit entitlements, integration contracts between the individual and the public employment service have become more widespread. On the one hand, benefit recipients are obliged to accept employment options or training schemes in order to receive benefits while, on the other hand, the state has the obligation to enhance the employability of benefit claimants.”³⁴

There are broadly four types of active labour market policy interventions geared towards such ends: (i) labour market training that aims to improve the productivity and employability of individuals by offering general education (for example, basic computer skills and language courses); (ii) training for specific vocations, or on-the-job training, that is aimed at improving work experience; (iii) private sector incentive programmes that typically aim to influence the behaviour of employers and potential employees, a prominent example being the wage subsidy; and (iv) job-search efficiency services that provide job-search assistance, vocational guidance and placement services. A typical active labour market programme accordingly comprises (some of) the following components: job-search assistance, training for the unemployed, retraining for workers in the event of mass layoffs, training for the youth, training of active workers, wage subsidies, direct job creation (for example, through public works) and self-employment assistance.³⁵

Most active labour market policies have been introduced in developed countries and are concerned with assisting the individual to re-enter the job

³³ Smith *International Experience with Worker-side and Employer-side Wage and Employment Subsidies* 5.

³⁴ W Eichhorst, O Kaufmann & R Konle-Seidl “Bringing the Jobless into Work? An Introduction to Activation Policies” in W Eichhorst, O Kaufmann & R Konle-Seidl (eds) *Bringing the Jobless into Work? Experiences with Activation Schemes in Europe and the US* (2008) 1 6-7

³⁵ Inter-American Development Bank “Active Labour Market Policies” (2005) *Job Training Programs Thematic Review* <<http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=494806>> (accessed 15-05-2010)

market in order to limit incidences of welfare-dependency.³⁶ A general trend towards “activation” has, for example, been one of the major issues in recent welfare and labour market reforms in Europe and the United States.³⁷ International experience suggests that the impact of globalisation on national economies necessitates the adoption of “active” labour market policies to minimise the effect of unemployment on particular economies.³⁸ However, many ostensibly successful active labour market policies³⁹ in other countries have simply enforced unemployment benefit “activation” rules more strictly, a strategy which South Africa may find difficult to emulate due, in part, to the institutional deficiencies and concerns related to capacity addressed below.⁴⁰ It must also be noted that countries such as Australia have, over time, softened earlier approaches to a “welfare sanctions regime”, in terms of which people were heavily penalised for failure to participate in activation endeavours.⁴¹

There are important human rights considerations pertaining to activation which must also be raised. These include, in particular, the elements of “compulsion” and “denial” associated with activation. Compulsion ensues in the sense that a person is indirectly compelled to engage in activation processes for the fear of being penalised if such person fails to participate in stipulated activation endeavours. On the other hand, denial arises in the sense that enjoyment of unemployment benefits is hinged on participation, thereby denying such benefits to anyone who fails to participate. Such issues are especially significant when viewed against the background of the constitutional right to access to social security and the obligation on the state not to act in a manner that would infringe or restrict such a right. Section 27(1)(c) of the Constitution of the Republic of South Africa, 1996 (the “Constitution”) expressly entrenches everyone’s right to “have access to

³⁶ “By turning benefit recipients into gainfully employed members of the labour force, activation policies are supposed to reduce expenditure on benefits while at the same time increasing revenue from taxes and social security contributions. The larger number of people participating full-time and part-time in the labour market, the greater the contribution they make towards maintaining the affordability of adequate levels of social protection.” Eichhorst et al “Bringing the Jobless into Work?” in *Bringing the Jobless into Work?* 3-4

³⁷ Eichhorst et al “Bringing the Jobless into Work?” in *Bringing the Jobless into Work?* 2

³⁸ Benjamin *Labour Market Regulation* 45. For a paper which appeals for an investigation as to how active labour market policies have performed in South Africa in terms of alleviating unemployment, see G Kingdon & J Knight “Unemployment in South Africa, 1995-2003: Causes, Problems and Policies” (2007) 16 *J Afr Econ* 813-848; also see M Altman “Research Gaps: Labour Market Function and Policy in South Africa” (2005) *Employment and Economic Policy Research Programme* 10 <http://www.hsra.ac.za/research/output/outputDocuments/4211_Altman_Researchgapslabourmarket.pdf> (accessed on 06-03-2010)

³⁹ The “welfare-to-work” experiments in the United States during the 1980s, for example, required individuals to provide proof of job searches, and attend job search counselling, while providing information on job availability. The imposition of welfare reciprocity requirements was found to reduce the amount of time spent claiming unemployment benefits, although it has been suggested that the threat of losing Unemployment Insurance Benefits was more effective than job counselling or training at inducing higher rates of employment. See, in general, Eichhorst et al “Bringing the Jobless into Work?” in *Bringing the Jobless into Work?* 1-16

⁴⁰ This issue has also been highlighted by the International Labour Organization as a core research area: see Economic and Labour Market Analysis Department (ELM) “Labour Market Policies and Institutions” (2011) *International Labour Organization (ILO)* <http://www.ilo.org/empelm/areas/lang--en/WCMS_DOC_ELM_ARE_MKT_EN/index.htm> (accessed 28-02-2011)

⁴¹ T Carney & G Ramia “Welfare Support and ‘Sanctions for Non-compliance’ in a Recessionary World Labour Market: Post Neo-liberalism or not?” (2010) 2 *IJSSWC* 29-40

social security, including, if they are unable to support themselves and their dependents, appropriate social assistance”.⁴²

In terms of section 7(2) of the Constitution, “the State must respect, protect, promote and fulfil the rights in the Bill of Rights”. In *Rail Commuter Action v Transnet Ltd t/a Metrorail*,⁴³ the Constitutional Court explained that

“[t]he rights contained in the Bill of Rights ordinarily impose, in the first instance, an obligation that requires [the State] not to act in a manner which would infringe or restrict the right.”⁴⁴

Also, in *Njongi v MEC, Department of Welfare, Eastern Cape*,⁴⁵ the court noted that

“when an organ of government invokes legal processes to impede the rightful claims of its citizens, it ... defies the Constitution, which commands all organs of State to be loyal to the Constitution and requires that public administration be conducted on the basis that ‘people’s needs must be responded to’ ...”.⁴⁶

It further noted that

“the Constitution in its preamble looks to the improvement of the quality of life of all citizens.”⁴⁷

It is unacceptable for such an organ to conduct a case “as though it were at war with its own citizens”.⁴⁸

It should be pointed out that the rights in the Bill of Rights are not absolute and that there are limitations recognised by the Constitution itself. The strict implementation of active labour market policies might be construed as a limitation of a person’s right to have access to social security. The manner in which activation is regulated will determine whether or not such a limitation is reasonable and justifiable in terms of section 36(1) of the Constitution.⁴⁹ A court applying section 36(1) places

“the purpose, effect and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused...on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.”⁵⁰

Importantly, a limitation of the right to access social security can only pass the section 36 test if it is contained in a law of general application. This implies that the regulation of activation mechanisms via government *policy* statements would be an inadequate justification for limiting a constitutional right. In so far as the provision of social security benefits (for example, an unemployment insurance continuation benefit) may be made conditional upon

⁴² See also, Charter of Fundamental Social Rights in the SADC (2003) art 10; Code on Social Security in the SADC (2007) art 4 1

⁴³ 2007 1 SA 343 (CC)

⁴⁴ Para 44

⁴⁵ 2008 4 SA 237 (CC) para 20

⁴⁶ *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC) para 20; *Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government v Ngxuzza* 2001 4 SA 1184 (SCA) para 15

⁴⁷ *Njongi v MEC, Department of Welfare, Eastern Cape* 2008 4 SA 237 (CC) para 17

⁴⁸ Para 20.

⁴⁹ In terms of this section, the rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and less restrictive means to achieve the purpose

⁵⁰ *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC) para 18

activities such as compulsory registration as a work-seeker, participation in public works programmes or involvement in skills development initiatives, such activation steps may need to be formalised in legislation in order for these measures to serve as a reasonable and justifiable limitation of the right to have access to social security.⁵¹ In other words, it is submitted that any attempt to strengthen labour market activation by making social security benefits conditional upon participation in active labour market activities would need to be regulated in legislation, and not merely by way of a policy directive. This is a direct consequence of the constitutional right to have access to social security and the importance of the human rights framework that exists in South Africa.

4 Bridging the gap: linking active labour market policies to social security policy in South Africa

This section focuses on the extent to which the current legislative system in South Africa encourages measures typically associated with “activation”, such as job-search assistance, training and retraining, and skills development. In particular, the focus will be on the extent to which the current unemployment insurance system links benefit entitlement to (re)integration in the labour market.

The pre-eminent statute currently in operation in this regard is the Skills Development Act (“SDA”). Section 2(1) of the SDA illustrates the link between benefit entitlement and reintegration by enunciating seven key issues as representing the purpose of the SDA; namely:

- developing the skills of the South African workforce (so as to improve the quality of life of workers, improve their prospects of work and labour mobility; improve productivity in the workplace and the competitiveness of employers; promote self-employment; and improve the delivery of social services);
- increasing the levels of investment in education and training in the labour market;
- encouraging employers to use the workplace as an active learning environment, provide employees with the opportunities to acquire new skills, provide opportunities for new entrants to the labour market to gain work experience, and employ persons who find it difficult to be employed;
- encouraging workers to participate in learning programmes;
- improving the employment prospects of persons previously disadvantaged by unfair discrimination and to redress those disadvantaged through training and education;
- ensuring the quality of learning in and for the workplace and assisting work-seekers to find work, retrenched workers to re-enter the labour market, and employers to find qualified employees; and

⁵¹ This would require a change in governmental approach at least with respect to public works programmes, which are currently regulated largely through policy documents as opposed to legislation

- providing and regulating employment services.⁵²

In addition, the draft Employment Services Bill⁵³ is an example of proposed legislation that seeks to embrace active labour market policies in South Africa and which, if enacted in its current form, will repeal various sections of the SDA. The purpose of the Bill is ambitious and manifold, and includes reducing unemployment, improving access to the labour market for all work-seekers, providing opportunities for work experience, improving the employment prospects of people with disabilities, assisting the unemployed, facilitating access by workers to training, improving workplace productivity and promoting job security.⁵⁴ These objectives are to be achieved by providing “comprehensive and integrated public employment services”,⁵⁵ co-ordinating the activities of public sector agencies engaged in the provision of employment services, encouraging partnerships between the public and private sectors of the economy to provide employment services, providing a regulatory framework for the operation of private employment agencies and promoting a constructive relationship between these agencies and the public employment service.⁵⁶ The draft provisions relating to private employment agencies reflects an evident attempt to align South Africa’s international obligations, in terms of the Unemployment Convention of the International Labour Organisation,⁵⁷ to endeavour to co-ordinate at a national scale the operations of public and private employment agencies, where they exist.

The impact of the proposals contained in the draft Employment Services Bill remains to be seen. In terms of this document, public employment services are to be financed pursuant to a special Parliamentary vote, together with money allocated from the UIF, among other sources.⁵⁸ The money received by the proposed “Public Employment Services” is to be used to fund the administration and performance of the Services’ functions as well as schemes for retrenched and unemployed work-seekers, among other matters.⁵⁹

It is clear from the foregoing that, at least in principle if not yet in practice, both the SDA and the draft Employment Services Bill embrace active labour

⁵² The SDA aims to achieve its purposes by: establishing an institutional and financial framework which consists of the National Skills Authority (see Ch 2 of the SDA for provisions relating to the establishment, functions, composition, constitution, and remuneration and administration of the National Skills Authority), the National Skills Fund (s 27(1) of the SDA), a skills development levy-grant scheme, Sector Education and Training Authorities (SETAs) (Ch 3 of the SDA), labour centres, and the Skills Development Planning Unit (see s 22 of the SDA); encouraging partnership between the public and private sectors of the economy to provide education and training in and for the workplace; and co-operating with the South African Qualifications Authority (s 2(2) of the SDA) From a policy perspective, the SDA can be criticised as it focuses more on employment instead of unemployment policy in the sense that it makes provision for a broad framework intended at developing the skills of the country’s labour force See Olivier & Van Kerken “Unemployment Insurance” in *Social Security: A Legal Analysis* 417

⁵³ Employment Services Bill (draft) GN 1112 in GG 33873 of 17-12-2010

⁵⁴ Cl 2(1) of the draft Employment Services Bill

⁵⁵ Cl 2(2)(a) of the draft Employment Services Bill

⁵⁶ Cl 2(2) of the draft Employment Services Bill

⁵⁷ Unemployment Convention of the International Labour Organisation (1919) (ratified on 20-02-1924)

⁵⁸ Cl 14(1)(a) of the draft Employment Services Bill

⁵⁹ For example, rehabilitation and promotion of re-entry into employment for people injured on duty and subsidies to organisations providing workplace opportunities for people with disabilities Cl 14(2) of the draft Employment Services Bill

market policies and measures such as public-private partnerships, job search assistance, employment services, and assisting workers displaced in mass layoffs to re-enter the labour market. As discussed earlier, the UIF is responsible for providing the unemployed persons (who contributed to the Fund) with so-called passive labour market measures whereas the institutional framework set up by the SDA (and the draft Employment Services Bill) should provide active labour market measures to assist unemployed persons to (re)enter the labour market.

However, in practice, the current linkage between the provision of passive labour market measures and active labour market measures is not as streamlined as it should be. It has already been noted that an unemployed contributor is obliged to register as a work-seeker with the labour centre before he or she can draw unemployment benefits. This provision serves as a bridge, at least for those people fortunate enough to fall within the ambit of the UIA, between the passive labour market measures contained in the UIA and the active labour market measures provided for by the SDA. The same cannot be said about unemployed persons (particularly the long-term unemployed) who are not covered by the UIA as there is no general duty or legal obligation, even in the latest version of the Employment Services Bill, for such unemployed persons to register as work-seekers. The same applies with respect to the informally employed and other categories of people not covered by the current UIF framework. The crux of the matter is that while the UIA does provide a limited link to the SDA for those unemployed contributors who enjoy a right to unemployment benefits, the vast majority of unemployed persons and work-seekers are currently not induced to participate in any labour activation opportunities whatsoever.⁶⁰

As Olivier and Smit note in this regard:

“It is unlikely that the statutory incentive to conduct training programmes in terms of the Skills Development Act will have a dramatic impact as far as preventing/combatting unemployment and the re-integration of the unemployed are concerned.”⁶¹

The fact of matter is that

“[F]rom a statutory perspective these programmes have an employee bias, with the result that those who are unemployed or who work but are not regarded as employees in the statutory sense of the word, will largely still not benefit from skills development programmes.”⁶²

The discussion must be understood against the background of a discernible trend in recent policy documents of government that place some emphasis on the conditionality of benefits, meaning that participation in active labour market policies becomes a precondition for the receipt or the continuation

⁶⁰ The draft Employment Services Bill makes no reference to any linkage with the UIF

⁶¹ MP Olivier & N Smit “Labour Law and Social Security Law” in *LAWSA 13* 2 ed (2002) para 22

⁶² Para 22 n 7

of benefits.⁶³ For example, the proposals put forward by the Department of Social Development (“DSD”) on strategic considerations for a comprehensive system of social security in South Africa states that all recipients of a (proposed) “continuation benefit” (which suggests elongated benefits for those people who have exhausted unemployment insurance benefits without having found a job) *would need to participate in labour activation programmes* where these have been implemented, and that these could include skills development programmes, special employment projects with or without a skills development component and participation in surveys to evaluate the causes of continued unemployment.⁶⁴ It has also been suggested that conditions could be attached for the receipt of social assistance benefits for unemployed persons. In terms of this proposal, receipt of any available unemployment assistance grant could be dependent, for example, upon participation in job-search or skills development activities.⁶⁵

By contrast, the Taylor Committee Report has noted that

“[a]lthough it is desirable to link active labour market policies to social security policy the preconditions for this do not exist in South Africa”.⁶⁶

Among these pre-conditions, the Report noted, would appear to be the following:

- The number of unemployed relative to the number of employed and the potentially economically active population should be relatively small (ie, unemployment rates should not be “too” high, nor economic activity rates “too” low).
- Sufficient employment opportunities must exist to make the threat of withholding of benefits on failure to take up a “suitable” job offer credible.
- Capacity to administer and manage the complex systems required must exist. This extends to the need to provide well-informed “advisors” to deal with cases on an individual basis.⁶⁷

Charles Meth expresses similar sentiments. He argues as follows:

“It is also my view that a country like South Africa, with its mass poverty and mass unemployment, cannot solve the age-old problem of what to do about the able-bodied poor, using the means employed in wealthy economies, especially the social democracies. The country does not have the resources to engage in the sort of one-on-one activities necessary to make active labour market policies work (assuming that the jobs into which to insert people exist).”⁶⁸

⁶³ See Department of Social Development *Creating our Future* 19:

“Conditional social transfers can link grant recipients to a range of related government programmes and initiatives which form part of the common developmental package. These can include: 1 Participation in primary and secondary education; 2 Skills development targeted at the youth; 3 Skills development targeted at the long-term unemployed; 4 Preventive healthcare programmes; 5 Job placement programmes; and 6 Special employment programmes”

⁶⁴ Department of Social Development *Creating our Future* 19
⁶⁵ 48

⁶⁶ Taylor Committee *Taylor Committee Report* ch v 166

⁶⁷ Ch v 166

⁶⁸ See C Meth “Basic Income Grant: There is no Alternative” *UKZN School of Development Studies Working Paper No 54* (2008) 36

In other words, South Africa does not have the required number of jobs into which the unemployed can be “activated”. In addition, the capacity or resources to establish a large-scale system of “individualised activation”, that is a system in which every unemployed person is linked to an advisor in a labour centre who will be able to engage in one-on-one activities with the unemployed, may be lacking.⁶⁹ There appears to be no reason in principle to prevent a “case management approach” to activation from being introduced in a developing country such as South Africa on a smaller scale.⁷⁰ The conclusion may be drawn that the emphasis of active labour market policies in the context of the unemployment insurance system should be on improving the currently malfunctioning employment services system that exists in South Africa and on developing effective active labour market services (for example, demand-oriented training and retraining services), coupled with job creation.

5 The challenges of providing public employment services

The “public employment services” contemplated in the Employment Services Bill include matching work-seekers with available work opportunities, registering work-seekers, registering job vacancies and other placement opportunities, vocational counselling, assessments and life skills provision.⁷¹

Other than requiring contributors to register as work-seekers with labour centres under the SDA, the UIA is silent on job-creation schemes and the provision of employment services. Instead, it is the mechanisms established under the SDA which are meant to promote self-employment,⁷² encourage employers to provide opportunities for new entrants to the labour market to gain work experience and to employ persons who find it difficult to be employed,⁷³ and assist work-seekers to find work and to assist retrenched workers to re-enter the labour market.⁷⁴ The Employment Services Bill takes some of these issues further by, for example, specifically promoting the employment prospects of the youth and persons with disabilities and by striving to regulate the provision of public employment services by the DL as well as private provision of such services.

The President recently transferred⁷⁵ most of the administration, powers and functions pertaining to skills development previously entrusted to the Minister of Labour to the Minister of Higher Education and Training.⁷⁶ Importantly, the Presidential Proclamation of 2009 excluded key provisions in the SDA relating to the establishment of labour centres and employment

⁶⁹ This is the normal way in which activation measures are implemented in developed countries. See, in general, Eichhorst et al “Bringing the Jobless into Work?” in *Bringing the Jobless into Work?* 1-16.

⁷⁰ The case management approach which is used to assist people who visit the offices of the Commission for Conciliation, Mediation and Arbitration (CCMA) is a good example of a successfully operating system of case management in South Africa

⁷¹ Cl 5 of the Employment Services Bill

⁷² S 2(1)(a)(iii) of the SDA

⁷³ Ss 2(1)(c)(iii) and 2(1)(c)(iv) of the SDA

⁷⁴ Ss 2(1)(g)(i) and 2(1)(g)(ii) of the SDA

⁷⁵ In terms of s 97 of the Constitution

⁷⁶ Proc R56 in GG 32549 of 04-09-2009 (“the Presidential Proclamation of 2009”)

services, implying that such matters will continue to be the responsibility of the Minister of Labour.⁷⁷

In terms of the SDA, read together with the Presidential Proclamation of 2009, and with direct reference to the provision of employment services, it remains the function of provincial offices of the DL to plan, coordinate, support, monitor and report on all activities occurring at all labour centres and to perform any other prescribed or delegated function.⁷⁸ The functions of these labour centres of the DL in respect of employment services are:

- (a) to provide information to workers, employers and skills development providers, including the unemployed;
- (b) to register work-seekers;
- (c) to register placement opportunities;
- (d) to assist workers and other prescribed categories of persons –
 - (i) to enter learning programmes;
 - (ii) to find placement opportunities;
 - (iii) to start income-generating projects; and
 - (iv) to participate in placement programmes;
- (e) to develop plans, programmes and coherent strategies to extend services to rural communities; and
- (f) to perform any other prescribed function related to the functions referred to in paragraphs (a) to (e).⁷⁹

Importantly, the Minister of Labour may, after consulting the National Skills Authority, by notice in the Gazette, require each employer to notify a labour centre in the prescribed manner of any vacancy that the employer has as well as the employment of any work-seeker referred by that labour centre.⁸⁰ There is an overlap between these provisions and proposals contained in clause 11 of the draft Employment Services Bill. In terms of the transitional provisions contained in Schedule 2 of this document, all SDA employment services provisions mentioned in the first column of the President's Proclamation of 2009 are to remain in force until repealed by a Notice published by the Minister of Labour in the Gazette.⁸¹ Given the direct relationship between the UIA and the SDA with respect to the registration of work-seekers, enactment of the Employment Services Bill (with its proposed repeal of various provisions of the SDA) will also result in amendment to the UIA being necessitated.

⁷⁷ Also see s 4 of the Higher Education Laws Amendment Bill 2010, Bill 24-2010 which proposes the formal replacement of the Minister of Higher Education and Training for the Minister of Labour in the wording of the SDA, barring various subsections of the SDA pertaining to employment services

⁷⁸ S 23(1)(a) and 23(1)(d) of the SDA. In terms of the amended institutional framework, it is now the function of the Minister of Higher Education and Training to establish a skills development forum and to maintain a database of skills development providers. S 23(1)(b) and 23(1)(c) of the SDA, read together with the Presidential Proclamation of 2009

⁷⁹ S 23(2) of the SDA

⁸⁰ S 23(3) of the SDA

⁸¹ Cl 2 of Sch 2 of the draft Employment Services Bill

The DL had already developed a system which promised delivery of registration services,⁸² career information and guidance services,⁸³ recruitment and selection services,⁸⁴ skills development services,⁸⁵ information services,⁸⁶ and special services.⁸⁷ The transfer of skills development functions to the Minister of Higher Education and Training may result in such advancements being nullified to some extent, due mainly to the institutional fragmentation that has occurred by splitting the provisions of the SDA between two ministries. The delivery of these services was piloted in two labour centres in 2008 and 2009. A number of people reportedly benefited from the process while challenges were identified and, to an extent, mitigated.⁸⁸ An important practical point which has emerged from the piloting process is that the flood of job seekers and unemployed people (including unemployment insurance benefit applicants) to labour centres for registration as beneficiaries of employment services created logistical problems. A number of unemployed people were either not registered at all or registered manually (resulting in a hybrid system of registration).⁸⁹

Other challenges identified in this regard relate to information technology systems,⁹⁰ infrastructure challenges⁹¹ and governance challenges.⁹² Perhaps understandably, the delivery of an integrated service has resulted in practical problems, despite being a laudable objective in theory. By adding more responsibilities to the current workload of DL officials, many have been overwhelmed by the numerous tasks that they have had to perform, ranging from attending to labour complaints, to registering job seekers on the

⁸² This includes the registration of individuals and opportunities

⁸³ This includes career, labour market, scarce and critical skills information and guidance on employability and accessing placement opportunities. Employment Services Practitioners are employed by the DL to register and provide career information to job-seekers and to identify projects for skill provision to the unemployed

⁸⁴ This includes the proactive identification of opportunities through networking with stakeholders, the matching of individuals to opportunities, recruitment and selection of a particular opportunity, and placement

⁸⁵ This includes identifying training needs of the job seekers, referring job seekers for training and ensuring that they are capacitated to participate actively in the labour market; managing this by identifying scarce and critical skills, developing the Provincial Implementation Plans, identifying possible training providers in the local areas, monitoring training and ensuring placement of trainees in opportunities, and monitoring to ensure transfer of skills in cases where foreign workers are employed to bring in scarce skills

⁸⁶ This includes the production of information brochures/pamphlets and packages, as well as advocacy on accessing employment and skills development services

⁸⁷ This includes services for special interest groups, such as people with disabilities, retrenched employees (social plan), ex offenders etc

⁸⁸ Department of Labour *Annual Report of the Department of Labour, 1 April 2008 – 31 March 2009* (2009) 31-35

⁸⁹ Department of Labour *Annual Report of the Department of Labour, 1 April 2009 – 31 March 2010* (2010) 42

⁹⁰ TW Oshikoya & M Nureldin Hussain "Information Technology and the Challenge of Economic Development in Africa" *Economic Research Papers No 36 African Development Bank* 15 <<http://www.afdb.org/fileadmin/uploads/afdb/Documents/Publications/00157606-EN-ERP-6 PDF>> (accessed 28-02-2011)

⁹¹ For example, inadequate resources for the appointment of Career Counsellors and lack of space in many Labour Centres for housing the few Career Counsellors already appointed

⁹² For example, there is no dedicated staff to take responsibility for registration of job seekers, opportunities matching, placement and reporting on placements. Staffing proposals made two years ago have apparently not been acted upon

employment services system and unemployment insurance beneficiaries on a different computer system.⁹³

The core problem appears to be lack of adequate human resource and logistical capacity to implement what appears, on paper, to be a sound plan. Recruitment and selection services, for example, are currently not prioritised by the labour centres (because of inadequate human resource capacity) despite the service promising employers and other providers of placement opportunities that the DL will find them the most suitable candidates for their opportunities.⁹⁴ A large percentage of opportunities are not filled despite the high level of unemployment: during the 2007 – 2008 financial year, approximately 169 059 job-seekers and 15 364 job opportunities were registered on the employment services system with only 5 578 of the registered job-seekers placed in formal employment.⁹⁵ Addressing this lack of human resource and logistical capacity may prove to be extremely costly given that a national roll-out of such labour centres are envisaged within the various DL offices.⁹⁶

6 The creation of work opportunities and a consolidated database

In 2002, the Taylor Committee considered the introduction of active labour market policies and the development of institutions to coordinate all policies related to job creation. The Committee agreed that the importance of providing the unemployed with “jobs that allow them to participate in society, to contribute financially to their families and to increase their self-worth” is self evident, despite being an imperative which requires major structural reform and a change of mindset.⁹⁷ The Committee concluded, however, that given the extremely high levels of poverty and related problems, such policies on their own are unlikely to address the immediate crisis, in particular when considering the structural barriers, educational levels and other features of the global economy.⁹⁸ Public works programmes, such as the Expanded Public Works Programme (EPWP) and Community Works Programme (CWP), are not considered to provide a long-term solution given the scale and nature of unemployment in South

⁹³ See generally, Department of Labour *Annual Report* (2009) 32; Department of Labour *Annual Report* (2010) 42. In some Labour Centres, employment services are expected to be provided irrespective of the number of clients and their complex needs for support in finding income earning opportunities. The UIF has used the Siyaya system as an improved benefit administrative system, since 2005.

⁹⁴ Department of Labour *Annual Report* (2009) 89.

⁹⁵ Parliament of the Republic of South Africa *Labour Report* (April 2009) 16.

⁹⁶ S 23(2) of the SDA.

⁹⁷ 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) 73.

⁹⁸ Taylor Committee *Taylor Committee Report* 73.

Africa.⁹⁹ Large-scale public works programmes are costly and have to be sustained for a number of years. They could attract lower-paid workers in the formal or informal sector in an unintended manner, resulting in displacement and wage distortion.¹⁰⁰ The emphasis must rather be on finding long-lasting solutions and not merely creating work opportunities for a very limited period of time.

Nevertheless, ending poverty requires that the economy generates employment opportunities.¹⁰¹ It appears to be inevitable that, at least in the short run, much employment creation will likely come from activities that depend largely on government spending; especially public employment schemes based on infrastructure construction programmes and government-supported community service and cultural activities.¹⁰² In addition to fast-tracking these programmes in order to alleviate some of the suffering currently being experienced, it has been suggested that the state must do more over the next five years to improve the support structures and systems for economic activities that create decent work opportunities on a large scale.¹⁰³ This includes the establishment of adequate skills development and training opportunities (through the Department of Higher Education and Training), reliable public and private employment services provision through DL labour centres and private providers, as indicated above, coupled with the creation and use of a consolidated database or register of work-seekers, as dealt with below.

At present there are a number of databases in terms of which unemployed persons may register as job-seekers.¹⁰⁴ These databases provide links to EPWP programmes and also allow prospective employers to register with them.¹⁰⁵ Consolidation of such databases (coupled with an aggressive marketing campaign) would appear to be crucial for the successful expansion

⁹⁹ Economists frequently draw a distinction between structural and cyclical unemployment, although both are accepted to be involuntary in nature. The impact of public works programmes on structural unemployment is highly questionable. McCord, for example, concludes that while public works programmes can offer a partial response to the problems of poverty and unemployment if appropriately designed, the gap between policy expectation and programme reality is significant, and that public works programmes cannot offer an adequate social protection response to the growing problem of the working age poor. She states that there is a need to recognise that public works programmes can have only a limited role in the context of entrenched and structural unemployment. AG McCord "Public Works: Policy Expectations and Programme Realities" SALDRU/CSSR Working Paper No. 79 *Southern Africa Labour and Development Research Unit, UCT* (2004) <<http://econpapers.repec.org/paper/ldressrwp/079.htm>> (accessed 31-03-2010). On the progress achieved by the EPWP and Community Works Programme (CWP) in reversing the "decent work deficit", see E Webster "There shall be Work and Security: Utopian Thinking or a Necessary Condition for Development and Social Cohesion" (2010) 72/73 *Transformation: Critical Perspectives on Southern Africa* 241.

¹⁰⁰ Olivier & Van Kerken "Unemployment Insurance" in *Social Security: A Legal Analysis* 421.

¹⁰¹ Anonymous "Towards an Anti-Poverty Strategy for South Africa" (*A Discussion Document*) (2008) 27 <<http://www.participation.org.za/docs/antipovstrat.pdf>> (accessed 18-11-2010).

¹⁰² See, in general, the website of the Department of Public Works "Expanded Public Works Programme (EPWP): Phase 2" (2006) *EPWP* <<http://www.epwp.gov.za>> (accessed 19-11-2010).

¹⁰³ Department of Public Works "Expanded Public Works Programme (EPWP): Phase 2" *EPWP*.

¹⁰⁴ S 57 of the UIA also provides for the creation and maintenance of a database of contributors, beneficiaries and employers by the Unemployment Insurance Commissioner. S 57(3)(b) specifically directs the Commissioner to co-operate with other State institutions so that these various databases may be linked.

¹⁰⁵ See, for example, Umsebenzi (EPWP Opportunities Portal) (27-10-2010) *Cape Gateway* <<http://www.capegateway.gov.za/xho/directories/services/7296/163896/>> (accessed 15-05-2010).

of employment creation programmes. Importantly, an “indigent register” is already in existence and is the mechanism by which municipalities identify households that are eligible to receive free basic services. Of the estimated 5.5 million indigent households in the country, just over four million (73%) are already registered on municipal databases and currently receive free basic water. It is submitted that this provides a golden opportunity for linking indigent households with other government poverty-alleviation programmes such as the EPWP, Municipal Infrastructure Grant and the SASSA social assistance grants programme.¹⁰⁶ Even more importantly, such an arrangement should dovetail with a well-conceptualised employment services arrangement, as alluded to above.

It must be remembered, however, that such suggestions also raise potential human rights concerns relating to the right to privacy and restrictions on the use of personal information. The draft Employment Services Bill deals with this matter by including a provision protecting the confidentiality of information provided by work-seekers and committing to respect for privacy rights. A private employment agency that fails to give due regard to the confidential nature of information it may have collected from a work-seeker runs the risk of having its licence to operate employment-related services withdrawn.¹⁰⁷

Finally in this regard, the challenge of arranging sensible and meaningful linkages amongst the available skills development and training opportunities, public works programmes, work-seekers’ registry and the unemployment insurance system must be addressed. Resolving this issue, for example by making the receipt of unemployment insurance continuation benefits conditional upon registration as a work-seeker and, furthermore, upon active participation in skills development activities and/or public works programmes, could act as a catalyst for the establishment of a more integrated and better regulated active labour market policy for the country.

7 Concluding remarks and proposals for reform

The introduction of active labour market policies in order to address unemployment in South Africa has been a contentious issue and both principled and practical objections have been raised in the past. There are, for example, various human rights considerations that become relevant when a country formalises attempts to encourage its people to work. One of the biggest challenges to be addressed in the creation of an enhanced system of activation in South Africa is the fragmentation of the developing legal framework. The separation of “skills” functions and “labour activation” activities between two different ministries compounds this difficulty, as does the intended partial replacement of the SDA if the Employment Services Bill is enacted. The insufficiency of human and other resources with respect to available employment services is an example of a practical constraint, the significance of which was manifest during the pilot phase of the proposed

¹⁰⁶ Anonymous “*Towards an Anti-Poverty Strategy for South Africa*” 51

¹⁰⁷ Ss 19-20 of the draft Employment Services Bill

employment services system. Such difficulties have prompted calls for an investigation regarding the performance of active labour market policies such as skills promotion and public works programmes in the country, given that they were formulated largely in the absence of local evidence.¹⁰⁸

Indeed, the potential for greater use of activation mechanisms in South Africa is severely limited by the lack of employment opportunities into which the unemployed can be “activated”. The South African economy appears to be incapable of drawing a significantly higher number of people into regular employment. When there are periods of economic growth, these seem not to contribute on their own toward the development of human potential. This raises important questions about whether existing government programmes aimed at bringing about a more equal sharing of resources are working properly. As a result, the success of the EPWP/CWP becomes relevant as an activation measure by demonstrating a national trend in favour of initiating an environment which is conducive to the creation of work opportunities.¹⁰⁹ However, public works programmes are not considered to provide a long-term solution to unemployment given the scale and nature of unemployment in South Africa. Despite this, it is submitted that increasing the creation of economic opportunities through public works programmes is a worthwhile endeavour, provided it is linked to skills development and training activities suitably correlated with the public works programmes. South Africa should, as a result, continue to address the problems it faces by increasing demand for the less-skilled through appropriate industrial and macroeconomic policies that support the growth of labour-intensive sectors.¹¹⁰ Simultaneously, more is to be done to reduce the current mismatch between skills required by employers and those possessed by prospective workers. This may be achieved through training initiatives directed towards improving education levels.¹¹¹

The Taylor Committee was adamant in its conclusion that the UIF could not be used to complement active labour market programmes because of the limited likelihood that anything more than a minority of unemployed persons could be guided back to work.¹¹² This view appeared to be based, among other reasons, on activation being equated with public works programmes and on the Committee’s preference for the introduction of a universal basic income grant.¹¹³ Nevertheless, the Committee acknowledged that the

¹⁰⁸ G Kingdon & J Knight *Unemployment in South Africa, 1995-2003: Causes, Problems and Policies* (2005) 813 For example, the authors submit that the policy on skills promotion is based on the supposition that skills raise employment chances – a supposition which may not have been rigorously tested in South Africa. In addition, according to the authors, it has been assumed that public works programmes improve the employability of rural unemployed persons but this has not been tested

¹⁰⁹ Participation in public works programmes, coupled with participation in training and skills development initiatives, could also serve as a precondition before a person would be entitled to access any “unemployment assistance grant” or “continuation benefit” that may potentially be introduced in the future

¹¹⁰ Department of Trade and Industry *Industrial Policy Action Plan* (2007) 2 <<http://www.idc.co.za/Policies/INDUSTRIAL%20POLICY%20FRAMEWORK%20ACTION%20PLAN.pdf>> (accessed 25-02-2011) (“DTI Industrial Policy Action Plan”)

¹¹¹ DTI Industrial Policy Action Plan 14

¹¹² Taylor Committee *Taylor Committee Report* ch v para 5 5

¹¹³ Ch viii

promotion of active labour market policies (and job creation policies, more broadly conceived) was essential in South Africa, although unlikely to address the immediate social crisis which required direct income support through social assistance.¹¹⁴ Indeed, recent developments in social policy direction, as reflected upon above, appear to support the finding that South Africa is steadily embarking on a process of increased activation. The recent United Nations “Rethinking Poverty” report supports the view that

“given that job losses disproportionately affect the poor and those at risk of slipping into poverty, active labour-market policies that focus on training programmes and employment services for displaced workers must be integral to a comprehensive social protection system.”¹¹⁵

The vision of a South African system of comprehensive social protection, incorporating work-seeker registration and active-labour market policies focusing on skills development and training programmes as well as participation in public works programmes is, however, clouded by the current institutional fragmentation between the DL and the Department of Higher Education and Training, as well as the other difficulties raised in this contribution. In fact, crucial components of a coherent active labour market system are dysfunctional, at present, in the South African setting in relation to unemployment protection. This requires better integration and urgent intervention.

Given the link between employment service centres and other potential initiatives, including labour market activation, it is also suggested that an expanded form of employment services ought to receive prioritisation in the South African context. An expanded labour centre framework that meaningfully strives to achieve the ideal of the labour centres contemplated by the SDA is, it would seem, crucial to endeavours to prevent unemployment.¹¹⁶ This must be coupled with a move to consolidate at least the various available governmental databases in terms of which unemployed persons may register as job-seekers. These databases provide important links to the EPWP/CWP and also allow prospective employers to register with them.¹¹⁷ Employers, including government, should be strongly encouraged to utilise such a database of work-seekers (perhaps in combination with database registers of private persons¹¹⁸ who wish to provide employment services for gain and who

¹¹⁴ Ch v para 5 7

¹¹⁵ United Nations Department of Social and Economic Affairs *Rethinking Poverty: Report on the World Social Situation 2010* (2010) 122 ST/ESA/324 <<http://www.un.org/esa/socdev/rwss/docs/2010/chapter7.pdf>> (accessed 15-05-2010)

¹¹⁶ For the proposed functions of labour centres, see the reference to s 23 of the SDA in part 5 above

¹¹⁷ Consolidation of such databases (coupled with an aggressive marketing campaign) would appear to be crucial for the successful expansion of the EPWP which (in terms of its Second Phase) incentivises the take-up of labour-intensive practices by promising a payment (from the funds of the Department of Public Works) to public bodies which create EPWP work opportunities

¹¹⁸ In terms of s 24 of the SDA, the Director-General also has the discretion to register private persons who wish to provide employment services for gain. Co-operation between the two agencies (the public employment service and private employment agencies) may include the exchange of databases on jobseekers, the promotion of a system of budget subsidies for people starting up their own businesses, the joint organisation of job fairs and job exchanges, the exchange of job offers which are difficult to fill, and the joint implementation of special programmes addressed to unemployed people. Very little has been achieved to date (for example, by way of a SDA regulation) with respect to such coordination and co-operation. As indicated elsewhere, the draft Employment Services Bill also deals with the provision of

have been registered by the Director-General).¹¹⁹ It may also be useful to link the database(s) in question to the municipal “indigent register” for purposes of streamlining broader social protection interventions, bearing in mind issues of privacy and confidentiality.

A co-ordinated and functional employment services system is vital to the development of a consolidated approach to addressing the challenges currently being experienced.¹²⁰ It is, in addition, decisively linked to the ability of the unemployment insurance system to be more than a passive provider of income replacement and to be able to reintegrate the unemployed into the labour market either through job placement or provision of skills. The labour centres already serve as a bridge between the passive labour market measures contained in the UIA and the active labour market measures provided for by SDA. It is of the essence that this link be strengthened through increased capacity and institutional linkages.¹²¹ While formal sector employees who wish to access a UIF payment may be incentivised to register as work-seekers with a labour centre, unemployed persons who are affected in the long-term are not subjected to any such duty and, furthermore, may currently have insufficient motivation to do so. This problem is not rectified by the proposals contained in the draft Employment Services Bill. There is also currently no deliberate statutory “activation link” (in either the UIF or the SDA) between registration as a work-seeker and actual participation in skills development and training initiatives and/or available public works programmes. Again, this deficiency does not appear to have been addressed in the Employment Services Bill.

The UIA has played a more limited role in alleviating the consequences of unemployment than what may have been expected, particularly when considering its current position of financial strength, as well as the tremendous need for constructive intervention to assist the unemployed. However, there is no provision in the legislation for the current surplus being used to facilitate unemployment protection measures beyond compensation, such as prevention and re-integration.¹²²

The use of this surplus to introduce an intervention such as the provision of unemployment insurance “continuation benefits” could, for example, be made conditional upon participation in the various activation avenues being

private employment services and its relationship with public employment services

¹¹⁹ It is interesting to note that the Gauteng City Region Academy (GCRA) has established an unemployment database consisting of skilled and semi-skilled “youth” between the ages of 18 and 35. The database has 11 000 potential candidates who are being advertised in the national press to provincial departments, municipalities, government agencies and the private sector to be utilised as interns and leadership candidates. The database is on the GCRA website: <www.gcracademy.gpg.gov.za> (accessed 23-02-2011). Incentives could, for example, take the form of tax relief, wage or other subsidy (and could even relate to UIF contributions being waived for a specified period of time).

¹²⁰ According to the Taylor Committee *Taylor Committee Report* para 12.5, given the absence of suitable preconditions for a tight integration of labour market and social security policy, there is a need, in the medium-term, for an inter-departmental body to co-ordinate the many existing active labour market policy and job creation initiatives.

¹²¹ See the NEDLAC Position Paper as an example of a proposal supporting a “one-stop” strategy for informal-sector worker registration for the purposes of obtaining identification documents.

¹²² Olivier & Mpedi *Preventing Unemployment and Reintegrating the Unemployed in the Labour Market* 22.

developed and would demonstrate a policy choice in favour of persuading the unemployed to seek work actively. The creation of an enabling framework to achieve such a goal would require a variety of legislative changes including, for example, widening the actual purpose of the UIA itself so that the UIF is allowed to use its resources to attempt to re-integrate a broader group of people into employment.

The search is on for long-term solutions to the problem of unemployment. While it may appear at first blush as if the UIF surplus is a significant amount of money to be used in order to implement a variety of reforms, the surplus is certainly not inexhaustible, particularly when considering the large number of unemployed people requiring support. Other solutions may also have to be considered in the final analysis, such as expanding the funding base of the UIF, or allocating fiscal responsibility for certain interventions to other sources of income outside the UIF framework. Whatever route is ultimately chosen, it is undeniable that the UIF requires urgent reform in order to better align the UIF with other existing social security and employment creation initiatives. Given the South African environment and the particular challenges faced by this country, serious consideration must be given to the proper role of activation measures in this process of alignment.

SUMMARY

The main aim of labour market activation policies is to bring jobless people from unemployment or inactivity into work or, at the very least, to influence the employment prospects of the unemployed positively. Activation schemes typically make benefit receipt conditional upon job search activities, acceptance of available job offers and participation in training activities. This article addresses the appropriate role of the Unemployment Insurance Fund (UIF) in the establishment of activation in South Africa. It focuses on a number of principled and practical considerations and constraints that challenge the use of activation mechanisms, such as the fragmentation of the existing legal and institutional frameworks, the lack of available employment opportunities and human rights considerations. It is argued that the limited and short-term impact of the UIF, its strong labour-market orientation and its inability to appropriately contribute to preventing and combating unemployment or to reintegrate the unemployed into the labour market all point to the urgent need to reform the UIF. The gaps in the current unemployment insurance system are highlighted, as is the need to enhance the relationship between the unemployment insurance system and (appropriate) activation measures. The role of existing social security and employment creation initiatives in this dynamic is also considered. In particular, the absence of a link between those excluded from the UIF and the activation mechanisms introduced by the Skills Development Act 97 of 1998 is underscored. Proposals contained in the Employment Services Bill are also evaluated. It is suggested that an expanded form of employment services provision, incorporating a network of labour centres, ought to receive prioritisation in the South African context. This must be coupled with a move to consolidate the various available governmental databases in terms of which unemployed persons may register as job-seekers. The creation of an enabling framework to achieve such goals would require a variety of legislative changes, some of which are discussed in the article.