

# REDESIGNING THE SOUTH AFRICAN UNEMPLOYMENT INSURANCE FUND: SELECTED KEY POLICY AND LEGAL PERSPECTIVES

Marius Olivier

BA LLB LLD

Director: International Institute for Social Law and Policy (IISLP);

Extraordinary Professor: Faculty of Law, Northwest University (Potchefstroom Campus);

Adjunct-Professor: Faculty of Law, University of Western Australia

Ockert Dupper

BA LLB LLM SJD

Professor of Law, University of Stellenbosch

Avinash Govindjee

BA LLB LLM LLD

Associate Professor of Law, Nelson Mandela Metropolitan University\*

---

## 1 Introduction

This is the third 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 coverage<sup>1</sup> and the second addressed the concept of “activation” in the context of UIF reform,<sup>2</sup> this contribution in the series examines selected issues from a policy and legal perspective. Against the background of the broader social security reform agenda in South Africa and the vision of a comprehensive social security system, the contribution covers five key areas, namely alignment with international standards; the need to develop synergies with the rest of the social security system and for institutional reform and alignment; addressing certain material deficiencies and inconsistencies in the UIF legislation (with reference to removing the restriction on certain contributors to benefit and redefining the range of dependants); re-aligning the current UIF benefit regime to focus on loss of

\* This contribution is based on work emanating from a project completed 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”), as well as the technical assistance of Jeanne van Zyl and Luyando Katiyatiya, both doctoral candidates at the University of Stellenbosch.

<sup>1</sup> O Dupper, MP Olivier & A Govindjee “Extending Coverage of the Unemployment Insurance-system in South Africa” (2010) 21 *Stell LR* 438

<sup>2</sup> A Govindjee, M Olivier & O Dupper “Activation in the Context of the Unemployment Insurance System in South Africa” (2011) 22 *Stell LR* 205

employment; and improving the UIF benefit regime through the introduction of standardised measures and other reforms (with reference to the indexation of benefits, utilising a minimum wage arrangement as a basis for benefit enhancement, adjusting the contribution rate, and developing a streamlined adjudication framework).

## **2 The need for reform and the vision of a comprehensive social security system**

As noted before,<sup>3</sup> the unemployment protection system in South Africa currently favours social insurance by means of contributions in the case of formal employment and neglects to provide for unemployment protection by means of social assistance. While the UIF is not the appropriate instrument for the provision of unemployment protection by means of social assistance, it has to be considered how the UIF should be reformed in order to ensure an improved unemployment insurance mechanism in the country, and to effect meaningful alignment with the rest of the social security system in South Africa. Income security in the form of unemployment protection must encompass those in the formal labour market, those in the informal labour market and those who have never worked or have been actively seeking work for a long time. This is a particular challenge.

In addition, measures adopted with regard to unemployment protection must make provision for short-term and long-term needs, taking into account the constitutional focus on vulnerability and on those whose needs are most urgent.<sup>4</sup> The question therefore is how the UIF, given the particular orientation of the Fund at present, should contribute to such ends. Already in 2008, an international expert panel remarked:

“The UIF pays benefits to about ten per cent of the approximately four million unemployed persons in South Africa. However, its reserves effectively take about R18 billion away from possible redistributive measures which could be introduced to alleviate hardship due to unemployment not covered by the UIF or caused by other contingencies.”<sup>5</sup>

<sup>3</sup> Govindjee et al (2011) *Stell LR* 209

<sup>4</sup> In *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 42 the Court remarked:

“Reasonableness must also be understood in the context of the Bill of Rights as a whole. A society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right.”

See also *Minister of Health v Treatment Action Campaign* 2002 10 BCLR 1033 (CC) paras 68, 78; *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development* 2004 6 BCLR 569 (CC) para 74; and, most recently, *Beja v Premier of the Western Cape* (21332/10) [2011] ZAWCHC 97 (29-04-2011) paras 95, 99, 101-102, 141 <<http://www.saflii.org/za/cases/ZAWCHC/2011/97.html>> (accessed 06-06-2011)

<sup>5</sup> International Expert Panel *Consultation Report: Observations on Social Security Reform in South Africa* (2008) para 4 (Annexure to Department of Social Development *Creating Our Future: Strategic Considerations for a Comprehensive System of Social Security (Discussion Paper)* (2008) 50)

However, the surplus is certainly not inexhaustible<sup>6</sup> and should be restricted to serve the clients of the Fund who contributed to the UIF, and their dependants. In fact, scenarios calculated for the UIF indicate that the surplus may only succeed in accelerating the implementation of a few initiatives in an attempt to plug the gaps in the current system.<sup>7</sup> The reality of such a limitation is that the prioritisation and sequencing of the initiatives attempted assumes greater importance. In the end, other solutions may have to be considered, such as expanding the funding base of the UIF,<sup>8</sup> or allocating fiscal responsibility for certain interventions to other sources of income outside the UIF framework.

There are also several other considerations which emphasise the need for reform of the UIF. The key considerations in this regard relate to:

- The lack of alignment of the UIF system with constitutional imperatives and with international and regional standards;<sup>9</sup>
- insufficient links between the UIF and labour market policies, including the absence of an appropriate interface between unemployment insurance and labour market activation measures, including employment services, job-seeking and placement, skills training interventions, and reintegration into the labour market;<sup>10</sup>
- unsatisfactory legal and operational arrangements regarding certain issues of crucial importance to the labour market role of the UIF, with particular reference to skills training in South Africa and the envisaged legislative framework informing the establishment of public employment services in South Africa;<sup>11</sup>
- the need to develop synergies at various levels with the rest of the social security system – including at the levels of policy synergy, institutional coordination, service delivery streamlining, benefit design and a shared registry/database;<sup>12</sup>
- the need for institutional reform and alignment;<sup>13</sup>
- unjustifiable exclusions of major categories of employees from UIF coverage, while coverage extension to other categories should in the longer-term be considered;<sup>14</sup>
- addressing certain material deficiencies and inconsistencies in the UIF legislation, relating to issues such as removing the restriction on certain

<sup>6</sup> By 2009 this surplus had grown to R23.5 billion (UIF *Annual Report of the Unemployment Insurance Fund for the Year Ended 31 March 2010* (2010) 91). However, it has been noted in the actuarial report for the UIF that while the Fund was in a sound financial position to weather the recession, bad economic conditions may deplete its cash stores by up to R9 billion by 2013: Anonymous “Recession Threatens UIF Cash” (08-09-2009) *Insurance Junction* <<http://www.insurancejunction.co.za/news/2009/09/08/recession-threatens-uif-cash.asp>> (accessed 06-05-2011)

<sup>7</sup> M Olivier (assisted by O Dupper, A Govindjee & A Wolvaardt) (in association with Aon (Pty) Ltd *Redesigning the South African Unemployment Insurance Fund: Reform Proposals (Report prepared for the UIF)* (2009) 111-155

<sup>8</sup> See part 7.3 below

<sup>9</sup> See part 3 below

<sup>10</sup> See Govindjee et al (2011) *Stell LR* 213-224

<sup>11</sup> 213-224

<sup>12</sup> See part 4 below

<sup>13</sup> See part 4 below

<sup>14</sup> See Dupper et al (2010) *Stell LR* 446-462

contributors to benefit and properly redefining the range of dependants who should benefit;<sup>15</sup>

- re-aligning the current UIF benefit regime, to enable the UIF to concentrate in future on dealing with the consequences of (and to some extent the prevention of) loss of employment;<sup>16</sup> and
- improving the UIF benefit regime through the introduction of standardised measures and other reforms with reference to an increase in the minimum income replacement rate, increasing the income replacement rate in the event of maternity, the indexation of benefits, reducing the benefit waiting period, utilising a minimum wage arrangement as a basis for benefit enhancement, adjusting the contribution rate, and developing a streamlined adjudication framework.<sup>17</sup>

While multi-faceted reform of unemployment insurance is evidently required to deal with the range of challenges, deficiencies and shortcomings indicated above, extending unemployment protection in South Africa also has to be located within the context of the vision of a comprehensive social security system and the need to develop a co-ordinated social security framework for South Africa. This broader context is closely associated with several initiatives taken by the South African government, including:

- Recommendations made in the 2002 report of the Cabinet-appointed Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the so-called “Taylor Committee”);<sup>18</sup>
- Government’s resolve to prioritise the introduction of such a comprehensive framework, appearing among others from discussion papers emanating from National Treasury<sup>19</sup> and the Department of Social Development,<sup>20</sup> and the establishment of an Inter-departmental Task Team on Social Security, which has been spearheading several reports and engaging with a range of issues related to this theme; and
- Governmental pronouncement to this effect reflected in Government’s Medium Term Strategic Framework and Programme (“NMTSF”) of Action 2009-2014.<sup>21</sup> The NMTSF confirms a vision of society in which “people who are able to work have access to decent jobs, workers’ rights are protected and social security measures are comprehensive enough to cover all citizens in need”.<sup>22</sup>

<sup>15</sup> See part 5 below

<sup>16</sup> See part 6 below

<sup>17</sup> See part 7 below

<sup>18</sup> 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)

<sup>19</sup> See, among others, National Treasury *Social Security and Retirement Reform (Second Discussion Paper)* (2007)

<sup>20</sup> Department of Social Development *Creating Our Future: Strategic Considerations for a Comprehensive System of Social Security (Discussion Paper)* (2008)

<sup>21</sup> Presidency *Together Doing More and Better: Medium Term Strategic Framework - a Framework to Guide Government’s Programme in the Electoral Mandate Period (2009 – 2014)* (2009)

<sup>22</sup> Presidency *Together Doing More and Better 5*

In this regard, however, it has to be noted, that there is no compelling and encompassing national strategic framework document which contains a vision on the linkages between two core priorities (ie comprehensive social security and job promotion/labour market policies), as is also evident in the area of unemployment protection.<sup>23</sup>

### 3 Alignment with international and regional standards

#### 3.1 Constitutional relevance of international standards

International law instruments are an important source when reforms to the UIF are considered. The Constitution of the Republic of South Africa, 1996 (“the Constitution”) adopts an interpretation approach that is international law-friendly. According to section 231(2) of the Constitution, an international agreement binds the Republic after it has been approved by resolution in both houses of Parliament.<sup>24</sup> Such agreement becomes law in the Republic when it is enacted into law by national legislation.<sup>25</sup> Section 39(1)(b) of the Constitution provides that when interpreting the fundamental rights in the Bill of Rights, every court, tribunal and forum must consider international law. Foreign law (for example of another country) may be considered.<sup>26</sup> While binding international law (such as ratified International Labour Organisation (“ILO”) Conventions) has to be applied, both binding *and* non-binding international law must be considered when the constitutional fundamental rights are interpreted<sup>27</sup> – such as relevant ILO Conventions (including those that have not been ratified by South Africa) and ILO recommendations concerning unemployment. In addition, section 233 of the Constitution states:

“When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any reasonable interpretation that is inconsistent with international law.”<sup>28</sup>

<sup>23</sup> See Govindjee et al (2011) *Stell LR* 205

<sup>24</sup> Unless it is an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive. According to s 231(3) of the Constitution, such an agreement binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

<sup>25</sup> S 233(4) of the Constitution. However, a self-executing provision of an agreement that has been approved by Parliament *is* law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

<sup>26</sup> S 39(1)(c) of the Constitution

<sup>27</sup> *S v Makwanyane* 1995 3 SA 391 (CC) para 35; *Government of RSA v Grootboom* 2000 11 BCLR 1169 (CC) para 26. For examples of reliance on a non-binding ILO Convention (ie ILO Convention 158 of 1982 on Termination of Employment, not ratified by South Africa), see *Sidumo v Rustenburg Platinum Mines Ltd (Rustenburg Section)* 2008 2 SA 24 (CC) para 61 and *Karras t/a Floraline v SA Scooter & Transport Allied Workers Union* 2000 21 ILJ 2612 (LAC) para 27.

<sup>28</sup> For an application of this principle, see *NUMSA v Bader Bop (Pty) Ltd* 2003 2 BCLR 182 (CC) para 33, where the Constitutional Court emphasised that an interpretation which would take into account principles contained in relevant ILO Conventions is to be preferred over an interpretation to the contrary. With reference to principles which could be distilled from ILO Conventions 87 of 1948 (on freedom of association and the right to organise) and 98 of 1949 (on the right to organise and collective bargaining), the Court ruled that minority unions and their members do indeed have the right to strike in order to compel an employee to recognise the union’s shop stewards. The same international law-friendly approach was adopted by the Court in the case of *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) paras 27-32, where the Court took extensive notice of the provisions of the UN International Covenant on Economic, Social and Cultural Rights (“ICESCR”) of 1966 and the approach

In view of the above, international (law) standards provide a benchmark for the evaluation of the South African unemployment protection system and, more particularly, the Unemployment Insurance Act 63 of 2001 (“UIA”) and the UIF. The applicable standards are mostly relevant Conventions and Recommendations of the ILO, and in some cases also relevant Southern Africa Development Community (“SADC”) standards.

In the rest of part 3 that follows below, we will consider some of the UIF areas which are in need of reform from the perspective of relevant international and regional standards.

### 3.2 UIF areas in need of reform from the perspective of the ILO Social Security (Minimum Standards) Convention 102 of 1952

ILO Convention 102 of 1952 (“Convention 102”) is the core convention of the ILO dealing with social security. It is the only instrument which sets minimum standards for the nine branches of social security, of which unemployment benefits is one. South Africa has not yet ratified this Convention.

Whereas Convention 102 covers all branches, it requires that only three of these branches be ratified by Member states. While the choice as to which of the nine to accept rests with the State, at least one of the three branches ratified must cover a long-term contingency or unemployment.<sup>29</sup> It therefore follows that by complying with the standards set in the unemployment part of Convention 102, South Africa would move closer to being in a position to ratify this particular Convention. Changes to the current UIF system required to make the system compliant with the provisions of Convention 102 relate mainly to the following:

- *Minimum income replacement rate:* Convention 102 prescribes that the minimum unemployment benefit should equal a replacement rate of not less than 45% of previous earnings.<sup>30</sup> The current UIF benefit framework is not fully compliant with this requirement. The maximum income replacement rate is fixed at 60%, while the minimum rate is currently set at 38%.<sup>31</sup> However, the Minister of Labour may vary the minimum income replacement rate with the concurrence of the Minister of Finance,<sup>32</sup> after consultation with the Board of the UIF,<sup>33</sup> and by announcement by way of notice in the Government Gazette.<sup>34</sup> It should be noted that comparative research also indicates that the current 38% replacement rate is well below

---

<sup>29</sup> towards the interpretation of the Covenant provisions adopted by the relevant supervising organ  
<sup>30</sup> Art 2 of Convention 102

<sup>31</sup> Art 22, read with arts 66-67, as well as the Schedule to Part XI (Periodical payments to Standard Beneficiaries)

<sup>32</sup> Sch 2, read with s 12(3)(b), of the UIA

<sup>33</sup> S 12(3)(a)

<sup>34</sup> S 12(4)(a)

<sup>34</sup> S 55 read with s 12(4)(b)

the norm in other developed and developing countries, where the rate ranges between 50% and 90% of previous earnings.<sup>35</sup>

- *Waiting period:* Convention 102 allows for a waiting period of seven days before benefits are payable.<sup>36</sup> In South Africa, the UIA provides that an unemployed contributor is entitled to unemployment benefits if the period of unemployment is longer than fourteen days.<sup>37</sup> The waiting period provided by the UIA in South Africa therefore appears too long and not in line with that provided by international standards. In order to align the UIF with international standards, the UIA waiting period should be reduced to seven days.

### 3.3 The importance of aligning the UIF with the provisions and requirements of the ILO Unemployment Convention 2 of 1919

The ILO Unemployment Convention 2 of 1919 (“Unemployment Convention”) has been ratified by (and is therefore binding on) South Africa.<sup>38</sup> It provides for reciprocity of treatment. In essence, the Convention compels member states, *via* mutually agreed arrangements which could include bilateral agreements or national legislation, to afford to migrant workers in their respective states benefit rates on the same basis as citizens of the country.<sup>39</sup>

South Africa is not fully in compliance with this Convention, which is binding on the country. The following areas need to be addressed in order to ensure compliance with this binding Convention:

#### 3.3.1 Exclusion of migrant workers

The UIA excludes from unemployment insurance persons who enter the Republic for the purpose of carrying out a contract, if by law or as a result of a contractual agreement or undertaking there exists an obligation that such person must leave the country upon termination of the contract.<sup>40</sup> In essence, it excludes non-citizens working on a fixed-term contract basis from access to the unemployment insurance system. And yet, it is evident from the same legislation that fixed-term contract workers, who are citizens of South Africa, are specifically included under UIF coverage.<sup>41</sup>

Apart from the fact that this form of nationality-based discrimination can hardly be constitutionally justified, this provision appears to be in conflict

<sup>35</sup> See Olivier et al *Redesigning the South African Unemployment Insurance Fund* 206-212 as well as OECD “Benefits and Wages: OECD Indicators” (01-2010) *OECD* <[www.oecd.org/els/social/workingincentives/](http://www.oecd.org/els/social/workingincentives/)> (accessed 06-05-2011)

<sup>36</sup> Art 24(3) of Convention 102. The more recent, unemployment protection-specific Convention, the ILO Employment Promotion and Protection against Unemployment Convention 168 of 1988, also stipulates that unemployment benefits should be paid after a waiting period of no more than seven days, or where a declaration is made in terms of Art 5 of the Convention, no longer than ten days

<sup>37</sup> S 16(I) of the UIA

<sup>38</sup> Ratification took place on 20-02-1924: see ILO “Ratifications: by country or by Convention” *ILOLEX* <<http://www.ilo.org/ilolex/english/newratframeE.htm>> (accessed 06-05-2011)

<sup>39</sup> Art 3 of the Unemployment Convention

<sup>40</sup> S 3(1)(d) of the UIA; s 4 (1)(d) of the Unemployment Insurance Contributions Act 4 of 2002

<sup>41</sup> S 16(I)(a)(i) of the UIA

with South Africa's obligations under the Unemployment Convention – at least as far as non-citizens from countries that have also ratified this Convention are concerned. Practical difficulties that may arise to effect cross-border payments, and to verify the continued unemployed status of beneficiaries for this purpose, could be dealt with by introducing mechanisms which apply in the social assistance area.<sup>42</sup> In addition, suitable bilateral agreements can be entered into with relevant countries to make appropriate arrangements in this regard – as appears from the discussion immediately below.

### *3.3.2 The need to enter into appropriate bilateral agreements*

The Convention stipulates that member states should, 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.<sup>43</sup>

Giving effect to this requirement of the Convention would ideally require a statutory basis and framework for entering into bilateral agreements. And yet, no such provision has been incorporated in the UIA, unlike a range of other South African social security laws, which do provide for formalised cross-border arrangements – for example, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (“COIDA”),<sup>44</sup> the Occupational Diseases in Mines and Works Act 78 of 1973 (“ODMWA”),<sup>45</sup> the Road Accident Fund Act 56 of 1996 (“RAFA”)<sup>46</sup> and the Social Assistance Act 13 of 2004 (“SAA”).<sup>47</sup>

The reality is also that South Africa has not yet entered into any bilateral agreement to give effect to this provision. In fact, in the absence of a multilateral arrangement including South Africa, there are only a few examples and little use made of bilateral social security agreements and effective portability

---

<sup>42</sup> As noted before (see Dupper et al (2010) *Stell LR* 457), s 16 of the Social Assistance Act 13 of 2004, read with Reg 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. 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. This model could be adapted to cover the situation of the payment of unemployment insurance to migrant workers.

<sup>43</sup> Art 3 of the Unemployment Convention

<sup>44</sup> S 94 of the Compensation for Occupational Injuries and Diseases Act, which provides for the possibility of bilateral cross-border agreements on the basis of reciprocity between South Africa and another country. The reciprocal arrangement has to relate to compensation for employees for accidents resulting in disablement or death.

<sup>45</sup> S 105 of the Occupational Diseases in Mines and Works Act (entitled “Arrangements by commissioner for payment of benefits on his behalf”), which stipulates:

“The commissioner may with the approval of the Minister make arrangements with any other Government Department or any other institution, organization or authority to undertake the payment, on behalf of the commissioner, of benefits or other amounts awarded under the previous Act or this Act.”

<sup>46</sup> S 9 of the Road Accident Fund Act, in terms of which the relevant Minister may, upon the recommendation of the Board of the Fund, co-operate and enter into agreements with any public or private institution in respect of the reciprocal recognition of compulsory motor vehicle insurance or compulsory motor vehicle accidents compensation. The Minister must sign the agreement on behalf of the Fund.

<sup>47</sup> S 2(1) of the Social Assistance Act, which provides that the Act applies to a non-citizen who resides in South Africa, if an agreement between South Africa and the country of which that person is a citizen, makes provision for the Social Assistance Act to apply to that person.

arrangements in South African law and practice.<sup>48</sup> In this regard South Africa appears to be out of step with general developments elsewhere in the world.

It is recommended, firstly, that a provision be introduced in the UIA which specifically and appropriately provides for the entering into of bilateral agreements in the area of unemployment insurance benefits. Secondly, it is recommended that suitable bilateral arrangements be made with other countries that have also ratified Convention 102, preferably by way of inter-state agreements. These arrangements could form part of broader-based social security agreements covering other social security benefits as well – such as pensions. Other applicable ILO Conventions could be of assistance when these agreements are entered into – in particular the Maintenance of Social Security Rights Convention 157 of 1982.

### ***3 3 3 Co-ordination of private employment agencies and public placement services***

The Unemployment Convention requires the co-ordination of the operations of public and private employment agencies.<sup>49</sup> The recent steps taken by the Department of Labour, in particular *via* the Employment Services Bill of 2010,<sup>50</sup> to provide for public employment services<sup>51</sup> and the regulation of private employment agencies<sup>52</sup> appear to be steps in the right direction. However, the Bill does not appear to *co-ordinate* the operations of the public and private agencies.

### **3 4 The value of standards contained in ILO Employment Promotion and Protection against Unemployment Convention No 168 of 1988**

Several issues covered by this most recent ILO Convention on unemployment provide valuable guidance in further reforming the UIF, and extending UIF coverage. Some of the relevant issues include:

#### ***3 4 1 Covering workers in the event of partial unemployment and/or temporary suspension of work***

The current UIA, unlike the previous UIA, excludes workers from drawing UIF benefits if they retain a position despite having lost another position.<sup>53</sup> The only exception in this regard is domestic workers.<sup>54</sup>

---

<sup>48</sup> M Olivier *Reflections on the Feasibility of a Multilateral SADC Social Security Agreement involving South Africa and Lesotho, Mozambique, Swaziland and Zimbabwe (Report submitted to the ILO)* (2010) 160

<sup>49</sup> Art 2(2) of the Unemployment Convention

<sup>50</sup> GN 1112 in GG 33873 of 17-12-2010

<sup>51</sup> Cls 5-13 (ch 2)

<sup>52</sup> Cls 14-20 (ch 3)

<sup>53</sup> This flows from the requirement that the contributor must have become unemployed – see s 16(1) of the UIA

<sup>54</sup> S 12(1A), read with s 13(6)

The current regulation appears to be contrary to the provisions of Convention 168 of 1988 (“Convention 168”), which specifically requires the provision of benefits in circumstances of partial unemployment.<sup>55</sup> This position also loses sight of important underlying policy considerations<sup>56</sup> – firstly, the fact that a person who is allowed to retain benefits while commencing some part-time employment will, hopefully, gradually again become independent of the Fund. Secondly, if an individual made contributions during the period of occupying a particular position, such individual should, in principle, be entitled to claim benefits if that particular position has been lost.

Also, the Convention suggests that unemployment benefits should be payable in the event of suspension or reduction of earnings due to a temporary suspension of work without any break in the employment relationship for reasons of, in particular, an economic, technological, structural or similar nature.<sup>57</sup> This is not currently the case in South Africa in terms of the UIA.<sup>58</sup> There are persuasive legal and factual considerations why unemployment benefits should be payable in these cases. As has been noted:<sup>59</sup>

“This contingency is legally and factually highly relevant to the South African scenario. The suspension of the contract of employment, such as in the event of a protected strike [*FGWU v Minister of Safety and Security* 1999 ILJ 1258 (LC)], or as a result of the employer’s operational requirements, legally has the result that the employer’s obligation to pay remuneration and ancillary benefits is suspended as well [*Stuttafords Department Stores Ltd v SACTWU* 2001 BLLR 46 (LAC); *3MSA (Pty) Ltd v SACAWU* 2001 BLLR 483 (LAC)].”

In view of the above, and given the fact that this is a reality with which many employees are faced in dire economic circumstances, it is recommended that UIF coverage be extended to cover this scenario as well.

### **3 4 2 Income replacement rate**

While it is being argued above that the minimum income UIF benefit income replacement rate should be increased to reflect the standard of minimum 45% of earnings, in accordance with the provisions of ILO Convention 102,<sup>60</sup> Convention 168 requires this to be raised to 50%.<sup>61</sup> Ratification of Convention 168 would imply that the UIF has to increase the minimum replacement rate to 50% of previous earnings.

<sup>55</sup> Arts 2 and 10 of Convention 168

<sup>56</sup> See MP Olivier & ET van Kerken “Unemployment Insurance” in MP Olivier, E Kalula & N Smit (eds) *Social Security: A Legal Analysis* (2003) 415 448; Dupper et al (2010) *Stell LR* 454-456

<sup>57</sup> Art 10(2) of Convention 168

<sup>58</sup> The payment of benefits in the event of the suspension of the contract of employment necessitated by the employer’s operational requirements is clearly not foreseen by the UIA. The Act stipulates that unemployment benefits are payable in respect of any period of unemployment if the reason for the unemployment is the *termination* of the contributor’s contract of employment by the employer, the *dismissal* of the contributor, or the *ending* of a fixed-term contract: s 16(1)(a) of the UIA

<sup>59</sup> Olivier & Van Kerken “Unemployment Insurance” in *Social Security* 449

<sup>60</sup> Part 3 2 above

<sup>61</sup> Art 15 of Convention 168

### **3 4 3 Ensuring that benefits are not forfeited if the unemployed worker refuses to take up a non-suitable job offer**

According to the Convention, an unemployed person should not be subject to an obligation to take up a job that is not suitable to his or her acquired professional and social status,<sup>62</sup> during the initial period of unemployment.

However, the UIA stipulates that an unemployed contributor is not entitled to unemployment benefits if he or she refuses, without just reason, to undergo training and vocational counselling for employment under any scheme.<sup>63</sup> Depending on the nature of the scheme and the purpose of the training, this might imply that an unemployed contributor may be compelled to take up a position that is not suitable in the sense indicated above.

It is recommended that the UIA be amended to clearly indicate that it is not required of an unemployed contributor drawing benefits to accept a non-suitable position. However, in accordance with the provisions of the 1988 Convention, accepting such a position might be required when a continuation benefit is paid.

### **3 5 Aligning maternity benefits with the requirements of the ILO Maternity Protection Convention 183 of 2000**

ILO Maternity Protection Convention 183 of 2000 (“Convention 183”) recommends that cash benefits should be at a level which ensures that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.<sup>64</sup> This is based on the recognition that maternity is a time of extraordinary expenditure where such a benefit is entirely appropriate. The Convention therefore requires that the minimum income replacement rate should be raised to no less than two-thirds of previous earnings in the event of maternity benefits.<sup>65</sup> This is also in accordance with the provisions of the Code on Social Security in the SADC<sup>66</sup> and the recommendations made by the Taylor Committee in South Africa.<sup>67</sup>

Therefore, it is recommended that the amount of such benefits should not be less than two-thirds of the woman’s previous earnings or of such of those earnings as are taken into account for the purpose of calculating benefits, as required by Convention 183. Setting the minimum benefit levels at this rate stipulated by the ILO Convention will not only align the UIF with international and regional standards, but will also facilitate the ratification

<sup>62</sup> Art 10(1) According to art 21(2), in assessing the suitability of employment, account shall be taken, in particular, under prescribed conditions and to an appropriate extent, of the age of unemployed persons, their length of service in their former occupation, their acquired experience, the length of their period of unemployment, the labour market situation, the impact of the employment in question on their personal and family situation and whether the employment is vacant as a direct result of a stoppage of work due to an on-going labour dispute

<sup>63</sup> S 16(2) of the UIA

<sup>64</sup> Art 6 2 of Convention 183

<sup>65</sup> Art 6 3

<sup>66</sup> SADC *Code on Social Security in the SADC* (2007) art 8 3

<sup>67</sup> Committee of Inquiry into a System of Comprehensive Social Security for South Africa *Transforming the Present - Protecting the Future* 72

of this instrument. Most importantly, it will give recognition to the fact that maternity is a time of extraordinary expenditure.

#### **4 The need to develop synergies with the rest of the social security system and for institutional reform and alignment**

##### **4.1 Implications flowing from a comprehensive social security system**

Creating a comprehensive social security system requires the development of synergies, co-ordination, cooperation and integrated frameworks and approaches. This is especially true of South Africa, where the social security system is characterised by a high degree of fragmentation and duplication at all levels – including the policy, legal, adjudicative, institutional, operational, funding and service delivery levels. In short, a common vision and framework is lacking. The need to address these shortcomings has been central to the work of the Inter-departmental Task Team on Social Security (“IDTT”) and the documents emanating from this institution<sup>68</sup> and the participating government departments.<sup>69</sup>

These initiatives naturally affect the unemployment insurance system as well. Integration of the unemployment insurance scheme with other social security arrangements in South Africa in principle involves a vast range of interventions. From an operational perspective, these concern, among others, an integrated social security contribution framework, streamlined collection of contributions, the establishment of a common registry, shared benefit payment facilities and arrangements, a common regulator, and common monitoring and external dispute resolution institutions. Thought should also be given to implementing a case management approach, whereby (at least some) officials serving in the different social security branches are adequately equipped to render a holistic service to social security clients, including potential and actual clients of the UIF. Such an approach would support the emphasis on integrative models demanded by a comprehensive and aligned social security system.

At a higher level, interfacing regarding policy-making and co-ordinated institutional frameworks is crucial for the medium to long term roll-out of an integrated and comprehensive social security system in South Africa. From a scheme and benefit design perspective, considerable scope for integration and common approaches exists. This is also true of the area of harmonisation of benefits. Where this is possible and will bring about synchronisation of the social security system, it should be done. For example, it should be interrogated whether and, if so, to what extent the range of dependants and their entitlement to benefits are regulated differently and often inconsistently by the various social security laws – as currently appears to be the case. However,

<sup>68</sup> See among others IDTT *Comprehensive Social Protection: Overview (A consultation document, prepared for the Inter-Ministerial Committee on Social Security, Retirement Reform and National Health Insurance)* (2010)

<sup>69</sup> See National Treasury *Social Security and Retirement Reform and Department of Social Development Creating Our Future: Strategic Considerations for a Comprehensive System of Social Security*

harmonisation or synchronisation of dependants' (ie survivors') benefits would require agreement on an appropriate framework for the payment of dependants' benefits, as it is apparent that in some contexts "dependant" is defined narrowly,<sup>70</sup> while in other contexts a broad definition<sup>71</sup> has been adopted. Also, the nature, quality and quantity (with specific reference to the monetary value) of dependants' benefits vary extensively across the social security system.

Moreover, it is evident that that skills training, and early return to work policies for occupationally injured workers and for unemployed workers could to a large extent be streamlined and integrated – amounting to considerable savings for the system as a whole. In the area of medical rehabilitation, synergies can clearly be developed between, for example, the employment injury scheme, the road accident insurance system, and the (envisaged) national system of health insurance. It should also be possible to subsume sickness benefits, currently provided by the UIF, under the envisaged (national) health insurance system.

Another area where an integrated approach is required, relates to the re-alignment of the unemployment insurance scheme, discussed below.<sup>72</sup>

#### **4.2 UIF-specific considerations and constraints impacting on the vision of a comprehensive social security system**

There are particular considerations and substantive constraints, which both define and circumscribe the extent and content of the alignment of the UIF that is currently considered. These considerations and constraints relate in particular to the

- compensation (ie income-replacement) function of the UIF;
- role of the UIF as a labour market instrument, also against the background of the developing public employment services and active labour market interventions spearheaded by the Department of Labour; and
- need to recognise unemployment insurance as a separate risk category with a ringfenced contribution (ie funding) and benefit regime framework.

---

<sup>70</sup> As in the case of the UIA (see s 30 and the discussion in part 5.2 below) The Social Assistance Act does not provide for dependants' or survivors' benefits

<sup>71</sup> For example, s 1 of the Pension Funds Act 24 of 1956 includes both factual and legal dependants. Also, third party claims in terms of the Road Accident Fund Act effectively subsume a large range of dependants' claims. See also s 1 of the Compensation for Occupational Injuries and Diseases Act: a dependant includes a widow and widower; a person with whom the employee was living as husband or wife; a child under the age of eighteen, including a posthumous child, a step-child, an adopted child and a child born out of wedlock; and exceptionally also a child over the age of eighteen years of the employee or of his or her spouse, and a parent or any person who in the opinion of the Director-General was acting in the place of the parent, a brother, a sister, a half-brother or half-sister, a grandparent or a grandchild of the employee; and a parent of the employee or any person who in the opinion of the commissioner was acting in the place of the parent, and who was in the opinion of the Director-General at the time of the employee's death wholly or partly financially dependent upon the employee

<sup>72</sup> Part 6 below

These considerations and constraints have a major impact on the design and place of the UIF<sup>73</sup> in a comprehensive social security system, as well as the desired institutional constellation.

#### *4.2.1 The compensation function: Paying UIF benefits, and strengthening the UIF's role through the introduction of an enhanced continuation benefit*

The UIF has in the first place a compensation function. Based on periods of contribution and past work activity, it pays out short-term benefits to workers who have lost employment and provides some level of income replacement, granting workers a period of time to find suitable alternative work.

However, the short-term nature of unemployment benefits provided by the UIF is linked to the assumption that unemployment is cyclical.<sup>74</sup> This is not the case in South Africa: almost 60% of the unemployed were in long-term unemployment in 2009, ie for one year or longer.<sup>75</sup> This proportion has been steadily rising.<sup>76</sup>

In view of this, and in order to assist workers covered by the UIF and who have exhausted their unemployment benefits, the introduction of a flat rate continuation benefit of limited duration has been proposed as part of developing a comprehensive social security system<sup>77</sup> – in this way ascribing an enhanced role to the UIF. This will be offered only to the eligible population under the UIF, has been actuarially costed,<sup>78</sup> and will be funded *via* the contributions paid by employers and employees. As such, the continuation benefit allows for basic protection for an extended period. Whether and, if so, to what extent access to the continuation benefit will be conditional upon participation/involvement in labour market activation measures, is currently under consideration. The advantage of such an approach is that it will allow those in receipt of the continuation benefit to improve their chances of being re-integrated into the formal labour market.<sup>79</sup> It has been emphasised that a continuation grant, in particular for older workers, fills a significant gap in the present income protection arrangements, and is a necessary complement to the intended preservation of retirement benefits until old age.<sup>80</sup>

<sup>73</sup> And for that matter also the Compensation Fund of South Africa, as the same considerations do apply in the case of that Fund

<sup>74</sup> See, for example, Olivier & Van Kerken “Unemployment Insurance” in *Social Security* 419

<sup>75</sup> See Statistics South Africa *Labour Market Dynamics in South Africa 2009* (2010) 6-12 <<http://www.statssa.gov.za/publications/Report-02-11-02/Report-02-11-022009.pdf>> (accessed 06-05-2011)

<sup>76</sup> Even on a year-on-year basis:

“In year ended in December 2009, the increase in the number of persons that were unemployed reflected an increase in those that were in long-term unemployment (up from 2,4 million in 2008 to 2,5 million in 2009)” – Statistics South Africa *Labour Market Dynamics* 6-12

<sup>77</sup> See IDTT *Comprehensive Social Protection: Overview* 6; Department of Social Development *Creating our Future* 19

<sup>78</sup> Olivier et al *Redesigning the South African Unemployment Insurance Fund* 39-45

<sup>79</sup> 44 See also Govindjee et al (2011) *Stell LR* 210, 213-214, 216-217, 223, 226

<sup>80</sup> IDTT *Comprehensive Social Protection: Overview* 6

#### 4.2.2 The UIF as a labour market instrument

Until recently, the UIF has almost exclusively focused on the payment of benefits to covered workers and their dependants. 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 the unemployment insurance scheme.<sup>81</sup>

Lately, however, the UIF has become involved in several initiatives which, generally speaking, fall within the domain of Active Labour Market Policies (“ALMPs”)/measures. These initiatives are aimed at ensuring continued employment, supporting employability, providing training and job placement:

- Special financial incentives were put in place during the recent recession to ensure security of employment of certain workers;<sup>82</sup>
- the UIF Board approved a sum of R2 billion to be invested with the Industrial Development Corporation (“IDC”) to be used as part of the capital available to assist sectors in distress;<sup>83</sup> and
- the UIF piloted (in Gauteng) a Training of the Unemployed scheme, approved by the Minister of Labour, to train and permanently place 300 candidates with two government departments.<sup>84</sup>

Of course, a *caveat* needs to be expressed. In many countries unemployment insurance contributions finance ALMPs for the insured. However, unemployment insurance revenues are not used to exclusively finance training on any substantial scale to the population at large – ie those who are unemployed but who are not contributors/beneficiaries/clients of the relevant unemployment insurance scheme. Therefore, also in the South African context, it is in fact incumbent on the State to address the (training) needs of the unemployed, both insured and non-insured. Within the South African context, given the earmarked 20% of its levy on employers, the National Skills Fund (“NSF”) is legally responsible to serve the unemployed and people in the informal economy.<sup>85</sup> The task of the UIF in this regard should be restricted to those covered by the Fund. This also flows from the nature of the UIF as

<sup>81</sup> “As a policy instrument the UIA, therefore, does not appear to be well aligned to a policy of preventing and combating unemployment, and to reintegrating those who have become unemployed in the labour market. Its primary focus is to arrange for measures dealing with the short-term unemployment of those who worked as ‘employees’ in the formal sector, and not to impact directly on the comprehensive context of mass and long-term structural unemployment in the country” (Olivier & Van Kerken “Unemployment Insurance” in *Social Security* 418)

<sup>82</sup> The most important of these relates to the introduction of a training lay-off scheme by the Department of Labour in 2009, which is funded partly by the UIF (See Department of Labour *A Guide to the Training Layoff Scheme* (2009). <<http://www.labour.gov.za/documents/useful-documents/skills-development/guide-to-training-lay-off-scheme>> (accessed 06-05-2011))

<sup>83</sup> IDC “IDC and UIF Announce R2 billion Fund to Create Employment” (14-04-2010) *IDC Media Release* <<http://www.idc.co.za/media/media-releases.asp?GroupCode=0&ArticleId=232>> (accessed 06-05-2011)

<sup>84</sup> Anonymous “Gauteng Training Project Skills the Jobless” (29-06-2010) *South Africa: The Good News* <[http://www.sagoodnews.co.za/economy/gauteng\\_training\\_project\\_skills\\_the\\_jobless.html](http://www.sagoodnews.co.za/economy/gauteng_training_project_skills_the_jobless.html)> (accessed 06-05-2011)

<sup>85</sup> See s 27(2)(a) of the Skills Development Act 97 of 1998, read with ss 2 and 28 of the same Act

a social insurance instrument, meant to benefit workers who and for whom contributions were made, and their dependants.

The *ad hoc* measures mentioned above should develop into a more structured and systematic involvement of the UIF in ALMPs. Such involvement could operate at two levels, ie an individual worker and broader system level:

- At the individual worker level, individual clients of the UIF (ie those who contribute(d) to the Fund but who lost employment) should be supported to be reintegrated into the labour market through any or a combination of ALMP mechanisms, including training or (re)skilling opportunities.<sup>86</sup> Ideally this should apply once the worker has exhausted his or her available unemployment benefits and qualifies for a continuation benefit. It is suggested that this should be construed as an additional “employment benefit”, consisting of an individualised right to training and reintegration services.
- At the broader system level, but still benefiting its contributor client base, the UIF could become involved in certain preventive measures, such as measures to prevent lay-offs during crises (for example, by means of partial wage compensation/subsidies, reductions of social security contributions) and early intervention measures (such as investing in labour market information services and data collection).

In this way the UIF, in keeping with international trends, fulfils a labour market and developmental function. This also emphasises the close involvement of the UIF and the Department of Labour in ALMPs, as is evident from the provisions of the new Employment Services Bill in relation to, among others, public employment services, referred to above.

The developments described here are not limited to the UIF. Closer linkages between the Compensation Fund and labour market (re)integration are currently being developed by the Compensation Fund, in particular *via* a new policy framework for the rehabilitation, reintegration and return-to-work of workers who have suffered occupational injuries or diseases.<sup>87</sup>

<sup>86</sup> However, this is complicated by the institutional fragmentation that has occurred as a result of the transfer of the responsibility for skills training to the Department of Higher Education and Training – the implication is that skills training and other aspects relating to labour market integration (such as the provision of public employment services) respectively now fall within the functional domain of two different Ministries (The President recently transferred (in terms of s 97 of the Constitution) 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 (see Proc R56 in GG 32549 of 04-09-2009 (“the Presidential Proclamation of 2009”). Importantly, the Presidential Proclamation of 2009 excluded key provisions in the Skills Development Act 97 of 1998 (SDA) relating to the establishment of labour centres and employment services, implying that such matters will (still) continue to be the responsibility of the Minister of Labour.)

<sup>87</sup> Department of Labour *Strategic Plan for the Department of Labour 2011-2016* (2011) 3-4 <<http://www.labour.gov.za/downloads/documents/annual-reports/department-of-labour-strategic-plan/2011-2016-strat%20plan%202011parta.pdf>> (accessed 06-05-2011)

#### **4 2 3 The need to recognise unemployment insurance as a separate risk category with a ringfenced contribution (ie funding) and benefit regime framework**

It has been proposed that

“all employers and employees should be obliged to contribute at a fixed rate, up to an agreed earnings threshold, to a centrally managed National Social Security Fund (NSSF). The new Fund will incorporate the present UIF, and will pay unemployment and maternity leave benefits, disability and death benefits and a basic retirement pension based on career-average earnings, adjusted for inflation.”<sup>88</sup>

Reference is also made to the

“adoption of a mandatory savings arrangement as part of a new, consolidated social security system providing pension, death, disability and unemployment benefits supported by compulsory contributions by all workers earning above a minimum income threshold.”<sup>89</sup>

There are several reasons why it is necessary to interrogate the proposed arrangement. Some of these reasons relate to the range of benefits to be provided by the UIF (discussed below),<sup>90</sup> the exclusion of workers earning below a certain minimum threshold,<sup>91</sup> and the need to recognise unemployment insurance as a separate risk category with a ringfenced contribution and benefit regime framework.

In this latter regard, it needs to be underscored that the particular purpose and role of the UIF – as discussed above – require its separate treatment, irrespective of where institutionally the UIF will be located in the new social security constellation in South Africa. Based on international experience, it has been indicated, also by the ILO,<sup>92</sup> that good standards in financial governance persuasively indicate that there be in principle full separation of accounts – and reserves – with appropriate actuarially defined separate contribution rates for each different risk. In particular, separating short-term and long-term benefits along the lines suggested here is imperative. Unless segmentisation of various benefit categories is actively pursued, there is a danger of unnecessary cross-subsidisation between different categories of

---

<sup>88</sup> IDTT *Comprehensive Social Protection: Overview* 6

<sup>89</sup> 5

<sup>90</sup> See part 6 below

<sup>91</sup> It is foreseen that income-earners with an income below about R1 000 per month per annum will be excluded from the obligation to contribute to the NSSF: IDTT *Comprehensive Social Protection: Overview* 7 From the perspective of retirement benefits, there might be some justification for such an approach. The reason is that the affected worker will in all probability be entitled to access the state-provided old age grant upon retirement. However, the exclusion of the lowest-income earners from accessing UIF benefits would be particularly problematic. There are several reasons why this is so. Firstly, the gradual scale of benefits (ie the varying income replacement rate – see part 3.2 above) has been introduced by the UIA to benefit lower-income earners, as they are entitled to a higher proportion of their income than is the case with higher-income earners, should they become unemployed. Secondly, excluding this group from accessing unemployment benefits, without providing alternative and comparable benefits in the event of unemployment must be seen as a retrogressive step. It is unlikely that this approach can be constitutionally countenanced

<sup>92</sup> See, for example, ILO *Actuarial Valuation of the National Social Security Fund as of 30 June 2006 Report to the Board of Trustees of the National Social Security Fund* (2008) ILO/TF/TANZANIA/R 19 57-59

benefits.<sup>93</sup> There are, therefore, ample reasons to opt for a separate accounting and fund management arrangement, and a separate reserve, as far as the UIF is concerned. Consequently, even if it could in other contexts be suggested that accounts and contribution rates be fully unified for the sake of simplicity of the NSSF scheme and given the particular social demographic conditions in the country, this could certainly not be said of the UIF.

Finally, it should be remarked that the international experience overwhelmingly indicates that unemployment insurance is, with little exception, being treated as a separate risk category. As remarked in a recent document,<sup>94</sup> only 9.1% of countries offer unemployment insurance through the same public entity offering retirement, disability and survivor benefits. Furthermore, comparative evidence indicates that the contribution rates for unemployment insurance are in most cases specified and ringfenced, and almost without exception meant to pay for unemployment (and at times unemployment-related) benefits.<sup>95</sup>

In view of the above, it is suggested that the UIF should not be incorporated or subsumed under the NSSF, as part of the proposed NSSF “common platform”. Furthermore, with reference to international experience and standards, it is recommended that the contribution rate regime in relation to the UIF has to be ringfenced, and used solely towards unemployment insurance benefits, bearing in mind that there is some scope for benefit adjustment, as well as benefit harmonisation, as discussed above<sup>96</sup> in relation to dependants’ benefits.

## **5 Addressing certain material deficiencies and inconsistencies in the UIF legislation: Removing the restriction on certain contributors to benefit and redefining the range of dependants**

In addition to the shortcomings in the present UIA discussed in the first two contributions, relating in particular to coverage exclusions<sup>97</sup> and the absence of a sufficient legislative *nexus* between the compensation focus (passive labour market context) and the desired labour market integration framework (active labour market interventions) of the UIF,<sup>98</sup> certain other material deficiencies and inconsistencies also appear from the UIA. In this part we concentrate on two issues: the restriction on certain contributors to benefit, and the inchoate notion of “dependant”.

<sup>93</sup> ILO *Actuarial Valuation of the National Social Security Fund* 57-59. See also L Barbone & LB Sanchez “Pensions and Social Security in Sub-Saharan Africa – Issues and Options” in ISSA *Social Security in Africa: New Realities* (2000) 15; M Olivier “Acceptance of Social Security in Africa” in ISSA *Proceedings of 15th African International Social Security Association Regional Conference* (2006) 39

<sup>94</sup> IDTT *Alignment of Risk Benefits Provided by Social Security Agencies* (2010) 61

<sup>95</sup> See Olivier et al *Redesigning the South African Unemployment Insurance Fund* 206-212

<sup>96</sup> Part 4 1 above

<sup>97</sup> Dupper et al (2010) *Stell LR* 438

<sup>98</sup> Govindjee et al (2011) *Stell LR* 205

## 5 1 Removing the restriction on certain contributors to benefit

According to section 14 of the UIA a contributor is not entitled to UIF benefits under certain circumstances. These circumstances relate among others to any period that the contributor was in receipt of certain other benefits, despite the fact that contributions to the UIF may have been deducted and paid over to the Fund. The contributor apparently loses his or her entitlement to any UIF benefits if other benefits emanating from a source covered by the section are received (ie a benefit obtained from the Compensation Fund,<sup>99</sup> or a benefit from any unemployment fund or scheme established by a bargaining or statutory council).<sup>100</sup> This appears to be the position despite the fact that the (periodic) amount received from the other source may be less than the UIF amount.

Whether a contributor should be entitled to UIF benefits (or possibly reduced UIF benefits) in the event that Compensation Fund benefits are received raises complex issues of a legal and policy nature, and will not be further explored in this contribution.<sup>101</sup> One particular consideration concerns the question whether and, if so, to what extent it is desirable to let a person claim from different public social security schemes simultaneously on the basis of the same set of facts. It should be noted that existing statutory provisions are unclear, conflicting or inconsistent.<sup>102</sup>

As has been noted,<sup>103</sup> it is inconsistent and wrong in principle to exclude UIF contributors from drawing UIF benefits in the event that they may have an entitlement to a bargaining or statutory council unemployment fund or scheme payment. It is inconsistent, since in the case of UIF illness, maternity and adoption benefits special provision is made to ensure that the benefit received from that other source and the UIF benefit together are not more than the remuneration that the contributor would have received if the contributor did not become unemployed.<sup>104</sup> It is wrong in principle as contributors who, partly through their own premiums, have built up entitlements over a period of time, should be allowed to claim at least that amount which constitutes the difference between the benefits paid out from another source and the UIF

<sup>99</sup> S 14(a)(ii) of the UIA

<sup>100</sup> S 14(a)(iii)

<sup>101</sup> See the recent ostensibly conflicting judgments of the South Gauteng High Court in *Makhuvula v Road Accident Fund* 2010 1 SA 29 (SGHC) 29 and the Supreme Court of Appeal in *Road Accident Fund v Timis* (29/09) [2010] ZASCA 30 (26-03-2010) <<http://www.saflii.org/za/cases/ZASCA/2010/30.html>> (accessed 06-06-2011); JP van Niekerk “Makhuvula v Road Accident Fund” (2009) 12 JILB 146

<sup>102</sup> While s 53 of the COIDA stipulates that (among others) a social assistance payment may be taken into account by the Compensation Fund, the position in terms of other public scheme arrangements may be different. For example, a UIF beneficiary/defendant could be receiving both an old age grant and an unemployment insurance benefit. Also, the UIA does not prohibit “double-dipping” in respect of other public funds such as the Road Accident Fund. Furthermore, the UIA is not entirely consistent as far as entitlement to different categories of UIF benefits is concerned, as it provides that the entitlement to unemployment, illness and adoption benefits may not be reduced by the payment of maternity benefits in terms of the UIA (s 13(5)). There is evidently an emphatic need for statutory reform in this area, which is sensitive to both the different and, at times, conflicting public policy considerations, and the overarching constitutional rights domain

<sup>103</sup> Olivier & Van Kerken “Unemployment Insurance” in *Social Security* 432

<sup>104</sup> See ss 21(2), 24(3) and 27(4) of the UIA respectively

benefit, if the latter is in excess of the former. In essence then, a *reduction* in the amount of unemployment benefits would have been more appropriate.

The effect of this provision is that, although employers and employees who are involved in a council scheme remain obliged to contribute to the Fund, unemployed contributors will have to forfeit their (periodic) benefits which they had expected to be entitled to under the council scheme. This provision is likely to discourage councils to arrange for unemployment benefits on this basis and it is likely that councils will discontinue their unemployment schemes, at least to the extent that periodic payments are envisaged, since these will impose a double burden and yield no advantage.<sup>105</sup>

There is yet a further anomaly: if the employee has made *private* provision for the contingency of unemployment, payment of unemployment benefits is not forfeited. One has great difficulty in understanding the discrepancy between occupational-based (council) payments and private payments.

It is submitted that it is unconscionable to impose an obligation to contribute to the statutory scheme and yet refuse entitlement to benefits for the mere reason that there is an entitlement under another scheme. Therefore, in view of the range of problems experienced with the exclusions contained in section 14(a), it is recommended that the relevant parts of this section, which cause a contributor to forfeit unemployment benefits if the person was in receipt of certain other benefits, despite the fact that contributions may have been deducted and paid over to the UIF, be thoroughly reviewed.<sup>106</sup>

## 5 2 Redefining the range of dependants

A dependant is entitled to the various benefits provided for by the Unemployment Insurance Act (UIA).<sup>107</sup> The benefit payable is the unemployment benefit that would have been payable to the contributor in terms of the Act if the contributor had been alive.<sup>108</sup>

Section 30 of the UIA defines a dependant as:

- “(i) primarily, the surviving spouse or a life partner of a deceased contributor;<sup>109</sup> and
- “(ii) secondarily, any dependent child of a deceased contributor if (a) there is no surviving spouse or life partner; or (b) the surviving spouse or life partner has not made application for the benefits within six months of the contributor’s death.”<sup>110</sup>

As has been noted,<sup>111</sup> there are several problems with the provision contained in section 30. In the first place, the UIA apparently ranks children below surviving spouses and life partners, who have claimed. The apparently unfounded assumption is that the surviving spouse will look after the child and

<sup>105</sup> It is, therefore, likely that the prohibition will effectively – contrary to the intention of the legislature – transfer the burden of unemployment provision to the State

<sup>106</sup> It is worth noting that in terms of the provisions of the unpublished and undated Unemployment Insurance Amendment Bill of 2010 (on file with the authors) it is suggested that s 14(a) be deleted

<sup>107</sup> S 12(1) of the UIA

<sup>108</sup> S 30(3)

<sup>109</sup> S 30(1): provided that the application for benefits has been made within six months of the death of the contributor (s 30(1)(b))

<sup>110</sup> S 30(2)

<sup>111</sup> Olivier & Van Kerken “Unemployment Insurance” in *Social Security* 444

that for this reason the child can only claim if the spouse has not done so.<sup>112</sup> This of course raises constitutional considerations, in view of the protected status enjoyed by children, also in the area of social security.<sup>113</sup>

Secondly, it is unclear how extensively the notion of “spouse” should be interpreted, as there is no definition of the notion.<sup>114</sup> For example, does a life-partner or spouse who was married to the deceased employee in terms of customary or religious law qualify as a beneficiary if there was also a civil law marriage with another person subsisting at the time of the employee’s death?<sup>115</sup> Thirdly, no age restriction with regard to children is mentioned.

It is submitted that the primary question should be whether a person was or would have been (wholly or mainly) financially dependent on the deceased. In the event of more than one dependant, there should either be a clear ranking of would be beneficiaries, or an equitable sharing of the benefits (much along the same lines as is the case with pension/provident fund payments in terms of the provisions of the Pension Funds Act 24 of 1956).<sup>116</sup>

## 6 Re-aligning the current UIF benefit regime to focus on loss of employment

As suggested above,<sup>117</sup> the central task of unemployment insurance is to pay unemployment benefits and to serve as a labour market instrument. Consideration should therefore be given to separate unemployment insurance benefits (ie benefits which are payable in the event of loss of employment) from other unemployment-related benefits such as sickness, maternity and adoption benefits. This would mean that the Fund could in the medium- to long

<sup>112</sup> The assumption would of course be unfounded where, for example, the child of the deceased is not the child of the surviving spouse

<sup>113</sup> S 28 of the Constitution, read with s 27(1)(c)

<sup>114</sup> S 38(7) of the UIA 30 of 1966, apart from its shortcomings, was much more precise. It stipulated:

“For the purpose of this section—

(a) ‘dependant’ means—

- (i) the widow or widower of the deceased contributor;
- (ii) any child (including an adopted child) of the deceased contributor who was under the age of seventeen years at the date of the death of the contributor and who was, in the opinion of the board, wholly or mainly dependent upon the contributor for the necessities of life; or
- (iii) any other person who was, in the opinion of the board, wholly or mainly dependent upon the deceased contributor for the necessities of life;

(b)

(c) ‘widow’ includes any woman who was a participant in a customary union according to indigenous law and custom, where neither the man nor the woman was a party to a subsisting marriage.”

<sup>115</sup> Whether the exclusion of any of these categories of *de facto* dependants will eventually pass constitutional and equality muster, is debatable, given the constitutional prohibition of unfair discrimination based on marital status, religion and sexual orientation. See *Langemaat v Minister of Safety & Security* 1998 ILJ 20 (T); *Hafiza Ismail Amod (born Peer) & Commission for Gender Equality v Multilateral Motor Vehicle Accidents Fund* CC 29-09-1999 case no 444/98. This is also the approach adopted by the Pension Funds Adjudicator when determining the range of dependants for purposes of the Pension Funds Act: see *Van der Merwe v The Southern Life Association Ltd* 1999 Juta’s Pension LB 110 (WC) (PFA/WE/21/1/98); *TWC v Rentokil Pension Fund and DVR* 1999 Juta’s Pension LB 120 (KZN) (PFA/KZN/129/98); *AT Swanepoel v Abrahams & Gross Provident Fund* (PFA/WE61/98).

<sup>116</sup> See the definition of “dependant” in s 1 of the Pension Funds Act, and the decisions of the Adjudicator in *Van der Merwe v The Southern Life Association Ltd* 1999 Juta’s Pension LB 110 (WC) (PFA/WE/21/1/98); *TWC v Rentokil Pension Fund and DVR* 1999 Juta’s Pension LB 120 (KZN) (PFA/KZN/129/98); *AT Swanepoel v Abrahams & Gross Provident Fund* (PFA/WE61/98)

<sup>117</sup> Olivier & Van Kerken “Unemployment Insurance” in *Social Security* 458

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, including benefits linked to re-integrating unemployed (ex) workers into the labour market.

The comparative evidence is compelling. While only a few countries would provide mixed benefits under their unemployment insurance schemes, the common trend discernable in most countries of the world is to separate unemployment benefits from family-related and sickness benefits. It is also evident<sup>118</sup> that in those countries where the unemployment insurance scheme provides a mixed range of unemployment-related benefits, the contribution rate is markedly higher than in South Africa – of course, in order to ensure that the scheme is able to properly cover the said benefits.

As has been noted,<sup>119</sup> in many countries maternity benefits (and the same applies to adoption benefits) are provided for in separate family benefit schemes. Providing for family protection-related social security matters in terms of such a separate scheme could have the added advantage that non-formal sector maternity situations could also in principle be covered. Furthermore, as indicated above,<sup>120</sup> it should also be possible to subsume sickness benefits, currently provided by the UIF, under the envisaged (national) health insurance system.

It is therefore recommended that South Africa consider separating unemployment insurance benefits in the strict sense of the word (ie benefits accruing to a beneficiary as a result of *loss of employment*) from unemployment-related benefits such as sickness, maternity and adoption benefits. It is suggested that these (latter – unemployment-related benefits) be catered for under separate schemes designed for family benefits and sickness benefits. The reason behind this proposal is that these benefits stretch the financial capacity of the UIF and divert the focus of the UIF from pressing issues such as re-integrating unemployed (ex) workers into the labour market and contributing to preventing and combating unemployment.

## **7 Improving the UIF benefit regime through the introduction of standardised measures and other reforms**

In the final part of this contribution, emphasis is placed on the need to introduce certain standardised arrangements, in addition to other particular reforms, to ensure a streamlined and effective unemployment insurance scheme in South Africa. This would enable the UIF to provide enhanced material coverage to beneficiaries – as regards both the quality and quantity of benefits. Some of the standardised arrangements were discussed earlier in this contribution and will not be reflected on again – namely those relating to the increase in the minimum income replacement rate,<sup>121</sup> the increase in the

<sup>118</sup> See Olivier et al *Redesigning the South African Unemployment Insurance Fund* 206-212

<sup>119</sup> Olivier & Van Kerken “Unemployment Insurance” in *Social Security* 451

<sup>120</sup> Part 4 1 above

<sup>121</sup> Parts 3 2 and 3 4 2 above

income replacement rate in the event of maternity,<sup>122</sup> and the reduction of the benefit waiting period.<sup>123</sup> In this part, focus will be placed on the potential relevance of two additional standardised arrangements, namely the indexation of benefits and the consideration of utilising a minimum wage arrangement as a basis for benefit enhancement. Two further potential reform areas are then discussed – raising the contribution rate and developing a streamlined adjudication framework involving the UIF as well.

### 7 1 Benefit indexation

Experience from the UIF shows that although benefits have been adjusted periodically, benefit increases have been discretionary, and not linked to or aligned with any inflation target – such as the annual consumer price index (CPIX).

The general principle is that benefits paid by a social security scheme need to be indexed regularly to maintain their purchasing power. As indicated by the ILO, failure to index benefits over a long period or during inflation may lead to hardship for recipients.<sup>124</sup> In other countries, the maximum and minimum benefit levels are updated according to changes in the CPIX, or other benchmarks such as changes in the minimum wage.<sup>125</sup>

It is recommended that the benefits paid by the UIF need to be indexed, preferably to the CPIX or the minimum wage in a particular sector (or a general minimum wage if this were to be introduced – see below),<sup>126</sup> and updated regularly to maintain their purchasing power.

### 7 2 Utilising a minimum wage arrangement as a basis for benefit enhancement

South Africa does not have a national minimum wage, although a sectoral and/or job type- or job grade-specific minimum wage effectively exists in several industries. A potentially positive impact that the implementation of a minimum wage can have on unemployment insurance is to ensure that low-paid workers will receive a higher minimum benefit level. Because contributions are generally calculated as a percentage of income, a higher minimum income will ensure that low wage earners will receive higher benefits in the case of unemployment.<sup>127</sup> Alternatively, one could envisage that an unemployment insurance scheme such as the UIF can be designed in a way that deems a wage at a particular level to be the “minimum wage”, even though a minimum wage

<sup>122</sup> Part 3 5 above

<sup>123</sup> Part 3 2 above

<sup>124</sup> ILO *Social Insurance and Social Protection: Report of the Director-General (Part 1)* (Eightieth sess, 1993) 22

<sup>125</sup> See, for example, Chile: G Acevedo, P Eskenazi & C Pagés *Unemployment Insurance in Chile: A New Model of Income Support for Unemployed Workers* (SP Discussion Paper No 0612 World Bank) (2006) 17

<sup>126</sup> For a discussion on using the minimum wage as a yardstick in unemployment insurance, see part 7 2 below

<sup>127</sup> J Wenger *Mending Unemployment Insurance with the Minimum Wage* (Economic Policy Institute Issue Brief No 163) (2001) <[http://www.epi.org/publications/entry/issuebriefs\\_ib163/](http://www.epi.org/publications/entry/issuebriefs_ib163/)> (accessed 06-05-2011)

has not been officially introduced. The result, as far as unemployment benefit payments are concerned, will be to raise the benefit level for low-income earners.<sup>128</sup> One of the positive aspects therefore of the relationship between minimum wage and unemployment benefits is that it assists in redistribution by ensuring that there is equity in unemployment benefits.

It is recommended that serious consideration be given to the introduction and implementation of a minimum wage, which could then serve as a tool to ensure a minimum unemployment insurance benefit; in addition, it could also serve other important purposes, including facilitating access to a range of other social benefits, and to be used as a tool to benchmark the indexation of benefit increases.<sup>129</sup>

### 7 3 Adjusting the contribution rate

Earlier mention was made of the limited fiscal ability of the UIF, despite the size of its current surplus.<sup>130</sup> This could impact negatively on the ability of the UIF to meaningfully address the range of reform proposals discussed in this contribution and the previous two contributions. It is therefore suggested that there may be a need to consider alternative or additional funding resources for this purpose.

Comparative evidence is indeed revealing. As is evident from comparative practice,<sup>131</sup> unemployment insurance contribution rates in a range of developing and developed countries are almost without exception higher, and in some cases significantly higher, than is the case with the UIF.<sup>132</sup> In addition, these higher contribution rates would usually only pay for the contingency of unemployment due to termination of employment, while other unemployment-related benefits, such as sickness, maternity and adoption benefits, are covered by *other*, non-unemployment insurance schemes.<sup>133</sup>

It is, therefore, recommended that, in view of compelling comparative evidence and the need to enlarge the funding base of the UIF in order to introduce and implement a range of crucial reforms, raising the (combined) contribution rate be seriously considered.

### 7 4 Developing a streamlined adjudication framework<sup>134</sup>

Different kinds of disputes, with varying dispute resolution routes, are applicable to the South African unemployment insurance system. The relevant

<sup>128</sup> In the South African UIF context, introducing any of these measures would be in addition to the statutorily introduced higher income replacement rate applicable to low-income earners, on the basis of which a graduated scale of benefits applies – see part 3 2 above, in particular Sch 2, read with s 12(3)(b), of the UIA

<sup>129</sup> See part 7 1 above

<sup>130</sup> See part 2 above. In particular, it should be noted that by 2009 this surplus had grown to R23.5 billion (*UIF Annual Report of the Unemployment Insurance Fund for the Year Ended 31 March 2010* (2010) 91)

<sup>131</sup> See Olivier et al *Redesigning the South African Unemployment Insurance Fund* 206-212

<sup>132</sup> Currently employers and employees contribute 1% each of the employee's remuneration on a monthly basis to the UIF: a total contribution rate of 2%. See s 6 of the Unemployment Insurance Contributions Act

<sup>133</sup> See the discussion in part 6 above

<sup>134</sup> See also Olivier & Van Kerken "Unemployment Insurance" in *Social Security* 456-457

laws, namely the UIA and the Unemployment Insurance Contribution Act 4 of 2002 (“UICA”), provide for different adjudication possibilities, depending on whether the dispute concerns the payment or non-payment of contributions,<sup>135</sup> a criminal offence,<sup>136</sup> a compliance order,<sup>137</sup> the statement of a case to a court,<sup>138</sup> and the payment or non-payment of benefits.<sup>139</sup> For purposes of this contribution, the emphasis is on the latter category of disputes, namely the payment or non-payment of benefits.

In the current unemployment insurance system, aggrieved persons who claim to be entitled to benefits in terms of the UIA may appeal to the Regional Appeals Committee, and from there refer the matter to the National Appeals Committee of the Unemployment Insurance Board for decision, if the Unemployment Insurance Commissioner suspends such persons’ rights to benefits or a claims officer makes a decision on the payment or non-payment of their benefits.<sup>140</sup> A decision by the National Appeal Committee is final, subject to judicial review.<sup>141</sup> In all other cases the Labour Court has jurisdiction to deal with matters in terms of the UIA,<sup>142</sup> except in the case of offences committed in terms of that Act.<sup>143</sup>

<sup>135</sup> Dispute resolution in respect of UIF contributions is dealt with by the provisions of the UICA. The Act stipulates that the relevant Commissioner may request a labour inspector to assist in the investigation of any employer who is required to make contributions (s 15). Objections and appeals can be lodged in accordance with the provisions of the Income Tax Act 58 of 1962 (s 14(1)(c) & 14(2)(d)). The provisions of that Act with regard to the jurisdiction of the courts also apply in respect of contribution disputes arising from the UICA (s 14(1)(h) & 14(2)(j)).

<sup>136</sup> The normal criminal court system would be applicable to offences, as s 66 of the UIA makes it clear that the Labour Court does not have jurisdiction in respect of an offence in terms of the Act. It would appear that the same applies to offences committed under the UICA, as s 17 of that Act does not provide for a specialised dispute resolution framework in respect of such disputes.

<sup>137</sup> A labour inspector may issue a compliance order to a non-compliant employer (s 39 of the UIA). An employer may object to a compliance order by referring the dispute for resolution to the Director-General of the Department of Labour (s 40). The Act grants the Director-General the specific power to apply to the Labour Court for a compliance order to be made an order of the Labour Court if the employer has not complied with the order: s 41.

<sup>138</sup> According to s 67(1) of the UIA, if any question of law arises concerning the application of this Act, the Director-General may of his or her own initiative, or at the request of a party with sufficient interest in this matter, state a case for decision by the Labour Court. S 67(3) provides for a further appeal by the Director-General (against the decision by the Labour Court) to the Labour Appeal Court.

<sup>139</sup> See s 37 of the UIA, read with s 36A.

<sup>140</sup> Wide powers are granted to these committees: They may confirm or vary the decision in question, or rescind it and substitute the decision of the relevant committee, as the case may be: s 37(4)(b) of the UIA.

<sup>141</sup> S 37(3) of the UIA. It is not clear whether judicial review will be exercised by the High Court or the Labour Court – the Labour Court does not have general judicial review powers outside the framework of the Labour Relations Act 66 of 1995 (“LRA”), in terms of the provisions of s 158 of the LRA.

<sup>142</sup> It is not clear whether the powers of the Labour Court in this regard should be understood to include the power to deal with matters on the basis of administrative law (ie judicial) review, or whether the High Court is still entrusted with judicial review jurisdiction in relation to UIF disputes which are amenable to judicial review. See also s 37(3) of the UIA and note 146 above. In *Tseleng v The Chairman, Unemployment Insurance Board* 1995 16 ILJ 830 (T) the Court was asked to review the policy of the Unemployment Insurance Board in terms whereof the granting of additional benefits (as provided for by s 35 of the UIA 30 of 1966) was made subject to the requirement that the applicant must satisfy the Board that he or she actively sought work while receiving initial unemployment benefits. Amongst other things, the Court found the policy to be unconstitutional, due to the fact that the policy had not been disclosed to the applicant. The failure to disclose the policy amounted to a breach of the applicant’s fundamental right to procedurally fair administrative action conferred by s 24 of the Constitution of the Republic of South Africa Act 200 of 1993 (“Interim Constitution”) (845E-G).

<sup>143</sup> S 66 of the UIA.

Two issues need to be raised. The first relates to the absence of an accessible dispute resolution institution, outside the framework of the UIF itself, also from the perspective of the broader South African social security adjudication system. The second relates to the suggested non-compliance of the current UIF adjudication system with international standards.

As regards the first matter namely the absence of an accessible dispute resolution institution outside the UIF framework, it should be noted that the Regional and National Appeals Committee structures set up by the UIA should be seen as part of the *internal* dispute resolution framework. This flows from the fact that members of these Committees, though appointed by the Minister of Labour,<sup>144</sup> are drawn from the ranks (ie members) of the UIF Board.<sup>145</sup> Whether the Labour Court could be seen as an easily accessible institution where flexible dispute resolution procedures would apply is of course debatable.

From the perspective of the broader social security system in South Africa, the present system is riddled with contradictions in terms of adjudicative measures, institutions and available remedies – as has been noted by the Committee of Inquiry into a Comprehensive System of Social Security for South Africa (the Taylor Committee).<sup>146</sup> Different bodies and officials are required to hear complaints in relation to appeals in respect of various parts of the system, undue delays occur far too often, courts only have review powers and no appeal powers, with the result that they are not specialised enough to deal with social security measures, litigation costs are prohibitive, cases are often dealt with on a purely legalistic, technical basis, with scant regard for considerations of fairness, and external adjudication measures at times involve the High Court and at times the Labour Court.<sup>147</sup>

The Taylor Committee consequently recommended that a uniform adjudication system be established to deal conclusively with all social security claims. This system should incorporate, firstly, an independent internal review or appeal institution and, secondly, a court (which could be a specialised court) (or, one could add, an independent tribunal) which has the power to finally adjudicate all social security matters. This court (or tribunal) should have the power to determine cases on the basis of law and fairness. The jurisdiction of this court (or tribunal) should cover all social security claims, whether under the UIA, the Road Accident Fund Act 56 of 1996, COIDA and all the other benefits (including the Social Assistance Act 13 of 2004) emanating from the social security system.

As regards the second matter, namely the suggested non-compliance of the current UIF adjudication system with international standards, reference should

<sup>144</sup> S 36A(1) of the UIA, which refers to the appointment of (members of) Regional Appeals Committees. Presumably the same arrangement would apply to the appointment of (members of) National Appeals Committees, although the Act does not regulate this specifically.

<sup>145</sup> According to s 50(2)(a)(i) of the UIA, the constitution of the UIF Board must provide for the establishment and functions of committees of the Board, which must include an appeals committee.

<sup>146</sup> Committee of Inquiry into a System of Comprehensive Social Security for South Africa *Transforming the Present - Protecting the Future* 124

<sup>147</sup> 124

be made to the applicable provisions of the ILO Social Security (Minimum Standards) Convention (Convention 102 of 1952) and the ILO Employment Promotion and Protection against Unemployment Convention (Convention 168 of 1988).<sup>148</sup> According to Convention 102, every claimant shall have a right of appeal in case of refusal of the benefit or complaint as to its quality or quantity.<sup>149</sup> Where a claim is settled by a special tribunal established to deal with social security questions and on which the persons protected are represented, no right of appeal shall be required.<sup>150</sup> Convention 168 provides that a dispute concerning the refusal, withdrawal, suspension, or reduction of the quantum of benefits must be resolved by the body administering the scheme, and that there should thereafter be an appeal to an independent body.<sup>151</sup> The available procedures should be simple and rapid.<sup>152</sup> The essence of this article is not that an in-house body should deal conclusively with disputes, but that that there should be a dispute resolution mechanism which includes an independent appeal procedure. Furthermore, the appeal procedure should allow the claimant to be appropriately represented or assisted.<sup>153</sup>

It is suggested that the current UIF dispute resolution procedure in respect of the payment or non-payment of benefits falls short of the standards set by these two ILO instruments. For the reasons advanced above, the Regional and National Appeals Committees cannot be regarded as constituting an external, independent appeal mechanism. The absence of a statutorily required legally qualified person on these committees,<sup>154</sup> and the fact that these committees take their decisions by majority vote,<sup>155</sup> underscores the conclusion that these bodies cannot be seen as true (external) appeal institutions. Furthermore, subjecting the “final” decision of the National Appeals Committee to judicial review, also does not amount to an appeal to an external independent institution, as judicial review is a power to be exercised within narrow boundaries, and certainly does not include an appeal.<sup>156</sup>

Therefore, in view of the largely fragmented adjudication system existing in social security in South Africa, the establishment of a dedicated social security adjudication mechanism to deal with social security disputes is recommended. This mechanism could be a dedicated court, or a tribunal. Adopting this approach would also make South Africa compliant with the international standards discussed above. Furthermore, heed should be taken of the additional requirements set by the relevant international instruments,

<sup>148</sup> See, in general in this regard, ILO *Social Security and the Rule of Law* ILC 100/III/1B 14-109

<sup>149</sup> Art 70(1) of Convention 102

<sup>150</sup> Art 70(3)

<sup>151</sup> Art 27(1) of Convention 168

<sup>152</sup> Art 27(1)

<sup>153</sup> By a qualified person of the claimant’s choice or by a delegate of a representative workers’ organisation or by a delegate of an organisation representative of protected persons: art 27(2) See ILO *Social Security and the Rule of Law* 172

<sup>154</sup> See s 36A(2) of the UIA – no provision is made for a legally qualified person to be a member of the committee(s)

<sup>155</sup> See s 37(4)(a)

<sup>156</sup> See *Carephone (Pty) Ltd v Marcus NO* 1998 BCLR 1326 (LAC); also see *Samancor Chrome Ltd (Tubatse Ferrochrome) v Metal and Engineering Industries Bargaining Council* (JA 38/2009) [2010] ZALAC 25 (26-11-2010) paras 14-19 <<http://www.saflii.org/za/cases/ZALAC/2010/25.html>> (accessed 06-06-2011)

namely that the procedures adopted by such a body should be rapid and simple, and that the claimant should have the right to be appropriately represented or assisted.<sup>157</sup>

## 8 Conclusions

Together with the two previous contributions, this contribution highlights particular reform challenges facing the UIF, flowing from a range of shortcomings, deficiencies and inconsistencies. The need – and timing – for this is accentuated by the governmental resolve to establish a comprehensive social security system which is at various levels streamlined, integrated and coordinated.

It is evident that there is need to align various aspects of the unemployment insurance system in South Africa with relevant international standards, in particular those emanating from the ILO, but also from SADC. The reforms required from an international standards perspective include the upwards adjustment of the minimum income replacement rate and of the income replacement rate applicable to maternity benefits, reducing the benefits waiting period, removing the exclusion of migrant workers, taking steps to statutorily provide for, and enter into appropriate bilateral agreements (which could cover not only unemployment insurance, but also other social security arrangements), the coordination of private employment agencies and public employment services, covering workers who have become partially unemployed or whose services have been temporarily suspended, ensuring the continuation of (initial) benefits even if the unemployed worker refuses to take up a non-suitable job offer, and aligning the social security (including the unemployment insurance) adjudication framework with international standards. Complying with these standards will move South Africa closer to be in a position to ratify these instruments, in particular ILO Convention 102 of 1952 on minimum standards in social security.

It is, furthermore, necessary to develop synergies with the rest of the social security system, and to bring about appropriate institutional reform and alignment. The South African social security system is characterised by a high degree of fragmentation and duplication at all levels – including the policy, legal, adjudicative, institutional, operational, funding and service delivery levels. From an overall perspective, a common vision and framework is lacking. This affects unemployment insurance as well, which has tended to operate in relative isolation from the rest of the social security system. Ample opportunity exists to introduce streamlined collection of contributions, the establishment of a common registry, shared benefit payment facilities and arrangements, integrated service delivery, a common regulator, and common monitoring and external dispute resolution institutions. Interfacing regarding policy-making and co-ordinated institutional frameworks, the harmonisation of benefits, skills training and early return to work policies should be considered, in addition to the re-alignment of the UIF benefit regime.

<sup>157</sup> See, in general, ILO *Social Security and the Rule of Law* 172-175

However, there are particular considerations and substantive constraints, which both define and circumscribe the extent and content of the alignment of the UIF that is currently considered. These considerations and constraints relate in particular to the compensation (ie income-replacement) function of the UIF; the role of the UIF as a labour market instrument; and the need to recognise unemployment insurance as a separate risk category with a ringfenced contribution (ie funding) and benefit regime framework. The particular purpose and role of the UIF require its separate treatment, irrespective of where institutionally the UIF will be located in the new social security constellation in South Africa. Good standards in financial governance persuasively indicate that there be in principle full separation of accounts – and reserves – with appropriate actuarially defined separate contribution rates for each different risk. In particular, separating short-term and long-term benefits is imperative. International experience also overwhelmingly indicates that unemployment insurance is, with little exception, being treated as a separate risk category.

In addition to the shortcomings in the present UIA discussed in the first two contributions, relating in particular to coverage exclusions and the absence of a sufficient legislative *nexus* between the compensation focus (passive labour market context) and the desired labour market integration framework (active labour market interventions) of the UIF, certain other material deficiencies and inconsistencies also appear from the UIA. Two issues are highlighted in this contribution: the restriction on certain contributors to benefit, and the inchoate notion of “dependant”. It is submitted that it is unconscionable to impose a statutory obligation to contribute to the UIF and yet refuse entitlement to benefits (from a bargaining or statutory unemployment fund or scheme) for the mere reason that there is an entitlement under a different (non-public) scheme. There are also several problems with section 30 of the UIA, providing for dependants’ benefits – with particular reference to the apparent ranking of children below surviving spouses and life partners. An appropriate definition of who is a dependant, and an appropriate framework for the distribution of benefits have to be developed.

It should also be considered to separate unemployment insurance benefits in the strict sense of the word (ie benefits accruing to a beneficiary as a result of *loss of employment*) from unemployment-related benefits such as sickness, maternity and adoption benefits. These (latter – unemployment-related benefits) could be catered for under separate schemes designed for family benefits and sickness benefits, as currently they stretch the financial capacity of the UIF and divert the focus of the UIF from pressing issues such as re-integrating unemployed (ex) workers into the labour market and contributing to preventing and combating unemployment.

There is also need to introduce certain standardised arrangements, in addition to other particular reforms, to ensure a streamlined and effective unemployment insurance scheme in South Africa. This would enable the UIF to provide enhanced material coverage to beneficiaries – as regards both the quality and quantity of benefits. Four areas deserve particular attention in this regard. Firstly, benefits paid by the UIF need to be indexed, preferably to

the CPIX or the minimum wage in a particular sector (or a general minimum wage if this were to be introduced) and updated regularly to maintain their purchasing power. Secondly, serious consideration should be given to the introduction and implementation of a minimum wage, which could then serve as a tool to ensure a minimum unemployment insurance benefit; in addition, it could also serve other important purposes, including facilitating access to a range of other social benefits, and to be used as a tool to benchmark the indexation of benefit increases.

Thirdly, in view of compelling comparative evidence and the need to enlarge the funding base of the UIF in order to introduce and implement a range of crucial reforms, raising the (combined) contribution rate to the UIF should be seriously considered. Finally, in view of the largely fragmented adjudication system existing in social security in South Africa, the establishment of a dedicated social security adjudication mechanism to deal with social security disputes, including UIF benefit disputes is recommended. This mechanism could be a dedicated court, or a tribunal. Adopting this approach would also make South Africa compliant with the applicable international standards. As indicated by these standards, rapid and simple procedures are required, and the claimant should have the right to be appropriately represented or assisted.

## SUMMARY

This contribution examines selected issues from a policy and legal perspective. Against the background of the broader social security reform agenda in South Africa and the vision of a comprehensive social security system, the contribution covers five key areas, namely alignment with international standards; the need to develop synergies with the rest of the social security system and for institutional reform and alignment; addressing certain material deficiencies and inconsistencies in the UIF legislation (with reference to removing the restriction on certain contributors to benefit and redefining the range of dependants); re-aligning the current UIF benefit regime to focus on loss of employment; and improving the UIF benefit regime through the introduction of standardised measures and other reforms (with reference to the indexation of benefits, utilising a minimum wage arrangement as a basis for benefit enhancement, adjusting the contribution rate and developing a streamlined adjudication framework). It is argued that complying with relevant international standards will move South Africa closer to be in a position to ratify these instruments, in particular ILO Convention 102 of 1952 on minimum standards in social security. Ample opportunity exists to introduce streamlined approaches in among others the collection of contributions and shared benefit payment facilities and arrangements, and the harmonisation of benefits. However, particular considerations and substantive constraints define and circumscribe the extent and content of the alignment of the UIF that is currently considered. These relate in particular to the compensation function of the UIF; its role as a labour market instrument; and the need to recognise unemployment insurance as a separate risk category with a ringfenced contribution and benefit regime framework. It should also be considered to separate unemployment insurance benefits in the strict sense of the word (ie benefits accruing to a beneficiary as a result of *loss of employment*) from unemployment-related benefits such as sickness, maternity and adoption benefits.