



**UNIVERSITY** *of the*  
**WESTERN CAPE**

**FACULTY OF LAW**

**Compliance with international standards on compensation for occupational injuries and diseases by Zimbabwe and South Africa.**

Mini-thesis submitted in partial fulfilment of the requirements for the LLM degree in the Department of Mercantile Law and Labour Law

**UNIVERSITY** *of the*  
**WESTERN CAPE**

By

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## DECLARATION

I, **Tapiwanashe Zvidzayi**, do hereby declare that **‘Compliance with international standards on compensation for occupational injuries and diseases by Zimbabwe and South Africa’** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signature: .....

Date: .....



## DEDICATION

To my late father, Mr Gerald Zvidzayi, for his inspiration, encouragement and no-nonsense approach to education. Even though you are not here to share this milestone with me, this is for you Mudhara Pongoh.



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## **KEYWORDS**

Compensation

International Labour Organisation

International Standards

Occupational Diseases

Occupational Injuries

Social Security

South Africa

Zimbabwe



## LIST OF ABBREVIATIONS AND ACRONYMS

AHFoZ	Association of Healthcare Funders of Zimbabwe
C102:	Social Security (Minimum Standards) Convention No. 102 of 1952
C12:	Workmen's Compensation (Agriculture) Convention No. 12 of 1921
C121:	Employment Injury Benefits Convention No. 121 of 1964
C17:	Workmen's Compensation (Accidents) Convention No. 17 of 1925
C18:	Workmen's Compensation (Occupational Diseases) Convention No. 18 of 1925
C189:	Domestic Workers Convention No. 189 of 2011
C19:	Equality of Treatment (Accident Compensation) Convention No. 19 of 1925
COIDA:	Compensation for Occupational Injuries and Diseases Act
ILO:	International Labour Organisation
ISSA:	International Social Security Association
NPS:	National Pension Scheme
NSSA:	National Social Security Authority
ODMWA:	Occupational Diseases in Mines and Works Act 78 of 1977
OHSA:	Occupational Health and Safety Act 85 of 1993
OSH:	Occupational Safety and Health
POBS:	Pension and Other Benefits Scheme
PTSD:	Post-Traumatic Stress Disorder
R202:	Social Protection Floors Recommendation No 202 of 2012
SADC:	Southern African Development Community
USA:	United States of America
WCA:	Workmen's Compensation Act
WCIF:	Accident Prevention and Workers' Compensation Insurance Fund

## TABLE OF CONTENTS

DECLARATION .....	i
DEDICATION .....	ii
ACKNOWLEDGEMENTS .....	iii
KEYWORDS .....	iv
LIST OF ABBREVIATIONS AND ACRONYMS .....	v
TABLE OF CONTENTS .....	vi

### CHAPTER 1

#### INTRODUCTION AND BACKGROUND

1.1 BACKGROUND .....	1
1.2 RESEARCH QUESTION .....	3
1.3 AIM OF RESEARCH PAPER .....	3
1.4 RESEARCH METHODOLOGY .....	3
1.5 CHAPTER OUTLINE .....	4

### CHAPTER 2

#### INTERNATIONAL LABOUR ORGANISATION

2.1 INTRODUCTION .....	5
2.2.1 The organisational structure of the ILO .....	6
2.2.2 The role of the ILO .....	7
2.2.3 The importance of the ILO .....	8
2.3 INTERNATIONAL LABOUR STANDARDS .....	9

2.3.1 Creating international labour and social security standards .....	12
2.3.2 Conventions and Recommendations .....	13
2.3.3 Fundamental Conventions .....	15

2.4 ILO CONVENTIONS REGARDING COMPENSATION OF OCCUPATIONAL INJURIES AND DISEASES .....	20
--	----

2.4.1 Workmen's Compensation (Agriculture) Convention, 1921 (No. 12) .....	20
2.4.2 Workmen's Compensation (Accidents) Convention, 1925 (No. 17) .....	20
2.4.3 Workmen's Compensation (Occupational Diseases) Convention, 1925 (No. 18) .....	21
2.4.4 Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19) .....	21
2.4.5 Workmen's Compensation (Occupational Diseases) Convention, 1934 (No. 42) .....	22
2.4.6 Social Security (Minimum Standards) Convention, 1952 (No. 102) .....	22

2.4.7 Employment Injury Benefits Convention, 1964 (No. 121).....	24
2.4.8 Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187) .....	26
2.4.9 Domestic Workers Convention, 2011(No. 189) .....	26
2.4.10 Social Protection Floors Recommendation No 202 of 2012.....	27
<b>2.5 CONCLUSION .....</b>	<b>28</b>

### **CHAPTER 3**

#### **SOUTH AFRICA’S COMPENSATION OF OCCUPATIONAL INJURIES AND DISEASES SYSTEM**

<b>3.1 INTRODUCTION .....</b>	<b>30</b>
<b>3.2 SOUTH AFRICA’S LEGAL FRAMEWORK FOR COMPENSATION OF OCCUPATIONAL INJURIES AND DISEASES .....</b>	<b>32</b>
3.2.1 Constitutional Guarantee of Access to Social Security.....	32
<b>3.3 SOUTH AFRICA’S SOCIAL SECURITY SYSTEM .....</b>	<b>34</b>
<b>3.4 THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT ...</b>	<b>36</b>
3.4.1 Financing of the COIDA scheme.....	38
3.4.2 Scope of application of COIDA.....	39
3.4.3 Limitations of scope of application.....	41
<b>3.5 QUALIFYING CRITERIA .....</b>	<b>42</b>
3.5.1 Accidents.....	42
3.5.2 Occupational Diseases .....	44
<b>3.6 PROCEDURE FOR CLAIMING COMPENSATION FOR AN ACCIDENT .....</b>	<b>46</b>
<b>3.7 CALCULATION OF BENEFITS .....</b>	<b>46</b>
3.7.1 Temporary Disablement.....	47
3.7.2 Permanent Disablement .....	48
<b>3.8 COMPENSATION FOR OCCUPATIONAL DISEASES .....</b>	<b>49</b>
<b>3.9 MEDICAL COSTS .....</b>	<b>50</b>
<b>3.10 COMPENSATION WHERE AN EMPLOYEE DIES .....</b>	<b>50</b>
<b>3.11 CONCLUSION .....</b>	<b>51</b>

### **CHAPTER FOUR**

#### **ZIMBABWE’S COMPENSATION OF OCCUPATIONAL INJURIES AND DISEASES SYSTEM**

<b>4.1 INTRODUCTION .....</b>	<b>53</b>
-------------------------------	-----------



<b>4.2 ZIMBADWE’S LEGAL FRAMEWORK FOR COMPENSATION OF OCCUPATIONAL INJURIES OF OCCUPATIONAL INJURIES AND DISEASES .....</b>	<b>53</b>
4.2.1 Constitutional Guarantee of Social Security .....	53
<b>4.3 ZIMBABWE’S SOCIAL SECURITY SYSTEM.....</b>	<b>54</b>
<b>4.4 THE ACCIDENT PREVENTION AND WORKERS COMPENSATION SCHEME .....</b>	<b>57</b>
4.4.2 Scope of application of WCIF .....	60
4.4.3 Limitations of Scope of Application .....	62
<b>4.5 QUALIFYING CRITERIA .....</b>	<b>63</b>
4.5.1 Accidents.....	63
4.5.2 Occupational Diseases .....	64
<b>4.6 PROCEDURE FOR CLAIMING COMPENSATION .....</b>	<b>65</b>
<b>4.7 CALCULATION OF BENEFITS .....</b>	<b>67</b>
4.7.1 Temporary Disablement.....	67
4.7.2 Permanent Disablement .....	70
4.7.3 Foreign Workers .....	71
4.7.4 Rehabilitation Benefit .....	72
4.7.5 Constant Attendants Allowance.....	72
<b>4.8 COMPENSATION FOR OCCUPATIONAL DISEASES.....</b>	<b>72</b>
<b>4.9 MEDICAL COSTS.....</b>	<b>73</b>
<b>4.10 COMPENSATION WHERE AN EMPLOYEE DIES .....</b>	<b>74</b>
<b>4.11 CONCLUSION .....</b>	<b>75</b>
<b>CHAPTER FIVE</b>	
<b>5.1 INTRODUCTION .....</b>	<b>78</b>
<b>5.2 COMPLIANCE WITH ILO STANDARDS.....</b>	<b>78</b>
5.2.1 Funding of benefits .....	78
5.2.2 Form of payments .....	78
5.2.3 Compensation levels.....	79
5.2.4 Equal treatment of migrant workers.....	79
5.2.5 Scope of application.....	80
<b>5.3 RECOMMENDATIONS.....</b>	<b>80</b>
<b>BIBLIOGRAPHY .....</b>	<b>82</b>

# CHAPTER 1

## INTRODUCTION AND BACKGROUND

### 1.1 BACKGROUND

The International Labour Organisation (ILO) defines social security as

‘the protection that a society provides to individuals and households to ensure access to health care and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner.’<sup>1</sup>

The ILO lists nine branches of social security that are recognised world-wide and these are medical care, sickness benefits, unemployment benefits, old-age benefits, family benefits, maternity benefits, invalidity benefits and survivors' benefits and, of most importance for this mini-thesis, employment injury benefits.<sup>2</sup>

This mini thesis focuses on the branch of compensation for employment injuries and diseases. This type of benefit provides medical care and cash benefits to employees who are injured whilst working or who develop occupational diseases and also provides survivors benefits for families of employment-related fatalities.<sup>3</sup>

It can be submitted that compensation for occupational injuries and diseases is the oldest and most widespread form of social protection that is used world-wide and in countries like South Africa and Zimbabwe that were once colonised by Britain.<sup>4</sup> According to the International Social Security Association (ISSA) there are two general types of employment injury schemes, and these are individual employer liability and social insurance.<sup>5</sup> Under the first scheme of individual employer liability, the government mandates that individual employers

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<sup>1</sup> ILO ‘Facts on Social Security’ available at [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms\\_067588.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_067588.pdf) (accessed 02 August 2014).

<sup>2</sup> ‘ILO Social Security (Minimum Standards) Convention, 1952 (No. 102)’ available at [http://www.ilo.org/secsoc/areas-of-work/legal-advice/WCMS\\_205340/lang--en/index.htm](http://www.ilo.org/secsoc/areas-of-work/legal-advice/WCMS_205340/lang--en/index.htm) (accessed 28 July 2014).

<sup>3</sup> ‘ILO Social Security (Minimum Standards) Convention, 1952 (No. 102)’ available at [http://www.ilo.org/secsoc/areas-of-work/legal-advice/WCMS\\_205340/lang--en/index.htm](http://www.ilo.org/secsoc/areas-of-work/legal-advice/WCMS_205340/lang--en/index.htm) (accessed 28 July 2014).

<sup>4</sup> Fultz B and Pieris F ‘Employment Injury Schemes in Southern Africa: An Overview and Proposals for Future Directions’ available at <http://www.ilo.org/public/english/region/afpro/mdtharare/download/discussionpapers/paps11.pdf> (accessed on 28 July 2014).

<sup>5</sup> Fultz B and Pieris F ‘Compensation for employment injuries in Southern Africa: An overview of schemes and proposals for reform’ (1999) 138 *ILR* 171.

assume responsibility for compensating their employees for industrial accidents and diseases. The employers are required to cover this liability by purchasing an insurance policy.<sup>6</sup>

The second option found in most countries is social insurance, which involves the establishment of a national employment injury fund that is based on the principle of social solidarity. Employers in this scheme are required to make regular contributions on behalf of their employees and the government will then use these revenues to pay benefits. Here the government is usually the agent of administration, collecting contributions, determining eligibility, making payments and ensuring the financial solvency of the scheme.<sup>7</sup>

Hans-Horst Konkolewsky, the Secretary General of International Social Security Association (ISSA), in his opening speech on The Day for Safety and Health at Work in 2013 stated that more than 2.3 million people die annually as a result of occupational accidents and work related diseases.<sup>8</sup> Therefore, there is an urgent need for countries to follow the standards set by the ILO because statistics are indicating that incidences of non-fatal workplace accidents are actually rising.<sup>9</sup> The ILO in supporting Konkolewsky's view stated that occupational health hazards are becoming more severe due to the employees' exposure to dangerous substances like carcinogens and asbestos. In addition, there is an increase in mental health issues or psychosocial risks in the workplaces due to the changing world of work.<sup>10</sup>

The ILO through its Conventions provides standards for the financing, benefit structure and administration of employment injury schemes.<sup>11</sup> Yet, in practice, most of these schemes fall short of providing a minimum standard. Some countries rely on antiquated forms of administration and in most cases compliance with the international and social security standards is low, record keeping is poor and usually delays in payments are frequent.

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<sup>6</sup> ILO 'Applying and promoting International Labour Standards' available at <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm> (accessed 03 August 2014).

<sup>7</sup> Fultz B and Pieris F 'Compensation for employment injuries in Southern Africa: An overview of schemes and proposals for reform' (1999) 138 *ILR* 171.

<sup>8</sup> Finnish Institute of Occupational Health 'From Risks to Vision Zero' available at [http://www.ttl.fi/en/international/conferences/culture\\_of\\_prevention/Documents/proceedings\\_cupre\\_2013.pdf](http://www.ttl.fi/en/international/conferences/culture_of_prevention/Documents/proceedings_cupre_2013.pdf) (accessed 03 August 2014).

<sup>9</sup> ILO 'International Labour Standards on Social Security' available at <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm> (accessed 03 August 2014).

<sup>10</sup> ISSA 'Prevention is good for health and good for business' available at <https://www.issa.int/details?uuid=56d1faac-d9cf-40a4-94a9-2e57fd869af6> (accessed 12 April 2014).

<sup>11</sup> Fultz B and Pieris F 'Compensation for employment injuries in Southern Africa: An overview of schemes and proposals for reform' (1999) 138 *ILR* 171.

Moreover, half of the schemes provide only lump sum benefits which may be rapidly exhausted by workers, leaving them with no social security at all.<sup>12</sup>

## **1.2 RESEARCH QUESTION**

Do the Zimbabwean and South African statutory compensation schemes comply with the international standards on compensation for occupational injuries and diseases?

## **1.3 AIM OF RESEARCH PAPER**

This mini thesis provides a comparative study on two Member States of the ILO. These are, namely: South Africa and Zimbabwe. The purpose of this research is to find out whether Zimbabwe and South Africa are complying with the standards set by the ILO regarding the issue of compensation for occupational injuries and diseases. The terms workers compensation and employment injury benefits are frequently used interchangeably.<sup>13</sup> Workers compensation is the older term, generally used originally to refer to schemes which provide benefits in the case of death and incapacity due to accidents at work and, later, due to prescribed occupational diseases as well. These benefits could be temporary or permanent, total or partial. In these ILO instruments, the term employment injury is used to cover both accidents at work and occupational diseases.<sup>14</sup>

This mini-thesis determines whether South Africa and Zimbabwe are complying with or failing to meet the standards set by the ILO. The research further provides recommendations regarding the shortfalls that South Africa and Zimbabwe are facing so that they will get in line with the standards of ILO, because this is essential to the lives of millions of workers working in these two countries.

## **1.4 RESEARCH METHODOLOGY**

This study adopts a desktop research methodology. This methodology, therefore, involves the reading and analysis of primary sources such as international conventions that govern labour standards, official reports of relevant international organisations and national laws. The secondary resources will range from books, journal articles, conference papers, case law and

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<sup>12</sup> Fultz B and Pieris F 'Compensation for employment injuries in Southern Africa: An overview of schemes and proposals for reform' (1999) 138 *ILR* 171.

<sup>13</sup> Finnish Institute of Occupational Health 'From Risks to Vision Zero' available at [http://www.ttl.fi/en/international/conferences/culture\\_of\\_prevention/Documents/proceedings\\_cupre\\_2013.pdf](http://www.ttl.fi/en/international/conferences/culture_of_prevention/Documents/proceedings_cupre_2013.pdf) (accessed 03 August 2014).

<sup>14</sup> Fultz B and Pieris F 'Compensation for employment injuries in Southern Africa: An overview of schemes and proposals for reform' (1999) 138 *ILR* 171.

also the internet. The study further undertakes a comparative analysis of South Africa and Zimbabwe regarding the issue of whether these two countries comply with international labour and social security standards.

This mini thesis is focusing on South Africa and Zimbabwe because these are the two countries in the SADC that are offering better employment injury schemes compared to other countries in the region. Therefore there is a need to determine whether these two leading countries in the region are complying with international labour and social security standards for compensation of occupational and diseases. The two schemes are almost similar to each other in terms of how they are funded, operated and the types of benefits provided. However, Zimbabwe has a national social insurance system which incorporates its employment injury scheme, whereas the South African employment injury scheme is a stand-alone scheme that does not form part of a coherent social insurance system.

## **1.5 CHAPTER OUTLINE**

This mini thesis comprises of five chapters.

Chapter 1 is the introductory part, which includes the definition of social security as defined by the ILO. This chapter also covers the research problem, significance of study and the research methodology.

Chapter 2 provides an overview of the role and functions of the ILO, but focuses on the relevant ILO standards that govern compensation for occupational injuries and diseases, in order to identify benchmarks by which the employment injury schemes in South Africa and Zimbabwe can be measured.

Chapter 3 examines South Africa's legislation dealing with compensation for occupational injuries and diseases. In addition, the chapter determines whether South Africa complies with the standards set by the ILO.

Chapter 4 examines Zimbabwe's legislation that deals with compensation for occupational injuries and diseases. Furthermore, the chapter explores whether Zimbabwe complies with the standards set by the ILO.

Chapter 5 provides the conclusions, and recommendations on how South Africa and Zimbabwe can learn from each other so that both countries will be able to comply with the ILO standards.

## CHAPTER 2

### INTERNATIONAL LABOUR ORGANISATION

#### 2.1 INTRODUCTION

This chapter briefly outlines how the International Labour Organisation (ILO) was established and how it functions. The chapter then focuses on how international labour and social security standards are created and how legal instruments such as Conventions and Recommendations are adopted by Member States of the ILO. This chapter mainly focuses on the relevant Conventions and Recommendations that cover the topic of compensation of occupational injuries and diseases.

#### 2.2 THE INTERNATIONAL LABOUR ORGANISATION

The ILO is the international organisation responsible for establishing and overseeing international labour and social security standards.<sup>15</sup> It is a specialised agency of the United Nations system and the principal centre of authority in the international system on labour and social policy.<sup>16</sup> The ILO was created in 1919 as part of the Treaty of Versailles that ended World War I and its main purpose was to reflect the belief that universal and lasting peace can be accomplished only if it is based on social justice.<sup>17</sup> The ILO was built on the belief that peace and justice goes hand in hand, not in the sense that war is always the result of injustice but rather that social justice is an essential foundation of peace.<sup>18</sup>

The ILO was created to promote social progress and overcome social and economic conflicts of interest through dialogue and cooperation.<sup>19</sup> During the formation of ILO only 42 nations were members but it went on to become one of the most successful organisations that currently has up to 185 member states.<sup>20</sup> As a result of the ILO Constitution that was drafted in 1919, the ILO became the first and only tripartite United Nations agency that brings

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<sup>15</sup> ILO 'ILO in History' available at <http://www.ilo.org/century/history/lang--en/index.htm> (accessed 25 February 2015).

<sup>16</sup> Rodgers G, Lee E, Swepston L and Van Daele J 'The International Labour Organisation and the quest for social justice, 1919–2009' (2009) 1. (Hereafter Rodgers G, Lee E et al ILO and Justice (2009)).

<sup>17</sup> Preamble of the ILO Constitution available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62\\_LIST\\_ENTRIE\\_ID:2453907:NO#A1](http://www.ilo.org/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#A1). The ILO in its Preamble states that universal and lasting peace can be achieved only if it is based upon social justice and this also includes the regulation of working hours, the protection of the worker against sickness, disease and injury arising out of his employment and the protection of the interests of workers when employed in countries other than their own.

<sup>18</sup> Rodgers G, Lee E et al ILO and Justice (2009) 3.

<sup>19</sup> Rodgers G, Lee E et al ILO and Justice (2009) 1.

<sup>20</sup> ILO *Rules of the Game: A brief introduction to International Labour Standards* (2014) 16. (Hereafter ILO *Rules of the Game* (2014)).

together representatives of governments, employers and workers to jointly shape policies and programmes promoting decent work for all throughout the world.<sup>21</sup>

### **2.2.1 The organisational structure of the ILO**

The ILO is comprised of representatives of government of member countries, employers and labour. These representatives are then grouped into three organs of power and these are the International Labour Conference, the Governing Body and the International Labour Office.<sup>22</sup> Each of these organs performs its functions as required by the Constitution. The International Labour Conference meets annually in June at the ILO headquarters in Geneva and each Member State is entitled to send four (4) delegates who will act as representatives of that government and organised labour.<sup>23</sup> At the conference these representatives will discuss labour and social problems affecting their countries before they make Recommendations or Conventions. This feature of tripartite representation is to ensure that the views of the social partners are closely reflected in labour standards and in shaping policies and programmes. This makes the ILO unique within the family of the United Nations and that is why it is regarded as the most democratic organisation in the multilateral system.<sup>24</sup>

The Governing Body is made up of twenty eight (28) government members, fourteen (14) employer members and fourteen (14) worker members. Therefore a total of fifty six (56) persons constitute the Governing Body.<sup>25</sup> The Governing Body acts like the board or executive council of the ILO. It meets three times yearly and sets the agenda for the organisation and also performs a very crucial role because it is responsible for electing the Director General of the ILO.<sup>26</sup> Therefore one can say that the Governing Body is the supreme body of the ILO that has the power to perform executive functions of the organisation.<sup>27</sup>

The International Labour Office is also located at ILO Headquarters in Geneva. This organ is the secretariat which is referred to as the administrative head of the ILO.<sup>28</sup> The International Labour Office is a very important organ of the ILO because it deals with day-to-day running

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<sup>21</sup> ILO 'ILO in History' available at <http://www.ilo.org/century/history/lang--en/index.htm> (accessed 25 February 2015).

<sup>22</sup> Mbah SE 'Core Conventions of the International Labour Organisation (ILO): Implications for Nigerian Labour Laws' (2011) 2 *IJBA* 131. (Hereafter Mbah SE 'ILO Core Conventions' (2011)).

<sup>23</sup> Article 3 of the 1919 ILO Constitution.

<sup>24</sup> ILO 'Origins and History' available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (accessed 25 February 2015).

<sup>25</sup> Article 7.1 of the 1919 ILO Constitution.

<sup>26</sup> Article 8.1 of the 1919 ILO Constitution.

<sup>27</sup> ILO 'Origins and History' available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (accessed 25 February 2015).

<sup>28</sup> Mbah SE ILO 'Core Conventions' (2011) 132.

of the organisation. However, its management is not centralised in Geneva but it is decentralised in regional, area and branch offices throughout the whole world. This decentralisation of management is actually a good thing because instead of meeting in Geneva so as to solve a problem that could arise in one region, the Member States in that region can easily have periodical meetings in their regional offices and solve the issue amicably.<sup>29</sup>

### **2.2.2 The role of the ILO**

The main aims of the ILO in terms of its Decent Work Agenda are to promote rights at work, encourage decent employment opportunities, enhance social protection and strengthen dialogue on work-related issues.<sup>30</sup> Its function is to create coordinated policies and programmes that are directed at solving social and labour issues. This makes it easier for the ILO to provide assistance to its Member States to solve social and labour problems affecting these countries. One of its main roles is to create and adopt international labour and social security standards that must be followed by its member and these are in the form of Conventions and Recommendations.<sup>31</sup>

The core elements of the ILO's broad mandate include social welfare policies on various issues including working conditions, forced labour, organised labour, freedom of association, the employment of children, the expansion of welfare programs and also promotion of social justice.<sup>32</sup>

The ILO is governed by its Constitution that was enacted in 1919 as part of the Treaty of Versailles. The Constitution is regarded as the first attempt to construct a universal organisation to address the social and economic problems that the world was facing at that time.<sup>33</sup> The ILO's Constitution laid out the rationale for the organisation, spelled out its aims and purposes as well as its detailed design and also identified certain methods and principles for regulating labour conditions that are of special and urgent importance which all industrial communities should endeavour to apply so far as their special circumstances will permit.<sup>34</sup>

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<sup>29</sup> ILO 'Origins and History' available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (accessed 25 February 2015).

<sup>30</sup> ILO 'Mission and Objectives' available at <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (accessed 19 August 2015).

<sup>31</sup> Mbah SE 'ILO Core Conventions' (2011) 130.

<sup>32</sup> Mbah SE 'ILO Core Conventions' (2011) 130.

<sup>33</sup> Rodgers G, Lee E et al ILO and Justice (2009) 6.

<sup>34</sup> Article 19 of the 1919 ILO Constitution.



This shows that the ILO from the onset was concerned about protecting the labour and working conditions so as to protect the lives of workers.

The vision of the original Constitution was taken a step further towards the end of World War II in a powerful declaration, which was adopted by the ILO at the Conference it held in Philadelphia 1944, and subsequently incorporated into its Constitution. The Declaration of Philadelphia reasserted the principles and goals of the ILO and above all reinforced and expanded them.<sup>35</sup> The Declaration of Philadelphia was a strong statement of the need for international and national action for universal social progress.<sup>36</sup>

### 2.2.3 The importance of the ILO

The importance of the work done by the ILO in making this world a better place was acknowledged in 1969 when the ILO was given the prestigious Nobel Peace Prize for contributing to peace and justice throughout the whole world on its fiftieth anniversary.<sup>37</sup>

This was as a result of ILO contribution in various crucial roles in many key historical junctures, most notably for helping to rebuild the world economy after World Wars I and II, and also after the Great Depression.<sup>38</sup>

The most important function of the ILO is to create and maintain international labour and social security standards that are aimed at promoting decent and productive work in conditions of freedom, equity, security, and dignity.<sup>39</sup> This is a very important task because it protects the lives of millions workers across the globe because they will be working in safer conditions that would have been stipulated in the international labour standards set by the ILO.<sup>40</sup>

The ILO is the only international intergovernmental institution in which governments do not have the exclusive voting power in setting standards and policies. Employers and workers have an equal voice with governments in its decision making processes.<sup>41</sup> During conferences, labour and social problems are discussed before being reduced into a Convention and subsequent Recommendation. However both employer and worker delegates can have the freedom of speech and may vote independently even against their government

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<sup>35</sup> Article 1 of the Declaration of Philadelphia; Declaration Concerning the Aims and Purposes of the ILO, 1944.

<sup>36</sup> Article 2 of the Declaration of Philadelphia; Declaration Concerning the Aims and Purposes of the ILO, 1944.

<sup>37</sup> ILO *Fundamental principles and rights at work: From commitment to action* (2012) 16.

<sup>38</sup> ILO *Fundamental principles and rights at work: From commitment to action* (2012) 16.

<sup>39</sup> Sengenberger W *The International Labour Organisation: Goals, Functions and Political Impact* (2014) 26. (hereafter Sengenberger W *Goals and Functions of ILO* (2014)).

<sup>40</sup> Sengenberger W *Goals and Functions of ILO* (2014) 26.

<sup>41</sup> ILO *Fundamental principles and rights at work: From commitment to action* (2012) 16.

for ideological reasons.<sup>42</sup> This is a very crucial aspect of the ILO because it is assumed that the delegates that will be representing the workers will be having the workers' interest at heart and that they will not be influenced by their government, because they have a say in the decision making process.

It is submitted that the institutions on which the ILO is founded have proved their worth. This can be seen by looking at tripartism which is the bedrock of the ILO and how it has successfully provided a democratic platform in decision making process. This can also be seen by looking at labour and social security standards that were created by the ILO and are now framed in various constitutions across the world.<sup>43</sup>

The ILO is also a very effective organisation that has the ability to respond to the demands that are put upon it regardless of whether it is economic crises, social conflicts, war or globalisation policies that are inimical to ILO values.<sup>44</sup> In the end one can say that the ILO is an indispensable tool to make decent work a reality because of the balance it brings between state and market, between society and individual and, today, between economic, social and environmental policies for sustainable development.<sup>45</sup>

### **2.3 INTERNATIONAL LABOUR STANDARDS**

In 1919, the signatory nations to the Treaty of Versailles created the ILO in recognition of the fact of that the working conditions that existed that time involved such injustice and hardship to a lot of people that in turn may cause great damage to the peace and harmony of the world.<sup>46</sup> As a way of trying to tackle this problem, the newly formed organisation established a system of international labour standards aimed at promoting decent and productive work in conditions of freedom, equity, security and dignity.<sup>47</sup>

These international labour and social security standards are laid down in Conventions, Recommendations and Protocols.<sup>48</sup> Other important documents of relevance for international labour and social security standards are ILO Declarations and Codes of Practice.<sup>49</sup> The idea

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<sup>42</sup> Mbah SE 'ILO Core Conventions' (2011) 132.

<sup>43</sup> ILO *Fundamental principles and rights at work: From commitment to action* (2012) 18.

<sup>44</sup> Mbah SE 'ILO Core Conventions' (2011) 132.

<sup>45</sup> ILO *Fundamental principles and rights at work: From commitment to action* (2012) 19.

<sup>46</sup> ILO *Rules of the Game* (2014) 10.

<sup>47</sup> ILO 'Labour Standards' available at <http://www.ilo.org/global/standards/lang--en/index.htm> (accessed 27 February 2015).

<sup>48</sup> ILO 'Labour Standards' available at <http://www.ilo.org/global/standards/lang--en/index.htm> (accessed 27 February 2015).

<sup>49</sup> Declarations can be described as resolutions of the International Labour Conference that are used to make formal and authoritative statements and reaffirm the importance which the constituents attach to certain

of having both Conventions and Recommendations came from two different countries, Britain and United States of America (USA). The British delegation to the Labour Commission of the Peace Conference proposed the adoption of only Conventions that would be binding once ratified in accordance with accepted international laws.<sup>50</sup> The USA took the opposite position, maintaining that the instruments adopted by the Conference should be mere Recommendations. Therefore if no action were taken to enact them into national law, there would be no obligation to pursue the matter further.<sup>51</sup>

International labour and social security standards are first and foremost about the development of people as human beings.<sup>52</sup> In the ILO's Declaration of Philadelphia of 1944, it was stated that 'labour is not a commodity'.<sup>53</sup> Indeed, labour is not like an apple or a television set that can be negotiated for the highest profit or the lowest price. Work is part of everyone's daily life and is crucial to a person's dignity, well-being and development as a human being. Economic development should include the creation of jobs and working conditions in which people can work in freedom, safety and dignity. In short, economic development is not undertaken for its own sake but to improve the lives of human beings. International labour and social security standards are there to ensure that it remains focused on improving human life and dignity.<sup>54</sup>

It is submitted that international labour and social security standards set the minimum social standards that are supposed to be followed by everyone in the global economy. These international labour and social security standards contribute to the goal of achieving decent work in the global economy by elaborating and promoting labour standards that are aimed at making sure that economic growth and development go along with the creation of decent work.<sup>55</sup> This is made much easier because of the ILO's unique tripartite structure which ensures that these standards are backed by governments, employers and workers alike.

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principles and values. Codes of Practice are a set of ILO's non-binding rules that provides guidance to countries on various issues affecting them and these rules can be used to develop legislations, regulations and policies. ILO *Rules of the Game* (2014) 15.

<sup>50</sup> Shotwell J *The origins of the International Labour Organisation* 2 ed (1934) 26.

<sup>51</sup> Shotwell J *The origins of the International Labour Organisation* 2 ed (1934) 26.

<sup>52</sup> ILO *Rules of the Game* (2014) 11.

<sup>53</sup> ILO 'The Benefits of ILO Standards' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm> (accessed 27 February 2015).

<sup>54</sup> Shotwell J *The origins of the International Labour Organisation* 2 ed(1934) 34.

<sup>55</sup> ILO 'The Benefits of ILO Standards' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm> (accessed 27 February 2015).

An international legal framework on social standards contributes to a level playing field in the global economy whereby the interest of all the social partners are taken into consideration and protected.<sup>56</sup> It helps governments and employers to avoid the temptation of lowering labour standards in the belief that this could give them a greater comparative advantage in international trade.<sup>57</sup> In the long run such practices do not benefit anyone. Lowering labour standards can encourage the spread of low-wage, low-skill and high-turnover industries and prevent a country from developing more stable high-skilled employment, while at the same time making it more difficult for trading partners to develop their economies upwards. Since international labour standards are minimum standards adopted by governments and the social partners, it is in everyone's interest to see these rules applied across the board, so that those who do not put them into practice do not undermine the efforts of those who do.<sup>58</sup>

The beneficial effects of labour and social security standards do not go unnoticed by foreign investors. Studies have shown that foreign investors when choosing countries to invest in, they rank workforce quality and political and social stability above low labour costs.<sup>59</sup> At the same time, there is little evidence that countries which do not respect labour standards are more competitive in the global economy.<sup>60</sup> Even though institutions like the World Bank discourages the adoption of standards because it is of the view of that adoption of standards is holding back economic development, there is evidence to prove that development is not sustainable if it ignores workers' rights and this is one of the driving impulses behind the Decent Work Agenda.<sup>61</sup> Research conducted jointly by the ILO and the Asian Development Bank in 2001 came to the firm conclusion that there was a measurable negative cost to development if standards are ignored, even if an individual employer might reap temporary benefit from undercutting conditions of work and pay.<sup>62</sup>

What the ILO's founders recognised in 1919 was that the global economy needed clear rules in order to ensure that economic progress would go hand in hand with social justice, prosperity and peace for all.<sup>63</sup> This system of having international labour standards later on

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<sup>56</sup> Mbah SE 'ILO Core Conventions' (2011) 132.

<sup>57</sup> Shotwell J *The origins of the International Labour Organisation* 2 ed (1934) 34.

<sup>58</sup> *ILO Rules of the Game* (2014) 12.

<sup>59</sup> Kucera D 'Core labour standards and foreign direct investment' (2002) 141 *ILR* 1 32.

<sup>60</sup> Kucera D 'Core labour standards and foreign direct investment' (2002) 141 *ILR* 1 32.

<sup>61</sup> Rodgers G, Lee E et al *ILO and Justice* (2009) 23.

<sup>62</sup> Rodgers G, Lee E et al *ILO and Justice* (2009) 24.

<sup>63</sup> Rodgers G, Lee E et al *ILO and Justice* (2009) 15.

became very important to the functioning of the ILO to the extent of that these labour standards are regarded as the cornerstone of the ILO.<sup>64</sup>

### 2.3.1 Creating international labour and social security standards

The ILO organises the International Labour Conference in Geneva every year in June, this is where Conventions and Recommendations are crafted and adopted.<sup>65</sup> The ILO does this through its unique legislative process that involves representatives of governments, workers and employers from around the world. As a first step, the Governing Body agrees to put an issue on the agenda of a future International Labour Conference.<sup>66</sup> The International Labour Office prepares a report that analyses the laws and practices of Member States with regard to the issue at stake. The report is then circulated to member states and to workers' and employers' organisations for comments and is discussed at the International Labour Conference.<sup>67</sup>

A second report is then prepared by the International Labour Office with a draft instrument for comments and submitted for discussion at the following Conference, where the draft is amended as necessary and proposed for adoption.<sup>68</sup> This 'double discussion' gives Conference participants sufficient time to examine the draft instrument and make comments on it. Lastly, for an international labour or social security standard to be accepted, a two-thirds majority of votes is required for a standard to be adopted.<sup>69</sup> The International Labour Conference has started using an integrated approach with the aim of improving the coherence, relevance and impact of standards-related activities and developing a plan of action that embodies a coherent package of tools to address a specific subject.<sup>70</sup> This was first used in 2003 for the purpose of developing a global strategy to improve occupational safety and health worldwide. These tools may include Conventions, Recommendations and other

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<sup>64</sup> Sengenberger W *Goals and Functions of ILO* (2014) 27. At the time of writing there are 189 Conventions and 202 Recommendations. However, a number of the older Conventions have been withdrawn or revised.

<sup>65</sup> ILO 'Origins and History' available at <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (accessed 25 February 2015).

<sup>66</sup> ILO 'International Labour Standards Creation' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm> (accessed 03 March 2015).

<sup>67</sup> Kucera D 'Core labour standards and foreign direct investment' (2002) 141 *ILR* 1 35.

<sup>68</sup> ILO 'International Labour Standards Creation' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm> (accessed 03 March 2015).

<sup>69</sup> ILO 'International Labour Standards Creation' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm> (accessed 10 November 2015).

<sup>70</sup> Kucera D 'Core labour standards and foreign direct investment' (2002) 141 *ILR* 1 32.

types of instruments, promotional measures, technical assistance, research and dissemination of knowledge, and inter-agency cooperation.<sup>71</sup>

### 2.3.2 Conventions and Recommendations

International labour and social security standards are legal instruments drawn up by the ILO setting out basic principles and rights at work.<sup>72</sup> They are either Conventions, which are legally binding international treaties that may be ratified by Member States, or Recommendations which serve as non-binding guidelines.<sup>73</sup> In many instances, a Convention will lay down the basic principles to be implemented by ratifying countries, while a related Recommendation will supplement the Convention by providing more detailed guidelines on how it could be applied. However, in some cases Recommendations can also be autonomous, meaning to say that they will not be linked to any Convention.<sup>74</sup>

Conventions have the same status of that of international treaties and therefore they have a binding effect on those countries that ratify them.<sup>75</sup> However, even if Conventions are not ratified, they are still regarded as international labour standards and have similar legal force as that imposed by a Recommendation.<sup>76</sup> Unlike Conventions, Recommendations have non-binding effect and they do not need to be ratified.<sup>77</sup> Their purpose is to clarify matters dealt with by the Conventions and most importantly to set guidelines for national policy and action.<sup>78</sup>

Once standards are adopted, Member States are required under the ILO Constitution to submit these instruments to their competent authority, which is usually the Parliament, for

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<sup>71</sup> ILO 'International Labour Standards Creation' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm> (accessed 03 March 2015).

<sup>72</sup> ILO *Rules of the Game* (2014) 16.

<sup>73</sup> ILO *Rules of the Game* (2014) 16.

<sup>74</sup> For example the Social Protection Floors Recommendation No. 202 of 2012. This Recommendation is not linked to any specific Convention but complements the existing ILO Conventions and Recommendations related to social security. This Recommendation provides guidance to Member States, so as to ensure that all members of society enjoy at least a basic level of social security throughout their lives.

<sup>75</sup> ILO 'Handbook of procedures relating to international labour Conventions and Recommendations' available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_192621.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_192621.pdf) (accessed on 13 November 2015).

<sup>76</sup> ILO 'Handbook of procedures relating to international labour Conventions and Recommendations' available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_192621.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_192621.pdf) (accessed on 13 November 2015).

<sup>77</sup> ILO 'Handbook of procedures relating to international labour Conventions and Recommendations' available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_192621.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_192621.pdf) (accessed on 13 November 2015).

<sup>78</sup> ILO 'Handbook of procedures relating to international labour Conventions and Recommendations' available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_192621.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_192621.pdf) (accessed on 13 November 2015).

consideration.<sup>79</sup> In the case of Conventions, this means consideration for ratification. If it is ratified, a Convention generally comes into force for that country one year after the date of ratification. Ratifying countries commit themselves to applying the Convention in national law and practice and to reporting on its application at regular intervals.<sup>80</sup> Technical assistance is provided by the ILO if necessary. In addition, representation and complaint procedures can be initiated against countries for violations of a Convention they have ratified.<sup>81</sup>

A ratified Convention is subject to the ILO's supervisory system for ensuring that the Convention is actually implemented and applied.<sup>82</sup> The supervisory bodies include the independent Committee of Experts on the Application of Conventions and Recommendations, and two tripartite committees of the International Labour Conference, the Committee on Freedom of Association and the Committee on the Application of Standards.<sup>83</sup> The supervisory system is to a large extent successful in convincing many governments to follow its comments on specific issues.<sup>84</sup> This can be proven by the fact of that most governments have taken measures after reading reports done by the Committee, either by adopting new legislation or amend their existing legislations so as to conform to relevant Conventions.<sup>85</sup>

Despite the ILO supervisory system's praiseworthy ability to be flexible, they are not able to rapidly overcome serious discrepancies in the application of ratified Conventions.<sup>86</sup> This can be proven by the fact of that the average length of time between the filing of a complaint under Article 26 of the ILO Constitution and its disposal is three years. The reason for this delay is that the ILO supervisory system consists of a two-tiered examination of cases, first

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<sup>79</sup> ILO 'The Benefits of ILO Standards' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/the-benefits-of-international-labour-standards/lang--en/index.htm> (accessed 27 February 2015).

<sup>80</sup> ILO *Rules of the Game* (2014) 16.

<sup>81</sup> ILO 'Conventions and Recommendations' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (accessed 05 March 2015).

<sup>82</sup> Sengenberger W *Goals and Functions of ILO* (2014) 28.

<sup>83</sup> Sengenberger W *Goals and Functions of ILO* (2014) 28.

<sup>84</sup> ILO 'The Committee on the Application of Standards of the International Labour Conference: A dynamic and impact built on decades of dialogue and persuasion' available on [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_154192.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_154192.pdf) (accessed on 13 November 2015).

<sup>85</sup> ILO 'The Committee on the Application of Standards of the International Labour Conference: A dynamic and impact built on decades of dialogue and persuasion' available on [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_154192.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_154192.pdf) (accessed on 13 November 2015).

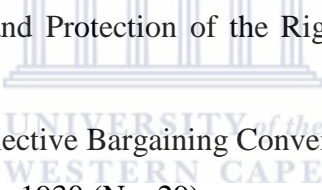
<sup>86</sup> Romano CPR 'The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements' available on <http://cesaroromano.com/wp-content/uploads/2015/05/ILO-System-of-Supervision-and-Compliance-Control.pdf> (accessed on 13 November 2015).

by a technical body and then by a political body, where the decision-making power ultimately rests.<sup>87</sup>

### 2.3.3 Fundamental Conventions

The ILO's Governing Body has identified eight Conventions that are viewed as fundamental or core conventions. These principles and rights are also covered in the ILO Declaration on Fundamental Principles and Rights at Work of 1998.<sup>88</sup> As emphasised in the preparatory work for the 1998 Declaration, 'fundamental rights are not fundamental because the Declaration says so, the Declaration says that they are fundamental because they are'.<sup>89</sup> These rights and principles are classified as fundamental, not to establish hierarchies, nor in disregard of other international labour and social security standards.<sup>90</sup> They are regarded as fundamental because they cover subjects that are considered as fundamental principles and rights at work.<sup>91</sup> These Conventions are viewed as enabling standards; hence, respecting them is viewed as a precondition for the application of all remaining ILO norms.<sup>92</sup>

The fundamental Conventions are:

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- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).
  - Right to Organise and Collective Bargaining Convention, 1949 (No. 98).
  - Forced Labour Convention, 1930 (No. 29).
  - Abolition of Forced Labour Convention, 1957 (No. 105).
  - Minimum Age Convention, 1973 (No. 138).
  - Worst Forms of Child Labour Convention, 1999 (No. 182).
  - Equal Remuneration Convention, 1951 (No. 100).
  - Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

What follows below is a brief chronological overview of the fundamental Conventions.

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<sup>87</sup> Romano CPR 'The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements' available on <http://cesareromano.com/wp-content/uploads/2015/05/ILO-System-of-Supervision-and-Compliance-Control.pdf> (accessed on 13 November 2015).

<sup>88</sup> ILO Declaration on Fundamental Principles and Rights at Work of 1998.

<sup>89</sup> ILO 'The text of the Declaration and its follow-up' available at <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm> (accessed 10 March 2015).

<sup>90</sup> ILO 'About the Declaration' available at <http://ilo.org/declaration/thedeclaration/lang--en/index.htm> (accessed 10 March 2015).

<sup>91</sup> ILO *Fundamental principles and rights at work: From commitment to action* (2012) 16.

<sup>92</sup> ILO *Rules of the Game* (2014) 16.



### **2.3.3.1 Forced Labour Convention, 1930 (No. 29)**

The Forced Labour Convention No. 29 of 1930 was adopted on 28 June 1930 and came into force on 1 May 1932.<sup>93</sup> Article 1 of Convention No. 29 of 1930 requires each Member State of the ILO to ratify this Convention which undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period. Forced or compulsory labour, according to this Convention, refers to all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.<sup>94</sup> This is a very important Convention because it clearly states the kind of jobs that are deemed as forced labour and those that are not. Both South Africa and Zimbabwe are signatories to this Convention.<sup>95</sup>

### **2.3.3.2 Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)**

The Freedom of Association and Protection of the Right to Organise Convention No. 87 of 1948 was adopted on 9 July 1948 and came into force on 4 of July 1950.<sup>96</sup> Article 2 of Convention 87 of 1948 states that each Member State of the ILO should allow workers and employers to join organisations of their own choosing without previous authorisation.<sup>97</sup> This is a very important Convention because the principle of freedom of association is one of the core ILO's values that is enshrined in the ILO Constitution (1919), the ILO Declaration of Philadelphia (1944), and the ILO Declaration on Fundamental Principles and Rights at Work (1998). Both South Africa and Zimbabwe are signatories to this Convention.<sup>98</sup>

### **2.3.3.3 Right to Organise and Collective Bargaining Convention, 1949 (No. 98)**

The Right to Organise and Collective Bargaining Convention No. 98 of 1949 was adopted on 1 July 1949 and came into force on 18 July 1951.<sup>99</sup> This fundamental Convention advocates for measures appropriate to national conditions to be developed by means of collective

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<sup>93</sup> ILO *The International Labour Organisation's Fundamental Conventions* (2003) 26. (Hereafter ILO *Fundamental Conventions* (2003)).

<sup>94</sup> Article 2 of Forced Labour Convention, 1930 (No. 29).

<sup>95</sup> South Africa signed this Convention on 5 March 1997 and Zimbabwe signed a year later on 27 August 1998. ILO 'Ratifications of C029 - Forced Labour Convention, 1930 (No. 29)' available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312174](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312174) (accessed 30 March 2015).

<sup>96</sup> ILO *Fundamental Conventions* (2003) 13.

<sup>97</sup> Article 2 of Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

<sup>98</sup> South Africa signed this Convention on 19 February 1996 and Zimbabwe signed a few years later on 9 April 2003. ILO 'Ratifications of C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)' available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312232](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312232) (accessed 30 March 2015).

<sup>99</sup> ILO *Fundamental Conventions* (2003) 18.

agreements so as to encourage and promote voluntary negotiations between employers or employer's organisations and workers' organisations.<sup>100</sup> Workers' and employers' organisations are supposed to enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration.<sup>101</sup> Both South Africa and Zimbabwe are signatories to this Convention.<sup>102</sup>

#### **2.3.3.4 Equal Remuneration Convention, 1951 (No. 100)**

The Equal Remuneration Convention No. 100 of 1951 was adopted on 29 June 1951 and came into force on 23 May 1953.<sup>103</sup> Article 2 of Convention No. 100 of 1951 states that each Member State shall by means appropriate to the methods in operation for determining rates of remuneration, promote constant application to all workers of the principle of equal remuneration for men and women workers for work of equal value.<sup>104</sup> Both South Africa and Zimbabwe are signatories to this Convention.<sup>105</sup>

#### **2.3.3.5 Abolition of Forced Labour Convention, 1957 (No. 105)**

The Abolition of Forced Labour Convention No. 105 of 1957 was adopted on 25 June 1957 and came into force on 17 January 1959.<sup>106</sup> This fundamental Convention prohibits forced labour including compulsory prison labour as a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system.<sup>107</sup> Both South Africa and Zimbabwe are signatories to this Convention.<sup>108</sup>

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<sup>100</sup> ILO *Rules of the Game* (2014) 31.

<sup>101</sup> Article 2 of The Right to Organise Collective Bargaining Convention, 1949 (No. 98).

<sup>102</sup> South Africa signed this Convention on 19 February 1996 and Zimbabwe signed on 27 August 1998. ILO 'Ratifications of C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98)' available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312243](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312243) (accessed 30 March 2015).

<sup>103</sup> ILO *Fundamental Conventions* (2003) 63.

<sup>104</sup> Article 2 of Equal Remuneration Convention, 1951 (No. 100).

<sup>105</sup> South Africa signed this Convention on 30 March 2000 and Zimbabwe had earlier on signed this Convention on 14 December 1989. ILO 'Ratifications of C100 - Equal Remuneration Convention, 1951 (No. 100)' available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312245](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312245) (accessed 31 March 2015).

<sup>106</sup> ILO *Fundamental Conventions* (2003) 38.

<sup>107</sup> Article 1 of Abolition of Forced Labour Convention, 1957 (No. 105).

<sup>108</sup> South Africa signed this Convention on 5 March 1997 and Zimbabwe signed on 27 August 1998. ILO 'Ratifications of C105 - Abolition of Forced Labour Convention, 1957 (No. 105)' available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312250](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312250) (accessed 31 March 2015).

### **2.3.3.6 Discrimination (Employment and Occupation) Convention, 1958 (No. 111)**

The Discrimination in Respect of Employment and Occupation Convention No. 111 of 1958 was adopted on 25 June 1958 and came into force on 15 June 1960.<sup>109</sup> Article 1 of Convention No. 111 of 1958 states that for purpose of this Convention the terms ‘employment’ and ‘occupation’ include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.<sup>110</sup> This fundamental Convention defines discrimination as any distinction, exclusion or preference made on the basis of, namely, race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.<sup>111</sup>

This is a very important Convention because the list of prohibited grounds is endless as the Convention provides for the possibility of extending the list after consultation with representative employers and workers’ organisations and relevant bodies.<sup>112</sup> For example, a number of national legislations have in recent years included a broad range of additional prohibited grounds of discrimination for example age, nationality, sexual orientation and gender identity.<sup>113</sup> Both South Africa and Zimbabwe are signatories to this Convention.<sup>114</sup>

### **2.3.3.7 Minimum Age Convention, 1973 (No. 138)**

The Minimum Age Convention No. 138 of 1973 was adopted on 26 June 1973 and came into force on 19 June 1976.<sup>115</sup> Article 1 of Convention No. 138 of 1973 states that each Member for which this Convention is in force undertakes to pursue a national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.<sup>116</sup> This is a very important Convention because child labour

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<sup>109</sup> ILO *Fundamental Conventions* (2003) 68.

<sup>110</sup> Article 1 (b) (3) of Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

<sup>111</sup> Article 1 of Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

<sup>112</sup> ILO *Rules of the Game* (2014) 42.

<sup>113</sup> ILO: *Equality at work: The continuing challenge – Global Report under the Follow up to the ILO Declaration on Fundamental Principles and Rights at Work* (2011) 62.

<sup>114</sup> South Africa signed on 5 March 1997 and Zimbabwe signed two years later on 23 June 1999. ILO ‘Ratifications of C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111)’ available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312256](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256) (accessed 31 March 2015).

<sup>115</sup> ILO *Fundamental Conventions* (2003) 45.

<sup>116</sup> Article 1 of Minimum Age Convention, 1973 (No. 138).

is a violation of fundamental human rights and has been shown to hinder children's development, potentially leading to lifelong physical or psychological damage.<sup>117</sup>

This fundamental Convention prohibits all economic activity by children younger than 12 and permits light work only for 12 and 13 year-olds in developing countries and 13 and 14 year-olds in the developed world.<sup>118</sup> C138 is a very crucial Convention in this research for compensation of occupational injuries and diseases because questions can be raised regarding whether an underage child who gets injured or ill as a result of his or her work can be compensated since he or she may not be covered by virtue of that he or she is not supposed to be working and is therefore not seen as an employee covered by the national compensation scheme. Both South Africa and Zimbabwe are signatories to this Convention.<sup>119</sup> The South African Constitution states that no child may be required or permitted to perform work or provide services that are inappropriate to the child's age or places the child's well-being, education, physical or mental health or spiritual, moral or social development at risk.<sup>120</sup>

#### **2.3.3.8 Worst Forms of Child Labour Convention, 1999 (No. 182)**

The Worst Forms of Child Labour Convention No. 182 of 1999 was adopted on 17 June 1999 and came into force on 19 November 2000.<sup>121</sup> Article 1 of the Convention states that each Member State that ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.<sup>122</sup> This is a very crucial Convention because it requires Member States to eliminate the worst forms of child labour by any person under the age of 18 that includes all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; child prostitution and pornography.<sup>123</sup> Both South Africa and Zimbabwe are signatories to this Convention.<sup>124</sup>

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<sup>117</sup> ILO *Rules of the Game* (2014) 37.

<sup>118</sup> Article 2 of Minimum Age Convention, 1973 (No. 138).

<sup>119</sup> South Africa signed this Convention on 30 March 2000 and set its minimum age limit at 15 years. Zimbabwe signed this Convention on 6 June 2000 and set its minimum age limit at 14 years. ILO 'Ratifications of C138 - Minimum Age Convention, 1973 (No. 138)' available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312283](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312283) (accessed 01 April 2015).

<sup>120</sup> Section 28(1)(f) of the South African Constitution, 1996.

<sup>121</sup> ILO *Fundamental Conventions* (2003) 5.

<sup>122</sup> Article 1 of Worst Forms of Child Labour Convention, 1999 (No. 182).

<sup>123</sup> Article 2 of Worst Forms of Child Labour Convention, 1999 (No. 182).

<sup>124</sup> ILO 'Ratifications of C182 - Worst Forms of Child Labour Convention, 1999 (No. 182)' available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312327](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327)

## **2.4 ILO CONVENTIONS REGARDING COMPENSATION OF OCCUPATIONAL INJURIES AND DISEASES**

This chapter focuses on various ILO Conventions that cover the topic of compensation of occupational injuries and diseases. The Conventions will be discussed in the chronological order in which they were adopted by the ILO. The status of each Convention to determine whether it is still valid or has been repealed is also highlighted.

### **2.4.1 Workmen's Compensation (Agriculture) Convention, 1921 (No. 12)**

The Workmen's Compensation (Agriculture) Convention No. 12 of 1921 (C12) was adopted on 12 November 1921 and came into force on 26 February 1923.<sup>125</sup> Article 1 of C12 states that each Member State of the ILO that ratifies this Convention undertakes to extend to all agricultural wage-earners its laws and regulations which provide for the compensation of workers for personal injury by accident arising out of or in the course of their employment.<sup>126</sup> C12 is regarded by the ILO as an instrument with an interim status meaning that its status is only valid until it is replaced by another Convention.<sup>127</sup> Both South Africa and Zimbabwe did not ratify this Convention before it was revised by Convention 121.<sup>128</sup>

### **2.4.2 Workmen's Compensation (Accidents) Convention, 1925 (No. 17)**

The Workmen's Compensation (Accidents) Convention No. 17 of 1925 (C17) was adopted on 10 June 1925 and came into force on 1 April 1927.<sup>129</sup> Article 1 of C17 states that each Member State of the ILO that ratifies this Convention undertakes to ensure that workmen who suffer personal injury due to an industrial accident, or their dependants, shall be compensated on terms at least equal to those provided by this Convention.<sup>130</sup> C17 is regarded

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(accessed 01 April 2015). South Africa signed this Convention on 7 June 2000 and Zimbabwe signed on 11 December 2000.

<sup>125</sup> ILO 'Workmen's Compensation (Agriculture) Convention No. 12 of 1921' available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C012](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C012) (accessed 12 April 2015).

<sup>126</sup> Article 1 of Workmen's Compensation (Agriculture) Convention, 1921 (No. 12).

<sup>127</sup> C012 - Workmen's Compensation (Agriculture) Convention, 1921 (No. 12) available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C012](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C012) (accessed 12 April 2015).

<sup>128</sup> ILO 'Ratifications of C012 - Workmen's Compensation (Agriculture) Convention, 1921 (No. 12)' available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312157](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312157) (accessed 12 April 2015). Convention 121 is discussed below at 2.4.7.

<sup>129</sup> ILO 'Workmen's Compensation (Accidents) Convention, 1925 (No. 17)' available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C017](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C017) (accessed 12 April 2015).

<sup>130</sup> Article 1 of Workmen's Compensation (Accidents) Convention, 1925 (No. 17).

by the ILO as an outdated instrument.<sup>131</sup> Both South Africa and Zimbabwe did not ratify this Convention before it was also revised by Convention No. 121.<sup>132</sup>

#### **2.4.3 Workmen's Compensation (Occupational Diseases) Convention, 1925 (No. 18)**

The Workmen's Compensation (Occupational Diseases) Convention No. 18 of 1925 (C18) was adopted on 10 June 1925 and came into force on 1 April 1927.<sup>133</sup> Article 1 of C18 states that each Member of the ILO which ratifies this Convention undertakes to provide that compensation shall be payable to workmen incapacitated by occupational diseases, or, in case of death from such diseases, to their dependants, in accordance with the general principles of the national legislation relating to compensation for industrial accidents.<sup>134</sup> C18 is regarded as an outdated instrument by the ILO.<sup>135</sup> Both South Africa and Zimbabwe have not yet ratified this Convention.<sup>136</sup>

#### **2.4.4 Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19)**

The Equality of Treatment (Accident Compensation) Convention No. 19 of 1925 (C19) was adopted on 5 June 1925 and came into force on 8 September 1926.<sup>137</sup> Article 1 of C19 states that each Member of the ILO that ratifies this Convention undertakes to grant to the nationals of any other Member which shall have ratified the Convention, who suffer personal injury due to industrial accidents happening in its territory, or to their dependants, the same treatment in respect of workmen's compensation as it grants to its own nationals.<sup>138</sup> This Convention is important to this research, as will be seen in following chapters, because one of the principles that can be derived from the ILO standards deals with the protection of migrant

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<sup>131</sup> C017 - Workmen's Compensation (Accidents) Convention, 1925 (No. 17) available on [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C017](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C017) (accessed 12 April 2015).

<sup>132</sup> ILO Ratifications of C017 - Workmen's Compensation (Accidents) Convention, 1925 (No. 17).

<sup>133</sup> Workmen's Compensation (Occupational Diseases) Convention No. 18 of 1925 available on [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C018](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C018) (accessed 12 April 2015).

<sup>134</sup> Article 1 of Workmen's Compensation (Occupational Diseases) Convention, 1925 (No. 18).

<sup>135</sup> C018 - Workmen's Compensation (Occupational Diseases) Convention, 1925 (No. 18) available on [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C018](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C018) (accessed 12 April 2015).

<sup>136</sup> ILO 'Ratifications of C018 - Workmen's Compensation (Occupational Diseases) Convention, 1925 (No. 18)' available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:312163](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312163) (accessed 12 April 2015).

<sup>137</sup> Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19) available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C019](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C019) (accessed 12 April 2015).

<sup>138</sup> Article 1 of Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19).

workers and their dependants.<sup>139</sup> C19 also makes provision for compensation for industrial accidents that could have happened to workers whilst temporarily or intermittently employed outside their country.<sup>140</sup> C19 is regarded by the ILO as an instrument with an interim status meaning that its status is only valid until it is replaced by another Convention.<sup>141</sup> Both South Africa and Zimbabwe are signatories to this Convention.<sup>142</sup>

#### **2.4.5 Workmen's Compensation (Occupational Diseases) Convention, 1934 (No. 42)**

The Workmen's Compensation (Occupational Diseases) Convention No. 42 of 1934 (C42) was adopted on 21 June 1934 and came into force on 17 June 1936.<sup>143</sup> Article 1 of C42 states that each Member State that ratifies C42 undertakes to provide that compensation shall be payable to workmen incapacitated by occupational diseases or in case of death from such diseases to their dependants in accordance with the general principles of the national legislation relating to compensation for industrial accidents.<sup>144</sup> Both South Africa and Zimbabwe are signatories to this Convention.<sup>145</sup>

#### **2.4.6 Social Security (Minimum Standards) Convention, 1952 (No. 102)**

The Social Security (Minimum Standards) Convention No. 102 of 1952 (C102) was adopted on 28 June 1952 and came into force on 27 April 1955.<sup>146</sup> C102 is one of the most fundamental Conventions regarding occupational injuries and diseases because it contains provisions regarding the consequences of accidents at work as well as of occupational diseases.<sup>147</sup> C102 lays down the minimum standards for the levels of social security benefits

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<sup>139</sup> See 2.5 below for the list of principles derived from ILO standards that are used to evaluate the South African and Zimbabwean compensation systems.

<sup>140</sup> Article 2 of Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19).

<sup>141</sup> This Convention has not yet been replaced by another Convention. C019 - Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19) available on [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C019](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C019) (accessed 12 April 2015).

<sup>142</sup> South Africa signed this Convention on 30 March 1926 whilst Zimbabwe signed it on 6 June 1980. Ratifications of C019 - Equality of Treatment (Accident Compensation) Convention, 1925 (No. 19) available on [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312164](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312164) (accessed 12 April 2015).

<sup>143</sup> ILO 'Workmen's Compensation (Occupational Diseases) Convention, 1934 (No. 42)' available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C042](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C042) (accessed 12 April 2015).

<sup>144</sup> Article 1 of Workmen's Compensation (Occupational Diseases) Convention, 1934 (No. 42).

<sup>145</sup> South Africa ratified this Convention on 26 February 1952 and Zimbabwe did not ratify this Convention before it was revised by Convention No 121. ILO 'Ratifications of C042 - Workmen's Compensation (Occupational Diseases) Convention (Revised), 1934 (No. 42)' available on [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312187](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312187) (accessed 12 April 2015).

<sup>146</sup> ILO 'Social Security (Minimum Standards) Convention, 1952 (No. 102)' available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C102](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C102) (accessed 12 April 2015).

<sup>147</sup> Olivier MP *Social Security: A Legal Analysis* (2003) 465.

and the conditions under which they are granted. It covers nine important social risks namely medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivors' benefits.<sup>148</sup> C102 sets the minimum standards for each social risk with regard to the minimum percentage of the population protected, minimum level of benefits to be paid in case of occurrence contingencies and conditions for entitlement to the prescribed benefits. It is therefore important as it sets the minimum standards for compensation for occupational injuries and diseases ('employment injury').

The contingencies related to occupational injuries and diseases include a morbid condition, incapacity for work, invalidity or a loss of faculty due to an industrial accident or occupational disease as well as the loss of support as a result of the death of the breadwinner following an employment injury.<sup>149</sup> Article 9 of C102 provides categories of people that can be protected by this Convention and these include;

- (a) prescribed classes of employees, constituting not less than 50 percent of all employees, and also their wives and children;<sup>150</sup>
- (b) prescribed classes of economically active population, constituting not less than 20 percent of all residents, and also their wives and children;<sup>151</sup>
- (c) prescribed classes of residents, constituting not less than 50 percent of all residents;<sup>152</sup>
- (d) where a declaration made in virtue of Article 3 is in force, prescribed classes of employees constituting not less than 50 percent of all employees in industrial workplaces employing 20 persons or more, and also their wives and children.<sup>153</sup>

Vonk regards C102 as the most important instrument for the development and expansion of social security as the ILO proudly refers to C102 as the flagship of social security

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<sup>148</sup> ILO 'International Labour Standards on Social security' available at <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang-en/index.htm> (accessed 12 April 2015).

<sup>149</sup> Article 8 of Social Security (Minimum Standards) Convention, 1952 (No. 102).

<sup>150</sup> Article 9 (a) of Social Security (Minimum Standards) Convention, 1952 (No. 102).

<sup>151</sup> Article 9 (b) of Social Security (Minimum Standards) Convention, 1952 (No. 102).

<sup>152</sup> Article 9 (c) of Social Security (Minimum Standards) Convention, 1952 (No. 102).

<sup>153</sup> Article 9 (d) of Social Security (Minimum Standards) Convention, 1952 (No. 102). Article 3 refers to a situation whereby a country that has insufficiently developed economy and medical facilities may avail itself to temporary exceptions provided by the Convention.



conventions.<sup>154</sup> Member States that wish to ratify C102 should first accept at least three of its nine branches before accepting the obligations of the other branches.<sup>155</sup> However, many developing countries have so far not yet ratified C102 and this has made some scholars to suggest that some provisions of C102 are not conducive for developing countries.<sup>156</sup> Olivier stated that C102 was developed during a time when it was believed that the goal of full employment in the formal sector was achievable.<sup>157</sup> However, at the moment most developing countries cannot reach the scope of coverage required since most of the workers work in the informal economy and therefore they are not covered under the provisions of C102. South Africa and Zimbabwe are among countries that have so far not yet ratified this Convention.<sup>158</sup>

#### **2.4.7 Employment Injury Benefits Convention, 1964 (No. 121)**

The Employment Injury Benefits Convention No. 121 of 1964 (C121) was adopted on 8 July 1964 and came into force on 28 July 1967.<sup>159</sup> C121 provides detailed provisions for compensation of damages sustained from employment accidents, occupational diseases as well as commuting accidents. Similar to C102, C121 provides flexibility for countries whose economic and medical facilities are insufficiently developed.<sup>160</sup> To these countries, temporary exceptions in regards to some articles in this convention may apply by means of a declaration which states the reasons for such exception when ratifying this Convention.<sup>161</sup>

There are a few items that stand out from this Convention. First, employment injury benefits must be financed by employers, unlike other forms of social security for example maternity benefits and pensions for which governments may require employees to match employer

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<sup>154</sup> Vonk G 'The Social Protection Floors Recommendation 2012 (No 202): The Human Rights Approach to Social Security in ILO Wrapping Paper' in Olivier M, Dupper O & Govindjee A *The Role of Standards in Labour and Social Security Law* (2013) 30.

<sup>155</sup> ILO 'International Labour Standards on Social Security' available on <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm> (accessed on 12 April 2014).

<sup>156</sup> Olivier M 'International Labour and Social Security Standards: A Developing Country Critique' in Olivier M, Dupper O & Govindjee A *The Role of Standards in Labour and Social Security Law* (2013) 22.

<sup>157</sup> Olivier M 'International Labour and Social Security Standards: A Developing Country Critique' in Olivier M, Dupper O & Govindjee A *The Role of Standards in Labour and Social Security Law* (2013) 23.

<sup>158</sup> ILO 'Ratifications of C102 - Social Security (Minimum Standards) Convention, 1952 (No. 102)' available on [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312247](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312247) (accessed on 12 April 2014).

<sup>159</sup> Employment Injury Benefits Convention No. 121 available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C121](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C121) (accessed on 12 April 2014).

<sup>160</sup> Article 2 of Employment Injury Benefits Convention, 1964 (No. 121).

<sup>161</sup> ILO 'International Labour Standards on Social Security' available on <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm> (accessed on 12 April 2014).

contributions.<sup>162</sup> The operating assumption here is that workplace safety is the employer's responsibility and as a corollary, so is compensation for unsafe conditions.<sup>163</sup> Secondly, compensation must generally be in the form of a periodic payment which lasts throughout the contingency as opposed to a lump-sum benefit.<sup>164</sup> However, exceptions are provided for minor injuries and for specific cases where the administering agency is satisfied that a lump-sum will be used appropriately.<sup>165</sup>

The compensation schemes should provide minimum compensation levels which are currently set at 50 percent of lost wages for an eligible worker with a family and 40 percent for a surviving spouse and two children.<sup>166</sup> When a Member State of the ILO ratifies C121, the Convention will only come into force twelve months after the Member State's initial registration of the C121 to the Director-General.<sup>167</sup> A Member State that has ratified C121 may only denounce it after the expiration of ten years from the date on which the Convention first comes into force.<sup>168</sup> However, during the time in which C121 would be in force, Member States are according to Article 22 of the ILO Constitution required to submit reports to the Director General in which they will furnish information concerning the frequency and severity of industrial accidents.<sup>169</sup>

Article 26 (1) of C121 requires Member States to provide rehabilitation services which are designed to prepare a disabled person for the resumption of his previous activity or if this is not possible, the most suitable alternative works having regard to his aptitudes and capacity and to take measures to further the placement of disabled persons in suitable employment.<sup>170</sup> C121 is supplemented by Recommendation No 121 of Employment Injury Benefits that was put into force in 1964.<sup>171</sup> Recommendation R121 extended the scope of coverage by including parties that were not included in the C121 and by also increasing the list of

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<sup>162</sup> Article 20 of Employment Injury Benefits Convention, 1964 (No. 121).

<sup>163</sup> ILO 'International Labour Standards on Social Security' available on <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm> (accessed on 12 April 2014).

<sup>164</sup> Article 9 of Employment Injury Benefits Convention, 1964 (No. 121).

<sup>165</sup> ILO 'International Labour Standards on Social Security' available on <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang--en/index.htm> (accessed on 12 April 2014).

<sup>166</sup> Article 19 of Employment Injury Benefits Convention, 1964 (No. 121).

<sup>167</sup> Article 33 of Employment Injury Benefits Convention, 1964 (No. 121).

<sup>168</sup> Article 34 of Employment Injury Benefits Convention, 1964 (No. 121).

<sup>169</sup> Article 26 (2) of Employment Injury Benefits Convention, 1964 (No. 121).

<sup>170</sup> Article 26 of Employment Injury Benefits Convention, 1964 (No. 121).

<sup>171</sup> Preamble of R121 – Employment Injury Benefits Recommendation of 1964.

occupational diseases and accidents.<sup>172</sup> However despite the importance of C121, South Africa and Zimbabwe have not yet ratified this Convention.<sup>173</sup>

#### **2.4.8 Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)**

The Promotional Framework for Occupational Safety and Health Convention No. 187 of 2006 (C187) was adopted on 15 June 2006 and came into force on 20 February 2009.<sup>174</sup> C187 states that each Member State that ratifies this Convention shall promote continuous improvement of occupational safety and health to prevent occupational injuries, diseases and deaths, by the development, in consultation with the most representative organisations of employers and workers, of a national policy, national system and national programme.<sup>175</sup> One can say that Convention No. 187 of 2006 is similar to Occupational Safety and Health Convention No. 155 of 1981 and the Occupational Safety and Health Recommendation No 164 of 1981 because they all focus on promoting occupational safety and health amongst all ILO Member States.<sup>176</sup>

#### **2.4.9 Domestic Workers Convention, 2011(No. 189)**

Domestic Workers Convention No. 189 of 2011 (C189) was adopted on 16 June 2011 and came into force on 5 September 2013.<sup>177</sup> Article 18 of C189 states that every domestic worker has a right to a safe and healthy working environment and that each Member shall take, in accordance with international laws to ensure the occupational safety and health of domestic workers.<sup>178</sup> C189 also allows member states to progressively ensure that domestic workers have access to social security and maternity benefits that are not less favourable than

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<sup>172</sup> Article 2 of R121 – Employment Injury Benefits Recommendation of 1964.

<sup>173</sup> ILO ‘Ratifications of C121 - Employment Injury Benefits Convention, 1964 [Schedule I amended in 1980] (No. 121)’ available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312266](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312266) (accessed 12 April 2015).

<sup>174</sup> ILO ‘Promotional Framework for Occupational Safety and Health Convention, 2006(No.187)’ available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312332:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312332:NO) (accessed 14 March 2015).

<sup>175</sup> Article 2 of Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187).

<sup>176</sup> Both South Africa and Zimbabwe have not yet ratified Convention No. 187 of 2006. ILO ‘Ratifications of C187 - Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187)’ available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312332](http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312332) (accessed 14 March 2015).

<sup>177</sup> Domestic Workers Convention, 2011(No. 189) available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C189](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189) (accessed 01 October 2015).

<sup>178</sup> Article 18 of Domestic Workers Convention, 2011 (No. 189) available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C189](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C189) (accessed 01 October 2015).

other workers.<sup>179</sup> However, the process of extending social protection to domestic workers to enable them to cope with ‘transitions’ in their lives is not easy and the decision on how exactly to improve their access to social security should not be taken lightly and without participation by domestic workers and employers.<sup>180</sup>

#### **2.4.10 Social Protection Floors Recommendation No 202 of 2012**

Social Protection Floors Recommendation No 202 of 2012 (R202) was adopted on 14 June 2012 during the 101st International Labour Committee session.<sup>181</sup> R202 urges Member States to implement national social protection floors using strategies for the extension of social security that will progressively ensure higher levels of social security to as many people as possible.<sup>182</sup> R202 complements the existing ILO social security standards and provides flexible but meaningful guidance to Member States in building social protection floors within comprehensive social security systems tailored to national circumstances and levels of development.<sup>183</sup>

Member States are required to set targets and time frames for the progressive realisation of social security rights and to practise social inclusion by including persons working in the informal economy.<sup>184</sup> Member States should consider different approaches, with a view of implementing the most effective and efficient combination of benefits and schemes in the national context.<sup>185</sup> The benefits may include child and family benefits, sickness and health-care benefits, maternity benefits, disability benefits, old-age benefits, survivors’ benefits, unemployment benefits and employment injury benefits, as well as any other social benefits

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<sup>179</sup> South Africa ratified C189 on 20 June 2013 however Zimbabwe has not yet ratified this Convention. Article 14 of Domestic Workers Convention, 2011 (No. 189).

<sup>180</sup> Malherbe K ‘Implementing Domestic Workers’ Social Security Rights in a Framework of Transformative Constitutionalism’ in Darcy du Toit (ed) *Exploited, Undervalued and Essential: Domestic Workers and the Realisation of their Rights* (2013) 153.

<sup>181</sup> Social Protection Floors Recommendation No 202 of 2012 available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:3065524](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3065524) (accessed 01 October 2015).

<sup>182</sup> Article 1 (b) of Social Protection Floors Recommendation No 202 of 2012 available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:3065524](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3065524) (accessed 01 October 2015).

<sup>183</sup> ILO ‘Social security for all: Building social protection floors and comprehensive social security systems’ available at [http://www.socialprotectionfloor-gateway.org/files/social\\_security\\_for\\_all.pdf](http://www.socialprotectionfloor-gateway.org/files/social_security_for_all.pdf) (accessed 13 November 2015).

<sup>184</sup> Article 3 of Social Protection Floors Recommendation No 202 of 2012 available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_INSTRUMENT\\_ID:3065524](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_INSTRUMENT_ID:3065524) (accessed 01 October 2015).

<sup>185</sup> Article 9 of Social Protection Floors Recommendation, 2012 (No. 202).

in cash or in kind.<sup>186</sup> Vonk argues that R202 is capable of bridging the gap between ILO standards and the human right to social security, because by setting universal social protection standards and combining these with requirements as to access to justice, R202 also sets a standard as to what each individual citizen in the world can expect from his or her government.<sup>187</sup>

## 2.5 CONCLUSION

Focusing on these ILO Conventions and Recommendations, many countries have so far ratified the eight fundamental Conventions of the ILO.<sup>188</sup> This shows that many countries have ratified these fundamental Conventions of the ILO with 94 per cent of all countries having ratified the Abolition of Forced Labour Convention and 47 per cent having ratified the Freedom of Association and Protection of the Right to Organise Convention.<sup>189</sup> However, a lot of work is still required to be done by the ILO to make sure that all countries have ratified these Conventions because about 48 countries have not yet ratified these eight fundamental principles.<sup>190</sup>

However this does not mean that the countries that have not ratified these Conventions are not required to comply with the standards set by the ILO because Member States that have not ratified the fundamental Conventions are obliged solely on the basis of their membership to observe, to promote, and to implement the core labour standards set by the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up that was adopted in 1998.<sup>191</sup> The Follow-up of the 1998 Declaration requires non-ratifying states to report annually to the ILO's Governing Body regarding their efforts to promote and realise the principles of the Conventions.<sup>192</sup>

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<sup>186</sup> Vonk G 'The Social Protection Floors Recommendation 2012 (No 202): The Human Rights Approach to Social Security in ILO Wrapping Paper' in Olivier M, Dupper O & Govindjee A *The Role of Standards in Labour and Social Security Law* (2013) 30.

<sup>187</sup> Vonk G 'The Social Protection Floors Recommendation 2012 (No 202): The Human Rights Approach to Social Security in ILO Wrapping Paper' in Olivier M, Dupper O & Govindjee A *The Role of Standards in Labour and Social Security Law* (2013) 30.

<sup>188</sup> ILO 'Conventions and Recommendations' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (accessed 10 March 2015).

<sup>189</sup> Sengenberger W *Goals and Functions of ILO* (2014) 29.

<sup>190</sup> ILO 'International Labour Standards Creation' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm> (accessed 10 March 2015).

<sup>191</sup> ILO *Rules of the Game* (2014) 16.

<sup>192</sup> ILO 'International Labour Standards Creation' available at <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-creation/lang--en/index.htm> (accessed 10 March 2015).

There have been calls by numerous experts to have most of the ILO standards that deal with social security to be simplified and modernised so as to improve the number of ratifications as most of these old ILO standards are unnecessarily complex and detailed; therefore some countries are not willing to ratify them.<sup>193</sup> These old or traditional ILO standards are still important because they can have five functions which include serving a benchmarking function, a preserving function, a counterbalancing function, bridging functions and a harmonising function.<sup>194</sup>

For the purposes of this research, relevant principles that have been drawn from the fundamental Conventions and Conventions on compensation for occupational injuries and diseases discussed above will be used as benchmarks for evaluating the South African and Zimbabwean position. These five principles are:

- Employment injury benefits must be financed by employers.
- Compensation must generally be in form of a periodic payment that should last throughout the contingency as opposed to a lump-sum benefit.<sup>195</sup>
- The appropriate scheme's scope of application must extend to at least half of the national workforce, or portion of the economically active population, constituting not less than 20 percent of all residents, and also their wives and children, or at least half of all residents.<sup>196</sup>
- Minimum compensation levels should be set at 50 percent of lost wages for an eligible worker with a family including a spouse and two children, and 40 percent for a surviving spouse and two children.<sup>197</sup>
- Migrant workers should be treated equally and allowed to meet the same eligibility rules and receive the same levels of employment injury compensation as the national

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<sup>193</sup> Vonk G 'The Social Protection Floors Recommendation 2012 (No 202): The Human Rights Approach to Social Security in ILO Wrapping Paper' in Olivier M, Dupper O & Govindjee A *The Role of Standards in Labour and Social Security Law* (2013) 35.

<sup>194</sup> Dijkhoff T *International Social Security Standards in the European Union: The Cases of the Czech Republic and Estonia* (2011).

<sup>195</sup> Exceptions are provided for minor injuries and for specific cases where the administering agency is satisfied that a lump-sum will be used appropriately. Olivier MP et al *Social Security: A Legal Analysis* (2004) 482.

<sup>196</sup> See 2.4.6 above.

<sup>197</sup> See 2.4.7 above.

work force. There should be reciprocal agreements between governments to ensure that migrants can receive compensation at home or abroad.<sup>198</sup>

The next chapter will look specifically at South Africa on whether it is complying with international labours standards that deal with compensation of occupational injuries and diseases and also recently established ILO norms like Recommendation No. 202 of 2012 on National Floors of Social Protection.

## CHAPTER 3

### SOUTH AFRICA'S COMPENSATION OF OCCUPATIONAL INJURIES AND DISEASES SYSTEM

#### 3.1 INTRODUCTION

The common law provides that if an employee suffers an injury on duty or contracts an occupational disease he or she can institute delictual action against his or her employer for compensation.<sup>199</sup> Employees enjoy a common law right to a safe working environment and health and safety arrangements which provide replacement income for persons affected by a loss of ability to earn as a result of an occupational injury or disease.<sup>200</sup>

However under the common law position it was difficult for an employee to be awarded compensation because for an employee to be successful in his or her delictual action, he or she had to prove all the elements of a delict, the most problematic being the requirement to prove fault (intent or negligence) on the part of the employer.<sup>201</sup> If it can be proven that the employee also contributed to his or her injuries then he or she would face the prospect of a proportional reduction of damages based on contributory negligence and would have to resort to expensive and time-consuming litigation to pursue a claim.<sup>202</sup> In addition, there was no guarantee that an award would be recoverable because there was no certainty that the employer would be able to pay large amounts in damages. It must also be borne in mind that

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<sup>198</sup> Olivier MP et al *Social Security: A Legal Analysis* (2004) 482.

<sup>199</sup> Smit N 'Employment Injuries and Diseases' in Olivier MP, Smit N & Kalula ER (eds) *Social Security: A Legal Analysis* (2003) 459 (hereafter Smit N *Employment Injuries and Diseases* (2003)).

<sup>200</sup> Smit N *Employment Injuries and Diseases* (2003) 459.

<sup>201</sup> Brandt DC *Civil Liability of an Employer for Injuries on Duty* (unpublished LLM thesis, Nelson Mandela Metropolitan University, 2009) 1. (Hereafter Brandt DC *Civil Liability of an Employer for Injuries on Duty* (2009)).

<sup>202</sup> *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1 106 (CC) para 12.

the employee would incur the risk of having to pay the costs of the employer if the case were lost.<sup>203</sup>

When the Compensation for Occupational Injuries and Diseases Act (COIDA) was enacted in 1993 it improved on the common law position.<sup>204</sup> COIDA expunges the common law claims of employees against the employer.<sup>205</sup> An employee who is disabled in the course of employment has the right to claim pecuniary loss only through an administrative process which requires a Compensation Commissioner to adjudicate upon the claim and to determine the precise amount to which that employee is entitled.<sup>206</sup> The procedure provides for speedy adjudication and for payment of the amount due out of a fund established by the COIDA to which the employer is obliged to contribute and if the employer fails to pay the contribution he or she will be sanctioned by the Commissioner.<sup>207</sup> Compensation is not dependent on the employer's negligence or ability to pay, nor is the amount susceptible to reduction by reason of the employee's contributory negligence. Compensation under COIDA is payable even if the employer was not negligent.<sup>208</sup> The amount of compensation may be increased if the employer or co-employee were negligent but not beyond the extent of the claimant's actual pecuniary loss.<sup>209</sup>

This chapter focuses on South Africa's social security system with special reference to its legislation that deals with compensation of occupational injuries and diseases. This will be done with the intention of determining whether South Africa is complying with the ILO standards that cover this topic.<sup>210</sup> These ILO standards state that employment injury benefits must be financed by employers, compensation must generally be in form of a periodic payment that should last throughout the contingency as opposed to a lump-sum benefit, the appropriate scheme's scope of application must extend to at least half of the national workforce or 20 per cent of residents, minimum compensation levels should be set at 50 percent of lost wages and that migrant workers should be treated equal to the local workforce.

These principles will be used as benchmarks to evaluate whether or not South Africa is in compliance with the relevant international standards.

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<sup>203</sup> *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1 106 (CC) para 14.

<sup>204</sup> *Smit N Employment Injuries and Diseases* (2003) 466.

<sup>205</sup> *Mankayi v AngloGold Ashanti Ltd* (CCT 40/10) (2011) 32 ILJ 545 (CC) para 92.

<sup>206</sup> Section 4(1) (d) of COIDA Act 130 of 1993.

<sup>207</sup> Section 87 (1) of COIDA.

<sup>208</sup> *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1 106 (CC) para 14.

<sup>209</sup> Section 56(4) of COIDA.

<sup>210</sup> See 2.5 above.



## 3.2 SOUTH AFRICA'S LEGAL FRAMEWORK FOR COMPENSATION OF OCCUPATIONAL INJURIES AND DISEASES

### 3.2.1 Constitutional Guarantee of Access to Social Security

South Africa has not yet ratified C102 and C121 even though Smit believes that it is in a position to do so.<sup>211</sup> However this does not mean that South Africa is not complying with other international standards or that its workers are not protected by these standards. A constitutional imperative regarding social security exists in South Africa. Section 27 (1)(c) of the South African Constitution, 1996, provides that everyone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.<sup>212</sup> Section 27(2) states that the State is required to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of these rights.

Therefore, although the Constitution provides everyone with a right of access to social security and imposes an obligation on the State to realise this right, section 27(2) gives it a certain degree of latitude in relation to three aspects.<sup>213</sup> These three aspects are the progressive realisation of the right, the availability of resources and the taking of reasonable measures to realise the right.<sup>214</sup> On the issue of reasonableness the court in *Minister of Health and Others v Treatment Action Campaign and Others*, stated that a purposive reading of section 27 implies that the right should not be construed as entitling everyone to demand that a minimum core be provided to them. All that is possible, and all that can be expected of the State, is that it acts reasonably to provide access on a progressive basis.<sup>215</sup>

The South African Bill of Rights further protects other socio-economic rights that are related to the realisation of social security such as access to food, health care and water. In the case of *Government of the Republic of South Africa and Others v Grootboom and Others*, the Constitutional Court held that the right of access to social security cannot be interpreted in isolation as there is a close correlation between it and other constitutional rights and

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<sup>211</sup> Smit N *Employment Injuries and Diseases* (2003) 465.

<sup>212</sup> Section 27(1) (c) of the Constitution of the Republic of South Africa, 1996.

<sup>213</sup> Nyenti MAT *Developing an Appropriate Adjudicative and Institutional Framework for Effective Social Security Provisioning in South Africa* (unpublished LLD University of South Africa, 2012) 86 (Hereafter Nyenti MAT *Developing an Appropriate Adjudicative and Institutional Framework* (2012)).

<sup>214</sup> Nyenti MAT *Developing an Appropriate Adjudicative and Institutional Framework* (2012) 86.

<sup>215</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) (CCT8/02) [2002] ZACC 15; 2002 (5) SA 721; 2002 para 29.

values.<sup>216</sup> The court remarked that rights in the Bill of Rights are interrelated, interdependent and mutually supporting therefore they must be read together in the setting of the Constitution as a whole.<sup>217</sup>

The South African Constitution provides everyone with a right of access to social security; this means that the right of access is not just limited to South Africans citizens but also includes foreigners who are permanent residents of South Africa. *In Khosa and others v Minister of Social Development and others*, the Constitutional Court held that the exclusion of permanent residents from COIDA was an infringement on permanent residents' rights to dignity and equality and of their right of access to social security.<sup>218</sup>

Looking at the South African society security system it can be stated that there is an influence of international standards set by the ILO as a result of the South African Constitution which states that international law should be taken into consideration when social security rights are interpreted.<sup>219</sup> South Africa is also bound by international treaties<sup>220</sup> that cover social security. Section 39(1) (b) of the Constitution provides that a court, tribunal or forum may, but is not obliged to, consider international law when interpreting the Bill of Rights.<sup>221</sup> South Africa as member of the Southern African Development Community (SADC) is a signatory to the Charter on Fundamental Social Rights which requires countries in the SADC to recognise the right to social protection as a fundamental right.<sup>222</sup> The Charter states that,

'[m]ember States shall create an enabling environment so that every worker in the region shall have a right to adequate social protection and shall, regardless of status and the type of employment, enjoy adequate social security benefits. Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance.'<sup>223</sup>

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<sup>216</sup> *Government of the Republic of South Africa v Grootboom and Others* CCT 11/00; 2001 1 SA 46 (CC) para 35.

<sup>217</sup> *Government of the Republic of South Africa v Grootboom and Others* CCT 11/00; 2001 1 SA 46 (CC) para 36.

<sup>218</sup> *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) 2004 (6) BCLR 569 (CC) para 46.

<sup>219</sup> Section 39(1) of the Constitution of the Republic of South Africa, 1996.

<sup>220</sup> These treaties include the SADC Treaty (1992), the Charter of Fundamental Social Rights in SADC (Social Charter) (2003), the 2007 Code on Social Security in the SADC Code and the 2006 Draft Protocol on the facilitation of Movement of Persons. Sibanda T *Social Security in Southern African countries: Lessons from abroad* (unpublished thesis, University of Pretoria, 2012) 15.

<sup>221</sup> Section 39(1) of the Constitution of the Republic of South Africa, 1996.

<sup>222</sup> Preamble of the Charter of Fundamental Social Rights in the SADC, 2003.

<sup>223</sup> Article 10 of Charter of Fundamental Social Rights in the SADC, 2003.

Therefore South Africa, as a member of SADC and signatory to the Charter on Fundamental Social Rights in the SADC, is obliged to recognise the right to adequate social security benefits as one of its fundamental rights. It is important to understand that various relevant international instruments exist, some not legally binding, but still having to be considered as relevant.<sup>224</sup> These instruments are regarded as significant benchmarks in evaluating whether or not South Africa is in compliance with the relevant international standards.<sup>225</sup>

### 3.3 SOUTH AFRICA'S SOCIAL SECURITY SYSTEM

Social security can be regarded as one of the most important rights available to everyone in South Africa. Social protection was defined by the Commission of Inquiry that was set up to look at Comprehensive System of Social Security for South Africa as:

‘Comprehensive social protection is broader than the traditional concept of social security, and incorporates developmental strategies and programmes designed to ensure, collectively, at least a minimum living standard for all citizens. It embraces the traditional measures of social insurance, social assistance and social services, but it goes beyond that to focus on causality through an integrated policy approach including many of the developmental initiatives undertaken by the State.’<sup>226</sup>

Social security is thus just part of social protection. In South Africa, social security is provided in different forms, which might be social insurance or social assistance. Social assistance consists of the grants paid by the state to older persons, persons with disabilities, families raising children and war veterans in terms of the Social Assistance Act.<sup>227</sup> Social insurance refers to contributory schemes of social protection, in terms of which benefits for a variety of possible contingencies are payable.<sup>228</sup> Social insurance schemes can be privately run retirement schemes whereby private employers and employees pay regular contributions to pension or provident funds. Social insurance schemes can also be public whereby the employers and employees and in some instances the state itself contribute to a state-run scheme for social protection.<sup>229</sup> An example of a public social insurance scheme is the compensation for employment injuries and diseases which is paid to employees and their

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<sup>224</sup> Olivier MP et al (eds) *Introduction to Social Security* (2004) 165.

<sup>225</sup> Olivier MP et al (eds) *Introduction to Social Security* (2004) 163.

<sup>226</sup> Lamarche L ‘Social security as a human right’ in Brand D & Russel S (eds) *Exploring the core content of socio-economic rights: South African and international perspectives* (2002) 113.

<sup>227</sup> Section 4 (a-g) of the Social Assistance Act 13 of 2004.

<sup>228</sup> Dupper O & Olivier M ‘Coordination of Social Security Schemes: The case of SADC’ in Dupper O, Olivier M & Govindjee A (eds) *Role of Standards in Labour and Social Security Law* (2013) 80.

<sup>229</sup> Van Rensburg LJ ‘Rights to Social Security and Assistance’ available at [http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/pdf/HeynsxBrand\\_Socio-Economic\\_Rights\\_Social\\_Security\\_PRINT\\_.pdf](http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/pdf/HeynsxBrand_Socio-Economic_Rights_Social_Security_PRINT_.pdf) (accessed on 12 May 2015).

dependants out of the Compensation Fund which the funded by contributions from their employers on the basis of industry-based risk assessments.<sup>230</sup>

In South Africa there are a number of statutes that cover the subject of occupational health and safety, and this includes the Occupational Health and Safety Act 85 of 1993 (OHSA) and the Mines Health and Safety Act 29 of 1996. OHSA encourages employers and employees to make sure that their own workplaces are safe so as to prevent the occurrence of occupational injuries and diseases.<sup>231</sup> OHSA can also be used to punish those employers who fail to comply with its regulations by imposing penalties on them or by referring cases to the criminal justice system for adjudicating contravention.<sup>232</sup> The Mines Health and Safety Act 29 of 1996 requires the owner of every mine that is being worked to ensure as far as reasonably practicable, that the mine is designed, constructed, equipped and operated in such a way that employees can perform their work without endangering the health and safety of employees or of any other person.<sup>233</sup> The employers and employees are required to identify hazards and eliminate, control and minimise the risks relating to health and safety at mines.<sup>234</sup>

Focusing on the South African legislation that regulates the compensation of employees for work-related injuries and illness, there are two significant pieces of legislation and these are the Occupational Diseases in Mines and Works Act 78 of 1977 (ODMWA) and the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA, as amended). ODMWA provides for mandatory reporting and the payment of certain benefits to mine workers who develop certain occupational lung diseases, as well as the payment of certain benefits for dependants of workers who die from such diseases.<sup>235</sup>

However for the purposes of this mini- thesis the discussion is confined to COIDA to determine whether it is complying with the international labour standards regarding compensation for occupational injuries and diseases. This is because COIDA is the most significant piece of legislation in South Africa that deals with the issue of compensation of occupational injuries and diseases.

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<sup>230</sup> Van Rensburg LJ 'Rights to Social Security and Assistance' available at [http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/pdf/HevnsxBrand\\_Socio-Economic\\_Rights\\_Social\\_Security\\_PRINT\\_.pdf](http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/pdf/HevnsxBrand_Socio-Economic_Rights_Social_Security_PRINT_.pdf) (accessed on 12 May 2015).

<sup>231</sup> Section 38(1) of OHSA.

<sup>232</sup> Section 38(1) of OHSA.

<sup>233</sup> Section 2(1) of the Mines Health and Safety Act 29 of 1996.

<sup>234</sup> Section 2(11) of the Mines Health and Safety Act 29 of 1996.

<sup>235</sup> Chapter VI (83) of ODMWA.

### 3.4 THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT

COIDA provides a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment or who contract occupational diseases.<sup>236</sup> The system of no-fault compensation means that an injured or ill employee is entitled to compensation without having to prove that the employer was at fault for the accident.<sup>237</sup> Therefore it can be submitted that COIDA improved on the common law position.<sup>238</sup> Section 35 of COIDA replaces the employer's delictual liability<sup>239</sup> with insurance coverage that will cover their workers. Section 35 of COIDA states that:

'no action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such an employee against such employee's employer and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.'

This issue of excluding employers from any form of liability has been considered by some as unconstitutional. The Constitutional Court was called upon in the case of *Jooste v Score Supermarket Trading (Pty) Ltd* to decide whether the prohibition contained in section 35 of COIDA is unconstitutional.<sup>240</sup> In considering the constitutionality of section 35, the Court contrasted the administrative remedy provided by COIDA to the common law situation. The legislated remedy available to an employee who suffered an occupational injury consists of a claim for pecuniary loss through an administrative system designed at speedy payment from a fund, is contrasted to a common law action through a process of civil litigation against a defendant employer by which damages will only be awarded upon proof of negligence on the part of the employer.<sup>241</sup>

The court found out that section 35 (1) is logically and rationally connected to the legitimate purpose of COIDA, which is to provide a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees

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<sup>236</sup> Myburgh P, Smit N & Van Der Nest D 'Social Security aspects of accident compensation: COIDA and RAF as examples' (2000) *Law, Democracy and Development* 45.

<sup>237</sup> National Treasury 'The Compensation Fund; Preliminary Report 2nd Draft' available at <http://www.treasury.gov.za/publications/other/ssrr/Session%20One%20Papers/Compensation%20Fund%20Project%202nd%20draft.pdf> (accessed 21 September 2015).

<sup>238</sup> Smit N *Employment Injuries and Diseases* (2003) 466.

<sup>239</sup> See 3.1 above.

<sup>240</sup> *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1 106 (CC) para 2.

<sup>241</sup> *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1 106 (CC) para 13.

in the course of their employment.<sup>242</sup> The court also argued that there is no evidence of unfair discrimination and that COIDA does not violate the right of access to court, the right to equal protection and benefit of the law.<sup>243</sup> However, an employee can still claim for increased compensation if he or she can prove that the injury or disease she contracted was caused by negligence of the employer.<sup>244</sup>

An employer is any person including the State who employs an employee.<sup>245</sup> All employers in South Africa with just a few exceptions<sup>246</sup> are required to register and contribute funds to a centralised state fund that is known as the Compensation Fund which is responsible of providing and monitoring funds for COIDA.<sup>247</sup> COIDA provides for benefits to be paid to:

- employees who suffer a temporary disablement;
- employees who are permanently disabled;
- the dependants of employees who die as a result of injuries sustained in accidents at work or as a result of an occupational disease.<sup>248</sup>

COIDA provides a list of the common diseases that are most likely to affect employees in different working conditions. However, if an employee contracts a disease that is not listed he or she must prove that the disease is related to his or her work in order to receive compensation.<sup>249</sup> Olivier argues that this method of proving that the illness or injury is linked to one's employment is actually a major improvement from the previous legislation that required employees to prove that the disease was contracted in circumstances amounting to an accident so as to be able to receive compensation.<sup>250</sup>

However, COIDA is not being fully utilised to its capacity because cases of occupational injuries and diseases have been hugely under-reported due to shortages of medical specialists

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<sup>242</sup> *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1 106 (CC) para 17.

<sup>243</sup> *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1 106 (CC) para 22.

<sup>244</sup> Section 56(1) (a) of COIDA.

<sup>245</sup> Section 1(xix) of COIDA. This includes any person controlling the business of an employer; if the services of an employee are lent or temporarily made available to some other person by his employer and a labour broker who provides a person whom he individually pays to a client for the rendering of a service or performance of work.

<sup>246</sup> Employers such as national and provincial spheres of government, including Parliament and provincial legislatures and municipalities are not required to contribute funds to the Compensation Fund.

<sup>247</sup> Section 84(1) (a) of COIDA.

<sup>248</sup> Section 47 of COIDA.

<sup>249</sup> Section 65(1) of COIDA.

<sup>250</sup> Olivier MP et al *Social Security Law: General Principles* (1999) 319.

and limited access to medical facilities by most employees.<sup>251</sup> Employers usually under-report the number of accidents to the Director-General so as to avoid paying additional premiums to the Compensation Fund.<sup>252</sup>

As a way of trying to increase the rate of compliance amongst employers, if an employer fails to comply with any of the statutory obligations in terms of COIDA, the Director-General of the Department of Labour has the power to penalise such employers.<sup>253</sup>

### 3.4.1 Financing of the COIDA scheme

One of the major principles that can be deduced from the ILO Conventions<sup>254</sup> is that employment injury benefits must be financed by employers.<sup>255</sup> With COIDA, all the funds are controlled by the Commissioner who is in charge of the Compensation Fund that is responsible for the financial administration of COIDA.<sup>256</sup> The Compensation Fund consists of assessments and other payments by employers, interest on investments and contributions by employers individually liable.<sup>257</sup> Assessments are calculations that are made by the Commissioner to determine how much an employer is supposed to pay to the Fund.<sup>258</sup> The assessment tariffs are set according to the Commissioner's discretion or as he may deem necessary by taking a certain percentage of the annual earnings of the employer's employees.<sup>259</sup> If the employer fails to pay these assessments then he or she will be guilty of an offence and will be liable to a fine not exceeding 10 per cent of the amount so assessed.<sup>260</sup>

Employers become individually liable if they are exempted from paying assessments to the compensation fund.<sup>261</sup> These employers reimburse the Commissioner after the end of each financial year for the money paid by the Fund so as to compensate their employees.<sup>262</sup> The

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<sup>251</sup> Myburgh P, Smit N & Van Der Nest D 'Social Security aspects of accident compensation: COIDA and RAF as examples' (2000) *Law, Democracy and Development* 46.

<sup>252</sup> Myburgh P, Smit N & Van Der Nest D 'Social Security aspects of accident compensation: COIDA and RAF as examples' (2000) *Law, Democracy and Development* 46.

<sup>253</sup> Section 39(8) of COIDA. COIDA refers to the Director-General but for the purposes of this mini-thesis reference will be made to the Compensation Commissioner since the Director-General can delegate powers to him or her Section 2 of COIDA

<sup>254</sup> See 2.5 above.

<sup>255</sup> Myburgh P, Smit N & Van Der Nest D 'Social Security aspects of accident compensation: COIDA and RAF as examples' (2000) *Law, Democracy and Development* 45.

<sup>256</sup> Section 4(1) of COIDA.

<sup>257</sup> Olivier MP et al *Social Security Law: General Principles* (1999) 320.

<sup>258</sup> Section 83(1) of COIDA.

<sup>259</sup> Section 83(1) of COIDA.

<sup>260</sup> Section 83(6) (a) of COIDA.

<sup>261</sup> Section 1 (xxi) of COIDA.

<sup>262</sup> Section 88(2) (a) of COIDA.

amount that these employers pay is determined by the Commissioner by focusing on the loss that the fund suffered in the administration of the provisions of COIDA.<sup>263</sup>

The Compensation Fund is advised by the Compensation Board which is comprised of representatives from the government, employers, employees and the medical profession.<sup>264</sup>

The Compensation Board acts as an advisory body on all policy issues as well as the benefits to be paid, the appointment of assessors and any amendments to COIDA.<sup>265</sup>

COIDA complies with the principles stated in the ILO Conventions that employment injury benefits must be financed by employers because the funds are not coming from the employees but directly from the employers as required by the ILO.<sup>266</sup>

### **3.4.2 Scope of application of COIDA**

An employee is defined in COIDA as a person who has entered into or works under a contract of service or of apprenticeship or learnership with an employer, whether the contract is express or implied, oral or in writing and whether the remuneration is calculated by time or work done or is in cash or in kind.<sup>267</sup> This definition expressly includes the following persons:

- a) “a casual employee employed for the purposes of the employer’s business;
- b) a director or member of a body corporate who has entered into a contract of service or of apprenticeship or learnership with the body corporate, in so far as he acts within the scope of his employment in terms of such contract;
- c) a person provided by a labour broker against payment to a client for the rendering of a service or the performance of work and for which service or work such person is paid by the labour broker;
- d) in the case of a deceased employee, his dependants; and in the case of an employee who is a person under disability, a curator acting on behalf of that person.”<sup>268</sup>

However not all employees are covered by COIDA since the following persons are expressly excluded from the scope of COIDA:

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<sup>263</sup> Section 88(2) (b) of COIDA.

<sup>264</sup> Strydom EML et al *Essential Social Security Law* (2001) 43.

<sup>265</sup> Section 12(1) of COIDA.

<sup>266</sup> Article 71 of Social Security (Minimum Standards) Convention, 1952 (No. 102).

<sup>267</sup> Section 1 (xix) of COIDA.

<sup>268</sup> Section 1 (xix) (a-d) of COIDA.



- i. “a person in the employ of the state, performing military service or undergoing training referred to in the Defence Act 44 of 1957;
- ii. a member of the Permanent Force of the South African Defence Force while on service in defence of the Republic;
- iii. a member of the South African Police Force while employed in terms of Section 7 of the Police Act 7 of 1958 on service in defence of the Republic;
- iv. a person who contracts for the carrying out of work and himself engages other persons to perform such work;
- v. a domestic employee employed as such in a private household.”<sup>269</sup>

In South Africa, children under the age of 15 are also excluded from the scope of COIDA because they are not supposed to work<sup>270</sup> in terms of section 28(1) (f) of the South African Constitution of 1996 and Article 1 of Minimum Age Convention No 138 of 1973.

If an employer carries on business chiefly in the Republic and an employee of his ordinarily employed in the Republic got injured whilst temporarily working outside South Africa then such employee will be entitled to compensation as if the accident had happened in South Africa.<sup>271</sup> The amount of compensation that this employee will get is determined on the basis of the earnings he or she would have received if he or she had remained in South Africa.<sup>272</sup>

However abovementioned law will cease to apply if the employee has been employed outside South Africa for a continuous period of 12 months unless an agreement had been made between the employee, employer and the Commissioner.<sup>273</sup> Persons employed outside of South Africa are excluded from COIDA, but while they are temporarily performing work within the country they may be entitled to compensation in the event of injuries provided that arrangements have been made with the Commissioner.<sup>274</sup>

In the situation whereby the employee unfortunately dies as a result of injuries or diseases that he contracted during his work, his dependants can claim compensation from COIDA.<sup>275</sup> COIDA provides a list of people that can claim from it as dependants of a deceased employee and these include:

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<sup>269</sup> Section 1 (xix) (d) (i-v) of COIDA.

<sup>270</sup> See 2.3.3.7 above.

<sup>271</sup> Section 23(1) (a) of COIDA.

<sup>272</sup> Section 23(1) (b) of COIDA.

<sup>273</sup> Section 23(1) (c) of COIDA.

<sup>274</sup> Myburgh P, Smit N & Van Der Nest D ‘Social Security aspects of accident compensation: COIDA and RAF as examples’ (2000) *Law, Democracy and Development* 46.

<sup>275</sup> Section 54 of COIDA.

- a) “a widow or widower who at the time of the employee’s death was married to the employee according to civil law;
- b) a widow or widower who at the time of the employee’s death was party to a marriage to the employee according to indigenous law or custom, if neither the husband nor the wife was a party to a subsisting civil marriage;
- c) if there is no widow or widower referred to as above, a person with whom the employee was at the time of the employee’s death living as husband and wife;
- d) a child under the age of 18 years of the employee or of his or her spouse, and includes a posthumous child, stepchild, an adopted child and a child born out of wedlock;
- e) a child over the age of 18 years of the employee or of his or her spouse, a parent or any person who in the opinion of the Commissioner was acting in the place of a parent, a brother, a sister, a half-brother or half-sister, a grandparent or a grandchild of the employee and who was in the opinion of the Commissioner at the time of the employee’s death wholly or partly financially dependent upon the employee.”<sup>276</sup>

### 3.4.3 Limitations of scope of application

One of the major principles that can be deduced from the ILO Conventions<sup>277</sup> is that the appropriate scheme’s scope of application must extend to at least half of the national workforce or twenty per cent of residents.<sup>278</sup> However, in South Africa, this is not the case as COIDA excludes certain categories of employees.<sup>279</sup> Therefore those that are not included in the definition of an employee<sup>280</sup> and those that have entered into a contract of service or apprenticeship or learnership are not covered by COIDA.<sup>281</sup> Non-standard workers, in particular informal workers, independent and dependent contractors and other self-employed persons are also not covered despite the fact that they contribute to a huge percentage of the working population in South Africa.<sup>282</sup>

One can also argue that COIDA benefits are not accessible to everyone, especially those employees who live in the rural areas where the functioning of the compensation system is

<sup>276</sup> Section 1(xv) of COIDA.

<sup>277</sup> See 2.5 above.

<sup>278</sup> Olivier MP et al *Social Security: A Legal Analysis* (2003) 465.

<sup>279</sup> Taylor Committee Report, ‘Report No 11: Coverage against Employment Injuries and Diseases’ (2002) 452.

<sup>280</sup> See the definition given in 3.4.2 above.

<sup>281</sup> Olivier MP et al *Social Security Law: General Principles* (1999) 322.

<sup>282</sup> Taylor Committee Report, ‘Report No 11: Coverage against Employment Injuries and Diseases’ (2002) 458.

inefficient.<sup>283</sup> In many rural areas it seems as if the system has broken down leaving the rural families and communities to bear the burden of disabilities and diseases that would have been incurred in urban-industrial workplaces.<sup>284</sup> This is so because it is common trend that when an employee working in a town or city gets injured or becomes too ill to work he or she usually relocates back to his or her rural home as to get care and assistance from his or her family. These employees after relocating to their rural areas usually find it difficult to claim for compensation because in most cases the offices where they can submit their claim forms are only found in the urban areas. This may put a great burden upon their family members who in most cases already have very limited resources to help them.<sup>285</sup>

The Taylor Committee discovered that individuals, families and communities with environmentally acquired diseases due to exposure from industrial pollutants, asbestos contamination and industrial disasters are not covered under the current compensation dispensation.<sup>286</sup> Therefore looking at all the people that are excluded from COIDA's scope of application it can be submitted that COIDA is not complying with the ILO Conventions since it is not providing coverage to at least half of the work force of South African population.

### 3.5 QUALIFYING CRITERIA

#### 3.5.1 Accidents

The COIDA definition of an 'accident' is an accident arising out of and in the course of an employee's employment and resulting in personal injury, illness or the death of the employee.<sup>287</sup> There should be a causal connection between the accident and the loss suffered by the employee without a break in causality.<sup>288</sup> For an employee to qualify to get compensation from COIDA he or she should have been injured in accident or contracted a disease.<sup>289</sup> However an employee is only entitled to compensation if the disablement lasts for three days or longer.<sup>290</sup> Furthermore, an employee is not entitled to compensation if the accident is attributable to the serious and wilful misconduct of the employee unless the

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<sup>283</sup> Smit N *Employment Injuries and Diseases* (2003) 474.

<sup>284</sup> Standing G *et al Restructuring the Labour Market: The South African Challenge, An ILO Country Review* (1996) 467.

<sup>285</sup> Standing G *et al Restructuring the Labour Market: The South African Challenge, An ILO Country Review* (1996) 467.

<sup>286</sup> Taylor Committee Report, 'Report No 11: Coverage against Employment Injuries and Diseases' (2002) 457.

<sup>287</sup> Section 1(i) of COIDA.

<sup>288</sup> Olivier MP 'Workers' Commuting Injuries: A South African Perspective' (1995) 16 *ILJ* 559.

<sup>289</sup> Olivier MP 'Workers' Commuting Injuries: A South African Perspective' (1995) 16 *ILJ* 559.

<sup>290</sup> Section 22(2) of COIDA.

accident results in serious disablement or if the employee dies in consequence of the accident and leaves behind a dependant wholly financially dependent on such deceased.<sup>291</sup>

An accident shall be deemed a rise out of and in the course of the employment of an employee despite the fact that the employee at the time of the accident contravened any applicable law or an order by the employer, or that the employee was acting without any order of the employer.<sup>292</sup> Section 22(5) states that an accident that occurs when an employee is being conveyed free of charge to or from the place of employment, for the purposes of employment by means of a vehicle which is driven by the employer or one of the employer's employees and specially provided by the employer for such conveyance, shall be deemed to take place in the course of such employee's employment.<sup>293</sup>

However section 22(5) of COIDA has been criticised by Olivier because it is actually more restrictive than section 27(3) of the old Workmen's Compensation Act (WCA) that COIDA replaced. The WCA only required that the employer must control the conveyance of the employees. It was not a requirement that the employer or one of the employer's employees must be the driver of the vehicle.<sup>294</sup> Therefore, the Taylor Report states that there is an unnecessarily narrow coverage of commuting injuries under COIDA; this is as a result of the fact that COIDA (despite WCA providing for a considerably limited coverage) went on to narrow down the scope of coverage and for that reason a lot of employees are excluded from benefiting from it.<sup>295</sup>

If an employer carries on his or her business mainly in South Africa and an employee who is ordinarily in South Africa is involved in an accident while temporarily outside of the country, such an employee is entitled to compensation as if the accident occurred in South Africa.<sup>296</sup> However this provision does not apply after an employee has been employed outside the country for a continuous period of 12 months unless an agreement has been reached between the Commissioner, employer and the employee.<sup>297</sup>

Even though there are reciprocal agreements between South Africa and some of its neighbouring countries that are supposed to assist injured employees in accessing payments,

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<sup>291</sup> Section 22(3) of COIDA.

<sup>292</sup> Section 1(i) of COIDA.

<sup>293</sup> Section 22(5) of COIDA.

<sup>294</sup> Olivier MP 'Workers' Commuting Injuries: A South African Perspective' (1995)16 *ILJ* 560.

<sup>295</sup> Taylor Committee Report, 'Report No 11: Coverage against Employment Injuries and Diseases' (2002) 458.

<sup>296</sup> Section 23(1) (a) of COIDA.

<sup>297</sup> Section 23(1) (b) of COIDA.

these agreements are not being utilised correctly because of corruption and mismanagement.<sup>298</sup> Cases regarding the problems that are experienced by migrant workers to access their benefits have been reported.<sup>299</sup> Therefore, it can be submitted that South Africa is to some extent not complying with one of the principles drawn from the ILO Conventions which state that migrant workers must be treated equally and allowed to meet the same eligibility rules<sup>300</sup> and receive the same levels of employment injury compensation as the national work force, and that there should be reciprocal agreements between governments to ensure that migrants can receive compensation at home or abroad.

### 3.5.2 Occupational Diseases

Apart from occupational injuries, COIDA also provides for statutory compensation in respect of a number of listed occupational diseases contracted by employees in the course of their employment and resulting in disablement or death.<sup>301</sup> Occupational diseases are listed in Schedule 3 of COIDA and for an employee to be able to claim for compensation he or she should have contracted one of the listed diseases.<sup>302</sup>

Therefore if an employee contracts a disease listed in Schedule 3 it is presumed that the disease arose out of and in the course of his or her employment. However, this does not mean that employees who contract a listed disease are the only ones that can claim compensation, because compensation also is payable to employees who contract unlisted diseases which arose out of and in the course of their employment.<sup>303</sup> An employee who claims compensation for an unlisted disease must however prove that the disease arose out of and in the course of his or her employment.<sup>304</sup>

Currently, the list of scheduled diseases is limited to diseases caused by exposure to certain substances or to excessive noise, vibrating equipment or repetitive movements.<sup>305</sup> However, COIDA makes no mention of psychological diseases like Post-Traumatic Stress Disorder (PTSD). This does not mean that those suffering from psychological diseases cannot claim

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<sup>298</sup> Olivier MP et al *Social Security Law: General Principles* (1999) 322.

<sup>299</sup> Mpedi LG & Nyenti MAT 'Challenges experienced by former mine workers in accessing social security benefits in SADC' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa: Harare, Zimbabwe (2015) 14.

<sup>300</sup> See 2.5 above.

<sup>301</sup> Section 65(1) (b) of COIDA.

<sup>302</sup> Section 65(1) (a) of COIDA.

<sup>303</sup> Section 65(1) (b) of COIDA.

<sup>304</sup> Myburgh P, Smit N & Van Der Nest D 'Social Security aspects of accident compensation: COIDA and RAF as examples' (2000) *Law, Democracy and Development* 48.

<sup>305</sup> Schedule 3 of COIDA.

for PTSD however, the onus is on the employee to prove that the PTSD arose out of or in the course of her employment.<sup>306</sup> In *Odayar v Compensation Commissioner* a tribunal held that the claim of a member of the South African Police Service that exposure to traumatic events caused PTSD could not succeed, since he could not point to any specific incident that caused the PTSD and therefore there was no accident that caused the injury.<sup>307</sup> However, on appeal the High Court held that Odayar's claim can succeed on the basis that he suffered from a disease and that there was no reason to hold that PTSD should be caused by an accident.

COIDA is responsible for compensating claims for occupational diseases in all other working sectors besides the mining sector<sup>308</sup> which is covered by ODMWA.<sup>309</sup> A lot of miners that work in the mines are migrant workers and in most cases the occupational disease they might have contracted whilst working in South African mines would only materialise after they have returned to their countries of origin.<sup>310</sup> The ILO requires that there should be reciprocal agreements between governments to ensure that migrants can receive compensation either at home or abroad.<sup>311</sup> These agreements should cover both occupational diseases and occupational injuries.

However this is not the case with South Africa and its neighbouring countries because in most cases the compensation that would be paid would rarely reach its intended beneficiaries because of rampant corruption in the receiving countries' governments.<sup>312</sup> Therefore, by not ensuring that the intended migrant beneficiaries are benefiting from COIDA, one can say that South Africa is not complying with the ILO principle that requires migrant workers to receive equal treatment<sup>313</sup> as the national work force and that there should be reciprocal agreements between governments to ensure that migrants can receive compensation at home or abroad.

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<sup>306</sup> Section 65(1) (b) of COIDA. An employee need not prove exposure to an extreme traumatic event or stressor to claim for PTSD. Jakob O *Perspectives on determining permanent disablement in South African occupational injury law* (Unpublished LLM thesis, North-West University, 2012) 46.

<sup>307</sup> *Odayar v Compensation Commissioner* (2006) 27 ILJ 1477 (N).

<sup>308</sup> Besides the construction industry, where separate provisions for occupational injuries and diseases is allowed.

<sup>309</sup> Smit N *Employment Injuries and Diseases* (2003) 477.

<sup>310</sup> Myburgh P, Smit N & Van Der Nest D 'Social Security aspects of accident compensation: COIDA and RAF as examples' (2000) *Law, Democracy and Development* 48.

<sup>311</sup> Myburgh P, Smit N & Van Der Nest D 'Social Security aspects of accident compensation: COIDA and RAF as examples' (2000) *Law, Democracy and Development* 45.

<sup>312</sup> Smit N *Employment Injuries and Diseases* (2003) 473.

<sup>313</sup> See 2.5 above.

### 3.6 PROCEDURE FOR CLAIMING COMPENSATION FOR AN ACCIDENT

If an employee is involved in an accident, a notice must be given to his or her employer by or on behalf of the employee as soon as possible after such an accident has occurred.<sup>314</sup> The employer must then notify the Commissioner within seven days after having received notice of the accident.<sup>315</sup> Should the employer fail to report an accident that he or she has been made aware of, he or she can be found guilty of an offence and liable for a fine not exceeding the compensation that would have been paid to the employee will be imposed.<sup>316</sup>

An employee or one of his or her dependants should submit a claim within 12 months after the date of the accident or the date of death of the employee.<sup>317</sup> If an employee fails to claim within 12 months, the right to benefits is forfeited because according to COIDA a claim for compensation prescribes after 12 months.<sup>318</sup> This strict application of prescription periods can have a negative impact in the lives of the uninformed employees suffering from occupational injuries or diseases, as in some cases the seriousness of one's injuries or diseases will only be discovered at a later stage.<sup>319</sup>

### 3.7 CALCULATION OF BENEFITS

One of the general principles of the ILO Conventions discussed above<sup>320</sup> is that the minimum compensation levels should be set at 50 per cent of lost earnings for an eligible worker with a family and 40 per cent for a surviving spouse and two children.<sup>321</sup> In South Africa, the rules that govern the calculation of compensation are found in Schedule 4 of COIDA which contains formulae for calculating the compensation of employees who would have suffered temporary or permanent injuries or serious disfigurement, and dependants of employees who die as a result of an occupational accident or disease. In order to calculate compensation, the Commissioner will look at the monthly earnings of an employee at the time of the accident and the degree of disablement of the employee.<sup>322</sup> However there is no single formula for all categories of compensation for occupational injuries and diseases because the formulae for

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<sup>314</sup> Section 38(1) of COIDA.

<sup>315</sup> Section 38(1) of COIDA No 130 of 1993.

<sup>316</sup> Section 39(6) and (8) of COIDA No 130 of 1993.

<sup>317</sup> Section 44 of COIDA No 130 of 1993.

<sup>318</sup> Smit N *Employment Injuries and Diseases* (2003) 486.

<sup>319</sup> Myburgh P, Smit N & Van Der Nest D 'Social Security aspects of accident compensation: COIDA and RAF as examples' (2000) *Law, Democracy and Development* 48.

<sup>320</sup> See 2.5 above.

<sup>321</sup> Article 67 of Social Security (Minimum Standards) Convention, 1952 (No. 102).

<sup>322</sup> Myburgh P, Smit N & Van Der Nest D 'Social Security aspects of accident compensation: COIDA and RAF as examples' (2000) *Law, Democracy and Development* 50.

compensation is determined by the degrees of disablement. The different formulae for the different degrees of disablement are discussed below.

### **3.7.1 Temporary Disablement**

Temporary disablement means that the employee will eventually get better or recover from the illness or injury. If the injury lasts less than 3 days then the employee will not be compensated because compensation will only be paid if the disablement lasts for four days or more.<sup>323</sup> Temporary disability can be total or partial:

#### **3.7.1.1 Temporary Partial Disablement**

An employee is deemed to have a temporary partial disablement if he or she is unable to perform the whole of the work at which he or she was employed at the time of such accident or at the commencement of such occupational disease.<sup>324</sup> This means that the employee would be able to work but will be on duty for fewer hours and if the employee earns less during this period then he or she will be compensated for the difference in his or her monthly earnings between the normal and the reduced monthly earnings that has been caused by the injury or illness.<sup>325</sup>

Compensation for temporary partial disablement is calculated on the basis set out in item 1 of schedule 4 of COIDA.<sup>326</sup> The compensation provided for temporary partial disablement comprises of an amount that would have been regarded by the Commissioner as equitable after using the basis set out in item 1 of schedule 4.<sup>327</sup> These payments will be stopped upon the termination of the partial disablement or if the employee resumes the work upon which he was employed at the time of the accident or occupational disease.<sup>328</sup>

#### **3.7.1.2 Temporary Total Disablement**

Temporary total disablement can be defined as the temporary total inability of an employee as a result of an accident or occupational disease for which compensation is payable to perform the work at which he was employed at the time of the accident or the commencement of occupational disease.<sup>329</sup> The employee will get 75 per cent of the normal monthly earning

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<sup>323</sup> Section 47(1) of COIDA.

<sup>324</sup> Section 1 (xlvi) of COIDA.

<sup>325</sup> Section 1 (xlvi) of COIDA.

<sup>326</sup> Section 47(1) (a) of COIDA.

<sup>327</sup> Section 47(2) of COIDA.

<sup>328</sup> Section 48(1) (a) of COIDA.

<sup>329</sup> Section 1 (xlvii) of COIDA.



as his or her compensation.<sup>330</sup> Compensation for temporary total disablement can be paid periodically for up to 24 months but if the disablement continues then it can be treated as permanent disablement.<sup>331</sup> However the right to compensation is terminated once the employee recovers from the disablement or if the employer is awarded compensation for permanent disablement.<sup>332</sup>

### **3.7.2 Permanent Disablement**

Permanent disablement can be defined as the permanent inability of an employee to perform his or her work as a result of an accident or occupational diseases for which compensation is payable.<sup>333</sup> This means that an employee never recovers from the injury or sickness and this can completely prevent an employee from working or doing his or her work before the accident or disease. The Commissioner, with the help of a panel of doctors, works out the degree of disablement with the most serious, for example the loss of two limbs, being referred to as 100 per cent disability and the least serious for example the loss of one toe being referred to as 1 per cent disability.<sup>334</sup>

Compensation for permanent disablement is paid either as a monthly pension or as lump sum. If the injury suffered by an employee is deemed to be 30 per cent or less, then that employee will get his or her compensation in form of a lump sum.<sup>335</sup> The lump sum will be consisted of 15 times the monthly earnings of the employee at the time of the accident or disease for 30 per cent disablement,<sup>336</sup> or “an amount which bears to a lump sum calculated in terms of item 2 the same proportion as the degree of permanent disablement to 30 per cent” for disablement less than 30 per cent. The lump sum is only paid once only and there will be no further payments.<sup>337</sup>

However, if the injury that has been suffered by an employee is regarded as more than 30 per cent then the employee will a receive compensation in form of a pension.<sup>338</sup> This pension will be paid on monthly basis during the lifetime of the employee but will expire at the end of the

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<sup>330</sup> Item 1 of Schedule 4 of COIDA.

<sup>331</sup> Section 47(6) of COIDA.

<sup>332</sup> Section 48(1) (a) of COIDA.

<sup>333</sup> Section 1 (xxxv) of COIDA.

<sup>334</sup> Schedule 2 of COIDA.

<sup>335</sup> Items 2 and 3 of Schedule 4 of COIDA

<sup>336</sup> Item 2 of Schedule 4 of COIDA.

<sup>337</sup> Item 2 of Schedule 4 of COIDA.

<sup>338</sup> Item 5 of Schedule 4 of COIDA.

month in which the employee dies.<sup>339</sup> The Taylor Committee argues that COIDA is not complying with ILO Conventions because it pays out some benefits in the form of lump sum whilst the ILO<sup>340</sup> encourages compensation to be paid in the form of a periodical payment that will last through out the contingency. The Committee argues that paying compensation in the form of a lump sum creates potential long-term problems, since beneficiaries may well become dependent on State social assistance provision when the lump sum has been exhausted.<sup>341</sup>

### **3.8 COMPENSATION FOR OCCUPATIONAL DISEASES**

According to section 65 of COIDA an employee is entitled to compensation if he or she has contracted a disease mentioned in the first column of Schedule 3 and that such disease<sup>342</sup> has arisen out of and in the course of his or her employment.<sup>343</sup> If an employee discovers that he or she has contracted a disease he or she has 14 days to inform his or her employer who will then inform the Commissioner.<sup>344</sup> If the Commissioner believes that the employee's sickness is being prolonged by another disease that he or she may be suffering from, the Commissioner may allow the employee to use medical aid so as to cure the other disease as well.<sup>345</sup>

However if an employee has contracted a disease which resulted in him or her getting permanently disabled and that disease was aggravated by some other disease, the Commissioner may in determining the degree of permanent disablement have regard to the effect of such other disease.<sup>346</sup> The compensation will be calculated on the basis of the earnings of the employee and the disablement of the employee at the time of the commencement of the disease or such earlier date as the Commissioner may determine.<sup>347</sup>

Focusing on COIDA, it can be submitted that benefits are calculated according to the same formulae whether it be accidents or diseases. In the case where the employee is no longer employed at the time of the commencement of the said disease, his or her earnings will be calculated on the basis of the earnings that he would probably have been earning had he still

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<sup>339</sup> Section 49 (4) of COIDA.

<sup>340</sup> See 2.5 above.

<sup>341</sup> Taylor Committee Report, 'Report No 11: Coverage against Employment Injuries and Diseases' (2002) 457.

<sup>342</sup> See 3.5.2 above.

<sup>343</sup> Section 65(1) (a) of COIDA.

<sup>344</sup> Section 68(2) (a) of COIDA.

<sup>345</sup> Section 65(2) of COIDA.

<sup>346</sup> Section 65(4) of COIDA.

<sup>347</sup> Section 67(1) of COIDA.

be working.<sup>348</sup> The employee has twelve months from the commencement of that disease to lodge the claim before the right to benefit lapses.<sup>349</sup>

### **3.9 MEDICAL COSTS**

According to COIDA, the Commissioner or an employer who is individually liable, is for a period of not more than two years from the date of an accident or the commencement of a disease referred to in section 65(1) liable to pay the reasonable cost incurred by or on behalf of an employee in respect of medical aid necessitated by an accident or disease.<sup>350</sup> If an employee requires more medical attention for longer than two years and the Commissioner believes that further medical aid will reduce the disablement that the employee is suffering from, he may pay the costs or direct the employer individually liable to pay the costs.<sup>351</sup>

### **3.10 COMPENSATION WHERE AN EMPLOYEE DIES**

If a situation arises whereby an employee dies as a result of an occupational injury or disease his widow or widower<sup>352</sup> or dependants can claim for compensation for loss of income of a breadwinner. The widow or widower will receive a lump sum payment that is comprised of two monthly pensions that the employee would have been paid if he or she had been 100 per cent disabled.<sup>353</sup> The widow or widower will also receive a monthly pension for life, this pension is comprised of 40 per cent of the monthly pension that the employee would have been paid every month if he had been permanently disabled.<sup>354</sup> This monthly pension will lapse on the last day of the month in which the widow or widower dies.<sup>355</sup>

Each child under the age of 18 years, including extra marital, adopted and step children, is entitled to 20 per cent of the monthly pension that the employee would have been paid every month if he had been permanently disabled.<sup>356</sup> This pension is paid on monthly basis until the child is 18 years old.<sup>357</sup> However the pension can continue for longer if the child has a mental

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<sup>348</sup> Section 67(2) of COIDA.

<sup>349</sup> Section 44 of COIDA.

<sup>350</sup> Section 73 (1) of COIDA.

<sup>351</sup> Section 73 (2) of COIDA.

<sup>352</sup> The term widow means a woman who was maintained by her husband at the time of his death. Widower refers to the husband of the deceased employee at the time of her death. Article 1 of Social Security (Minimum Standards) Convention, 1952 (No. 102).

<sup>353</sup> Item 6 of Schedule 4 of COIDA.

<sup>354</sup> Item 7 of Schedule 4 of COIDA.

<sup>355</sup> Section 54(4) of COIDA.

<sup>356</sup> Item 8 of Schedule 4 of COIDA.

<sup>357</sup> Section 54(1) (iv) of COIDA.

or physical disability or until the child completes tertiary education.<sup>358</sup> The Commissioner may pay out of the compensation fund such an amount as he may deem reasonable to a maximum of R5 350 for the funeral costs of an employee or direct the employer individually liable to pay such costs.<sup>359</sup>

### 3.11 CONCLUSION

South Africa's position will now be evaluated against the principles (drawn from ILO standards) stated in Chapter 2 so as to determine whether South Africa's system of compensation for occupational injuries and diseases is complying with these international social security standards. Looking at South Africa's social security system, with special reference to compensation of occupational injuries and diseases, it can be submitted that it is to some extent complying with the international standards on occupational injuries and diseases. One of the principles that South Africa is complying with is that employment injury benefits must be financed by employers.<sup>360</sup> This is because the funds that sustain COIDA come from the contributions that are made by the employers.<sup>361</sup>

Another principle that South Africa can be regarded to be complying with is the one that states that compensation must be generally in the form of a periodical payment which lasts throughout the contingency<sup>362</sup> instead of lump sum benefits. Periodical payments are meant to protect injured employees by providing them with financial stability. However a reasonable exception may be made so as to give lump sum payments to low-income employees suffering from minor temporary disablement. The periodical payments that these low-income employees would receive will not be that much,<sup>363</sup> making the lump sums payable to them in South Africa a reasonable exception to the principle.

One of the principles that South Africa is not complying with is that the scope of an appropriate scheme must extend to at least half of the national workforce or 20 per cent of residents.<sup>364</sup> It can be submitted that the benefit system in terms of COIDA is not complying with this requirement because a number of vulnerable persons such as domestic workers<sup>365</sup>, civil servants and members of the defence force are not covered by the scope of coverage of

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<sup>358</sup> Section 54(1) (iv) of COIDA.

<sup>359</sup> Item 10 of Schedule 4 of COIDA.

<sup>360</sup> See 2.5 above.

<sup>361</sup> See 3.4.1 above.

<sup>362</sup> See 3.7.1.2 above.

<sup>363</sup> See 3.7.1.3 above.

<sup>364</sup> See 3.4.3 above.

<sup>365</sup> See 3.4.2 above.

COIDA.<sup>366</sup> In addition, a significant portion, if not the majority, of the workforce are informal workers, who do not gain access to the COIDA system through their employers.

It can be submitted that South Africa is not fully complying with the ILO principle that states that migrant workers must receive equal treatment and that there should be reciprocal agreements among governments to ensure that migrants can continue to receive compensation even when they relocate to their countries of origin.<sup>367</sup> Mpedi and Nyenti have argued that South Africa is not complying with this principle because there are a lot of reported cases regarding the problems that are experienced by migrant ex-mineworkers to access their benefits.<sup>368</sup> Even though there are reciprocal agreements between South Africa and some of its neighbouring countries that are supposed to assist injured employees in accessing payments, these agreements are not being utilised correctly because of corruption and mismanagement.<sup>369</sup>

Therefore, focusing on South Africa's system of compensation of occupational injuries and diseases it can be argued that South Africa is not complying with all the principles that can be drawn from the international labour and social security standards. It is recommended that steps be taken to effect the ratification of C121 and that the ratification of other Conventions in this field should be seriously considered.<sup>370</sup>

Vonk suggests that for most countries to comply with the ILO principles they must ratify the Social Protection Floors Recommendation No 202 of 2012 because it bridges the gap between ILO standards and the human rights approach to social security.<sup>371</sup> By doing so, South Africa will be regarded to be taking big steps towards complying with the international standards in compensation of occupational injuries and diseases.<sup>372</sup>

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<sup>366</sup> See 3.4.3 above.

<sup>367</sup> See 3.5.1 above.

<sup>368</sup> Mpedi LG & Nyenti MAT 'Challenges experienced by former mine workers in accessing social security benefits in SADC' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa: Harare, Zimbabwe (2015) 14.

<sup>369</sup> Dupper O & Olivier M 'Coordination of Social Security Schemes: The case of SADC' in Dupper O, Olivier M & Govindjee A (eds) *Role of Standards in Labour and Social Security Law* (2013) 89.

<sup>370</sup> Taylor Committee Report, 'Report No 11: Coverage against Employment Injuries and Diseases' (2002) 453.

<sup>371</sup> Vonk G 'The Social Protection Floors Recommendation 2012 (No 202): The human rights approach to social security in ILO wrapping paper' in Olivier MP, Dupper O & Govindjee A *The role of standards in labour and social security law* (2013) 29.

<sup>372</sup> Taylor Committee Report, 'Report No 11: Coverage against Employment Injuries and Diseases' (2002) 453.

## CHAPTER FOUR

### ZIMBABWE'S COMPENSATION OF OCCUPATIONAL INJURIES AND DISEASES SYSTEM

#### 4.1 INTRODUCTION

This chapter focuses on Zimbabwe's social security system with special reference to its legislation that deals with compensation for occupational injuries and diseases. The purpose of this chapter is to find out whether Zimbabwe, which has not yet ratified important ILO instruments like Convention 102 of 1952 and Convention 121 of 1964, nonetheless still is complying with the international social security standards regarding compensation of occupational injuries and diseases.

#### 4.2 ZIMBABWE'S LEGAL FRAMEWORK FOR COMPENSATION OF OCCUPATIONAL INJURIES AND DISEASES

##### 4.2.1 Constitutional Guarantee of Social Security

Zimbabwe as a member of the Southern African Development Community (SADC) is a signatory to the Charter on Fundamental Social Rights<sup>373</sup> which requires countries in the SADC to recognise the right to social protection as a fundamental right.<sup>374</sup> Therefore Zimbabwe as a member of SADC and signatory to the Charter on Fundamental Social Rights in the SADC is obliged to recognise the right to social security as one of its fundamental rights. However this is not the case as the recently adopted Constitution of Zimbabwe of 2013 guarantees various social security related rights as fundamental human rights, but does not include social security as one of them.<sup>375</sup> This is important as the Constitution is the supreme law of Zimbabwe and the obligations imposed by it are binding on every person, natural or juristic, including the State.<sup>376</sup> Therefore, since the Zimbabwean Constitution makes no reference to the right to social security, Kaseke argued that Zimbabwe does not have a constitutional obligation to ensure the realisation of the right to social security.<sup>377</sup> The State is

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<sup>373</sup> See 3.2.1 above.

<sup>374</sup> Kaseke E 'Social Assistance and the Right to Social Security: The Case of Zimbabwe' (2012) 4 *International Journal of Social Security and Workers Compensation* 3 (Hereafter Kaseke E *Right to Social Security* (2012)).

<sup>375</sup> Chapter 4 of the Constitution of Zimbabwe Act 20 of 2013.

<sup>376</sup> Chapter 2 of the Constitution of Zimbabwe Act 20 of 2013.

<sup>377</sup> Kaseke E *Right to Social Security* (2012) 5.

only bound by the Constitution to protect workers from safety and health hazards at their workplaces.<sup>378</sup>

In Zimbabwe, social welfare and other social security related rights are protected as national objectives, not as national laws.<sup>379</sup> These national objectives are not legally binding but they guide the State to formulate and implement laws and policies that will lead to the establishment and promotion of a sustainable, just and democratic society in which people enjoy prosperous and fulfilling lives.<sup>380</sup> The State is required to take all practical measures, within the limits of the resources available to it so as to provide social security to those who are in need.<sup>381</sup>

Zimbabwe as a Member State of the ILO is bound by various social security standards for example the Convention 102 of 1952<sup>382</sup> which focuses on the minimum standards of social security.<sup>383</sup> However, Zimbabwe has not yet ratified Convention 102 of 1952 and Convention 121 of 1964.<sup>384</sup> Non-ratification may actually signal that Zimbabwe does not want to be held accountable for the realisation of the right to social security or is not yet able to do so. Thus Zimbabwe has no obligation to meet the minimum social security standards enshrined in Convention 102.<sup>385</sup> This led Kaseke to state that the consequence of not ratifying this Convention is that the Government of Zimbabwe is not subjected to the scrutiny of the ILO and may not take the rights of people to social security seriously.<sup>386</sup>

#### **4.3 ZIMBABWE'S SOCIAL SECURITY SYSTEM**

The system for providing social security has been part and parcel of Zimbabwe ever since its colonial period when it was still a British colony. However, the benefits provided were not the same as currently since they were differentiated on the basis of race and this resulted in the white settlers getting better benefits than black indigenous people.<sup>387</sup> The system was

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<sup>378</sup> Section 65 (1) of the Constitution of Zimbabwe Act 20 of 2013.

<sup>379</sup> Chapter 2 of the Constitution of Zimbabwe Act 20 of 2013.

<sup>380</sup> Section 8 of the Constitution of Zimbabwe, Act 20 of 2013.

<sup>381</sup> Section 30 of the Constitution of Zimbabwe, Act 20 of 2013.

<sup>382</sup> See 2.4.6 in Chapter 2.

<sup>383</sup> Article 1 of the Social Security (Minimum Standards) Convention, 1952 (No. 102).

<sup>384</sup> ILO 'Ratifications for Zimbabwe' available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:103183](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:103183) (accessed 24 July 2015).

<sup>385</sup> Kaseke E *Right to Social Security* (2012) 4.

<sup>386</sup> Kaseke E *Right to Social Security* (2012) 4.

<sup>387</sup> Kaseke E 'The Poor Laws, Colonialism and Social Welfare: Social Assistance in Zimbabwe' in Midgley J and Piachaud D (eds), *Colonialism and Welfare: Social Policy and the British Imperial Legacy* (2011) 119.

changed after Zimbabwe got its independence in 1980 and the racial discrimination and bias in the social security system was abolished.

In general, there are three pillars of social security in Zimbabwe and these are social assistance, social insurance and voluntary arrangements which consist of private insurance and occupational pension schemes.<sup>388</sup>

In Zimbabwe, social assistance is provided and administered by the Ministry of Public Services Labour and Social Welfare through the Department of Social Welfare. The Department of Social Welfare provides social assistance in accordance with the terms set in the Social Welfare Assistance Act 22 of 2001. The Department of Social Welfare uses a categorical approach in providing social assistance whereby it targets a specific population group that it deems to be vulnerable therefore deserving support from the state.<sup>389</sup> The vulnerable groups who are eligible for social assistance include persons over the age of 60 years, persons with disabilities, chronically-ill persons and dependents of indigent persons.<sup>390</sup> However, this categorical nature of social assistance in Zimbabwe leaves out a lot of people since there are many people, especially poor persons living in the rural areas, who are denied the right to access social assistance even though they may be in need of assistance from the government.<sup>391</sup>

There are various laws that regulate the social assistance position of vulnerable groups, and these include the Older Persons Act 1 of 2012 that provides for health and education among destitute or indigent older persons<sup>392</sup> and also provide community and health services to residents aged sixty-five years or above.<sup>393</sup> The Disabled Persons Act 5 of 1992 makes provision for the welfare and rehabilitation of persons with disability.<sup>394</sup> The Children's Act 14 of 2002 makes provision for the protection, welfare and supervision of children.<sup>395</sup> Assistance is usually given in the form of cash transfers, assistive devices for persons with disabilities and project loans. In some instances the Department of Social Welfare through the Basic Education Assistance Module programme pays school fees for children from poor

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<sup>388</sup> Kaseke E *Right to Social Security* (2012) 3.

<sup>389</sup> Section 4 of the Social Welfare Assistance Act 22 of 2001.

<sup>390</sup> Section 6(1) of the Social Welfare Assistance Act 22 of 2001.

<sup>391</sup> Kaseke E *Right to Social Security* (2012) 7.

<sup>392</sup> Section 10 of the Older Persons Act 1 of 2012.

<sup>393</sup> Refers to an older person who resides in Zimbabwe for not less than one hundred and eighty-one days in any calendar year. Section 2 of the Older Persons Act 1 of 2012.

<sup>394</sup> Section 5 of the Disabled Persons Act 5 of 1992.

<sup>395</sup> Section 2 of the Children's Act 14 of 2002.



backgrounds that are living in difficult circumstances.<sup>396</sup> It is submitted that this Basic Education Assistance Module programme is one of the reasons why Zimbabwe has the highest literacy rate in Africa as it ensures that every child in Zimbabwe, even those living in the rural areas, have access to basic education by paying their fees.

However, as Kaseke states, social assistance is something that the government of Zimbabwe provides grudgingly, not only because it is seen as a waste of scarce resources that otherwise could be used to enhance economic growth, but it is also seen to encourage the development of a hand-out mentality.<sup>397</sup> This is not helped by the fact of that the public also view social assistance in a negative manner. The negative manner is as a result of the fact of that during the colonial period the recipients of social relief were considered as objects of pity and in many instances were seen as people who had chosen a life of poverty. This in a way made the general public to have this notion that social assistance is charity, and this has been internalised by the recipients who consequently remain apologetic for receiving social assistance.<sup>398</sup> The Zimbabwean Government in general prefers social insurance rather than social assistance because it believes that it is not financially burdensome to the government that is already working on a tight budget.<sup>399</sup>

Social Insurance in Zimbabwe is provided mainly by the National Social Security Authority (NSSA). The government introduced NSSA after realising that the majority of the Zimbabwean workforce did not have adequate and comprehensive social insurance.<sup>400</sup> Before the NSSA scheme was introduced, workers would only have access to social protection under the occupational schemes that were not compulsory and the coverage was limited. This meant that only a small fraction of the labour force had social security cover. However, social security lacked portability and transferability, because if a worker resigned from his or her employment he or she would receive (and use) all his or her contributions plus interest earned and if the worker found another job, he or she will start contributing to the scheme again.<sup>401</sup> There was a need to establish NSSA because the occupational pension schemes that were there only catered for one risk and that was loss of income due to retirement. Therefore this

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<sup>396</sup> Kaseke E *Right to Social Security* (2012) 1.

<sup>397</sup> Kaseke E *Right to Social Security* (2012) 8.

<sup>398</sup> Kaseke E *Right to Social Security* (2012) 4.

<sup>399</sup> Olivier MP *The Role of Standards in Labour and Social Security Law* (2014) 266.

<sup>400</sup> Chikova H 'Social Protection in Zimbabwe' International Conference SASPEN-FES "Social Protection for Those Working Informally. Social & Income (In) Security in the Informal Economy" (2013) 3.

<sup>401</sup> Chikova H 'Social Protection in Zimbabwe' International Conference SASPEN-FES "Social Protection for Those Working Informally. Social & Income (In) Security in the Informal Economy" (2013) 3.

meant that a lot of workers were left vulnerable since they were not fully protected by these occupational schemes.<sup>402</sup>

NSSA as a semi-public body was established in terms of the National Social Security Authority Act of 1989 and is tasked to administer social security schemes in Zimbabwe on behalf of workers, employers and the government.<sup>403</sup> NSSA currently runs two schemes that are compulsory and these are the Pension and Other Benefits Scheme (POBS) which is commonly known as the National Pension Scheme (NPS) and the Accident Prevention and Workers' Compensation Insurance Fund (WCIF).<sup>404</sup>

#### **4.4 THE ACCIDENT PREVENTION AND WORKERS COMPENSATION SCHEME**

In Zimbabwe, employment injury compensation is provided by the Accident Prevention and Worker's Compensation Scheme<sup>405</sup> This is an insurance scheme whereby the employer insures his or her workers against work related injuries and occupational diseases. The scheme is regulated by Statutory Instrument 68 of 1990. Besides the Statutory Instrument, a procedure manual guides benefits officers<sup>406</sup> on the day to day and step by step processing of employment injury claims.<sup>407</sup>

The WCIF provides a system of no-fault compensation for employees who are injured in accidents or who contract occupational diseases that arise out of and in the course of their employment. The system of no-fault compensation means that if an employee is injured or contracts a disease he or she cannot sue the employer for compensation. Similarly to section 35 of the South African COIDA,<sup>408</sup> section 8(a) of the Statutory Instrument states that:

'No action at common law shall lie by a worker or any dependant of a worker against such worker's employer to recover any damages in respect of an injury resulting in the disablement or death of such worker arising out of and in the course of his employment.'<sup>409</sup>

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<sup>402</sup> Chikova H 'Social Protection in Zimbabwe' International Conference SASPEN-FES "Social Protection for Those Working Informally. Social & Income (In) Security in the Informal Economy" (2013) 3.

<sup>403</sup> Chikova H 'Social Protection in Zimbabwe' International Conference SASPEN-FES "Social Protection for Those Working Informally. Social & Income (In) Security in the Informal Economy" (2013) 4.

<sup>404</sup> Part 2 of the NSSA's Employers Guide available at <http://www.nssa.org.zw/index.php/template-features/national-pension-scheme-nps> (accessed 18 October 2015).

<sup>405</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 25 July 2015).

<sup>406</sup> Benefits Officers are subordinates of the General Manager who assists the General Manager to pay people who have been injured at work, widows or widowers.

<sup>407</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 3.

<sup>408</sup> See 3.3 above.

<sup>409</sup> Section 8(a) of Statutory Instrument 68 of 1990.

However, an employee can still claim for additional compensation if he or she can prove that the injury or disease was caused by the negligence of the employer or any person entrusted by his or her employer with the management or in charge of such employer's trade or business.<sup>410</sup>

The main objectives of WCIF are to compensate workers who get injured at work, providing financial relief to employees and their families when an employee is injured or killed in a work related accident or suffers from a work related disease or dies thereof.<sup>411</sup> One of WCIF's objectives is to provide rehabilitation services to disabled employees so as to reduce their disablement and enable them to return to their former employment or otherwise prepare them for a useful and meaningful place in society.<sup>412</sup> In short, it can be submitted that this scheme aims to remove from the employer the burden of compensating an injured worker, both in terms of medical expenses and loss of earnings during periods of temporary lay-off due to illness or injury that is work-related.<sup>413</sup>

According to the NSSA, accident prevention is the responsibility of the Occupational Safety and Health (OSH) Division within NSSA, whilst compensation of employment injury victims, which is the main subject of this paper, is the responsibility of the WCIF. This paper will look at NSSA's WCIF to see whether it is complying with the international social security standards on compensation for occupational injuries and diseases.

#### **4.4.1 Financing and Administration of WCIF**

One of the major principles that can be deduced from the ILO Conventions<sup>414</sup> is that employment injury benefits must be financed by employers.<sup>415</sup> In Zimbabwe, the Accident Prevention and Worker's Compensation Scheme is administered by the office of the General Manager of NSSA. The General Manager receives all notices of accidents and claims for compensation then adjudicates on the matter after making an inquiry regarding the cause of accident and seriousness of the injury.<sup>416</sup> The General Manager is also responsible for the management of the operations, investments and property of the NSSA and also for advising

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<sup>410</sup> Section 9 of Statutory Instrument 68 of 1990.

<sup>411</sup> Section 3 of NSSA Act 12 of 1989.

<sup>412</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 25 July 2015).

<sup>413</sup> Chikova H 'Social Protection in Zimbabwe' International Conference SASPEN-FES "Social Protection for Those Working Informally. Social & Income (In) Security in the Informal Economy" (2013) 4.

<sup>414</sup> See 2.5 in Chapter 2.

<sup>415</sup> Myburgh P, Smit N & Van Der Nest D 'Social Security aspects of accident compensation: COIDA and RAF as examples' (2000) *Law, Democracy and Development* 45.

<sup>416</sup> Section 15 (1) of Statutory Instrument 68 of 1990.

the Minister of Labour, Public Works and Social Welfare on all matters concerning the operation of WCIF.<sup>417</sup>

WCIF is a scheme that is 100 per cent employer funded, meaning to say that employees do not contribute anything for them to be covered by this scheme. According to section 6 (1) of the Statutory Instrument,

‘an employer is any person or anybody of persons, corporate or un-incorporate, having a contract of employment or apprenticeship or learner ship with a worker or who employs a worker, and includes any person controlling the business of an employer.’<sup>418</sup>

Employers are supposed to pay monthly premiums to NSSA and these premiums finance this scheme.<sup>419</sup> The premiums differ according to the type of industry that the employer operates in.<sup>420</sup> According to NSSA, the industry premium rate is the rate that applies to all companies that are within the same industrial sector and is calculated based on the risk rating of that particular sector.<sup>421</sup> To calculate a premium, one has to look at the statistics of accidents that have happened in that sector, mainly focusing on the history of claims and the costs of these claims that have occurred over a specific period of time.<sup>422</sup>

The premiums are reviewed after every three years through actuarial valuations that assess financial viability and sustainability of the fund.<sup>423</sup> These actuarial valuations also help NSSA to forecast the WCIF’s ability to meet future financial obligations based on projected accidents rates and pension reforms and also advise NSSA on whether to increase or decrease premium rates in line with required financing levels needed to maintain viability of the fund.<sup>424</sup> When analysing the funding of WCIF, it can be determined that it is complying with the principle drawn from ILO Conventions<sup>425</sup> which states that employment injury benefits must be financed by employers because the funds are not coming from the employees but directly from the employers as required by the ILO.<sup>426</sup>

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<sup>417</sup> Section 25 of the NSSA Act 12 of 1989.

<sup>418</sup> Section 6 (1) of Statutory Instrument 68 of 1990.

<sup>419</sup> Section 40A of the NSSA Act 12 of 1989.

<sup>420</sup> Schedule 6 of the Statutory Instrument 68 of 1990.

<sup>421</sup> Section 40A of the NSSA Act 12 of 1989.

<sup>422</sup> Section 40A of the NSSA Act 12 of 1989.

<sup>423</sup> Chikova H ‘Political Economy of the Design of and Implementation of Existing Employment Injury Funds’ ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 5.

<sup>424</sup> Chikova H ‘Political Economy of the Design of and Implementation of Existing Employment Injury Funds’ ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 6.

<sup>425</sup> See 2.5 in Chapter 2.

<sup>426</sup> Article 71 of Social Security (Minimum Standards) Convention, 1952 (No. 102).

#### 4.4.2 Scope of application of WCIF

One of the major principles that can be deduced from the ILO Conventions<sup>427</sup> is that the appropriate scheme's scope of application must extend to at least half of the national workforce or twenty per cent of residents.<sup>428</sup> WCIF covers all workers working in a profession, trade or occupation who are above the age of 16.<sup>429</sup> WCIF defines a worker as:

- a) "any person who has entered into, or works under, a contract of employment or of apprenticeship or of learnership with an employer, whether the contract is expressed or implied, is oral or in writing, and whether the remuneration is calculated by time or by work done, or is in cash or in kind; and
- (b) any person undergoing rehabilitative treatment or training in terms of this Scheme; and
- (c) includes any person whose occupation is conveying for gain persons or goods by means of any vehicle, vessel or aircraft, the use of which he has obtained under any contract (other than a purchase or hire-purchase agreement) whether or not the remuneration of such person under such contract is partly an agreed sum and partly a share in the takings, but does not include any such person whose remuneration is fixed solely by a share in the takings."<sup>430</sup>

In the absence of a valid contract the General Manager can deal with any claim that has come before him or her as if it is valid when the injury occurred.<sup>431</sup> Therefore the fact that an employee was injured whilst working on an expired contract would not prevent him or her from successfully claiming under this scheme, because of the General Manager's discretion to allow the claim.

WCIF also compensates workers that get injured in the following circumstances:

- If a worker resides at the employer's property and then gets injured while going to work after leaving the residential quarters, he may be considered to have been injured on duty;
- If a worker is called out in an emergency after hours from a standby situation and is normally paid for such call-outs then he or she may be considered to have been injured on duty;
- If any employee is wearing artificial aids for example artificial limbs and these get damaged during a work related accident, such damage may be regarded as an 'injury' therefore they should be repaired or replaced.<sup>432</sup>

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<sup>427</sup> See 2.5 in Chapter 2.

<sup>428</sup> Olivier MP et al *Social Security: A Legal Analysis* (2003) 465.

<sup>429</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 25 July 2015).

<sup>430</sup> Section 4 (1) of Statutory Instrument 68 of 1990.

<sup>431</sup> Section 4(2)(c) of Statutory Instrument 68 of 1990.

<sup>432</sup> Section 5(1) (a-f) of Statutory Instrument 68 of 1990.

However, not all employees can be compensated by WCIF since the following persons are not covered by WCIF as they are not regarded as workers:

- (a) “any person who by the nature of his work is deemed to be an employer;
- (b) any person employed casually by an employer and not in connection with the employer's trade or business or any person employed casually for the purposes of any game or recreation unless so employed by a club or association of persons;
- (c) any outworker, that is to say, any person to whom articles or materials are given out by an employer to be made up, cleaned, washed, ornamented, finished or repaired or adapted for sale on premises not under the control of the employer;
- (d) any person employed outside Zimbabwe;
- (e) any person who is employed in domestic service in a private household.”<sup>433</sup>

In the situation where the employee unfortunately dies as a result of injuries or diseases that he or she contracted during his or her work, his or her dependants can claim compensation from WCIF on his or her behalf. Section 5 of the Statutory Instrument 68 of 1990 provides a list of people that can claim from WCIF as dependants:

- (a) “the widow or widower<sup>434</sup>, if married to the worker at the time of the accident;
- (b) if there is no widow or widower who, at the time of the accident, was wholly or partly dependent upon the worker for the necessities of life, any person with whom the worker was, in the opinion of the general manager, living as man and wife at the time of the accident;
- (c) any child if born before, or within 10 months after, the time of the accident;
- (d) any parent or step-parent or an adoptive parent who adopted such worker if the general manager is satisfied that the worker was in fact adopted prior to the accident;
- (e) any son or daughter (other than a child as defined), brother, sister, half-brother or half-sister or brother of a parent, or any grandparent or grandchild;
- (f) any person who at the time of the accident was wholly dependent upon the worker for the necessities of life.”<sup>435</sup>

In the case of a worker who leaves two or more widows, such widows shall be entitled to share between themselves such compensation as would be payable to a single widow of the deceased worker. The General Manager can either divide the compensation equally between

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<sup>433</sup> Section 4(3) (a-e) of Statutory Instrument 68 of 1990.

<sup>434</sup> Widow or widower refers to any person with whom the worker was, in the opinion of the General Manager, living as man and wife at the time of the accident. Section 3 of Statutory Instrument 68 of 1990.

<sup>435</sup> Section 5(1) (a-f) of Statutory Instrument 68 of 1990.

them or use his discretion to determine the amount that each widow will get from the compensation.<sup>436</sup>

#### 4.4.3 Limitations of Scope of Application

One of the major principles that can be deduced from the ILO Conventions is that the appropriate scheme's scope of application must extend to at least half of the national workforce or twenty per cent of residents.<sup>437</sup> However, in Zimbabwe this is not the case because a lot of workers are excluded from the operation of WCIF, as WCIF excludes certain categories of employees from its definition of an employee.<sup>438</sup> WCIF covers all employees that work in the private sector, local authorities and non-governmental organisations. It however excludes all civil servants, members of the armed forces, domestic workers and those who are self-employed or working in the informal economy.<sup>439</sup>

The exclusion of civil servants, armed forces, domestic workers and those working in the informal economy means that Zimbabwe is failing to meet the requirements of ILO which states that the scope of application must extend to at least half of the national workforce or twenty per cent of residents. Zimbabwe has a high rate of unemployment and the majority of the people that are working are those employed by the government and those working in the informal economy, of which both are not covered by WCIF.<sup>440</sup> It can therefore be submitted that Zimbabwe is failing to provide coverage to 20 per cent of its residents or half of the work force.

The high unemployment rate is a result of the crippling financial difficulties that the country has been facing ever since the controversial land reform program which has been implemented from the year 2000 onwards.<sup>441</sup> This resulted in Western governments imposing economic sanctions on Zimbabwe and as a result of these sanctions the country's economic sector has been hugely affected. It is submitted that due to the effects of the financial difficulties, the manufacturing industry has been hard hit leading to closures and many

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<sup>436</sup> Section 5 of Statutory Instrument 68 of 1990.

<sup>437</sup> Olivier MP et al *Social Security: A Legal Analysis* (2003) 465.

<sup>438</sup> Section 4(3) of Statutory Instrument 68 of 1990.

<sup>439</sup> Section 4 (3) of Statutory Instrument 68 of 1990.

<sup>440</sup> Chiumia S 'Is Zimbabwe's unemployment rate 4%, 60% or 95%? Why the data is unreliable available at <https://africacheck.org/reports/is-zimbabwes-unemployment-rate-4-60-or-95-why-the-data-is-unreliable/> (accessed 24 November 2015).

<sup>441</sup> Kaseke E *Right to Social Security* (2012) 1.

workers ended up joining the informal economy where there is no access to social insurance and little regard for occupational safety and health.<sup>442</sup>

Before the land reform programme the government of Zimbabwe had set its priorities to improve the scope of coverage of WCIF so as to include domestic workers by December 2001 and all the people employed in the informal sector by year 2005.<sup>443</sup> However this did not come to pass because of the financial crisis that engulfed Zimbabwe between 2002 and 2009 which completely crippled the social security system to the extent that from 2007 until 2008 the government actually stopped providing social assistance to millions of Zimbabweans.<sup>444</sup>

## **4.5 QUALIFYING CRITERIA**

### **4.5.1 Accidents**

According to section 3(1) of Statutory Instrument 68 of 1990 the definition of an 'accident' means an unlooked for mishap or untoward event or process of work arising out of and in the course of a worker's employment, which was not expected or designed by the worker and which results in an injury to him or her.<sup>445</sup> The meaning of the word accident under section 24 of Statutory Instrument 68 of 1990 is similar to the one offered by Section 1(i) of South Africa's COIDA. The Statutory Instrument provides that the worker or his or her dependants can only claim compensation from the WCIF if the accident that injured or killed the worker arose out of and in the course of his or her employment.<sup>446</sup> However, the General Manager can reject a claim for compensation if he determines that the accident can be attributed to the serious and wilful misconduct of the worker.<sup>447</sup> Serious and wilful misconduct includes working under the influence of alcohol or drugs and any contravention of any laws or statutory regulation made or lawful orders that are meant to protect and ensure the safety and health of workers.<sup>448</sup>

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<sup>442</sup> Mudavanhu N 'Occupational Safety and Environmental Risks Scenario of Small and Medium Enterprises (SMEs): An Analysis of the Situation in Harare Chemical Industries, Zimbabwe' (2013) 2 *American Chemical Science Journal* 100.

<sup>443</sup> Dhemba J, Gumbo P & Nyamusara J 'Social Security in Zimbabwe' (2002) 17 *Journal of Social Development in Africa* 2 123.

<sup>444</sup> Kaseke E *Right to Social Security* (2012) 6.

<sup>445</sup> Section 3(1) of Statutory Instrument 68 of 1990.

<sup>446</sup> Section 24(1) of Statutory Instrument 68 of 1990.

<sup>447</sup> Section 24(2) (a) of Statutory Instrument 68 of 1990.

<sup>448</sup> Section 3 of Statutory Instrument 68 of 1990.



The General Manager may also reject claims by dependants of a worker who died more than twelve months after being involved in an accident unless it is proved that the accident directly caused the death or was the principal contributory cause of his death.<sup>449</sup> The exception on the twelve month expiration period is beneficial to the dependants of the deceased worker because sometimes after an accident people recover fast, but as time goes on the after effects of the injury may return and change their lives and in this case it might lead to death. Therefore by proving that their deceased relative, who in most cases would be the breadwinner, died as a result of the injuries that he or she suffered whilst working for his or her employer, they will be able to successfully claim for compensation and get the much needed financial assistance.

However, for the purposes of claiming under the WCIF, section 24(3) of Statutory Instrument 68 of 1990 states that an accident which resulted in the disablement or death of a worker is deemed to have arisen out of and in the course of his employment notwithstanding that the worker at the time when the accident happened was acting in contravention of any law applicable to his employment or instruction from his employer.<sup>450</sup> The awarding of compensation to a worker who was injured whilst doing work without the instruction of his employer is a very important aspect of WCIF, because in most cases the worker would likely have been doing something that would have been beneficial to his employer's business.

Regarding workers that get injured outside Zimbabwe, a worker can successfully claim for compensation under WCIF if he or she usually works for his or her employer in Zimbabwe but gets injured whilst working for the same employer outside of Zimbabwe.<sup>451</sup> The worker shall be entitled to compensation in the same manner as if the accident has happened in Zimbabwe. However, this does not apply if the worker has been working outside Zimbabwe for twelve continuous months, unless the General Manager had earlier on agreed with the worker and his employer that if the employee gets injured outside Zimbabwe the accident would be regarded as if it had happened in Zimbabwe.<sup>452</sup>

#### **4.5.2 Occupational Diseases**

The WCIF provides compensation for workers suffering from occupational diseases where a medical practitioner grants a certificate that proves that a worker is suffering from a

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<sup>449</sup> Section 24(2) (b) of Statutory Instrument 68 of 1990.

<sup>450</sup> Section 24(3) of Statutory Instrument 68 of 1990.

<sup>451</sup> Section 13 (1) of Statutory Instrument 68 of 1990.

<sup>452</sup> Section 13 (1) of Statutory Instrument 68 of 1990.

scheduled disease that caused disablement or that the death of the worker was caused by a scheduled disease.<sup>453</sup> The list of scheduled diseases is found under Second Schedule of Statutory Instrument 68 of 1990. WCIF does not necessarily cover only scheduled diseases because a worker or any of his or her dependants can be granted compensation if they manage to prove that the disease that he or she (or their relative in the case of dependants) was suffering from was due to the nature of his or her employment. However, the General Manager will reject their claim if he or she finds out that the worker had wilfully and falsely represented in writing in reply to a specific question on whether he or she had previously suffered from the disease or not.<sup>454</sup>

With regards to workers who contracted an occupational disease whilst working outside Zimbabwe, the Statutory Instrument states that in no case shall the worker or his or her dependants be entitled to compensation in respect of any causation or aggravation of the disease which the worker contracted whilst employed outside Zimbabwe except in the case of a worker who ordinarily resides in Zimbabwe but who is employed outside Zimbabwe by his or her employer.<sup>455</sup>

The President of Zimbabwe may make rules by proclamation in the National Gazette whereby compensation which was awarded in any territory of any country to Zimbabweans can be transferred and administered by the General Manager and in cases whereby compensation was given to any foreign national that compensation can also be transferred to and administered by a competent authority in his or her native country.<sup>456</sup>

#### **4.6 PROCEDURE FOR CLAIMING COMPENSATION**

WCIF provides for a step-by-step procedure that has to be followed from the moment a worker gets injured until he or she is compensated. Immediately after a worker has been involved in an accident, the employer is obliged to provide first aid to the worker and then transport the injured worker to the nearest medical centre.<sup>457</sup> The employer can later on claim for the cost of transporting the worker to the medical centre from NSSA. If the General Manager determines that an employer had negligently or wilfully refused to transport an

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<sup>453</sup> Section 62(1) (a) of Statutory Instrument 68 of 1990.

<sup>454</sup> Section 62(1) (b) of Statutory Instrument 68 of 1990.

<sup>455</sup> Section 62(1) (b)(ii) of Statutory Instrument 68 of 1990.

<sup>456</sup> Section 86(c) of Statutory Instrument 68 of 1990.

<sup>457</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 25 July 2015).

injured worker to a medical centre, he can find the employer guilty of an offence.<sup>458</sup> This was done so as to ensure that an injured worker will get medical attention as soon as possible to avoid the situation where employers may claim that they do not have the funds to transport the injured worker to hospital. Employers that are refunded by NSSA may be more willing to spend their money so as to transport the injured worker.

According to section 48(1) of the Statutory Instrument, every employer shall within three days after an accident in which a worker is disabled or injured occurs, certify that the worker is unfit for work.<sup>459</sup> The employer should then record the accident with details regarding how, where and when it took place. The employer is required to notify the General Manager at the nearest NSSA office of the accident and particulars of the injured worker within 14 days of gaining knowledge of such work related accident.<sup>460</sup> In the event of a fatal accident at work, the employer is required to report such incidents to any nearest police station and NSSA offices within 24 hours of occurrence of the incidents.<sup>461</sup> Any employer who fails to comply with the above requirements will be found guilty of an offence.<sup>462</sup>

In the case where an employee has been diagnosed with an occupational disease, for example pneumoconiosis, the employer should create a report that should be submitted to NSSA in the same way as a workplace accident.<sup>463</sup> The adjudication process, which in some cases involves investigations at the workplace is done to determine whether or not the accident or disease is indeed work related and starts as soon as the report of an employment injury is submitted by the employer.<sup>464</sup> If the accident or disease is determined to not be work related, then the claim will be rejected and the employer and worker are notified of the outcome in writing. However, if it is found to be work related then a claim file is opened at the regional office and legitimate benefits arising from the injury are processed and then paid.<sup>465</sup>

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<sup>458</sup> Section 57(3) of Statutory Instrument 68 of 1990.

<sup>459</sup> Section 48(1) of Statutory Instrument 68 of 1990.

<sup>460</sup> Zendera M 'Occupational Accidents Reporting and Notification' (2013) 2 *NSSA On Guard* Volume 19 29.

<sup>461</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 7.

<sup>462</sup> Section 48(5) of Statutory Instrument 68 of 1990.

<sup>463</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 25 July 2015).

<sup>464</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 8.

<sup>465</sup> Zendera M 'Occupational Accidents Reporting and Notification' (2013) 2 *NSSA On Guard* 19 29.

## 4.7 CALCULATION OF BENEFITS

One of the general principles that can be taken from the international social security standards discussed in Chapter 2<sup>466</sup> is that the minimum compensation levels should be set at 50 per cent of lost earnings for an eligible worker with a family and 40 per cent for a surviving spouse and two children.<sup>467</sup> In Zimbabwe, the rules that govern the calculation of compensation are found in Section 41 of the Statutory Instrument 68 of 1990. The Act states that when calculating monthly earnings of a worker, the earnings that must be used are that which the worker was being paid by his employer at the time of the accident.<sup>468</sup> This number should include the value of any food or accommodation supplied by the employer to the worker, any overtime payments and any cost of living and local allowances. A worker's earnings shall not be calculated at a level below that prescribed by the Labour Relations Act 16 of 1985 as the minimum wage, unless the worker concerned was lawfully receiving a wage below the minimum prescribed in terms of any exemption or other dispensation granted to his employer.<sup>469</sup>

NSSA offers two forms of benefits and these are short term benefits that are meant to help the worker and his or her family for a short period while he or she is recovering from the injury, and the long term benefits that are there to help the worker or his or her dependants over a longer period of time.

### 4.7.1 Temporary Disablement

If an employee is involved in an accident and is not fit enough to work, as ascertained by a medical doctor, then NSSA will pay the wages or earnings in respect of the days that he missed work.<sup>470</sup> Usually the employer will pay the earnings to the injured worker and then get reimbursed by WCIF. An injured employee is paid 100 per cent of his or her earnings for the first 30 days following the accident but then after 30 days the percentage will vary according to a sliding scale based on his or her earnings.<sup>471</sup> If a worker is paid up to US\$600, his or her periodical payments will be set at 80 per cent of his or her monthly earnings.<sup>472</sup> In

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<sup>466</sup> See 2.5 in Chapter 2.

<sup>467</sup> Smit N *Employment Injuries and Diseases* (2003) 465.

<sup>468</sup> Section 41(1) of Statutory Instrument 68 of 1990.

<sup>469</sup> Section 41(6) of Statutory Instrument 68 of 1990.

<sup>470</sup> Chikova H 'Social Protection in Zimbabwe' International Conference SASPEN-FES "Social Protection for Those Working Informally. Social & Income (In) Security in the Informal Economy" (2013) 4.

<sup>471</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 25 July 2015).

<sup>472</sup> Section 33(1) (a) of Statutory Instrument 68 of 1990.

the scenario whereby a worker's earnings exceeds \$600 up to \$1 200, his or her periodical payments will be set at 60 per cent of his or her monthly earnings.<sup>473</sup> If he or she earns more than \$1 200 (up to \$2 000) then his or her periodical payments will be set at 50 per cent of his or her monthly earnings.<sup>474</sup>

#### **4.7.1.1 Periodical payments**

Periodical payments are made once a month by NSSA. However, there is a provision whereby the payments would be made weekly, provided that the monthly payments would be proportionally divided so as to cover all the weeks in a month.<sup>475</sup> The right to periodical payments ceases to exist upon the termination of temporary disablement. Therefore, once the worker is fit enough to resume his or her duties then the periodical payments will stop.<sup>476</sup> The payments would also lapse if the injured worker is awarded compensation for permanent disablement.<sup>477</sup> However, a worker is still eligible to claim for the reintroduction of the periodical payments provided that he or she proves that the injury has resurfaced.<sup>478</sup>

These periodical payments have a time limit of 18 months. Therefore, if a worker has received payments for a period or periods totalling 18 months, he or she will be regarded as if he or she has suffered a permanent disablement unless the contrary is proved.<sup>479</sup> Provided that in the case of an accident, the General Manager may after consulting with a medical board, direct that these periodical payments must continue to be paid to an injured worker for such a period as he may determine and such worker will not be deemed to be permanently disabled.<sup>480</sup>

One of the principles derived from international labour and social security standards is that the minimum compensation level should be set at 50 per cent of lost earnings for an eligible worker with a family.<sup>481</sup> Zimbabwe's compensation levels are complying with the standard

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<sup>473</sup> Section 33(1) (b) of Statutory Instrument 68 of 1990.

<sup>474</sup> Section 33(1) (c) of Statutory Instrument 68 of 1990.

<sup>475</sup> Section 33(4) of Statutory Instrument 68 of 1990.

<sup>476</sup> Section 33(5) of Statutory Instrument 68 of 1990.

<sup>477</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 25 July 2015).

<sup>478</sup> Section 33(5) of Statutory Instrument 68 of 1990.

<sup>479</sup> Section 33(3) of Statutory Instrument 68 of 1990.

<sup>480</sup> Section 33(3) of Statutory Instrument 68 of 1990.

<sup>481</sup> Article 65 of Social Security (Minimum Standards) Convention, 1952 (No. 102).

because the level of compensation for workers earning low earnings is set at 80 per cent whilst that of high earning workers is set at 50 per cent of their salaries.<sup>482</sup>

#### 4.7.1.2 Lump Sum Payments

If a worker is injured whilst on duty and that employment injury results in disablement or impairment that is less than 30 per cent, a lump sum is paid to him or her as compensation.<sup>483</sup>

Disability assessments that determine the percentage of a worker's injuries are usually done three months after the worker has been injured. These disability assessments are first done by each worker's medical doctor. However, these doctors' medical assessments are subsequently checked and verified by doctors employed by NSSA, who will either uphold or adjust the disability assessments.<sup>484</sup> There is no need for verification of medical assessments regarding scheduled disabilities such as amputations, because they are assessed immediately after the accident.<sup>485</sup>

In a scenario whereby a worker has suffered an injury that is 30 per cent or less and his or her monthly pension is less than \$60, the General Manager may in his discretion pay or order the payment in lieu of:

- (a) "the pension or portion of the pension, of a lump sum equal to 70 times the amount of monthly pension or portion of the monthly pension, as the case may be;
- (b) the children's allowance or portion of the children's allowance of a lump sum equal to 70 times the amount of the children's allowance or portion of the children's allowances."<sup>486</sup>

One of the principles of the international labour and social security standards identified above states that compensation must generally be in the form of a periodical payment instead of lump sum payments.<sup>487</sup> This is meant to protect injured employees by providing them with financial stability. However a reasonable exception may be made so as to give lump sum payments to low-income employees suffering from temporary disability.<sup>488</sup> The periodical payments that low-income employees suffering from 30 per cent disability would get is not

<sup>482</sup> Section 33(1) of Statutory Instrument 68 of 1990.

<sup>483</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 02 August 2015).

<sup>484</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 9.

<sup>485</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 9.

<sup>486</sup> Section 43(1) of Statutory Instrument 68 of 1990. Children's allowance refers to the monthly allowance that is payable in respect of a child or children of a disabled or deceased worker.

<sup>487</sup> Taylor Committee Report, 'Report No 11: Coverage against Employment Injuries and Diseases' (2002) 457.

<sup>488</sup> Article 15 of the Employment Injury Benefits Convention No 121 of 1964.

that much and, therefore, giving them their compensation in form of lump sum can be regarded as a reasonable exception to the international social security standards. Therefore, it is submitted that Zimbabwe complies with the principle that compensation must generally be in the form of a periodical payment.

#### **4.7.2 Permanent Disablement**

In instances where an employee's injury results in permanent disablement, compensation will be paid to the employee as a pension, if the disability is rated at more than 30 per cent.<sup>489</sup> Compensation will be calculated according to the degree of disablement of the worker and in accordance with the following provisions:

- where the degree of disablement is 100 per cent in the case of a married worker and in the case of an unmarried worker with children of his own, they are paid 75 per cent of their monthly earnings;
- where the degree of disablement is 100 per cent in the case of an unmarried worker with no children, he or she will be paid 75 per cent of the pension that is payable to a married worker with children.<sup>490</sup>

It can be submitted that Zimbabwe is complying with one of the principles of taken from the international social security standards discussed in Chapter 2<sup>491</sup> which states that the minimum compensation levels should be set at 50 per cent of lost earnings for an eligible worker with a family and 40 per cent for a surviving spouse and two children.<sup>492</sup> However it can be argued that section 34 of Statutory Instrument 68 of 1990 is contravening Convention 111 of the ILO which prohibits exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations.<sup>493</sup>

Section 34 states that a married worker with a degree of disablement of 100 per cent is paid 75 percent of his or her monthly earnings whilst an unmarried worker with no children but having the same degree of disablement is not paid 75 per cent of his or her monthly

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<sup>489</sup> Mpedi LG & Nyenti MAT 'Employment Injury Protection in Eastern and Southern African Countries' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 79.

<sup>490</sup> Section 34 of Statutory Instrument 68 of 1990.

<sup>491</sup> See 2.5 in Chapter 2.

<sup>492</sup> Smit N *Employment Injuries and Diseases* (2003) 465.

<sup>493</sup> Article 1(b) of Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

earning.<sup>494</sup> He or she will be paid 75 per cent of the pension payable to a married worker with children.<sup>495</sup> Therefore by discriminating against unmarried workers without children who cannot get the same compensation as their married colleagues with children, it can be submitted that section 34 of Statutory Instrument 68 of 1990, even though it complies with ILO standards on compensation of occupational injuries and diseases it however fails to comply with ILO Convention C111 which prohibits unfair discrimination amongst workers.

### 4.7.3 Foreign Workers

WCIF also pays pensions to people who were injured whilst working in Zimbabwe and later on relocated to their countries of origin.<sup>496</sup> In this respect, NSSA has pensioners throughout the world in countries such as South Africa, Malawi, Zambia, Italy and Portugal.<sup>497</sup> Therefore, Zimbabwe is complying with the principles of international social security standards which states that that migrant workers must receive equal treatment to the residents of that country. There should be reciprocal agreements among governments to ensure that migrants can receive compensation at home or away from home.<sup>498</sup>

However, it is important to know that if upon a medical review it is established that the employee has recovered and his residual disability is now below 30 per cent, the pension will be paid off as a lump sum.<sup>499</sup> Similarly, if upon a medical review it is discovered that the condition of a worker has deteriorated and his disability has risen to above 30 per cent, the lump sum previously paid is recovered and replaced by a temporary pension for the same period.<sup>500</sup> This provision is meant for both local and foreign workers and once they utilise this provision, the workers would then become fulltime pensioners.

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<sup>494</sup> Section 34(1) (a-b) of Statutory Instrument 68 of 1990.

<sup>495</sup> Section 34(1) (b) of Statutory Instrument 68 of 1990.

<sup>496</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 11.

<sup>497</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 11.

<sup>498</sup> Olivier MP et al *Social Security Law: General Principles* (1999) 317.

<sup>499</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 11.

<sup>500</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 11.



#### 4.7.4 Rehabilitation Benefit

NSSA offers full rehabilitation services for injured employees at a fully equipped Workers' Compensation Rehabilitation Centre in the city of Bulawayo.<sup>501</sup> This is where seriously injured workers are admitted so as to receive rehabilitation services including spinal injury care, physiotherapy and occupational therapy. These workers also receive vocational training in practices like carpentry and tailoring. NSSA also provide disabled pensioners with capital to start up self-sustaining projects; this helps in allowing injured workers to rejoin the society as employable or self-supporting members who are not wholly dependent on family members or the state.<sup>502</sup> Mpedi and Nyenti argue that NSSA is the only scheme in Southern Africa that provides rehabilitation of injured workers or those who contracts a disease because most employment injury schemes are compensation-focused, with little or no efforts to provide rehabilitation and reintegration to workers recovering from a disablement.<sup>503</sup>

#### 4.7.5 Constant Attendants Allowance

NSSA hires, trains and provides constant attendants to severely disabled workers, such as paraplegics and quadriplegics to assist them with their day to day care requirements. The constant attendants allowance is currently 80 per cent of the minimum pension.<sup>504</sup>

### 4.8 COMPENSATION FOR OCCUPATIONAL DISEASES

As discussed above, WCIF provides for compensation for workers suffering from occupational diseases.<sup>505</sup> WCIF provides that in a situation whereby a worker was not, at the date of the disablement or death employed in the occupation to the nature of which the disease is due, the earnings of the worker shall be calculated on the basis of his earnings when he was last employed in such occupation.<sup>506</sup> If the Commissioner is satisfied by a medical certificate granted by a medical practitioner then the worker or his or her dependants

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<sup>501</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 12.

<sup>502</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 02 August 2015).

<sup>503</sup> Mpedi LG & Nyenti MAT 'Employment Injury Protection in Eastern and Southern African Countries' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 83.

<sup>504</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 12.

<sup>505</sup> See 4.5.2 above.

<sup>506</sup> Section 62(1) (b) (ii) of Statutory Instrument 68 of 1990.

will be entitled to receive compensation from WCIF as if the contracting of the disease was an injury by accident arising out of and in the course of the worker's employment.<sup>507</sup>

If a worker is suffering from pneumoconiosis or whose death was caused by pneumoconiosis, compensation may only be claimed under WCIF if the medical certificate has been granted by the Medical Bureau in terms of the Pneumoconiosis Act certifying that the worker is suffering from or had suffered from pneumoconiosis.<sup>508</sup>

#### **4.9 MEDICAL COSTS**

According to section 58(1) of the Statutory Instrument, the General Manager, or the employer in some cases, shall defray any expenses reasonably and necessarily incurred by a worker as the result of an accident arising out of and in the course of his employment. The Act goes on to state examples of when the General Manager or employer can reimburse the worker, for example dental, medical, surgical or hospital treatment and the supply of medicines or surgical dressings.<sup>509</sup> The General Manager will also refund the worker for travelling costs to seek treatment either within or outside Zimbabwe as directed by a medical practitioner.<sup>510</sup>

In summation, NSSA pays all medical fees including transport, drugs, hospital fees and provide artificial appliances using the pricing system set by the Association of Healthcare Funders of Zimbabwe (AHFoZ).<sup>511</sup> However, the amount of money that can be refunded by the General Manager or an employer that is individually liable is limited to \$2 000.<sup>512</sup> The only way the General Manager can increase this figure is when he is satisfied that the injury that the worker suffered is of a serious nature therefore needs special medication or surgery.<sup>513</sup> The General Manager can also approve an agreement between employees and their employers whereby the employers will pay for their workers' medical aid coverage, the General Manager can only accept this agreement if he is of the view that the medical aid coverage is adequate.<sup>514</sup>

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<sup>507</sup> Section 62(2) of Statutory Instrument 68 of 1990.

<sup>508</sup> Section 62(3) of Statutory Instrument 68 of 1990.

<sup>509</sup> Section 58(1) of Statutory Instrument 68 of 1990.

<sup>510</sup> Section 58(1)(d) of Statutory Instrument 68 of 1990.

<sup>511</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 02 August 2015).

<sup>512</sup> Section 58(2) of Statutory Instrument 68 of 1990.

<sup>513</sup> Section 58(2) of Statutory Instrument 68 of 1990.

<sup>514</sup> Section 61 of Statutory Instrument 68 of 1990.

#### 4.10 COMPENSATION WHERE AN EMPLOYEE DIES

If a worker dies as a result of a work accident, the surviving spouse will receive a monthly pension equal to two thirds of the deceased worker's pension.<sup>515</sup> If the worker is survived by a widow<sup>516</sup> and one or more children, the widow would receive two thirds of his pension plus a monthly allowance for children, which is determined by the government.<sup>517</sup> The widow's pension and the children allowance are subject to the provision that they can only be paid if the joint amount of the two grants do not exceed the monthly earnings of the worker.<sup>518</sup> In the case of an employee with more than one wife, the General Manager will share the proceeds equally between them.<sup>519</sup> If a widow who is receiving the widow or widower's pension remarries, the pension is terminated starting from the day the marriage occurs. He or she will also get a lump sum that is equivalent to 24 months' pension.<sup>520</sup> However, it is important to note that children allowances remain the same because they are not affected by their parent's new marriage.<sup>521</sup>

If a single employee dies as a result of a work related accident and does not leave behind a widow or child but is survived only by his or her dependants, then these dependants can receive an allowance.<sup>522</sup> The dependants will be entitled to claim one third of the monthly pension the deceased would have received in terms of any provision related to his accident.<sup>523</sup> The dependants can be parents, sisters or brothers of the deceased worker and such an allowance will only be given if they prove their dependency beyond any reasonable doubt.<sup>524</sup>

In the unfortunate event of a worker losing his or her life as a result of a work related injury or disease, WCIF pays out a grant towards the funeral expenses.<sup>525</sup> The funeral grant is paid

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<sup>515</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 02 August 2015).

<sup>516</sup> Reference to 'widow' also include 'widower'.

<sup>517</sup> Sec 35(1)(c) of Statutory Instrument 68 of 1990.

<sup>518</sup> Sec 35(1) (c) of Statutory Instrument 68 of 1990.

<sup>519</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 02 August 2015).

<sup>520</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 02 August 2015).

<sup>521</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 02 August 2015).

<sup>522</sup> Sec 35(1) (d) of Statutory Instrument 68 of 1990.

<sup>523</sup> Sec 35(1) (d) of Statutory Instrument 68 of 1990.

<sup>524</sup> NSSA 'The Accident Prevention and Workers Compensation Scheme' available at <http://www.nssa.org.zw/index.php/template-features/2012-09-10-08-13-50> (accessed 02 August 2015).

<sup>525</sup> Mpedi LG & Nyenti MAT 'Employment Injury Protection in Eastern and Southern African Countries' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 79.

as a flat amount, currently pegged at \$300 which is meant to cover funeral expenses.<sup>526</sup> The money being paid by WCIF is insignificant when compared to the expenses that are incurred during a funeral. However, the point of paying the grant is that it can be used to pay some of the expenses, not to cover the whole funeral. The amount is reviewed from time to time so as to keep up with the inflation rate.<sup>527</sup>

#### 4.11 CONCLUSION

Zimbabwe's position is now being evaluated against the principles (drawn from ILO standards) stated in Chapter 2 so as to find out if Zimbabwe's system of compensation of occupational injuries and diseases is complying with these international labour and social security standards. Looking at Zimbabwe's social security system, with special reference to compensation of occupational injuries and diseases, it is submitted that it is to some extent complying with the international standards on occupational injuries and diseases. The first principle that Zimbabwe is complying with is that employment injury benefits must be financed by employers.<sup>528</sup> Zimbabwe is complying with this principle because the funds that sustain WCIF come from the contributions that would have been made by the employers.<sup>529</sup>

Another principle that Zimbabwe is complying with is that minimum compensation that should be given to an eligible employee with a family must be set at 50 per cent of the lost earnings.<sup>530</sup> Looking at Zimbabwe's compensation levels one can say that they are complying with the standard because the level of compensation for workers earning low earnings is set at 80 per cent whilst those of high earning workers is set at 50 per cent of their earnings.<sup>531</sup> Therefore Zimbabwe is complying with this standard, although it can be pointed out that the compensation that these workers will receive will provide minor benefit to their families because of the fact of that the majority of workers earn very low earnings.<sup>532</sup>

Zimbabwean law is complying with the principle which states that migrant workers must receive equal treatment to the citizens of that country and there should be reciprocal

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<sup>526</sup> My Wage 'Decent Work Check' available at <http://www.mywage.org/zimbabwe/main/decent-work-check/social-security/benefit> (accessed 02 August 2015).

<sup>527</sup> Chikova H 'Political Economy of the Design of and Implementation of Existing Employment Injury Funds' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 10.

<sup>528</sup> See 2.5 in Chapter 2.

<sup>529</sup> See 4.4.1 above.

<sup>530</sup> See 2.5 in Chapter 2.

<sup>531</sup> See 4.7.1.1 above.

<sup>532</sup> Government of Zimbabwe 'Poverty Datum Line' available at <http://www.zimtreasury.gov.zw/189-poverty-datum-lines-january-2014> (accessed 09 August 2015).

agreements among states to ensure that migrants can receive compensation at home or away from home.<sup>533</sup> WCIF complies with this principle because NSSA pays compensation to various people throughout the world in countries such as South Africa, Malawi, Zambia, Italy and Portugal that were injured whilst working in Zimbabwe and later relocated to their countries of origin.<sup>534</sup> WCIF makes provision for reciprocal agreements between Zimbabwe and other countries. However these agreements may not be being utilised correctly because of corruption and mismanagement.<sup>535</sup>

Another principle that Zimbabwe can be regarded to be complying with is the one that states that compensation must be generally in the form of a periodical payment which lasts throughout the contingency instead of lump sum benefit.<sup>536</sup> This is meant to protect injured employees by providing them with financial stability. However, a reasonable exception may be made so as to give lump sum payments to low-income employees suffering from temporary disability. The periodical payments that these low-income employees would receive will not be sufficient and as a result Zimbabwe can make an exception to the ILO Conventions so as to give them lump sums.

However, Zimbabwe is not complying with the principle which states that the scope of an appropriate scheme must extend to at least half of the national workforce or 20 per cent of residents.<sup>537</sup> WCIF does not comply with this principle because its scope is very narrow.<sup>538</sup> This is not also helped by the fact that the majority of workers are working in the informal economy, with no access to social security and very little regard for occupational health and safety by employers.<sup>539</sup> The direct exclusion of civil servants, armed forces, domestic workers and lack of provision for those working in the informal sector means that Zimbabwe is failing to meet the requirements of ILO which states that the scope of application must extend to at least half of the national workforce or twenty per cent of residents.<sup>540</sup>

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<sup>533</sup> See 2.5 in Chapter 2.

<sup>534</sup> See 4.7.2.2 above.

<sup>535</sup> Mpedi LG & Nyenti MAT 'Portability of Social Security Benefits in Mining Sector' available on [http://www.southernafricatrust.org/docs/highlights\\_portability\\_of\\_social\\_security\\_benefits\\_in\\_mining\\_sector.pdf](http://www.southernafricatrust.org/docs/highlights_portability_of_social_security_benefits_in_mining_sector.pdf) (accessed 02 October 2015).

<sup>536</sup> See 4.7.1.3 above.

<sup>537</sup> See 2.5 in Chapter 2.

<sup>538</sup> See 4.4.3 above.

<sup>539</sup> Mpedi LG & Nyenti MAT 'Employment Injury Protection in Eastern and Southern African Countries' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 81.

<sup>540</sup> See 4.4.3 above.

Finally, the government of Zimbabwe is aware that the current laws on occupational safety and health and employment injury are not achieving the desired outcomes. Therefore the laws are currently being reviewed to ensure that they are more focused and robust in enforcing strict occupational health and safety standards.<sup>541</sup> These new laws will help in the long run because the more accidents are prevented, less the burden on the compensation scheme.



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<sup>541</sup> My Wage 'Proposed review of health and safety legislation in Zimbabwe' available at [http://www.mywage.co.za/main/news/mywage-south\\_african-news/proposed-review-of-health-and-safety-legislation-in-zimbabwe-2013-november-2011](http://www.mywage.co.za/main/news/mywage-south_african-news/proposed-review-of-health-and-safety-legislation-in-zimbabwe-2013-november-2011) (accessed 09 August 2015).

## CHAPTER FIVE

### CONCLUSIONS AND RECOMMENDATIONS

#### 5.1 INTRODUCTION

In this final chapter of the mini-thesis, conclusions are drawn regarding the extent to which the statutory schemes for compensation for occupational injuries and diseases in South Africa and Zimbabwe are complying with international labour and social security standards. The principles that South Africa and Zimbabwe are complying with are covered first, then followed by principles they were found not to be complying with, followed by some recommendations for improvement.

#### 5.2 COMPLIANCE WITH ILO STANDARDS

The research question for this mini-thesis is: Do the Zimbabwean and South African statutory compensation schemes comply with the international standards on compensation for occupational injuries and diseases? The findings in chapters 3 and 4 on whether South Africa and Zimbabwe are complying with international labour and social security standards are now briefly outlined below based on the main principles used to evaluate the extent of compliance with ILO standards that were identified in chapter 2<sup>542</sup> and to answer the research question.

##### 5.2.1 Funding of benefits

The first principle identified above states that employment injury schemes must be financed by employers not employees.<sup>543</sup> South Africa and Zimbabwe are complying with this principle because South Africa's COIDA<sup>544</sup> and Zimbabwe's WCIF<sup>545</sup> are both financed by contributions that are made by the employers.

##### 5.2.2 Form of payments

Regarding the form of payments, the identified principle states that compensation must generally be in form of a periodic payment that should last throughout the contingency as opposed to a lump-sum benefit.<sup>546</sup> South Africa and Zimbabwe are both complying with this principle because they provide compensation in the form of periodical payments.<sup>547</sup> Even

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<sup>542</sup> See 2.5 of Chapter 2.

<sup>543</sup> See 2.5 of Chapter 2.

<sup>544</sup> See 3.4.1 in Chapter 3.

<sup>545</sup> See 4.4.1 in Chapter 4.

<sup>546</sup> See 2.5 of Chapter 2.

<sup>547</sup> See 3.7.1 of Chapter 3.

though both South Africa and Zimbabwe sometimes provide compensation in the form of lump sums, it can be argued that they are still complying with this principle because they will be using the exception provision provided for by the ILO.<sup>548</sup> The provision states that a reasonable exception may be made so as to give lump sum payments to low-income employees suffering from minor temporary disablement.<sup>549</sup>

### **5.2.3 Compensation levels**

This principle states that minimum compensation levels should be set at 50 percent of lost wages for an eligible worker with a family including a spouse and two children, and 40 percent for a surviving spouse and two children.<sup>550</sup> Zimbabwe is complying with this principle because the level of compensation for workers earning low earnings is set at 80 per cent whilst compensation for those earning high earnings is set at 50 per cent of their earnings.<sup>551</sup> South Africa is also complying with this principle because its level of compensation for the more serious degrees of disablement is 75 per cent of an employee's monthly earnings.<sup>552</sup>

### **5.2.4 Equal treatment of migrant workers**

This principle states that migrant workers should be treated equally to national workers and allowed to meet the same eligibility rules and receive the same levels of employment injury compensation as the national work force.<sup>553</sup> The relevant standard goes on to suggest that there should be reciprocal agreements between governments to ensure that migrants can receive compensation at home or abroad. Zimbabwe is complying with this principle because WCIF has various agreements with other schemes from various countries around the world and as a result of this WCIF pays compensation to a lot of people throughout the world that were injured whilst working in Zimbabwe and later relocated to their countries of origin.<sup>554</sup>

Even though South Africa also has some agreements with other countries, it is not fully complying with this principle because there are a lot of reported cases regarding the problems that are experienced by migrant ex-mineworkers to access their benefits.<sup>555</sup>

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<sup>548</sup> See 4.7.1 of Chapter 4.

<sup>549</sup> See 4.7.1.1 of Chapter 4.

<sup>550</sup> See 2.5 of Chapter 2.

<sup>551</sup> See 4.7.1 of Chapter 4.

<sup>552</sup> See 3.7.1.2 of Chapter 3.

<sup>553</sup> See 2.5 of Chapter 2.

<sup>554</sup> See 4.7.3 of Chapter 4.

<sup>555</sup> See 3.11 of Chapter 3.



### 5.2.5 Scope of application

This principle states that the appropriate scheme's scope of application must extend to at least half of the national workforce or 20 per cent of residents.<sup>556</sup> South African and Zimbabwean law is not complying with this principal because COIDA<sup>557</sup> and WCIF<sup>558</sup> have limited scope of coverage that does not cover a lot of people including domestic workers and workers working in the informal economy.

## 5.3 RECOMMENDATIONS

South Africa's and Zimbabwe's compensation of occupational injuries and diseases systems are to some extent complying with the principles drawn from the international labour and social security standards but a lot still need to be done so as to make these two countries comply with all the principles. For example, Mpedi and Nyenti suggest that countries like South Africa and Zimbabwe must extend their statutory definition of 'employee' or 'worker' so as to include categories of employees that are currently not covered by their schemes.<sup>559</sup>

Looking at the two countries compensation of employment injuries and diseases schemes it is submitted that Zimbabwe offers a better scheme than South Africa because it offers higher levels of compensation for those suffering from temporary disablement and for migrant workers who have returned to their countries of origin. Zimbabwe unlike South Africa, is the only country in Southern Africa that provides rehabilitation of injured workers or those who contracts a disease as a result of their employment.<sup>560</sup> NSSA also hires, trains and provides constant attendants to severely disabled workers, something which COIDA does not provide.

It is submitted that an important reason for the difference between the South African and Zimbabwean systems is that compensation for occupational injuries and diseases in Zimbabwe forms part of a coherent social insurance system run by the NSSA.<sup>561</sup> It is recommended that South Africa must find a fool proof way of ensuring that the compensation they provide to migrant workers will reach its intended targets instead of being misused by corrupt government officials. It is recommended that South Africa steps up its social security

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<sup>556</sup> See 2.5 of Chapter 2.

<sup>557</sup> See 3.4.2 of Chapter 3.

<sup>558</sup> See 4.4.2 of Chapter 4.

<sup>559</sup> Mpedi LG & Nyenti MAT 'Employment Injury Protection in Eastern and Southern African Countries' ILO FES Workshop Employment Injury Protection in Eastern and Southern Africa (2014) 85.

<sup>560</sup> See 4.7.4 of Chapter 4.

<sup>561</sup> See above at 4.3 in Chapter 4.

reform process in order to create a comprehensive national social security system,<sup>562</sup> which includes compensation for occupational injuries and diseases, to replace the current fragmented system. It is also recommended that the new social security system is designed to take the issue of coverage of currently excluded workers and workers in the informal economy into consideration.

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<sup>562</sup> See Malherbe ED “Intergenerational solidarity and the provision of support and care to older persons” (unpublished LLD thesis, UWC, 2010) chapter 5.

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