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REMOTE WORKING AND LABOUR LEGISLATION IN SOUTH AFRICA

A proposal submitted for approval in partial fulfilment of the requirements for the degree of LLM: Labour Law in the Department of Mercantile and Labour Law, University of the Western Cape.

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DECLARATION

I, Jessica Ann James, declare that '**Remote work and labour legislation in South Africa**' is my own and has not been submitted before for any degree or examination at a University. I declare that all the sources I have used or quoted in this paper are acknowledged as complete references.

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ABSTRACT

The coronavirus pandemic has caused working arrangements to evolve to remote work across the globe, which has become an area of concern for labour legislation, particularly in South Africa. The Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997, among other statutes, were enacted to regulate working conditions in the workplace. These legislations were enacted to give effect to section 23 of the Constitution which provides that everyone has the right to fair labour practices as well as section 9 of the Constitution which provides that everyone is equal before the law. However, there is a lacuna in the legislation as there is no explicit provision regulating remote work. The objective of this study is to analyse the labour legislation in South Africa to determine to what extent employees working from home are catered for under existing labour statutes. Within this context, working hours, occupational health and safety, and employee performance will be discussed. Furthermore, a comparative analysis with relevant Italian legislation will be conducted.

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KEYWORDS AND PHRASES

Working hours

Working conditions

Occupational health and safety

Remote working

Labour legislation

Telework

Changing world of work

Future of work

Working from home

Telecommuting

TABLE OF CONTENTS

ABBREVIATIONS

BCEA: Basic Conditions of Employment Act 75 of 1997

CC: Constitutional Court

CCMA: Commission for Conciliation, Mediation and Arbitration

COIDA: Compensation for Occupational Injuries and Diseases Act 130 of 1993

COSATU: Congress of South African Trade Unions

COVID-19: Coronavirus

ECTA: Electronic Communication and Transaction Act 25 of 2002

EEA: Employment Equity Act 55 of 1998

FAD: European Social Partners' Autonomous Framework Agreement on Digitalisation

ICA: Industrial Conciliation Act 11 of 1924

ICT: Information and Communication Technologies

ILO: International Labour Organisation

LAC: Labour Appeal Court

LRA: Labour Relations Act 66 of 1995

MHSA: Mine Health and Safety Act 29 of 1996

NCBA: National Collective Bargaining Agreement

NEDLAC: National Economic Development and Labour Council

OHS: occupational health and safety

OHSA: Occupational Health and Safety Act 85 of 1995

POLA: Organisational Plan for smart work

POPIA: Protection of Personal Information Act 4 of 2014

UK: United Kingdom

RDP: Reconstruction and Development Programme

RICA: Regulation of Interception of Communication and Provision of Communication Related Information Act 70 of 2002

SMS: Short Message System

SPA: Social Partnership Agreement

WFH: working from home

CHAPTER 1: INTRODUCTION

1.1. Introduction

The world of work is being shaped by globalization, technological innovations and more recently the Coronavirus pandemic (hereafter referred to as COVID-19). The COVID-19 was declared a pandemic by the World Health Organisation on the 11 March 2022.[1] As a result, millions of employees in South Africa and around the world, worked from home.[2] Working from home is commonly referred to as 'remote working', 'telework', 'virtual work' and 'telecommuting'.[3] While not necessarily a new phenomenon, increasingly, many businesses are shifting away from traditional work offices and are moving towards remote work arrangements.[4] For example, the CEO of Facebook, Mark Zuckerberg, confirmed that fifty percent of his employees will work remotely within the next five to ten years.[5] In South Africa, Standard Bank's chief executive, Sim Tshabalala, stated that there is a push towards digitalisation and that Standard Bank's employees will continue to work on a hybrid basis for the next year.[6] Although, this change in the employment relationship paradigm has long been predicted, the COVID-19 pandemic fast-tracked this dramatic increase of remote work as part of the landscape in the world of work.[7]

Studies have shown that remote working impacts the quality of employment conditions, depending on the personal and professional characteristics of individual employees, for example, technology savviness, access to internet and family responsibilities, among others.[8]

[1] Radi S 'The Future after the Covid-10 Pandemic: Remote Work in South Africa' available at *The Future after the Covid-19 Pandemic: Remote Work in South Africa - Kujenga Amani (ssrc.org)* (accessed 23 October 2022).
[2] Donthu N & Gustafsson A 'Effects of COVID-19 on business and research' (2020) 117 *Journal of Business Research* 285.
[3] Bloom N & Liang J et al 'Does Working from Home Work? Evidence from a Chinese Experiment' (2015) 130 *The Quarterly Journal of Economics* 165.
[4] Ntlhoro M & Raseote N 'South Africa: Regulating employee conduct while working remotely' available at *https://ensafrica.com/news/detail/2556/south-africa-regulating-employee-conduct-whil/* (accessed 23 March 2021).
[5] Olivier D, Miti-Qamata L, Patel A & Mhlongo T 'Remote Working Challenges To Traditional Employment Contracts' available at *https://www.adams.africa/labour-law/remote-working-employment-contracts/* (accessed 20 March 2021).
[6] Staff Writer 'South Africa's biggest banks are making a work-from-home shift' available at *https://businesstech.co.za/news/banking/515006/south-africas-biggest-banks-are-making-a-work-from-home-shift/* (accessed 09 September 2021).
[7] Choudhury P 'Our Work-from-Anywhere Future' available at *https://hbr.org/2020/11/our-work-from-anywhere-future* (accessed 09 September 2021).
[8] Lodovici E et al 'The impact of teleworking and digital work on workers and society' available at *https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU(2021)662904_EN.pdf* (accessed 09 September 2021).

This could arguably foster polarization in the workplace.[9] Besides, remote work could also lead to the breakdown of certain employment features such as difficulty in striking a balance between work and private life; increased and more intense working hours; moving financial burden for work tools to employees (for example, payment of internet connection), and uncertainty around health and safety protections as well as employee privacy.[10] However, regardless of these drawbacks, remote working has introduced flexibility and ushered in a new era of inclusiveness and productivity.[11] As a result, many researchers have predicted that remote work is here to stay.[12] Against this background, this mini-thesis explores the extent to which existing South African labour statutes cover remote work and employees working remotely, particular focus will be on the working hours, occupational health and safety and employee performance.

1.2. Problem statement and scope of thesis

This thesis is broadly focused on the regulation of remote work in South Africa. This is of interest because the Covid-19 pandemic has fast-tracked the adoption of remote work as part of the landscape in the world of work. As a result, there is need to ensure that labour legislation adequately regulates remote work and protects employees working remotely. Labour legislation regulates the employment relationship with the goal of correcting an imbalance in bargaining power between the employer and employee in order to secure a more just working relationship for the worker.[13] However, various dimensions of employment relations have emerged which go beyond the traditional employment structure. One of which is remote work arrangements, raising new potential challenges which might be beyond the scope of the existing regulatory framework.

[9] Böhm M 'The Causes and Consequences of Job Polarization, and their Future Perspectives' available at *https://www.bbvaopenmind.com/en/articles/causes-and-consequences-of-job-polarization-and-their-future-perspectives/* (accessed 09 October 2021).
[10] Oakman J et al 'A rapid review of mental and physical health effects of working at home: how do we optimize health? (2020) 20 *BMC Public Health* 4.
[11] Lodovici E et al 'The impact of teleworking and digital work on workers and society' available at *https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU(2021)662904_EN.pdf* (accessed 09 September 2021).
[12] Willcocks L 'Remote working: here to stay?' 2020 *LSE Business Review* 5.
[13] Howe J *The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation and Decent Work* (published Legal Studies Research Paper No. 529, University of Melbourne, 2011) 1.

Remote work does not have a standardized definition or terminology.[14] Matli W defines remote work as 'people working from their homes who use technology to communicate with their managers and colleagues'.[15] Perry S and Hunter E further define remote work as 'performing work at a location other than one's primary office'.[16] Examples of these locations are the homes of employees, coworking spaces, coffee cafes and local libraries, among others. The scope of this thesis is limited to employees who work from home, due to space constraints. These authors go further to state that remote working has resulted in flexible working arrangements between employers and employees.[17] The difficulty with this is that there is no boundaries or regulations regarding these arrangements. In other words, employees can communicate with their colleagues, managers or vice versa at any time of the day. This indicates that emails can be exchanged outside of the traditional working hours. According to research, many employees feel obliged to work longer hours when WFH than when working from the employer's premises.[18] However, long working hours have a negative effect on health. Employees working long hours have a higher chance of inducing hypertension, diabetes, and metabolic syndrome, amongst others.[19] Together with this, heart disease, stroke, increased mortality and adverse effects on mental health are likely to occur, which have adverse effects on family responsibility such as creating tension, stress and other emotional as well as behavioural consequences.[20] These are some of disadvantages of the flexible arrangements and lack of facilitation thereof. Consequently, researchers have highlighted the need for the development of policies to regulate remote working arrangements between employers and employees.[21]

[14] Matli W 'The changing work landscape as a result of the Covid-19 pandemic: insights from remote workers life situation in South Africa' 2020 *International Journal of Sociology and Social Policy* 1238.
[15] Matli W (2020) 1238.
[16] Perry S & Hunter E 'Out of Office: What Type of Employee is Best Suited for Remote Work?' (2019) 12 *Keller Center Research Report* 1.
[17] Matli W (2020) 1238; Perry S & Hunter E (2019) 1.
[18] Howe J *The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation and Decent Work* (published Legal Studies Research Paper No. 529, University of Melbourne, 2011) 1: Spurk D & Straub C 'Flexible employment relationships and careers in times of the COVID-19 pandemic" (2020) 119 *Journal of Vocational Behavior* 2.
[19] Wong K, Chan A & Ngan S 'The Effect of Long Working Hours and Overtime on Occupational Health: A Meta-Analysis of Evidence from 1998 to 2018' (2019) 16 *International Journal of Environmental Research and Public Health* 1-2.
[20] Park S et al 'The negative impact of long working hours on mental health in young Korean workers' (2020) 15 *PLOS ONE* 2.
[21] Lippel K & Walters D 'Regulating health and safety and workers' compensation in Canada for the mobile workforce: now you see them, now you don't' (2019) 29 *Journal of Environmental and Occupational Health Policy* 1.

Longer working hours is not the only challenge that has emerged as a result of the prevalence of remote work.[22] Remote working has implications for health and safety.[23] Many occupational health and safety (OHS) laws are not relevant to remote work arrangements. The need for appropriate regulatory measures, as stated by Lacopo S and Spinelli C, is to ensure that employees working from home do not burn out and are able to distinguish between their working life and personal life.[24] Therefore, it is useful to have measures in place to ensure there is no intrusion on the employee's personal life and employees can disconnect from work. Despite South Africa having OHS legislation in place to cover injuries that occur during the course and scope of employment duties, employees working from home that are injured are not protected. This is more fully illustrated and discussed in chapter 3.4.

The employment relationship in South Africa is specifically regulated by the Labour Relations Act 66 of 1995 (LRA), Basic Conditions of Employment Act 75 of 1997 (BCEA), Occupational Health and Safety Act 85 of 1993 (OHSA) and Employment Equity Act 55 of 1998 (EEA), among others.[25] These Acts were enacted to provide employees with fair labour practices by affording employees protective measures. These Acts provide the scope of their application in the workplace. For the LRA and the BCEA, only workers who fall within the definition of an employee and certain non-standard employees can receive the protective measures under these statutes.[26] Nonetheless, the scope and application of these laws presupposes that employment is performed in traditional offices and within the typical model of labour law.

The pandemic has prompted a change in the employment relations paradigm. Indeed, remote working has largely decentralized the traditional employment structure.[27] However, as will be discussed further in chapter three, this 'new' way of working offers both new opportunities and potential regulatory challenges. Therefore, a question that arises is whether the existing legal framework is fit for remote work. As previously mentioned, remote work allows employees

[22] Lippel K & Walters D (2019) 1.
[23] Spurk D & Straub C (2020) 2.
[24] Lacopo S & Spinelli C '(Re-) Regulating Remote Work in the Post-pandemic scenario: Lessons from the Italian experience' (2021) 14 *Italian Labour Law e-Journal* 237.
[25] Skills Development Act 97 of 1998, Unemployment Insurance Act 30 of 1996 and Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[26] Labour Relations Act, section 186.
[27] Malone T *The Future of Work: How the New Order of Business Will Shape Your Organization, Your Management Style, and Your Life* (2005) 5.

to embark on flexible working arrangements.[28] Flexible working arrangements are often associated with longer working hours because employers/employees can communicate with each other at any time. Due to this, employees might not disconnect from work, potentially leading to imbalance in work and personal life.[29] Notably, South Africa does not have the right to disconnect which may result in employees working all hours.[30] These academics have raised that there should be changes to the current legislation or the development of a national code of practice should be put in place to ensure employees can disconnect from work and prevent burnout, among other concerns.[31] Consequently, consideration needs to be applied to the definition of 'ordinary hours of work' and 'overtime' within the context of remote work.[32] Related to this, employees that are continuously working are likely to face increased stress levels and are prone to burnout and anxiety, amongst others.[33] High levels of stress, anxiety and burnout has the potential for employees to underperform.[34] This can result in employees being dismissed for poor work performance.

Another challenge that arises from remote work, is how employee performance would be measured and monitored.[35] In other words, how will the performance of employees' working from home (hereafter referred to as WFH) be measured while respecting their right to privacy. Arguably, employers can make use of remote monitoring technologies to measure employees' active time and take photos of employees to ensure he/she is sitting at their computer.[36] Although, remote monitoring technologies can be a useful tool for employers to monitor

[28] Jermyn R 'Working remotely – the employment law and HR considerations' available at *https://www.lexology.com/library/detail.aspx?g=edd65615-ac2e-4bf2-96f0-5177173c64bc* (accessed 11 September 2021).
[29] Jermyn R 'Working remotely – the employment law and HR considerations' available at *https://www.lexology.com/library/detail.aspx?g=edd65615-ac2e-4bf2-96f0-5177173c64bc* (accessed 11 September 2021).
[30] Staff Writer 'Proposal for new laws to stop work calling you after hours in South Africa' available at *Proposal for new laws to stop work calling you after hours in South Africa (businesstech.co.za)* (accessed 11 March 2023).
[31] Staff Writer 'Proposal for new laws to stop work calling you after hours in South Africa' available at *Proposal for new laws to stop work calling you after hours in South Africa (businesstech.co.za)* (accessed 11 March 2023).
[32] Olivier D et al 'South Africa: Remote Working Challenges To Traditional Employment Contracts' available at *https://www.mondaq.com/southafrica/employee-rights-labour-relations/1009368/remote-working-challenges-to-traditional-employment-contracts* (accessed 12 September 2021).
[33] Jacobs E 'Homeworking: isolation, anxiety and burnout' available at *https://www.ft.com/content/315095c0-7da0-11ea-8fdb-7ec06edeef84* (accessed 12 September 2021).
[34] Pindek S 'Failing Is Derailing: The Underperformance as a Stressor Model' (2020) 11 *Front Psychol* 1-2.
[35] Israelstam I 'Managing employees working remotely' available at *https://www.labourlawadvice.co.za/articles/managing-employees-working-remotely/* (accessed 12 September 2021).
[36] Zielinski D 'Monitoring Remote Workers' available at *https://www.shrm.org/hr-today/news/all-things-work/pages/monitoring-remote-workers.aspx* (accessed 12 September 2021).

employees' performance, this is not without legal implications. Indeed, this is potentially a breach of the right to privacy. Consideration would need to be given to these legal obligations, such as the right to privacy, when harnessing these monitoring tools. This is discussed in chapter 3.

Similarly, remote work has implications for the health and safety of employees. In terms of the OHSA, employers are obligated to take reasonable and practical steps to ensure that the health and safety of employees are catered. However, the context of remote work makes the implementation of this obligation a challenge. In other words, how will the employer effectively and efficiently protect his/her remote employees' health and safety. All of the above challenges have regulatory implications. Given the absence of specific guidelines and laws on remote work in South Africa, this mini-thesis explores to what extent existing legislation regulates remote work in the country. Against this background, the working hours, occupational health and safety, and performance of employees working remotely will be the focus of this mini-thesis. The discussion in this thesis applies only to employees as defined by South African labour statutes.

1.3. Research question

The key question addressed in this thesis is: 'to what extent does South Africa's labour legislation make provisions for remote work?' This requires a consideration of more specific questions, including:

- Does South Africa labour legislation adequately safeguard working hours for employees working remotely? Is the current method of monitoring working hours suitable for employees working remotely?
- How would employers ensure that their remote employees are working in a safe and healthy environment in compliance with section 8(1) of the OHSA?[37]
- Should employers be held responsible for any injuries that occur during working hours while employees are working from home? If so, are the current regulatory requirement applicable?

[37] Act 85 of 1993.

- How should employers oversee the performance of the employees working from home without violating the right to privacy?

1.4. Significance and aim of thesis

South Africa has limited research on the regulation of remote work.[38] Yet, as stated earlier, remote work is here to stay. Inadequate regulation of employees working from home can result in severe consequences, such as psychosocial and psychological risks, amongst others.[39] This research therefore contributes to literature on the regulation of remote work in South Africa.

The key research explores the extent to which the current regulatory framework makes provision for remote work. This is significant for many reasons. First, the BCEA as well as section 23 of the Constitution of the Republic of South Africa gives effect to the right to fair labour practices by, for example, regulating the working hours.[40] Throughout this mini-thesis, gaps are identified to indicate that the current BCEA does not adequately regulate the working hours of employees WFH. Secondly, the OHSA places obligations on employers to reduce the hazards within the workplace, which is conducted through risk assessments; and ensure proper health and safety assistance programmes are in place. However, since employees are working remotely, this has become a challenging task as discussed throughout this mini-thesis. Thirdly, employee performance is an important factor in businesses as employee performance determines the outcome of business' achieving their goals and improving productivity. This mini-thesis highlights that employers cannot physically monitor or supervise employees that are telecommuting, therefore, certain measures would need to be put in place to allow employers to oversee the performance of employees working remotely without invading their personal lives and privacy, as regulated by certain Acts.[41]

Finally, the study of the potential regulatory challenges of remote work presents an opportunity for contribution towards to the development of policies for regulating remote work in South

[38] Thomas A & Nicholas B "Teleworking in South Africa: Employee benefits and challenges" (2010) 8 *SA Journal of Human Resource Management* 7.
[39] International Labour Organisation *Homeworkers need to be better protected, says the ILO* (2021) International Labour Organisation: Geneva.
[40] Section 23 of the Constitution of the Republic of South Africa, 1996.
[41] Electronic Communication and Transaction Act 25 of 2002; Regulation of Interception of Communications and Provisions of Communications Related Information Act 70 of 2002; Protection of Personal Information Act 4 of 2013; section 14 of the Constitution of the Republic of South Africa, 1996.

Africa. Indeed, the findings and recommendations from this research has both legal and practical implications which will be beneficial to both employees, employers and policymakers. As this research provides a prism for further debates on how to effectively regulate the employment relationships in a changing world of work.

1.5. Research methodology

The principal method of research informing this mini-thesis is desk-based analysis. This involves the collection of data or the gathering and analysis of information from existing resources.[42] This mini-thesis will rely on relevant primary sources such as national legislation, case law and other regulatory instruments to understand the extent to which South Africa's labour laws regulates remote work. This paper will, further, rely on secondary sources such as textbooks, journal articles, working papers and internet publications.

Furthermore, a comparative study will be used to indicate the extent in which South Africa's current labour legislation caters for remote work, that is; how the current regulatory framework provides guidance regarding work-related accidents, balancing risk assessments with employee's privacy and implementing clear working hour procedures to employees working remotely. This comparison will be limited to Italy as they have implemented legislation regulating remote work.

1.6. Chapters outline

This mini-thesis consists of six chapters. Chapter one broadly introduces the study, presents the problem statement and scope of research, and the research question and method.

Chapter two provides an overview of the context of employment and labour regulation in South Africa. This chapter discusses the history and the current state of labour regulations in South Africa.

[42] Villegas F 'Desk Research: What it is, Tips & Examples' available at *Desk Research: What it is, Tips & Examples | QuestionPro* (accessed 11 March 2023).

Chapter three provides an extensive analysis on the following dimensions of remote work: working time, employee performance, and OHS. This analysis is done within the context of the existing labour regulation and highlights potential regulatory challenges.

Chapter four provides a comparative analysis on the regulation of remote work in Italy and explores three distinct aspects (working time, employee performance, and OHS) of remote work in this country.

Chapter five discusses potential options/pathways for the regulation of remote in South Africa to ensure effective protection for employees.

Finally, chapter six concludes this mini-thesis and reiterate the main points highlighted. This chapter recognises policy implications for regulatory remote work in South Africa.

CHAPTER 2: REGULATION AND OVERVIEW OF THE EMPLOYMENT RELATIONSHIP IN SOUTH AFRICA

2.1. Introduction

This chapter provides an overview of the developments of labour law in South Africa. In this regard, this chapter aims to set out the context for chapter 3 where the specific regulation of remote work in South Africa is discussed. The chapter consists of three parts. The first section explores the historical background of employment in South Africa pre-1994, tracing the attempts to create a dual system of labour relations based on race. Section 2 discusses the advent of the democratic government in 1994 after which new labour statutes were introduced to address the marginalisation in labour relations created by the apartheid system. This leads to the analysis in section 3 which highlights how the current labour regulatory framework primarily protects workers who fall within the definition of employee. The meaning of employee and the tests for determining whether an individual is an employee are briefly discussed. This section ends by highlighting disruption of the world of work, how the COVID-19 pandemic fast-tracked the advancement of technology as well as the adoption of remote work.

2.2. Historical background of employment regulation in South Africa

Before 1994, Blacks workers in South Africa lived oppressed and difficult lives due to apartheid.[43] Apartheid is a racial segregation amongst South Africans in which white supremacy had control over the system of legislation and policies.[44] South Africa was separated by race, which was achieved through legislation as well as the 'exercise of the power of the State and the furtherance of long-established attitudes, customs and prejudices'.[45] Within this system, the Black majority were restricted by oppressive laws and were treated as slaves.[46] Examples of such oppressive laws include the Population Registration Act 30 of 1950 which

[43] Gwynn B 'Overcoming Adversity from All Angles: The Struggle of the Domestic Worker during Apartheid by Bennett Gwynn' available at *https://www.sahistory.org.za/article/overcoming-adversity-all-angles-struggle-domestic-worker-during-apartheid-bennett-gwynn* (accessed 27 December 2021).
[44] Ford C 'Challenges and Dilemmas of racial and Ethnic Identity in American and Post-Apartheid South African Affirmative Action' (1996) 43 *UCLA Law Review* 1957.
[45] Vose W 'Wiehahn and Riekert Revisited: A Review of Prevailing Black Labour Conditions in South Africa' (1985) 124 *INT'I LAB. REV* 447.
[46] Harber J *The Malevolent Invisible Hand: Evolving Institutions of Social and Labour Control in Apartheid and Post-Apartheid South Africa* (unpublished Mundus MAPP, Institut Barcelona D'estudis Internacionals, 2013) 23.

categorized people by race and the Group Areas Act 36 of 1966 which separated the people by race, amongst other oppressive laws.[47] This resulted in the black majority being dispossessed of land; having inadequate access to health services and education; poor infrastructure, deprived of economic opportunities, amongst others.[48]

Similarly, labour regulations and policies discriminated against Black South Africans. Black South Africans were denied access to skilled jobs, excluded from membership of registered trade unions and their employment was restricted as a wide range of jobs were reserved for the white minorities only.[49] These oppressive practices that were perpetrated by the white minority deprived the vast majority of the Blacks not only from their own natural riches but even their identity as human beings.[50] Whereas, the white minority monopolised power and enjoyed extensive rights and privileges.[51] Black South Africans were looked down upon, seen as inferior and received 'serious forms of physical abuse and repression'.[52] Specifically in the workplace, black workers had to 'endure extreme racial prejudice and demeaning social norms that degraded their existence as people'.[53] Besides this, Black South Africans were subject to long working hours, little privacy, inhumane working and living conditions, and earned low wages, amongst other oppressive practices.[54] This ultimately led to 'South Africa suffering from a history of unequal access to jobs, land, and labour discrimination'.[55]

Against this background, South Africa's oppressive labour regulations were based on a model of labour law known as racial Fordism.[56] Racial Fordism is a racially constructed version of

[47] Population Registration Act 30 of 1950 required people to be identified and registered from birth as one of four distinct racial groups, namely White, Coloured, Bantu (Black African), and others. The Group Areas Act 36 of 1966 aimed to eliminate mixed neighbourhoods in favour of racially segregated ones which would allow South Africans to develop separately.
[48] Modiri JM 'Law's Poverty' (2015) 18 *PER* 224.
[49] Vose W (1985) 448.
[50] Kaur A 'White Prosperity with Cheap Black Labour' (1994) 3 *World Affairs: The Journal of International Issues* 43.
[51] Liebenberg S 'Human Development and Human rights South African Country Study' 2000 *United Nations Development Programme: Human Development Reports* 3.
[52] United Nations Centre against Apartheid *Apartheid as a Collective Form of Slavery: Exploitation of black farmworkers in South Africa* (1980) 1.
[53] Gwynn B 'Overcoming Adversity from All Angles: The Struggle of the Domestic Worker during Apartheid by Bennett Gwynn' available at *https://www.sahistory.org.za/article/overcoming-adversity-all-angles-struggle-domestic-worker-during-apartheid-bennett-gwynn* (accessed 27 December 2021).
[54] Kloppers HJ & Pienaar GJ 'The historical context of land reform in South Africa and early policies' (2014) 17 *PERJ* 680.
[55] Leibbrandt M et al *Employment and Inequality Outcomes in South Africa* (Research Paper, University of Cape Town, 2015) 6.
[56] Kraak A 'Transforming South Africa's Economy: From Racial-Fordism to Neo-Fordism?' (1996) 17 *Economic and Industrial Democracy* 40.

Fordism.[57] Fordism is achieved through a hierarchical structure and a centralised management structure that has strict control over the employees.[58] In essence, Fordism is based on a clear-cut separation of working time from leisure or private time, industrial unionism, long-term service in the same firm doing one or similar jobs, a male as a full-time breadwinner as well as homogenous and standardized working styles.[59] Racial Fordism relies on racial power and control as a preeminent factor to shape the economic institutions.[60] Put differently, racial Fordism is 'focused on extending industrialization by means of the production of consumer sophisticated consumer goods primarily for the white South African market'.[61] Based on this, whites represented the working class, whereas blacks were impoverished.[62] This deprived black families, especially black females of wealth, land, livelihood, amongst others, as the central management was preserved for the white minority.[63] Within this context, South Africa 'was a colonial society where profit came from coercive exploitation of cheap, unskilled labour', which was reserved for Black workers.[64] A recruitment agency referred to as the Rand Native Labour Association was established to recruit black workers at very low wages.[65] Ultimately, this classical approach to industrial relations only benefited the white workforce and restricted wealth to the white minority through racially discriminatory labour practices and labour legislation.[66]

Furthermore, Black workers were restricted from joining/forming trade unions and bargaining collectively for wages.[67] However, there was resistance to the apartheid system. This resistance took many forms including, black South Africans unionising and forming trade unions which

[57] Kraak A (1996) 40.
[58] Previtali FS & Fagiani CC 'Deskilling and degradation of labour in contemporary capitalism: the continuing relevance of Braverman' (2015) 9 *Pluto Journals* 79.
[59] Inagamit T 'The End of Classic Model of Labor Law and Post-Fordism' (1999) 20 *Comp. Labor Law & Pol'y Journal* 692; Hendrickx F 'Regulating new ways of working: From the new 'wow' to the new 'how'' (2018) 9 *European Labour Law Journal* 197.
[60] Gelb S 'Democratizing Economic Growth: Crisis and Growth Models for the Future' (1991) 18 *Social Justice* 244.
[61] Harber J *The Malevolent Invisible Hand: Evolving Institutions of Social and Labour Control in Apartheid and Post-Apartheid South Africa* (unpublished Mundus MAPP, Institut Barcelona D'estudis Internacionals, 2013) 4.
[62] Harber J *The Malevolent Invisible Hand: Evolving Institutions of Social and Labour Control in Apartheid and Post-Apartheid South Africa* (unpublished Mundus MAPP, Institut Barcelona D'estudis Internacionals, 2013) 5.
[63] Dugard J *Confronting Apartheid: A Personal History of South Africa* (2018) 55.
[64] Makhulu AM 'A Brief History of the Social Wage: Welfare before and after Racial Fordism' (2016) 115 *The South Atlantic Quarterly* 115.
[65] Kaur A (1994) 45.
[66] Supiot A, Meadows P & Casas M *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (2001) 24.
[67] Harrison DS *Collective Bargaining Within the Labour Relationship: In a South African Context* (unpublished Masters in Industrial Sociology, North-West University, 2004) 40.

led to many strikes and rebellion activities in South Africa.[68] The purpose of these strikes was to emphasize that the black majority were excluded from labour legislation.[69] Unions such as the Industrial and Commercial Workers' Union of Africa, the Council of Non-European Trade Unions, South African Domestic Workers Union, amongst others, organised many strikes and protests which raised awareness on the lack of labour rights of black South Africans leading to these unions gaining credibility.[70] This culminated in many black workers embarking on strikes in order to raise concerns on their terrible working conditions.[71]

Strikes were generally successful in achieving short-term gains, such as improvement in their wages.[72] For example, a strike in 1914 led to the establishment of the Workmen's Wages Protection Act 15 of 1914 which recognised and regulated the wages of Black workers.[73] Other actions taken by black workers include the burning of pass books by attendees at a meeting in 1952 organised by the South Indian National Congress and the African National Congress.[74] The Black majority also assembled in Sharpeville, a township near Vereeniging and demonstrated resistance against carrying identity documents as was required under the Pass Law.[75] Beside the above, the Transvaal trade unions presented a document called 'The Workers' Charter' which contained their grievances as well as the demands of the workers.[76] This charter noted that black South Africans were paid low wages, they were prevented from accessing skilled jobs and that the Transvaal Industrial Disputes Prevention Act 20 of 1909 operated against their interests, amongst others.[77] These rebellious acts, further, aimed to

[68] Marx AW 'South African Black Trade Unions as an Emerging Working-Class Movement' (1989) 27 *The Journal of Modern African Studies* 388.
[69] Harrison DS *Collective Bargaining Within the Labour Relationship: In a South African Context* (unpublished Masters in Industrial Sociology, North-West University, 2004) 33.
[70] Wickins PL *The Industrial and Commercial Workers' Unions of Africa* (published Thesis, University of Cape Town, 1973) 233.
[71] Moodie TD 'The Moral Economy of the Black Miners' Strike of 1946' (1986) 13 *Taylore & Francis* 3.
[72] Vose W (1985) 448.
[73] Conradie M *A critical analysis of the right to fair labour practices* (unpublished LLM Thesis, University of the Free State, 2013) 101.
[74] History.com Editors 'Apartheid' available at *https://www.history.com/topics/africa/apartheid* (accessed 17 January 2022).
[75] Pass Law Act of 1952; South African History Online 'Pass Laws and Sharpeville Massacre' available at *https://www.sahistory.org.za/article/pass-laws-and-sharpeville-massacre* (accessed 17 January 2022).
[76] These trade unions represented the non-white workers in Transvaal. These unions aimed to achieve political rights for Black workers as well as regulate the relations between employees and their employers. These unions further aimed to improve the working conditions for Black workers. Overall, these unions were developed to overcome the struggle against Apartheid.
South African History Online 'The historical significance of COSATU's Workers' Charter Campaign' available at *https://www.sahistory.org.za/article/historical-significance-cosatus-workers-charter-campaign* (accessed 15 January 2022).
[77] Malunga F 'In Search of Better Wages: A Challenge to Mining Capitalism and State Power, 1943' (2006) 51 *Historia* 121.

overthrow the oppressive labour laws such as the Group Areas Act 41 of 1950, and the Native Labour Regulation Act 15 of 1911, amongst others as these laws prevented blacks from entering certain areas (these areas were reserved for whites only) and black workers from striking or unionising.[78] Nonetheless, black workers continued to face oppressive labour laws and inhumane working conditions.

In 1973, massive strike action occurred which brought the state to the realization that a more fundamental change was needed if the state wished to maintain control over the black majority.[79] As a result, the Wiehahn Commission was appointed to investigate labour relations and the Riekert Commission was appointed to 'modify the influx control system'.[80] These Commissions recommended significant changes to apartheid labour law such as 'allowing black trade unions to be incorporated into the system of collective bargaining'.[81] This unleashed the power of black trade unions and contributed significantly to subsequent economic and political transformation. Furthermore, reforms stemming from the Riekert Commission loosened some of the restrictions on labour allocation. This started a process which culminated in the lifting of influx control.[82] Within this context, the Riekerk Commission made recommendations for the improvement, modernization, and reform of the existing statutory framework of the labour market.[83]

[78] Marx AW (1989) 388.
[79] South African History Online 'Wiehahn Commission Report tabled in parliament' available at *https://www.sahistory.org.za/dated-event/wiehahn-commission-report-tabled-parliament* (accessed 18 January 2022).
[80] South African History Online 'Wiehahn Commission Report tabled in parliament' available at *https://www.sahistory.org.za/dated-event/wiehahn-commission-report-tabled-parliament* (accessed 18 January 2022).
[81] Truth and Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report* (1998) 40.
[82] Truth and Reconciliation Commission *Truth and Reconciliation Commission of South Africa Report* (1998) 40.
[83] The Riekerk Commission sought to achieve an effective functioning of the free labour market mechanism to be achieved by strategic direct and indirect Government intervention with a view to the elimination of existing market failures, and the non-intervention where labour market results cannot be significantly improved. This was achieved through legislation that would recognise the permanence of urban black residents; legislation that would permit geographic mobility between the black townships for those with permanent residence rights; those with permanent residence rights be allowed to have their families join them; permission for permanent residents to purchase homes and promotion of home-ownership; and removal of restrictions on black traders and promotion of some Black enterprise.
Ngwane T ''Insurgent Democracy': Post-Apartheid South Africa's Freedom Fighters' (2019) 45 *Journal of Southern African Studies* 3.

Similarly, the Wiehahn Commission suggested the legal recognition of black trade unions and a move towards a non-racial freedom of association.[84] Action plan to implement these suggestions was the amendment of the LRA.[85] It was also recommended that the political rights and participation of black South Africans be increased.[86] This was to be achieved through the abolition of statutory job reservations, retention of the closed shop bargaining system, the creation of a National Manpower Commission and the introduction of an Industrial Court to resolve industrial disputes.[87] These recommendations were intended to reform the apartheid labour regulations.[88] Subsequently, black unions were officially registered and given the same rights as white South African unions.[89] The black majority were also accorded equal pay for equal work and racial job reservations were replaced by non-discriminatory policies.[90] However, these amendments were merely tools used by the apartheid government to maintain control and suppression of black workers.[91] Consequently, black workers and unions continued to view these changes with scepticism and mistrust as labour laws were still not fully inclusive.

Due to this scepticism and mistrust, there was an increase in strike activities which once again, led to the amendment of the Industrial Conciliation Act 11 of 1924 (ICA).[92] The ICA was renamed to the Labour Relations Act in 1981.[93] This was necessary to have a racially inclusive industrial system in South Africa in order to provide for the freedom of association and trade union rights to all workers.[94] Despite this amendment, the struggle against apartheid intensified. As a result, the LRA was further amended in 1991 to finally 'abolish the dual nature of the industrial relations system by deleting all reference to race in the act and repealing the Black Labour Regulations Act'.[95] The industrial relations also increased the rights of workers in the

[84] Budeli M 'Workers' right to freedom of association and trade unionism in South Africa: An historical perspective' (2009) 15 *Fundamina* 70.
[85] Suchard H 'Labour relations in South Africa: retrospect and prospect' (1982) 12 *Africa Insight* 89.
[86] Suchard H (1982) 89.
[87] Jones R 'The Emergence of Shop-Floor Trade Union Power in South Africa' (1985) 6 *Managerial and Decision Economics* 161.
[88] Lichtenstein A 'The Hope for White and Black'? Race, Labour and the State in South Africa and the United States, 1924-1956' (2004) 30 *Journal of Southern African Studies* 141.
[89] Rajah M 'The socio-political and work environment as sources of workplace discrimination: Implication for employment equity' (2000) 5 *Southern African Business Review Special Issue on Information Technology* 80
[90] Rajah M (2000) 80.
[91] Lichtenstein A (2004) 141.
[92] Industrial Conciliation Act 11 of 1924; Mosala SJ et al 'South Africa's Economic Transformation since 1994: What Influence has the National Democratic Revolution (NDR) Had?' (2017) 44 *Rev Black Polit Econ* 330.
[93] Botha N & Mischke C 'A New Labour Dispensation for South Africa' (1997) 41 *Journal of African Law* 136.
[94] Budeli M (2009) 67.
[95] Intelliconn 'Reform vs Oppression: The Impact of Wiehahn Commission on Labour Relations in South Africa' available at *https://intelliconn.wordpress.com/2012/11/02/reform-vs-oppression-the-impact-of-wiehahn-commission-on-labour-relations-in-south-africa/* (accessed 15 January 2022).

workplace.[96] Furthermore, South Africa's Labour Relations Act 66 of 1995 legitimized Black trade unions, de-racialized labour regulations and prevented coercive and forceful repression over the Black majority.[97] These changes aimed to restore political and economic stability in South Africa and laid the foundation for the post-apartheid labour regulatory framework.[98]

2.3. Labour regulation post-1994

With the aim of bringing apartheid to an end, the Transitional Constitution which is commonly referred to as the Interim Constitution was drafted in 1993.[99] The aim of the Interim Constitution was to provide a 'historic bridge between the past and the future and facilitate the continued governance of South Africa, while an elected constitutional assembly drew up a final Constitution'.[100] In other words, the Interim Constitution facilitated a radical shift from apartheid to a democratic government.[101] Subsequently, the government enacted the Constitution, which came into effect on 4 February 1997.[102]

The Constitution is the supreme law of the land and any law or conduct that is inconsistent with this law including the Bill of Rights, which enshrines the rights of all South Africans is therefore invalid.[103] According to Van Eck, 'the Bill of Rights is intended to protect people against state power, by enshrining rights which may not be violated using law-making or through state conduct'.[104] Furthermore, it involves the removal of prejudicial legislation by introducing anti-discriminatory and affirmative action policies.[105] Within this legal framework, the Reconstruction and Development Programme (herewith referred to as RDP) was

[96] Botha N & Mischke C (1997) 136.
[97] Lichtenstein A *From Durban to Wiehahn: Black Workers, Employers, and the State in South Africa during the 1970s* (unpublished Social and Economic Research Paper, University of the Witwatersrand, 2013) 4.
[98] Kasuso TG *The definition of an "employee" under labour legislation: An elusive concept* (unpublished LLM Thesis, University of South Africa, 2015) 20.
[99] Constitution of the Republic of South Africa, Act 200 of 1993.
[100] South African History Online 'The Interim South African Constitution 1993' available at *https://www.sahistory.org.za/article/interim-south-african-constitution-1993#:~:text=Therefore%2C%20the%20Constitution%20which%20they,a%20democratically%20elected%20Constitutional%20Assembly* (accessed 16 January 2022).
[101] Inman R & Rubinfeld DL 'Understanding the Democratic Transition in South Africa' (2013) 15 *American Law and Economics Review* 4.
[102] Constitution of the Republic of South Africa, Act 200 of 1993.
[103] International Labour Organization *National Labour Law Profile: South Africa* (2002) International Labour Organisation: Geneva.
[104] Van Eck S *Human Rights at Work: Perspectives on Law and Regulation* (2010) ch 9.
[105] Gradin C (2019) 559.

developed.[106] The RDP was a socio-economic policy framework, which sought to build a democratic, non-racial and non-sexist future for South Africans.[107] The RDP which was produced after a multi-level stakeholders engagement contained a section on labour rights which guided the ANC in developing policy on labour rights.[108]

Accordingly, the Constitution in section 23 guarantees everyone the right to fair labour practices.[109] This section underpins South African labour regulations and one critical point is obvious from this provision. Contrary to the provision in majority of the labour statutes, the Constitution refers to 'everyone' as having the right to fair labour practices. In addition, the basic rights in the subsections of this provision refer to every 'worker' not 'employee'. The use of the term 'worker' has been argued to be inclusive and extends to working arrangements beyond the traditional employment paradigm.[110] This overcomes racial segregation and oppressive policies that occurred during Apartheid and can be argued to be applicable beyond the typical employment relationship.[111]

Furthermore, section 23 should be read in conjunction with section 9 of the Constitution. Section 9 is the equality clause and 'guarantees that everyone is equal before the law and enjoys equal protection of the law'.[112] Based on this, the broadest interpretation to section 23 should apply as section 9 guarantees that everyone should be seen as equal before the law and afforded the right to fair labour practices.[113] However, there are limitations to these rights as provided in section 36 of the Constitution. Section 36 states that the rights found in section 23 may be limited if it is reasonable and justifiable to do so in an open and democratic society based on human dignity, equality and freedom.[114] For example, the right to strike as entrenched in section 64 of the Labour Relations Act is not absolute and can be limited in terms of section

[106] Mosala SJ, Venter JCM & Bain EG 'South Africa's Economic Transformation Since 1994: What Influence has the National Democratic Revolution (NDR) Had?' (2017) 44 *The Review of Black Political Economy* 327.
[107] Mosala SJ, Venter JCM & Bain EG (2017) 327.
[108] Mosala SJ, Venter JCM & Bain EG (2017) 327; Marais H 'South Africa: The Popular Movement in the Flux and the Reconstruction and Development Programme (RDP)' (1996) 21 *CODESRIA* 121.
[109] International Labour Organization *National Labour Law Profile: South Africa* (2002) International Labour Organisation: Geneva.
[110] Fourie ES 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 11 *PER* 117.
[111] International Labour Organization *National Labour Law Profile: South Africa* (2002) International Labour Organisation: Geneva.
[112] Conradie M *A critical analysis of the right to fair labour practices* (unpublished LLM Thesis, University of the Free State, 2013) 101.
[113] Rautenbach IM 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 17 *PER* 2232.
[114] Rautenbach IM (2014) 2232.

65 of the Labour Relations Act as well as section 36 of the Constitution. This includes for the 'legitimate purpose of maintaining peace and creating a just society based on human dignity and freedom', especially if the strike is violent.[115]

Various labour statutes were introduced to give effect to the rights under section 23 of the Constitution.[116] These statutes include the LRA, BCEA, OHSA and the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), amongst others.[117] These laws generally aim to provide labour protection to all employees within South Africa, including those that were historically disadvantaged. For example, the LRA, which is the primary law that governs labour relations aims to protect employees in the workplace as well as promote economic development, fair labour practices, democracy and social development.[118] To achieve this, the scope of the LRA was extended to include those employees who were previously excluded from labour legislation.[119] The LRA, further, abolished the Colour Bar.[120] Besides this, the purpose of the LRA also includes the regulation of trade unions and the promotion of collective bargaining in the workplace.[121]

The BCEA aims to advance economic development and social justice by providing for the minimum conditions of employment for all employees irrespective of gender, race and disability, among other personal characteristics.[122] These minimum conditions include the maximum working hours, the regulations of overtime and leave amongst others. This is to ensure employees receive fair labour practices.[123]

[115] Tenza M 'An evaluation of the limitation of the right to strike in terms of the law of general application in South Africa' (2018) 29 *Stellenbosch Law Review* 471.
[116] Conradie M *A critical analysis of the right to fair labour practices* (unpublished LLM Thesis, University of the Free State, 2013) 84.
[117] Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997, Occupational Health and Safety Act 85 of 1993, and Compensation for Occupational Injuries and Diseases Act 130 of 1993.
[118] Naidoo C 'Understand How the Labour Relations Act Affects You in the Workplace' available at 554. *https://blog.sabinet.co.za/2016/09/understand-labour-relations-act-affects-workplace-08112016/* (accessed 28 December 2021).
[119] Ferreira GM (2005) 202.
[120] Harber J *The Malevolent Invisible Hand: Evolving Institutions of Social and Labour Control in Apartheid and Post-Apartheid South Africa* (Mundus MAPP, Institut Barcelona D'estudis Internacionals, 2013) 30.
[121] Chapter 1 of the Labour Relations Act 66 of 1995.
[122] Botha MM 'The Different Worlds of Labour and Company Law: Truth or Myth?' (2014) 17 *PELJ* 2055; Answeeuw W & Pons-Vignon N 'Working Conditions in South Africa Since the End of Apartheid: A Comparison Between the Agricultural, Forestry and Mining Sectors' (2012) 65 *The Economic History Review* 3.
[123] Conradie M *A critical analysis of the right to fair labour practices* (unpublished LLM Thesis, University of the Free State, 2013) 84.

The OHSA is the primary legislation for workplace health and safety.[124] The OHSA seeks to protect workers from hazardous environments and provides for the health and safety of all employees working on the premises of the employer.[125] The EEA is the specific law that seeks to achieve equity in the workplace.[126] This law which aligns with section 9 of the Constitution which prohibits unfair discrimination, directly or indirectly, against all employees.[127] This is achieved by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination.[128] The law further provides for affirmative action for designated employees.[129] Designated employees include Black people, women and employees with disabilities.[130] However, as previously mentioned, these core labour legislation applies only to workers classified as employees.

2.4. Definition of an employee

An employee is defined in section 213 of the LRA and section 1 of the BCEA as the following:

> 'employee means –
>
> (a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
> (b) any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed" and "employment" have meanings corresponding to that of employee'.[131]

Furthermore, section 200A of the LRA provides for the presumption as to who is an employee, which is described as the following:

[124] International Labour Organisation *Fundamental Principles of Occupational Health and Safety* (2008) International Labour Organisation: Geneva.
[125] International Labour Organisation *Fundamental Principles of Occupational Health and Safety* (2008) International Labour Organisation: Geneva.
[126] Employment Equity Act 55 of 1998.
[127] du Toit D 'Protection against unfair discrimination in the workplace: Are the courts getting it right' (2007) 11 *AJOL* 4.
[128] Horwitz F 'Employment Equity In South Africa: Overcoming The Apartheid Legacy' (2011) 30 *Equality diversity and inclusion: An International Journal* 299.
[129] Employment Equity Act, section 21.
[130] Employment Equity Act, section 1(e).
[131] Labour Relations Act, section 213 and Basic Conditions of Employment Act, section 1.

> '(1) Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:
>
> (a) the manner in which the person works is subject to the control or direction of another person;
>
> (b) the person's hours of work are subject to the control or direction of another person;
>
> (c) in the case of a person who works for an organisation, the person forms part of that organisation;
>
> (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
>
> (e) the person is economically dependent on the other person for whom he or she works or renders services;
>
> (f) the person is provided with tools of trade or work equipment by the other person; or
>
> (c) (g) the person only works for or renders services to one person'.[132]

Whereas, section 1 of the OHSA defines an employee as the following:

> 'employee means, subject to the provisions of subsection (2), any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person'.[133]

The definition of an employee has been a debated concept throughout the years.[134] This is due to the scope and interpretation of section 23 of the Constitution. With regards to a broad interpretation of section 23, 'everyone' enjoys this constitutional protection. This includes

[132] Labour Relations Act, section 200A.
[133] Occupational Health and Safety Act 85 of 1993.
[134] International Labour Organisation *Non-standard employment around the world* (2016) International Labour Organisation: Geneva.

natural persons, citizens, children, juristic persons, workers, employers, employees, amongst others. Based on this interpretation, the traditional employment relationship is included in section 23. However, a question that arises is whether this interpretation includes workers other than those in the traditional employer-employee relationship. This question was considered in *NEHAWU v University of Cape Town*.[135] This case dealt with whether upon transfer of a business as a going concern, in the context of section 197 of the LRA, workers are automatically transferred to the new owner of the business as part of the transaction. Based on this, NEHAWU made an application to have this matter heard in the Labour Court (LC), however, this court dismissed the application.[136] The court held that there had been no transfer of the university's business as a going concern. Thereafter, NEHAWU appealed to the Labour Appeal Court (LAC) which dismissed the appeal stating that employees can only be taken over by the new owner where there is a prior agreement between the transferor employer and the transferee employer that the workers or a majority of them are part and parcel of the transaction.[137] The majority concluded that the interpretation of section 197 'must be interpreted so as to limit its scope to cases where the transfer follows from an agreement between the seller and the purchaser defining the subject matter of the sale as … a going concern (with employees included)'.[138] Nevertheless, NEHAWU held that:

> "the interpretation of section 197 adopted by the majority of the LAC fails to promote the spirit, purport and objects of the Bill of Rights".

Consequently, NEHAWU approached the Constitutional Court (CC), seeking special leave to appeal; stating that the interpretation of section 197 is to give effect to the dismissed employees' constitutional right to fair labour practices.[139] In delivering the majority judgement, Ngcobo J held that the main purpose of section 197 is to protect workers against loss of employment in the event of a transfer of a business as a going concern.[140] Ngcobo J, further, held that:

[135] *National Education Health & Allied Workers Union v University of Cape Town* (*NEHAWU* case) 2003 (2) BCLR 154 (CC).
[136] *NEHAWU* case, para 7.
[137] *NEHAWU* case, para 9.
[138] *NEHAWU* case, para 54.
[139] *NEHAWU* case, para 26.
[140] *NEHAWU* case, para 26.

> 'the focus of section 23(1) is the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both … care must therefore be taken to accommodate, where possible, these interests to arrive at the balance required by the concept of fair labour practices'.[141]

It was, further, held that 'everyone' goes beyond the employment relationship because it is not stated that it refers to employees only and this section intends to cover atypical workers as well. Furthermore, the CC ruled that the effect of the section is that the new employer takes over the workforce and all the rights and obligations that flow from their contracts of employment.

This case illustrates that there is still a grey area in the interpretation and application of section 197. This case, further, reveals that there are problems relating to how the courts interpret this section, and whether the interpretation includes workers other than those in the traditional employer-employee relationship. Despite this, the courts will have to interpret the legislation in a fair manner that considers the interests of both the employer and the employee.

In spite of the above, the application of the definition of an employee in terms of section 213 of the LRA and section 1 of the BCEA remains applicable to work arrangements that resemble an employment relationship and excludes an independent contractor.[142] Thus, a worker that enters into a contract to perform work independently rather than an employment contract may be excluded from this protection.[143] This ability to exclude workers who are effectively employees is open to abuse and exploitation.[144] Consequently, the courts have tried to distinguish between employees and independent contractors. For example, the court in *SABC v McKenzie* stated the following:

> 'The object of the contract of service is the rendering of personal services by the employee to the employer. The services are the object of the contract. The object of the contract of work is the performance of a certain specified work for the production of a certain specified result. According to a contract of service, the employee will typically be at the beck and call of the employer to render his personal services at the behest of

[141] *NEHAWU* case, para 40.
[142] Kasuso TG *The definition of an "employee" under labour legislation: An elusive concept* (unpublished LLM, University of South Africa, 2015) 3.
[143] Kasuso TG *The definition of an "employee" under labour legislation: An elusive concept* (unpublished LLM, University of South Africa, 2015) 3.
[144] Huysamen E 'An Overview of Fixed-Terms Contracts of Employment as a Form of a Typical Employment in South Africa' (2019) 22 *PER* 3.

> the employer. The independent contractor, by way of contrast, is not obliged to perform the work himself or to produce the result himself, unless otherwise agreed upon … . The independent contractor is bound to perform certain specified work or produce a certain specified result within a time fixed by the contract of work or within a reasonable time where no time has been specified. The employee is subordinate to the will of the employer. He is obliged to obey the lawful commands of the employer who has the right of supervising and controlling him by prescribing to him what work he has to do as well as the manner in which it has to be done. The independent contractor, however, is notionally on a footing of equality with the employer'.[145]

Once again, as shown in *NEHAWU v University of Cape Town*, whether the person is an employee or worker is open to interpretation. Each case is determined own its own merits and surrounding circumstances. As a result, to determine whether a proposed or existing work arrangement exists would also be determined on the terms of the agreement. This ultimately lacks uniformity and uncertainty persists when seeking an advisory award.

Similarly, the court in *Borcherds v CW Pearce and F Sherwood t/a Lubrite Distributors* noted that the following requirements that must be complied with to be considered an employee:

> 'the person must not perform work or services which have the effect of providing assistance but assist in the carrying on or conducting of a business, assistance should be rendered regularly, there must be a legal obligation to render such assistance arising *ex contractu* or *ex lege*, and assistance should not be at the will and at the sole discretion of the one assisting'.[146]

These requirements indicate that to establish whether the worker falls into the category of an employee or independent contractor, the focus should be on the existence of the employment relationship instead of the existence of the contract of employment.[147] Notwithstanding, common law tests for distinguishing between an independent contractor and an employee remain relevant. These tests include the control test and dominant impression test, which are used to determine whether an employment relationship exists.[148] The control test relies on

[145] *McKenzie* case, para 7.
[146] *Borcherds v CW Pearce and F Sherwood t/a Lubrite Distributors* 1993 (14) ILJ 1262 (LAC).
[147] Kasuso TG *The definition of an "employee" under labour legislation: An elusive concept* (unpublished LLM Thesis, University of South Africa, 2015) 20.
[148] Fourie ES 'Non-standard workers: The South African context, international law and regulation by the European Union' (2008) 11 *PER* 117.

whether work is carried out according to instructions and control of another party, namely the employer, for the benefit of the employer, among other factors.[149] Also, courts rely on the dominant impression test by examining all aspects of the contract and the employment relationship as a whole, and a decision will be made depending on whether an employment relationship is prevailing relationship in the evaluation.[150] More recently, courts rely on a 'reality test' to determine the existence of an employment relationship.[151] This test which is closely aligned to the dominant impression test requires that despite the form of contract the real relationship between the parties must be considered in deciding whether the worker is an employee or an independent contractor.[152] This test gained momentum after the judgment of the LAC in *Denel (Pty) Ltd v. Gerber*.[153] Generally, in terms of these tests, the employment is relationship determined by both the terms of the contract and the scrutinization of the relationship.

Similarly, in 2002, a presumption in sections 200A LRA and 83A of the BCEA to further determine who is an employee was introduced. The statutory presumption in terms of these sections provide that irrespective of the form of contract between the parties if any of the factors listed are present the person is deemed to be an employee.[154] In addition, the 2006 *Code of Good Practice: Who is an Employee* which incorporates the provisions of the International Labour Organisation (ILO)'s Employment Relations Recommendation 197 further explain the factors in section 200A of the LRA. While these provisions and developments provide statutory protection to employees, South African labour legislation presupposes that employment is performed mostly on the employer's premises with definite working hours separate from private time and with tools of trade provided by the employer.

In the last few decades, the world of work has evolved. Increasingly, there has been a proliferation of flexible work patterns and fluid workspaces. One of these is the adaption of remote working because of the COVID-19 pandemic. Indeed, in the past two years, a significant proportion of the workforce in South Africa have performed their work from their

[149] Basic Conditions of Employment Act, section 83A.
[150] Le Roux R 'The Evolution of the Contract of Employment in South Africa' (2010) 39 *Industrial Law Journal* 155.
[151] *Pam Golding Properties (PTY) LTD v Erasmus* 2010 (31) ILJ 1460 (LC).
[152] *Denel (Pty) Ltd v Gerber* 2005 (9) BLLR 849 (LAC).
[153] *Denel (Pty) Ltd v Gerber* 2005 (9) BLLR 849 (LAC).
[154] van Staden MJ *Identification of the parties to the employment relationship: an appraisal of teleological interpretation of statutes* (unpublished LLD Thesis, University of Pretoria, 2017) 34.

private home, had unstructured hours and provided their tools of trade (e.g., Wi-Fi connection). In this dynamic, the notion of a workplace and how work is done has escaped the classic model of labour law.[155] This, therefore, raises the question to what extent does the current labour regulatory framework in South Africa cater for remote working. This is examined in the next chapter.

2.5. Conclusion

This chapter has analysed and explored the development of the South Africa's labour law system. Furthermore, the definition and the application of the term 'employee' was discussed, noting that common law and statutory tests have been developed to ensure the protection of employees. It was noted that the application of labour legislation is premised on the idea that work will be performed from the employer's premises with structured hours. However, the Covid-19 pandemic disrupted the world of work and fast-tracked the use of remote work in South Africa. The next chapter seeks to explore whether remote work is regulated in South Africa.

[155] Osiki A 'The impact of soci-legal inequality on women in the Nigerian domestic work sector' (2022) 26 *Law, Democracy and Development* 52.

CHAPTER 3: REGULATION OF REMOTE WORK IN SOUTH AFRICA

3.1. Introduction

Remote work has gained popularity since the measures to mitigate the pandemic forced many people to work from home.[156] This change in work arrangements caused a significant shift in the world of work, and it is predicted to last beyond the pandemic.[157] However, with remote work comes potential legal challenges for parties in an employment relationship. Within this context, this chapter examines the regulation of remote work in South Africa. The first section provides a general overview of remote work. Section 2 discusses the application of statutory provisions on working hours in the context of remote working as well as identify potential challenges. Section 3 explores the regulation of occupational health and safety for employees working remotely. The fourth section examines the scope of regulation on the performance of remote employees. This includes a discussion on the challenges involved in the monitoring and supervision of these employees.

3.2. Remote work

As previously stated in chapter 1, remote work is a form of working style that allows people to work outside of the traditional office environment.[158] However, this is a long-established concept as employees have been telecommuting since 1973.[159] Telecommuting occurred 'before storefronts and commercial real-estate, craftsmen in trades such as carpentry, pottery, whole-grain foods, and smiths sold their wares in the comfort of their homes'.[160] Thereafter, businesses sprouted and employees started telecommuting through the invention of the telephone.[161] The telephone allowed for quick communication between employees who were not in the same place at the same time. Thereafter, the digital age occurred, resulting in a

[156] Salfi F et al 'Working from home due to the COVID-19 pandemic abolished the sleep disturbance vulnerability of late chronotypes relieving their predisposition to depression' 2022 *Psychiatry and Clinical Psychology* 4.
[157] Carroll N & Conboy K 'Normalising the "new normal": Changing tech-driven work practices under pandemic time pressure' (2020) 55 *International Journal of Information Management* 1.
[158] Remote Year 'What is Remote Work' available at *https://www.remoteyear.com/blog/what-is-remote-work* (accessed 28 March 2022).
[159] Borkovich D et al 'Working from home: Cybersecurity in the age of COVID-19' (2020) 21 *Issues in Information Systems* 235.
[160] Gupta A 'The History of Remote Work: How it Came to be What it is Today' available at *https://www.sorryonmute.com/history-remote-work-industries/* (accessed 16 May 2022).
[161] Judy R & D'Amico C *Workforce 2020: Work and Workers in the 21st Century* (1997) 32.

paradigm shift.[162] This resulted in systems being created to link networks and allow employees to connect to each other from various locations.[163]

Remote work has rapidly accelerated and expanded over the last several decades. More specifically, the COVID-19 pandemic has 'unleashed the potential for telework across the globe as of 2020'.[164] The 'innovations in information and computer-mediated communication technologies that support remote work make it possible' for employees to perform their work from any place that they desire.[165] As a result, employees have flexibility in designing and arranging their days.[166] This offers various benefits as well as challenges. For example, an experiment conducted at a Chinese company found that the company experienced a 13% performance increase due to 'employees being able to work more minutes per shift on a monthly average, due mainly to fewer breaks and sick days'.[167] On the other hand, lack of restriction to ordinary working hours have resulted in employees conducting work at all hours of the day.[168] Consequently, these increased hours and blurred boundaries have negatively affected employees' mental health leading to burnout.[169] Employee burnout negatively affects work performance. Indeed, numerous studies have found a link between employee well-being and quality of output.[170] Meanwhile, the inability of an employee to meet the required standard of performance is a ground for dismissal.[171]

In sum, remote work is accompanied by higher flexibility demands. However, there are far-reaching social and health consequences for employees. Given the role of labour law in the

[162] Perovic J 'Towards a New, Digital Communication Paradigm' (2016) 4 *Studies in Media and Communication* 99.
[163] Perovic J (2016) 99.
[164] Popovici V 'Remote Work Revolution: Current Opportunities and Challenges for Organizations' (2020) 20 *Economic Sciences Series* 468.
[165] Popovici V (2020) 468.
[166] Remote Year 'What is Remote Work' available at *https://www.remoteyear.com/blog/what-is-remote-work* (accessed 28 March 2022).
[167] Bloom N et al Experiment' (2018) 165.
[168] Awada M et al 'Working from home during the COVID-19 pandemic: Impact on office worker productivity and work experience' (2021) 69 *PudMed.gov* 1171.
[169] Xiao et al 'Impacts of Working From Home During COVID-19 Pandemic on Physical and Mental Well-Being of Office Workstation Users' (2021) 63 *JOEM* 181.
[170] HealthWorkerBurnout 'How Does Burnout Affect Productivity?' available at *https://healthworkerburnout.com/how-does-burnout-affect-productivity/#:~:text=Burnout%20negatively%20affects%20productivity%20at,retention%2C%20output%2C%20and%20engagement* (accessed 17 May 2022).
[171] Mokumo MF *The Dismissal of Managerial Employees For Poor Work Performance* (unpublished LLM Thesis, University of Limpopo, 2012).

employment relationship, it is imperative to examine whether South Africa's labour legislation apply to work performed outside the company.

3.3. Working hours

For many years, employees suffered from long working hours.[172] It was not uncommon for employees to work 15 hours or more a day.[173] During apartheid, black employees worked an average of eight to ten hours in dirty and dangerous conditions and spend an additional five hours travelling to and from work.[174] For example in mines, 'underground mine workers remained below for nine hours without a break for food'.[175] Therefore, labour legislation was needed to regulate working hours. The first labour legislation in South Africa that addressed working hours was the Factories Act 29 of 1931, which was applicable to any factory whereon ten or more workers are working.[176] This Act first introduced a 50-hour workweek which was subsequently reduced to a 46 working hours per week after various amendments of this law.[177]

As mentioned in chapter 2, after the democratic elections in 1994, the BCEA was enacted in 1997.[178] This Act sets out the basic conditions of employment including working hours. Chapter 2 regulates the working time and prescribes maximum ordinary hours of work and overtime.[179] In terms of this chapter, ordinary working hours is 45 hours weekly.[180] Furthermore, the Code of Good Practice on the Arrangement of Working Time (hereafter referred to as the Code) was developed to be read in conjunction with the provisions on working

[172] Ally SA *From Servants to Workers: South African Domestic Workers and the Democratic State* (2009) 8.
[173] Southern Africa Labour and Development Research Unit *Shorter Working Hours: Possibilities for South Africa* (Working Paper 79 of September 1990.
[174] Andrews P (1986) 100.
[175] Southern Africa Labour and Development Research Unit *Shorter Working Hours: Possibilities for South Africa* (Working Paper 79 of September 1990).
[176] This Act is applicable to any factory whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on; but this does not include a mine, or a mobile unit belonging to the armed forces of the union, a railway running shed or a hotel, restaurant or eating place. Factories Act 29 of 1931.
[177] Factories Act 29 of 1931. The Factories undertook the following amendments, namely the safety of working place and machinery, health provision, working hours, weekly off, paid leave, among others.
[178] Act 75 of 1997.
[179] Moyane K et al *Understanding the Basic Conditions of Employment Act* (2009) 1.
[180] This is nine hours per day (excluding a lunch break) if the employee works a five-day week, and eight hours per day (excluding a lunch break) if the employee works more than 5 days per week.

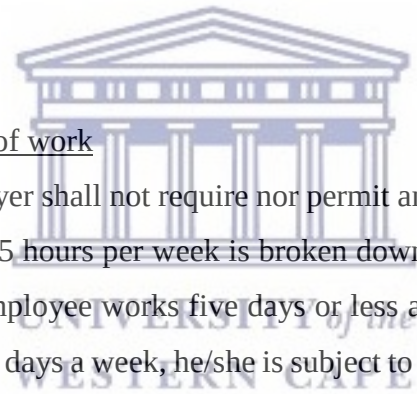
hours in the BCEA.[181] This Code 'gives considerable guidance to employers regarding practical matters around working hours'.[182] The BCEA and Code of Good Practice aim to ensure that there is a balance regarding worker protection (prevent exhausting work hours) and allowing employees to have sufficient rest periods.[183] In other words, the BCEA 'ensures that working hours do not exceed certain maxima; employees are granted adequate breaks during the working day, given prescribed annual and paid sick leave, paid a premium for overtime, work on Sundays and Public Holidays, and afforded other basic rights'.[184] Collective agreements in terms of the LRA and BCEA also regulate working hours of employees. [185] The regulation of working hours is vital as this is the most long-standing concern of labour legislation.[186] This is because it forces the employer to take the health and safety of employees into account as well as their family responsibility.[187]

3.3.1. Regulation of working hours

Working hours is regulated in terms of sections 9 to 18 of the BCEA. Section 9 which addresses ordinary working hours provides that an employee is not allowed to work more than 45 hours per week unless agreed upon.[188] Section 10 concerns overtime when employees work beyond the 'ordinary hours of work'.[189] Section 11 provides for a compressed working week. A compressed working week is an agreement made in writing between the employer and employee that permits an employee to work up to 12 hours in a day (this includes meal intervals) without receiving overtime pay.[190] Section 12 addresses the averaging of hours of work. This section allows employees to be bound by a collective agreement that prevents

[181] Worklaw 'Code of Good Practice on the Arrangement of Working Time' available at *https://www.worklaw.co.za/SearchDirectory/Codes_Of_Good_Practice/praticearrangementworktime_new.asp* (accessed 17 May 2022).
[182] Code of Good Practice on the Arrangement of Working Time in GN R1440 in *GG* 19453 of 13 November 1998, 3.
[183] Godfrey S and Clarke M 'The Basic Conditions of Employment Act amendments: More questions than answers' (2002) 6 *Law, Democracy & Development* 1.
[184] Jacobs A 'Looking at the Basic Conditions of Employment act and how it regulates Working Hours' available at *https://ceosa.org.za/looking-at-the-basic-conditions-of-employment-act-and-how-it-regulates-working-hours/* (accessed 23 March 2022).
[185] Lee S et al (2007) 8.
[186] The Danish Institute for Human Rights 'Working hours' available at *https://biz.sdg.humanrights.dk/salient-issue/working-hours* (accessed 8 January 2022).
[187] Lee S et al *Working Time Around the World* (2007) 7.
[188] Labour Relations Act, section 9(1)(*a*).
[189] Labour Relations Act, section 10.
[190] Labour Relations Act, section 11.

working more than the ordinary working hours and overtime.[191] Section 13 grants the Minister the powers to make regulations prescribing maximum working hours on grounds of health and safety.[192] Section 14 stipulates that employers are required to give employees that have worked continuously for five hours or more a break that is at least one continuous hour.[193] Section 15 ensures that employees are afforded the necessary daily break of at least twelve consecutive hours and a weekly rest period of at least 36 consecutive hours.[194] Moreover, section 16 states that an employer is required to pay double wages for each hour worked on a Sunday, unless the employee ordinarily works on a Sunday.[195] Furthermore, any work after 18:00 and before 06:00 the following day, is considered a night shift and is regulated by section 17 of the BCEA.[196] Lastly, an employee is not required to work on a public holiday as stipulated in section 18, unless the employer and employee have made an agreement to this effect.[197] For purposes of this mini-thesis, the discussion will be limited to ordinary working hours. The next section will demonstrate that there are flaws in the BCEA, particularly section 9 as it does not regulate remote working.



3.3.2. Ordinary hours of work

In terms of section 9, an employer shall not require nor permit an employee to work more than 45 hours in any week.[198] The 45 hours per week is broken down into nine hours a day, which excludes lunch breaks if the employee works five days or less a week.[199] Alternatively, if the employee works more than five days a week, he/she is subject to work eight hours a day, which excludes lunch breaks.[200] Notwithstanding, Schedule 1 of the BCEA further provides for the progressive reduction of the ordinary working hours to a maximum of 40-hours per week.[201] In this regard, in 2019, the Congress of South African Trade Unions (COSATU) created a

[191] Labour Relations Act, section 12.
[192] Labour Relations Act, section 13.
[193] Labour Relations Act, section 14.
[194] Labour Relations Act, section 15.
[195] Labour Relations Act, section 16.
[196] Labour Relations Act, section 17.
[197] Labour Relations Act, section 18.
[198] Grogan J *Workplace Law* (1998) 47.
[199] Grogan J *Workplace Law* (1998) 47.
[200] Klopper H 'SA's leader in Legal Compliance and Transformation Solutions' available at *https://serr.co.za/what-are-normal-working-hours-in-south-africa* (accessed 11 May 2021).
[201] Labour Relations Act, Schedule 1.

campaign to reduce the number of working hours to a 40-hour workweek.[202] The aim of this campaign was to reduce the unemployment rate in South Africa. According to COSATU,

> 'it is generally accepted that the reason for reducing working hours to 40 is to create employment. If work that is done by five people can be done by 10 people who are not working long hours of 45 hours, this could create more jobs'.[203]

However, till date there has been little progress in this regard.

Nonetheless, since the pandemic, working from home allows employees to enjoy flexible hours.[204] However, research shows many employees are working longer hours than before the pandemic.[205] Many remote employees have stated that they work more than 45 hours a week as well as work on weekends.[206] Consequently, there is a flaw in the BCEA as ensuring that the working hours do not exceed certain maxima is not achieved for employees working remotely.

Furthermore, in South Africa, Old Mutual Corporate's reward management platform conducted a survey which found that 88% of companies have stated that employees are working longer hours than ever.[207] Similarly, a survey conducted by a business support company based in United Kingdom (UK) called NordVPN, workers in the UK are working 25% more while working remotely and they are only logging off at 20:00.[208] This is because employees are unable to detach from work.[209] For example, 'employees skip taking their breaks in order to

[202] Capeetc 'Call for fewer working hours in SA' available at *https://www.capetownetc.com/news/call-for-fewer-working-hours-in-sa/* (accessed 31 March 2022).
[203] Capeetc 'Call for fewer working hours in SA' available at *https://www.capetownetc.com/news/call-for-fewer-working-hours-in-sa/* (accessed 23 March 2022).
[204] Vyas L & Butakhieo N 'The impact of working from home during COVID-19 on work and life domains: an exploratory study on Hong Kong' (2021) 4 *Policy Design and Practice* 61.
[205] Carroll N & Conboy K (2020) 1; Murillo A 'It's Confirmed: The Workweek Is Indeed Longer Now That You're WFH' available at *Work From Home Employees Put in More Hours During Workweek | Money* (accessed 22 November 2022); Bolisani E 'Working from home during COVID-19 pandemic: lessons learned and issues' (2020) 15 *Management and Marketing* 472.
[206] Maurer R 'Remote Employees Are Working Longer Than Before' available at *https://www.shrm.org/hr-today/news/hr-news/pages/remote-employees-are-working-longer-than-before.aspx* (accessed 24 March 2022).
[207] Fokazi S 'Global 'great resignation' trend seen in SA as long working hours in pandemic rattle employees' available at *https://www.sowetanlive.co.za/good-life/health/2021-11-02-global-great-resignation-trend-seen-in-sa-as-long-working-hours-in-pandemic-rattle-employees/* (accessed 21 May 2022).
[208] McKinsey Global Institute 'What's next for remote work: An analysis of 2000 tasks, 800 jobs, and nine countries' available at *https://www.mckinsey.com/featured-insights/future-of-work/whats-next-for-remote-work-an-analysis-of-2000-tasks-800-jobs-and-nine-countries* (accessed 31 March 2022).
[209] Eddeston K & Mulki K 'Toward Understanding Remote Workers' Management of Work-Family Boundaries: The Complexity of Workplace Embeddedness' (2015) 42 *Group & Organization Management* 350.

keep pace with rising performance standards'.[210] Within this context, employees working remotely do not shut down their laptop at the time they usually do, instead, they say 'just one more email' which stretches into, for example, an additional two hours of work.[211] According to the NordVPN study, 44% of employees working remotely in the UK reported that they were expected to do more work while working remotely in comparison to working at the traditional office.[212] Furthermore, research has shown that remote employees are spending more time in meetings (which can be conducted at any time of the day), keeping up with more communication channels, working through sickness and adapting an always-on culture.[213] As previously states, this is not in accordance with section 9 of the BCEA, which shows that there is a flaw in the current legislation as it does not regulate remote working.

Nonetheless, employees and employers may agree to alter the working conditions by extending or shortening the hours.[214] This includes that parties in an employment relationship can amend the working hours with a contractual agreement.[215] This amendment must be conducted with the voluntary consent of both parties.[216] In spite of this, employers have the authority to make unilateral amendments provided such changes fall within their managerial prerogative.[217] In *Apollo Tyres South Africa v National Union of Metalworkers of South Africa*, where a collective agreement regarding the implementation of a 12-hour, three-shift system was implemented.[218] The union argued that these amendments constituted unilateral changes to the employees' terms and conditions of employment. On the other side, the employer argued that these changes did not constitute unilateral amendments as these changes

[210] Jeske D 'Monitoring remote employees: Implications for HR' (2021) 20 *Emerald Publishing Limited* 4.
[211] Howe C, Whillans A & Menges J 'How to (Actually) Save Time When You're Working Remotely' available at *https://www.hbs.edu/ris/Publication%20Files/How%20to%20(Actually)%20Save%20Time_5307067a-78f0-4693-b466-7bddcf1bbf21.pdf* (accessed 25 January 2022).
[212] McKinsey Global Institute 'What's next for remote work: An analysis of 2000 tasks, 800 jobs, and nine countries' available at *https://www.mckinsey.com/featured-insights/future-of-work/whats-next-for-remote-work-an-analysis-of-2000-tasks-800-jobs-and-nine-countries* (accessed 31 March 2022).
[213] Yang L et al 'The effects of remote work on collaboration among information workers' (2022) 6 *Nature Human Behaviour* 46; McKinsey Global Institute 'What's next for remote work: An analysis of 2000 tasks, 800 jobs, and nine countries' available at *https://www.mckinsey.com/featured-insights/future-of-work/whats-next-for-remote-work-an-analysis-of-2000-tasks-800-jobs-and-nine-countries* (accessed 31 March 2022).
[214] Landers R, Rebitzer J & Taylor L 'Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms' (1996) 86 *JSTOR* 335.
[215] Jacobs A 'Looking at the Basic Conditions of Employment Act and how it regulates Working Hours' available at *https://ceosa.org.za/looking-at-the-basic-conditions-of-employment-act-and-how-it-regulates-working-hours/* (accessed 13 May 2021).
[216] Landers R, Rebitzer J & Taylor L (1996) 335.
[217] Strydom E *Employer Prerogative From A Labour Law Perspective* (unpublished LLD Thesis, University of South Africa, 1997) 5.
[218] *Apollo Tyres South Africa (Pty) Ltd v National Union of Metalworkers of South Africa & Others* (*Apollo Tyres* case) 2012 (6) BLLR 544 (LC).

fell within managerial prerogative. The LC held that changing a shift system does not constitute a change to the terms and conditions of employment.[219] The court also held that changes to the operations of an employer fall within the managerial prerogative and, therefore, does not need to be negotiated with employees.[220] However, it was held that changes to the shift system will only constitute changes to terms and conditions if it can be established that the right to work according to a specific shift is a contractual right to work.[221] Therefore, an employer cannot unilaterally change the terms and conditions of the employment relationship. In spite of this, the employer does retain some managerial prerogative in respect of aspects that are not entrenched in the contractual relationship.[222] Based on this, consultations with the employees will suffice in respect of changes to shift.[223] However, if the parties decide to extend the statutory limit, such extension only can be from fifteen minutes to sixty minutes a week.[224] No extensions are permitted beyond sixty minutes per week.[225] Furthermore, employees are under no obligation to work beyond the agreed working hours.[226]

Despite the above and what is stated in the employment contracts, employees have embraced a characteristic of an 'always-on' culture, which employees are available after ordinary working hours or whenever the employer/client might need the employee.[227] This is embarked on regardless that no extensions are permitted beyond sixty minutes per week. This is due to, as stated by Chance and Warwick-Evans:

> 'the absence of a commute has made the start and end of the working day less clear and work now often starts well before the contractual start time and continues into the evening, with emails being received out of hours and often very late into the evening and in some cases into the early morning, resulting in the always-on

[219] *Apollo Tyres* case, para 16.
[220] *Apollo Tyres* case, para 16.
[221] *Apollo Tyres* case, para 28.
[222] *Apollo Tyres* case, para 28
[223] *Apollo Tyres* case, para 28 – 29.
[224] International Labour Organization *National Labour Law Profile: South Africa* (2002) International Labour Organisation: Geneva.
[225] International Labour Organization *National Labour Law Profile: South Africa* (2002) International Labour Organisation: Geneva.
[226] Kelliher C & Anderson D 'Doing more with less? Flexible working practices and the intensification of work' (2010) 63 *Human Relations* 67.
[227] Daly N 'Flexible Working Is Here To Stay: Here's How To Make it Work' available at *https://www.wrike.com/blog/flexible-working-future-of-work/* (accessed 24 January 2022); Cheng A 'What is"always-on" culture and how does it impact work? available at *https://www.ringcentral.com/us/en/blog/what-is- always-on-culture-and-how-does-it-impact-work/* (accessed 30 April 2022).

culture'.[228]

This has resulted in a blurred line between ordinary working hours and after-hours when employees work remotely. Employees have described this situation as 'sleeping at work' rather than 'working from home'.[229] This has caused a large range of negative impacts, such as disruption of family life and damage to employee mental and physical well-being such as depression, downfall in the quality of life, strain, amongst others.[230] This has implications for the continued participation of employees in the labour market as seen in the Great Resignation being experienced in most developed countries.[231] Moreover, an always-on culture places more stress upon employees and such employees may become less productive.[232] This was affirmed by a study conducted by Erin Reid, a professor at Boston University's Questrom School of Business, which held that long working hours do not result in more output.[233]

As stated earlier, the BCEA stipulates the ordinary working hours and any amendments to the working hours will need to be mutually consented to between the parties and implemented in accordance with the BCEA. Despite this, the parties cannot extend the working hours to more than sixty minutes per day.[234] This has raised many legal challenges because, as discussed earlier, employees working remotely tend to work long hours that extends beyond the hours stated in the BCEA. Furthermore, this Act does not cater for remote working and as a result,

[228] Chance M & Warwick-Evans C 'The "Always on" Work Culture. Is a "Right to Disconnect" the Next Step in the Home Working Revolution? What Employers Should Start to Consider Now to Protect their Employees and Businesses' available at *https://www.rosenblatt-law.co.uk/insight/the-always-on-work-culture-is-a-right-to-disconnect-the-next-step-in-the-home-working-revolution-what-employers-should-start-to-consider-now-to-protect-their-empl/* (accessed 24 March 2022).

[229] Chance M & Warwick-Evans C 'The "Always on" Work Culture. Is a "Right to Disconnect" the Next Step in the Home Working Revolution? What Employers Should Start to Consider Now to Protect their Employees and Businesses' available at *https://www.rosenblatt-law.co.uk/insight/the-always-on-work-culture-is-a-right-to-disconnect-the-next-step-in-the-home-working-revolution-what-employers-should-start-to-consider-now-to-protect-their-empl/* (accessed 24 March 2022).

[230] Wong K, Chan A & Ngan S (2019) 1; Oakman J et al (2020) 3.

[231] Chugh A 'What is 'The Great Resignation'? An expert explains' available at *https://www.weforum.org/agenda/2021/11/what-is-the-great-resignation-and-what-can-we-learn-from-it/* (accessed 17 May 2022); Liu J 'A record 4.4 million people quit in September as Great Resignation shows no signs of stopping' available at *https://www.cnbc.com/2021/11/12/a-record-4point4-million-people-quit-jobs-in-september-great-resignation.html* (accessed 01 April 2022); Fokazi S 'Global 'great resignation' trend seen in SA as long working hours in pandemic rattle employees' available at *https://www.sowetanlive.co.za/good-life/health/2021-11-02-global-great-resignation-trend-seen-in-sa-as-long-working-hours-in-pandemic-rattle-employees/* (accessed 21 May 2022).

[232] International Labour Organization *The effects of working time on productivity and firm performance: a research synthesis paper* (2012) International Labour Organisation: Geneva.

[233] Carmichael S 'The Researtch Is Clear: long Hours Backfire for People and for Companies' available at *https://hbr.org/2015/08/the-research-is-clear-long-hours-backfire-for-people-and-for-companies* (accessed 01 April 2022).

[234] Basic Conditions of Employment Act, section 9(2).

it becomes difficult to ensure compliance with the required hours. Related to this, there is a lack of legal provision providing for the right to disconnect. The right to disconnect does not have a precise definition, however, it can be understood as the following:

> 'the right that recognizes workers the possibility of remaining inaccessible or of not being contacts by any means through digital or other devices for matters related to their work performance, whenever they are out of their work times, that is to say, in their breaks during the work day, daily, weekly and annual rest periods, work leaves, holidays, among others'.[235]

The purpose of the right to disconnect is for employers to respect the private and family life of employees as well as their dignity.[236] As will be discussed in chapter 4, the Italian Law 81/2017, the *El Khomri* law, regulates the right to disconnect. The purpose of this law is 'to make dependent work more flexible, accompanying the changes produced in the labour market thanks to the advance of new digital technologies'.[237] This is to ensure that boundaries are established to improve the work-life balance of employees working remotely.[238] Further analysis will be addressed in chapter 4.

Nevertheless, the legal right to disconnect for South African employees is not provided under current labour regulations.[239] Despite the absence of a legal right to disconnect, employers are still obligated to regulate the working hours and consider the health and well-being of employees.[240] This includes taking reasonable steps to ensure employees do not work continuously beyond the statutory hours.[241]

[235] Chiuffo FM 'The "Right to Disconnect" or "How to Pull the Plug on Work"' (2019) 4 *SSRN Electronic Journal* 12.
[236] Chiuffo FM (2019) 12.
[237] Chiuffo FM (2019) 6.
[238] Dima L & Högback A 'Legislating a right to disconnect' available *Untitled-1 (fes.de)* (accessed 15 December 2022).
[239] The right to disconnect refers to the right which allows employees to disengage and reframe from work and all work-related communications during non-working hours. Van Staden M 'The digital ties that bind – South Africans need the right to disconnect and slip the work leash' available at *https://www.dailymaverick.co.za/article/2021-11-03-the-digital-ties-that-bind-south-africans-need- the-right-to-disconnect-and-slip-the-work-leash/#:~:text=The%20Code%20requires%20employers%20to,that%20employees%20take%20rest%20breaks.* (accessed 20 May 2022).
[240] CitizensInformation 'Your employment rights during COVID-19' available at *https://www.citizensinformation.ie/en/employment/employment_rights_during_covid19_restrictions.html* (accessed 25 March 2022).
[241] International Labour Organization *The effects of working time on productivity and firm performance: a research synthesis paper* (2012) International Labour Organisation: Geneva.

3.4. Occupational health and safety

According to the ILO, OHS is the 'discipline dealing with the prevention of work-related injuries and diseases as well as the protection and promotion of the health of workers'.[242] In other words, OHS is aimed at providing a safe working environment for employees. This covers a broad range of activities to ensure standards are set to prevent and mitigate workplace accidents/hazards and work-related ill-health.[243] This is critical because poor working conditions affect employees' social, mental and physical well-being.[244] Within this context, various OHS policies and legislation have been developed to ensure occupational accidents and diseases are prevented as well as ensuring those that suffer from these accidents/diseases are compensated and reintegrated into the labour market. In South Africa, these legislations include the OHSA, and COIDA, amongst others.[245]

The OHSA is the principal law regulating health and safety within the workplace.[246] This Act 'provides a framework for setting and enforcing occupational health standards' and requires employers to maintain, as far as reasonably practicable, a work environment that is safe and without risk to the health of employees.[247] This legislative framework, further, imposes various measures to promote the improvement of the health and safety of employees at the workplace.[248] This includes obligation on employers to impose appropriate preventive measures to ensure a safer and healthier working environment.[249] The next section will illustrate the scope of the OHSA and its application in remote work.

[242] International Labour Organisation *Occupational Safety and Health* (2020) International Labour Organisation: Geneva.
[243] International Labour Organisation *Occupational Safety and Health* (2020) International Labour Organisation: Geneva.
[244] Efectio 'Workplace Factors Affecting Employee Health' available at *https://efectio.com/en/workplace-factors-affecting-employee-health/* (accessed 06 June 2022).
[245] Others are Mine Health and Safety Act 29 of 1996 and Diseases Act 130 of 1993 and Occupational Diseases in Mines and Works Act 78 of 1973.
[246] National Health & Safety Council *Report of the Committee of Inquiry into a National Health & Safety Council* (Executive Summary of 1997) 8.
[247] National Health & Safety Council *Report of the Committee of Inquiry into a National Health & Safety Council* (Executive Summary of 1997) 8.
[248] Occupational Health and Safety Act 85 of 1993.
[249] Occupational Health and Safety Act, section 8(1).

3.4.1. Scope of Occupational Health and Safety Act

The OHSA's main purpose is to provide and maintain a healthy and safe working environment.[250] This applies to employees who are defined as 'any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction/supervision of an employer or any other person'.[251] Although the OHSA applies to all employees, employees working in a mine, a mining area or any works as defined in the Mine Health and Safety Act 29 of 1996 (MHSA), except if the MHSA provides otherwise, fall outside the scope of this Act.[252]

Health and safety in the workplace is the joint responsibility of the employer and employees.[253] However, the OHSA places a duty on the employer to ensure employees work in a safe and healthy work environment.[254] Within the context, an employer means 'any person who is employed or provides work for any person and remunerates that person or expressly or tacitly undertakes to remunerate him, but excludes a labour broker as defined in section 1(1) of the LRA'.[255] The definition of employer and employee does not include people working outside the workplace, however, the definition of 'workplace' is broadly formulated. The definition of 'workplace' as defined in the OHSA states that 'workplace means any premises or place where a person performs work in the course of his employment'.[256] This definition suggests that employees working remotely are also protected in terms of the OHSA. This means that the employer's duty extends beyond the traditional work environment and caters to employees working remotely. Based on this, the OHS duties placed on the employer within the context of remote work 'are particularly significant today, as ensuring OHS at work is indispensable in the management of the COVID-19 pandemic and the ability to resume work'.[257] The OHS obligation remains the responsibility of the employer for employees WFH, as the definition of 'workplace' in terms of the OHSA extends beyond the traditional office. Therefore, it can be

[250] Machabe A & Indermun V 'An overview of the Occupational Health and Safety Act: A theoretical and practical global perspective' (2013) 3 *Arabian Journal of Business and Management Review* 13.
[251] Machabe A & Indermun V (2013) 13.
[252] Adeyemo O & Smallwood J 'Impact of Occupational Health and Safety Legislation on Performance Improvement in the Nigerian Construction Industry' (2017) 196 *Procedia Engineering* 786.
[253] Adeyemo O & Smallwood J (2017) 786.
[254] Occupational Health and Safety Act, section 8(2)(*a*)-(*j*).
[255] Labour Relations Act 85 of 1993.
[256] Labour Relations Act 85 of 1993.
[257] International Labour Organisation *A safe and healthy return to work during the COVID-19 pandemic* (2020) International Labour Organisation: Geneva.

argued that employers are still required to provide safe systems for remote employees.[258] Irrespective of this, the OHSA does not explicitly stipulate this, which produces a gap in the current BCEA.

3.4.2. Duties of the employer

As previously mentioned, in terms of the OHSA, the employer is required to take steps to prevent, and protect workers from occupational risks.[259] This obligation is an extension of the duty of care imposed on the employer under common law.[260] Under common law, the employer is required to take reasonable care for the safety of employees and prevent them from being exposed to any unnecessary risks and ensure a safe system of work.[261] This common law duty is used to determine the costs of the work-related accident/illness.[262] Under the OHSA, the duties of the employer are stipulated in section 8. Section 8(1) provides:

> 'Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees'.[263]

This duty is more preventative in nature as it aims to prevent accidents/injuries in the workplace.[264] Similarly, employers are required to have knowledge of the hazards within the workplace and have a commitment to ensuring that the management processes promote health and safety at work.[265] In addition, employers have the 'responsibility of ensuring that all practicable preventive and protective measures are taken to minimise occupational risks'.[266] The interpretation of this duty was given by the court in *Du Pisanie v Rent-A-Sign*.[267] In this case, the appellant instituted a claim for damages against the respondent when he fell from an

[258] Matisane L et al 'Challenges for Workplace Risk Assessment in Home Offices-Results from a Qualitative Descriptive Study on Working Life during the First Wave of the COVID Pandemic in Latvia' (2021) 18 *Int. J. Environ. Res. Public Health* 3.
[259] Bujor G 'Occupational Risk Assessment: Imperatives for Process Improvement' (2018) 19 *EBSCO* 134.
[260] Hughes P & Ferrett E *Introduction to Health and Safety at Work* 3 ed (2007) 7.
[261] Alli B *Fundamental Principles of Occupational Health and Safety* 2 ed (2008) 8.
[262] Alli B (2008) 8.
[263] Occupational Health and Safety Act, section 8(1).
[264] International Labour Organisation *An employers' guide on working from home in response to the outbreak of COVID-19* (2020) International Labour Organisation: Geneva.
[265] Occupational Health and Safety Act, section 8(2)(*d*); Alli B (2008) 8.
[266] Occupational Health and Safety Act, section 12(1)(*b*); International Labour Organisation *An employers' guide on working from home in response to the outbreak of COVID-19* (2020) International Labour Organisation: Geneva.
[267] *Du Pisanie v Rent-A-Sign (Pty) Ltd and Another* (*Rent-A-Sign* case) 2001 (2) SA 894 (SCA).

advertising board while performing maintenance and repairing the board.[268] The appellant argued that the incident resulted from the respondent's negligence in failing to ensure the appellant's safety while working on the board.[269] The High Court found in favour of the respondents, stating that by warning the appellant that it was dangerous to walk or place weight on certain parts of the structure, they had done what was required to guard against the risk of harm or injury, although the warning was ignored by the appellant.[270] On appeal to the SCA, the court held that there is a statutory obligation placed on the employer to provide safe premises, safe machinery and tools and safe systems of work.[271] According to the court, if any work that is performed is dangerous, the employer must take all reasonable precautions to ensure the safety of his/her employees.[272] The SCA held that the employer took reasonable precautions to guard against the risk of harm, and therefore, found in favour of the employer.

The above context demonstrates the duties placed on the employer dealing with injuries that occur within the workplace. The question that arises is how these duties are implemented for employees WFH. Implementing this raises certain challenges as employers are unable to design, operate and evaluate a work system for remote employees.[273] Based on this, it becomes difficult for employers to ensure there is a set of procedures in place to minimise/reduce hazards.[274] Irrespective of this, an employer must identify the hazards present in the workplace, evaluate the seriousness of these hazards and take appropriate steps to eliminate the hazards or mitigate the consequences thereof.[275]

Furthermore, the employer has the duty to create safe systems of work and ensure plants and machinery do not pose undue risks to health.[276] Safe systems of work 'is a fundamental concept applied to designing, operating, and evaluating a work system'.[277] This 'ensures that work tasks, work environment, and processes are designed such that they are unlikely to result in physical or psychological harm; identify and control foreseeable risks to acceptable levels; and

[268] *Rent-A-Sign* case, para 8.
[269] *Rent-A-Sign* case, para 8.
[270] *Rent-A-Sign* case, para 8.
[271] *Rent-A-Sign* case, para 15.
[272] *Rent-A-Sign* case, para 15.
[273] Caponecchia C & Wyatt A (2021) 422.
[274] International Labour Organisation *How can occupational safety and health be managed?* (2020) International Labour Organisation: Geneva.
[275] Occupational Health and Safety Act, section 12.
Gerber M & von Solms R 'Management of risk in the information age' (2005) 24 *Computers & Security* 18.
[276] Occupational Health and Safety Act, section 8(2)(*a*); Caponecchia C & Wyatt A 'Defining a "Safe System of Work"' (2021) 12 *Saf Health Work* 421.
[277] Caponecchia C & Wyatt A (2021) 421.

minimise harm when it occurs'.[278] The employer implements this duty by establishing an OHS management system and making appropriate arrangements accordingly.[279] To establish this, the employer is required to conduct an appropriate risk assessment and put in place adequate precautionary.[280] Employers are, further, required to perform workplace risk assessments for employees working remotely. Within this context, employers are required to identify workplace hazards and develop measures in accordance with the hazard. However, the 'traditional workplace risk assessment and management methods are not applicable as employers are not allowed to send OHS experts to identify existing workplace hazards in remote workers' homes'.[281]

In relation to this, the risk assessment requires the employer to try to remove/reduce any potential damage to the health and safety within the workplace by placing precautionary measures in place and taking the provisions of section 8(2) into account.[282] To facilitate this, the employer is required to appoint OHS representatives as provided in section 17 of the OHSA.[283] The representatives' responsibilities are to ensure that the precautionary measures are in place and continuously perform risk assessments in the workplace.[284] If there are two or more health and safety representatives in the workplace, the employer is obligated to establish a health and safety committee(s).[285] The committee holds meetings as often as necessary to consult initiate, develop, promote, maintain and review measures to ensure the OHS of the employees.[286] Overall, the employer is required to take steps that are reasonably practicable to ensure the safety and absence of risk of health as well as eliminate/mitigate the health issues of employees.[287]

Within the context of remote work, risk assessment will not be based on physical visits as it is not reasonably practicable for employers to visit each remote employee's home. Therefore, 'without proper ergonomics and risk assessments, remote employees are at risk of developing

[278] Caponecchia C & Wyatt A (2021) 422.
[279] International Labour Organisation *OSH Management System: A tool for continual improvement* (2011) International Labour Organisation: Geneva.
[280] Occupational Health and Safety Act, section 8.
[281] Matisane L et al (2021) 3.
[282] Occupational Health and Safety Act, section 8(2).
[283] Hovden J et al 'The safety representative under pressure. A study of occupational health and safety management in the Norwegian oil and gas industry' (2008) 46 *Safety Science* 496.
[284] Occupational Health and Safety Act, section 18(1); Hovden J et al (2008) 496.
[285] Occupational Health and Safety Act, section 19(1).
[286] Occupational Health and Safety Act, section 19(4).
[287] Alli B (2008) 46.

health problems over time'.[288] Yet, the employer still has the responsibility to conduct reasonably practicable standard of care.[289] This ideally would be achieved by assessing, controlling and mitigating risks of remote employees' working environment. However, the employee's home as the workplace has implications on the right to privacy which are not relevant to the traditional approaches of occupational health and safety in terms of the OHSA which focuses on safety in traditional workplaces such as offices or work sites. Additionally, research has shown that one of the reasons for dissatisfactory performance is the lack of access to workspace tools and inadequate workstation/work environment.[290] For example, many employees conduct their work in their kitchen, dining room table, on the couch, and in bed, among other places. Together with this, 'the lack of amenities like fast internet connections and quick interactions with team members or the inevitable distractions at home' also affects poor work performance.[291] Furthermore, legislation does not provide the necessary guidelines applicable to the uniqueness of remote work. Therefore, there is a gap in the labour legislation in respect of this.

3.4.3. Reasonably practicable standard of care

The primary standard of care required to comply with the general provisions of the OHSA is to do what is reasonably practicable.[292] This aligns with the standard prescribed by ILO's Occupational Safety and Health Convention.[293] The phrase 'reasonably practicable' is used throughout the OHSA and is defined in section 1 as:

'practicable having regard to-

(a) the severity and scope of the hazard or risk concerned;

[288] Snook A 'Health and Safety Issues When Employees are Working from Home' available at *https://www.i-sight.com/resources/health-and-safety-issues-when-employees-are-working-from-home/* (accessed 30 January 2022).
[289] International Labour Organisation *How can occupational safety and health be managed?* (2020) International Labour Organisation: Geneva.
[290] PossibleWorks 'The Impact of Remote Work on employee Performance and the role of HR to alleviate the impact' available at *https://possibleworks.com/blog/the-impact-of-remote-work-on-employee-performance-and-the-role-of-hr-to-alleviate-the-impact/* (accessed 02 June 2022).
[291] PossibleWorks 'The Impact of Remote Work on employee Performance and the role of HR to alleviate the impact' available at *https://possibleworks.com/blog/the-impact-of-remote-work-on-employee-performance-and-the-role-of-hr-to-alleviate-the-impact/* (accessed 02 June 2022).
[292] Alli B (2008) 46.
[293] Convention 155 of 1981.

(b) the state of knowledge reasonably available concerning that hazard or risk and of any means of removing or mitigating that hazard or risk;
(c) the availability and suitability of means to remove or mitigate that hazard or risk; and
(d) the cost of removing or mitigating that hazard or risk in relation to the benefits deriving therefrom'.[294]

This definition indicates that there is no absolute standard of care in respect of occupational health and safety, provided that reasonably practicable measures have been taken.[295] As stated by Colyn P, 'in order for an employer to demonstrate a system which is healthy and safe, as far as reasonably practicable and which ensures a healthy and safe working environment, a holistic approach must be adopted'.[296] A holistic approach is achieved by considering various measures placed by the employer. Some examples of measures that employers can rely on include, formal and informal training of employees; an organisational structure of experienced and competent persons; equipment that is safe and does not endanger the health of persons; systems of work that are safe and which do not expose persons to unhealthy conditions; health and safety standards and procedures; supervisions and proper discipline; maintenance procedures; and risk management, amongst others.[297] In relation to this, the employer is required to implement the above measures with a duty of care.[298]

In order to determine whether the employer acted with a duty of care, South African courts rely on the standard of the reasonable person as the criterion to determine the reasonableness of the duty performed by the employer.[299] For example, in *Joubert v Buscor*, the issue was the

[294] Occupational Health and Safety Act, section 1.
[295] There are three levels of statutory duty. First, absolute duty which occurs when the risk of injury is so high that injury is inevitable unless safety precautions are taken. Secondly, practicable. A duty that the employer ensure, so far as is practicable, that any control measure is maintained in an efficient state means that if the duty is technically possible or feasible then it must be done irrespective of any difficulty, inconvenience or cost. Thirdly and lastly, reasonably practicable which occurs if the risk/injury is very small compared to the cost, time and effort required to reduce the risk, then no action is necessary. This duty requires judgment on the part of the employer and clearly needs a risk assessment to be undertaken with conclusions noted.
Hughes P & Ferrett E (2007) 7.
[296] Le Roux W 'When is a workplace safe or unsafe?: the safety criterion in terms of the occupational health and safety act and the mine health and safety act*'* (2011) 111 *Journal of the Southern African Institute of Mining and Metallurgy* 530.
[297] International Labour Organisation *How can occupational safety and health be managed?* (2020) International Labour Organisation: Geneva.
[298] Tshoose I 'Employer's Duty to Provide a Safe Working Environment: A South African Perspective' (2011) 6 *Journal of International Commercial Law and Technology* 166.
[299] *MacDonald v General Motors South Africa (Pty) Ltd* (*McDonald* case) 1973 (1) SA 232 (E), para 56.

employer's liability for damages arising from the death of an apprentice with a company contracted by the employer to perform work. [300] The court held that the liability of the employer under OHSA is a strict liability and set out a number of factors against which it is evaluated.[301] The court further relied on the reasonable person test, interpreting this to mean a person of ordinary knowledge and experience.[302] In addition, the court held that section 9(1) of the OHSA provides 'a framework within which employers will be responsible for the health and safety of independent contractors who may be affected by their activities also in the absence of negligence'.[303] In other words, the obligation of the employer in section 9(1) is broad enough to include subcontractors and the public at large if affected by the employer's activities.[304] Therefore, the Court found in favour of the appellant.[305]

The above indicates that the OHSA places a general obligation on employers to provide a reasonable standard of care and ensure the working environment is safe and without risk. It does not specifically provide guidance on how this must be conducted in the context of remote working. This, together with the above flaws identified above, states that the current BCEA provides requirements and duties which are placed on employers to cater for employees WFH. Therefore, employers will need to establish their own risk assessment, that is reasonably practicable and takes a reasonable care of their remote employees health and safety into account.

3.5. Employee performance

The monitoring of employee performance has been 'widely used in the field of management studies to improve productivity since the early 1980s'.[306] Productivity is measured by comparing the relationship between the quantity and quality of the goods produced and the

[300] *Joubert v Buscor Proprietary Limited* (*Joubert* case) 2016 ZAGPPHC 1024, para 22.
[301] Factors that would need to be considered include the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his/her long-service record. This is not an exhaustive list. *Joubert* case, para 23-35.
[302] Ahmed R 'The Standard of the Reasonable Person in Determining Negligence – Comparative Conclusions' (2021) 24 *PELJ* 5.
[303] *Joubert* case, para 23-35.
[304] *Industrial Health Resource Group and Others v Minister of Labour and Others* 2015 (4) All SA 78 (GP), the court held that section 32 of the OHS Act extends to non-employees.
[305] *Joubert* case, para 42.
[306] Clayton C et al 'Management of employee performance in the South Africa Public Service: the case of the National Department of Rural Development and Land Reform in the Western Cape' (2015) 13 *Problems and Perspectives in Management* 125.

quantity of the resources used.[307] Employee productivity is defined as 'an assessment of the efficiency and value generated by an individual employee within a specific time period'.[308] This is determined by various factors such as the ability, desire, environment, among others.[309] Employee productivity is evaluated by the output produced by the employee within a specific period of time.[310] Employees that produce satisfactory results receive an appraisal for their performance in the form of recognition, rewards, status, and social acceptance.[311]

The LRA recognises that 'employers may set certain performance standards which employees would be required to meet in order to remain employed', provided these standards are lawful, reasonable, relevant within the workplace and it is made known to the employee.[312] Employers are required to communicate to employees the reasonable standards of performance that are expected and how progression towards these standards will be monitored.[313] Where the employee does not meet the required standard, a dismissal can occur. This is known as dismissal for poor work performance.[314]

Poor work performance is the failure on part of the employee to meet and/or maintain the employer's work performance standards.[315] Employees that do not meet the reasonable and attainable performance standard or job requirement as set out by the employer can be dismissed for incapacity due to poor work performance, as provided in Item 9 of the Dismissal Code.[316] In terms of this Code, before employees can be dismissed for poor work performance, the employer is required to evaluate the employee's performance and, if it is not up to standard, to

[307] Shital M 'Productivity: Meaning, Concept, Formulas, Techniques, Measurement and Advantages' available at *https://www.economicsdiscussion.net/management/productivity-meaning-concept-formulas/32324* (accessed 06 June 2022).
[308] BasuMallick C 'What Is Employee Productivity? Definition, Calculation, and Best Practices for Improvement' available at *What Is Employee Productivity? Definition, Calculation, and Best Practices for Improvement | Spiceworks It Security* (accessed 22 November 2022).
[309] Pawirosumarto S & Sarjana PK 'Factors affecting employee performance of PT' (2016) 59 *International Journal of Law and Management* 3.
[310] Pawirosumarto S & Sarjana PK 'Factors affecting employee performance of PT' (2016) 59 *International Journal of Law and Management* 3.
[311] Yusof A 'Sociological perspective of Performance Appraisal: An Overview' (2000) 1 *Utara Management Review* 79.
[312] Arnold F 'Protocol for dismissing an employee for poor work performance' available at *https://www.golegal.co.za/dismissal-work-performance/* (accessed 28 May 2022).
[313] Fisic I 'Why and how to create performance standards in an organization' available at *https://clockify.me/blog/business/performance-standard/* (accessed 27 January 2022).
[314] *Joslin v Olivetti Systems & Networks Africa (Pty) Ltd* 1993 (14) ILJ 227 (IC).
[315] Smit P *Disciplinary Enquiries in Terms of Schedule 8 of The Labour Relations Act 66 of 1995* (unpublished PhD Thesis, University of Pretoria, 2010) 3.
[316] Labour Relations Act, Schedule 8.

allow the employee a fair opportunity to improve while providing reasonable assistance, guidance, and training, counselling and regular evaluations.[317]

The employer dismissing an employee for poor work performance must ensure that this is in accordance with substantive and procedural fairness in terms of the LRA.[318] Substantive fairness is achieved by the following:

> 'the employer proving that the employee actually failed to meet the work performance standard, despite having been given the necessary evaluation, counselling, training and guidance and despite having been afforded a reasonable time period in which to attain and maintain the required standard'.[319]

In terms of procedural fairness, Item 8 of the Dismissal Code provides guidance on steps an employer should take before dismissing an employee for poor work performance. In terms of this provision:

> 'an employee should not be dismissed for unsatisfactory performance unless the employer has -
>
> (a) Given the employee appropriate evaluation, instruction, training, guidance or counselling; and
> (b) After a reasonable period of time for improvement, the employee continues to perform unsatisfactorily'.[320]

Furthermore, the Dismissal Code requires that before a dismissal, an employee has the right to be heard in the process and to be assisted by a trade union or a fellow employee.[321] Also, an investigation should be conducted to establish the reasons for unsatisfactory performance.[322]

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[317] Schedule 8 of the Code of Good Practice – Dismissal, section 8(1)(*e*) and section 8(2)(*a*).
Du Toit et al *The Labour Relations Act of 1995 – A Comprehensive Guide* (1998) 452.
[318] Cheadle H 'Regulated Flexibility and Small Business: Revisiting the LRA and the BCEA' (2006) 27 *Indus. LJ* 11.
[319] The South African Labour Guide 'Poor Performance Procedures' available at *https://www.labourguide.co.za/poor-performances/508-poor-performance-procedures#:~:text=A%20fair%20procedure%20encompasses%3A,reasons%20for%20the%20poor%20performance* (accessed 22 May 2022).
[320] The Code of Good Practice: Dismissal, Schedule 8(8)(*2*).
[321] The Code of Good Practice: Dismissal, Schedule 8(8)(*4*).
[322] The Code of Good Practice: Dismissal, Schedule 8(8)(*3*).

Therefore, although there may be a fair reason to dismiss an employee, the employer is under obligation to follow a fair procedure for dismissal.

Against this background, employers have typically used traditional time and attendance systems and direct observation to monitor employee performance.[323] Employers monitor employees' activities to determine whether they are performing and whether employees meet the performance standard set out by the employer.[324] This also allows employers to provide assistance, training, and counselling, amongst others to facilitate employees' productivity. Related to this, supervision/control is one of the elements of the employment relationship and is of vital importance in the workplace.[325] Indeed, under common law and the statutory presumptions in section 200A of the LRA, supervision/control is one of the ways to determine whether a person is an employee or an independent contractor.[326] Furthermore, constant supervision of employees can allow employers to identify employee burnout, emotional exhaustion, poor performance and minimise staff turnover.[327] The law provides for employers to set Key Performance Areas (KPAs) which is used as a way of monitoring and supervision of employee's work.[328]

However, the law does not explicitly provide for how the performance of employees should be monitored or supervised in remote work. KPAs could be used in remote working as a useful tool to implement effective, corrective and preventive actions.[329] Many employers rely on electronic monitoring and supervising to establish the performance of employees WFH. Based on this, research has shown that electronic monitoring and supervising have negative effects on employees WFH.[330] Such effects include increased psychological and physical health

[323] Seopros 'How to Monitor Employees Time and Attendance' available at *How to Monitor Employees Time and Attendance ? PayDay* (accessed 15 December 2022).
[324] Donnelly R & Johns J 'Recontextualising remote working and its HRM in the digital economy: An integrate framework for theory and practice' (2021) 32 *The International Journal of Human resource Management* 94.
[325] International Labour Organisation *Employment Relationship* (2020) International Labour Organisation: Geneva.
[326] [326] International Labour Organisation *Employment Relationship* (2020) International Labour Organisation: Geneva.
[327] Meinert D 'How to Prevent Employee Burnout' available at *https://www.shrm.org/hr-today/news/hr-magazine/0817/pages/how-to-prevent-employee-burnout.aspx* (accessed 06 June 2022).
[328] Graham T 'How to Use Corrective and Preventive Actions to Keep Your Company Safe' available at *How to Use Corrective and Preventative Actions to Keep Your Company Safe - KPA* (accessed 12 March 2023).
[329] Graham T 'How to Use Corrective and Preventive Actions to Keep Your Company Safe' available at *How to Use Corrective and Preventative Actions to Keep Your Company Safe - KPA* (accessed 12 March 2023).
[330] Jeske D 'Remote workers' experiences with electronic monitoring during Covid-19: implications and recommendations' (2022) 15 *International Journal of Workplace Health and Management* 397.

problems.[331] This is because employees suffer from high tension, anxiety, depression, among others, as they are aware that they are being monitored and need to increase their efficiency and better their performance.[332] Yet, constant monitoring actually worsens their performance and affects employees morale due to the negative factors stated above.[333] Many remote employees do not have a designated office in their homes, which means that any video conferencing or surveillance through the camera is capturing private lives that employers do not have a legal right to.[334] The camera monitoring includes the 'capturing of family members such as children and spouses who unwittingly appear in video recordings'.[335] Similarly, employee monitoring 'seems to be a violation of privacy to a lot of workers when they are required to have software on their computers that tracks their every move in their own homes'.[336] Many employees have argued that technological monitoring tools invade the privacy of their homes.[337] Especially since employees have no insight as to what data is being collected, how it is used, and whether this leads to any discrimination, among others.[338] This has led to legal scholars to question whether privacy protections change because employees are working remotely instead of in the traditional office environment.[339] Indeed, there is a diminishing sense of privacy, which is linked to the shortcomings of any legal protections.[340] The shortcomings in legal protection is due to technological developments that are generated at a rapid pace and the inability of laws to develop in accordance with these technological developments.[341]

[331] Jeske D (2022) 397.
[332] Jeske D (2022) 397.
[333] Blackman R 'How to Monitor Your Employees – While Respecting Their Privacy' available at *How to Monitor Your Employees — While Respecting Their Privacy (hbr.org)* (accessed 27 November 2022).
[334] Jeske D (2021) 3.
[335] Sorensen S 'Monitoring the Remote Employee: Oversight or an Overstep?' available at *https://www.epraxis.com/post/monitoring-the-remote-employee-oversight-or-an-overstep* (accessed 02 June 2022).
[336] Vatcha A (2020) 6.
[337] Vatcha A (2020) 6.
[338] Vatcha A (2020) 6.
[339] Katsabian T (2020) 15; Bhave et al 'Pirvacy at Work: A Review and a Research Agenda for a Contested Terrain' (2019) 46 *Journal of Management* 132; Vyas L & Butakhieo N 'The impact of working from home during COVID-19 on work and life domains: an exploratory study on Hong Kong' (2020) 4 *Policy Design and Practice* 62.
[340] Nurse J et al (2021) 2.
[341] Kerry C 'Why protecting privacy is a losing game today – and how to change the game' available at *Why protecting privacy is a losing game today—and how to change the game (brookings.edu)* (accessed 1 December 2022).

3.5.1. Privacy in the workplace

More recently, employers monitor employees through tracking internet activity, taking screenshots, tracking keystrokes, and GPS tracking, amongst others.[342] However, there are implications placed on monitoring/surveillance as employers are required to be mindful of an employee's right to privacy in terms of section 14 of the Constitution.[343] Section 14 of the Constitution imposes the right to privacy.[344] The right to privacy is defined as 'the right not to have their person or home searched, their property searched, their possessions seized or the privacy of their communications infringed'.[345] Although employers have surveillance systems in place, there are two conflicting interests of privacy in the workplace, namely:

> '1. In the first instance, there are the legitimate business interests and information assets of the employer which require protection and can fairly be said to justify the monitoring of its information systems.
>
> 2. Secondly, there is the simultaneously competing interest of an employees' reasonable expectation of privacy regarding communications they make in the workplace. It may intrude into their private lives, undermine respect for their correspondence or interfere with the relationship of mutual trust and confidence that should exist between the two parties'.[346]

The above conflicting interests are not always easy to draw a distinction between business and private information. Yet, these conflicting interests need to be balanced. This is particularly important as the right to privacy is intertwined with the right to dignity.[347] Lucas K defines dignity as 'a personal sense of worth, value, respect, or esteem that is derived from one's humanity and individual social position; as well as being treated respectfully by others'.[348] Hence, if an employer violates an employee's privacy by monitoring them, this could be an infringement on the employee's dignity, honour and self-respect.[349] Accordingly, the right to

[342] Weisberg L 'What can an employer track?' available at *https://www.weisbergcummings.com/employee-tracking-and-recording/* (accessed 16 January 2022).
[343] Section 14 of the Constitution of the Republic of South Africa, 1996.
[344] Section 14 of the Constitution of the Republic of South Africa, 1996.
[345] Chigumba P *The employee's right to privacy versus the employer's right to monitor electronic transmissions from the workplace* (unpublished LLM Thesis, University of Kwazulu-Natal, 2013) 9.
[346] Michalson L 'Link between Monitoring and Privacy in South Africa' available at *Link between Monitoring and Privacy (michalsons.com)* (accessed 27 November 2022).
[347] Chigumba P *The employee's right to privacy versus the employer's right to monitor electronic transmissions from the workplace* (unpublished LLM Thesis, University of Kwazulu-Natal, 2013) 9.
[348] Lucas K 'Workplace Dignity: Communicating Inherent, Earned, and Remediated Dignity' 52 *Journal of Management Studies* 622.
[349] Chigumba P *The employee's right to privacy versus the employer's right to monitor electronic transmissions from the workplace* (unpublished LLM Thesis, University of Kwazulu-Natal, 2013) 6.

privacy and dignity are fundamental to both the social and personal development of an employee and concern whether an employee allows others to know about his/her activities.[350] Put differently, the loss of protection to privacy is an automatic attachment on employee's dignity.[351]

Various statutes protect and reinforce employees' right to privacy in their communications by regulating the monitoring of the internet, telephone and e-mails.[352] For example, the Electronic Communication and Transaction Act 25 of 2002 (ECTA) protects any communication conducted through personal email, telephone conversations and any data stored electronically except if such an employee is using employer-provided equipment.[353] The regulation on monitoring and interception of communications of employees is also provided in terms of the Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002 (RICA).[354] Section 6 of RICA provides that interception of communication of employees must be in connection with the objectives of carrying on of business.[355] More recently, the Protection of Personal Information Act 4 of 2013 (POPI Act) was promulgated to give effect to the constitutional right to privacy, and therefore, should be read in conjunction with section 14 of the Constitution.[356] The effect of these statutes and section 14 of the Constitution implies that employees must be aware that they are being monitored and recorded and as such, they are aware of the reasons therefore.[357]

Despite this, there are limitations to the constitutional right to privacy as stipulated in section 36 of the Constitution, namely:

[350] Chigumba P *The employee's right to privacy versus the employer's right to monitor electronic transmissions from the workplace* (unpublished LLM Thesis, University of Kwazulu-Natal, 2013) 9.
[351] Social care institute for excellence 'Privacy and dignity in care' available at *Privacy and dignity in care | SCIE* (accessed 27 November 2022).
[352] Michalson L 'Monitoring or intercepting of communications lawfully' available at *https://www.michalsons.com/blog/monitoring-of-communications/171* (accessed 06 June 2022).
[353] Electronic Communications and Transactions Act 25 of 2002: Mabeka NQ 'When does the conduct of an employer infringe on an employee's constitutional right to privacy when intercepting or monitoring electronic communications' (unpublished LLM, University of the Western Cape, 2008) 43.
[354] Act 70 of 2002.
[355] Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2022, section 6.
[356] SAICA 'Promotion of Access to Information Act' available at *https://www.saica.org.za/resources/legislation-and-governance/promotion-of-access-to-information-act* (accessed 16 January 2022).
[357] Mosdell, Pama & Cox 'CCTV cameras in the workplace? Allowed or not?' available at *CCTV cameras in the workplace? Allowed or not? (mpc.law.za)* (accessed 27 November 2022).

> '… limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factoring, including –
>
> (a) The nature of the right;
> (b) The importance of the purpose of the limitation;
> (c) The nature and extent of the limitation;
> (d) The relation between the limitation and its purpose; and
> (e) Less restrictive means to achieve the purpose'.[358]

Therefore, the right to privacy can be limited in terms of section 36, provided that the reasonableness and proportionality test is satisfied.[359] This test states that the limitation to section 14 must be for purposes that are reasonable and necessary in a democratic society.[360] Consequently, employers are allowed to monitor their employees provided that they have informed the employees they will be monitored, explained the reason for the monitoring and the employee is using employer-provided equipment, as stated in section 6 of RICA. Therefore, employees using 'employer's equipment can expect privacy to be limited'.[361] This indicates that employers may watch, read and listen to most of the employee's workplace communications.[362] This allows employers to 'detect employees neglecting their responsibilities during work hours'.[363] Regardless, the limitation of the right to privacy must be done in the least intrusive way, as addressed in *Amabhungane Centre for Investigative Journalism v Minister of Justice and Correctional Services*.[364] As stated in para 24 and 26:

> '… the country's apartheid history was characterised by the wanton invasion of privacy of people by the state through searches and seizures, the interception of their communications and generally by spying on them in all manner of forms. The constitutionally-protected right to privacy seeks to be one of the guarantees that South

[358] Section 36 of the Constitution of the Republic of South Africa, 1996.
[359] Rautenbach IM 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 17 *PELJ* 2240.
[360] Section 36 of the Constitution of the Republic of South Africa, 1996.
[361] Upcounsel 'employee Privacy Rights: Everything You Need to Know' available at *https://www.upcounsel.com/employee-privacy-rights* (accessed 05 February 2022).
[362] Ebert I 'Big Data in the workplace: privacy Due Diligence as a human rights-based approach to employee privacy protection' 2021 *Big Data & Society* 3.
[363] Vatcha A 'Workplace Surveillance Outside the Workplace: An Analysis of E-Monitoring Remote Employees' (2020) 15 *iSCHANNEL* 4.
[364] *Amabhungane Centre for Investigative Journalism v Minister of Justice and Correctional Services* (*Amabhungane* case) 2021 (3) SA 246 (CC).

> Africa will not again act like the police state that was under apartheid. As the surveillance and interception of a person's communications under RICA is a highly invasive violation of privacy, it infringed section 14 of the Constitution'.[365]

Together with the above, workplace privacy was already minimal before the COVID-19 pandemic and nowadays, the lack of privacy is drastically increasing due to employees WFH.[366] The COVID-19 pandemic has accelerated the usage of technology in South Africa and many employers are increasingly turning to technology as a means to oversee the performance of employees.[367] The supervising and monitoring of employees, especially employees WFH, is of substantial importance in the workplace. As previously mentioned, employers monitor employees 'to ensure they are being productive and efficient. Indeed, they may even have ethically admirable aims in doing so, such as for the sake of their employees' health'.[368] While there are a variety of remote monitoring technologies to assist employers, the difficulty, however, that arises is how the employer can monitor the performance of employees without invading the employee's privacy.

Moreover, although employers can monitor the performance of employees WFH, employees are not aware if employers abuse the monitoring systems and prod into their personal lives.[369] As stated by Mishra and Crampton:

> 'while employees generally view monitoring as a violation of privacy and a source of unneeded job stress, monitoring continues basically unregulated because employers view it as a means to increase productivity, quality, among others'.[370]

Consequently, remote employees' rights to privacy 'are under substantial threat'.[371] Besides the above regulations, a major consequence of this monitoring/surveillance system is that it has a negative impact on the employment relationship by undermining and damaging the trust

[365] *Amabhungane* case, para 24 and 26.
[366] Katsabian T 'The Telework Virus: How the COVID-19 Pandemic Has Affected Telework and Exposed Its Implications for Privacy and Equality' 2020 *SSRN Electronic Journal* 15.
[367] Bhave D 'The Invisible Eye? Electronic Performance Monitoring and Employee Job Performance' (2014) 67 *Personnel Psychology* 1.
[368] Blackman R 'How to Monitor Your Employees – While respecting Their Privacy' available at *https://hbr.org/2020/05/how-to-monitor-your-employees-while-respecting-their-privacy* (accessed 01 June 2022).
[369] Mishra JM & Crampton 'Employee monitoring: Privacy in the workplace?' 63 *S.A.M. Advanced Management Journal* 4.
[370] Mishra JM & Crampton 'Employee monitoring: Privacy in the workplace?' 63 *S.A.M. Advanced Management Journal* 4.
[371] Katsabian T (2020) 13.

between employers and employees.[372] For example, research has shown that under this system employees are less likely to help their colleagues and be team players.[373] As noted previously, supervision of employees is necessary to identify those who lack required skills and need further training.[374]

Despite this, the legislation stated above protects employees WFH as, for example, RICA prohibits workplace monitoring and interception, unless it falls within the exception stipulated in Chapter 2, namely where the employee consents or where their consent can be reasonably implied; where the interception occurs in connection with carrying on of business (the business exception); or where interception is carried out by a person who is a party to the same communication'.[375]In connection with the above, employers can implement surveillance systems in the workplace to simply assured productivity. This is allowed to the extent that the monitoring of employees does not capture their personal information such as passwords, banking details, among other factors.[376] The monitoring technologies are only used for tracking employees' productivity during working hours.[377] This can also be used to identify and rectify employee misconduct and underperformance.[378] Additionally, should employers use these monitoring systems for other reason other than carrying on of business, employees have civil remedies available which allows employees to bring claims against their employers for their infringement of their personal information.[379]

[372] Katsabian T (2020) 13.
[373] Katsabian T (2020) 13.
[374] Sorensen S 'Monitoring the Remote Employee: Oversight or an Overstep?' available at *https://www.epraxis.com/post/monitoring-the-remote-employee-oversight-or-an-overstep* (accessed 02 June 2022).
[375] Regulation of Interception of Communications and Provision of Communication-Related Information Act, section 6(2)(*a*), section 6(1)(*a*)-(*c*), section 4(1); Botes J & Kgomosotho K 'South Africa: Trust is good, but monitoring is better the legal implications of employee monitoring in a home setting' available at *South Africa: Trust is good, but monitoring is better the legal implications of employee monitoring in a home setting (globalcompliancenews.com)* (accessed 27 November 2022).
[376] Botes J & Kgomosotho K 'South Africa: Trust is good, but monitoring is better the legal implications of employee monitoring in a home setting' available at *South Africa: Trust is good, but monitoring is better the legal implications of employee monitoring in a home setting (globalcompliancenews.com)* (accessed 27 November 2022).
[377] Tomczalk D et al 'Evidence-based recommendations for employee performance monitoring' (2018) 61 *Business Horizons* 251.
[378] Botes J & Kgomosotho K 'South Africa: Trust is good, but monitoring is better the legal implications of employee monitoring in a home setting' available at *South Africa: Trust is good, but monitoring is better the legal implications of employee monitoring in a home setting (globalcompliancenews.com)* (accessed 27 November 2022).
[379] Millard D & Bascerano EG 'Employers' Statutory Vicarious Liability in Terms of the *Protection of Personal Information Act*' (2016) 19 *PER* 1.

Yet, there remains a regulatory gap between the privacy of employees and the need for employers to monitor/supervise remote employees to ensure compliance with required standards of performance.

3.6. Conclusion

This chapter has analysed the current legislation in South Africa that caters for working hours, OHS as well as employee performance. This chapter examined whether the current laws catering for these three distinct aspects of working conditions are applicable to employees WFH. Furthermore, this chapter has shown that Chapter 2 of the BCEA which provides the working hours does not prevent remote employees from long working hours. However, research indicates that remote employees work longer hours in comparison to when working on the employer's premises. As a result, there is a gap in the BCEA in respect of the working hours for employees working remotely. Furthermore, while, the OHSA implies that the duties of the employer extend to employees working from home, this law does not stipulate the reasonably practicable standard of care that employers are required to undertake. Finally, this chapter identified some challenges that have arisen in respect of monitoring and evaluating of remote employee performance. This includes the right to privacy which limits the monitoring of remote employees. Consequently, the protection of employees working remotely relishes under the current labour legislature therefore is limited. Furthermore, the next chapter explores the regulation of remote workers in Italy.

CHAPTER 4: THE REGULATION AND OVERVIEW OF REMOTE WORK IN ITALY

4.1. Introduction

This chapter examines the regulation of remote work in Italy. The first section provides a brief background on labour regulation and remote work in Italy. Section 2 discusses the laws that regulate working hours in Italy. This explores how the current labour laws apply to employees WFH and how these laws regulated the working hours during the pandemic which facilitated the rapid adoption of remote working. Section 3 analyses whether and to what extent the regulatory framework places an obligation on employers to ensure the health and safety of employees WFH. The final section examines the laws that regulate remote employee performance. This entails an exploration of the laws applicable to the monitoring and supervision of employees working remotely.

4.2. Background on the labour regulation and remote work in Italy

The laws in Italy that regulate working hours, occupational health and safety, and employee performance include provisions for employees WFH.[380] This is because Italy has been conducting remote work and a hybrid approach to work for many years.[381] However, the COVID-19 pandemic fast-tracked the digital transformation and development of digital knowledge. [382] Furthermore, the COVID-19 mitigation measures ultimately requires more employees to embark on remote work.[383]

The concept of remote working is commonly referred to as smart working in Italy by legal scholars.[384] The definition given by scholars is similar to the broad definition of remote work. Smart work refers to:

[380] Clarke O 'Working Hours Limitations in Italy' available at *Working Hours Limitations in Italy - Lexology* (assessed 29 November 2022).
[381] International Labour Organisation *Teleworking during the COVID-19 pandemic and beyond* (2020) International Labour Organisation: Geneva.
[382] Loi D *The impact of teleworking and digital work on workers and society – Case study on Italy* (2021) Committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament: Luxembourg.
[383] Loi D *The impact of teleworking and digital work on workers and society – Case study on Italy* (2021) Committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament: Luxembourg.
[384] Zappala S 'The Implementation of a Remote Work Program in an Italian Municipality before COVID-19: Suggestions to HR Officers for the Post-COVID-19 Era' (2021) 11 *European Journal of Investigation in Health, Psychology and Education* 866.

'a manner of performance of the employment contract arranged by the two parties and featuring:

i) the absence of rigid working time or working place limitations;
ii) the likely use of high-technology devices and tools; and
iii) the performance of the working activity outside the employer's premises'.[385]

Article 18 of Italian Law 81 of 2017, further, defines smart work as 'the possibility to use information and communication technology to work in many different places'.[386]

In 2016, due to the increase of remote work, the Commission on Production, Trade and Tourism initiated a preliminary survey to 'define a national Industry 4.0 strategy' by better framing the legal framework to promote the realisation of this form of work.[387] Against this background, Italy has developed various policies and legislation to regulate the working conditions of employees WFH. In relation to this, the Italian government drew up an Organisational Plan for Smart Work (herewith referred to as POLA) as well as the Italian Directive on Smart Working and Teleworking No. 3/2017.[388] This Directive 'provides specific guidelines on experimentation with and organization of remote working'.[389] In addition, 'Law No. 81/2017 was introduced to set up the guidelines for collective agreement in respect of remote working'.[390] In addition to this, the Italian Government and their social partners entered into a Protocol regarding remote work on 7 December 2021.[391] This Protocol supplements the legislative framework regulating remote working.[392] No official title was given to the Protocol,

[385] Article 18 of Italian Law 81 of 2017; Marco B 'Covid-19 and labour law in Italy' (2020) 11 *European Labour Law Journal* 310.
[386] Article 18 of Italian Law 81 of 2017; Zappala S, Toscano F & Topa G (2021) 867.
[387] Seghezzi F & Tiraboschi M 'Italy's Industry 4.0 Plan: An Analysis from a Labour Law Perspective' (2018) *E-Journal of International and Comparative Labour Studies* 2.
[388] Sanz de Miguel P, Caprile M & Arasanz J 'Regulating telework in a post-COVID-19 Europe' 2021 *European Agency for Safety and Health at Work* 19.
[389] Law No. 81/2017 is the new labour and employment legislation that came into effect in Italy. This legislation expanded the protections to include smart working. Smart working is an agreement reached between an employer and employee which allows the employee to complete the work he or she is contracted to perform without the constraints of a fixed location or fixed working hours. This Directive provides specific guidelines on experimentation with and organisation of smart working that public administrations are required to undertake, which has binding effect.
Italian Directive on Smart Working and Teleworking No. 3/2017.
[390] Italian Directive on Smart Working and Teleworking No. 3/2017.
[391] Allen & Overy 'The latest Italian National Protocol on remote working' available at *https://www.allenovery.com/en-gb/germany/news-and-insights/publications/approvato-il-protocollo-nazionale-sul-lavoro-in-modalita-agile* (accessed 15 April 2022).
[392] Allen & Overy 'The latest Italian National Protocol on remote working' available at *https://www.allenovery.com/en-gb/germany/news-and-insights/publications/approvato-il-protocollo-nazionale-sul-lavoro-in-modalita-agile* (accessed 15 April 2022).

rather it is referred to as the Protocol and non-legally binding. However, the Protocol provides fundamental principles and sets up guidelines to assist in implementing smart work.[393] In terms of this Protocol, employees WFH have the freedom to decide where and when work activities will be conducted.[394] Beside the above, the Italian government provided procedures to assist businesses in regulating employees WFH during the COVID-19 pandemic.[395] This was needed as 'remote work implies the redesign of space and ways of carrying out work'.[396] This regulatory framework is discussed in detail in the remaining parts of this chapter.

4.3. Working hours within the context of remote work

As previously mentioned, before the COVID-19 pandemic, Italy had been conducting remote work.[397] The legislation that generally regulate the working hours for employees that work on the premises of the employer are the Italian Law No. 300 of 1970 and Legislative Decree No. 66 of 2003.[398] There is no legal provision which particularly states the maximum working hours, relatively the law consequently bestow that the normal working time is 40 hours per week and the working week cannot exceed 48 hours including overtime.[399] In addition, the National Collective Bargaining Agreement (herewith referred to as NCBA) states that any employee working overtime is paid by way of an increase in salary or, alternatively, such employees can be compensated with time off.[400] Specifically for employees working remotely, in addition to the above, working hours are regulated by Law No. 81/2017 and the NCBA.

[393] Costantino T 'Regulating smart working in the private sector: The guidelines of the new national protocol' available at *Regulating smart working in the private sector: The guidelines of the new national protocol - Portolano Cavallo* (accessed 29 November 2022).
[394] Department of Employment and Social Affairs *The impact of teleworking and digital work on workers and society* (2021) European Parliament: Europe 105.
[395] International Labour Organisation *Teleworking during the COVID-19 pandemic and beyond* (2020) International Labour Organisation: Geneva.
[396] Cominotto C 'Telework, Smart Work, and the Right to Disconnect in Italy' available at *https://lineenetwork.org/telework-smart-work-and-the-right-to-disconnect-in-italy/* (accessed 12 February 2022).
[397] Molino M 'Wellbeing Costs of Technology Use during Covid-19 Remote Working: An Investigation Using the Italian Translation of the Technostress Creators Scale' (2020) 12 *Sustainability* 2.
[398] Law No. 300 of 1970, known as Workers' Statute (*Statuto dei Lavoratori*) and Legislative Decree No. 66 of 2003 on working time and rest.
[399] Article 18(1) of the Law No. 81/2017; Law No. 300 of 1970, known as Workers' Statute (*Statuto dei Lavoratori*) and Legislative Decree No. 66 of 2003 on working time and rest; Watchdog 'National Laws in Italy' available at *Italy – Watchdog (eu-watchdog.com)* (accessed 28 November 2022).
[400] Toffoletto F, Soncin M & De Luca Tamajo T 'Employment and Employee Benefits in Italy: Overview' available at *https://uk.practicallaw.thomsonreuters.com/2-503-3122?transitionType=Default&contextData=(sc.Default)&firstPage=true* (accessed 16 April 2022).

The need for specific regulation for the working hours for remote workers, is due to there being no clear boundaries between working time and non-working time. According to a survey conducted by the Commission on Production, Trade and Tourism, remote employees tend to perform their work activities till it is completed, irrespective of whether it goes beyond the maximum working hours as provided in Italy's labour legislation.[401] Similarly, the Protocol entered into between the Italian Government and their social partners affirms that employees who do not have fixed work schedules, tend to work overtime and do not receive extra pay for this.[402] Therefore, there was an urgent need for a balance between the autonomy of workers and their protection.[403]

To overcome this, Law No. 81/2017 provides a mandatory requirement that a written agreement between the employer and employee is required before the employee can work from home.[404] This agreement must explicitly state the expected working hours.[405] Moreover, the NCBA also addresses the working hours for employees WFH. The NCBA states that there should be an agreement entered into between the employer and the employee WFH which must state the specific working hours of WFH employees and the hours to be reachable.[406] This is a separate agreement that gets integrated into the contract of employment.[407] According to Dagnino, the development of the agreement between the parties can be an 'evolved version of telework as defined by the 2002 European Framework Agreement on Telework and by the relevant regulations provided by the Member States and by collective agreements at a national level'.[408] South Africa should incorporate the above in the current legislation stipulating that

[401] Seghezzi F & Tiraboschi M (2018) 2.
[402] Verite C 'Remote Work In Italy: Agreement on 'Smart Working' Protocol Beyond Covid-19' available at *https://www.newsendip.com/remote-work-italy-agreement-protocol-guideline-smart-working-private-sector-covid/ (*accessed 10 February 2022).
[403] Monlino M (2020) 13.
[404] Article 18(1) of the Law No. 81/2017; Conte M & Gramano E 'Looking to the other side of the bench: The new legal status of independent contractors under the Italian Legal System' 2018 *Comp. Lab. Law & pol. Journ.* 5.
[405] Conte M & Gramano E (2018) 5.
[406] Article 18(1) of the Law No. 81/2017; Working hours is the regularly scheduled hours of work assigned to an employee as determined by the employer in which the employee is required to perform work/tasks. Whereas contactable hours includes your working hours as well as hours outside of your regular working hours. Put differently, contactable hours means that you must be available after working hours should you called on to work. Toffoletto F, Soncin M & De Luca Tamajo T 'Employment and Employee Benefits in Italy: Overview' available at *https://uk.practicallaw.thomsonreuters.com/2-503-3122?transitionType=Default&contextData=(sc.Default)&firstPage=true* (accessed 16 April 2022); Article 3(1) of the Law No. 81/2017; Toffoletto F, Soncin M & De Luca Tamajo T 'Employment and Employee Benefits in Italy: Overview' available at *https://uk.practicallaw.thomsonreuters.com/2-503-3122?transitionType=Default&contextData=(sc.Default)&firstPage=true* (accessed 16 April 2022).
[407] Dagnino E (2020) 4.
[408] Dagnino E (2020) 6.

agreements between employers and employees must be entered into before encountering on remote work.

In addition, this agreement must 'state various periods of availability or the need for the worker to at least be contactable (while not guaranteeing actual performance) during normal opening hours of the company's office'.[409] Furthermore, parties must agree on what constitutes overtime.[410] However, many organisations agree that overtime work should be forbidden because 'it can be difficult to measure the amount of it and it is a contradiction in terms as far as smart working is concerned'.[411] The safeguarding of working hours of employees is also ensured in the Legislative Decree No. 66/2003.[412] Articles 3 and 4 of Legislative Decree No. 66/2003 states that the normal working hours is 40 hours per week and the maximum working hours is 48 hours for every 7-day period, as provided in collective agreements.[413] Furthermore, the regulation of remote work and the right to disconnect is implemented through individual agreements between the employer and the employee WFH.[414] Nonetheless, Italy places particular attention on avoiding the risks that are associated with 'technostress'.[415]

Technostress is commonly explained as:

> 'the stress that users experience as a result of application multitasking, constant connectivity, information overload, frequent system upgrades and consequent uncertainty, continual relearning and consequent job-related insecurities, and technical problems associated with the organizational use of Information and Communications Technology (ICT)'.

To simplify, technostress is the stress experience by end-users in organisations, such as employees, due to the use of ICT.[416] Technostress includes anxiety, feelings of exhaustion, poor concentration, reduced productivity, and reduced job satisfaction, amongst others.[417] This

[409] Well S 'SMART Working – Italy: New Flexible Working Opportunity' available at *SMART Working - Italy: New Flexible Working Opportunity | Fisher Phillips* (accessed 17 July 2022).
[410] Law No. 81/2017.
[411] Well S 'SMART Working – Italy: New Flexible Working Opportunity' available at *SMART Working - Italy: New Flexible Working Opportunity | Fisher Phillips* (accessed 17 July 2022).
[412] Dagnino E (2020) 9.
[413] Watchdog 'National Laws in Italy' available at *Italy – Watchdog (eu-watchdog.com)* (accessed 28 November 2022).
[414] Molino M (2020) 2.
[415] Spagnoli P 'Workaholism and Technostress During the COVID-19 Emergency: The Crucial Role of the Leaders on Remote Working' 2020 *Frontiers in Psychology* 2.
[416] Spagnoli P et al (2020) 3.
[417] Spagnoli P et al (2020) 3.

can be due to lighting, noise, and dangers of falls due to electrical wiring and cables, amongst others.[418] These factors are arguably identified and minimized for those employees that work on the employer's premises.[419] In order to avoid technostress and employees working overtime, there are rules of rest periods and breaks that are established by law as well as the collective agreement which must be complied with.[420] This compliance is ensured through the Code of Good Practice, agreements with the unions and 'some statutory changes to give employees some form of right to disconnect from work emails, text messages and calls'. [421] Ultimately, the right to disconnect from work is associated with the aim of protecting employee OHS by ensuring rest periods and preserving their work-life balance as well as their private life.[422]

Remote employees suffer from an 'always-on' culture as they can be reached at all times of the day, through their smartphones, messaging apps, or other means of instant contact.[423] Consequently, the right to disconnect was introduced in 2015 through the establishment of Madia Reform (Article 12 of Law No. 124/2015).[424] The Madia Reform stipulates the minimum daily and weekly rest periods to safeguard the employees' health and safety, as well as to attaining a better work-life balance.[425] Thereafter, the right to disconnect was outlined in Law No. 81/2017.[426] Article 19 of Law No. 81/2017 states that 'the agreement also indicates the employee's rest period and the technical and organizational measures needed to guarantee the disconnection of the employee from technological working tools'.[427] In other words, the employer and remote employee are both required to declare in the agreement regulating the rest period the employee is entitled to. Within this context, SA must develop legislation which

[418] Spagnoli P et al (2020) 3.
[419] Alli B (2008) 148.
[420] Sanz de Miguel P, Caprile M & Arasanz J (2021) 11-12.
[421] Chance M 'The "Always on" Work Culture. Is a "Right to Disconnect" the Next Step in the Home Working Revolution? What Employers Should Start to Consider Now to Protect their Employees and Businesses.' Available at *https://www.rosenblatt-law.co.uk/insight/the-always-on-work-culture-is-a-right-to-disconnect-the-next-step-in-the-home-working-revolution-what-employers-should-start-to-consider-now-to-protect-their-empl/* (accessed 09 April 2022).
[422] Dagnino E 'Working Anytime, Anywhere and Working Time Provisions. Insights from the Italian Regulation of Smart Working and the Right to Disconnect' (2020) 9 *E-Journal of International and Comparative Labour Studies* 2.
[423] Broughton A & Battaglini M ' Teleworking during the COVID-19 pandemic: risks and prevention strategies' 2021 *European Agency for Safety and Health at Work* 14.
[424] Article 14 of Madia Reform Law 124/2015.
[425] EurWORK 'Right to disconnect' available at *Right to disconnect | Eurofound (europa.eu)* (accessed 16 December 2022).
[426] Dagnino E ''Working Anytime, Anywhere' and Working Time Provisions. Insights from the Italian Regulation of Smart Working and the Right to Disconnect' (2020) 9 *E-Journal of International and Comparative'* 4.
[427] Dagnino E (2020) 9.

specifically deal with the right to disconnect. This is an imperative concept and as shown in chapter 3, SA lacks this protection. Therefore, the above laws must be consulted, and a similar approach should be embodied in the current legislation.

4.4. Occupational health and safety within the context of remote work

4.4.1. General provisions

In Italy, companies are 'required to adopt, in the interests of preventing accidents at work and occupational illnesses, a system of precautionary measures'.[428] Italy has various laws which regulate the health and safety of employees. These are Legislative Decree No. 81/2008 (Testo Unico Sicurezza Lavoro), the primary occupational health and safety legislation, and Article 2087 of the Italian Civil Code.[429] These regulations generally provide safety measures to eliminate risks in the workplace as well as to ensure the protection and improvement of safety of employees.[430] Companies within Italy are required to adopt a system of precautionary measures to eliminate/mitigate accidents and occupational illnesses.[431]

Article 15 of Law 81/2008 provides,

> 'the general measures to be adopted to protect health and safety of the employees whose implementation is, in general terms, the employer's responsibility (such as, for example, the identification of risks in the workplace, the reductions of such risks, the adoption of measures to check the employees' health)'.[432]

In relation to this, an employer is required to draft a formal document for the evaluation of risks.[433] This document is a 'mandatory document that not only analyses the company structure, but also identifies the risk factors present and defines the prevention and protection measures, already adopted and to be adopted, in order to protect workers and reduce the probability of

[428] Beny-Boatti 'Health and safety at work Italy' available at *Health and safety at work in Italy | Studio Beny-Boatti Avvocati (benyboatti.com)* (accessed 18 July 2022).
[429] Legislative Decree No. 81/2008 and Codice civile; Degan GA et al 'Occupational health and safety management systems: comparison between BS OHSAS 18001: 2007 and Italian Decree 81/2008' (2009) 14 *Environmental Health Risk* 402.
[430] Legislative Decree No. 81/2008 and Codice civile.
[431] Burman F *A retrospective review of the most common safety concerns encountered at a range of international recompression facilities when applying the Risk Assessment Guide for Recompression Chambers over a period of 13 years* (unpublished Master of Science Thesis, Stellenbosch University, 2014) 11.
[432] Legislative Decree No. 81/2008, section 15.
[433] Beny-Boatti 'Health and safety at work in Italy' available at *Health and safety at work in Italy | Studio Beny-Boatti Avvocati (benyboatti.com)* (accessed 7 August 2022).

danger in the workplace'.[434] In addition, Article 2087 of the Italian Civil Code provides that the employer has the responsibility to provide information on the risks that are present within the workplace and adopt appropriate preventive/protective measures .[435] Article 2087 of the Italian Civil Code states that:

> 'that the employer in the performance of a working activity is obliged to adopt, in accordance with the work peculiarities, experience, and techniques, all the necessary measures to assure physical integrity and moral personality of the employee'.[436]

Furthermore, employers are required to exercise their OHS obligation with utmost caution and therefore apply the best practices to ensure a risk-free environment.[437] This is implemented by evaluating the working environment, identifying the risks and undertaking the most suitable technique to eliminate/mitigate the hazard or risk.[438] Together with this, Article 2087 provides a broad and extensive scope on the employers' general safety obligation, which includes the obligation to ensure remote employees are working in a safe and healthy working environment.[439] This is achieved by requiring the employer to:

> 'identify all possible risks connected with the performance of work, eliminate or reduce them as much as possible, substitute the dangerous processes with non-dangerous ones, respect the ergonomic principles in conceiving the working places and in choosing the equipment, and inform and train the workers in matters concerning health and safety in the working place'. [440]

The above is required irrespective of where the employees are performing their work as stated in Article 2087.[441] Furthermore, Article 2087 must be read in conjunction with Article 3103 of the Italian Civil Code, which states that the 'employer is required to take all appropriate steps to avoid both the risks inherent to the work environment, and those resulting from external

[434] StudioSantoro 'Health and safety at work: the Risk Assessment Document' available at *Health and safety at work: the Risk Assessment Document – Studio Santoro (studio-santoro.it)* (accessed 23 July 2022).
[435] Degan GA (2009) 402.
[436] Biagi M & Treu T 'A Comparative Study of the Impact of Electronic Technology on Workplace Disputes: National Report on Italy' (2002) 24 *Comp. Lab. L. & Pol'y J.* 182.
[437] Article 31 till 35 of the Italian Civil Code; Degan GA (2009) 403; International Labour Organisation *Occupational Safety and Health (OSH): Italy* (2015) International Labour Organisation: Geneva.
[438] Alli B (2008) 148.
[439] Article 2087 of the Italian Civil Code; Auricchio A et al 'COVID-19: Protection of employees' health and other impacts on businesses' available at *8.pdf (gop.it)* (accessed 7 August 2022).
[440] Biagi M & Treu T 'A Comparative Study of the Impact of Electronic Technology on Workplace Disputes: National Report on Italy' (2002) 24 *Comp. Lab. L. & Pol'y J.* 183.
[441] Article 2087 of the Italian Civil Code.

factors and inherent to the place where that environment is located'.[442] As a result, the Italian Civil Code specifically states that the employer is required to eliminate the risks that arise and failure to comply with this obligation would result in a punishable offense.[443] Beside these general provisions, Italy has also implemented an Occupational Health and Safety Act Risk Assessment guidance for remote employees.[444] This Risk Assessment 'describes the risks and prevention measures for health and safety in the workplace'.[445] In ensuring that the risks and preventative measures are in place, a Prevention and Protection Service Manager is appointed.[446] One of the duties of this Manager is to provide risk assessment training to all members of the company.[447] This expresses that Italy's regulations provide employees WFH the right to the same protections against work-related accidents and illnesses as do employees rendering services on the company's premises.[448] This is therefore justified 'by the constitutional importance of the right to health and by the fact that private business initiative may not prejudice workers' health'.[449] These measures are crucial for SA as SA can undergo a similar approach to safeguard the health and safety of employees WFH. In other words, SA can administer the risk assessment by stating that employers are required to employ a Prevention and Protection Service Manager which ensures that the health and safety of employees WFH are protected. In addition, the Articles analysed above must be taken into account as a guide to implement appropriate steps to avoid the risks inherent to the work environment of remote employees.

[442] Broughton A & Battaglini M (2021) 11.
[443] Beny-Boatti 'Health and safety at work Italy' available at *Health and safety at work in Italy | Studio Beny-Boatti Avvocati (benyboatti.com)* (accessed 18 July 2022).
[444] In terms of the OHS legislation, employers are obliged to conduct a risk assessment. The risk assessment is a legal requirement and is binding. However, the Occupational Health and Safety Act Risk Assessment guidelines provided by Italy is not binding, instead it provides employers with guidelines and assistance on the manner in which the employer is required to conduct the risk assessment. The risk assessment is required to be undertaken as employers are legally responsible for ensuring a safe and healthy environment in which people work, it is therefore the employer's job to understand the work activities and the environment in the workplace, assess the risks that are significant enough to require control measures, and act.
Broughton A & Battaglini M (2021) 11.
[445] Safetyone Ingegneria 'Safety and health law in ItakyL Guidelines for foreign companies' available at *Safety and Health at work in Italy - Safetyone.it* (accessed 12 March 2023).
[446] Safetyone Ingegneria 'Safety and health law in ItakyL Guidelines for foreign companies' available at *Safety and Health at work in Italy - Safetyone.it* (accessed 12 March 2023).
[447] Safetyone Ingegneria 'Safety and health law in ItakyL Guidelines for foreign companies' available at *Safety and Health at work in Italy - Safetyone.it* (accessed 12 March 2023).
[448] CMS 'Mobile Working Regulations in Italy' available at *https://cms.law/en/int/expert-guides/cms-expert-guide-to-mobile-working/italy* (accessed 08 February 2022).
[449] Auricchio A et al 'COVID-19: Protection of employees' health and other impacts on businesses' available at *8.pdf (gop.it)* (accessed 7 August 2022).

4.4.2. Health and safety protections for remote workers: regulatory framework

Employers are required to safeguard the health and safety of remote employees in terms of Article 22 of Act No. 81/2017.[450] This Law regulates the equality of workers performing the same duties, a right to disconnect, and the obligations of the employer.[451] This Law aims to improve the work-life balance and working conditions of remote employees. Within this framework, the employer has an obligation to annually ensure that the employee's workplace and equipment contribute a safe working environment.[452] The employer must also provide health and safety representatives with 'written information specifying the general and specific risks concerning smart work performance, at least on an annual basis'.[453] These are safety obligations placed on the employer as the employer is not exonerated from the general health and safety obligations, provided in terms of Legislative Decree No. 81/2008 and Article 2087 of the Italian Civil Code.[454]

In addition, a Guide for Safe and Healthy Work from Home (hereafter referred to as the Guide) was adopted in Italy in 2021, and 'prescribed the implementation and improvement of safety and health at work of person who participates in the work process, as well as persons found in the work environment, in order to prevent injuries at work, occupational diseases, and work-related diseases'.[455] This Guide is not a formal source of law but rather to be used resourcefully in understanding the expectations of the labour authorities regarding the employers; obligations towards employees WFH, which SA can use when developing the current legislation to incorporate remote working.[456] This Guide states that the employer should first determine whether the work activities can be performed in a well and safe manner at home before allowing

[450] Italian Law No. 81/2017, Article 22.
[451] James R 'Italy: New "Smart Working" Rules To Reflect Modern Flexible Working Arrangements' available at *New "Smart Working" Rules To Reflect Modern Flexible Working Arrangements - Employee Rights/ Labour Relations - Italy (mondaq.com)* (accessed 24 July 2022).
[452] Italian Law No. 81/2017, Article 22; CMS 'Mobile Working Regulations in Italy' available at *https://cms.law/en/int/expert-guides/cms-expert-guide-to-mobile-working/italy* (accessed 08 February 2022).
[453] Rymkevich O (2018) 55.
[454] Article 174 of Legislative Decree No. 81/2008 states that the employer must evaluate the risks in relation to the eyesight, posture and physical and mental fatigue, ergonomic conditions and environmental hygiene while Article 177 obliges the employer to provide appropriate training and information in relation to the measures applicable to the workplace. The Civil code requires the employer to adopt measures that, according to the specific characteristics of the work, experience and technology, are necessary to protect the physical integrity and moral personality of workers.
[455] Safety and Health at Work Act 113/2017.
[456] Deloitte 'New guide for Healthy & safe work from home' available at *New guide for healthy & safe work from home | Deloitte Serbia* (accessed 29 November 2022).

the employee to WFH.[457] In other words, the employer should determine whether the employee has all the necessary conditions for a safe and healthy working environment. This can be achieved by frequently providing remote employees with sufficient information, instructions, and training regarding health and safety at work.[458] This Guide also recommends that the employer should prescribe the rights and obligations of employees working remotely through by-laws such as collective agreements or the labour rulebook.[459]

Furthermore, Article 28 of Legislative Decree No. 81/2008 places the 'burden of assessing the working conditions in which the employees operate falls on the employer, so as to reduce or prevent the risks that could degenerate into occupational diseases due to work-related stress'.[460] This also aligns with the EU policy which requires employers to adopt measures which ensures the psychological and physical well-being of employees.[461] The well-being of employees is a vital component in the OHS obligation of the employer. Research has shown that the work environment of remote employees impacts their physical and mental well-being.[462] For example, research in EU has shown that many employees working from home live in areas that are about 90cm^2.[463] For these employees, homes do not provide substantial space to conduct work activities as they are not intended for this purpose.[464]

However, it is difficult for employers to monitor employee's compliance with OHS processes and measures.[465] This is because it is not practical for employers to physically oversee all employees that WFH. Subsequently, two questions arise. Namely, (1) can a remote employee still claim for an injury on duty, and (2) how would a remote employee prove that the injury

[457] Guide for Safe and Healthy Work from Home.
[458] International Labour Organisation *An employers' guide on working from home in response to the outbreak of COVID-19* (2020) International Labour Organisation: Geneva.
[459] Occupational Health & Safety Administration (a part of the Ministry of Labour) issued the Guide for Healthy & Safe Work from Home; International Labour Organisation *An employers' guide on working from home in response to the outbreak of COVID-19* (2020) International Labour Organisation: Geneva.
[460] Giordani M 'Compensation for damage caused by work-related stress and "straining"' available at *Compensation for damage caused by work-related stress and "straining" - Studio Zunarelli* (accessed 21 July 2022).
[461] Employment, Social Affairs & Inclusion *Promoting mental health in the workplace: Guidance to implementing a comprehensive approach* (2014) European Commission: Europe.
[462] Salamone F et al 'Working from home in Italy during COVID-19 Lockdown: A survey to Assess the Indoor Environmental Quality and Productivity' (2021) 11 *Buildings* 2.
[463] Spagnoli P et al 'Workaholism and technostress During the COVID-19 Emergency: The Crucial Role of the Leaders on Remote Working' (2020) 11 *Front. Psychol.* 7.
[464] Spagnoli P et al (2020) 7.
[465] International Labour Organisation *Teleworking during the COVID-19 pandemic and beyond: A Practical Guide* (2020) International Labour Organisation: Geneva.

occurred during ordinary working hours or while on duty.[466] These questions are relevant because despite the health and safety obligation placed on the employer, the employer cannot guarantee safe working conditions for employees working from home.

In respect to the above questions, it has been argued that:

> 'remote workers have the right to the benefit of protection against accidents at work and professional diseases deriving from risks connected to work performance executed outside the company's premises, and he is also required to cooperate to the implementation of the preventive measures provided by the employer'.[467]

Furthermore, Italy's regulatory framework allows remote employees to be insured against injuries and occupational illnesses that may arise from hazards that are related to work occurring outside the workplace.[468] This is regulated in terms of Article 23 of Law No. 81/2017 and the Presidential Decree No. 1124/1965.[469] In terms of these regulations, employees are still compensated under their employer's workers' compensation insurance 'if they are injured while working from home, so long as they meet the burden of proving that the injury was work-related'.[470] The insurance compensates employees for illnesses/injuries that occurred outside the traditional workplace while under the control of the employer.[471] Currently, SA legislation does not provide information on whether employees WFH are protected from injuries occurring while performing their duties at home. Article 23 of Law No. 81/2017 and the Presidential Decree No. 1124/1965 are useful legislation to assist SA in this regard.

Within the above context, to claim for injuries on duty, the remote employee is required to prove that the injury is work-related.[472] This will be determined by an adjuster who will investigate if the injury occurred within the course of and arising out of employment, after the

[466] International Labour Organisation *In the face of a pandemic: ensuring Safety and Health at Work* (2020) International Labour Organisation: Geneva.
[467] Getilli F 'Italy: Smart Working – agile, performing and increasing' available at *Italy: Smart Working - agile, performing and increasing | Warwick legal* (accessed 24 July 2022).
[468] Rymkevich O (2018) 58.
[469] Italian Law No. 81/2017, Article 23 and the Presidential Decree No. 1124/1965.
[470] Article 23 of Law No. 81/2017; Providence R 'Workers' compensation claims involving remote workers: What employers and HR professionals need to know' available at *https://lewisbrisbois.com/newsroom/legal-alerts/workers-compensation-claims-involving-remote-workers-what-employers-and-hr-should-know* (accessed 11 April 2022).
[471] Tompa E, Scott-Marshall H & Fang M 'The impact of temporary employment and job tenure on work-related sickness absence' (2008) 65 *Occup Environ Med* 801.
[472] Halpern & Scrom 'Remote Work and Worker's Compensation Coverages' available at *Remote Work and Worker's Compensation Coverages (halpernadvisors.com)* (accessed 24 July 2022).

employer or employee files a worker's compensation claim and notifies their insurer.[473] In spite of this, the Director of Evaluations has clarified that there are instances in which employees cannot claim for injury on duty as certain injuries are non-work related injuries.[474] For example,

> 'if an employee is injured because they trip on their dog while rushing to answer a work phone call, the case is not considered work-related. If an employee working from home is electrocuted because of faulty home wiring, the injury is not considered work-related'.[475]

Moreover, the Guide indicates possible injuries that may occur while WFH and ways to prevent them.[476] To prevent injuries and illnesses from occurring, there are certain activities that employers embark on to ensure a safe workplace. Such activities include completing a regular safety checklist, which is used to 'assess the overall safety of their work environment'.[477] This can be done by asking whether the floor area is clear and free of tripping hazards? Are phone lines and charging cables secured under a desk or along a wall? Are area rugs secured to the floor or free of frayed or worn seams, amongst other questions.[478] The employer can also make regular contact with employees to maintain any work-related accidents and injuries in order to address them promptly.[479] Furthermore, the employer can develop a remote work agreement with the employee and provide regular training on health and safety issues with the employees.[480]

[473] Halpern & Scrom 'Remote Work and Worker's Compensation Coverages' available at *Remote Work and Worker's Compensation Coverages (halpernadvisors.com)* (accessed 24 July 2022).
[474] Halpern & Scrom 'Remote Work and Worker's Compensation Coverages' available at *Remote Work and Worker's Compensation Coverages (halpernadvisors.com)* (accessed 24 July 2022).
[475] Halpern & Scrom 'Remote Work and Worker's Compensation Coverages' available at *Remote Work and Worker's Compensation Coverages (halpernadvisors.com)* (accessed 24 July 2022).
[476] International Labour Organisation *In the face of a pandemic: ensuring Safety and Health at Work* (2020) International Labour Organisation: Geneva.
[477] Providence R 'Workers' compensation claims involving remote workers: What employers and HR professionals need to know' available at *https://lewisbrisbois.com/newsroom/legal-alerts/workers-compensation-claims-involving-remote-workers-what-employers-and-hr-should-know* (accessed 11 April 2022).
[478] Providence R 'Workers' compensation claims involving remote workers: What employers and HR professionals need to know' available at *https://lewisbrisbois.com/newsroom/legal-alerts/workers-compensation-claims-involving-remote-workers-what-employers-and-hr-should-know* (accessed 11 April 2022).
[479] Stone K *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers* (unpublished Research Paper No. 06-12, UCLA School of Law) 20.
[480] Allen & Overy 'The latest Italian National Protocol on remote working' available at *https://www.allenovery.com/en-gb/germany/news-and-insights/publications/approvato-il-protocollo-nazionale-sul-lavoro-in-modalita-agile* (accessed 15 April 2022).

Other regulatory instruments include the 'H&S Protocol'.[481] The OHS obligations provided in the Protocol are similar to that provided in the Guide and the Italian Law No. 81/2017. This Protocol states that any company that is in breach of the health and safety obligations provided for in the Protocol, may be subject to an immediate suspension of their commercial license.[482] Additionally, the European-level social partners' framework agreement on telework provides that remote employees can request inspection visits from health and safety inspection bodies to assist in ensuring he/she is working in a safe and healthy environment.[483] The above legislations, risk assessments and Protocols are useful tools in Italy which SA can analysis and develop to fill the gaps in the current legislation as it does not cater for remote employees.

Despite all the obligations placed on the employer to ensure a safe and healthy working environment, the difficulty arises when an employee fails to inform the employer of where the employee intends on working or where the employer has no possibility of discovering the conformity of the workplace to the existing health and safety standards.[484] Considering this, it has been argued that

> 'there is a lack of detailed provisions relating to the OHS of remote work in Act 81/2017 and more appropriate legal regulation of smart work is required, however, the only possible solution at present would be to apply a reasonable manner to the existing specific norms regulating health and safety under Act 81/2008 together with the more general principles laid down in the Italian Civil Code'.[485]

4.5. Employee performance within the context of remote work

As previously mentioned, employee performance within the workplace is traditionally managed and controlled by having the managers and colleagues to physically interact and coordinate with each other.[486] However, 'remote work diminishes the possibility of supervising

[481] The H&S Protocol introduces significant measures that companies are required to take into consideration to ensure there are safe conditions, and this Protocol has binding upon companies. Department of Employment and Social Affairs *The impact of teleworking and digital work on workers and society* (2021) European Parliament: Europe 105.
[482] Department of Employment and Social Affairs *The impact of teleworking and digital work on workers and society* (2021) European Parliament: Europe 105.
[483] Broughton A & Battaglini M (2021) 11.
[484] Rymkevich O (2018) 57.
[485] Rymkevich O (2018) 57.
[486] Zappalà S, Toscano F & Topa G (2021) 867.

employees and requires new practices to facilitate their control'.[487] This is a challenge in Italy for employees working remotely. Yet, monitoring and supervising remote employees' performance is of crucial importance to ensure productivity.[488]

Generally, employees in Italy can be dismissed for poor work performance in terms of the Italian Law No. 604/1966.[489] This law states that employers can dismiss an employee on condition that the dismissal is fair for reasons concerning productivity, work organisation and its regular functioning.[490] Before an employer can dismiss an employee for poor performance, the employer is obliged to prove two conditions. First, the employee has performed at a level that is inferior to that of colleagues with the same job title.[491] An employee that performs at a level inferior to that of a colleague, indicates that, 'there is a significant gap between the employee's productivity and the average productivity of his/her colleagues with similar professional classification levels and duties'.[492] Secondly, the employee's poor performance is a result of the employee's negligence and inexperience and cannot be ascribed to the company.[493] Within this context, if 'the employee's poor performance is at least partially attributable to the way the company organizes working practices or to social or environmental factors, then dismissal for poor performance may be deemed unfair'.[494]

Additionally prior to dismissal within the above context, the employer is required to assess whether the employee can properly carry out his/her duties as placed within the employment

[487] Zappalà S, Toscano F & Topa G (2021) 867.
[488] OECD 'OECD Italy' available at *Italy.pdf (oecd.org)* (accessed 7 August 2022).
[489] Italian Law No. 604/1966.
[490] Article 2 of the Italian Law No. 604/1966; OECD 'OECD Italy' available at *Italy.pdf (oecd.org)* (accessed 7 August 2022).
[491] Article 3 of the Italian Civil Code; Toffoletto De Luca Tamajo 'Dismissal for poor performance: The Toffoletto De Luca Tamajo Employment Law Hub releases a new Law Map comparing the risks posed in 38 countries' available at *https://www.toffolettodeluca.it/en-gb/news-events/news-and-events/a/dismissal-for-poor-performance-new-law-map-comparing-the-risks-posed-in-38-countries/* (accessed 10 April 2022).
[492] De Luca T 'Italy – how to dismiss an employee for poor performance' available at *https://kliemt.blog/2018/05/11/italy-how-to-dismiss-an-employee-for-poor-performance/* (accessed 10 April 2022).
[493] Article 3 of the Italian Civil Code; Toffoletto De Luca Tamajo 'Dismissal for poor performance: The Toffoletto De Luca Tamajo Employment Law Hub releases a new Law Map comparing the risks posed in 38 countries' available at *https://www.toffolettodeluca.it/en-gb/news-events/news-and-events/a/dismissal-for-poor-performance-new-law-map-comparing-the-risks-posed-in-38-countries/* (accessed 10 April 2022).
[494] De Luca T 'Italy – how to dismiss an employee for poor performance' available at *https://kliemt.blog/2018/05/11/italy-how-to-dismiss-an-employee-for-poor-performance/* (accessed 10 April 2022).

contract.[495] This forms part of the conditions for poor work performance to be established.[496] This is typically conducted by employers physically monitoring employees to ensure that work is undertaken correctly.[497] At this stage, the employer can identify whether such an employee lacks any required skill or training. Thereafter, the employee is equipped with the necessary training and counselling, among other skills.[498] Implementing this within the context of remote work is a challenge as employers are unable to physically oversee their employees. Alternatively, this further, raises the challenge of the violation of privacy. This is due to employers relying on, for example, camera monitoring which in essence captures the private lives of employees working from home.[499] This also an invasion of employees' homes.[500]

However, employees WFH are afforded the protection of privacy in the same manner as provided to employees working on-site.[501] This is found in the Italian Data Protection Authority Legislative Decree No. 196/2003 and Italian Law No. 300/70.[502] In terms of these laws, the monitoring of employees WFH must be conducted with careful assessment — ensuring the right to privacy is not breached, as employees are guaranteed the right to privacy and dignity.[503]

In ensuring the right to privacy is not breached, Article 4 of the Italian Workers' Statute of Rights (Law no. 300/1970) prevents employers from using any technical or machinal control over their employees working remotely, unless it is in connection with the productive and organisational reason and for protection of the Company's properties.[504] Article 4 also states

[495] Article 2119 of the Italian Civil Code; De Luca T 'Italy – how to dismiss an employee for poor performance' available at *https://kliemt.blog/2018/05/11/italy-how-to-dismiss-an-employee-for-poor-performance/* (accessed 10 April 2022).
[496] Article 2119 of the Italian Civil Code.
[497] Ball K *Electronic Monitoring and Surveillance in the Workplace. Literature review and policy recommendations* (2021) 13.
[498] Toffoletto De Luca Tamajo 'Dismissal for poor performance: The Toffoletto De Luca Tamajo Employment Law Hub releases a new Law Map comparing the risks posed in 38 countries' available at *https://www.toffolettodeluca.it/en-gb/news-events/news-and-events/a/dismissal-for-poor-performance-new-law-map-comparing-the-risks-posed-in-38-countries/* (accessed 10 April 2022).
[499] Jeske D (2021) 3.
[500] Jeske D (2021) 3.
[501] Zappala S, Toscano F & Topa G (2021) 887.
[502] Italian Legislative Decree No. 196/2003 and the Italian Data Protection Authority Legislative Decree No. 196/2003.
[503] The 1948 Universal Declaration of Human Rights enshrined human dignity in its preamble. The Italian Constitution does not expressly refer to a right to privacy or data protection. Article 14 (inviolability of domicile) and 15 (confidentiality of correspondence), both the Constitutional Court (Dec. n. 81/1993) and the Supreme Court of Cassation (Dec. n. n. 2129/1975 - Soraya) have regularly defined the privacy as a fundamental human right.
[504] Floris M 'How Italian employers can lawfully monitor employees' electronic devices' available at *How Italian employers can lawfully monitor employees' electronic devices - International Employment Lawyer* (accessed 7 August 2022).

that 'an employer is not allowed to use audiovisual equipment or any other device which is aimed at the remote monitoring of an employee's activities' unless required for organisational purposes and employees are aware of the monitoring.[505] Moreover, section 4(2) of the Italian Law No. 300/70 as well as section 13 of the Personal Data Protection Code states monitoring of employees should be for productivity reasons and/or for safety requirements. However, the employer must enter into an agreement with the trade union or local Labour Authority asking for authorization.[506] According to Weil, these regulations aim to do the following:

> 'validly effect such monitoring without violating the Italian legislation on the remote control of workers as stated in Article 4 of Italian Law 300/70, smart workers must be given a specific document indicating which technological devices will be at their disposition for the performance of their working activity, what controls the employer will be able to make on these devices and what the consequences could be for the employees, even from a disciplinary standpoint, of the inspections made by the employer'.[507]

Furthermore, the employer bears the obligation to ensure that remote employees are 'properly informed about the methods for using such tools and the execution of monitoring, which must be made explicit in specific internal regulations drafted clearly without boilerplate material and adequately distributed to workers'.[508] In other words, employees are required to receive adequate information regarding the oversight conducted by the employer. As a result, SA can use electronic monitoring tools as stated in chapter 3, provided that they take a similar approach to the above. This means employees must be informed of the monitoring, what information is gathered and have strict laws in place that only information required for the organisation is gathered.

[505] Law No. 300/70; Rampolla A & Brambilla G 'Italian Courts' Decision on Remote Monitoring of An Employee's Activities' available at *https://www.mondaq.com/italy/employment-and-hr/108236/italian-courts-decision-on-remote-monitoring-of-an-employees-activities* (accessed 16 April 2022).
[506] International Labour Organisation *Regulating the employment relationship in Europe: A guide to Recommendation No. 198* (2013) International Labour Organisation: Geneva: Legislative Decree 196/2003.
[507] Weil S 'SMART Working – Italy: New Flexible Working Opportunity' available at *https://www.fisherphillips.com/news-insights/cross-border-employer-blog/smart-working-italy-new-flexible-working-opportunity.html* (accessed 12 February 2022).
[508] Law No. 300/1970, section 4; Lodovici M 'The impact of teleworking and digital work on workers and society: Special focus on surveillance and monitoring, as well as on mental health of workers' 2021 *Policy Department for Economic, Scientific and Quality of Life Policies Directorate* 111.

Therefore, SA can monitor employees WFH should it conduct a similar approach as Italy, as the above laws allow information that is obtained through such monitoring to be used by the employer for the evaluation of the performance of employees and any disciplinary procedures, if necessary.[509] This is allowed on condition that the employees have been informed of any performance monitoring facility that is used to monitor/control the employees' performance, and whereas the evaluation and monitoring focuses on the output produced by the employees as opposed to the activity.[510] Therefore, 'an employer that decides to use at-home telework is obliged to *ex lege* to identify the specific risks, ergonomic conditions of the environmental hygiene, and adopt the appropriate measures in order to eliminate these risks'.[511]

4.6. Conclusion

This chapter has analysed and explored the Italian regulatory framework regarding remote work. Within this context, the legislative frameworks regarding working hours, OHS as well as employee performance were deliberated. This chapter further explained how Italy has developed laws to regulate employees WFH in respect of the above working conditions. Overtime within Italy is frowned upon as there is a blurred line as to what constitutes ordinary working hours and overtime. The parties to the employment relationship are required to enter into an agreement as to what the working time will be before the employee embarks on remote work. Furthermore, this chapter has explained that employers are still obliged to protect employees in respect of the OHS. This chapter highlighted certain tasks/checklists that employers can rely on to ensure employees are working in a safe and healthy environment. In relation to this, chapter 4 also discussed the framework regulating the performance of remote employees. Lastly, employers are mandated to comply with the requirements of fair reason and procedure before dismissing a remote employee for poor performance. Overall, South Africa can learn from the regulatory framework of remote work in Italy in order to ensure remote employees in the country are adequately protected. However, a challenge that arises in embodied the legislation of Italy into SA is the economic development of SA. SA does not have an highly developed social market economy such as Italy.

[509] Law No. 300/20, section 4; Personal Data Protection Code, section 13; Rymkevich O (2018) 54.
[510] Biagi M & Treu T (2002) 181.
[511] Biagi M & Treu T (2002) 183.

CHAPTER 5: REGULATION OF REMOTE WORK IN SOUTH AFRICA: SOME PATHWAYS

5.1. Introduction

Remote work is deemed to be the future way of conducting work.[512] In spite of this, as discussed in chapter 3, there are various gaps in South Africa's labour legislation regarding the working conditions of employees working remotely. This makes it imperative to determine ways to regulate remote work. Within this context, lessons have been drawn from Italy—discussed in the previous chapter, which has a regulatory framework for remote work. This chapter explores three broad pathways for the regulation of the working conditions of employees working remotely in South Africa. The first section will explore amendments to the employment contract as a protective option for employees working remotely in three work life areas, namely (1) working hours, (2) OHS and (3) employee performance. Section 2 will consider legislative amendments to the current labour legislations in South Africa. This discussion will consider ways to close the gap in the current labour legislation and provide protection to remote employees. Lastly, section 3 explores Social Partnership Agreements (hereafter referred to as SPA) as a tool for regulating the working conditions for remote employees. The pathways that will be discussed throughout this chapter are not necessarily exhaustive, however, discussion is restricted to these pathways due to space constraints. These pathways are essential to protect workers' working hours, OHS and employee performance.

5.2. Employment contract

The employment contract is an agreement entered into between two parties, namely the employer and employee.[513] This contract stipulates and regulates the terms and conditions of the employment relationship. More importantly, employment contracts are the foundation of employment relationships, and bind employers and employees to their duties and obligations.[514] Therefore, it is imperative that there is a clear and precise written employment

[512] Ozimek A & Stanton C 'Remote Work Has Opened the Door to a New Approach to Hiring' available at *Remote Work Has Opened the Door to a New Approach to Hiring (hbr.org)* (accessed 14 August 2022).
[513] Kasuso T *The definition of an "employee" under labour legislation: An elusive concept* (unpublished LLM, University of South Africa, 2015) 11.
[514] Kasuso T *The definition of an "employee" under labour legislation: An elusive concept* (unpublished LLM, University of South Africa, 2015) 14.

contract which breakdowns performance expectations, working hours among other things.[515] Similarly, the contract stipulates the roles and responsibilities placed on the parties to the employment relationship.[516] This is to avoid conflict and disputes in the workplace.

Employment contracts play an important role in the workplace. The principles of sanctity and freedom of contracts are common law foundational values in the South African law of contract.[517] The sanctity of contracts, which is the cornerstone of employment contracts, requires that once the parties enter into a contract, they honour their obligations.[518] This was confirmed in *Buthelezi v Municipal Demarcation Board*, which dealt with whether a breach of contract by an employer automatically equated to an unfair dismissal.[519] In this case, the employer gave detailed notes for the proposed restructuring of the company and the appellant's post was one of the posts that were going to be redundant.[520] The employer also invited the appellant for a different vacant post within the company, however, the appellant was unsuccessful.[521] Thereafter, the appellant was dismissed. The appellant took the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation.[522] Nevertheless, the appellant was unsuccessful at the CCMA.[523] The appellant took the matter to the LC. Thereafter the appellant argued that the termination of the employment contract was substantively unfair since the parties had concluded a fixed-term contract, in which the employer could not unilaterally terminate due to operational requirements.[524] The LC held that the dismissal was substantively fair as the employer had fair reason to restructure the company, therefore, the matter was dismissed.[525]

The matter was taken on appeal to the LAC. The LAC found that the employer unfairly dismissed the employee. The court further stated that:

[515] Humphries M 'The importance of the employment contract' available at *The importance of the employment contract | RSM South Africa The importance of the employment contract* (accessed 10 October 2022).
[516] Doyle A 'What Is and Employment Contract?' available at *What Is an Employment Contract? (thebalancemoney.com)* (accessed 11 October 2022).
[517] Pillay MM *The impact of pacta sunt servanda in the law of contract* (unpublished LLM, University of Pretoria, 2015) 2.
[518] Naidoo A *Recent case law on the Influence of the Constitution on the Enforceability of Restraint of Trade Agreements* (unpublished LLM, University of Pretoria, 2013) 7.
[519] *Buthelezi v Municipal Demarcation Board (Buthelezi* case) 2004 (25) *ILJ* 2317 (LAC).
[520] *Buthelezi* case, para 1.
[521] *Buthelezi* case, para 3.
[522] *Buthelezi* case, para 4.
[523] *Buthelezi* case, para 4.
[524] *Buthelezi* case, para 5.
[525] *Buthelezi* case, para 6.

> 'the unlawful breach of the employment contract rendered the dismissal substantively unfair and the rights of the employer fairly to dismiss employees for operationally justifiable reasons were subjugated to the interests of sanctity of contract. By elevating considerations of lawfulness over fairness, an unfair distinction was made between fixed-term contract employees, who, in the court's view, could not be fairly retrenched during a fixed-term contract and indefinite period employees who face the prospect of fair and lawful dismissal if genuine operational requirements are found to exist. The court declined to develop the common law in accordance with s 39(2) of the Constitution as, in the court's view, the common-law right to enforce a prematurely terminated fixed-term contract was not in conflict with the spirit, purpose and objects of the Bill of Rights. What the court failed to appreciate is that the right to sanctity of contract is not a constitutionally entrenched right but falls under the general protection afforded by the right to dignity, unlike the right to fair labour practices which unambiguously requires the fair treatment of both parties to the employment relationship. The employer's right to dismiss fairly for operational requirements, which has been recognized and entrenched by the LRA, ought to have been factored into the court's assessment of the fairness of the premature termination'.[526]

Therefore, the employer had no right in law to terminate the contract of employment, in addition such termination was unfair and constituted an unfair dismissal.[527] Accordingly, the LAC held that the dismissal was substantively unfair.[528]

Given the contract of employment's role as a key regulatory device, it is a useful way to regulate the working conditions of employees WFH. It can potentially address some of the gaps in legislation for the certainties of remote work that was highlighted in chapter 3. This way, employees working remotely are still afforded the same benefits and working conditions as employees working on-site. This pathway would require amendment of existing contracts of employment. This must be the mutual decision of the parties to the employment relationship as changes to employment conditions requires consultation between employees or their

[526] Louw AM ""The Common Law is … not what it used to be:" Revisiting Recognition of a Constiutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment (part 3)' (2018) 21 *PER* 34-35.
[527] *Buthelezi* case, para 16.
[528] *Buthelezi* case, para 16.

representatives and the employer.[529] This was confirmed in *Magnum Security v PTWU*, where the LAC held that the employer was unable to unilaterally reduce the ordinary working hours of employees.[530]

In order for the parties to amend the employment contract, they would need to mutually agree to such amendment. Amendments to the employment contracts must be done effectively and in good faith.[531] Furthermore, in *Monyela v Bruce Jacobs t/a LV Construction* the LC held that unilateral changes of employment contracts means that the employer has taken certain benefits away from employees or has failed to honour the terms and conditions of the employment contract.[532] Consequently, employees can embark on strike action due to the unilateral amendments.[533] Unless the amendment was conducted under the managerial prerogative of the employer.[534] The amendments will fall under managerial prerogative if there is a change in the method of performing work, provided that it is essential to the nature of the job.[535] Amendments to the employment conditions fall under managerial prerogative in the following circumstances:

> '1. The amendments were necessary because of the operational demands;
>
> 2. The employees have been consulted in a fair and inclusive way;
>
> 3. The employees have the opportunity to state their side of the case and the objections, reasons and possible alternatives have been considered'.[536]

[529] International Labour Organisation *National Labour Law Profile: South Africa* (2002) International Labour Organisation: Geneva; Bechard M 'Are your working-from-home policies in accordance with the law?' available at *Are your working-from-home policies in accordance with the law? - Moonstone* (accessed 12 October 2022).
[530] *Magnum Security v PTWU* 2004 (7) *BLLR* 693 (LAC).
[531] Meth T 'Unilateral changes to Basic Conditions of Employment and the recourse thereto' available at *Unilateral changes to Basic Conditions of Employment and the recourse thereto - Consolidated Employers Organisation (ceosa.org.za)* (accessed 30 November 2022).
[532] *Monyela & Others v Bruce Jacobs t/a LV Construction* 1998 (19) ILJ 75 (LC); Le Roux 2013 *CLL* 79 commenting on *Apollo Tyres* case is of the view that the fact that employees may have the right to embark on strike action or to institute legal proceedings in respect of the same dispute is irrelevant.
[533] *Monyela & Others v Bruce Jacobs t/a LV Construction* 1998 (19) ILJ 75 (LC); Le Roux 2013 *CLL* 79 commenting on *Apollo Tyres* case is of the view that the fact that employees may have the right to embark on strike action or to institute legal proceedings in respect of the same dispute is irrelevant.
[534] Meth T 'Unilateral changes to Basic Conditions of Employment and the recourse thereto' available at *Unilateral changes to Basic Conditions of Employment and the recourse thereto - Consolidated Employers Organisation (ceosa.org.za)* (accessed 20 October 2022).
[535] CCMA 'Unilateral changes to terms and conditions of employment' available at *Unilateral Changes Info Sheet (ccma.org.za)* (accessed 1 December 2022).
[536] Davel P 'Amendment of employment conditions' available at *Amendment of employment conditions - Jy en die RegJy en die Reg (solidariteit.co.za)* (accessed 29 November 2022).

These amendments do not necessarily have to be implemented individually with employees. They could be in the form of a general policy in the workplace. Employers can implement general policies and workplace policies after negotiating and engaging with the relevant trade unions or employee representatives in the workplace.[537] This is a more efficient way to change a workplace policy. Along with this, any changes to the employment contract must be settled in writing.[538] This is particularly important as these are alterations to the employment contract.[539] This helps to ensure everyone is aware of the change and that there less chance of misunderstandings/disagreements.[540] This is provided in the Italian Law No. 81/2017 stating that parties to the employment relationship are required to enter into a written agreement before the employee can work from home.[541] Reducing the mutual agreement to writing has also been confirmed by other counties such as Turkey and Chile.[542]

5.3. Legislative amendments

Legislative amendment is another potential way to fill the gaps in regulation for remote employees. Legislative amendment is the process of making an addition or alteration to statute.[543] While this pathway is time consuming, it is necessary to address some of the fundamental gaps in protection. For example, the right to disconnect. At the core of the right to disconnect, is the need to ensure a better work-life balance for remote employees.[544] This is achieved by employers respecting employees' right to disconnect after the completion of their

[537] International Labour Organisation *National Labour Law Profile: South Africa* (2002) International Labour Organisation: Geneva
[538] Italian Law No. 81/2017 and Argentina Teleworking Law No. 27,555.
[539] Acas 'Making changes to employment contracts – employer responsibilities' available at *If employment contract changes are agreed : Making changes to employment contracts – employer responsibilities - Acas* (accessed 1 December 2022).
[540] Acas 'Making changes to employment contracts – employer responsibilities' available at *If employment contract changes are agreed : Making changes to employment contracts – employer responsibilities - Acas* (accessed 1 December 2022).
[541] Italian Law No. 81/2017 and Argentina Teleworking Law No. 27,555.
[542] Dogan I & Luke K 'Turkey: Impacts of Corona Virus Pandemic in Terms of Turkish Labor Law' available at *Impacts Of COVID-19 On Employment Relations - Employee Rights/ Labour Relations - Turkey (mondaq.com)* (accessed 19 June 2022).
Lockton Global Compliance 'New remote working legislation around the world' available at *New remote working legislation around the world [Updated] - Lockton Global Benefits* (accessed 29 August 2022).
[543] Ndlovu N 'Legislation as an Instrument in South African Heritage Management: Is it Effective?' (2011) 13 *Conservation and mdmt of arch* 33.
[544] Van Staden M 'The digital ties that bind – South Africans need the right to disconnect and slip the work leash' available at *South Africans need the right to disconnect and slip th... (dailymaverick.co.za)* (accessed 20 October 2022).

working hours.[545] Furthermore, 'private and public employees will have a right to digital disconnection, outside of legal or conventionally established work time, in order to guarantee the respect of their rest period, work leave and holidays, as well as their personal and family privacy'.[546] Accordingly, any clauses or agreements that contradicts the right to disconnect will be ineffective.[547] This amendment would also need to develop a practical procedure that that must be complied with and impose sanctions if any person does not comply with the practical procedure or breaches his/her obligation stated therein.[548] Similarly, certain words such as 'ordinary working hours' as well as 'overtime' must be reconsidered in the current labour legislation and may be refined to include employees working remotely. This is because the 'normal/ordinary working hours' have evolved and taken on new meanings.[549]

Subsequently, the Italian Safety and Health at Work Act, discussed in chapter 4, indicates the obligation of the employer to constantly/frequently provide employees WFH with information, instructions, and training regarding OHS.[550] These obligations include completing a checklist that assesses the overall safety of the employee's workplace as well as making regular contact with employees to combat and maintain any work-related accidents and injuries, among others.[551] The obligations can be found in by-laws, Collective Agreements, Labour Rulebooks or guidelines.[552] The current OHSA in South Africa will, therefore, need to be amended to include the above and by providing that 'inspections, location approval and risk assessment and audits should take place by employers'.[553] These tasks are to be performed by the employer or an appointed assessor who conducts an audit checklist and feedback checklist to monitor the

[545] Lockton Global Compliance 'New remote working legislation around the world' available at *New remote working legislation around the world [Updated] - Lockton Global Benefits* (accessed 27 August 2022).
[546] Chiuffo F (2019) 10.
[547] Lockton Global Compliance 'New remote working legislation around the world' available at *New remote working legislation around the world [Updated] - Lockton Global Benefits* (accessed 27 August 2022).
[548] van Staden 'The digital ties that bind – South Africans need the right to disconnect and slip the work leash' available at *South Africans need the right to disconnect and slip th... (dailymaverick.co.za)* (accessed 18 June 2022).
[549] Rogers P & Abader N 'Employers must carefully navigate the legal maze of remote working during the COVID Pandemic' available at *https://www.dailymaverick.co.za/article/2021-09-30-employers-must-carefully-navigate-the-legal-maze-of-remote-working-during-the-covid-pandemic/#:~:text=Remote%20working%20is%20not%20specifically,as%20necessitated%20by%20Covid%2D19*. (accessed 02 May 2022).
[550] International Labour Organisation *An employers' guide on working from home in response to the outbreak of COVID-19* (2020) International Labour Organisation: Geneva.
[551] International Labour Organisation *How can occupational safety and health be managed?* (2021) International Labour Organisation: Geneva.
[552] Legislative Decree 81/2008.
[553] Staff Writer 'This is what's causing a massive work from home headache in South Africa right now' available at *This is what's causing a massive work from home headache in South Africa right now (businesstech.co.za)* (accessed 3 September 2022).

OHS arrangements.[554] Moreover, the risk assessment can be done via video conference in order for the employee to move freely around the specific work location as to help the assessor identify and direct the employee to areas that need to be assessed.[555] This will help determine whether the workplace and equipment used by employees contribute to a safe working environment and helps the OHS representatives with written information specifying the general and specific risks.

Similarly, amendments to the legislative framework regarding employee's performance must take into consideration the right to privacy of remote employees. If remote supervision/monitoring is allowed, the law must clearly state that information gathered from these must be used for productivity reasons and/or safety requirements.[556] Furthermore, legislation dealing with dismissal for poor work performance, must be developed in relation to the monitoring of employees and performance improvement programmes.[557] Another requirement the amendment may provide for is the development of Working from Home policies by employers.[558] This policy must be effectively communicated to remote employees.[559] The purpose of this policy will be to ensure that proper guidance is provided to employers to assess employees underperforming; and to ensure remote employees are not being dismissed for incapacity due to factors beyond their control. The mandatory requirements that are found in the Italian Law No. 81/2017 can be consulted as a guide for such policies.[560] Examples of mandatory requirements include the rules on work performance outside the office; methods for ensuring control and disciplinary power by the employer; working tools used by the employee; and measures ensuring rest and right to disconnect.[561]

[554] Iosh 'Home office, mobile office' available at *https://iosh.com/media/1507/iosh-home-office-mobile-office-full-report-2014.pdf* (accessed 18 April 2022); SafetyWallet 'How to conduct a health and safety audit' available at *How to conduct a health and safety audit (safetywallet.co.za)* (accessed 19 June 2022).
[555] Health and Safety Authority 'Guidance on Working from Home' available at *https://www.hsa.ie/eng/topics/remote_working/homeworking_guidance_9mar21_v8.pdf* (accessed 08 June 2022); Lockton Global Compliance 'New remote working legislation around the world' available at *New remote working legislation around the world [Updated] - Lockton Global Benefits* (accessed 27 August 2022).
[556] Legislative Decree 101/2018.
[557] Organisation for Economic Co-operation and Development *Productivity gains from teleworking in the post COVID-19 era: How can public policies make it happen?* (2020) OCED.
[558] Hunt S 'How HR Departments Can Support Work-From-Home Models available at *How HR Departments Can Support Work-From-Home Models (forbes.com)* (accessed 19 June 2022).
[559] International Labour Organisation *An employers' guide on working from home in response to the outbreak of COVID-19* (2020) International Labour Organisation: Geneva.
[560] Italian Law No. 81/2017.
[561] Italian Law No. 81/2017.

Although legislative amendments are useful tools to address the gaps in protection of remote employees, there are various potential pitfalls as well. For example, the lack of familiarity with legislative texts perpetuates misconceptions associated with the law, which consequently, results in the law being of no effect.[562] In spite of this, legislative frameworks are needed to be in place to regulate and provide protection to employees WFH, particularly as remote work is here to stay under the new working regime.

5.4. Social Partnership Agreements

Social Partnership Agreements (SPAs) are mutual agreements between the Government, employers, community, organization and/or trade unions regarding social and economic developments that affect the country.[563] This agreement is a potential way for parties in the employment relationship to negotiate and regulate remote work. However, it is based on the formation of social partnerships. Within the context of the workplace, social partnership entails employers and representatives of employees working together to coordinate 'the collaboration of key interests, freeing the state from deep involvement in organising work and wages…'. [564]

This partnership is structured in such a manner that a small number of associations such as trade unions or employer associations can negotiate matters and build-up professionalism and trust.[565] However, SPAs are more applicable to certain sectors such as data science, computer science and information technology, certain aspects of higher education, among others where remote work is more prevalent. Therefore, not anyone can take a stance and compete for influence as SPAs are between interested organised labour, organised business and government.[566] Nonetheless, SPA can be potentially useful in the remote work arrangements as it delivers fairness and trust.[567] Applicable to this is the use of social dialogue which functions as a circuit breaker with the capacity to coordinate different actors and as a tool to build trust.[568] SPA are also relevant to remote work as 'remote work can only be arranged

[562] Schane S 'Ambiguity and Misunderstanding in the Law' 25 *Thomas Jefferson Law Review* 167.
[563] See section 5.2, ch 5.
[564] Greer S et al *Civil society and health* (2017) 139-140.
[565] Greer S et al *Civil society and health* (2017) 139-140.
[566] Greer S et al *Civil society and health* (2017) 139-140.
[567] Organisation for Economic Co-operation and Development *Productivity gains from teleworking in the post COVID-19 era: How can public policies make it happen?* (2020) OCED.
[568] Global Deal 'Social Partnership in the times of the COVID-19 Pandemic' available at *SOCIAL PARTNERSHIP IN THE TIMES OF THE COVID-19 PANDEMIC (theglobaldeal.com)* (accessed 19 August 2022).

voluntarily if both the employee and the employer agree on it, and there must be a written agreement between the individual partners'[569]

Many countries such as Italy, Britain, Ireland, France, Spain, among others, have engaged in SPA to regulate remote work.[570] For example, the EU implemented a EU Social Partners' Autonomous Framework Agreement on Digitalisation (FAD) which acknowledges the need to address the challenges and opportunities that rose from the advancement of technology as well as the impact COVID-19 pandemic had on the working arrangements.[571] This is a general framework agreement that covers 'all workers and employers in the public and private sectors'.[572] Similarly, Luxembourg has a SPA regulating telework.[573] This SPA defines telework by reference to three criteria namely: 'the use of information and communication technologies (ICT) as a key element of the work; the work is carried out away from the employer's premises; and the work is generally of a regular and habitual nature'.[574] The SPA goes further to regulate aspects of remote work including working hours, health and safety as well as the employee performance, among other things.

South Africa could use SPAs as an options to regulate remote work in the country. SPAs have been used to develop and implement labour policies in the country since the end of apartheid. In 1994, the National Economic Development and Labour Council (NEDLAC) was established through the National Economic Development and Labour Council Act 33 of 1994.[575] This social partnership was formed to enable negotiations between organised labour, organised business and government on all socio-economic and labour issues.[576] Since the dawn of the democratic era, NEDLAC has been used as the forum for the negotiations of labour legislation

[569] Reisecker S 'Social partners negotiated ground rules for remote work' available at *Social partners negotiated ground rules for remote work | European Economic and Social Committee (europa.eu)* (accessed 14 August 2022).
[570] Ferris T 'Do we need Social Partnership?' available at *Do we need Social Partnership? - Public Affairs Ireland (pai.ie)* (accessed 14 August 2022).
[571] Mangan D 'Agreement to Discuss: The Social Partners Address the Digitalisation of Work' (2021) 50 *Industrial Law Journal* 689.
[572] Mangan D 'Agreement to Discuss: The Social Partners Address the Digitalisation of Work' (2021) 50 *Industrial Law Journal* 689.
[573] Wlodarski O 'Social partner agreement open the way for telework' available at *Social partner agreement opens the way for telework | Eurofound (europa.eu)* (accessed 14 August 2022).
[574] Wlodarski O 'Social partner agreement open the way for telework' available at *Social partner agreement opens the way for telework | Eurofound (europa.eu)* (accessed 14 August 2022).
[575] National Economic Development and Labour Council 'Social Dialogue: A catalyst for social and economic development' available at *Nedlac-2010.pdf* (accessed 20 October 2022).
[576] Congress of South African Trade Union *The Future of Collective Bargaining: In defense of Jobs and Wages* (2020) 6.

in South Africa.[577] Therefore, South Africa already has the framework to implement SPAs through NEDLAC or even through the collective bargaining structures in the country.[578] More recently, NEDLAC was the forum through which emergency responses were developed to protect workers and support enterprises during the pandemic.[579] Consequently, a similar approach can be used to develop policies to address the gaps in the regulation of remote work. This SPA will supplement/complement the current legal provisions on the working conditions of remote workers. However, this will require consultations with relevant stakeholders to ensure the interests of all parties are taken into consideration.

5.5. Conclusion

The regulation and governing of employees working from home is of vital importance as shown throughout this thesis. Based on this, this chapter has provided potential pathways to regulate remote work. As mentioned, regulation can be achieved through employment contracts, legislation amendments and SPAs. In relation to this, the implementation executed in other countries, particularly Italy, can be used in South Africa as a guideline to ensure all employees working from home are protected. These pathways provide clarity on the rights and obligations of all parties in the employment relationship and address the challenges that the COVID-19 pandemic and the changing world of work has brought upon the South African labour market.

[577] Benjamin P *South African Labour Law: A Twenty-Year Assessment* (Working Paper, Swiss Programme for Research on Global Issues for Development, 2016) 3.
[578] Benjamin P *South African Labour Law: A Twenty-Year Assessment* (Working Paper, Swiss Programme for Research on Global Issues for Development, 2016) 3.
[579] Global Deal 'Social Partnership in the times of the Covid-19 pandemic' available at *SOCIAL PARTNERSHIP IN THE TIMES OF THE COVID-19 PANDEMIC (theglobaldeal.com)* (accessed 28 November 2022).

CHAPTER 6: CONCLUSION

6.1. Introduction

This mini-thesis has noted that remote work is here to stay. In relation to this, the current legislative framework on working hours, OHS and employee performance were examined. The analysis revealed that the working conditions such as working hours, health and safety and employee performance of remote workers were not adequately protected. These have implications on productivity, the work-life balance and overall well-being of remote employees. Consequently, chapter five recommended pathways through which South Africa can facilitate legal protection for these employees. However, the implementation of these pathways has policy implications. This chapter reflects briefly on some policy implications necessary to ensure the implementation of an appropriate regulatory framework for remote work in South Africa.

This chapter has two broad sections. The first part discusses policy implications for the successful regulation of remote working. While this, just like the pathways in chapter five is by no means exhaustive, it is hoped that this discussion serves as a trigger for more research. The second part of the chapter concludes this mini-thesis.

6.2. Policy implementation for the regulation of remote working

As shown in the previous chapters, there are gaps in South Africa's legislation governing three distinct working conditions of remote employees. The previous chapter provided pathways through which South Africa can ensure employees WFH are protected. However, these pathways have policy implications. Policy implications are generally understood as a series of events undertaken by the government and others to achieve the goals and objectives stated in the policy statements.[580] Within the context of this thesis, policy implications are action-plans that will give effect to the pathways discussed in chapter 5. Some of these policy implications are discussed below.

[580] Bullock H & Lavis J 'Understaning the supports needed for policy implementation: a comparative analysis of the placement of intermediaries across three mental health systems' (2019) 17 *Health Research Policy and Systems* 1.

Labour Inspection

Labour inspection plays a fundamental role in labour administration by ensuring there is compliance with labour regulation in the workplace.[581] Without inspection, labour law has been compared to an exercise in ethics and not a binding social discipline.[582] Indeed, while legislation can be amended and SPAs developed (as discussed in chapter 5), they are irrelevant and mere suggestions without proper labour inspection.[583] Consequently, inspection has a major role to ensure compliance with any regulation developed for remote employees. For that reason, South Africa's Government would have to:

> 'take the necessary measures to ensure them. This could be done through a close control from the Labour Inspections, evaluating the possibility of imposing specific penalties – financial or not – in case of non-compliance. In the last report, legislators should reconsider their initial position and move towards a regulation with minimum set of general rules to be followed by all, regarding digital disconnection'.[584]

This is however dependent on good governance.

Training

There is need to provide adequate training for all stakeholders if regulations developed for remote work will be effective. For example, labour inspectors will need to be trained to understand the specific application of OHS policies within the context of remote work.[585] Employees will need adequate training and information to understand the health, safety and psychosocial risks that comes with remote work.[586] Similarly, employers will need training on how to develop remote work risk assessments and working from home policies.[587]

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[581] International Labour Organisation *Guidelines on general principles of labour inspection* (2021) International Labour Organisation: Geneva.
[582] Director-General for Department of Employment and Labour 'The effective labour inspector beyond 2025' available at *Francis Blanchard (ilo.org)* (accessed 15 December 2022).
[583] Mustchin S & Lucio MM 'The evolving nature of labour inspection, enforcement of employment rights and the regulatory reach of the state in Britain' (2020) 62 *Journal of Industrial Relations* 752.
[584] Chiuffo F (2019) 19.
[585] Mustchin S & Lucio MM (2020) 752.
[586] Pisiotis A, Rieff J & Rosini S (2021) 147.
[587] Iosh 'Home office, mobile office' available at *https://iosh.com/media/1507/iosh-home-office-mobile-office-full-report-2014.pdf* (accessed 18 April 2022); Health and Safety Authority *Guidance on Working From Home for Employers and Employees* (2020) Health and Safety Authority: Dublin 14.

Political will and commitment

As stated in chapter one, considering the potentials of remote work to impact negatively on the quality of employment conditions, political will and commitment are important requirements for the pathways discussed in chapter five to be developed and implemented. As shown in chapter 2, the historical context of South Africa shows that without political will, there will be no change in the law. Therefore, the government need to show commitment to providing maximum legal protection for all employees including remote employees, irrespective of whether such employment relationships are outside of the traditional employment structure.

6.3. Concluding remarks

This thesis has analysed the regulatory framework of remote work in South Africa. It was argued that the current legal framework does not adequately regulate the working conditions of remote workers. Therefore, highlighting the need to amend and supplement the legislative framework in South Africa to cater for employees working remotely. This is imperative as remote work is here to stay. Otherwise, without addressing the gaps, the working conditions of these employees will not be adequately protected. This means that issues/concerns regarding work-life balance that arise from employees WFH will not be addressed nor protected. This will have severe consequences on employees, businesses and the economy. For example, many employees may experience burn out and suffer from psychological issues as stated in chapter 3. Furthermore, if employees' right to privacy is not fully protected, employers could invade their personal lives and gain access to personal information. Therefore, there is an urgent need to implement regulatory strategies to address these gaps. In this regard, this mini-thesis explored the approach taken by Italy, which South Africa can use as a guide to address these gaps in the labour legislation. The mini-thesis ended by exploring some pathways and policy implications to regulate remote work. Notwithstanding the analyses provided in this mini-thesis in respect of working hours, OHS and employee performance, there are various other aspects that require research. These include leave, benefits afforded to employees and structure of workers' organisation in respect of remote work. It is therefore anticipated that the discussion in this thesis will trigger further research into the other aspects of remote work.

[Words: 34 450]

BIBLIOGRAPHY

Books

Alli B *Fundamental Principles of Occupational Health and Safety* 2 ed (2008) Oxford University Press: United States.

Ally SA *From Servants to Workers: South African Domestic Workers and the Democratic State* (2009) University of KwaZulu-Natal Press: South Africa.

Ball K *Electronic Monitoring and Surveillance in the Workplace. Literature review and policy recommendations* (2021) European Union: Luxembourg.

Ceighton WB & Stewart A *Labour Law: An Introduction* 3ed (2016) Federation Press: Sydney.

Cook S *Making a Success of Managing and Working Remotely* (2019) IT Governance Publishing Ltd: United Kingdom.

Davidov G and Langille B *The Idea of Labour Law* (2011) Oxford University Press: United States.

Dugard J *Confronting Apartheid: A Personal History of South Africa* (2018) Jacana Media: South Africa.

Du Toit et al *The Labour Relations Act of 1995 – A Comprehensive Guide* (1998) LexisNeis: South Africa.

Greer S et al *Civil society and health* (2017) World Health Organisation: Europe.

Grogan J *Workplace Law* (1998) Juta: Cape Town.

Hart R *The Economics of Overtime Working* (2009) Cambridge University press: United Kingdom.

Hughes P & Ferrett E *Introduction to Health and Safety at Work* 3 ed (2007) Routledge: London.

Judy R & D'Amico C *Workforce 2020: Work and Workers in the 21st Century* (1997) Hudson Institute: United States of America.

Khunou G et al *COSATU'S Contested Legacy: South African Trade Unions in the Second Decade of Democracy* (2013) African Studies Centre: Leiden.

Lee S, McCann D & Messenger J *Working Time Around the World* (2007) Routledge: Oxon.

Le Roux P & Van Niekerk A *The South African Law of Unfair Dismissal* (1994) Juta: Cape Town.

Loi D *The impact of teleworking and digital work on workers and society – Case study on Italy* (2021) Committee on Employment and Social Affairs, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament: Luxembourg.

Malone T *The Future of Work: How the New Order of Business Will Shape Your Organization, Your Management Style, and Your Life* (2005) Harvard Business School Press: Boston.

Moyane K et al *Understanding the Basic Conditions of Employment Act* (2009) Juta: Cape Town.

Safley T *Labor Before the Industrial Revolution: Work, Technology and their Ecologies in an Age of Early Capitalism* 1 ed (2019) Routledge: Oxon.

Supiot A, Meadows P & Casas M *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (2001) Oxford University Press: United States.

Van Eck S *Human Rights at Work: Perspectives on Law and Regulation* (2010) Bloomsbury Publishing: United States.

Van Jaarsveld SR, Fourie JD & Olivier MP *Principles and Practice of Labour Law* (2004) LexisNexis: Butterworths.

Case Law

Amabhungane Centre for Investigative Journalism v Minister of Justice and Correctional Services 2021 (3) SA 246 (CC).

Apollo Tyres South Africa (Pty) Ltd v National Union of Metalworkers of South Africa & Others 2012 (6) BLLR 544 (LC).

Borcherds v CW Pearce and F Sherwood t/a Lubrite Distributors 1993 (14) ILJ 1262 (LAC).

Buthelezi v Municipal Demarcation Board 2004 (25) *ILJ* 2317 (LAC).

Denel (Pty) Ltd v Gerber 2005 (9) BLLR 849 (LAC).

De Gee v Transnet SOC Ltd 2020 (2) SA 488 (GJ).

Du Pisanie v Rent-A-Sign (Pty) Ltd and Another 2001 (2) SA 894 (SCA).

Everfresh Market Virgina (Pty) Lrd v Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 (CC).

Industrial Health Resource Group and Others v Minister of Labour and Others 2015 (4) All SA 78 (GP).

Joubert v Buscor Proprietary Limited 2016 ZAGPPHC 1024.

Joslin v Olivetti Systems & Networks Africa (Pty) Ltd 1993 (14) ILJ 227 (IC).

MacDonald v General Motors South Africa (Pty) Ltd 1973 (1) SA 232 (E).

Magnum Security v PTWU 2004 (7) *BLLR* 693 (LAC).

Midas Group Komatipoort v NUMSA and Others 2018 (14) SA 83 (LC).

Monyela & Others v Bruce Jacobs t/a LV Construction 1998 (19) ILJ 75 (LC).

National Education Health & Allied Workers Union v University of Cape Town 2003 (2) BCLR 154 (CC).

Pam Golding Properties (PTY) LTD v Erasmus 2010 (31) ILJ 1460 (LC).

Phaka and others v Bracks and others 2015 (5) BLLR 514 (LAC).

Uber South Africa Technology Services (Pty) Ltd v NUPSAW & others 2018 (39) ILJ 903 (LC).

S v AMCA Services (Pty) Ltd 1963 (4) SA 637 (A).

SABC v McKenzie 1999 (20) ILJ 585 (LAC).

State Information Technology Agency (SITA) (Pty) Ltd v CCMA & Others 2008 (7) BLLR 611 (LAC).

South African Broadcasting Commission v McKenzie 1999 (20) ILJ 585 (LC).

Supreme Court (judgment n. 26676 of 10 November 2017).

Unilong Freight Distributors (Pty) Ltd v Muller 1998 (1) SA 581 (SCA).

Wells v Cooper 1958 (2) QB 265.

ILO Conference Proceedings, Reports and Policy Documents

International Labour Organization *An employer's guide on working from home in response to the outbreak of COVID-19* (2020) International Labour Organisation: Geneva.

International Labour Organisation *A safe and helathy return to work during the COVID-19 pandemic* (2020) International Labour Organisation: Geneva.

International Labour Organisation *Employment Relationship* (2020) International Labour Organisation: Geneva

International Labour Organisation *Ensuring decent working time for the future* (2018) International Labour Organisation: Geneva.

International Labour Organisation *Fundamental Principles of Occupational Health and Safety* (2008) International Labour Organisation: Geneva.

International Labour Organisation *Guidelines on general principles of labour inspection* (2021) International Labour Organisation: Geneva.

International Labour Organisation *Guidelines on occupational safety and health management systems, ILO-OHS* (2001) International Labour Organisation: Geneva.

International Labour Organization *How can occupational safety and health be managed?* (2020) International Labour Organisation: Geneva.

International Labour Organisation *In the face of a pandemic: ensuring Safety and Health at Work* (2020) International Labour Organisation: Geneva.

International Labour Organisation *Managing work-related psychosocial risks during the COVID-19 pandemic* (2020) International Labour Organisation: Geneva.

International Labour Organisation *Mental health and work: Impact, issues and good practices* (2000) International Labour Organisation: Geneva.

International Labour Organisation *National Labour Law Profile: South Africa* (2002) International Labour Organisation: Geneva.

International Labour Organisation *Negotiating For Decent Working Time – A Review of Practice* (2020) International Labour Organisation: Geneva.

International Labour Organisation *Occupational injuries* (2020) International Labour Organisation: Geneva.

International Labour Organisation *Occupational Safety and Health* (2020) International Labour Organisation: Geneva.

International Labour Organisation *Occupational Safety and Health (OSH): Italy* (2015) International Labour Organisation: Geneva.

International Labour Organisation *OSH Management System: A tool for continual improvement* (2011) International Labour Organisation: Geneva.

International Labour Organisation *Regulating the employment relationship in Europe: A guide to Recommendation No. 198* (2013) International Labour Organisation: Geneva.

International Labour Organisation *Social dialogue and tripartism* (2018) International Labour Organisation: Geneva.

International Labour Organisation *Teleworking during the COVID-19 pandemic and beyond* (2020) International Labour Organisation: Geneva.

International Labour Organisation *The effects of working time on productivity and firm performance: a research synthesis paper* (2012) International Labour Organisation: Geneva.

International Labour Organisation *The Scope of the Employment Relationship* (2003) International Labour Organisation: Geneva.

International Labour Organisation *The Social Partnership Agreement (SPA) in Ireland* (2020) International Labour Organisation: Geneva.

International Labour Organisation *Homeworkers need to be better protected, says the ILO* (2021) International Labour Organisation: Geneva.

International Labour Organisation *National Labour Law Profile: South Africa* (2002) International Labour Organisation: Geneva.

International Labour Organisation *Non-standard Employment Around The World* (2016) International Labour Organisation: Geneva.

International Labour Organisation *Working time and the future of work* (2018) International Labour Organisation: Geneva.

Internet Resources and Media Reports

Allardyce & Partners Attorneys 'Why is Labour Law Necessary' available at *https://www.allardyce.co.za/labour-law-necessary/* (accessed on 20 April 2021).

Allen & Overy 'The latest Italian National Protocol on remote working' available at *https://www.allenovery.com/en-gb/germany/news-and-insights/publications/approvato-il-protocollo-nazionale-sul-lavoro-in-modalita-agile* (accessed 15 April 2022).

Andreassen H 'Norway: Updated Rules for Home Office Work' available at *Norway: Updated Rules for Home Office Work - L&E Global (leglobal.org)* (accessed 8 September 2022).

Arnold F 'Protocol for dismissing an employee for poor work performance' available at *https://www.golegal.co.za/dismissal-work-performance/* (accessed 28 May 2022).

Auricchio A et al 'COVID-19: Protection of employees' health and other impacts on businesses' available at *8.pdf (gop.it)* (accessed 7 August 2022).

Bechard M 'Are your working-from-home policies in accordance with the law?' available at *Are your working-from-home policies in accordance with the law? - Moonstone* (accessed 8 September 2022).

Beny-Boatti 'Health and safety at work Italy' available at *Health and safety at work in Italy | Studio Beny-Boatti Avvocati (benyboatti.com)* (accessed 18 July 2022).

Böhm M 'The Causes and Consequences of Job Polarization, and their Future Perspectives' available at *https://www.bbvaopenmind.com/en/articles/causes-and-consequences-of-job-polarization-and-their-future-perspectives/* (accessed 09 October 2021).

Bhoola U 'National Labour Law Profile: South Africa' available at *https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.html* (accessed on 10 April 2021).

Blackman R 'How to Monitor Your Employees – While respecting Their Privacy' available at *https://hbr.org/2020/05/how-to-monitor-your-employees-while-respecting-their-privacy* (accessed 01 June 2022).

Buckingham M & Goodall A ;Reinventing Performance Management' available at *https://hbr.org/2015/04/reinventing-performance-management* (accessed 27 March 2022).

Braam 'The role and importance of occupational health and safety in the workplace' available at *https://www.inconhealth.co.za/2019/07/25/the-role-and-importance-of-occupational-health-and-safety-in-the-workplace/* (accessed 10 January 2022).

Capeetc 'Call for fewer working hours in SA' available at *https://www.capetownetc.com/news/call-for-fewer-working-hours-in-sa/* (accessed 31 March 2022).

Carmichael S 'The Researtch Is Clear: long Hours Backfire for People and for Companies' available at *https://hbr.org/2015/08/the-research-is-clear-long-hours-backfire-for-people-and-for-companies* (accessed 01 April 2022).

CitizensInformation 'Your employment rights during COVID-19' available at *https://www.citizensinformation.ie/en/employment/employment_rights_during_covid19_restrictions.html* (accessed 25 March 2022).

Chance M & Warwick-Evans C 'The "Always on" Work Culture. Is a "Right to Disconnect" the Next Step in the Home Working Revolution? What Employers Should Start to Consider Now to Protect their Employees and Businesses' available at *https://www.rosenblatt-law.co.uk/insight/the-always-on-work-culture-is-a-right-to-disconnect-the-next-step-in-the-home-working-revolution-what-employers-should-start-to-consider-now-to-protect-their-empl/* (accessed 24 March 2022).

Cheng A ‘What is “always-on” culture and how does it impact work? available at *https://www.ringcentral.com/us/en/blog/what-is-always-on-culture-and-how-does-it-impact-work/* (accessed 30 April 2022).

Chugh A ‘What is ‘The Great Resignation’? An expert explains’ available at *https://www.weforum.org/agenda/2021/11/what-is-the-great-resignation-and-what-can-we-learn-from-it/* (accessed 17 May 2022).

Choudhury P ‘Our Work-from-Anywhere Future’ available at *https://hbr.org/2020/11/our-work-from-anywhere-future* (accessed 09 September 2021).

CMS Expert ‘Mobile Working Regulations in Italy’ available at *https://cms.law/en/int/expert-guides/cms-expert-guide-to-mobile-working/italy* (accessed 30 September 2021).

Collins ‘legislative amendment’ available at *Legislative amendment definition and meaning | Collins English Dictionary (collinsdictionary.com)* (accessed 20 October 2022).

Cominotto C ‘Telework, Smart Work, and the Right to Disconnect in Italy’ available at *https://lineenetwork.org/telework-smart-work-and-the-right-to-disconnect-in-italy/* (accessed 12 February 2022).

Daly N ‘Flexible Working Is Here To Stay: Here’s How To Make it Work’ available at *https://www.wrike.com/blog/flexible-working-future-of-work/* (accessed 24 January 2022).

Delahoussaye E ‘Working from Home During COVID-19: Challenges and Solutions’ available at *https://journal.ahima.org/working-from-home-during-covid-19-challenges-and-solutions/* (accessed 31 January 2022).

De Luca T ‘Italy – how to dismiss an employee for poor performance’ available at *https://kliemt.blog/2018/05/11/italy-how-to-dismiss-an-employee-for-poor-performance/* (accessed 10 April 2022).

Department of Labour ‘Health & safety in the workplace’ available at *https://www.labour.gov.za/DocumentCenter/Publications/Occupational%20Health%20and%20Safety/What%20every%20worker%20should%20know%20about%20health%20and%20safety%20at%20work.pdf?platform=hootsuite#:~:text=The%20Occupational%20Health%20a*

nd%20Safety%20Act%2C%201993%2C%20requires%20the%20employer,the%20health%20of%20the%20workers. (accessed 01 April 2022).

Digital Nomad 'The History of Remote Working' available at *https://andysto.com/the-history-of-remote-working/* (accessed 16 May 2022).

Dogan I & Luke K 'Turkey: Impacts of Corona Virus Pandemic in Terms of Turkish Labor Law' available at *Impacts Of COVID-19 On Employment Relations - Employee Rights/ Labour Relations - Turkey (mondaq.com)* (accessed 19 June 2022).

Doyle A 'What Is and Employment Contract?' available at *What Is an Employment Contract? (thebalancemoney.com)* (accessed 11 October 2022).

Efectio 'Workplace Factors Affecting Employee Health' available at *https://efectio.com/en/workplace-factors-affecting-employee-health/* (accessed 06 June 2022).

Erasmus A 'Remote Working' available at *https://www.gibs.co.za/about-us/faculty/documents/whitepapers/erasmus_remote%20working.pdf* (accessed 22 January 2022).

Emid 'Workforce performance monitoring' available at *https://emid.co.za/managed-ict-solutions/workforce-performance-monitoring/* (accessed 28 May 2022).

Farish A 'Occupational Health and Safety Act Summary' available at *https://absolutehealth.co.za/blog/occupational-health-and-safety-act-summary/#:~:text=The%20Occupational%20Health%20and%20Safety%20(OHS)%20Act%2085%20of%201993,the%20well%2Dbeing%20of%20workers.&text=Inspect%20any%20condition%2C%20process%2C%20plant,any%20person%20within%20the%20workplace* (accessed 10 September 2021).

Ferris T 'Do we need Social Partnership?' available at *Do we need Social Partnership? - Public Affairs Ireland (pai.ie)* (accessed 14 August 2022).

Finnegan M 'The New Normal: When work-from-home means the boss is watching' available at *https://www.computerworld.com/article/3586616/the-new-normal-when-work-from-home-means-the-boss-is-watching.html* (accessed 18 April 2022).

Fisic I 'Why and how to create performance standards in an organization' available at *https://clockify.me/blog/business/performance-standard/* (accessed 27 January 2022).

Floris M 'How Italian employers can lawfully monitor employees' electronic devices' available at *How Italian employers can lawfully monitor employees' electronic devices - International Employment Lawyer* (accessed 7 August 2022).

Fokazi S 'Global 'great resignation' trend seen in SA as long working hours in pandemic rattle employees' available at *https://www.sowetanlive.co.za/good-life/health/2021-11-02-global-great-resignation-trend-seen-in-sa-as-long-working-hours-in-pandemic-rattle-employees/* (accessed 21 May 2022).

Global Deal 'Social Partnership in the times of the COVID-19 Pandemic' available at *SOCIAL PARTNERSHIP IN THE TIMES OF THE COVID-19 PANDEMIC (theglobaldeal.com)* (accessed 19 August 2022).

Haridy R 'The right to disconnect: The new laws banning after-hours work emails' available at *https://newatlas.com/right-to-disconnect-after-hours-work-emails/55879/* (12 June 2022).

Health and Safety Authority 'Guidance on Working from Home' available at *https://www.hsa.ie/eng/topics/remote_working/homeworking_guidance_9mar21_v8.pdf* (accessed 08 June 2022).

Humphries M 'The importance of the employment contract' available at *The importance of the employment contract | RSM South Africa The importance of the employment contract* (accessed 10 October 2022).

Hunt S 'How HR Departments Can Support Work-From-Home Models available at *How HR Departments Can Support Work-From-Home Models (forbes.com)* (accessed 19 June 2022).

Intelliconn 'Reform vs Oppression: The Impact of Wiehahn Commission on Labour Relations in South Africa' available at *https://intelliconn.wordpress.com/2012/11/02/reform-vs-oppression-the-impact-of-wiehahn-commission-on-labour-relations-in-south-africa/* (accessed 15 January 2022).

Iosh 'Home office, mobile office' available at *https://iosh.com/media/1507/iosh-home-office-mobile-office-full-report-2014.pdf* (accessed 18 April 2022).

Israelstam I 'Managing employees working remotely' available at *https://www.labourlawadvice.co.za/articles/managing-employees-working-remotely/* (accessed 12 September 2021).

Getilli F 'Italy: Smart Working – agile, performing and increasing' available at *Italy: Smart Working - agile, performing and increasing | Warwick legal* (accessed 24 July 2022).

Giordani M 'Compensation for damage caused by work-related stress and "straining"' available at *Compensation for damage caused by work-related stress and "straining" - Studio Zunarelli* (accessed 21 July 2022).

Greyling M 'Everything you need to know about Injuries on Duty' available at *https://www.makrosafe.co.za/blog/Everything-you-need-to-know-about-Injuries-on-Duty* (accessed 27 March 2022).

Gwynn B 'Overcoming Adversity from All Angles: The Struggle of the Domestic Worker during Apartheid by Bennett Gwynn' available at *https://www.sahistory.org.za/article/overcoming-adversity-all-angles-struggle-domestic-worker-during-apartheid-bennett-gwynn* (accessed 27 December 2021).

Halpern & Scrom 'Remote Work and Worker's Compensation Coverages' available at *Remote Work and Worker's Compensation Coverages (halpernadvisors.com)* (accessed 24 July 2022).

HealthWorkerBurnout 'How Does Burnout Affect Productivity?' available at *https://healthworkerburnout.com/how-does-burnout-affect-productivity/#:~:text=Burnout%20negatively%20affects%20productivity%20at,retention%2C%20output%2C%20and%20engagement* (accessed 17 May 2022).

History.com Editors 'Apartheid' available at *https://www.history.com/topics/africa/apartheid* (accessed 23 December 2021).

Howe C, Whillans A & Menges J 'How to (Actually) Save Time When You're Working Remotely' available at *https://www.hbs.edu/ris/Publication%20Files/How%20to%20(Actually)%20Save%20Time_5307067a-78f0-4693-b466-7bddcf1bbf21.pdf* (accessed 25 January 2022).

Jacobs A 'Looking at the Basic Conditions of Employment Act and how it regulates Working Hours' available at *https://ceosa.org.za/looking-at-the-basic-conditions-of-employment-act-and-how-it-regulates-working-hours/* (accessed 13 May 2021).

Jacobs E 'Homeworking: isolation, anxiety and burnout' available at *https://www.ft.com/content/315095c0-7da0-11ea-8fdb-7ec06edeef84* (accessed 12 September 2021).

James R 'Italy: New "Smart Working" Rules To Reflect Modern Flexible Working Arrangements' available at *New "Smart Working" Rules To Reflect Modern Flexible Working Arrangements - Employee Rights/ Labour Relations - Italy (mondaq.com)* (accessed 24 July 2022).

Jermyn R 'Working remotely – the employment law and HR considerations' available at *https://www.lexology.com/library/detail.aspx?g=edd65615-ac2e-4bf2-96f0-5177173c64bc* (accessed 11 September 2021).

Jessop B 'Fordism' available at *https://www.britannica.com/topic/Fordism* (accessed 31 December 2021).

Johansan M 'The countries resisting remote work' available at *https://www.bbc.com/worklife/article/20220511-the-countries-resisting-remote-work* (accessed 01 June 2022).

Jorge J 'Shaftered … but was it during the course and scope of employment?' available at *https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Employment/employment-alert-12-february-shaftedbut-was-it-during-the-course-and-scope-of-employment.html* (accessed 05 February 2022).

Klopper H 'SA's leader in Legal Compliance and Transformation Solutions' available at *https://serr.co.za/what-are-normal-working-hours-in-south-africa* (accessed 11 May 2021).

Landmann K & Noakes J 'The 'Great Resignation': A Global Risk?' available at *https://www.nortonrosefulbright.com/en-za/knowledge/publications/cc03a277/the-great-resignation-a-global-risk#:~:text=The%20term%20'Great%20Resignation'%20was,the%20end%20of%20the%20pandemic.* (accessed 30 March 2022).

L&E Global 'Legal Framework Differentiating Employees From Independent Contractors' available at *https://knowledge.leglobal.org/eic/country/south-africa/legal-framework-differentiating-employees-independent-contractors-31/* (accessed 30 December 2021).

le Roux S 'Employers who require employees to work on a Sunday which is a public holiday, and the following Monday, also a public holiday, are in for an expensive exercise' available at *https://blog.seesa.co.za/index.php/2019/08/12/employers-who-require-employees-to-work-on-a-sunday-which-is-a-public-holiday-and-the-following-monday-also-a-public-holiday-are-in-for-an-expensive-exercise/* (accessed 21 January 2022).

Leshem D 'Software Delivers Remote Productivity Monitoring and OPEX Analytics for Work-from-Home and In-Office Workforce – All While Respecting Employee Privacy' available at *Softwatch, Remote Employee Productivity Monitoring (ceocfointerviews.com)* (accessed 20 June 2022).

Lexellent 'Employer's control on employee's activity: reform of article 4 Italian Workers' Statute of Rights' available at *employer's control on employee's activity: reform of article 4 italian workers' statute of rights. - Lexellent* (accessed 31 August 2022).

Liu J 'A record 4.4 million people quit in September as Great Resignation shows no signs of stopping' available at *https://www.cnbc.com/2021/11/12/a-record-4point4-million-people-quit-jobs-in-september-great-resignation.html* (accessed 01 April 2022).

Liu J 'How remote work has changed discussion politics in the office' available at *How remote work has changed discussing politics in the office (cnbc.com)* (accessed 9 October 2022).

Lockton Global Compliance 'New remote working legislation around the world [Updated]' available at *https://globalnews.lockton.com/new-remote-working-legislation-around-the-world/* (accessed 20 September 2021).

Lodovici E et al 'The impact of teleworking and digital work on workers and society' available at *https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662904/IPOL_STU(2021)662904_EN.pdf* (accessed 09 September 2021).

Maurer R 'Remote Employees Are Working Longer Than Before' available at *https://www.shrm.org/hr-today/news/hr-news/pages/remote-employees-are-working-longer-than-before.aspx* (accessed 24 March 2022).

McKinsey Global Institute 'What's next for remote work: An analysis of 2000 tasks, 800 jobs, and nine countries' available at *https://www.mckinsey.com/featured-insights/future-of-work/whats-next-for-remote-work-an-analysis-of-2000-tasks-800-jobs-and-nine-countries* (accessed 31 March 2022).

Meth T 'Unilateral changes to Basic Conditions of Employment and the recourse thereto' available at *Unilateral changes to Basic Conditions of Employment and the recourse thereto - Consolidated Employers Organisation (ceosa.org.za)* (accessed 20 October 2022).

Meinert D 'How to Prevent Employee Burnout' available at *https://www.shrm.org/hr-today/news/hr-magazine/0817/pages/how-to-prevent-employee-burnout.aspx* (accessed 06 June 2022).

Michalson L 'Monitoring or intercepting of communications lawfully' available at *https://www.michalsons.com/blog/monitoring-of-communications/171* (accessed 06 June 2022).

Morgan K 'Since the pandemic, employees are leaving the workforce or switching jobs in drives. For many, employers have played a big part in why they're walking away' available at *https://www.bbc.com/worklife/article/20210629-the-great-resignation-how-employers-drove-workers-to-quit* (accessed 24 March 2022).

Mosdell, Pama & Cox 'CCTV cameras in the workplace? Allowed or not?' available at *CCTV cameras in the workplace? Allowed or not? (mpc.law.za)* (accessed 27 November 2022).

Naidoo C 'Understand How the Labour Relations Act Affects You in the Workplace' available at 554. *https://blog.sabinet.co.za/2016/09/understand-labour-relations-act-affects-workplace-08112016/* (accessed 28 December 2021).

National Academy of Sciences 'Occupational Health and Safety in the Care and Use of Nonhuman Primates' available at *https://www.ncbi.nlm.nih.gov/books/NBK43443/* (accessed 25 March 2022).

National Economic Development and Labour Council 'Social Dialogue: A catalyst for social and economic development' available at *Nedlac-2010.pdf* (accessed 20 October 2022).

Nunes I 'Occupational safety and health risk assessment methodologies' available at *https://oshwiki.eu/wiki/Occupational_safety_and_health_risk_assessment_methodologies* (accessed 01 February 2022).

Ntlhoro M & Raseote N 'South Africa: Regulating employee conduct while working remotely' available at *https://ensafrica.com/news/detail/2556/south-africa-regulating-employee-conduct-whil/* (accessed on 23 March 2021).

OECD 'Implications of Remote Working Adoption on Place Based Policies' available at *Implications of remote working adoption on place based policies (oecd.org)* (accessed 25 September 2022).

OECD 'OECD Italy' available at *Italy.pdf (oecd.org)* (accessed 7 August 2022).

Olivier D et al 'South Africa: Remote Working Challenges To Traditional Employment Contracts' available at *https://www.mondaq.com/southafrica/employee-rights-labour-relations/1009368/remote-working-challenges-to-traditional-employment-contracts* (accessed 12 September 2021).

Olivier D, Miti-Qamata L, Patel A & Mhlongo T 'Remote Working Challenges To Traditional Employment Contracts' available at *https://www.adams.africa/labour-law/remote-working-employment-contracts/* (accessed on 20 March 2021).

Ozimek A & Stanton C 'Remote Work Has Opened the Door to a New Approach to Hiring' available at *Remote Work Has Opened the Door to a New Approach to Hiring (hbr.org)* (accessed 14 August 2022).

Parliament 'How a law is made' available at *How a Law is Made - Parliament of South Africa* (accessed 20 October 2022).

Parliamentary Monitoring Group 'The Legislative Process' available at *The Legislative Process. | PMG* (accessed 20 October 2022).

PossibleWorks 'The Impact of Remote Work on employee Performance and the role of HR to alleviate the impact' available at *https://possibleworks.com/blog/the-impact-of-remote-work-*

on-employee-performance-and-the-role-of-hr-to-alleviate-the-impact/ (accessed 02 June 2022).

Providence R 'Workers' compensation claims involving remote workers: What employers and HR professionals need to know' available at *https://lewisbrisbois.com/newsroom/legal-alerts/workers-compensation-claims-involving-remote-workers-what-employers-and-hr-should-know* (accessed 11 April 2022).

Radi S 'The Future after the Covid-10 Pandemic: Remote Work in South Africa' available at *The Future after the Covid-19 Pandemic: Remote Work in South Africa - Kujenga Amani (ssrc.org)* (accessed 23 October 2022).

Rampolla A & Brambilla G 'Italian Courts' Decision on Remote Monitoring of An Employee's Activities' available at *https://www.mondaq.com/italy/employment-and-hr/108236/italian-courts-decision-on-remote-monitoring-of-an-employees-activities* (accessed 16 April 2022).

Raphulu L & Gaffney S 'The laws around working from home that every South African should know' available at *https://businesstech.co.za/news/business/516326/the-laws-around-working-from-home-that-every-south-african-should-know/* (accessed 12 June 2022).

Redlich H 'Acting in 'good faith' – what does it really mean?' available at *Acting in 'good faith' - what does it really mean? - Lexology* (accessed 20 October 2022).

Reisecker S 'Social partners negotiated ground rules for remote work' available at *Social partners negotiated ground rules for remote work | European Economic and Social Committee (europa.eu)* (accessed 14 August 2022).

Remote Year 'What is Remote Work' available at *https://www.remoteyear.com/blog/what-is-remote-work* (accessed 28 March 2022).

Rocchi V & Krisnamurthy S 'Global: Many countries introducing new regulations on teleworking' available at *Many countries introducing new regulations on teleworking - WTW (wtwco.com)* (accessed 8 September 2022).

Rogers P & Abader N 'Employers must carefully navigate the legal maze of remote working during the COVID Pandemic' available at *https://www.dailymaverick.co.za/article/2021-09-30-employers-must-carefully-navigate-the-legal-maze-of-remote-working-during-the-covid-*

pandemic/#:~:text=Remote%20working%20is%20not%20specifically,as%20necessitated%20by%20Covid%2D19. (accessed 02 May 2022).

SAICA 'Promotion of Access to Information Act' available at *https://www.saica.org.za/resources/legislation-and-governance/promotion-of-access-to-information-act* (accessed 16 January 2022).

SAnews 'Government, social partners pull together to save and create jobs' available at *Government, social partners pull together to save and create jobs | SAnews* (accessed 21 August 2022).

SafetyWallet 'How to conduct a health and safety audit' available at *How to conduct a health and safety audit (safetywallet.co.za)* (accessed 19 June 2022).

Shital M 'Productivity: Meaning, Concept, Formulas, Techniques, Measurement and Advantages' available at *https://www.economicsdiscussion.net/management/productivity-meaning-concept-formulas/32324* (accessed 06 June 2022).

Sibanda O 'Slipping the electronic leash: Remote work and the right to switch off after hours' available at *https://www.dailymaverick.co.za/opinionista/2021-11-16-slipping-the-electronic-leash-remote-work-and-the-right-to-switch-off-after-hours/* (accessed 08 June 2022).

Snook A 'Health and Safety Issues When Employees are Working from Home' available at *https://www.i-sight.com/resources/health-and-safety-issues-when-employees-are-working-from-home/* (accessed 30 January 2022).

Sorensen S 'Monitoring the Remote Employee: Oversight or an Overstep?' available at *https://www.epraxis.com/post/monitoring-the-remote-employee-oversight-or-an-overstep* (accessed 02 June 2022).

South African History Online 'Pass Laws and Sharpeville Massacre' available at *https://www.sahistory.org.za/article/pass-laws-and-sharpeville-massacre* (accessed 17 January 2022).

Staff Writer 'Proposal for new laws to stop work calling you after hours in South Africa' available at *Proposal for new laws to stop work calling you after hours in South Africa (businesstech.co.za)* (accessed 11 March 2023).

Staff Writer 'South Africa's biggest banks are making a work-from-home shift' available at *https://businesstech.co.za/news/banking/515006/south-africas-biggest-banks-are-making-a-work-from-home-shift/* (accessed 09 September 2021).

Staff Writer 'This is what's causing a massive work from home headache in South Africa right now' available at *This is what's causing a massive work from home headache in South Africa right now (businesstech.co.za)* (accessed 3 September 2022).

StudioSantoro 'Health and safety at work: the Risk Assessment Document' available at *Health and safety at work: the Risk Assessment Document – Studio Santoro (studio-santoro.it)* (accessed 23 July 2022).

South African History Online 'The Interim South African Constitution 1993' available at *https://www.sahistory.org.za/article/interim-south-african-constitution-1993#:~:text=Therefore%2C%20the%20Constitution%20which%20they,a%20democratically%20elected%20Constitutional%20Assembly* (accessed 16 January 2022).

South African History Online 'The historical significance of COSATU's Workers' Charter Campaign' available at *https://www.sahistory.org.za/article/historical-significance-cosatus-workers-charter-campaign* (accessed 15 January 2022).

South African History Online 'Wiehahn Commission Report tabled in parliament' available at *https://www.sahistory.org.za/dated-event/wiehahn-commission-report-tabled-parliament* (accessed 18 January 2022).

Suemo J '4 main reasons employers monitor their workers' available at *https://www.worktime.com/4-main-reasons-employers-monitor-their-workers* (accessed 31 May 2022).

The Danish Institute for Human Rights 'Working hours' available at *https://biz.sdg.humanrights.dk/salient-issue/working-hours* (accessed 8 January 2022).

The South African Labour Guide 'Poor Performance Procedures' available at *https://www.labourguide.co.za/poor-performances/508-poor-performance-procedures#:~:text=A%20fair%20procedure%20encompasses%3A,reasons%20for%20the%20poor%20performance* (accessed 22 May 2022).

Tobey E 'The right to Work and Workers' Rights' available at *https://www.escr-net.org/rights/work* (accessed 14 January 2022).

Toffoletto De Luca Tamajo 'Dismissal for poor performance: The Toffoletto De Luca Tamajo Employment Law Hub releases a new Law Map comparing the risks posed in 38 countries' available at *https://www.toffolettodeluca.it/en-gb/news-events/news-and-events/a/dismissal-for-poor-performance-new-law-map-comparing-the-risks-posed-in-38-countries/* (accessed 10 April 2022).

Toffoletto F, Soncin M & De Luca Tamajo T 'Employment and Employee Benefits in Italy: Overview' available at *https://uk.practicallaw.thomsonreuters.com/2-503-3122?transitionType=Default&contextData=(sc.Default)&firstPage=true* (accessed 16 April 2022).

United States Department of Labor 'Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace' available at *https://www.osha.gov/coronavirus/safework* (accessed 23 January 2022).

Upcounsel 'employee Privacy Rights: Everything You Need to Know' available at *https://www.upcounsel.com/employee-privacy-rights* (accessed 05 February 2022).

Van Staden M 'The digital ties that bind – South Africans need the right to disconnect and slip the work leash' available at *https://www.dailymaverick.co.za/article/2021-11-03-the-digital-ties-that-bind-south-africans-need-the-right-to-disconnect-and-slip-the-work-leash/#:~:text=The%20Code%20requires%20employers%20to,that%20employees%20take%20rest%20breaks.* (accessed 20 May 2022).

Verite C 'Remote Work In Italy: Agreement on 'Smart Working' Protocol Beyond Covid-19' available at *https://www.newsendip.com/remote-work-italy-agreement-protocol-guideline-smart-working-private-sector-covid/ (*accessed 10 February 2022).

Villegas F 'Desk Research: What it is, Tips & Examples' available at *Desk Research: What it is, Tips & Examples | QuestionPro* (accessed 11 March 2023).

WageIndicator Foundation 'Health and Safety' available at *https://mywage.co.za/decent-work/health-and-safety-at-work/health-and-safety* (accessed 9 January 2022).

WageIndicator 'Work Hours and Overtime' available at *https://mywage.co.za/decent-work/compensation/hours-and-overtime/work-hours-and-overtime* (accessed 23 March 2022).

Weisberg L 'What can an employer track?' available at *https://www.weisbergcummings.com/employee-tracking-and-recording/* (accessed 16 January 2022).

Weil S 'SMART Working – Italy: New Flexible Working Opportunity' available at *https://www.fisherphillips.com/news-insights/cross-border-employer-blog/smart-working-italy-new-flexible-working-opportunity.html* (accessed 12 February 2022).

Well S 'SMART Working – Italy: New Flexible Working Opportunity' available at *SMART Working - Italy: New Flexible Working Opportunity | Fisher Phillips* (accessed 17 July 2022).

Wlodarski O 'Social partner agreement open the way for telework' available at *Social partner agreement opens the way for telework | Eurofound (europa.eu)* (accessed 14 August 2022).

Worklaw 'Code of Good Practice on the Arrangement of Working Time' available at *https://www.worklaw.co.za/SearchDirectory/Codes_Of_Good_Practice/praticearrangement worktime_new.asp* (accessed 17 May 2022).

Wrike 'What Is a Remote Work Agreement/Contract?' available at *What Is a Remote Work Agreement / Contract? | Remote Work Guide (wrike.com)* (accessed 29 August 2022).

Yeates M 'OHSA – Yes, this includes mental health – what does the law say?' available at *https://www.cliffedekkerhofmeyr.com/en/news/publications/2020/Employment/employment-alert-2-march-ohsa-yes-this-includes-mental-health-what-does-the-law-say.html* (accessed 10 January 2022).

Zielinski D 'Monitoring Remote Workers' available at *https://www.shrm.org/hr-today/news/all-things-work/pages/monitoring-remote-workers.aspx* (accessed 12 September 2021).

Journal Articles

Adepoju A 'Continuity and Changing Configurations of Migration to and from the Republic of South Africa' (2003) 41 *International Migration* 3-28.

Ahmed R 'The Standard of the Reasonable Person in Determining Negligence – Comparative Conclusions' (2021) 24 *PELJ* 1-55.

Andrews P 'The legal underpinnings of gender oppression in apartheid South Africa' (1986) 3 *Australian Journal of Law and Society* 92-104.

Answeeuw W & Pons-Vignon N 'Working Conditions in South Africa Since the End of Apartheid: A Comparison Between the Agricultural, Forestry and Mining Sectors' (2012) 65 *The Economic History Review* 1-34.

Awada M et al 'Working from home during the COVID-19 pandemic: Impact on office worker productivity and work experience' (2021) 69 *PudMed.gov* 1171-1189.

Azim M, Ahmed H & Khan A 'Operational Performance and Profitability: An Empirical Study on the Bangladeshi Ceramic Companies' (2015) *Operational Performance and Profitability* 63-73.

Benjamin P 'Labour Market Regulation: International and South African Perspectives' 2005 *Employment & Economic Policy Research Programme* 1-58.

Bhave D 'The Invisible Eye? Electronic Performance Monitoring and Employee Job Performance' (2014) 67 *Personnel Psychology* 605-635.

Bhave D et al 'Privacy at Work: A Review and a Research Agenda for a Contested Terrain' (2019) 45 *Journal of Management* 127-164.

Biagi M & Treu T 'A Comparative Study of the Impact of Electronic Technology on Workplace Disputes: National Report on Italy' (2002) 24 *Comp. Lab. L. & Pol'y J.* 177-194.

Bolisani E 'Working from home during COVID-19 pandemic: lessons learned and issues' (2020) 15 *Management and Marketing* 458-476.

Borkovich D et al 'Working from home: Cybersecurity in the age of COIVD-19' (2020) 21 *Issues in Information Systems* 234-246.

Botha MM 'The Different Worlds of Labour and Company Law: Truth or Myth?' (2014) 17 *PELJ* 2042-2099.

Botha N & Mischke C 'A New Labour Dispensation for South Africa' (1997) 41 *Journal of African Law* 134-146.

Bloom N & Liang J et al 'Does Working from Home Work? Evidence from a Chinese Experiment' (2015) 130 *The Quarterly Journal of Economics* 165–218.

Budeli M 'Workers' right to freedom of association and trade unionism in South Africa: An historical perspective' (2009) 15 *Fundamina* 57-74.

Bujor G 'Occupational Risk Assessment: Imperatives for Process Improvement' (2018) 19 *EBSCO* 133-144.

Bullock H & Lavis J 'Understaning the supports needed for policy implementation: a comparative analysis of the placement of intermediaries across three mental health systems' (2019) 17 *Health Research Policy and Systems* 1-13.

Broughton A & Battaglini M 'Teleworking during the COVID-19 pandemic: risks and prevention strategies' 2021 *European Agency for Safety and Health at Work* 1-32.

Campo G et al 'The Italian National Surveillance System for Occupational Injuries: conceptual Framework and fatal Outcomes, 2002-2016 (2020) 17 *International Journal of Environmental Research and Public Health* 1-27.

Caponecchia C & Wyatt A 'Defining a "Safe System of Work"' (2021) 12 *Saf Health Work* 421-423.

Carroll N & Conboy K 'Normalising the "new normal": Changing tech-driven work practices under pandemic time pressure' (2020) 55 *International Journal of Information Management* 1-6.

Carney T 'A Call to Revise Section 8(2)(e) of the Occupational Health and Safety Act in Include Crisis Risk Communication' (2019) 40 *Industrial Law Journal* 1-17.

Cheadle H 'Regulated Flexibility and Small Business: Revisiting the LRA and the BCEA' (2006) 27 *Indus. LJ* 1-57.

Chiuffo F 'The "Right to Disconnect" or "How to Pull the Plug on Work"' (2019) 4 *SSRN Electronic Journal* 1-22.

Christianson M 'Incapacity and Disability: A Retrospective and prospective Overview of the Past 25 Years' (2004) 25 *Indus. L.J.* 879-895.

Clayton C et al 'Management of employee performance in the South Africa Public Service: the case of the National Department of Rural Development and Land Reform in the Western Cape' (2015) 13 *Problems and Perspectives in Management* 125-131.

Collewet M & Sauermann J 'Working Hours and Productivity' (2017) 47 *Labour Economics* 1-35.

Conradie M 'The Constitutional Right to Fair Labour Practices: A Consideration of the Influence and Continued Importance of the Historical Regulation of (Un)Fair Labour Practices Pre-1977' (2016) 22 *Fundamina* 163–204.

Conte M & Gramano E 'Looking to the other side of the bench: The new legal status of independent contractors under the Italian Legal System' 2018 *Comp. Lab. Law & pol. Journ.* 1-24.

Corfe S '4IR in the Workplace: Ensuring employers and employees benefit' 2018 *The Social Market Foundation* 1-43.

Dagnino E 'Working Anytime, Anywhere and Working Time Provisions. Insights from the Italian Regulation of Smart Working and the Right to Disconnect' (2020) 9 *E-Journal of International and Comparative Labour Studies* 1-22.

David N et al 'Wages, Hours, and Overtime Premia: Evidence from the British Labor Market' (2003) 56 *Industrial & Labor Relations Review* 470-480.

Degan GA et al 'Occupational health and safety management systems: comparison between BS OHSAS 18001: 2007 and Italian Decree 81/2008' (2009) 14 *Environmental Health Risk* 401-409.

De Lucas Ancillo A et al 'Workplace change within the COVID-19 context: a grounded theory approach' (2020) 34 *Economic Research* 2297-2316.

Donini A et al 'Towards collective protections for crowdworkers: Italy, Spain and France in the EU context' (2017) 23 *European Review of Labour and Research* 207-223.

Donnelly R & Johns J 'Recontextualising remote working and its HRM in the digital economy: An integrate framework for theory and practice' (2021) 32 *The International Journal of Human resource Management* 84-105.

du Toit D 'Protection against unfair discrimination in the workplace: Are the courts getting it right' (2007) 11 *AJOL* 1-15.

Donthu N & Gustafsson A 'Effects of COVID-19 on business and research' (2020) 117 *Journal of Business Research* 284–289.

Ebert I 'Big Data in the workplace: privacy Due Diligence as a human rights-based approach to employee privacy protection' 2021 *Big Data & Society* 1-14.

Eddeston K & Mulki K 'Toward Understanding Remote Workers' Management of Work-Family Boundaries: The Complexity of Workplace Embeddedness' (2015) 42 *Group & Organization Management* 346-387.

Ferreira GM 'Developments in labour relations in South Africa: Ten years of democracy (2005) 24 *Politeia* 197–214.

Fourie ES 'Non-standard workers: the South African context, international law and regulation by the European Union' (2008) 11 *PER* 110-184.

Gaitens J et al 'COVID-19 and Essential Workers: A Narrative Review of Health Outcomes and Moral Injury' (2021) 18 *International Journal of Environmental Research and Public Health* 1-18.

Gelb S 'Democratizing Economic Growth: Crisis and Growth Models for the Future' (1991) 18 *Social Justice* 243-258.

Gradin C 'Occupational segregation by race in South Africa after Apartheid' (2018) 23 *Review of Development Economics* 553-576.

Gerber M & von Solms R 'Management of risk in the information age' (2005) 24 *Computers & Security* 16-30.

Godfrey S and Clarke M 'The Basic Conditions of Employment Act amendments: More questions than answers' (2002) 6 *Law, Democracy & Development* 1-26.

Golden L 'Time After Time Mandatory overtime in the U.S. economy' 2002 *Economic Policy Institute* 1-18.

Guite HF 'The impact of the physical and urban environment on mental well-being' (2006) 120 *Public Health* 1117-1126.

Hendrickx F 'Regulating new ways of working: From the new 'wow' to the new 'how' (2018) 9 *European Labour Law Journal* 195–205.

Hill E, Ferris M & Martinson V 'Does it matter where you work? A comparison of how three work venues (traditional office, virtual office, and home office) influence aspects of work and personal/family life' (2003) 63 *Journal of Vocational Behavior* 220-241.

Hunter M 'The Post-Fordist High Road? A South African Case Study' (2000) 18 *Journal of Contemporary African Studies* 67-90.

Hutchison A 'Good Faith In Contract: A Uniquely South African Perspective' (2019) 1 *Journal of Commonwealth Law* 227-270.

Huysamen E 'An Overview of Fixed-Term Contracts of Employment as a Form of A-typical Employment in South Africa' (2021) 22 *PER* 1-42.

Horwitz F 'Employment Equity In South Africa: Overcoming The Apartheid Legacy' (2011) 30 *Equality diversity and inclusion: An International Journal* 225-242.

Hovden J et al 'The safety representative under pressure. A study of occupational health and safety management in the Norwegian oil and gas industry' (2008) 46 *Safety Science* 493-509.

Inagamit T 'The End of Classic Model of Labor Law and Post-Fordism' (1999) 20 *Comp. Labor Law & Pol'y Journal* 691-740.

Inman RP & Rubinfeld D 'Understanding the Democratic Transition in South Africa' (2013) 15 *American Law and Economics Review* 1-38.

Jeske D 'Monitoring remote employees: Implications for HR' (2021) 20 *Emerald Publishing Limited* 42-46.

Johnstone R, Quinlan M & Walters D 'Statutory Occupational Health and Safety Workplace Arrangements for the Modern Labour Market' (2005) 47 *The Journal of Industrial Relations* 93-116.

Jones R 'The Emergence of Shop-Floor Trade Union Power in South Africa' (1985) 6 *Managerial and Decision Economics* 160-166.

Jungkunz S 'Political Polarization During the COVID-19 Pandemic' 2021 *Front. Polit. Sci.* 1-8.

Katunge J & Wahu M 'Maintaining Health and Safety at Workplace: Employee and Employer's Role in Ensuring a Safe Working Environment' (2016) 7 *Journal of Education and Practice* 1-7.

Katsabian T 'The Telework Virus: How the COVID-19 Pandemic Has Affected Telework and Exposed Its Implications for Privacy and Equality' 2020 *SSRN Electronic Journal* 1-57.

Katz E 'White Workers' Grievances and the Industrial Colour Bar, 1902-1913' (1975) 33 *African Studies Institute* 127-156.

Kaur A 'White Prosperity with Cheap Black Labour' (1994) 3 *World Affairs: The Journal of International Issues* 43-50.

Kelliher C & Anderson D 'Doing more with less? Flexible working practices and the intensification of work' (2010) 63 *Human Relations* 83-106.

Kniffin K et al 'COVID-10 and the Workplace: Implications, Issues, and Insights for Future Research and Action' 2021 *American Psychological Association* 63-77.

Kraak A 'Transforming South Africa's Economy: From Racial-Fordism to Neo-Fordism?' (1996) 17 *Economic and Industrial Democracy* 39-74.

Kloppers HJ & Pienaar GJ 'The historical context of land reform in South Africa and early policies' (2014) 17 *PERJ* 677-706.

Koinis A 'The Impact of Healthcare Workers Job Environment on Their Mental-emotional Health. Coping Strategies: The Case of a Local General Hospital' (2015) 3 *Health Psychol Res* 1-6.

Kovac C 'Social partnership in occupational safety and health' (2017) 7 *Safety Engineering* 85-91.

Lacopo S & Spinelli C '(Re-) Regulating Remote Work in the Post-pandemic scenario: Lessons from the Italian experience' (2021) 14 *Italian Labour Law e-Journal* 209-260.

Landers R, Rebitzer J & Taylor L 'Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms' (1996) 86 *JSTOR* 329-348.

Lavicoll S 'Risk assessment at work and prevention strategies on COVID-19 in Italy' (2021) 16 *PLOS ONE* 1-11.

Le Roux W 'When is a workplace safe or unsafe?: the safety criterion in terms of the occupational health and safety act and the mine health and safety act*'* (2011) 111 *Journal of the Southern African Institute of Mining and Metallurgy* 529-533.

Le Roux R 'The Evolution of the Contract of Employment in South Africa' (2010) 39 *Industrial Law Journal* 139-165.

Liebenberg S 'Human Development and Human rights South African Country Study' 2000 *United Nations Development Programme: Human Development Reports* 1-37.

Lichtenstein A 'The Hope for White and Black'? Race, Labour and the State in South Africa and the United States, 1924-1956' (2004) 30 *Journal of Southern African Studies* 133-153.

Lippel K & Walters D 'Regulating health and safety and workers' compensation in Canada for the mobile workforce: now you see them, now you don't' (2019) 29 *Journal of Environmental and Occupational Health Policy* 1-45.

Lodovici M 'The impact of teleworking and digital work on workers and society: Special focus on surveillance and monitoring, as well as on mental health of workers' 2021 *Policy Department for Economic, Scientific and Quality of Life Policies Directorate* 1-171.

Louw A '"The Common Law is … not what it used to be": Revisiting Recognition of a Constitutionally-Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment (Part 3)' (2018) 21 *PER* 1-53.

Lucas K 'Workplace Dignity: Communicating Inherent, Earned, and Remediated Dignity' 52 *Journal of Management Studies* 621-646.

Makhulu AM 'A Brief History of the Social Wage: Welfare before and after Racial Fordism' (2016) 115 *The South Atlantic Quarterly* 113-124.

Malunga F 'In Search of Better Wages: A Challenge to Mining Capitalism and State Power, 1943' (2006) 51 *Historia* 117-139.

Mangan D 'Agreement to Discuss: The Social Partners Address the Digitalisation of Work' (2021) 50 *Industrial Law Journal* 689-705.

Mankiewicz R 'The Concept and Development of Labour Law' (1950) 5 *Bulletin des Relations Industrielles* 83-87.

Marais H 'South Africa: The Popular Movement in the Flux and the Reconstruction and Development Programme (RDP)' (1996) 21 *CODESRIA* 211-233.

Marco B 'Covid-19 and labour law in Italy' (2020) 11 *European Labour Law Journal* 306-313.

Marx AW 'South African Black Trade Unions as an Emerging Working-Class Movement' (1989) 27 *The Journal of Modern African Studies* 383-400.

Mariotti M 'Labour markets during apartheid in South Africa' (2011) 65 *The Economic History Review* 1100-1122.

Matli W 'The changing work landscape as a result of the Covid-19 pandemic: insights from remote workers life situation in South Africa' (2020) *International Journal of Sociology and Social Policy* 1237-1256.

Matisane L et al 'Challenges for Workplace Risk Assessment in Home Offices-Results from a Qualitative Descriptive Study on Working Life during the First Wave of the COVID Pandemic in Latvia' (2021) 18 *Int. J. Environ. Res. Public Health* 1-19.

Millard D & Bascerano EG 'Employers' Statutory Vicarious Liability in Terms of the *Protection of Personal Information Act*' (2016) 19 *PER* 1-38.

Modiri JM 'Law's Poverty' (2015) 18 *PER* 244-274.

Molino M 'Wellbeing Costs of Technology Use during Covid-19 Remote Working: An Investigation Using the Italian Translation of the Technostress Creators Scale' (2020) 12 *Sustainability* 1-20.

Moodie TD 'The Moral Economy of the Black Miners' Strike of 1946' (1986) 13 *Taylore & Francis* 1-35.

Mosala SJ et al 'South Africa's Economic Transformation since 1994: What Influence has the National Democratic Revolution (NDR) Had?' (2017) 44 *Rev Black Polit Econ* 327-340.

Mrara B 'Burnout: is all the talk of burnout causing us to burn out' (2020) 26 *Southern African Journal of Anaesthesia and Analgesia* 530-531.

Murphy C, Marcus-Quinn A & Hourigan T 'Exploring the Ripple Effect of 'Always On' Digital Work Culture in Secondary Education Settings' 2021 *Handbook for Online Learning Contexts: Digital, Mobile and Open* 339-353.

Mustchin S & Lucio MM 'The evolving nature of labour inspection, enforcement of employment rights and the regulatory reach of the state in Britain' (2020) 62 *Journal of Industrial Relations* 735-757.

Ngwane T 'Insurgent Democracy': Post-Apartheid South Africa's Freedom Fighters' (2019) 45 *Journal of Southern African Studies* 229-245.

McGregor M 'Judicial notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces' (2011) *De Jure* 111-125.

Oakman J et al 'A rapid review of mental and physical health effects of working at home: how do we optimize health? (2020) 20 *BMC Public Health* 1-13.

Osiki A 'The impact of soci-legal inequality on women in the Nigerian domestic work sector' (2022) 26 *Law, Democracy and Development* 48-83.

Pawirosumarto S & Sarjana PK 'Factors affecting employee performance of PT' (2016) 59 *International Journal of Law and Management* 1-14.

Park S et al 'The negative impact of long working hours on mental health in young Korean workers' (2020) 15 *PLOS ONE* 1-13.

Perry S & Hunter E 'Out of Office: What Type of Employee is Best Suited for Remote Work?' (2019) 12 *Keller Center Research Report* 1-8.

Perovic J 'Towards a New, Digital Communication Paradigm' (2016) 4 *Studies in Media and Communication* 99-110.

Pindek S 'Failing Is Derailing: The Underperformance as a Stressor Model' (2020) 11 *Front Psychol* 1-15.

Pisiotis A, Rieff J & Rosini S 'Better together: managing the crisis and embracing structural change – the role of social dialogue' 2021 *Employment and Social Developments in Europe* 143-166.

Previtali FS & Fagiani CC 'Deskilling and degradation of labour in contemporary capitalism: the continuing relevance of Braverman' (2015) 9 *Pluto Journals* 76-91.

Popovici V 'Remote Work Revolution: Current Opportunities and Challenges for Organizations' (2020) 20 *Economic Sciences Series* 468-472.

Rajah M 'The socio-political and work environment as sources of workplace discrimination: Implication for employment equity' (2000) 5 *Southern African Business Review Special Issue on Information Technology* 77-82.

Rautenbach IM 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 17 *PER* 2229-2267.

Rymkevich O 'An overview of the regulatory framework for smart work in Italy: Some critical remarks' (2018) 5 *Kutafin University Law Review* 209-260.

Salamone F et al 'Working from home in Italy during COVID-19 Lockdown: A survey to Assess the Indoor Environmental Quality and Productivity' (2021) 11 *Buildings* 1-31.

Salfi F et al 'Working from home due to the COVID-19 pandemic abolished the sleep disturbance vulnerability of late chronotypes relieving their predisposition to depression' 2022 *Psychiatry and Clinical Psychology* 2-22.

Sanz de Miguel P, Caprile M & Arasanz J 'Regulating telework in a post-COVID-19 Europe' 2021 *European Agency for Safety and Health at Work* 2-28.

Schane S 'Ambiguity and Misunderstanding in the Law' 25 *Thomas Jefferson Law Review* 167-193.

Schaufeli WB 'Past performance and future perspectives of burnout research' (2003) 29 *SA Journal of Industrial Psychology* 1-15.

Schumacher S 'What Employees Should Know About Electronic Performance Monitoring' (2021) 8 *ESSAI* 138-144.

Seitanidi M, Koufopoulos D & Palmer P 'Partnership Formation for Change: Indicators for Transformative Potential in Cross Sector Social Partnerships' 2011 *Journal of Business Ethics* 139-161.

Shamsuddin KA et al 'Investigation the Safety, Health and Environment (SHE) Protection in Construction Area' (2015) 2 *International Research Journal of Engineering and Technology (IRJET)* 624-636.

Shimazu A, Schaufeli W & Taris T 'How Does Workaholism Affect Worker Health and Performance? The Mediating Role of Coping' (2010) 17 *International Journal of Behavioral Medicine* 154-160.

Seghezzi F & Tiraboschi M 'Italy's Industry 4.0 Plan: An Analysis from a Labour Law Perspective' (2018) *E-Journal of International and Comparative Labour Studies* 1-32.

Suchard H 'Labour relations in South Africa: retrospect and prospect' (1982) 12 *Africa Insight* 89-97.

Spagnoli P 'Workaholism and Technostress During the COVID-19 Emergency: The Crucial Role of the Leaders on Remote Working' 2020 *Frontiers in Psychology* 1-9.

Spurk D & Straub C 'Flexible employment relationships and careers in times of the COVID-19 pandemic" (2020) 119 *Journal of Vocational Behavior* 1-4.

Thomas A & Nicholas B "Teleworking in South Africa: Employee benefits and challenges" (2010) 8 *SA Journal of Human Resource Management* 1-10.

Tompa E, Scott-Marshall H & Fang M 'The impact of temporary employment and job tenure on work-related sickness absence' (2008) 65 *Occup Environ Med* 801-807.

Previtali FS & Fagiani CC 'Deskilling and degradation of labour in contemporary capitalism: the continuing relevance of Braverman' (2015) 9 *Pluto Journals* 76-91.

Rajah M 'The socio-political and work environment as sources of workplace discrimination: Implication for employment equity' (2000) 5 *Southern African Business Review Special Issue on Information Technology* 77-82.

Rautenbach IM 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 17 *PER* 2229-2267.

Suchard H 'Labour relations in South Africa: retrospect and prospect' (1982) 12 *Africa Insight* 89-97.

Tomczalk D et al 'Evidence-based recommendations for employee performance monitoring' (2018) 61 *Business Horizons* 251-259.

Willcocks L 'Remote working: here to stay?' 2020 *LSE Business Review* 1-5.

Tshoose I 'Employer's Duty to Provide a Safe Working Environment: A South African Perspective' (2011) 6 *Journal of International Commercial Law and Technology* 165-175.

Vatcha A 'Workplace Surveillance Outside the Workplace: An Analysis of E-Monitoring Remote Employees' (2020) 15 *iSCHANNEL* 4-9.

Von Bergen CW & Bressler M 'Work, Non-Work Boundaries and the Right to Disconnect' (2019) 21 *Journal of Applied Business and Economics* 57-69.

Vyas L & Butakhieo N 'The impact of working from home during COVID-19 on work and life domains: an exploratory study on Hong Kong' (2021) 4 *Policy Design and Practice* 59-76

Wong K, Chan A & Ngan S 'The Effect of Long Working Hours and Overtime on Occupational Health: A Meta-Analysis of Evidence from 1998 to 2018' (2019) 16 *International Journal of Environmental Research and Public Health* 1-22.

Wu Aimin et al 'Global low back pain prevalence and years lived with disability from 1990 to 2017: estimates from the Global Burden of Disease Study 2017' (2020) 8 *Annals of Translational Medicine* 300-314.

Yang L et al 'The effects of remote work on collaboration among information workers' (2022) 6 *Nature Human Behaviour* 43-54.

Yusof A 'Sociological perspective of Performance Appraisal: An Overview' (2000) 1 *Utara Management Review* 79-92.

Xiao Y et al 'Impacts of Working From Home During COVID-19 Pandemic on Physical and Mental Well-Being of Office Workstation Users' (2021) 63 *J Occup Environ Med.* 181-190.

Zappala S 'The Implementation of a Remote Work Program in an Italian Municipality before COVID-19: Suggestions to HR Officers for the Post-COVID-19 Era' (2021) 11 *European Journal of Investigation in Health, Psychology and Education* 866-877.

Zito M 'Does the End Justify the Means? The Role of Organizational Communication among Work-from -Home Employees during the COVID-19 Pandemic' (2021) 18 *International Journal of Environmental Research and Public Health* 1-14.

Legislation

Argentina

Argentina Teleworking Law No. 27,555.

Italy

Federal Law No. 197-FZ of 2001.

Italian Law No. 604/1996.

Italian Civil Code (Codice civile).

Italian Data Protection Authority Legislative Decree No. 196/2003.

Italian Directive on Smart Working and Teleworking No. 3/2017.

Italian Legislative Decree No. 196/2003.

Italian Law No. 81/2017.

Italian Law No. 300/70.

Legislative Decree No. 81/2008.

Legislative Decree 101/2018.

Legislative Decree No. 66 of 2003 on working time and rest.

Madia Reform Law 124/2015.

Presidential Decree No. 52/22.

Presidential Decree No. 1124/1965.

Workers' Statute Law No. 300 of 1970.

Regulatory Decree No. 27/202.

Royal Decree-Law No. 10/2021.

South Africa

Basic Conditions of Employment Act 75 of 1997.

Basic Conditions of Employment Amendment Act 20 of 2013.

Compensation for Occupational Injuries and Diseases Act 130 of 1993.

Constitution of the Republic of South Africa, 1996.

Diseases Act 130 of 1993.

Electronic Communications and Transactions Act 25 of 2002.

Employment Equity Act 55 of 1998.

Factories Act 29 of 1931.

Forty-Hour Week Convention 47 of 1935.

Group Areas Act 36 of 1966.

Industrial Conciliation Act 11 of 1924.

Industrial Conciliation Act 28 of 1956.

Labour Relations Act 66 of 1995.

Labour Relations Amendment Act 6 of 2014.

Masters and Servants Act 15 of 1856.

Mines and Works Act 27 of 1956.

Mine Health and Safety Act 29 of 1996.

National Economic Development and Labour Council Act 33 of 1994

Native Labour Regulation Act 15 of 1911.

Native Laws Amendment Act 54 of 1952.

Occupational Health and Safety Act 85 of 1993.

Pass Law Act of 1952.

Population Registration Act 30 of 1950.

Prohibition of Mixed Marriages Amendment Act 21 of 1968.

Protection of Personal Information Act 4 of 2013.

Occupational Diseases in Mines and Works Act 78 of 1973.

Regulation of Interception of Communications and Provision of Communication Related Information Act 70 of 2002.

Safety and Health at Work Act 113/17.

Skills Development Act 97 of 1998.

Unemployment Insurance Act 30 of 1996.

Compensation for Occupational Injuries and Diseases Act 130 of 1993.

International Regulatory Instruments

Hours of Work (Commerce and Offices) Convention 30 of 1930.

Hours of Work (Industry) Convention, 1919.

The 1948 Universal Declaration of Human Rights.

Reports and Policies of Governmental Bodies

Code of Good Practice on the Arrangement of Working Time in GN R1440 in *GG* 19453 of 13 November 1998.

Department of Employment & Labour *Compensation for Occupational Injuries and Diseases Act* (1993) Department of Employment & Labour: South Africa.

Department of Employment and Social Affairs *The impact of teleworking and digital work on workers and society* (2021) European Parliament: Europe.

Department of Labour. 1996. Green Paper: Policy Proposals for a New Employment Standards Statute, Government Gazette, 23 February.

Employment, Social Affairs & Inclusion *Promoting mental health in the workplace: Guidance to implementing a comprehensive approach* (2014) European Commission: Europe.

National Health & Safety Council *Report of the Committee of Inquiry into a National Health & Safety Council* (Executive Summary of 1997).

European Parliament *Report on the implementation of the European social partners' Framework Agreement on Telework* (Commission Staff Working Paper, 2008).

European Employment Policy Observatory *The role of social partners in the design and implementation of policies and* reforms (2016) European Commission: Europe.

Office of the Information & Privacy Commissioner *Guidance Document: Employee Privacy Rights* (2017) Office of the Information & Privacy Commissioner for British Columbia.

Organisation for Economic Co-operation and Development *Productivity gains from teleworking in the post COVID-19 era: How can public policies make it happen?* (2020) OCED.

Southern Africa Labour and Development Research Unit *Shorter Working Hours: Possibilities for South Africa* (Working Paper 79 of September 1990).

Truth and Reconciliation Commission *Volume 4 Truth and Reconciliation Commission of South Africa Report* (1998) Department of Justice: South Africa.

Thesis

Benjamin P *South African Labour Law: A Twenty-Year Assessment* (Working Paper, Swiss Programme for Research on Global Issues for Development, 2016).

Burman F *A retrospective review of the most common safety concerns encountered at a range of international recompression facilities when applying the Risk Assessment Guide for Recompression Chambers over a period of 13 years* (unpublished Master of Science Thesis, Stellenbosch University, 2014).

Chigumba P *The employee's right to privacy versus the employer's right to monitor electronic transmissions from the workplace* (unpublished LLM Thesis, University of Kwazulu-Natal, 2013).

Conradie M *A critical analysis of the right to fair labour practices* (unpublished LLM Thesis, University of the Free State, 2013).

Harber J *The Malevolent Invisible Hand: Evolving Institutions of Social and Labour Control in Apartheid and Post-Apartheid South Africa* (unpublished Mundus MAPP, Institut Barcelona D'estudis Internacionals, 2013).

Harrison DS *Collective Bargaining Within the Labour Relationship: In a South African Context* (unpublished Masters in Industrial Sociology, North-West University, 2004).

Howe J *The Broad Idea of Labour Law: Industrial Policy, Labour Market Regulation and Decent Work* (published Legal Studies Research Paper No. 529, University of Melbourne, 2011).

Kasuso TG *The definition of an "employee" under labour legislation: An elusive concept* (unpublished LLM Thesis, University of South Africa, 2015).

Leibbrandt M et al *Employment and Inequality Outcomes in South Africa* (Research Paper, University of Cape Town, 2015).

Lichtenstein A *From Durban to Wiehahn: Black Workers, Employers, and the State in South Africa during the 1970s* (unpublished Social and Economic Research Paper, University of the Witwatersrand, 2013).

Mabeka NQ 'When does the conduct of an employer infringe on an employee's constitutional right to privacy when intercepting or monitoring electronic communications' (unpublished LLM, University of the Western Cape, 2008).

Mamabolo LC *An Analysis of the Concept of Employees in South African Labour Law* (unpublished LLM, University of Limpopo, 2011).

Mokumo MF *The Dismissal of Managerial Employees For Poor Work Performance* (unpublished LLM Thesis, University of Limpopo, 2012).

Slater H *The Distinction Between a Contract of Employment and a Contract with an Independent Contractor* (unpublished LLM Thesis, University of Port Elizabeth, 2001).

Smit P *Disciplinary Enquiries in Terms of Schedule 8 of The Labour Relations Act 66 of 1995* (unpublished PhD Thesis, University of Pretoria, 2010).

Stone K *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers* (unpublished Research Paper No. 06-12, UCLA School of Law).

Strydom E *Employer Prerogative From A Labour Law Perspective* (unpublished LLD Thesis, University of South Africa, 1997).

Thorstensson E *The Influence of Working from Home on Employees' Productivity: Comparative document analysis between the years 2000 and 2019-2020* (unpublished Thesis, Karlstad University, 2020).

van Staden MJ *Identification of the parties to the employment relationship: an appraisal of teleological interpretation of statutes* (unpublished LLD Thesis, University of Pretoria, 2017).

Vettori MS *Chapter 2: The Functions of Labour Law* (unpublished LLM Thesis, University of Pretoria, 2005).

Wickins PL *The Industrial and Commercial Workers' Unions of Africa* (published Thesis, University of Cape Town, 1973).