

# Regulatory Innovation in the Governance of Decent Work for Domestic Workers in South Africa: Access to Justice and the Commission on Conciliation, Mediation and Arbitration<sup>\*</sup>

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*South Africa ratified the Decent Work for Domestic Workers Convention, 2011 (No. 189) in 2013, after playing an important role in the adoption of the Convention. South Africa is one of the countries that has a significant domestic work population that reflects the legacies of slavery and apartheid. South Africa is also one of the ILO Members to have acted decisively to foster decent work for domestic workers through law. This article offers a critical analysis of the legislative landscape on domestic work in South Africa, but focuses its attention on the innovative Commission for Conciliation, Mediation and Arbitration (CCMA). The article draws on interviews and participant observations of the CCMA's approach to dispute resolution. It canvasses the ethnographic material alongside key scholarship on topic, to suggest that there are firm indicia that the CCMA structure, procedures and accessibility have helped to reinforce, over time, a recognition that domestic work is a form of employment to which labour law principles apply. The institution, its structure, its attempt at inclusion, play a crucial mediating role, underscoring that state law is applicable to the household as a workplace, and can help to change its asymmetrical, pluralist law. That mediation is part of the aspiration of decent work for domestic workers embodied in Convention No. 189 and Recommendation No. 201. The article*

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concludes by affirming that the CCMA is a critically important institution, only part – but also a meaningful part – of the promise of labour law’s ‘citizenship at work’ in the context of persisting societal inequality.

## 1 INTRODUCTION

*Eve*,<sup>1</sup> the ‘African Mother’,<sup>2</sup> even the ‘fairy godmother maid’:<sup>3</sup> Romanticized, caricatured portrayals of domestic workers remain prevalent in South African popular culture, and offer all too relevant insights into historical legacies and contemporary dynamics of the domestic work relationship. Although the regulatory and sociopolitical landscape has changed significantly in the post-apartheid period in South Africa, there is a troubling constancy in the lived experiences of the approximately one million domestic workers.<sup>4</sup> Ethnographic studies chronicle the persistence of arduous working conditions, inequalities, discrimination and abuses linked to migration status.<sup>5</sup> While in the post-apartheid era, the demography of the employer has changed to span all of the racial demarcations so central to apartheid’s hierarchical order,<sup>6</sup> in the South African

<sup>1</sup> *Eve* the maid is a character of the popular South African satirical comic strip *Madam & Eve* created by Stephen Francis and Rico Schacherl. See also Gail Smith, *Madam and Eve: A Caricature of Black Women’s Subjectivity?*, 12(31) *Agenda: Empowering Women for Gender Equity* 33 (1996).

<sup>2</sup> Popularized by Catherine Winter in her 1999 documentary *My African Mother*, this expression depicts the widely observed phenomenon, in South Africa, of black domestic workers having to raise their employers’ white children, progressively becoming the mother figure for – sometime generations of – children.

<sup>3</sup> Shireen Ally coined this expression in an article analysing the iconic South African OMO advert that portrays a domestic worker as a magically appearing black ‘fairy godmother’ maid. See Shireen Ally, *Ooh, Eh Eh ... Just One Small Cap Is Enough! Servants, Detergents, and Their Prosthetic Significance*, 72(3) *Afr. Stud.* 321 (2013) [Ally 2013].

<sup>4</sup> The official number of domestic workers in South Africa in 2016 was 1,013,000 although the actual number might be considerably higher, given the prevalence of irregular migrant domestic workers from neighbouring countries. Statistics South Africa, *Quarterly Labour Force Survey: Quarter 2, 2016* (Pretoria: Statistical release P0211 2016). At times case law bears witness to the appalling extent of some of the abuse, stigmatization and preconceptions lived by domestic workers. Consider that in *Sindane v. The State*, (510/10) [2010] ZASCA 157 (1 Dec. 2010) an employer, after being convicted for the rape of his teenage domestic worker, appealed his sentence to the Supreme Court of Appeals with the argument that he could not have raped his domestic worker because the victim did not know nor did she understand the meaning of the word ‘rape’.

<sup>5</sup> See Pamhidzai Bamu, *Nurturing a Culture of Compliance with Domestic Workers’ Rights in South Africa*, in *Exploited, Undervalued – and Essential: Domestic Workers and the Realisation of Their Rights* 157 (Darcy Du Toit ed., Pretoria: Pretoria University Law Press 2013) [Bamu]. See also Monica Kiwanuka, Zaheera Jinnah & Becca Hartman-Pickerill, *MiWORC Policy Brief No. 4 – Getting the House in Order: Precarity, Migration and Domestic Work in South Africa* (Johannesburg: African Centre for Migration & Society, University of the Witwatersrand 2015) [Kiwanuka, Jinnah & Hartman-Pickerill].

<sup>6</sup> Debbie Budlender relies on the Time Use Survey conducted by Statistics South Africa in 2010, which included a question asking which persons in the household did the most housework. The question included a special code for households in which a non-member did the most housework, considering it to be a proxy indicator of households employing one or more domestic workers. Based on that proxy indicator, she estimates that 6% of South African households employ domestic workers, with 32% in the much smaller population of white households, 2% in African households, 5% in coloured households, and 2% in Indian households. Based on 2000 statistics, Budlender suggests that although

domestic work sector,<sup>7</sup> domestic workers are invariably black, and overwhelmingly female.<sup>8</sup> Domestic workers amount to a full 6.5% of the total South African workforce.<sup>9</sup>

Contemporary South Africa is also characterized by a robust labour governance framework, within a conducive constitutional environment and a state supportive of decent work for domestic workers internationally. After contributing significantly to the development of new international labour standards on domestic work,<sup>10</sup> South Africa became one of the twenty-five International Labour Organization (ILO) Members to have ratified the ILO Decent Work for Domestic Workers Convention, 2011 (No. 189).<sup>11</sup> Domestic workers' basic rights as workers are within the ambit of mainstream labour instruments, including the

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the indicators are crude, they imply that little has changed in ten years. See Debbie Budlender, *The Introduction of a Minimum Wage for Domestic Workers in South Africa* 6, ILO Conditions of Work and Employment Series No. 72 (Geneva: ILO 2016) [Budlender].

<sup>7</sup> The ILO Decent Work for Domestic Workers Convention, 2011 (No. 189) defines domestic work as 'work performed in or for a household or households'; a domestic worker being an individual who regularly and continuously is engaged in domestic work within employment relationships. (See Art. 1 of ILO C189). The South African framework, however, differentiates between 'domestic work' as an occupation and 'private households' as a broader sector. (See Statistics South Africa, *Quarterly Labour Force Surveys*). S. 31 of Sectoral Determination 7 of 2002 provides that a domestic worker is: 'any domestic worker or independent contractor who performs domestic work in a private household and who receives, or is entitled to receive, pay and includes – (a) a gardener; (b) a person employed by a household as a driver of a motor vehicle; and (c) a person who takes care of children, the aged, the sick, the frail or the disabled; (d) domestic workers employed or supplied by employment services'. This definition therefore excludes rural domestic workers employed in farms; and despite including professional occupations mostly held by men (such as drivers and gardeners), it has not had an impact on statistical figures, showing clear domination of the sector by female workers, who account for 95% of the total.

<sup>8</sup> Statistics South Africa, *supra* n. 4. The South African policy and legal framework officially recognizes three categories of previously disadvantaged individuals: black (the official definition of 'black' includes Blacks, Coloureds, Indians, and Chinese), women and disabled individuals as per the Preamble and s. 1 of the Employment Equity Act 55 of 1998. Although the Quarterly Labour Force Survey does not indicate precisely what proportion of the domestic work population is considered to be 'Blacks' or 'coloured', it does report that only 3.3% of Indian/Asian men and 5.2% of Indian/Asian women are employed in any 'low-skilled' occupations. See also Darcy Du Toit, *Situating Domestic Work in a Changing Global Labour Market*, in *Exploited, Undervalued – and Essential: Domestic Workers and the Realisation of Their Rights* (Darcy Du Toit ed., Pretoria: Pretoria University Law Press 2013) [Du Toit] at 5–6; Jennifer Natalie Fish, *Domestic Democracy: At Home in South Africa* (New York: Routledge 2006) [Fish]. And see Paul Benjamin's important apartheid-era reflection entitled *The Contract of Employment and Domestic Workers*, 1 *Indus. L.J.* (Juta) 187 (1980), concerning 'the most neglected area of a very neglected body of law', arguing that 'courts ought to adopt a restrictive approach in deciding whether the summary dismissal of a domestic worker is justified' (at 191). One interviewee stressed the extent to which some domestic workers' organizers relied on invocations of the common law – beyond rather than through the courts – to extract concessions from employers for reasonable notice on termination of employment. Interview with domestic workers' representative 3B, Mar. 2014.

<sup>9</sup> Statistics South Africa, *supra* n. 4.

<sup>10</sup> For a discussion of this role, see Adelle Blackett, *Introduction – Decent Work for Domestic Workers*, 23 *Can. J. Women & L.* 1 (2011).

<sup>11</sup> By virtue of s. 231(1)–(5) of the Constitution of the Republic of South Africa, 1996 [*Constitution of South Africa*], on 20 June 2013. The number of ratifications is accurate as of 1 May 2018.

Labour Relations Act 66 of 1995 (LRA) and the Basic Conditions of Employment Act 75 of 1997, which improved the protection initially afforded to domestic workers in 1993 by recognizing employment contracts and the particulars of employment and termination, regulating working time, and stipulating minimum leave periods. Domestic workers are entitled to employment discrimination protection,<sup>12</sup> and coverage for skills development and training.<sup>13</sup> Social protection, through unemployment insurance legislation,<sup>14</sup> provides coverage for maternity leave.<sup>15</sup> South African jurisprudence even extends the scope of legal employment protection to workers with irregular immigration status;<sup>16</sup> this jurisprudence has considerable potential in a sector in which cross-border migrants constitute a sizeable proportion of the workforce.<sup>17</sup> Mostly, the landmark, specific regulatory text embodied in South Africa's Sectoral Determination No. 7 of 2002 on domestic workers, and established under the Basic Conditions of Employment Act (BCEA), was largely expected to introduce and implement labour market transformations into the domestic sector. The framework is embedded in the institutional structure of the Commission for Conciliation, Mediation and Arbitration (CCMA), which offers an innovative mechanism that aims to render labour dispute resolution accessible to a range of low-wage workers, including domestic workers.<sup>18</sup> The CCMA is an innovative, accessible complaints mechanism that gives meaning to Article 16 of Convention No. 189, and which requires that:

Each Member shall take measures to ensure, in accordance with national laws, regulations and practice, that all domestic workers, either by themselves or through a representative,

<sup>12</sup> In terms of the Employment Equity Act 55 of 1998.

<sup>13</sup> The Skills Development Act 97 of 1998 facilitated the establishment in 1999 of the Domestic Workers Skills Development Project. See Budlender, *supra* n. 6, at 27–29.

<sup>14</sup> The Unemployment Insurance Act 63 of 2001 (s. 1) and the Unemployment Insurance Contributions Act 4 of 2002. Domestic workers have to work for at least 24 hours a month in order to qualify for sickness benefits and Unemployment Insurance Fund (UIF) payments.

<sup>15</sup> S. 22 of Sectoral Determination No. 7 provides that domestic workers are entitled to at least four consecutive months of maternity leave. Paid maternity leaves are however not statutorily enforced and are left to the discretion of employers, leaving most domestic workers reliant on UIF payments. UIF payments for maternity leaves are only available to formally registered domestic workers working the requisite number of hours a month. See Kitty Malherbe, *Implementing Domestic Workers' Social Security Rights in a Framework of Transformative Constitutionalism*, in Du Toit ed., *supra* n. 8, at 127–128.

<sup>16</sup> See *Discovery Health Limited v. Commission for Conciliation, Mediation and Arbitration and Others* (JR 2877/06) [2008] ZALC 24; [2008] 7 BLLR 633 (LC); (2008) 29 ILJ 1480 (LC) (28 Mar. 2008). This jurisprudence is one amongst a series of decisions having established the superseding effect of the right to fair labour practice (s. 23.1) which the South African Constitution affords to 'everyone', including individuals whose employment contracts would normally be deemed illegal.

<sup>17</sup> See Kiwanuka, Jinnah & Hartman-Pickerill, *supra* n. 5, at 5–6.

<sup>18</sup> The CCMA was established by Ch. 7 (Dispute Resolution), Part A (Commission for Conciliation, Mediation and Arbitration) of the Labour Relations Act 66 of 1995. The CCMA operates in terms of the Rules for the Conduct of Proceedings before the CCMA (CCMA Rules) published by the CCMA Governing Body in terms of s. 115 of the Labour Relations Act 66 of 1995.

have effective access to courts, tribunals or other dispute resolution mechanisms under conditions that are not less favourable than those available to workers generally.

South Africa's CCMA was also one of the inspirations for drafting Article 17(1) of Convention No. 189:

Each Member shall establish effective and accessible complaint mechanisms and means of ensuring compliance with national laws and regulations for the protection of domestic workers.

The hypothesis of this study is that the CCMA has the concrete potential to disrupt and contribute to the redress of the asymmetrical relationship between domestic workers and employers, at least incrementally, on a case-by-case basis, as well as shape broader public consciousness. The study offers a discussion of the South African regulatory landscape in which domestic workers are situated, before contextualizing the CCMA. Its focus is a qualitative analysis of the mediating role played by the CCMA, in the process of reconstructing the law of the household workplace. The study offers a close assessment of CCMA commissioners' consciousness of their mediating role. The article concludes with concerns about the limits of mediating devices in a context of weak social redistribution.

Few commentators would deny that the South African framework – entirely enviable in comparative perspective – has increased rights consciousness in the domestic work relationship, and has had a meaningful impact on domestic workers' lives.<sup>19</sup> Moreover, the available studies of Sectoral Determination 7 have so far tended to suggest that despite limited state inspection capacity,<sup>20</sup> there has been an increase in wages since its introduction,<sup>21</sup> with some displacement effect for employment.<sup>22</sup> However, there are persisting questions about the extent to which the 'democratic statecraft'<sup>23</sup> associated with legislating workplace citizenship<sup>24</sup> actually redresses domestic workers' historic exclusion. Consider that the South African Domestic and General Workers Union (NCFAWU–

<sup>19</sup> See Paul Benjamin, *Informal Work and Labour Rights in South Africa*, 29 *Indus. L.J.* 1579, 1591–1595 (2008). See also Shireen Ally, *From Servants to Workers: South African Domestic Workers and the Democratic State* 67–71 (Ithaca: Cornell University Press 2009) [Ally 2009].

<sup>20</sup> There has been real creativity in public outreach efforts, including to reach employers. On arrival in Mar. 2014, the principal investigator was struck to see huge banners, in South African airports, specifying the updated minimum wage for domestic workers.

<sup>21</sup> See Budlender, *supra* n. 6, at 27. For an early study, see Tom Hertz, *The Effect of Minimum Wages on the Employment and Earnings of South Africa's Domestic Service Workers*, Upjohn Institute Working Paper No. 05-120 (2005).

<sup>22</sup> See Budlender, *supra* n. 6, at 28–29. For Budlender, the overall welfare result, from an econometric perspective, is characterized as at best tentatively beneficial. She distinguishes this from the important moral benefit of higher wages and lower working hours. *Ibid.*, at 27 (fn. 31).

<sup>23</sup> Ally 2013, *supra* n. 3, at 85.

<sup>24</sup> For further literature on citizenship at work, see Judy Fudge, *After Industrial Citizenship: Market Citizenship or Citizenship at Work?*, 60(4) *Indus. Rel.* 631 (2005).

SADAGWU), in its own historical account entitled *Crawling through the history of common law and BCOA of Vulnerable Workers in South Africa*, situates the challenge of migrant domestic work within the broader framework of regulation in a context of prevalent unemployment, contractualization, and regional migration.<sup>25</sup>

This work acknowledges the persistence of social stratification faced by domestic workers, despite the significance of the contemporary legislated rights. The South African constitutional and legislative framework is rightly hailed as progressive and labour-friendly, and was the basis of significant, optimistic theorizing on the potential of a transformative constitutionalism,<sup>26</sup> including as it relates to domestic workers.<sup>27</sup> Yet domestic workers continue to face poor working conditions, impoverishment and isolation. In a generation of 'born free' South Africans, the labour regulatory framework's ability to redress persisting structural inequalities observed in South African society is increasingly called into question.

This study seeks to provide a close and textured inquiry into the assessment of domestic workers' rights, in context. This compels an assessment of the role and impact not only of the specific regulatory instrument, Sectoral Determination 7, but of the enforcement of labour rights by the labour administration and judicial structure. The focus is particularly placed on an institution that has been at the core of regulatory innovation on labour law enforcement, the CCMA. This study seeks to complement rather than duplicate the important legal and statistical analyses that have emerged about the CCMA's functioning, drawing on qualitative, participant interviews and observations of domestic work conciliations undertaken in Cape Town in March 2014.

The study of the CCMA is a study in contrasts. On the one hand, the CCMA is a mechanism that is swift and accessible, the envy of many jurisdictions<sup>28</sup> in its ability to mediate, conciliate or arbitrate cases concerning some of the most marginalized, low-waged workers,<sup>29</sup> nationally and across the Southern African

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<sup>25</sup> Unpublished booklet provided to the principal investigator during interviews, Mar. 2014. The precise quote is as follows:

More educated youth are entering the domestic sector due to unemployment. We also had competition with our brothers from Zimbabwe that will work for less than what the wage act says. Employers employ men because they can drive, work inside and do gardening; for women that a very bitter struggle. Domestic workers prefer char or daily employment working for ten employers per week. This increase the unemployment in this sector, because they work 2–4 hours per house no respect for the labour laws because there is no deduction (spelling and punctuation modified).

<sup>26</sup> See Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S.Afr. J Hum. Rts. 146 (1998).

<sup>27</sup> See Wessel le Roux, *Advancing Domestic Workers' Rights in a Context of Transformative Constitutionalism*, in Du Toit ed., *supra* n. 8, at 31.

<sup>28</sup> See Adelle Blackett, *Decolonizing Labour Law: A Few Comments*, 92 BCLR 89, 92 (2016) [Blackett].

<sup>29</sup> Haroon Borhat, Kalie Pauw & Liberty Mncube, *Understanding the Efficiency and Effectiveness of the Dispute Resolution System in South Africa: An Analysis of CCMA Data 7*, DPRU Working Paper 09-137 (Cape Town: University of Cape Town/Development Policy Research Unit 2009) [Bhorat, Pauw & Mncube].

region.<sup>30</sup> As Paul Benjamin affirms, the ‘CCMA’s procedures are now extremely well known among the South African workforce’.<sup>31</sup> The CCMA seems to have acquired a legitimacy, credibility and broad societal support, highly respected and scarcely attacked in a context in which some other institutions face serious legitimacy challenges.<sup>32</sup> Moreover, the domestic sector provides one of the highest numbers of referrals to the CCMA. The simplicity and efficiency of the CCMA process enable domestic workers to seek justice when faced with labour disputes.<sup>33</sup>

This study is concerned, however, to look beyond swift enforcement in its appraisal of the CCMA, to assess the quality of the justice rendered. The preliminary findings of this study suggest that the high degree of respect enjoyed by the institution in the domestic work sector is linked at least in part to its attentiveness to bringing state law into the household workplace, and to the mediating role played by its commissioners. On the other hand, this study forces attention to the CCMA’s limits. It questions how much the CCMA manages to shift the domestic work framework, in a context in which broad societal redistribution may be blocked. The qualitative research methods provide a unique opportunity to explore how those limits are experienced.

## 2 METHODOLOGY

In South Africa, domestic work has been the subject of ethnographic studies of singular importance, both during apartheid<sup>34</sup> and in the post-apartheid era.<sup>35</sup> Several key works focus on the legal regulation of domestic work.<sup>36</sup> This micro-study seeks to build upon that insightful literature, to take a qualitative snapshot of the functioning of a legal institution at the centre of the enforcement of domestic

<sup>30</sup> ‘Its institutional architecture has already had a significant impact on labour law reforms in the Southern African region with countries such as Lesotho (2000), Swaziland (2000), Botswana (2004), Tanzania (2004) and Namibia (2007) establishing specialist labour dispute resolution institutions that promote the role of mediation and arbitration as the primary mechanism for the prevention and settlement of labour disputes.’ See Paul Benjamin, *Assessing South Africa’s Commission for Conciliation, Mediation and Arbitration (CCMA)* 45, Dialogue Working Paper No. 47 (Geneva: ILO 2013) [Benjamin]; see also Pamhidzai H. Bamu & Rutendo Mudarikwa, *Social Regionalism in the Southern Africa Development Community: The International, Regional and National Interplay of Labour Alternative Dispute Resolution Mechanisms*, in *Research Handbook on Transnational Labour Law* 463 (Adelle Blackett & Anne Trebilcock eds, Cheltenham: Edward Elgar 2015).

<sup>31</sup> See Benjamin, *supra* n. 30, at 15.

<sup>32</sup> William Gumede, *Marikana: A Crisis of Legitimacy in the Institutions that Form the Foundations of South Africa’s 1994 Post-Apartheid Political Settlement*, 41(2) *Soc. Dynamics* 327, 334 (2015).

<sup>33</sup> Bhorat, Pauw & Mncube, *supra* n. 29, at 7.

<sup>34</sup> See Jacklyn Cock, *Maids and Madams: A Study in the Politics of Exploitation* (Johannesburg: Ravan Press 1980). See also Jacklyn Cock, *Trapped Workers: The Case of Domestic Workers in South Africa*, in *Patriarchy and Class: African Women in the Home and the Workforce* (Sharon Stichter & Jane L. Parpart eds, Boulder & London: Westview Press 1988).

<sup>35</sup> See e.g. Ally 2013, *supra* n. 3; Fish, *supra* n. 8.

<sup>36</sup> See e.g. Benjamin, *supra* n. 30; and chapters in Du Toit ed., *supra* n. 8.

workers' rights, the CCMA. Thus, in addition to a classic review of existing legislation and secondary sources on labour law generally, and the regulation of domestic work specifically, this study is built around seven (7) semi-structured qualitative interviews, ranging from approximately 40–70 minutes in duration, conducted by the first author in March 2014 in Cape Town. Interviews were undertaken with members of the Ministry of Labour, including the labour inspectorate, and several commissioners of the CCMA. The first author also interviewed a representative of the International Domestic Workers' Federation and the South African Domestic and General Workers Union (SADSAWU), which became in 1986 the first affiliate of the newly launched Congress of South African Trade Unions (COSATU);<sup>37</sup> and a representative of the South African Domestic and General Workers Union, affiliated with the National Certificated Fishing and Allied Workers Union (NCFAWU–SADAGWU). The first author interviewed an employer consultant specialized in representing employers of domestic workers. The study also includes small-scale participant observations of randomly selected CCMA conciliation hearings,<sup>38</sup> involving both male and female domestic workers and their employers. She exchanged at length with key labour law experts. A lecture at the University of Western Cape (UWC) to participants in a Post-Graduate Diploma in Labour Dispute Resolution Practice for prospective CCMA commissioners on 19 September 2015 provided a means of validating preliminary findings.

Despite the range of respondents for this research project, it remains important to bear in mind that this is a microstudy, based on a small interview sample conducted over a short timeframe. It offers a snapshot into regulatory possibilities, rather than a definitive overview.

### 3 SITUATING DOMESTIC WORKERS IN REGULATORY CONTEXT

#### 3.1 DOMESTIC WORK IN THE POST-APARTHEID CONSTITUTIONAL DISPENSATION

As mentioned above, the post-apartheid era led to significant transformations of South African labour and employment relations law and practices. These reflect faith in the potential of constitutional transformation, emblematic not only of expansive rights to dignity,<sup>39</sup> equality and protection against unfair discrimination<sup>40</sup> that are

<sup>37</sup> See Budlender, *supra* n. 6, at 7. Budlender's study offers a useful synthesis of some of the organizing initiatives undertaken and challenges faced by domestic workers' associations in South Africa, as well as the differing statements of membership numbers reported in scholarly publications.

<sup>38</sup> Regrettably due to the limits of the microstudy and the availability of hearings during the time of the visit, it was not possible to attend an arbitration hearing.

<sup>39</sup> *Constitution of South Africa*, *supra* n. 11, s. 10.

<sup>40</sup> *Ibid.*, s. 9.

also constitutionally entrenched, but also strong institutional protections through court litigation. The regulatory mechanisms in labour law are also comprehensive and relatively robust, including those on employment equity.<sup>41</sup> Domestic workers were understood to constitute an important dimension of this post-apartheid constitutional and regulatory landscape, despite limits to the regulatory imagination on vehicles to promote domestic workers' collective autonomy.<sup>42</sup>

A review of relevant cases suggests that South African courts generally strive to ensure that domestic workers are able to benefit fully from a broad panoply of protections that the constitution affords to others, even beyond the strict employment law context. Consider, for example, that the Constitutional Court adopted this approach in *Stratford and others v. Investec Bank*,<sup>43</sup> a case dealing with domestic workers' rights as 'employees' in the context of the insolvency of a businessperson, who happened also to be the domestic workers' employer. Rejecting previous jurisprudence by the Supreme Court of Appeal in *Gungudoo and Another v. Hannover Reinsurance Group Africa (Pty) Ltd and Another*,<sup>44</sup> the Constitutional Court unanimously found that despite the fact they are not employed by an insolvent business but rather by the business owner as an individual, that business owner's domestic workers benefited from the same protections available to employees of the insolvent business.<sup>45</sup> Adopting a purposive approach, the Constitutional Court found that the word 'employees' in section 9(4A) of the Insolvency Act includes domestic employees, as such an interpretation best 'promotes the spirit, purport and objects of the Bill of Rights'.<sup>46</sup>

That the courts remain attentive to the historical status markers associated with domestic work can be seen in the *Standard Bank of SA Ltd v. Caster Transport CC*<sup>47</sup> decision about the manner in which 'returns of service' (notifications of delivery of

<sup>41</sup> See Sandra Fredman, *Facing the Future: Substantive Equality Under the Spotlight*, in *Equality in the Workplace: Reflections from South Africa and Beyond* (Ockert Dupper & Christoph Garbers eds, Cape Town: Juta & Co 2009). See also Darcy Du Toit, *Affirmative Action or Positive Action in the Employment Context: Comparing the Interpretation of Equality by the European Court of Justice with That of the South African Constitutional Court*, 36 *Comp. Lab. L. & Pol'y J.* 423 (2001).

<sup>42</sup> See Darcy Du Toit & Thierry Galani Tiemeni, *Do Cooperatives Offer a Basis for Worker Organisation in the Domestic Sector? An Exploratory Study*, 36 *Indus. L.J.* 1677 (2015) [Du Toit & Galani]. See also Thierry Galani Tiemeni & Darcy Du Toit, *Domestic Workers' Cooperatives: Organisational and Regulatory Possibilities*, Paper at the ILO's 4th Conference on *Regulating for Decent Work: Developing and Implementing Policies for a Better Future at Work (RDW)*, 8–10 July 2015 in Geneva [Galani & Du Toit].

<sup>43</sup> *Stratford and others v. Investec Bank Limited and others*, Case No: CCT62/14, 2015 (3) BCLR 358 (CC) [Stratford].

<sup>44</sup> *Gungudoo and Another v. Hannover Reinsurance Group Africa (Pty) Ltd and Another* [2012] ZASCA 83.

<sup>45</sup> The issue revolved around the definition of 'employees' in s. 9(4A) of the Insolvency Act 24 of 1936; this provision requires a notice of an employer's provisional sequestration application to be given to the employees.

<sup>46</sup> *Stratford*, *supra* n. 43, para. 19.

<sup>47</sup> See *Standard Bank of SA Ltd v. Caster Transport CC and Others (13700/2012, 4444/2014)* [2014] ZAGPPHC 314(4 June 2014).

official documents) were made to several defendants, employed as domestic workers. Judge Makgoka of the North Gauteng High Court of Pretoria found that it was undignified, demeaning and in violation of section 10 of the Constitution for the sheriffs' 'return of service' to be addressed to several of the defendants by referring to them merely as 'Bongiwe, a domestic helper', or by first name without a last name. Recalling the country's past system of institutionalized racism, he observed that it is indigenous African people who are the ones subjected to this mode of address, adding that:

[t]he mindset discernable in the returns of service referred to above has no place in an open and democratic society premised on the foundational values of human dignity and respect. The sheriffs perform a critical task in the administration of justice, and thus have an abiding duty to treat everyone with dignity, irrespective of their race or social standing.<sup>48</sup>

At one level symbolic, and imbued with an ethos of transformative constitutionalism, this High Court decision may even be said to be inscribed in the 'decent work for domestic workers' narrative that is alive to the relationship between those indignities that are taken for granted, and the everyday indignities that impede the necessary structural change to proceed from the status of servant to the status of a worker like any other.

### 3.2 SECTORAL DETERMINATION NO. 7 OF 2002

Sectoral determinations are issued by the Minister of Labour, pursuant to the BCEA, and with a view to setting minimum wages.<sup>49</sup> In 2002, Sectoral Determination No. 7<sup>50</sup> was introduced to create a regulatory framework specific to the domestic sector.<sup>51</sup> Regulating domestic work via a sectoral determination created opportunities for the formalization of the employment relationship between domestic workers and employers, and has certainly played a part in improving working conditions in the sector.<sup>52</sup> Sectoral Determination No. 7 contains a deeming provision in section 1(1), which appropriately includes

<sup>48</sup> *Ibid.*, paras 3–6. Further challenging the view that this decision was somehow pedantic or form over substance, (para. 7) the high court judge ordered a written apology to each defendant as part of the remedy.

<sup>49</sup> See generally Budlender, *supra* n. 6, at 7ff.

<sup>50</sup> The domestic work sector is regulated by Sectoral Determination 7: Domestic Worker Sector; Sectoral Determination 13: Farm Worker Sector is also relevant to domestic workers as it applies to domestic workers employed on farms.

<sup>51</sup> Sectoral Determination 7 introduced sector-specific rules pertaining to core labour issues, including wages, leaves, working time and written particulars of employment.

<sup>52</sup> Haroon Borat et al., *Minimum Wages and Youth: The Case of South Africa*, 25 AERC Suppl 1 J. Afr. Econ. 61 (2016), provides an econometric assessment of the impact of minimum wages introduced by sectoral determination on employment, wages and non-wage benefits in various sectors, including domestic work.

domestic workers employed or supplied by employment services, as well as those employed as independent contractors, in its scope of application. As a result, it decisively attenuates the negative impact on working conditions of temporary employment services and labour brokering practices. However, it may create difficulties for domestic workers employed by several different employers.<sup>53</sup> It should also not be forgotten that Sectoral Determination No. 7 provides for a lower floor of minimum wages for domestic workers, as compared to workers in other industries, except for farmworkers.<sup>54</sup> Minimum wages for the domestic sector are determined by the Minister of Labour and regularly recalculated and amended.<sup>55</sup>

The overall impact of Sectoral Determination No. 7 is therefore recognized to be more limited than might initially have been hoped.<sup>56</sup> Key observers have argued that the overall regulatory picture for employment regulation is fairly mitigated.<sup>57</sup> In part, this is due to the limits on labour enforcement.

### 3.3 THE LABOUR ADMINISTRATION

The Department of Labour is entrusted with the task of monitoring and enforcing compliance with basic conditions of employment, including minimum wages, as established by Sectoral Determination No. 7. The role of the Department's labour inspectors is especially important in ensuring that domestic workers' labour and employment rights are effectively monitored and implemented in the workplace. Labour inspections also provide the Department with the opportunity to intervene

<sup>53</sup> See s. 1(3), taking into account the fact the 'informality' of many of these arrangements, particularly for migrant 'day' workers from neighbouring countries. See e.g. Laura Griffin, *Unravelling Rights: Migrant Domestic Workers in South Africa*, 42 S.Afr. Rev. Soc. 83 (2011).

<sup>54</sup> Farmworkers' and domestic workers' minimum wages are set at lower than minimum wages in other industries – even those covered by sectoral determinations – as a result of the 'two-tier solution' adopted during negotiations by COSATU for the purpose of raising minimum wages in other sectors. Eddie Cottle, *An Overview of the Living Wage and the National Minimum Wage in South Africa*, in *Bargaining Indicators 2014: Twenty Years – A Labour Perspective* vol. 14 (Eddie Cottle et al. eds, Cape Town: Labour Research Service 2014).

<sup>55</sup> For the most recent minimum wage see Amendment of Sectoral Determination 7: Domestic Worker Sector, Department of Labour Notice No.1429, South Africa, Government Gazette 15 Dec. 2017. [http://www.labour.gov.za/DOL/downloads/legislation/sectoral-determinations/basic-conditions-of-employment/domesticwages\\_2017.pdf](http://www.labour.gov.za/DOL/downloads/legislation/sectoral-determinations/basic-conditions-of-employment/domesticwages_2017.pdf) Available online. On 17 Nov. 2017, three bills were introduced that would significantly amend existing labour law: the Labour Relations Amendment Bill, 2017, No. R. 1273, the Basic Conditions of Employment Amendment Bill, 2017, No. R. 1274, and the new National Minimum Wage Bill, 2017, No. R. 1275. While the proposed changes are beyond the scope of this article, it is noteworthy that if passed, the CCMA would assume primary responsibility for enforcing minimum wage law. For a brief discussion, see *Why Changes to South Africa's Labour Laws Are an Assault on Workers' Rights*, The Conversation, 12 Dec. 2017, available online.

<sup>56</sup> See Budlender, *supra* n. 6, at 22–23 for discussion.

<sup>57</sup> See Darcy Du Toit, *Extending the Frontiers of Employment Regulation: The Case of Domestic Employment in South Africa*, 14 L. Democracy & Dev. 205 (2010).

upstream, such as to ensure that domestic workers' key labour rights are consistently improved, especially as pertains to pressing issues, such as occupational health and safety, as well as live-in domestic workers' living conditions and working time.<sup>58</sup>

This has proven an arduous task for a Department already facing severe logistical constraints.<sup>59</sup> The Department of Labour has been struggling to keep up with these responsibilities, its resolve to accomplish its mission at times effectively inhibited by a lack of personnel and resources, amongst others constraints.<sup>60</sup> Significant sector-specific challenges are also frequently raised as hampering the activities of the state labour inspectors<sup>61</sup> available to service the domestic sector, notably their restricted access to domestic workers' workplaces.<sup>62</sup>

That is different from stating that labour inspections do not occur in the domestic work sector in South Africa, as is often assumed. Representatives of the Western Cape provincial office of the Ministry of Labour affirmed in interviews that domestic sector blitz inspections take place occasionally, it would seem at best once per year, during which the resources of approximately one-third of the province's inspectors are dedicated to visiting targeted neighbourhoods for a week to speak with employers and domestic workers. The expectation during those blitzes, which are planned ahead of time, is that approximately 600 households would be visited. The inspectors literally knock on doors in affluent, middle- and lower-income neighbourhoods, to provide legislation and contact information in the form of a pamphlet on conditions of employment in the domestic work relationship, including the particulars that need to appear in writing. They set appointments so that they may return, sit down first with the employer to work through legislative requirements, and subsequently with the domestic worker, alone, albeit in the same dining area or lounge space.<sup>63</sup> From the few households

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<sup>58</sup> See Sandra Fredman, *Home from Home: Migrant Domestic Workers and the International Labour Organization Convention on Domestic Workers*, in *Migrants at Work: Immigration and Vulnerability in Labour Law* 418–419 (Cathryn Costello & Mark Freedland eds, Oxford: Oxford University Press 2014).

<sup>59</sup> Budlender, *supra* n. 6, at 5.

<sup>60</sup> Bamu, *supra* n. 5, at 196–197.

<sup>61</sup> In Mar. 2014, we were informed that the number was at 105 inspectors, servicing twelve labour centres in the Western Cape provincial office of the Ministry of Labour. Twenty-five of the 105 inspectors service all of Cape Town. Interview, Ministry of Labour, Western Cape provincial office, Mar. 2014.

<sup>62</sup> In relation to labour inspection in households, the labour inspector is required to seek either the homeowner's or occupier's consent or a Labour Court's written authorization before conducting a workplace visit in relation to domestic workers. See Ziona Tanzer, *Domestic Workers and Socio-Economic Rights: A South African Case Study* 19–22 (Washington DC: Solidarity Center/Global Labor Program 2013).

<sup>63</sup> Our informant insisted that inspectors are quite firm about the need to ensure the confidentiality of the meetings. However, there appears not to be a practice of verifying domestic workers' living conditions.

that actually have attendance registers that are provided to the inspectors for their review, to the small number of households that are adamant that their privacy rights are at stake and insist on setting a meeting with inspectors at a separate mutually convenient place, our informant described a process that covers a vast gamut of practices, misgivings and preconceptions about a process that emphasizes the fostering of compliance through information. In this process, we were told that discrepancies, at least on working conditions, were relatively easy to find:

It's fairly easy to find because the worker would mention something like sick leave, for example, and say that they refused, declined to give sick leave or something and leave a letter. It's really easy when we talk to them and we find the discrepancies. The contract or the particulars where you say one thing, they – my sense is also their

hours of work .... Being a private house, they tend to slowly encroach on the private time of a domestic worker. The contract would say, work please 'til four, five o'clock of an evening, but you find they will use their evening, as well.<sup>64</sup>

We were also informed that the inspector would go back to the employer, immediately after the meeting with the worker, if a discrepancy were found. The employer would be afforded a few weeks (typically three) to rectify the situation. Far from suggesting a concern about reprisals,<sup>65</sup> our informant stated that employers were typically:

Very accommodating if they realize that they've got three weeks to do it, and it's mainly technical things. There could be a problem if there's an underpayment of wages. Then they may say, if I have to pay the back pay for three years or whatever, please allow me a longer period of time within which – but they're really quite accommodating. They know that if they fail to do it within the three-week period, we will then go to the labour court and make sure.<sup>66</sup>

Moreover, our informant did acknowledge later, that '[t]here is a challenge there because it's to do with the fact that [the workers are] thinking that they may lose their job. The difference is in the factory work, they can be concealed, they can be hidden if you talk to two or three workers'.<sup>67</sup>

<sup>64</sup> Interview, Ministry of Labour, 5 Mar. 2014. We were informed that even in situations in which a domestic worker might be in an irregular migration situation, 'We still apply the law to it, to the relationship. We choose not to go maybe to another government department and say there's an illegal person there, but there have been instances where we would tell the worker maybe they should look at their eligibility.' Our informant acknowledged further: 'It's not the policy of the department. ... We're not saying they mustn't, they shouldn't do it, because I think they do. But we're not advocating it. We're not saying it must be done. It's difficult.'

<sup>65</sup> It would be surprising for reprisals not to be a live concern, given the high degree of unemployment and the growing prevalence of largely undocumented migrant domestic work in South Africa.

<sup>66</sup> Interview with an Official in the Ministry of Labour, Mar. 2014. In the event of non-compliance, a compliance order would be sought and served.

<sup>67</sup> *Ibid.*

And later still, on broader rights consciousness and awareness of other remedial options, our informant in the Ministry of Labour affirmed:

Yeah, we have had workers that are conversant with the processes and their rights, but there is a gap there. We need to improve that. A worker may know, if they dismiss me, I'm going to the CCMA because they cannot dismiss me on those grounds. So we have had cases where workers stand their ground and say, fine, this is the case. But many of them choose not to because of the fact that they may lose their job.<sup>68</sup>

The lack of frequency and small number of inspections together constitute one of the reasons why commentators tend to underscore enforcement challenges. A further dimension of the concern is that the same inspection process that is applied to factories is essentially applied in the household, with minor modifications. Our informant stated the following about the difficult prospect of regulatory change:

We are aware that the worker is not revealing everything while we are there at the place. We need to find a way to get that worker out of the home so that we can deal properly with her.<sup>69</sup>

A final challenge raised relates to the fact that the Ministry of Labour's 'reactive work'<sup>70</sup> implementing Sectoral Determination No. 7's conditions depends on domestic workers coming forward and lodging a complaint at a labour centre. Such complaints tend to involve issues like unemployment insurance applications, maternity claims, sick benefits, ordinary benefits, and other statutory entitlements. But if the matter also entails unfair dismissal, the claimant is likely also to be sent to the CCMA, to seek relief pay or notice pay alongside their alleged unfair dismissal complaint.<sup>71</sup>

#### 4 ENGAGING THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION: A PRELIMINARY, QUALITATIVE REFLECTION

##### 4.1 OVERVIEW OF THE CCMA IN JUDICIAL CONTEXT

Creating the CCMA was one of the key and most significant provision of the LRA; the CCMA was innovatively established as an independent body providing alternative dispute resolution mechanisms (as opposed to formal litigation) targeting labour and industrial disputes.<sup>72</sup> The CCMA is funded by the national

<sup>68</sup> *Ibid.*

<sup>69</sup> Interview with an Official in the Ministry of Labour, Mar. 2014.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*

<sup>72</sup> Benjamin provides a helpful overview of the legislative framework for dispute resolution, including the CCMA. See *Figure 1: Legislative Framework for Dispute Resolution*, in Benjamin, *supra* n. 30, at 5.

government, there are no charges for referring disputes to it, and it is run and managed by a Governing Body that encompasses representatives of workers, employers and the government.<sup>73</sup> In a South African context characterized by strikingly adversarial industrial relations, the holistic purpose of the CCMA seeks to diffuse tensions and achieve social justice and peace by offering an egalitarian platform for the resolution of labour dispute in a less litigious manner.<sup>74</sup>

When a labour dispute is referred to the CCMA, the parties to the dispute are led by a CCMA Commissioner throughout a sequential process of conciliation, mediation and ultimately arbitration. Section 191(5A) of the LRA also provides for a relatively speedy and continuous process combining both conciliation and arbitration ('con-arb'). Con-arb proceedings may be applied for in rights disputes involving individual claims of unfair labour practices and unfair dismissals, including disputes pertaining to probation, dismissal for misconduct or incapacity, and constructive dismissals. Combining both procedures in a single day has its advantage for domestic workers who are often otherwise unable to proceed with disputes due to various reasons, including finances (money for taxis), distance, and time constraints. These factors were raised as considerations, despite the fact that the CCMA service itself is free of charge.

Based on data from the Western Cape office for the period April 2014 to March 2015, obtained by the Social Law Project, domestic workers, farm workers, health care workers and call centre workers used the CCMA extensively to resolve employment disputes. Of 1,143 cases involving domestic workers, 718 were settled at the conciliation stage. Of those that proceeded to arbitration, 86% of awards were issued in favour of employees.<sup>75</sup>

The CCMA is the frontline jurisdiction for conflicts between domestic workers and employers. When not resolved at the CCMA, disputes may be brought before higher, specialized labour jurisdictions. The Labour Court reviews CCMA rulings or awards, and directly adjudicates matters relating to specific labour disputes between domestic workers and employers.<sup>76</sup> The Labour Appeal Court is the highest specialist court for labour appeals, on decisions of the Labour Court.<sup>77</sup> If a dispute persists, unresolved issues may enter the regular court system, potentially reaching the Supreme Appeal Court and the Constitutional Court.<sup>78</sup>

<sup>73</sup> *Ibid.*, at 6, 10–11. Benjamin adds that although parties may apply to have more complex cases that within the CCMA's arbitral jurisdiction heard by the Labour Court, this is power is rarely used in practice (at 6).

<sup>74</sup> *Ibid.*, at 46–47.

<sup>75</sup> See *Social Law Project, University of Western Cape, Report: Organising and Empowering Precarious Workers: Common Problems and Shared Solutions* 15 (15–16 May 2015) [Social Law Project].

<sup>76</sup> Labour Relations Act 66 of 1995 [LRA], ss 151–166.

<sup>77</sup> LRA, ss 167–183.

<sup>78</sup> See Paul Benjamin, Haroon Borat & Halton Cheadle, *The Cost of 'Doing Business' and Labour Regulation: The Case of South Africa*, 149(1) *Int'l Lab. Rev.* 73, 82 (2010).

The regular court system may also be directly solicited by domestic workers seeking remedies for work-related issues and incidents found to be out of the CCMA jurisdictional scope. In such instances, specific issues arising from the relationship between domestic workers and employers may also be directly brought before regular courts, namely Magistrate and High Courts. This entails civil and criminal matters arising from the employment relationship between domestic workers and employers, including civil actions for damages, allegations of rape, violence, harassment and abuse. For instance, while the CCMA might provide remedies for labour-related aspects of gender, racial and sexual abuses between domestic workers and employers, the regular court system offers a wider range of recourses for victims seeking further remedies, including reparation and retribution.

Specialized and dedicated courts also exist, including the Equality Court,<sup>79</sup> the Small Claims Court,<sup>80</sup> and even the Sexual Offence Court.<sup>81</sup> In terms of the section 16(1)(a) of the PEPUDA, all High Courts are Equality Courts for their area of jurisdiction. Some of these specialized institutions hold the potential to redress specific forms of racial and sexual harassment and violence against domestic workers by reaffirming their rights to dignity and equality.<sup>82</sup> At least where media attention is high, the process can be relatively swift and efficient.

Swift and efficient access to justice is a hallmark of the CCMA. This is now increasingly true also for the enforcement of CCMA monetary awards. Prior to a decision rendered on 28 June 2016, unless an employer voluntarily expedited the payment of a monetary award, the affected domestic worker would normally have been faced with stringent and complex procedures to follow, including having the CCMA certify the award,<sup>83</sup> and then having the Registrar of the Labour Court

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<sup>79</sup> Established by the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). See its Ch. 4.

<sup>80</sup> Established by the Small Claims Courts Act 61 of 1984. The Small Claims Court has formally declined to hear matters that might be heard by the CCMA, since labour issues are excluded from the court's jurisdiction. The court may decide to hear certain labour-related cases in very few and specific instances, as established by the Department of Justice and Constitutional Development in the *Guidelines for the Commissioners of Small Claims Courts* (2010) at 31–33; and the *Guidelines for the Clerks of Small Claims Courts* (2010) at 27–29.

<sup>81</sup> The first Sexual Offence Court was introduced, in 1993, as a pilot project in Cape Town and then progressively rolled out. Their evolution had stagnated until the Judicial Matters Second Amendment Act 43 of 2013 formally re-established them throughout the country.

<sup>82</sup> The highly mediatized incident of racial harassment and assault against Gloria Kente led to two different court actions. In *Nomasomi Gloria Kente v. Andre van Deventer (EqC)* 2014, Unreported Case No EC 9/13, 24 Oct. 2014, Cape Town Magistrates Court (Judgment by Magistrate Jerome Koeries) [*Nomasomi*] the Equality Court awarded substantial damages to the domestic worker. Her employer was later sentenced to two years' house arrest and was required to complete 70 hours of community service in the service of black women. See *The State v. Andre van Deventer* (unreported Case No. 17/1430/2013, 6 Feb. 2015, Cape Town Magistrates Court) (Magistrate Alta Le Roux).

<sup>83</sup> *LRA*, s. 143.

issue a warrant of execution or writ. Only then could the aggrieved employee have the CCMA's award enforced by contacting the Sheriff of the Court for the employer's belongings to be seized.<sup>84</sup> For the average domestic worker, these procedures would entail both fees<sup>85</sup> and delays. The new jurisprudence of the Labour Appeal Court is that arbitration awards certified by the Director of the CCMA are fully enforceable without the need for a writ to be issued by any court.<sup>86</sup>

#### 4.2 IMPORTANCE OF THE CCMA: STATE LAW IN THE HOUSEHOLD WORKPLACE

Interviews suggested that there is significant support in South Africa for the CCMA, across a broad range of constituents. Both domestic workers' union representatives and the employers' consultant offered praise. For example, one of the two interviewed trade union representatives affirmed the following:

The CCMA is one of the best labour protection laws that could be – have been in South Africa for workers. Why I'm saying that, the moment you send an employer (a letter), tomorrow you will get an answer. Can we talk?<sup>87</sup>

The employers' consultant added that '[b]efore the CCMA existed there was a different system that I don't think was as organised and well run as the CCMA'.<sup>88</sup>

Domestic workers are identified by the CCMA as a 'vulnerable' sector, prioritized regionally by the CCMA in Cape Town.<sup>89</sup> All interviewees reaffirmed the seriousness of the regulation and enforcement of disputes involving domestic workers, and affirmed in one way or another the reality of exploitation that this category of workers faces. Interviewees tried to convey the significance of the most basic starting point in a tangible, embodied manner; that is, they sought to clarify that the domestic work relationship is an employment relationship, even if the domestic worker is engaged on a casual basis.<sup>90</sup>

Paul Benjamin affirms that although workers make extensive use of the CCMA, the cases tend to be mostly 'downstream' in that they concern dismissals,

<sup>84</sup> See e.g. two unopposed applications: *MBS Transport CC v. CCMA and Three Others and Bheka Management Services v. Kekana and Two Others*, Johannesburg Labour Court (LC) Case No: J 1807/2015 (6 Nov. 2015) (unreported).

<sup>85</sup> The Sheriff may require a deposit to covers his costs pending successful collection of amounts owed by the employer.

<sup>86</sup> The Labour Appeal Court found that 'a certified award should not only be assumed to be an order of the Labour Court but it must also be assumed that a writ has been issued in respect of that order'. See *CCMA v. MBS Transport CC and Others, CCMA v. Bheka Management Services (Pty) Ltd and Others* (J 1807/2015, J 1706/2015, J A94/2015) [2016] ZALAC 34 (28 June 2016), para. 39.

<sup>87</sup> Interview with domestic workers' union representative 3B, Mar. 2014.

<sup>88</sup> Interview with employer consultant, Mar. 2014.

<sup>89</sup> Interview with CCMA Commissioner 2A, Mar. 2014.

<sup>90</sup> Interview with CCMA Commissioner 2A, Mar. 2014.

or suspensions.<sup>91</sup> The University of Western Cape's Social Law Project has come to similar conclusions for the period from April 2014 – June 2015, reporting that 89% of referrals in that period alleged unfair dismissal, with the remainder relating to discrimination, unilateral changes to the terms and conditions of employment, and unfair labour practices as defined by the Labour Relations Act.<sup>92</sup> Interviewees all concurred, noting the bifurcated enforcement role shared with the Ministry of Labour. Examples of other types of decisions were therefore less frequently referenced than unjust dismissal cases.

None the less, one CCMA commissioner related a case of discrimination/victimization, which was not filed as a constructive dismissal case even though the domestic worker subsequently left her job. The Commissioner drew on the potential jurisdictional and procedural anomalies as a lever to arrive at a settlement. Through that example, the Commissioner also related the complexity of cases relating to domestic work, especially those involving alleged sexual harassment:

sexual harassment cases on their own are hard to deal with. In a domestic situation for one I dealt with was particularly hard, because both the husband and wife were cited as the employer. The husband was the person being – alleged to have sexually harassed the domestic worker and the wife wouldn't have any of it ... my husband would never do that kind of thing. [...] [The domestic worker] very specifically kept notes of it in a diary

Not surprisingly, the employers both wanted to settle, with some urgency, and to include within the settlement that it constituted a full and final settlement of all the issues arising out of the complaint, thereby foreclosing any subsequent constructive dismissal claim. The Commissioner considered, however, that it was her responsibility to explain separately to the domestic worker that she could bring a constructive dismissal claim, but would need to refer the case again, preventing a conclusion of the conciliation currently in progress. The domestic worker accepted a settlement of only six months' salary and benefits but with a written reference. The Commissioner added that the reference letter would not have been ordered in an arbitral award. The Commissioner further opined that even if the claimant might have gained a larger award had the litigation continued, the matter could have taken over eighteen months to be resolved.

This case and the range of participant interviews all confirmed how the CCMA provides mass access to justice by reducing financial constraints,<sup>93</sup>

<sup>91</sup> See Paul Benjamin, *Table 1: Principal Categories of Disputes Referred*, in Benjamin, *supra* n. 30, at 13. After analysing CCMA data covering a ten-year period (2002–2012), Benjamin found that roughly 80% of CCMA referrals each year were dismissal cases.

<sup>92</sup> *Social Law Project*, *supra* n. 75, at 15.

<sup>93</sup> CCMA procedures are free and the parties do not incur direct cost to the parties; representation has typically not automatically been allowed, except in specific instances as established by the CCMA Rules and the LRA. In a recent case brought by an individual applicant and three organizations,

simplifying otherwise complicated procedures,<sup>94</sup> and significantly alleviating time and delay factors.<sup>95</sup> But what comes across further is the manner in which the CCMA engages with and speaks to the domestic work relationship, in all of its specificity, to reshape it.

Consider the following comment from one of the commissioners:

With domestic workers it's definitely [about] unfair dismissals ... [T]he relationship at that point [doesn't allow] further room for a discussion, or a meeting, or a conversation about you hurt my feelings because – a lot of the time it's about you hurt my feelings, how could you have done that? But you almost need a third party that you feel can assist you and a lot of the times the employer unfortunately feels that the CCMA's calling on behalf of the applicant to sort this situation out, because of compliance levels being so low. So they think we want to bring them in to rap them over [the] knuckles for not complying with the sector determination, but it's more about looking at the nature of the relationship and how it was terminated. [...] We probably will say something about that, but it's more about, okay, so what happened? Why was the relationship terminated? On what base – what procedure took place, what was the reason? You kind of get into that conversation with – in conciliation on a very basic level, a very, very basic level.<sup>96</sup>

The attentiveness of the approach to understanding why the relationship was terminated speaks to the specificity of domestic work. The line of questioning above is part of how Commissioners were able to reaffirm that domestic work is work. It is undertaken in a household, and involves a relational dimension that cannot be overlooked in the decision-making process: the conciliation-based approach seems to lend itself to reinforcing that simple but pivotal, paradigm-shifting message. The CCMA structure and the Commissioners' own positionality captured an active process of mediation of the relationship to resolve the dispute within the state labour law framework. This entails challenging inequitable assumptions, including the law of the household workplace that may assume the invisibility of the domestic workers' needs and perspective. In their very actions, in the fact of holding a hearing itself, and inquiring into the reasons for termination, the CCMA also recognizes the incredible importance of affirming that domestic workers are protected by state law against wrongful dismissal. The process and substance of adjusting the law of the household workplace – the domestic work

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namely the Casual Workers Advice Office, the historic anti-apartheid and contemporary human rights organization, Black Sash, and the Maokeng Advice and Resource Centre, the Johannesburg Labour Court interpreted CCMA Rule 25 (representation before the Commission) as read with Rule 35 (consequences of failure to comply with the rules and form) to hold that a commissioner has the discretion to authorize any party to CCMA proceedings to be represented by any other person, on good cause shown. Case No. J 645/16 (20 Sept. 2016).

<sup>94</sup> The CCMA has simple referral forms and the procedures, with no formal legal pleading. Proceedings are led by a commissioner whose duty entails ensuring that each party is aware of its duties and obligations, and is provided the relevant information on CCMA functioning and procedures.

<sup>95</sup> Procedures are speedy and of reasonable duration when compared to matters before regular courts.

<sup>96</sup> Interview, CCMA Commissioner 2A, Mar. 2014.

relationship – to a more accessible and inclusive labour law framework and process – is part of what it means to affirm that domestic work is at once work like any other, and work like no other. In other words, it is through the attentive mediation of the employment relationship offered by the CCMA that South African regulation of the work relationship accepts the importance not simply of choosing one or the other side of the binary, but inhabiting its necessary intersections.

Consider the following example, related by one commissioner, on the conduct of a mediation that might well have continued on to arbitration by a husband and wife team who had both worked as domestic workers in an employer's household, albeit in an agricultural context,<sup>97</sup> for many years:

it was a situation where they were both dismissed, the husband and wife. ... it was the weekend off, everyone had a bit too much to drink, there was a fight and it spilled over into the employer's premises and ... some things [were] damaged. Anyway they were both eventually just dismissed for it, because it was quite serious. The police were involved [...] The farmer was quite sick about it, that yes they do parties on the weekends and it's their time and they can do what they want to, but they still [...] live on the property.

The notions of working time, living space, and what actually should constitute serious misconduct warranting dismissal in the domestic work relationships were intertwined in this case that related to activity outside of the work, but on the work premises, which happened to be the employees' living space. Those issues were ultimately not tackled, at least directly, in the mediation. The Commissioner recognized how many other issues surrounded the understanding of what it meant to be summoned to appear before the CCMA, on the basis of the dismissed workers' complaint:

Then there was this all to and fro-ing about but you know I've been so good for your family and this was just the first time it happened. We are sorry, because we have no issues and we've sorted it out and it won't happen again. We're really sorry, but we appreciate our work and you've been good to us and we've been good to you. If you want me to work til 10 o'clock I'll work it, that sort of thing. Then the farmer being upset, because – but now you've already brought me to the CCMA, I'm already going to have to pay, because people think the CCMA just wants [...] you to pay money to the workers, even if they've done something wrong. You've brought me here and you've already put in complaints. I'm already – they think this is like a blacklisting ... Yes, we must just go through with this thing now and see how I must pay you, because I don't want you back. We've been so good to you and we've given you the fridge, the TV and then that starts coming out, send your children to school and how can you bring me here?

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<sup>97</sup> As mentioned *supra* n. 50, domestic workers employed in the agricultural sector are excluded from the scope of Sectoral Determination 7, but are covered by Sectoral Determination 13: Farm Worker Sector.

The Commissioner of course recognized the likely violations of the relevant Sectoral Determination 13, including on working time. They are not trivial, although they would chiefly be perceived as enforcement issues for the Ministry of Labour. But crucially, the Commissioner explained the portrait of the broader relationship – including employer maternalism or paternalism<sup>98</sup> – that surrounds this specific relationship as part of a structure of relationships. What is distinct in the observation of this relationship, in this context, is the interposition of a dispute resolution mechanism whose very existence and availability clarifies that domestic work is a recognized employment relationship, where state law applies to the household workplace.

The Commissioner decided to let the parties speak, left them a bit of time, and made some tea. On the Commissioner's return, the parties were separated. The Commissioner proceeded to foreground a central labour law notion that has disciplined employer power in the workplace: progressive discipline. Progressive discipline became the basis for a voluntary settlement that led to the workers' reinstatement. The Commissioner explained:

You [...] make sure that the employees understand that it's not about those hurt feelings and everything you've done before. That if we're going to be arbitrating, [...] these are the tests we need to apply. Not because I don't like you and I prefer them, but because that's what the law says [...] Then having a minute with the employer about the fact that whether they [the employees] brought you here or not, it's actually to assist both parties. So what's happened? [D]o you see yourself working with them again? Can they come back to work, is there anything else? Progressive discipline, has it been considered, because of arbitration that's going to be a problem [...] Was there a disciplinary hearing, was there – you kind of go through this whole reality testing, which you obviously see in your observations as well.

In this case, the employers agreed to reinstate the workers, with a final written warning, valid for six months. Significantly, given a context of deep structural inequality and high unemployment for indigenous African workers, the Commissioner added that she thought the workers 'would've taken a final warning valid 25 years if they had to'.<sup>99</sup> The statement speaks volumes about life options in a structural economic context in which high unemployment and stark income inequality prevail.<sup>100</sup> The statement offers one window into how easy it could be

<sup>98</sup> Indeed, several interviewees mentioned the prevalence of a maternalism/paternalism that surfaced as employers talked about the domestic work relationship. One informant stated the following: 'Nine out of 10 times in domestic cases, [the employer says] but I gave you the keep, I gave you the fridge and all the children's clothing and I paid for your daughter's school fees.' (CCMA Commissioner 2A, 3 Mar. 2014).

<sup>99</sup> Interview, CCMA Commissioner, Mar. 2014.

<sup>100</sup> See e.g. Bob Hepple, *Labour Laws and Global Trade* 12 (Hart 2005) (offering a vignette on the relationship between flexibility and the exercise of the right to strike in the context of mass youth unemployment).

for the CCMA's work ultimately to reinforce, rather than fundamentally challenge, the relational status quo.

Benjamin rightly affirms that the CCMA levels the field between employees and employers in the domestic sector by offering workers 'enhanced and expedited access to dispute resolution'.<sup>101</sup> The interviews underscored the extent to which the levelling extends beyond this vision of access to justice. Commissioners were alive to the unequal bargaining power of the parties in a context of high unemployment, rampant informality, poor housing, and minimal social safety nets. The settlement of course leaves many labour law issues untouched – based on the Commissioner's invariably fraught but necessary appraisal of what seems possible. But reinstatement alone was highly significant. The Commissioner focused on the domestic work relationship, and helped the parties to see it as an employment relationship.

CCMA commissioners readily admitted that their role was often misunderstood by the parties. Employers might have the impression that to be summoned to a hearing by the CCMA is to be put on a list of excluded employers. They might consider the CCMA to be an institution that pressures them to pay up, even small sums of money, even when they have done nothing wrong.<sup>102</sup> According to an employer consultant, at the outset, employers considered that individual employees were more than likely to win any case. The consultant noted, however, that the perception amongst clients had changed to the point where employers currently consider that they stand a better chance of winning than they might have in the past.<sup>103</sup>

Paying attention to apparently shifting perceptions takes on some importance in part because of the extent to which studies of the CCMA have tended to focus on statistical analyses of the character of cases before the labour dispute resolution institution. This micro-study of regulatory innovation has been concerned to open a scholarly conversation about the extent to which the shift in perception reflects greater knowledge of the law by employers themselves, and of their ability to shift their employment practices in domestic work, to conform to the law. Due caution is necessary because of the small size of the study. It is relevant, though, that actors with different institutional roles and social location tended to note shifts in perceptions over time. For example, it matters that some employers may have been – or may have been perceived to be – initially reactive when faced with a summons to appear at the CCMA. It is important if, over time – perhaps because of the counselling services they have received from actors

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<sup>101</sup> Benjamin, *supra* n. 30, at 45.

<sup>102</sup> Interview with CCMA Commissioner 2A, Mar. 2014.

<sup>103</sup> Interview with Employer Consultant, Mar. 2014.

with experience at the CCMA – they learn what they may need to do to reduce the likelihood of future disputes, and to better manage disputes should they occur. It is conceivable, of course, that some employers might not adjust their practices. In part, this prospect raises the serious question of whether the CCMA’s resolutions are themselves sufficiently dissuasive, a matter on which there was some ambivalence amongst the respondents. But as the employer consultant affirmed, when 12–24 months’ salary is at issue, the amounts can in fact be quite dissuasive.<sup>104</sup>

However, dissuasion may not be sufficient, and here the broader structural inequality could remain a factor in whether the CCMA is even, actually invoked:

Well, you know, the type of person is not going to be told what to do by the individual employee or the system in this country because if an employer feels aggrieved and acts hastily and acts unlawfully on the spur of the moment the employer does whatever they want to and accepts repercussions and the repercussions will not necessarily always result in a CCMA dispute. It could be that the person just leaves the employ and does nothing about it because, in fact, one thing is if the employer is not educated in their rights, the employee is sometimes less educated.<sup>105</sup>

The kind of thorough, often qualitative work on employer compliance with workplace equity norms that characterizes some of the recent scholarship on the implementation of employment standards<sup>106</sup> and equality principles<sup>107</sup> in the workplace is needed here. This microstudy shines a spotlight of its potential and importance.

#### 4.3 CCMA COMMISSIONERS AS LEGAL ACTORS IN THE MEDIATION OF DISPUTES IN THE HOUSEHOLD WORKPLACE

CCMA commissioners underscored the professional ethics attached to their role, as both conciliators, and then arbitrators – potentially in the same case – in individual workplace disputes. They recalled the real time pressure associated with a tight case management process that places a premium on the institution’s ability to resolve matters expeditiously, in order to hear over 100,000 cases per year.<sup>108</sup> In this sense, the CCMA may be a victim of its own success, which quickly translated into a

<sup>104</sup> Interview with Employer Consultant, Mar. 2014.

<sup>105</sup> Interview with Employer Consultant, Mar. 2014.

<sup>106</sup> See notably Lizzie Barmes, *Bullying and Behavioural Conflict at Work: The Duality of Individual Rights* (Oxford 2015).

<sup>107</sup> See e.g. Iyiola Solanke, *Black Women Workers and Discrimination: Exit, Voice, and Loyalty ... or 'Shifting'?*, in *Migrants at Work: Immigration & Vulnerability in Labour Law* 303 (Cathryn Costello & Mark Freedland eds, Oxford 2014) (focusing on the importance of social location in framing workplace alienation and options).

<sup>108</sup> See Benjamin, *supra* n. 30, at 15.

growing number of referrals that put its case management abilities under strain.<sup>109</sup> In response, the CCMA has progressively streamlined its procedures and processes.<sup>110</sup> As informants described it, parties are met for conciliation within only a few weeks of filing a case; one hour hearings are close to the average.<sup>111</sup> As one Commissioner attests, sometimes there is particular time pressure:

So this conciliation took about an hour-and-a-half; [for] con-arb of out of town I normally set two hours apart. So it was quite pressured, but I wouldn't have let it go on – if you're out of town you have 30 minutes to assess whether it's going to settle or not.<sup>112</sup>

CCMA commissioners none the less underscored the real flexibility – indeed latitude – afforded by their work to consider a range of factors, particularly in conciliation, to encourage a settlement. To the first author, this desire to foster settlement seemed strong, framed in a concern for 'understanding the relationship' rather than caricaturing it. They seemed highly aware that relationships could not necessarily be repaired, at least not by them. If an overarching concern can be named, it seemed to be to enable the parties to depart with a sense that some degree of justice had been rendered.

The justice of the situation is in part a function of the process, of the setting, of its relative formality and informality. In a typical conciliation hearing, the employer and employee sit across a table from each other in a standard size conference room. In addition to the commissioner, who might sit at the head of the table, there is often a CCMA appointed interpreter, who speaks the domestic worker's language. There is also meaningful societal diversity amongst the CCMA commissioners themselves. An important dimension of justice in its own right, racial inclusion may also – as one informant mentioned – lead to racism and generalized disrespect towards the commissioner.<sup>113</sup> The reality of persisting racial discrimination is not denied or ignored by the CCMA, and the first author was

<sup>109</sup> See Paul Benjamin & Carola Gruen, *The Regulatory Efficiency of the CCMA: A Statistical Analysis of the CCMA's CMS Database*, DPRU Working Paper 06/110 (Cape Town: University of Cape Town/ Development Policy Research Unit 2006).

<sup>110</sup> See Benjamin, *supra* n. 30, at 15ff (including telephone 'pre-conciliation' techniques).

<sup>111</sup> An early assessment of the first three years of the CCMA's existence provides an indication of the impact of the tight timeframes on conciliation and arbitration:

In order to deal with the pressure of case volume, commissioners have often been forced to cut corners in order to get through their case load. CCMA figures indicate that the average duration of a conciliation is two hours for individual disputes, two to four hours for mass dismissals, one to three days for wage disputes and three hours for other disputes. The average duration of an arbitration is half a day for individual dismissals, one day for mass dismissals and one day for other disputes. Therefore, commissioners are required to handle up to three conciliations per day and two or three arbitrations per day as well as to write reasoned awards for each arbitration within 14 days.

John Brand, *CCMA: Achievements and Challenges – Lessons from the First Three Years*, 21(1) *Indus. L.J.* 77, 83–84 (2000).

<sup>112</sup> Interview with CCMA Commissioner 2A, Mar. 2014.

<sup>113</sup> Interview with CCMA Commissioner 7D, Mar. 2014.

informed that commissioners are taught to anticipate this kind of reaction, and receive training on how to engender respect while learning to challenge their own biases.<sup>114</sup> Commissioners underscored the need to command and treat parties with professionalism and respect, remaining self-aware of the importance and integrity of their role in the administration of justice.

The issue of relative power and the commissioner's role in mediating is particularly noteworthy. In the small number of randomly selected hearings that the first author had the opportunity to observe, the arm's length, across-the-table-as-equals set up had a slight unfamiliarity, even awkwardness to it. In one case, the domestic worker barely made eye contact with the employer, but she did with the commissioner. The commissioners were acutely aware of the disparities between the parties, and as a result, the extent of the power, and scope of the responsibility that remained in their hands. About the weight of the responsibility, one commissioner candidly acknowledged: 'I hate it when they say but Commissioner, what would you do?'<sup>115</sup>

It is therefore not surprising that domestic workers' representatives underscored the importance of being present alongside the domestic worker, to explain the situation and offer guidance.<sup>116</sup> Although the practice apparently remains relatively infrequent, this is poised to change in light of the recent Johannesburg Labour Court decision that commissioners have the 'discretion to authorise any party to CCMA proceedings to be represented by any other person, on good cause shown'.<sup>117</sup> Informants spoke both about the deregistration of an organization of domestic employers run by a consultant, and the deregistration of a domestic workers trade union. The viability of existing representational structures in the domestic work context in South Africa has been the subject of serious scholarly inquiry.<sup>118</sup> Of course, there is not necessarily a justification for parallel representation of the parties, which may accompany lengthier processes with greater opportunities for delays.

However, the informants underscored the challenge to access to justice in the absence of safeguards to ensure that the parties effectively understand the processes. One interviewed domestic workers' representative mentioned that based on her experiences accompanying domestic workers, she decided to contact the CCMA independently, and explain that the *ex parte* meetings were being misunderstood by

<sup>114</sup> Interview with CCMA Commissioner 7D, Mar. 2014.

<sup>115</sup> Interview with CCMA Commissioner 2A, Mar. 2014.

<sup>116</sup> Interview with domestic workers' representative 3B, and domestic workers' representative 2C, Mar. 2014. See also Affidavits of Labour Court challenge to CCMA Rule 25 (on file with the authors).

<sup>117</sup> *Supra* n. 93, para. 2. See also Shireen Ally, *Domestic Worker Unionisation in Post-Apartheid South Africa: Demobilisation and Depoliticisation by the Democratic State*, 35(1) *Politikon* 1 (2008).

<sup>118</sup> See Du Toit & Galani, *supra* n. 42.

domestic workers, fostering a climate of distrust.<sup>119</sup> Interviewed commissioners indicated that they make a real effort to explain to domestic workers the reason for the pre-arbitration *ex parte* meetings, and are especially careful to explain what the legal tests will be if the matter goes to arbitration. If conciliation is flexible, arbitration is framed as the place where the commissioners act based on ‘that’s what the law says’.<sup>120</sup>

## 5 CONCLUSION: THE DOMESTIC WORK RELATIONSHIP IN THE BROADER CONTEXT OF WEAK SOCIAL REDISTRIBUTION

In the post-apartheid context, the CCMA has been seen to serve as an essential ‘social safety valve’<sup>121</sup> both by ‘limiting social tensions and in creating and preserving a deliberative labour policy.’<sup>122</sup> This OECD’s framing of the CCMA’s role hints at the broader context within which the CCMA’s decision making is rooted. Does this thesis hold true specifically for domestic workers? Does it extend at all to workers who – although they have been extremely militant in challenging apartheid and in claiming better futures for themselves and their children, including in the international campaign for decent work for domestic workers – have faced significant hurdles organizing themselves into representative trade unions to defend their rights and seek more transformative change in their workplace relations within South Africa?

This article began with an acknowledgement of the persistence of social stratification. Nothing about the study challenges that starting point. The micro-study has instead been able to point to firm indicia that the CCMA structure, procedures and accessibility have helped to reinforce, over time, a recognition that domestic work is a form of employment to which labour law principles apply. The institution, its structure, its attempt at inclusion, play a crucial mediating role, underscoring that state law is applicable to the household as a workplace. That mediation is part of the aspiration of decent work for domestic workers. While critically important, and rare worldwide, it remains only part of the promise of labour law’s ‘citizenship at work’.

This closer reflection on labour law’s broader transformative goals was inspired in part by the informant interviews. Interviewees recalled that for a domestic

<sup>119</sup> Interview with domestic workers’ representative 3B, Mar. 2014.

<sup>120</sup> Interview with CCMA Commissioner 2A, Mar. 2014.

<sup>121</sup> OECD, *OECD Territorial Reviews: The Gauteng City-Region, South Africa* 175 (Paris: OECD Publishing 2011) [OECD] (adding that the CCMA ‘now performs functions that go well beyond the terms of reference one would expect from its name’). Benjamin points to the significant decrease, since 1996, in the rate and extent of industrial actions over individual dismissal disputes. See Benjamin, *supra* n. 30, at 46.

<sup>122</sup> OECD, *supra* n. 121, at 175.

worker, even the cost of taxi fare might be relevant, influencing whether a claim might be brought before the CCMA, and more likely, whether a small settlement that falls below what might be expected under the law might be accepted.<sup>123</sup> Commissioners, alive to this dynamic, might interact with real subtlety, but must react. For example, one informant suggested that rather than saying the sum offered is too low, a commissioner might stress that there is another level of dispute resolution.<sup>124</sup> Ultimately, though, they – like the employer – know that a destitute unemployed domestic worker, with children to feed back home in precarious housing, will likely accept a small settlement.<sup>125</sup>

Such outcomes are more likely in the absence of broad social protection. Regulatory responses that extend social protection to domestic work are of course urgently needed. With no statutory obligation for workers to join and contribute to a retirement fund, no positive duty for employers to establish or contribute to retirement funds for their employees, low wages and a lack of incentive structures for occupational fund members to preserve their savings, domestic workers are likely to lack adequate savings on retirement.<sup>126</sup>

Historically in labour law the scope for more transformative distributive changes for workers has been understood to come through workers' collective action. There is sustained inquiry into whether the CCMA model holds the potential to operationalize collective relations for domestic workers, or whether other models should be considered. Proposals of this order are beyond the scope of this microstudy. It is instructive, though, that interviewees, and in particular domestic workers' representatives, seemed persuaded that:

the sectoral determination is not enough. We need to make money to make our people's lives better, because if you see all these bargaining councils a lot of people are coming somewhere, they are getting very good training.<sup>127</sup>

Post-apartheid labour relations are built on legacies of colonial dispossession. Domestic work literally embodies those legacies. That is why the constitutional decision in *Standard Bank of SA Ltd*, at least symbolically, is so important. Arguably, that is also why changing the reliance on paid domestic work performed almost exclusively by women of African descent needs to remain an urgent part of the

<sup>123</sup> CCMA Commissioner 2A, Mar. 2014.

<sup>124</sup> Interview with CCMA Commissioner 7D, Mar. 2014.

<sup>125</sup> Blackett, *supra* n. 28, at 92–93.

<sup>126</sup> It is common for corporations to register their employees with retirement and or provident funds; voluntarily, as the outcome of a negotiated agreement with organized labour, or due to labour market incentives. It is, however, less usual for employers to register their domestic workers with retirement and or provident funds; certainly because of a lack of incentive or compelling factors, such as labour market pressure, collective action or regulation. See L. G. Mpedi, *The Evolving Relationship Between Labour Law and Social Security*, Acta Jur. 270, 276–277 (2012).

<sup>127</sup> Interview with domestic workers' representative 3B, Mar. 2014.

construction of meaningful alternative futures, twenty years after the advent of the post-apartheid state. As one interviewee said:

domestic workers have brilliant minds ... there will always be domestic work ... [but with alternative training,] 'when she goes back to her own environment, she'll be able to do things *for herself*' (emphasis added).<sup>128</sup>

This microstudy has tried to shine a spotlight on some of these qualitative concerns. The South African context remains a relentlessly urgent site through which to interrogate whether transformation can be brought to the domestic work relationship between domestic workers and employees, in the broader context of entrenched racial and economic inequality. With due attention to South Africa's specificity, the study also aims to ensure that South African experience is not exceptionalized. Rather, South Africa continues to be an important contributor to international and comparative discussions on regulating decent work for domestic workers. The microstudy contains anything but a claim to comprehensiveness, but is rather a plea for ongoing attention to compliance and enforcement mechanisms. The CCMA is an institution through which it is possible to catch a glimpse of how regulatory change is lived. It offers a site through which a range of actors converge, to assess whether state law might be mediated to help to shift the governance of domestic work, including the law of the home workplace, towards social justice. In this regard, the study has sought to inflect public policy discourse on implementation of Convention No. 189 and Recommendation No. 201 on decent work for domestic workers with a sensibility for the relational dimensions of regulatory change, nationally and transnationally. The South African experience with the CCMA speaks volumes about the possibilities of labour law-anchored, alternative dispute resolution based compliance measures that might be fostered and enhanced, to make decent work a reality for domestic workers worldwide.

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<sup>128</sup> Interview with domestic workers' representative 2C, Mar. 2014.