

**Title: The Violation of The National Minimum Wage Act in South Africa and
Recommendations for Improving Compliance.**



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Research dissertation presented for the approval of the Senate in partial fulfilment of the requirements for the M.Phil. degree in Labour Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

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Abbreviations:

BCEA – Basic Conditions of Employment

CC – Constitutional Court

COSATU – Congress of South African Trade Unions

DG – Director General

DoL – Department of Employment and Labour

IES - Inspection and Enforcement Services

ILO- International Labour Organisation

LC – Labour Court

LRA – The Labour Relations Act

MoL – Minister of Labour

NEDLAC - The South African National Development and Development Council

NMWA - National Minimum Wage Act

NQF – National Qualifications Framework

SA – South Africa

SADC –Southern African Development Community

SADSAWU – South African Domestic Services and Allied Workers Union

StatsSA – Statistics South Africa

UK – The United Kingdom

Abstract

South Africa is rated as one of the most unequal countries in the world, with the majority of its population living in abject poverty, or entirely dependent on one source of income for their livelihood. On top of the high unemployment rate, most workers who are employed or engage in some form of labour cannot afford basic living necessities such as food, transport, and health care. As a result, the government adopted the National Minimum Wage Act (NMWA). The Act aims to narrow the wage gap, reduce the pool of the working poor, and improve the material conditions of the worker's families. The broader objective of the Act is to observe the Constitution's mandate to social security, and its values of dignity. The Act protects workers against unfair remuneration by unprincipled employers. It builds upon the Basic Conditions of Employment Act of 1997, which enforces fair working conditions, including wages. The effectiveness of the Act, since its promulgation has, however been limited due to a high rate of violation and non-compliance amongst employers.

The high rate of non-compliance has thrived despite of the existing enforcement systems and structures. The main challenges to non-compliance include insufficiency and undertraining of labour inspectors, lack of inspector resources, lack of public awareness of the legislation, tedious compliance procedures, lenient non-compliance penalties, labour migration trends, informalisation of labour and an increase of triangular forms of employment, including the gig economy. However, there is an observation that a sectoral approach yields to more non-compliance than an across board or blanket minimum wage. Nonetheless, it is important to consider whether the sectoral approach is more fitting for South Africa's economic circumstances.

The prevailing non-compliance circumstances are not beyond remedy. There is evidence of countries that have been able to improve minimum wage enforcement, although they have had rife non-compliance. The Department of Employment and Labour can improve compliance through intensifying public awareness, reviewing enforcement procedures, reviewing inspection procedures, the formalisation of labour sectors, tightening non-compliance penalties, and mobilising trade unions and employers as party to national minimum wage compliance. This dissertation discusses the reasons for the violation of NMWA and proposes solutions and interventions that can be adopted by the Department of Employment and Labour (DoL) in improving compliance amongst South African employers.

Chapter 1: Introduction and Literature Review

1.1 Introduction

In South Africa, the National Minimum Wage Act¹ was enacted in 2018. The Act is aimed at advancing economic development, and the course of social justice.² It aims to improve the earnings of the lowest paid workers, protect workers from low wages, promote collective bargaining and support economic policy.³ It also serves to observe the International Labour Organisation (ILO) imperatives such as decent work⁴, and constitutional values such as the right to social security⁵ and fair labour practices^{6,7}. The promulgation of the Act in South Africa

¹ The National Minimum Wage Act 9 of 2018 (NMWA)

² NMWA s2 mentions the purpose of the Act , which is to advance economic development and social justice justice by :

- Improving the wages of lowest paid workers
- protecting workers from unreasonably low wages
- preserving the value of the national minimum wage
- promoting collective bargaining and
- supporting economic policy

³ Supra note 2

⁴ International Labour Organisations (ILO) Decent Work: Report of the Director General, International Labour Conference, 87th Session.(1998) Geneva: International Labour Office, Geneva.

Decent Work is a concept used by the ILO in identifying and emphasizing the urgent need to improve waged and unwaged working conditions in formal and informal economy for all people. The organisation aims to achieve this through regulation of social and labour protections.

⁵ Constitution of the Republic of South Africa , 1996 s 27(1)(c) provides that "everyone has the right of access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance". NMWA improves the wages of the lowest paid workers , which will resultantly put them on better footing to afford themselves and their dependants essential social security necessities.

⁶ Supra s 23(1) states that of the Constitution, 1996 states that ‘Everyone has the right to fair labour practices.’ This provision of the constitution is given effect through the Labour Relations Act ,66 of 1995 and the Basic Working Conditions of Employment Act ,75 of 1997.

⁷ David Neumark, JM Ian Salas, & William Wascher. "*Revisiting the minimum wage—Employment debate: Throwing out the baby with the bathwater?.*", (2014) *ILR Review*: 608

is essential for establishment of a fair labour market, and the improvement of workers economic circumstances .⁸ This is mostly because the majority of South Africans have salaries as their only source of income.⁹ Francis & Valodia mentions that the implementation of the minimum wage is a timely intervention to South Africa's wage inequality crisis. This is inconsideration of that South Africa is a country with highest wage in equality in the world. Francis and Webster also reflect on this paradox on their critical reflection of poverty and inequality in South Africa.¹⁰ There is also high wage gap between the working classes.¹¹ Therefore, the Act is a necessary intervention in the country's prevailing low wage crises.¹² Implementing and enforcing the NMWA is essential for affording decent livelihood and dignity to workers who enable functioning of the South African economy.¹³

Unfortunately, the effectiveness of the Act has been limited by the high level of non-compliance amongst employers.¹⁴ A study by Borhat, Kunbur & Mayet shows that 44% of workers earned on average 35% below what was stipulated as form of minimum wage .¹⁵ A report by the Development Policy Research Unit mentions that the effectiveness of NMW is limited by high levels of non-compliance, which persist from sectoral determinations.¹⁶ The report used labour force data to measure the actual impact of NMWA in workers earnings .¹⁷ The data of the report shows that at the end of 2019, there were high levels of non-compliance,

⁸ See page 788 of Francis, David, & Edward Webster. "Poverty and inequality in South Africa: critical reflections." (2019) 36 *Development Southern Africa* .

⁹ Arden Finn. 'A national minimum wage in the context of the South African labour market', (2015). Wage inequality accounted for 90.65% of income inequality in South Africa.

¹⁰ David Francis and Imraan Valodia. "Minimum wage for South Africa: A question of power." *New Agenda: South African Journal of Social and Economic Policy* ,2018.

¹¹ Erik Heppell. 'The South African national minimum wage: potential or concern?' *ILO 5* , (2015).

¹² Ibid at 21

¹³ Ibid at 23

¹⁴ Feder, Jade & Derek Yu. 'Employed yet poor: low-wage employment and working poverty in South Africa'(2020):. *Development Southern Africa* , 363.

¹⁵ Borhat Haroon, and Benjamin Stanwix. 'The Impact of the National Minimum Wage in South Africa: Early Quantitative Evidence.' (2021) at 28.

¹⁶ Clemens Jeffrey, and Michael Wither. 'The minimum wage and the Great Recession: Evidence of effects on the employment and income trajectories of low-skilled workers.' (2019). *Journal of Public Economics* ,67.

¹⁷ Ibid

with 43.5% of workers reporting that they earn below the stipulated national minimum wage.¹⁸ This is despite the provision of exemption for employers who report not being able to pay their workers as per the National Minimum Wage Act.¹⁹ Employers, with time, devise creative ways of avoiding remunerating workers according to the national minimum wage Act.²⁰ The violation is mostly prevalent in vulnerable sectors, where workers have low skills, and have no qualification.²¹ shows that the most vulnerable sectors which fell under sectoral determinations are security, domestic work, taxi industry, construction, and agriculture.²² Their vulnerability is a result of intersectional axes of identity such as lack of education, low skill, minimal unionisation, and gender, especially in the case of domestic work and agriculture.²³ The majority of workers constituting these sectors cannot read, apply, or demand the enforcement of policy .²⁴ The minimal or absence of unionisation, means minimal representation and collective bargaining in the case of low income.²⁵ As a result, many employees cannot afford essential living necessities such as health care.²⁶

This dissertation aims inquires on numerous factors which enable the violation of the minimum wage act. It aims to identify shortfalls within the Act which undermine compliance and enforcement. Drawing from foreign and international law, the thesis aims to identify possible solutions which the South African Government can adopt to improve compliance. It aims to

¹⁸ Ibid

¹⁹ Ibid

NMWA Chap 4, affords individual employers, or employers' organisation who are registered in terms of s 96 of the LRA

²⁰NMWA Chap4(15)(1) explains that:

“An employer or an employers' organisation registered in terms of section 96 of the Labour Relations Act, or any other law, acting on behalf of a member, may, in the prescribed form and manner, apply for an exemption from paying the national minimum wage.”

²¹ Francis and Valodia op cite note 10 at 36 .

²² Ibid

²³ Neumark David, and Luis Felipe Munguia Corella. ‘Do minimum wages reduce employment in developing countries? A survey and exploration of conflicting evidence.’(2021). *World Development* .

²⁴ Ibid

²⁵ Wong Sara . ‘Minimum wage impacts on wages and hours worked of low-income workers in Ecuador.’ (2019). *World Development* , 99.

²⁶ Ibid

draw from international literature, and discusses lessons that can be adopted and implemented by the South African Department of labour to improve compliance.

The remainder of this chapter consists of a literature review, and an overview of South Africa's historical background with regards to the NMWA. The discussion considers critical areas of relevance with regards to the Act. These include the wage regulation debate, the working poor, a living wage, policy awareness, impact on the informal economy, the NMWA compliance and the gig economy.

Chapter 2 discusses an outline of the ILO framework for minimum wages, and the National Minimum Wage Act setting in South Africa. It delves on the sectoral approach versus across-the-board approach, sectoral determinations process, the minimum wage calculation, payments in kind, the minimum wage level in 2022 and the national minimum wage beneficiaries.

Chapter 3 discusses various factors that enable the violation of the minimum wage. These include inadequate inspection procedures, non-compliance penalties, the casualisations of labour and migration trends.

Chapter 4 engages with international literature; and considers how selected countries have addressed the issue of minimum wages. It draws lessons which could inform the approach in South Africa to improve local compliance.

Chapter 5 discusses practical solutions which can be implemented in the identified areas of non-compliance and concludes with recommendations in this regard.

The following section discusses South Africa's historical background with regards to the NMWA. It engages on its industrial progress over the years, the prevailing employment circumstances, and the country's architecture relating to industrial relations. This section brings across the necessity of the Act in resolving the country's prevailing wages and livelihood issues.

1.2 Historical Background

South Africa is considered as a developing country, with the biggest economy in Africa, after Nigeria and Egypt.²⁷ It has achieved significant industrial development since the early days of colonialism.²⁸ It is acknowledged to have one of the world's strictest labour laws, as a result of efforts to undo the effects of slavery, which has historically characterized its labour practices.²⁹ The country is however, still confronted by material adversities with regards to employment. Currently; 14.3 million of the working population is unemployed, and 64.4% of the youth³⁰ is unemployed.³¹ The plight of unemployment is experienced by both the skilled and unskilled population.³² The labour market is not able to absorb as many graduates as the education system produces.³³ Many of the unemployed graduates' resort to the informal sector, and despite it evolving, the sector remains ever saturated, as there are more unemployed people than it can accommodate.³⁴

Alongside the high and rising unemployment levels, there is also a worrying high level of poverty amongst the employed.³⁵ The working poor refers to the employed individuals who

²⁷ Tim Gindling. 'Does increasing the minimum wage reduce poverty in developing countries?' , (2018). *IZA World of Labor*.

²⁸ Ibid

²⁹ Benjamin, Paul, Haroon Borat, & Halton Cheadle. 'The cost of "doing business" and labour regulation: The case of South Africa.' (2010) 149 (1) *Int'l Lab Review* 73.

Meyer, Daniel Francois. 'Job creation, a mission impossible? The South African case.' (2014)5(16) *Mediterranean Journal of Social Sciences* .

Sitharam, Sharmilee, and Muhammad Hoque. 'Factors affecting the performance of small and medium enterprises in KwaZulu-Natal, South Africa.' (2016) 14(2) *Problems and perspectives in Management* 277.

³⁰In South Africa; youth commonly refers to an individual within the bracket of 15-34 years of age. <https://www.statssa.gov.za/?p=14415#:~:text=In%20South%20Africa%2C%20youth%20consists,the%20compulsory%20school%20attendance%20age.>

³¹ Statistics South Africa 2021.

³² Ibid

³³ David Francis & Imraan Valodia. 'Inequality in the South African labour market: The political economy of the national minimum wage.' *Critical Social Policy* ,2021.

³⁴ Ibid

³⁵Elesabe Huysamen 'The future of legislated minimum wages in South Africa: Legal and economic insights' (2018).

earn low wages to the extent that they are unable to meet the basic living needs³⁶. Their earning does not allow them meaningful economic activity, it rather limits them to basic living essentials such as food and transport to work.³⁷The high levels of poverty and the resultant inequality, is of great concern, whether viewed from a perspective of economic sustainability, social justice, or adherence to constitutional values such as dignity and equality.³⁸

Employers and employees periodically engage in negotiations on terms of employment, which are mostly on wages³⁹. As an industrial norm in South Africa, employees make use of trade unions as representatives in the processes of collective bargaining.⁴⁰ In case there is no common ground; the constitution⁴¹ with assistance of Labour Relation Act 66 of 1995 (LRA)⁴² affords the right to strike to employees⁴³, and a lock-out to employers.⁴⁴Most notably through

³⁶ Feder, Jade & Derek Yu. 'Employed yet poor: low-wage employment and working poverty in South Africa'. (2021). *Development Southern Africa*, 385.

³⁷ Ibid at 385

³⁸ Supra note 6

³⁹ Karin Calitz, 'Violent, Frequent and Lengthy Strikes in South Africa: Is the Use of Replacement Labour Part of the Problem' (2016) 28 *S Afr Mercantile LJ* 436

⁴⁰ Ibid

⁴¹ The Constitution of the Republic of South Africa, 23 (the Constitution hereafter)

⁴² The Labour Relation Act 66 of 1995

⁴³

(1) Everyone has the right to fair labour practices.

(2) Every worker has the right—

(a) to form and join a trade union

(b) to participate in the activities and programmes of a trade union; and

(c) to strike

⁴⁴ A lockout refers to when an employer refuses the employer access to the workplace. Consequently, the employee cannot perform their duties, and therefore are not entitled to any remuneration. In the regulation of the lockouts the Constitutional Court(CC) held that:

'Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers. Workers exercise collective power primarily through the mechanism of strike action. In theory, employers, on the other hand, may exercise power against workers through a range of weapons, such as dismissal, the employment of alternative or replacement labour, the unilateral implementation of new terms and conditions of employment, and the exclusion of workers from the workplace (the last of these being generally called a lockout). The importance of the right to strike for workers has led to it

history, industrial action of such nature often turns into violent displays of power.⁴⁵ The most recent and remarkable example is the Marikana Massacre which transpired in year 2012.⁴⁶ The miners were striking for living wages, and it culminated in the loss of lives.⁴⁷ The point of conflict in South Africa, is the question of whether the demand for wage increase is reasonable given the economic and social climate of South Africa.⁴⁸

Wage regulation has been a discourse in the labour scholarship, human resources, industrial sociology and even civil society rights movements and organisations.⁴⁹ The following section discusses wage regulation debate over the years. It explores the views of the proponents and dissidents of wage regulation. The importance of the debate is emphasised by how the different views have formed basis of implementation in South Africa.

1.3 The Debate on Wage Regulation

Labour market regulation is divided into different categories such as minimum conditions of employment, collective bargaining and worker participation, dispute resolution and adjudication, skills development and placement and employment linked social security.⁵⁰ The legislated minimum wages forms part of the minimum or basic condition of employment.⁵¹ The views which affirm the NMWA revolve around its objectives, which is assisting the poor

being far more frequently entrenched in constitutions as a fundamental right than is the right to lock out. The argument that it is necessary in order to maintain equality to entrench the right to lock out once the right to strike has been included, cannot be sustained, because the right to strike and the right to lock out are not always and necessarily equivalent.’

⁴⁵ Mlungisi Tenza ‘*An investigation into the causes of violent strikes in South Africa: Some lessons from foreign law and possible solutions*’(2015) 19 *Law Democracy & Development* : 211.

⁴⁶ Ngcukaitobi, Tembeka. ‘Strike law, structural violence and inequality in the platinum hills of Marikana.’ (2012)*ILJ* 34.

⁴⁷ Ibid at 836

⁴⁸ Ibid at 836

⁴⁹ Isaacs Gilad, & B. Fine. "The national minimum wage debate: looking beyond a narrow focus on labour markets." *Econ3x3*,(2015).

⁵⁰Gilad Isaacs. ‘*A national minimum wage for South Africa.*’ University of the Witwatersrand, (2016).

⁵¹ Ibid

and vulnerable workforce.⁵² Proponents of the Act hold the view of that unregulated wages pose a risk of increased exploitation of labour and power in the wage negotiation processes between the employer and the employee.⁵³ The regulation of wages also ensures the observation of the ILO objectives of decent work and constitutional imperatives such as the right to dignity and fair labour practices.⁵⁴

Dissident views argue that the NMWA limits the flexibility to adjust the wage in line with the marginal productivity of labour.⁵⁵ It limits the labour market from making spontaneous adjustment as a result of economic changes and shocks, which poses a threat to profitability.⁵⁶ It is however unfair to subject workers labour to the employer's sense of fairness whereas history and the real-time statistics point to constant low pay despite increase in company's profitability.⁵⁷ Unregulated labour remuneration makes room for unprincipled employers to abuse workers right to decent pay in the disguise of minimizing cost of employment.⁵⁸ To address this, a holistic legal framework is necessary to enforce labour standards and uphold constitutional values such as dignity and to achieve decent work. In South Africa, the debate of regulation and non-regulation remains academic, as the NMWA is already in effect.⁵⁹ Therefore, the attention has shifted from whether to regulate, to how to best regulate wages.⁶⁰

The proponents of the NMWA have mainly been premised on the improved quality of life ideal.⁶¹ It has also been argued that it can serve to protect workers, amidst the declining bargaining power of trade unions, more in particular in the prevailing of high unemployment rate.⁶² The main opposing argument however is that the institutionalisation of the NMWA has

⁵²Arden Finn. 'A national minimum wage in the context of the South African labour market', (2015). Also see Haroon Borat, Ravi Kanbur, & Natasha Mayet. 'The impact of sectoral minimum wage laws on employment, wages, and hours of work in South Africa.'(2013) 2(1) *IZA Journal of Labor & Development* 1.

⁵³ Ibid at 43

⁵⁴ Ibid

⁵⁵ Supra note 22: Op cit note 24

⁵⁶ Ibid note 22

⁵⁷ Supra note 22

⁵⁸ Ibid

⁵⁹ Supra note 24

⁶⁰ Ibid

⁶¹ David Neumark, JM Ian Salas, & William Wascher. 'Revisiting the minimum wage—Employment debate: Throwing out the baby with the bathwater?.', (2014): 608-648.

⁶² Ibid at 615

the risk of worsening the unemployment rate.⁶³ For example, Mike Schussler⁶⁴ has expressed the opinion that in South Africa unskilled and semiskilled workers are being overpaid, which keeps other people out of employment. This assertion is however open to criticism on its premise that labour should remain cheap to assist absorption of more workers⁶⁵.

Huysamen has argued that the implementation of the NMWA has the potential to develop favourable economic and employment outcomes in the long run, despite the likely decline in the early stages.⁶⁶ This could be due to the fact that fair wages are linked to high productivity, which would increase individual companies' prospects of employment.⁶⁷ Also, high wages would increase the worker's buying power and economic activity, which would have direct effect on domestic economy.⁶⁸ There should be caution however, in linking high minimum wage with labour productivity, as it is a resultant of multi layered factors.⁶⁹ Congress of South African Trade Unions (COSATU) argued that limiting setting of minimum wage to the fear of job losses is simplistic, as there is no statistic which indicates incline of unemployment in farming sector since year 2013⁷⁰. It is noteworthy, however, that there has not been significant research on the impact of NMWA on employment in developing countries, as much as there has been in developed countries.⁷¹ As a result, there is not much known on its impact on developing economies, very few studies have presented tangible empirical evidence to show that the increase of minimum wage has material effects on employment.⁷²

⁶³ Ibid

⁶⁴ Supra note 33

⁶⁵ Elsabe Huysamen. '*The future of legislated minimum wages in South Africa: Legal and economic insights.*', (2018): 271-297.

⁶⁶ Ibid at 280

⁶⁷ Ibid at 281

⁶⁸ Ibid note 34

⁶⁹ Supra note 37

⁷⁰ Elsabe Huysamen. '*The future of legislated minimum wages in South Africa: Legal and economic insights.*', 2018 at 288.

⁷¹ Broecke, Stijn, Alessia Forti, and Marieke Vandeweyer. 'The effects of minimum wages on employment in emerging economies: A literature review.' (2015) .*Social, Employment and Migration Working Papers* .

⁷² Ibid at 12

Coleman argued that there is no local or international evidence which supports the job destruction claims, and it is a myth.⁷³ On the other hand, Seekings and Natrass⁷⁴ contests this argument by asserting that Coleman is selective of evidence, and that he has ignored sceptical research by the World Bank and other relevant resources.⁷⁵ Other literature suggests that effects on employment are often downplayed due to - there being focus on short term changes. Sorkin submits that the effects might be more visible in the long run, when employers resort to substituting capital for labour.⁷⁶ The data from the USA over a period of 37 years show that effects are visible after 3 years of stipulation.⁷⁷ The ILO in 2013 concluded by claiming that it almost has no significant effects on developed countries, whereas effects on developing countries differ according to each's economic standpoint.⁷⁸

Those affected the most are unskilled workers, and those in small firms⁷⁹. It is currently a challenge to predict the impact of the policy on employment in the local economy, as both local and international research present different findings.⁸⁰ It is of paramount importance therefore to not be extreme nor simplistic when conducting estimations.⁸¹ The neoclassical computable general equilibrium (CGE)⁸² suggest that a minimum wage set too high will have devastating outcomes for the labour market.⁸³ The neoclassical computable general equilibrium models

⁷³ Supra note 37

⁷⁴ Jeremy Seekings, & Nicoli Natrass. '*National Minimum Wage-Setting in South Africa*', 2015.

⁷⁵ For World Bank reports see Nurrachmi, Rininta, et al. 'Article Review on World Bank Report, Optimal Design for a Minimum Wage Policy in Malaysia.' (2012). And Alatas, Vivi, and Lisa A. Cameron. 'The impact of minimum wages on employment in a low-income country: an evaluation using the difference-in-differences approach.' *Available at SSRN 636347*, 2003.

⁷⁶ Isaac Sorkin. '*Are there long-run effects of the minimum wage?*' (2015) *Review of economic dynamics*, 306

⁷⁷ Ibid at 307

⁷⁸ International Labour Organisation: *World of Work Report 2013*. Geneva: International Labour Organisation, 2013.

⁷⁹ Supra note 14

⁸⁰ The '*National Minimum Wage Panel Report to the Deputy President – Recommendations on Policy and Implementation*', 2016.

⁸¹ Ibid 68

⁸² Ghaith Ziad, Suren Kulshreshtha, David Natcher, and Bobby Thomas Cameron. "Regional computable general equilibrium models: A review.' (2021) *Journal of Policy Modeling* , 724.

⁸³ Storm, Servaas, and Gilad Isaacs. 'Modelling the impact of a national minimum wage in South Africa: Are general equilibrium models fit for purpose.' (2016) 1, *Research Brief* .

(CGE), used in the National Treasury and University of Cape Town's Development Policy and Research Unit (DPRU) predict high job losses in direct proportion to the National Minimum Wage level.⁸⁴ These models show that the economy adjust economy adjust to rising minimum wage through inflation of prices and downsizing of labour.⁸⁵ Research by Servaas Storm and Gilad Issacs (2016) is critical of these models.⁸⁶ Storm and Issacs argue that the construction of the models is systematically biased to finding adverse effect of minimum wages without considering other material and significant economic factors.⁸⁷ The premise of their criticism is that the changes these models suggest have no empirical evidence or their effect is insignificant.⁸⁸ The economic adjust which actually occur are not accounted for in the models.⁸⁹ There should however be a sharp eye to those economists who are against every regulation that seeks to oversee the payment of workers in a country that ranks as the epitome of inequality.⁹⁰

The complexity of application should not take away from the nobility, or at the very least the essentiality of the act.⁹¹ The majority of South Africans are already languishing in abject poverty, despite falling on the positive side of employment statistics.⁹² The adversarial attitude of those who claim to have the best interest of the economy but no sympathy for its main drivers, which is the majority of the working poor, should be met with sober critic.⁹³ The heart of a sustainable economy should be sustainable lively-hoods, not merely fixing the unemployment statistics.⁹⁴ Marx expresses that the local government are often misguided in their concern for number of people participating in the labour market or employment over of

⁸⁴ Shipalane Acquila. 'Mechanisms for effective implementation of South Africa's National Minimum Wage. (2018) University of Pretoria.

⁸⁵ Supra note 83

⁸⁶ Jones Samuel, Annanya Mahajan, Maria Oliva, Debora Reyna, and Marta Vila. 'The effects of the South African minimum wage on labour market outcomes for low-income earners.' (2018).

⁸⁷ Ibid

⁸⁸ Ibid

⁸⁹ Ibid

⁹⁰ Supra note 37

⁹¹ Supra note 37

⁹² Supra note 33

⁹³ Ibid

⁹⁴ Marx, Ive. 'The working poor.' (2019) In *Routledge International Handbook of Poverty*, Routledge, 245.

the material conditions of their lively-hood.⁹⁵ He further expresses that the focus should equally be on ensuring that employment provides relief from poverty for workers at level of employment.⁹⁶ Francis and Valodia argue that the loss of employment debate is a simplistic view of how labour markets operate, and it neglects the power relations in the labour market.⁹⁷ The authors argue that labour markets are more complex in a sense there is a myriad of social forces that shape outcome in labour market.⁹⁸ For example, women in lower paying jobs have low bargaining power both because of the social status as low paid workers, and the systematic patriarchy that continues to plague society.⁹⁹ In essence, this means we cannot approach labour market in the same manner as others.¹⁰⁰ For instance, in the retail market, at least the very least in theory and some limited instances in theory; buyers have equal powers to sellers .¹⁰¹ The labour market is however completely different, given that employers as buyers of labour have more power than workers as sellers of labour.¹⁰² This is mostly where there is no formal collective bargaining, and minimal to no labour organisation.¹⁰³ Although employment is most commonly means to reduce poverty, some workers do not escape poverty due to being paid wages insufficient to afford or maintain decent living .¹⁰⁴ The following section discusses the working poor. This existence of this category of workers serves an emphasis for the necessity of the NMWA and guiding against its violation.

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ David Francis & Imraan Valodia. ‘*Minimum wage for South Africa: A question of power.*’ (2018) .*New Agenda: South African Journal of Social and Economic Policy* , 34.

⁹⁸ Ibid 35

⁹⁹ Ibid

¹⁰⁰ Ibid

¹⁰¹ Ibid

¹⁰² Azar José, Emiliano Huet-Vaughn, Ioana Marinescu, Bledi Taska, and Till Von Wachter. ‘*Minimum wage employment effects and labor market concentration.*’ (2019) .National Bureau of Economic Research, 2019.

¹⁰³ Ibid

¹⁰⁴ Feder, Jade, and Derek Yu. ‘Employed yet poor: low-wage employment and working poverty in South Africa.’ (2020) 37.3 .*Development Southern Africa* , 363.

1.4 Minimum Wage Vs Living Wage

There has been widespread call for living wages by trade unions and labour scholars in the interest of sustainable livelihoods.¹⁰⁵ A living wage can basically be described as a minimum wage of a value that enables a worker to live a life of material quality in consideration of necessities such as housing, food, transport, and health care.¹⁰⁶ It is instrumental and strategic in the lessening the pool of what is known as the working poor.¹⁰⁷ It also consists of creation of a sustainable wage income mechanisms which look beyond basic living needs, but also improve worker's skills and further employment prospects.¹⁰⁸ COSATU submits that a contractual agreement cannot be regarded as fair when the employee works for low wage in effort to escape starvation.¹⁰⁹ It uses the example of multitude of locals that spent all of their working lives in mines and agriculture without ever escaping poverty.¹¹⁰ This is indicative that South Africa is failing in the stipulation of minimum wages that is effective in the fight against abject poverty.¹¹¹

Alongside living wage, another policy intervention that could supplement minimum wage is the basic income grant (BIG).¹¹² The following section briefly discusses Big as a suitable provision for supplementing the limitations of minimum wage.

1.5 The Working Poor

There is no standard identification or definition for low wage workers or the working poor.¹¹³ However, some literature refers to workers residing in households with income less than two

¹⁰⁵ Cottle, Eddie. "An Overview of the Living Wage and the national Minimum Wage in South Africa." (2014) *Bargaining Indicators 2014: Twenty Years-A Labour Perspective*.

¹⁰⁶ Ibid at 2

¹⁰⁷ Ibid at at 3

¹⁰⁸ Ibid at 3

¹⁰⁹ Coleman, Neil. "Towards new collective bargaining, wage and social protection strategies in South Africa-Learning from the Brazilian experience." (2013) 17. Global Labour University Working Paper, 2013.

¹¹⁰ Ibid at 48

¹¹¹ Lehlere, Oupa. "The road to the right: COSATU economic policy in the post-apartheid period." (2019) *Rethinking the Labour Movement in the 'New South Africa'*. Routledge , 25.

¹¹² Plagerson, Sophie, Leila Patel, Tessa Hochfeld, & Marianne S. Ulriksen. 'Social policy in South Africa: Navigating the route to social development.'(2019) 113 *World Development* , 1-9.

¹¹³ Arden Finn. "A national minimum wage in the context of the South African labour market", (2015).

thirds of the national median.¹¹⁴ In South Africa, the median is very low in relative to the mean, hence there is hesitation to subscribe to the mention definition.¹¹⁵ The term working poor is instead used to refer to workers in households which their monthly income falls below the poverty line.¹¹⁶ This is the approach adopted by the US Bureau of Labour Statistics, which categorises workers living in household earning below the poverty line as poor.¹¹⁷

The following section discusses the essentiality of NMWA as an intervention to the wage crises in the labour market. It engages on its importance on achieving South Africa's' and the ILO's economic and sustainable livelihood objectives.

1.6 Reducing Wage Inequalities

South Africa is ranked as a country with high level of inequality with regard to distribution of income and wealth.¹¹⁸ Its labour market is characterized by a very wide income gap, those in the upper end benefit from wage increments, while the poor remains bottom since their income is mostly from social transfers.¹¹⁹ The data from Labour Market Dynamics Report in 2014 showed that 47.3% of 6.2 million employees earned a monthly salary of less than R3500.¹²⁰

The legislative stipulation of wage floor is intended as a structural intervention towards transformation of South African labour market.¹²¹ In year 2015, full time employees earned 82% time more than the bottom 10%.¹²² On average, white workers earned three times higher than African workers.¹²³ Statics by Finn (2015) show that wages account for 90.65% of total

¹¹⁴ Ibid at 37

¹¹⁵ Ibid 37

¹¹⁶ US Bureau of Labor Statistics. "A profile of the working poor, 2012". (2012) BLS report 1047. Washington D.C.: Bureau of Labor Statistics .

¹¹⁷ Ibid

¹¹⁸ Arden Finn 'A National Minimum Wage in the Context of the South African Labour Market' (2015).SALDRU Working Paper Number 153 University of Cape Town.

¹¹⁹ The Department of Labour 'The Agreement on the introduction of a National Minimum Wage', (2017).

¹²⁰ Statistics South Africa (2012). Labour Market Dynamics in South Africa 2014. [Dataset]. Pretoria: Statistics South Africa [Producer].

¹²¹ David Francis & Imraan Valodia 'Minimum wage for South Africa: A question of power' (2018),*South African Journal of Social and Economic Policy*, 34.

¹²² Ibid at 34

¹²³ Ibid 35

income inequality in South Africa.¹²⁴ The processes which resulted to the adoption of the NMWA were inspired by former President Jacob Zuma's State of the Nation Address (SONA).¹²⁵ On the address he called for the mobilisation of the country's social in reduction of low wages, wage inequalities and protracted strikes which were characterized by violence.¹²⁶ The South African National Development and Development Council (NEDLAC) responded by convening a conference later in November 2014, which saw to the rise of Ekurhuleni Declaration.¹²⁷ The Declaration was significant in that it was in way a recognition by the social partners of that wages are the main source of income and sustainable livelihood for the majority of workers in the country.¹²⁸ Therefore, increasing wage for the lower rank employees has material economic, social, and legal benefits for majority of working South Africans.¹²⁹

There is a debate that the Minimum Wage is insufficient to resolve the prevailing economic and sustainable livelihood issues.¹³⁰ The industrial sociology, civil right movement and trade unions propose living wages as an antidote to the prevailing wage gaps and inadequacy.¹³¹ The following section discusses living wages versus the NMWA, as more fitting method in eradicating the socio-economic issues confronting workers.

¹²⁴ Finn Arden. 'A National Minimum Wage in the Context of the South African Labour Market.' (2015) . National Minimum Wage Research Institute.

¹²⁵ Francis, David, & Imraan Valodia 'Inequality in the South African labour market: The political economy of the national minimum wage.'(2021) *Critical Social Policy*, 385.

¹²⁶ Ibid at 387

¹²⁷ Ibid at 397

¹²⁸ Pakkies, Dineo. 'Impact of the National Minimum Wage on Social Reproduction and the Livelihoods of Black Working-Class Women'. (2020) . Diss. University of Johannesburg (South Africa).

¹²⁹ Supra note 17

¹³⁰ Schmitt, John. 'Why does the minimum wage have no discernible effect on employment?'. (2013) 4. Washington, DC: Center for Economic and Policy Research.

Adams, Ronald. 'Standard of living as a right, not a privilege: Is it time to change the dialogue from minimum wage to living wage?' (2017) 122(4) *Business and society review* , 613.

¹³¹ Maloney, T. J. 'A literature review on the effects of living wage policies.' (2013).

Alsos, Kristin, Kristine Nergaard, & Andreas Van Den Heuvel. 'Collective bargaining as a tool to ensure a living wage. Experiences from the Nordic countries.' (2019) ,351.

1.7 The Basic Income Grant

The basic income grant (BIG) is a monthly monetary grant paid by the government to every legal resident, regardless of age, income, family factors or other relevant factors.¹³² The BIG would be a sustainable supplement to the national minimum wage, under the South African circumstances where most workers cannot afford basic needs with their salaries.¹³³ The BIG idea dates back to 1998, it emerged as a policy alternative in the Presidential Jobs Summit.¹³⁴ Prior to the Job Summit Assembly, the NEDLAC constituency would submit proposals on how to fight against unemployment.¹³⁵ The BIG formed part of the Labor input, the constituencies agreed that it would be considered as part of social security system.¹³⁶ The idea has not yet materialized as it was initially proposed. Instead, the South African government had R350 social relief grant¹³⁷ for the unemployed during the prevalence of Covid 19.¹³⁸ The particulars

¹³² Matisonn, Heidi, & Jeremy Seekings. "Welfare in wonderland? The politics of the basic income grant in South Africa, 1996-2002." (2003) *The basic income grant in South Africa* ,56.

Barchiesi Franco. 'South African debates on the Basic Income Grant: wage labour and the post-apartheid social policy.'(2007) 33(3) *Journal of Southern African Studies* , 561.

¹³³ Makole, Kaizer Raseane, et al. 'Can a basic income grant improve the quality of life for the poor in South Africa: an analytical review.' (2022) : 81-89.

Pienaar, G., et al. 'A BIG Need: Covid-19 has rammed home the necessity of social protection and a universal basic income grant.' (2020).

¹³⁴ NEDLAC Labour Constituency (1998). *Creating Jobs in South Africa: Key Issues and Strategies - Labour Input to Presidential Jobs Summit*, April 1998. [<http://www.cosatu.org.za/docs/jobs-ned.htm>]

¹³⁵ Makino Kumiko. 'Social security policy reform in post-apartheid South Africa: a focus on the basic income grant.' (2004) : 14-15.

¹³⁶ Ibid at 14

¹³⁷ The social relief of distress grant is the government's temporary intervention to assist persons living in intense poverty, so they are able to provide their families with most basic needs. The South African through the South African Social Security Agency announced this provision as one of its measures to navigate the pandemic, while protecting its citizens from starvation and lack of basic needs.

¹³⁸ Pienaar G. A. R. Y., et al. 'The BIG question: COVID-19 and policy support for a basic income grant.' (2021). Zindi Beauty, and Elvin Shava. 'Confronting the Monster': Exploring the Implementation of Social Protection Measures Amid COVID-19 in South Africa.'2022 *Exploring the Consequences of the Covid-19 Pandemic*. Apple Academic Press, 3.

concerning the establishment of BIG are beyond the scope of this paper. However, its materialization would bring about necessary social security for low wage workers.¹³⁹

Although there the minimum wage is currently active in South Africa, workers in particular in low skill industries, are not aware of minimum wage.¹⁴⁰ The following section discusses policy awareness as a barrier to workers enjoying the protection by the national minimum wage and other relevant policies.

1.8 Policy Awareness

There is an alarmingly high level of unawareness and lack of information on the NMWA.¹⁴¹ This is mostly amongst low skill employers who are from previously disadvantaged backgrounds.¹⁴² Most of the employees are situated in the domestic, agriculture and security sector.¹⁴³ The employers in these sectors also do minimal to nothing to inform the workers on payment provisions by the NMWA.¹⁴⁴

1.9 Impact on Informal Economy

The regulation of minimum wages is also necessary for developing countries such as South Africa, where there is a prevalence of non-unionised informal work, for instance domestic

¹³⁹ Jain Ronak, Joshua Budlender, Rocco Zizzamia, and Ihsaan Bassier. 'The labor market and poverty impacts of covid-19 in South Africa.'(2020). Fleischer, Miranda Perry, and Daniel Hemel. 'The architecture of a basic income.' (2020) 87. *U. Chi. L. Rev.* , 625.

¹⁴⁰ Gregory, Terry, and Ulrich Zierahn. 'When the minimum wage really bites hard: Impact on top earners and skill supply.' (2020) *ZEW-Centre for European Economic Research Discussion Paper* 20-042.

¹⁴¹ Jade Feder & Derek Yu. "*Employed yet poor: low-wage employment and working poverty in South Africa.*" *Development Southern Africa*, (2020).

¹⁴² Jade Feder & Derek Yu op cite 375. "*Employed yet poor: low-wage employment and working poverty in South Africa.*" (2020) ,*Development Southern Africa* .

Finn, Arden, Murray Leibbrandt, and Morné Oosthuizen. *Poverty, inequality, and prices in post-apartheid South Africa*. No. 2014/127. WIDER Working Paper, 2014.

Statistics South Africa, 2017. *Poverty trends in South Africa: An examination of absolute poverty between 2006 and 2015*. Statistics South Africa, Pretoria.

¹⁴³ Finn, Arden, Murray Leibbrandt, and Morné Oosthuizen op cite

¹⁴⁴ Ibid at 394

workers.¹⁴⁵ A predetermined wage floor might help in protecting workers in such sectors from exploitation.¹⁴⁶ Domestic workers' earnings do not reflect their valuable contribution on the economy by what they do, allowing their employers to have more time to perform their economic activities.¹⁴⁷ Their employers have more time to generate income, while they have assumed their domestic duties such cleaning and child rearing.¹⁴⁸ Yet their wages hardly average 4% of their employer's salary.¹⁴⁹ The workers in the informal economy do not enjoy the same statutory protection as those in the formal economy, where there is prevalence of trade unionism and industrial actions.¹⁵⁰ These workers do not adequately benefit from legal regulations as they should, and there is often no clear enforcement route in the common cases of non-compliance.¹⁵¹ It is no different when it comes to minimum wage, groups such as domestic workers and public taxi operators do not earn as much as the policy stipulates.¹⁵²

1.10 The Gig Economy

The advancement of technology and the predominance of mobile devices such as smartphones has given consumers a different way of accessing the marketplace.¹⁵³ They have reshaped the commercial landscape, with more civilians able to participate in the economy without being in possession of the traditional set of skills and qualifications.¹⁵⁴ There were 3.9 million people

¹⁴⁵ Rogan, Michael, & Laura Alfes. 'Gendered inequalities in the South African informal economy.' (2019) 33(4) *Agenda*, 91. Francis, David, and Edward Webster. 'Poverty and inequality in South Africa: critical reflections.'(2019) 36(6) *Development Southern Africa*, 788,

¹⁴⁶ Ibid

¹⁴⁷ ILO: Domestic workers across the world: Global and regional statistics and the extent of legal protection (2013). Geneva, 75.

¹⁴⁸ Ibid

¹⁴⁹ The statistic by the ILO does not necessary reflect that of South Africa. The majority of domestic worker employers in South Africa are middle class to upper class earners. According to article by BUSSINESSTECH, the domestic workers earn 4 times lesser than their employers, which is concerning gap considering that the Domestic Workers sector is dominated by Black woman who are main income earners in their households.

See <https://businessstech.co.za/news/finance/589558/how-much-money-you-need-to-be-middle-class-in-south-africa-2/>

¹⁵⁰ Ibid

¹⁵¹ Ibid

¹⁵² Supra note 95

¹⁵³ Glasner Benjamin. 'The Minimum Wage, Self-Employment, and the Online Gig Economy.' (2021) *Unpublished Draft, University of Washington*.

¹⁵⁴ Ibid at 2

in the gig industry in 2021.¹⁵⁵ They have different benefits from the traditional full-time employment.¹⁵⁶ The most notable is that the worker is able to determine the amount of work they willing to do, the amount of time they willing to spend, and at times who they are willing to offer their services to¹⁵⁷.

The proliferation of the gig economy is, however, accompanied by material concerns with regards to the protection of the gig workers.¹⁵⁸ This is mostly because most on-demand platforms such as those in the transport sector do not regard the registered workers as employees, rather as independent contractors.¹⁵⁹ Consequently, this means that these workers are exempted from legislative provisions aimed at protecting employees.¹⁶⁰ This paper is more focused on the payment of minimum wage, although there more concerns raised by local governments, labour activist and experts .¹⁶¹ The discussion of the gig economy is most urgent relevant due to that there are more South Africans, as is globally, who are finding employment shelter in the gig economy.¹⁶² There is however a concern that the supply and demand patterns may lead to more workers earning less than they can make a living off, despite the profitability of the on-demand online platforms.¹⁶³

1.10.1 How it works

There has been a rapid global shift of the labour market, which is also catalysed by the 4th industrial revolution.¹⁶⁴ The gig economy is a collection of markets that matches service

¹⁵⁵ https://www.investec.com/en_za/focus/economy/rocking-the-gig-economy.html

¹⁵⁶ Roy Gobinda, and Avinash K. Shrivastava. 'Future of gig economy: opportunities and challenges.' *IMI Konnect* 9.1: 14-27.

¹⁵⁷ The option to choose who the worker provides their services to is however limited by the local countries labour law . For instance , one cannot choose to only offer their services to a certain race in South Africa as that amount discrimination , which a serious legal offence.

¹⁵⁸ Laureen Snider. 'Enabling exploitation: law in the gig economy.' (2018) *Critical Criminology* , 563.

¹⁵⁹ Ibid at 354

¹⁶⁰ Ibid 354

¹⁶¹ Supra note 141 : Op cite note 144

¹⁶² Supra note 144

¹⁶³ Supra note 141

¹⁶⁴ Alex Wood, Mark Graham, & Mohammad Amir Anwar. 'Minimum wages for online labor platforms? Regulating the global gig economy.' (2019) Wood AJ, Graham M and Anwar A, *Minimum Wages for Online Labor Platforms*.

providers to clients or customers on a gig basis, in support of on-demand market.¹⁶⁵ In its basic operations, the gig workers engage in formal agreements to provide services to the clients of on-demand companies.¹⁶⁶ The potential clients make a service request through an internet platform, such as a website or an application, to service provider or worker.¹⁶⁷ The worker performs the service on behalf of the company and remunerated in through commissions.¹⁶⁸ The transport, food and tourism sector are the most which have seen an inclining prevalence of the of the gig economy.¹⁶⁹ Individual companies have different business models which guide the use of their platforms and associated brands.¹⁷⁰ For instance, some platforms allow the service provider or the worker to set the price and decide which clients they take .¹⁷¹ Other platforms rather maintain control over the setting of prices and what jobs the worker will take.¹⁷² Some companies operate locally, whereas others operate across the continents.¹⁷³ The drivers and personal households are the most popular service providers in the gig economy.¹⁷⁴ It, however, operates in many sectors, including as business services, deliveries and medical or healthcare services.¹⁷⁵

1.10.2 Freelancing and the Gig Economy

It is fair to refer to the gig economy as an expansion or a form of freelancing. It is however different to it, in a few notable and significant aspects.¹⁷⁶ The on-demand companies reduce market entry cost for the workers in that they do not need to own any company or have any

¹⁶⁵ Ibid at 74

¹⁶⁶ Ibid 74

¹⁶⁷ Ibid note 78

¹⁶⁸ Anwarand Graham. ‘*Digital Gig Work in Africa: Freedom, Flexibility, Precarity and vulnerability Among Workers. In: Reshaping Work in the Platform Economy Conference*’, (2017).

¹⁶⁹ Ibid at 19

¹⁷⁰ Ibid 19

¹⁷¹ Ibid at 20

¹⁷² Aaron Shapiro. ‘*Between autonomy and control: Strategies of arbitrage in the “on-demand” economy.*’ (2018). *New Media & Society* ,2954.

¹⁷³ Ibid at 2945

¹⁷⁴ Ibid at 2956

¹⁷⁵ Ibid

¹⁷⁶ Malos, Stan, Gretchen Vogelgesang Lester, & Meghna Virick. ‘Uber drivers and employment status in the gig economy: Should corporate social responsibility tip the scales?’ (2018) 30(4) *Employee Responsibilities and Rights Journal* , 239. DeBruyne, Nicholas L. ‘Uber drivers: a disputed employment relationship in light of the sharing economy.’ (2017) 92 *Chi.-Kent L. Rev.*, 289.

sets of skills beyond providing the main service.¹⁷⁷ These companies make returns through collecting a portion of the earning made through their platforms.¹⁷⁸ Commissions are normally through a flat percentage per job completed, with the exception of some companies which use more complicated models.¹⁷⁹ The companies are also responsible for the brand, in terms of marketing and employment criteria.¹⁸⁰ They reserve the right to terminate relationship if the service provider no longer meets the stipulated standards of operation.¹⁸¹ The companies also reserve control over the relationship between the service provider and the client.¹⁸² The platform companies commonly prohibit workers from providing service to clients, outside the platform.¹⁸³ For instance, Upwork, which is business service company, prohibits service providers from working with clients identified on platform for a period of 24 months.¹⁸⁴ The same applies with home-service company handy, it adopts the same non-circumvention clause¹⁸⁵. They are most notable differences between freelancing and the gig economy, the service provider does not have the same privileges and responsibilities as a traditional freelancer.¹⁸⁶

1.10.3 Workers in the Gig Economy

The online platforms companies regard the service providers or the workers as independent contractors, not employees.¹⁸⁷ This is most emphasized in the formal agreement that guide the relationship between the service provider and the company.¹⁸⁸ This form of employment also

¹⁷⁷ Ibid

¹⁷⁸ Alex Wood, Mark Graham, & Mohammad Amir Anwar. ‘4 Minimum wages for online labor platforms?’ (2020) *The Digital Transformation of Labor*, 74.

¹⁷⁹ Ibid at 75

¹⁸⁰ Ibid

¹⁸¹ Supra note 141 at 76

¹⁸² Ibid note 78

¹⁸³ Ibid 78

¹⁸⁴ Supra note 141

¹⁸⁵ A Rosenblat & Stark. ‘Algorithmic labor and information asymmetries: A case study of Uber’s drivers. *International Journal of Communication*’(2016), 27.

¹⁸⁶ Ibid at 27

¹⁸⁷ *Development Southern Africa* ,462. Devereux, S. ‘Violations of farm workers’ labour rights in post-apartheid South Africa.’ (2020) 37(3) *Development Southern Africa*, 382.

¹⁸⁸ Ibid at 382

finds expression in that the service providers can mostly stipulate their hours of work, set service prices and other areas of their work.¹⁸⁹

1.10.4 The Gig Economy and the Minimum Wage

There is generally no issue with the pay rate in relation to job quality.¹⁹⁰ In actual fact, the platforms have a considerably higher pay rate than most non-high skill occupations.¹⁹¹ There is however a concern over the high of intake of workers which leads to high most workers having inadequate earning opportunities.¹⁹² Although the implementation of minimum wages in these platforms might alleviate some wages issues, it would mean the companies would have to increase the services prices.¹⁹³ High prices have a potential of reducing the demand of platforms and the supply of clients.¹⁹⁴ The increase of pay rates would require improving the quality of service, in order to maintain their attractiveness and demand.¹⁹⁵ There is however no material benefit in having surplus of employment which do not afford their employees any financial stability.¹⁹⁶

Regardless of the ongoing course for living wage, South Africa currently has the NMWA as wage regulation system.¹⁹⁷ The following chapter discusses ILO standards and national minimum wage setting in South Africa.

1.11 NMWA Compliance

The materiality or effectiveness of the policy is the question of how well it is able to be implemented on the real world, regardless of how sharp it looks on paper.¹⁹⁸ The success of a

¹⁸⁹ Ibid at 384

¹⁹⁰ Ibid at 382

¹⁹¹ Supra note 146.

¹⁹² Ibid

¹⁹³ Joshua Healy, Daniel Nicholson, & Andreas Pekarek. 'Should we take the gig economy seriously?' (2017) *Labour & Industry: a journal of the social and economic relations of work*, 232.

¹⁹⁴ Ibid

¹⁹⁵ Ibid at 232

¹⁹⁶ Ibid 232

¹⁹⁷ Jacques Van Wyk. 'Understanding the National Minimum Wage Act.' (2019) 459(5). *Personal Finance* .

¹⁹⁸ David Francis and Imraan Valodia. 'Minimum wage for South Africa: A question of power.' (2018) *New Agenda: South African Journal of Social and Economic Policy* ,: 34-39.

policy is dependant in the effectiveness of other supporting policies.¹⁹⁹ This is because most of the labour regulations do not seem to have any effect on the informal economy, where workers it targets the most are concentrated²⁰⁰. Other scholars argue that the issue is not the weakness of legislation, but the enforcement of compliance.²⁰¹ There is a disturbingly high level of non-compliance with the stipulated sectoral minimum wage in developing countries, including South Africa.²⁰² This may be a result of that it has been set too high, a complex system of regulation, far-fetched penalties, and sanctions for non-compliance.²⁰³ The adverse effects of high non-compliance also extend to compliant employers as they have to bear cost disadvantage.²⁰⁴

The level of compliance does not only depend on the level of minimum wage, but also the legal framework and supporting policies²⁰⁵. The ILO submits that countries, amongst other strategies, there should be an implementation of effective monitoring system, frequent labour inspections, stringent penalties and firm legislation that discourages employers from committing to their obligation.²⁰⁶ South Africa is currently a low compliance country; most employers take every opportunity to avoid fair payment.²⁰⁷ Statistical estimates show that there was high cross sector non-compliance, especially in the rural areas and low skilled labour.²⁰⁸

¹⁹⁹ Ibid at 37

²⁰⁰ Ibid 38

²⁰¹ Basu, Arnab K.; Chau, Nancy H.; Kanbur & Ravi. *'Turning a blind eye: Costly enforcement, credible commitment and minimum wage laws'*(2010) , 244.

²⁰² US Bureau of Labor Statistics. "A *profile of the working poor, 2012*". BLS report 1047. Washington D.C.: Bureau of Labor Statistics , (2012).

²⁰³ Ibid at 16

²⁰⁴ Ibidat 16

²⁰⁵ Ibid 16

²⁰⁶ ILO Domestic Workers Convention, 2011 (No. 189)

²⁰⁷ Feder Jade, and Derek Yu. 'Employed yet poor: low-wage employment and working poverty in South Africa.' (2020) *Development Southern Africa* 37, 363.

²⁰⁸ Bhorat Haroon, & Benjamin Stanwix. "The Impact of the National Minimum Wage in South Africa: Early Quantitative Evidence." (2021).

Piek, Marlies, Dieter von Fintel, & Johann Kirsten. *Separating employment effects into job destruction and job creation: Evidence from a large minimum wage increase in the agricultural sector using administrative tax data.* No. 2020/51. WIDER Working Paper, 2020.

Most of the workers from the villages are not aware of the NMWA, nor the proper channels to explore in the cases of non-compliance. Section 76A of Basic Conditions of Employment Act (BCEA) ²⁰⁹ states that, an employer in contravention must pay the employee an amount which is the value of underpayment or the employee's monthly wages.²¹⁰ It further explains the rates of compensation in the cases of further compliance.²¹¹ The high rate of non-compliance is indicative of the gap between the intended and the actual effectiveness of the policy.²¹² Some employers undermine minimum wage by unpaid overtime instead of not paying hourly wages.²¹³ On a research conducted by Bhorat et al., in 2016²¹⁴ the respondents reported that most employers would sidestep minimum wage by continuous renewal of short-term contracts

Piek, Marlies, & Dieter von Fintel. "Sectoral minimum wages in South Africa: Disemployment by firm size and trade exposure." (2020) 37(3) . *Development Southern Africa* ,462. Devereux, S. 'Violations of farm workers' labour rights in post-apartheid South Africa.' (2020) 37(3) *Development Southern Africa*, 382.

²⁰⁹ s 76A of the of the BCEA, 1997:

(1) Subject to section 76, a fine that may be imposed on an employer who paid an employee less than the national minimum wage, is an amount that is the greater of:

- (a) twice the value of the underpayment; or
- (b) twice the employee's monthly wage.

²¹⁰ Section 76A of the of the BCEA, 1997:

(2) For second or further noncompliance's, a fine that may be imposed on the employer is an amount that is [the] greater of (

- a) thrice the value of the underpayment; or
- (b) thrice the employee's monthly wage.

²¹¹ Ibid

²¹² Ibid

²¹³ Jinnah Zaheera. 'Negotiated precarity in the global south: A case study of migration and domestic work in South Africa.' *Studies in Social Justice* 2020, no. 14 (2020) ,227.

²¹⁴ Bhorat, H, Caetano, T, Jourdan, B, Kanbur, R, Rooney, C, Stanwix, B & Woolard, I. *Quantitative analysis investigating the feasibility of a national minimum wage for South Africa*, (2016).

instead of registering them.²¹⁵ Their argument for less pay would be on that the contract is on temporary bases, hence the low pay.²¹⁶

The Act itself does not have provisions with regards to compliance and enforcement, the workers are however protected through the Labour Relations Act (LRA)²¹⁷ and BCEA.²¹⁸ The LRA is more concerned with safe-guarding employees from unfair labour practices, whereas the BCEA is more concerned with basic conditions of employment, which is inclusive of minimum wage. Any tempering of working condition such as hours of work, wages, amongst other conditions related to the NMWA makes up unfair labour practices. Chapter 10 of BCEA afford powers to the labour inspectors, which one of them is access to a workplace to conduct inspections, without any warrants.²¹⁹

There is no sufficient quantified data on enforcement, which poses a risk of anecdotal evidence and speculations. The results on a survey conducted by Borat²²⁰ shows that 44% workers targeted by Act are paid 35% less than the legislated wage level. The violation mostly common in the forestry, farming, and security sector.²²¹ The Department of Labour (DoL) makes use of a team of inspectors to monitor and enforce compliance to the policy. There were about 781 labour inspects in 127 labour sectors in South Africa in the year 2007.²²²

The digital era also imposes challenge to compliance to minimum wage and other labour regulations.²²³ International co-operations can now conduct all their business without

²¹⁵ Clemens Jeffrey. "How do firms respond to minimum wage increases? understanding the relevance of non-employment margins." *Journal of Economic Perspectives* 35, no. 1 (2021): 51-72. & Mansoor Kashif, and Donal O'Neill. 'Minimum wage compliance and household welfare: An analysis of over 1500 minimum wages in India.' (2021) *World Development* 147.

²¹⁶ Ibid 155

²¹⁷ Act 66 of 1995

²¹⁸ Supra note 97

²¹⁹ Chapter 10 of BCEA, 1997

²²⁰ Haroon Bhocharat, Ravi Kanbur, & Natasha Mayet. 'Minimum wage violation in South Africa.' (2012) , *International Labour Review*.

²²¹ Ibid at 2

²²² Ibid at 2

²²³ Stewart, Andrew, & Jim Stanford. "Regulating work in the gig economy: What are the options?"(2017) , 420.

establishing a designated physical working location.²²⁴ The following section discusses the gig economy, and how its manner of operation enables the violation of minimum wage regulations. It is of paramount importance that the Act considers workers in gig economy to ensure their protection and sustainable livelihood.²²⁵

1.12 Minimum Wage Trends During Covid 19 Pandemic

The labor market was not spared the shock from the measures which were aimed at controlling the spread of Covid 19.²²⁶ Most industries, with the exception of essential services, were brought to a complete halt.²²⁷ The length and the effect of lockdown varied across industries, most assumed gradual resumption with limited staff and working hours.²²⁸ This was coupled with major cuts in payments, as most companies could not afford to pay full salaries on a long-term basis.²²⁹ The small to medium entities witnessed a high rate of retrenchments and closed shops.²³⁰ The severity of the impact in different countries has not yet been quantified.²³¹ The regular wage statistics in many countries are only published years after the data has been collected.²³² Therefore, it is only in the coming years that the actual impact on wages and the labor market can be realized.²³³

There is, however, case study evidence of workers having to work less our and accept wage cuts during the mitigation of covid.²³⁴ The government of Argentina legislatively prohibited dismissals without cause during the pandemic.²³⁵ Rather, through collective bargaining

²²⁴ Ibid at 421

²²⁵ Minter, Kate. "Negotiating labour standards in the gig economy: Airtasker and Unions New South Wales." (2017) , 438.

²²⁶ Larue, Bruno. "Labor issues & COVID-19." (2020) 68(2). *Canadian Journal of Agricultural Economics/Revue canadienne d'agroeconomie* ,231.

²²⁷ Ibid at 231

²²⁸ Cortes, Guido Matias, & Eliza Forsythe. "Heterogeneous Labor Market Impacts of the COVID-19 Pandemic." (2020). *ILR Review* .

²²⁹ Khamis, Melanie, et al. "The early labor market impacts of covid-19 in developing countries." (2021).

²³⁰ Ibid at 4

²³¹ Jain, Ronak, et al. 'The labor market and poverty impacts of covid-19 in South Africa.' (2020).

²³² Ibid at 5

²³³ Ibid at 5

²³⁴ Aumayr-Pintar Christine. "Minimum wages in 2021: Most countries settle for cautious increase." (2021).

²³⁵ Sindicato Empleados de Comercio de Junín. "Convenio de emergencia por suspensión de actividades para el sostenimiento de los puestos de trabajo y la actividad productiva"(2020).

emergency measures implemented, which also consisted of 25% wages cut for workers in non-essential sectors.²³⁶ The similar transpired in Chile, the businesses together with workers agreed to reduced wages from 6% in early April 2020 to 15% in July in the same year.²³⁷ In Ethiopia, the private sector had a 6% wages cuts in February 2022.²³⁸ In India, the formal workers experienced 3.3% wages cuts, while the informal sector experienced an intense 22.6% wage cuts.²³⁹ Paraguay adopted temporally wage cuts measures in the public sector in order to focus more funds to their public health system.²⁴⁰ The Uruguay government implemented a 20% wage cut for their public officials, while in Burkina Faso a portion of their civil worker's salaries were redirected to covid response measures.²⁴¹ The United States witnessed intense labor market effects as early as April, after implementing lockdown by the end of March 2022.²⁴² The unemployment rate hiked to 14.7%, while the average wage index escalated to 106.6.²⁴³ Job losses were more concentrated amongst workforce without any tertiary education compared to those with some form of formal qualification.²⁴⁴ In countries such as Denmark and Romania, there are no notable effects of the pandemic on wages.²⁴⁵

The surge of covid resulted in some countries temporally suspending minimum wage adjustments.²⁴⁶ For instance, the authorities in Peru suspended minimum wage increase to

²³⁶ Ibid at 35

²³⁷ See Instituto Nacional de Estadística, Chile: https://www.ine.cl/docs/default-source/sueldos-y-salarios/boletines/esp%C3%B1ol/base-anual-2016-100/m%C3%B3dulo-covid-19-ir-icmo/bolet%C3%ADn_covid_amjj.pdf?sfvrsn=a1a46ea9_12.

²³⁸ ILO, JCC, and Ethiopoll. 2020. Rapid labour force survey of COVID-19 impact in Ethiopia, August.

²³⁹ Estupiñan & Mohit Sharma, M. 2020. "Job and wage losses in informal sector due to the COVID-19 lockdown measures in India", August 2020. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680379 [15 Oct. 2020].

²⁴⁰ Gamba Laura. "Paraguay to Cut Public Sector Wages over COVID-19." (2020) , Anadolu Agency.

²⁴¹ García-Escribano, Mercedes, & Chadi Abdallah. "Issues When Cutting Government Pay to Help Reshuffle Spending in a Crisis, Fiscal Affairs," (2020) IMF Special Series on Fiscal Policies to Respond to COVID-19.

²⁴² INTERNATIONAL LABOUR OFFICE. 'Global Wage Report 2020-21: Wages and minimum wages in the time of COVID-19.'(2020) . International Labour Office, 37.

²⁴³ Ibid at 37

²⁴⁴ Ibid at 37

²⁴⁵ Ibid at 38

²⁴⁶ Wakhyuni Emi, Siti Nurhayati and Abdi Setiawan. 'Analysis of Wages and Severance Pay During the Covid-19 Pandemic Reviewed from Labor Law.' (2022) *Ilomata International Journal of Management* 3, no. 3: 319-336.

prevent further deterioration of the economy.²⁴⁷ Countries such as New Zealand, North Macedonia, United Kingdom, and Venezuela persisted with their minimum wage adjustment plans despite the pandemic's effect on their economies.²⁴⁸ There were calls to cancel or delay the adjustments, particularly in New Zealand, in consideration of the economic climate.²⁴⁹ The government, however, persisted with the adjustments on the basis that they would improve the workers' buying power and overall, the economy.²⁵⁰ It was a similar case with the UK, the government continued with wage adjustments despite calls for postponements.²⁵¹ The largest minimum wage increases in 2020 were in countries that adjusted their minimum wages in an interval of several years.²⁵² The government of the Plurinational State of Bolivia turned down the call of 15% minimum wage raise by the workers, arguing it would pose a threat of employment instability.²⁵³ The government of Mozambique raised the same concerns in 2020, while in Myanmar the minimum wage negotiations were suspended for at least the first three months of the eruption of Covid.²⁵⁴ The local government of the Punjab region of India reversed the announcement of minimum wage increase during the surge of covid.²⁵⁵ In Costa Rica, the government decided to reverse the announcement of minimum wage increase for civil servants, in order to focus more funds to the health facilities.²⁵⁶

²⁴⁷ Gestión. 'Ministra de Economía: 'No estamos en condiciones de comprometernos a un aumento del sueldo mínimo' (2020).

²⁴⁸ Small, Zane. "Jacinda Ardern Rules Out Delaying Minimum Wage Increase amid COVID-19 Economic Pressure."(2020) , Newshub.

²⁴⁹ Ibid at 10

²⁵⁰ Ibid at 10

²⁵¹ Tkinson, Andrew. 2020. "UK Should Delay Minimum Wage Rise to Help Companies, Says Think Tank". (2020) .Bloomberg.

²⁵² Ibid

²⁵³ Montes, Lorena Amurrio. "Incremento salarial se tratará luego de la pandemia." (2020).Los Tiempos.

²⁵⁴ Euronews. 2020. "Pandemia dita suspensão das negociações para subir salário mínimo", 16 April 2020.

²⁵⁵ Jha, Somesh. "Punjab Drops Hike in Minimum Wage, Says Situation 'Not Appropriate'".(2020) Business Standard.

²⁵⁶ Costa Rica, Ministry of Finance. "Hacienda solicita a Procuraduría reconsiderar criterio sobre aumento salarial del sector público".(2020) .

Chapter 2: ILO Standards and The National Minimum Wage in South Africa

2.1 The International Labour Organisation and Minimum Wage

2.1.1 A Brief History of the Minimum Wage

The minimum wage was developed towards the end of the 19th century in New Zealand and Australia, it was adopted in the UK in 1909, covering a few industries.²⁵⁷ The ILO adopted for the first time a Minimum Wage- Fixing Machinery convention (26) in 1928²⁵⁸, following a proposal by the British government in 1920's.²⁵⁹ This Convention was in its effect limited to commerce and did not include agriculture, which consisted of a significant portion of labour force during that time.²⁶⁰

The concern at the time was that minimum wage was present only in few countries, and its protection was limited to workers from particular industries.²⁶¹ The convention emphasized the protection of workers payment in the lowest paying sectors, and those did not have provision for collective bargaining.²⁶² The convention had 108 ratifications and is acknowledged as having a significant role in the wide adoption of the minimum wage in 20th century.²⁶³ The idea of national minimum wage was on a decline after World War II, the oil crisis in 1973, debt crisis in developing countries in 1980 and structural adjustment policies in 1980s and 1990s.²⁶⁴ The UK abolished Wage Councils from 1980s to 1993, following a call for flexible

²⁵⁷ Gerald Starr Minimum wagefixing : An international review of practices and problems Geneva, International Labour Office, 1981. Also see ILO website https://www.ilo.org/global/topics/wages/minimum-wages/definition/WCMS_439071/lang--en/index.htm

²⁵⁸ The Minimum Wage- Fixing Machinery convention (26) of 1928

²⁵⁹ Ibid

²⁶⁰ Syed Robayet. 'Mechanisms implementing minimum wage policies and compliance with the ILO's provisions: the case of Bangladesh's Garment Global Supply Chain.' (2020). *E-Journal of International and Comparative Labour Studies* .

²⁶¹ Ibid

²⁶² Ibid

²⁶³ Ibid

²⁶⁴ Cornia, Giovanni Andrea, & Sampsa Kiiski. "Trends in income distribution in the post-World War II period: Evidence and interpretation." (2001) : pg 3 . Belser, Patrick, and Uma Rani. "Minimum wages and inequality." (2015) .*Labour markets, institutions and inequality*. Edward Elgar Publishing,123.

labour markets and eradication of labour market distortions by Washington DC.²⁶⁵ It however regained its momentum in the last two decades.²⁶⁶ In 1999, The UK introduced a minimum wage system with national coverage, due to increasing child poverty.²⁶⁷ Proactive minimum wage policies in middle income industrial countries such Brazil, China and South Africa have also revived the adoption of minimum wages as an instrument for social protection.²⁶⁸

2.1.2 The ILO's Definition of the Minimum Wage

According to the ILO's committee of experts, the minimum wage is the amount of remuneration that the employer is required to pay the worker for the work they had performed during a given of period.²⁶⁹ It cannot be reduced by the individual's contract or collective agreement.²⁷⁰ The ILO's committee of experts had earlier defined it as the amount of remuneration which in each country is enforceable through the law, the threat of punishment of appropriate sanction.²⁷¹ The instruments of ILO relevant to minimum wage also acknowledged that minimum wage could be set by wage boards or councils, legitimate authorities, labour courts or tribunals, legal frameworks, or statutes, or by giving force of law to collective agreements.²⁷² Hence, binding minimum wages stipulated through the means of collective agreements by public authorities are mentioned in the ILO's definition of minimum

²⁶⁵ Belser, Patrick, and Uma Rani. "Minimum wages and inequality." (2015) *Labour markets, institutions and inequality*. Edward Elgar Publishing ,125.

²⁶⁶ Ibid at 134

²⁶⁷ Piachaud, David, & Holly Sutherland. 'How Effective is the British Governments Attempt to Reduce Child Poverty?.'(2000) . *LSE STICERD Research Paper No. CASE038* (2000). Atkinson, Anthony B., et al. 'Reducing poverty and inequality through tax-benefit reform and the minimum wage: the UK as a case-study.' (2017) 15(4) *The Journal of Economic Inequality* ,303.

²⁶⁸ Supra note 7

²⁶⁹ILO (2014), *Minimum wage systems*, General Survey of the reports on the Minimum Wage Fixing Convention, 1970 (No.131), and the Minimum Wage Fixing Recommendation, 1970 (No.135) . Also see Report of the Committee of Experts

on the Application of Conventions and Recommendations, ILC, 103rd session, 2014, Report III (Part 1B), Geneva: International Labour Office.

²⁷⁰ Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC, 103rd session, 2014, Report III (Part 1B), Geneva: International Labour Office.

²⁷¹ ILO (1967), *Report of the Meeting of Experts on Minimum Wage Fixing and Related Problems, with Special Reference to Developing Countries*, presented at the 170th session of the Governing Body of November 1967, Geneva: International Labour Office.

²⁷² Minimum Wage-Fixing Machinery Recommendation, 1970 (No. 135).

wages.²⁷³ In line with this broad definition, 164 out of 185 ILO member states had a minimum wage system in place.²⁷⁴ This was inclusive of 159 countries that had minimum wage extending to private sector, and 5 countries which it was based on extensions of collective agreements.²⁷⁵ Minimum wage is today a universal wage policy instrument through which countries establish fair remuneration systems.²⁷⁶

2.1.3 The ILO's International Labour Standards

The ILO embodies the most important International Labour Standards (ILS) through its Conventions and Recommendations.²⁷⁷ It by 1993 had adopted 174 Conventions and 181 Recommendations, which are otherwise known as International Labour Standards²⁷⁸. The Conventions and Recommendations are adopted by the International Labour Conference at its annual conference.²⁷⁹ They result from the discussions by the ILO's constituency which constitutes of governments, employer representatives and workers of each member state.²⁸⁰ The Conventions have binding obligations under international law, once they have voluntarily approved by the states. They are also under supervision of the ILO.²⁸¹ The governments have to report to the ILO regularly how they are implementing the ratified conventions.²⁸² The governments must provide the copies of the reports to employers and worker representative in their countries, who can make their own comments on the reports.²⁸³

²⁷³ Para op cite note 231 at 125

²⁷⁴ Supra note 237

²⁷⁵ Ibid at 237

²⁷⁶ Ibid at 237

²⁷⁷ Remuneration and International Labour Standards”, in *Bulletin of Comparative Labour Relations* (Deventer), No. 19, 1990, pp. 37-60.

²⁷⁸ Standing, Guy. ‘The international labour organization.’ (2010) *New Political Economy* 15, 318. Also see Koliev, Faradj. ‘Promoting international labour standards: The ILO and national labour regulations.’ (2022), *The British Journal of Politics and International Relations* 24, 361

²⁷⁹ Maupain, Francis. ‘*The future of the International Labour Organization in the global economy.*’ (2013). Bloomsbury Publishing.

²⁸⁰ Ibid

²⁸¹ Haworth Nigel and Steve Hughes. ‘The International Labour Organization.’ (2012). *Handbook of Institutional Approaches to International Business*, 204.

²⁸² Ibid

²⁸³ Silva Vicente. ‘The ILO and the future of work: The politics of global labour policy.’ (2022). *Global Social Policy* 22, 341-358.

There are three sets of international labour standards by the ILO which are concerning remuneration policy.²⁸⁴ These are supplemented by those that affect pay but are not directed at it.²⁸⁵ Some ILO instruments that do not consist of the word wage or pay but have a significant impact on pay; Freedom of Association and Protection of the Right to Organise Convention 1948 (No.87).²⁸⁶ The second one is the Right to Organise and Collective Bargaining Convention, 1949 (No. 98).²⁸⁷ These are two prominent instruments of the ILO that deal with Freedom of association, whereas they have some effect on wage regulation.²⁸⁸ In their interpretation, it has been held that the right to negotiate wage and conditions of employment makes up a fundamental aspect of freedom of association.²⁸⁹ Therefore, trade unions should be equally able to exercise this right as employers and their organisations.²⁹⁰ Convention No.87 is applicable to work in both the public and the private sector, whereas Convention No. 98 does not deal cover worker in administration of the state or public servants.²⁹¹

The first set is the Minimum Wage- Fixing Convention 26 of 1982 and Recommendation No.30.²⁹² The ILO convention (No.26) do not necessarily mandate the level of minimum wage, they are rather concerned with mechanisms or procedures used at deciding on the level.²⁹³ It was primarily directed to workers whom in their trade there was no effective regulation of pay by collective agreement, or any other means and the remunerations is significantly low.²⁹⁴ The

²⁸⁴ Ibid

²⁸⁵ Swepston Lee. 'Crisis in the ILO supervisory system: Dispute over the right to strike.'(2013). *International Journal of Comparative Labour Law and Industrial Relations* 29.

²⁸⁶ Freedom of Association and Protection of the Right to Organise Convention 1948 (No.87)

²⁸⁷ Right to Organise and Collective Bargaining Convention, 1949 (No. 98)

²⁸⁸ Teklè, Tzehainesh. "The contribution of the ILO'S international labour standards system to the European Court of Human Rights' jurisprudence in the field of non-discrimination." (2020), *Industrial law journal* 49, 112.

²⁸⁹ Ibid

²⁹⁰ Ibid

²⁹¹ Supra note 285

²⁹² Amin, Muhammad. 'Fixing Minimum Wage in Pakistan: Comparative Analysis of the ILO Convention No. 131 and the Islamic Principles of Adal and Ihsan.'(2022) , *Manchester Journal of Transnational Islamic Law & Practice*.

²⁹³ Bomba, Katarzyna. 'Role of the minimum wage in promoting decent work and reducing inequality in a cohesive society108.'(2022) *Human Rights As A Guarantee Of Smart, Sustainable And Inclusive Growth* , 93.

²⁹⁴ Ibid

statutory intervention is supposed to be an interim solution, until it can be replaced by collective bargaining in the target sectors.²⁹⁵ The Minimum Wage Fixing-Convention ,1928 (N0.26) and Recommendation No.30 were a supplement, so protection extends workers in Agricultural sector.²⁹⁶ The Minimum Wage-Fixing Convention No.131 and Recommendation No.135 was adopted in 1970, particularly referenced developing countries.²⁹⁷

The second prominent set of ILO standard concerning pay is the Protection of Wages Convention (No. 95) and Recommendation (No.85), adopted in 1949.²⁹⁸ These standards deal with the worker's right to be paid for the worked they have performed, and the systems by which they are paid.²⁹⁹ They were later supplemented by the Protection of Workers' Claims Convention (No.173)³⁰⁰ and Recommendation No. 180. The third significant set of ILO Labour Standard regarding payment are those that have to do with prevention of discrimination in employment.³⁰¹ The first of these was the Equal Remuneration Convention (No.100) and Recommendation (No.90), adopted in 1951.³⁰² These dealt with equal pay for equal work, between men and woman.³⁰³ There is also Discrimination Convention (No.111) and

²⁹⁵ Ibid

²⁹⁶ The Minimum Wage Fixing-Convention ,1928 (N0.26) and Recommendation No.30

²⁹⁷ Minimum Wage Fixing Convention, 1970 (No.131), requires that all each state or country establish a national minimum wage system which extend to all workers whom their terms of employment would be appropriate. Article 3 of the Convention is also particular in how the level of minimum wage should be set. It mentions the following elements which should be considered in determining the level of minimum wages:

(a) the needs of the workers and their families, considering the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;

(b) b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment

²⁹⁸ ILO Convention 95 The Protection of Wages Convention, 1949.

²⁹⁹ Ibid

³⁰⁰ ILO Convention 173 Protection of Workers Claims Convention, 1992 also known as Employer's Insolvency.

³⁰¹ Ibid

³⁰² ILO Convention 85 the Equal Remuneration Convention,

³⁰³ Supra note 252

Recommendation adopted in 1958.³⁰⁴ The Convention aimed at establishing equal treatment and opportunity in the workplace.³⁰⁵ It is essentially aimed at abolishing discriminatory treatment in employment and occupation.³⁰⁶

The ILO has a hybrid approach of laissez-fair liberalism and legislative intervention, in determining the wage fixing parameters.³⁰⁷ The ILO's supervisory machinery has hope that the labour market progresses towards collective bargaining, rather than long term statutory intervention.³⁰⁸ The use of legal framework should anticipate a more negotiation friendly labour climate.³⁰⁹ However, there are sectors which demand the involvement of government in protecting the interests of workers.³¹⁰ The Labour inspection Convention, 1947(No.81) and Recommendation (No.81)³¹¹, provides that states should consist of a labour inspection system to ensure compliance with the stipulated wages. Labour Inspections are an important system of support, in ensuring compliance with existing wage frameworks.³¹²

2.2 The NMWA Setting in South Africa

Determination of minimum wage in SA is based on the Labour Relations Act (LRA) of 1995

³⁰⁴ILO Convention 111 The Discrimination Convention, 1958.

³⁰⁵ Ibid

³⁰⁶ Supra note 252

³⁰⁷ Edgren Gus, 'Fair Labour Standards and Trade Liberalisation', *International Labour Review*, ILO, Geneva, Vol. 118 No. 5, September-October 1979, pp. 523-36. Also see Shaheed Zafar. 'Minimum wages and low pay: An ILO perspective.' *International Journal of Manpower*, 1994.

³⁰⁸ 'Minimum wages and low pay: An ILO perspective.' *International Journal of Manpower*, 1994 at 58

³⁰⁹ Ibid

³¹⁰ ILO Convention 81 The Labour Inspection Convention, 1947

³¹¹ Ibid

³¹² David Weil . 'A strategic approach to labour inspection.' (2008) 147(4) *International Labour Review*, 349.

³¹³, Basic Conditions of Employment of 1997 and the National Minimum Wage Act.³¹⁴ Section 23(5) of the Constitution³¹⁵ makes provision for collective bargaining, and the LRA³¹⁶ informs the legal framework within which bargaining can transpire. The latter sets out basic rights and minimum working conditions for all employees, regardless of whether they belong bargaining council.³¹⁷ It also makes provisions for sectoral determinations, which sets minima for sectors, such as domestic work, where collective bargaining is not present.³¹⁸ The International Labour Organisation (ILO) convention N0.131³¹⁹ submits in determination of the minimum wage, there should be first; the consideration of the need of workers and their families, inconsideration of cost of living, social security benefits and countries general wage level.³²⁰ Secondly; there should be consideration of local countries' economic factors such as economic developments requirements, level of productivity and the need to achieve high employment levels.³²¹

2.2.1 Sectoral Approach Vs Across-the - board Approach

The application of minimum wage calls for the consideration of the system of implementation, and the level at which it will be set.³²² The two most common options of system of

³¹³ The Labour Relations Act (LRA) of 1995 , alongside with Basic Conditions of Employment Act of 1997 give effect to the constitutional principle of fair labour practices . This legislation regulates and facilitates the employment relationship between employers (and employer's organisation) and workers(and their trade unions) . It regulates organisational rights , facilitates collective bargaining and provides recourse for employees who deem that their rights organisational and constitutional rights been violated These legislations are most relevant as remunerations or payments is the is most notable matter of mutual interest in the employment . Numerous literatures have expressed that wages are the primary course of industrial action , which guided

³¹⁴ The National Minimum Wage Act 9 of 2018 (hereafter; the minimum wage)

³¹⁵Section 23 (5) of the Constitution:

- Every trade union, employers' organisation and employer have the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)

³¹⁶

³¹⁷ Cottle, Eddie. "An Overview of the Living Wage and the national Minimum Wage in South Africa." (2014). *Bargaining Indicators 2014: Twenty Years-A Labour Perspective*

³¹⁸ Ibid

³¹⁹ The International Labour Organisation (ILO) convention N0.131

³²⁰ Ibid

³²¹ Supra note 265

³²² Aumayr-Pintar, Christine. "Fears and hopes around future minimum wages." (2020), 25.

implementation are an across-the-board single national minimum wage, and a sector specific minimum wage or the hybrid of the two approaches.³²³ In a sectoral approach, the wage can be set by the government or could be agreed upon through collective bargaining.³²⁴ There are very few countries which have opted for an across board minimum wage.³²⁵ South Africa adopted the sectoral approach route prior to the introduction of a national minimum wage, and is regarded as an example of complex wage setting system.³²⁶ In setting of wage level, the goal is to observe a balance between dignified wages and guarding against the destabilisation of the labour market and the economy.³²⁷ The issue with sectoral approach towards the minimum wage is poor enforcement. Bhoharat, Kunbur and Mayet (2012) found 44% of workers were paid 35% lower than the stipulated sectoral payment.³²⁸ COSATU had proposed that the government should set an across board minimum wage, which would be a bit higher than the lowest sectoral minimum wage which has been set till the year 2014.³²⁹ Their argument was that a high blanket minimum wage is in line with the international norms and would not temper with employment. In year 2012, COSATU had presented concept written by Neil Coleman³³⁰ who was a strategist at the time. The proposal was that the minimum be set between R4800 and R6000 per month, it had suggested R2800 a month in the organisational report.³³¹ COSATU continued to recommend R4500 per month in year 2013.³³²

³²³ Bruttel, Oliver. "The effects of the new statutory minimum wage in Germany: a first assessment of the evidence." (2019) 53(1) *Journal for labour market research*, 13.

³²⁴ Ibid at 3

³²⁵ Tito Boeri. "*Setting the minimum wage.*" (2012) . *Labour Economics*.

³²⁶ Ibid at 7

³²⁷ Ibid at 2

³²⁸ Haroon Bhoharat, Ravi Kanbur, & Natasha Mayet. "*Minimum wage violation in South Africa.*" (2012) . *International Labour Review*, 278.

³²⁹ Jeremy Seeking & Nicoli Nattras '*What is the issue in the minimum wage debate*' University of Cape Town, (2015).

³³⁰ Neil Coleman. Concept Paper: Towards New Collective Bargaining, Wage and Social Protection Strategies: Learning from the Brazilian Experience. Input to COSATU Central Executive Committee, May.

³³¹ Ibid

³³² Supra note 213.

SACTWU approved of sectoral minimum wage by arguing that it is able to look into the interests of the particular sectors and its workers.³³³ It further argued that a blanket approach would not take into consideration the cost structure of each industry.³³⁴

The policy guide of the ILO³³⁵ mentions 5 factors which may qualify adoption of the sectoral approach. These factors are sector, occupation, size of enterprise, region, and population.³³⁶ At the heart of these factors is the observation of economic and social nuances which would make a blanket minimum wage more detrimental than redemptive.³³⁷ Workers in the domestic work and farming sector have low job security, introducing a uniform minimum wage is likely to pose a threat on their employment.³³⁸ The sectoral approach can, however, not be used to excuse the stipulation of low wages, but rather as system to observe the needs of both employer and employee, without any industrial hazard.³³⁹

2.2.2 Sectoral Determinations Process

Chapter 8 of the BCEA³⁴⁰ provides guidelines for the sectoral determination in South Africa. The sectoral determinations come as a result of the Minister of Labour's instruction to the director general to investigate employment condition in the particular sector.³⁴¹ It can be of the minister's discretion or a written request of investigation by a trade union or employers' organisation. In case of request by trade unions and employer organisations, the minister can either order the investigation or seek advice from the Commission³⁴² of the need for investigation.³⁴³ Investigation is made up of written representations by members of the public,

³³³ The National Minimum Wage: A Contribution to the Debate', by Lesley Maasdorp & Mark Bennett for SACTWU, sent to the COSATU Living Wage Working Group, 24 June 1990.

³³⁴ Ibid

³³⁵ Minimum Wage Fixing Recommendation, 1970 (No. 135)

³³⁶ Supra note 280

³³⁷ Supra note 95

³³⁸ Taryn Dinkelman & Vimal Ranchhod. 'Evidence on the impact of minimum wage laws in an informal sector: Domestic workers in South Africa.' (2012) *Journal of Development Economics*, 27.

³³⁹ Ibid at 27

³⁴⁰ Act 75 of 1997

³⁴¹ Section 52(1) of BCEA, 1997:

- The Minister may make a sectoral determination establishing basic conditions of employment for employees in a sector and area.

³⁴² Supra note 286

³⁴³ Section 52(4) of BCEA, 1997:

the conduction of a research and public hearing for individual organisation inputs.³⁴⁴ The Commission must take the report into consideration and advise the minister on sectoral determinations³⁴⁵. The advice must be factor in the report by director general, the employer's profitability, operation of small to medium enterprises, abolishment of poverty, conditions of employment, wage difference and inequality.³⁴⁶

2.2.3 Minimum Wage Calculation in South Africa

The calculation of the national minimum wage in South Africa is guided by section 5 of the minimum wage Act.³⁴⁷ The calculation of the minimum wage level is set by considering the cost of living, the median or mean wages, and the economic factors such effects on employment.³⁴⁸ The general minimum wage level is set at R21.69 for 2021, there are different tiers for workers in domestic sector, agriculture, and the expanded public works program.³⁴⁹ The agricultural and domestic starter are two big sectors earning below the general set level, in the efforts to maintain their affordability to employers.³⁵⁰ The expanded public works programmes are set at lower level due to that they are intended at providing work and training.³⁵¹ The South African minimum wage is calculated on hourly basis, for instance a domestic worker is entitled to R19.09 for every hour they spend on duty.³⁵²

There are different rates which other countries have assumed, the hourly rate is however simple and easier to monitor³⁵³. There is however a risk that some employers might reduce the hours of work to minimize cost of production, especially for casual and seasonal workers.³⁵⁴ Section

(4) If an organisation representing employers or employees in a sector and area makes a written request to the Minister to investigate conditions of employment in that sector and area, the Minister must either:

(a) direct the Commission to investigate; or

(b) request the Commission to advise the Minister on whether the requested investigation ought to be conducted.

³⁴⁴ Section 54(1) of the BCEA ,1997

³⁴⁵ Section 52(2) of the BCEA ,1997

³⁴⁶ Section 54(3) (a-j) of the BCEA ,1997

³⁴⁷ National Minimum Wage Amendment Act, No. 3 of 2020

³⁴⁸ <https://www.labour.gov.za/employment-and-labour-minister-tw-nxesi-announces-minimum-wage-increases>

³⁴⁹ Ibid

³⁵⁰ Ibid

³⁵¹ Ibid

³⁵² Ibid

³⁵³ Supra note 85 ; op cit note 32

³⁵⁴ Ibid

4 of the minimum wage Act³⁵⁵ also holds that it is unfair labour practice for an employer to temper with wages, hours of work and other conditions of employment in relation with the implementation of NMWA.³⁵⁶ Section 9 of the of the BCEA³⁵⁷, stipulates 45 ordinary working hours per week. The term ‘ordinary hours of work’ is very pertinent in terms of NMWA as it makes up the definition of wage in BCEA. There has however been contention with the stipulation of weekly maximum hours of work, the trade unions were advocating for 40 hours. The Act however set the 45 hours as ordinary weekly working hours. Section 6 (1) of NMWA³⁵⁸ stipulates that the minimum wage level is to be reviewed annually, to keep up with the inflation rates³⁵⁹.

³⁵⁵ Section 4 (8) of the NMWA of 2018:

- It is an unfair labour practice for an employer to unilaterally alter wages, hours of work or other conditions of employment in connection with the implementation of the national minimum wage and sections 191, 193, 194 (4) and 195 of the Labour Relations Act apply, unless the context indicates otherwise.

³⁵⁶ Ibid

³⁵⁷ Section 9 of the of the BCEA, 1997:

- (1) Subject to this Chapter, an employer may not require or permit an employee to work more than:
 - (a) 45 hours in any week; and
 - (b) nine hours in any day if the employee works for five days or fewer in a week; or
 - (c) eight hours in any day if the employee works on more than five days in a week.

³⁵⁸ Section 6 of the NMWA ,2018:

(1) The Commission must review the national minimum wage annually and make recommendations to the Minister on any adjustment of the national minimum wage, which minimum wage must commence on a date fixed by the President by proclamation in the Gazette.

(1) Subject to this Chapter, an employer may not require or permit an employee to work more than

³⁵⁹ Section 7 of the NMWA , 2018:

Conduct of annual review.—

For the purposes of conducting an annual review and recommending adjustments, the Commission must—
promote—

- (i) the medium-term targets referred to in section 11 (d);
- (ii) the alleviation of poverty; and
- (iii) the reduction of wage differentials and inequality; and consider—
- (iv) inflation, the cost of living and the need to retain the value of the minimum wage;
- (v) wage levels and collective bargaining outcomes;
- (vi) gross domestic product;
- (vii) productivity;

2.2.4 Payment In-kind

In the developing countries, the informal economy, especially domestic workers, has high prevalence of payment in-kind.³⁶⁰ This kind of payment is when an employer pays the employee non-monetary goods and service as part of their payment for their labour. It is normally through the giving of groceries, clothing, and subsidised housing. This form of payment does have its advantages such as that its quantity is not affected by inflation. However, Boeri³⁶¹ argues that this system of remuneration is more open to abuse, that is if it achieves any good. The workers are left with less freedom to buy what they desire from the market, with a portion of their salary being paid in items.³⁶² The risk is goods handed out by the employer could be of lesser quality, value, and utility to the needs of the worker. The ILO protection of Wages Convention 95 acknowledges various payment in kind, with the exception of liquor and drugs.³⁶³ ILO Protection of Wages Convention 95, 1949. The convention holds that payment in-kind may only be an addition or complement cash payment. They should essentially be of personal benefit, be of reasonable proportion and quality.³⁶⁴ It however holds that local government can exercise discretion with regards to its permissibility on their local countries.³⁶⁵ Section 5 (1) of the act³⁶⁶ rules out payment in-kind as part of the minimum wage, to avoid employers from paying

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- (viii) ability of employers to carry on their businesses successfully;
 - (ix) the operation of small, medium or microenterprises and new enterprises;
 - (x) the likely impact of the recommended adjustment on employment or the creation of employment; and
 - (xi) any other relevant factor.

³⁶⁰ Supra note 44

³⁶¹ Supra note 99

³⁶² Amin Muhammad. 'Fixing Minimum Wage in Pakistan: Comparative Analysis of the ILO Convention No. 131 and the Islamic Principles of Adal and Ihsan.'(2020). *Manchester Journal of Transnational Islamic Law & Practice* 18.

³⁶³ ILO Protection of Wages Convention 95, 1949.

³⁶⁴ Also See United Nations. 1993. *System of National Accounts 1993 (SNA93)*, prepared jointly by the Commission of the European Communities, IMF, OECD, UN Statistical Division and the World Bank. Available at <http://unstats.un.org/unsd/nationalaccount/docs/1993sna.pdf>.

³⁶⁵ Ibid Supra note 306

³⁶⁶ Section 5(1) of the NMWA ,2018:

(1) Despite any contract or law to the contrary, the calculation of a wage for the purposes of this Act is the amount payable in money for ordinary hours of work excluding—
any payment made to enable a worker to work including any transport, equipment, tool, food or accommodation

workers with non-valuable goods. Even if they had to be valuable, they limit the employee choice and buying power as meaningful participant in the economy.

2.2.5 Minimum Wage Level 2022

The Minister of Labour Mr Thulasi Nxesi³⁶⁷ announced that nation minimum wage level for the year 2022, the minister of employment and labour Mr Thulasi Nxesi announced that the national minimum wage for each ordinary hour worked R23,19, taking effect from the 1st of March 2022.³⁶⁸ This amount reflects a 6.9% increase from minim wage R21,69 per ordinary hour, in 2021. The domestic worker sector is set at R23.19 per hour, there is an expectation is aligned with the farm worker sector on the next review.³⁶⁹ The expanded public works programme is set at R12.75, workers who have fulfilled learnerships agreement are to be paid allowances as stipulated by the national qualifications framework (NQF).³⁷⁰

2.2.6 NMWA Beneficiary

The gateway to enjoying the protection and provisions of NMWA is its definition a ‘worker.’ The NMWA Amendment Act³⁷¹ defines a worker as any person who works for another, who receives or is entitled to receive any payment for that work, whether in money or in-kind.³⁷² The definition of an employee is mostly common amongst the core labour statutes, including the BCEA, although others have different definitions.³⁷³ It is important that the difference between these statutes is reviewed, so that there are no loopholes in the protection of workers, and none are left to no protection.³⁷⁴ There is also a need to review the BCEA and LRA

allowance, unless specified otherwise in a sectorial determination;

any payment in kind including board or accommodation, unless specified otherwise in a sectorial determination;

gratuities including bonuses, tips or gifts; and any other prescribed category of payment.

³⁶⁷ Supra note 115

³⁶⁸ See <https://www.labour.gov.za/Media-Desk/Media-Statements/Pages/Minister-Thulasi-Nxesi-announces-2022-National-Minimum->

[Wageincreases.aspx#:~:text=Minister%20Thulas%20Nxesi%20announces%202022%20National%20Minimum%20Wage%20increases&text=Employment%20and%20Labour%20Minister%20TW,from%20R21%2C69%20to%20R23.](https://www.labour.gov.za/Media-Desk/Media-Statements/Pages/Minister-Thulasi-Nxesi-announces-2022-National-Minimum-Wage-increases.aspx#:~:text=Minister%20Thulas%20Nxesi%20announces%202022%20National%20Minimum%20Wage%20increases&text=Employment%20and%20Labour%20Minister%20TW,from%20R21%2C69%20to%20R23.)

³⁶⁹ Ibid

³⁷⁰ Ibid

³⁷¹ Chap 1 of the NMWA , 20.

³⁷² Ibid

³⁷³ Ibid

³⁷⁴ Supra note 33

definition of an ‘employee,’ the main point of contention is whether it should also include independent contractors.³⁷⁵ In this manner it would apply to ‘workers’ rather than ‘employees.’ Section 55 of the BCEA³⁷⁶ states that the Minister can regulate in sectoral determination; task-based work, piecework, homework, subcontracting and contract work. An example where it has been applied is the sectoral determination for domestic work sector. Section 3 of the Act³⁷⁷ explains that it shall apply to every worker and their employers, with the exception of South African National Defence Force, National Intelligence Agency, and South African Secret Service.³⁷⁸

³⁷⁵ Supra note 33

³⁷⁶ s 55 of the BCEA, 1997:

(1) After considering the report and recommendations of the Commission contemplated in section 54 (4), the Minister may make a sectoral determination for one or more sector and area or as contemplated by subsection (8).

(4) A sectoral determination may in respect to the sector and area concerned (

a) set minimum terms and conditions of employment, including minimum rates of remuneration;

(b) provide for the adjustment of remuneration by way of (

i) minimum rates; or

ii) minimum increases;

[Para. (b) substituted by s. 8 (b) of Act 20 of 2013 (wef 1 September 2014).]

(c) regulate the manner, timing and other conditions of payment of remuneration;

(d) prohibit or regulate payment of remuneration in kind;

(e) require employers to keep employment records;

(f) require employers to provide records to their employees;

(g) prohibit or regulate task-based

work, piecework, homework, subcontracting

and contract work;

[Para. (g) substituted by s. 8 (c) of Act 20 of 2013 (wef 1 September 2014).]

³⁷⁷ s3 of the NMW Amendment Act ,2020:

(1) This Act applies to all workers and their employers except members of the South African National Defence Force, the National Intelligence Agency and the South African Secret Service.

(2) This Act does not apply to a volunteer, who is a person who performs work for another person and who does not receive or is not entitled to receive, any remuneration for his or her services.

³⁷⁸ Ibid at s3(1)

The Act also consist of provision for certain employers or companies not to pay minimum under certain conditions.³⁷⁹ The following section discusses minimum wage exemptions as per the NMWA. It discusses loopholes in this provision that enable employers to avoid remunerating according to their wage obligations.

2.2.7 Minimum Wage Exemptions

Chapter 4 of the NMWA³⁸⁰, affords individual employers, or employers' organisation who are registered in terms of section 96 of the LRA³⁸¹, to apply for exemption from paying the national minimum wage.³⁸² The exemption process is a provision for employers who can demonstrate that they can afford to pay workers the stipulated minimum wage.³⁸³ Exemptions are different to exclusions in a sense that they allow the employer to not pay the stipulated rate for a certain period of time³⁸⁴. This provision aims to afford the employer reasonable time to build up capacity to pay minimum wage.³⁸⁵ There is a risk of many employers exploring this provision, in trying to escape their legal obligation to pay according to the regulations.³⁸⁶ The ILO has

³⁷⁹ Chap 4 of the NMWA deliberates on the bases on which companies or organisation satisfying a certain criterion can be eligible for not paying the stipulated national minimum wage for a specific period of time .

³⁸⁰ s15(1) of the NMW Amendment Act ,2020:

(1) An employer or an employers' organisation registered in terms of section 96 of the Labor Relations Act, or any other law, acting on behalf of a member, may, in the prescribed form and manner, apply for an exemption from paying the national minimum wage.

³⁸¹ s96 of LRA , 1995:

96 Registration of trade unions or employers' organisations

(1) Any trade union or employers' organisation may apply for registration by submitting to the registrar

(a) a prescribed form that has been properly completed; (b) a copy of its constitution; and
(c) any other information that may assist the registrar to determine whether or not the trade union or employers' organisation meets the requirements for registration.

³⁸²Supra note 166

³⁸³ Department of Employment and Labour 'Regulations to the National Minimum Wage Act ,2018' ,Government Gazette , December 2018. The Gazzette is also accessible online: www.gpwonline.co.za

The gazette provides a detailed requirements and procedure for applying for national minimum wage exemptions.

³⁸⁴ Umkehrer, Matthias, and Philipp Vom Berge. "Evaluating the minimum-wage exemption of the long-term unemployed in Germany." (2020) 73(5). *ILR Review* : 1118.

³⁸⁵ Ibid at 1096

³⁸⁶ Ibid

submitted the number of exemptions should be minimal, in order to not erode the effectiveness of the policy³⁸⁷. The most notable which are likely apply for exemption are small enterprises, family businesses and philanthropic organisations³⁸⁸. The eligibility and consideration are assessed on a case-by-case basis. Section 16 of the Act³⁸⁹ gives minister of labour, after the consultation of NEDLAC and the commission, a mandate to regulate on the process of application, and criteria of consideration and the period of exemption.³⁹⁰ The South African economy has high prevalence of small to medium entities, it is a fact that most of these organisations cannot yet afford to pay as much.³⁹¹

Section 16 of the NMWA³⁹² consists of regulations which aim to provide for manner in which exemptions must be made in accordance with section 15(1) of the Act. The Regulations Gazette

³⁸⁷ On the importance of sustainable enterprises, see <http://www.ilo.org/global/topics/employment-promotion/sustainable-enterprises/lang--en/index.htm>

³⁸⁸ Ibid

³⁸⁹ s16 of the NMWA ,2018:

- (1) The Minister must, after consulting NEDLAC and where appropriate after consulting the Commission, make regulations relating to—
the form and manner in which exemptions must be made in terms of section 15 (1), which include the—
(i) procedure for applying for an exemption; (ii) information to be submitted with an exemption application; (iii) obligations on employers to consult with employees or trade unions concerning an exemption application; (iv) criteria that must be applied when evaluating exemption applications; (v) period within which an application must be made; and (vi) period within which a decision on an exemption application must be made; and the publication of data on exemptions.
- (2) The Minister may make regulations which the Minister considers necessary or expedient to be prescribed in order to achieve the primary objects of this Act.
- (3) The Minister must publish the draft of any regulations that the Minister proposes to publish in terms of this Act in the Gazette and allow interested parties at least 21 days to comment in writing on the draft regulations.
- (4) If the Minister alters the draft regulations based on the comments received from interested parties, it shall not be necessary to publish those alterations before making the final regulations.
- (5) The Minister must table the regulations in Parliament.

³⁹⁰ Ibid

³⁹¹ Supra note 33

³⁹² s16 of the NMWA , 2018 :

16. Regulations.—

- (1) The Minister must, after consulting NEDLAC and where appropriate after consulting the Commission, make regulations relating to—

by the Department of Employment and Labour consist of application procedures, legal effect of exemption notice, display and copies of exemption, withdrawal of exemption notice, decision process and details to be included in the National Minimum wage Exemption System.³⁹³

The common criterion on other countries is the company's annual turnover, the number of employees and financial documentation showing unaffordability.³⁹⁴ The application of the same criteria in South Africa would still entail of risks.³⁹⁵ Companies are likely to provide illegitimate accounting documentation to misrepresent their annual turnover³⁹⁶. Some of the companies would be discouraged or avoid on-boarding more employees in keeping with the exemption floor³⁹⁷. There could also be higher rate of keeping workers at a volunteering or intern level in order to not raise the number of employments.³⁹⁸ Section 15 of the Act³⁹⁹,

the form and manner in which exemptions must be made in terms of section 15 (1), which include the— (i) procedure for applying for an exemption; (ii) information to be submitted with an exemption application; (iii) obligations on employers to consult with employees or trade unions concerning an exemption application; (iv) criteria that must be applied when evaluating exemption applications; (v) period within which an application must be made; and (vi) period within which a decision on an exemption application must be made; and the publication of data on exemptions.

³⁹³Gazette can be accessed on https://www.gov.za/sites/default/files/gcis_document/201812/42124gon1401.pdf

³⁹⁴ Haroon Bhorat, Ravi Kanbur, & Natasha Mayet. "A note on measuring the depth of minimum wage violation." (2013) .

³⁹⁵ In South Africa the criteria for micro enterprises is a maximum of 10 employees. Small businesses must have between 10 and 50 employees , and medium-sized enterprise can have up to 250 employees. The Small Enterprise Development Agency (SEDA) 3rd Quarterly Update 2020 which was released on March 2021 states that there were 2.36 million smalls to medium enterprises in third quarte of 2020 . These entities employed about approximately 10.1 million workers. Therefore, the adoption of offering exemption on the basis of size of the business would mean a significant number of workers would not benefit from economic relief intended by the NMWA.

³⁹⁶ Ibid

³⁹⁷ Stephen Devereux, "*Violations of farm workers' labour rights in post-apartheid South Africa.*" *Development Southern Africa*, 2020.

³⁹⁸ Ibid at 15

³⁹⁹ s15 of the NMWA ,2018:

(2) An exemption granted in terms of this section—
must specify the period for which it is granted, which may not be longer than one year;

does however stipulate that the period of exemption may not be longer than one year.⁴⁰⁰ The approval of exemption must specify the wage which the employer will be paying during the exemption period.⁴⁰¹ Other countries have exemption provision which are directly aimed at small and medium sized businesses.⁴⁰²

The focus of the next chapter is the particular factors which cause or at the least enable minimum wage violation. The chapter discusses limitations in the construction of the Act and explores employers' patterns of non-compliance. It also considers the workers' position as a victim of minimum wage violation, and their limitations in exploring available remedies. The deliberation on the particular factors is fundamental for identifying recommendations in respect of each factor.

Chapter 3: Factors enabling Violation of the Minimum Wage Act

3.1 Introduction

This chapter discusses factors which enable the violation of the NMWA. These factors manifest in parallel; given the South African economic circumstance. The mentioned factors are not exhaustive; however, their observation is important in improving the country's minimum wage Act compliance. The chapter begins by discussing inspectorate in South Africa and international labour literature. It engages on its role on the enforcement of the minimum wage, its historic and current circumstances which enable wage regulation violation.

The chapter will discuss the following factors; inspections, non-compliance penalties, labour casualisation, decline of trade union density, migration trends, informalisation and the informal sector, employee resources and facilities.

3.1 Inspections

According to the ILO the labour inspectors have the role and the responsibility to monitor and enforce Act national minimum wage.⁴⁰³ Their primary role is to promote and ensure

must specify the wage that the employer is required to pay workers; and may contain any other relevant condition.

⁴⁰⁰ Ibid

⁴⁰¹ Ibid Supra note 333

⁴⁰² Ibid note 333

⁴⁰³ ILO '*Minimum Wage Manual, Chapter 6*'. International Labour Organization, 2016.

compliance with labour regulations and fair labour practices in order to observe the basic rights of the workers and healthy industrial relations.⁴⁰⁴ In South Africa, the DoL is responsible for observation of labour legislations, including the minimum wage.⁴⁰⁵ The Inspection and Enforcement Services (IES) is the department's division that is responsible for the inspections which have been discussed above.⁴⁰⁶ The inspector has a mandate of informing both the employers and the workers about their rights and obligations as per the EEA.⁴⁰⁷

The South African labour inspectorate is confronted by the various challenges, of which one of them is the quality and quantity of labour inspectors.⁴⁰⁸ According to the ILO report, approximately 60% of inspectors in year 2009 were not in possession of any tertiary qualification.⁴⁰⁹ Although a qualification is not the sealing, lack of thereof does indicate a gap in necessary knowledge, skills, and training. Inspectors need to have a correct balance of necessary qualifications, skills, and personal attributes, so they are able to manoeuvre in range of situations and handle different people.⁴¹⁰ Labour inspectors in other countries such as Germany and Brazil, are required to be in possession of necessary tertiary qualification.⁴¹¹ Whereas other countries such as Macedonia only appoint lawyers with considerable experience as inspectors.⁴¹² In South Africa, the MoL may appoint any individual in the public service or designate any agent of a bargaining council to carry out the duties of a labour inspector.⁴¹³ As per the ILO Convention 81⁴¹⁴, inspectors should be appropriately qualified to enforce labour legislations pertaining working conditions. Article 9(1) of Convention 129⁴¹⁵ holds that

⁴⁰⁴ Department of Labour. *Administrative Data on Inspection and Enforcement Services*. Department of Labour, 2015.

⁴⁰⁵ Ibid at 11

⁴⁰⁶ Ibid at 11

⁴⁰⁷ Ibid at 13

⁴⁰⁸ Brian Murahwa. *Monitoring and enforcement: strategies to ensure an effective national minimum wage in South Africa* (2016).

⁴⁰⁹ ILO. *The Global Jobs Crisis & beyond. World of Work Report 2009*. Geneva: Internat. Inst. for Labour Studies, 2009.

⁴¹⁰ Supra note 342

⁴¹¹ Ibid at 81

⁴¹² Ibid at 82

⁴¹³ Supra note 191

⁴¹⁴ ILO Convention 81.

⁴¹⁵ Article 9(1) of ILO Labour Inspection (Agriculture) Convention 129:

inspectors should be on-boarded exclusively on their qualifications and performance of their roles, in line with national laws' regulation on recruitment of public servants.⁴¹⁶

3.1.1 High Inspector Turnover

The quality and insufficient number of labour inspectors is exacerbated by high turnover of the appointed inspectors.⁴¹⁷ The high turnover is reported to be due to low salaries and the limited career prospects within the inspectorate, which sees most of the qualified and high performing inspectors leaving for private sector or other expandable roles in the public sector.⁴¹⁸ Consequently, the department is left with a pool of underqualified and undertrained inspectors, with no proper transfer of expertise.⁴¹⁹ This issue was also confirmed by Director General of the department, where he also called for specialisation models to build career paths for inspectors.⁴²⁰

3.1.2 Lack of Inspector Resources

One of the main issues in South Africa is the insufficiency of inspection resources to reach out to all sectors effectively.⁴²¹ For instance, The Domestic Worker's sector is a significant sector which has been affected the most, by the major scarcity of inspections.⁴²² StatsSA (2015) reports that there were approximately 800 000 households that employ domestic workers in the country.⁴²³ The sector is predominantly made up of woman who mostly from disadvantaged backgrounds and are the main providers and sole providers for their families.⁴²⁴ A study which

1. This Convention shall be binding only upon those Members of the International Labour Organisation whose ratifications have been registered with the Director-General

⁴¹⁶ Ibid

⁴¹⁷ Benjamin, Paul. "Enforcement and sanctions to promote compliance with South African labour legislation." (2011) 1(32) . *Indus. LJ* , 807.

⁴¹⁸ Matthew Amengual. 'Linkages and Labour Inspectors: Enforcement in the Garment Workshops of Buenos Aires.'(2014).*Creative Labour Regulation*. Palgrave Macmillan, London, 207.

⁴¹⁹ Rodríguez, Arsenio Fernández, and Labour Inspection. "A study on labour inspectors' careers." (2020) , 48.

⁴²⁰ Ibid at 48

⁴²¹Devereux Stephen. 'Violations of farm workers' labour rights in post-apartheid South Africa.' (2020). *Development Southern Africa* 37, no. 3, 382.

⁴²² Ibid at 384

⁴²³ Department of Labour Statistics 2015

⁴²⁴ Ibid at 53

was conducted by Tenzer et al⁴²⁵, reports that DoL does not have sufficient resources to effectively inspect all employer households.⁴²⁶ The constraint of resources tempers with the inspectorate's mandate and capacity to reach out to vulnerable sectors, in which violation is more prevalent.⁴²⁷ Furthermore, there are currently no accurate records of household employing domestic workers, which make it systematically difficult to budget for thorough household's inspections in South Africa.⁴²⁸

3.1.3 Unreasonable Inspection Procedures

Different sectors have different procedures and inspection criteria, which have material impact on effective enforcement of NMWA.⁴²⁹ For instance, inspection in private residences employing Domestic Workers requires consent from the employer or homeowner.⁴³⁰ In cases where a homeowner refuses a voluntary inspection, it can only be enforced through a LC order.⁴³¹ The court is however under no obligation to issue the order, as per section 65(3) of BCEA.⁴³² The order may be issued after the inspector has stated the reasons why they suspect non-compliance.⁴³³ The procedure in the domestic work sector requires presence of both the employer and the employee.⁴³⁴ Most employees would avoid reporting non-compliance by their employers in fear of risking their employment.⁴³⁵ In other forms of employment such as outsourcing sub-contracts, there is also an issue of identifying the main employer who is responsible for the contracts and should account for the violation. In sectors such as farming, the DoL has an agreement with the employers and their associations that inspectors should give

⁴²⁵Ziona Tanzer, Kyle deCant, & Dan Terzian. '*The Transformation of Work: Challenges and Strategies.*' (2013).

⁴²⁶ Ibid

⁴²⁷ Ibid at 10

⁴²⁸ Ibid at 10

⁴²⁹ Adema, Joop, et al. "Minimum wages across countries." (2019) 16(4). *ifo DICE Report* : 55.

⁴³⁰ Ibid at 56

⁴³¹ Ibid at 56

⁴³² Section 65(3) of BCEA, 1997:

(3) The Labour Court may issue an authorisation contemplated in subsection (2) only on written application by a labour inspector who states under oath or affirmation the 50 reasons for the need to enter a place in order to monitor or enforce compliance with any employment law.

⁴³³ Ibid

⁴³⁴ Feder, Jade, and Derek Yu. 'Employed yet poor: low-wage employment and working poverty in South Africa.' (2020) *Development Southern Africa* 37, no. 3, 363.

⁴³⁵ Supra note 167

an inspection notice before conducting the actual inspections.⁴³⁶ Such requirements generally undermine the efforts of identifying the employers who should be held accountable for the violations.⁴³⁷ Unprincipled employers may also use the notices as an alarm for destroying non-compliance evidence.⁴³⁸ Inspectors also have a legal obligation to respect the employer's right to privacy, as per section 65 (2) of BCEA (1997).⁴³⁹ As result, it is more difficult to conduct inspection in private homes than public or other organisations.⁴⁴⁰

3.1.4 Awareness and Understanding of Inspections

The other hindrance to inspection is low level of awareness of the inspections, the possibility of inspections and the legal recourse available, mostly amongst the vulnerable workers.⁴⁴¹ The Social Law Project reported that many domestic workers are no aware of the minimum wage levels nor inspection.⁴⁴² Non-awareness in vulnerable sectors translate to low reporting of non-compliance.⁴⁴³ This is mostly relevant given that the employer's compliance is to some extent determined by the likelihood of being instigated or inspected.⁴⁴⁴ Stanwix⁴⁴⁵ reported that in the Western Cape Province, the probability of farmer being inspected was 0,13%, which also reflects other provinces.⁴⁴⁶ It therefore would make more sense for a farmer to pay their employees less than stipulated, given that there are low chances of ever accounting for it.⁴⁴⁷ It is more challenging to enforce minimum wage in vulnerable sectors, where employees are unorganised as compared organised workers with a designated workplace.⁴⁴⁸

⁴³⁶ Supra note 33

⁴³⁷ Op cit 33 at 15

⁴³⁸ Supra note 177

⁴³⁹ s65 (2) of BCEA (1997)

⁴⁴⁰ Supra note 167

⁴⁴¹ Social Law Project. '*Decent Workers: Decent Work for All Prepared for South African Domestic Services and Allied Workers Union (SADSAWU)*.' (2010).

⁴⁴² Ibid at 15

⁴⁴³ Ibid at 15

⁴⁴⁴ Kanbur Ravi, and Lucas Ronconi. 'Enforcement matters: The effective regulation of labour.'*International Labour Review* 157, 356.

⁴⁴⁵ Stanwix, Benjamin. '*Minimum Wages & Compliance in South African Agriculture*.'(2013).

⁴⁴⁶ bid

⁴⁴⁷ Ibid at 25

⁴⁴⁸ Ibid at at 25

Unawareness of the wage regulations is paralleled by ignorance towards the available recourse for workers in case of NMWA violation.⁴⁴⁹ The following section discusses penalties and sanctions as a consequence for non-compliance to wage regulations.⁴⁵⁰ It also expands on how vague and lengthy reporting procedures enable minimum wage violation. International literature shows that some employers would resort to violation with the confidence of not risking any punishment.⁴⁵¹ The workers also tend to not report if they are not aware of the remedies associated with the violation.⁴⁵²

3.2 Non-Compliance Penalties

The penalty system is very strategic in ensuring compliance with the stipulated minimum wage.⁴⁵³ The most effective method is setting the penalties at a level that outweighs the cost of compliance.⁴⁵⁴ High penalties and effective inspection make up an effective enforcement system.⁴⁵⁵ There is still a high rate of non-compliance, despite the current minimum wage penalty levels.⁴⁵⁶ This is indicative of a weak enforcement system which tempers with the country's labour and economic progress.⁴⁵⁷ A study conducted by Dinkelman et al⁴⁵⁸, reported that out of 1600 sampled household, only 25% remunerated according to the minimum wage.

3.2.1 Tedious Sanction Procedures

The difficulty of enforcing penalties is further worsened by the tedious processes of taking action against an employer found to be in contravention of the act.⁴⁵⁹ As mentioned above,

⁴⁴⁹ Galvin, Daniel J. "Deterring wage theft: Alt-labor, state politics, and the policy determinants of minimum wage compliance." (2016) , 324.

⁴⁵⁰ Ibid at 324

⁴⁵¹ Basu, Arnab K.; Chau, Nancy H.; Kanbur, Ravi. '*Turning a blind eye: Costly enforcement, credible commitment and minimum wage laws*', (2010): 269.

⁴⁵² Ibid 261

⁴⁵³ Supra note 180 ; op cit note 226

⁴⁵⁴ Basu, Arnab K.; Chau, Nancy H.; Kanbur, Ravi. '*Turning a blind eye: Costly enforcement, credible commitment and minimum wage laws*' (2010): 244.

⁴⁵⁵ Ibid

⁴⁵⁶ Ibid at 260

⁴⁵⁷ Ibid at 261

⁴⁵⁸ Taryn Dinkelman, Vimal Ranchhod, & Clare Hofmeyr. '*Enforcement and Compliance: The Case of Minimum Wages and Mandatory Contracts for Domestic Workers*' (2014): 1.

⁴⁵⁹ Lalitha Naidoo, Gilton Klerck, & Lebogeng Manganeng. '*The 'bite' of Minimum Wage: Enforcement of and Compliance with the Sectoral Determination for Farm Workers*' (2007): 25-46.

inspection is initiated by issuing a notice to the relevant employer.⁴⁶⁰ This may be following proactive inspections, follow-up on previous inspection, or as complaint lodged by employees.⁴⁶¹ The inspector will report to the workplace, after the notification, to acquire the necessary information.⁴⁶² This could be through company documentation, payslips or consulting with the employer or the employee.⁴⁶³

3.2.2 Compliance Enforcement Procedure

In the circumstances where there has been violation identified, the labour inspector issues a written report which describes the violation.⁴⁶⁴ The employer has a specific number of days to comply with the Act, after which the inspector returns to check.⁴⁶⁵ In case the employer has not complied, the inspector issues a compliance order which specifies fines they are liable for which they must comply with within 21 days.⁴⁶⁶ The case is then referred to Director General, which after the employer is given 21 days to comply, failure of which; the case is then referred to LC which there are 42 days for compliance.⁴⁶⁷ Tenzer et al⁴⁶⁸, mention that it might take up to 3 years before the matter reaches the LC.⁴⁶⁹ This procedure makes it considerably a stretch to enforce an act which guides the lives and livelihoods of millions of vulnerable workers.⁴⁷⁰ The procedure has no sense of urgency, contrary to the attitude supposed by the act.⁴⁷¹ The process needs to be reviewed in favour of maximising accountability and promoting compliance.⁴⁷²

⁴⁶⁰ Haroon Bhoharat, Ravi Kanbur, and Natasha Mayet. 'Minimum wage violation in South Africa.' *International Labour Review*, (2012).

⁴⁶¹ Ibid at 5

⁴⁶² Ibid at 6

⁴⁶³ Ibid at 7

⁴⁶⁴ Section 69 of the LRA, 1997

⁴⁶⁵ Supra note 388

⁴⁶⁶ Supra note 388

⁴⁶⁷ Supra note 388

⁴⁶⁸ Supra note 210

⁴⁶⁹ Ibid

⁴⁷⁰ Supra note 180

⁴⁷¹ Ibid

⁴⁷² Pike Kelly. 'Voice in supply chains: Does the better work program lead to improvements in labor standards compliance?.' *ILR Review* 73, no. 4 (2020): 913.

3.3 Labour Casualization

South Africa's labour market is experiencing an incline in the prevalence of labour casualization and externalisation.⁴⁷³ This form of employment consists of temporary contracts, fixed term contracts, seasonal work, subcontracting and outsourcing.⁴⁷⁴ The erosion of the formal standard employment complicates the enforcement of different labour regulations, including NMWA.⁴⁷⁵ A traditional or standard employment is mainly characterised by full time contract with one employer.⁴⁷⁶ There is an identifiable and designated workplace where the employee performs their contractual duties.⁴⁷⁷ The employment relationship is ongoing, and the employer and employee are guided by a binding contract.⁴⁷⁸ Labour casualization has destabilised the state's control over employment, and it mostly leads to worker vulnerability.⁴⁷⁹ It is mostly inspired by maximising profit through the reduction of cost of production, which most of it is labour.⁴⁸⁰

The propellant of this form of employment is the liberalisation of global markets, and the restructuring of work towards flexibility of employment ranks, remuneration and conditions of employment.⁴⁸¹ Standard employment has been replaced by triangular employment relationships.⁴⁸² In this form of employment, the labour broker provides labour to the relevant firm.⁴⁸³ In this case the broker is the main employer, and the firm owner is a client.⁴⁸⁴ The handicaps of this form of employment are well documented in Industrial Sociology scholarly

⁴⁷³ Stewart, Andrew, and Jim Stanford. "Regulating work in the gig economy: What are the options?" ,(2017): 420

⁴⁷⁴ Ibid at 420

⁴⁷⁵ Ibid 421

⁴⁷⁶ Jan Theron. *'The Shift to Services and Triangular Employment'*(2008).

⁴⁷⁷ Ibid at 4

⁴⁷⁸ Ibid at 4

⁴⁷⁹ Oupa Bodibe *'The Extent and Effects of Casualisation in Southern Africa: Analysis of Lesotho, Mozambique, South Africa, Swaziland, Zambia and Zimbabwe.'* (2006). National Labour and Economic Development Institute.

⁴⁸⁰ Ibid

⁴⁸¹ Stewart, Andrew, and Jim Stanford. "Regulating work in the gig economy: What are the options?" ,(2017): 420.

⁴⁸² Ibid at 421

⁴⁸³ Ibid at 422

⁴⁸⁴ Ibid at 431

and are beyond the scope of this paper.⁴⁸⁵ These forms of employment, however; further complicate the minimum wage enforcement procedures as it is difficult to locate the main employer who should be held accountable for non-compliance.⁴⁸⁶

3.4 Decline of Trade Union Density

There is an alarming decline of trade union density in South Africa.⁴⁸⁷ The sectors which experience decline the most are the agriculture, manufacturing, and construction.⁴⁸⁸ Casual workers are often characterised by shifting locations, and therefore are not easy to organise or establish standing representative.⁴⁸⁹ The part-time and temporary workers are also hard to recruit and retain when they are not working or earning to afford membership fees.⁴⁹⁰ It has also been noted that these workers are unlikely to associate with any union, in fear losing their employment.⁴⁹¹ Lack of representation amounts to minimal protection and non-awareness on the available legal recourse in cases of non-compliance.⁴⁹²

⁴⁸⁵ An overview of detrimental effects of triangular employment relationships

Lack of Security:

The workers do not have guarantees of income, for both work and the periods they could be out of work, for instance due to illness or reasonable works leaves. Most countries do not have leave benefits and provisions for self-employed, freelancers and sub-contractors.

⁴⁸⁶ Elnar Lindoor Sharon Messina, Nora Baessler, & Patricia Dyata. 'Going for Broke: A Case Study of Labour Brokerage on Fruit Farms in Grabouw' (2009).

⁴⁸⁷ Alex Wood, Mark Graham, and Mohammad Amir Anwar. '*Minimum wages for online labor platforms? Regulating the global gig economy.*' 2019.

⁴⁸⁸ Ibid at 77

⁴⁸⁹ Margaret Visser and Stuart Ferrer. '*Farm Workers Living and Working Conditions in South Africa: Key Trends, Emergent Issues, and Underlying Structural Problems*' (2015).

⁴⁹⁰ Ibid at 138

⁴⁹¹ Ibid at 139

⁴⁹² The overview of disadvantaging nature of labour casualization:

- Lack of security

Security requires that there is income guarantees for both work, and periods where one is not able to work. Most countries do not have income provision and leave benefits for self-employed, freelancers and subcontractors. For instance, these types of workers do not have income protection for periods of unemployment, retirement and maternity leave.

- Limited Opportunities

3.5 Migration trends

The South African labour market is experiencing an increase of irregular migration between the neighbouring countries.⁴⁹³ The immigration was previously more prevalent in the mining sector. The growth of the service sector has however, fuelled the migration of low skilled workers across SADC.⁴⁹⁴ The main sectors of recent traction are the private security, retail, construction, and domestic work sectors.⁴⁹⁵ Crush and Williams⁴⁹⁶ also reported that the migrations are characterised by non or irregular documentation.⁴⁹⁷ The influx of such labour pokes holes in the department's regulation of labour practices, including the enforcement of minimum wages.⁴⁹⁸ The resident employees in sectors such as construction and agriculture settle for low wages in fear that demanding their rightful wage rate would lend them to being replaced by the migrant workers.⁴⁹⁹ The South African employers in the mentioned sectors resort to hiring the immigrants instead of the locals in order to side-step remunerating according to minimum wages.⁵⁰⁰ The employers in turn, threaten the immigrants of reporting them to law enforcement and deportation when the migrant employees consider reporting low payment.⁵⁰¹ Such circumstances complicate the departments position in enforcing the minimum wage regulation.⁵⁰²

Workers in the in the non-standard employment have limited career prospects in comparison to those in standard employment . In most cases they are stuck in dead-end jobs or moving between working and unemployment.

- Fair treatment

It is hard to organise workers in in standard employment , as compared to those in formal full-time employment . This is mostly because they do not have a designated place of work . As results most of the workers do not enjoy the protection and advocacy of trade unions and shop stewards .

⁴⁹³ Supra note 191

⁴⁹⁴ Ibid at 279

⁴⁹⁵ Ibid at 279

⁴⁹⁶ Crush, J, & V Williams. '*Labour Migration Trends and Policies in Southern Africa.*'(2010) SAMP Policy Brief No 23. Southern African Migration Programme.

⁴⁹⁷ Ibid

⁴⁹⁸ Ibid at 52

⁴⁹⁹ Ibid at 52

⁵⁰⁰ Supra note 418

⁵⁰¹Jinnah, Zaheera. "Negotiated precarity in the global south: A case study of migration and domestic work in South Africa." *Studies in Social Justice* 2020.14 (2020): 210-227.

⁵⁰² Ibid at 5

3.6 Informalisation and the Informal Sector

The ILO describes informalisation in terms of work relationships in the informal sector, and informal employment in the formal sector.⁵⁰³ This definition also includes of businesses, establishments or enterprises that are not under government regulation.⁵⁰⁴ Their employment also does not consist of a contractual agreement or benefits.⁵⁰⁵ South Africa is experiencing an incline in informalisation, which also impedes on its capacity to enforce minimum wage.⁵⁰⁶ This is most due to that the informal sector does not provide stable employment. According to StatsSA (2015)⁵⁰⁷, 15% of informal workers lost employment.⁵⁰⁸ Chances are the actual figure are percentages higher, these statistics are hardly accurate as it is difficult to identify those in informal sector as significant portion is constituted by undocumented migrants.⁵⁰⁹ There is no organisation of workers in the informal sector, and therefore there is no consolidated voice to denounce violations by the employers.⁵¹⁰ Trade unions have a difficulty of organising employees in the informal sector.⁵¹¹ Workers in informal employment do not benefit from the provisions of collective bargaining.⁵¹² The inspectorate also has difficulties in fulfilling their mandate, given the structural and operational setup of the sector⁵¹³.

This is a grave concern for South Africa as the evidence show that the informal sector as grown two times faster than the formal sector in the past 20 years.⁵¹⁴ The ILO also mention that it made 36% of total employment in year 2015.⁵¹⁵ The vulnerable sectors are the most in service

⁵⁰³ ILO. 2003. *‘International Conference of Labour Statisticians’*. International Labour Organization.

⁵⁰⁴ Ibid at 3

⁵⁰⁵ Ibid at 3

⁵⁰⁶ Supra note 161

⁵⁰⁷ StatsSA. 2015. *‘Labour Market Dynamics in South Africa. Statistics South Africa, Pretoria*

⁵⁰⁸ Ibid

⁵⁰⁹ Ibid

⁵¹⁰ StatsSA. 2015. *‘Labour Market Dynamics in South Africa. Statistics South Africa, Pretoria*

⁵¹¹ Supra note 191

⁵¹² Supra note 161

⁵¹³ Ibid

⁵¹⁴ Steuart Pennington. *‘The SA Informal Sector - Mind Boggling Numbers’*.(2014). South Africa: The Good News : 125

⁵¹⁵ Ibid at 125

sectors such as transport, construction, farming, and domestic worker.⁵¹⁶ It is also important to note that the domestic work and farming are female dominated industries.⁵¹⁷ The architect of informal sector perpetuates the side-lining of woman from fair labour practices.⁵¹⁸ The expansion of formal sector has gained momentum on mushroom companies who are not registered as per the state regulation.⁵¹⁹ For instance, the private security sector has seen an influx of security companies as there is loss of public confidence on the state's capacity to control crime.⁵²⁰ Unregistered companies are likely to hire undocumented migrants; as result they are more to remunerate less than the national minimum wage stipulations.⁵²¹

3.7 Employee Recourse and Facilities

It is of paramount importance to maintain the understanding of that, wage violations are mostly concentrated on vulnerable sectors.⁵²² Vulnerability in this circumstance is characterised by lack of formal qualification, and alternative sources of income.⁵²³ The workers normally do not have the necessary resource to lodge complains to relevant authorities.⁵²⁴ For instance, most of them do not have access or acquaintance to emails or cannot afford enough airtime that will allow them to report the violations.⁵²⁵ It is concerning that the workers, in their desperate need of intervention, cannot access channels of enforcement.⁵²⁶ Most of them find the reporting and the possibility of their case receiving attention a far-fetched phenomenon.⁵²⁷ As result, the

⁵¹⁶ Wilson, Tamar Diana. "Precarization, informalization, and Marx." *Review of Radical Political Economics* 52.3 (2020): 486.

⁵¹⁷ Ibid at 482

⁵¹⁸ Supra note 161

⁵¹⁹ Ram, Monder, et al. "From the informal economy to the meaning of informality: Developing theory on firms and their workers." (2017) . *International Journal of Sociology and Social Policy* .

⁵²⁰ Ibid at 363

⁵²¹ Ibid at 363

⁵²² Supra note 105

⁵²³ Francis, David, and Imraan Valodia 'Inequality in the South African labour market: The political economy of the national minimum wage.' (2021) .*Critical Social Policy*: 385

⁵²⁴ Ibid at 358

⁵²⁵ Ibid at 359

⁵²⁶ Devereux, Stephen. "Violations of farm workers' labour rights in post-apartheid South Africa." (2020) 37(3). *Development Southern Africa* :393.

⁵²⁷ Ibid at 393

labour inspectors never get to have an idea of which sectors or even geographical areas that need urgent attention.⁵²⁸

Minimum wage violation is a scourge that even countries with developed economies have had to address over the years.⁵²⁹ The following chapter discusses how countries have navigated the implementation and enforcement of the minimum wage. The consideration of international literature on the issue can be very instrumental in devising suitable local interventions.⁵³⁰

Chapter 4: Lessons from the International Experience

This section discusses international literature, how different countries have implemented, monitored and enforced the minimum wage. The discussion has been included with the intention of presenting the success of different countries that can be of benefit for the South African minimum wage compliance systems. The following sections are discussed below; inspections, sector formalisation, minimum wage awareness, name and shame and non-compliance penalties. The lessons are from countries from both developed and developing countries. Some of the countries which the discussed lessons are from Brazil, the United Kingdom, Peru, Costa Rica, Mexico, Philippines, Belgium, Dominican Republic, Colombia, Indonesia, Malaysia, and the United States of America.

4.1 Minimum Wage Setting: a comparative perspective

Different countries have different designs of the minimum wage systems.⁵³¹ The designs have a material effect on monitoring, compliance, and enforcement of the wage regulation.⁵³² Some countries in Britain and Latin America such as Brazil and Peru have implemented a single

⁵²⁸ Garnero Andrea. ‘The dog that barks doesn’t bite: coverage and compliance of sectoral minimum wages in Italy.’(2018) *IZA Journal of Labor Policy* 7,24. & Fine Janice et al . ‘Wage theft in a recession: Unemployment, labour violations, and enforcement strategies for difficult times.(2021). *International Journal of Comparative Labour Law and Industrial Relations* 37.

⁵²⁹ Betcherman, Gordon. ‘Labor market institutions: A review of the literature.’ (2012) *World Bank Policy Research Working Paper*, 2012.

⁵³⁰ Ibid at 867

⁵³¹ Clemens, Jeffrey P. ‘Making sense of the minimum wage: A roadmap for navigating recent research.’ (2019) *CATO Institute Policy Analysis* :867.

⁵³² Ibid at 867

national minimum wage floor.⁵³³ Countries such as India determine minimum wage according to sectors, geographical locations, and occupations.⁵³⁴ Some countries such as Costa Rica have set the hybrid of the hybrid of the two mentioned designs .⁵³⁵ A study conducted by Rani et al shows that there is more compliance in countries that an implement a single national minimum wage than those of sectoral approach.⁵³⁶ Countries such as Philippines and Vietnam with single minimum wage cover higher percentage of workers than in India and South Africa.⁵³⁷ Countries such as Mexico and Peru, with hybrid system also cover higher percentage than those with industry-based minima.⁵³⁸ The data from these different countries shows that countries with simple design have higher rate of compliance than countries with complex systems .⁵³⁹ Therefore, South Africa can invest in simplifying their design in order to improve monitoring, compliance, and enforcement.⁵⁴⁰

4.2 Inspections

The sufficiency of inspection resources is necessary for effective monitoring and compliance with the minimum wage.⁵⁴¹ A study conducted in Argentina showed that the frequency and intensity of inspections determines adherence to minimum wage regulations.⁵⁴² Research by the ILO shows that there must be balanced inspector to worker ratio in order to improve compliance.⁵⁴³ In 2019 , the Deputy Director General of Inspection and Enforcement Services (IES) announced that the Department of Employment and Labour had prepared 1 392 inspectors to monitor

⁵³³ Bruttel, Oliver, Arne Baumann, and Matthias Dütsch. "The new German statutory minimum wage in comparative perspective: Employment effects and other adjustment channels." (2018) 24(2) *European Journal of Industrial Relations* : 145.

⁵³⁴ Ibid at 145

⁵³⁵ Smeeding, Timothy M. "Public policy, economic inequality, and poverty: The United States in comparative perspective." (2005) . *Social Science Quarterly* : 967.

⁵³⁶ Rani, Uma. "Minimum wage policies and their effects in developing countries: A comparative perspective." (2017) 60(1). *The Indian Journal of Labour Economics* .43.

⁵³⁷ Cengiz, Doruk, et al. "The effect of minimum wages on low-wage jobs." (2013) 134(3).*The Quarterly Journal of Economics* :1405.

⁵³⁸ Lemieux, Thomas. "Wage inequality: A comparative perspective." (2011) 37(1) *Australian bulletin of labour* :23.

⁵³⁹ Ibid at 23

⁵⁴⁰ Ibid at 23

⁵⁴¹ Supra note 215

⁵⁴² Supra note 326

⁵⁴³ See https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_077633/lang--en/index.htm

the National Minimum Wage Act.⁵⁴⁴ According to Stats SA, the total workforce was 36.8 million in 2019.⁵⁴⁵ This means there was 1 inspector for 26 000 workers.⁵⁴⁶ Whereas the ILO in November 2016, recommended that there must be at-least 1 inspector per 20 000 workers in order to strengthen labour inspections.⁵⁴⁷

Data in Indonesia shows that the increase of number of inspectors to improve inspector to worker ratio improved over time.⁵⁴⁸ The country however continued to have limitations in enforcements due to insufficient inspector resources.⁵⁴⁹ The data from 2006 census showed that less than 1% of the enterprises were reached from year 2009 to year 2013.⁵⁵⁰ The insufficiency of inspector resources compromises the effectiveness of inspections.

Brazil improved their labour inspections despite the fluctuation of the number of their labour inspectors⁵⁵¹. Firstly, it was because they changed inspector's incentive structure.⁵⁵² The government implemented a bonus system by which substantial percentage of their salaries was tied to the inspector's individual performance and that of labour inspectorate as whole.⁵⁵³ The new system emphasised the goal of formalising workers, collection of employer contributions and the number of workers covered in inspections.⁵⁵⁴ The second method was to task specific teams of inspectors for deliberating on specific issues on a particular sector.⁵⁵⁵ The inspectors were evaluated as team, on their ability to resolve sector-wide problem.⁵⁵⁶ The objective went

⁵⁴⁴ Ibid

⁵⁴⁵ Statistics South Africa, 2019

⁵⁴⁶ Ibid

⁵⁴⁷ Rodríguez, Arsenio Fernández. 'A Study on Labour Inspectors' Careers'. International Labour Organisation (ILO), 2020.

⁵⁴⁸ Supra note 220

This was between year 2009 to 2013. There was also an observed reduction of child labour as result of the inspections.

⁵⁴⁹ Hardy, Tess, Ockert Dupper, and Colin Fenwick. "The interaction of labour inspection and private compliance initiatives: A case study of better work Indonesia." (2016): 19.

⁵⁵⁰ Ibid at 19

⁵⁵¹ Janine Berg. "Laws or luck? Understanding rising formality in Brazil in the 2000s." (2011) *Regulating for Decent Work*. Palgrave Macmillan, London: 123.

⁵⁵² Ibid at 18

⁵⁵³ Ibid at 18

⁵⁵⁴ Ibid at 19

⁵⁵⁵ Ibid at 18

⁵⁵⁶ Ibid at 18

beyond mere inspections to resourcefulness to labour issues confronting companies.⁵⁵⁷ The two approaches were able to improve inspections and the number of registered workers .⁵⁵⁸

4.3 Sector Formalisation

The structure of the labour market is an enabling factor in the in implementing and monitoring labour regulations such as minimum wage.⁵⁵⁹ The prevalence of sub-construction, triangular employment relationships and concentration of low skilled workers facilitate the violation of minimum wage.⁵⁶⁰ Brazil adopted business formalisation as a strategy to improve minimum wage compliance.⁵⁶¹ Their formal sector increased by 5.3% between 1999 to 2008.⁵⁶² The main idea behind formalisation was that formalised sectors are easier to monitor and regulate.⁵⁶³ As a result, the formal employment domestic work sector increased by 8% in the same period.⁵⁶⁴ The formalisation campaigned was implemented through Simples Law.⁵⁶⁵ In year 1996, the Brazilian government setup a new system of tax exemption and simplification for small and micro enterprises.⁵⁶⁶ In the provision of this law, companies payed a reduced income taxes and are relieved from other social obligations. ⁵⁶⁷The system reduced the firms tax responsibilities for up to 8%. ⁵⁶⁸The system taxed companies according to their gross sales .⁵⁶⁹ In essence the government made it less costly and more convenient for firms to operate as

⁵⁵⁷ Ibidc at 18

⁵⁵⁸ Ibid at 18

⁵⁵⁹ Jana Mudronova . 'The international experience of the relationship between inequality, poverty and the minimum wage.' (2016) 3 ,Working Paper Series,.

⁵⁶⁰ Ibid

⁵⁶¹ Supra note 346

⁵⁶² Dinkelman, Taryn, and Vimal Ranchhod. "Evidence on the impact of minimum wage laws in an informal sector: Domestic workers in South Africa." (2012) 99(1) *Journal of Development Economics* : 22.

⁵⁶³ Magruder, Jeremy R. "Can minimum wages cause a big push? Evidence from Indonesia." (2013) 100(1).*Journal of Development Economics* : 48.

⁵⁶⁴ Ibid

⁵⁶⁵ Janine Berg . 'Laws or luck? Understanding rising formality in Brazil in the 2000s.' (2011) *Regulating for Decent Work*. Palgrave Macmillan, London.

⁵⁶⁶ Ulysees Gabriel. 'Firms, informality, and development: Theory and evidence from Brazil.(2018) *American Economic Review* 108, 2047.

⁵⁶⁷ Ibid

⁵⁶⁸ Ibid

⁵⁶⁹Ibid

registered enterprises rather than remaining in the informal economy.⁵⁷⁰ The end result of process was rewarding for both the employers and the government.⁵⁷¹ The business could operate as profitable while paying according to the stipulated minimum wage.⁵⁷²

Significant amount of local and international literature argues that the larger population of the general public is not aware of labour policies in their respective countries.⁵⁷³ As result, unprincipled employers sidestep regulations with no fear of potential sanctions or penalties.⁵⁷⁴ The following section deliberates minimum wage awareness amongst workers and the general public. It deliberates on how it enables violation by employers and immobilises workers from reporting.

4.4 Minimum Wage Awareness

It is important that employers, workers, and worker representatives are equally aware and informed of the national minimum wage.⁵⁷⁵ This is to avoid cases of non-compliance due to non-awareness and illiteracy on wage regulations.⁵⁷⁶ The ILO facilitated a program in Cambodia where they were training the sector on minimum wage and relevant labour standards.⁵⁷⁷ The program targeted employers, workers, and managers. The program in parallel with monitoring systems improved compliance from 93% to 100%.⁵⁷⁸ Costa Rica improved compliance through intensive public awareness campaigns.⁵⁷⁹ The campaign consisted of minimum wage awareness, as well as encouragement of reporting violations.⁵⁸⁰ In the United

⁵⁷⁰ Supra note 346

⁵⁷¹ Jun, Zhang, Zhao Da, and Zhou Longfei. "Effects of Minimum Wage Hikes on the Formalization of Employment." (2017) 12(5). *China Economist*: 84.

⁵⁷² Ibid at 84

⁵⁷³ Rani, Uma. 'Minimum wage policies and their effects in developing countries: A comparative perspective.' (2017): 33.

⁵⁷⁴ Ibid at 33

⁵⁷⁵ Supra note 220 at 333

⁵⁷⁶ Gan Joo-Ee. 'Minimum wage and the hospitality industry in Malaysia: An analysis of employee perceptions.' (2016).; *Journal of Human Resources in Hospitality & Tourism*, 29.

⁵⁷⁷ Supra note 346 at 135

⁵⁷⁸ Supra note 364 at 135

⁵⁷⁹ Gindling, Thomas H., Nadwa Mossaad, and Juan Diego Trejos. "The consequences of increased enforcement of legal minimum wages in a developing country: An evaluation of the impact of the Campaña Nacional de Salarios Mínimos in Costa Rica." (2015) 68(3). *ILR Review*, 29.

⁵⁸⁰ Ibid at 29

Kingdom, the Department of Trade and Industry facilitated awareness campaigns which resulted to a 400% increase of reported non-compliance.⁵⁸¹ The complaints were generally through telephones hotlines and online platforms.⁵⁸² They also concluded that employees aware of their rights are less likely to be paid below the minimum wage.⁵⁸³

The Indian government improved their public awareness campaigns by inviting and encouraging the participation of non-governmental organisations.⁵⁸⁴ The responsibility of information dispensation was extended to employers' and civil society organisations.⁵⁸⁵ The dispensation of information has a potential of improving compliance in the informal economy.⁵⁸⁶ The evidence from Brazil demonstrates that investing time and resources in dispensing information about the minimum wage is crucial for reaching the informal sector and small businesses.⁵⁸⁷

4.5 Name and Shame

This is a system by which the name of firms violating minimum wage are publicised.⁵⁸⁸ The intention is to tarnish the company's public image and risk their competitive advantage.⁵⁸⁹ In the UK, more than 200 employers' names were published for violation of minimum wage.⁵⁹⁰ In the UK some labour organisations used naming and shaming to advocate for minimum wage

⁵⁸¹ Croucher, Richard, and Geoff White. "Enforcing a national minimum wage: the British case." (2007) 28(2). *Policy studies*, 151.

⁵⁸² Ibid at 151

⁵⁸³ Ibid at 151

⁵⁸⁴ India, Government of. 2009. Evaluation study on the implementation of Minimum Wages Act, 1948 in stone breaking and stone crushing industry in Karnataka 2007–08. Chandigarh, Ministry of Labour and Employment, Labour Bureau.

⁵⁸⁵ Ibid

⁵⁸⁶ Rani, Uma, et al. "Minimum wage coverage and compliance in developing countries." *International Labour Review* 152.3-4 (2013): 398

⁵⁸⁷ Ibid 398

⁵⁸⁸ Anner Mark. 'Three labour governance mechanisms for addressing decent work deficits in global value chains.' (2021). *International Labour Review* 160, 629.

⁵⁸⁹ Richard Calland, & Kristina Bentley. 'The impact and effectiveness of transparency and accountability initiatives: Freedom of information.' (2013) 31. *Development policy review*, 69.

⁵⁹⁰ Hull, Andy. *Settle for nothing less: Enhancing National Minimum Wage compliance and enforcement*. (2013) .London: Centre for London,.

and fair working conditions.⁵⁹¹ An organisation called Clean Clothes Campaign in fabric sector blacklisted non-compliant companies and led the boycotting of their products .⁵⁹² Other firms resort to compliance in avoidance of being publicised .⁵⁹³

4.6 Non-compliance Penalties

Penalties are strategic in encouraging employers to comply with the stipulated labour standard, including minimum wage.⁵⁹⁴ Strict penalties also serve as a deterrent for non-compliance and perpetual violation.⁵⁹⁵ The United States, violation of the minimum wage can lead to criminal sanction for perpetrating employers .⁵⁹⁶This has resulted in increase of public awareness and encouraged workers to report cases of violations.⁵⁹⁷ In countries such as Malaysia, Indonesia and Israel, employers who violate the minimum wage may be subjected to prosecution and imprisonment.⁵⁹⁸ The Brazilian government empower for the suspension of access to all financial credit.⁵⁹⁹ As a result, employers' resort to compliance in fear of being isolated. In countries such as Belgium and Dominican Republic, the employers pay two times the stipulated fine for repeated offences.⁶⁰⁰ In Colombia, the fines can scale up to hundred times the stipulated minimum wage.⁶⁰¹ Most employers use cost benefit heuristic in deciding whether to comply

⁵⁹¹ Garnero, Andrea. "The dog that barks doesn't bite: coverage and compliance of sectoral minimum wages in Italy." (2018) 7(1). *IZA Journal of Labor Policy* :19.

⁵⁹² Ibid 19

⁵⁹³ Kapeller, Jakob, Bernhard Schütz, and Dennis Tamesberger. "From free to civilized trade: a European perspective." (2016) 17(3) .*Review of Social Economy* 320-328.

⁵⁹⁴ Daniel J Galvin. 'Detering wage theft: Alt-labor, state politics, and the policy determinants of minimum wage compliance.' (2016) 14(2).*Perspectives on Politics* ,323.

⁵⁹⁵ Ibid 324

⁵⁹⁶ Fine, Janice, and Tim Bartley. "Raising the floor: New directions in public and private enforcement of labor standards in the United States." (2016) 61(2).*Journal of Industrial Relations* ,276.

⁵⁹⁷ Ibid at 276

⁵⁹⁸ Belser, Patrick, and Uma Rani. "Minimum wages and inequality." *Labour markets, institutions and inequality*. Edward Elgar Publishing, 2015. 146.

⁵⁹⁹ Ibid 123

⁶⁰⁰ Ibid 124

⁶⁰¹ Munguía Luis F. 'Minimum Wages and Enforcement Effects on Employment in Developing Countries.'(2019).

with wage regulations.⁶⁰² It therefore makes sense that the cost of non-compliance should outweigh the cost of compliance.⁶⁰³

4.7 Conclusion on International Experience

The Chapter discussed how various countries have implemented monitored and enforced their national minimum wage. These factors work in parallel and have material effect in the monitoring, compliance, and enforcement.⁶⁰⁴ The mention countries are of different socio-economic standpoints.⁶⁰⁵ This section discussed strategies from countries of developed and developing economies. It is important therefore to be sensitive of South Africa's economic standpoint in the adoption of the discussed factors.⁶⁰⁶ The following and final chapter of this dissertation discusses recommendations that can implemented to improve compliance in South Africa. It suggests a solution to factors discussed in chapter 2.

Chapter 5: Recommendations for Improving National Minimum Wage Act Compliance

This chapter discusses recommendations that the South African government can adopt in improving national minimum wage monitoring, compliance, and enforcement. The proposed solutions are not exhaustive; however, their application has the potential of improving the countries prevailing minimum wage violation. The proposed solution can be adopted and implemented in parallel as they address different of wage compliance.

5.1 Inspections

5.1.1 Improving the Pool of Inspectors

The South African DoL needs to focus more structural and financial resources in improving the acquisition and retention of adequately qualified labour inspectors.⁶⁰⁷ Labour inspectors are the custodians of legislation compliance, they are a bridge to the actual realisation of the

⁶⁰² Meghir, Costas, Renata Narita, and Jean-Marc Robin. "Wages and informality in developing countries." (2015) 105(4).*American Economic Review* ,1509.

⁶⁰³ Ibid at 1509

⁶⁰⁴ Supra note 501 at 19

⁶⁰⁵Supra note 501 at 19

⁶⁰⁶ Ibid

⁶⁰⁷ Garnero, A., and C. Lucifora. Turning a "Blind Eye"? Compliance with Minimum Wage Standards and Employment. (2021) .IZA Discussion Paper No. 14456.

legislation objectives.⁶⁰⁸ The quality and frequency of inspections needs to reflect the urgency that is emphasized by the objectives of the constitution.⁶⁰⁹ A sufficient pool of labour inspectors is essential for efficient enforcement of wage regulations as per NMWA. Ronconi⁶¹⁰ concluded that the intensity and rigour of inspections determines the level of adherence to the wage laws.⁶¹¹ International researchers have found a positive correlational relationship between the number of inspectors and the level of employer compliance.⁶¹² The response reflects that of visible policing and crime incidents.⁶¹³ Therefore, South Africa needs to establish and maintain a reasonable inspector to worker ratio in order to inspire confidence on the inspection system.⁶¹⁴

5.1.2 Reviewing Inspection Procedures

The processes of initiating inspections and enforcing penalties makes the whole process of enforcement seem unreasonably lengthy .⁶¹⁵ It is understandable that the timelines were set to allow the employers reasonable time to comply with the orders of compliance.⁶¹⁶ They have, however proven to cause more damage than good with regards to encouraging compliance, and whistle blowing by employees.⁶¹⁷ The DoL, through the relevant channels, needs to reconsider the enforcement guidelines, in the interest of improving their pace and efficiency.⁶¹⁸ Workers would be more prone to accessing the enforcement channels if they know the process are time friendly.⁶¹⁹ It should be re-emphasized that employers who are violating the minimum wage

⁶⁰⁸ Ibid at 23

⁶⁰⁹ Ibid at 23

⁶¹⁰ Ronconi, Luca. 'Enforcement and Compliance with Labor Regulations in Argentina.' (2010) . Industrial & Labor Relations Review, 719.

⁶¹¹ Ibid

⁶¹² Ibid 719

⁶¹³Rita Almeida, & Pedro Carneiro. 'Enforcement of Labor Regulation and Firm Size'. (2009) 37 Journal of Comparative Economics, 28.

⁶¹⁴ILO 2013. 'Labour and Social Trends in Indonesia: Reinforcing the Role of Decent Work in Equitable Growth'. International Labour Organization.

⁶¹⁵ International Labour Conference, ed. 2011a. Labour Administration and Labour Inspection: International Labour Conference, 100th Session.

⁶¹⁶ Ibid

⁶¹⁷ Ibid

⁶¹⁸Mario Bossle, Ursula Jaenichen, & Simeon Schächtele. 'How effective are enforcement measures for compliance with the minimum wage? Evidence from Germany.' (2020) , 936.

⁶¹⁹ Ibid at 936

are unprincipled and unethical.⁶²⁰ The processes, therefore, need to assume a very disciplinary rather than a casual attitude towards holding such employers accountable.⁶²¹ Violating minimum wage is an infringement on the right to fair labour practices and working conditions.⁶²² The processes should therefore be intense to discourage such unprincipled actions.⁶²³

5.1.3 Adoption of Electronic Inspection Facilities

The DoL can also take advantage of the advancement of technology, by establishing user friendly and efficient online reporting systems.⁶²⁴ Countries such as Peru and the United Arab Emirates have already had successes in improving compliance through an online system where employers register their employees, including migrant workers, and submit a social security declaration every month.⁶²⁵ A system of this nature allows the authorities to monitor the observation of minimum wages.⁶²⁶ Employers are also able to do the necessary administration with independence and convenience.⁶²⁷ The labour inspectors can also be responsible for overseeing the registration of employers in different sectors.⁶²⁸ The system would be sustainable with regards to assuring that employers who were once in contravention do not revert to their non-compliance after a period of time.⁶²⁹ In Peru, the online system has been reported to improve compliance at significant rate.⁶³⁰

⁶²⁰Ibid at 947

⁶²¹Leila Patel, Zoheb Khan, & Thomas Englert. 'How might a national minimum wage affect the employment of youth in South Africa?' (2020) ,154.

⁶²² Ibid 157

⁶²³ Ibid at 157

⁶²⁴ Suhartini, Endeh, et al. "Legal politics and policy setting of wage systems for creating social justice of workers." (2019) 22(6) *Journal of Legal, Ethical and Regulatory Issues* .

⁶²⁵ Rani, Uma, et al. "Minimum wage coverage and compliance in developing countries." (2013) 152(3) *International Labour Review* , 401.

⁶²⁶ Ibid 401

⁶²⁷ Ibid 401

⁶²⁸David Weil. 'Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage', (2005): 238-257.

⁶²⁹ Ibid 252

⁶³⁰ Ibid 253

5.2 Information and Awareness

5.2.1 The role of the government

The employers and the workers should be well and equally informed of the NMWA, inspections and legal recourse in the case of violation.⁶³¹ This is very important in mobilising workers as party to the wide reach of the inspectorate.⁶³² It would help to safeguard employers from non-compliance due to misinformation.⁶³³ A training initiative in Cambodia which targeted workers, employers and HR managers improved compliance significantly for remuneration of both full time and casual workers.⁶³⁴ The outcome was the same in Costa Rican after a nationwide minimum wage awareness campaign.⁶³⁵ The DoL needs to explore the modern, and traditional mass media platforms in conscientizing and familiarising the public on the national minimum wage regulations.⁶³⁶ In South Africa, the department has done bare minimum in publicizing information on minimum wage as much as it has marketed political election campaigns.⁶³⁷ Traditional mass media would be more efficient in reaching out to vulnerable workers, as most of them are still committed to traditional media platforms such as public radio stations, newspapers, and television channels.⁶³⁸ The use of mass media would be more helpful in reaching out to the non-organised and informal sectors.⁶³⁹ Workers in these sectors do not have any platform for information besides the media, which now also consists

⁶³¹ Benassi, Chiara. 'The Implementation of Minimum Wage: Challenges and Creative Solutions.' (2011) 12. Global Labour University Working Paper .

⁶³² Ibid at 64

⁶³³ Ibid at 64

⁶³⁴ Moazzem, Khondaker Golam. "New minimum wage of the RMG sector addressing the issues of non-compliance in implementation." (2019) : 13.

⁶³⁵ Gindling, Thomas H., Nadwa Mossaad, and Juan Diego Trejos. "The consequences of increased enforcement of legal minimum wages in a developing country: An evaluation of the impact of the Campaña Nacional de Salarios Mínimos in Costa Rica." (2015)68(3) *JLR Review* :697.

⁶³⁶ Ibid at 697

⁶³⁷ Ibid 697

⁶³⁸ Prowse, Peter, Ana Lopes, and Ray Fells. "Community and union-led living wage campaigns." *Employee Relations* (2017) : 827

⁶³⁹ Ibid at 827

of social media.⁶⁴⁰ The departments commitment to provide information on minimum wage needs to inspire confidence on their commitment to enforce compliance.⁶⁴¹

5.2.2 Mobilising employers

The noble task of informing workers about their rights to fair wages should not be limited to government.⁶⁴² The DoL needs to mobilise employers in the efforts of creating mass awareness of the minimum wage.⁶⁴³ The employers interact with their employees on regular bases, using the workplace as platforms of conscientizing would prove to be more convenient and efficient.⁶⁴⁴ There is a risk of that some employers might not take the initiative, to evade remunerating workers according to the regulations.⁶⁴⁵ The department can however make it compulsory for the employers to inform their workers of the minimum wage rate as part of them on-boarding processes.⁶⁴⁶ Wages are a very sensitive matter of mutual interest; therefore, the contracts and workplace orientations need to consist of adequate orientation of the minimum wage.⁶⁴⁷ South Africa has a high rate of violent strikes, which most of them are concerning the issue of wages.⁶⁴⁸ Therefore, it would be more fitting for employers to take the initiative of dispensing and spreading information about minimum wage to promote high compliance and curb the frequency of industrial action.⁶⁴⁹ Employers' organisation also needs

⁶⁴⁰ Heery, Edmund, Deborah Hann, and David Nash. "The Living Wage campaign in the UK." (2017) *Employee Relations* : 806.

⁶⁴¹ Ibid 806

⁶⁴² Supra note 807

⁶⁴³ Benassi, Chiara. *The implementation of minimum wage: Challenges and creative solutions.*”(2011) 12. Global Labour University Working Paper: 34.

⁶⁴⁴ Ibid at 34.

⁶⁴⁵ National Minimum Wage Panel ‘*A National Minimum Wage for South Africa: Recommendations on Policy and Implementation. Report to the Deputy President*’ 2016 : 22.

⁶⁴⁶ Ibid at 22

⁶⁴⁷ Shane Godfrey, Darcy du Toit & Mario Jacobs ‘*The New Labour Bills: An Overview and Analysis*’ (2018) 2(39) *Indus. LJ* :2161.

⁶⁴⁸ Adema, Joop, et al. "Minimum wages across countries." (2019) 16(4). *ifo DICE Report* : 63.

Bhorat, Haroon, and Benjamin Stanwix. "Wage Setting and Labor Regulatory Challenges in a Middle-Income Country Setting." (2018). Devereux, Stephen.

⁶⁴⁹ Devereux, Stephen. "Violations of farm workers' labour rights in post-apartheid South Africa." (2020) 37(3) *Development Southern Africa* .

to display good faith by holding their member employers to informing and remunerating according to the minimum wage rates.⁶⁵⁰

5.2.3 Mobilising Trade Unions

The philosophy of trade unionism revolves on advocating for the best interest of the working class.⁶⁵¹ The government can partner with various trade unions in informing the workers about minimum wage.⁶⁵² Although it would still be a challenge to reach out to sectors where workers are the least organised, it will help to set the foundation for transfer of information through the word of mouth between workers on unionised and non-unionised sectors.⁶⁵³ The main point of focus would be to emphasize that minimum wage is not a prerogative, but rather a constitutional right.⁶⁵⁴ Also, that they are entitled to compensation for the robbed income and infringed right.⁶⁵⁵ The workers would then be also galvanised as agents of minimum wage. The South African trade unions, such as SADSAWU⁶⁵⁶, have made an effort in raising awareness and advocating for non-unionised sectors such as the domestic workers.⁶⁵⁷ The word of mouth has proven to be very effective in spreading information about other important government provisions and avenues.⁶⁵⁸ It would take less effort for workers to share such a matter of priority in their social circles.⁶⁵⁹ The provision of compensation would also serve as an incentive for increased rate reporting, and consequently evoking employer's conscience or avoiding investigation.⁶⁶⁰

⁶⁵⁰ Ibid at 391

⁶⁵¹ Supra note 272

⁶⁵² Grimshaw, Damian, Gerhard Bosch, and Jill Rubery. "Minimum wages and collective bargaining: what types of pay bargaining can foster positive pay equity outcomes?."(2014) 52(3) : *British Journal of Industrial Relations* 470.

⁶⁵³ Ibid At 470

⁶⁵⁴ Boeri, Tito. "Setting the minimum wage." (2012) 19(3) .*Labour Economics* : 281.

⁶⁵⁵ Ibid at 282

⁶⁵⁶ South African Domestic Service and Allied Workers Union

⁶⁵⁷ Murahwa, Brian. "Monitoring and enforcement: strategies to ensure an effective national minimum wage in South Africa."(2016) 5 .*National Minimum Wage Research Initiative Working Paper Series* .

⁶⁵⁸ Supra note 523 at 67

⁶⁵⁹ Supra note 523 at 67

⁶⁶⁰ Supra note 564 at 35

5.3 Naming and Shaming

Employers who deprive employees their rightful salaries are committing a crime that has far more ripple effect than they realise.⁶⁶¹ The role of minimum wage extends beyond a labour market discourse, it means dignity and livelihood for the most part of the population who historically suffered oppression and are currently suffering financial exclusion.⁶⁶² Non-compliant employers strip their workers off a right to social security and dignity.⁶⁶³ Violation of minimum wage is theft from those who have nothing to spare, the conscience of such employers requires an intense and intentional resuscitation.⁶⁶⁴ Habitually and persistent non-compliant employers have indirectly taken a stance to exploit workers with no intension to repent.⁶⁶⁵ Employment must be mutually beneficial and ethical; anything less is criminal.⁶⁶⁶ There organisations and employers infringe on the employees right by depriving them minimum should be confronted with the same humiliation they subject their workers to.⁶⁶⁷ The DoL should adopt publicising organisation who refuse to pay according to the minimum wage regulations.⁶⁶⁸

Public naming and shaming would tarnish the employer's public image and their competitive advantage.⁶⁶⁹ Such a strict sanction would encourage employers to refrain from dehumanising their workers.⁶⁷⁰ The South African labour market is still recovering from the injustices of the past towards Black people, it cannot be excusable for an individual and organisation in position

⁶⁶¹ Shackleton, J. R. 'Restructuring Minimum Wages: Complexity, Compliance, and a Case for Reform.' (2018) 92.*Institute of Economic Affairs Discussion Paper* .

⁶⁶² Lippel, Katherine. "Preserving workers' dignity in workers' compensation systems: an international perspective." *American journal of industrial medicine* (2012) 55.6: 530.

⁶⁶³ Ibid at 530

⁶⁶⁴ Galvin, Daniel J. "Deterring wage theft: Alt-labor, state politics, and the policy determinants of minimum wage compliance." *Perspectives on Politics* 14.2 (2016): 325.

⁶⁶⁵ Public Welfare Foundation. "Effective Wage Theft Enforcement." (2015) Public Welfare Foundation. Press release, March 9.

⁶⁶⁶ Supra note 571 at 325

⁶⁶⁷ Schiller, Zach and Sarah Decarlo. "Investigating Wage Theft: Survey of the States." (2010) .Cleveland: Policy Matters Ohio.

⁶⁶⁸ Ibid at 10

⁶⁶⁹ Zhongming, Zhu, et al. "£ 1.7 m back pay identified for a record 16,000 workers as 260 employers are named and shamed for underpaying minimum wage rates." (2017) :126.

⁶⁷⁰ Ibid at 126

of power to further exploitation without any severe consequences.⁶⁷¹ The strategy has proved to be effective in UK where more than 200 companies were named and shamed for robbing their employees of the minimum wages.⁶⁷² South African constitution legislation advocates for fair labour practices, employers who contradict this fundamental value should be met with a rebuke.⁶⁷³

5.4 Non-Compliance Penalties

The threat of facing harsh penalties is necessary for employers to have valid reasons to comply with the minimum wage.⁶⁷⁴ The cost of penalties should considerably exceed the benefits of non-compliance.⁶⁷⁵ The DoL can consider the following sanction which have also proved to be effective in other industrial countries.⁶⁷⁶

5.4.1 Criminal Sanctions

The national minimum wage is law, which the infringement thereof can also be escalated to being prosecuted under criminal law.⁶⁷⁷ This means that employers who have been found to be in contravention of minimum wage could face the full might of the law, with the potential of landing a criminal record.⁶⁷⁸ The awareness of such a risk would serve as deterrent to employers, while protecting the employees.⁶⁷⁹ The United States has applied criminal sanctions to offending employers, which improved the commitment to wage regulations and, while it

⁶⁷¹ Wocke, Albert, and Jana Marais. "The use of external perceived injustices by AMCU in the South African Platinum Mining Industry." (2016) 40(1).*South African Journal of Labour Relations*: 108.

⁶⁷² The Telegraph. 'Firms Named and Shamed for Not Paying Minimum Wage' (2015): 218.

⁶⁷³ Ibid at 218

⁶⁷⁴ Hamid, Adnan, and Hasbullah Hasbullah. "The Implementation of criminal sanctions as ius puniendi: A case study of entrepreneurs paying below the minimum wage in Indonesia." (2021) 10(4) *International Journal of Research in Business and Social Science*: 536.

⁶⁷⁵ Ibid at 536

⁶⁷⁶ Santoso, Budi, and Kamal Halili Hassan. "Enforcing Minimum Wage through Criminal Sanctions: A Case of Indonesia." (2014) 8.*International Business Management* : 12.

⁶⁷⁷ Budi Santoso & Kamal. H Hassan. 'Enforcing The Minimum Wage Through Criminal Sanctions: A Case of Indonesia.'(2013). National University of Malaysia.

⁶⁷⁸ Benjamin, Paul. "Enforcement and sanctions to promote compliance with South African labour legislation." (2011) 32. *pt. 1 Indus. LJ* :18.

⁶⁷⁹ Ibid at 18

also improved the employee's reporting rate.⁶⁸⁰ In countries like Indonesia and Israel, non-compliant employers risk facing prosecution and imprisonment⁶⁸¹. South Africa needs to follow suit in order to add weight to the seriousness enforcement processes.⁶⁸²

5.4.2 Heavy fines

The cost of the penalties needs to be unconditionally strict and discouraging for potential offenders⁶⁸³. The department can also stipulate different levels of fining for offenders, depending on the frequency of their offence.⁶⁸⁴ For instance, in countries such as Algeria and Belgium, repeating offenders pay double the first-time offence rate.⁶⁸⁵ As result, most employers avoid finding themselves having to pay penalties due to costs.⁶⁸⁶ South Africa could also adopt a similar approach, to avoid repeated contraventions.⁶⁸⁷ The main point is that the cost of penalties outweighs the financial benefits of evading minimum wage.⁶⁸⁸ Weil⁶⁸⁹ in his study of United States labour market mentioned that employers will resort to non-compliance following a thorough cost-benefit evaluation.⁶⁹⁰ There are broadly two main decision-making heuristics which are explored by employers in deciding on whether to comply.⁶⁹¹ The first is a rationally calculated decision, as already mentioned, this is when an employer decides to not comply after considering the cost and benefits of violation.⁶⁹² The second refers to when an

⁶⁸⁰ Rani, Uma, et al. "Minimum wage coverage and compliance in developing countries." (2013) 152(3) *International Labour Review* :410.

⁶⁸¹ Supra note 322

⁶⁸² Supra note 585 at 22

⁶⁸³ Broecke, Stijn, Alessia Forti, and Marieke Vandeweyer. "The effects of minimum wages on employment in emerging economies: A literature review." (2015) *Social, Employment and Migration Working Papers* :362

⁶⁸⁴ Ibid at 362

⁶⁸⁵ Suhartini, Endeh, et al. "Legal politics and policy setting of wage systems for creating social justice of workers." (2019) 22(6).*Journal of Legal, Ethical and Regulatory* :36.

⁶⁸⁶ Ibid Supra note 195

⁶⁸⁷ Dube Arindrajit. 'Impacts of minimum wages: review of the international evidence.'(2019) *Independent Report. UK Government Publication* ,304.

⁶⁸⁸ Ibid at 36

⁶⁸⁹ David Weil. 'Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage'. (2005) .Cornell University, School of Industrial & Labor Relations:238.

⁶⁹⁰ Ibid

⁶⁹¹ Ibid at 238

⁶⁹² Rosado Marzan, Cesar F. "Wage Theft as Crime: An Institutional View." (2020). *JL Soc'y* 20: 300.

employer decides to not comply due to range of economic factors, such as non-affordability.⁶⁹³ Essentially, the fines should serve as caution and reflect the gravity of the offence of violation.⁶⁹⁴

5.4.3 Labour Market Structure

The structure of the labour market is a crucial enabling factor in monitoring labour regulations, including the national minimum wages.⁶⁹⁵ The prevalence of non-contracts, low employment, outsourcing, subcontracting and the high concentration of low skilled workers breed high non-compliance amongst employers of the mentioned sectors of interest.⁶⁹⁶ Therefore, the DoL can follow the inspiration of Brazil on their approach to the formalisation of work as developing country.⁶⁹⁷ The Brazilian government, through provisions of the Simples Law of 1996, embarked on formalisation of small to medium sized bonuses in order to improve governments regulation of the labour market.⁶⁹⁸ The law relaxed business registration and taxes for small businesses, which resulted in the increment of business registration.⁶⁹⁹ Most of business would not register previously due to bureaucratic red tape.⁷⁰⁰ These newly registered small businesses were granted grace period to some labour regulations such as tax and other environmental law so as to not to destabilise the during their transition process.⁷⁰¹

Other countries such as Brazil and areas such as States such as Carencro provided subsidies for the newly registering firms to assist with administrative costs of formalising a business.⁷⁰²

⁶⁹³ Ibid at 300

⁶⁹⁴ Khisni, Akhmad. "Law Into the National Legislation." (2020) 12(2). *Transformation* . 1275-1281.

⁶⁹⁵ Francis, David, and Imraan Valodia. "Inequality in the South African labour market: The political economy of the national minimum wage." (2021) 41(3). *Critical Social Policy*: 392.

⁶⁹⁶ Ibid at 392

⁶⁹⁷ Katovich, Erik S., and Alexandre Gori Maia. "The relation between labor productivity and wages in Brazil." *Nova Economia* 28 (2018): 9.

⁶⁹⁸ Berg, Janine. "Laws or luck? Understanding rising formality in Brazil in the 2000s." (2011). *Regulating for Decent Work*. Palgrave Macmillan, London: 17.

⁶⁹⁹ Ibid at 17

⁷⁰⁰ Piza, Caio. "Revisiting the impact of the Brazilian SIMPLES program on firms' formalization rates." (2016). *World Bank Policy Research Working Paper* : 1

⁷⁰¹ Ibid at 1

⁷⁰² De Andrade, Gustavo Henrique, Miriam Bruhn, and David McKenzie. "A helping hand or the long arm of the law? Experimental evidence on what governments can do to formalize firms." *The World Bank Economic Review* 30.1 (2016): 52.

As result these countries were able to formalise three sectors, while improving profitability of the registered companies.⁷⁰³ The NMW Act already has the provision exemptions for smaller companies and those who cannot afford to pay per the stipulated rates.⁷⁰⁴ These can also be complimented, by providing extra support to encourage registration of small to medium businesses.⁷⁰⁵ The benefits of running a registered company should outweigh the costs which are normally avoided by informal companies.⁷⁰⁶ The expense that comes with formalising sectors is a long-term investment for the department's control over the labour market, and consequently the enforcement of the minimum wage.⁷⁰⁷

Chapter 6: Thesis Conclusion

South Africa's has taken a progressive position of adopting the national minimum wage to achieve the Constitution's ambition of fair labour practices, social security, and dignity. The objectives of the Act are beyond urgent, they are matter of life and indignity. The South African labour market is recovering from a tragic past that continues to manifest itself in labour practices. The bargaining power and voice of influence still belong to the same previously advantaged, the call for reconciliation has apparently not resonated to the level of resources. Trade Unionism has achieved significantly in its efforts to consolidate the workers' voice for a better bargaining position. The formal sector has experienced a measure of improvement with regards to fair working conditions, which the most pertinent is wages. It however goes without mention that unionisation is limited in its capacity to bargain and the reach to the working class. This is evident in that industrial action in its violent nature has taken a sharp incline, the main point of contention being wages. The well documented Marikana Massacre also transpired in face of trade unionism, to no accountability even in the present day. Therefore, the country's adoption of minimum wage is timely, to mention the very least, it is a necessary intervention in the countries debilitating wage conditions.

⁷⁰³ The local governments also opened new business and economic opportunities for the registering companies . These include giving them access to formal credit markets , trading with established entities and government . As result it was more profitable to run a formalised business than remaining unregistered.

⁷⁰⁴ Section 14 of the National Minimum Wage Amendment Act, No. 3 of 2020

⁷⁰⁵ Ulyssea, Gabriel. "Informality: Causes and consequences for development." (2020) *Annual Review of Economics* : 15.

⁷⁰⁶ Ibid at 15

⁷⁰⁷ Dix-Carneiro, Rafael, et al. *Trade and informality in the presence of labor market frictions and regulations*. (2021) No. w28391. National Bureau of Economic Research :4.

The effectiveness of the NMWA, in same patterns as most regulations, is determined by the intentionality of supporting policies. The evidence presented above has shown that NMW has achieve significantly less than it had objected to achieve since its promulgation. There is an alarming low compliance rate amongst employers. This is due to the mentioned insufficiency of inspections, tedious compliance processes, low NMWA awareness amongst workers, lack of recourse facilities, growth of informal sector, migration trends, casualization of employment and incline of third-party employments. There is also evidence that the country's complex approach to minimum wage determinations leads to low compliance. The employers make the most of the opportunity to violate minimum wages without considerable chances of accountability and sanctioning. As result the presence of the Act achieved significantly less than it was aimed to.

This dissertation has identified numerous factors which enable the violation of the minimum wage act. It discussed shortfalls within the Act which undermine compliance and enforcement. Drawing from foreign and international law, the thesis explored possible solutions which the South African Government can adopt to improve compliance. It drew from international literature and discussed lessons that can be adopted and implemented by the South African Department of labour to improve compliance.

The paper has discussed possible solutions and interventions which the department can adopt in improving the rate of compliance amongst employers. These include the expansion of the inspectorate quantity and career prospects, improving awareness of the minimum wage through traditional and modern media, revision of the accountability procedures, provision of recourse facilities, formalisation of vulnerable sectors, tightening of non-compliance penalties, mobilisation of trade-unions and public as compliant agents. Some of the strategies have proved to be efficient in a number of countries, including those with developing economies. The rampant violation of the NMWA is not beyond repair. The pace and extent of progress will however call for the governments intentionality on enforcing its regulations with no reservations. The state of NMWA violation in South Africa is a great course of concern and calls for a sober approach in dealing with employers who espouse values contrary to those of the Constitution.

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