



## **MINIMUM WAGE FIXING FOR DOMESTIC EMPLOYEES**

Research dissertation presented for the approval of senate in fulfilment of part of the requirements for the degree of Masters of Laws in approved courses and a minor dissertation. The other requirement for this degree was the completion of a programme of courses.

By **Lavinia Khangala**

September 1994

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## MINIMUM WAGE FIXING FOR DOMESTIC EMPLOYEES

### 1. INTRODUCTION

The term "minimum wage fixing" is here defined as the fixing of a legally binding lower limit to wages by a process invoking the authority of the state.<sup>1</sup>

Domestic employees are excluded from the provisions of most South African labour laws, although the Basic Condition of Employment Act<sup>2</sup> has been extended to domestic employees.<sup>3</sup> The Act makes provision for guidelines for remuneration of domestic employees, but no provision is made for the determination of wage levels.<sup>4</sup>

In sectors with strong trade unions, collective bargaining is the best method of wage fixing. It is presumed that the parties have full knowledge of the problems of the specific sector and that agreements between them are most likely to be appropriate and workable.<sup>5</sup> In sectors without adequate statutory protection, the absence of legal mechanism for ensuring the application of collective agreements has meant that there is no longer an effective floor to wages.

The enactment of a statutory minimum wage covering all domestic employees appears to be a natural response for employees who are characterised by both the absence of collective bargaining and low pay.<sup>6</sup> This is in line with the ILO convention concerning the creation of minimum wage fixing machinery<sup>7</sup> which has as its objective that ratifying states "undertake to create or to maintain machinery whereby minimum rates to pay can be fixed for workers employed in certain of the trades or parts of trade (and in particular of homeworking trade) in which no arrangements exist for the effective regulation of wages by collective agreement or otherwise and wages are exceptionally low."

The ILO convention No.131<sup>8</sup> sets out that the criteria to be taken into consideration in determining the level of minimum wages should include:

1. The needs of workers and their families (taking into consideration the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other groups); and
2. Economic factors, including the requirements of economic development, level of productivity and the desirability of attaining and maintaining a high level of employment.

## **2. SOME INSTITUTIONAL ASPECTS OF MINIMUM WAGE FIXING**

In this chapter the machinery for fixing minimum wages for domestic workers will be discussed, then a discussion on the role of employers' and workers' representatives and independent persons or government officials in minimum wage fixing.

### **2.1 Machinery for fixing minimum wages for domestic employees.**

The institutional framework in which the price of the country's most important factor viz, labour, is regulated is adequate for South Africa's special needs. The Wage Act provides for the setting of minimum wages and conditions of employment by the Wage Board, in industries in which unions and employers are not associated in industrial councils. This means that the existing statutory framework should be retained but should be made more effective. Recommendations aimed at more effective use and application of existing statutory measures falling outside the ambit of the Labour Relations Act,<sup>9</sup> particularly those related to the Wage Act<sup>10</sup> are as follows:

Wage-fixing institutions (i.e the Wage Board) should be tripartite in nature" i.e the board may be assisted in its functions by an equal number of employers' representatives and employees' representatives together with disinterested persons. Although there may be inadequate representation by employer bodies

at present, an invitation to employers of domestic workers to make representations in respect of minimum wage legislation could soon lead to the establishment of an employer negotiating body.<sup>12</sup>

At present investigations into the minimum wage fixing are carried out by the Wage Board which can consist of three full members as well as assessors (from the industry being investigated) who serve in an advisory capacity. The main functions of the Board are:

- a) At the request of the Minister, to make investigations into and submit a report on any trade,<sup>13</sup> and
- b) To submit recommendations to the Minister,<sup>14</sup> the recommendations of the Board may cover aspects of wages and conditions of employment.<sup>15</sup>

'The Board is thus subject to the minister's control and is influenced by government policy. Its effective role is determined by the minister. In other words it is at the minister's disposal'<sup>16</sup>

Certain considerations are laid down in the Act which the Wage Board has to take into account when making recommendations on wages, for example:

- i) Whether the employer would be able to run his/her undertaking successfully should the recommendations on the minimum wages are in force." "This clause is conservatively interpreted, but nevertheless represents a barrier to the setting of acceptable wage standards. The Wage Board is not permitted to take the employees' needs into account."<sup>17</sup>
- ii) The cost of living in the area and the value of other income received by the workers, such as housing and food.<sup>18</sup>

The Labour Act of Namibia<sup>19</sup> also makes provision for the establishment of a wage commission<sup>20</sup> which may make recommendations on the minimum

remuneration which ought to be paid to any employee, employees or the category of employees." The commission shall in the course of its recommendations have regard to the aims of the Namibian Constitution" and give consideration to inter alia, the following:

- i) the cost of living in Namibia or in the particular area in which the industry in question is situated.
- ii) the minimum subsistence level in such area.

Minimum wage fixing legislation for domestic employees could be introduced in South Africa through reform of the Wage Board. The following reforms would be part of the programme to be introduced for low paid, vulnerable workers without damaging the economy as a whole.

The Wage Act could be adjusted (section 7 in particular) with a view to including the following in the matters that the Wage Board has to make allowance for in a wage determination:"

- a) the general socio-economic development policy and objectives of the government
- b) the current and expected wage positions and trends in the country.

A Sectoral Wage Board to be established for domestic employees since they are in the weak bargaining position. Representation would be tripartite, but representatives would have a strong connection with the sector in question."

The Wage Board should be given greater freedom of action in terms of the Wage Act to enable it to institute its own investigations into wage levels of an industry and area, as well as in respect of classes of employees."

Under a reformed Wage Act, trade unions and inspectors would have the power to institute legal proceedings against employers who pay less than the sectoral minimum wage determinations. At present enforcement is ineffectively carried out by the Department of Manpower.<sup>27</sup>

The new wage act would make provision for the phasing-in period for a minimum wage. A maximum period of between two to five years could be stipulated. This provision would enable employers and trade unions to minimize the effects of the minimum wage on employment levels.<sup>28</sup>

Existing collective bargaining (where there is any) between employers and trade unions would remain untouched by this scheme... Trade unions would have the security of knowing however, that even where they are weak, the employer would not be able to force wages below the minimum wage.<sup>29</sup>

Because of the existing inflationary conditions, wage determinations, regardless of whether they contain any adjustment clauses, should be revised every two years in accordance with the targets of the sectoral Wage Board itself and with due allowance for the possible effect of wage determinations on the rate of inflation.<sup>30</sup>

The Wage Act would be amended to give Wage Boards the duty to set wages which assured workers basic decent standards of living. At present the Wage Board may take into account only the cost of living and the ability of employers to carry on their businesses successfully should the recommendations of the wage board come into effect.<sup>31</sup>

## **2.2 The role of employers and employers and independent persons in the operation of minimum wage fixing machinery**

Article 3,<sup>32</sup> of ILO Convention No.26<sup>33</sup> provides, as one of the general principles to be observed in the operation of the minimum wage fixing machinery, that before the machinery is applied in any trade representatives of the employers and employees concerned, including representatives of their respective

organisations shall be consulted, as well as any other person especially qualified for the purpose by their trade or functions whom the competent authority deems it expedient to consult.”

It further provides that employers and employees concerned shall be associated in the operation of the minimum wage fixing machinery, in equal numbers and on equal terms.” This principle is elaborated by providing that representatives of the employers and employees concerned, equal in number or having equal voting strength, should jointly take a direct part in the deliberations and decisions of the wage fixing body, that employers and employees concerned should have a voice in the selection of their representatives and that the wage fixing body should also include one or more qualified independent persons whose votes would ensure effective decisions being reached in the event of the votes of the employers and employees' representatives being equally divided.”

The reasons for associating representatives of employers and employees with the process of minimum wage fixing are as follows: First, they are the people most closely and directly affected by minimum wage fixing decisions. It is essential that their views should be known to, and fully taken into account by those who fix minimum wages.”

Secondly, they are the people who have the closest first hand knowledge of the needs of employees and the conditions and problems of their working environment”. It is important in the general interest that this knowledge should be made use of in the wage fixing process, particularly because what is involved is not merely a national, but a sectoral minimum wage. Serious mistakes may otherwise be made, resulting from lack of knowledge of relevant considerations.

Thirdly, whereas any minimum wage is likely to be considered too low by employees and too high by employers, this is particularly likely to be the case if they, or their representatives, have not participated in the process of fixing the wage. Minimum wage is more likely to be acceptable if it has been arrived at through a democratic process of discussion in which each side knows that its views have been taken into account, and each side has heard the views of the

other. This may have important effects on the motivation of both sides, their performance and job satisfaction.

Finally, participation in the operation of minimum wage fixing machinery can be a valuable educative experience for employers' and employees' representatives and also for those whom they represent in so far as the representatives are able to communicate to the represented the reasons that have motivated decision. To be brought into contact with the viewpoints of the other side, and of independent members participating in minimum wage fixing, can help to broaden the knowledge and understanding of representatives of both sides. One reason for setting up tripartite minimum wage fixing machinery in some countries has been the hope that this would lead to the development of collective bargaining.<sup>39</sup> And even if it does not it may tend to promote organization among both employers and employees.

What role should be played by independent persons in minimum wage fixing for domestic employees?

ILO Recommendation No.30 provides that independent members "should be selected from among men or women recognized as possessing the necessary qualifications for their duties and as being dissociated from any interest in the trade or part of the trade concerned which might be calculated to put their impartiality in question."<sup>40</sup>

There appears to be at least two quiet distinct conceptions of the duties for which these members should have the necessary qualifications. The first is that their role is to serve primarily as mediators, helping the two sides reach the agreement. This has been the British tradition and that of a number of countries (e.g. Northern Ireland) who have minimum wage systems.<sup>41</sup> It is a role that fits in with the view that statutory wage fixing is a prelude to collective bargaining<sup>42</sup> and that, with the assistance of the independent members, proceedings should resemble collective bargaining as closely as possible.<sup>43</sup>

The second conception of the role of independent members is that they are representatives of the public interest and should bring to bear in the wage fixing, considerations relating to the well being of the community as a whole. They have to judge in the light of all relevant considerations, what constitutes an appropriate minimum wage in any particular circumstance."

Independent members may need other qualifications too, particularly the knowledge and experience required to form a judgement of what is in the public interest, or at least to apply in specific situations general guidance or directives, if any, provided by the government.

### **3. FIXING A LEVEL FOR MINIMUM WAGES FOR DOMESTIC EMPLOYEES**

#### **3.1 The needs of employees**

Since those responsible for fixing minimum wages are commonly enjoined to take account, among other things, the needs of workers, it has often seemed logical to start by trying to determine what the needs of workers are. The idea that everybody who works full time in a job should receive at least a living wage in return has a strong appeal, but raises at least two questions:

##### **3.1.1 What is meant by a living wage?**

##### **3.1.2 Granted the suppression of poverty is one of the most urgent objectives of policy, how far should this objective be sought through the raising of minimum wages?**

The main object of introducing a minimum wage for domestic employees is to ensure that every domestic worker is paid at a level that enables him/her to maintain a certain "minimum living standard." The minimum wage will make it possible for the worker to satisfy certain "basic needs," particularly in regard to clothing, housing and health.

This principle involves a number of matters that are often not given due consideration by the supporters of a minimum wage for domestic employees. To an important extent, however, it depends precisely on how these matters are dealt with in the proposals, whether this policy instrument for the prosperity goals is attractive or not. Below are a few remarks on some problems.

The first aspect of the principle that raises problems is the concept of "basic needs." To start with, these could be defined in a variety of ways depending on the standard or quality of, for instance, the clothing, food, housing or whatever is needed for subsistence.

Initially the living standards indices in this country were regularly compiled regularly by both UNISA Bureau of Market Research which produces the MLL (minimum living level) for various towns, and the Institute for planning and Research at the University of Port Elizabeth which produces Household Subsistence Level figures. Both these sets of figures are regularly updated and indicate the basic amount of money required by a family in a particular area, of a given size and colour." These reports are available from the institutions direct. A certain degree of consensus was reached (by the above mentioned organizations) on certain of the concepts used as a basis, as for example what essential goods and services should be included and what diet should be considered "sufficient or adequate." Thus a widely held view seems to be that 'a family should not be obliged by poverty to live in a manner that sets it apart from other families in the social group to which it belongs and that makes it unable to live according to the established customs of the community.'

The Southern Africa Labour and Development Research Unit recently launched their report of statistics on living standards in South Africa. The report, entitled South Africans Rich and Poor: Baseline Household statistics, is a statistical summary of the results of a survey of 9 000 households. (The report is accompanied by 13 other volumes focusing on nine regions and on energy, nutrition, urbanization, housing and water supply).

These aspects will be very useful for the minimum wage fixing authorities when they determine the minimum cost of living for a family-holding that a 'fair' wage should at least equal the basic cost of subsistence for a family in the area where domestic workers are employed.

This leads to the second question, namely how far should government try to solve problems of poverty by means of minimum wage systems alone? It is clear that minimum wage fixing is one of the measures in the strategy of an attack on poverty.

These questions give rise to differences of opinion regarding the interpretation of the "minimum needs" criterion of minimum wage fixing. One view stresses the difficulty or impossibility of measuring social needs, and even physical needs such as the need for clothing in absolute terms. It holds that needs are essentially a relative concept and can only be measured in relation to the established customs of the community. The corollary of this is believed to be that there is no scientific and objective way of resolving differences of opinion as to what should be included in minimum needs, and that it is therefore not very fruitful for minimum wage fixing authorities to spend a great deal of time debating this question. This does not mean that the needs of workers should not be carefully considered."

There is another view which insists that, notwithstanding the difficulties of measuring minimum needs, the concept of minimum living wage is an essential element in the protection of workers. If there is no strictly objective and scientific way of measuring minimum needs, this is true of many other concepts in the field of social sciences (for example, that of an individual's intelligence quotient) to which it is never found useful to attach an approximate measure."

Adherents of this view question whether it is necessary, or even important, for purposes of minimum wage fixing that the measurement of minimum needs should have a rigorously scientific character. It is usually accepted that needs are relative, in the sense that social needs at least have to be evaluated in relation to the established customs and standards of the community, but it is

held that in a community with given customs and standards the concept of minimum needs has a recognised operational value, that through various means (estimates of physical and social needs, studies of family budgets showing the levels, confrontation of the views of trade unionists and employers, economists and sociologists) it is very possible in very many cases to reach practical operational decisions of the minimum needs of workers."

One aspect of the "needs" criterion which it is especially important for minimum wage fixers to bear in mind is the cost of living. Increase in prices not compensated by wage increases are liable to cause serious hardship and have done so in many countries."

### **3.2 Development of organization**

The payment of unduly low wages, especially where caused by the cutting of rates by certain employers, could largely be prevented by means of organized action on the part of the domestic employees. A strong trade union would be able to prevent wages in individual establishments from falling considerably below the general level, and would also be able to secure the highest rates which the industry could bear." This is to a large extent true, but it is frequently in those industries in which the workers are badly organized (e.g domestic employees) that the level of wages is unduly low, and that serious exploitation is usually found. It is to protect unorganized workers that the minimum wage principle has been applied in certain countries. The fixing of wages by machinery established by law is regarded as necessary while the workers remain badly organized, but if trade union organization should develop sufficiently, the application of the law could be suspended, and wages determined by the ordinary process of collective bargaining."

The principle of State interference only in cases where wages cannot be regulated adequately by collective agreement is given recognition in the minimum wage laws of a number of countries, including Austria, Czechoslovakia, Germany etc." In Great Britain the Minister of Labour has

power to withdraw any trade from the operation of the Trade Boards Act if organization become adequate for the effective regulation of wages.

In Australia the development of organization among workers and employers has been encouraged by various laws establishing wage fixing machinery. Thus in New Zealand the Industrial Conciliation Act<sup>54</sup> and its amending Acts provided a stimulus to the growth of organizations. Neither the individual employee is recognized under the law, except in so far as he/she is a member of a registered union of workers or a registered trade union of workers or association of employers. Much of the support for collective bargaining was destroyed by the Employment Contracts Act of 1991. In this case, however as in similar cases in Australian states, the object was to secure the development of organization so that wages might be regulated satisfactorily by collective agreement as to ensure the regular working of the arbitration system for settling disputes.

#### 4. WAGE PAYMENT IN KIND

The domestic worker is very often paid in kind by way of groceries, toiletries, clothes, subsidised housing etc. In determining a minimum wage it is very difficult to calculate the value of the in kind remuneration. It could be reasoned that this type of remuneration should be eliminated, but the advantages of payment in kind, for example that the quantity remains the same despite inflation should not be lost sight of.

On the other hand abuses can be found under the system by which a substantial part of the wage is paid in kind. If only a small part of the wage is paid in kind, domestic workers will have little freedom to buy in the markets the goods they wish to have. The goods supplied in kind can be of poor quality and little worth. This is particularly true of perishable foods. In suitable circumstances there is no objection and even some advantage if employers buy foods and other goods of adequate quality and then distribute them to workers at subsidized prices. Workers should however, be protected against having to accept poor goods as part of their wage.<sup>55</sup> In many developing countries the custom of paying a

substantial part of the wages in kind is still a serious problem. The position is as follows:

i) The act may require employers to pay the whole wage in cash. For example in Swaziland, if an employer requires an employee to occupy accommodation provided employer as part of his conditions of employment, such accommodation shall be provided free of charge to the employee.<sup>56</sup>

ii) Legislation may provide for strictly regulated payment of a limited part of the wage.<sup>57</sup> In New Zealand the cash value placed on board and lodging by legislation or agreement may be deducted from wages. If the cash value is not fixed in such a manner, the deduction in respect thereof may not exceed an amount such as will reduce the worker's wages by more than 15% for lodging or 5% for board.<sup>58</sup>

iii) In certain countries deductions permitted for board and lodging are set out in the code. A provision is made that these deductions may not cause an employee's wages to drop below the prescribed wage.<sup>59</sup>

iv) In certain countries payment in kind is so defined that the workers receive proper value or even the benefits from such payments. In Zimbabwe it is optional for the employer to provide and for the employee to accept rations<sup>60</sup> or other benefits such as employee's accommodation, fuel light or transport unless an employer is paying an employee above the minimum wage and the deductions do not reduce the employee's wage to below the minimum wage for that grade.<sup>61</sup>

Since payment in kind constitutes an important part of the domestic worker's wages, the value of accommodation food and other consumer goods which form part of the remuneration of the employee, should be regarded as part of the wages.<sup>62</sup> An ILO publication states "It would obviously be absurd to lay down a rule that employers must pay everything in cash and absolutely nothing at all in kind. The important thing is that wages should be paid in such a way that the

worker can choose his/her way of life. That means that for most purposes he should have the cash and spend it personally as he thinks best for himself and his/her family."<sup>63</sup>

The value of such goods should be prepared and revised on a regular basis for instance by the Wage Board.<sup>64</sup> The following should however be taken into consideration:

i) In view of the dual nature of wages as cost to the employer and earnings of the employee, it may be necessary to evaluate wage payment in kind according to both these concepts.

ii) Evaluation of remuneration received in kind should be on the basis of retail market prices which will generally provide a reasonable estimate of the value accrued to the employee.

This is in accordance with the ILO Convention (No.95)<sup>65</sup> on the protection of wages, which provides that :

1. National laws or regulations, collective agreement or arbitration awards may authorize the partial payment of wages in the form of allowances in kind in industries or occupations in which payment in the form of such allowances is customary or desirable because of the nature of the industry or occupation concerned; the payment of wages in the form of liquor or high noxious drugs shall not be permitted in any circumstances.'

2. In cases in which partial payment of wages in the form of allowances in kind is authorised, appropriate measures shall be taken to ensure that-

- a) such allowances are appropriated for the personal use and benefit of the worker and his family; and
- b) the value attributed to such allowances is fair and reasonable.

## 5. METHODS OF ENFORCEMENT

Provision is made in the minimum wage fixing legislation, though valuable may not be sufficient to prevent the abuses. As domestic workers are usually ignorant, illiterate and unorganized, unscrupulous employers may infringe minimum wage laws in a number of ways.<sup>66</sup>

The fixing of legal minimum rates of wages should therefore, involve the adoption of some methods of ensuring that their rates are actually paid. This necessitates a system of discovering cases of non observance.

For reporting cases of non-compliance it might be thought adequate if the workers themselves undertook such notification. the workers will be acquainted with the rates of wages to which they are entitled, as the minimum wage law will generally provide that any employee who is employed in the domestic service in a household, must be paid wages at a rate not less than the hourly wage stipulated. Failure on the part of employers to pay the stipulated amount will be generally be punishable by fine. However domestic workers may be afraid to report their employers, as this might involve subsequent discrimination against them. The minimum wage law may provide for protection from dismissal or other discrimination against domestic workers who give evidence of non compliance on the part of their employers and discrimination may be rendered punishable by fine. Such protection is necessary, but nevertheless, enforcement of minimum rates solely by the action of individual could hardly give satisfactory results. This is probably because of the special relationship of dependence that exists between domestic workers and their employers.<sup>67</sup>

Action for enforcing payment of the rates may be taken by representatives of workers' organizations (e.g domestic workers could turn to SADWU<sup>68</sup> for support in obtaining their new legal rights),<sup>69</sup> by employers or employers' association. This method accords with the Labour Administration Convention (No.150)<sup>70</sup> which provides that 'A member which ratifies this convention may, in accordance with national laws or regulations or national practice, delegate or entrust certain activities of labour administration to non governmental

organizations, particularly employers and employees' representatives.' Support received from such sources are valuable means of discovering cases of non observance.

However some more systematic method is required. This can be provided by appointment of inspectors. This is in line with Labour Inspection Convention (No.81)<sup>71</sup> and Recommendation (No.81) which provide for a national system of labour inspection to ensure that employers respect legal provisions relating to terms and conditions of work. In particular view of the problems of enforcement of statutory minimum wages, labour inspection is the key supportive mechanism in this respect.<sup>72</sup>

An ILO publication<sup>73</sup> states thus: 'For people such as domestic workers, records have to be kept by the employer, showing the name, age, address ... kind of work done, the raw materials supplied, the wage actually paid out etc, for every worker. However the inspector will be able to work the accuracy of such entries only by putting questions or examining samples of the raw material provided by the employer.'

'Of course the difficulties involved when people are living in scattered private dwellings provide opportunity for fraud. If not infrequently happens too, that people whom the inspector wants to protect, not fully grasping what the inspection is all about, are too frightened to cooperate. In such circumstances the inspector has to fall back on his/her tact and power of persuasion and by a show of interest in workers' problems, attempts to win their confidence so that he can perform his duty.'<sup>74</sup>

However abuses cannot be ruled out when invoking a method of inspection. The prevention of such abuses depend on:

i) Hiring enough inspectors who are adequately paid and trained. It has been claimed that an increase in the size of the inspectorate will improve compliance through a higher rate of inspection;<sup>75</sup>

ii) A gradual process of education of employers as well as of workers;  
and

iii) The strengthening of the trade union movement to the point at which workers can defend themselves effectively through collective action.

Progress may be made in all these ways, but further progress will take time, and the adoption of the following measures would have to limit breaches of the law:

i) Improved publicity for the provision of minimum wage laws, adopted where necessary to the needs of illiterate workers and employers, and provided in all the languages used by workers who need protection. Barker<sup>76</sup> suggests that 'there should be a quarterly or annual government publication of information regarding all wage determination of information regarding all wage determination - which should be very basic and user-friendly.' The Commission of the European Communities guidelines<sup>77</sup> recommends the "development of codes of good practice with regard to the treatment of weaker low wages, improved arrangements for providing information about the labour market, particularly with regard to rates of pay, while avoiding imposing undue burden on small and medium-sized undertakings."

ii) Simplification and reduction of the costs of legal procedures. This can be achieved by avoiding the use of formal language and a comprehensive statute with flexible procedural rules.<sup>78</sup>

iii) Deterrent penalties for infringement of the law, such as the imposition of a fine but steps should be taken by the legislature to ensure that fines do not lose their deterrent value through inflation.<sup>79</sup>

iv) More effective protection of workers against victimization, by means of legal guarantee of their anonymity<sup>80</sup> in certain instances and a provision to be made in a statute which criminalizes acts of victimization.

## 6. THE LABOUR COURT SYSTEM

At present some domestic workers are making use of the Small Claims courts, mostly for claims involving wages in arrear. The Small Claims court act provides for courts to hear civil claims only up to two thousand rand and for related matters. The South African Domestic Workers' Union is however, not satisfied with the way in which this court operates. Their complaint relates specifically to the fact that no representation is allowed in this court<sup>81</sup>

The National Manpower Commission<sup>82</sup> made recommendation for access to a simplified labour court for hearing disputes between domestic workers and their employers<sup>83</sup> Marcus<sup>84</sup> in an article on 'access to industrial justice' states: "Perhaps the greatest shortcomings of the South African legal systems is its expense and inaccessibility to those who need it most ... Ideally a fair system of industrial justice requires ready and inexpensive access to the courts untrammelled by the complexity and formalism which characterise the ordinary courts of law."<sup>85</sup>

The NMC suggested further that the court would have simplified procedures and there would be no legal representation nor other professional (i.e any other person who charges for appearing in court) representation. However, the NMC is of the opinion that trade union and other representation free of charge should not be excluded since this would have the effect that domestic workers would in all probability then approach the Industrial court and not the Small Labour court.<sup>86</sup> Marcus' view is that "lay people will not be as skilled in the presentation of cases as qualified lawyers. Mistakes, misrepresentation and even a measure of carelessness are expected. But lay representation are potentially capable of performing a valuable function and their shortcoming ought to be more readily accommodated ... Presiding officers in the labour courts ought to be equally tolerant and flexible when dealing with lay representatives." <sup>87</sup>

Representation free of charge in the small labour courts can be obtained from the legal aid services - which are available to people who cannot afford the

services of an attorney i.e services form the legal aid board, resource centres and the university legal aid clinics.

## **7. ECONOMIC EFFECTS ON MINIMUM WAGE FIXING FOR DOMESTIC EMPLOYEES.**

This chapter introduces some of the issues involved in addressing the socio-economic effects on a statutory minimum wage fixing for domestic employees. The point of departure is that the question of a minimum wage cannot be seen in isolation from other important developments in the economy in general. General economic matters that have a direct bearing on the minimum wage question are matters such as unemployment, inflation and economic growth. Therefore, the effects of a minimum wage on employment and economic growth are examined as well as the inflationary consequence of a minimum wage. Although the discussion that ensues does not claim to be exhaustive, it does however provide some important issues that need to be probed.

### **7.1 Minimum wages and unemployment.**

#### **7.1.1 Elasticities**

The crucial element in measuring the minimum wages and its unemployment effects is to examine the sensitivity of the demand for labour to changes in the price of labour. Thus, whether the demand is elastic or inelastic is a vital theme in wage fixing.<sup>88</sup>

The law of demand and supply postulates that, as the price of labour increases, the quantity of labour demanded will decrease.<sup>89</sup> Yet these are instances where the quantity demanded or supplied is not responsive to price, hence the concepts of elastic and inelastic demand or supply. If the demand for labour is elastic, it usually implies that the elasticity of substitution of capital is a greater one. Following the imposition of a minimum wage then, employers would be inclined to lay off workers. It must be remembered that the increase in labour

price can mean increased productivity which in turn imply expanded employment opportunities.<sup>90</sup> In this sense then an elastic labour demand function should not be considered an obstacle.

Likewise, where quantity demanded cannot easily change, the demand is said to be inelastic. But of more importance is the fact that the inelastic demand for labour implies a corresponding substitution effect. This means that in practice it would be difficult to readily substitute capital for labour. In terms of employment, an inelastic demand for labour means that the minimum wage would not, have much impact on employment levels.

With an inelastic demand, employment levels remain quiet constant, even in the significant increase in wages (e.g through the fixing of a minimum wage legislation). 'Demand will be more inelastic if labour is essential and irreparable. Consequently it can safely be argued that the resulting unemployment due to a minimum wage would be minimal or insignificant.<sup>91</sup> Domestic services are essential to the continuance of the household when the services involve attending the children and the elderly, gardening and generally administering to the employers needs and wants. However, cleaning, cooking and laundry services can be dealt with by the occupants of the house with the assistance of modern household appliances currently on the market.

### **7.1.2 General arguments of economic logic**

One of the most common arguments levelled against minimum wage legislation is that it harms those it intended to help, because it leads to a reduction in the employment of low wage workers and that it is better to be employed at a low wage than not to have a job at all because the employer cannot afford to pay the prescribed minimum wage.<sup>92</sup>

In a paper on minimum wages, Young<sup>93</sup> argues that: "Those who argue that the unemployment problem is the priority, and that the low wage problem must wait until unemployment is substantially reduced, have made a mistake of assuming that low pay reduces unemployment. And so many workers have found out that

low has not saved workers from retrenchment.<sup>94</sup> However it can be argued that in certain cases low pay has reduced the number of retrenchments.

He goes on to say that "It would seem to be a poor policy to use low wages as an employment creating measure ... There are many employment-creating measures available to governments which do not require workers to subsidise their own jobs by accepting low pay."<sup>95</sup>

Empirical studies on the effect of minimum wage on employment levels are not conclusive. The minimum wage has given rise to a very substantial economic literature, in particular in the United States of America. Many of these studies have found evidence that the legal minimum wage produces rise in teenage and sometimes adult unemployment.<sup>96</sup> However it is significant that nearly all these accounts have been time series studies based on long term aggregate data of teenage employment derived from a single data source, the US Current Population Survey.<sup>97</sup> These econometric studies are said to be hardly definitive, especially as there is no evidence of what employment pattern would have been in the absence of a minimum wage.<sup>98</sup>

In contrast case studies that made use of a control group of employees not affected by the statutory minimum did not exhibit the negative employment effects measured by the econometric accounts using time series data.<sup>99</sup> One such recent study was done in California.<sup>100</sup> The consequence for the teenage labour after raising the California state minimum wage in 1987 was measured against the trends in employment in comparable states which did not enact a similar increase in their state minimum wage. It was found that both the earnings and the employment of teenage workers increased.

An international workshop examined a number of studies on the effects of minimum wages on employment and the general consensus was that the minimum wage has no impact on employment.<sup>101</sup> "The assumptions of a necessary negative relationship between wages and employment is, it seems an arbitrary one which cannot be justified by reference to any clear empirical basis"<sup>102</sup>

Even if minimum wages fixing sometimes leads to unemployment, "it need not lead to unemployment in the domestic sector. ILO Convention No.131 mentions the desirability of attaining and maintaining a high level of employment as one of the factors to be taken into consideration in determining minimum wage levels. Where employers cannot afford to employ a worker full time at the minimum wage hourly rate, the worker could be employed for the time that the minimum rate can be afforded. This would enable the employee to engage in other employment during the remainder to supplement her income. In this way a wage is paid commensurate with the employer's ability to pay, yet at the same time, the worker is protected against exploitation."<sup>103</sup> Furthermore, more organized and open hiring procedures could help equalise access to work.<sup>104</sup>

Starr<sup>105</sup> has this to say "Given that since the turn of the century almost all countries have adopted minimum wage regulation in some form or another, that individual domestic workers are too weak in bargaining with employers for higher wages and given that organized collective bargaining in domestic labour sector is non existent, minimum wage fixing as a means of protecting workers from exploitative wages is an option that cannot be ignored."<sup>106</sup>

## **7.2 Minimum wages, inflation and economic growth**

It is maintained that the burden of paying higher wages to consumers can be shifted by charging higher prices for the product, thus creating the inflationary effect.<sup>107</sup> This leads to the argument that domestic workers are not engaged directly in productive activities and are therefore not able to support their claims for higher wages by reference to profits and other arguments which workers in other industries may use to back up their demand.<sup>108</sup>

Furthermore, it has been argued that the minimum wages may lead to a reduced and less successful export effort, which like the reduced investment will have a negative effect on economic growth.<sup>109</sup> By this argument a minimum wage would raise wages and hence costs in the export sector to the extent that South African companies would not be able to compete on world markets. The notion that low wages are necessary for exports must be questioned, since many of the

low paid are in such sectors as cleaning, security services, domestic work etc. Higher wages here would have no noticeable effect on exports.

"Orthodox economists argue that low pay results from low productivity. However, the causation can also work the other way round. For example, when sweat shop conditions safety, health hazards and stress are associated with the absence of any effective floor to the health and well being of workers, it can be argued that low pay and other related terms and conditions of employment lead to lower labour productivity. This situation has been described as an underevaluation of labour fixing, the value of labour below the real value of labour input."<sup>110</sup>

It can be argued that minimum wages will contribute to the physical capacity of domestic employees. Thus the minimum wage will, in the worst of cases, salvage the domestic employees from malnutrition and poor diets they might have been experiencing.

The minimum wage can also aid in providing for instance, more clothing for domestic employees. Essentially the minimum will go a long way to wrenching workers from others their position of poverty. But what is notable here is that the above mentioned improvements will make them more able to work.

However, having proposed that a minimum wage will not be detrimental to economic growth, a warning need to be made. It must be ensured that the wage increase does not entail too large a jump in earning levels. It is often suggested that a change in wage that is sudden and at the same time too big will at the same stage impinge on hand and stunt economic growth.

It is important to note that the economic consequences of introducing statutory minimum wage for the first time will be different from those of raising an existing minimum, it should be borne in mind that the transitional effect can be met through a phasing in of such legislation.<sup>111</sup>

To sum up, the case for the establishment and encouragement of a domestic workers' union is undeniable. But it might well be wise of the union to push less strongly for immediate wage increases than for other benefits e.g training, compulsory education, retrenchment packages, job security, pension benefits, etc.

## 8. CONCLUSION

In the light of the preceding discussion, it can be concluded that there is an important role from minimum wage fixing in the fight against poverty. Aimed at assisting the lowest paid and the most vulnerable sections of the community.

Statutory intervention is not a substitute for collective bargaining and while it is important to provide homeworkers with a raft of protection, it is equally important that the raft will not operate unless it is supported by effective collective machinery. The encouragement of trade unionism by the legislative is essential, not only to enable unions to develop upon the minimum wages which the law can guarantee, but also to ensure that minimum wage are enforced in practice and with hope that in time collective bargaining machinery will develop in the domestic sector so that the statutory intervention can be withdrawn.

A reformed wage board will be necessary for setting minimum wages for domestic employees. The difficulty of reaching and maintaining a balance of reconciling and balancing fundamental goals of national development (i.e the objective of raising the income at the lowest paid with that of sustainable growth and employment generation) can be eliminated by adequate participation of employers and workers representatives on minimum wage boards, appropriate data and technical expertise at the boards' disposal, sufficient periodic adjustment of minimum rate and above all effective enforcement machinery.<sup>112</sup>

Minimum wage legislation will ensure domestic workers a basic standard of living. Unwanted economic side effects can be minimised by a negotiated phasing-in period.<sup>113</sup>

It is therefore suggested that the following minimum wages should be paid: R550 per month for an eight-hour day for five days a week providing full meals, transport costs and protective clothing in respect of a full-time skilled worker and R350 per month, R80 per week or R4,50 per hour for a semi-skilled worker.

## FOOTNOTES

1. This definition is in accordance with that implicit in the International Labour Convention concerning creation of minimum wage fixing machinery 1928 (No.28)
2. Act No.3 of 1983
3. It came into operation from 1 January 1994.
4. Van Der Walt 'Minimum Wage fixing for Domestic Labour?' *Industrial Law Journal* (1994) at 811
5. *Ibid*
6. Deakin and Wilkinson 'The Law and economics of the minimum' *Journal of law and society* (1992) at 378; Makgetla et al, 'Toward a statutory minimum wage' *National Labour and Economic Development Institute* at 2
7. Convention No.26 of 1928
8. Convention 131 of 1970 concerning minimum wage fixing with special reference to developing countries.
9. Act 28 of 1956
10. Act 5 of 1957
11. Makgetla *op cit* at 9
12. The Department of Manpower reported that the employer organisations 'mushroomed' as soon as the National Manpower Commission recommendations for legislation for domestic workers were published. *The Weekly Mail* 20-26 November 1992 at 15; see Van Der Walt *op cit* at 817.
13. Section 3(11)
14. Rycroft and Jordaan 'a guide to South African Labour Law' 313-314
15. Rycroft and Jordaan *op cit* 314
16. Horner 'Reconstituting the wage board: rescue and resuscitation' at 3
17. Section 7(d)
18. Young 'The National Minimum Wage or How to fight low pay in South Africa' at 13
19. Section 7(e)
20. Act 6 of 1992; see Van Der Walt 816-17

21. Section 84
22. Section 91(2)
23. Article 95 includes, inter alia, the payment workers of 'a living wage adequate for the maintenance of a decent standard of living and the enjoyment of social and cultural opportunities' as a policy objective obliging the state to 'actively promote the welfare of the people by adopting appropriate policies'
24. National Manpower Commission Report' on the principle and application of a national minimum wage with specific reference to the Republic of South Africa' (1983) at 53
25. See Barker 'Reconstituting the Wage Board' at 4
26. NMC Report loc cit; as in the case of the Competition Board  
The Board may on its own initiative and the directions of the Minister, make such investigation as it may consider necessary (section 10(1))
27. Young op cit at 15
28. Makgetla op cit at 10; young at 15.
29. Young op cit at 15.
30. Baker op cit at 4.
31. Ibid; Young op cit at 15.
32. Paragraph 2(1).
33. Of 1928.
34. These provisions are elaborated in Recommendation No. 30. Similar provisions are to be found in Convention No. 99 (article 3, paragraph 2) and Recommendation N0.89 (paragraph 3).
35. Article 3, paragraph 2(2).
36. Part II, paragraph 2. Convention No.99 (article 3, paragraph 3) and Recommendation No.89 (Paragraph 3).
37. Starr 'Minimum Wage Fixing' International Labour Office (Geneva) at 72.
38. Ibid
39. Van Der Walt op cit at 817.
40. Part II paragraph 2(c).
41. 'Minimum pay in 18 countries' European Industrial Relations Review 225 (1992) 14 pages 19-20.

42. Shaheed 'Does South Africa need minimum wages as part of a system of labour standards?' An ILO perspective' ILO (Geneva) at 4.
43. It is worth noting, however that, while the proceedings of a minimum wage board in which independent members confine themselves to a mediatory or conciliatory role have some affinity with collective bargaining, they also differ from it in important ways. There is no need to convince, or to reach agreement with, the other side - it is the independent members who have to be convinced. This may tend to make for a wider difference of views of views and less flexibility in tactics than real collective bargaining where negotiators have to reach agreement or accept a breakdown of negotiations. Another important difference is that decisions or recommendations of a minimum wage board do not have the morally binding character of an agreement. The negotiators have to defend the agreement before the groups on whose behalf they sign.
44. Shaheed op cit at 19.
45. See a CRIC booklet 'The fight for a living wage' produced by the Community Resource and Information Centre. pp 53-78
46. Franklin "The concept and measurement of 'minimum living standards' International Labour Review (1967) 95 at 272.
47. See Starr op cit at 99-100.
48. Ibid.
49. Ibid.
50. Compano' The minimum Wage act in argentina' International Labour Review (1966) 94 at 238.
51. An organised trade is likely to secure a higher rate than an unorganised one would in circumstances otherwise similar; standard rates will have a wider authority and be more uniformly observed where the organisation extends over the whole of a trade and is not confined to few regions.
52. Shaheed op cit at 4.
53. See minimum pay in 18 countries op cit at 15.
54. Ibid.

55. Wages 'a workers' education manual International Labour Office (Geneva) at 104.
56. National Manpower Commission 'Labour Legislation for domestic workers' at 13.
57. See European Social Character of Fundamental Social for worker. article 4 para.5.
58. NMC report op cit at 14.
59. Ibid.
60. Ibid.
61. See Van Der Walt op cit at 814.
62. NMC report op cit at 99.
63. Wages ILO publication op cit at 105.
64. NMC report op cit at 99.
65. of 1949.
66. e.g delaying tactics to postpone the hearing of cases.
67. See Starr op cit at 140.
68. South African Domestic Workers Union.
69. Makgetla op cit at 10.
70. of 1978.
71. of 1947.
72. See Shaheed op cit at 19.
73. 'Labour Inspection, purposes and practice' International Labour organisation (Geneva).
74. Ibid.
75. Bazen 'Low Wages. Family circumstances and minimum wage 6 legislation' studies of the social security system No.12 at 68.
76. Barker 'Reconstituting the wage Board' National Manpower8 Commission (1994) at 5.
77. Commission of the European Communities opinion on an equitable wage - adopted by the commission on 1st September 1993 at 169.
78. Marcus 'Access to industrial justice ' Employment Law (1992)8 at 70.
79. Starr op cit at 145.
80. Ibid
81. Domestic workers union Newsletter.

82. In the report concerning 'Labour legislation for domestic workers' (1991) pp 37-40.
83. It is important to note that NMC recommendations are significant because they are the product of cooperation between NMC members, COSATU representatives and delegates from SADWU.
84. Marcus 'access to industrial justice' Employment law (1992) Volume 8. No.4.
85. At 70.
86. NMC op cit at 72.
87. Marcus op cit at 72.
88. See Bendix. 'Industrial relations in South Africa' pp 181-183.
89. See Flanigan 'Labour Economics' pp 23-29.
90. This will be dealt with in 7.2 above.
91. Bendix op cit at 182.
92. Robertson (ed) 'Human rights for South Africans'(1991) at 174.
93. The National Minimum Wage, or how to fight low wages in South Africa, Salt River (LRS).
94. Young at 12.
95. Ibid.
96. The evidence is summed up by Brown; Cilroy and Kohen 'The effect of the minimum wage on employment' Journal of economic Literature 20(1982) 487 at 491.
97. Deakin and Wilkinson ' The law and economics of a minimum wage' Journal of Law and Society (1992) 379 at 382.
98. Card 'Minimum wages and teenage labour market: a case study of california 1987-1989 proceedings of the Industrial Relations Research at 234.
99. Deakin and Wilkinson op cit at 388.
100. Card op cit at 234.
101. International workshop on the economic analysis of low pay and the effects on the minimum wage, arles (309-1.10.93) see Shaheed op cit at 11.
102. Deakin and Wilkinson loc cit.

103. Van Der Walt op cit at 819.
104. Makgetla op cit at 16.
105. In Minimum wage fixing: International experience with alternative roles' International Labour Review (1981).
106. Starr op cit at 454.
107. NMC report on 'Minimum wage with specific reference to the Republic of South Africa' at 9.
108. Van Der Walt op cit at 818.
109. NMC report loc cit.
110. Shaheed op cit at 216.
111. Young op cit at 21.
112. Shaheed op cit at 19.
113. Young op cit at 21

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13. Marcus G 'Access to industrial justice (1992) 8 Employment law 70.
14. 'Minimum pay in 18 countries (1992) 225 European Industrial Relations Review 14.
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17. 'National Manpower Report' on the principle and application of a national minimum wage with specific reference to the Republic of South Africa (1983).

18. Shaheed Z 'Does South Africa need minimum wages as part of a system of labour standards?' An ILO perspective. Paper presented at a national workshop of the minimum wage subcommittee held under the auspices of the National Manpower Commission, Midrand 20 May 1994, 18.
19. Starr 'Minimum Wage Fixing' International Labour Office 1981.
20. Starr 'minimum Wage Fixing: International experience with alternative roles' (1981) 120 International Labour Review 545.
21. Wages International Labour Office.
22. Van Der Walt 'Minimum Wage Fixing for domestic labour?' (1994) 15 Industrial Law Journal 811.
23. Young 'The national minimum wage or how to fight low pay in South Africa?' (1991) Labour Research Service (Salt River).