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DOMESTIC WORKER COMPENSATION - SYLVIA BONGI MAHLANGU V THE MINISTER OF LABOUR

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On 23 May 2019, the North Gauteng High Court (the Court) issued an order declaring section 1(xix)(v) of the *Compensation for Occupation Injuries and Diseases Act* of 1993 (COIDA) unconstitutional and invalid to the extent that it explicitly excludes domestic workers employed in private households from the definition of “employee”. The Court also ordered that the section be severed from section 1 of COIDA, and under consideration is whether the amendment will apply retrospectively.

For over 25 years, domestic workers have been excluded from COIDA’s protections. There are over one million domestic workers in South Africa, 96% of whom are women and 91% of whom are black. Domestic work is one of the lowest paying occupations in the labour market, due in large part to wage discrimination and limited bargaining power. The low status of domestic workers in society and their limited bargaining power in the labour market renders them susceptible to exploitation and abuse. The deprivation of benefits of social insurance under COIDA only serves to further marginalise them and entrench pre-existing inequalities.

Briefly, the facts of the case are that Sylvia Mahlangu - the daughter of domestic worker, Maria - filed a motion and affidavit on 30 September 2015 to declare section 1(xix)(v) of COIDA unconstitutional and sever it from the Act. Maria worked for a private home in Pretoria for 22 years. On 31 March 2012, while cleaning the bedroom windows, Maria slipped from the step ladder and fell into the pool, in which she drowned. Mahlangu approached the Department of Labour for compensation for her mother’s death, as her mother’s employer could only provide R2 500.

Mahlangu and her sibling were financially destitute in the absence of their mother’s support and enquired the Department of Labour (the Department) about benefits under the COIDA compensation fund. This social insurance fund - financed on a monthly basis by employers - was established under section 15(1) of COIDA and enables employees who are injured at work or who contract an occupational disease to claim compensation. Mahlangu was informed that the word “employee” - regarding the rights to claim compensation under sections 22(1) and 65(1) of COIDA - expressly excludes domestic workers in private households. While compensation and unemployment insurance benefits are normally covered by COIDA, Maria and her family did not qualify for the protections. Together with the Socio-Economic Rights Institute of South Africa (SERI), Mahlangu argues that the exclusion of domestic workers from COIDA leaves their families’ dependants without protection.

COIDA itself provides broad protections to employees. Section 22(3)(ii) extends coverage to those who are completely financially dependent on an employee who dies as a result of a work-related accident. However, the exclusion of domestic workers from the term “employee” disables them from claiming coverage for temporary total disablement (ss. 28 and 47),



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permanent disablement (ss. 28, 49, 51, and 65(3)), medical costs (ss. 22(3)(b), 27, 38(10), 65(2), 72 and 73), and death benefits (ss. 39(10), 54(1)(d), and 56(1)(a)). The exclusion of domestic workers in private households from COIDA violates constitutional rights to equality and social security and amounts to unfair discrimination.

The Acting Compensation Commissioner of the Department of Labour issued the respondents' affidavit on 9 December 2015, in which he argues that coverage for domestic workers by COIDA has been delayed in order to allow the Department of Labour to increase its institutional capacity to administer such coverage. The respondents acknowledge that the *Labour Relations Act*, *Basic Conditions of Employment Act*, and *Unemployment Insurance Act* have all been amended to extend coverage to domestic workers. Further, the parties affirm that the Minister of Labour is in the process of compiling a Bill to amend COIDA, which must be subjected to approval by Cabinet, publication for public comments, and consideration by various councils and committees. Ultimately, the Department of Labour contended that it was unnecessary for the applicants to take a litigious route to compel them to make changes that it has already committed to.

On 2 June 2016, the applicants responded to the Department's contentions. Specifically, the plaintiffs noted that the Department has failed to provide evidence of an amendment to section 1(xix)(v), with no reference to terms, scope, or timeframes. Further, the draft bill and amendments' stage of legislative development is unclear, which renders the Department's postulations baseless and speculative. The Department has had over 20 years to develop the requisite institutional capacity. Furthermore, institutional capacity is not a factor in the evaluation of the constitutionality of the exclusion of domestic workers from COIDA protection. Ultimately, the respondents failed to provide any justification for limitations to the rights of domestic workers and seem to concede to the constitutional invalidity of section 1(xix)(v) of COIDA.

The Department issued a draft amendment bill on 18 October 2018, which includes domestic workers under the category of "employee". Subsequently, on 23 May 2019, the North Gauteng High Court granted the order requested by Mahlangu and declared section 1(xix)(v) of COIDA unconstitutional, for intentionally excluding domestic workers in private homes from its definition of "employee". The section is to be severed from COIDA, and the respondents were ordered to pay costs. This judgment represents a positive change toward State recognition and protection of domestic worker rights. South African domestic workers can now claim money from the Compensation Fund if they are injured or contract a disease at their place of work. Their families can also make claims if a domestic worker dies due to work-related injuries or illnesses. Furthermore, employers now have a legal duty to register domestic workers for compensation purposes and pay regular contributions. While the present judgment does not eliminate discrimination against domestic workers, it certainly improves access to just compensation and relief.