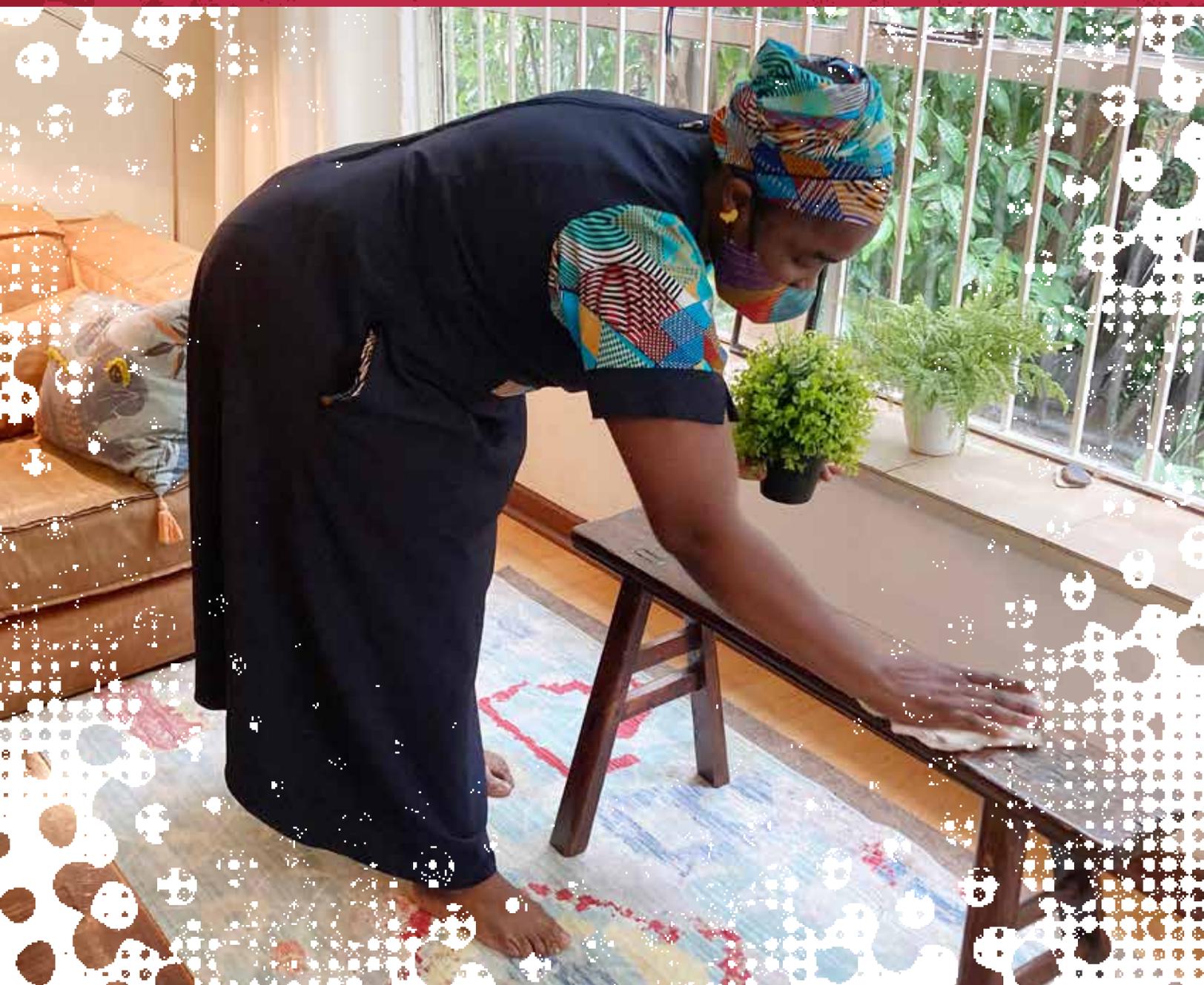


The Persistence of Private Power: Sacrificing Rights for Wages



A QUALITATIVE SURVEY OF HUMAN RIGHTS VIOLATIONS AGAINST
LIVE-IN DOMESTIC WORKERS IN SOUTH AFRICA

DECEMBER 2021



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IZWI DOMESTIC WORKERS ALLIANCE is a network of domestic workers in Johannesburg that advises workers on their labour rights, provides assistance with individual cases and conducts related advocacy and research work. Izwi also offers training to domestic workers and collects and shares workers' stories for media and advocacy.

The SOLIDARITY CENTER is the largest U.S.-based international worker rights organization helping workers attain safe and healthy workplaces, family-supporting wages, dignity on the job and greater equity at work and in their community. Allied with the AFL-CIO, the Solidarity Center assists workers across the globe as, together, they fight discrimination, exploitation and the systems that entrench poverty—to achieve shared prosperity in the global economy.

Design: Deepika Mehta
Editing: Rebecca Winzenried
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ON THE COVER:

Former domestic worker and IZWI employee Nomuhle Ndlovu is fighting for the rights of domestic worker rights in South Africa. Photo: A. Tekie

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Introduction

Live-in domestic workers in South Africa frequently find themselves in the intractable position of having to forego their rights in order to retain their jobs. The unique conflation of the home and workplace in the domestic sector frequently leads to the entanglement of workplace rights and personal freedoms. In an industry that is historically underpinned by racism, sexism and classism, rights to privacy, freedom of movement and children's right to parental care are frequently sacrificed for wages and stable work. Often this leads to unchecked exploitation—regardless of constitutional protections and industry-specific labor regulations.

Indeed, domestic workers are included within the bulwark of South African labor protections, but these do not include sometimes crucial constitutional and human rights. While rights such as privacy and freedom of movement are entrenched in the South African Constitution, they are largely absent from labor legislation and have not been incorporated into Sectoral Determination 7 regulating domestic work.

The South African Constitutional Court has acknowledged the unique circumstances of domestic workers, who are primarily Black women. In the case of *Mahlangu v Minister of Compensation*, the Constitutional Court found that the state's exclusion of domestic workers from workers' compensation claims in cases of injury, illness or death violated their right to social security, dignity and equality rights.¹ It found that discrimination against domestic workers occurs at the confluence of intersecting grounds, and describes the pernicious impacts of colonialism and apartheid, which placed Black women at the bottom of the social hierarchy, doing the least paid, most insecure work. The Court articulates how domestic workers are denied both a family life and a social life, devoting more time to caring for their employers' children than their own.

The COVID-19 pandemic has exacerbated the conditions of domestic work depicted by the Constitutional Court. Lockdown measures imposed by the state, and much more severe restrictions put in place by employers, were abrupt and continue to severely limit the movement of live-in domestic workers, denying them access to their families, health care, food and other basic needs during the pandemic.²

This study provides a qualitative exploration of the broader constitutional and human rights violations of domestic workers who live on their employer's premises. The research contributes to the understanding of intersectional discrimination experienced by domestic workers, as set out in the *Mahlangu* judgment, and sheds light on indignities that frequently rise to the level of rights violations but are invisible because of the private spaces in which they occur.

Background and Methodology

The Context of Live-in Domestic Workers

The International Labor Organization (ILO) Domestic Workers Convention No. 189 of 2011 defines domestic work as any “work performed in or for a household or households.” South African legislation³ refers more specifically to “an employee who performs domestic work in the home of his or her employer, and includes a gardener; a driver of a motor vehicle; and a person who takes care of any person in that home, but does not include a farm worker.”

Domestic work is the fourth-largest employer of women in South Africa. As of March 2021, some 848,000 South African residents identified as domestic workers, 96 percent of whom were women.⁴ (These numbers dropped by about 15 percent from early 2020, due to retrenchments related to COVID-19.) Live-in domestic workers are workers who reside on their employers’ property, either full time or for extended periods. In some cases, workers have homes nearby to which they commute on weekends; for others, the work accommodation is their only residence, perhaps outside of a home in the rural areas or their home country. Worker accommodation can take a variety of physical forms, from sharing a room in the employer’s house to an independent cottage or shared staff quarters.

According to the ILO, live-in domestic work is traditionally a “life-cycle occupation” in which workers begin at a young age with one family and remain with that family throughout their life.⁵ However, according to a 2013 ILO policy brief, while domestic work as a sector has grown, live-in domestic work appears to be declining globally, likely due to financial and residential capacity of employers, cultural changes in the management of domestic duties, and/or the increasing professionalization and modernization of the industry.⁶ That said, the aging of the global population, combined with a shift away from multi-generational households, is likely to result in a continued demand for live-in housekeepers and caregivers, particularly in countries with few adequate and affordable community

or facility-based care services.⁷ While the number of live-in domestic workers in South Africa is unknown, it is estimated to be high.

Of the survey respondents in this study, 57 percent of live-in domestic workers said that they would prefer not to live in but rather commute to work, if they had the choice, for the personal freedom and time with family it offered. The remaining 43 percent preferred the live-in arrangement, primarily due to cost savings on housing and transport. However the “cost” of those savings is frequently very high. The dependency created by the housing accommodation frequently exacerbates power disparities: It inhibits the workers’ ability to negotiate for better working conditions and wages, to organize with other workers, or to leave the job when their rights are violated.⁸ It also limits the capacity of the Department of Employment and Labour to enforce regulations, as the workplace is private property and employers can deny entry to labor inspectors. Some workers report that live-in domestic workers experience a more generalized violation of autonomy because employers assume the right to govern the worker’s life beyond the scope of working hours and responsibilities.⁹

The Legal Context: Labor Law, Constitutionalism and Private Power

While there is a growing awareness on behalf of governments and labor movements that domestic work must be formalized and professionalized, the legal regimes regulating the sector remain absent or sparse in many countries.¹⁰ As of 2020, a full 36 percent of domestic workers globally had no labor rights at all. In Africa, only 63 percent of domestic workers are recognized by the labor laws of their country.¹¹

However, South Africa set an early precedent by enshrining the rights of domestic workers into law, eventually granting them most of the basic labor rights and social protections due to other workers in the country. Domestic work is included in the general regulations laid out in the Labor Relations Act No. 66 of 1995 (LRA) and the Basic Conditions of Employment Act No. 75 of 1997 (BCEA). Furthermore, Sectoral Determination 7: Domestic Worker Sector, 2002 (SD7), lays out sector-specific regulations. Employers are required to register workers with the Unemployment Insurance Fund, and a recent Constitutional Court case has finally given domestic workers the right to inclusion in the Compensation for Occupational Injuries and Diseases Act, No. 130 of 1993.¹² In addition, the Labor Court has recognized that undocumented migrant workers are recognized as employees under the Labor Relations Act.¹³

While these laws provide a strong foundation for domestic workers to realize dignified working conditions, serious gaps remain in both policy and enforcement. Domestic work in South Africa continues to be an “informal” profession, despite the detailed regulations governing it, as most workers are employed without a contract and are never registered for the Unemployment Insurance Fund.¹⁴ Employers claim ignorance of the labor law, and workers either do not know their rights or fear, with reason, that claiming them will result in job loss or deportation. The ongoing impunity in this sector heightens the worker’s vulnerability and effectively permits the employer’s power to extend to other areas of the worker’s life.

Questions such as the right to adequate housing for live-in domestic workers and their rights to privacy, family life and the freedoms of expression, movement and association are complex because they occur in the context of an employer's countervailing rights to property, security and privacy in his or her home. The employer can claim that to ensure household security, she must search the worker's room or forbid the worker from having visitors. In order to protect her health during a pandemic, the employer may claim limits to the worker's freedom of movement that extend well beyond government regulations. This raises important questions about the application of the Constitution horizontally, between private parties.

The determination of how these competing rights should be balanced is largely unaddressed in South African labor legislation. It does, however, raise a crucial question of South African constitutional law: To what extent are private parties—in this case employers in private homes—bound by constitutional duties?

Section 8(2) of the Constitution specifically envisages that constitutional rights will apply in some form between private actors. It indicates that a provision of the Bill of Rights binds a natural or juristic person, "if and to the extent that it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right."¹⁵ In the last five years the Constitutional Court has adopted a more robust approach to holding private actors constitutionally accountable. The test it has formulated to determine where 8(2) applies horizontally hinges on "the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the potential invasion of the right by persons other than organs of state, and would letting private persons off the net negate the essential content of the right?"¹⁶

In the 2017 case, the Constitutional Court made clear that while private conduct should not be subject to the Bill of Rights to the same extent as that of public institutions, which carry the power of the purse, they "cannot be enclaves of power immune from constitutional obligation."¹⁷ In *Pridwin* the Court stated that while no private entity is constitutionally obliged to establish and maintain educational institutions, once it does so, it cannot escape at least some of the constitutional responsibility the right entails.¹⁸ The court was of the view that private entities have at very least a negative duty not to interfere with the rights already enjoyed by schoolchildren, without appropriate justification.¹⁹ In a concurring judgment, Justice Theron quotes Justice Madlanga, "if we are to take seriously the transformative injunction of our Constitution to improve the of life of each person, then our private interactions cannot be left out of reach of those human rights obligations that may appropriately be borne by private individuals."²⁰

Similarly, an earlier reluctance to impose positive obligations on private parties appears to be falling away. In *Daniels v Scribante* (2017), the Constitutional Court found that a domestic worker on a private farm was entitled to make improvements to her dwelling without the owner's consent.²¹ In this case, the judge found that the act in question, the Extension of Security of Tenure Act, was not only concerned with securing the tenure of occupiers but also affording them the dignity that had been absent during colonialism and apartheid. In interpreting Section 8(2) the judge said that "if in weighing up all relevant factors, we are led to the conclusion that private persons are not only

bound but must in fact bear a positive obligation, we should not shy away from imposing that.” In a concurring judgment, Judge Froneman stressed that the Constitutional Court has often rejected an absolutist conception of property where the owner has absolute authority over rights, and that the absolutization of ownership and property and the hierarchy of rights perpetuates existing inequalities in the South African context.²²

The Constitution has the conceptual and doctrinal tools to adequately address and remedy rights violations that take place between private parties in the private space of the home. However, in view of the challenges domestic workers face in obtaining access to justice, litigation would not be the most efficient approach to remediation. Rather, the Sectoral Determination 7 for Domestic Workers could be revised to define minimum standards for housing, protect privacy, family rights and visitation rights, legislate freedom of movement, and provide clear guidance in matters of harassment and violence, in accordance with Constitutional Court principles and jurisprudence.



Research Methodology

Research Purpose and Questions

The purpose of this research is to understand the range of human rights violations experienced by live-in domestic workers in South Africa, in order to guide further research and advocacy.

The core research questions are:

- 1. Do live-in domestic workers enjoy basic constitutional and human rights, including access to adequate housing?**
- 2. Are there South African legal regulations in place to ensure these rights, and is enforcement effective?**
- 3. Are there any lacunae in South African legal protections for live-in domestic workers?**
- 4. Does international law provide standards that could remedy these deficits?**

To meet its descriptive purpose, within the scope and allocated resources, the research was designed as a qualitative study with the sample size of just over 100 live-in domestic workers. Leaders from four domestic worker rights organizations confirmed that these issues are representative of the cases they address. It should also be noted that in some cases the researchers specifically targeted respondents who had negative experiences to understand the types of violations occurring. Indeed, the stories collected here are likely a tip of the proverbial iceberg.²³

Research Methods

Research methods included:

- **Desktop research:** to explore relevant legal frameworks and case law, as well as to review the rules of Sectional Title complexes.
- **Online group discussion:** to determine the scope of worker experiences and define areas and questions for research.
- **Surveys and structured interviews:** to detail the experiences of live-in workers.
- **Key informant interviews:** to provide context, analysis and perspective.

The research design was also informed by 494 cases of domestic worker complaints serviced by Izwi Domestic Workers alliance from May 2018 to February 2021, as well as stories and comments shared by workers on organizational WhatsApp groups during that period. The cases and quotes included in the findings, although they were identified and described outside of the research period, are noted.

Online Group Discussion

COVID-19 restrictions and precautions prevented in-person gatherings over most of the research period. In lieu of a physical focus group session, 662 domestic worker participants on three WhatsApp groups were invited to comment on challenges they faced as live-in workers, both generally and in specific areas. Similar questions were posted on multiple Facebook groups of domestic workers. Occasionally, more detailed questions were posted at different points during the research. The responses from workers were used primarily to inform the research focus areas and questionnaire, but some quotes are also included in the research findings.

Surveys and Interviews

The research targeted female domestic workers who are currently living with their employer or had done so in the last five years.²⁴ A total of 111 live-in or former live-in domestic workers filled out the questionnaire directly, or with a researcher.²⁵ These responses informed the bulk of the research findings.

The questionnaire design was informed by the online discussion input, and by Izwi case experience. Questions were primarily multiple choice, with open-ended follow-up questions to elicit more detail. The questionnaire was in English and was reviewed by several domestic workers to provide input on language and accessibility.

The COVID-19 pandemic rendered it difficult to distribute surveys in hard copy. Furthermore, the survey length (34 questions, including four multiple-choice grids) was daunting to workers, but could not be reduced further without jeopardizing the research credibility and findings. Finally, limited resources required the survey to be available in English only. To address these limitations, we:

- Made the questionnaire available via Google Forms for those who were able to respond online. (This was a minority of respondents.)
- Assisted workers to fill out the forms in hard copy, and then uploaded them to Google Forms on their behalf.
- Conducted structured interviews with workers, in person and over the phone, with local language options available, which were then uploaded onto Google Forms.

Desktop Research

Legal research was conducted using academic databases and online resources. For the analysis of Sectional Title Complex regulations, copies of conduct rules for estates, buildings and complexes were found through online research and provided by personal acquaintances. Documents that did not include any relevant references to domestic workers or staff residents were excluded, leaving 34 documents for analysis.

Key Informant Interviews

Five semi-structured interviews were conducted by telephone or Zoom with the following key informants:

- Pinky Mashiane, president, United Domestic Workers of South Africa (UDWOSA)
- Eunice Dhladhla, assistant secretary general, South African Domestic and Allied Workers Union (SADSAWU)
- Queeneth Simelane, founder, African Vulnerable Workers Organization, and former organizer at SADSAWU and UDWOSA
- Kelly Kropman, attorney with a focus on constitutional law and human rights
- Simon Grobelaar, portfolio manager, Trafalgar Property Management

Demographics of Respondents

All survey respondents and participants in online group discussions are female, Black and current or former domestic workers, with 60 percent of survey respondents currently living with their employer. More information on survey respondents (including interviewees) follows:

Location	Except for one respondent from Limpopo, all respondents were from relatively urban environments: 96 percent were living in Gauteng, and the other 4 percent in the Western Cape.
Age	82 percent of respondents were between 26 and 45 years of age, 4 percent from 18 to 25 years, and 14 percent from 45 to 60 years.
Country of Origin	94 percent were migrants from Southern African countries (89 percent Zimbabwean), and only 6 percent were South African.
Breadwinners	92 percent of respondents were supporting at least three people on their wages; 45 percent were supporting six or more individuals.
Labor Rights Context	<ul style="list-style-type: none">• 69 percent did not have a written contract.• 57 percent worked 10 or more hours per day. (25 percent worked more than 12 hours per day).• 54 percent were not paid overtime even if they worked extra hours.• 39 percent worked at night.

It is important to note that the vast majority of research participants were urban migrant workers. According to the experiences of Izwi and the African Vulnerable Workers Organization (AVWO), workers in urban areas generally have better working conditions. Exploitation becomes increasingly extreme and widespread outside of metropolitan areas. Nationwide, then, domestic workers are likely experiencing more abuse, and more extreme abuse, than is detailed here. Unfortunately, statistics are not available on what percentage of South Africa's domestic workers are migrants, but it is undoubtedly high; in some areas of the country, migrants may be the majority. In many cases migrant workers are more highly exploited than South Africans, as employers take advantage of their vulnerable status despite the fact that they are granted full rights under the labor law and Constitution, even if they were undocumented.

The Findings



Section One—addresses the right to adequate housing, which is understood to include privacy in housing and in the domestic work sector, and is also linked to the provision of food and water.



Section Two—focuses on the right to family and social life, which includes non-discrimination on the basis of pregnancy, the right to reside with family and the freedom to have visitors.



Section Three—looks at freedom of movement and association and the ways in which violations of this right have been exacerbated by the COVID-19 pandemic.



Section Four—looks at domestic worker rights in the specific context of Sectional Title Housing, which represents a microcosm for violation of housing, family and freedom of movement rights.



Section Five—looks at freedom from violence and harassment in the context of live-in domestic workers.

Each section contains a brief introduction, then sets out the research findings, followed by a broad overview of the South African legal context as well as guidelines from the International Labor Organization and other relevant international human rights instruments.²⁶

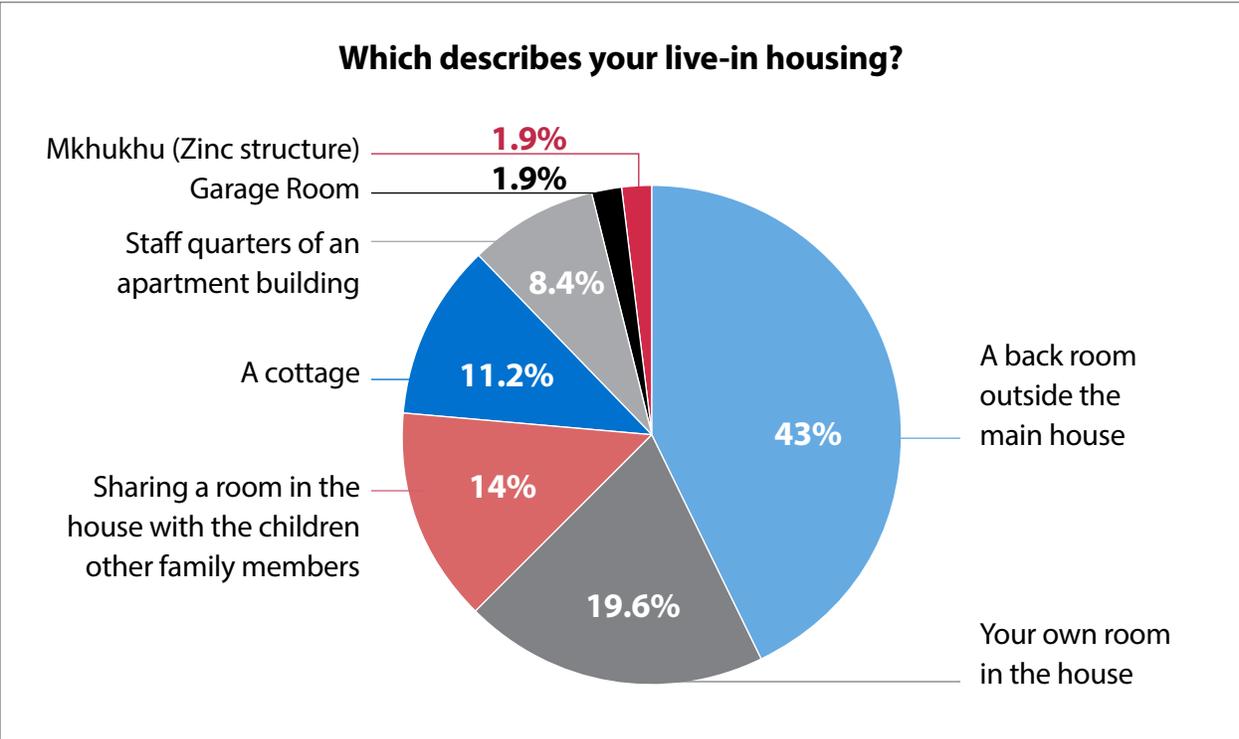
RIGHT TO ADEQUATE HOUSING

The South African Constitution guarantees the right of access to adequate housing. However, the term “adequate” has not been defined. Sectoral Determination 7 provides no minimum standards for domestic worker accommodation, except when the employer is deducting rent. In contrast, ILO guidelines set minimum standards for domestic worker accommodation. The International Covenant on Economic Social and Cultural Rights makes clear that privacy and dignity are core components of adequate housing and also recognizes that the right to food and water is part of the right to an adequate standard of living. Comparative regulation of domestic work addresses all three issues. Interviewees similarly highlighted the inter-relatedness of housing, privacy, food and water. Accordingly, these issues will be looked at together.



RESEARCH FINDINGS

Adequate Housing



Nearly a third (27 percent) of respondents report not having a home nearby other than the residence provided by the employer. The standards of staff accommodation provided for survey respondents vary, as detailed below:

- 26 percent of respondents cannot lock their room/cottage.
- 25 percent do not have their own toilet.

- 24 percent do not have their own/bath shower.
- 4 percent do not have windows that can be opened.
- 17 percent do not have curtains to protect their privacy.
- 6 percent do not have access to electrical outlets in their room.
- 7 percent do not have access to hot water.
- 9 percent report holes, leaks or other problems with the building.
- 9 percent share the room with at least one other worker.
- 36 percent are generally not happy with their living quarters.
- 77 percent are not allowed to have a family member or friend living with them.

Some of the comments from respondents on what was lacking in their accommodation included:

- Hot water, there was none. I had to carry it from another room to my room.
- It is not a room, it is a loft which is open and needs renovation.
- The room is too small, very hot and needs air conditioning.
- The room needs to be repainted and the windows need replacement.
- [I need] to have my own room; their kids are noisy and sleep late.
- It is a small and hot room; it's the baby's room, which is not designed for an adult.
- The room is small. I need a bigger space because I live with my child and am expecting another.
- [I need] a sink for dishes.
- The plugs needed to be fixed; the wall has cracks; and I need my boss to stop telling us to use five liters of water to bathe.
- Room was too small, and I had to cook my food in their kitchen.
- The toilet does not have a door and if someone uses it, the smell fills my room.
- My room needs hot water. I am tired of bathing with cold water even during winter.
- I have no access to hot water...the roof leaks and the room has lots of rats...and I live with my 2-year-old daughter in such conditions.
- Even if I wished to change something, they always shout at me. No one will listen so it is ok as it is.

In many cases, workers do not have a separate kitchen and are expected to use their employers' kitchen for cooking meals. This is often problematic as employers then can control when and even what workers can cook.

- Two workers (with separate employers) reported not being able to eat meat because it is against their employers' dietary regulations. They are not allowed to buy it with their own funds or cook it during off hours. "I love meat but because they don't want me to buy it...I end up eating things I don't want."
- An UDWOSA member was told she wastes her bosses' electricity using their kitchen stove to cook her meals. When she bought a paraffin stove for her room, they got angry and told her she would blow up their house with it.²⁷

- One worker reported, “They complain of my use of water and electricity in my room, and she (the employer) is threatening to make me pay for it...They buy me chicken braai pack and mealie meal only, no change of diet...I once bought myself veggies and put them in their fridge as I do not have one in my room...In the morning I found she had thrown them in the bin, saying she didn’t like how they smelt.”
- “[I want] to have my own kitchen so I can cook in my own room...Their kitchen, if I cook late, they say they want to sleep and sometimes I sleep without cooking.”

Domestic worker rights organizations report that this type of employer behavior is not at all uncommon. In Izwi’s experience, employers often keep separate plates and cutlery for the domestic worker since they do not want her using theirs, which is understood as a remnant from apartheid-era discrimination. In some cases, this crockery is kept with the dog food or cleaning supplies.

Another common frustration for live-in workers is employers admonishing them for using too much water and electricity. As quoted above, one respondent was told that she should only be using five liters of water to bathe. An average bathtub one-third full uses 75 liters, and five liters would be the equivalent of barely over one minute in the shower.²⁸ It is unlikely that this amount of water would be considered “adequate” or “fit for purpose” for the employer’s own bathing, but the definitions of “adequate” surely differ depending on the class or position of the individual in question. A live-in domestic worker represented by AVWO was told to stop using the shower and bath, and to use only a bucket to bathe. When she complained about this, she was dismissed.

Privacy

Survey and interview results revealed a host of frustrations about the lack of privacy afforded to workers in their off hours. Some of the comments included:

- I need to have my own space so I can rest and not be with the kids 24/7.
- I would love my own room because I always find my stuff searched.
- I need privacy and have none. Their kids go through my stuff.
- The room has no curtains and I need privacy.
- I need more privacy because I have a bathroom and toilet in my room, but if their toilet is being used, they come use mine without asking—they just barge in.
- I need to have a house so that I can protect my privacy, and so that my husband can visit or stay with me.
- I need to put curtains in my bathroom.
- If it was possible I do not like to share a kitchen with “the guy” though we each have self-contained rooms.
- Give me my own toilet.
- I need privacy; for them not to come to my house anytime, even if I am not around on a weekend they enter without my permission.
- I need at least to have keys for my security.
- I would love to have my own room and more privacy.
- Staying in you have no privacy...no peace...You are like a robot to them and they don’t consider that you need rest.

It is not uncommon for employers to search a worker's room (usually without permission) when they suspect theft or for other reasons. UDWOSA reported on employers who search workers' rooms without asking in order to see what medications they are on, and if they are HIV or TB positive.²⁹ According to AVWO, employers do what they like, claiming, "This is their property, you have no property."³⁰ Many workers have reported to Izwi instances of employers taking their personal phones and reading their messages. These are all direct violations of Section 14 of the Constitution, and potential breaches of the Rental Housing Act 50 of 1999. However, the right to privacy is generally overlooked when workers determine what cases to report to unions or the Centre for Conciliation, Mediation and Arbitration (CCMA).

The absence of the right to privacy or any requirement that a domestic worker's accommodation has a door that locks can enable sexual harassment and abuse of domestic workers, which is discussed in the final section of this paper. Domestic workers who live in a room in the employer's house or share a room with the employer's children have reported the male employer coming into their room at night to sexually abuse them.³¹ Workers who have their own room or cottage frequently report being watched by the male employer through the windows or that he comes in without knocking.³²

Food

The issue of food frequently complicates the domestic employment relationship. Historically, food was provided to domestic workers as part of their employment package, perhaps as informal compensation for their extremely low wages. Although domestic workers are now covered by the national minimum wage law, that wage is still below what has been defined as a "living wage" and is even below the minimum wage for all other workers in the country.

Research respondents' comments on food included:

- I was told to eat bread and peanut butter or margarine only.
- They said I must buy my own food, and when I said I cannot because I have no money, they now give me leftovers or expired stuff they cannot eat. It makes me sick time and again.
- I have my own set of cups and plates and cutlery that I must use.
- We are being overworked and abused by employers and their kids. They do not buy food for us as agreed; we only eat bread margarine and their leftovers.

12% of respondents said their employer has rules about what food they can eat during their off hours.

When asked on a WhatsApp group of workers whether they would prefer to have employers provide decent food or be paid fair wages and bring/buy their own food, every participant who responded preferred the latter.

- It is better for them to pay fair wages so that we can buy our own food because for me it is always rotten food that I get, and I only get fresh food when there are visitors.
- Most employers choose to leave all food in the fridge for a week before they give it to us.
- If they give me off foods, I do not talk to them but go straight to the dustbin and throw it away. This other boss of mine always gives me off foods, or the leftovers from her daughter from school. Imagine, her daughter is 4 years old and obviously will touch or play with that food.
- Honestly, most of these employers give us what they want to throw away.

Several participants in the research discussion on food provision noted that after raising the issue with their employers, they had been given a 30- to 40-rand daily allowance, with the agreement that they would buy their own food.³³

LEGAL CONTEXT

Labor Regulations

Sectoral Determination 7 (SD7) outlines the standard of housing required for live-in accommodation only in the context of rent deductions. Section 8 (b) states that an employer may deduct up to 10 percent of the worker's wage if they provide accommodation that: is weatherproof and generally kept in good condition; has at least one window and one door, which can be locked; and has a toilet and bath or shower, if the domestic worker does not have access to any other bathroom. However, these provisions do not apply to domestic workers who do not pay for accommodation.

Sectoral Determination 7 also does not include any provisions with respect to a domestic worker's right to privacy. Yet, in cases where an employer is deducting rent (or offering reduced wages) for accommodation, the Rental Housing Act 50 of 1999 may be applicable to the domestic sector. Under this Act, it is illegal for a landlord to search the property or seize a tenant's possessions without a court order.³⁴

This absence of guidelines on housing in the domestic sector for workers who do not pay for accommodation can be contrasted with the level of regulation in other labor sectors. The agricultural sector, for example, has numerous guidelines on worker accommodation. Despite the agricultural sector being much smaller than the domestic sector, several civil society organizations (including the Wine and Agriculture Ethical Trade Association,³⁵ Fruit South Africa and Sustainable Agriculture ZA) have each introduced accommodation guidelines, and the issue has been explored in policy and academic writing. Similarly, the Mining Charter addresses standards of accommodation for mineworkers, which incidentally, are significantly higher than for farm or domestic workers.³⁶

Constitution

Access to housing is a fundamental and enforceable socioeconomic right in South Africa. Section 26 provides that, "everyone has the right to have access to adequate housing" and "the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right."³⁷

In 2000, the acclaimed *Grootboom* case tested the standard of "reasonable" in context of Section 26.³⁸ The Court in *Grootboom* specifically declined the opportunity to affirm that Section 26 included a minimum core approach, which would grant claimants certain minimum concrete entitlements or set standards against which government regulations could be tested.³⁹ However, the judgment made clear that a policy that does not take into account the housing needs of the most vulnerable would not be constitutionally reasonable. It also emphasized the central role that the right to dignity plays in access to housing.

Accordingly, the absence of minimum standards to regulate the live-in accommodation of domestic workers, who do not pay rent for accommodation, is arguably not constitutionally reasonable, in that it does not take into account the needs of a population that has experienced compounded vulnerability by virtue of historic and present-day discrimination.⁴⁰ The absence similarly runs counter to the remedial purpose of socioeconomic rights, including the right to housing, which is to “undo” systems of racialized and gendered poverty.⁴¹

While *Grootboom* did not deal with the obligations of private actors with respect to constitutional rights, the South African Constitution Court has been increasingly willing to state that the question of whether private actors will bear positive constitutional obligations depends on “weighing up all relevant factors.”

In the case of *Daniels v Scribante* (2017), the Constitutional Court held that a domestic worker on a private farm was entitled to make basic improvements to her dwelling on the farm to render it habitable, without the owner’s consent. On the particular facts of the case, the manager of the farm was trying to remove Yolanda Daniels from the farm by cutting the electricity supply and failing to maintain the dwelling. In this case, the Court was clear that “habitability” within a discussion of extending security of tenure to labor tenants under the Extension of Security of Tenure Act (ESTA) was not only concerned with securing tenure of occupiers, but also of affording them dignity. The concurring judgment made clear that private property ownership rights are not trump cards but must be understood within the wider project of transformative constitutionalism.

Although in *Daniels* the facts revolved around the right of a domestic worker to render her dwelling on a private farm habitable, without the consent of the owner, and the issues raised by the respondents in our study concern the absence of adequate standards for employer-provided housing in private homes, we would argue that while employers are not obliged to provide housing to domestic workers, once they voluntarily do so, they become bound to ensure that such housing is constitutionally “adequate.”⁴²

Section 14 of the Constitution also entrenches a right to privacy, which includes the right not to have one’s person, home or property searched, possessions seized, or privacy of communications infringed upon. In the *Bogoshi* judgment,⁴³ Justice O’Regan set out perhaps the most detailed definition of privacy and placed the justification for the protection of privacy firmly on “the Constitutional conception of being a human being.”

ILO Guidelines

Decades ago, the International Labor Organization passed Housing Recommendation, 1961, which is the lengthiest international convention on housing. The ILO has also incorporated housing provisions into numerous conventions and recommendations, including Housing Recommendation, 1961 (R115), which provided direct guidelines on collective workers’ accommodation.⁴⁴

In the context of domestic workers, Article 6 of the ILO C189 provides as follows: “Each Member shall take measures to ensure that domestic workers, like workers generally, enjoy fair terms of employment as well as decent working conditions and, if they reside in the household, decent living

conditions that respect their privacy.” Article 17 of the ILO Domestic Workers’ Recommendation of 2011 (R201) outlined guidelines for live-in accommodation in the domestic sector, stating that when accommodation and food are provided to a live-in worker, they should include:

- A separate, private room that is suitably furnished, adequately ventilated and equipped with a lock, the key to which should be provided to the domestic worker
- Access to suitable sanitary facilities, shared or private
- Adequate lighting and, as appropriate, heating and air conditioning in keeping with prevailing conditions within the household
- Meals of good quality and sufficient quantity, adapted to the extent reasonable to the cultural and religious requirements, if any, of the domestic worker concerned.

Other International Legal Instruments

The right to housing is widely entrenched in international human rights law, including under the Universal Declaration of Human Rights,⁴⁵ the Convention on Elimination of Racial Discrimination,⁴⁶ the Convention on Elimination of All Forms of Discrimination against Women,⁴⁷ the International Convention on the Rights of All Migrant Workers and Members of Their Families.⁴⁸ The Convention on the Rights of the Child (CRC) imposes obligations on state parties to assist parents with providing adequate housing for their children.⁴⁹

The International Covenant on Economic, Social and Cultural Rights (ICESCR) entrenches the right to adequate housing and the protection from evictions and has issued two General Comments on the issue.⁵⁰ Under General Comment No. 4 of 1991, the ICESCR Committee espouses the view that housing should not be interpreted in the restrictive sense of the shelter provided by a roof over one’s head, but should be seen as the right “to live somewhere in security, peace and dignity.”⁵¹

The ICESCR Committee determines “adequacy” with reference to: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability, habitability and accessibility; location; and cultural adequacy. It defines “habitability” as “providing the inhabitant with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors.”⁵² It views housing as inadequate when occupants do not have adequate sanitation, energy for cooking, heating, lighting, food storage or refuse disposal.⁵³ It also understands that the right to “adequate housing” includes the right to be free from arbitrary interference with one’s home, privacy and family.⁵⁴

Although this right to housing is subject to progressive realization, the obligation to guarantee the right to adequate housing in an equal and non-discriminatory way is an immediate obligation. Women are thought to constitute a high percentage of those inadequately housed and, according to the OHCHR, discrimination can take place through gender-neutral laws and policies that do not consider women’s special circumstances.⁵⁵

Under Article 11 of the ICESCR, everyone has the right to an adequate standard of living for “himself and his family,” which includes the right to adequate food.⁵⁶ Under General Comment 12 of 1999, “violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States.” Further discrimination in access to food is considered a violation of

the ICESCR. General Comment No. 15 makes clear that the right to water is understood as an essential component of the right to an adequate standard of living, and includes an obligation to protect the right by preventing individuals or groups from interfering with the enjoyment of the right.⁵⁷

The absence of provisions in Sectoral Determination 7 to address and regulate issues such as energy for cooking, heating, lighting and food storage, as well as protection from arbitrary interference with domestic workers' privacy, all arguably fall afoul of ICESCR General Comments on adequate housing. Similarly, states that fail to protect individuals from violations of rights to food and water—essential components of the right to an adequate standard of living—fall afoul of obligations under the ICESCR.

It is further arguable that the absence of standards regulating adequate housing in the domestic work sector is itself a form of indirect gender-based discrimination, precisely because Sectoral Determination 7 does not adequately take into account the gender-specific vulnerabilities implicated in adequate housing in the domestic work sector. This absence of regulation stands in stark contrast to provisions in other sectors, such as mining and agriculture, which are predominantly and historically male. Indeed, in its 2018 consideration of South Africa's compliance with its ICESCR treaty obligations, the Committee recognized that the standard for accommodation of domestic workers and farmworkers was not regulated.

Comparative Jurisdictions

In contrast to Sectoral Determination 7, internationally, countries such as Austria, Bolivia, Singapore, Switzerland and Uruguay, and also Hong Kong, regulate standards of live-in housing for domestic workers, and expressly include provisions on privacy, security and provision of food.

In **Austria**, in terms of Section 4 of the Governing Domestic Help and Domestic Employees Act of 1962, for an employee who resides in a household and is assigned a separate room, the room must comply with health, construction and fire regulations, and must be designed "so as not to harm the employee's morals."⁵⁸ The room must be capable of being heated in cold weather and also to be lockable from the inside and outside; it must have the requisite fittings, including, in particular, a cupboard with a lock. If the employee only has a bed of her own, and not a room, the same provisions apply, except that the room should be lockable only from the inside. Employees whose compensation also includes board must be given healthy and adequate food that generally corresponds to the food given to the adult healthy family members.

In **Bolivia**, Article 21 of the Household Workers Act, 2003, requires the employer to provide workers living in the household adequate and hygienic accommodation; access to a toilet and shower for personal hygiene; and the same food as the employer.⁵⁹

In **Uruguay**, the Ministry of Labor and Social Welfare Decree of June 25, 2007, issued under Act No. 18.065, regulates employer-provided accommodation and food. Under Section 11 on the right to food and accommodation, an employer who hires staff on a live-in basis must provide food and accommodation. The food must be wholesome and sufficient, and shall include, as a minimum, breakfast, lunch and dinner, in accordance with the practices and customs of the household. The accommodation shall be private, furnished and hygienic.⁶⁰

In **Singapore**, legislation contains detailed obligations for employers of migrant domestic workers. The Employment of Foreign Manpower (Work Passes) Regulations, first schedule, part I, section 4, obliges the employer to provide adequate food, as well as medical treatment. In addition, the employer must supply acceptable accommodation for the foreign employee that complies with laws and regulations in Singapore.⁶¹

In **Hong Kong**, the Standard Employment Contract for domestic workers recruited from abroad stipulates an obligation on the part of the employer to provide food and lodging free of charge, although instead of providing food, an allowance can be paid. The Schedule of Accommodation and Domestic Duty attached to the contract sets forth a minimum standard of decency in regard to accommodation provided, including examples of unsuitable accommodation (“sleeping on made-do beds in the corridor with little privacy and sharing a room with an adult/teenager of the opposite sex”).⁶² The nature and size of the accommodation and related facilities have to be specified on the schedule, which is to be signed by both parties.

ANALYSIS

While South Africa has entrenched the right to adequate housing and privacy, and the right to food in its Constitution, these rights have not been adequately incorporated into labor laws, particularly the Sectoral Determination governing domestic work. Notably, the only mention of accommodation standards in Sectoral Determination 7 is for workers who are charged rent. The standards set in the Sectoral Determination provisions do not apply to workers who do not pay rent.

Furthermore, even if SD7 guidelines were to be extended to all live-in workers regardless of rent deductions, they would still fall short of the ILO R201 standards for live-in accommodation. Most notably, it does not mandate a separate, private room for workers, allowing employers to house domestic workers in shared rooms with each other or with the children in the family. In addition, there is no mention of lighting, or heating/cooling and SD7 does not require employers to provide food for workers, other than to forbid employers from making wage deductions or requiring payment in exchange for food.

In addition, despite the explicit constitutional right of an individual not to have their person, home or property searched, or the privacy of their communications infringed, SD7 notably does not include any provisions with respect to a domestic worker’s right to privacy. The research finds that some employers freely search the worker’s accommodation and property without permission and read personal phone messages.

Both the ICECR and the ILO recognize that the right to be free from arbitrary interference with privacy is intrinsically linked to the standards of accommodation. ILO guidelines for domestic workers’ accommodation address the right to privacy by mandating a separate bed or room, and the ability to lock the door. South Africa’s regulations for rent-paying domestic workers only require the latter. Similarly, while Section 27(1)(b) of the Constitution guarantees the rights of everyone to sufficient food, the South African law is not specific about the provision of food to workers, in

contrast to ILO standards and comparative jurisdictions. However, in South Africa, the historical expectation that employers will provide food remains, especially in a live-in context.

It is clear from the research comments that a significant number of workers are living in accommodation that does not meet most basic standards for domestic worker accommodation under ILO Domestic Worker Convention or adequate housing under the ICECR. Yet, of these respondents, only 18 percent are paying for their housing through either wage deductions or extra unpaid hours of work. This means that for 82 percent or more of respondents, there is no legal basis for them to access better housing standards.

Constitutionally, two questions are raised by these issues: Are private employers constitutionally bound by provisions on the right to adequate housing? And, what is the content of adequate housing? With respect to the first question, while a private employer would not carry equal obligation of the state, concerning housing, the extent of the obligation would depend on weighing all factors, including an understanding of the history of “adequate” housing in the sector. Inadequate housing in the context of domestic workers employed in private homes is most certainly capable of being violated by non-state employers, as the notorious “back room” attests. Furthermore, letting private persons off the hook with respect to the provision of adequate housing would clearly have an impact on the worker’s dignity and would negate the essential content of the right. Conversely, the measures required to render housing “adequate” could be minimal.

We would argue, in line with *Pridwin*, that while an individual is not obliged to employ a live-in domestic worker, once he or she does so, they are constitutionally obliged to ensure that such housing is adequate. With respect to the second question, since the standards of “adequate” housing with respect to live-in domestic workers are undefined, the refusal of the Constitutional Court to define Section 26 narrowly is problematic; employers and workers may have different perceptions of what is required to meet an “adequate” standard. We would argue that adequate housing in this context should be defined, consistent with the ICECR, to include habitability, privacy and access to cooking, heating/cooling, food and water.

MATERNITY, FAMILY AND SOCIAL LIFE

This section looks at the rights of domestic workers to bear children, raise families and engage in a social life, and focuses on: (a) the right not to be dismissed because of pregnancy; (b) the right to live with one's children (and/or other family members); and (c) the right to have visitors in one's home. The first of these rights, the right to non-discrimination based on pregnancy, is explicitly protected under constitutional and labor law, but in practice is violated regularly by employers. The rights to live with children or other family members and to have visitors in your home are not explicitly protected in labor law or the Sectoral Determination.



RESEARCH FINDINGS

Pregnancy

In reference to domestic workers globally, the ILO notes that “the frequency and occurrence of dismissal on grounds of pregnancy is alarming despite legislative protection.”⁶³ This holds true for South Africa.

- I once had a miscarriage and they said it was for my good because they were planning to fire me since they do not want pregnant people working for them.
- When I became pregnant, they dismissed me; they asked why I fell pregnant and said that they no longer have use for me.
- They told me that if I get pregnant for the second time, they will fire me.

Izwi has recorded multiple cases of dismissal due to pregnancy. Usually this happens at the end of the worker's maternity leave, when they are casually told they do not need to return to work because someone else has been hired in their place.⁶⁴

For many households, the role of a domestic worker is to care for the employer's family, and employers sometimes feel that the worker's own family will present a conflict of interest. As detailed by one respondent: “[My employer said] I can't have a baby while still working for them. The reason being that I can't divide attention between my baby and theirs.”

This assumption of conflict of interest is linked with the round-the-clock working hours expected of many live-in domestic workers. If an employee is working eight to nine hours per day, with the legally prescribed rest periods, it is not difficult to see how she could manage her own children during off hours, with childcare while she is working. This is what women do in most sectors, often including the female employer herself. However,

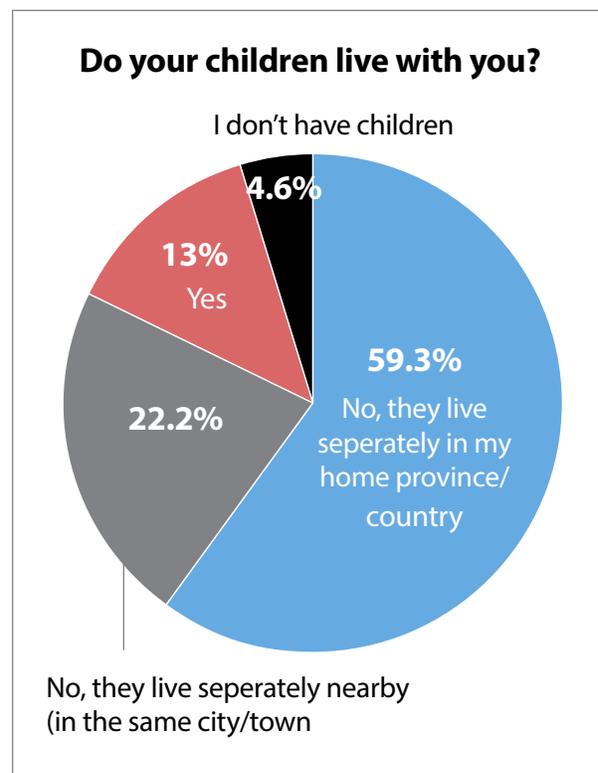
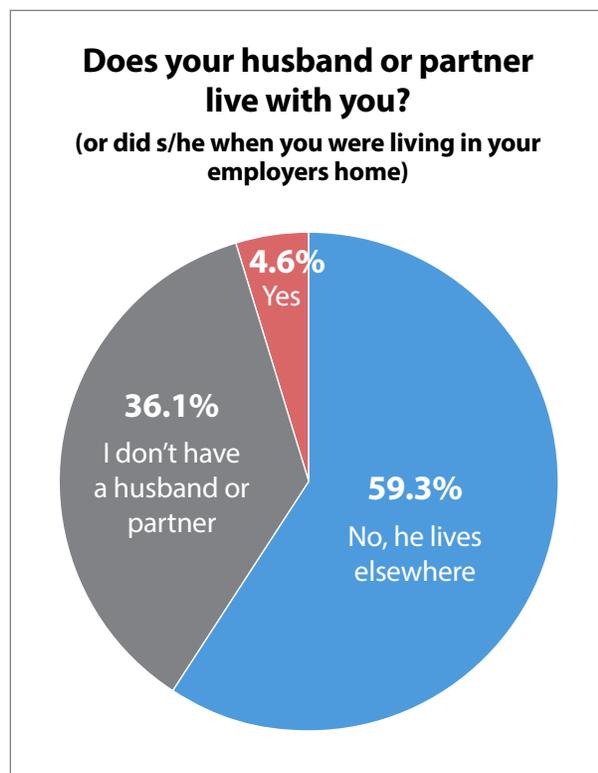
17% of survey respondents said that their employer has rules about whether the worker can have a baby.

live-in domestic workers are often expected to be available at any time of day or night, and personal family duties might detract from that unlimited availability. In a sense, employers expect that the worker should not have any concurrent personal obligations, and arguably even any meaningful identity outside of her job.

Here, an absolutist conception of private property comes into play. The employer presumes that because she owns the staff accommodation, she has the absolute authority to decide if a child can live there. If she decides against it, the domestic worker has to choose between her job and her family. According to Maggie Mthombeni, Izwi case manager, many domestic workers who want to have a child are choosing not to because they know they will lose their job.⁶⁵

Family Life and Visitors

78 % of respondents said they are not allowed to have family members or friends live with them, while 60% live separately from their partners and children.



This issue came up repeatedly in response to questions on how workers would like to change their living conditions:

- Not living with my children stresses me.
- She used to tell me not to bring my 5-year-old kid, and when they go away for holidays I must stay with [to look after] their dogs only.
- [I wish] they could allow my partner to come visit me or stay with me.

A domestic worker represented by AVWO was not allowed to leave her employer's home, even on weekends, and her boyfriend was not allowed to visit her at work. When her daughter entered a nearby university and needed housing, she came to live with her mother. The employers ultimately dismissed the domestic worker for this. Another AVWO member was dismissed for having her boyfriend visit.⁶⁶

Visitors

More than half (52 percent) of research respondents said their employer has rules about whether they can have visitors.

- They do not want me to have visitors because they say on off weekends, I can see them.
- My partner cannot come to visit me.
- Only my mum is allowed to visit me, but for a day only.
- My boss said he does not trust Black people, so he doesn't want any visitors, including my husband.
- They don't want visitors because they fear for their safety.
- They are afraid of being robbed so they say no visitors.
- They say my visitors will steal their stuff.

LEGAL CONTEXT

South African Labor Law

In South Africa, pregnant domestic workers enjoy the same protection from dismissal or discrimination on the basis of pregnancy as other workers. Sectoral Determination 7 provides clear and detailed guidelines on a domestic worker's right to maternity leave. It also includes an important reference to the Labor Relations Act: In terms of section 187(1)(e) of the Labor Relations Act, 1995, the dismissal of an employee because of her pregnancy, intended pregnancy or any reason related to her pregnancy is automatically unfair. The definition of dismissal in Section 186 of the Labor Relations Act, 1995, includes the refusal to allow an employee to resume work after she has taken maternity leave in terms of any law, collective agreement or her contract.⁶⁷ Section 6 of the Employment Equity Act also prohibits dismissal on the basis of pregnancy.⁶⁸ In addition, under the Basic Conditions of Employment Act, domestic workers are entitled to at least four months of maternity leave, paid by the Unemployment Insurance Fund, a compulsory contributory social security system.

In contrast to pregnancy protection and maternity leave, the Sectoral Determination is silent on the issue of family life. Similarly, the Sectoral Determination does not address the right of domestic workers to have visitors. This "sovereignty" of private property also has implications for labor relations and organizing in the sector. While Section 12 of the Labor Relations Act allows any union official to "enter the employer's premises" in order to recruit, communicate and hold off-hours meetings, according to Section 17(2)(a) such access to the premises does not extend to the employer's home unless the employer agrees. Further, Section 17(2)(b) explicitly states that an employer is not required to disclose information to a union pertaining to a dispute in a domestic context. The legislation thus effectively imposes a barrier for live-in domestic workers to organize, which ultimately hinders their freedom of association.

The right to family life and to have visitors is, however, explicitly granted to farmworkers through the Extension of Security of Tenure Act 62 of 1997. Section 6(2)(b) of ESTA has addressed this issue directly for live-in farmworkers, stating an occupier shall have the right “to receive bona fide visitors at reasonable times and for reasonable periods: Provided that—(i) the owner or person in charge may impose reasonable conditions that are normally applicable to visitors entering such land in order to safeguard life or property or to prevent the undue disruption of work on the land; and (ii) the occupier shall be liable for any act, omission or conduct of any of his or her visitors causing damage to others while such a visitor is on the land if the occupier, by taking reasonable steps, could have prevented such damage.”

Furthermore, according to the *Tenants Guide to Rental Housing*, it is unfair for a landlord to forbid overnight visitors.⁶⁹ Considering the protections afforded to tenants and live-in farmworkers, the lack of regulations on visitors for live-in domestic workers is anomalous.

The Constitution

The South African Constitution is similarly clear about the prohibition of discrimination on the basis of maternity. Article 9 prohibits unfair discrimination on the basis of pregnancy, among other grounds. Section 12 of the Constitution provides that “everyone has the right to bodily and psychological integrity,” which includes the rights to a) make decisions concerning reproduction; and b) to security in and control over their body. While the South African Constitution does not explicitly protect the right to live with your children, it is arguably implicit in Section 28, 1(b), which provides that every child has the right “to family care or prenatal care, or to appropriate alternative care when removed from the family environment.” It goes on to clarify at Section 28, 2 that “a child’s best interests are of paramount importance in every matter concerning the child.”

The question of whether “family care” includes the right to live with children was addressed by the Constitutional Court in the case *Hattingh and Others v Juta*.⁷⁰ The Court considered whether a domestic worker’s right to family life under the Extension of Security Act meant that her adult children, who were not dependent on her, could live with her in the cottage on the farm. The lower court (the Land Claims Court) had found that the right to family life under ESTA was limited to living with a spouse and dependents. It reached this conclusion by balancing the occupier’s right to family life against what was just and equitable to the landowner, finding that to hold otherwise would impose an onerous and intolerable burden of housing adult family members of occupiers’ extended family indefinitely. It permitted an eviction in this circumstance.

The Constitutional Court was of the view that there was no statutory justification for limiting the term “family” in ESTA to the dependent nuclear family. It found that families come in different shapes and sizes, and that the attainment of majority or independence does not remove a person from his or her family. The Court found that the purpose of the conferment of the statutory right to family was to ensure that people living on other people’s land would be afforded “as close as possible the kind of life they would lead if they lived on their own land,” and “as normal a family life as possible having regard to landowner’s right.” This is because, historically, most people benefitting from ESTA were denied these rights.⁷¹ However, the Court found that it must balance the occupier’s rights and the owner’s right and avoid a result that is unjust and inequitable.⁷² In its opinion, the aim of

the ESTA provisions on family is to “enable occupiers to live as full a family life as possible including engaging in cultural activities or practices, as long as this does not offend the equitable balance of the occupier’s right with the rights of the landowner.” On the facts, the Court found that in balancing the rights of the owner of the land against the occupier’s right to family life—including that Mrs. Hattingh would remain in the cottage, that the landowner was prepared to pay a significant sum of money to help her children find alternate accommodation, that the owner required part of the property to house another worker, and that the children were adults and independent, and wished to find alternative accommodation—it would be just and equitable that applicants be evicted.⁷³

While the Constitutional Court case is concerned with the interpretation of legislation granting family life to occupiers on farms under ESTA, and does not address the question of whether live-in domestic workers in private homes are entitled to family life, the reasoning in *Hattingh* is highly relevant to the domestic worker context. In view of the historic and intersectional discrimination experienced by domestic workers, as explained by the Court in *Mahlangu*, which denied both family life and social life, there is no reason why domestic workers in private homes should not similarly be afforded the kind of life they would have if they were living in their own homes, or as close as possible. Similarly, and in line with *Hattingh*, this should be balanced in particular circumstances against the employer’s right to privacy and household security, and the courts should assess which circumstances would amount to imposing “an onerous and intolerable burden” on the owner.⁷⁴ The absence of any guidance on the issue, however, effectively grants employers a wholesale privilege to make this judgment call, free of constitutional constraint.

ILO Guidelines and International Human Rights Law

International labor standards **on maternity protection** have recognized its critical importance to domestic workers. The Maternity Protection Convention (Revised), 1952 (No. 103) explicitly recognizes that those who perform “domestic work for wages in private households” (Art. 1.3 (h)) require protection during pregnancy, maternity and nursing periods. More recently, the Maternity Protection Convention, 2000 (No. 183) applies to all employed women, including those in atypical forms of dependent work (Art. 2.1), and aims to ensure that work does not threaten the health of women and their newborns during pregnancy and nursing, and that women’s reproductive role does not jeopardize their economic security.⁷⁵

The Domestic Workers Convention, 2011 (No. 189) and accompanying Recommendation (No. 201) recognize the right of domestic workers, like other workers, to maternity protection and the need for work-life balance, acknowledging that these may require progressive steps.

While a right to live with one’s children is not explicitly provided, it is inherent in numerous ILO and International Human Rights Conventions aimed at creating a work-life balance. Workers with Family Responsibilities Convention, 1981 (No. 156) aims to enable men and women workers to exercise their right to participate and advance in employment while meeting their unpaid family responsibilities. Among the work-family measures included in Convention No. 156, affordable and quality childcare services are essential to vulnerable workers, including those in domestic work.

Similarly, the right to family life is recognized in a variety of international human rights instruments. Article 16 of the Universal Declaration of Human Rights states that “[a]ll men and women have the right to marry and found a family,” and that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” According to Article 10(1), of the ICESCR, “the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, *particularly for its establishment and while it is responsible for the care and education of dependent children.*”⁷⁶ Article 9 of the Convention on the Rights of the Child provides that children have the right to live with their parents, except in situations of abuse or impossibility due to separation.⁷⁷

The right to receive visitors is a lesser discussed area of the law. However, Article 3(a) of the ILO Workers’ Housing Recommendation, 1961 (R115) is directly relevant, stating that in cases where housing is provided by the employer, “the fundamental human rights of the workers, in particular freedom of association, should be recognized.” Further, it is arguable that the right to visitors is a component of the right to rest and leisure, which is protected by Article 24 of the Universal Declaration of Human Rights, as well as the International Covenant on Social, Economic and Cultural Rights.

ANALYSIS

The right of non-discrimination based on pregnancy is explicitly protected under constitutional and labor law but, in practice, it is violated regularly by employers. In contrast, the rights to live with children or other family members and to have visitors in employer-provided housing are not explicitly protected in labor law and need to be addressed specifically in legislation and the Sectoral Determination. While there are certainly differences between the context of live-in domestic workers on farms, covered by ESTA, and those outside of rural areas, there is also much commonality. The absence of guidelines or provisions on family life and visitors in the domestic work sector, which would take into account both constitutional rights to family as well as potential hardships to employers in the exercise of these rights, effectively grants an absolute discretion to an employer on these issues.

In practice, this results in a negation of rights to family, as attested to by the 78 percent of respondents in this study who are not permitted to have family members or friends live with them, and the 60 percent who live away from their partners and children. The reasoning articulated in *Hattingh*—that the protection of family life for farmworkers, in the context of ESTA, are animated by a commitment to affording workers as close as possible the kind of life they would be living in their own homes—should similarity be incorporated into regulation in the domestic worker context. International Labor Law and Human Rights Law similarly protect non-discrimination on the basis of maternity, and there are conventions in place addressing work-life balance. These conventions, while not directly addressing the right to live with children, implicitly do so. Similarly, a right to have visitors is arguably protected by the broader constitutional and human right to associate.

FREEDOM OF MOVEMENT

Research findings confirm that many employers restrict the movement of domestic workers during their off hours. The Constitution explicitly protects the individual's right to free movement, but this right is not specifically mentioned in labor regulations. The inability of a worker to leave the employer's household freely and independently impacts on a plethora of other human rights. The COVID-19 pandemic has exacerbated the working conditions of live-in domestic workers. In the name of preventing transmission, many employers have restricted the rights of live-domestic workers well beyond the national COVID-19 regulations. Some workers are virtually imprisoned in their employers' homes, unable to see their families, access medical care, buy necessities or take care of other needs without sacrificing their jobs.



RESEARCH FINDINGS

General Findings

In this research, 20 percent of respondents said their employer had rules about where they could go during their off hours, even *before* the COVID-19 pandemic. Izwi Domestic Workers Alliance has had three notable pre-COVID cases of employers inhibiting freedom of movement:⁷⁸

- Two sisters were brought to Johannesburg from KwaZulu-Natal (KZN) by the employer, to whom they were not related, to work at the household in the suburbs. The women were not allowed to leave the employer's gated townhouse complex unless they were accompanied by the employer. This included simply crossing the road to buy airtime or taking a child to the park. They were prohibited from socializing with other domestic workers. They were extremely difficult to contact, as their phones were regularly taken and read by the employers. Once a month, they would be delivered to the bus station on a Friday and put on a bus to KZN. On Sunday, they would be collected from the bus station. Despite extensive efforts, including finding shelter for the women to move to, the workers never left the job and the employers were never held accountable.
- Several Izwi members reported a house in Houghton, Johannesburg, where workers were brought by a male agent, on the promise of a good job. Many women were working there. Upon arriving, they were constantly shouted at and verbally abused, given unreasonable tasks and workloads, and rotten food to eat, which was served to them on the floor. They shared staff rooms, and those were locked from the outside at night, so they could not leave. Though three women who had escaped the job were keen to report the employers, they decided against it because they were undocumented migrants and did not want to risk attention.
- A woman who approached Izwi had been working for her employer for seven years. The employer was remarkably supportive in providing a comfortable home and all the provisions the worker needed. However, the worker was not allowed to leave the home unaccompanied. If she had a medical issue, she would be taken to the employer's doctor. If she wanted to see her family,

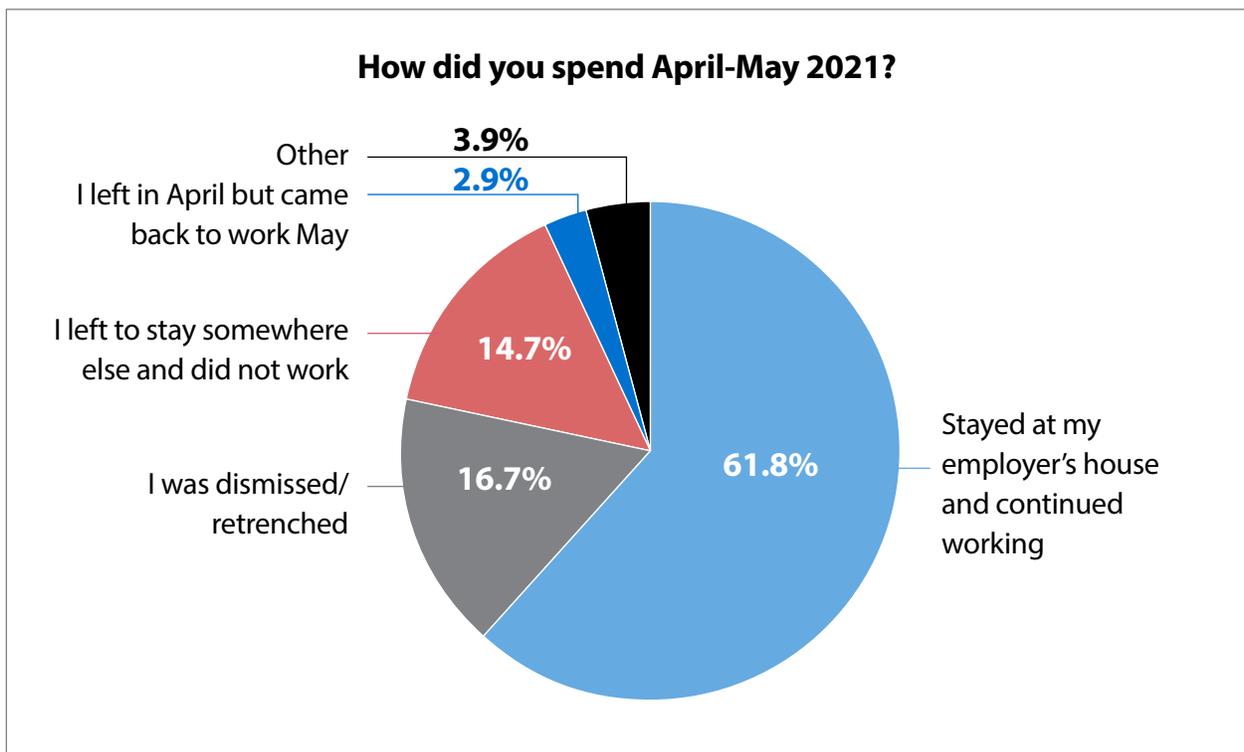
they would allow her family to come stay with her at her workplace accommodation. Ultimately, she needed to collect medication from the clinic, and did not want her employer to know what the medication was for. She tried several ways to get permission to go out on her own but failed. She resigned from the job.

These cases are not unique and the restrictions on the freedom of movement of domestic workers effectively isolates the worker.⁷⁹ As noted by Simelane, “plenty of employers are restricting where workers go during their off hours.”⁸⁰ Many respondents viewed this as a form of employer control over domestic workers:

- They do not want me to befriend anyone in the complex.
- They do not want me to speak to other nannies because they say they will teach me bad behavior.

The Impact of COVID-19

In South Africa, 259,000 domestic workers lost their jobs during the second quarter of 2020, representing a year-on-year decrease of 25.1 percent during the course of the imposed lockdown.⁸¹ The government’s temporary relief measures for laid-off workers (TERS) required Unemployment Insurance Fund registration as a precondition for making a claim, which left a vast number of workers ineligible due to their employer’s failure to register employees. The exclusion of domestic workers from the Compensation for Occupational Injuries and Diseases Act also meant that domestic workers were not able to access compensation when they fell ill from COVID-19.



Workers experienced the following treatment between June and October 2020, after COVID-19 Regulations had moved to Level 3 and above:

- **21% of those who continued to work had their wages and/or hours reduced**
- **52% were prevented from buying their own food and toiletries**
- **19% were prevented from going to the doctor or collecting medication**
- **59% were prevented from seeing their spouse or children**
- **73% were prevented from leaving the house for any reason at all**
- **16% had reduced wages with no reduced working hours**
- **37% were forced to work longer hours and have more duties without additional overtime pay**
- **33% were forced to work on public holidays**

Domestic workers were not considered “essential workers” during stages 4 and 5 of lockdown. When a hard lockdown was announced at the end of March 2020, employers rushed to decide what should be done. Live-in domestic workers generally were expected to lock down with the employer’s family. Some workers who usually commute to work agreed to lock down with employers, and slept in makeshift spaces—on couches or in the children’s room. More than a year later, South Africa experienced a treacherous third wave of the pandemic, with particular implications for live-in domestic workers.

During the pandemic, labor violations spiked due to a sharp increase in flagrant violations of privacy, freedom of movement, freedom of association and right to family life. Izwi received numerous complaints by workers whose employers prevented them from seeking necessary, sometimes urgent, medical care and from collecting essential medication. Workers struggling to be apart from their partners and children for long stretches of time were bluntly told they would have to choose between their job and their marriage. Employers purchased food and toiletries for workers to prevent them from leaving the house or complex, and many refused to let workers out even after lockdown restrictions had eased to Levels 3, 2 and 1. While employers relaxed their personal restrictions, attending family events and taking their kids to the zoo, they would still forbid their domestic worker from seeing her husband, stepping out to buy airtime, or going to send money home.

When asked what frustrations they experienced being in lockdown with their employers, responses included:

- The frustration I have is my boss is still not allowing me to go out on my off days and I cannot even buy what I want to because I am not allowed to go out. I am very worried about my life and my future. I have a partner and do not know how I will make my own family if am not allowed to go out. I am really losing my mind.
- I missed my husband, and this took a huge toll on my marriage.
- I just missed my partner and was only able to chat by phone with him.

- I have no freedom to be with family and friends and it is terrible that my husband was not allowed to visit during the lockdown, and that I was not allowed to go and see him. It was also very difficult for me and my husband to go and send food home to our kids because we were not allowed to be out.
- Not being allowed to go anywhere was stressful and hard.
- When they refuse to let me go and collect my medication.
- I missed my family so much and wished to see them but was not allowed to.
- There was more work for me, as they had relatives come over always.
- I was always indoors while they went out always. Their family members came to visit and slept over, making it more work for me.
- It added more work for me...making it too much labor for me.
- Doing gardening, which is not my job, and not being paid.
- Working long hours.
- The kids were ruder, and their parents did not say anything. I was like a puppet in the house.
- My lady boss used to blow her nose and throw or leave the tissue anywhere and I had to pick up after her...I was also scared for my health, not knowing if she had something contagious.

In a WhatsApp discussions held with members of Izwi Domestic Workers Alliance in May 2020, workers shared the following:

- Right now, since this lockdown, I cannot see my husband. They locked me in the house before the lockdown and told me I will only go out when there is a vaccine. I am like a criminal because I am locked in and not allowed to go outside even. I need to be by myself. I have needs like them.
- I am not allowed to step foot on the street in front of the house, but they go to see their parents and relatives. Three weeks ago, they went to the Pretoria zoo with three other families. On Saturday they went to a brother's 50th birthday. My flat is a walk away from here, but they do not want me to go to my flat.
- I feel like we domestic workers are being taken advantage of because it is not fair to lock me in while they go everywhere...She [the employer] said Ramaphosa does not make rules in her house so even if lockdown is eased, if there is no vaccine I won't go out or else I have to go and look for another job.
- They told me I must work 21 days straight with them; they refused to let me go home to take care of my kids or allowed me to make sure my kids are safe.
- I am working every day and there is no off day. It is non-stop work, with no holidays and no overtime.
- Due to this coronavirus, I must work as a sleep-in domestic worker, and I get paid half of the salary I used to get.
- My aunt is a live-in domestic worker and has been stuck in lockdown from the beginning of March and has never been out, not even to buy herself toiletries. Her bosses tell her that they will buy her everything. But why can someone not go choose what soap or which type of pads she wants to use? Especially since shops are close by, so she can go by herself without a taxi to buy her stuff. The worst was last week when she asked to go send money home to the ATM and her boss said no.
- I am staying at work and my family is running out of food and I cannot help them.

In most cases these restrictions on movement go unchallenged. Eunice Dhladhla of the South Africa Domestic Services and Allied Workers Union (SADSAWU) noted that some employers have been willing to loosen restrictions when confronted by their employees. However, many workers are not willing to confront their employer due to the threat of dismissal. This threat leads some domestic workers to continue to work and abide by their employer's restrictions until they can no longer bear it and leave the job, without claiming constructive dismissal.

LEGAL CONTEXT

Labor Regulation and the Constitution

The LRA, Basic Conditions of Employment Act (BCEA), and Sectoral Determination 7 do not address the issue of freedom of movement. This omission is critical and consequential for domestic workers. The historic conditions of labor migration and apartheid segregation in South Africa led to the explicit inclusion of freedom of movement in the Constitution. Section 12 addresses the freedom and security of the person, which includes "the right not to be deprived of freedom arbitrarily or without just cause." Section 21 on the freedom of movement and residence is more direct, stating that "everyone has the right to freedom of movement." The Constitutional Court has determined that the protection outlined in Section 12 above has both a substantive and a procedural dimension. The substantive aspect ensures that a deprivation of liberty cannot take place arbitrarily or without just cause. The procedural element ensures that should just cause exist, the deprivation will only take place in terms of a fair procedure.

ILO Guidelines

An example of this explicit incorporation of the right to freedom of movement is Article 9 of the ILO C189. It states that domestic workers are free to decide whether to reside in the household, are not obliged to remain in the household during periods of rest or annual leave, and are entitled to keep their travel and identity documents in their possession.

International Law

Article 13 of the Universal Declaration on Human Rights and Article 12 of the International Covenant on Civil and Political Rights provides that, "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence." The permissible limitations which may be imposed on the rights protected under Article 12 must not nullify the principle of liberty of movement and are governed by the requirement of necessity.

Article 12(1) of the African Charter similarly sets out that "every individual shall have the right to freedom of movement and residence within the borders of a State provided he abides by the law." Under General Comment No. 5, the Commission makes clear that this right is not conditional upon being legally within a State.⁸² According to the General Comment, while limitation on this right is permissible, "it must serve a legitimate aim; and must be proportionate with and absolutely necessary for the advantages that are to be obtained in a free and democratic society."⁸³ It continues, that while restrictions may be imposed for purposes of public health, like a pandemic, restrictions on movement must not be indiscriminate, must respect the right to equality and non-discrimination and must not be "targeted specifically at stigmatizing a particular group."⁸⁴

THE IMPACT OF COVID-19

Under COVID-19 lockdown regulations, people have been confined to their place of residence and prohibited from moving around, except to perform or procure essential services and goods, to access social grants or medical care. Government subsequently amended these regulations, permitting forms of the right to “gather,” including allowing taxis to carry 75 percent of their usual passenger load, allowing mines to operate at 50 percent capacity and funeral goers to travel, with a permit, across provincial lines under strict conditions. As of July 2021, South Africa was back on Level 4 restrictions.⁸⁵

In at least one case, these regulations were challenged for imposing a blanket ban that was found not to be rationally connected to the purpose of the legislation, and consequently unconstitutional. In the *De Beer* case, Judge Davis concluded that the minister adopted a paternalistic, rather than a constitutional approach to the lockdown regulations, which displayed little or no regard for constitutional rights.⁸⁶

Similarly, an individual employer does not have the right to impose a blanket ban or arbitrary restrictions on domestic workers beyond those set by the government. Generally, rights can only be limited in terms of a law of general application.⁸⁷ However, in cases involving private actors, a general limitations clause is not likely to be applicable. Rather, the respondent would show that his or her conduct was fair if involving a discrimination matter, or reasonable and justifiable with reference to a countervailing right.

ANALYSIS

The absence of explicit protection of freedom of movement in Sectoral Determination has had devastating consequences for domestic workers. In the COVID-19 context, many employer-imposed restrictions on their live-in domestic workers extend well beyond national regulations, with the justification that these are exceptional times and they must protect themselves from transmission. Yet in protecting themselves, they are often setting much more stringent restrictions on workers than on their own families, which has important rights implications. Domestic workers are prohibited from buying food, accessing medical care and seeing their children. A domestic worker choosing to stand up to her employer risks retrenchment or being placed on the government-sanctioned unpaid leave that left many domestic workers destitute.

SECTIONAL TITLE HOUSING

Section 1 of this paper argued that gaps in regulation have enabled inadequate housing standards for domestic workers in private homes. In the situation of live-in domestic workers in Sectional Title Housing, it is not gaps in regulation but formal rules of these housing schemes that enable and even prescribe segregation and discrimination against live-in domestic workers. The Sectional Title Housing schemes are in many ways a microcosm for societal treatment of domestic workers, in which adequate housing, right to family and visitors, as well as freedom of movement, are infringed.



For reasons of community and security, clustered housing, including apartment buildings, complexes and estates, is increasingly popular in South Africa.⁸⁸ According to the Rawson Property Group, the number of Sectional Title schemes has risen exponentially in the last 10 years, and there are currently over 700,000 Sectional Titled homes in the country, housing more than 6 million people.⁸⁹ Many of these Sectional Title units are middle- and upper-class homes and include staff quarters for domestic workers. These are either attached to each unit or built together around shared bathrooms and kitchens. In apartment blocks, these are usually on the roof or adjacent to the parking area.

The communal regulations of housing complexes place restrictions on the rights and access of resident domestic workers. Live-in workers in such complexes are frequently prohibited from using communal areas, from entering and exiting freely, or from having visitors or family members in their homes. In some cases, they are forced to carry special passes or show IDs on demand and can be removed from the complex or denied entry by will of the body corporate trustees.

RESEARCH FINDINGS

The research on Sectional Title housing consisted of two components: (a) a survey of body corporate conduct rules relating to domestic workers living in staff quarters of the scheme and (b) surveys and interviews of workers.

a) Body Corporate Regulations

Practices detailed in the various conduct rules regulate a specific tier of rights that is more restrictive for domestic workers than for other residents. This differentiation is spatially reflected in the structure of the staff quarters, which are usually on the roof or by the parking lot. For those on the roof, the lift usually does not go to their floor.

The wording and tone of the relevant regulations is also telling. Some conduct rules, even those registered in the post-apartheid era, still use the term “servants.” Most of those reviewed stipulated, “Owners shall be responsible for the activities and conduct of their domestic employees,” and many note that domestic workers and their visitors shall not make “undue noise” or disturbances. One set

of conduct rules was incorporated in 1984 and remarkably has not yet been updated or replaced. It includes the following:

15. The owner or any other lawful occupant of any section shall not house or cause or permit to be housed a non-white servant anywhere in the building or on the premises, other than in the outside rooms provided and then only with the written consent of the trustees, who, in giving such consent, may impose conditions on such housing of non-white servants.

Of particular concern, three of the documents reviewed specified that under no circumstances may units be rented or bought to house domestic workers. Domestic workers do not have the right to live in residential units of those complexes, even if the units are legally purchased and paid for by them or for them. It is difficult to understand this in any way, other than an open form of class segregation and discrimination.

Of the 32 conduct rules reviewed, the following types of regulations were prevalent:⁹⁰

- Domestic workers must be registered with the body corporate.
- Domestic workers must submit a copy of their ID, and/or carry it with them at all times.
- Domestic workers are given a special ID card or badge allowing them to be in the building.
- Domestic workers may only use certain entrances.
- Domestic workers are not to be given access tags to the main entrance.
- The body corporate reserves the right to approve or reject employment of a domestic worker, and to require the “removal” of a domestic worker should there be a breach of conduct or security concern, or at its discretion.
- Domestic workers shall not loiter in the common areas or be found in the common areas after certain hours.
- Visitors to domestic workers must be authorized in advance with the body corporate, and limited to certain hours, or are not allowed.
- Overnight visitors are not allowed.

In many cases these rules are for domestic workers generally, not only for domestic workers living in the complex. Although these are the official conduct rules filed with the deeds office or The Community Schemes Ombud Service (**CSOS**), they may or may not represent actual practice. Some buildings place restrictions on staff residents that are not codified in the conduct rules, and others may have codified regulations that are not enacted. The best assessment of actual practice is, then, the experience of the staff residents in these complexes.

b) Workers' Experiences

Respondents to our research who reside in the staff quarters of a complex, apartment building or estate report the following:

- 39 percent do not have a key to get in and out of the building/complex.
- 50 percent are not allowed to use the common areas, such as gardens or lobbies.
- 76 percent are not allowed to use the swimming pool.
- 72 percent are not allowed to have visitors at their accommodation.
- 82 percent are not allowed to have overnight visitors at their accommodation.
- 82 percent are not allowed to have a family member or friend live with them.

Some of the rules to which workers are subject are shockingly reminiscent of the apartheid era, explicitly creating a tier of second-class citizens:

- My going in or out the complex must be confirmed to the guard at the gate by my boss.
- If you buy personal groceries in the complex, when I take them out with me, the security needs receipts of my purchases. If I do not have them, they say I stole the items and arrest me. They call my employer and he has to come and see if they are his items. If he says no then they will release me, but they would have wasted all your time. It is so bad.
- You must sign in and out, which is laborious.
- Not having a [main access] key makes privacy hard. I must report my every movement.
- No visitors for domestic workers are allowed inside, but I can go see them outside the complex.
- My boss does not allow visitors or even my husband to visit. I see him when I go out on weekends.
- Domestic workers are not allowed visitors or a boyfriend.
- You are not allowed to use the lift [elevator] after 8 pm; nor allowed in the garden because they say we make noise. Signing in and out of the complex is a big job. You are not allowed to have kids.
- For safety, they say no visitors except if they are approved by my employer to enter.
- You will need her [the employer] to come fetch you by the gate.
- You are not allowed to stand outside the gate for a long time.
- We are not allowed visitors for fear of theft ... If someone comes to see me, I need to meet them out of the complex.
- No visitors are allowed at all.
- No radios are allowed; no noise at all; and if you pray loudly, it is also not allowed. If I want visitors, the boss must first agree and sign the paperwork, which is long and complicated.
- No visitors allowed for workers but tenants are allowed visitors
- I was not allowed to have visitors or to go out.

In some cases, body corporate regulations on these issues have been successfully challenged. For example, an apartment building in Illovo, Johannesburg, placed restrictions on who could live with staff-quarter residents and prohibited children. A unit owner successfully challenged and overturned this regulation on the grounds that it would be unconstitutional to unnecessarily force a mother to live apart from her children.⁹¹ In another building, a researcher on this project was able to have the prohibition of children in staff quarters and the restriction on allowing spouses to cohabit with workers overturned, as well as the levy of nightly fees for overnight visitors. However, challenges take place infrequently, on a case-by-case basis.

LEGAL CONTEXT

The Sectional Title Schemes Management Act 2011

The Sectional Titles Schemes Management Act 8 of 2011 (STA) is the regulation by which the shared common property and interests of owners in many apartment buildings, townhouse complexes and estates are governed.⁹² In practice, when a person buys land or housing in a Sectional Title scheme, they automatically become a member of the body corporate. The body corporate develops conduct rules to guide the behavior of the owners and tenants living in the scheme. The conduct rules govern issues such as joint insurance payments, noise, use of communal areas or activities on the common property, security and supervision of children.⁹³ In 2016, revisions to the STA included a fixed set of conduct rules. Those rules can be added to and amended by the body Corporate but must then be approved by the Community Schemes Ombud Service.⁹⁴

The conduct rules do not offer any guidance on regulating residential staff or managing staff quarters. Domestic workers residing in staff quarters of a complex are not officially considered owners or tenants in the building, because in most cases they do not pay rent. They are usually considered the responsibility of their employer, who is in turn beholden to building conduct rules

In many cases, the conduct rules of a body corporate are clearly discriminatory—limiting access to the main entrance, forbidding use of communal areas, and limiting visitor rights and cohabitation rights. In an interview, Simon Grobbelaar of Trafalgar Property Management noted that resident staff “are not granted the latitude of rights that we would expect.” According to Grobbelaar, the body corporates enact hyperlocal discriminatory rules that are legally unenforceable according to the Constitution, but that usually go unchallenged. Some schemes attempt to promote a certain image of the building or complex, in which they prefer to hide the staff, while other rules are approved in the name of security.

South African Case Law

One of the few court cases to address the rights of domestic workers in Sectional Title Housing schemes is *Singh and Another v Mount Edgecombe*.⁹⁵ In this case, the conduct rules were challenged by estate residents. Two of the challenged rules “restrict[ed] the hours of employment of domestic employees of owners and residents” and “restrict[ed] the rights of such domestic employees to traverse the public road network over the estate by walking around or otherwise.”⁹⁶

The High Court of Appeal had to decide whether the statutory regime put in place to govern public roads could be waived contractually, in favor of rules agreed to under the association. The court held that to do this, the private bodies were obliged to seek permission from the municipality before they could impose such conditions. The judge could not conceive that members could contract out of statutory obligations and found the impugned road rules to be contrary to public policy because they are illegal and contrary to the statutory provisions.

With respect to association provisions restricting the movement of domestic workers, the court found, “Domestic employees are simply not free to traverse the public roads in the estate save in the limited manner provided by the rules. From a constitutional point of view their rights in this regard are severely restricted. The first respondent appears to have categorized them into a class of people

who pose a security risk to people living on the estate.”⁹⁷ The Court further acknowledged that the status of domestic workers in the Sectional Title estate was “reminiscent of apartheid,” and while domestic workers are “good enough” to perform domestic duties for employers in the estate, “they are precluded from exercising any rights derived from public law and the Constitution” including their rights to “human dignity, equality, freedom of association, freedom of movement, freedom of occupation and fair labor practices.”

The case was then heard by the Supreme Court of Appeal, which reversed the judgment of the High Court, finding that the roads running through the estate were private, enclosed by electrified security wiring, with ingress and egress controlled by security guards, to which the general public has no access. The Court found that by choosing to purchase property and become members of the association, owners were contractually bound by its rules. The Court stressed that the contractually binding regulations are enforceable by the parties to the contract alone. It did not address the question of whether limitations on the movements of domestic workers under the association rules posed a constitutional question. Indeed, domestic workers are not parties to the association agreement, in ways that the Court found the litigants to be.

International Human Rights

Under international human rights conventions, including Article 2(d) of the International Covenant on Elimination of Racial Discrimination (ICERD), parties are required to prohibit and “bring to an end by all appropriate means” racial discrimination by any persons, group or organization. The Convention specifically requires that states prohibit discrimination in all forms and guarantee a right of access “to transportation, hotels, restaurants, cafés and theaters.” General Recommendation 20 makes clear that states have an obligation to deal with racism and racial discrimination perpetrated by non-state actors in the public and private spheres. Article 3 of the Convention obligates states to “condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature.” The Special Rapporteur on Racism has observed that segregation practices are not static but are capable of mutating and developing.⁹⁸ General Recommendation 19 recognizes that segregation can also take place indirectly and privately, “in many cities residential patterns are influenced by group differences in income, which are sometimes combined with race, color, descent and national or ethnic origin, so that inhabitants can be stigmatized and individuals suffer a form of discrimination in which racial grounds are mixed with other grounds.”

ANALYSIS

Domestic workers who work in Sectional Title housing schemes are frequently subject to egregious rules that restrict their movement and residence, in language that is often reminiscent of apartheid-era legislation. The few cases that have been adjudicated before the common law courts have dealt with the legality of these association agreements and have not addressed the constitutionality of provisions. The exception is the High Court appeal in the *Singh* case, which opined on the restriction of rights of freedom of movement of domestic workers, but ultimately decided the case based on the issue of public roads and contractual regulation. Yet, most cases do not get to court, and the research findings show that domestic workers have severely diminished rights within the context of Sectional Title schemes.

In this context, the creation of a lower class of residents in Sectional Title complexes is particularly egregious, particularly when viewed in light of South Africa's ICERD obligations to eliminate racial discrimination in both public and private spheres. Residents of staff quarters in Sectional Title housing are not considered owners or tenants and have no official status in a complex. Yet they share communal living arrangements and are impacted by communal decisions over which they have no right to give input. In many cases they are even forbidden from accessing certain areas of shared property.

It is likely that such association rules would be considered discriminatory under Section 9 of the Constitution or the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), which defines discrimination as “any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly (a) imposes burdens, obligations or disadvantages on; (b) withholds benefits, opportunities or advantages from any person on one or more of the prohibited grounds.”⁹⁹ In light of the Constitutional Court decision in *Mahlangu*, the starting point would be that association rules singling out domestic workers for adverse treatment would constitute prima facie discrimination on the intersectional grounds of race, gender and class. The onus would then fall on the respondents to show, on a balance of probabilities, that the discrimination was fair.¹⁰⁰

FREEDOM FROM VIOLENCE AND HARASSMENT

Abuse, harassment and bullying are some of the most commonly reported ways in which the basic human rights of domestic workers are violated, especially their right to dignity. Live-in domestic workers are especially vulnerable to such abuse because of shared living spaces, long working hours and intimate nature of the work and relationships. The full scope of sexual, physical, verbal and emotional abuse experienced by workers is beyond the capacity of this research.¹⁰¹



RESEARCH FINDINGS

In the current research, workers reported a variety of forms of abuse and harassment. Nearly a third (27 of 100 of respondents) have experienced an employer shouting at them or using foul language, while 13 of 98 respondents have experienced the employer using language that is clearly racist:

- She sometimes calls me stupid.
- She calls me *malcop*¹⁰² and I do not know what it means.
- There was the time my boss called me an “asshole” because I once forgot to tell his wife to pack his sunglasses in the car.
- One day as she was going to work, I was upstairs and took some time to collect the baby from her. She was angry and started shouting at me. Outside people gathered to listen to her and I was embarrassed.
- They call me stupid or idiot or if I do something wrong, they say “Fuck you.”
- You are abused. They insult you and say you must be grateful for free living space.
- They always talk badly to me and call me monkey...they misplace things and say I took them and when they find them, they do not apologize.
- She always says, “Can’t you hear what I tell you?... You are a monkey.”

Two out of 98 respondents have been hit or physically hurt by an employer. In 2017–2018, Izwi handled the case of a woman who was punched and knocked unconscious by her employer because she was late to work, as she had taken her child to the clinic. She was summarily dismissed and made to move out that weekend after returning from the hospital. She was granted three months’ compensation for the unfair dismissal at CCMA. The assault case went to court, where the employer was found guilty and given the choice of six months imprisonment or 60,000 rands in fine.

Three out of 98 respondents experienced the employer flirting with them, touching them in private places, or sexually abusing them. *"I look after their disabled 37-year-old son. He loves passing sexual remarks and it doesn't sit well with me."*

- While compiling this research report, Izwi had a case reported of a woman who was raped by her employer 10 times between April and December 2020. In December, he walked up to her, pricked her hand without permission, and used the blood to do an HIV test, reporting to her that she was HIV positive.
- In 2019, a domestic worker was sexually harassed by a 17-year-old boy. She came to Izwi for advice, but ultimately chose not to tell his father, her employer, or her own husband, for fear he would act out in anger. When the son repeated and intensified his behavior, to the extent that she was fearful to be at work, she reported it to his father. The father accused her of sexually abusing a minor and dismissed her immediately. Her husband found out and accused her as well, eventually leaving her.

Meanwhile, 25 of 99 respondents have been falsely accused of stealing by their employer on more than one occasion:

- We work as two nannies and when her [the employer's] things go missing, she asks me where they are. After a thorough search we found them hidden in the children's bedroom.
- At one point they could not find their keys on a weekend when I was at my own home, so they called asking for the keys. I told them where they are kept and they said I must bring the keys back. In another incident they misplaced the kitchen knife, and his wife told me that since she does not wash utensils the person who does that must know where the knife is. They found it on the patio five days later.
- I was accused of stealing a T-shirt. A week later she found it and did not offer an apology.
- She misplaced her wedding ring when she took a bath and she demanded it back from me. The following day we did a thorough search together and found it behind her headboard.
- Items kept going missing in the house. They thought it was me but later discovered it was their son-in-law.
- They said we steal the cleaning stuff and sell it on the street.
- I was once accused of stealing food like biscuits and sweets.
- She removed her ring to go bathe when she came back, she said it was missing and that I stole it. Later we did a thorough search and found it behind the dresser.

In addition, 15 of 95 respondents have experienced the employer's children calling them rude names:

- They call me stupid or idiot or if I do something wrong, they say "Fuck you." The children do the same and call me their slave.
- The child calls me a servant and says that I did not finish school and am not part of their family. She tells me I am big like an elephant and I smell bad. She does not want me to touch her things. She shouts at me.
- Most of the time the mother is a quiet person, but I do not know if she talks about me when the kids are listening because the kids are the one always saying mean stuff to me. They tell me not to tell them what to do because I am only a cleaner or a nanny or that "my mom is paying you a lot of money to do all the work."
- The children are rude and refuse to do what I tell them. They say I am the maid so cannot tell them anything.
- The children are twins; the boy is rude and calls me stupid.
- They treat me like trash and something useless. Their kids do the same thing and never say "please," only "Do this now for me."
- Their children are always rude.

Reported cases of severe physical and sexual abuse are not infrequent, and those that are reported are only the tip of the iceberg. In these situations, there is no real avenue for a domestic worker to report an abusive employer without losing her job, risking additional consequences such as false allegations, deportation, or problems within her own family as a result.

LEGAL CONTEXT

South African Labor Regulations

Physical and sexual abuse, including assault and rape, are offenses under South African criminal law. These offenses may also amount to a wrongful act under civil law or harassment under the Employment Equity Act (EEA), both of which would entitle the worker to claim damages and/or compensation. The Labor Relations Act states that sexual harassment is a form of misconduct and the employer "may" take disciplinary action against the harasser, who may be fairly dismissed. Significantly, Section 6(3) of the EEA sets out unequivocally that harassment of an employee is a form of unfair discrimination and is prohibited on a combination of grounds of unfair discrimination.

In May 1998, the National Economic, Labor, Development Council (NEDLAC), which consists of representatives of government, organized labor, organized business and the community, passed a voluntary Code of Good Practice on Handling Sexual Harassment Cases. The Code of Good Practice defines harassment as "an act or omission (or more than one act or omission) directed toward an individual at the workplace that is unwelcome, unwanted, and has a destructive effect." The document lists examples of harassment, which most notably includes "overbearing supervision or other misuses of power or position," "unwelcome sexual advances" and "ridiculing or degrading someone, picking on them or setting them up to fail."¹⁰³

In August 2020, the South African Department of Employment and Labor issued for public comment a draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work. This draft aims to improve on the current code managing sexual harassment in the workplace,¹⁰⁴ and to bring South Africa into compliance with ILO conventions.

Women in Informal Economy: Globalizing and Organizing (WIEGO) correctly observes the challenges domestic workers face in accessing justice against abusers, despite that fact that they are protected under the law:¹⁰⁵

“Laying a criminal charge or suing the employer in court (assuming the worker can find a way of covering the cost) is not compatible with the intimate nature of the domestic employment relationship and, in practice, will mean an end to the relationship. The law does not require this, and the worker has a legal right to remain in her job. But, in reality, this is unlikely to happen. A claim of unfair dismissal is likely to result in an order of compensation rather than reinstatement. The effect is that the worker cannot defend her rights without losing her job.”

WIEGO goes on to state that “[i]t is possible that [the Domestic Abuse Act] could be invoked by a live-in domestic worker who has suffered violence (which is defined as including ‘emotional, verbal and psychological abuse’ or ‘any other controlling or abusive behavior towards a complainant’ at the hands of her employer.... However, there are important differences between family relationships and working relationships. The unique nature of domestic work makes it necessary to design a process for domestic workers to access appropriate forms of intervention to prevent abuse.”

International Law

Under the ILO Domestic Worker Convention (C189), “members shall take measures to ensure that domestic workers enjoy effective protection against all forms of abuse, harassment and violence.” Under Convention 190, on Violence and Harassment, which came into force in June 2021, members are required to adopt an “inclusive, integrated and gender-responsive approach to the prevention and elimination of violence and harassment in the world of work.” This requires members to adopt laws and regulations to define and prohibit violence and harassment, including gender-based violence and harassment. Under Article 8, each member must take appropriate measures to prevent such violence and harassment, including recognizing the importance of public authorities in the case of informal economy workers, identifying in consultation with employers and workers organizations the sectors or occupations and work arrangements in which workers and other persons concerned are more exposed to violence and harassment, and taking measures to effectively protect such persons. South Africa has yet to ratify C190.

Under Article 4 of the ICERD, state parties shall declare punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race group or persons of one color or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form. GR 35, at paragraph 6, lists affected groups and specifies “speech directed against women members of these and other vulnerable groups” as a specific subject of concern.

ANALYSIS

While domestic workers are covered by labor laws and criminal law on gender-based violence and harassment, these have proven inadequate for the reasons articulated by WIEGO: Domestic workers are loath to complain and risk losing their jobs. South Africa has not yet ratified C190, but it contains provisions requiring a preventative approach to gender-based violence and harassment, that takes into account the particular vulnerability and the particular mechanisms that would be appropriate to the sector. The current draft law includes informal workers in its ambit but does not meaningfully create mechanisms that are appropriate to the domestic work sector or the informal economy.



Conclusions and Recommendations

The core research questions addressed in this study were:

- 1. Do live-in domestic workers enjoy basic constitutional and human rights, including access to adequate housing?**
- 2. Are there South African legal regulations in place to ensure these rights, and is enforcement effective?**
- 3. Are there any lacunae in South African legal protections of live-in domestic workers?**
- 4. Does international law provide standards that could remedy these deficits?**

In principle, domestic workers in South Africa are protected by the full panoply of constitutional and labor laws, including a Sectoral Determination tailored to the sector. However, the research in this paper identified two types of gaps in regulation: those laws that are prohibited at a level of generality in the Constitution and other laws but require greater specificity to adequately address violations in the domestic work sector; and those for which there is an almost complete absence of legal protections.

Gaps in the Legal Landscape

Adequate Housing

While South Africa has entrenched the rights to adequate housing and privacy, as well as the right to food in its Constitution, these rights have not been adequately incorporated into labor laws, particularly the Sectoral Determination governing domestic work. The only mention of accommodation standards in Sectoral Determination 7 is for workers who are charged rent; the provisions do not apply to workers who are not charged rent. However, even if the SD7 guidelines were to be extended to all live-in workers, regardless of rent deductions, they would still fall short of the ILO R201 standards for live-in accommodation.

Yet, of respondents in this research project, only 18 percent are paying for their housing through either wage deductions or extra unpaid hours of work. This means that 82 percent or more of respondents have no legal basis to access better housing standards. This is in contrast to ILO and ICESCR standards, which have been adopted to regulate live-in domestic workers in Austria, Bolivia, Hong Kong, Singapore, Switzerland and Uruguay. The absence of housing standards for domestic workers was recognized by the ICESCR Committee in its 2018 review of South Africa.

Similarly, despite the explicit constitutional right of an individual to not have their person, home or property searched or the privacy of their communications infringed, Sectoral Determination 7 notably does not include any provisions with respect to a domestic worker's right to privacy. The research showed that some employers freely search the worker's accommodation and property without permission and read personal phone messages. A domestic worker's right to privacy is intrinsically linked to the absence of adequate standards of their accommodation.

While Section 27(1)(b) of the Constitution guarantees the rights of everyone to sufficient food, the South African law is not specific about the provision of food to workers, unlike ILO standards and comparative jurisdictions. Yet the historical expectation that employers will provide food remains, especially in a live-in context.

Maternity, Family and Visitors

The right of non-discrimination on the basis of pregnancy is explicitly protected under constitutional and labor law, but in practice it is violated regularly by employers. In contrast, the right to live with children or other family members is not explicitly protected in labor law or the Sectoral Determination. The right of domestic workers to have visitors is similarly absent from labor laws. International labor law and human rights law protect non-discrimination on the basis of maternity, and there are conventions in place addressing work-life balance. These conventions, while not directly addressing the right to live with children, implicitly do so. Similarly, a right to have visitors is arguably protected by the broader Constitutional and human right to associate. The absence of explicit provisions in the Sectoral Determination, contributes to the widespread enforced isolation of live-in domestic workers, limits access to trade unions, and increases their vulnerability as well as their dependency on employers.

Freedom of Movement

While domestic workers have reported challenges with exercising freedom of movement, there are no provisions on freedom of movement in labor legislation and Sectoral Determination 7. During the COVID-19 pandemic, many employers-imposed restrictions on their live-in domestic workers that extended well beyond the national pandemic restrictions, with the justification that these were exceptional times and they needed to protect themselves from transmission. In many cases, domestic workers were prohibited from buying food, accessing medical care and seeing their children.

The COVID-19 pandemic is an exceptional and time-bound context, but there is a risk that the restrictions imposed by employers will outlive it. Some employers declined to lift restrictions on workers despite the decline in risk levels. Workers remained in employer homes during official Level 1 status, indicating that the temporary conditions imposed during the "state of emergency" may result in ongoing restrictions on workers' freedoms.

Sectional Title Housing

Domestic workers who work in Sectional Title housing schemes are subject to frequently egregious rules that restrict their movement and residence, in language that is often reminiscent of apartheid-era legislation. The few cases that have been adjudicated before the common law courts have dealt with the legality of these association agreements, but have not explicitly addressed the constitutionality of provisions, specifically those dealing with domestic workers. Yet, the majority of cases do not get to court, and the research findings show that domestic workers have diminished rights within the context of Sectional Title schemes, which raise crucial constitutional questions.

Freedom from Violence and Harassment

While domestic workers are covered by labor laws and criminal law on gender-based violence and harassment, these have proven inadequate for the sector. South Africa has not yet ratified C190 on Violence and Harassment, which contains provisions requiring a preventative approach to gender-based violence and harassment, that takes into account the particular vulnerabilities of the sector and mechanisms that would be appropriate. The current draft law includes informal workers in its ambit but does not meaningfully create mechanisms that are appropriate to the domestic work sector or the informal economy.

Conclusion: A Constitutional Question of Private Power

Many of the legal issues underpinning this study have not been adequately addressed by either courts or the legislature. The constitutional issues are complex precisely because they occur in the private sphere, between private parties, albeit with vastly disparate economic and social power. While some of these issues, such as the right to adequate housing and access to food, involve imposing positive obligations on private actors, other issues, such as non-discrimination on the basis of pregnancy, the right to family or visitors, freedom of movement and freedom from violence and harassment, involve negative duties not to interfere with such rights.

The test that the Constitutional Court has formulated to determine where 8(2) applies horizontally hinges on: “The nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the potential invasion of the right by persons other than organs of state, and would letting private persons off the net negate the essential content of the right?”¹⁰⁶

The starting point in an analysis of constitutional rights violations that occur in the private sphere among private actors, would be a recognition that under the South African Constitution private property is not absolutely sovereign; the impact of its use on the rights of non-owners is part of the calibration of constitutionality.¹⁰⁷ Similarly, cognizance must be taken of the judgments of Ackerman J of the Constitutional Court, which recognized that while privacy in the truly personal realm is protected, “as a person moves into communal relations and activities, such as business and social interaction, the scope of personal space shrinks accordingly.”¹⁰⁸ This notion was also adopted in the context of domestic work by a ruling in the State of California that held: “[T]he household [that hires domestic workers] enters in a limited degree into the economic marketplace. The isolation of the household has to a certain extent been stripped away. The householder has become an employer

and with that status takes on certain social responsibilities not present in the vast number of households which do not use domestic help.”¹⁰⁹

An interpretation of the rights “sacrificed” in the live-in domestic work context would equally need to be conscious of the history of the right, and potential invasions by non-state actors, and whether letting private persons off the hook would negate the essential content of the right. In an article, based on interviews with women who had worked as domestic workers under apartheid, Rebecca Ginsburg describes a “miserable occupation” with workdays often stretching over 12 hours, and workers being slapped, yelled at and facing racial slurs by their employers; of being forbidden to eat off employers’ plates, all in the context of the precarity of being dismissed on a whim.¹¹⁰

These observations were similarly articulated by AJ Victor in *Mahlangu*, over 20 years after the end of apartheid, who advises that, historically, domestic workers have been marginalized, “their employment conditions were based on the whims of their White employers.”¹¹¹ Victor describes the pernicious impacts of colonialism and apartheid, which placed domestic workers at the bottom of the social hierarchy, doing the least-paid work, denied both family life and social life, and devoting more time to caring for their employer’s children than their own. Ginsburg similarly described how the domestic workers she interviewed expressed that their greatest concern was fighting the “daily loneliness” living in employers’ homes, cut off from families and communities.

In effect, when the state is silent on crucial issues such as adequate housing or the right to family or visitors in this sector, or when it permits Sectional Title Housing rules that flagrantly discriminate for fear of impinging on an employer’s autonomy or private property rights, it is perpetuating the status quo and “entrenching a social and economic system that privileges the haves, mainly white people in the South African context.”¹¹² It is effectively granting a liberty or permission to employers to act on their whim, rather than in accord with Constitutional values. This flies in the face of the transformative goals of the South African constitutional project, which aims to undo “gendered and racialized systems of poverty inherited from South Africa’s colonial and apartheid past.”¹¹³

These omissions are particularly incongruous in light of the fact that farmworkers face many of the same challenges as domestic workers. And yet, Section 5 of the Extension of Tenure Security Act (ESTA) for farmworkers guarantees that an occupier, an owner and a person in charge shall have the right to human dignity; freedom and security of the person; privacy; freedom of religion, belief and opinion and of expression; freedom of association; and freedom of movement.¹¹⁴ Section 6 goes on to delineate the rights of a farmworker residing on the employer’s land to have visitors, to have family life, to receive postal communication,¹¹⁵ and to freely access medical care, among others.

Each of these issues is directly relevant to domestic workers. Yet not one of them is sufficiently addressed in the Sectoral Determination or other legislation applicable to the domestic sector.

It is clear from the experiences of workers detailed in this report that either new ESTA-like law should be passed, or the Sectoral Determination 7 for domestic workers should be revised to define minimum standards for housing, protect privacy, family rights and visitation rights, legislate freedom

of movement, and provide clear guidance in matters of harassment and violence. The Sectoral Determination has been revised several times since it became binding in September 2002. The most recent was November 2014. It is time to further amend SD7 (or create alternate legislation) to include:

- **Minimum housing standards for all live-in domestic workers, not only those paying rent¹¹⁶**
- **Basic regulations on rights to family life and visitors, including the right for family to cohabit with a worker, within residential density laws, and the right for workers to have visitors in their homes**
- **Regulations to protect privacy, explicitly preventing employers from searching rooms, phones, or property without permission**
- **Clear protection of a worker's right to move freely during off hours**
- **Guidelines on bullying, harassment and assault, as those provided in the labor law do not address the specifics of the domestic sector**
- **Guidelines for provision of food.¹¹⁷**

This process could also include revisions needed to the basic labor laws, in consultation with the relevant labor rights organizations.

In the area of Sectional Title Housing, there is an urgent need to push for policy changes, including to:

- Advocate for amendments to the Sectional Title Act, with a focus on equal rights and access for residents of staff quarters
- Create a code of good practice for managing staff residences. This would include housing standards, security regulations, and protection of staff resident rights.

There is also a need for quantitative, nationwide research on the demographics and working conditions of domestic workers in South Africa. Currently, only small, localized studies are available (usually qualitative), as well as data from the Census and Labor Force Survey. The latter is useful, but it includes only very limited, sector-specific information. More detailed data would provide much-needed specifics, including the ratio of live-in to live-out workers, the percentage of workers who live with employers who are migrants, who have formalized working conditions, etc. This would substantially bolster research and advocacy efforts in the sector.

Endnotes

- 1 *Mahlangu and Another v Minister of Labour and Others* [2020] ZACC 24. <http://www.saflii.org/za/cases/ZACC/2020/24.html>.
- 2 Helena Wasserman, "Domestic workers can now get coronavirus cash from the UIF—even if they're not registered," *Business Insider SA*, May 27, 2020. <https://www.businessinsider.co.za/domestic-workers-can-now-get-coronavirus-payouts-2020-5>.
- 3 Unemployment Insurance Contributions Act 4 of 2002, 1(1).
- 4 Statistics, South Africa, *Quarterly Labor Force Survey, Q1:2021*, June 2021.
- 5 ILO, "Working time of live-in domestic workers," *Domestic Work Policy Brief 7*, 2013, p. 2. https://www.ilo.org/travail/info/publications/WCMS_230837/lang-en/index.htm.
- 6 *Ibid.*
- 7 *Ibid.*
- 8 *Ibid.*
- 9 *Ibid.*
- 10 ILO, "Making decent work a reality for domestic workers: Progress and prospects ten years after the adoption of the Domestic Workers Convention, 2011 (No. 189)," 2021, pp. 60-63. https://www.ilo.org/global/publications/books/WCMS_802551/lang-en/index.htm.
- 11 *Ibid.*
- 12 Department of Employment and Labour, "Department of Employment and Labour welcomes Constitutional court judgment on domestic workers," November 22, 2020. Available at <http://www.labour.gov.za/departments-of-employment-and-labour-welcomes-constitutional-court-judgement-on-domestic-workers>.
- 13 *Discovery Health Limited v CCMA & Others* (2008) ILJ 1480 (LC).
- 14 Department of Employment and Labour, November 22, 2020. The Department of Labour reports that 30 percent of domestic workers are not registered for UIF, while civil society, ILO and academic reports cite up to 80 percent.
- 15 In the first years of democracy the Constitutional Court adopted an approach to the interpretation of 8(2) that favored indirect horizontal application through the development of existing common law doctrine, such as "public policy."
- 16 See *AB and Another v Pridwin Preparatory School and Others*, [2020] ZACC 12, <http://www.saflii.org/za/cases/ZACC/2020/12.html>; also *Daniels v Scribante and Another* [2017] ZACC 13, <http://www.saflii.org/za/cases/ZACC/2017/13.html>.
- 17 *Ibid.* *AB v Pridwin Preparatory School* (CCT 2020).
- 18 *Ibid.*, para. 85.
- 19 *Ibid.* The court found that private independent schools by providing education to children assume constitutional duties and obligations.
- 20 *Ibid.*, para. 121.
- 21 Also, *Daniels v Scribante and Another* [2017] ZACC 13. <http://www.saflii.org/za/cases/ZACC/2017/13.html>.
- 22 Most recently, in *James King v De Jager*, (CCT 2021), the Constitutional Court found a private will, which discriminated against female descendants, who were precluded from inheriting, was abhorrent and contrary to a constitutionally infused conception of public policy. <http://www.saflii.org/za/cases/ZACC/2021/4.html>.
- 23 Less than 5 percent of domestic workers are unionized. Most abuse goes unreported, because workers do not know their rights, because they do not know who to report to, or because they fear dismissal or deportation.
- 24 Workers with experiences older than five years were excluded to ensure that the findings are up-to-date and relevant.
- 25 Some respondents did not reply to every question; the number of respondents per question is on survey results.
- 26 These findings do not preclude the occurrence of other human rights violations not addressed here. For example, two cases of live-in workers dismissed for their religion were noted in the research findings.
- 27 "[Employers] don't care whether the house is leaking or has no toilet. They just want you to work." Queeneth Simelane (Founder, AVWO) interviewed by Amy Tekie, February 2021.
- 28 Pinky Mashiane (President, UDWOSA) interviewed by Amy Tekie, February 2021.
- 29 Jack Serle, "How long does a shower have to be, to use the same amount of water as a bath?" *Science Focus*, n.d. Available at <https://www.sciencefocus.com/science/how-long-does-a-shower-have-to-be-to-use-the-same-amount-of-water-as-a-bath/>.
- 30 Mashiane, interview.
- 31 Queeneth Simelane (Founder, AVWO) interviewed by Amy Tekie, February 2021.
- 32 On file, Izwi.
- 33 On file, Izwi.
- 34 An exploration of the way power dynamics play out over food provision in the domestic sector, and how employers sometimes use food provision to reinforce skewed power structures, can be found in Sarah Archer, "Buying the Maid Ricoffy: Domestic Workers, Employers and Food," *South African Review of Sociology* 42(2):66-82, June 2011
- 35 Rental Housing Act, 1999 (Act No. 50 of 1999), as amended, Procedural and Unfair Practice Regulations, 2008. <https://static.pmg.org.za/gazettes/080314housing-unfairregs.pdf>.
- 36 Wine and Agricultural Ethical Trade Association (WIETA), *WIETA Housing Guidelines 2016*. Available at <http://wieta.org.za/wp-content/uploads/2019/03/WIETA-Housing-Guidelines-2016.pdf>; Fruit South Africa (FSA), "Worker Accommodation in the Agricultural Sector in South Africa," Draft document. Available at http://www.siza.co.za/documents/FSA_Ethical_Housing_Guide_Draft_Part_1.doc; Sustainable Agriculture South Africa (SIZA), "Guide to Agri-Worker Accommodation in Agriculture," 2nd Ed. 2020. Available at <https://siza.co.za/wp-content/uploads/2020/07/SIZA-Guide-to-Accommodation-V03-2020.pdf>.
- 37 Fruit South Africa (FSA), "Worker Accommodation in the Agricultural Sector in South Africa," Draft document. Available at http://www.siza.co.za/documents/FSA_Ethical_Housing_Guide_Draft_Part_1.doc.
- 38 Sustainable Agriculture South Africa (SIZA), "Guide to Agri-Worker Accommodation in Agriculture," 2nd Ed. 2020. Available at <https://siza.co.za/wp-content/uploads/2020/07/SIZA-Guide-to-Accommodation-V03-2020.pdf>.
- 39 The Housing Act 107 of 1997 is the leading legislation on housing standards in South Africa. In line with the act, in 1999 the Minister of Housing introduced the National Norms and Standards for the Construction of Stand-Alone Residential Dwellings, which stipulate that all stand-alone houses constructed through the National Housing Programs must have: a minimum gross floor area of 40m²; two bedrooms; a separate

bathroom with a toilet, a shower and hand basin; a combined living area and kitchen with wash basin; and ready board electrical installation, if electricity is available in the project area. These standards significantly exceed ILO recommendations and the standards set by comparative jurisdictions but are unlikely to be applied to the domestic sector.

37 *Government of the Republic of South Africa and Others v Grootboom and Others* [2000] ZACC 19, 4 October 2000. See *Minister of Health v Treatment Action Campaign 2002 (5) 721 (CC)* and *Mazibuko and Others v City of Johannesburg and Others (Centre on Housing Rights and Evictions as Amicus Curiae)*. <https://collections.concourt.org.za/handle/20.500.12144/3582>. Under Section 26(3), no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

38 Ibid.

39 Ibid.

40 *Mahlangu* case.

41 *Mahlangu*, para. 7.

42 Using the reasoning in the case of *AB Pridwin*.

43 Supreme Court of Appeals, *National Media Ltd. and Others v Bogoshi*, [1998] ZASCA 94, September 1998.

44 In addition to provisions guarding against unreasonable rental rates, unfair termination, and employer limits on freedom of association, the Workers Housing Recommendation set out minimum requirements for collective domestic worker accommodation, which include: a separate bed for each worker, separate accommodation of the sexes, adequate supply of safe water, adequate drainage and sanitary conveniences, adequate ventilation and, where appropriate, heating; and common dining rooms, canteens, rest and recreation rooms and health facilities, where not otherwise available in the community.

45 Universal Declaration of Human Rights, December 8, 1948, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

46 International Convention on the Elimination of All Forms of Racial Discrimination, December 21, 1965, S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212.

47 Convention on the Elimination of All Forms of Discrimination against Women, December 18, 1979, 1249 U.N.T.S. 13; 19 I.L.M. 33 (1980).

48 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, December 19, 1990, entered into force July 1, 2003, 2220 U.N.T.S. 93; 30 I.L.M. 1517 (1991).

49 Convention on the Rights of the Child, November 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456 (1989).

50 International Covenant on Economic, Social and Cultural Rights, December 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).

51 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), December 13, 1991, E/1992/23, available at <https://www.refworld.org/docid/47a7079a1.html>.

52 See WHO, "Health Principles of Housing," Geneva, 1989. https://apps.who.int/iris/bitstream/handle/10665/39847/9241561270_eng.pdf?sequence=1&isAllowed=y.

53 UN Office of the High Commissioner for Human Rights (OHCHR), Fact Sheet No. 21, The Human Right to Adequate Housing, November 2009, Fact Sheet No. 21/Rev.1, available at <https://www.refworld.org/docid/479477400.html>.

54 Ibid.

55 The Mandate of the Special Rapporteur on the right to adequate housing includes applying a gender perspective, including through the identification of gender-specific vulnerabilities in relation to the right to adequate housing.

56 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), January 20, 2003, E/C.12/2002/11, available at <https://www.refworld.org/docid/4538838d11.html>.

57 Ibid.

58 ILO, NATLEX, Database of national labor, social security and related human rights legislation. https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=42844&p_classification=22.15.

59 ILO, Effective Protection for Domestic Workers: A Guide to Designing Labor Laws, 2012. https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_173365.pdf.

60 Ibid. https://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_173365.pdf.

61 Employment of Foreign Manpower Act, <https://sso.agc.gov.sg/SL/EFMA1990-S569-2012>.

62 Revised Schedule of Accommodation and Domestic Duties, <https://www.immd.gov.hk/eng/forms/forms/id407g.html>.

63 ILO, "Meeting the needs of my family too: Maternity protection and work-family measures for domestic workers," Domestic Work Policy Brief, July 6, 2013, p. 6.

64 On file with Izwi.

65 Maggie Mthombeni (Case Manager, Izwi Domestic Workers Alliance) interviewed by Amy Tekie, February 2021.

66 Simelane, interview.

The right to have visitors is an even greater issue for those living in complexes, estates or apartment buildings, as noted. It has also become a significant problem for workers during the COVID-19 pandemic.

67 Sectoral Determination 7, para. 352.

68 Ibid, para. 35.

69 Socio-Economic Rights Institute of South Africa (SERI) and the Centre for Urbanism and Built Environment Studies (CUBES), (University of the Witwatersrand), *A Tenant's Guide to Rental Housing*, November 2013. p. 16.

70 *Hattingh and Others v Juta* (CCT 50/12) [2013] ZACC 5; 2013 (3) SA 275 (CC); 2013 (5) BCLR 509 (CC) (March 14, 2013).

71 Ibid, para. 35.

72 Ibid, para. 32 and 33.

73 Ibid, para. 42.

74 Ibid, para. 16 provides the Land Claims Court's description of its assessment of what is just and equitable under ESTA.

75 Convention No. 183 defines the five core elements of maternity protection at work, namely: maternity leave; cash and medical benefits; employment protection and non-discrimination; health protection; and breastfeeding arrangements at the workplace. Combating all forms of

maternity-based discrimination at work and safeguarding the employment of pregnant workers form an integral part of maternity protection. Convention No. 183 protects women against maternity related dismissal during pregnancy, maternity leave or during the period following their return to work; gives women the right to return to the same or an equivalent position, paid at the same rate as at the end of their maternity leave; and prevents discrimination, including the prohibition of pregnancy tests. The Termination of Employment Convention, 1982 (No. 158), explicitly declares that pregnancy is an invalid reason for dismissing a worker.

76 These statements are echoed in Article 23 of the International Covenant on Civil and Political Rights, and again in Article 8 of the European Convention on Human Rights (ECHR): “Everyone has the right to respect for his private and family life, his home and his correspondence.”

77 UN Convention on the Rights of the Child. <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>.

78 On file with Izwi.

79 In a 2006 report on domestic worker abuses globally, Human Rights Watch noted that employers of domestic workers in numerous countries use techniques to control and limit “their ability to contact family and friends, confiscating passports and immigration documents, to forced confinement in the household.” They often defend these practices as necessary to protect the employer’s household, the privacy of the family, and the personal security of the domestic worker, and to prevent workers from running away. “Arbitrary denial of freedom of movement and association is abusive in its own right, and [...] dramatically increases the vulnerability of domestic workers to economic exploitation, forced labor, intimidation, and sexual violence and harassment.”

80 Simelane, interview.

81 Statistics, South Africa, November 2020.

82 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 5: Persons with Disabilities, December 9, 1994, E/1995/22, available at: <https://www.refworld.org/docid/4538838f0.html>.

83 Ibid, para. 14.

84 Ibid, para. 15.

85 Regulations under Section 27 of the Disaster Management Act 57 of 2002 (DMA).

86 *De Beer v The Minister of Cooperative*, Case No: 21542/2020, High Court of South Africa (Gauteng Division, Pretoria). The ruling addresses the millions of South Africans who operate in the informal sector, and whose contact with people is less than the attendance at a funeral, noting the examples of a single mother who is a hairdresser and can’t work under the regulations, while a minicab taxi with many passengers can.

87 As set out in Section 36 of the Constitution, constitutional rights “may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”

88 There are two ownership structures for these types of developments. In Sectional Title schemes, buyers own a unit (or section), and have exclusive use rights to certain areas, such as gardens, parking bays and staff/storage rooms. The rest of the common areas and the land are owned jointly, and maintenance, electricity, water and taxes are managed communally. In Housing Associations (HoA), buyers own the land and unit, and are individually responsible for maintenance, and rates and taxes. Common property is more limited, and is usually legally owned by the HoA, which incorporates as a non-profit company with the CIPC. This section focuses on Sectional Title law, because it is more prevalent and more prone to have and regulate staff quarters.

89 Bill Rawson, “Sectional titles: role of body corporate explained” in BizCommunity, available at <https://www.bizcommunity.com/Article/196/568/161017.html>.

90 Some of the conduct rules are for housing associations rather than sectional title schemes. The discriminatory nature of HoA laws is equally relevant, so we have included them in the research findings.

91 Izwi, Personal Communication, 2017.

92 The act “aims to provide for the establishment of bodies corporate to manage and regulate sections and common property in sectional titles schemes and ... to apply rules applicable to such schemes.”

93 Centre for Urbanism and Built Environment Studies (University of the Witwatersrand), and the Socio-Economic Rights Institute of South Africa (SERI), *A Guide to Sectional Title in South Africa*, 2013, p. 12.

94 Simon Grobbelaar, Portfolio Manager, Trafalgar Property Management, interviewed by Amy Tekie, February 2021.

95 KwaZulu Natal High Court Pietermaritzburg, *Singh and Another v Mount Edgecombe Country Club Estate and Others*, November 17, 2017.

96 *Singh and Another v Mount Edgecombe Country Club Estate and Others*, 2017.

97 Ibid, para. 43.

98 Cited in Patrick Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination: A Commentary*, (2015) at 239.

99 Promotion of Equality and Prevention of Unfair Discrimination Act, <https://www.refworld.org/pdfid/3ae6b6080.pdf>.

100 *Social Justice Coalition and Others v Minister of Police and Others* (ECO/2016)[2018] ZAWCHC 181; 2019 (4) SA 82 (WCC).

101 See *Isolated and Vulnerable: The Story of SA’s Domestic Workers & GBV*, Hlanganisa Institute of Development in Southern Africa; September 2020. <https://www.hlanganisa.org.za/domestic-workers-gbv-research-report/>.

102 Afrikaans for “crazy or foolish person.”

103 Centre for Conciliation, Mediation and Arbitration (CCMA), “CCMA Info Sheet: Harassment,” January 2002. <https://www.labourguide.co.za/download-top/97-infosheetsharassment20-20jan2020021/file>.

104 Amended Code of Good Practice of Handling Sexual Harassment Cases in the Workplace (No. 27865 Government Gazette, August 4, 2005).

105 WIEGO, *Domestic Workers’ Laws and Legal Issues in South Africa*, Law and Informality Project, November 2014, p. 13.

106 See *AB v Pridin Preparatory School* (CCT 2020); *Daniels v Scribner* (CCT 2017).

107 Ibid. See dissent in *Daniels v Scribner*.

108 Johnathon Burchell, “The Legal Protection of Privacy in South Africa: A Transplantable Hybrid”, *Electronic Journal of Law in South Africa*, Vol 13:1, March 2009. p. 12. Similarly, in *S v Jordan & Others* (Sex Workers Education and Advocacy Task Force & Others as Amici Curiae) sex workers argued that the regulation of sex work violated their right to privacy (in the spatial sense). However, because the relationship between the sex worker and her sexual partner was commercial in nature and thus not a private and intimate association, the Constitutional Court held that if the right to privacy was violated, that violation was not of a serious nature and easily justifiable given the importance of regulating sex work. Similar considerations might apply in the case of domestic work, especially in cases where the domestic worker is employed on a live-in basis.

109 Court of Appeals of California, *Annenberg v. Southern Dist. California District Council of Laborers*, Civ. No. 13032, April 1, 1974. para. 8a.

110 Rebecca Ginsburg, “Come in the Dark”: Domestic Workers and their Rooms in Apartheid-Era Johannesburg, South Africa. *Perspectives in Vernacular Architecture*, 2000, Vol. 8, *People, Power, Places* (2000) at p. 88.

111 *Mahlangu*, para. 100.

112 *Ibid*

113 *Mahlangu*, para. 63.

114 Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

115 Izwi assisted in the case of a worker who was officially dismissed at a disciplinary hearing for receiving a package at her employer's address, despite the fact that it is her only place of residence.

116 The BCEA 55(4h) explicitly authorizes a sectoral determination to "set minimum standards for housing and sanitation for employees who reside on their employers' premises."

117 This issue need not necessarily be legislated, but it causes problems for both employers and workers. A clear statement regarding what is or is not required would assist in reducing conflict and aligning expectations.

