

DECOLONISING LABOUR LAWS AND REPOSSESSING SUBALTERN EPISTEMOLOGIES: A REVIEW OF SOUTH AFRICAN AND NAMIBIAN MINEWORKERS' FIGHT FOR LABOUR RIGHTS

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SUMMARY

In the historical and current transformation discourses in South Africa and Namibia, the concept of decolonisation is no longer a mere abstract concept. Decolonisation is now a fundamental policy and regulatory imperative that is heavily centred on, among other things, the land question and debates around the historical as well as present-day use of indigenous cheap and unskilled labour in underpaid sectors of industry –particularly the mining sector. During the colonial era, as the mining industries in South Africa and Namibia expanded, a substantial number of migrant labourers and local workers entered the mines. To safeguard these mineworkers' legal rights, labour laws were passed. Despite the implementation of such labour laws, regular strikes were a feature of the mining industries in South Africa and Namibia at the time. In the post-colonial dispensation, the South African mining industry has been characterised by numerous strike actions, while in Namibia, widespread dissatisfaction with working conditions has been noted. This raises the question of whether or not South Africa and Namibia have made progress in defending mineworkers' labour rights. This question is critical when viewed through the lens of a post-colonial society governed by a constitutionalised labour law framework. While there has arguably been a noticeable improvement in mineworkers' employment conditions, labour-related inequities continue to characterise the mining industries in South Africa and Namibia in the post-colonial era. Profiteering, capitalism, safeguarding the security of tenure of foreign mining corporations, and the persistent need to ensure the ease of doing business in the mining sector appear to take precedence over defending mineworkers' rights. Thus, this article explores the labour rights discourse developed by South African and Namibian mineworkers, as well as the applicable labour legislation. A strong case is made for reconsidering the extent to which South African and Namibian labour laws have been decolonised. This is done in a manner that is attentive to investment security and sustainable growth of the mining sector in the two countries as well as the realisation of African mineworkers' fundamental labour rights.

1 INTRODUCTION

Despite its distributive objectives and arguable philosophical foundations, contemporary labour law appears to be failing to fully redress colonially-induced injustices in labour-related aspects of the mining sector. As a result, there is a need to refocus the study of labour-related aspects of mining in South Africa and Namibia by addressing what happens when the existing labour law framework does not fully address historically-rooted injustices, and instead favours business interests and profiteering. It appears that mining industry investors have become the drivers of the law, supplanting constitutional imperatives, the decent work agenda driven by international law, core labour standards, indigenous laws and subaltern African epistemologies relevant to labour relations on the continent. It must be appreciated that labour regulation in South Africa and Namibia cannot be conceptualised outside of a concise understanding of the historical, socio-political and economic contexts informing the formulation of labour laws in the two countries.¹ It is critical to note that, in the post-independence era, labour regulation has arisen as a critical concern in the mining sectors of South Africa and Namibia. A historical overview of labour regulation in the Southern African Development Community (SADC) provides a more comprehensive picture of how capital/business-controlled political and economic forces in SADC have shaped labour relations in mines. The polarised character of the region's past and the present domination of political and economic forces have made decolonising labour regulations a complex and contentious issue.²

Various economic sectors in South Africa and Namibia (for example, the mining industry, banking and financial sectors, retail sectors, employment sector, among others) have had to deal with the postcolonial repercussions of injustices orchestrated by the colonial and/or apartheid regimes. Affirmative action measures focusing on transformation, nationalisation policies and movements such as the controversial (as well as racially polarising) “#feesmustfall” and “#Rhodesmustfall” have aimed at redressing colonial injustices in labour relations in the two countries. However, from the perceived view that not enough has been done (from a legal, socio-political and economic level) to empower indigenous mineworkers (who are the focal point of this article), endless calls continue to be advanced for the decolonisation of the regulatory, socio-political, religious and economic spheres in South Africa and Namibia. Endless strike actions in South Africa's mining sector, highlighted by the tragic Marikana Lonmin Mine killings during an unprotected strike, give urgency to such calls. It should be noted that all of these developments are largely informed by polarised views: on the one hand, they are informed by business-oriented capitalist ideologies that define the current labour relations regime in South Africa and Namibia; on the other hand, a radical socialist ideology is underpinned by an arguably

¹ Pelders and Nelson “Living Conditions of Mine Workers From Eight Mines in South Africa” 2019 36(3) *Development Southern Africa* 265–282.

² Botha and Fourie “Decolonising the Labour Law Curriculum in the New World of Work” 2019 82 *THRHR* 177.

“economically devoid” ideology for decolonising the two countries’ current labour law regimes.

This article emphasises the importance of having a labour law regime that promotes the recognition of mineworkers’ rights and interests in South Africa and Namibia. The labour laws affecting the mining sector in the two countries are thus scrutinised in order to determine their adequacy for improving the welfare of mineworkers in the post-colonial era. This is owing to the fact that the history of labour legislation and its impact on the mining sector in South Africa and Namibia have been marked by inequalities and resource exploitation by corporates (mostly foreign-owned investors) that provide minimal benefits to local communities, but which place a strong emphasis on profiteering and securing businesses’ security of tenure, as well as the ease of doing business, rather than on empowering workers.³

The language of the labour laws in the two countries has not *per se* been reinforced by empowerment and/or redistributive terms but rather features general conceptualisations of creating employment relationships that do not pay particular attention to the need to transform the livelihoods of mineworkers substantially and sustainably. Workers’ rights have frequently been provided for by law without particular attention being paid to their accessibility/realisation in a neoliberal economic order that arguably thrives on exploiting cheap labour in the mines (through low wages, poor working conditions, limited workplace inspections, long working hours, poor occupational health and safety, minimal skills transfer and limited participation of locals at managerial level and in black economic empowerment and employee share-ownership schemes, among other issues).

Mineworkers have historically been the weaker party in the employment relationship and have long been overlooked by mining businesses as an important and/or substantial stakeholder.⁴ Workers (particularly mineworkers) are emerging as essential stakeholders in businesses as a result of the introduction of human rights, individual and collective labour rights, core labour standards, and good corporate governance principles. This has resulted in repeated requests for equitable salaries (not just minimum wages), skills transfer, and an increase in the proportion of indigenous people in mine management, among other significant issues. Observing occupational health and safety requirements and ensuring effective individual and collective bargaining, in addition to consultations and negotiations on changing or improving employment circumstances, have now become critical issues in mining labour relations and practices.⁵

³ Massey “Class Struggle and Migrant Labour in South African Gold Mines” 1983 17(3) *Canadian Journals of African Studies (CJAS)* 429–448. See also Harington, McGlashan and Chelkowska “A Century of Migrant Labour in the Gold Mines of South Africa” 2004 *The Journal of the South African Institute of Mining and Metallurgy (JSAIMM)* 65.

⁴ Pelders and Nelson 2019 *Development Southern Africa* 265–266.

⁵ Tshoose “Placing the Right to Occupational Health and Safety Within a Human Rights Framework: Trends and Challenges for South Africa” 2014 47(2) *The Comparative and International Law Journal of Southern Africa* 276–296.

Thus, from the perspectives of both sustainable economic growth (as inspired by the fourth and fifth industrial revolutions) and the decolonisation agenda, there is an obvious need to modify labour laws in order to eradicate poverty and poor labour practices in South African and Namibian mines. There may be a need to reformulate labour laws in the two countries in order to match them with the decent work, decolonisation and transformation agendas of these societies. Such transformation must broaden workers' power bases so that they emerge as significant stakeholders in a company's operations rather than just as vehicles of corporate capitalist and/or profiteering agendas. Human rights, labour rights, core labour standards and constitutionalism should inform a renewed emphasis on decolonising labour legislation while promoting corporates' business interests, security of tenure and best practices.⁶ The objective implied in this method is to ensure that mineworkers are not exploited while corporations reap substantial returns from natural resource extraction in South Africa and Namibia. The larger aim of achieving a win-win strategy to exploiting natural resources in South Africa and Namibia will be ensured by a reform of labour laws; win-win situations in mining can also be realised by negotiating and drafting strong mining agreements or contracts. Owing to a lack of competence in Africa in negotiating and structuring win-win mining contracts, additional measures must be put in place to defend mineworkers' best interests. Emphasis is placed on labour laws as they originate from non-legal processes that include socio-political and cultural issues. Labour laws impacting the mining sectors in both nations are thus scrutinised in order to assess their relevance to the decolonisation objective in the twenty-first century.

2 HISTORICAL CONTEXT OF LABOUR PRACTICES IN MINES DURING THE APARTHEID ERA

The discovery of extractive mineral resources (particularly gold) in the Transvaal region of South Africa around the year 1886 triggered an immediate demand for cheap labour in the newly constructed mines.⁷ Thus, at this time, labour practices were characterised by the exploitation of inexpensive labour from African indigenes. Migratory labour from SADC countries (mainly Malawi, Lesotho, Zambia and Zimbabwe) provided a significant pool of workers with poorly protected and promoted rights.⁸ Mining corporations had little trouble attracting desperate mineworkers ready

⁶ Botha and Fourie 2019 *THRHR* 265. See also Arthurs "Labour Law After Labour" in Langille and Davidov (eds) *The Idea of Labour Law* (2011) 16; and Rycroft and Le Roux "Decolonising the Labour Law Curriculum" 2017 38(3) *Industrial Law Journal* 1473.

⁷ Stewart *Labour Time in South African Gold Mines: 1886–2006* (doctoral thesis, University of the Witwatersrand) 2012; see also Ramela *The Evolution of Occupational Structures in South Africa 1875–1911: An Analysis of the Effects of the Resource Curse and Blessing* (master's thesis in Economics, Stellenbosch University, South Africa) (2018); and South African History Online "Grade 8–Term 2: The Mineral Revolution in South Africa" (2015) sahistory.org.za (accessed 2022-12-12).

⁸ Vosloo "Extreme Apartheid: The South African System of Migrant Labour and Its Hostels" 2020 34 *Image & Text: A Journal for Design, University of Pretoria* 1–33. See also Massey 1983 *CJAS* 429; Delius "The History of Migrant Labour in South Africa (1800–2014)" (2017) <https://doi.org/10.1093/acrefore/9780190277734.013.93> (accessed 2022-12-12).

to earn a living at any cost. It is hardly surprising, then, that by 1894, over 100 000 African indigenes (dubbed “Wenela” workers) were employed in Johannesburg’s gold mines.⁹ This meant that working conditions remained appalling and earnings remained extremely low. Because of the poor working conditions and extremely low wages, the majority of gold mine personnel were from other countries in the SADC region, with few South African indigenes interested in working in mines.¹⁰ The abundant foreign cheap labour allowed mine owners to offset their “increased” production costs.

As a result, cheap labour became an important component of the mining industry, driving mine owners to form the Native Labour Association (NLA) in 1896.¹¹ The NLA’s main objectives were to recruit cheap labour and to standardise wage levels in all South African mines. The NLA served as the foundation for establishing a monopoly of cheap labour sources.¹² Cheap labour from migrants and a few indigenous South Africans was viewed as a source of reserve employees who could be relied on during periods of economic boom when demand for labour increased, and who could be discarded during times of recession at little or no extra expense to the employer. This manner of exploiting cheap labour led the 1955 Tomlinson Commission to point out:

“The elastic source of labour helps to increase the flexibility of the South African economic system. In periods of prosperity and boom conditions it serves as a medium to obviate relative scarcities of unskilled labour or to limit their intensity, while during depression, the labour supply shrinks automatically. For the industrialist and businessman, the additional labour signifies that the elasticity of the labour supply is maintained, or at all events, is not greatly decreased, so that wages need not be raised at all, or not much to attract labour.”¹³

However, Tanzania and Zambia called for an end to the use of cheap labour in mines in the 1960s.¹⁴ The Anglo-American Corporation (AAC) then proposed a salary increase for mineworkers in 1962.¹⁵ The AAC hoped that, by adopting this approach, it would be able to entice more South Africans to work in mines. The AAC’s ideas were met with opposition by mine owners,

⁹ Maloka “Mines and Labour Migrants in Southern Africa” 1997 10(2) *Journal of Historical Sociology* 213–224.

¹⁰ Harington *et al* 2004 *JSAIMM* 65.

¹¹ Schutte “The Origins of Wenela and Teba” (1977) <https://www.ui.ac.za/library/information/sources/special-collections/Documents/TEBA%20-%20The%20origins%20of%20WENELA%20and%20TEBA.pdf> (accessed 2022-12-12).

¹² The foundation set by the NLA in turn led to the establishing of the Employment Bureau of Africa (TEBA) which at some point supplied in excess of half a million contract workers to South Africa’s mines on an annual basis.

¹³ Massey 1983 *CJAS* 429.

¹⁴ Mendes, Bertella and Teixeira “Industrialisation in Sub-Saharan Africa and Import Substitution Policy” 2014 34(1) *Brazilian Journal of Political Economy* 120–138. See also Lemon “State Control Over the Labour Market in South Africa” 1984 *Freedom and Boundaries* 189–208; and Freund “Labour and Labour History in Africa: A Review of the Literature” 1984 27(2) *African Studies Review* 1–58.

¹⁵ Massey 1983 *CJAS* 429–434.

who opposed measures to eliminate the employment of cheap labour. As a result, the mining industry continued to rely on cheap labour.

A neo-Marxist study on southern Africa predicted that pre-capitalist wealth accumulation mechanisms would be integrated into the postcolonial capitalist sector.¹⁶ This has proven to be a reality, as the majority of indigenous African miners now employed by neoliberal mining companies barely make ends meet. This subsistence model based on labour in capitalist-controlled firms has its roots in colonialist business and labour laws that pushed young Africans to work in settler-controlled mines in exchange for meagre wages. Workers were paid wages commensurate with the average cost of reproducing their labour power. As is the situation in the contemporary labour relations setting on mines, anything that a mineworker generated in addition to the value of their earnings would accrue to the mine owner/capitalist.¹⁷ This surplus then serves as the foundation for capitalist accumulation through reinvestment or, in some cases, ostentatious expenditure. As a result, any mechanism aiming at exogenously lowering the cost of production, which is frequently carried by impoverished mineworkers, has typically met with capitalist opposition. This is owing to the fact that lower manufacturing costs mean capitalists give workers much lower wages while generating enormous profits. It is no surprise, then, that the mining industry has been marked by persistent labour unrest over poor working conditions and low salaries.

The bulk of mineworkers in apartheid South Africa and Namibia were paid approximately 150 rands (150 Namibian dollars) per month in 1977. This figure remained well below the subsistence wage of 217 rands (217 Namibian dollars) “Household Effective Level” for African families at the time.¹⁸ This pattern of remuneration prompted some scholars, such as Arrighi, to suggest that in southern Africa, a conventional wage for mine employees is fixed to the subsistence needs of a solitary worker.¹⁹ Arrighi argued that

“[t]he real wage rate came to be customarily fixed at a level that would provide for the subsistence of a single worker while working in the capitalist sector and a small margin to meet the more urgent of cash requirements of his family (which continued to reside in the peasant sector).”²⁰

It is not surprising, then, that most mineworkers in South Africa and Namibia have been paid low wages for almost 60 years.²¹ Furthermore, almost 90 per

¹⁶ Williams and Satgar (eds) *Marxisms in the 21st Century: Crisis, Critique and Struggle* (2013) 220. See also Satgar (ed) *Capitalism's Crises: Class Struggles in South Africa and the World* (2015) 20, 211; and Satgar (ed) *The Climate Crisis: South African and Global Democratic Eco-Socialist Alternatives* (2018) 70, 168.

¹⁷ Massey 1983 *CJAS* 429–434. See also Hofmeester and De Zwart (eds) “Colonialism, Institutional Change, and Shifts in Global Labour Relations” (2018) oapen.org (accessed 2022-12-11).

¹⁸ Massey 1983 *CJAS* 429–434.

¹⁹ Arrighi “Labour Supplies in Historical Perspective: A Study of the Proletarianisation of the African Peasantry in Rhodesia” 1970 6(3) *Journal of Development Studies (JDS)* 200.

²⁰ Arrighi 1970 *JDS* 200.

²¹ Massey 1983 *CJAS* 429–434.

cent of African employees were employed on short-term contracts at mines in South Africa and Namibia.²² The underlying assumption by mining companies in this contract-labour regime was that workers would find it difficult to organise because they were constantly hired and dismissed. The apartheid labour regulation regime prohibited migrant mineworkers from working for more than two years at a time, whereas indigenous South African mineworkers could not work for more than 18 months without returning home.²³ Because workers were given nine-month contracts, mining turnover rates were always at 100 per cent every year.²⁴

The colonial mining labour system also established a control mechanism through large-scale compound housing.²⁵ Through this housing system, employers could control workers both on and off the job. Because mineworkers were not permitted by law to establish houses at their workplaces, the large-scale compound system was employed as a way for mining companies to save operating expenses while increasing social control. This system was first used in South African diamond mines in the 1800s.²⁶ Under this housing regime,

“[a]ll black workers were housed in the mines in large barracks-like hostels; entrance and exit were strictly controlled; and even the most private of workers’ activities were subject to surveillance. Before a worker could leave the job, for example, he had to go through a careful process of inspection in case he had purposely swallowed a diamond. One Tswana ex-miner who had worked in the Kimberley diamond mines at the turn of the century described the inspection process as follows: There was a law on the diamond mines that at the end of the job you had to go through detention for two weeks because they thought that you might have swallowed a diamond.”²⁷

Wilson stated that, in 1972, over 80 000 migrant workers were accommodated in large-scale compound houses, in different mines in South Africa.²⁸ In a single mine, large-scale compound houses accommodated almost 5 000 workers with each room containing no fewer than 16 persons at any given time. The large-scale compound houses were not *per se* meant to control theft of minerals. Instead, they were intended to suppress and diffuse mineworker unrest. Mineworkers were thus exploited in search of profits for mine owners or companies, as evidenced by the history of labour practices and relations during the colonial era. This prompted resistance from mineworkers as they became confrontational and/or combative, resulting in numerous strikes and riots as well as contract terminations at

²² Crush, Ulicki, Tseane and Van Veuren “Undermining Labour: The Rise of Subcontracting in South African Gold Mines” 2001 27(1) *Journal of Southern African Studies* 5–31. See also Kenny and Bezuidenhout “Contracting, Complexity and Control: An Overview of the Changing Nature of Subcontracting in the South African Mining Industry” 1999 *JSAIMM* 186.

²³ Lucas “Mines and Migrants in South Africa” 1985 75(5) *The American Economic Review* 1094–1108.

²⁴ Massey 1983 *CJAS* 429.

²⁵ Bezuidenhout and Buhlungu “From Compounded to Fragmented Labour: Mineworkers and the Demise of Compounds in South Africa” 2011 43(2) *Antipode* 237–263.

²⁶ Massey 1983 *CJAS* 430.

²⁷ *Ibid.*

²⁸ Wilson *Migrant Labour* (1972) 3 11.

steadily higher rates. The 1971 Ovambo strike in Namibia is thought to have ignited the strikes and riots in South African and Namibian mines.²⁹ The Ovambo strike, which began in November 1971, was primarily a protest against the mines' unfair contract labour structure. Following the Ovambo strike, 50 other mine strikes and riots were recorded over a three-year period. These strikes and riots occurred primarily at the Sover Mine in South Africa's Cape region.³⁰ The exploitative conditions in South Africa's mines prompted Malawi's late President, Kamuzu Banda, to prohibit the transfer of migrant labour to South Africa's mines in 1974.³¹ Mozambique followed suit in the same year, following the dethronement of the Caetano government in Portugal.³² These developments marked the beginning of a rapid change in the political paradigm as most countries in the SADC region became independent. There was great expectation that independence would result in considerable improvements in labour relations and procedures in South African and Namibian mines. Nonetheless, even after several years of independence, some mineworkers continue to live in compounds, are subjected to hazardous working conditions, and are paid inadequate wages, among other things. Post-independence labour laws have been crafted so as to promote profiteering and minimal gains for impoverished mineworkers. This state of affairs has been justified by arguments to the effect that mining is capital intensive, hence the need for mining corporations not to be subjected to regulatory rigidity, a development that would be likely to lead to capital flight. The argument is that it is preferable to encourage ease of doing business and tenure security for "much needed" international mining investors who will create jobs for locals. However, in an era when corporate social responsibility, corporate citizenship, good corporate governance, and human rights protection are key fundamentals in doing business, questions arise about the benefits of the current labour law regimes in South Africa and Namibia for traditionally exploited mineworkers. The next section of this article therefore explores the labour regulation regimes in the two countries and points out why they may not be of much benefit to mineworkers. The related challenges posed by the current nature of labour laws are set out.

3 THE SOUTH AFRICA AND NAMIBIA LABOUR LEGAL FRAMEWORK AND THE CURRENT CHALLENGES

Namibia and South Africa were both ruled by apartheid, and therefore they shared regulatory frameworks in a variety of sectors, including labour legislation. This section discusses the labour rules that affect the mining

²⁹ Bauer *Labour and Democracy in Namibia, 1971–1996* (1998) 18–40. See also Sharp *Waging Nonviolent Struggle: 20th Century Practice and 21st Century Potential* (2005) 205–215.

³⁰ Massey 1983 *CJAS* 433–434.

³¹ Daimon "Settling in Motion: Nyasa Clandestine Migration Through Southern Rhodesia Into Union of South Africa: 1920s–1950s" (undated) https://www.wider.unu.edu/sites/default/files/Daimon%2C%20Anusa_Paper.pdf (accessed 2022-12-11).

³² Wilson "Minerals and Migrants: How the Mining Industry Has Shaped South Africa" 2001 130(1) *Daedalus* 99–121.

industry. The key issues of such legislation are highlighted in order to demonstrate that there is still work to be done in decolonising labour laws in South Africa and Namibia.

3 1 South Africa

In South Africa, labour law has been viewed as a critical component of the post-apartheid era.³³ There was great hope among African indigenes that the post-apartheid era would be marked by the prevalence of social justice based on a transformational constitution and its underlying values. This is why the recent decision by South Africa's Constitutional Court to jail former President Jacob Zuma for 15 months for failing to appear before a Commission of Inquiry into corruption was met with violent protests. However, it is highly debatable in a decolonising society underpinned by African value systems such as *ubuntu* that, in the name of "constitutionalism", an elderly liberation hero should be sentenced to prison by the country's apex court, the Constitutional Court, with no possibility of appeal.³⁴ The point here is not to advocate for the former head of state's non-accountability for violating the laws of the country, but to determine if his imprisonment was consistent with the underlying principles of *ubuntu* in a decolonising South Africa. The realisation that the modern justice system and the accompanying legislative framework still echoes with colonial and/or apartheid "injustices" could have fuelled the rage of some South Africans. While not supporting illegalities or unbecoming behaviour, African traditions, and value systems do not advocate for the humiliation of elders in the manner in which former President Jacob Zuma was treated. Dialogue could have broken the impasse that resulted in the former president's conviction. The imprisonment of former President Jacob Zuma raises fundamental concerns about whether the post-apartheid era in South Africa is characterised by decolonised laws. The fixation with jail terms is not African; rather it is Eurocentric. African value systems usually prioritise rehabilitation over humiliating and insulting elders. The imprisoning of former President Zuma, however divisive, establishes a foundation for examining the labour regulations that govern the mining sector in South Africa and Namibia.

Apart from the Constitution,³⁵ which seems to be broad but entails numerous rights that on the face of it are arguably not entirely accessible to the Black majority in the country, the Basic Conditions of Employment Act³⁶ (BCEA), the Labour Relations Act³⁷ (LRA), the Employment Equity Act³⁸

³³ Pons-Vignon and Anseeuw "Great Expectations: Working Conditions in South Africa Since the End of Apartheid" 2009 35(4) *Journal of Southern African Studies* 883–899; Leibbrandt, Woolard, McEwen and Koep "Employment and Inequality Outcomes in South Africa" (undated) <https://www.oecd.org/employment/emp/45282868.pdf> (accessed 2021-12-10).

³⁴ Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State v Zuma [2021] ZACC 18.

³⁵ The Constitution of the Republic of South Africa, 1996.

³⁶ 75 of 1997. See also the Basic Conditions of Employment Amendment Act 11 of 2002.

³⁷ 66 of 1995.

³⁸ 55 of 1998.

(EEA), the Occupational Health and Safety Act³⁹ and the Mine Health and Safety Act⁴⁰ regulate labour matters, and are thus applicable to labour relations in the mining sector. It is imperative to observe that regardless of the sizeable number of labour laws regulating the mining sector in South Africa, the sector has frequently registered a high number of protected and unprotected strike actions.⁴¹ Among such strike actions was the regrettable Lonmin Mine strike, which resulted in the shooting of 22 mineworkers who were demonstrating for wage increases (the shooting has now been termed the Marikana massacre).⁴² Such continual strike actions and riots in the mining sector indicate that the labour regulation regime in South Africa may not be aligned to the socio-political, cultural and economic context of the country. Perhaps the capitalist model that informed the apartheid regime still operates under the guise of a modern and supposedly progressive constitutional dispensation.⁴³ The labour laws appear to be failing to play their role in addressing the inequality gaps in the labour relations domain. The generally accepted argument by scholars such as Botha and Fourie has been that there has been a vast improvement in workers' rights and issues relating to health and safety in South Africa.⁴⁴ This theoretically permissible contention is attributed to the role that has been played by the National Union of Mineworkers, the Association of Mineworkers and Construction Union, and the Congress of South African Trade Unions in negotiating for improved workers' rights in post-apartheid South Africa. However, the reality remains that mineworkers are still subjected to unfavourable working conditions,⁴⁵ live in compounds/shanty towns,⁴⁶ and are subcontracted,⁴⁷ leading to meagre wages.⁴⁸ Artisanal miners remain unprotected by labour laws.⁴⁹ This is the same pattern that prevailed during the apartheid era.

³⁹ 85 of 1993.

⁴⁰ 29 of 1996.

⁴¹ Amnesty International "South Africa: Mining Gathering Must Confront Human Rights Violations" (2020) <https://www.amnesty.org/en/latest/news/2020/02/south-africa-mining-gathering-must-confront-human-rights-violations/> (accessed 2022-12-10).

⁴² See Farlam, Hemraj and Tokota "The Marikana Commission of Inquiry: Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at Lonmin Mine in Marikana, in the Northwest Province" (Farlam Report) (31 March 2015) <https://www.sahistory.org.za/archive/marikana-commission-inquiry-report-matters-public-national-and-international-concern> (accessed 2022-10-12). See also South African History Online "Marikana Massacre 16 August 2012" (undated) <https://www.sahistory.org.za/article/marikana-massacre-16-august-2012> (accessed 2022-12-11).

⁴³ Plagerson and Stuart "Social, Economic and Environmental Policy Complementarity in the South African Mining Sector" 2018 UNRISD Working Paper, No 2018-7, United Nations Research Institute for Social Development (UNRISD), Geneva. See also Lane, Guzek and Van Antwerpen "Tough Choices Facing the South African Mining Industry" 2015 115 *JSAIMM* 471.

⁴⁴ Botha and Fourie 2019 *THRHR* 191.

⁴⁵ International Labour Organisation "South Africa Could Do More for Miners, says ILO Mining Specialists" (2012) https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_187783/lang-en/index.htm (accessed 2022-12-10).

⁴⁶ Pelders and Nelson 2019 *Development Southern Africa* 265–282.

⁴⁷ Benya "Women, Subcontracted Workers and Precarity in South African Platinum Mines" 2015 48(1 & 2) *Labour, Capital and Society* 68–91.

⁴⁸ Heiberg "South Africa's NUM Union Seeks 15% Wage Hike From Gold Miners and Eskom" (1 April 2021) Reuters (2021) <https://www.reuters.com/article/uk-safrica-mining-wages->

In the case of *Naptosa v Minister of Education, Western Cape*,⁵⁰ the court observed that labour law, although a complex and significantly polarising subject, was premised on a socio-political and economic compromise between employers and organised labour. The idea implicit in this approach is to protect the constitutionally-enshrined right to fair labour practices. Other rights that must be protected include the rights to privacy, equality, freedom of association and freedom of expression. However, in the mining sector, such rights are not easily accessible, as was illustrated in the case of *Nhlapo v Sasol Mining Ltd*.⁵¹ In this case, the recognition of mineworkers' right to strike and to be protected by trade unions as well as the right to health and safety were in issue. The workers had embarked on an unprotected strike by sitting in, underground, at the end of their shifts. Mine safety prevented additional shifts from going underground. The shop steward leaders engaged with the striking workers and headed the calls to surface. However, the management proceeded to dismiss the striking workers. The court held that while the workers' misconduct was serious, the dismissals were inappropriate. It is worth asking what prompted the mineworkers' dismissal when an *ubuntu* approach would have placed emphasis on engagement that served the best interests of a transforming society. The management in this case made no effort to engage with the recognised workers' shop stewards. The South African LRA regards unprotected strikes outside of section 64 as being unlawful and thus as demanding a disciplinary sanction.⁵² However, this collective bargaining system significantly weakens the worker and contributes to low wages. Mineworkers will be reluctant to undertake strike actions to cripple the employer's operations in order to achieve the objectives of the strike action. Owing to the language of the LRA in item 6 of Schedule 8, to the effect that an unprotected strike constitutes misconduct, employers have often used this provision as ammunition for dismissing striking workers.⁵³

The position adopted by the courts is also at times not helpful to the noble cause of impoverished mineworkers to get fair wages. For example, in the case of *National Union Mineworkers obo Shayi v Sishen Iron Ore Company (Pty) Ltd*,⁵⁴ the court held that the decision to dismiss workers who went on an unprotected strike that led to a loss of 140 million rands by the employer

[idUSKBN2BO4ID/](#) (accessed 2022-12-10). See also Zenda "Pay Us Before We Die: Ex-South African Miners Plead" (2021) <https://www.fairplanet.org/story/%E2%80%9Cpay-us-before-we-die%E2%80%9D-ailing-ex-south-african-miners-plead/> (accessed 2022-12-10).

⁴⁹ World Bank 2020 *State of the Artisanal and Small-Scale Mining Sector* (2020) 17–34; World Bank "Better Working Conditions Can Improve Safety and Productivity of Artisanal and Small-Scale Miners Around the World" Press Release No. 2021/145 (4 May 2021).

⁵⁰ [2000] ZAWCHC 9; 2001 (2) SA 112 (C).

⁵¹ [2019] ZALC JHB 260.

⁵² See Item 6 of Schedule 8 of the LRA.

⁵³ *Association of Mineworkers and Construction Union obo Rantho v Samancor Western Chrome Mines* [2021] 3 BLLR 236 (LAC). In this case mine workers participated in two unprotected strike actions. The employer, Samancor Western Chrome Mines sent text messages to workers to return to work. The workers complied but were all subjected to a disciplinary action and subsequently dismissed on account of Item 6 of Schedule 8 of the LRA.

⁵⁴ [2017] ZALCJHB 271.

was fair. The court was of the view that the employer had reasonably discharged the onus of demonstrating that the dismissal was fair as provided for in section 192 of the LRA. It must be questioned whether the fairness alluded to extends to addressing matters of inequality that have characterised the mining sector in South Africa. Often, the operational requirements and losses suffered by the employer take precedence. There is therefore nothing in the language of the LRA or related legislation that places significance on the transformative aspect of the country's labour laws. The courts also appear not to contextualise the inequalities characterising labour relations in the mining sector. The common law must be seen to close the gap that exists in legislation insofar as transformation and decolonisation are concerned. However, owing to the fact that the labour laws were never drafted from an Afrocentric context, the disregard of mineworkers' genuine interests will continue to be dismissed on the grounds of their failure to promote free market policies and/or the neoliberal economic agenda and its policies.

The fact that the LRA provides for social justice in section 1 and at the same time provides for disciplinary sanctions against workers who engage in unprotected strikes is a paradox. Although it is accepted that workers' rights are not absolute, as they have to be balanced with the rights of the employer and third parties, there is a need to understand that South African society is underlined by inequalities that labour relations deeply entrench. Deliberate efforts must thus be made to close the gap between these inequalities. This is why the South African Constitution was drafted with the intent, among other things, of addressing inequalities in the country. The South African Constitution, in principle, seeks to address injustices promoted by the apartheid regime and aims at realising transformation in society. To this end, section 23(1) provides for the right to fair labour practices. The same Constitution further provides for the intrinsic rights to dignity,⁵⁵ equality⁵⁶ and fairness.⁵⁷ However, the Constitution is not an instrument of direct recourse with regard to labour matters, as it is envisaged that labour legislation ought to give effect to section 23(1) of the Constitution.⁵⁸

Although labour law now affords indigenous African workers' rights such as freedom of association, organisation and the right to strike, incidents such as the Marikana massacre raise questions about the substance of such rights. It appears that workers' rights to organise must be subject to corporate interests. Further, affirmative action and black economic empowerment language is not expressly retained in all labour laws and is limited to the EEA and the Broad-Based Black Economic Empowerment Act

⁵⁵ S 10 of the Constitution. See also the Preamble of the Universal Declaration for Human Rights (UNGA 217 A (III) (1948)); Steinmann "The Core Meaning of Human Dignity" 2016 19 *Potchefstroom Electronic Law Journal* 3–34.

⁵⁶ S 9 of the Constitution.

⁵⁷ Kapdi, Sulaiman and Hofmeyr "The Standard of Fairness in South African Law – A Case for the Petroleum Industry" (2017) <https://www.lexology.com/library/detail.aspx?g=b2951f76-904a-4bd8-aa42-942e27fd2b10> (accessed 2022-10-10).

⁵⁸ *Chirwa v Transnet Limited* [2007] ZACC 23; 2008 (4) SA 367 (CC); 2008 (3) BCLR 251 (CC); [2008] 29 ILJ 73 (CC).

(BBBEA).⁵⁹ Black Economic Empowerment (BEE)⁶⁰ has been significantly welcomed in South Africa. Furthermore, in the case of *Kievits Kroon Country Estate (Pty) v Mmoledi*,⁶¹ the court held that workers' cultural beliefs must be protected. However, traditional healers' "medical" certificates are not yet recognised in proving the existence of illness.

The BEE approach gives impetus to the Constitution's section 9(2), which provides for adopting special measures to ensure equality in society. Inequality was characterised in the case of *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*⁶² to include discrimination of a worker on racial grounds. It must be understood that BEE and measures such as affirmative action seek to ensure full and equal enjoyment of rights.⁶³ However, whether contemporary South African society reflects an equal society or is regressing further, especially when the effects of COVID-19 are factored into the equation, is questionable.

Positives have nonetheless been realised insofar as male chauvinistic tendencies leading to sexual harassment are concerned.⁶⁴ Domestic workers have been offered protection in the Constitution, the LRA, the EEA and the BCEA to the extent that they fall into the definition of "employee".⁶⁵ However, the majority of workers in the informal sector are still excluded from express protection by the labour laws of South Africa. While they may satisfy the rebuttable presumption of the employment test set out in the LRA, the Skills Development Act,⁶⁶ the BCEA, and the Code of Good Practice: Who Is an Employee,⁶⁷ there is no evidence in the existing legislation that there are deliberate efforts to promote and protect the rights and interests of this category of workers. It is evident that independent contractors and self-employed persons are excluded from the ambit of the law. It must be observed that while tests such as the supervision-and-control test, dominant control test, organisation or integration test and the economic-dependency test have been introduced to protect workers, there is a greater need to protect workers in the post-apartheid era. Radical changes in the world of work in the twenty-first century and post-apartheid South Africa have led to employers structuring employment relations in an informal manner. Informal working arrangements aimed at cutting the costs of doing business and

⁵⁹ 53 of 2003.

⁶⁰ Kruger "The Impact of Black Economic Empowerment (BEE) on South African Businesses: Focusing on Ten Dimensions of Business Performance" 2011 15(3) *Southern African Business Review* 207; Warikandwa and Osode "Regulating Against Business 'Fronting' to Advance Black Economic Empowerment in Zimbabwe: Lessons from South Africa" 2017 20 *Potchefstroom Electronic Law Journal* 2–43.

⁶¹ [2013] ZASCA 189.

⁶² (1998) 19 ILJ 285 (LC).

⁶³ *Minister of Finance v Van Heerden* 2004 (11) BCLR 1 125 (CC).

⁶⁴ *Campbell Scientific Africa (Pty) Ltd v Simmers* (2016) 37 ILJ 116 (LAC). See also *K v Minister of Safety and Security* [2018] ZAECPEHC 82; [2019] 1 All SA 415 (ECP); and s 60 of the EEA.

⁶⁵ Wiego and Informality Project "Domestic Workers' Laws and Legal Issues in South Africa" (2014) <http://www.wiego.org/sites/default/files/resources/files/Domestic-Workers-Laws-and-Legal-Issues-South-Africa.pdf> (accessed 2021-12-11).

⁶⁶ 97 of 1998.

⁶⁷ Issued in terms of s 200A of the LRA, GN 1774 in GG 29445 of 01-12-2006.

maximising profits have led to workers being deprived of basic statutory rights.

The Fourth Industrial Revolution (4IR) has also brought about technological changes to the organisation of work, which has, in the process, created new types of workers. As such there is a need to explore further the scope of labour laws and/or their boundaries⁶⁸ insofar as the mining sector is concerned. Changes brought about by 4IR have also impacted the mining sector.⁶⁹ Mechanisation is likely to change the manner in which mineworkers are controlled and how they work. Furthermore, a number of mineworkers are likely to be replaced by machines, causing further inequalities in South African society. There is therefore a need to revise labour laws to address related and anticipated challenges to mitigate the unemployment that could arise from 4IR, as well as current inequalities in South African society.

3 2 Namibia

Namibia's mining industry carries a high risk of industrial accidents owing to the nature of mining operations.⁷⁰ As such, the country's post-apartheid labour laws ought to be crafted in a manner that ensures workers' safety at the workplace. The right to safe and healthy working conditions is crucial at the national, regional and international levels. The African Charter emphasises the right to work under equitable and satisfactory conditions.⁷¹ The International Labour Organization's (ILO) Convention on Health and Safety in Mines⁷² requires that national legislation should provide for safety and health in mines and frequent inspections by designated labour inspectors. Sadly, the regulation of health and safety in the Namibia mining industry has been neglected.

Health and Safety in Namibia's mining industry was initially regulated by the Mines, Works and Minerals Ordinance.⁷³ After the enactment of the Labour Act,⁷⁴ the Schedule to the Act, in terms of section 116, repealed section 93 of the Ordinance and those parts of the Ordinance pertaining to the health and safety of workers employed in or in connection with mining and prospecting operations. Section 139 read in conjunction with Schedule 2 of the Minerals Act⁷⁵ repealed the entire Ordinance except for provisions relating to the appointment of, and the powers, duties and functions of, the

⁶⁸ *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW)* [2018] 4 BLLR 339 (LC).

⁶⁹ Deloitte "The Future of Mining in Africa: Navigating a Revolution" (2018) https://www2.deloitte.com/content/dam/Deloitte/za/Documents/energy-resources/za_Future_of_mining.pdf (accessed 2022-12-12) 8.

⁷⁰ Alberto A *Critical Analysis of the Impact of the Namibian 1992 Labour Act on the Health and Safety Regulation in the Namibian Mining Industry* (master's thesis, University of Pretoria) 2017.

⁷¹ Art 15 of the Organization of African Unity's African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982). Adopted: 27 June 1981.

⁷² ILO Occupational Safety and Health Convention C155 (1981). Adopted 22/06/1981.

⁷³ Mines, Works and Minerals Ordinance 20 of 1968.

⁷⁴ 6 of 1992.

⁷⁵ 33 of 1992.

Chief Inspector of Mines, and provisions relating to the safety and health of persons employed in the mines. The 1992 Minerals Act, unlike the 1992 Labour Act, sought to revive the 1968 Ordinance insofar as health and safety were concerned. Take note that the Minerals Act was passed after the Labour Act of 1992, which had earlier repealed all provisions concerning health and safety in the 1968 Ordinance. There is therefore a conflict of laws and confusion as to which law to follow. Such confusion can only favour the employer and not the worker.

Further laws were to be passed to govern the labour sector in Namibia. These include the 2004 Labour Act,⁷⁶ which was meant to repeal the 1992 Labour Act but never became fully operational. This implies that the 2007 Labour Act⁷⁷ now governs labour relations in Namibia. Health and Safety provisions of the 1992 Labour Act were imported into the 2007 Labour Act. Part XI of the 1992 Act imposes a positive duty on employers to ensure the health and safety of workers. The same language is retained in the 2007 Labour Act. The confusion informing the regulation of health and safety of employees at work in Namibia has resulted in the Ministry of Mines and Energy pointing out that the Health and Safety Regulations promulgated under Ordinance 20 of 1968 remain valid. However, the 1992 Labour Act provides otherwise, although the 1992 Minerals Act reinstates the 1968 Ordinance. There is no doubt that such confusion retards the effectiveness of protecting workers' rights in the mining sector. There is therefore a need to develop principled laws that effectively regulate health and safety in Namibia's mining sector. Such development can only be realised if decolonisation of the same laws is made a priority.

4 CALLS FOR DECOLONISATION

Decolonisation is a concept that has been debated for a long time and now extends to the potentially polarising calls for decolonising labour laws.⁷⁸ National labour laws have been "modernised" and now no longer carry an apartheid but rather a capitalist agenda.⁷⁹ Regulatory flexibility informed by the World Bank's ease-of-doing-business principles now characterises labour laws in the world.⁸⁰ The plausible principle underlying investor-friendly labour legislation is to attract investors, in certain cases at the expense of workers' welfare and best interests. The discriminatory apartheid labour laws have been substituted by modern laws that, on the face of it, "promote and

⁷⁶ Labour Act 15 of 2004.

⁷⁷ Labour Act 11 of 2007.

⁷⁸ Botha and Fourie 2019 *THRHR* 177.

⁷⁹ Freund "Labour Studies and Labour History in South Africa: Perspectives From the Apartheid Era and After" 2013 58(3) *International Review of Social History* 493–519.

⁸⁰ Arvo "Labour Regulations Throughout the World: An Overview" World Bank Jobs Working Paper no. 16 (2018). See also Lee, McCann and Torm "The World Bank's 'Employing Workers' Index: Findings and Critiques – A Review of Recent Evidence" 2008 147(4) *International Labour Review* 416–432 https://www.ilo.org/public/english/revue/download/pdf/s6_notes_lee_mccann_torm.pdf (accessed 2022-10-10) 416; and Bakvis How the World Bank & IMF Use the Doing Business Report to Promote Labour Market Deregulation in Developing Countries (2006) <https://library.fes.de/pdf-files/gurn/00171.pdf> (accessed 2022-10-10).

protect” workers’ rights. Questions are thus raised as to the tangible changes that such labour laws have brought post-independence. In particular, the labour laws largely reflect the Eurocentric narrative and not so much the Afrocentric view, which is underpinned by the *ubuntu* philosophy. It is thus questioned if the neoliberal-aligned labour laws embrace the collective African view and experience.

In light of African experiences and views, which are not expressly reflected in the labour laws in South Africa and Namibia, there is a need to interrogate how such laws promote inclusivity and the social and structural transformation agenda. It is thus critical to conceptualise decolonisation of labour laws in a manner that demands the formulation of laws that have due regard for indigenous norms and standards while embracing progressive Eurocentric narratives and related legal epistemologies. In this regard, there is a need to embrace a holistic conceptualisation of decolonisation that is socio-political, economic and discursive. It is in this regard that epistemological decolonisation assumes significance. It is driven by value systems such as *ubuntu*. This implies that the formulation of labour laws, as is the case with any other laws, is not relegated to a mere attempt to conceive of employer-employee relations from a contractual point of view but rather proceeds from a humane perspective. In other words, labour laws must be formulated from an Afrocentric perspective of what is humane. The idea here is that decolonised labour laws must be inclusive of the Afrocentric value systems and must not be Eurocentric and hegemonic.

Labour laws in contemporary South Africa and Namibia need reform to embrace humaneness (accentuated by *ubuntu*). This process of reform must be informed by the cross-cutting effects of labour law. Labour law extends or is connected to a vast array of laws such as international law, constitutional law, administrative law, corporate law, law of contract, and civil and criminal law.⁸¹ The complex nature of labour law implies reforming it will have far-reaching effects on other laws in the two countries, as far as the decolonisation agenda is concerned. The need to decolonise labour laws assumes importance at a time when discourses around the 4IR agenda have reached a crescendo in the context of businesses suffering from COVID-19-induced economic shocks. Weak labour laws that are not decolonised will lead to massive unemployment and complicate the employment relationship between employer and worker.

Labour laws are no longer connected to their main objective of creating harmony between parties in an employment relationship. This is attributed to the fact that in contemporary society, workers have diminished labour and social protection. Furthermore, informal workers (for the purposes of this article, workers employed in the artisanal mining sectors often known as *makorokoza/zama zama* in SADC countries) have largely remained excluded from labour law recognition and protection.⁸² This is because

⁸¹ Botha and Fourie 2019 *THRHR* 177.

⁸² ILO “International Labour Standards (ILS) 4.a2: Bringing the Unprotected Under the Law” The Regulatory Framework and the Informal Economy (19 March 2013) https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_policy/documents/publication/wcms_210446.pdf (accessed 2022-10-11).

postcolonial labour law has not aligned itself with aspirations to inclusivity in South Africa and Namibia. Businesses and governments are aligning themselves with a global capitalist agenda that has ushered in a global apartheid agenda.⁸³ This has led to laxity in labour regulation in pursuit of attracting investors and realising the 4IR agenda. This evident race to the bottom has improved mining companies' security of tenure but impoverished many African workers in the two countries.⁸⁴

Labour laws now seem to adopt a market-oriented perspective of aggressive profiteering at all costs. This explains why Western and particularly Asian investors operating in the African mining industry often practise poor labour standards but are never brought to account for their unethical business practices. Special economic zones where labour regulation is lax or from which they are exempted have seen complaints being raised over poor labour conditions, debates over land expropriation and the prevalence of debates around lost revenue for governments.⁸⁵ Governments are advised by neoliberal economic institutions such as the Bretton Woods institutions (i.e., the International Monetary Fund (IMF) and the World Bank) not to overregulate labour matters for fear of stunting economic growth and prosperity. The free market and neoliberal economic policies championed by these institutions have led to more investors in the mining sector, more resource plunder of Africa's extractive natural resources and the realisation of minimal returns to mineworkers. This has occurred in the belief that labour laws must not be crafted so as to interfere with market forces/free market policies.

The application of the humanistic (*ubuntu*) philosophy, however, would focus on the protective agenda of labour law. It is generally accepted that workers (in this case mineworkers) are usually the weaker party in the employment relationship. This imbalance in power relations thus demands that deliberate measures be put in place to protect the worker who is vulnerable. Labour laws must be viewed as a mechanism to address labour violations in the workplace.⁸⁶ At the same time, labour laws must be seen to protect the interests of businesses from disruptions by organised workers and ensure the organisation of producing goods or services.⁸⁷ Regrettably, the narrative that labour is a market transaction appears to be overtaking the importance of protecting workers from the prevalent commodification of labour in the twenty-first century and from the substitution of labour as underlined by 4IR. While the ILO through its core labour standards and

⁸³ Satgar "Neoliberalized South Africa: Labour and the Roots of Passive Revolution" 2008 41(2) *Labour Capital and Society* 38–69. See also Khor *Rethinking Globalisation: Critical Issues and Policy Choices* (2001) 1–141.

⁸⁴ Andrews, Elizalde, Le Billon, Hoon Oh, Reyes and Thomson *The Rise in Conflict Associated With Mining Operations: What Lies Beneath?* (2017) <https://cirdi.ca/wp-content/uploads/2017/06/Conflict-Full-Layout-060817.pdf> (accessed 2022-10-11) 11.

⁸⁵ UNCTAD "Special Economic Zones" (2019) https://unctad.org/system/files/official-document/WIR2019_CH4.pdf (accessed 2022-10-11) 128. See also ILO "Promoting Decent Work and Protecting Fundamental Principles and Rights at Work in Export Processing Zones" (2017) https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---ifp_seed/documents/publication/wcms_584474.pdf (accessed 2022-10-11).

⁸⁶ Botha and Fourie 2019 *THRHR* 177.

⁸⁷ *Ibid.*

decent work agenda discourages the commodification of labour, free market policies and the neoliberal economic agenda appear to promote a different objective. Workers are regarded as assets of the business and not hired parties. Evidently, this is why the legally enforceable rights and obligations of an employment contract are rarely respected by the employer. Labour laws and the market society that inform such laws regard labour as a commodity. These issues are discussed in more detail in the next section of this article.

4 1 The capitalism agenda in labour law

Karl Marx advanced the theory of capitalist exploitation.⁸⁸ This theory is succinctly amplified in English classical economists' economic doctrines (i.e., Adam Smith and David Ricardo)⁸⁹ as well as French physiocrat, Francois Quesnay.⁹⁰ Exploitation, according to Smith, Ricardo and Quesnay, consisted of producing surplus or net product over and above the cost of workers' subsistence and replacement of materials used up in production, and appropriation of that surplus by a class of non-productive owners of property (i.e., capitalists, landlords and their hangers-on, and the State). Exploitation under capitalism, according to Marx, has various forms. It is related to the capital-labour relation. The key features of the capital-labour relations are that the worker enters the market as free labour in that: a) the worker is unfettered by relations of legal ownership (slavery) or obligation (serfdom) to a particular capitalist and thus is free to sell their labour power to another buyer, and b) the worker is freed or separated from ownership of the means of production, and thus has nothing to sell but their labour power.⁹¹ Labour power is thus a commodity that is freely traded. Exploitation thus consists of expropriating the value that is in excess of what the capitalist pays for the labour power of the worker and for materials.⁹² In principle, the worker spends part of the working day producing the means of subsistence for themselves and their family, while the rest of the time is spent producing surplus value for the capitalist.⁹³ The surplus value (the difference between the product of labour and labour power) is regarded as "unpaid labour".⁹⁴ This is regarded as profit, interest or rent for the business and revenues for the State. Workers thus do not produce their own subsistence but are exploited as a class.

The post-apartheid labour laws in South Africa and Namibia have not adequately addressed capitalist exploitation in all its inherent forms. It is thus

⁸⁸ Marx *Das Kapital* vol 1 s 2 (1867) 83. See also Lysandrou "The Market and Exploitation in Marx's Economic Theory: A Reinterpretation" 2000 24(3) *Cambridge Journal of Economics* 325–347.

⁸⁹ Adam "An Inquiry Into the Nature and Causes of the Wealth of Nations" in Campbell and Skinner (eds) *The Glasgow Edition of the Works and Correspondence of Adam Smith* 1976 (1776) 2. See also Siddiqui "David Ricardo's Comparative Advantage and Developing Countries: Myth and Reality" 2018 8(3) *International Critical Thought* 426–452.

⁹⁰ Schachter "Francois Quesnay: Interpreters and Critics Revisited" 1991 50(5) *The American Journal of Economics and Sociology* 313–322.

⁹¹ Marx *Das Kapital* 83.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*

not surprising that regardless of the perceived “progressive labour laws” in South Africa and Namibia, social dominance of the capitalist class over the working class still persists. Surplus value is not shared with workers and, several years after independence, indigenous workers are still excluded from ownership of the means of production. Capitalists maintain a vice-like grip over the use of labour in production and continue to exploit workers in the mining industry. The constitutional aspiration of closing inequality gaps remains a pipe dream and very few mineworkers (if any) have become owners of mining companies in the two countries. This development is attributed to the fact that labour laws are not meant to be vehicles of transformation but a basis for ensuring a decent supply of labour to the capitalists.

The capital-class relation has been sustained by post-apartheid labour laws. Thus, it is apparent that labour laws have not been decolonised. If they had been decolonised, workers would have become owners of the means of production. Employee share-ownership schemes would have constituted part of the legal text of labour laws as would matters pertaining to skills transfer and the presence of indigenous people in management. These issues have often been relegated to black economic empowerment policies and laws that are regarded as not being friendly to free market policies, the neoliberal economic order and protection of capitalists’ security of tenure.

4 2 Exclusion of *ubuntu* values in labour law

Labour laws in South Africa and Namibia have been drafted with a view to advancing a capitalist and not a worker-protection agenda. It is thus not surprising that African value systems and/or norms found in *ubuntu* have been significantly excluded from the language of the law and the formal legal system.⁹⁵ The net effect of this approach is that African legal systems, the attendant judicial aspects and subsequent laws formulated remain underdeveloped, and they consistently fail to address the need for societal changes and/or reducing inequalities.⁹⁶ The moral theory of *ubuntu*, which offers a different conception of dignity compared to the Eurocentric human rights concept, has often been ignored in the legal drafting process.⁹⁷ *Ubuntu* provides a basis for addressing contemporary moral dilemmas that is not commonly found in Western and individualistic concepts of human rights.⁹⁸

⁹⁵ *Gumede v President of the Republic of South Africa* 2009 (3) SA 152 (CC) par 11 and 16–18.

⁹⁶ Mokgoro “Ubuntu and the Law in South Africa” 1998 4 *Buffalo Human Rights Law Review* 15; Paper first delivered at the first Colloquium on Constitution and Law held at Potchefstroom (31 December 1997) 2.

⁹⁷ Devenish A Commentary on the South African Bill of Rights (1999) 623. See also Bennett “Ubuntu: An African Equity” 2011 14(4) *Potchefstroom Electronic Law Journal* 30; and Kunene *The Essence of Being Human: An African Perspective* Inaugural Lecture presented in Durban (1996) 10.

⁹⁸ Mokgoro *Ubuntu and the Law in South Africa* (1998) 2–3. See also Mbigi and Maree *Ubuntu: The Spirit of African Transformation Management* (1995) 1–7; and *AZAPO v TRC* 1996 (4) SA 562 (C) 570 par 58.

Ubuntu's jurisprudential interpretation potentially takes cognisance of a multiplicity of inherent entitlements recognised by Africans, and which are consistent with human rights.⁹⁹ It provides direction on how to address contemporary justice-related disputes.¹⁰⁰ It is thus crucial to demonstrate the paradox of the express omission of *ubuntu* values in South African and Namibian labour laws, a matter that citizens of the two countries frequently lament.

Ubuntu is a complex concept to define. However, its substance is discerned from the lived experiences of people in a specified context. It is not a concept that can easily be well understood from a Western perspective. The West places significance on an individual's rights/interests whereas Africans place value on the individual's rights/interests in pursuit of the best interests of a group of individuals. *Ubuntu* thus constitutes a decisive aspect in influencing social behaviour/conduct.¹⁰¹ *Ubuntu* is also depicted as a value system, the philosophical basis of which is morality, humaneness, personhood and humanity.¹⁰² It emphasises group solidarity in pursuit of the collective best interests of all members of society (regarding the availability or non-availability of resources). The key principle with *ubuntu* is "*umuntu ngumuntu ngabantu*" (translated to imply that one can only be a person through others). *Ubuntu* thus has an anti-individualistic thrust, a position contrary to the individualistic approach of the West. According to Justice Mokgoro, *ubuntu*

"is the very quality that guarantees not only a separation between men, women and the beast, but the very fluctuating gradations that determine the relative quality of that essence. It is for that reason that we prefer to call it the potential of being human."¹⁰³

Applying *ubuntu* values to the formulation of labour laws would imply that group camaraderie, respect, compassion, conformity, humanistic orientation, collective unity and human dignity were the central social values of labour relations.¹⁰⁴ In order to realise an ordered society, *ubuntu* is crucial. To this end, labour laws must be formulated with the greater good of African communities' best interests in mind and not just capitalist objectives. The interests of mine owners cannot be the basis upon which the labour laws of a country are formulated. The collective good of society should be the premise upon which labour laws are formulated.¹⁰⁵ Sensitivity must be shown to the past experiences of mineworkers and workers in any other industry insofar as the need to develop laws that unyoke workers from modern "smart slavery" is concerned. Deliberate efforts have to be made to

⁹⁹ Bilchitz, Metz and Oyowe *Jurisprudence in an African Context* (2017) 32. See also Broodryk *Ubuntu in South Africa* (doctoral thesis, University of South Africa) 1997.

¹⁰⁰ Himonga, Taylor and Pope "Reflections on Judicial Views of Ubuntu" 2013 16(5) *Potchefstroom Electronic Law Journal* 67.

¹⁰¹ Mugumbate and Nyanguru "Exploring African Philosophy: The Value of Ubuntu in Social Work" 2013 3(1) *African Journal of Social Work* 82.

¹⁰² Mokgoro *Ubuntu and the Law in South Africa* 2–3.

¹⁰³ Mokgoro *Ubuntu and the Law in South Africa* 3.

¹⁰⁴ Mokgoro *Ubuntu and the Law in South Africa* 2–3.

¹⁰⁵ *Ibid.*

embed *ubuntu* value systems in the labour laws of South Africa and Namibia. It is accepted that the two countries cannot go back entirely to the pre-colonial societal settings, but there is a need to “[r]e-establish[...] contacts with familiar landmarks of modernisation under indigenous impetus”.¹⁰⁶ Deliberate efforts must be made to close the culture gaps between Western norms and standards, and African value systems, in order to realise just and fair labour laws. Failure to close the culture gap will leave many challenges in labour relations unresolved.

The need for holistic reform and dignifying of South African and Namibian labour laws thus requires a substantial repositioning of the current state of the two countries’ value systems. Policymakers and lawmakers need to be inventive in “[f]inding and or creating law reform programmes, methods, approaches and strategies that will enhance adaptation to such unprecedented change”.¹⁰⁷ If embraced, the central values of *ubuntu* could drive labour law reform and the far-reaching process of embedding *ubuntu* values in other existing laws in the two countries. *Ubuntu* might therefore be a vital cog in developing a reformed labour law regime and jurisprudence for South Africa and Namibia. This may in turn revive sustainable African values in pursuit of the broader process of an African renaissance.

5 RECOMMENDATIONS

Labour laws in South Africa and Namibia have not been decolonised. To achieve labour law decolonisation there is a need to decolonise the minds of Africans in general, including policymakers, technocrats and legal minds.¹⁰⁸ Such changes must be driven by the transformation of all levels of education from primary to tertiary levels.¹⁰⁹ More specifically, legal education must be transformed to accommodate African value systems. Legal practitioners and legal academics need to embrace decolonisation in practice and in the lecture room. Legal interns in law firms, and law students in law schools, must be trained to think critically insofar as deliberate efforts aimed at decolonising the South African and Namibian legal systems are concerned. Corporate governance principles must also embrace *ubuntu* as a fundamental component of doing business in the two countries. The King Reports on corporate governance, which are used in both countries, do reflect the significance of *ubuntu* in conducting business but the sections on corporate citizenship and corporate social responsibility in the area of labour law do not significantly reflect the implementation of *ubuntu*. Low wages, poor working conditions and living conditions for workers still characterise the mining sector in the twenty-first century. This needs to change drastically

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

¹⁰⁸ Mamdani “Between the Public Intellectual and the Scholar: Decolonisation and Some Post-Independence Initiatives in African Higher Education” 2016 *Inter-Asia Cultural Studies* 68. See also Himonga and Diallo “Decolonisation and Teaching in Africa With Special Reference to Living Customary Law” 2017 *Potchefstroom Electronic Law Journal* 5.

¹⁰⁹ Dladla “Decolonising the University in South Africa” in Nabudere (ed) *Afrikology and Transdisciplinary: A Restorative Epistemology* (2012) 163.

to avoid civil strife such as the violent demonstrations and looting of July 2021 in South Africa.

The theory or philosophy of law (jurisprudence) must now be deliberately taught with a view to decolonising legal thinking in South Africa and Namibia. Law students, legal practitioners and legal academics must be challenged to address colonial injustices and not simply cosy up to Western theoretical constructs that do not align with the African context. There is a need to consciously problematise the labour law regime and matrix emanating from the colonial and apartheid eras. A lot of unlearning has to take place and must be premised on deliberate efforts to reform the curriculum. It should be regarded as a disgrace that over twenty years after the advent of democracy in South Africa and Namibia, theories of law from Western countries inform how jurisprudence is taught in twenty-first century Africa. Although there is no problem in appreciating what John Locke, Thomas Hobbes, Thomas Aquinas, Jeremy Bentham and Herbert Hart postulated in their theories from a Eurocentric perspective, there is a problem in making the same theories the basis for legal education in Africa. There is a need to engage with the writings of African jurists to usher in jurisprudential decolonisation. In this way, the thinking about the law and the manner of formulating labour laws, (among other laws) will be driven by an Afro-centred way of thinking. This context- and culture-specific approach to lawmaking is what has led to development in most Asian and Western countries.

Ubuntu as a value system must be deeply embedded in legal education, legal training during internships and articles of clerkship as well as legal practice. It cannot be acceptable that Roman-Dutch law constitutes the common law of South Africa and Namibia. It must be asked what is “common” to Africa about the common law that constitutes the indigenous laws of colonisers that became transplanted in African legal systems. The fact that legal systems have not been decolonised implies that inequalities emanating from the colonial and apartheid eras cannot be sufficiently addressed. Colonial injustices persist in labour laws and in other pieces of legislation, in South Africa and Namibia, as well as in the rest of Africa. It is thus imperative that the legal systems of the two countries (and other African countries) be decolonised to usher in substantive social justice.

6 CONCLUSION

Many mineworkers are still vulnerable in the world of work, including in the formal and informal sectors in South Africa and Namibia. Such workers remain vulnerable and without social protection. Thus, labour laws in South Africa and Namibia ought to be reformed by decolonising them in order to substantially empower mineworkers, often an extremely exploited group of workers. There is a need to ensure substantive socio-economic transformation in twenty-first century societies. Mineworkers have often worked and generated substantial profits for mining companies, yet they remain impoverished 20 years after each country's embrace of democracy. Although there are arguments to the effect that labour laws have been decolonised, structural inequalities remain in both South Africa and Namibia.

There is a persistent reluctance to interrogate the elephant in the room by academics and practitioners in the legal and economic fraternities, who often prefer to endorse the convenient Western narrative of free market policies and ease of doing business. Implicit in this approach is the narrow pursuit of “investment retention” or ensuring security of tenure for investors that create any form of employment, no matter how exploitative. The argument is often that half a loaf is better than nothing. It is evident that this approach has not transformed African countries or the general welfare of their workers in the mining industry. Superficial transformation is taking place with more strike actions and riots characterising African societies. Inequality, unfairness, lack of social justice, lack of inclusivity, diversity and protection from harassment in the workplace remain ingrained in the mining sector. The role of investors, particularly the Chinese and their atrocious human and labour rights protection record, speaks volumes in the mining sector. There is thus a need to infuse the *ubuntu* philosophy and African value systems into decolonising labour laws in South Africa and Namibia, for the benefit of vulnerable and impoverished mineworkers. Failure to decolonise labour laws, and other post-apartheid laws for that matter, will lead to incessant cycles of civil strife in the not-too-distant future. Such civil strife is likely to mirror the developments that ensued after the incarceration of Mr Jacob Zuma in the pursuit of constitutional values. Constitutionalism that is devoid of *ubuntu* and African value systems will not resonate well with reasonable African people. It does not make sense that a post-apartheid era reflects similar practices and laws to those prevailing in the apartheid era, albeit crafted in a different, sophisticated and subtle form.