

A CRITICAL EVALUATION OF WHETHER BENEFITS PROVIDED FOR IN COIDA FALL WITHIN THE AMBIT OF THE CONSTITUTIONAL RIGHT TO ACCESS SOCIAL SECURITY PROTECTED IN SECTION 27(1)(c) OF THE CONSTITUTION

Kamalesh Newaj

*BCom(Law) LLB HDip(Labour Law) LLM LLD
Senior Lecturer, University of Pretoria*

SUMMARY

The right to access social security is a constitutionally entrenched right. Section 27(1)(c) of the Constitution provides that everyone has the right to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. Apart from the concept of social security being inclusive of social assistance, neither the term “social security” nor the term “social assistance” is defined. Conventionally, social security has been regarded as a broad term comprising two primary pillars, namely social insurance and social assistance. Social insurance takes the form of earnings-based insurance schemes, which provide protection against risks such as unemployment and employment injuries. On the other hand, social assistance is synonymous with social grants, which are non-contributory and are provided by the State to categories of society that are in need. Notwithstanding this conventional understanding of social security, the recent Constitutional Court decision in *Mahlangu v Minister of Labour* found it necessary to engage with the question of whether compensation payable in terms of the Compensational for Occupational Injuries and Diseases Act (COIDA) fell within the ambit of the constitutional right to access social security. The majority and minority judgments differed in this respect. The majority found that COIDA benefits constituted a form of social security, but that they fell within the ambit of social assistance. The minority contrarily held that such benefits were not encompassed within the constitutional right to access social security. As both the majority and minority deviated from the conventional understanding of the definition of social security, the focus of this article is to evaluate the ambit of the constitutional right to social security, specifically whether it encompasses benefits payable in terms of COIDA. The conclusion reached is that COIDA benefits are encompassed within the constitutional right to access social security, as it constitutes a form of social insurance. Therefore, as highlighted in this article, the legal principles articulated by both the majority and minority were flawed.

1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (the Constitution) provides for a number of socio-economic rights.¹ One such right is the right to access social security. Section 27(1) of the Constitution states that everyone has the right to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) *social security, including, if they are unable to support themselves and their dependants, appropriate social assistance*. Section 27(2) provides that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. The Constitution does not define “social security” but makes specific reference to social assistance being included within this concept. However, the concept of social security is conventionally regarded as comprising two categories. The one is social assistance, while the other is social insurance.²

The Compensation for Occupational Injuries and Diseases Act³ (COIDA) provides compensation for disablement caused by occupational injuries and diseases.⁴ The question of whether such compensation falls within the constitutional definition of social security came under the spotlight in the Constitutional Court decision of *Mahlangu v Minister of Labour (Mahlangu)*.⁵ Here, the daughter of a domestic worker employed in a private household sought to claim compensation subsequent to her mother’s death. Her mother died while at work performing her duties.⁶ Compensation was not payable, as a domestic worker employed in a private household was excluded from the definition of employee in COIDA.⁷ A constitutional challenge was launched against the exclusion of domestic workers from this. Reliance was placed on a violation of section 27(1)(c), among other constitutional rights, to challenge the unconstitutionality of COIDA.⁸

Although both the majority and minority judgments concluded that section 1(xix)(v) was unconstitutional for its exclusion of domestic workers, they differed on the applicability of section 27(1)(c).⁹ The majority decision found that compensation received in terms of COIDA constitutes a form of social security.¹⁰ However, surprisingly, it found that it constitutes a form of social assistance and no mention was made of social insurance.¹¹ This contradicts the conventional understanding that compensation for occupational injuries

¹ Ch 2 of the Constitution.

² Kalula and Strydom (eds) *Understanding Social Security Law* (2009) 8. See further Govindjee and Dupper “Constitutional Perspectives on Unemployment Security and a Right to Work in South Africa” 2011 *Stellenbosch Law Review* 778.

³ 130 of 1993.

⁴ S 22 of COIDA; see further Strydom (ed) *Essential Social Security Law* (2006) 41, and Olivier, Smit, Kalula and Mhone *Introduction to Social Security Law* (2004) 326–327. (2021) 42 *ILJ* 269 (CC).

⁵ *Mahlangu supra* par 7–8.

⁶ *Mahlangu supra* par 8.

⁷ *Mahlangu supra* par 28.

⁸ *Mahlangu supra* par 115, 131, 135 and 183.

⁹ *Mahlangu supra* par 59.

¹⁰ *Mahlangu supra* par 52.

and diseases falls into the latter category.¹² Even more unexpected were the two minority judgments that found that compensation payable in terms of COIDA does not fall within the ambit of the constitutional right to access social security.¹³

The right to social security plays an important role in the achievement of social justice. Smit correctly explains that the “building blocks” of social justice are rooted in the Constitution, notably in Chapter 2, which includes the right to access social security.¹⁴ This right aims to assist those in need, thereby helping to solve the challenges of poverty, unemployment and inequality that South African society faces.¹⁵ Steps taken towards achieving social justice assist in improving the quality of lives.¹⁶

Against this background, it is imperative to determine the scope of this right, specifically whether compensation in terms of COIDA was intended to form part of social security. Understanding “the reach” of this constitutional right¹⁷ will aid litigants who may in future seek to rely on a violation of this right in the context of occupational injuries and diseases sustained.

Based on the foregoing discussion, this article seeks to evaluate whether compensation in terms of COIDA constitutes an element of social security, and if so, determine whether it falls within the ambit of social assistance as found by the majority in *Mahlangu*. The approach adopted in this article is to start by highlighting the relevant aspects of COIDA and the Social Assistance Act¹⁸ (SAA). Secondly, the article considers the ambit of the constitutional right to social security by deliberating on the definition of social security from a domestic and international perspective. Thirdly, it evaluates the decision of *Mahlangu*. Lastly, a conclusion is reached regarding the accuracy of the pronouncements made by both the majority and minority judgments of the Constitutional Court; the conclusion is then used to postulate a better understanding of COIDA’s place within the constitutional right to access social security.

2 THE COMPENSATION FOR OCCUPATIONAL INJURIES AND DISEASES ACT

COIDA provides a system of no-fault compensation for employees who are injured in accidents that arise out of and in the course of their employment, or who contract occupational diseases in employment.¹⁹ The Director-General of the Department of Labour is responsible for considering claims

¹² Kalula and Strydom *Understanding Social Security Law* 8.

¹³ *Mahlangu supra* par 171 and 183.

¹⁴ Smit “Towards Social Justice: An Elusive and a Challenging Endeavor” 2010 1 *TSAR* 6 and 10.

¹⁵ Olivier *et al Introduction to Social Security Law* 28 and 31. See further Olivier, Dupper and Govindjee “Redesigning the South African Unemployment Insurance Fund: Selected Key Policy and Legal Perspectives” 2011 2 *Stellenbosch Law Review* 396–399.

¹⁶ Smit 2010 *TSAR* 7.

¹⁷ Olivier *et al Introduction to Social Security Law* 13.

¹⁸ 13 of 2004.

¹⁹ Van Niekerk and Smit (eds) *Law@Work* (2019) 517.

and paying out benefits.²⁰ A compensation fund is established in terms of COIDA and it is from this fund that employees receive benefits.²¹ A substantial part of the fund is made up of employer contributions or payments. However, COIDA authorises the Director-General to take certain actions in order to raise money for the fund.²²

In order to receive compensation in terms of COIDA, the individual applying must qualify as an employee. COIDA defines an employee as a person who has entered into or works under a contract of service, which includes casual employees and persons provided by a labour broker. Importantly, it includes the dependants of a deceased employee.²³ In line with the inclusion of dependants within the definition of employee, COIDA defines who qualifies as a dependant. The definition of a dependant includes a child who is both under and over the age of 18.²⁴

If an employee has an accident resulting in disablement or death, the employee or the employee's dependants will be entitled to compensation in terms of COIDA.²⁵

The Constitutional Court in *Jooste v Score Supermarket Trading*²⁶ described COIDA as

“important social legislation which has a significant impact on the sensitive and intricate relationship amongst employers, employees and society at large.”²⁷

3 THE SOCIAL ASSISTANCE ACT

The Constitution makes specific reference to social assistance in section 27(1)(c). To understand the composition of social assistance, it is important to consider the SAA, which seeks to give effect to this constitutional right. The Preamble explains that the SAA was passed to give effect to the right to access social security by providing uniform norms and standards, to prevent

²⁰ S 4 of COIDA.

²¹ S 15 and 16 of COIDA. See further Van Niekerk and Smit *Law@Work* 516.

²² S 5, 18 and 80–83 of COIDA.

²³ S 1(xix) of COIDA. Domestic workers employed in private households are excluded from the definition. However, there is a proposed amendment to the definition of employee that includes domestic workers of private households, as per s 1(h) of the Compensation for Occupational Injuries and Diseases Amendment Bill (B21–2020).

²⁴ S 1(xv) (d)–(e) of COIDA. There is a proposed amendment to the definition of dependant in the Compensation for Occupational Injuries and Diseases Amendment Bill (B21–2020), as per section 1(f) The proposed amendment has placed limitations on benefits available to children above 18. It states that a child over 18 but below 25 can qualify as a dependant if the child is still receiving a tertiary education. A child of 25 years or older can qualify only if the Compensation Commissioner is of the opinion that the child was at the time of the employee's death wholly or partially financially dependent on the employee (provided there is no widow or widower, child below the age of 18, or child above 18 but below 25).

²⁵ S 22(1) of COIDA.

²⁶ (1999) (2) SA 1 (CC).

²⁷ *Jooste v Score Supermarket Trading (Pty) Ltd supra* par 8.

the proliferation of laws, and in turn provide effective, transparent and accountable social assistance.²⁸

The objectives of the SAA include the administration of social assistance, the payment of social grants, and determining the qualification requirements of applicants.²⁹ The SAA provides for eight types of social grant, namely grants for old age, care dependency, child support, foster care, disability, social relief of distress, grant in aid and war veterans.³⁰ Importantly, eligibility for most social grants requires the individual to meet the financial requirements set out in the Social Assistance Regulations.³¹ Therefore, an evaluation of the income and assets of the applicant for a social grant is conducted,³² except for a foster care grant.³³

The provision of social grants is means tested to ensure that only families in need receive grants.³⁴

4 THE CONSTITUTIONAL RIGHT TO ACCESS SOCIAL SECURITY

4.1 What does section 27(1)(c) entail?

What is clear from this constitutional right is that it encompasses more than just social assistance, which consists of social grants payable by the State to individuals in need. This is evident from the use of the word “including”. While the constitutional right to access social security includes the right to access social assistance, it does not exclusively refer to the provision of social assistance. Aspects other than access to social assistance are included in this constitutional right. It would be helpful if the Constitution provided a definition of social security but, even in the absence of such a definition, there is certainty that it is not only the provision of social assistance that is encapsulated within this right.

It has been said that social security is not a fixed concept. Instead, the definition is flexible and country-specific.³⁵ To understand the South African definition as postulated in the Constitution, one must consider relevant instruments from both the domestic and international perspective.

²⁸ Preamble to the SAA.

²⁹ S 3 of the SAA.

³⁰ Ss 4 and 13 of the SAA.

³¹ Regs 2–4, 6, 8 and 15 of the Regulations as enacted by GoN R898, G. 31356 (c.i.o 22 August 2008), amended by GoN R193, G. 32917(c.i.o 1 January 2010), GoN R556, G.34529 (c.i.o 15 August 2011), GoN R269, G. 35205 (c.i.o 1 April 2012), and , GoN R621, G. 39007 (c.i.o 21 July 2015) in terms of the SAA

³² Kalula and Strydom *Understanding Social Security Law* 70.

³³ S 7 of the Regulations in terms of the SAA.

³⁴ In *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development* 2004 (6) SA 505 (CC) par 51, the Constitutional Court explained that social grants are made to those in need, including vulnerable persons.

³⁵ Dekker “Social Security: A Conceptual View” 2000 4 *Law Democracy and Development* 1; see further Olivier *et al Introduction to Social Security Law* 14.

4 1 1 *Social security defined from a South African perspective*

As the Constitution does not provide a definition of social security, clarity on what was intended can be found in the Supplementary Memorandum on the Bill of Rights and Party Submissions (Supplementary Memorandum).³⁶ It was emphasised that the right of everyone to social security and an adequate standard of living is recognised in most major international human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)³⁷ and the Social Security (Minimum Standards) Convention,³⁸ which provides for minimum standards of social security.³⁹

The document discusses the distinction that is often made between social insurance referred to as “the earned benefits of workers and their families” and social assistance regarded as “need-based assistance received from public funds”.⁴⁰ It was emphasised that the concept of social security is sometimes regarded as being “synonymous to social insurance”.⁴¹ While, in a “strict sense”, social insurance refers only to contributory social security benefits where there is a direct correlation between an amount paid and the benefit received, there is an overlap in many social insurance schemes which can be contributory or non-contributory.⁴² There is also an overlap with needs-based social assistance. Importantly, it was stated that there is a general tendency to give the concept of social security a wider interpretation to align with international trends in order to develop a comprehensive system of social protection.⁴³ Based on these reasons, it was specifically stated:

“[T]he right is formulated as the right of access to a social security system, including appropriate social assistance where they are unable to support themselves and their dependants ... This covers both contributory and non-contributory social security benefits, including appropriate social assistance from the state.”⁴⁴

In keeping with the pronouncements in the Supplementary Memorandum, the White Paper on Social Welfare⁴⁵ explains that the concept of social security covers a wide range of public and private measures that provide

³⁶ Constitutional Committee of Constitutional Assembly “Supplementary Memorandum on the Bill of Rights and Party Submissions” <https://www.justice.gov.za/legislation/constitution/history/DRAFTS/SUP09115.PDF> (accessed 2022-05-01).

³⁷ 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976.

³⁸ ILO C102 (1952). Adopted: 28/06/1952; EIF 27 April 1955.

³⁹ Constitutional Committee of Constitutional Assembly <https://www.justice.gov.za/legislation/constitution/history/DRAFTS/SUP09115.PDF> clause (3.5.1) 20–21.

⁴⁰ Constitutional Committee of Constitutional Assembly <https://www.justice.gov.za/legislation/constitution/history/DRAFTS/SUP09115.PDF> (clause 3.5.3) 22.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ Department of Welfare “White Paper for Social Welfare” (August 1997) https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf (accessed 2022-05-01).

cash or in-kind benefits or both. These benefits are required to be provided when an individual is permanently or temporarily unable to earn an income, or where an individual has never had the opportunity or ability to earn an income.⁴⁶ Social security benefits are required to be provided to avoid poverty and to allow for the maintenance of children under these circumstances.⁴⁷

The “domains” of social security are described as poverty prevention, poverty alleviation, social compensation and income distribution.⁴⁸ There are four elements to the social security system in South Africa. These are stated to be private savings, social insurance, social assistance and social relief.⁴⁹ Social insurance is defined as comprising schemes or funds to which employers and employees jointly contribute, such as pension and provident funds, as well as schemes or funds that cover other unexpected events. It is specifically stated that “government may also contribute to social insurance covering accidents at work”.⁵⁰

Social assistance is defined as comprising benefits that are provided by the State to people who are unable to provide for their own minimum needs – namely, those with disabilities, elderly people and unsupported parents and children. Social assistance is explained to be a non-contributory form of assistance that takes the form of social grants.⁵¹ It is income tested, as it is reserved for low-income earners.⁵²

In the White Paper, social security is broadly defined, and it is apparent that social security entails measures beyond social assistance. The term “social insurance” is specifically mentioned, and it is evident from the manner in which social insurance is defined that the compensation provided in terms of COIDA constitutes an insurance scheme that covers an unexpected event such as an occupational injury or disease.

The Taylor Committee, which was appointed to make recommendations to overhaul the social security system in South Africa, also engaged with the concept of social security.⁵³ The chairperson of the Committee states in the foreword of the Taylor Committee Report of 2002:⁵⁴

“While this is not the first time issues of social security have been engaged, this Report is significant for a number of reasons. First, it is one of the most comprehensive inquiries into both public and private forms of social security in

⁴⁶ Department of Welfare https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf ch 7 par 1.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Department of Welfare https://www.gov.za/sites/default/files/gcis_document/201409/whitepaperonsocialwelfare0.pdf ch 7 par 2.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Strydom *Essential Social Security Law* 23.

⁵⁴ The Taylor Committee “Transforming the Present – Protecting the Future Consolidated Report” (March 2002) https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf (accessed 2022-05-01).

South Africa and seeks to identify those who fall through the system and are without any social protection.”⁵⁵

The Report does not provide a definition of social security as it calls for the implementation of a comprehensive social protection framework, which is broader than social security.⁵⁶ However, the concept of social security is discussed. The Report explains that in developed countries a distinction is made between social assistance and social insurance. Social assistance is regarded as state-provided basic minimum protection, which seeks to relieve poverty, and which is non-contributory. Social insurance on the other hand is referred to as a mandatory contribution system of “one kind or another”.⁵⁷

More importantly, the Committee engages with the meaning of social security from a constitutional perspective. It explains that social security consists not only of public measures. Rather, social, fiscal and occupational welfare measures, whether provided publicly or privately, must be taken into account when developing coherent social security policies. It explains that such an approach is necessary in a country like South Africa. This requires a

“functional definition of social security to be adopted, which includes all instruments, schemes, or institutions representing functional alternatives for the publicly recognised schemes – that is, all instruments available to society for guaranteeing social security.”⁵⁸

In line with this broad understanding of the constitutional right to social security coverage, compensation for employment injuries and diseases provided for in COIDA is one of the chapters discussed in the Report.⁵⁹ One of the observations was that there were shortcomings in COIDA as it excluded a number of persons, such as domestic workers and those engaged in non-standard forms of work.⁶⁰

It is apparent that the Committee viewed the constitutional right to social security in broad terms. In other words, it recognised that social security constitutes more than the provision of social assistance. The discussion of compensation for occupational injuries and diseases illustrates that it recognised that the compensation provided in terms of COIDA is an element of social security.

⁵⁵ The Taylor Committee https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 36.

⁵⁶ The Taylor Committee https://darpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 40–41 and 154.

⁵⁷ The Taylor Committee https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 36.

⁵⁸ The Taylor Committee https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 50.

⁵⁹ The Taylor Committee https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 113. See further Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life for the Poor People in South Africa* (doctoral thesis, University of South Africa) 2016 98, where he explains the broad ambit of the concept of social security.

⁶⁰ The Taylor Committee https://sarpn.org/CountryPovertyPapers/SouthAfrica/march2002/report/Transforming_the_Present.pdf 113.

Lastly, consideration must be given to the National Development Plan.⁶¹ Chapter 11 of the Plan discusses social protection measures. It explains that the key elements of the social protection system adopted in democratic South Africa includes social assistance, which comprises: cash grants for children, the aged and persons with disabilities; access to free basic services; free education; and statutory social insurance arrangements, such as the unemployment insurance fund and the compensation for occupational injuries and diseases provided for by COIDA.⁶² The Plan highlights that the concept of social protection is broader than the concept of social security but makes the point that this broader concept of social protection includes traditional forms of social security measures, namely social assistance and social insurance.⁶³ It goes further to explain that social insurance assists the unemployed but also covers loss of income owing to work-related injury or illness.⁶⁴

The Plan, which was finalised in 2012, is yet another indication that the constitutional definition of social security comprises both social insurance and social assistance, and that benefits paid in terms of COIDA constitute a form of social insurance.⁶⁵

4 1 2 *Social security defined from an international perspective*

International law plays an essential role in determining the constitutionality of legislation. Section 39 of the Constitution states that, when interpreting the Bill of Rights, a court must consider international law. Equally, section 233 of the Constitution plays a role. It directs a court when interpreting any legislation to prefer a reasonable interpretation of the legislation that is consistent with international law as opposed to an interpretation that is inconsistent with international law.

The International Labour Organization (ILO) is an important source of international law when interpreting the right to access social security, as well as the legislation (such as COIDA) that gives effect to this constitutional right. This is because one of the ILO's primary objectives is the promotion of social security measures. The ILO headquarters in Geneva has a social

⁶¹ The National Planning Commission "Our Future – Make It Work: National Development Plan 2030" https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf (accessed 2022-05-01).

⁶² The National Planning Commission https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf 356.

⁶³ The National Planning Commission https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf 357.

⁶⁴ The National Planning Commission https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf 357 and 359.

⁶⁵ Tshoose *Social Assistance: Legal Reforms to Improve Coverage and Quality of Life for the Poor People in South Africa* 26 supports this interpretation of the definition of social security. He explains that legal reforms that seek to improve coverage and quality of life for the poor people of South Africa recognise the benefits payable in terms of COIDA as a form of social insurance. Social insurance schemes such as the one set up in terms of COIDA play an important role through the provision of survivors' benefits upon the death of the breadwinner.

security department; one of its functions is to design sustainable social security schemes.⁶⁶ Furthermore, several international standards have been adopted in the field of social security law.⁶⁷

The most important labour standard regulating social security is the Social Security (Minimum Standards) Convention. The Convention itself does not define the term social security but sets out the contingencies for which social security benefits should be provided. Reference is made to the provision of medical care, as well as benefits for sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivor benefits.⁶⁸ It is evident that, of these nine contingencies, one relates to an employment injury benefit and another to the payment of survivor benefits.⁶⁹ Although South Africa has not ratified this convention, South Africa is a member of the ILO.⁷⁰ Apart from this, the Constitution prescribes the consideration of international law.

Another important international instrument is the ICESCR, which was ratified by South Africa in 2015.⁷¹ This covenant requires states parties to take steps to the maximum of their available resources to progressively achieve the full realisation of the rights recognised in the covenant by appropriate means, including the adoption of legislation.⁷² One such right is the right to social security, including social insurance. General Comment 19 of the Committee for Economic, Social and Cultural Rights (CESCR) explains that the right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection from, among other things, a lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member.⁷³ The committee explained that a country's social security system should provide for the nine principal branches or contingencies of social security as set out in the Social Security (Minimum Standards) Convention.⁷⁴ As explained above, occupational injuries are regarded as one of the contingencies for which benefits must be paid. In respect of employment injuries, CESCR explains that a country's social security system should "cover the costs and loss of earnings from the

⁶⁶ Strydom *Understanding Social Security Law* 323–324.

⁶⁷ Strydom *Understanding Social Security Law* 326–327.

⁶⁸ Parts II–X of the Social Security (Minimum Standards) Convention.

⁶⁹ Parts VI and X of the Social Security (Minimum Standards) Convention.

⁷⁰ Van Niekerk and Smit *Law@Work* 24.

⁷¹ Basson "The Compliance of the South African Social Security System with the International Covenant on Economic, Social and Cultural Rights" 2020 *Obiter* 851.

⁷² Art 2 of the ICESCR.

⁷³ The Committee for Economic, Social and Cultural Rights (CESCR) "General Comment, No 19" (4 February 2008) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f19&Lang=en (accessed 2022-05-01) clause 2; see further Basson 2020 *Obiter* 855.

⁷⁴ CESCR https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f19&Lang=en clause 12.

injury or morbid condition and the loss of support for spouses or dependents suffered as the result of the death of a breadwinner".⁷⁵

At the time that the Constitution was enacted, South Africa had re-joined the ILO, and sections 39 and 233 evince the country's objective of aligning itself to international standards. As explained earlier, the Supplementary Memorandum made specific reference to international law in deciding on what the right to access social security should entail. In terms of international law, the payment of benefits for employment injuries forms part of the right to social security.

4 2 Section 27(2)

Section 27(2) of the Constitution provides that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access social security. This places an internal limitation on this right.⁷⁶ While the State must implement reasonable measures to achieve this right, this can only be done within the available resources of the State.⁷⁷ As stated by Olivier, the inclusion of this section "is an acknowledgement that the right to social security cannot be fulfilled by the State immediately and completely".⁷⁸

A similar limitation is placed on the constitutional right to access housing set out in section 26(1). Section 26(2) mirrors section 27(2). Therefore, the deliberations that took place in the Constitutional Court in *Government of the Republic of South Africa v Grootboom (Grootboom)*⁷⁹ are relevant to the application of section 27(2). *Grootboom* discussed at length what the State's obligation in terms of section 26(2) entailed.⁸⁰ The court explained that, when it comes to reasonable legislative and other measures, the issue is not whether more desirable or favourable measures could have been adopted, or whether public money could have been better spent, as it recognised that a wide range of possible measures could be adopted by the State to meet its obligations.⁸¹ What was important, said the court, was whether it could be shown that the measures that had been adopted were indeed reasonable.⁸²

The Constitutional Court explained that with regard to progressive realisation it was about whether accessibility to the right is progressively facilitated. In other words, whether the right is made available to a larger number of people as well as to a wider range of people as time

⁷⁵ CESCR https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fGC%2f19&Lang=en clause 17.

⁷⁶ *Khosa v The Minister of Social Development; Mahlaule v The Minister of Social Development supra* par 43.

⁷⁷ Olivier *et al Introduction to Social Security Law* 141.

⁷⁸ Olivier *et al Introduction to Social Security Law* 143.

⁷⁹ 2000 (1) SA 46 (CC).

⁸⁰ Wesson "Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court" 2004 2 *SAJHR* 287.

⁸¹ *Grootboom supra* par 41.

⁸² *Ibid.*

progresses.⁸³ Progressive realisation is also about the duty on the State to improve the nature and quality of services to which people have access.⁸⁴ As stated in *Mazibuko v City of Johannesburg*,⁸⁵ a policy that is set in stone and never revisited is unlikely to be a policy that will result in the progressive realisation of rights within the obligations imposed by the Constitution.⁸⁶

What becomes apparent is that, in line with section 27(2), the State has an obligation to provide to a larger group of people the social security measures that are already in place, to improve the nature and quality of social security measures that are on offer, and to broaden the type of social security measures that are available.

5 CONSTITUTIONAL COURT DECISION OF MAHLANGU v MINISTER OF LABOUR⁸⁷

5 1 The facts

Ms Mahlangu worked as a domestic worker at a private residence in Pretoria. While undertaking her duties, she fell into her employer's swimming pool and drowned.⁸⁸ Subsequent to Ms Mahlangu's death, her daughter, who was financially dependent on her, sought compensation from the Department of Labour.⁸⁹ The Department of Labour advised that no compensation was payable as domestic workers of private households did not fall within the definition of employee for the purposes of COIDA. Therefore, a domestic worker and their dependants were excluded from the benefits provided by COIDA.⁹⁰ This led to the constitutionality of the definition of employee in section 1(xix)(v) of COIDA being challenged, to the extent that it excluded domestic workers.⁹¹

In 2019, the High Court declared the section unconstitutional. Following this decision, the matter came before the Constitutional Court for confirmation of the order of invalidity.⁹² The basis for challenging the constitutionality of the section was that excluding domestic workers violated their constitutional rights to equality, human dignity and the right to have access to social security.⁹³

⁸³ *Grootboom supra* par 45.

⁸⁴ Chenwi "Unpacking Progressive Realisation, Its Relation to Resources, Minimum Core and Reasonableness, and Some Methodological Considerations for Assessing Compliance" 2013 *De Jure* 747.

⁸⁵ 2010 (3) BCLR 239 (CC) par 1. In this case, the court considered s 27(2) in relation to s 27(1)(b), which provides that everyone has the right to have access to sufficient water.

⁸⁶ *Mazibuko v City of Johannesburg supra* par 162.

⁸⁷ *Supra*.

⁸⁸ *Mahlangu supra* par 7.

⁸⁹ *Mahlangu supra* par 8.

⁹⁰ *Ibid*.

⁹¹ *Mahlangu supra* par 9.

⁹² *Mahlangu supra* par 10 and 12.

⁹³ *Mahlangu supra* par 28.

5 2 The majority judgment

The judgment appreciated that the right to social security is an internationally recognised human right.⁹⁴ Reference was made to the Universal Declaration of Human Rights, which provides “everyone with the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond [their control]”.⁹⁵ Importantly, the judgment acknowledged that international law regards benefits in terms of COIDA “as a component of the fundamental right to social security”.⁹⁶ The importance of preferring an interpretation of the Bill of Rights that is consistent with international law was further highlighted.⁹⁷

The scope of the right to access social security as provided for in section 27(1)(c) of the Constitution became the focal point.⁹⁸ Interestingly, the court zoomed in to the part of the definition that provides “[i]ncluding, if they are unable to support themselves and their dependants, appropriate social assistance”.⁹⁹ It asked the question whether social assistance includes “social security assistance for those in need of support and sustenance due to an injury or disease that is work-related or the death of a breadwinner as a result of such injury or disease?”¹⁰⁰

The conclusion reached was that providing benefits to an employee’s dependants in terms of COIDA has a similar purpose to providing social grants to those who are unable to support themselves in terms of the SAA.¹⁰¹ Therefore, the court concluded that “social security assistance in terms of COIDA is a subset of the right of access to social security under section 27(1)(c) of the Constitution”.¹⁰²

The judgment went further and discussed section 27(2) of the Constitution. It concluded that “COIDA is an example of the very type of legislation that the Constitution envisages as a reasonable legislative measure, within its available resources, to achieve the progressive realisation of [the] right”.¹⁰³

The court explained that the obligation under section 27(2) includes the obligation to extend COIDA to domestic workers. In view of the respondent’s admission that it had the resources to do this, a failure to do so, constituted a direct infringement of section 27(1)(c), read with section 27(2) of the Constitution.¹⁰⁴

⁹⁴ *Mahlangu supra* par 36.

⁹⁵ *Ibid.*

⁹⁶ *Mahlangu supra* par 41.

⁹⁷ *Ibid.*

⁹⁸ *Mahlangu supra* par 42 and 50.

⁹⁹ *Ibid.*

¹⁰⁰ *Mahlangu supra* par 50.

¹⁰¹ *Mahlangu supra* par 52.

¹⁰² *Mahlangu supra* par 59.

¹⁰³ *Mahlangu supra* par 60.

¹⁰⁴ *Mahlangu supra* par 66.

What is glaringly obvious about the majority's decision is that it regarded the terms "social security" and "social assistance" as being equivalent. It failed to recognise that the concept of social security is broader than the provision of social assistance. Even though the court acknowledged that international law recognises COIDA as a form of social security, no consideration was given to the concept of social security. Instead, it found it necessary to equate benefits received by dependants of a deceased employee in terms of COIDA with social grants. As both these benefits in the majority's opinion fell within the concept of social assistance, the conclusion reached was that it amounted to social security.

5 3 The minority judgment

The first minority judgment was penned by Jafta J. He found that the exclusion of domestic workers from the definition of employee in COIDA did not violate their right to access social security in terms of section 27(1)(c) of the Constitution.¹⁰⁵ The view held was that a plain reading of the section shows that a person would be entitled to social assistance if they were unable to support themselves, and that it does not require that harm must be suffered as a result of bodily injuries in the course of employment.¹⁰⁶ These conclusions were reached based on the majority's finding that benefits payable in terms of COIDA are similar to social grants and therefore fall within the ambit of social assistance.¹⁰⁷

Notably, it was explained that the right to compensation for bodily injuries has been part of South African law for a long time, which illustrates that the right regulated by COIDA is different from the socio-economic rights regulated in section 27(1)(c) of the Constitution.¹⁰⁸ Further evidence that section 27(1)(c) does not envisage compensation in terms of COIDA is the fact that the latter is payable on demand, whereas social assistance under section 27 is not.¹⁰⁹ The view of Jafta J was that if an employee sustains an injury in the course of employment, the only constitutional right that comes into play is the right to security of the person and freedom from violence, which is enshrined in section 12(1)(c) of the Constitution.¹¹⁰ A section 12 right is the right of the employee, not of the employee's dependants. Therefore, the claim that Ms Mahlangu's daughter had was a common-law claim for loss of support.¹¹¹

The second minority judgment penned by Mhlantla J supported Jafta J on the issue of social security. She stated:

¹⁰⁵ *Mahlangu supra* par 135 and 171.

¹⁰⁶ *Mahlangu supra* par 171.

¹⁰⁷ *Mahlangu supra* par 170.

¹⁰⁸ *Mahlangu supra* par 179.

¹⁰⁹ *Mahlangu supra* par 180.

¹¹⁰ *Mahlangu supra* par 176 and 179.

¹¹¹ *Mahlangu supra* par 176.

“I agree that, based on the plain reading of the section coupled with other key differences between the statutory right juxtaposed against the constitutional right, one cannot merely incorporate COIDA into section 27(1)(c).¹¹²

The minority judgments failed to give any consideration to international law and other domestic instruments in reaching the conclusion that compensation payable in terms of COIDA does not form part of the constitutional right to access social security. A proper assessment of the law on social security should have led to a discussion about the broad ambit of the concept of social security and the fact that it rests on two legs. Having found that compensation received in terms of COIDA does not constitute social assistance, a proper evaluation would have revealed that it does constitute a form of social insurance, which falls squarely within the constitutional right to access social security.

5 4 Analysis of the judgment

The majority judgment correctly found that COIDA provisions concern the constitutional right to access social security. The court is further convincing in saying that the extension of COIDA benefits to categories excluded, in this instance domestic workers, amounts to the progressive realisation of the right to access social security, as envisaged in section 27(2). However, where the court went wrong was its attempt to classify benefits received for occupational injuries as a form of social assistance. The court’s reasons for concentrating on the part of the definition that deals with social assistance is puzzling to say the least. It is difficult to understand why the court did not focus its attention on the concept of social security referred to in the constitutional definition. There is certainly sufficient material to illustrate that the South African system of social security rests on two pillars, namely social insurance and social assistance. Compensation received in terms of COIDA, whether by an employee who sustains an occupational injury or disease, or the employee’s dependants in the case of death arising from the occupational injury or disease, is undoubtedly a form of social insurance. The term “social assistance” is very specific to the provision of social grants, which are provided for in the SAA. The court’s likening of the benefits received by a dependant in terms of COIDA to the social grants provided in terms of the SAA was misplaced.

Jafta’s interpretation of the circumstances under which an individual qualifies for social assistance was correct. It does not include instances where injuries are sustained during the course of employment. Having rejected the majority’s assertions that compensation in terms of COIDA constitutes a form of social assistance, he should have interrogated the definition of social security; relying on aspects such as international law, he should then have reached the conclusion that although COIDA benefits are not a form of social assistance, they fall within the broader concept of social security. Instead, he found that, where an employee sustains occupational injuries, the constitutional right to access social security is not implicated, but that section 12(1)(c) of the Constitution is. The case law referred to by

¹¹² *Mahlangu supra* par 183.

Jafta J in coming to this conclusion has been considered.¹¹³ However, neither *Mankayi v AngloGold Ashanti* nor *Law Society of South Africa v Minister of Transport* dealt with the question of whether benefits provided in terms of COIDA fell within the ambit of the constitutional right to access social security.

In *Mankayi*, the employee (after receiving compensation in terms of the Occupational Diseases in Mines and Works Act (ODIMWA)) instituted a delictual claim against the employer for failing to provide a safe and healthy working environment, and which led to the employee's contraction of tuberculosis.¹¹⁴ The employer argued that the employee was precluded from instituting such a claim by virtue of section 35(1) of COIDA.¹¹⁵ The court found that COIDA did not apply to *Mankayi* as he was required to institute his claim in terms of ODIMWA. Therefore, he was not barred from instituting a common-law claim for damages.¹¹⁶

In *Law Society of South v Minister of Transport*, there was a constitutional challenge to provisions in the Road Accident Fund Act.¹¹⁷ The provisions were challenged on the basis that they limited the right to security of the person, which is enshrined in section 12(1) of the Constitution.¹¹⁸ The court found that this right applies to victims of motor vehicle accidents.¹¹⁹

Neither of these cases serves as authority for the proposition that section 12(1)(c) is implicated in instances where an occupational injury or disease is sustained. Furthermore, neither of these cases dealt with the primary issue at play in *Mahlangu*. Therefore, Jafta's reliance on these cases was ill conceived.

Mhlantla J merely deferred to Jafta J's reasons for concluding that COIDA does not fall within the ambit of section 27(1)(c). The decision reached by her is thus incorrect for the same reasons expressed in respect of Jafta J's decision.

6 CONCLUSION

This article has demonstrated that the aim of the constitutional right to access social security has always been to provide for a broad array of social security measures. While the right specifically refers to social assistance, the concept of social security contained in section 27(1)(c) of the Constitution encompasses elements of social insurance as well. This includes funds to which employees and/or employers contribute to cater for risks such as employment injuries and unemployment. Social insurance is a form of social

¹¹³ In *Mahlangu supra* par 176–178, Jafta J referred to the cases of *Mankayi v AngloGold Ashanti Ltd* (2011) (3) SA 237 (CC) and *Law Society of South v Minister of Transport* [2010] ZACC 25.

¹¹⁴ *Mankayi v AngloGold Ashanti supra* par 2 and 3.

¹¹⁵ *Mankayi v AngloGold Ashanti supra* par 5.

¹¹⁶ *Mankayi v AngloGold Ashanti supra* par 113.

¹¹⁷ *Law Society v Minister of Transport supra* par 1–2.

¹¹⁸ *Law Society v Minister of Transport supra* par 4.

¹¹⁹ *Law Society v Minister of Transport supra* par 63.

security that is separate from social assistance. Social assistance is regulated in the SAA and relates specifically to state-funded social grants.

COIDA's provision for compensation to an employee, which is inclusive of both the person employed and that person's dependants, is a form of social security encompassed within the section 27(1)(c) constitutional right. The majority in *Mahlangu* was correct in finding that the challenge launched into the constitutionality of COIDA implicated the constitutional right to access social security. However, it erred in failing to recognise that social security comprises more than just social assistance. Because of the shortcomings in this regard, the majority conflated the concept of social assistance with that of social security. In other words, the majority saw social security and social assistance as synonymous concepts, when they are not. While social assistance is one form of social security, social security is much broader than social assistance. On the other hand, the conclusions reached by the minority were completely out of step with the objectives of the constitutional right to access social security, as well as with international standards.

There is sufficient support for the fact that benefits provided for in terms of COIDA form part of the constitutional right to access social security. It is specifically a form of social insurance. Therefore, it is possible for future disputes relating to the constitutionality of COIDA to be challenged as a violation of the right to access social security provided for in section 27(1)(c) of the Constitution.