FROM PRECARITY TO PANDEMIC: HOW THE COVID-19 PANDEMIC HAS EXACERBATED POVERTY, UNEMPLOYMENT, AND INEQUALITY IN SOUTH AFRICA

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Abstract

The pre-covid-19 world of work was rife with inequalities and difficulties with over 40 per cent of people of working age unemployed.

The majority of those in employment was barely able to eke out a living in the informal economy, most without labour rights, without social protection, and earning low incomes that trapped them in poverty. The precarious nature of the South African labour market before the covid-19 pandemic was characterised by casualisation, informalisation, and externalisation of work. This resulted in the reduction of the number of workers employed for definite periods and rising levels of precarious workers.

This article investigates the precarious nature of work and the various work paradigms present in the South African labour market before the covid-19 pandemic. New challenges arising from the covid-19 pandemic and new forms of work in the South African labour market are also considered together with measures taken to address precarity.

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Introduction

The world of work is constantly changing. The covid-19 pandemic has underscored deep-rooted labour market fragilities and structural inequalities in South Africa with precarious workers, low-paid workers, the youth, women, the self-employed, and workers in the informal economy among the hardest hit by the pandemic.

Full-time positions with job security, commonplace in previous decades, are being replaced by precarious or non-standard arrangements that have no benefits, little protection and lower pay. The outbreak of the covid-19 pandemic and its rapid spread across the entire world has turned into a public health crisis with no parallel in living memory and has propelled the global economy into the deepest recession since the Great Depression. To contain the spread of the virus and its deadly effects, numerous states around the world introduced unprecedented restrictions on individual mobility and economic activities at the beginning of 2020. These steps appear to have succeeded in limiting the contagion in South Africa. Nonetheless, the combination of great uncertainty, fear of infection, individual limitations following public guidelines and compulsory lockdowns, have precipitated a sharp contraction in economic activity and tested the resilience of labour markets, social-protection systems, and communities at large.

Unlike during the global financial crisis of 2008, the South African government reacted swiftly to put in place an unprecedented set of fiscal and monetary policies. These measures were important to protect employment and contain the social effects of the crisis, but also to provide people and businesses with appropriate incentives and support to adhere to the limitations that government-mandated or approved.

Notwithstanding these measures, the immediate effect on the South African labour market has so far been considerably greater than during the first months of the global financial crisis and far more serious than suggested by unemployment statistics to date. Its impacts are unlikely to fade away any time soon as the supply shock has rapidly turned into a demand shock, and economic activity in numerous sectors remains subdued. Further, now that the South African government has started easing containment policies and moving to a '[new normal', policymakers confront the daunting task of moving the economy from 'intensive care, with massive assistance, to 'long-term care', where assistance must be differentiated by the circumstances of sectors, businesses, and workers.

This article provides an assessment of the precarious nature of the South African labour market before the covid-19 pandemic. It also addresses the socio-economic challenges facing South Africa and the effects of the covid-19 pandemic on the South African economy before addressing the new forms of work and a future world of work. The article also briefly provides some of the attempts made by the International Labour Organisation (ILO) to address the issue of precarious or non-standard work. The article draws on a series of policy briefs on the labour market, social policy, and health issues released since the beginning of the covid-19 pandemic.

The concept of precarious or non-standard work in South Africa

1. The concept 'precarious work'

Precarious or non-standard work arrangements, such as temporary work, fixed-term work, and part-time work, have taken centre stage in research and writing on labour and employment relations.[1] How we currently describe precarious or non-standard work is precisely the opposite of the Fordist version of standard employment which peaked in the 1950s.[2] Non-standard employment, as the expression implies, is described by what it is not – it is not standard employment.[3] Edgell[4] lists the characteristics of standard employment which sprang from the Fordist production system: job security; an expectation of rising living standards through high wages; workplace participation by workers; the presence of strong trade unions; free collective bargaining; and a strong welfare state.

Non-standard work is employment that differs from the conventional standard work relationship where work is generally full-time and anticipated to continue until the regular retirement age, or until either party gives notice of termination. Researchers have embraced distinctive terminology for this category of work arrangement, including, for example, 'non-standard employment relations',[5] 'alternative work arrangements',[6] 'flexible staffing

[1]Krahn, H 'Non-standard Work Arrangements' (2004) 5 *Perspectives on Labour and Income* 35–45; Polivka, AE 'Contingent and Alternative Work Arrangements Defined' (1996) 119 *Monthly Labour Review* 3–9; Schellenberg, G & Clark, C *Temporary Employment in Canada: Profiles, Patterns and Policy Considerations* (Canadian Council on Social Development 1996); Vosko, L 'Legitimizing the Triangular Employment Relationship: Emerging International Labour Standards from a Comparative Perspective' (1997) 19 *Comparative Labour Law and Policy Journal* 43–77; Fudge et al, *The Legal Concept of Employment: Marginalizing Workers*, Report for the Law Commission of Canada.

[2] Edgell, S *The Sociology of Work: Continuity and Change in Paid and Unpaid Work* (Sage 2012) 146.

[3] Theron et al, *Keywords for a 21st Century Workplace* (UCT 2011) 62.

[4] Edgell (Sage 2012) 146.

[5] Kalleberg, AL 'Non-standard Employment Relations: Part-time, Temporary and Contract Work' (2002) 26 *Annual Review of Sociology* 341–365.

[6] Polivka (1996) 119 *Monthly Labour Review* 3–9.

arrangements',[7] 'contingent work',[8] and 'precarious employment.[9] For purposes of this article, the terms precarious work and non-standard employment are used interchangeably and refer to work undertaken by part-time workers, temporary workers, workers supplied by employment agencies or labour brokers, casual workers, workers in fixed-term contracts, and workers engaged in a variety of contractual relationships.

Generally, precarious work relationships are associated with the denial of entitlements and privileges, poor wages, absence of job security, loss of status, an uncertain future, and the threat of contract termination. These categories of workers – and in particular the less skilled among them – are also frequently more vulnerable to exploitation.[10] Furthermore, they are not always covered by collective agreements and generally have no trade union protection. Precarious workers are more inclined to depend on statutory protection enacted to ensure basic working conditions. Although they may enjoy equal statutory protection in theory, in practice the circumstances under which they work make it very difficult to enforce their rights.[11] This was reiterated in *Mandla v LAD Brokers (Pty) Ltd*,[12] where the court held that non-standard workers are at the mercy of a statute passed by the legislature to protect basic working conditions. This notwithstanding, the introduction of section 198A of the Labour Relations Act (LRA) has advanced the position of Temporary Employment Services (TES) employees in numerous ways. For example, should a low-earning employee be placed with a client for a period over three months, or should he or she no longer be substituted for an employee of the client who was temporarily absent, the worker will be considered an employee of the client? Amongst other things, this will entitle the employee to refer disputes concerning unfair dismissal and unfair labour practices against the client.[13]

The ILO is of the view that there is no official definition of non-standard forms of employment. It states that "typically, non-standard forms of employment cover work that falls outside the scope of a standard employment relationship, which itself is understood as being work that is

[7] See Houseman, SN *The Benefits Implications of Recent Trends in Flexible Staffing Arrangements* (WE Upjohn Institute for Employment Research 2001) 2.
[8] Polivka AE & Nardone, TJ 'On the Definition of Contingent Work' (1998) 12 *Monthly Labour Review* 9–16.
[9] Treu, T 'Labour Flexibility in Europe' (1990) 131 *International Labour Review* 497–512.
[10] See the statement by the Department of Labour, *Minimum Standards Directorate Policy Proposals for a New Employment Standard Statute* Green Paper on Labour 13 February 1996 available at http://www.info.gov.za/greenpapers/1996/labour.htm#Executive (accessed 10 November 2017).
[11] Gericke, SB 'A New Look at the Old Problem of a Reasonable Expectation: The Reasonableness of Repeated Renewals of Fixed-Term Contracts of Employment' (2011) 14 *PER/PELJ* 1 and 3.
[12] *Mandla v LAD Broker (Pty) Ltd* [2002] 9 BLLR 1047 (LC) 1051E-F.
[13] LRA s 198D, ss 198A–C, and s 187.

full-time, indefinite employment in a subordinate employment relationship".[14]

It is worth noting that the adjectives 'contingent' and 'precarious', often used to describe non-standard employment, highlight the insecurity of the job or work arrangement; this points to a need for a policy that establishes measures to improve or protect job security. Such measures could apply to all citizens and advance job security (eg, a basic income grant). Against this background, the various forms of precarious or non-standard employment.

The various forms of precarious or non-standard employment

2. Forms of non-standard employment

2.1 Temporary employment agencies (labour brokers)

'Temporary employment agency' and 'labour broker' are the terms usually used in South Africa to describe a person who procures or provides workers to work for a client (the core business) but who are paid by the agency or broker. The LRA[15] defines 'temporary employment service' as "any person who, for reward, procures for or provides to a client other persons who perform work for the client; and who are remunerated by the temporary employment service".[16] Therefore, there are three parties involved in a triangular relationship of agency work: the worker(s); the employment agency or labour broker; and the client or core business for whom the worker(s) work. This article examines employment agencies only, which are to be distinguished from recruitment agencies or placement agencies which simply place a worker with an enterprise for a fee. In South Africa, the LRA and the Basic Conditions of Employment Act (BCEA)[17] use the term 'temporary employment service' (TES).[18] The ILO uses the term 'private employment agency',[19] and the European Union (EU), the term 'temporary employment agency'.[20]

[14]See Non-standard forms of employment ILO, available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/meetingdocument/wcms_336934.pdf access on 12 April 2021.
[15] Labour Relations Act 66 of 1995.
[16] Section 198(1) of the LRA.
[17] Basic Conditions of Employment Act 75 of 1997.
[18] Ibid.
[19] ILO, Private Employment Agencies Convention 181 of 1997 and ILO, Private Employment Agencies Recommendation 188 of 1997.
[20] Article 3(1)(b) of the EU Directives on Temporary Agency Work 2008/104/EC (Temporary Agency Work Directives) defines a 'temporary work agency' as "any natural person or legal person who, in compliance with national law, concludes contracts of employment or employment relationships with temporary agency workers in order to assign them to user undertakings to work there temporarily under their supervision and direction".

For purposes of this article the term 'employment agency' is used, regardless of whether ILO or EU standards are being examined. The term 'client' is used to refer to a person or enterprise that acquires agency workers from an employment agency to perform work for a client. This explanation is drawn from the definition of a TES in South Africa, where it is stated that 'placements are made with a client'.[21] When referring to a client, the ILO has embraced the phrase 'user enterprise' but the concept has been given no specific definition by the ILO.[22]

For purposes of this article the term 'agency worker' refers to a worker who is placed by an employment agency (labour broker) to work for a client or the core business. In South Africa, in the recent ground-breaking Constitutional Court judgment *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa & Others*,[23] the court dismissed Assign's appeal and upheld the Labour Appeal Court (LAC) ruling. The majority of the court held that for the first three months of employment, the TES is the employer of the placed worker, but thereafter the client becomes the 'sole' employer. The majority further held that section 198A of the LRA must be read in the context of the right to fair labour practices in section 23 of the Constitution of the Republic of South Africa, 1996 (the Constitution) and all the objectives of the LRA.

Under ILO norms, the term 'worker' includes a 'jobseeker'. However, in this article, the term 'agency work' excludes job seekers as otherwise indicated. Furthermore, the term 'temporary agency worker' has been defined as "a worker with a contract of employment or an employment relationship with a temporary work agency with a view [to] being assigned to a user undertaking to work temporarily under its supervision and direction".[24] It is worth noting that the term 'temporary agency worker' excludes a jobseeker in the ILO Temporary Work Directive.

2.2 Fixed-term workers

Fixed-term workers are a sub-group of non-standard workers and are important not only on account of their numbers but also because they, in particular, are unequal bargaining parties in the employment relationship. The employment relationship in South Africa is fraught with

[21] Section 198(1)*(a)* of the LRA.
[22] Article 1 of the Private Employment Agencies Convention 181 of 1997 uses the term 'user enterprise'.
[23] *Assign Services (Pty) Limited v National Union of Metalworkers of South Africa & others* (CCT194/17) [2018] ZACC 22, [2018] 9 BLLR 837 (CC).
[24] Article 3(1)(c) of the Temporary Work Directives.

legal responsibilities, and it is trite that employers treat fixed-term workers differently from workers who are employed indefinitely. Many employers use the fixed-term contract of employment to avoid their statutory responsibilities under the BCEA, the LRA, and the Employment Equity Act (EEA).[25]

Temporary employment relationships are frequently linked to the denial of rights and employment benefits, the absence of medical aid benefits, avoidance of the processes required for the termination of employment, the absence of job security, loss of status, and poor earnings. The employers, in turn, save money by denying their employees these benefits. Fixed-term workers – especially the less-skilled among them – are often left unprotected and open to exploitation.[26] Furthermore, they frequently do not benefit from trade union protection and are not sheltered by collective agreements. Accordingly, fixed-term workers are more predisposed to rely on the statutory protection that is available to safeguard basic working conditions. While they may benefit from equal statutory protection in theory, in practice, the conditions of their employment render it very difficult for them to enforce their rights.[27]

In broad terms, a fixed-term contract of employment is concluded between an employer and worker and is linked to a determinable period or to the completion of a specific task that will bring the contract to an end.[28] These contracts are generally concluded for a comparatively restricted period[29] which may vary from a matter of hours to a period of twelve months or longer.[30] The implication is that both parties must initially have agreed that the duration of the contract will be limited. Fixed-term contracts serve the need for temporary appointments. In terms of the common law, the termination of a fixed-term contract of employment is generally not unfair if the reason for which the employee was employed no longer exists.[31] In addition, where the parties have declared that the contract will terminate on the occurrence of a particular

[25] Employment Equity Act 55 of 1998.
[26] However, certain fixed-term positions may need highly developed skills. For example, it is usual to appoint rectors of universities on fixed-term contracts of employment.
[27] See statement made in the Department of Labour, *Minimum Standards Directorate Policy Proposals for a New Employment Standard Statute* Green Paper on Labour of 13 February 1996, available at http://www.info.gov.za/greenpapers/1996/labour.htm#Executive (accessed 17 November 2017).
[28] Grogan, J *Workplace Law* 10 ed (Juta 2009) 41.
[29] *National Union of Metalworkers of SA & others v SA Five Engineering (Pty) Ltd & others* (2007) 28 *ILJ* 1290 (LC) paras 39 & 42.
[30] Bhorat, H & Cheadle, H 'Labour Reform in South Africa: Measuring Regulation and a Synthesis of Policy Suggestions' (1 September 2009). Development Policy Research Unit (DPRU) Working Paper 09/139 available at SSRN: https://ssrn.com/abstract=2176756 or http://dx.doi.org/10.2139/ssrn.2176756 (accessed 9 October 2016) 22.
[31] Ibid.

event or the completion of a particular task, the onus rests on the employer to prove that the event has occurred or that the task has been completed.[32]

Section 198B(1) of the South African Labour Relations Amendment Act 6 of 2014 (LRAA) provides a new definition of a 'fixed-term contract' which is the definition used in this article. A fixed-term contract is a contract of employment that terminates on:

> *(a)* the occurrence of a specified event;
> *(b)* the completion of a specified task or project; or
> *(c)* a fixed date, other than an employee's normal or agreed on retirement age, subject to subsection (3).

2.3 Part-time work

Generally, it is difficult to distinguish the following groups of workers – 'temporary', 'part-time' and 'casual' workers, as they overlap. Nevertheless, it is essential to deal with these groups of non-standard workers individually as their circumstances differ. Temporary workers are workers hired on a fixed-term contract of employment.[33] Casual workers also referred to as occasional or irregular workers, are "employees hired periodically when the need arises".[34] They are hired on individual fixed-term contracts usually for a day at a time,[35] and frequently work irregular, long daily hours over weekends, on holidays, and during the night.[36] This category is the most vulnerable group. Part-time workers are described as those who work considerably less than the 'normal working hours.[37] They are usually hired frequently.[38] It is submitted that part-time workers are comparatively better placed than their casual and temporary counterparts as their employment is often indefinite.[39] "Part-time work allows employers greater flexibility in planning work, aligning schedules with peaks in customer demand, and retaining workers who are not in a position to commit to full-time work."[40]

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[32] See *Bottger v Ben Nomoyi Film & Co Video CC* (1997) 2 LLD 102 (CCMA).
[33] Theron, J *'Employment is Not what it Used to be'* (2004) 25 *ILJ* 1250.
[34] Ibid.
[35] Basson et al, *Essential Labour Law* 5 ed (Labour Law Publications 2009) 32.
[36] Mills, SW 'The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility' (2004) 25 *ILJ* 1219.
[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] See ILO, 'Non-standard Forms of Employment' available at www.ilo.org/wcmsp5/groups/public /@edprotect/ @protrav/.../wcms_336934.pdf (accessed 13 May 2018).

The LRA defines a 'part-time worker' as "someone who is remunerated wholly or partly by reference to the time that the worker is employed and who works less than a comparable full-time employee".[41] A full-time employee is, in turn, defined primarily "in terms of the custom and practice of the employer",[42] but does not include a full-time worker "whose hours of work are temporarily reduced for operational requirements as a result of an agreement".[43] This is presumably intended to refer to situations where firms have to work short-time, as well as where a compressed working week is introduced in terms of the BCEA.[44]

Part-time workers generally work fewer hours than the norm established by a wage-regulating measure, a collective agreement, or in terms of the contract of employment in respect of the employer's other employees.[45] This could, for example, include morning work, or the permanent domestic worker who works one day per week for five different employers. Workers who work for short periods as and when required by the employer, perform casual and temporary work. Here, both parties know that the workers do not expect that the employment relationship will continue.[46] In some instances, the employer places these workers in a pool from which workers are drawn depending on the needs of the business.

The ILO defines a part-time worker as an "employed person whose normal hours of work are less than those of comparable full-time workers".[47] This is a common legal definition of part-time work and is reflected, for example, in the EU's Part-time Work Directive.[48] For statistical purposes, however, 'part-time' is commonly defined as a specified number of hours. The threshold which determines whether a worker is full-time or part-time varies from country to country but is usually 30 or 35 hours per week.[49] For example, in the United States, part-time work is generally defined as less than 35 hours a week.[50] Canada and the United Kingdom normally use 30 hours as the cut-off point for part-time work.[51] Part-time, casual, and

[41] Section 198C(1)*(a)* of the LRA.
[42] Section 198C(1) of the LRA.
[43] Ibid.
[44] Theron, J *Non-standard Employment and Labour Legislation: Outlines of a Strategy* (UCT 2014) 18.
[45] See Baker, R & D Holtzhausen, D *South African Labour Glossary* (Juta 1996) 109–110.
[46] See Baker & Holtzhausen 21 where 'casual work' is defined to mean "work performed by a temporary employee".
[47] ILO, Part-Time Work Convention 175 of 1994.
[48] Part-time Work Directive 97/81/EC is one of three European Union Directives that regulate non-standard work.
[49] Part-time Work Directive 97/81/EC.
[50] US Bureau of Labour Statistics, *Labour Force Characteristics, Full or Part-time Status* available at https://www.dol.gov/wb/stats/NEWSTATS/latest/parttime-text.htm (accessed March 2017).
[51] Kahne, H 'Part-time Work: A Hope and a Peril' in Warme et al (eds), *Working Part-Time: Risks and Opportunities* (Praeger 1992) 295–309.

temporary workers are all included under the umbrella definition of 'employees' for the duration of the period during which they work.[52] In what follows, we examine models of work that were present in South Africa before the pandemic.

Paradigms of work in South Africa and their ramifications

3. Paradigms of work in South Africa

Globalisation has transformed the patterns of engagement in labour markets not only in South Africa but the world over. As noted by Osterman, in the United States, "the ties that bind the workforce to the firm have frayed. … New work arrangements, captured by the phrase 'contingent work' imply a much looser link between firm and employee".[53] While Hacker[54] contends that the unpredictability of the labour market is increasingly borne by workers as employers back off from long-term employment standards. In an in-depth study of economic reorganisation and changing corporate forms, Weil[55] contends that the growth of supply chains and the popularity of franchising have culminated in 'fissured' workplaces. This has led to a reduction in the pervasiveness of direct employment relationships, growth in more non-standard categories of work, and an erosion of labour's capacity to bargain for better employment conditions. Standing[56] contends that a new category of worker, the 'precariat', has emerged: these are workers in less secure employment who enjoy few employment benefits and minimal social protection.

There is evidence of significant changes in the South African labour market, particularly during the last twenty years of the twentieth century, including a meteoric rise in precarious work relationships.[57] The South African government investigated the need to amend the LRA in light of these developments and this resulted in the adoption of the LRAA in 2014. At the heart of

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[52] See *Bezuidehout v Ibhayi Engineering Contractors (CC)* (2005) 26 *ILJ* 2477 (BCA) in this regard.
[53] Osterman, P *Securing Prosperity: The American Labour Market: How It Has Changed and What to Do about It* (Princeton University Press 2000) 3–4.
[54] Hacker, J *The Great Risk Shift: The Assault on American Jobs, Families, Health Care and Retirement and How You Can Fight Back* (OUP 2006).
[55] Weil, D *The Fissured Workplace: Why Work Became so Bad for so Many and what can be Done to Improve It?* (Harvard University Press 2014).
[56] Standing, G *The Precariat: The New Dangerous Class* (Bloomsbury 2003).
[57] Department of Labour, *Minimum Standards Directorate Policy Proposals for a New Employment Standard Statute* Green Paper on Labour, available a t *http://www.dpsa.gov.za/dpsa2g/documents/acts&regulations/frameworks/green-papers/employ.pdf* access 12 April 2021.

the LRAA is the understanding that work today is less secure. The amendments follow the position that the labour laws and regulations adopted in the decades following World War II, when the standard work relationship was more widespread, no longer serve the needs of South African workers.[58]

3.1 Informalisation of work

The growth in precarious work often gives rise to informalisation[59] and separation of the worker from his or her place of work. Features such as globalisation, socio-economic and technological developments, and amendments to legislation to adapt to increasingly competitive surroundings, have added to the informalisation of the workplace.[60]

This process of informalisation, by which workers are obliged to move from conventional employment to the informal economy results in deregulation – workers move beyond the protective scope of labour law.[61] Informalisation relates to the situation of "employees who are *de jure* covered by labour law but who are *de facto* not able to enforce their rights, as well as to those employees that are *de jure* not covered by labour law because they are independent contractors".[62]

There is little consensus on the definition of informality.[63] Terms such as the 'informal sector need to be distinguished from the 'informal economy' and 'informal employment. This article distinguishes the informally employed from the informal sector. The informal sector relates to whether a firm is registered with the appropriate authorities (eg, for tax purposes). Informal employment, on the other hand, relates to the protections and benefits afforded workers. The ILO defines the informal economy as "all economic activities by workers and economic units that are – in law or practice – not covered or insufficiently covered by formal arrangements".[64]

[58] Mitchell, CM & Murray, JC *Changing Workplaces Review: Special Advisors' Interim Report* (Ministry of Labour, Canada 2016).
[59] When secure, indefinite employment is replaced by a-typical employment, where employees have access to fewer benefits and job security, it is described as informalisation.
[60] See the introduction to Theron (2003) 1247.
[61] Fenwick et al, 'Labour Law: A Southern African Perspective' in T Tekle (ed), *Labour Law and Worker Protection in Developing Countries* (Hart Publishing 2007) 20.
[62] Fenwick et al, (Hart Publishing 2007) 20.
[63] See Kanbur R, 'Conceptualising Informality Regulation and Enforcement' (2009) 52 *Indian Journal of Labour Economics* 33–42.
[64] ILO, Resolution concerning Decent Work and the Informal Economy.

3.2 Casualisation of work

In ordinary terms, 'casual' is sometimes used to describe anyone who is not in standard employment, including part-time and temporary workers. However, the term no longer has a precise legal meaning. The most sensible use of the term 'casual' is regarding what in North America is termed a 'day labourer' – i.e., someone who is employed on a day-to-day basis.[65]

The BCEA distinguishes between workers who work less than 24 hours a month for an employer, and those who work 24 hours or more a month.[66] This difference adds no value to the cause of casual workers as only employees who work for more than 24 hours a month fall within the safety net of protection in respect of aspects such as payments for overtime and paid leave. However, it is worth noting that the National Minimum Wage Act (NMWA) offers some measure of protection to employees who work for less than four hours on any day. It reads as follows:

> 9A. Daily wage payment— (1) An employee or a worker as defined in section 1 of the National Minimum Wage Act, 2018, who works for less than four hours on any day must be paid for four hours of work on that day.
>
> (2) This section applies to employees or workers who earn less than the earnings threshold set by the Minister in terms of section 6(3).[67]

Casualisation is derived from the term 'casual' and has no exact meaning. In the literature on non-standard work, it is used as a 'catch-all term to describe how employment is changing and can be used more or less interchangeably with the terms 'contingent' or 'precarious' employment.[68] In South Africa, the term has been used by both organised labour and the Department of Labour in the above sense, to justify policy reforms.[69] The term has, however, also been criticised for conflating direct employment (whether part-time or temporary) and indirect or triangular employment where employees are also commonly employed temporarily, but through an agency, intermediary, or service provider.[70] In the latter case, the employment contract between the core business and its employees is replaced by a commercial contract

[65] Theron et al, (UCT Press 2011) 8.
[66] Sections 6(1), 19(1) and 28(1) of the BCEA.
[67] See s 5(2) of the NMWA and s 9A of the BCEA.
[68] Theron, J 'Employment is Not What It Used to Be' in E Webster and K von Holdt (eds) *Beyond the Apartheid Workplace: Studies in Transition* (University of KwaZulu Natal Press 2005) 293–294.
[69] Ibid.
[70] Ibid.

between the core business and an agency, an intermediary, or a service provider.[71] This is referred to as externalisation and is discussed below.

3 Externalisation of work

Externalisation is an additional element that gives rise to an increase in 'precarious' employment in South Africa. Fenwick et al are of the view that "externalisation is more radical and complex than casualisation".[72] The rationale behind externalisation is that enterprises wish to concentrate on their core functions, ie, those activities in which they have gained a comparative advantage or are most competent.[73] Deregulation[74] and privatisation are policies that emerged in the 1980s and 1990s. The predominant means by which deregulation has been achieved in South Africa is through a process of industrial restructuring which includes, and is at the same time broader than, what is conventionally understood as outsourcing.[75]

Benjamin defines externalisation as follows: "[E]xternalisation refers to a process of economic restructuring whereby employment is regulated by a commercial contract rather than a contract of employment."[76] Externalised work includes situations where the nominal employer does not control the employment relationship.[77] In other words, the workers are seen as 'externals' as they fall outside the enterprise which is making use of their services.[78] One of the main attributes of this type of employment model is that it reduces the number of workers employed by the principal enterprise and, as such, restricts the implementation of labour legislation.

Externalisation may be achieved in several ways, such as outsourcing, transferring assets to satellite firms, and the use of labour brokers. Although it is challenging to differentiate clearly between the contrasting ways because of the difference in the methods used and the contrasting definitions of different writers, the most common means by which externalising is achieved is by triangulation.[79] An enterprise ('the client', 'core business' or 'true employer') enters into a

[71] Ibid.
[72] Ibid.
[73] Ibid.
[74] Literally, it implies the removal of government regulations, although it is not concerned with all types of government regulations, but rather with those regulations that affect how business is done. The idea behind deregulation is that regulations interfere with the free and unhindered operation of the market, and the markets should be left to regulate themselves.
[75] Theron et al, (UCT Press 2011) 18.
[76] Benjamin, P 'Beyond the Boundaries: Prospects for Expanding Labour Market Regulation in South Africa' in G Davidov & B Langille (eds), *Boundaries and Frontiers of Labour Law* (Bloomsbury 2006) 188.
[77] Ibid.
[78] Owen et al, *Strategic Alliances and the New World of Work* (NCVER 2001).
[79] Theron, (UKZN Press 2005) 293–294.

commercial contract with a contractor, intermediary, satellite enterprise, or labour broker ('the nominal employer') in terms of which the client pays the contractor an agreed amount for services provided. The labour broker then hires the workers to do the work for the core business and pays them. One type of externalisation that does not necessarily include triangulation, is the use of 'independent contractors who are dependent on the core enterprise.[80]

Externalisation may also be effected through the process termed 'outsourcing'. This takes place when a core enterprise retrenches workers performing non-core duties, and employs an external contractor to do the work. Theron notes that the core firm may or may not transfer the work to the external contractor.[81] A classic example of outsourcing in South Africa is where large companies, such as hotels and educational institutions, for example, universities, outsource their protection services and hospitality and cleaning duties to external contractors.[82]

'Franchising', too, is a form of externalisation which involves the franchisor permitting the franchisee to run an enterprise using the franchisor's trademark. The franchisee, in turn, hires employees to help him or sheruns the enterprise. The franchisor, nonetheless, retains authority over the enterprise about employment and labour-related issues. The hiring of employees, however, is the responsibility of the franchisee.[83] Against this background, it is vital to explore the socio-economic challenges facing South Africa.

Socio-economic challenges facing South Africa

South Africa, like other poor and deprived Southern African countries, is faced with a myriad of socio-economic challenges.[84] Poverty, unemployment, low levels of education, HIV/Aids, migration, and most recently the covid-19 pandemic, have resulted in serious socio-economic challenges for the governments of these developing states. This is particularly true of South Africa who is at the receiving end of the majority of migrants who barely manage to eke out a living in the informal economy.

[80] Fenwick et al, (Hart Publishing 2007) 20.
[81] Ibid at 20–22.
[82] Ibid.
[83] Theron, (UKZN Press 2005) 293–294.
[84] Olivier, MP & Mpedi, LG 'Co-ordination and Integration of Social Security in the SADC Region: Developing the Social Dimension of Economic Co-operation and Integration' (2004) 28 *JJS* 15.

To illustrate the point, in South Africa the results of the Quarterly Labour Force Survey (QLFS)[85] for the second quarter of 2020 indicate that in comparison to the first quarter of 2020, the number of employed persons decreased by 2,2 million to 14,1 million in the second quarter. This unprecedented decrease is the largest first-quarter to second-quarter decline since the survey began in 2008.

Contrary to what one might expect in the face of so great a decline in employment, unemployment also declined substantially – decreasing by 2,8 million to 4,3 million compared to the first quarter of 2020 and resulting in a decrease of 5,0 million (down by 21,4%) in the number of people in the labour force. South Africa was already in recession when covid-19 burst onto the scene, having experienced three consecutive quarters of contraction in GDP between the third quarter of 2019 and the first quarter of 2020.[86] After a brief look at the socio-economic conditions, it is necessary to view the effects of covid-19 on the South African economy.

Effects of the covid-19 pandemic on the South African economy

Estimates by the ILO show that assuming a situation without alternative sources of income, lost labour income will increase relative poverty for informal workers and their families by more than 56 points in lower- and low-income countries.[87] This includes workers in sectors such as accommodation and food services, manufacturing, wholesale and retail trade, and many more. Because those in the informal economy need to work, lockdowns and other containment measures are a source of social tension and lead to transgression of regulations which, in turn, endanger government efforts to protect the population and fight the pandemic.[88] Further, logistical challenges within supply chains – in particular cross-border and domestic restrictions on movement – may lead to disruptions in the food supply which undermine precarious workers' food security.[89]

Informal food markets play an essential role in ensuring food security in South Africa, both as a source of food and a place for small-hold farmers to sell their produce. Closing these down

[85] Quarterly Labour Force Survey (QLFS) – Q1:2020 available at https://www.statssa.gov.za/publications/ P0211/ P02111stQuarter2020.pdf (accessed February 2021).
[86] 0.8 per cent in Q3 2019; 1.4 per cent in Q4 2019; and 2 per cent in Q1 2020. In Q1 2019 the economy contracted by 3.2 per cent.
[87] ILO Monitor, *COVID-19 and the World of Work* 3 ed available at https://www.ilo.org/wcmsp5/groups/ public/@dgreports/@dcomm/documents/briefingnote/wcms_743146.pdf (accessed January 2021).
[88] ILO, *Jobs for Peace and Resilience: A Response to COVID-19 in Fragile Contexts* (draft) (ILO Geneva 2020).
[89] ILO, *COVID-19 and the Impact on Agriculture and Food Security* ILO Sectoral Brief, 17 April 2020 (ILO Geneva 2020).

results in street and market vendors, domestic workers, or home-delivery workers plunging deeper into poverty and facing still greater food insecurity. For many, home is their workplace, and given the conditions described above, the overwhelming majority of workers in the informal economy – and particularly migrant workers – have heightened exposure to occupational health and safety risks, no appropriate protection, and an increased likelihood that they will face illness, accident, or death. Covid-19 adds to these risks. If they fall ill, most workers, including migrants,[90] have no guaranteed access to medical care and no income security in the form of sickness or employment injury benefits. As we study the effects of the pandemic on precarious workers, we must examine the further challenges posed by new forms of work.

New forms of work and the future world of work

Disruptive technological changes and increasing socio-economic imbalances have impacted the entire world in recent times.[91] The fourth industrial revolution (4th IR) is characterised by the blending of the digital, physical, and biological worlds, as well as an increasing application of new technologies such as artificial intelligence, robotics, and wireless technologies. These developments have heralded a new period that accelerated the process of disruption by making room for new forms of precarious work.[92]

Notwithstanding the positive outcomes that technological developments may have on the economy and growth in new jobs, they also have negative results. Convoluted networks make the problem of identifying the parties to the employment relationship an international concern.[93] In the words of Weiss, "digitalisation contains many risks but it also is a chance to improve working and living conditions to the benefit of workers. It is not an apocalyptic evil but something which needs to be shaped". The question regarding digitalisation will be – to couch it in a somehow simplistic formula – whether labour law, the legislator, and the collective actors, will succeed in ensuring that human beings will not become the slaves of this new technological phenomenon.[94]

[90] World Health Organisation and the International Bank for Reconstruction and Development/World Bank, *Tracking Universal Health Coverage* Global Monitoring Report (WHO and World Bank Geneva 2017).
[91] Du Toit, D 'Platform Work and Social Justice' (2019) 40 *ILJ* 1.
[92] Ibid.
[93] Ibid.
[94] See Weiss, M 'Challenges for Labour Law and Industrial Relations' in Dong-One Kim and Mia Rönnmar (eds), *Global Labour and Employment Relations. Experiences and Challenges* (Park Young Publishing & Company, Seoul 2020) 133–162.

The entrance to labour and social security protection is through an employment relationship.[95] However, the nebulous line that separates the situation where there is an employment relationship and that where there is independent contracting, has been a matter of discord.[96]

The application of labour law in its narrowest sense does not include either the self-employed or independent contractors. As a result, persons engaged in modern forms of work, such as on-demand platform work, may not be viewed as employees and as such, they would not fall within the safety net of labour law.[97] However, the government has a very significant role to play in addressing the situation as illustrated by the NMWA.[98] This Act applies to all workers and their employers, and given that the expanded definition of a worker includes *"any person who works for another and is entitled to receive any payment for that work",* [99] this broadens the application of the Act to cover 'independent contractors' – including casual labourers – who personally undertake to perform work or services.

The digital-platform economy, typified by online suppliers of goods and services such as Uber, represents a vital stage in this development. The question that arises is whether the reversing of the eroding effect of new forms of work, such as Uber, rests solely in the broadening of the definition of employee? Uber drivers in South Africa, like their counterparts in many other countries, have tried to gain labour law protection through the gateway of being classified as employees.

In *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and SATAWU obo Tsepo Morekure,*[100] the Commission for Conciliation, Mediation and Arbitration (CCMA) held that Uber drivers whose services were 'deactivated', are employees for the LRA. However, in a disappointing development, the South African Labour Court upheld an application for review and concluded that the CCMA commissioner had conflated the roles of Uber SA and the foreign mother company, Uber BV. The drivers had not contracted with Uber SA – the applicant in this matter – and could, therefore, not succeed in their case.[101]

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[95] Van Niekerk et al, *Law@Work* (LexisNexis 2019) 59.
[96] Brassey (1990) refers to *National Labour Relations Board v Hearst Publications* (1944) 322 US 111 at 121.
[97] Du Toit, D Fredman, S & Graham, M 'Towards Legal Regulation of Platform Work: Theory and Practice' (2020) 41 *ILJ* 1493.
[98] See National Minimum Wage Act 9 of 2018.
[99] Ibid.
[100] *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and SATAWU obo Tsepo Morekure* unreported case WECT12537-16 7 July 2017.
[101] *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers* (2018) 39 *ILJ* 903 (LC).

After this decision, the Supreme Court of the United Kingdom, in *Uber BV v Aslam* [2021] UKSC 5, held that Uber drivers are not self-employed or independent contractors as they enjoy the status of 'workers'.[102] It can be argued that it would have been appropriate for the South African Labour Court to adopt a broader approach. It could have explored ways of piercing the legal complexities associated with triangular relationships created by online platforms, and placed less emphasis on the existence of a contract of employment than it did in this case.[103]

The future world of work can unlock opportunities, improve the quality of working life, and bridge the gap between citizens when it comes to socio-economic inequalities.[104] As a result, the Director-General of the ILO established the Global Commission on the Future of Work (Global Commission).[105] The Global Commission's report calls for a human-centred approach to the future of work. The ideal is to place people and their work "at the centre of economic and social policy and business practice".[106]

This approach is forward-looking and aims at developing humans to cope in a digital world[107] and strengthening social dialogue to improve employees' quality of working life.[108] The report contains three pillars: the promotion of investment in people's capabilities; investment in the institutions of work; and investment in decent and sustainable work.[109] As will be shown below, the struggle to regulate new forms of work and achieve social justice and workplace democracy lies at the heart of the ILO's goals.

The ILO and precarious or non-standard work in South Africa

Over the past century, the ILO has played a very important role in developing labour standards and Conventions. Precarious work, which covers workers outside of the traditional employment relationship, has been recognised by the ILO. The changes to the traditional perceptions of work have received the attention of the ILO, and since 1990 have been addressed

[102] [2021] UKSC 5.
[103] Ibid.
[104] ILO Global Commission on the Future of Work: Work for a Brighter Future (2019) 18.
[105] Ibid at 5.
[106] Ibid at 8.
[107] Ibid at 28.
[108] Ibid.
[109] Ibid at| 24.

at its annual conferences. The ILO has acknowledged the upsurge in precarious work and the need to protect these workers employing the following:

> (a) Conventions and Recommendations on particular categories of non-standard workers, such as part-time workers and homeworkers; (b) support for micro-enterprises in the informal economy; (c) programmes like Strategies and Tools against Social Exclusion and Poverty (STEP) to promote the extension of social protection to informal workers; (d) support for mutual health insurance schemes; and (e) the continuance of work at its social security department commissioning research and investigating the extension of social- security protection to non-standard workers. [110]

ILO norms dealing with specific categories of precarious employment

The ILO Termination of Employment Convention[111] and Recommendation[112] control and offer guidance on the use of fixed-term or temporary employment contracts. The Convention regulates the termination of employment at the discretion of the employer and allows for certain exclusions from all or some of its provisions which may relate to workers engaged under a contract of employment for a specified period or a specified task, or to workers engaged on a casual basis for a short period.

The Preamble to the Private Employment Agencies Convention 181 of 1997 notes the role that private employment agencies may play in an operational labour market, and also the need to protect these employees. The Convention applies, in principle, to all private employment agencies, all categories of employees (except for seafarers), and all branches of economic activity. Ratifying states are obliged to take measures to guarantee that workers hired by private employment agencies are not deprived of the right to freedom of association and the right to collective bargaining and that the agencies do not discriminate against workers.

The Private Employment Agencies Recommendation 188 of 1997 acts as an add-on to Convention 181 by providing, among other things, that workers employed by private employment agencies and made available to employer enterprises should, where applicable, have a written contract of employment stipulating their terms and conditions of employment, with information on such terms and conditions provided, at the very least, before the actual commencement of their assignments.

[110] ILO, *Non-standard Forms of Employment* Report for discussion at the Meeting of Experts on Non-Standard Forms of Employment, Geneva 16–19 February 2015) at 32–36.
[111] Termination of Employment Convention 158 of 1982.
[112] ILO Recommendation 166 of 1982.

The Employment Relationship Recommendation provides that member states should formulate and apply, in consultation with the most representative employers' and workers' organisations, a national policy for revising at suitable periods and, if required, clarifying and adjusting, the scope of relevant laws and regulations to ensure active protection for workers in an employment relationship. Such a policy should include procedures: to give direction on establishing the presence of an employment relationship and on the difference between employed and self-employed workers; to contest hidden employment relationships that conceal the true legal standing of workers; to guarantee standards relevant to all forms of contractual arrangement, including those involving various parties, so that employed workers are protected; and to guarantee that such standards state who is accountable for offering such protection.

The Part-Time Work Convention[113] promotes access to productive, freely chosen, part-time employment which honours the needs of both employers and employees, and guarantees protection for part-time employees as regards access to employment, working conditions, and social security. The Convention attempts to ensure the equal treatment of part-time workers and equivalent full-time workers in several ways.

First, part-time workers are to be accorded the same protection as equivalent full-time employees concerning the right to organise, the right to bargain collectively, the right to act as employee representatives, access to occupational safety and health, and non-discrimination in employment. Secondly, procedures must be followed to ensure that part-time workers do not, simply because they work part-time, receive a basic wage[114] which, calculated proportionately, is less than that of equivalent full-time employees. Thirdly, legislative social security schemes based on work-related engagements should be modified so that part-time workers are afforded working conditions equivalent to full-time workers. Fourthly, part-time workers must also benefit from equivalent conditions concerning maternity provisions, termination of employment, paid annual leave, paid public holidays, and sick leave.[115]

[113] The Part-Time Work Convention 175 of 1994 came into force on 28 February 1998 and has 14 ratifications: Albania, Australia, Bosnia and Herzegovina, Cyprus, Finland, Guyana, Hungary, Italy, Luxembourg, Mauritius, Netherlands, Portugal, Slovenia, and Sweden.

[114] Pursuant to Recommendation 182 of 1994, part-time workers should benefit on an equitable basis from financial compensation additional to basic wages which is received by comparable full-time workers.

[115] Exclusions may be introduced for part-time workers whose hours of work or earnings do not meet certain thresholds.

Convention 175 also requires the implementation of measures to expedite access to productive and freely chosen part-time work which meets the requirements of both employers and employees, provided that the essential protection mentioned above is guaranteed. The Part-Time Work Recommendation 182 of 1994 encourages employers to consult with the representatives of the workers concerned on the institution or extension of part-time work on a comprehensive scale and subject to associated rules and procedures and to offer information to part-time workers regarding their specific conditions of employment.

CONCLUSION

This article examines the precarious nature of work in the South African economy before the covid-19 pandemic (the 'old normal'), the impact of the pandemic on precarious workers, and an overview of measures taken by the ILO to address precarity in South Africa. The immediate impact of the crisis on employment and hours worked has been ten times more severe than that experienced during the first months of the 2008 global financial crisis. Once again, precarious workers are bearing the brunt of the shock, with low-skilled workers and those in vulnerable employment having been particularly exposed. It is clear from this article that the covid-19 pandemic has aggravated poverty, unemployment, and inequality in South Africa.

Uncertainty as to future labour market developments continues to loom large and much depends on how the pandemic evolves. Further, the disruptive nature of the new forms of work that are emerging during this period of the 4th IR has not improved the situation. The virus has by no means been defeated and until vaccines are available to all, the risk of new outbreaks remains imminent. The major challenge for South Africa, therefore, is to find ways of re-starting economic and social life and steering the economy towards recovery while keeping the pandemic in check without unduly strict measures of containment.

Now is the time for us closely to evaluate this 'new normal' and start with the task of building a future of work that will be safer and more effective in cushioning the fall-out from future crises on jobs and earnings. Many challenges highlighted in the ILO's Centenary Declaration for the Future of Work are very important in a post-covid-19 world. 'Building back better' requires policy coherence, especially between economic, employment, and social policies, and a holistic approach by governments. It also requires an approach that takes all stakeholders on board and leads to the identification and execution of state-specific policy packages. In this regard, social dialogue and collective bargaining can play a crucial role. Building back better

also demands that assistance reaches those most in need and that improving the circumstances of the most disadvantaged and vulnerable categories in the labour market is accorded the highest priority to avoid a further escalation in already unacceptable levels of inequality. Ultimately, the government must step in and fill the gaps to protect precarious workers and persons involved in new forms of work – eg, minimum wage or sector-specific regulation as in the 'SweepSouth' (SweepSouth is a Cape Town-based on-demand platform for domestic cleaning services) initiative.