

An overview of maternity protection in Botswana: A critique of the Employment Act through the International Labour Organisation's Maternity Protection Convention lens

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SUMMARY

This paper assesses the legal framework pertaining to maternity protection in Botswana's private sector. Botswana is a member of the International Labour Organisation (ILO), but the country has not ratified the ILO Maternity Convention. This notwithstanding, the Government has enacted a legal framework on maternity protection through the Employment Act to guarantee some protection for female private sector employees. This paper critiques this framework through the ILO Maternity Protection Convention lens. Drawing on this comparative analysis, the paper highlights the manner in which Botswana's framework complies with international standards on maternity protection and highlights key points where legislative reform is justified. The analysis also considers the jurisprudence of Botswana's Industrial Court to demonstrate the contribution of the judiciary towards assisting employers and employees interpret the provisions of the Act, but most significantly, to highlight the extent to which the Industrial Court may use its equitable jurisdiction to protect the reproductive function of female employees in Botswana's private sector.

1 Introduction

Despite being active participants in labour markets for many centuries, research indicates that women continue to experience various forms and degrees of discrimination in the workplace.¹ Like their male counterparts, women are prone to be discriminated against on the basis of their sex, religious choices, nationality and race amongst others. However, women may suffer double jeopardy as they are further likely to be discriminated against due to their reproductive function.² Protection against maternity discrimination is significant in the

1 Welle and Heilman *Formal and Informal Discrimination against Women at Work: The Role of Gender Stereotypes* (2005) 25-29.

2 Addati "Extending Maternity Protection to all Women: Trends, Challenges and Opportunities" 2015 *International Social Security Review* 70-71; Brand and Barreiro-Lucas "Return-to-Work Experiences of Female Employees following Maternity Leave" 2014 *South African Journal of Labour Relations* 70.

workplace as it safeguards women's human rights and job security. The protection is justified on the following grounds. Firstly, a need is recognised to protect the life and health of the expectant female worker and their unborn child.³ This extends to the need to afford adequate maternity leave before child birth and after confinement, as well as protecting women from work that could be hazardous to their health and safety as well as that of their unborn children. Secondly, the protection is geared towards ensuring that the interruption of a female worker's employment due to pregnancy and maternity should not translate to the cessation of an income. Finally, the protection secures the employment of the woman so that she may not be dismissed nor demoted solely for the reason of her pregnancy and/or maternity.

Botswana's legislative framework on maternity protection is simplistic and underdeveloped. Yet, a gap still exists in literature on female workers' entitlement to maternity leave in Botswana. This paper seeks to bridge this gap by examining the range and scope of maternity protection afforded to female workers in Botswana. The scope of enquiry entails the consideration of international standards securing maternity protection in order to establish minimum standards of best practice. By so doing, the paper lays a foundation for future discourse on contemporary issues concerning parental leave and family responsibilities of all workers without distinction in Botswana. Finally, the paper considers the contribution of the Industrial Court of Botswana to the maternity protection discourse and how the Court has previously assisted in the interpretation of the provisions of the Act.

2 The International Labour Organisation's (ILO) Maternity Protection Convention, 2000

Maternity protection is a subject of various human rights instruments. In particular, the Universal Declaration of Human Rights (UDHR) provides at article 25(2) that motherhood and childhood must receive special care and assistance. The protection and assistance envisaged here is to be enjoyed by all children whether or not they have been born out of wedlock. In more specific terms, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) categorically compels state parties to take appropriate measures to eliminate discrimination against women in the field of employment by amongst others, promoting the right to protection of health and to safety in working conditions, including the safeguarding of women's reproductive function.⁴ Furthermore, the Convention requires state parties to eliminate and prevent discrimination against women on the basis of maternity by amongst others, introducing maternity leave with pay or

3 Addati and Cheong *Meeting the Needs of my Family too: Maternity Protection and work-family Measures for Domestic Workers* (2013) 3-6.

4 Art 11(1)(f) Convention on the Elimination of all forms of Discrimination Against Women of 18 December 1979.

comparable social benefits without loss of former employment, seniority or social allowances.⁵ Finally, state parties are compelled to provide special protection to women during pregnancy in types of work proved to be harmful to them.⁶

The International Labour Organisation's contribution to the need to protect maternity rights in the workplace is not new. Maternity protection has been on the agenda of the ILO since its inception in 1919. The earliest international standard adopted by the ILO on maternity protection is the Maternity Protection Convention (No.3) as adopted at the International Labour Conference in 1919.⁷ Since then, the ILO has made several attempts to refine its minimum standards on maternity protection in the workplace. This included the revision of this Convention to reflect the growing changes in the participation of women in gainful employment.⁸

At its 88th Session held on May 2000, the General Conference of the International Labour Conference adopted the Maternity Protection Convention, 2000. According to its preamble, the Convention is founded on the need to amongst others, promote equality of all women in the workforce and to ensure the health and safety of the mother and child as well as the development of the protection of maternity in national law and practice. Of the one hundred and eighty-seven (187) ILO members, only forty-one (41) have ratified this Convention.⁹ Like all other ILO conventions, the Maternity Protection Convention creates binding obligations on all ILO members that ratify it. This includes their submission to the ILO's supervisory mechanism which is intended to ensure compliance with ILO standards through the submission of reports on steps taken in law and in practice to ensure compliance with the Convention.¹⁰ The Convention is normally read with the Maternity Protection Recommendation, 2000. The Recommendation is non-binding, and will therefore not be discussed in this paper.

Finally, maternity protection is not only an issue of human rights but is also an important component of social security under the ILO framework.¹¹ This flows from the fact that maternity and childbirth are

5 Art 11(2) Convention on the Elimination of all forms of Discrimination Against Women.

6 Art 11(2) Convention on the Elimination of all forms of Discrimination Against Women.

7 Addati 2015 *International Social Security Review* 70-71.

8 Addati 2015 *International Social Security Review* 70-71.

9 https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312328 (last accessed: 2022-05-09)

10 Art 15 Maternity Protection Convention.

11 Social security provides a means of protection to members of society against social and financial distress that may otherwise be caused by the substantial reduction or loss of income due to amongst others, old age, maternity, unemployment and disability. See further, Mpedi "The Evolving Relationship between Labour Law and Social Security Law" 2012 *Acta Juridica* 270-271.

guaranteed to cause an interruption to the employment of a female worker.¹² In this sense, the ILO Social Security Minimum Standards Convention 102 of 1952 lists maternity benefit as one of the nine (9) classical contingencies in social security that ILO members who ratify the Convention may be required to provide for their population. Whereas it remains a significant component of social security, this paper does not discuss maternity protection from this perspective. For that reason, the ILO Social Security Minimum Standards Convention does not form part of this discussion.

3 A comparison of maternity protection in the Employment Act and the Convention

3.1 Scope of application of the protection

The Employment Act of Botswana¹³ is the chief legislation regulating employment relationships in Botswana's private sector. In Part XII, the Act entitles every female "employee" to the benefits conferred in the provisions under this Part.¹⁴ Botswana adopts a less liberal approach to the protection of labour rights for workers under its labour legislative framework. For this reason, it becomes necessary for an individual seeking protection under the provisions of the Employment Act to contemplate whether or not they are considered an "employee" for purposes of the Act.

Section 2 of the Act defines an employee as any person who has entered into a contract of employment for the hire of his labour, either before or after the commencement of the Act. Consequently, an employer for purposes of the Act means any person who has entered into a contract of employment to hire the labour of any person and this can include the Government (in respect of any of its officers or servants who have been declared as above), a public authority or the person who owns or is carrying on for the time being or is responsible for the management of the undertaking, business or enterprise of whatever kind in which an employee is engaged. This definition does little to assist an individual decipher whether or not they are in an employment relationship *stricto sensu* with the employer. The difficulty to establish the existence of an employment relationship based solely on these definitions is also acknowledged by Botswana's Industrial Court in several cases.

12 Brand and Barreiro-Lucas 2014 *South African Journal of Labour Relations* 70-71.

13 Employment Act 6 of 2008.

14 There is currently no statutory paternity leave for male employees in the private sector under the Employment Act nor any other law. Paternity leave is commonly accorded to employees under voluntary collective labour agreements concluded between employers and trade unions. General conditions of service may also make provision for paternity leave.

In light of this, Grogan's observations regarding the distinctions between a contract of employment and a contract of work are of assistance. Grogan submits that:

... there are fringe cases in which it may not be immediately apparent whether the parties have entered into the *locatio conductio operarum* (contract of employment) or *locatio conductio operis* (contract of work). Although the *locatio conductio operis* entails the provision of work or services, it is not a contract of employment. The independent contractor of the common law is not an employee. Nor, to take other examples, are partners or agents, even though one of the parties may work for the other.¹⁵

In applying Grogan's sentiments above, the Industrial Court in *Sigwele v Botswana Life Insurance Ltd*,¹⁶ was of the opinion that in order to decide whether an applicant is an employee in terms of the Act, it ought to have resort to the common law tests developed by the courts in England and other jurisdictions. In particular, the Court preferred the dominant impression test as it was of the view that the supervision and control tests previously used by the Court in other judgements was narrow to suit the circumstances presently before it. The dominant impression test requires a court to view the relationship as a whole and arrive at a conclusion based on assessment of the relationship. Accordingly, the court will consider amongst others, the form of the contract, method of payment, employer's right of suspension and dismissal, employer's right to select who will do the work, is the employee obliged to do the work himself or can he nominate someone else to do the work.

Arising from this decision, the Industrial Court concluded that individuals in agency relationships are not employees for purposes of the Act. This was further reiterated in *Phiri v Lewis Stores*¹⁷ and *William v Teak Construction*.¹⁸ Whether or not an individual is an employee in terms of the labour regulatory framework has implications on the rights an individual may claim and the forums they may approach to make such claims. In this regard, Grogan¹⁹ points out that:

The distinction between the *locatio conductio operarum* and other contracts the performance of which entails the rendering of work is critically important, because different legal consequences flow from the various forms of contract. Only employees proper are entitled to social security benefit and have access to the statutory mechanisms if they wish to seek remedies for violation of their employment rights; only employers are bound by the labour statutes and are vicariously liable for the delicts of their employees.

Similarly, if upon the examination of the facts before it, the Industrial Court decides that an individual falls outside the ambit of the definition of an employee in terms of the Act, their matter falls outside the

15 Grogan *Workplace Law* (2000) 16.

16 *Sigwele v Botswana Life Insurance Ltd* 2000 2 BLR 331 (IC).

17 *Phiri v Lewis Stores* 2011 2 BLR 75 (IC).

18 *William v Teak Construction* 2012 1 BLR 119 (IC).

19 Grogan (2000) 16.

jurisdiction of the Court. This is because unlike the High Court of Botswana, the Industrial Court's jurisdiction is limited to the resolution of trade disputes. In fact, in *Marope and Others v Signal Signs*,²⁰ it was indicated that the Industrial Court is a specialised court mandated to determine disputes between parties to an employment relationship which must be disputes of right. This requires that there must be an employer-employee relationship between the parties before it, save for when the dispute involves a trade union. This requirement risks the individual's application for a claim for maternity benefits under the Employment Act to be struck off the roll on this technicality only.²¹

It ought to be highlighted that this does not imply the loss of an avenue to seek redress altogether where there has been a breach of one of the terms under what was perceived to be a contract of employment. The applicant in this instance has the right to approach the High Court, which has unlimited original jurisdiction²² to hear and determine matters before it and argue their matter under contract law. The only losses suffered would be the benefit of the rights under the Employment Act as well as the jurisdiction of the Industrial Court, which is not only a court of law, but is also empowered by statute to apply principles of equity²³ in the determination of matters before it. In particular, the role of the Industrial Court in the exercise of its equitable jurisdiction is significant in the area of maternity protection as it allows the Court to apply the ILO Maternity Protection Convention notwithstanding that Botswana has not ratified it. In contradistinction, the High Court is strictly a court of law and it will only apply the law and not principles of fairness.²⁴

As a general requirement, the ILO Maternity Protection Convention is more liberal in its scope. According to article 2(1), the provisions of the Convention will be applied to all employed women, including those in atypical forms of dependent work. This provision requires an ILO member that ratifies the Convention to not only limit its application of maternity protection in national law to women employed under formal contractual arrangements. For this reason, Addati²⁵ submits that the Convention is intended to extend coverage to a broad range of non-standard work arrangements such as casual and seasonal workers, fixed term contracts, temporary agency work and informal employees in all

20 *Marope and Others v Signal Signs* 2006 1 BLR 468 (IC). See further *Phiri v Lewis Stores* 2011 2 BLR 75 (IC).

21 See for example *Morapedi v Twinco Enterprises Pty Ltd T/A Master Joinery and Aluminium* 2010 2 BLR 59 (IC); *Tshukudu v Southern Africa Media Development Trust* 2012 1 BLR 54 (IC).

22 S 95(1) Constitution of the Republic of Botswana. See in particular *Molosankwe v Botswana Telecommunications Corporation & Nkambule v Botswana Telecommunications Corporation* 2010 3 BLR 659 (HC). See further *Kakuli Civil Procedure and Practice in the High Court of Botswana* (2005).

23 S 14(1) of the Trade Disputes Act 6 of 2016.

24 *Mogende & Others v Bamangwato Concessions Limited* Misca 390 of 2004 (HC).

25 Addati 2015 *International Social Security Review* 73.

sectors. Addati²⁶ further holds the view that by defining the term “woman” in article 1 to apply to “any female person without any discrimination whatsoever”, the Convention obliterates the possibility of discrimination against any female worker who is entitled to the protection envisaged in the Convention.

This notwithstanding, the Convention permits an ILO member to exclude certain categories of workers from application of the Convention if their inclusion would raise problems of a substantial nature. It is evident from the existing literature that this provision is less helpful as it does not give an indication of circumstances that would raise problems of a substantial nature.²⁷ In my view, it may be difficult to apply the provisions of the Convention to self-employed female workers and independent contractors where the entitlement to benefits in the national legal framework depends solely on the existence of an employer-employee relationship and the employer is exclusively accountable for the payment of maternity benefits.

The Employment Act is intended to extend coverage to all workers in the private sector, so long as there is evidence of the existence of an employment relationship as highlighted above. This is demonstrated by the fact that the Act extends coverage to the following industries:²⁸

- a building, construction, exploration or quarrying industry,
- b garage or motor trade, road transport industry,
- c hotel, catering or entertainment trade,
- d manufacturing, service or repair trade,
- e watchmen employed in the above industries or any section thereof
- f domestic service sector
- g agricultural sector
- h security guards employed by security companies

In view of the above, the maternity protection envisioned under the Act covers a broad range of sectors in Botswana’s private sector. However, the scope of protection falls short of the standard proposed by the Convention as it depends on the existence of an employer-employee relationship and effectively excludes women workers in atypical forms of employment such as those that are self-employed and those serving as independent contractors.

3 2 Maternity benefits applicable

3 2 1 Leave benefits

According to the ILO, maternity leave is vital because pregnancy and childbirth requires of women to halt or reduce their participation in paid

26 Addati 2015 *International Social Security Review* 73.

27 Behari “Meeting Minimum International and Regional Standards: An Analysis of Maternity Cash Benefits” 2019 *South African Mercantile Law Journal* 246.

28 Employment Act Fourth Schedule.

work for purposes of child rearing.²⁹ This is expected during the most productive years of a woman's life which correspond to her reproductive years.³⁰ Consequently, if employers are not compelled to provide maternity leave, women would be placed in a position where they would have to choose between child rearing and fulfilling their liberty to be active participants in the labour market. This results in an indirect discrimination as their male counterparts are less likely to be faced with similar circumstances. Furthermore, leave benefits are essential because there is a need to protect the health of both the expectant mother and child. This affords them adequate time to rest before and after childbirth as is medically advisable to do so.³¹

Botswana recognises the importance of the above-mentioned factors because leave benefits are an essential component of maternity protection in the Employment Act. In order to qualify for maternity leave benefits, section 113(1) of the Act requires a pregnant female employee to give notice to an employer of her confinement by submitting a written certificate signed by a medical officer or a registered nurse and midwife, certifying that medical officer's opinion that the employee is likely to go on confinement within six weeks immediately after the date of the certificate. Once the notice is received, the employer must immediately permit the employee to absent herself from work until after confinement. The employer must also not permit the employee or require her to return to work until after the expiry of six weeks immediately after confinement.³² If an employer does not permit the employee to absent herself, such employer will be guilty of an offence and liable to a fine not exceeding P1500 or to imprisonment for a term not exceeding six months or to both.³³ If the employer permits the employee to return to work or requires her to perform any work within six weeks immediately after her confinement, the employer shall be liable to a fine not exceeding P1000 or to imprisonment for a term not exceeding six months or to both.³⁴

In essence, upon serving this notice, the female employee is entitled to twelve weeks statutory maternity leave. During this time, she shall not be permitted to come to work or perform any work under her contract of employment. As indicated above, an employer who withholds permission to absent herself or requires her to work after confinement commits an offence under the act. The standard proposed in the Convention is similar in that it requires a pregnant female employee to produce a medical certificate stating the presumed date of childbirth in order to be entitled to leave.³⁵ However, the Convention suggests a

29 Addati, Cassirer and Gilchrist *Maternity and Paternity at Work: Law and Practice Across the World* (2014) 8-12.

30 Addati, Cassirer and Gilchrist (2014) 8.

31 Addati, Cassirer and Gilchrist (2014) 8.

32 S 113(2) Employment Act.

33 S 113(8)(a) Employment Act.

34 S 113(8)(b) Employment Act.

35 Art 4(1) Maternity Protection Convention.

minimum period of fourteen weeks maternity leave,³⁶ in contrast with the twelve weeks suggested under the Act. The Convention allows ILO members who are bound by it to further extend this period as may be appropriate in national legislation.³⁷

Note should be taken of the imperative nature of the provisions at section 113(1) of the Employment Act in so far as the delivery of the medical certificate is concerned. In *Ramoswetsi v Mpepu Private Senior Secondary School (Pty) Ltd*³⁸ the Industrial Court took the view that the provisions of this section require strict compliance as per the rule of interpretation in the section 45 of the Interpretation Act.³⁹ In terms of section 45 of this Act, whenever a provision uses the word “shall”, it is intended that whatsoever needs to be done under that provision is pre-emptory and cannot be dispensed with. For this reason, the Court proceeded to hold that an application for maternity leave must be accompanied by the medical certificate signed by the medical official or midwife. Further, the employee is required to comply with the stipulated timelines. That is, the application for leave must be made at least six weeks prior to the expected date of confinement. If an employee fails to make this application or give notice to the employer in accordance with the section 113(1), then her application for maternity leave will be considered non-compliant with the Act and will result in the loss of maternity leave pay. The applicant in this case was found to have applied for maternity leave eleven days before confinement and her application was not accompanied by the required certificate. For this reason, the Court concluded that her claim for maternity leave pay was unenforceable.

This requirement raises concern because employees who are not aware of their right to apply for maternity leave may innocently make such applications outside the stipulated timeframe and thereby lose their maternity leave pay. This is further exacerbated by the fact that the Employment Act does not stipulate any mechanism within Part XII to ensure that employers raise awareness of the entitlement of employees to maternity benefits under the Act. In my view, the Act needs to make it a requirement for employers to inform employees about maternity leave rights as provided for under the Act or any other collective labour agreements in the workplace. Further, it must be reiterated that employees need to ensure that their applications for maternity leave are done in accordance with the Act at all material times.

Section 113(3) of the Act further requires that within 21 days immediately after confinement, the female employee shall inform the employer of the date of confinement by delivering to the employer the certificate of the midwife certifying that date. This section is intended to

36 Art 4(1) Maternity Protection Convention.

37 Art 4(3) Maternity Protection Convention.

38 *Ramoswetsi v Mpepu Private Senior Secondary School (Pty) Ltd* 1992 2 BLR 243 (IC).

39 Interpretation Act 9 of 2010.

inform the employer of the birth of the child, and accordingly entitles the employee to the first instalment of her maternity allowance in terms of section 114(1)(a). The Court in *David v Auto & General Supplies*⁴⁰ accentuated that a failure to submit this certificate will be fatal to an employee's claim for maternity leave pay.

The Act allows for the minimum twelve weeks maternity leave to be increased by two weeks to fourteen weeks where the female employee in question has health-related complications following the confinement.⁴¹ The female employee needs to deliver a medical certificate signed by the medical officer or registered nurse/ midwife certifying that she is experiencing an illness arising out of her confinement. Article 5 of the ILO Maternity Convention also incorporates this standard to allow for the extension of the fourteen weeks maternity but leaves it to an ILO member to decide on the duration of the extension in its national law.

3 2 2 Cash benefits

The ILO emphasises that paid maternity leave is vital to the income security of women workers.⁴² Hence, it is irrational to grant a female worker maternity leave if that worker will not receive any cash benefits for the duration of her absence from work. The Convention generally provides that women absent from work pursuant to the maternity leaves in articles 4 and 5 shall be paid cash benefits in accordance with national law and regulations.⁴³ The Convention does not set a minimum amount, but instead, recommends that the level of benefits be such that the woman can maintain herself and her child in proper conditions of health and with a suitable standard of living.⁴⁴

According to the Convention, cash benefits may be computed based on a woman's previous earnings and this shall not be less than two-thirds of her earnings.⁴⁵ Further, an ILO member is welcome to use other methods to determine the level of benefits, so long as the computation of the benefits is no less than two-thirds of the woman's previous earnings.⁴⁶ Whereas the Convention does not define what constitutes previous earnings, it has been observed by the ILO that jurisdictions have assigned divergent meanings to this concept. The ILO's findings demonstrate that in most jurisdictions previous earnings imply that the employee's maternity leave pay will be determined according to her basic salary in terms of her contract of employment.⁴⁷

40 *David v Auto & General Supplies* 2007 3 BLR 265 (IC).

41 S 113(4) Employment Act.

42 Addati, Cassirer and Gilchrist (2014) 8.

43 Art 6(1) Maternity Protection Convention.

44 Art 6(2) Maternity Protection Convention.

45 Art 6(3) Maternity Protection Convention.

46 Art 6(4) Maternity Protection Convention.

47 Addati, Cassirer and Gilchrist (2014) 16-19.

Article 6(5) of the Convention places an obligation on the ILO member to ensure that conditions requisite to qualify for cash benefits can be satisfied by a large majority of women to whom the Convention applies. This suggests that conditions for qualification should not be so stringent as to exclude women who would otherwise be eligible to benefit. Further, article 6(6) stipulates that a safety net in the form of benefits under social assistance should be availed in cases where a woman does not satisfy the conditions set to qualify for cash benefits under national law. This additional safety net is to be subject to the means-test required for benefits under the social assistance scheme.

It ought to be highlighted that the convention recommends that cash benefits should become payable through compulsory social insurance⁴⁸ and should not be the individual responsibility of the employer unless if this is agreed on at national law by government and trade unions and employers' organisations; or if it is provided for in national law by a member state. Under the Employment Act, section 113(5) requires an employer to pay an employee on maternity leave a maternity allowance of not less than 50% of her basic pay or 50thebe for each day of her absence. The final determinant of the allowance to be paid by the employer rests on whichever amount between the two is higher. Whereas social insurance is a preferred model for the payment of maternity allowance under the Convention, the *modus* adopted by Botswana under the Act does not altogether contravene the Convention.

The point of departure between the Act and the Convention can be found in the manner in which the maternity allowance is to be paid. The model presented by the Act is quite peculiar and demands revisions by law makers. Section 114(1) of the Act indicates that the employer shall pay maternity allowance in three instalments in the following sequence:

- a The first instalment, accounts for the period of absence for the first six weeks (before confinement) and shall be paid within 48 hours immediately after the employee delivers to her employer the certificate in section 113(3) confirming her date of confinement;
- b The second instalment, accounts for the period of absence for the six weeks following the day of confinement and shall be paid on the return of the employee to work. If the six weeks following confinement has been increased due to complications under section 113(4), this instalment will be paid on the day in which she would otherwise have been due to return to work; and
- c The third instalment is applicable where there has been an extension of the leave period pursuant to section 113(4) due to complications following confinement. This allowance is payable within 48 hours immediately after the employee delivers to the employer the certificate thereby required.

It is not apparent from a reading of the Act why an employer is permitted to adopt this model to pay maternity allowances. However, it is the

48 Art 6(8) Maternity Protection Convention.

practice of some employers, particularly corporates and parastatals to pay employees their maternity leave allowances as they normally would their monthly wages, as opposed to in instalments.⁴⁹ Presumably, the model suggested by the Act was meant to cater for small scale employers, who may not be able to pay an employee their full salary for the period of absence of twelve weeks. Be that as it may, this requirement does not comply with the Convention as it does not encompass the entire period of maternity leave as suggested in the Convention.⁵⁰ A reading of section 114(1) suggests that whilst the employee will be absent on leave for three months, she can only be paid twice, and thrice only under circumstances explained in section 113(4). The manner of payment would be easier if the employee is paid the allowance under normal circumstances as is usually done for her basic salary. In this regard, she would receive 50% of her basic salary for the three months that she is on maternity leave.

Whereas the *modus* adopted by Botswana to not use social insurance schemes for the payment of maternity leave benefits is acceptable under the Convention, it is noted by the ILO that when social insurance is used, discriminatory practices against the employment of women is averted. The ILO observes that where employers are liable to pay for maternity benefits, the interests of women workers may be jeopardised in that employers become reluctant to hire, retain or promote pregnant workers or women with family responsibilities.⁵¹ Employers may also find reasons to dismiss pregnant employees in order to avoid paying the costs of wage replacements during maternity leave.⁵² While there is currently no concrete evidence nor research on the prevalence of prejudice suffered by women in Botswana's labour market arising from maternity related issues or family responsibilities, it cannot, in the absence of evidence to the contrary, be negated that such acts are totally non-existent. Furthermore, it should be highlighted that the adoption of social insurance-based payments may cater for the position of self-employed women workers and independent contractors, who as highlighted above may not typically find coverage under the current legal framework.

The Employment Act should be celebrated for the fact that it compels the employer to pay maternity allowance in the unfortunate circumstance of the death of a pregnant female employee whilst she is absent on maternity leave.⁵³ Payment of maternity allowance under this

49 For example, the University of Botswana General Conditions of Service (2015) provide at clause 12.16.3 that maternity leave will be paid at an employee's full basic salary and the employee shall be paid any allowance applicable to her position during the period of maternity leave. Clause 12.16.4 applies to temporary employees who are entitled to 50% of their basic monthly salary and 100% of their salary related and non-salary benefits during maternity leave.

50 Addati, Cassirer and Gilchrist (2014) 16.

51 Addati, Cassirer and Gilchrist (2014) 8, 20, 22.

52 Addati, Cassirer and Gilchrist (2014) 8.

53 S 114(2) Employment Act.

provision is done to align with the requirements of section 30 of the Act which instructs the employer to pay all benefits due to an employee whose contract of employment is terminated due to her death. The provision in section 114(2) is open-ended in that it obliges the employer to pay the maternity allowance of a pregnant employee who dies from any cause before or on the day of her confinement or after her confinement. Consequently, the death of an employee does not absolve the employer from fulfilling its obligation under the Act, irrespective of the employee's cause of death.

Finally, note should be taken of the fact that Botswana's framework falls short of the standard proposed in article 6(6) of the Convention. Currently, Botswana does not have cash-based social assistance programmes specifically tailored for pregnant women. Employed females would likely not be eligible to benefit under the available programmes because a means-test is normally applied across various social assistance schemes. Current schemes are only designed to assist citizens who have little to no resources to sustain themselves.⁵⁴ However, primary health care remains available for all expectant mothers in Botswana, but it does not provide cash benefits that may enable the mother to maintain herself and her child in the manner recommended at article 6(2) of the Convention.⁵⁵

3 2 3 Employment protection and non-discrimination

The ILO observes that maternity and childbirth may be a ground upon which women are discriminated against in the workplace.⁵⁶ Hence, the Convention emphasises on the need to protect the employment of female workers and guard against their discrimination based on their reproductive function. For this reason, article 8(1) of the Convention makes it unlawful for an employer to terminate the employment of a woman during her pregnancy, whilst she is absent on maternity leave, or during a period following her return to work. Termination of employment may be permitted when it is for reasons unrelated to her pregnancy or childbirth and its consequences or nursing. In this particular instance, an employer who terminates a contract of employment bears the burden of proving that the reasons for the termination of employment are unrelated to an employee's pregnancy or childbirth and nursing. Note should also, by extension, be taken of the fact that the ILO Termination of Employment Convention provides that family responsibility, pregnancy and absence from work during maternity leave shall not constitute valid reasons for termination of employment.⁵⁷

54 See generally Maundeni and Mupedziswa "Social Assistance Programmes in Botswana: Efficiency and Effectiveness" *International Journal of Development and Sustainability* 2017 426-442.

55 Addati, Cassirer and Gilchrist (2014) 16.

56 Addati, Cassirer and Gilchrist (2014) 72-75; Addati 2015 *International Social Security Review* 75.

57 Art 5(d) and (e) Termination of Employment Convention 153 of 1982.

Furthermore, signatories to the ILO Maternity Protection Convention are implored to adopt measures to ensure that maternity does not constitute a source of discrimination in employment, including discrimination with regards to access to employment.⁵⁸ Such measures may include a prohibition in national law of making it a prerequisite that a female job seeker undertakes a pregnancy test except in instances where the employment in question is prohibited or restricted for pregnant or nursing women or where there is a recognised or significant risk to the health of the woman and child.⁵⁹

Discrimination on the basis of gender is generally prohibited in Botswana's private employment. Section 3 of the Constitution of Botswana guards against discrimination of people in the Republic on the basis of their sex. From this very fact, section 23(d) of the Employment Act prohibits the termination of an employee's contract of employment on the ground of their sex. This provision was clarified by the Industrial Court in the case of *Moatswi v Fencing Centre (Pty)*.⁶⁰ In this particular case, a group of women had been dismissed from their employ because the employer held the opinion that the work involved in the enterprise was heavy and that they could not load or work night shifts.

The Court took the opportunity to distinguish between acts of direct and indirect discrimination that may affect female employees in the workplace. The Court observed that employers may impose regulations or policies that are directly discriminatory or indirectly discriminatory on the basis of sex, marital status and family responsibility. While direct discrimination is overt and is usually aimed at treating a female employee less favourably than a male employee in the same position based solely on the fact that she is a woman, indirect discrimination may not be easily discernible. According to the Court, it occurs where a regulation ostensibly applies to all employees but its application has a disproportionate negative effect on one group of employees. For this reason, it can be deduced from the Court's reasoning that whilst section 23(d) of the Act does not list pregnancy and childbirth as prohibited grounds of termination, an argument may nonetheless be mounted within this section where a contract of employment has been terminated unfairly.

More specifically, the Act's protection is limited because it does not protect female job seekers from discrimination based on their reproductive function. Therefore, the Act remains silent on the prohibition of requirements to undergo pregnancy tests by job applicants and females who have already been absorbed into the labour market. In fact, the Act *prima facie* leaves the position of female job applicants and other female employees alike in a precarious position since section 46 permits medical examinations to be conducted on employees to whom

58 Art 9(1) Maternity Protection Convention.

59 Art 9(2) Maternity Protection Convention.

60 *Moatswi v Fencing Centre (Pty)* 2002 1 BLR 262 (IC).

the section applies. This provision may be abused by unscrupulous employers because the Act does not describe the breadth of the medical examinations envisioned under this section. An employer may, as part of the pre-employment tests permitted under this provision, require an employee to undergo a pregnancy test.

The above notwithstanding, the Act prohibits the serving of notice of intention to terminate an employee's contract of employment whilst she is absent on maternity leave in accordance with the Act. Any notice so given which expires during that period shall be null and void. An employer who contravenes this provision is liable to a fine under section 151(c) of the Act. Consequently, an employer cannot serve notice of intention to terminate employment whilst a female employee is on maternity leave.

It appears that even if notice were to be served before her maternity leave or when the employee returns to work upon completion of the leave, the employer will still bear the burden of proving that the termination is not related to the employee's maternity or childbirth. This is in accordance with the cardinal rules of fair termination of employment as prescribed by the ILO Termination of Employment Convention. Botswana has not ratified this convention, but the Industrial Court has consistently used its equitable jurisdiction to apply the Convention's principles to lay down the procedure for the fair termination of employment contracts under the Act.

Whenever an employer seeks to terminate a contract of employment under the Act, the Industrial Court has consistently required that the employer must give good reason for such termination. In *Motsumi v First National Bank of Botswana*,⁶¹ the Court was of the view that:

When an employer wants to dismiss an employee..., he must not merely have a reason for doing so. He must have a good reason for doing so and it is in the court's discretion to decide on the facts of each particular case whether a good reason for the termination of a contract of employment exists or not.

For this reason, whenever an unfair dismissal dispute is brought before the Industrial Court, the Court is mandated by its equitable jurisdiction to enquire whether such dismissal of an employee is lawful by considering whether there is a fair reason for the dismissal and whether a fair procedure has been followed to dismiss the employee.⁶² The Court will then assess the facts before it to determine whether the employee's dismissal is fair.

Section 23 of the Act sets out grounds upon which termination of a contract of employment will not be permitted. This includes reasons that an employee is a member of a trade union, seeks office to represent

61 *Motsumi v First National Bank of Botswana* 1995 BLR 713 (IC).

62 *Makwaeba v Botswana Stock Exchange* Case IC 976/15 (Unreported). See further s 20 Trade Disputes Act.

other employees, makes a complaint in good faith or participates in proceedings against the employer regarding the violation of any law or termination based on discriminatory grounds. It ought to be noted that these grounds are not exhaustive. It rests with the Court to make an assessment on the facts before it to determine whether the employer's reasons for dismissal are fair.

In *David v Auto & General Supplies*⁶³ the Court applied article 8 of the ILO Maternity Convention to make a ruling on the substantive fairness of the dismissal of an employee who believed she had been dismissed due to her pregnancy and found that indeed the dismissal was for no other reason except the pregnancy of the employee. It suffices to highlight that an employer is not barred from terminating the employment of a pregnant female employee for acts of misconduct. Section 26(1) of the Act allows the employer to terminate a contract without giving notice where the employee is guilty of a misconduct. The employer must exercise this right within a reasonable time after becoming aware of the misconduct in question. Dismissals of this nature also require that the employer adduce a valid reason.

In *Phirinyane v Spie Batignolles*⁶⁴ where an employee had been summarily dismissed, the Court held that:

In disciplinary dismissals there must therefore firstly be a valid reason for the dismissal. This means that there must be sufficient proof, judged objectively, that the employee has in fact committed the alleged misconduct. In the absence of such proof the reason for the dismissal cannot be said to be valid. When an employee denies the alleged misconduct, the employer must place sufficient facts before the chairman of the disciplinary enquiry to establish, not only that the alleged misconduct has been committed but that it has in fact been committed by the employee so charged.

Secondly, the reason for dismissal must also be fair. This means that the dismissal must be justified according to the requirements of natural justice or of equity, ... and in particular the requirement of reasonableness.

Flowing from this, it arises that in addition to having to show that the reason for the dismissal is fair, the Court will enquire whether the procedure followed by the employer in dismissing the employee was fair. The requirement is that the employer must conduct a disciplinary enquiry that complies with the cardinal requirements for a fair disciplinary enquiry unless if the employer cannot reasonably be expected to provide one.⁶⁵ Nothing exempts the employer who terminates the employment of a pregnant employee or nursing mother from following this procedure when seeking to dismiss her for an alleged misconduct. Should the procedure not be followed, then the dismissal will be declared unfair.

63 *David v Auto & General Supplies* 2007 3 BLR 265 (IC).

64 *Phirinyane v Spie Batignolles* 1995 BLR 1 (IC).

65 *Phirinyane v Spie Batignolles* 1995 BLR 1 (IC).

In *David v Auto & General Supplies*,⁶⁶ the female employee had been dismissed from her employ upon her return from maternity leave. It appears from the facts before the court that the employee had not complied with the requirements of section 113(1) to give notice to her employer of her confinement six weeks prior to her confinement. She thus went for her maternity leave for a period shorter than that recommended under the Act. She challenged her dismissal on the basis that it was solely due to her pregnancy and the fact that she had been absent on maternity leave. Whereas the Court found that she had not complied with the strict requirements of section 113 entitling her to maternity leave pay, it found that the employer had failed to prove that her dismissal was for a reason unrelated to her pregnancy or childbirth. Furthermore, the Court found that her dismissal was also procedurally unfair as she was never given an opportunity to defend herself. The Court found that there was no valid reason for her dismissal; hence the procedure would not have been fair either way. Whereas the employee was unsuccessful on her claim for maternity leave allowance, the Court awarded her compensation for her unfair dismissal.

Similarly, in *Ramoswetsi v Mpepu*,⁶⁷ whereas the employee in question was unsuccessful in her claim for maternity leave allowance due to non-compliance with section 113, the Court held that she had been unfairly dismissed. In this particular instance, the employer had changed its management and the employee was informed upon her return from maternity leave that the establishment did not require her services for the time being; and that she could re-apply for employment should she so desire once she was physically fit. Since the employee was not dismissed for a misconduct, the Court took the opportunity to make an enquiry on whether or not her dismissal was for operational reasons. Having established no evidence of dismissal for misconduct and that she could have been possibly retrenched, the Court concluded that her dismissal was unlawful and awarded her compensation.

On that note, attention of the reader is drawn to the fact that even where the employer purports to have retrenched the pregnant female employee, the employer must prove that the retrenchment was substantively and procedurally fair. Section 25(1) of the Employment Act permits the employer to reduce the size of the workforce by terminating contracts of employment in accordance with the principle of first-in-last out (LIFO). Whereas the courts do not normally interfere with an employer's decision to economise his enterprise by reducing the size workforce,⁶⁸ the employer is required to follow a set of principles of equity in carrying out a retrenchment exercise. In *Mokaya v Morteo Condotte (Pty) Ltd*⁶⁹ the Industrial Court held that a retrenchment exercise

66 *David v Auto & General Supplies* 2007 3 BLR 265 (IC).

67 *Ramoswetsi v Mpepu* 1992 2 BLR 243 (IC).

68 *Mokaya v Morteo Condotte (Pty) Ltd* 1994 BLR 394 (IC); *Macheng and Others v Western Apparels* 2012 2 BLR 84 (IC).

69 *Mokaya v Morteo Condotte (Pty) Ltd* 1994 BLR 394 (IC).

must be substantively and procedurally fair. Essentially, the substantive fairness goes to the commercial decision which remains the prerogative of the employer as highlighted above. The question would then turn on the aspect of procedural fairness; which was captured in *Mokaya v Morteo Condottee* as follows:

Should an employer decide in principle that retrenchment or any other method which will or is likely to affect an employee is a possible way of achieving that result, then he must forthwith notify all such employees (or their representatives) of the possibility of retrenchment and the reasons for it.

Section 25(2) of the Employment Act requires that the Commissioner of Labour be also notified. The employer must consult with such employees or their representatives at the earliest opportunity. The reason for such consultation is three-fold. Firstly for the parties to seek ways of avoiding or averting the need to terminate the employee's employment. Secondly, if retrenchment proves unavoidable, then the parties should consult on a fair selection criterion and thirdly consult on ways of alleviating the hardships caused by such retrenchment, e.g. a reasonable severance package, possible alternative employment elsewhere, time off to seek alternative employment, etc. The employees should be given a fair chance to participate meaningfully in such discussions and be invited to propose reasonable alternatives to retrenchment, e.g. reduction in wages, short time, etc. In such consultations. It is the duty of the employer to "consult" and not necessarily to "negotiate".⁷⁰

In this case then, the requirements for a fair retrenchment avoid as far much as possible the unfair retrenchment of a pregnant female employee. If the employer fails to demonstrate that he followed the above procedure in the retrenchment of such employee, he will be required to pay compensation to the employee.

3 3 Other provisions

The ILO Maternity Protection Convention extends protection to breastfeeding mothers by requiring that they be afforded the right to one or more daily breaks or a daily reduction of hours of work to breastfeed their infants.⁷¹ Nursing breaks are to be determined in accordance with national laws and shall be counted as working time which has to be remunerated. The Employment Act complies with this standard in that a female employee who wishes to suckle her child or feed the child herself shall be permitted to do so by the employer.⁷² The period for this shall be half an hour twice a day during working hours for six months immediately after her return to work. The employer is prohibited from making deductions from the employee's salary for those periods of

70 *Mokaya v Morteo Condottee (Pty) Ltd* 1994 BLR 394 (IC).

71 Art 10(1) Maternity Protection Convention.

72 S 118(1) Employment Act.

absence. Penalties lie against any employer who contravenes this provision.⁷³

Finally, article 6(7) of the Convention requires that the expectant woman be accorded medical benefits which shall include prenatal, childbirth and postnatal care when necessary, as well as hospitalization care. In contradistinction, section 119 of the Act exempts liability of the employer for a female employee's medical expenses attributable to her pregnancy. However, primary health care is provided in Botswana's public hospitals for all expectant mothers generally under public health initiatives which cover prenatal and postnatal remedies, as well as nutrition for infants. Employees who make contributions to private social insurance in medical aids may also use such schemes to cover medical costs in private hospitals.

4 Conclusion

It has been established in this paper that maternity protection is a key component of the protection of women's effective participation in the labour market from both the ILO perspective and Botswana's labour legislation. Be that as it may, Botswana is not one of the 38 ILO members who have ratified the ILO Maternity Protection Convention. This notwithstanding, the country has made significant strides in protecting the rights of pregnant and nursing female employees in the workplace. Despite its shortcomings, the Employment Act of Botswana provides a good backdrop against which employers in the private sector may develop and implement maternity protection provisions in the workplace.

The Act entitles female employees to maternity leave with the assurance to return to their positions upon lapse of the leave. Provision is also made for the maintenance of the livelihood of an employee and her infant child through the sole obligation of the employer to pay her maternity leave allowance. However, the *modus* of paying maternity allowance in instalments as discussed in the paper does not cover the employee's entire period of absence from work. This inconsistency justifies a review of the provision as it does not comply with the ILO Convention.

Furthermore, whereas the Act affords a level of protection against discrimination, it has been demonstrated in this paper that even more protection is justified to cover females job applicants. The Act should be revised so that it provides in clear and unequivocal terms that the requirement of a pregnancy test as part of the pre-employment medical tests (that are permitted by the Act) is strictly prohibited save where the employer can prove that the work involved could pose a threat to the health of the employee and her unborn child. Finally, the jurisprudence

73 S 151(c) Employment Act.

of the Industrial Court in the area of maternity protection remains consistent in so far as the need for female employees and their employers to strictly comply with the provisions of the Act. Whereas non-compliance with maternity leave provisions may be fatal to an employee's claim, the Court will ensure that all other benefits due to the employee are paid, and the Court may in appropriate circumstances make an order for the payment of compensation. The Court will also hold accountable any employer who unfairly dismisses a female employee based solely on her pregnancy or her being absent on maternity leave. In light of this, measures intended at raising awareness need to be put in place to ensure that employers and employees are aware of the stringent nature of the provisions of the Act in order to improve compliance on both ends.