

## ENDNOTES

- <sup>1</sup> Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 11.
- <sup>2</sup> Submitted to the Department of Labour in 1997 (the Benjamin-Greef Report).
- <sup>3</sup> 130 of 1993 (referred to as COIDA).
- <sup>4</sup> COIDA took effect in the former homelands which had workers' compensation laws from 1 March 1995.
- <sup>5</sup> However, the retention of the structure and wording of the previous *Workmen's Compensation Act* 30 of 1941 (WCA) as well as some of the previous wording used means that many of the decided cases under the WCA remain applicable.
- <sup>6</sup> Section 30(1). The mutual associations operate in terms of a licence issued by the Minister of Labour and are required to deposit securities with the Commissioner to cover their liability in terms of the Act. An employer who obtains a policy of insurance from a mutual association, for the full extent of its potential liability in terms of the Act, is exempted from paying assessments to the Compensation Fund. See section 84(1)(b).
- <sup>7</sup> The state, including Parliament and provincial governments, are employers individually liable and do not pay contributions to the Compensation Fund (section 84(1)(a)(i)). The Commissioner may exempt local authorities from any of the obligations on certain conditions (section 84(2)). He may require an employer individually liable to deposit securities to cover its liabilities for the costs of compensation and medical aid (section 31(1)). If an employer individually liable or a mutual association fails to pay compensation or any other benefit, he may issue an order requiring payment (section 61(1)). The power to determine claims and benefits is not transferred and all their decisions are subject to confirmation by the Commissioner. The Commissioner may authorise employers individually liable and mutual associations to settle claims for compensation and the costs of medical aid provisionally. Employers individually liable and mutual associations must contribute to the costs of administering the Act and to covering any losses suffered by the Compensation Fund (section 88(1) and (2)). The procedures concerning reviews, objections and High Court referrals are the same as described below and are dealt with by the Commissioner.
- <sup>8</sup> Act 78 of 1973.
- <sup>9</sup> Pneumoconioses, lung cancer /mesothelioma and platinum salt sensitivity/asthma.
- <sup>10</sup> 29 of 1996.
- <sup>11</sup> Section 2(1).
- <sup>12</sup> 85 of 1993.
- <sup>13</sup> Section 38(1): The maximum penalty for the contravention of a provision of the Act is a fine of R50 000 or 12 months' imprisonment or both.
- <sup>14</sup> For a comparison of these two laws, see Hermanus M *Trends in occupational health and safety policy and regulation—issues and challenges for South Africa* (Institute of Development and Labour Law, UCT)( 2001) 61.
- <sup>15</sup> 130 of 1993 (referred to as COIDA).
- <sup>16</sup> 78 of 1977.
- <sup>17</sup> R570 per month.
- <sup>18</sup> Notably the UIF and the RAF systems. Statutory provisions prohibiting such practices only provide a partial solution; the question remains whether effective enforcement is administratively and otherwise possible, given the absence of a linked database system.
- <sup>19</sup> This is largely due to the absence of a database system which links the state social assistance system with the public insurance funds.
- <sup>20</sup> Fultz and Pieris *Employment Injury Schemes* 3.
- <sup>21</sup> Benjamin-Greef Report 60.
- <sup>22</sup> Such as the Vocational Rehabilitation and Employment (Disabled Persons) Convention 159 of 1983; the Occupational Safety and Health Convention 155 of 1981; the Occupational Health Services Convention 161 of 1985 and the Labour Inspection Convention 81 of 1947.
- <sup>23</sup> Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 13-15 and authorities referred to there.
- <sup>24</sup> As presented by Calabresi G *The costs of accidents: a legal and economic analysis* (1970) 26.
- <sup>25</sup> Act 85 of 1993.
- <sup>26</sup> Act 29 of 1996.

- <sup>27</sup> See in particular ILO Conventions 155 of 1981 (Occupational Safety and Health and the Working Environment); 174 of 1996 (Prevention of Major Industrial Accidents); and 176 of 1996 (Occupational Safety and Health in Mines).
- <sup>28</sup> It is clear that the legislation attempts to cast the net of coverage as wide as possible—this flows from the wide categories of persons who qualify as “employer” for purposes of the Act, as well as from the wide ambit of the notions of “employee” and “user of machinery” in the OHSA (see section 1)—limited exclusions are provided for.
- <sup>29</sup> Section 35 of COIDA takes away the common-law liability of employers, replacing it with the entitlement to claim from the Compensation Fund. The constitutionality of section 35 has recently been upheld by the Constitutional Court—cf *Jooste v Score Supermarket Trading (Pty) Ltd* 1998 BCLR 1106 (CC).
- <sup>30</sup> Not only does the definition of “health” in the two Acts differ, but also does the OHSA have a particularly narrow definition, in that “healthy” is meant to be “free from illness or injury attributable to occupational causes”.
- <sup>31</sup> The OHSA defines “safe” as being “free from hazard”.
- <sup>32</sup> The World Health Organisation defines “health” as “a state of complete physical, mental and social well-being, and not simply the absence of illness or disease”. It is suggested that this definition is more in keeping with a broad social security approach, as it is clearly concerned with the total well-being of a person in a workplace.
- <sup>33</sup> Benjamin-Greef Report 164.
- <sup>34</sup> See the Benjamin-Greef Report 170-171.
- <sup>35</sup> COIDA requires that the employer must pay the compensation due to the injured employee for the first three months of temporary total disablement (section 47(3)). This could perhaps be seen as a measure which will ensure to some extent the continuation of the employee’s link with his/her employment. However, this remains essentially a temporary measure, which is not backed by other (re)integration measures.
- <sup>36</sup> The establishment of two rehabilitation centres (in the form of section 21-companies) by the Office of the Commissioner is commendable, but more will be needed in order to address this issue.
- <sup>37</sup> Fuchs 1997 *ISSR* 19-21.
- <sup>38</sup> As propagated by Berghman in most of his contributions.
- <sup>39</sup> Section 56(4)(a). Where the worker suffers a permanent disability or dies the Commissioner will have to estimate the earnings that the employee would have received had he not been injured or killed; this is done with the assistance of actuarial reports.
- <sup>40</sup> Section 56(4)(b).
- <sup>41</sup> Section 56(7).
- <sup>42</sup> Thompson and Benjamin *Commentary* H1-37.
- <sup>43</sup> Benjamin-Greef Report 174.
- <sup>44</sup> See Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 25.
- <sup>45</sup> Benjamin-Greef Report 171, 175; Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 23.
- <sup>46</sup> Section 35.
- <sup>47</sup> Section 100.
- <sup>48</sup> Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 23.
- <sup>49</sup> Definition of “employee”: section 1.
- <sup>50</sup> Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 21 and authorities cited there. They consequently have to resort to common law civil action, but would not qualify for State support (in the form of legal aid) in order to bring their claim.
- <sup>51</sup> ILO *Social Protection of Migrant Workers in South African Paper No. 3 ILO/SAMAT Policy Paper series* (1996).
- <sup>52</sup> In South Africa it is a reality that many people operate in the informal sector (for example, street-vendors) on behalf of someone else. Even though such people could through a formal approach be classified as self-employed this is not in line with reality. In most instances these people are distributing goods/services of (and assisting in furthering the business of) someone else rather than their own private enterprise.
- <sup>53</sup> Section 22(5).
- <sup>54</sup> See Olivier M ‘Workers’ commuting injuries: a South African perspective’—vol. 16(3) *Industrial Law Journal* (1995) 559-576.

- <sup>55</sup> Section 27(3) of the Workmen's Compensation Act 30 of 1941.
- <sup>56</sup> Clause 5(1)(c).
- <sup>57</sup> See par 2.
- <sup>58</sup> See Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 21-22 and authorities cited there.
- <sup>59</sup> See Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 24-25.
- <sup>60</sup> Notably the UIF and the RAF systems. Statutory provisions prohibiting such practices only provide a partial solution; the question remains whether effective enforcement is administratively and otherwise possible, given the absence of a linked database system.
- <sup>61</sup> This is largely due to the absence of a database system which links the state social assistance system with the public insurance funds.
- <sup>62</sup> Myburgh "Investigating models to provide and sustain adequate long-term employment injury benefits in South Africa" (undated) 43.
- <sup>63</sup> Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 25.
- <sup>64</sup> Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 26.
- <sup>65</sup> Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 26.
- <sup>66</sup> 1998 *BCLR* 1106 (CC).
- <sup>67</sup> Parsons 5.
- <sup>68</sup> Parsons 6.
- <sup>69</sup> Mittner *Vrae oor ou Ongevallewet* 69 shows that even though the number of registered employers decreased to 217 000 in the financial year 1997/1998 tariff-income still increased with 15 per cent from R792 million to R916 million.
- <sup>70</sup> See the Benjamin-Greef Report 176.
- <sup>71</sup> See also Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 25.
- <sup>72</sup> Jeebhay MF *et al Submission to the Committee of Enquiry into Comprehensive Social Security—2001* (Department of Public Health and Primary Health Care, UCT) 26.
- <sup>73</sup> As is the case in the UK.
- <sup>74</sup> See the paper entitled "The legal framework of social security in South Africa with reference to: (a) exclusion and marginalisation; (b) legal remedies and adjudication measures; (c) death and survivors' benefits; and (d) legal aid within the social security system" prepared by Olivier MP, Van Niekerk R, Kuppan GY and Mpedi G, prepared for the Committee of Inquiry into a Comprehensive Social Security System (July 2001).
- <sup>75</sup> Fuchs M *The German Industrial injuries insurance system* (1996) 31.
- <sup>76</sup> *Road Accident Fund Act* 56 of 1996.
- <sup>77</sup> Under the RAF Act.
- <sup>78</sup> s 17.
- <sup>79</sup> Draft White Paper GN 170 in GG 18658 of 1998-02-04.
- <sup>80</sup> Act 34 of 1956.
- <sup>81</sup> *AA Insurance v Ndhlovu* 1991 3 SA 655 (E).
- <sup>82</sup> See par 1 *supra*.
- <sup>83</sup> Daniels *MMF—RAF The Practitioner's Guide* E-64.
- <sup>84</sup> Visser PJ and Potgieter JM *Skadevergoedingsreg* (1993) 18.
- <sup>85</sup> Visser & Potgieter *Skadevergoedingsreg* 18.
- <sup>86</sup> See Visser & Potgieter *Skadevergoedingsreg* 19 where it is explained that a *solatium* is a type of solace that is used to make the victim feel better about his lot.
- <sup>87</sup> See the discussion of s 18 under paragraph 4 *supra*. Passengers who do not fall under the provisions of s 18(1)(a) will be classified as social passengers, with the result that their claims will be limited to R25 000 only, excluding any payments for non-patrimonial loss suffered.

- <sup>88</sup> Visser & Potgieter *Skadevergoedingsreg* 67.
- <sup>89</sup> Reynecke MFB “Die Elemente van die begrip skade” 1978 *TSAR* 26.
- <sup>90</sup> Van der Walt CFC “Die voordeeltorekeningsreëlknoppunt van uiteenlopende teorieë oor die oogmerk met skadevergoeding” 1980 *THRHR* 1: Continued and gratuitous employment where an injured person works during a period of incapacity; Donations from third parties other than employers; Accelerated accrual of benefits to dependants from their breadwinner’s estate; Cases of valuable wreckage; The case where a seller resells the *merx* at a profit to a third party after the initial purchaser committed a breach of their contract; The type of case where a party to a contract, whose counterpart breached their contract before he had fulfilled his own obligations under the contract, consequently saving the cost of doing so at all; The factual situation that an injured worker who has no income during the period of his incapacity also saves the income tax he would otherwise have had to pay; and, lastly, the rather obvious case where an injured person, in addition to insurance benefits already received claims, delictual damages of the wrongdoer.
- <sup>91</sup> Actuaries and courts have laid down principles for the calculation of future damages. See, for example, Koch RJ “Discounting to date of delict: fair or unfair?” 1987 *THRHR* 105, where he discusses the cases of *Nhlumayo v General Accident Insurance Co of SA Ltd* 1986 3 SA 859 (D) and *Mayeke v Guardian National Insurance Company Ltd* 1986 4 SA 326 (T). The problem here is that actuaries and lawyers try to bring two different disciplines together, sometimes with results that are unsatisfactory. It is submitted that disputes on future damages should rather be avoided in total by making use of undertakings where the Fund contractually undertakes to compensate future losses.
- <sup>92</sup> Daniels E-30.
- <sup>93</sup> See *supra*.
- <sup>94</sup> Visser & Potgieter *Skadevergoedingsreg* 94 95.
- <sup>95</sup> Visser & Potgieter *Skadevergoedingsreg* 238.
- <sup>96</sup> GN 170 in GG 18658 of 1998-02-04.
- <sup>97</sup> A present commission of enquiry is chaired by Judge Satchwell, and will be reporting in due course.
- <sup>98</sup> Draft White Paper on the Multilateral Motor Vehicle Accidents Fund, 1996.
- <sup>99</sup> Draft White Paper 18.
- <sup>100</sup> Draft White Paper 19.
- <sup>101</sup> Draft White Paper 20.
- <sup>102</sup> Draft White Paper 22.
- <sup>103</sup> Berghman J “The resurgence of poverty and the struggle against exclusion: A new challenge for social security?” 1997 *International Social Security Review* (vol 50) 18, 20; Pieters D *Introduction into the Basic Principles of Social Security* (1993) 2-4.
- <sup>104</sup> Berghman J “Basic Concepts of Social Security” in *Social Security in Europe* (1991) 18.
- <sup>105</sup> See par 7 par 16 of the paper entitled “Coverage against employment injuries and diseases” (Paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System by Prof MP Olivier and Adv E Klinck) July 2001.
- <sup>106</sup> See the 1997 Report of the Committee on Inquiry into a National Health and Safety Council in South Africa (the Benjamin-Greef Report) 100-106 for a similar viewpoint with regard to the employment injury and disease compensation system.
- <sup>107</sup> See par 14.2 of the paper entitled “Coverage against employment injuries and diseases” (Paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System by Prof MP Olivier and Adv E Klinck) July 2001.
- <sup>108</sup> As is the case in the UK.
- <sup>109</sup> See the paper entitled “The legal framework of social security in South Africa with reference to: (a) exclusion and marginalisation; (b) legal remedies and adjudication measures; (c) death and survivors’ benefits; and (d) legal aid within the social security system” prepared by Olivier MP, Van Niekerk R, Kuppan GY and Mpedi G, prepared for the Committee of Inquiry into a Comprehensive Social Security System (July 2001).
- <sup>110</sup> R570 per month.
- <sup>111</sup> See par 16 of the paper entitled “Coverage against employment injuries and diseases” (Paper prepared for the Ministerial Committee of Inquiry into a Comprehensive Social Security System by Prof MP Olivier and Adv E Klinck) July 2001.