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# Zero- Hours Contracts in South Africa: Is there a need for Legislative Intervention

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# ZERO-HOURS CONTRACTS IN SOUTH AFRICA: IS THERE A NEED FOR LEGISLATIVE INTERVENTION?

*by*

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Submitted in partial fulfilment of the requirements for the degree of

Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Date: 13 October 2023

**DECLARATION**

I, _852595_(Student number, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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Abstract

The South African law of contract is centred on the principles of freedom of contract and good faith. These principles mean that parties are free to choose what terms to contract on and with whom to contract with, provided that the result is not contrary to public policy. Consequently, the resulting contract is likely to be more favourable to the party in a higher bargaining position. It is noted that there is no general rule providing that contracts must be fair. Considering this, zero-hours contracts freely entered into, which are not against public policy, are valid in South Africa, even if they are unfair. According to research conducted by the CIPD, zero-hours contracts can benefit both parties if they are well regulated. The CIPD research also suggests that the contracts are often only advantageous to employees whose circumstances do not allow them to be engaged in full-time employment.

This paper explores the need for the legislature to intervene in regulating zero-hours contracts. It emphasizes the need for the legislature to limit the unfettered exercise of bargaining power in zero-hours contracts to provide for the balancing of employee and employer rights. South Africa's current legal framework does not specifically regulate the use of zero-hours contracts. In the absence of such regulation, vulnerable employees find themselves at the mercy of unscrupulous employers who exploit the weaknesses in the legal system for their own gain. The effect, thereof, being the blatant disregard of statutory obligations, Constitutional rights and values, and an unfettered exercise of power.

The paper further explores the regulation of zero-hours contracts in jurisdictions such as the United Kingdom and New Zealand which have legislation specifically dealing with these contracts and recommends that South Africa should follow suit. It also recommends, *inter alia*, that the Labour Relations Act be amended to specifically deal with zero-hours contracts, that the use of exclusivity clauses be reserved for specific circumstances, and the amendment of the Basic Conditions of Employment Act to provide for minimum working hours. It concludes that there is a need for the legislature to intervene in regulating zero-hours contracts to ensure the protection of vulnerable employees from exploitation; the fair balancing of employee and employer rights; the advancement of Constitutional values of Ubuntu, fairness, and dignity; and the prevention of abuse of power by parties in strong bargaining positions.

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1. Introduction and background to the research problem

The Constitution of the Republic of South Africa, 1996 (the Constitution) provides everyone with the right to fair labour practices.[1] This right is particularly important given South Africa's past labour laws which catered mostly to the interests of employers and left employees with little to no protection of the law.[2] The Labour Relations Act[3] (the LRA) and the Basic Conditions of Employment Act[4] (the BCEA), were enacted to give effect to this right. These Acts essentially ensure, among other things, that employees are protected against unfair labour practices and exploitation. Due to the decline in standard employment[5] and the emergence of trends of non-standard employment, the protection provided by this right has become insufficient.

The emergence of non-standard employment has brought about immense precarity for employees in countries with developing economies like South Africa.[6] The precarity is brought about by the fact that this type of employment does not provide for security and consistency which one needs to maintain a livelihood.[7] Zero-hours Contracts (ZHCs) are one of the consequences of non-standard types of employment that significantly promote the prevalence of such precarity. Zero-hours Contracts are employment contracts in which the employer and employee enter into an agreement that the employee may be called in to work, without setting out the number of hours

[1] Section 23 of the Constitution.

[2] Conradie M 'The Constitutional Right to Fair Labour Practices: A Consideration of the Influence and Continued Importance of the Historical Regulation of (un)fair Labour Practice pre-1977' (2016) 22 *Fundamina* 163 at 164.

[3] Act 66 of 1995.

[4] Act 75 of 1997.

[5] Andrew Herod & Rob Lambert 'Neoliberalism, precarious work and remaking the geography of global capitalism' in Rob Lambert & Andrew Herod (eds), *Neoliberal Capitalism and Precarious Work* (2016) ch 1 at 2.

[6] Ibid.

[7] Ibid at 3.

that they will work or when they will be called to work.[8] Essentially this means that the employee will only be remunerated for work that they have performed.[9]

This type of contract has the potential of denying employees various Constitutional rights such as the right to fair labour practices, dignity, and equality. It also contravenes s 29(1) of the BCEA in that when entered into, the employee does not know the ordinary days or hours they will work or how often they will be remunerated.[10] The fact that the BCEA does not set a minimum number of working hours further contributes to the prevalence of such contracts.

Authors agree that these types of contracts show the worst exploitative traits in the sense that employers can use them for cheap labour[11], as they tend to be popular in industries lacking trade union presence such as hospitality, retail and agriculture.[12] They also identified that these industries are dominated by women.[13] Women in these industries, who are under such contracts, find themselves having to deal with requests for sexual favours or bribes in order to be called in for work.[14] If they refuse to abide by the requests, they are often dismissed indirectly by never being called in for work as the contracts do not set minimum hours or days of work.[15] In certain circumstances, the employee will also be indirectly dismissed if they cannot come in to work when

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[8] New Frame 'Zero Hours contracts are a poverty sentence' 6 May 2020. available at *https://www.newframe.com/zero-hours-contracts-are-a-poverty-sentence/,* accessed on 09 March 2023.

[9] Ibid.

[10] Dieketseng Damane and Clement Marumoagae 'Zero rated contracts in South Africa' (2021) 623 *DE REBUS* 1-28 at 11.

[11] Jerry Mmanoko Mathekga 'The Analyses of Non-standard Employment and Contemporary Labour Protest in South Africa' (2016) 40 *South African Journal of Labour Relations* 139 at 145.

[12] Anna Koens & Roy C. Wood 'Analysis of international employment levels in hospitality occupations using secondary statistics' (2017) 19 *International Journal of Tourism Research* 496 at 498.

[13] ES Fourie 'Non-standard workers: The South African Context, International Law and Regulation by the European Union' (2008) 11:4 PER/*PELJ* 110 at 110

[14] Femke Brandt 'Asserting autonomy and belonging in precarious times: Working lives of Women Labour Broker Workers in Johannesburg, South Africa' (2022) *Third World Thematics: A TWQ Journal* DOI: 10.1080/23802014.2022.2070270 at 14.

[15] Ibid note 9.

they are called to do so.[16] In turn, this undermines the legislative frameworks in place for dismissals.[17]

Some authors argue that these types of contracts expose employees to employment that has no opportunities for growth and discourages skills development[18] as they often move from one employer to another and with no prospects of permanent employment.[19] Notwithstanding the above, there has never been a case before a South Africa court questioning the validity of these contracts. Despite the apparent lack of case law or a legislative framework regulating ZHCs, many South African authors have not called for a reform in law to remedy the infringement of employees' Constitutional rights to fair labour practices, dignity, and equality. The authors have succeeded in identifying the exploitative nature of these contracts; however, they have failed to provide solutions to the problem.

There have been developments in countries such as New Zealand and the United Kingdom in curing the negative implications of these contracts. The New Zealand government implemented legislation in 2016 which made it a requirement for employment contracts such as ZHCs to guarantee minimum working hours.[20] In the United Kingdom, the Supreme court found in favour of workers on ZHCs holding that those with contracts that have been in force for a whole year will be entitled to the same annual holiday leave as their comparators on permanent contracts, irrespective of the number of hours they work.[21]

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[16] Ibid.

[17] Ibid.

[18] Thabang E. Marule, Willem J.S Schurink and Wilfred I. Ukpere 'Exploring the Work-Life Experiences of Temporary Employment Service Employees in South Africa' (2019) *8 Journal Reviews on Global Economics* 1157 at 1157.

[19] Herod & Lambert op cit at note 4.

[20] Iain Campbell International Labour Organisation- 'On-call and related forms of casual work in New Zealand and Australia' (2018) 102 *Conditions of Work and Employment Series* at 1.

[21] *DGWGO* 'Supreme Court Rules in Favour of Scottish Zero Hour Contract Workers' 10 August 2022, available at *https://www.dgwgo.com/business/supreme-court-rules-favour-scottish-zero-hour-contract-workers*/, accessed on 09 March 2023.

### 1.1. Research question

This paper will investigate whether there is a need for South Africa to develop a legislative framework to specifically regulate and deal with Zero-Hours Contracts, in light of the Constitutional values of equality, fairness, and Ubuntu. It will do so by exploring the position of ZHCs in South Africa, the validity and fairness of ZHCs; and whether there are any lessons to be learnt from other jurisdictions who have laws that specifically address and regulate these contracts such as the United Kingdom and New Zealand. It will further recommend that the LRA be amended to specifically deal with ZHCs and that the BCEA be further amended to provide for minimum working hours. The research questions are as follows:

1. Are Zero-Hours Contracts in South Africa valid in light of Constitutional values?
2. Does South Africa have a legislative framework regulating Zero-Hours contracts? If so, does the current framework provide adequate regulation in light of Constitutional values? If not, is there a need for further regulation?
3. Are there any lessons to be learnt from other jurisdictions, such as New Zealand and the United Kingdom, who have legislation regulating such contracts?
4. Are the approaches compatible with South African law?

### 1.2. Research methodology

The method of research is qualitative and will comprise consulting primary sources such as legislation, regulations, and case law. Secondary sources in the form of journal articles, textbooks, commentary, and internet articles will also be used.

## 2. Types of employment

In the 21st century, a workforce is made up of various working arrangements which are typically characterised as standard and non-standard types of employment.[22] These employment relationships include but are not limited to employees working on a permanent and temporary basis.[23] The permanent working arrangement constitutes

[22] *Chartered Institute of Personnel and Development CIPD* 'Zero-Hours Contracts: Understanding the law' June 2021 Guide available at *https://www.cipd.org/globalassets/media/knowledge-hub/guides/zero-hours-contracts-guide-web-2021_tcm18-10706.pdf* accessed on 19 May 2023 at 2.

[23] Ibid.

the traditional, standard employment relationship, whereas the temporary working arrangement comprises of atypical and non-standard employment relationships.[24]

> "On average, employers estimate that 70% of their workforce is made up of full-time employees on permanent contracts, 20% is made up of part-time employees on permanent employment contracts, and 10% is made up of a mixture of employees, casual workers, and self-employed and agency workers in atypical employment relationships".[25]

In essence, ZHCs fall within the scope of atypical employment relationships with part-time employees employed on permanent contracts. The various types of employment relationships are discussed below.

### 2.1. Standard employment

The standard type of employment is permanent, full-time employment for the same employer, usually for an indefinite period.[26] It is the traditional employment which legislatures had in mind when labour laws were drafted, and for this reason, people engaged in standard employment are usually able to enforce their employment rights without much difficulty. Standard employment is characterised, in simple terms, by a "…worker with a contract of employment who has access to benefits and rights established by public law. These workers can in turn agree with their employer on working conditions above minimum legal requirements".[27]

Essentially, employees on standard employment typically have the power to negotiate with the employer on the conditions of their employment and enjoy various benefits such as pension, medical aid, psychosocial support and annual or special leave. They also enjoy the full protection of the law against unfair labour practices or

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[24] Ibid.

[25] *Chartered Institute of Personnel and Development CIPD* 'Zero-hours contracts: Myth and reality' Research Report, November 2013 available at *https://www.cipd.org/globalassets/media/knowledge/knowledge-hub/reports/zero-hours-contracts_2013-myth-reality_tcm18-10710.pdf* accessed on 19 May 2023 at 8.

[26] Ibid.

[27] Nicola Countouris 'Defining and regulating work relations for the future of work' *International Labour Organization* February 2019, available at *https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/documents/publication/wcms_677999.pdf*, accessed on 8 June 2023 at 4.

unfair dismissals. This type of employment is regulated by a contract of employment, often drafted in line with statutory obligations, which sets out the rights and responsibilities that the employer and employee owe to one another.[28]

### 2.2. Non-standard employment

Non-standard employment arose as a result of increasing economic competition, among other things, which forced employers to explore other ways of meeting business demands while maximising profits.[29] Some argue that employers also adopted these working arrangements to limit the costs of labour and the benefits they offer to employees on standard employment.[30] Non-standard employment comprises of various types of employment relationships such as part-time, casual, seasonal, fixed-term work etc:[31]

> "'Atypical', 'non-standard', or even 'marginal' are terms used to describe these new workers and to refer to those engaged, for instance, in part-time work, contract work, self-employment, temporary, fixed-term, seasonal, causal, piece-rate work, or to employees supplied by employment agencies, home workers and those employed in the informal economy".[32]

Fourie argues that people working in non-standard employment are compensated for the work performed as opposed to their time.[33] According to Fourie, these employees are often unskilled and are prone to exploitation due to their peculiar employment which makes enforcing their rights particularly difficult.[34]

This type of employment can be argued to also deny employment benefits to those engaged in it due to its nature of infrequency. The result of this, according to

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[28] Ibid.

[29] A A Ntisa, M Dhurup, P A Joubert 'The Contract of Employment Status and its Influence on the Job Satisfaction of Academics within South African Universities of Technology' (2016) 8 *International Journal of Social Sciences and Humanity Studies* 180 at 183.

[30] Ibid.

[31]Fourie op cit at 111.

[32] Ibid.

[33] Ibid.

[34] Ibid.

Fenwick, is having redundant employment contracts which fail to hold employers accountable in terms of their statutory obligations:

> "…the contract of employment is increasingly challenged in its ability to fulfil this critical regulatory goal in the labour market. First, workers are increasingly engaged in nonstandard employment, including temporary employment; temporary agency work and other work involving multiple parties; ambiguous employment relationships; and part-time employment. These arrangements can provide businesses and workers with important flexibility. But they are often associated with significant decent-work gaps such as lower earnings, reduced social security coverage and diminished working conditions".[35]

Zero-hours contracts are a fitting example of employment contracts that deny employees the benefits of employment due to its scarcity and at the same time fail to hold employers accountable in relation to their statutory obligations because of their peculiarity. Zero-hours contracts are discussed in detail below.

3. Zero-Hours Contracts

According to the Chartered Institute of Personnel and Development (CIPD), a Zero-hours contract is:

> "an agreement between two parties that one may be asked to perform work for the other but there is no set minimum number of hours. The contract will provide what pay the individual will get if he or she does work and will deal with the circumstances in which work may be offered (and, possibly, turned down)".[36]

Essentially, employees are employed on a permanent basis but work part-time, or as and when work becomes available or as and when the employer may require their services. It is important to note that the term 'Zero-Hours Contract' is not a recognized legal term.[37] Employers can use ZHCs with either employees or workers,[38]

[35] Ibid note 27.

[36] Ibid note 25.

[37] Ibid.

[38] Ibid at 4.

and they also have discretion on whether to grant them additional rights that they would not be entitled to under statute due to their employment status.[39]

Zero-Hours Contracts are also known to include exclusivity clauses to prevent employee from working for another employer,[40] usually in the same area of business.[41] In addition to exclusivity clauses, some contracts may contain clauses that require the employee to be available whenever they are called in to work.[42] In essence, this has the effect of requiring an employee to reject an offer or withdraw acceptance thereof, from another employer, should the employer with the contract containing this clause call them to work.

Research indicates that the main discussions around ZHCs are in relation to the use of these contracts to deny employees their statutory rights and benefits, as well the financial insecurity they bring due to not having guaranteed working hours.[43] According to Grogan:

"These types of contracts lend themselves to perpetuate employers to abuse employees by evading the procedural requirements for retrenchment and the obligation to pay severance monies by keeping employees indefinitely on such contracts and terminating them when the employees' services are no longer required".[44]

In addition, Mantouvalou argues that:

[39] Ibid at 6.

[40] Ibid at 16.

[41] Andrew Willis 'Agreement Not to Work for Competitors' *Croner UK* 11 December 2020, available at *https://croner.co.uk/resources/contracts-documentation/exclusivity-clause-agreement-employment-contracts/,* accessed on 23 July 2023.

[42] Ibid at 17.

[43] *Chartered Institute of Personnel and Development CIPD* 'Zero Hours Contracts: Myth and Reality' Research Report November 2013 available at *https://www.cipd.org/globalassets/media/knowledge/knowledge-hub/reports/zero-hours-contracts_2013-myth-reality_tcm18-10710.pdf,* accessed on 19 May 2023 at 6.

[44] Ntisa op cit et al at 185.

"the flexibility that is valued by some is linked to insecurity for many, and particularly for those who are already in a position of disadvantage for other reasons, such as their race or gender".[45]

It is also argued that due to the fluctuating income resulting from having no guaranteed hours, employees "...cannot plan their private life, have a family, pay their rent and cover other basic needs".[46]

Furthermore, it is argued that these employees often endure unpleasant working conditions and do not complain due to the fear of being victimised.[47] According to Mantouvalou, the reason for the prevalence of the negative effects that ZHCs have on employees are "state mediated structures of injustice".[48] State mediated structures of injustice are, according to Mantouvalou, "…concrete legal rules that are *prima facie* legitimate but which increase workers' vulnerability that is systematically exploited by private actors".[49]

This means that although the state may implement rules to protect employees' rights and to eliminate exploitation, the same rules fall short in achieving these objectives due to the inherent unequal bargaining power between employees and employers, as well as manipulation by unethical employers.[50] The shortfalls of the legal rules regulating ZHCs in South Africa are discussed below.

4. The position of Zero-Hours Contracts in South Africa

The South African common law of contract is centred on the principles of good faith and freedom of contract.[51] According to Bhana et al, freedom of contract, on the one

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[45] Virginia Mantouvalou 'Welfare-to-Work, Zero-Hours Contracts and Human Rights' (2022) 13 *European Labour Law Journal* 431 at 433.

[46] Mantouvalou op cit citing M. Ball et al 'Agency Workers and Zero Hours – The Story of Hidden Exploitation' (2017) *University of Salford Research Report* at 17.

[47] Ibid.

[48] Virginia Mantouvalou 'Structures of Injustice, the Law and Exploitative Work' (2022) 2 *UCL Research Paper Series* 1-14 at 1.

[49] Ibid.

[50] Ibid at 8-10.

[51] Deeksha Bhana, Minette Nortjie & Elsje Bonthuys *Student's Guide to the Law of Contract* 5 ed (2015) at 8.

hand, means that parties to a contract have to decide on "whether to contract, whom to contract and on what terms to contract".[52] Good faith, on the other hand, means that the parties have to behave honestly when negotiating the terms of a contract and treat each other with respect in the contractual relationship.[53] In essence, together these principles mean that parties can contract with whomever they wish, and on whatever terms they wish to, while exercising good faith.

In addition, our law of contract also consists of the principle of *pacta sunt servanda*, which means that obligations that are created by an agreement, sincerely entered into, must be honoured.[54] The above principles are not without limitation. A contract will not be enforced if it goes against public policy.[55] In essence, this means that if parties exercise their right to freedom of contract, to enter into an agreement with terms that go against public policy, such as exploitation or slavery, that agreement will not be enforced.

Based on the above, a ZHC would be valid in South Africa where the parties seriously intend to enter into it, exercise good faith in carrying out their obligations to each other, and the terms do not go against public policy. The question of whether ZHCs are in line with public policy will be discussed under section 5.

### 4.1. Are Zero-Hours contracts sufficiently regulated in South Africa?

As discussed above, in terms of the South African common law of contract, ZHCs are valid. However, this is not the case in relation to legislation. At face value, the contracts seem to be valid, considering the governing principles of contract law, however, in terms of legislation, these contracts may very well constitute an unfair labour practice. Notwithstanding the above, ZHCs also have the potential of being used to thwart the legislative and Constitutional obligations that employers owe to their employees.

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[52] Ibid.

[53] Ibid.

[54] Thandazile Makasi 'Limiting the Pacta Sunt Servanda?' *GoLegal* available at *https://www.golegal.co.za/pacta-sunt-servanda-contract/*, accessed on 4 August 2023.

[55] Ibid.

4.1.1. The Basic Condition of Employment Act and the Labour Relations Act.

The Basic Conditions of Employment Act sets out the particulars of employment and remuneration in chapter four. In terms of s 29(1), an employer must provide an employee, when they commence their employment, with the particulars of their employment in writing. The particulars include, among other things, "the employee's ordinary hours of work and days of work", and "how frequently remuneration will be paid".

It is clear from the provision that the purpose of requiring an employer to provide an employee with these particulars at the beginning of their employment, is to eliminate any precarity in relation to the terms and conditions of their employment. In light of this section, ZHCs at their core, are contrary to this provision, as their defining feature is that they do not stipulate the hours or days that the employee will work or how often they will be remunerated.

Section 23 of the Constitution provides everyone with the right to fair labour practices. This right is manifested in s 185 of the LRA which provides that every employee has the right, among other things, not to be subjected to unfair labour practice. The LRA defines unfair labour practice as:

"Any unfair act or omission that arises between an employer and an employee involving…the unfair suspension of an employee or any other unfair disciplinary action short of a dismissal in respect of an employee".[56]

The LRA also provides for a process of dismissing an employee that must be followed for the dismissal to be fair. In terms of the Code of Good Practice: Dismissal in Schedule 8(2) a dismissal is unfair if:

"it is not effected for a fair reason and in accordance with a fair procedure, even if it complies with any notice period in a contract of employment or in legislation governing employment, Whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of a dismissal as a penalty".[57]

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[56] Ibid note 3 s 186(2)*(b).*

[57] Ibid Schedule 8, Code of Good Practice: Dismissal.

This means that, by law, an employer cannot indirectly dismiss an employee by not calling them to work as that would not only constitute an unfair labour practice but would also constitute an unfair dismissal. Where an employer chooses to thwart the legislative processes in place for a dismissal as described above, they would then be acting contrary to the principle of good faith as well as going against public policy which in essence would render the contract invalid or voidable.

### 4.2. *Lupindo and Others v Ferrero SA (Pty) Ltd and Adcorp Blu*.

As mentioned above, there has never been a case before a South African court where the validity of zero-hours contracts has been questioned. However, the Commission for Conciliation, Mediation and Arbitration (CCMA) handed down an arbitration award in October 2020 in *Lupindo and Others v Ferrero SA (Pty) Ltd and Adcorp Blu (Lupindo).*[58]

In the case of *Lupindo*, a Temporary Employment Service (TES), Adcorp Blu, placed workers at a Ferrero production plant who were subsequently deemed employees of Ferrero as per s 198A(3)*(b)* of the LRA.[59] A TES procures workers for a client and remunerates them.[60] In terms of s 198A(3)*(b):*

> "an employee that is not performing temporary employment service for a client, for a period not exceeding three months, as a substitute for an employee of the client who is temporarily absent, or in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6), is deemed to be the employee of that client and the client is deemed to be the employer, and on a permanent basis, subject to the provisions of section 198B".

In essence, this section offers protection to vulnerable employees in precarious employment relationships by ensuring that they get absorbed by a client provided that the requirements set out in the Act are met. It is important to note that s 198A(5) requires that a deemed employee in terms of subsection (3)*(b)* not be treated less

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[58] (CCMA) (GAVL 3153-18, 22-10-2020).

[59] Supra.

[60] Paul Benjamin, 'Restructuring Triangular Employment: The Interpretation of Section 198A of the Labour Relations Act' (2016) 37 *Industrial Law Journal* 28 at 29.

favourably unless there is a justifiable reason for the differentiation. Ferrero had employed the employees under ZHCs which did not stipulate the hours that they would work or the frequency of their remuneration.[61]

The employees argued that they were entitled to no less favourable treatment than their comparators, which are employees doing the same work, on standard employment contracts and were guaranteed working hours.[62] Ferrero argued that the employees were part-time workers who were not eligible to have guaranteed working hours[63] or benefits[64] and that their business model did not allow them to have the employees on full time hours.[65]

Ferrero further argued that the reason it could not guarantee the deemed employees minimum working hours was, among other things, because in terms of its business model, it was not possible to know beyond a week how much it had to produce, and thus could not guarantee the hours without making a loss.[66] The Commissioner therefore had to determine whether:

"the employment of the Applicants on a flexible working hour arrangement with no guaranteed minimum hours of work per week amounts to less favourable treatment compared to Ferrero directly employed employees performing the same or similar work?"[67]

The Commissioner found that the arrangement denied the deemed employees favourable treatment compared to those directly employed by Ferrero,[68] and that Ferrero's reasons did not "amount to a justifiable reason to treat the Applicants less favourably than their directly employed comparators".[69] The Commissioner argued that the treatment the employees were subjected to was against public policy and s 198A(5) of the LRA.[70] Furthermore, the Commissioner argued that Ferrero, in treating

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[61] Ibid note 10.

[62] Supra *Lupindo* para 44.

[63] Supra paras 76-78.

[64] Supra para 79.2.

[65] Supra note 62.

[66] Supra para 90.

[67] Supra para 189.

[68] Supra para 190.

[69] Supra para 193.

[70] Supra note 67.

the deemed employees less favourably, had undermined and violated the LRA and s 198A(5)[71] and had also "transferred the risk with running a business" to the employees [72] and offered its directly employed employees "full benefits, mental and job security".[73]

In addition, the Commissioner found that Ferrero failed to exercise fairness in dealing with the deemed employees and that its treatment infringed on their rights to dignity and equality,[74] as s 198A(5) also applied to the allocation of hours.[75] The Commissioner therefore held that the use of ZHCs with the deemed employees constituted an unfair labour practice in the context of s 198A.

The above section was introduced as part of the 2014 amendments to the LRA to offer legal protection to vulnerable employees in precarious employment relationships.[76] The amendments were also introduced to regulate, among other things, temporary employment services.[77] The protection afforded by these amendments, however, is not broad enough to cover other instances of vulnerability that employees in precarious employment find themselves in. For instance, s 198A (5) will not come to the aid of deemed employees who work for an employer that does not offer guaranteed working hours. The employees in such a case would end up in the same position as the deemed employees in *Lupindo,* except they will not be able to argue that they are treated less favourably, as there would be no employees with guaranteed working hours. This then raises the question of the point of sections like s198A(5) in the context of ZHCs where employers don't guarantee working hours.

The arbitration award shows the context in which ZHCs usually occur in South Africa and reiterates the main issue of such contracts, which is the uncertainty and

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[71] Supra para 205.

[72] Supra para 114.

[73] Supra.

[74] Supra para 115.

[75] Supra note 72 above.

[76] *ProBono.Org* "Temporary Employment Services (Labour Brokers) and their future in the South African Labour spectrum" August 27 2020 available at *https://probono.org.za/temporary-employment-services-labour-brokers-and-their-future-in-the-south-african-labour-spectrum/* accessed on 31 August 2023.

[77] Clarence Tshoose and Benjamin Tsweledi 'A Critique of the Protection Afforded to Non-standard Workers in a Temporary Employment Services Context in South Africa' (2014) 18 *Law, Democracy & Development* 334 at 346.

lack of security they come with. Although the 2014 amendments and the *Lupindo* arbitration award show a move in the right direction, the reality is that they are, arguably, only useful in the case illustrated above. The lack of robust legislative regulation, i.e., requiring employers to provide minimum working hours, continues to leave employees under ZHCs open to exploitation when there is already an inherent unequal bargaining power in the employment relationship.[78]

## 5. The validity of Zero-Hours Contracts in light of Constitutional values

As discussed above, ZHCs are valid in terms of South African common law as a result of the fundamental principles of freedom of contract and good faith. However, the case is not as simple when looking at these contracts considering the Constitutional values of fairness and Ubuntu. In *Barkhuizen v Napier* (*Barkhuizen*) the court explained that:

> "public policy imports the notions of fairness, justice, and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair".[79]

It is therefore noted that a contract will be illegal under common law if it is contrary to public policy and will be illegal in terms of statute if it is prohibited by legislation.[80] The values, together with the principles of freedom of contract and good faith,[81] enjoy protection under the Constitution which creates conflict in the competing interests of employers and employees under ZHCs. The conflict that arises as a result is discussed below.

### 5.1. Public policy

In South Africa, fairness as a standalone value will not be enough to invalidate a contractual clause where *pacta sunt servanda* is concerned.[82] In *Bredenkamp v Standard Bank*, the court held that "…fairness is not a free-standing requirement for

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[78] Tshoose and Tsweledi op cit at 340.

[79] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 73.

[80] Bhana et al op cit at 174.

[81] Ibid at 9.

[82] Bhana et al op cit at 165.

the exercise of a contractual right…".[83] This is because parties willingly enter into a contract, being aware of its terms and conditions.[84] *Pacta sunt servanda* therefore means that the terms of a contract that has been willingly entered into will be strictly upheld, provided that they are not contrary to public policy.[85] In *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd*[86] the court opined that public policy:

"…is the general sense of justice of the community, the boni mores, manifested in public opinion".[87]

Public policy is made up of values such as fairness, the legal convictions of the community, the Bill of Rights etc.[88] In *Barkhuizen* the court explained that:

"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus, a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."[89]

According to Bhana et al, in terms of South African contract law, contractual terms do not have be objectively fair.[90] This means that terms of a contract are likely to be enforced by our courts even if they are unfair. The authors argue that:

"Where people are free to bargain with one another, the resulting contract will generally be fair to both parties, since each party will only enter into the contract if she thinks it is to her

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[83] *Bredenkamp v Standard Bank* 2010 (4) SA 468 (SCA) para 53.

[84] Bhana et al op cit at 165.

[85] Supra *Bredenkamp*.

[86] Supra *Barkhuizen* para 73 citing *Lorimar Productions Inc and Others v Sterling Clothing Manufacturers (Pty) Ltd; Lorimar Productions Inc and Others v OK Hyperama Ltd and Others; Lorimar Productions Inc and Others v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1152-3.

[87] Supra.

[88] Bhana et al op cit at 165.

[89] Supra *Barkhuizen* para 29.

[90] Bhana et al op cit at 165.

advantage…Courts should not protect people against their own bad decisions, because every person should look out for her own interests".[91]

In theory, this is true, however it is not always the case due to unequal bargaining power. Mupangayanhu argues that:

"A party in a weak bargaining position has little option but to contract on harsh and oppressive terms".[92]

It could be argued that in any employment relationship, the employee is always at a disadvantaged position. This is certainly the case in ZHCs, and it is exacerbated by the fact that people who are subject to these contracts are, in most cases, uneducated and lack awareness or understanding of Constitutional or statutory rights. The aforementioned reasons are part of the reason why there is a need to regulate ZHCs, considering the values of Ubuntu and fairness.

### 5.2. Ubuntu and Fairness

In *Barkhuizen,* Ngcobo J emphasised the importance of taking Constitutional values into account when determining whether contractual clauses go against public policy.[93] As discussed above, Constitutional values include, *inter alia*, the rights contained in the Bill of Rights, Ubuntu, and fairness. Accordingly, the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*[94]*,* expressed the necessity to instill Constitutional values such as ubuntu and fairness into the law of contract.[95]

As explained in *Barkhuizen*, "public policy imports the notions of fairness, justice and reasonableness".[96] This means that public policy requires that freedom of contract be exercised in a fair and reasonable manner that gives effect to Constitutional values as well as fundamental rights. In *S v Makwanyane and Another*[97]

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[91] Ibid.

[92] Yeukai Mupangavanhu 'Fairness a slippery concept: The common law of contract and the Consumer Protection Act 68 of 2008' (2015) *De Jure* 116 at 121.

[93] Supra *Barkhuizen* para 30.

[94] 2012 (1) SA 256 (CC).

[95] Supra para 71.

[96] Supra Barkhuizen para 73.

[97] 1995 (3) SA 391.

the court outlined that Ubuntu as a value embodies the notions of "justice, humanness and fairness".[98] Furthermore, the court explained that while Ubuntu comprises principles of:

"…respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense, it denotes humanity and morality. Its spirit emphasises respect for human dignity…".[99]

Furthermore, Langa J emphasised that Ubuntu:

"…recognises a person's status as a human being, entitled to unconditional respect, dignity, value, and acceptance from the members of the community such person happens to be part of…The person has a corresponding duty to give the same respect, dignity, value, and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all".[100]

From the above, Ubuntu requires that parties in a contractual relationship treat each other with humanity, fairness, respect, and dignity. It also requires that each party acknowledge that the other is entitled to the full enjoyment of their legal rights and that those in a position of power, refrain from imposing exploitative contractual clauses. In the context of ZHCs, it simply means that an employer should not treat an employee as merely a means to an end, but rather as a means to his/her own end.

Furthermore, in *Africa Personnel Services v Government of the Republic of Namibia* [101] the court stressed that:

**"**Labour is not a tradable innate object but an activity of human beings. Unlike a commodity, it cannot be bought or sold in the market without regard to the inseparable connection it has to the individual who produces it, it is integral to the person of a human being and intimately related to the skills, experience, qualifications, personality, and life of that person. It is the means through which human beings provide for themselves, their dependents, and their communities. A way through which they interact with others and assert themselves as contributing to society; and activity through which to foster their spiritual wellbeing, to

[98] Supra para 237.

[99] Supra 308.

[100] Supra 224.

[101] 2011 1 BLLR (Nms) 2 (1).

enhance their abilities and to fulfil their potential. All these factors must be brought into the equation of labour relations if social justice and fairness are to be achieved at the workplace; if social security, stability, and peace are to be maintained".[102]

In essence, Ubuntu means that although an employer has the right to freedom of contract and has the upper hand in the employment relationship, he/she is not precluded from treating employees under ZHCs as fellow human beings who deserve to be treated with dignity and are worthy of respect and compassion.[103]

In light of the above discussions, a typical ZHC is invalid in South Africa in terms of public policy because it does not only contravene statutory provisions put in place to regulate labour relationships and prevent unfair labour practices, but it is also not in line with Constitutional values of fairness, ubuntu and dignity. Although contractual terms do not have be objectively fair, public policy requires that they be substantively fair and in line with our Constitutional values to prevent exploitation of vulnerable individuals who are subject to them. The competing interests of employees and employers in zero-hours contractual relationships are expanded on in the following sections.

## 6. The Competing Interests: Employer's business interests against the employee's Constitutional rights

In any employment relationship, both the employer and employee have legal rights that are protected by statute and the common law.[104] Employment relationships that arise from ZHCs are bound to give rise to competing interests for the employer and the employee. The employer, on the one hand, wishes to be flexible and be able to manage fluctuating business demands. The employee, on the other hand, wishes to have stable employment with a consistent income.

Both parties' interests are valid, however the employee's interests are likely to be overlooked because of the unequal bargaining power that exists between the parties. Although it is evidently clear that ZHCs are less favourable for employees,

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[102] Supra para 70.

[103] *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W) para 63.

[104] André Claassen 'Employee and employer rights" *Labour Guide* available at *https://labourguide.co.za/general/employee-a-employer-rights/* accessed on 30 September 2023.

some argue that these contracts have similar advantages for employees.[105] The differing views of employers and employees in relation to the benefits of ZHCs are discussed in the sections below.

### 6.1. Employer rights and interests and rationale for using Zero-Hours Contracts

In terms of South African law, both the employer and employee have the rights to freedom of association,[106] freedom of trade, occupation, and profession,[107] and the right to fair labour practices.[108] For the employer, the rights to freedom of association and trade are closely connected to and strengthened by the principle of freedom of contract. Essentially, this means that an employer is free to contract with whomever they wish, and on whatever terms they desire.

Since the employer holds the higher position in relation to bargaining power, it means that they have the power to decide on contractual terms that are mostly beneficial to them and their businesses. In the context of ZHCs, this means that employers will contract on terms which suit their business interests, allow them flexibility, and which put them in a better position to manage fluctuating business demands.[109] Thus, the justification for the use of ZHCs, for most employers, follows a common theme across different business sectors which is either flexibility or managing fluctuations in demand.[110] Case studies from research conducted by the CIPD relating to the rationale of employers for using the contracts are discussed below.

#### 6.1.1. Hertz United Kingdom (UK)

Hertz UK is a car rental company which employed approximately 1000 staff, 300 of which were employed on ZHCs at the time when the research was conducted.[111] The pool of employees ranged from low-skilled to high-skilled staff such as customer

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[105] Ibid note 43 at 7.

[106] Section 18 of the Constitution.

[107] Ibid s 21.

[108] Ibid s 25.

[109] Ibid note 105 at 10.

[110] Ibid.

[111] Ibid.

service representatives, drivers and self-employed contractors.[112] The employees were employed on contracts which were somewhat similar to those of the permanently employed staff, and which outlined the terms and conditions of their employment including benefits and circumstances in which the contract would be terminated.[113] The hourly rate of Hertz's zero-hours employees was similar to that of their comparators performing the same work who were employed on standard contracts.[114]

According to the research conducted by the CIPD, Hertz UK used ZHCs to manage fluctuations in demand as its business tends to peak in summer and during holidays.[115] It also used these contracts for flexibility and as a way of filling permanent positions.[116] Hertz argued that employees under ZHCs were under no obligation to accept work when it was offered and that the contracts did not include an exclusivity clause.[117]

Furthermore, it argued that where an employee was called to work on numerous occasions, and they declined the offer in absence of a prior agreement, and in the same period, the company had the discretion to void the contract.[118] In addition, where Hertz cancelled a shift at short notice, the employee would be paid for a minimum of three hours' work.[119]

### 6.1.2. Produce World Group

Produce World is a company that operates in the wholesale and distribution of fruits and vegetables,[120] and employed around 735 staff, at the time the research was conducted, 40 of which were on ZHCs.[121] Produce World's zero-hours employees

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[112] Ibid.

[113] Ibid.

[114] Ibid.

[115] Ibid.

[116] Ibid.

[117] Ibid.

[118] Ibid.

[119] Ibid.

[120] *RocketReach* 'Produce World Group Information' available at *https://rocketreach.co/produce-world-group-profile_b5d6ad7af42e331e*, accessed on 30 September 2023.

[121] Ibid note 119 at 17.

were notably students who benefited from the flexibility provided by the contracts.[122] The employees were permitted benefits and rates that were similar to those of Produce World's permanently employed staff on standard contracts.[123]

The company's rationale for using ZHCs followed the common theme of managing fluctuating production demands for one of its factories as well as providing flexible working hours for employees.[124] Management would determine the amount of labour needed for production for the coming week and the employees would choose the number of hours or days they wished to work.[125] The parties were obligated to give each other 24 hours' notice where there was a change, for instance, in the availability of the employee or available work/hours.[126] Based on the above, Produce World's model appears to support the CIPD's research conclusion that "zero-hours contracts, managed properly, can work for both employers and individuals".[127]

### 6.1.3. Holiday Inn (Liverpool)

Holiday Inn is a hotel and resorts company which employed 96 staff at the time of the research, 15 of which were ZHCs employees.[128] The staff on ZHCs consisted of waiters and waitresses, bar, and housekeeping staff.[129] The company's rationale for using ZHCs was, in addition to managing fluctuating demands, minimising recruitment agency fees.[130] It also argued that the flexibility provided by the contracts was in the interest of the employees as a larger part of the hours were centred around their needs, in certain circumstances, particularly those who are students and mothers.[131]

Holiday Inn ZHCs are distinct in that they have characteristics of a typical fixed-term contract. Employees under ZHCs are offered permanent standard contracts

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[122] Ibid.

[123] Ibid.

[124] Ibid.

[125] Ibid.

[126] Ibid.

[127] Ibid at 5.

[128] Ibid at 31.

[129] Ibid.

[130] Ibid.

[131] Ibid.

where they have consistently worked a certain amount of hours a week for a period longer 6 months.[132] The company argued that it typically absorbed about 15 per cent of its zero-hours employees and offered them permanent contracts.[133] Zero-hours employees were permitted to explore other employment opportunities with a condition that they do not work for the company's director competitor.[134] The company argued that it only penalised employees who consecutively turned down work more than five times.[135]

From the above, Hertz and Produce World offer employees fair ZHCs that are beneficial to both the employer and employee. The zero-hours employees are not treated less favourably than their comparators performing the same or similar work, who are employed on standard contracts. They offer flexibility and do not show typical exploitative characteristics such as a denial of statutory benefits or exclusivity clauses. Produce World's model for managing zero-hours employees shows consideration for employees' social lives by affording them the freedom to choose when to work, based on the availability of work, so they can fulfil other commitments.

Holiday Inn, on the other hand, reasonably uses typical fixed-term contracts and offers its zero-hours employees permanent contracts provided that certain conditions are met. Although it does not prohibit employees from accepting employment from other companies, it prohibits them from working for its direct competitors.

It appears, from the above case studies, that there is a common trend of zero-hours employees occupying low-skilled positions such as hotel and sales staff or factory workers. This can be argued to be the reason for the prevalence of ZHCs because it is unlikely that employees in these positions would turn down employment that presents with unfair employment conditions. The truth of the matter is that these employees often must choose between accepting employment on ZHCs or endure unemployment. This then raises the question of the reasonableness of exclusivity clauses in ZHCs, especially in low-skilled positions.

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[132] Ibid.

[133] Ibid.

[134] Ibid.

[135] Ibid.

The argument made above is not meant to invalidate the employer's need to use zero-hours contracts, it merely sheds light on the disparity advanced by ZHCs. It is noted that the responsibility to provide skills development and employment does not fall on the employer but on the government. The main industries where ZHCs are largely used are also more likely to be affected by environmental changes which are out of the control of business owners. For instance, hospitality and food services industries were largely affected by the COVID-19 pandemic which saw most of these businesses having to downsize or close down due to business disruptions because of national shutdowns put in place to curb the spread of the virus.[136]

South Africa is also currently experiencing an energy crisis, with consistent load-shedding, which means that employers must invest in equipment to enable them to remain operational during periods where they do not have electricity. Due to the rise in costs of maintaining their businesses, they also must make the decision to downsize or explore other forms of employment such as hiring staff on ZHCs to be able to deal with fluctuating demands. Thus, it is noted that it would be unreasonable and unfair to expect the employer to provide consistent employment opportunities under these circumstances. There is therefore the need to regulate ZHCs to give effect to both the employee and the employer's contractual and Constitutional rights.

### 6.2. Employee rights and interests and rationale against using Zero-Hours Contracts

In terms of South African law, every employee, like the employer, has the right to freedom of trade and the right to fair labour practices.[137] In addition to these rights, an employee also has the right to not be unfairly dismissed in terms of the LRA.[138] All the above rights are, to some extent, infringed by ZHCs.

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[136] Mirela Miescu and Raffaele Rossi 'Who suffered most from economic uncertainty early in the Covid-19 pandemic?' *Economics Observatory* available at *https://www.economicsobservatory.com/who-suffered-most-from-economic-uncertainty-early-in-the-covid-19-pandemic*, accessed on 5 October 2023.

[137] Urmila Bhoola 'National Labour Law Profile: South Africa' *International Labour Organization* March 2002 available at *https://www.ilo.org/ifpdial/information-resources/national-labour-law-profiles/WCMS_158919/lang--en/index.htm,* accessed on 5 October 2023.

[138] *SME South Africa* 'Your 2023 Guide to Employee Rights in South Africa' 6 February 2023 available at *https://smesouthafrica.co.za/your-2023-guide-to-employee-rights-in-south-*

Although some authors and employers argue that ZHCs are beneficial to both parties, employees seldom benefit from them. First, in most cases, employees do not know when or how often they will work or earn an income because the hours or frequency of their remuneration is not stipulated in the contracts. The employees may go long periods without being called for work. They are not able to plan their lives in advance because they do not know whether they will be called for work. In most cases, they have to live with the uncertainty of not knowing what will happen should they make plans and be unable to accept the work offered. Only in a few circumstances are ZHCs beneficial to employees. For instance, where the employee is a student and needs to work part-time so they can be able to attend to their studies, or where the employee, if allowed to, works for more than one employer.[139]

Secondly, most of these contracts include exclusivity clauses. An exclusivity clause is a form of restraint of trade.[140] It is used where the employer seeks to protect their "legitimate business interest" by restricting an employee or former employee from working in the same industry or for a direct competitor.[141] As mentioned previously, parties are free to enter into contracts on terms of their own choosing, as such it would not be considered unfair where the employer seeks to include an exclusivity clause to protect their interests. However, one must ask the question of the relevance of the clause where the employee works in a low-skilled position with no access to the employer's unique trade secrets.

According to Mupangavanhu "unequal bargaining power is a relevant consideration in determining whether a contractual term is contrary to public policy".[142] Notwithstanding the aforementioned, it would be against public policy where such a clause is added to restrict the employee from accepting work from another employer where the employee could possibly go long periods without being offered work.[143] It

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*africa/#:~:text=General%20employee%20rights%20in%20South%20Africa&text=not%20to%20be%20unfairly%20dismissed,the%20agreed%20date%20and%20time*, accessed on 5 October 2023.

[139] Ibid note 135.

[140] *Deale Attorneys* 'Restraints of Trade' available at *https://deale.co.za/restraints-of-trade/* accessed on 30 September 2023.

[141] Ibid.

[142] Mupangavanhu op cit note 92 at 126.

[143] Ibid.

has been argued above that some employers use ZHCs to flout the legislative obligations they owe to employees. In this sense, the addition of exclusivity clauses would further undermine the Constitutional values of Ubuntu, dignity, and fairness.

In *Mozart Ice Cream v Classic Franchises (Pty) Ltd v Davidoff and Another*[144] the court emphasised the need to regulate contractual relationships in light of Constitutional values.[145] The court further emphasised that the exercise of private power, especially in unequal bargaining positions, must also pass Constitutional muster.[146] In addition, South Africa currently has the highest unemployment rate in the world with a rate of 33 per cent.[147] This means that millions of people are unemployed and desperate to be employed. This also means that people are more vulnerable and susceptible to exploitation. It is now, more than ever, that ZHCs must be regulated by legislation to give effect to the right to fair labour practices and to provide for a fair balancing of the parties' rights.[148]

Mupangavanhu argues that:

"The need to legislate against contractual unfairness, unreasonableness, unconscionability or oppressive contractual provisions…remains crucial particularly in light of the inherent limits of judicial control".[149]

In addition, South African courts have not been shy in pointing out that there is no obligation to be fair in contractual dealings.[150] In light of the above, there is a need to regulate ZHCs to limit the use and/or abuse of private power and to ensure that

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[144] 2009 (3) SA 78 (C).

[145] Supra at 17.

[146] Supra.

[147] Mogomotsi Magome 'South Africa's unemployment is a 'ticking time bomb'. Anger rises with million jobless' *ABC News* 14 August 2023, available at *https://abcnews.go.com/Business/wireStory/south-africas-unemployment-ticking-time-bomb-anger-rises-102245343*, accessed on 1 October 2023.

[148] Labour Guide 'Employee and employer rights" André Claassen available at *https://labourguide.co.za/general/employee-a-employer-rights/* accessed on 30 September 2023.

[149] Mupangavanhu op cit note 142 at 128.

[150] Louw AM "'The Common Law is … not what it used to be'*: Revisiting Recognition of a Constitutionally Inspired Implied Duty of Fair Dealing in the Common Law Contract of Employment (Part 2)"(2018) 21 *PER / PELJ* 1-20 at 4 citing *SA Maritime Safety Authority v McKenzie* 2010 (3) SA 601 (SCA).

vulnerable members of society are protected against exploitation. Adams et al, caution that the regulation of ZHCs must be carefully implemented to avoid standardizing a broad range of atypical employment arrangements.[151]

## 7. The position of Zero-Hours Contracts in other jurisdictions: the United Kingdom (UK) and New Zealand

Unlike South Africa, other jurisdictions such as the United Kingdom, and New Zealand, have not shied away from introducing legislation regulating the use of ZHCs. The position of ZHCs in these jurisdictions is discussed below.

### 7.1. United Kingdom (UK): Section 27A of the Employment Rights Act 1996 (the Employment Rights Act) and the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015.

In 2015, the UK government outlawed exclusivity clauses in ZHCs.[152] Section 27 of the Employment Rights Act was amended to provide, among other things, that any provision of a ZHC that prohibits a worker from working for another employer or from doing so without the employer's consent will be unenforceable.[153] Section 27A(3) reads as follows:

> "(3)Any provision of a zero hours contract which—
>
> (a) prohibits the worker from doing work or performing services under another contract or under any other arrangement, or
>
> (b) prohibits the worker from doing so without the employer's consent,
>
> is unenforceable against the worker."[154]

Furthermore, in 2016 the UK government further made regulations dealing with employers who use exclusivity contracts.[155] The regulations address unfair dismissals

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[151] A Adams, M Freedland, and J Prassl, 'The "Zero-Hours Contract": Regulating Casual Work, or Legitimating Precarity?' (2015) 11 Oxford Legal Studies Research Paper No. 11/2015 at 2.

[152] Ibid note 22 above.

[153] Legislation.gov.uk 'Employment Rights Act' available at *https://www.legislation.gov.uk/ukpga/1996/18/section/27B* accessed on 19 May 2023.

[154] Ibid.

[155] Alex Cook Helix Law 'Zero Hours Contracts: Detriment And Unfair Dismissal From Today' *Helix Law* 11 January 2016, available at *https://helix-law.co.uk/zero-hours-contracts-detriment-and-unfair-dismissal-from-today/*, accessed on 5 October 2023.

of zero-hours workers and make provisions for the referral of complaints to the employment tribunals and for remedies against employers who flout the regulations.[156]

The UK Supreme Court also dealt with a case of ZHCs in *The Harpur Trust v Brazel*[157] where it had to determine whether the respondent's statutory right to paid annual leave in terms of the Working Time Regulations (WTR) was reliant on how often she worked in a year.[158] In other words, the court had to determine whether she was entitled to lesser annual paid leave due to the fact that she did not work full time.[159] The appellant had changed its formula for calculating annual paid leave to be dependent on how often she worked, which prejudiced the respondent.[160] The respondent was employed under a ZHC and only worked a few weeks in a year.[161]

The Supreme Court found that the appellant had misinterpreted the WTR which required annual leave to be calculated based on a worker's average week's pay as opposed to the period of time worked.[162] The court was of the view that the legislation did not intend for atypical workers to receive less annual paid leave due to the scarcity of their work.[163] The court opined that the fact that the workers are on permanent contracts should be a sufficient reason for their entitlement to full annual paid leave:

"It is important to appreciate that the workers in question are on permanent contracts. It does not seem to me unreasonable to treat that as a sufficient basis for fixing the quantum of

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[156] Regulations 2, 3 and 4 of the Exclusivity Terms in Zero Hours Contracts (Redress) Regulations 2015 No. 2021.

[157] [2019] EWCA Civ 1402.

[158] *Osborne Clarke* 'UK Supreme Court rules on zero-hours and 'umbrella worker' holiday pay' 21 July 2022, available at *https://www.osborneclarke.com/insights/uk-supreme-court-rules-zero-hours-and-umbrella-worker-holiday-pay#:~:text=Workforce%20Solutions-,UK%20Supreme%20Court%20rules%20on%20zero,and%20'umbrella%20worker'%20holiday%20pay&text=The%20Supreme%20Court%20published%20its,the%20UK%20%E2%80%93%20and%20some%20claims*., accessed on 5 October 2023.

[159] Supra *Harpur Trust* para 64.

[160] *The Supreme Court* '*Harpur Trust (Appellants) v Brazel (Respondent)* 2019/0209' available at *https://www.supremecourt.uk/cases/uksc-2019-0209.html*, accessed on 5 October 2023.

[161] Ibid note 158.

[162] Ibid.

[163] Supra *Harpur Trust* para 64.

holiday entitlement, irrespective of the number of hours, days, or weeks that the worker may in fact have to perform under the contract…".[164]

The court therefore held that the respondent was entitled to the full annual paid leave as per the WTR, regardless of whether they have worked a whole year or not.[165] From the above, it is clear that the UK government has fully recognised the necessity to regulate ZHCs to curb their inherent precarious nature and weak traits that employers exploit. The Supreme Court decision also gives effect to the employees' right to not be unfairly discriminated against due to the precarity of their work.

### 7.2. New Zealand: Employment Standards Legislation Act 2016.

In 2016, the New Zealand government enacted the Employment Standards Legislation Act which deals, *inter alia*, with regulating the use of ZHCs. The Act specifically addresses exclusivity and availability clauses, the cancellation of shifts, the refusal to work and the consequences thereof.[166] It provides that:

(a) an availability clause be reserved for circumstances where the employer has legitimate reasons for requiring its inclusion, and the employee has been offered reasonable compensation for their time;[167]
(b) an employee may refuse to work more hours than previously agreed to and may not be treated adversely because of the refusal;[168]
(c) an employer must not cancel a shift unless the contract specifies the notice period required for cancellation and the compensation to the employee where the cancellation falls outside the notice period;[169] and
(d) an exclusivity clause may not be included unless it is based on the listed reasonable grounds and the reasons for its inclusion are outlined in the

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[164] Supra para 70.

[165] Ibid note 162.

[166] Employment Relations Amendment Act 2016 available at *https://www.legislation.govt.nz/act/public/2016/0009/latest/DLM6774124.html#DLM6774125,* accessed on 6 October 2023.

[167] Ibid s 67D.

[168] Ibid s 67E.

[169] Ibid s 67G.

contract. The clause may also not unreasonably restrict the employee from accepting other work, having regard to the listed grounds.[170]

The Act mainly focuses on incorporating elements of fairness, equality, and reasonableness by balancing the scales in the zero-hours employment relationship. The New Zealand parliament recognised the apparent unequal bargaining relationship that exists and the exploitation that employees are open to. It effectively limited the exercise of power to ensure fairness to both parties.

8. Recommendations

The above approaches are compatible with South African law as they provide for the advancement of Constitutional values of Ubuntu, fairness, and reasonableness. They also give effect to employees' fundamental rights to equality, freedom, and dignity and provide for a fair balancing of both the employee and employer's labour rights.

The approaches further allow for the harmonisation of ZHCs with Constitutional values, the right to fair labour practices as well as s 29 of the BCEA. The prohibition of exclusivity clauses, in certain circumstances, and the guaranteeing of minimum working hours' pay will restore dignity to employees under ZHCs. Considering the above, it is therefore recommended that South Africa take lessons from both the UK and New Zealand approaches to ZHCs. The following recommendations are made:

1. The amendment of the LRA to have a provision that specifically deals with ZHCs.
2. Such provision should also explicitly prohibit the inclusion of exclusivity clauses in ZHCs where the legitimate business interests of the employer are not threatened. Where exclusivity clauses are allowed, they should require that the employer guarantee minimum working hours.
3. In addition, the provision should also deal with cases of cancellation of work or availability, which falls short of the notice period agreed to. In cases where cancellation is inconsistent with the agreement, the provision should entitle the employee to minimum working hours' pay, where the employer cancels on short notice.

[170] Ibid s 67H.

4. The provision should also require that severance pay be compulsory for employees with contracts that have exclusivity clauses, in cases where they go long periods without being called to work, to avoid exploitation and undermining statutory provisions in place to deal with dismissals.
5. The amendment of the BCEA to provide for minimum working hours to harmonise the contracts with s 29 of the same Act.

9. Conclusion

There is a need to regulate ZHCs in South Africa. The current situation in the country, that is, the high unemployment rate, the energy crisis, and the lingering effects of the COVID-19 pandemic on the economy, demand that the legislature intervene to regulate ZHCs. As noted previously, the responsibility to create employment and to curb the rising unemployment rate, falls on the state. It would be unjust to expect employers to bear the responsibility of guaranteeing employment, especially in circumstances which they are also affected by. Employers also find themselves having to adjust their business models to cope with the changing circumstances that cause business disruptions.

Notwithstanding the above, ZHCs when unregulated, have detrimental consequences for the employees working under them. In general, employees under ZHCs are in a constant state of uncertainty. They are hardly able to earn a living or plan their lives. That is the inherent nature of the contracts. Furthermore, zero-hours employees often find themselves being unfairly discriminated against by employers as in the *Harpur Trust v Brazel* case or being treated less favourably to their comparators who do the same or similar work on standard contracts as in the *Lupindo* arbitration.

To add insult to injury, the unfavourable effects of these contracts are exacerbated by unscrupulous employers who see the employees as merely a means to an end. Under the worst circumstances, the employees are unreasonably restricted from working for other employers even where work is not offered and are often indirectly and unfairly dismissed in cases where they turn down work offered.

The employees also find themselves being robbed off their statutory entitlements, such as paid annual leave or a fair dismissal. In addition, their Constitutional rights to dignity, equality and fair labour practices are unreasonably

limited, which in turn undermines the Constitutional values of Ubuntu, fairness, and dignity.

It is acknowledged that the flexibility provided by a ZHC can be beneficial to both the employer and the employee. However, this is often only in cases where the employee's circumstances do not allow them to be engaged in full-time employment. The reality is that a ZHC largely serves the employer's business interests of either cutting down on labour costs or managing fluctuations in demand. It is noted that employers are well within their rights to enter contracts that are largely beneficial to their interests. As stated previously, there is no general rule that requires contracts to be fair. This is the effect of freedom of contract and having more bargaining power.

However, the issue arises where these privileges are used to undermine public policy by exploiting vulnerable employees, flouting statutory obligations, and disregarding Constitutional values. The court in *Mozart Ice cream* made it clear that private power is also subject to Constitutional values. This means that the exercise of private power should not be left unfettered. In essence, those exercising private power should do so while having regard to the values underlying the Constitution.

As mentioned previously, there has not been any South African case law specifically dealing with ZHCs, apart from the *Lupindo* arbitration award, where the contracts were incidental to the main issue which was the less favourable treatment of deemed employees prohibited by s 198A of the LRA. This means that there are no foreseeable prospects of judicial development of the common law of contract in relation to ZHCs. Thus, to ensure the protection of vulnerable employees from exploitation; the fair balancing of employee and employer rights; the advancement of Constitutional values of Ubuntu, fairness, and dignity; as well as the prevention of abuse of power, it is necessary for the legislature to intervene and join other jurisdictions in regulating ZHCs.

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