

**PROTECTING THE RIGHTS OF EMPLOYEES IN SOUTH AFRICA DURING THE  
COVID-19 PANDEMIC: THE ROLE OF NATIONAL HUMAN RIGHTS  
INSTITUTIONS (NHRIs)**

**BY**

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## DECLARATION

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I, **ESIHLE BOKO** declare that **PROTECTING THE RIGHTS OF EMPLOYEES IN SOUTH AFRICA DURING THE COVID-19 PANDEMIC: THE ROLE OF NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs)** submitted for the Master's Degree in Interdisciplinary Human Rights at the University of the Free state, is my independent work and that I have not previously submitted it for a qualification at another institution of higher education.

I **ESIHLE BOKO** acknowledge that all the sources that I have used or cited have been indicated and acknowledged employing complete references. I understand that failure to do this amounts to plagiarism and will be considered as a ground for failure in this research paper.

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**ESIHLE BOKO**

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**Date**

## **DEDICATION**

I am dedicating this thesis to my late uncle Zamva Stanford Boko who has meant and continues to mean so much to me. Although he is no longer in this world, his memories continue to regulate my life.

## **ACKNOWLEDGMENTS**

I would like to convey my heartfelt gratitude to the following people for their assistance and co-operation in making this study possible, I am particularly indebted to Dr Rita Ozoemena for her services in making this project a success. Her useful advice and suggestions were really helpful to me during the project's completion. In this aspect, I am eternally grateful to her.

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## **ABSTRACT**

The relationship between employees and employers is built on mutual trust and both the employees and employers have rights that are outlined by common law and legislation. Workers' rights are outlined by South Africa's Constitution as well as various acts that include the Labour Relations Act. The government established National Human Rights Institutions (NHRIs) so they could be the independent organisations responsible for ensuring that there is an integration of the protection of human rights. This study focused on whether the National Human Rights Institutions succeeded in protecting the rights of employees during the COVID-19 pandemic lockdown.

To achieve this the qualitative research methodology was applied. Secondary data was collected and analysed through the use of methods and techniques of an exploratory, descriptive, and contextual research design. The provisions of the legislation associated with the protection of employees' rights such as the Bill of Rights, and the responsibilities of the NHRIs were analysed in the context of how they were practised during the lockdown. The focus was on whether the rights of workers were not compromised because of the sudden changes that were made by the government to protect its citizens from becoming sick or dying due to the Coronavirus.

The findings show that the rights of employees were compromised and violated in various ways including employers unilaterally changing work contracts, leading to a reduction in the salaries of workers. Some employees were also retrenched because they did not agree to the mandatory vaccination requirement. Others who provided essential services were not provided with the needed protective apparel, such as front-line health workers who performed community work with personal protection equipment.

This shows that NHRIs failed to ensure that the rights of employees were protected during the COVID-19 era. The recommendation is that there is a need for a nationwide collaboration led by the government and NHRIs to develop strategic plans on how this failure can be prevented in future, should South Africa be faced with another state of emergency.

## **KEYWORDS**

**Human rights; Employee rights; Bill of Rights; COVID-19 pandemic; NHRIs**

## LIST OF ABBREVIATIONS

<b>BCEA</b>	Basic Conditions of Employment Act
<b>COIDA</b>	Compensation of Occupational Injuries and Diseases Act
<b>COVID-19</b>	Coronavirus Disease
<b>CRPD</b>	Committee on the Rights of Persons with Disabilities
<b>HRCA</b>	Human Rights Commission Act
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social, and Cultural Rights
<b>GANHRI</b>	Global Alliance of National Human Rights Institutions
<b>ILO</b>	International Labour Organization
<b>LRA</b>	Labour Relations Act
<b>MAC</b>	Ministerial Advisory Committee
<b>NatJOINTS</b>	National Operational and Intelligence Join Structure
<b>NCCC</b>	National Coronavirus Command Council
<b>NHRIs</b>	National Human Rights Institutions
<b>NIOH</b>	National Institute for Occupational Health
<b>OHCHR</b>	Office of the High Commissioner for Human Rights
<b>OHS</b>	Occupational Health and Safety
<b>OHSA</b>	Occupational Health and Safety Act
<b>OMP</b>	Office of the Commissioner for Human Rights Management Plan
<b>PEPUDA</b>	Promotion of Equality and the Prevention of Discrimination Act
<b>SAHRC</b>	South African Human Rights Commission
<b>SARB</b>	South African Reserve Bank
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UIA</b>	Unemployment Insurance Act
<b>WHO</b>	World Health Organisation

## **SUPERVISORS CERTIFICATE**

I, Dr Rita Ozoemena hereby certify that the research and writing of this Mini dissertation for a Master's Degree in Interdisciplinary Human Rights was carried out under my supervision.

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**Dr Rita Ozoemena**

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**Date**

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## CHAPTER ONE

### INTRODUCTION AND BACKGROUND TO THE STUDY

#### 1.1 INTRODUCTION

The relationship between employees and employers is built on trust and both the workers and employers have rights that are outlined by common law and legislation. An employee refers to a person formally contracted full-time or part-time in the context of this study. Accordingly, the relationship between employees and employers is guided mainly by the reality that every person has human rights, and the United Nations Office of the High Commissioner for Human Rights (OHCHR) developed the OHCHR Management Plan (OMP) to highlight how the six pillars of human rights must be facilitated.<sup>1</sup> The six pillars are the following:<sup>2</sup>

- Pillar 1 – Support for the international human rights mechanisms.
- Pillar 2 – Mainstreaming of human rights within the development.
- Pillar 3 – Mainstreaming of human rights within peace and security efforts.
- Pillar 4 – Advancement of the core human rights principles of non-discrimination.
- Pillar 5 – Advancement of the core human rights principles of accountability.
- Pillar 6 – Advancement of the core human rights principles of participation.

Accordingly, National Human Rights Institutions (NHRIs) were established as independent bodies responsible with a mandate for ensuring that governments are held accountable for their human rights obligations.<sup>3</sup> Added to that, NHRIs help in shaping laws and policies while also facilitating attitudes that create stronger and more fair societies.

When there is a state of emergency such as when there is a national crisis or a disruptive event, the NHRIs are still responsible for ensuring that the rights of the people are not violated.<sup>4</sup> This was also expected in the case of the COVID-19 pandemic, which was initially discovered in Wuhan, China in December 2019. It was

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<sup>1</sup> OHCHR 2023: 15.

<sup>2</sup> OHCHR 2018: 3.

<sup>3</sup> NHRIS "About Human Rights Institutions" <https://ennhri.org/about-nhris/> (accessed 19 May 2023)

<sup>4</sup> OSCE/ODIHR 2020: 4.

at this point that the World Health Organization (WHO) was informed of a severe outbreak of an unknown aetiology of pneumonia that had been detected in China.<sup>5</sup>

During the early stages of the virus detection in Wuhan, on the 3<sup>rd</sup> of January 2020, approximately 44 cases of infection were detected, 11 of these cases (according to WHO) were those who were severely ill from this new strain of pneumonia, whilst the remaining 33 of the cases were of people deemed as stable. The symptoms of this new phenomenon included a severe fever, shortness of breath (due to the invasion of the lungs by the virus) and a dry cough.<sup>6</sup>

Between the 16<sup>th</sup> and 24<sup>th</sup> of February, the World Health Organization assisted in a collaborative effort between China, Canada, Germany, Nigeria, Japan, South Korea, Russia, Singapore, and several other countries, to engage health officials, scientists, health workers in the formulation of strategies to facilitate physical distancing. By the 11<sup>th</sup> of March 2020, after extensive empirical observation, research and medical responses to the COVID-19 cases that were spreading like wildfire across international borders, the Novel Coronavirus was officially declared a global pandemic.<sup>7</sup>

It was on the 5<sup>th</sup> of March 2020 when the South African National Institute for Communicable Diseases confirmed a suspected case of COVID-19 in a 38-year-old South African male who had travelled to Italy. The man was suspected to be displaying symptoms of coronavirus upon his return to South Africa. He was then tested for the virus and placed under self-isolation until there was medical confirmation that he was indeed Covid-19-positive.<sup>8</sup>

Following this report, South Africa subsequently experienced a rapid spread and increase of COVID-19-positive infection cases across its different provinces. This led the government to urgently respond to the matter by implementing regulations under the Disaster Management Act (57 of 2002) and imposing restrictions and guidelines. These included social distancing, changes in workplaces, reduction of contact with crowds and congested public spaces, hand sanitizing practices as well as encouraging

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<sup>5</sup> Wang et al 2020: 442.

<sup>6</sup> Wang et al. 2020: 442.

<sup>7</sup> World Health Organisation 2020.

<sup>8</sup> NICD 2020.

citizens to wear gloves and masks when going into the public domain, such as grocery stores, malls, hospitals and other public spaces.<sup>9</sup>

The COVID-19 pandemic was a crisis that led to governments responding with reactionary approaches aimed at reducing the spread of the virus, and some of the actions taken by governments led to a compromise and sometimes violations of the human rights of citizens. Social distancing and quarantine were some of the restrictions and it is reported that there is a strong association between adverse mental health outcomes and human rights restrictions.<sup>10</sup> Mental health outcomes that were more common included anxiety and mood disorders, and vulnerable subgroups in populations such as children, girls, the elderly, and racial/ethnic minorities were reported to experience adverse mental health outcomes following human rights violations.<sup>11</sup> However, the limitation of freedom of citizens was an action taken by governments globally as mandated by one of the principal human rights: The Right to Life and the Highest Attainable Standard of Health.<sup>12</sup> At the same time, some employers took advantage and violated the rights of workers while it remains to be comprehensively investigated if the NHRIs were of any help for workers.

Accordingly, this study aimed to investigate if NHRIs effectively protected the rights of workers in South Africa during the COVID-19 pandemic as well as how the pandemic impacted the rights of the employees.

## **1.2 PROBLEM STATEMENT**

South Africa has pieces of legislation that share details on labour and social security matters where information on people's constitutional right to fair labour practices. Amongst others, the Labour Relations Act (LRA), the Basic Conditions of Employment Act (BCEA), the Occupational Health and Safety Act (OHSA), the Unemployment Insurance Act (UIA), and the Compensation for Occupational Injuries and Diseases Act (COIDA) have legislative measures that apply to the COVID-19 pandemic at differing degrees.<sup>13</sup> This legislative framework required that organisations of all types develop policies that are aligned with the refined legislative model of the country that

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<sup>9</sup> NICD 2020

<sup>10</sup> Rahman et al. 2021: 12.

<sup>11</sup> Rahman et al., 2021: 12.

<sup>12</sup> de Mesquita et al., 2021: 3.

<sup>13</sup> Mokofe & van Eck 2022: 160.

was aimed at protecting workers from infection with the Coronavirus while also supporting their overall well-being.

In a State of Disaster, the government has to take serious and urgent procedures to curtail the continuous spread of COVID-19. The imposition of the national lockdown is intended to slow down (flatten the curve) the infection rate of COVID-19, to assist the government in building the capacity necessary to deal with the effects of the epidemic.

It is common cause that, the regulations and restrictions that have characterized the National Lockdown have, in parallel (unintentionally) aided and facilitated in creating an environment, that has been conducive to the infringement, inaccessibility, violation, abuse, and therefore non-enjoyment of human rights in South Africa.

A report in September 2020 highlighted that the rights of employees in the healthcare sector of South Africa were violated by not providing adequate Personal Protective Equipment (PPE) while those providing community work did not have PPE at all. This showed discrimination in the workplace, and it compromised the health and well-being of the healthcare employees. was reportedly due to corrupt activities.<sup>14</sup> There was also the issue of the complexity of the workplace plus social interventions that resulted in workers becoming frustrated. This resulted in the exclusion of vulnerable groups such as women workers and it worsened their vulnerability through increased risk at work and job losses.<sup>15</sup>

Other changes made by employers in South Africa included making unilateral amendments to the contracts of employees, which means workers and unions were not consulted as per common law.<sup>16</sup> This then led to the retrenchment of employees who did not agree to the changes including a reduction of working hours, for example. When the above was happening, employees could not practice collective bargaining because of the lockdown restrictions and the reality that it would put their lives in danger (increasing their risk of being infected by the Coronavirus).

It is in light of the above examples of instances of reports of the violation of employees' rights during the COVID-19 pandemic that this study aimed to assess how National

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<sup>14</sup> Msomi 2020 "South Africa may have stepped on Human Rights in COVID-19 response, report finds" <https://health-e.org.za/2020/09/15/icj-report-on-covid-19-regulations/> (accessed 25 August 2023)

<sup>15</sup> Saloshni & Nithiseelan 2022: 4.

<sup>16</sup> Zungu 2020: 39.

Human Rights Institutions have responded to their constitutional mandate, to protect the rights of employees in the context of the pandemic in South Africa.

### **1.3 AIM, RESEARCH OBJECTIVES**

The research aim is a statement that provides the primary purpose of the study, while research objectives are goals that are specific, measurable, and achievable.<sup>17</sup> This study aimed to analyse the role of National Human Rights Institutions (NHRIs) in protecting the rights of employees in South Africa during the COVID-19 pandemic. To achieve the mentioned aim, the following objectives were formulated for the study:

- a) To explore the treatment of employees in the workplace during the time of COVID-19.
- b) To examine whether the National Human Rights Institution considers the best interests of employees.
- c) The recommended measures to mitigate the violation of the rights of employees in South Africa during the time of COVID-19.

### **1.4 RESEARCH QUESTIONS**

The key questions that guided the overall investigation of this research are:

- a) How were workers treated in the workplace during the time of COVID-19?
- b) Does the National Human Rights Institution consider the best interests of workers?
- c) What are the recommended measures to mitigate the violation of the rights of workers in South Africa during the time of COVID-19?

### **1.5 RATIONALE OF THE STUDY**

The rationale of a study refers to the justification for conducting the study and outlines the reasons why the researcher chose to focus on a particular topic.<sup>18</sup> It is a researcher's way of highlighting the significance of the study as well as emphasising the identified gaps the research intended to fill, therefore, giving an explanation that rationalises why the study needed to be conducted.

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<sup>17</sup> Thomas 2023 "Research aims and objectives: The dynamic duo for successful research" <https://www.enago.com/academy/research-aims-and-objectives/> (accessed 25 August 2023)

<sup>18</sup> AJE 2023 "How to write the rationale for a research paper" <https://www.aje.com/arc/how-to-write-the-rationale-for-a-research-paper/> (accessed 26 August 2023)

This study will help the National Human Rights Institutions (NHRIs) to become learning organisations and better approach disruptive events such as pandemics in future. This is with a focus on the rights of employees when such disruptions occur, and some changes have to be implemented in how organisations operate. As it has been observed with the COVID-19 pandemic changes such as remote and flexible working needed to be speedily implemented. When gaps are identified from the experience of the pandemic, they will help the NHRIs to be more effective when it comes to considering the rights of employees. Added to the above, individual organisations and their management will potentially learn from the findings of this study and amend policies accordingly. Overall, the findings of this study will help in strategic planning for the future to ensure that employees are not unfairly treated when South Africa is faced with a pandemic or any event that is considered a state of emergency.

## **1.6 PRELIMINARY LITERATURE REVIEW**

In Chapter 2 of the Constitution of South Africa<sup>19</sup>, there is a provision for an outline of the various groups of human rights. This is referred to as the Bill of Rights and forms the cornerstone of democracy in South Africa, clearly explaining what the rights of all people are in our country and affirming democracy. In Chapter 9 of the Constitution, there is an establishment of several independent institutions that are mandated for the advocacy, monitoring, as well as the protection of human rights of all South Africans. These are collectively termed the National Human Rights Institutions (NHRIs). The NHRIs are specifically mandated to ensure that there is protection and accountability in instances where these rights as enshrined in the nation's Bill of Rights are being infringed upon, violated or inaccessible.<sup>20</sup>

The main characteristics of NHRIs are that they have the authority and jurisdiction to monitor compliance with human rights protection in South Africa, both vertically (between the state, bureaucratic institutions and its citizens) and horizontally (between and amongst the citizens themselves). They rely primarily on advocacy tools, more than they do on the judiciary, to provide advice and capacity-building to the

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<sup>19</sup> The Constitution of the Republic of South Africa, 1996.

<sup>20</sup> Woo Koo & Ramirez 2009:1322.

government. They are, therefore, strategically positioned between government, civil society and other non-governmental actors.<sup>21</sup>

This study focuses predominantly on the role South African Human Rights Commission (SAHRC) as the main NHRI that has taken centre stage to protect, advocate for and monitor the preservation of human rights, during the COVID-19 pandemic in South Africa. The SAHRC is the constitutional guardian of human rights, and its mandates are aligned with the Paris Principles. In its existence of about 25 years, it has played a major role, as intended, in contributing to the shaping of the human rights culture in South Africa. The Commission has also contributed to the understanding, at an international level, of the role that national human rights institutions play in the effective promotion and protection of human rights.<sup>22</sup>

This study used secondary data to highlight the importance of various legislation as well as how they contribute towards facilitating the valuing of employee rights, and some of the secondary data used is discussed in the subsections to follow. Secondary data refers to publications or data sets not collected by the researcher and that was published for a different purpose, this secondary data is government and institutional publications as well as journal articles focusing on the research problem explored in this study.<sup>23</sup>

### **1.6.1 The International Legal Framework of Employee Rights**

The International Legal Framework Of Employee Rights focuses on presenting information on how human rights law has evolved (otherwise referred to as the International Human Rights Regime). It also looks at how and why the Universal Declaration of Human Rights (UDHR) came to be, as well as how and why it was adopted as the global benchmark and model for human rights law, as well as the basic tenets of human rights protection.<sup>24</sup>

Accordingly, on the 10<sup>th</sup> of December 1948, the United Declaration of Human Rights (UDHR) was drafted. The Declaration then began to serve as a common standard of achievement for all people and nations. The Declaration was the first, in human history, to give an outline of the various rights that human beings have. These include

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<sup>21</sup> Centre for economic and social rights 2020.

<sup>22</sup> SAHRC 2020.

<sup>23</sup> Martins, da Cunha & Serra, 2018: 2.

<sup>24</sup> Marks & Clapham, 2005.

basic, civil, political, economic, social, and cultural rights that are meant for all human beings to enjoy. This strengthened the international human rights movement globally which led to widely accepted fundamental norms of human rights that all nations should respect and protect. The UDHR, together with the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) and the International Covenant on Civil and Political Rights (“ICCPR”) form the International Bill of Human Rights”.<sup>25</sup>

Occupational health services play a key role in the monitoring of employees’ health and provision of guidance for adopting workplace procedures and practices and developing safety protocols, as set out in the Occupational Health Services Convention, 1985 (No. 16).<sup>26</sup> In Article 2 of the Convention, it explains that national policy must include the provision of occupational health services that provide advice to employers, workers, and their representatives concerning how to ensure a safe and healthy work environment<sup>27</sup>. This is inclusive of the physical and mental health of workers and also ensures that there are means and resources to improve the capabilities of the employees when it comes to their physical and mental health. What this means is that there has to be awareness created as well as worker training in each country and all organisations within each country.

### **1.6.2 National Legal Framework of Human Rights**

The Bill of Rights is an important document for this study because it gives a prescription of the fundamental human rights of the individual, while it also imposes limitations on the powers of the government so all people can enjoy their rights. It establishes the legal framework for the rights and privileges enshrined in the Constitution.<sup>28</sup>

However, when South Africa was faced with the spread of the Coronavirus, there were measures put in place by the government aimed at reducing the spread of the virus. These were procedures implemented because the matter was urgent, and they included a restriction on the movement of the citizens. Hence, on the 16<sup>th</sup> of March 2020, the national government, as commanded by President Cyril Ramaphosa, announced the implementation of a national lockdown. These actions by the South

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<sup>25</sup> *Occupational Health Services Convention, Act 161 of 1985*

<sup>26</sup> Occupational Health Services Convention

<sup>27</sup> <https://www.iol.org>

<sup>28</sup> United Nations Development Programme 2023: 17.

African government were also taken by various countries globally as a way of taking extraordinary measures for the protection of the health and wellness of the countries' citizens. These restrictions had to meet the requirements of legality, necessity and proportionality, and be non-discriminatory. According to Mann *et al.*, the limitation of human rights can be justified if done following acceptable standards".<sup>29</sup>

Chapter 2 of the Bill of Rights, Section 15 (1), states that everyone has a right to freedom of conscience, religion, thought, belief, and opinion. However, governments were forced to restrict the spread of the Coronavirus, especially during lockdown level 5 where citizens' movements were greatly restricted. Section 21 (1), (2) and (3) of the Bill of Rights state that everyone has a right to freedom of movement, everyone has a right to leave the Republic, and every citizen has a right to enter, to remain in and to reside anywhere. These rights were not a reality for citizens during the level 5 lockdown when the pandemic started.

After the President of South Africa declared a National State of Disaster on the 15<sup>th</sup> of March 2020, he also announced that there would be a 21-day statewide lockdown beginning on the 26<sup>th</sup> of March. Regulations were made to carry out the lockdown during that time. According to Section 27(2) of the National Disaster Act 57 of 2002, these laws restrict several fundamental rights and liberties (the Act).<sup>30</sup> The measures that were adopted by the President of South Africa to slow down the spread of the Coronavirus were concerning when it comes to Human Rights. The following are some of the necessary restrictions that were first implemented: For the period of the lockdown, every person was confined to his or her residence unless strictly to perform an essential service, obtain an essential good, collect a social grant or seek medical attention. All businesses and other entities that did not offer essential services were ordered to cease operation during the lockdown. When it comes to burial services, there was a restriction of a maximum of fifty people at a funeral, while burials and cremations were within 24 hours requiring a permit from the police with an affidavit and supporting letter from a cultural or religious leader. For co-parenting parents, they were required to have a court order and a registered parenting plan as well as a certified birth certificate of the child. The clothes and essential goods for babies and toddlers up to

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<sup>29</sup> Mann et al, Health and Human Rights: A Reader (Routledge,1991) 7-20

<sup>30</sup> Zondi, Limitations of Rights and Covid 19. <https://probono.org.za/limitations-of-rights-and-covid-19> (Accessed 26 May 2020).

36 months were permitted. Operations of grocery stores and retail of essential goods were only allowed if there was written permission from their municipal authorities. Also, people renting could not be evicted from their place of residence for the duration of the lockdown.

According to Section 27(3)(a) of the National Disaster Act 57 of 2002, the above regulations that were implemented by the South African government must only be exercised to the extent that it is necessary for assisting and protecting the public. This was the intent of the government because the goal was to reduce the spread of the Coronavirus and protect citizens from sickness and, in the worst cases, death.

This is also supported by the Occupational Health and Safety Act (OHSA) 107 of 2004<sup>31</sup> which focuses on the rights of employees. The Act states that it is the responsibility of the employer to ensure that the working environment is safe and without risks, and it provides the mandated regulations and incorporated standards. This means that employers must have preventative ways for hazards in the workplace, prioritising the health and safety of employees. Additionally, employers are responsible for ensuring that their business activities and operations do not affect others such as customers and clients in a hazardous way. This obligation also applies to self-employed persons (for example, plumbers or electricians) whose working activities bring them into contact with members of the public.<sup>32</sup> This is why only employees needed for the provision of essential services were allowed to report for work and customers were only allowed to visit retail stores when necessary, so the two groups could not spread the Coronavirus between each other, a way preventing a risk by the employers.

When businesses were to commence with operations, they were required to adhere to regulations of section 27(2) of the Disaster Management Act, which included performing risk assessments, in terms of clauses 20.1 to 20.3. This meant the businesses were required to develop a plan giving details on the protective measures to be taken when employees returned to their workplaces before they returned. The businesses were also required to consult and involve trade union representatives concerning the risk assessment plus the developed risk assessment, adhering to the

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<sup>31</sup> *Occupational Health and Safety Act (OHSA) 107 of 2004*

<sup>32</sup> *Occupational Health and Safety Act*

mandate of Section 14(1) of the Labour Relations Act (LRA) No. 66 of 1995.<sup>33</sup> This process was required to be steered by the health and safety committee of each business entity, following the guidelines of Section 19 of the LRA (a health and safety representative was allowed for businesses without a health and safety committee, as per Section 17(1) of the Act). In the assessment plan, the information needed included the date when business operations were planned to start as well as work hours, plus the list of employees who were working during the lockdown period. The was then ended with an arrangement for inspection so it could be ascertained by the relevant parties that it was less risky for the employees to return to work.

## **1.7 RESEARCH METHODOLOGY**

For this study, a qualitative approach was employed. According to Denzin and Lincoln, such an approach is a multi-perspectival one that attempts to understand events in their natural setting.<sup>34</sup> Therefore, based on the nature of the topic being investigated, a qualitative study, guided by an exploratory, descriptive, and contextual research design was employed. The study is exploratory because the identified research problem has not been greatly researched.<sup>35</sup> The exploration was performed through the studying of related and pertinent books, articles and reports, which have the potential to provide several lead clues for further investigative studies that will advance this research. This is because other researchers may formulate workable hypotheses and identify important variables.<sup>36</sup> This study is also descriptive because it aims to describe the situation concerning how employees were treated during the lockdown of the COVID-19 pandemic as well as if NHRIs were in support of the protection of the rights of the employees. This is because descriptive research focuses on the “what” and it is defined as “a research method that describes the characteristics of the population or phenomenon that is being studied”.<sup>37</sup> On the other hand, contextual research is applied when a researcher seeks to uncover the latent needs, desires, and core values of a particular population.<sup>38</sup> In this study, it has been identified that employees needed their rights to still be valued even when the country was faced with a state of emergency due to the pandemic.

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<sup>33</sup> Labour Relations Act No. 66 of 1995

<sup>34</sup> Denzin & Lincoln 2005: 39.

<sup>35</sup> Swaraj 2019: 666.

<sup>36</sup> Swaraj 2019: 666.

<sup>37</sup> Manjunatha 2019: 863.

<sup>38</sup> Duda, Warburton & Black 2020: 2.

Moreover, a desktop approach was used to gather information. A desktop approach refers to a study that is carried out exclusively by using publicly available data or information.<sup>39</sup> This methodology was employed to analyse, describe, explain, and conceptualise secondary data. This secondary data refers to data that was not originally collected by the researcher and its initial intentional use differs from the current use<sup>40</sup>. Secondary data is useful in exploratory studies<sup>41</sup> and this study is exploratory, seeking to analyse data that has not been extensively analysed. In this study, the secondary data included legislative documentation of the South African government as well as relevant institutions mandated to facilitate the respect and prioritisation of human rights, with a focus on the rights of workers during the COVID-19 pandemic.

In addition, this study follows a socio-legal approach in which the “analysis of law is directly linked to the analysis of the social situation to which the law applies, and should be put into the perspective of that situation by seeing the part the law plays in the creation, maintenance and/or change of the situation”.<sup>42</sup> Relevant literature such as international legal sources, including customary international law, treaties, declarations, resolutions, and reports as well as general principles of law, judicial decisions, interpretative human rights instruments, academic works, public policies, stories, and studies on development in South Africa were reviewed. This is because this study sought to obtain a contextual understanding of how NHRIs were supposed to be of help to employees during the COVID-19 era and if the institutions indeed succeeded in protecting the employees’ rights during that period.

Overall, this study was guided by the philosophies of the critical research paradigm, it is a paradigm that focuses on power, inequality, and social change.<sup>43</sup> This paradigm is also called the transformative paradigm because it is followed when researchers aim to confront issues associated with social oppression while also seeking to improve social justice in the investigated situation.<sup>44</sup> What this means is that the philosophies of the critical paradigm are followed when a researcher aims to go beyond describing

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<sup>39</sup> Management Study Guide 2013. Desk research—methodology and techniques. Available at <https://www.managementstudyguide.com/desk-research.htm> (accessed 18 October 2019).

<sup>40</sup> Kalu et al. 2018: 55.

<sup>41</sup> Kalu et al. 2018: 55.

<sup>42</sup> Schiff 1976: 287.

<sup>43</sup> Callaghan 2016: 59.

<sup>44</sup> Kivunja & Kuyini 2017: 35.

a situation in the world and seeks to get action in motion through the application of effective solutions. Although there were no interviews conducted in this study, the focus was on gathering whether workers were treated fairly during the COVID-19 lockdown and whether their rights were not violated, with a focus on the role of the NHRIs. This study critically evaluates what was expected and provides recommendations for what can be done in future for better treatment of workers. Therefore, it serves as a foundation for further research to be performed on how there can be improvements in future when South Africa is faced with a disruptive event that requires working conditions to be adjusted. When such solutions are implemented successfully, what workers have experienced during the COVID-19 lockdown will no longer repeat itself in South Africa in a case where there is a disruptive event such as a pandemic.

## **1.8 CHAPTER OUTLINE**

**Chapter 1** provides the introduction and background of the study, presenting an overview of the study. The chapter provides explanations concerning why it was important that the study be conducted and how its findings will be beneficial to policymakers and NHRIs in South Africa.

**Chapter 2** is a discussion on how the NHRIs were developed in South Africa, demonstrating their intended purpose and importance when it comes to the consideration of employees' rights, as well as their facilitation so workers are not exploited. The above is achieved through the provision of insights into the international legal framework(s) upon which the Human Rights system is premised, plus a general summary of the Constitution of South Africa and particular attention to the South African Bill of Rights.

**Chapter 3** is an analysis of government interventions in disaster management when South Africa was faced with the COVID-19 pandemic, with a focus on labour regulations.

**Chapter 4** is an assessment of the role of NHRIs during the COVID-19 pandemic and it focuses on unpacking the role of National Human Rights Institutions, as enshrined by the Constitution of South Africa.

**Chapter 5** is a presentation of this study's findings, conclusion, and recommendations. The primary objective of the chapter is to conduct a summative analysis of the

observations, proposed arguments, perspectives, and criticisms that have been presented throughout the research.

## CHAPTER TWO

### THE DEVELOPMENT OF NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs)

#### 2.1 INTRODUCTION

The notion of national institutions specifically crafted to deal with human rights issues in states was mooted in 1946.<sup>45</sup> Over the years and following the adoption of the Paris Principles in 1991,<sup>46</sup> National Human Rights institutions (NHRIs) have become spaces accepted in the international community as key role players in the advancement, protection and promotion of Human Rights. This chapter seeks to provide context to this development and break down the developments regarding NHRIs. To that end, This chapter will critically examine, the normative and theoretical frameworks that support the development of NHRIs. The first section of the chapter will focus on defining the NHRIs. This will be followed by an outline of the evolution of NHRIs as institutions of human rights protection and conclude by identifying the specific NHRIs in South Africa.

#### 2.2 DEFINING THE NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs)

The notion of National Human Rights Institutions is defined in several ways, the United Nations High Commissioner for Human Rights (OHCHR) defines NHRIs as “state bodies with a constitutional and legislative mandate to protect and promote human rights.”<sup>47</sup> Although NHRIs are government-funded, they function independently.<sup>48</sup> Goodman *et al* assert that NHRIs “are frequently labelled as a connection between international human rights obligations and domestic implementation.”<sup>49</sup>

The UN Center for Human Rights provides a definition describing NHRIs as “a body which is established by a Government under the constitution, or by law or decree, the functions of which are specifically defined in terms of the promotion and protection of human rights.”<sup>50</sup> Another definition includes “a quasi-governmental or statutory institution with human rights in its mandate”<sup>51</sup> or as suggested by Cardenas that an

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<sup>45</sup> OHCHR 2010:14.

<sup>46</sup> The Paris Principles ('Principles Relating to the Status of National Human Rights Institutions.')

<sup>47</sup> OHCHR 2010:13.

<sup>48</sup> OHCHR 2010:13.

<sup>49</sup> Goodman and Pegram 2012:12.

<sup>50</sup> UN Centre for Human Rights, National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights, Professional Training Series No. 4 at para. 39, UN Doc. HR/P/PT/4, UN Sales No. E.95.XIV.2 (1995).

<sup>51</sup> International Council on Human Rights Policy (ICHRP) 2004:3.

NHRI is “an administrative body responsible for protecting and promoting human rights domestically.”<sup>52</sup>

### **2.2.1 Instances of Establishing NHRIs**

NHRIs were established under consideration of specific circumstances. These are categorised into three forms. The first happened in countries where there was a transition from conflict, and these countries include Northern Ireland, South Africa, the Philippines, Spain and Latvia. The second happened in countries that established a Commission as a way of consolidating and underpinning other human rights protections, and this took place in countries such as Australia, Canada, and France. The third and last happened in countries that were under pressure to respond to allegations of serious human rights abuses, the countries then speedily established commissions as proof that they were actively invested in taking action to address the problem, for example, in Cameroon, Nigeria, Togo, and Mexico.<sup>53</sup>

### **2.2.2 NHRIs' Accreditation**

NHRIs are accredited through an assessment of compliance with the Paris Principles. The responsible body that coordinates this process is the international coordinating committee's Sub-Committee on Accreditation which considers the applications from NHRIs and grades them with a renewal being done every 5 years.<sup>54</sup>

There are three levels of accreditation:

- a) A status: this grade means the NHRI is a voting member of the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (International Coordinating Committee) and is in full compliance with the Paris Principles. These institutions are allowed to hold offices in the International Coordinating Committee Bureau or any subcommittee that the bureau establishes, as well as participate fully in the work and meetings of national institutions.
- b) B status: this grade means the NHRI is an observer member of the International Coordinating Committee and does not fully comply with the Paris Principles. NHRIs with this grade are permitted to participate in the process as observer members only.

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<sup>52</sup> Cardenas 2014:7.

<sup>53</sup> Smith 2010:905.

<sup>54</sup> OHCHR 2010:44-45.

d) C Status: the last status is C status, meaning NHRIs in this category are not in compliance with the Paris Principles at all and are considered non-members of the international Coordinating Committee.

The OHCHR and Global Alliance of National Human Rights Institutions (GANHRI) practice, leads to the understanding that NHRIs are those institutions that have the broadest human rights instruction and are qualified with an A status. In May 2013 the GANHRI general observation was adopted, and the GANHRI Sub-Committee on Accreditation recognized and encouraged “the trend in the direction of a strong national human rights protection system in a State, by having one consolidated and comprehensive national human rights institution.” Subsequently, because the United Kingdom is one of the states which has three NHRIs accredited with the A status, it remains the exception rather than the norm. Other States have added national-level thematic human rights institutions involved in human rights promotion and protection such as equality bodies and children’s rights commissioners. These institutions can also influence human rights outcomes and need to be considered when researching human rights, especially within the domestic context.<sup>55</sup>

This study considers this. While South Africa has established national human rights institutions that are designated A-status that is fully compliant with the Paris principles, due regard is given to other State institutions with a human rights mandate - in so far as their work relates to the promotion and protection of the rights of persons such as employees in the workplace.

### **2.3 HISTORICAL OVERVIEW OF THE EVOLUTION OF NHRIs**

The advancement of the modern human rights movement through notions such as NHRIs found its birth post-World War II. World Leaders began to advance the notions of protection of fundamental human rights. Franklin D Roosevelt in his Four Freedoms speech in 1941,<sup>56</sup> advanced the notion of how it was necessary for the advancement of the human race for the freedoms of speech, workshop, freedom from want and freedom from fear, were significant symbols of hope to the people in a post-war society.<sup>57</sup> The Atlantic Charter of 1941 further articulated these liberties, setting an

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<sup>55</sup> Linda & Reif, 2015:482

<sup>56</sup> FDR and the four freedoms <https://www.fdrlibrary.org/four-freedoms> (Accessed 10 June 2022)

<sup>57</sup> Borgwardt, 2005: 220-221

agenda of a post-war world that was based on Roosevelt's four freedoms and declaring that the principles of freedom, prosperity and peace were at the forefront of the post-war agenda.<sup>58</sup> These new rights claims, which quickly expanded to encompass the right to self-determination, were quickly supported by the leadership of national independence movements such as the ANC in South Africa.<sup>59</sup> The creation of the Universal Declaration of Human Rights was aided by this early mobilization and the symbolic requirement to invoke human rights norms to support trials for individuals who had committed "crimes against humanity".<sup>60</sup> It became more challenging for national legal systems to defend persons accused of human rights violations when the Nuremberg paradigm evolved.

Even though this prosecutorial strategy for handling human rights breaches is still in use today, the truth commission paradigm has also taken hold in more than 30 nations, including South Africa, Argentina, Uruguay, Germany, and Chad. Truth commissions, in contrast to judicial proceedings, expose violations of human rights rather than bringing offenders to justice. Both the prosecution and truth commission models acknowledge that nation-states are the primary legitimate institutions for advancing and defending human rights, a principle that the international community and the United Nations have often highlighted (OHCHR 1993). International organizations and non-governmental organizations have underlined the necessity of creating separate national machinery specifically devoted to the enforcement and advancement of human rights in keeping with this emphasis on the role of governments in defending human rights. To close this gap, a brand-new class of organizations called NHRIs has arisen.

The United Nations Commission on Human Rights issued a resolution in 1962 urging states to form national human rights organisations.<sup>61</sup> These institutions could be in the shape of a national advisory council or local committees entrusted with dealing with human rights issues.<sup>62</sup> They would assess the state of human rights in their respective countries, provide advice to the government, and promote a human rights culture.<sup>63</sup>

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<sup>58</sup> Patrick (2019) Atlantic Charter 2.0: A "Declaration of Principles for Freedom, Prosperity, and Peace" <https://www.cfr.org/blog/atlantic-charter-20-declaration-principles-freedom-prosperity-and-peace> (Accessed 10 June 2022)

<sup>59</sup> Mashingaidze 1981:1955-77.

<sup>60</sup> Pendas 2002: 22

<sup>61</sup> Pohjolainen 2004: 36.

<sup>62</sup> Pohjolainen 2004:36.

<sup>63</sup> Pohjolainen 2004:35-37.

This resolution builds on the United Nations Economic and Social Council Resolution of 1946, which encourages states to establish local human rights committees to promote human rights standards.<sup>64</sup> At that point, however, there was reluctance among the members of the states to determine such institutions as many considered such matters domestic and at the States' discretion.<sup>65</sup> In 1978, the UN Commission on Human Rights adopted a resolution on "national Institutions within the field of human rights."<sup>66</sup> Its objective was to "provide a suggestion for the structure and performance of national institutions for the protection of human rights."<sup>67</sup> After the resolution was adopted, the United Nations held its first State Institution Seminar, where member states discussed guidelines and shared information on existing State Institutions such as the Anti-Discrimination Commission and the Ombudsman Office.<sup>68</sup> This was the first conference to use the term "national human rights institution" to standardize the dual function of NHRIs in promoting and protecting human rights.<sup>69</sup> In the next decade, after the 1978 resolution was adopted, the United Nations produced a series of reports on the functioning of state institutions as a mechanism for promoting and protecting human rights.<sup>70</sup>

The findings from these reports laid the foundation for the 1991 United Nations International Workshop on National Organizations for Human Rights Promotion and Protection held in Paris from 7th - 9th October 1991. These were finally approved by the United Nations in 1993 and adopted and approved as the "Paris Principles". Therefore, the 1990s proved to be extremely important to NHRI. The Paris Principles were a product of the first International Workshop on National Institutions for the Promotion and Protection of Human Rights. The output was a set of recommendations and principles, adopted by the UNHRC the following year,<sup>71</sup> and later adopted by the UN General Assembly in 1993. The Paris Principles provide for institutional competence in the promotion and protection of human rights. In sum, the key criteria for NHRIs as laid down by the Paris Principles are the following: Independence

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<sup>64</sup> UN ECOSOC, ECOSOC Resolution 9 (II), 21 June 1946.

<sup>65</sup> Cardenas 2014:28.

<sup>66</sup> UN Commission on Human Rights, Resolution on National Institutions in the Field of Human Rights; Annex: Some possible functions which could be performed by national institutions in the field of Human rights, if so, decided by the Government concerned, CHR Res. 23(XXXIV) of 1978 (Mar.8, 1978).

<sup>67</sup> Pohjolainen 2004:36.

<sup>68</sup> Cardenas 2014:39

<sup>69</sup> Cardenas 2014:39

<sup>70</sup> Legislation Online, UN Standards on NHRIs, <http://www.legislationonline.org/topics/organisation/2/topic/82> (accessed 28 February 2022).

<sup>71</sup> UN Human Rights Commission Resolution 1992/54 of 3 March 1992

guaranteed by statute or constitution, autonomy from government, pluralism, included in membership, a broad mandate based on universal human rights standards, adequate powers of investigation and sufficient resources.

The idea of establishing NHRI as an integral part of the national human rights system was widely supported. However, there was no formal agreement on the definition of NHRI or the standard model for designing such institutions. As a result, the state has and will continue to have considerable autonomy in deciding which institutional design is most appropriate. This means that NHRI's design, role and operation vary widely from country to country.<sup>72</sup> Differences in these formats and features also affect the potential and nature of human rights compliance. From a structural and authoritative point of view, the modern NHRI's roots can be traced back to the classic Ombudsman and early investigative committee.<sup>73</sup> “The classic ombudsman emerged in Sweden in 1809 and centred on a single individual elected by Parliament”.<sup>74</sup> In contemporary society, NHRIs are commonly formulated within four categories or types: Ombudsman, Human Rights Commission, Human Rights Research Institute, and Hybrid Institution.<sup>75</sup>

## **2.4 MODELS OF NATIONAL HUMAN RIGHTS INSTITUTIONS**

For the domestic implementation of international rules, the profusion of NHRIs brings both opportunities and obstacles. As a result, when analysing national institutions, it is critical to categorize the various types of institutions. Human rights commissioners (HRCs), the Ombudsman, and specialized national organizations created to defend the rights of vulnerable groups are the three types of NHRIs classified by the UN.<sup>76</sup> NHRIs are divided into five categories by Cardenas and the International Council on Human Rights, which include parliamentary organizations and hybrid institutions in addition to HRCs, Ombudsmen, and specialized state institutions they have included parliamentary bodies and hybrid institutions.<sup>77</sup>

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<sup>72</sup> Beco & Murray 2015:5-6.

<sup>73</sup> International Council on Human Rights Policy, Performance and Legitimacy <https://reliefweb.int/report/world/performance-legitimacy-national-human-rights-institutions> (accessed 15 July 2022).

<sup>74</sup> The Parliamentary Ombudsman, Sweden, accessed 4 April 2018. <https://www.jo.se/en/About-JO/History/> (accessed 10 July 2022)

<sup>75</sup> Pegram 2010:732-737.

<sup>76</sup> Human Rights Watch 2001:10.

<sup>77</sup> Cardenas 12 – 14 International Council on Human Rights 2000:3 – 4.

### 2.4.1 Human Rights Commissions

Human rights commissions are multi-member organizations tasked with safeguarding and promoting human rights. They are primarily concerned with the promotion and protection of individuals against all sorts of discrimination, as well as the safeguarding of civil and political rights.<sup>78</sup> A few of these entities, however, have been given the authority to protect socioeconomic rights. These commissions also provide training and education on human rights problems to the general public. "A government agency with administrative, legislative, or judicial responsibilities," according to the definition of the term "commission."<sup>79</sup> As a result, a court or a soft forum that promotes and protects human rights comes under this category.

The human rights commission is based on the traditional model of a commission of inquiry.<sup>80</sup> "A body constituted by the government for a fixed duration to enquire into problems of public concern and to advise the government on policy alternatives," according to the classic commission.<sup>81</sup> Human rights commissions often have a broad jurisdiction that includes advising, research, educational, and investigative duties.<sup>82</sup> They may or may not feature a complaints management facility, though many do.<sup>83</sup> They are made up of members who have been appointed by either the government or the legislature. The Paris Principles are best implemented by a human rights commission.<sup>84</sup> Within the human rights commission concept, however, there is a wide range of options.<sup>85</sup> Some models have strong corrective powers to deal with individual complaints (such as South Africa,<sup>86</sup> Uganda,<sup>87</sup> and Ghana's<sup>88</sup> Human Rights Commission).<sup>89</sup> Others have simpler functions and serve as government advisory bodies or research institutes with strong powers to promote human rights such as the

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<sup>78</sup> UN Handbook 7.

<sup>79</sup> Penguin Hutchinson Reference Library (1996) Longman Dictionary of English Language: Penguin Books Ltd.

<sup>80</sup> Pegram 2010:735.

<sup>81</sup> Pegram 2010:735.

<sup>82</sup> OHCHR, National Human Rights Institutions, 16

<sup>83</sup> OHCHR 2010:16.

<sup>84</sup> OHCHR 2010:16.

<sup>85</sup> Pegram 2010:735

<sup>86</sup> South Africa. South African Human Rights Commission <https://www.sahrc.org.za/> (accessed 17 July 2022).

<sup>87</sup> Uganda, Uganda Human Rights Commission <https://www.uhrc.ug/> (accessed 17 July 2022).

<sup>88</sup> Ghana. Commission on Human Rights and Administrative Justice <https://chraj.gov.gh/> (accessed 17 July 2022).

<sup>89</sup> OHCHR 2010:20.

French National Consultative Commission on Human Rights in France<sup>90</sup> and the Danish Institute of Human Rights in Denmark.

#### **2.4.2 Human Rights Ombudsman Institutions**

The model of the ombudsman can be modelled in two ways. National Ombudsman and institutionalized ombudsman. The national ombudsman is a single-member institution that began in Sweden and has since gained popularity across Europe.<sup>91</sup> Individuals are protected by an Ombudsman from government misbehaviour or maladministration. It's worth noting that the term "ombudsman" in this case refers to the Swedish version of the position. Institutionalized ombudsmans on the other hand are ombudsman organizations that have undergone significant alterations because of the evolution of the Ombudsman concept and are no longer based on the Swedish model. In some circumstances, an Ombudsman is not a single person, but rather a group of people who have the status of an Ombudsman, or a group of people who are under the control of a single person. In Zambia, for example, even though there is only one Ombudsman, he or she is assisted by a team of four individuals at any given time. In other circumstances, such organizations are no longer known as Ombudsman. In South Africa, for example, a new concept known as "Public Protector" has been formed.

The Ombudsman was empowered to investigate and if necessary, prosecute grievances relating to legality and administrative fairness lodged against the government.<sup>92</sup> A constitutional revision in 1974 resulted in the inclusion of a human rights mandate within the Swedish Ombudsman`s functions.<sup>93</sup> Similarly, across Europe, existing classical ombudsman institutions in Denmark, Finland, Norway and the Netherlands have had their mandates broadened to include human rights.<sup>94</sup> The modern variant of this model is the human rights ombudsman or hybrid model. In Latin America and Central and Eastern Europe, rather than having a multiplicity of institutions within a single jurisdiction, States tend to establish the so-called hybrid NHRI model.<sup>95</sup> This model incorporates elements of both the ombudsman and the human rights commission. These institutions undertake two roles: "to promote and

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<sup>90</sup> <https://ennhri.org/our-members/france/>

<sup>91</sup> ICHR (n 10 above) 65

<sup>92</sup> Pegram 2010:733-734.

<sup>93</sup> Reif 2000:8-9.

<sup>94</sup> Pegram 2010:734.

<sup>95</sup> Pegram 2010:734.

protect human rights” and “to monitor government administration.”<sup>96</sup> Its structure and composition usually resemble the classical ombudsman model.<sup>97</sup> This institution usually has an express human rights mandate, an oversight over administrative fairness, and a legality function.<sup>98</sup> It may also have jurisdiction over corruption and electoral monitoring.<sup>99</sup> Such institutions also engage in other activities such as research and documentation, may perform an advisory function and conduct educational activities.<sup>100</sup> The common powers include investigation and court referral with others having prosecutorial authority and jurisdiction over private entities.<sup>101</sup>

## **2.5 RESEARCH INSTITUTIONS, CONSULTATIVE AND ADVISORY BODIES AND HYBRID INSTITUTIONS**

The last form an NHRI can take are commonly research institutions and consultative or advisory boards. They have a human rights obligation of advice or advocacy, but they do not have a protection obligation as they do not have the authority to investigate or deal with individual complaints.<sup>102</sup> In Africa, the dominant NHRI model is the Human Rights Commission.<sup>103</sup> According to Reif, GANHRI's accreditation process grants priority only to the National Commission on Human Rights and the Human Rights Ombudsman Authority.<sup>104</sup> This excludes other domestic institutions with similar functionality.<sup>105</sup> She claims that this process is used to implement GANHRI's gatekeeping role and impacts NHRI's international participation and monitoring capabilities.<sup>106</sup> It also affects the concept of institutional effectiveness.<sup>107</sup> GANHRI's accreditation process means that adherence to the Paris Principles shows that NHRI is functionally and structurally effective and therefore most suitable for promoting and protecting human rights.<sup>108</sup> This does not necessarily have to be the case, as factors such as political and social conditions can affect the effectiveness of NHRIs. The Paris Principles do not provide for such considerations when assessing NHRIs.

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<sup>96</sup> Linda C. Reif, “Building Democratic Institutions,” 11

<sup>97</sup> Thomas Pegram, “Diffusion across Political Institutions,” 736.

<sup>98</sup> Pegram, 736.

<sup>99</sup> Pegram, 736.

<sup>100</sup> Pegram, 736

<sup>101</sup> engram, “Diffusion across Political Systems,” 736.

<sup>102</sup> Pohjolainen, 17.

<sup>103</sup> OHCHR, National Human Rights Institutions, 15.

<sup>104</sup> Reif, “Boundaries of NHRI Definition,” 71

<sup>105</sup> Reif, 71.

<sup>106</sup> Reif, 71.

<sup>107</sup> Reif, 71.

<sup>108</sup> The GANHRI's Sub-Committee on Accreditation publishes General Observations, which substantiate the Paris Principles. These may in future include such contextual considerations in assessing NHRIs.

### **2.5.1 Human Rights Bodies**

These are a combination of national Ombudsman and National Human Rights Commissions. They are also known as Quasi HRCs. Ghana's Commission on Human Rights and Administrative Justice (CHRAJ) and the Palestinian Citizen's Rights Commission are two examples of such agencies.

## **2.6 NHRIs IN SOUTH AFRICA AND THE PROMOTION AND PROTECTION OF RIGHTS**

In Africa, most countries have experienced the rapid spread of NHRIs that occurred from the 1990s onwards.<sup>109</sup> “The trajectory of the evolution of NHRIs in Africa is closely linked to the renewal, in the 1990s, of the consideration of human rights as integral to political processes.”<sup>110</sup> South Africa embodies these same principles and conforms to the international best practise through the establishment of the South African human Rights Commission (SAHRC) as the NHRI provided for in the South African constitution. This next section explores the SAHRC.

### **2.6.1 South African Human Rights Commission**

The SAHRC was founded as one of the numerous governmental institutions promoting constitutional democracy under Section 115 of the interim Constitution and Section 184 of the final Constitution of the Republic of South Africa.<sup>111</sup> The SAHRC's mission is to foster a culture of human rights and to monitor the expansion of rights to all citizens, following the Constitution's Bill of Rights.<sup>112</sup> The normative criteria that the SAHRC must follow are the human rights standards in the final Constitution and the Human Rights Commission Act (HRCA), 1994<sup>113</sup> which regulates the SAHRC.

### **2.6.2 Legislative Framework Establishing The SAHRC**

The SAHRC is governed by several legislative imperatives. The two which are of paramount import in this chapter are the Constitution of South Africa and the Human

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<sup>109</sup> Thomas Pegram, “Diffusion Across Political Systems,” 737

<sup>110</sup> Human Rights Watch, *Protectors or Pretenders? Government Human Rights Commissions in Africa*, (New York: Human Rights Watch, 2001). <https://www.hrw.org/reports/2001/africa/overview/record.html>

<sup>111</sup> Constitution of the Republic of South Africa Act 200 of 1993 and Constitution of the Republic of South Africa Act 108 of 1996 respectively.

<sup>112</sup> McQuoid-Mason, D “The role of human rights institutions in South Africa” in Hossain (n 1 above) 618.

<sup>113</sup> South African Human rights Commission 2021. *The South African Human Rights Commission National Investigative Hearing into the July Unrest especially in Gauteng and KwaZulu-Natal Provinces*.

Available

<https://www.sahrc.org.za/> (Accessed 22 April 2022).

Rights Commission Act 40 of 2013. It's also imperative to understand that the work of the SAHRC is cross-fixed with other legislative imperatives which will further be explored here.

#### *2.6.2.1 South African Constitution*

The Constitution provides for the establishment of State Institutions Supporting Constitutional Democracy in Chapter 9 (Chapter 9 Institutions).<sup>114</sup> Section 181 of the constitution specifically provides for Chapter 9 Institutions which includes the South African Human Rights Commission.<sup>115</sup> Imperative to the provisions in Section 181 is the emphasis on the character of Chapter 9 institutions, which are envisaged to be institutions that are independent, subject to the Constitution and laws and must embody principles of impartiality, functioning without fear, favour or prejudice.<sup>116</sup> Section 181(3) directs that state organs must, through legislation and other measures, provide assistance and protect chapter 9 institutions as a means of ensuring their independence, impartiality, dignity and effectiveness. No person may interfere with these institutions and the accountability modality of chapter 9 institutions is housed in the National Assembly where these institutions must report on their function on an annual basis.<sup>117</sup>

Section 184 of the constitution specifically provides for the functions and powers of the SAHRC. The SAHRC is envisaged to promote respect for human rights and advance a culture of human rights in South Africa, to promote the protection, development and attainment of human rights and to monitor and assess the observance of human rights in South Africa.<sup>118</sup> Section 184(2) provides for the powers of the SAHRC. These powers are regulated by national legislation and are envisaged to allow the facilitation of the SAHRC functions. These powers include the power to investigate and report on the observance of human rights in South Africa, the power to take necessary steps to secure appropriate redress in the instance of a human rights violation and to carry out research and educate on human rights.<sup>119</sup>

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<sup>114</sup> Constitution Sec181.

<sup>115</sup> Constitution section 181(1)(b)

<sup>116</sup> constitution Sec 181(2).

<sup>117</sup> Constitution Sec181(5)

<sup>118</sup> Constitution Sec 184(1)(a-c)

<sup>119</sup> Constitution Sec 184(2)(a-d)

An important function that the constitution prescribes for the SAHRC is a somewhat oversight role over state organs in that the constitution requires the SAHRC to receive reports on the measures state organs have taken towards the realisation of the rights provided for in the Bill of Rights.<sup>120</sup> The central nature of the bill of Rights in the SANRC work is thus imperative as it provides for the wide range of rights relevant to the commission's work. All these functions and powers are supplemented by national legislation which is the Human Rights Commission Act 54 of 1994 promulgated in 1984 and repealed in 2013.

#### *2.6.2.2 South African Human Rights Commission Act*

The Human Rights Commissions Act (HRCA) was promulgated in 1994, this Act was however repealed in 2013 by the South African Human Rights Commission Act 40 of 2013. The two acts provide for fundamentally the same issues. Outlining modalities for the establishment of the SAHRC, its composition, powers, functions and matters connected therewith.

##### *2.6.2.2.1 Independence and impartiality*

NHRIs are by their character envisaged to be independent and impartial institutions. The HRCA makes an effort to ensure that the demands of this impartiality and independence are founded in the laws of the Country. Section 4 directs that the commissioners and members of staff act in a manner befitting of this principle of impartiality and independence through two specific provisions that are very direct. Section 4(a) directs that they "Must serve impartially and independently and exercise or perform his or her powers and functions in good faith and without fear, favour, bias or prejudice and subject to the constitution and the law."<sup>121</sup> Secondly, the service of commissioners and members of staff is further emphasised in section 4(c) which expresses further characteristics that must be embodied by these individuals by outlining that they "may not act in any manner that compromises the credibility, impartiality, independence or integrity of the commission"<sup>122</sup>

Importantly in support of these efforts, the HRCA places an obligation on other organs of the state to support the efforts of the SAHRC through the provision of assistance in

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<sup>120</sup> Constitution Sec 184(3)

<sup>121</sup> HRCA Sec 4(a)

<sup>122</sup> HRCA Sec 4(a)

advancing and protecting the SAHRC's independence, impartiality, and dignity when in pursuit of its objectives.<sup>123</sup> Other modalities to advance impartiality and independence speak towards non-interference of the SAHRC work by other organs of the state,<sup>124</sup> the disclosure of any interests by members of the SAHRC in any matter they are dealing with<sup>125</sup> and the obligation on commissioners to disclose their financial interests to the SAHRC.<sup>126</sup>

#### 2.6.2.2.2 Composition of commissioners and their powers

The SAHRC is made up of eight commissioners.<sup>127</sup> One key take away is the fact that the HRCA prescribes the qualifications or records they must have which includes a commitment to the promotion of respect for human rights and a culture of human rights.<sup>128</sup>

#### 2.6.2.2.3 Powers and functions of the Commission s10

The constitution outlines the specific powers of the SAHRC and its commissioners in section 184. The HRCA acknowledges these powers and functions and further expands on them in section 13.<sup>129</sup>

a) The commission is competent and is obliged to.

- (i) Make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of human rights within the framework of the Constitution and the law, as well as appropriate measures for the further observance of such rights.
- (ii) Undertake studies for reporting on or relating to human rights as it considers advisable in the performance of its functions or to further the objects of the Commission.
- (iii) Request any organ of the state to supply it with information on any legislative or executive measures adopted by it relating to human rights.

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<sup>123</sup> HRCA sec 4(2)

<sup>124</sup> HRCA Sec 4(3)

<sup>125</sup> HRCA Sec 4(4)

<sup>126</sup> HRCA Sec 4(6)

<sup>127</sup> HRCA Sec 5(1)(a)

<sup>128</sup> HRCA Sec 5(1)(a)(i-iv)

<sup>129</sup> HRCA Sec 13(1)(a)(i-iii)

It is these sections that provide a comprehensive outline of their specific powers that are relevant to the advancement of the promotion of human rights. In the context of this dissertation, the SAHRC had an obligation to utilise these functions and powers towards the protection of persons affected by COVID-19 concerning their rights as employees as part of its mandate towards advancing socio-economic rights.<sup>130</sup> In addition to these functions, the commission has other functions that involve conducting educational programs on the Bill of Rights, reviewing government policies, and interacting with civil society and state institutions.<sup>131</sup>

#### 2.6.2.2.4 Investigations by The South African Human Rights Commission.

The SAHRC also plays a proactive role in advancing a culture of human rights. The HRCA gives the SAHRC powers to investigate matters either by its violation or where a complaint is laid to the commission and the commission determines that the complaint warrants further investigation to address the alleged violation.<sup>132</sup> The commission is equally empowered to provide necessary assistance to an aggrieved party in securing the necessary financial support if a matter is taken to the courts.<sup>133</sup> Other modalities that are available to the SAHRC to deal with complaints include mediation, conciliation and negotiation. These modalities are all directed towards arriving at equitable solutions that allow for the avoidance of adversarial methods such as court proceedings.

#### 2.6.2.2.5 Other Legislative imperatives

Furthermore, the SAHRC has additional functions and powers derived from certain legislative obligations, including the Promotion of Equality and the Prevention of Unfair Discrimination Act (PEPUDA, or the Equality Act)<sup>134</sup> and the Promotion of Access to Information Act (PAIA).<sup>135</sup> Through these pieces of legislation and its broad powers, the

SAHRC is instrumental in ensuring adherence to the values enshrined in the Bill of Rights as well as the defence and promotion of the rights therein. PEPUDA and PAIA

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<sup>130</sup> Horsten D THE ROLE PLAYED BY THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION'S ECONOMIC AND SOCIAL RIGHTS REPORTS IN GOOD GOVERNANCE IN SOUTH AFRICA Per 2006(2) at 6

<sup>131</sup> HRCA Sec 13(1)(b)(i-viii); Makwati E The South African Human Rights Commission in Compendium of documents on National Human Rights Institutions in eastern and southern Africa Charles M Fombad (2019)

<sup>132</sup> HRCA Sec 13(3)(a).

<sup>133</sup> Ibid

<sup>134</sup> Act 4 of 2000

<sup>135</sup> Act 2 of 2000

are central pieces of legislation in that equality and access to information are preconditions for a functional democracy. The SAHRC is also obligated to foster public understanding and awareness of the Bill of Rights of the Constitution, the SAHRC Act and the role of the Commission by developing, conducting and managing education and information programmes.<sup>136</sup>

## **2.7 CONCLUSION**

In conclusion, it is obvious that governments' commitment to the above criteria, particularly international and regional normative norms, is manifested when they establish national institutions to promote and safeguard citizens' and others' rights within their authority. At the national level, these institutions must adhere to certain norms to function properly, such as human rights laws and laws establishing and governing such institutions. National normative standards are the names given to this legislation. Even though NHRIs are required to follow these guidelines, these organizations frequently fail to do so. However, as noted in previous paragraphs, experience has demonstrated that certain institutions function effectively while not adhering to some of these criteria – national, regional, or worldwide standards – while others that do adhere to such standards do not perform effectively. Despite this, I believe that the existence of standards and a willingness to follow them are necessary for NHRIs to work effectively.

As a result, meeting the following criteria is insufficient for an NHRI to work properly. The government and its law enforcement authorities should make a clear and firm commitment to uphold the rule of law. This commitment must involve upholding, complying with, and implementing human rights norms, as well as recommendations and decisions issued by bodies tasked with human rights promotion and protection. Furthermore, because NHRIs have the potential to make a significant contribution to the realization of human rights by translating the rhetoric of international instruments into reality, these standards must be consistent. That is, regional standards must adhere to the concepts enshrined in international standards. Standards at the national level, like standards at the regional and worldwide levels, must adhere to the same principles.

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<sup>136</sup> HRCA Se 13(1)(b)(i)

## CHAPTER THREE

### COVID-19 AND GOVERNMENT INTERVENTIONS DISASTER MANAGEMENT OF COVID-19 IN SOUTH AFRICA – LABOUR REGULATIONS

#### 3.1 INTRODUCTION

In early 2020, the first COVID-19 case was reported in South Africa. What followed from this announcement was a gradual move towards shutting down the country to slow down the spread of the virus. The government declared a national state of disaster under the provisions of the Disaster Management Act 57 of 2002 which allowed the government to provide for regulations across various issues towards efforts to stem the spread of the virus.<sup>137</sup>

These interventions had an impact on various aspects of the country's operations as had been the case across the world, particularly, companies were largely affected as they could not operate, this in turn affected workers as well and continues to affect these two groups today. Discussions as to the rights of employees at this time became quite prominent.<sup>138</sup> The slow-down of the covid-19 numbers following the introduction of antivirus and discussions of mandatory jobs further exacerbated these discussions as some employers demanded that employees take the vaccine if they wished to continue working for them.<sup>139</sup>

The last chapter has outlined the role of NHRIs as institutions mandated in advancing human rights and hold public and private institutions to task when violations materialise and allow individuals a platform that is impartial and independent to report any violations, they may deem relevant. This chapter seeks to build on these discussions by firstly, exploring the regulations that were apparent throughout the COVID-19 pandemic lockdown and that continues today, and secondly, assessing if there were any violations and the role that NHRIs played in executing their functions to ensure no violations continued or materialised.

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<sup>137</sup> Department of Cooperative Governance and Traditional Affairs. Declaration of a National State of Disaster no 313 15 March 2020.

<sup>138</sup> Tušil, Brauchli, Kerksieck, et al. 2021: 741.

<sup>139</sup> Madubela 2022 Standard Bank repeals controversial Covid-19 vaccination policy <https://mg.co.za/business/2022-07-12-standard-bank-repeals-controversial-covid-19-vaccination-policy/>

### 3.2 COVID-19 REGULATION IN SOUTH AFRICA

The first verified COVID-19 case was reported on March 5 by South Africa. South Africa announced a nationwide lockdown on March 26, 2020.<sup>140</sup> Cyril Ramaphosa, the president of the Republic, declared a national calamity and called for immediate action to stop the pandemic from spreading. According to the National Institute for Communicable Diseases, since the first lockdown announcement, the spread of COVID-19 in South Africa has been massive.<sup>141</sup> An overview of the institutional and regulatory frameworks for health emergency responses is presented in this part before the government of South Africa's major responses.

#### 3.2.1 Regulation And Institutional Responses By National Government

In response to the COVID-19 pandemic, numerous national regulations were produced by the government at different levels from the president to ministerial levels. Several regulations and rules were also produced to guide national and local responses. Dr Nkosazana Dlamini Zuma, Minister of Cooperative Governance and Traditional Affairs, as designated under Section 3 of the Disaster Management Act, 2002 (Act No. 57 of 2002), declared a National State of Disaster on 15 March.<sup>142</sup> This was after recognizing that special circumstances existed to warrant the declaration of a national state of disaster. In terms of Section 27(2) of the Act, the government may, when required, make regulations or issue directions or authorize the issue of directions for the following reasons: (a) To assist and protect the public, (b) To provide relief to the public, (c) To protect property, (d) To prevent or combat disruption, or (e) To deal with the destructive and other effects of the disaster.<sup>143</sup>

The country was placed in complete lockdown on March 16. Five different alert levels had to be followed.<sup>144</sup> The most severe level, level five, involved a total lockdown. All South Africans were forced to remain at home, except those who performed vital activities, obtained necessary goods or services, collected social grants, or needed emergency, life-saving, or ongoing medical care.<sup>145</sup> In addition to limiting international

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<sup>140</sup> Masiya et al. 2021:6

<sup>141</sup> Masiya et al. 2021:6

<sup>142</sup> Department of Cooperative Governance and Traditional Affairs. Declaration of a National State of Disaster no 313 15 March 2020.

<sup>143</sup> Disaster Management Ac: Sec 27(2).

<sup>144</sup> <https://www.gov.za/covid-19/about/about-alert-system#:~:text=Adjusted%20alert%20level%20is,June%20to%2025%20July%202021>.

<sup>145</sup> Masiya et al.2017:7

travel, these rules also closed schools and other educational institutions, forbade gatherings of more than 100 individuals, and banned the sale of cigarettes and alcohol.<sup>146</sup> On April 16, 2020, new rules were published in the federal gazette. These rules prohibited visiting prisons, remand prisons, holding cells, military detention facilities, and Department of Social Development facilities such as childcare centres, shelters, One Stop Centers, and treatment centres as well as other places.<sup>147</sup>

Level 4 principles became compulsory from 01 to 30 May 2020. In terms of the level four regulations, people could travel to perform and acquire services only where such services could not be provided from the safety of their homes. “Permitted business sectors were advised to take into account the necessary social distancing guidelines as per the National Department of Health.” The President pleaded with the citizens that the process engaged at the two levels was meant to limit the spread of the Coronavirus and give the country time to organize health facilities and mobilize some of the essential medical supplies needed to meet the inevitable increase in infections. Similar conditions applied at level three but additional businesses such as domestic air travel, schools and essential government services were allowed to operate. Level two saw the permission for interprovincial travel and restricted opening of more industries. Progression was meant to ensure that the pandemic is reduced to negligible levels if not eliminated.<sup>148</sup>

In essence, the different regulations and alert levels restricted normal operations and affected the day-to-day realities of many people, particularly employees who could not execute their duties within the normal conditions of employment. This would have an impact as will be reflected later in the dissertation.

### **3.3 NATIONAL CORONAVIRUS COMMAND COUNCIL FOR COVID-19 RAPID RESPONSE**

A National Coronavirus Command Council (NCCC) was established as a body tasked with coordinating a national response to the Covid-19 pandemic. The NCCC was comprised of members from 20 of the 33 ministers and their directors general.<sup>149</sup> The

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<sup>146</sup> Regulations to address, prevent and combat the spread of Coronavirus COVID-19  
<https://www.gov.za/documents/disaster-management-act-regulations-address-prevent-and-combat-spread-coronavirus-covid-19>.

<sup>147</sup> Masiya et al.2017:7-8

<sup>148</sup> <http://www.apsdpr.org>

<sup>149</sup> Singh 2020

notoriety of the members of this facilitated the dissemination of information, drawing lessons and experiences from other parts of the world and generating a better understanding of the nature of the pandemic, they are challenges and myths. The NCCC is a cabinet committee, which was established to address the COVID-19 pandemic in the country and is accountable to parliament for the decisions it takes. The National Operational and Intelligence Joint Structure (NatJOINTS) is constituted by the security of the country and the operations of the police in a consortium to coordinate the government's daily response to COVID-19.<sup>150</sup>

A Ministerial Advisory Committee (MAC) of 45 distinguished scientists with knowledge and experience in laboratory testing, clinical issues, public health, and research is responsible for maintaining the NCCC.<sup>151</sup> These experts placed a strong emphasis on research and evidence-based planning in their work. These highly qualified professional and scientific experts therefore aided South Africa's reaction to COVID-19.<sup>152</sup> The establishment of the NCCC and the MAC led to aggressive, well-thought-out, domestically tailored, scientifically sound, and culturally sound public health actions that prioritized preventive interventions over therapeutic approaches to avoid the severe constraints brought on by the scarcity of available treatments in hospitals. As the nation grappled with the pandemic's effects, the NCC came to dominate government decision-making in its response to COVID-19. At the height of the pandemic, NCCC meetings would span anywhere from three to six hours.<sup>153</sup> However, detractors like Hunter (2020) maintained that the majority of these sessions were held in private and that details on how the Council made the majority of decisions were never disclosed.<sup>154</sup> Additionally, this resulted in some segments of society contesting its judgments in the legislative, public, and courts of law.

The coronavirus crisis caused a panic sale of developing market debt in late March. As a result of this selling, government bond yields increased, which prompted the South African Reserve Bank's (SARB) action to change rates in line with its policy. Since SA's interest rate was only about 3.8 per cent at the time, the SARB has not engaged in quantitative easing in the conventional meaning. However, as SA's

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<sup>150</sup> Masiya et al. 2017: 7.

<sup>151</sup> Wiysonge 2020: 7-8.

<sup>152</sup> Masiya et al. 2017: 8.

<sup>153</sup> Hunter 2020: 9.

<sup>154</sup> Hunte 2020: 9.

National Treasury and Government fund themselves through the same market, the outcome is the same. The SARB unintentionally funds a portion of the COVID-19 response, despite not wanting to grant the government extra spending authority.<sup>155</sup> The SARB is also likely to keep purchasing bonds because the R500 billion COVID-19 response plan will require further borrowing, increasing the government's budget deficit. This may oblige the SARB to continue purchasing bonds for some time to come, if not always.<sup>156</sup> A full exodus of investors from the SA bond market would result from this, which is undoubtedly something the country's finances cannot afford as it might fuel concerns that the SARB is losing control over price stability. Furthermore, the SARB's power to interfere is limited.<sup>157</sup>

Positively, the government has had great success in securing private assistance. Over 124,000 small and medium-sized businesses have received R12 billion in debt relief from the banking industry, and private healthcare providers are assisting with testing and treatment at advantageous pre-determined prices.<sup>158</sup> “Additionally, 2 million customers at commercial banks received 3-month payment breaks worth roughly R17 billion, and other programs offered interest-free loans. This demonstrates the dedication of SA citizens to the future of SA and the greater good. If SA is to recover and grow, these successes and alliances must be fostered.” As discussed by Arndt et al., 2020 the best-case scenario is that SA's GDP will decline by 5% - something ordinarily associated with disaster before COVID-19. However, SA is rated at junk status. However, with SA rated at junk status, this problem is exasperated the future of South Africa looks very uncertain with projected job losses and tax revenue being depressed. What is clear is that the decisions made now will have a big impact on South Africa's economy. One path could lead to a recovery, while the other could lead to an economic collapse.<sup>159</sup>

### **3.4 THE WORKPLACE AND EMPLOYEE WELLBEING – INTERNATIONAL STANDARDS IN RESPONSE TO COVID-19**

The spread of the COVID-19 pandemic has significantly impacted the universe of work, getting better approaches for working and the utilization of substitute work game

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<sup>155</sup> De Villiers et al. 2020: 14-15.

<sup>156</sup> De Villiers et al. 2020: 15

<sup>157</sup> De Villiers et al. 2020: 15

<sup>158</sup> De Villiers et al. 2020: 5

<sup>159</sup> White 2020: 15

plans. Associations are only sometimes ready for the disintegration and rearrangement of working circumstances following a worldwide emergency. The job of Information and Communications Technology in reinforcing the associations' Occupational Health and Safety (OHS) measures cannot be disregarded.<sup>160</sup> The subject of work-related well-being and security the board in the public area is on the ascent not just on account of its situation as the most elevated bosses of work, but additionally the ascent of new administrative organizations, propels in research and an expansion in degree of training/mindfulness on safety. Regardless of workers' knowledge of the OHS ideas, numerous associations across the globe keep on recording misfortunes and failures due to rebelliousness.

As discussed by scholars, OHS became necessary due to work risks associated with physiological, psychosocial, emotional and mental demands, furthermore, accenting the adverse effects of the direct and indirect costs of work-related injuries, accidents and illnesses on the workforce, assets, equipment, environment, and the economy at large.<sup>161</sup>

Workers face occupational hazards in complex work environments around the world as a result of rapid industrialization, technological advancement, and globalization, resulting in injuries, accidents, illnesses, disabilities, and death.<sup>162</sup> Annually, 340 million occupational accidents and 160 million victims of work-related illnesses occur, according to the International Labour Organization (ILO) (2020). These figures are consistent with the ILO's estimate of 2.3 million workers worldwide dying from work-related accidents or diseases each year, amounting to over 6000 deaths per day. Though the National Institute for Occupational Health (NIOH) (2020) asserted the lack of national comprehensive data on occupational diseases, injuries, and death, these incidents occur at industry/sector levels, South Africa is not an exception. In the mining industry, for example, there were 2, 406 injuries in 2019 While 3,458 diseases and 25 medical deaths were recorded in 2018, the department received 999 annual medical reports. According to Hrpulse, over R2 billion in claims are lodged with the Department of Labour each year seeking compensation for non-compliance.<sup>163</sup> Furthermore, Construction (2020) notes that the construction industry continues to be one of the

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<sup>160</sup> Obianuju & Okeke-Uzodike 2021: 91

<sup>161</sup> Jespersen et al. 2016; Mohammadfam et al. 2016

<sup>162</sup> Obianuju & Okeke-Uzodike, 2021: 97.

<sup>163</sup> Department of Mineral Resources 2020: 91

three industries with the highest work-related injuries due to chemical, physical, biological, ergonomics, and psychosocial occupational hazards, which manifest in a variety of short- and long-term health consequences for workers. Agriculture/forestry, the informal economy, and healthcare are not immune to occupational injuries, diseases, and death.<sup>164</sup>

The International Labour Organization (ILO) establishes principles to protect workers from illnesses, diseases, and injuries caused by the work environment. The ILO standards on Occupational Health and Safety provide national governments, employers, and workers with guidance and tools to ensure maximum workplace safety.<sup>165</sup>

In the context of South Africa, workplace health and safety is well covered by the Constitution of the Republic of South Africa Act 108 of 1996; Acts of Parliament (e.g., The Occupational Health and Safety Act 85 of 1993, The Compensation for Occupation Injuries and Diseases Act of 130 of 1993, The Labour Relations Act 66 of 1995); and Regulations and Codes of Practice and Standards, for example, The Environmental Regulations for Workplace Health and Safety.<sup>166</sup> With these regulations in place, changes in work practices present both challenges and opportunities for improving worker well-being. The SARS-CoV-2-caused Coronavirus disease (COVID-19) outbreak has drastically altered the way we live and work. The rapid spread of COVID-19 has increased the number of infections, death tolls, and thus fear in society. To contain the virus, nations imposed lockdown measures, including the closure of land, sea, and air borders.<sup>167</sup>

### **3.4.1 Occupational Health and Safety**

The World Health Organization (WHO, 2010) considers workplace safety to be a priority for health promotion in the twenty-first century. This is because, in many settings, work remains hazardous, and injuries, illnesses, and fatalities inflicted on humans, societal fabric, and the economy remain a major concern.<sup>168</sup> "As a result, today's workplace quality, health, knowledge, and safety requirements are more stringent than they were previously." Occupational Health and Safety is one of the risk-

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<sup>164</sup> Obianuju & Okeke-Uzodike 2021: 97.

<sup>165</sup> Obianuju & Okeke-Uzodike 2021: 97-98

<sup>166</sup> Obianuju & Okeke-Uzodike 2021: 98-99

<sup>167</sup> Obianuju & Okeke-Uzodike 2021: 100

<sup>168</sup> Obianuju & Okeke-Uzodike 2021: 101

mitigation strategies that businesses use. The South African OHS policy establishes guidelines for the health and safety of employees at work, concerning machinery or hazards that may arise while performing job tasks.<sup>169</sup> OHS is concerned with the tasks of protecting employees and workplaces by reducing the number of accidents, minimizing insufficient information, and increasing employee awareness.<sup>170</sup> Over the years, OHS research has advanced significantly, but the COVID-19 pandemic outbreak and technology improvements have necessitated a greater commitment to its practices and policies. OHS is an interdisciplinary field of study that engages with a variety of stakeholders.<sup>171</sup>

### **3.4.2 Theoretical Framework**

Organizations are equipped with both human and other material resources, and they can use these resources to enforce safety behaviour and maintain a secure working environment. To some extent, human behaviour is associated with how organizational resources are applied and impacts the level of workplace safety. Aijzen's Theory of Planned Behavior is one of the psychological ideas that is frequently utilized across disciplines to comprehend variations in human behaviour (TPB).<sup>172</sup> Since the COVID-19 outbreak, discussions among stakeholders, governments, and health experts, have focused heavily on safety behaviour. Many, if not all, governments around the world introduced a variety of mitigation measures in response to the epidemic, including physical separation, hygiene precautions, and mask use. Human behaviour has been extensively related to the individual and communal adoption of these techniques in managing the virus. As a result, more research studies have used the TPB paradigm to analyse how human behaviour affects the development of COVID-19 pandemic mitigation strategies.<sup>173</sup>

### **3.4.3 Quarantine and Isolation In South Africa**

Guidelines for isolation and quarantine in connection to exposure to and infection with COVID-19 were published by the Department of Health in 2020. The guidelines state that COVID-19 quarantine is only appropriate for those who are asymptomatic but may still be infectious. To avoid the possibility of unintentional infection, those who are

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<sup>169</sup> RSA, Government Gazette 1993

<sup>170</sup> Obianuju & Okeke-Uzodike 2021:101

<sup>171</sup> Beus et al., 2016; Bhagawati 2015:352

<sup>172</sup> Obianuju & Okeke-Uzodike 2021:103

<sup>173</sup> Obianuju & Okeke-Uzodike 2021:103

quarantined are kept apart from others. In these situations, people are detained in quarantine facilities. According to the guidelines, isolation is used in cases where people are already ill or have tested positive for COVID-19 infections but do not need to be admitted to the hospital for medical care, even though it serves the same goal as quarantine. However, the purpose of both isolation and quarantine was to stop people from possibly and unintentionally infecting others. Regarding facilities, the rules allow people to quarantine either at home (self-quarantine) or at a facility in both cases (administered quarantine)

First off, the quarantine or isolation time for asymptomatic individuals was set at 10 days beginning on the first positive test day. Second, it was established at 10 days from the start of symptoms in the case of a minor condition. Thirdly, the cutoff for the moderate or severe disease was established 10 days after clinical stabilization or the point at which the patient is no longer in need of oxygen. Following the updated WHO recommendations that South Africa should apply its own quarantine or isolation criteria, the original timeframe was 14 days but was shortened to 10 days.

For individuals unable to isolate themselves at home, the authorities set up state-sponsored provincial-level quarantine and isolation centres. The establishment of such facilities at hotels, resorts, and university or college buildings, will provide those in need with transportation to the centres at the expense of the government. A nurse had to be on duty at the institution for at least eight hours every day to do regular temperature checks and assist with any other potential medical requirements. There are 521 quarantine facilities across the nation, according to the Department of Health.

In terms of self-quarantine or self-isolation enforcement, the policy requires an enforcement officer (police or military) to compel the person to go to a facility for obligatory isolation or quarantine if they don't follow the rules for doing so. Conflicts over ethics, human rights, and the law occasionally arise, despite the possibility of an unprecedented public health disaster like COVID-19, which would necessitate extraordinary containment measures like isolation and quarantine, either voluntarily or imposed. Moodley and Obasa argued that South Africa needed to execute isolations and quarantines in a way that minimized the violation of civil freedoms.<sup>174</sup> South Africa

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<sup>174</sup> Moodley and Obasa 2020

appears to have attained a reasonable amount of compassion, restraint, and respect in this regard, at least to some level.

### **3.5 CONCLUSION**

This chapter has provided a breakdown of the conditions in which South Africa found itself when the COVID-19 pandemic was at its worst and the reactions to stem the spread of the virus. Importantly, the dissertation identifies the key areas of control that the government sought to ensure compliance through the regulation of movement and operations of business operations. These regulations would effectively render the employee subject to regulations adopted to suit the needs of the country at the time. In some instances, rendering how they executed their contractual obligations a subject of debate these instances of debate are what will be dealt with in the next chapter. This will look at how government regulations on the covid-19 pandemic, may have led to violations and the role of NHRIs in ensuring violations are nipped in the bud.

## CHAPTER FOUR

### THE ROLE OF SOUTH AFRICAN NHRIs IN A TIME OF CRISIS

#### 4.1 INTRODUCTION

The period when covid-19 was at its peak and the introduction of various forms of vaccination options, brought about debates about the use and implementation of vaccination policies at an international, national and local level. The government in South Africa had to make policies and regulations about COVID-19 vaccination and in the context of this paper, employers had to adopt these guidelines and implement policies relevant to their workplaces. This process involved and implicated human rights being at the centre of considerations of implementation of vaccination policies. This section seeks to expand on the various human rights that were at risk of being affected as it relates to the workplace. Secondary to that, the section explores the role of NHRIs in the process and how the NHRIs viewed vaccination policies concerning their mandate in advancing, promoting and protecting human rights with specific reference to the workplace.

#### 4.2 HUMAN RIGHTS AND COVID-19

There are two primary rights that this section will explore, primarily those affected by the discussion around the implementation of vaccination mandates in the workplace. These are the rights to work and the right to bodily integrity human rights are primarily affected during this period. These rights are the right to work, and the right to bodily integrity. The constitution provides for these rights in clear terms and subsidiary to that, consideration of employment legislation such as the Labour Relations Act 66 of 1995; the Occupational Health and Safety Act 95 of 1993; the Employment Equity Act 55 of 1998; and the Basic Conditions of Employment Act 75 of 1997 provide the necessary guidance when considerations of mandatory vaccination policies are to be crafted.<sup>175</sup> But first, let's explore the right to work and the right to bodily integrity and how this must be viewed in light of mandatory immunisation in the workplace.

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<sup>175</sup> <https://www.hhrjournal.org/2021/04/constitutional-rights-in-south-africa-protect-against-mandatory-covid-19-vaccination/>

### 4.2.1 Rights vs COVID-19 Measures

The last chapter detailed the events, including the government interventions that arose from the COVID-19 pandemic. This section explores the right to work and the right to bodily integrity as key concerns of violations arising from the COVID-19 pandemic and the role of NHRIs.

### 4.2.2 Right to Work

The Constitution of South Africa prohibits direct and indirect discrimination on several grounds.<sup>176</sup> “The Constitution goes on to state that ‘[e]very citizen has the right to choose their trade, occupation, or profession freely’<sup>177</sup> Section 7(2) of the Constitution provides that the state must ‘respect, protect, promote and fulfil’ the rights which are contained in the Bill of Rights, including the right to work and employment. This provision may be construed to be impliedly creating a duty to put positive measures in place in line with Article 27 of the Committee on the Rights of Persons with Disabilities (CRPD).

The right to work was greatly affected during the COVID-19 pandemic. The pandemic itself necessitated various regulations that affected the normal operations of day-to-day lives. One such implication was the closure of business which resulted in the loss of employment for large groups of people. Statistics South Africa estimates that the job losses in the formal sector ranged from 600,000<sup>178</sup> to around 3 million during the lockdown period.<sup>179</sup> Other elements that were affected when it comes to the right to work, arise out of the mandatory provisions for vaccination that some employers instituted as conditions for return to workplaces.<sup>180</sup>

### 4.2.3 Right to Bodily Integrity

Another constitutional imperative that is of concern is the right to bodily integrity as prescribed in section 12 of the Constitution. Everyone has the right to bodily and psychological integrity as outlined in section 12(2) of the constitution which states that:

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<sup>176</sup> Constitution sec.9(3)

<sup>177</sup> Constitution sec.22

<sup>178</sup> SA loses more than 600K formal sector jobs during COVID-19 lockdown <https://www.statssa.gov.za/?p=13690> (accessed 19 October 2023).

<sup>179</sup> Yolisa Tswana, <https://www.business-humanrights.org/en/latest-news/so-africa-three-million-south-africans-have-lost-their-jobs-as-a-result-of-the-covid-19-pandemic-women-most-affected/> So. Africa: Three million South Africans have lost their jobs as a result of the Covid-19 pandemic, women most affected

<sup>180</sup> An employer’s guide to mandatory vaccination. <https://www.cliffedekkerhofmeyr.com/export/sites/cdh/practice-areas/downloads/An-Employers-Guide-to-Mandatory-Workplace-Vaccination-Policies.pdf>

(2) Everyone has the right to bodily and psychological integrity, which includes the right—

- (a) to make decisions concerning reproduction;
- (b) to security and control over their body; and
- (c) not to be subjected to medical or scientific experiments without their informed consent.

Several elements arise from this section. Firstly, People have the freedom to decide what happens to their bodies and how to keep them safe. Secondly, there is an important provision that creates protections over one's bodily integrity not to be subjected to any medical or scientific experiments. Imperative to this second right is the fact that consent is integrated into the wording of the constitutional right. These protections cannot be denied to anyone, and the plain reading of this section directs one to the inference that every person has the right to make decisions regarding their health and medical interventions and treatment. In the instance of the COVID-19 pandemic, this must expectedly include the right to decide whether to accept or reject the vaccine.

#### **4.2.4 Limitations under Section 36**

However, constitutional rights are never monolithic; they can be restricted when there are good reasons to do so. Additionally, the National Health Act 61 of 2003 has explicit rules for emergency care (section 5), consent (sections 7 and 9), and involvement in medical decisions (section 8). When utilizing the rights guaranteed by the Bill of Rights, it is necessary to take into account the restrictions indicated in section 36. The clauses state:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.<sup>181</sup>

### 4.3 SAHRC INTERVENTIONS

The SAHRC Act prescribes specific objectives for the SAHRC. These objectives include the need to promote respect for human rights and a culture of human rights, to promote the protection, development and attainment of human rights and to monitor and assess the observance of human rights.<sup>182</sup> The SAHRC thus has a mandate to act proactively and reactively. Means must be placed to ensure the promotion of rights and means must be placed to ensure protection in the event of a violation. But how does this affect the specific topic at hand as it relates to the rights of workers and the possible violations arising from the COVID-19 pandemic?

#### 4.3.1 *Justified limitations and the role of NHRIS*

Section 36 of the Constitution provides for the limitation of constitutional rights in so far as it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, and having regard to (i) the nature of the right; (ii) the importance of the purpose of the limitation; (iii) the nature and extent of the limitation; (iv) the relation between the limitation and its purpose; and (v) less restrictive means to achieve the purpose. In *S v Manamela and Another (Director-General of Justice Intervening)* [2000] ZACC 5 it was held that these five factors do not form an exhaustive list or automatic checklist. The courts are encouraged to conduct an overall assessment to arrive at a judgment based on proportionality. The right to bodily and psychological integrity can thus be limited by legislation which passes the stringent test of being both “reasonable” and “justifiable”. The two-stage approach is set out in the case of *S v Zuma* [1995] ZACC 1. First, it needs to be determined whether there has been a contravention of a guaranteed right in the Constitution and secondly, whether the contravention is justified under section 36 (the limitation clause). The test of reasonableness involves the weighing up of competing rights and values based on proportionality. In *S v Makwanyane and Another* [1995] ZACC 3 it was further held that a right should not be taken away altogether under the guise of limitation and should be limited as little as possible. Drawing on the above, it is evident that there is

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<sup>181</sup> Constitution sec 36.

<sup>182</sup> SAHCR ACT section 2

no absolute limitation of the right envisaged in section 12 and that the courts ought to consider broader societal and governmental interests when balancing competing rights.

#### **4.4 CONCLUSION**

The World Health Organisation created operational planning guidelines that sought to strike a balance between the demands of effectively responding to COVID-19 and the need to protect economies from collapse to ensure that African nations, and indeed the world as a whole, navigate the challenges posed by the pandemic. The challenge it poses to the health and economic sectors has prompted different reactions from southern African nations like Botswana and South Africa. There is no one-size-fits-all method for handling cases and outbreaks of diseases like COVID-19 because a review of the patterns of responses in these nations reveals the "domestication" of responses. However, the domesticated cases, although having met with criticism in some cases have significantly contributed to the effective management of COVID-19 health and economic effects.

## **CHAPTER FIVE**

### **FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS**

#### **5.1 INTRODUCTION**

This chapter focuses on outlining the findings of this study in achieving the study's research aim and objectives. This means this chapter shares an indication of whether this study achieved its research aim and objectives or not. Accordingly, this study aimed to analyse the role of National Human Rights Institutions (NHRIs) in protecting the rights of workers in South Africa during the COVID-19 pandemic. The research objectives were a) To explore the treatment of employees in the workplace during the time of COVID-19, b) To examine whether the National Human Rights Institution considers the best interests of employees, and c) To share the recommended measures to mitigate the violation of the rights of employees in South Africa during the time of COVID-19.

#### **5.2 TREATMENT OF WORKERS DURING THE COVID-19 PANDEMIC LOCKDOWN**

The National Human Rights Institutions (NHRIs) are mandated by the government to ensure that there is a facilitation of a fair society. This includes ensuring the rights of employees are not marginalised in the workplace, including when there is a state of emergency.

When the government declared a lockdown as a way of curbing the spread of the Coronavirus, there was an unintentional creation of an environment that was conducive to infringement, inaccessibility, violation, and abuse. This led to an overall non-enjoyment of the human rights of South African citizens.

Workers experienced unfair treatment by employers that included the unilateral amendments of employment contracts, without the involvement of employees and trade unions. Changes were made in the working hours that also affected the salaries of the workers, where the employees were paid less. This happened while the workers could not practice collective bargaining because of the lockdown restrictions. At the same time, some employees were retrenched. In other cases, the health and safety of employees were compromised, such as in the case of some health employees who were not provided with adequate Personal Protective Equipment (PPE) when doing

community work. This was also a form of discrimination because there were health employees who had access to complete sets of PPEs they needed. These are only examples of incidences that were reported when employees' rights were violated during the lockdown in South Africa.

### **5.3 NATIONAL HUMAN RIGHTS INSTITUTIONS' CONSIDERATIONS OF THE BEST INTERESTS OF EMPLOYEES**

In South Africa, NHRIs were established when there was a transition from the Apartheid ruling to the current government that allowed for people's rights to be respected. Since then, NHRIs have become an integral part of the country's human rights system. Accordingly, the NHRIs were given authority and jurisdiction to monitor compliance with human rights protection. The protection of human rights is a mandate for associations between all types of organisations and citizens, as well as amongst citizens. This means, in the context of this study, NHRIs were expected to facilitate the practising of human rights protection even during the COVID-19 pandemic lockdown. NHRIs were supposed to have emphasised that employers continued to adhere to the provisions of The South African Constitution, the Bill of Rights, the Labour Relations Act, and the Occupational Health and Safety Act.

Added to the issue of unilateral changes to employment contracts, the NHRIs failed workers when it came to the compulsory vaccination that was imposed on employees. The workers who chose to not vaccinate were warnings while others were retrenched. Although the claim was that vaccinating was for the protection of others, the vaccine's effectiveness and side effects were not ascertained by scientists. And workers could not liaise with trade unions to bargain because of the lockdown restrictions. This means the rights of workers were violated and it contributed towards a large number of workers losing their jobs in South Africa during that period.

### **5.4 RECOMMENDATIONS**

The issue of human rights protection needs to be tackled before a disruptive event such as the COVID-19 pandemic happens. NHRIS must develop strategic approaches to how employees' rights can be protected even when there is a state of emergency in South Africa. This will require some research concerning the strategies that can be developed and the research must be done in collaboration with relevant institutions. Such research must include obtaining data from workers from various fields to

determine detailed information about their experiences as well as possible recommendations. In this way, the voices of the workers will be heard, and the information used for better planning and strategising. Also, employers must be a part of this research to help determine the challenges that were faced and can be prevented in future. Therefore, it serves as a way of getting employers actively involved. With the inclusion of trade unions as well, the NHRIs can effectively develop strategies that will help ensure that workers' rights are not violated in future when there is a state of emergency in South Africa.

## **5.5 CONCLUSION**

The establishment of NHRIs was for the protection of the rights of the people and workers of South Africa. However, the NHRIs failed employees because there were no strategies in place for instances when the working conditions were changed because of disruptions. This means that the government and NHRIs need to develop and implement amended policies, ensuring that all organisations provide strategic plans of how workers' rights will be protected in a state of emergency. Therefore, it is the responsibility of not only the government and the NHRIs but also various types of organisations in South Africa, trade unions, and workers to ensure that there are effective changes implemented so history does not repeat itself.

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