



UNIVERSITEIT VAN PRETORIA  
UNIVERSITY OF PRETORIA  
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Faculty of Law

# **THE RIGHT TO WORK OF MIGRANTS AND THE CHALLENGES OF ACCESSING THE LABOUR MARKET IN SOUTH AFRICA**

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**Mini-dissertation submitted in fulfilment of the requirements for the  
degree LLM in Multi-disciplinary Human Rights**

**In the Faculty of Law  
University of Pretoria**

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## Declaration of originality

I, **Arlette Mbuyi Mwamba**, student No. **18228713** declare that “**The Right to Work of Migrants and the Challenges of Accessing the Labour Market in South Africa**” is my own and original work. It has never been submitted to any other University or institution.

Indeed, someone else’s work and all sources (primary or secondary) used, have been acknowledged and referenced in this study in accordance with the requirements of the Faculty of Law of the University of Pretoria.

Signature: AM

Date: .....

Supervisor: **Dr Tshepo Madlingozi**

Signature:.....



## Dedication

I dedicate this work to God Almighty for his goodness and endless grace, for allowing me to add more knowledge and to complete this study.

To my husband, my soulmate and my best friend **Paulin Musangu Ngeleka** for trusting me and giving me the opportunity to fulfil my dream. Thank you for investing in me, for all the sacrifices, encouragement, support and love. Nothing can describe my appreciation of you. You mean the world to me.

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To all migrants in the world.



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## **Abstract**

Migrants are people who leave their countries for different reasons. These reasons can be political, economic, social and environmental. Those who migrate seek protection and better opportunities in the destination countries with stable political environments and strong economies. Migrants are also willing to work to sustain their livelihoods and their families. However, they find themselves in an extremely vulnerable position and encounter many challenges which prevent the enjoyment of the right to work.

The right to work is a fundamental human right which is protected and recognised in many human rights standards. The right to work is necessary for the realisation and the enjoyment of other human rights. It constitutes an integral part of human dignity and enables people to gain a living through the work they choose or accept.

This mini-dissertation examines how the right to work is guaranteed to migrants in South Africa. The focus on South Africa is due to the fact that South Africa is one of the main destination countries in Africa. Since the post-apartheid period, the majority of migrants target or prefer to come to South Africa because of its political and economic stability.

If the right to work is an integral part of basic rights, human dignity and human survival, it must also be guaranteed to migrants because being a migrant does not exclude the exercise and the enjoyment of the right to work. However, the majority of migrants are discriminated against in so far as accessing the job market in South Africa due to many barriers.

This mini-dissertation analyses different challenges migrants are facing in looking for employment and how difficult their integration is in the South African labour market. It examines South African legislation in relation to the right of migrants to work, with a brief



emphasis on refugees and asylum seekers. It considers international instruments that recognise migrants' right to work and other labour rights.

This mini-dissertation concludes by giving some recommendations that will help the South African government to review its laws, as well as to prevent challenges that impede migrants getting jobs and accessing the labour market.



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## Abbreviations

ACHPR	African Charter on Human and People's Rights
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation, Mediation and Arbitration
CESCR	Committee on Economic, Social and Cultural Rights
DHA	Department of Home Affairs
EEA	Employment Equity Act
ESA	Employment Services Act
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families
ILO	International Labour Organisation
LRA	Labour Relations Act
PSIRA	Private Security Industry Regulatory Authority
QLFS	Quarterly Labour Force Survey
SAQA	South African Qualification
UNGA	United Nations General Assembly



## Chapter One: Introduction

*“All human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in condition of freedom, and dignity, of economic security and equal opportunity”.*

(ILO Declaration of Philadelphia, principle II (a), 1944)

### 1.1 Background of the study

Throughout the years, there has been a massive migration of people around the world<sup>1</sup>; in particular, those coming from countries with serious crises, such as political conflicts, war, human rights violations, environmental disasters, social and economic upheaval linked to extreme poverty, famine, economic insecurity and unemployment.<sup>2</sup> There are also people who migrate because they have been transferred to work in another country other than their country of origin.

It has been observed in the *New York Declaration for Refugees and Migrants* that:

*‘Since earliest times, humanity has been on the move. Some people move in search of new economic opportunities and horizons. Others move to escape armed conflict, poverty, food insecurity, persecution, terrorism, or human rights violations and abuses. Still, others do so in response to the adverse effects of climate change, natural disasters (some of which may be linked to climate change) or other environmental factors. Many move, indeed, for a combination of these reasons’.*<sup>3</sup>

Those people who migrate are seeking protection; and better opportunities in the destination countries. They have many goals to achieve, which can be explained by their

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<sup>1</sup>S Castles & MJ Miller “The age of migration: international population movements in the modern world” (2009) 9

<sup>2</sup>K Ramjathan-Keogh “The Rights of Refugees and Migrant Workers: Basic Education Rights Handbook – Education Rights in South Africa” (2017) 133

<sup>3</sup>New York Declaration for Refugees and Migrants, UN General Assembly Resolution A/Res/71/1 of 19 September 2016, para 1

desire to find a good job that can generate more income which may help them to fulfil their dreams.

The right to work is a basic human right, accepted and guaranteed to everyone in many instruments at the global and regional level, as well in some legislation and policies at the national level. In addition, it is also an essential human right that contributes to the realisation and enjoyment of other human rights, such as ‘the rights to education, to health and good standards of living’.<sup>4</sup> It also promotes migrants’ integration to the host countries and helps them to preserve their dignity.

As Mantouvalou states ‘[w]ork is valuable because productive labour generates goods needed for survival, such as food and housing, goods needed for self-development, such as education and culture; and other material goods that people wish to have in order to live a fulfilling life. It brings both material and non-material benefits’.<sup>5</sup>

Work helps people to achieve their goals, to have self-esteem and development, as well as the respect of others because of the social ties people develop at the workplace.<sup>6</sup> However, the protection and the enjoyment of the right to work for non-nationals, particularly migrants, sometimes come with certain limitations concerning its application. It also depends on countries’ legislation on immigration.

In South Africa, since the post-apartheid period after 1994 that brought many political, economic and social changes, the country has become one of the African countries for migration. It has become a better destination for foreign migrants, both high-skilled and low-skilled, to stay and work due to its political and economic stability.<sup>7</sup> In fact, the South African government has enacted laws regulating the basic protection of refugees and

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<sup>4</sup>H Lu “The personal Application of the Right to Work in the Age of Migration” (2008) 43

<sup>5</sup>V Mantouvalou “The Right to Work: Legal and Philosophical Perspectives” (2015) 1

<sup>6</sup>Lu (n4 above) 43

<sup>7</sup>PJ Lehohla “Census 2011: Migration Dynamics in South Africa”, Pretoria: Statistics South Africa, 2015, Report No. 03-01-79. [www.statssa.gov.za](http://www.statssa.gov.za) [accessed on 9 October 2018]



migrants' rights, which also recognised their fundamental rights. This was done since it has signed and ratified human rights instruments at the international and regional level.

Despite opportunities and laws that exist, in practice, most migrants are unemployed, even those that are skilled migrants<sup>8</sup>. They experience social inequality in the form of verbal and physical attacks<sup>9</sup>, such as xenophobia, discrimination, exploitation, racism and stereotyping which create barriers for their integration into the job market and therefore limit their right to work or to seek employment.

In addition to this, South African laws provide conditions and restrictions to migrants' employment with due regard to their legal status.<sup>10</sup> It should also be noted that South Africa itself is experiencing a job crisis with a high rate of unemployment amongst its citizens, which also restricts the enjoyment of the right to work to migrants and their integration into the labour market.

## 1.2 Definition of the term “migrant”

The term migrant can often be used interchangeably with the term refugee and asylum seeker depending on scholars' thoughts, despite their different meanings in international law.<sup>11</sup> There is no legal standard definition of the term 'migrant', however the next paragraphs will attempt to describe the various terminology used.

The International Organisation for Migration defines the term migrant as 'any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of the person's legal status; or whether the

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<sup>8</sup>Consortium for Refugees and Migrants in South Africa (CORMSA) "Protecting Refugees, Asylum Seekers and Immigrants in South Africa" (2008) 40, Johannesburg. [www.cormsa.org.za](http://www.cormsa.org.za) [accessed on 18 October 2018]

<sup>9</sup>R Cholewinski *et al.*, "Migration and Human Rights: The United Nations on Migrant Workers' Rights" (2009) 257

<sup>10</sup>See Immigration Act 13 of 2002 amended by Immigration Act 19 of 2004

<sup>11</sup>See UN General Assembly Resolution 2198 (XXI) of 1951 and Resolution 45/158 of 18 December 1990



movement is voluntary or involuntary; what the causes for the movement are, and what the length of the stay is'.<sup>12</sup>

Alternatively, a refugee is defined in the UN Refugee Convention as someone who fled his/her country due to 'a well-founded fear of being persecuted for reasons of race, religion, nationality, [...]'.<sup>13</sup>

Unlike refugees' migration that is involuntary, migrants are personally making a decision to move from one country to another to seek a better life and to work. Their migration may be voluntary or involuntary. They make a free decision to leave their countries whenever they want. Unlike migrants, refugees are obliged to leave their countries by lack of alternative choice due to political reasons, war, armed conflicts or environmental catastrophe.<sup>14</sup>

An undocumented migrant is defined in the Immigration Act as 'a foreigner who is in the Republic of South Africa in contravention of the Immigration Act and includes a prohibited person'.<sup>15</sup> An undocumented migrant can also be seen as a person who moved into another country where he or she is not a citizen or a resident, 'usually in search of income-generating activities, without authorisation and without the necessary documents and permits'.<sup>16</sup>

A migrant worker is defined in the UN Convention on Migrant Workers as 'a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national'.<sup>17</sup>

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<sup>12</sup>International Organization for Migration [who is a migrant?]; at: <https://www.iom.int/who-is-a-migrant> [accessed on 20 October 2018]

<sup>13</sup>"UN Convention Relating to the Status of Refugees": UNGA Res. 2198 (XXI) of 1951 and its protocol of 1967, art 1(A)(2)

<sup>14</sup>J Shrivastava "Distinguish Between Asylum Seekers and Economic Migrants: An Analysis of State Practice", published on 2 January 2018, Atha, Harvard Humanitarian initiative's Humanitarian Academy At Harvard, Harvard University 2014 <http://atha.se/blog/distinguishing-between-asylum-seekers-and-economic-migrants-analysis-state-practice> [accessed on 20 October 2018]

<sup>15</sup>Immigration Act (n 11 above) sec 1(1) (xviii)

<sup>16</sup>Green Paper on International Migration, Government Gazette no. 40088 of 2016, p 5

<sup>17</sup>Res. 45/158 of 18 December 1990, article 2

However, an illegal or undocumented migrant worker is defined in the UN Convention on Migrant Workers as ‘a person who enters a country without authorisation for the purpose of obtaining employment’.<sup>18</sup>

### **1.3 Significance of the study and problem statement**

The right to work is an integral part of the basic rights of human beings and must be guaranteed to everyone. It is indispensable for every human being’s dignity, life and for his/her survival. Being a migrant does not exclude the exercise and enjoyment of this right, as work assists migrants to be productive, to ensure economic progress in host countries, and to increase their well-being and dignity in the society.

Considering the employment of migrants, some limitations are found in legislation and in practice. As a result, most migrants are unemployed, while some are working in the informal sector. They are exposed to abuse and exploitation with poor working conditions and low wages.

In South Africa, migrants, who include refugees and asylum seekers, are experiencing social inequality, stereotyping and discrimination which prevent them from fully exercising their rights, most particularly the right to work.

Therefore, it is worthwhile when considering this study, to know why migrants are facing obstacles in finding a good job or accessing the job market in South Africa. More specifically of interest is that some migrants who are highly skilled and well educated are found among those that are struggling when their work could contribute to South Africa’s economy. This study will also attempt to uncover why immigration and labour laws are very restrictive to migrants’ employment and how to remedy this problem.

### **1.4 Objectives of the study/ Research questions**

The objectives of this study are similar to the research questions this study intends to answer.

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<sup>18</sup>As above art 5

The main objective of this study is: to examine to what extent the right to work is guaranteed to migrants in South Africa.

The specific objectives are:

- to address the barriers preventing migrants' access to the South African labour market;
- to explore the difference between migrants, refugees and asylum seekers' right to work or employment in South African legislation;
- to access the international and regional law standards which recognise and guarantee the enjoyment of the right to work for migrants, and how South Africa complies with these standards;
- to make some recommendations on how South Africa must extend its protection to migrants' labour rights and facilitate their integration into the job market; and
- to contribute to people's work and efforts that already exist on promoting and protecting the rights of migrants and how they can exercise their right to work and access the labour market without facing challenges.

## 1.5 Literature review

Many scholars have focused their studies on refugees and asylum seekers' socio-economic rights, the history of human migration, migrant workers, and labour migration. Migrants' right to work and their access to the job market in South Africa is a particular literature to the existing literature on migrants that has not been much detailed. Indeed, books and articles have been written on migrants' right to work in general but not regarding South Africa.

Mantouvalou explains the universality of the right to work in her book. According to her, everyone must enjoy this right because it is universal, but this universality found limitations in practice due to national laws on immigration.<sup>19</sup>

The right to work is necessary for the enjoyment of other rights. It is considered to be important to everyone because it is linked to human dignity. The Court in the *Minister of*

<sup>19</sup>Mantouvalou (n 5 above) 42



*Home Affairs and Others v Watchenuka and Others* case asserts that: 'human dignity has no nationality. [...] And while that person happens to be in this country - for whatever reason - it must be respected, [...]'.<sup>20</sup>

Despite the universality of the right to work, the South African Constitution does not recognise the right to work in its Constitution to anyone. There is no provision in the Bill of Rights that mentions the right to work but it only recognised labour rights to everyone. However, the right to work and labour rights are recognised in other South African legislation and labour laws. In the Immigration Act and other South African labour laws, the right to work is recognised to legal migrants. .<sup>21</sup>

Mantouvalou describes an undocumented migrant as 'a person who has come into a country without a visa and a work permit or someone who has entered a country with legal documents that later expired'.<sup>22</sup> According to her, undocumented migrant does not have any right to work, because this right is specifically reserved to citizens and migrants in regular situations with legal statuses.<sup>23</sup> This is also specified in the Immigration Act, where the Act prohibits the act of employing an undocumented migrant.<sup>24</sup>

It can be agreed that certain conditions can limit the exercise of the right to work to illegal migrants. These can be considered as part of state sovereignty over its immigration and the protection of nationals' interests and the labour market. It is not a violation of the principle of universality of human rights.<sup>25</sup>

In his article concerning the rights of irregular migrants, Carens argues that permanent and temporary migrants who are legally allowed to enter and access the labour market in the state are qualified to enjoy other legal rights related to work in consideration to their

<sup>20</sup>*Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142 of 28 November 2003, para. 25

<sup>21</sup>Act 13 of 2002 (n 10 above) sec 38(1)

<sup>22</sup>Mantouvalou (n 5 above) 43

<sup>23</sup>As above 43

<sup>24</sup>Act 13 of 2002 ( n 10 above) sec 49(3)

<sup>25</sup>Mantouvalou (n 5 above) 43



significant contribution to the economy.<sup>26</sup> However, Carens admits that ‘irregular migrants’ who are already in the territory must not be denied basic human rights.<sup>27</sup> In this case, ‘irregular migrants who are working have the legal right to be paid, and the state has the obligation to protect this right in order to prevent employers being able to rob them; they must morally be protected concerning their working conditions’.<sup>28</sup>

Illegal migrants are human beings and their basic rights, such as the right to work, must be protected. If they are employed, their labour rights must be protected in the same way as other employees’ rights.

In South Africa, illegal migrants are considered as ‘employees’ under the Labour Relations Act (LRA)<sup>29</sup> and the Basic Conditions of Employment Act (BCEA)<sup>30</sup>. They have been granted labour rights from the *Discovery Health Ltd v CCMA*.<sup>31</sup> The contract of employment between an employer and an illegal employee is not null and void, as can be seen from the *Discovery* case. In this particular case, the CCMA had taken Discovery to the labour Court regarding the unfair dismissal of a migrant employee. Discovery had hoped that the contract of employment would be found null and void in light of common law, however the Court ruled in the CCMA and migrant worker’s favour by declaring that the contract was indeed enforceable.

Böhning’s article concerning temporary migrant workers’ basic rights supports that the state, in its legitimacy, can place some limitations on migrants’ access ‘to jobs and free choice for employment because the principle of non-discrimination as guarantee in some instruments does not include nationality as a prohibited grounds of discrimination’.<sup>32</sup> It is obvious that South Africa as a sovereign state has the power to control its territory and

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<sup>26</sup>JH Carens “The Rights of Irregular Migrants”(2008) 22 Ethics & International Affairs 171

<sup>27</sup>As above 165

<sup>28</sup>As above 173-174

<sup>29</sup>Labour Relations Act 66 of 1995

<sup>30</sup> Basic Conditions of Employment Act 75 of 1997

<sup>31</sup>*Discovery Health Limited v CCMA & Others (JR 2877/06) [2008] 7 BBLR 633 (LC)*

<sup>32</sup>WR Böhning “Basic Rights of Temporary Migrant Workers: Law vs. Power” (1985) 8 Centre for Migration Studies 99



labour market to avoid illegal movement and unemployment among its citizens. This might be the reason why the South African Constitution restricts ‘the freedom to choose, occupation, profession and trade’ only to its citizens. With consideration to certain circumstances, some limitations of rights are permitted under the law.

In opposition to Böhning, Källström and Eide stated that the right to work can be considered as a precondition concerning ‘the protection against discrimination, the freedom of association and other economic and social rights of employees’.<sup>33</sup> This argument can be asserted in the sense that people in a place of work develop relationships and ties that may prevent them from discriminating against one another and allows them to protect their rights in the workplace and in the community. In addition, nationality cannot be a legitimate reason to discriminate against migrants in terms of employment, even though the right to choose employment is not universally recognised to migrants, their right to work and labour rights must be protected at the very least.

Källström and Eide affirmed that:

“The right to access labour market applies as well to non-citizens, while the state is entitled to set as a condition for temporary entry into the country that the person shall not have a right to work under that temporary stay’.<sup>34</sup>

This argument is also supported by Lu, in her article on the right to work and migration.<sup>35</sup> According to her, in general, the right to work is guaranteed to non-nationals as well; however there are some restrictions that are allowed under international law, which can be an exception to this right.<sup>36</sup>

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<sup>33</sup>K Källström & A Eide “The Universal Declaration of Human Rights: A common standard of achievement” by A Gudmundur and A Eide (eds) (1999) 505

<sup>34</sup>As above 505

<sup>35</sup>Lu (n4 above) 43

<sup>36</sup>As above 44

It should be noted that migrants' restrictions to entering the labour market may be allowed if these limitations are justified by a general limitations clause and recognised by international law standards.<sup>37</sup>

However, Lu states that in practice, the enjoyment of the right to work and the restrictions to the labour market depend on the legal status of migrants in the host country.<sup>38</sup> These restrictions may also depend on the status of the migrant and whether they are an economic migrant, a refugee, an asylum seeker, a migrant worker and/or an undocumented migrant. These categories of migrants are differently recognised in law and they are afforded specific protection.

In South Africa, even though there are other conditions attached to the employment of migrants, such as a valid work permit and critical skills, most of the laws emphasise the legality of migrants as a precondition to migrants' employment.

In opposition to Böhning, Lu explains that despite the limitations on the right to work, the right to work is linked to the principle of non-discrimination and equal treatment that apply to all non-nationals. They have the right to be treated equally in remuneration and the conditions of work when they are employed.<sup>39</sup> This principle has since been a core principle in different standards concerning the protection of non-nationals' rights.

Just as argued by Carens, Lu also affirms that in the same way a country can control people's movement in its territory, the state may also decide on the right to work of those people.<sup>40</sup> She considers that it is always important to clarify the application of the right to work, because of its implications on the protection of immigrants' human rights and on the promotion of immigrants' integration in the host country.<sup>41</sup>

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<sup>37</sup>B Saul *et al.*, "The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases and Materials" (2014) 315

<sup>38</sup>Lu (n4 above) 43

<sup>39</sup>As above 76

<sup>40</sup>As above 44

<sup>41</sup>As above 43

It is, therefore, the obligation of South Africa to determine to which extent the right to work can be guaranteed to migrants and how this right can be enjoyed and protected for migrants. Furthermore, Lu concluded by saying that ‘the right to work, as important and interdependent with other human rights, should be treated as an independent right and important factor to be considered in any immigrant decision-making where immigrants are concerned’.<sup>42</sup> Although the right to work is contributing to the realisation and enjoyment of other human rights, such as the rights to life, to health, to education and good standards of living, it cannot only be linked to other human rights, but it should be considered as a fundamental human right that applies to everyone independently.

Most international instruments recognise the right to work for everyone and they also protect migrants’ labour rights. Under General Comment No 18 concerning the right to work, the Committee on Economic, Social and Cultural Rights (CESCR or Committee) states that: ‘[e]very individual has the right to work, allowing him/her to live in dignity’.<sup>43</sup> Further, the committee declares ‘the labour market must be open to everyone under the jurisdictions’.<sup>44</sup> The right to work is viewed as connected to human dignity by the simple fact of being a human. Therefore, no one can be restricted or denied the enjoyment of this right and access to the job market.<sup>45</sup>

An observation was made during the International Labour Conference on Migrant Workers that states:

‘Despite the positive experiences of migrant workers, a significant number face undue hardships and abuse in the form of low wages, poor working conditions, virtual absence of social protection, denial of freedom of association and workers’ rights, discrimination and xenophobia, as well as social exclusion. Gaps in working conditions, wages and treatment exist among migrant workers and between migrant and national workers. In a significant

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<sup>42</sup>As above 77

<sup>43</sup>General Comment No 18: The Right to Work, Art 6 of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/C.12/GC/18 (General Comment No 18), para 2

<sup>44</sup>As above, para. 12b

<sup>45</sup>As above para 23

number of cases unemployment rates, job security and wages differ between regular migrant workers and national workers'.<sup>46</sup>

According to Crush and Ramachandran, South Africa represents a particular 'case study of how citizen attitudes and behaviours materially affect the business climate for migrant's entrepreneurs'.<sup>47</sup>

Although the right to work is recognised to legal migrants in South Africa, most of them are facing many challenges; these challenges include discrimination and xenophobia, which prevent them from accessing the job market. In practice, there are many obstacles to the realisation and the enjoyment of the right to work for migrants in South Africa.

Taran considers that the ratification of the International Convention on the Rights of Migrant Workers and the application of human rights standards to migrants are strong ways to fight against cheap labour and other challenges faced by migrants. This is because migrant labour might run the risk of not being recognised when it doesn't fulfil a specific need.<sup>48</sup>

South Africa has not yet ratified the International Convention on the Rights of Migrant workers.<sup>49</sup> However, the South African Constitution obliges the Court to consider international law when interpreting the Bill of Rights.<sup>50</sup>

In opposition to nationals, migrants are willing to work in any sector by accepting low wages, because they face obstacles entering the job market. They are obliged to accept any employment that can help them to support them and their families rather than being

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<sup>46</sup>International Labour Organisation, International Labour Conference, Geneva, 2004

<sup>47</sup>J Crush *et al.*, "Migrant entrepreneurship, collective violence and xenophobia in South Africa" (2014) 1 Migration Policy Series no. 67 at 5

<sup>48</sup>PA Taran "The need for a right based approach to migration in the age of globalization" in R Cholewinski, P De Guchteneire & A Pecoud (eds) Migration and Human Rights: The UN Convention on Migrant Workers' Rights (2009) 151

<sup>49</sup>[https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg\\_no=IV-13&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-13&src=IND) [accessed on 2 May 2019]

<sup>50</sup> Constitution of the Republic of South Africa, Act 108 of 1996, section 39 (1)(b)

unemployed. Consequently, employers are taking advantage of their vulnerable situation and labour laws by abusing and exploiting them, most particularly ‘irregular migrants’ who are unable to defend their rights because of fear stemming from dismissal and deportation.

The poor or absence of protection of migrants’ employment allows the violation of the right to work regardless of the legal status of migrants. If the right to work is linked to human dignity, this right should be granted to everyone, because of the principle of equality and equal treatment of rights to everyone as stated in different human rights standards.<sup>51</sup> Nevertheless, it is very important for a state to regulate its immigration laws and labour laws in order to protect both citizens and non-citizens, and also for public and private interests of the country.

## **1.6 Research methodology**

This mini-dissertation is desk research, based on the analysis of relevant sources such as conventions, statutes, books, laws and policies related to migrants’ employment. It is based also on the analysis of secondary sources such as journal articles, publications, reports, general comments and websites. It allows for further reference to other readers.

## **1.7 Scope and limitations of the study**

As a migrant, it is challenging for the researcher to do research in a country that is not the researcher’s own. The researcher found herself limited from gaining some specific information needed for the research.

Language is also a challenge for the researcher, as the researcher comes from a country where French is the first language; performing the research in English may somehow affect the quality of the research in the sense that the researcher must understand and analyse the work and ideas of some scholars in order to give her views and contributions.

As the topic regards advocating for migrants’ rights to work in South Africa, this research would have been more effective and comprehensive by conducting deep field interviews

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<sup>51</sup>See article, Universal Declaration on Human Rights, Resolution 217 A of 1948

with migrants, letting them talk about their experiences in looking for employment and the challenges they faced in South Africa to be employed. However, the study is limited due to the time frame in which it had to be done and the rules set by the University of Pretoria for a mini-dissertation.

This study intends to look at the term migrant broadly due to the fact that, in practice, the term 'migrant' is used interchangeably; there is no distinction made between different categories of migrants in South Africa. The study covers different categories of migrants and addresses how the right to work is guaranteed to them and the challenges they are facing in the South African job market. However, a particular analysis will be done on refugees and asylum seekers' rights to work.

## **1.8 An overview of chapters**

This mini-dissertation is divided into five chapters:

Chapter One is an introduction to the study. It gives an overview of the study by defining the term migrant, explaining the importance and objectives of this research, as well as analysing different works and opinions of scholars with regard to the right to work in general and the right to work of migrants in South Africa in particular. It also presents methods that will be used in this research.

Chapter Two looks at how migrants' right to work is limited due to the many challenges they encounter in South Africa. It also assesses how these challenges prevent them from accessing the South African labour market.

Chapter Three examines the domestic legislation and labour laws which protect and guarantee migrants the right to work in South Africa. This examination has a brief emphasis on refugees and asylum seekers' employment in South Africa.

Chapter Four gives an overview of international and regional law standards in relation to the right of migrants to work, considering that the right to work was first legally recognised internationally. Finally, Chapter Five gives a summary of the study and makes some





recommendations on how South Africa must recognise the right to work for migrants and how it must review its laws and policies to protect migrants' employment and labour rights, as well as facilitate their integration in South Africa.



## **Chapter Two: Challenges against migrants' employment and integration into the South African job market**

### **2.1 Introduction**

This chapter looks at the barriers that prevent migrants for obtaining employment and entering the South African job market. It explores how these barriers represent obstacles against migrants' employment and integration into the job market.

In Section 2.2 of this chapter, the researcher will look at how South African laws and policies regulate the employment of migrants by setting some conditions and restrictions that prevent their access to the job market. The researcher will also look at the limitations that exist in obtaining the work permits allowing migrants' employment.

Section 2.3 examines how the enjoyment of migrants' right to work is limited due to socio-economic challenges, and how these socio-economic challenges constitute barriers to the economic and social integration of migrants into the job market.

Migrants play an important role in the labour market while contributing to the development and economic growth of the host country through paying taxes. Besides, when migrants are granted the opportunity to work or accessing the job market, they can earn money and save more incomes which may qualify them to become prospective investors or create jobs in the host country.

The South African government has enacted laws and policies on immigration. These laws and policies determine conditions in which the right to work must be guaranteed to migrants as well as to protect the South African labour market against competition and foreign labour. However, some provisions in these laws and policies concerning the right to work are discriminatory and restrictive against migrants, and consequently disadvantage them and limit the exercise of this right. In practice, they are considered as barriers to migrants' right to work and to entering the labour market.

It should be noted that the socio-economic environment in South Africa affects migrants' rights to gain employment, thus impeding their access to the job market. There are beliefs and perception from South Africans that migrants are the reasons for the socio-economic insecurity, crime and unemployment in the country.<sup>52</sup>The socio-economic challenges that will be examined include things such as xenophobia, discrimination and inequality, the high rate of unemployment in South Africa, lack of skills and lack of language proficiency, among others.

## **2.2 Legal and procedural challenges to migrants' employment in South Africa**

### **2.2.1 Anti-labour migration law**

The right to work that is inherent to human dignity is not recognised in the South African Constitution. This right is guaranteed in the Immigration Act of 2002 (hereinafter the Act) to foreigners (herein migrants) with legal status and work permits.<sup>53</sup>However, the Act is more restrictive to the employment of undocumented migrants.<sup>54</sup>Unlike legal migrant who is not a national, nor a resident of the host country but has been granted an authorization to enter and stay in South Africa for a specific period of time; undocumented migrant is an individual who is neither a national, nor a resident, and who does not have a legal permit or any authorization to enter or to stay in the country, and who does not comply or he/she is in contravention with the Immigration Act.<sup>55</sup>Despite the fact that undocumented migrants' labour rights are protected under South African labour laws, their employment is not guaranteed in the Act.

The Act does not prohibit or deny the employment of migrants, but the act of employing a migrant who is in an irregular situation in the country.

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<sup>52</sup>R Mattes *et al.*, "The brain Gain: Skilled Migrants and Immigration Policy in Post-Apartheid South Africa", (2002) Migration Policy Series no. 20 at 6

<sup>53</sup>Act 13 of 2002 (n 10 above) sec 38(1)

<sup>54</sup>As above sec 49 (3)

<sup>55</sup>Act 13 of 2002 Section 1(1) (xvii) and sec 1(1) (xviii)



Groenewald asserts that the Immigration Act does not nullify the contract of employment between an employer and an undocumented foreign employee and doesn't incriminate an undocumented foreign migrant for accepting a job without a valid permit; however it prohibits and incriminates the act of employing an undocumented foreigner.<sup>56</sup>In this regard, it is important for an employer to verify the legality or the validity of migrants' permits when employing them. This can help them avoid being arrested because the Act prohibits the 'unlawful' employment of migrants in an irregular situation.<sup>57</sup>

According to Mantouvalou, even though undocumented migrant does not have any legal right to work under immigration law, because this right is specifically reserved to citizens and migrants in regular situation or with work permit, however they cannot be exploited at work. She states further that 'the denial of the right to work because of immigration rules often leads to exploitation'.<sup>58</sup>

Thus, in restricting the right to work to undocumented migrants due to the fact that their irregular status does not allow them to work, the Act creates social exclusion. It should be noted that in practice, migrants, particularly those who are in an irregular situation because of their expired permits or illegal staying in South Africa, are willing to work in the informal sector to support their families and needs. As a result, they become victims of abuse, forced labour and exploitation by certain employers who take advantage of their vulnerability when offering undocumented migrants low wages, as well as poor and unprotected working conditions<sup>59</sup>.In this case, undocumented migrants not knowing their protected rights within labour laws find themselves in a situation where they fear reporting abuse and exploitation from their employers. Consequently, the protection of

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<sup>56</sup>I Groenewald "Talking Foreign: The employment of foreign nationals on South African farms" (2017) 8 Red meat/rooivleis8 at 90

<sup>57</sup>Act 13 of 2002 (n 10 above), secs 38 (2) and 49 (3)

<sup>58</sup>Mantouvalou (n 5 above) 39-40

<sup>59</sup>A Namukasa "Demystifying human rights: A socio-legal approach to the political framing of migrant workers' rights in Africa", in F Viljoen (eds) Beyond the law: Multi-disciplinary perspectives on human rights (2012) 133

their labour rights cannot be claimed under the Act, owing to the fact that their employment is prohibited in the Act.

### **2.2.2 Procedural barriers against migrants' employment**

The Department of Home Affairs (the Department or DHA) is a South African government department whose mission in the context of immigration is to render immigration services in so far as providing identity documents (ID), permanent residence, passports and visas, and granting citizenship to deal with refugees and asylum seekers, as well as to control immigration.<sup>60</sup>

The Department plays an important role in migrants' entry, sojourn and employment in South Africa. Hence, having a valid or legal permit is the first and most important step that guarantees migrants' rights to work and to access the job market.

However, the process of obtaining the document or permit allowing migrants to enter, to sojourn and work in South Africa is delayed by some officials and sometimes the application for a work permit is rejected or forged.<sup>61</sup> Thus, the delay in obtaining the work permit for migrants, the poor service delivery by the officials for granting permits and the failure of renewing permits within the framework constitute a big challenge for migrants to get jobs or to secure their jobs in companies.<sup>62</sup>

The Department has amended the Immigration Act several times to protect the South African labour market. Recently, it has enacted a new immigration policy that brought changes and reinforced measures concerning the employment of migrants and their access to the labour market.<sup>63</sup>

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<sup>60</sup>[www.home-affairs.gov.za](http://www.home-affairs.gov.za) > about-us [accessed on 22 January 2019]

<sup>61</sup>O Tella *et al.*, "Hegemony or Survival: South Africa's soft power and the challenge of xenophobia" (2014) 44 *Africa Insight* at 155

<sup>62</sup>CoRMSA (n 8 above) 106

<sup>63</sup>Immigration Regulations, Government Gazette No. 37679, Notice No. R413, vol. 587, 2014  
See sec 18 of the Immigration Regulations of 2014



Within the Immigration Regulations, the employment of migrants and their access to the labour market is subject to certain conditions, such as the lack of skills or availability from South African citizens or permanent residents to fill the vacancy, the validity of the work permit and the critical skills permit which cannot exceed five years.<sup>64</sup>The Immigration Regulations comply with some provision of the Immigration Act.<sup>65</sup>Both Acts encourage the employment of legal migrants over those with an irregular status.<sup>66</sup>

Concerning the critical skills' policy, high skilled migrants are guaranteed the right to work and encouraged because of their positive and fair contribution in the South African labour market and economy. This is unlike those with semi or low skills and capital who are restricted by the immigration policies due to their poor inputs.<sup>67</sup>These job qualifications restrict the employment of migrants who often do not comply with all the requirements, such as the lack of skills from South African or permanent residents and the critical skills permit needed to be employed.

In conclusion, despite the recognition of this right in South African laws and policies, the integration of migrants into the labour market is lower due to the restriction of employment requirements and opportunities and the slowness of the DHA in granting migrants a work permit.

## **2.3 Economic and social challenges impeding migrants' employment and job market's opportunities**

### **2.3.1 Xenophobia and migrants' employment**

According to Procter, Ilson and Ayto, the term 'xenophobia' comes from the formation of two Greek words: *xeno* which means 'stranger or foreigner' and *phobia* which means 'fear'; both words combined mean 'unreasonable fear and dislike of foreigners or strangers'.<sup>68</sup>

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<sup>64</sup>As above sec 18

<sup>65</sup>Immigrations Regulations of 2014, sec 18 (3), and sec 19 (2) of Immigration Act 13 of 2002

<sup>66</sup>Sec 35 of the Immigration Regulations of 2014, and sec 38 of Immigration Act 13 of 2002

<sup>67</sup>Preamble of Act 13 of 2002, para d

<sup>68</sup>Procter *et al.*, 'Longman Dictionary of Contemporary English', London, Harlow, 1978, p. 1275

In general terms, xenophobia means different forms of discriminatory attitudes, practices, threats, prejudices, negative beliefs, behaviours, feelings or stereotypes towards foreigners or non-nationals, 'whatever their sources or rationality'.<sup>69</sup>

It is important to know that the socio-economic and political situations in South Africa and the increasing number of migrants have put a strain on the relationship between South African citizens and migrants, therefore creating social consequences.

However, without any evidence, South African nationals have a negative stereotype of immigrants and consider them to be a 'threat' to the South African economy, scarce resources, jobs and social services that South Africans are benefiting from the government.<sup>70</sup> While being denied work and access to job market, South African nationals accuse migrants of being opportunists rather than contributors; because they are stealing jobs which belong to them at lower wages, and for being responsible for the high unemployment rate as well.<sup>71</sup>

The number of irregular migrants in South Africa is a matter of concern in the labour market. More irregular migrants integrate into the job market and their number affects and reduces the employment of South Africans and legal migrants, the security of the job market, the quality of services and wages.<sup>72</sup> Consequently, the restrictions of migrants in the labour market, notably in the formal sector, make them compete for jobs and accept wages that South African citizens may not consider, particularly in the informal sector.

Sichone states that:

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<sup>69</sup>Landau *et al.*, "Xenophobia in South Africa and problems related to it" (2005) Forced Migration Working Paper Series 13 at 6. [www.academia.edu](http://www.academia.edu) [accessed on 23 January 2019]

<sup>70</sup>Mattes et al. (n52 above)

<sup>71</sup>G Tati "The Immigration Issues in the Post-Apartheid South Africa: Discourses, Policies and Social Repercussions" (2008) 3 *Space populations societies* at 423. Available at: <https://doi.org/10.4000/eps.3496> [accessed on 23 January 2019]

<sup>72</sup>Tati (as above) 427; See also O Tella "Understanding xenophobia in South Africa: The Individual, the State and the International System" (2016), *Insight on Africa*, Sage Publications, African Studies Association of India, South Africa 152



'The cultural definition of *makwerekwere* is not the main source of hatred, rather immigrants who create wealth or provide jobs are welcome, while those who are seen to take away jobs are not'.<sup>73</sup>

According to Sichone, the negative attitude towards migrants depends on migrants' contribution to the country. This means that migrant's status does not matter, due to the fact that xenophobia affects other migrants than those with skills or assets, as well as investors.<sup>74</sup>

However, most South African citizens do not distinguish migrants' status from refugees as they treat them equally with regards to their rights, presence and contribution in the country.<sup>75</sup>

As mentioned before, Crush and Ramachandran find that South Africa represents a case study of citizen attitudes and behaviours against migrants and how these materially affect business and its climate for migrants and their own businesses.<sup>76</sup>

From this argument, we should understand that xenophobia in South Africa does not only target a particular category of migrant. It includes all categories of migrants regardless of their legal status, presence or contribution to the country. Thus, the negative perception of foreigners is rooted in South Africans to the point where they do not differentiate between foreigners who are in their country. They view all migrants as job seekers but not as investors, contributors or entrepreneurs.

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<sup>73</sup>O Sichone "The Making of Makwerekwere: East Africans in Cape Town", paper for the workshop Interrogating the New Political Culture in Southern Africa; Ideas and Institutions, Harare, 13-15 June 2001, p 10

<sup>74</sup>C Kavuro "Refugees and Asylum Seekers: Barriers to accessing South Africa's labour market" (2015) 19 Law, Democracy & Development Juta233

<sup>75</sup>This is from my personal experience; See also L Waller 'Irregular Migration to South Africa during the First Ten Years of Democracy' (2006) Migration Policy Brief No. 19 1

<sup>76</sup>Crush *et al.*, (n 47 above) 5



In conclusion, the xenophobic environments in which migrants are seeking employment, and the threats they are facing in South Africa, prevent them from working and having full access to the labour market.

### **2.3.2 Discrimination against migrants' employment**

Many migrants living and working in South Africa are victims of inequality and discrimination.<sup>77</sup> Most of them experience stereotyping and prejudices while looking for employment or while trying to access the labour market because of their social origin and nationality. Mattes *et al.*, observed that 'South Africans not only hold negative attitudes towards foreigners, they also have a readily accessible set of stereotypes with which to justify or rationalise their negative attitudes'.<sup>78</sup> South African citizens discriminate against migrants because they already have the unfounded fear and public perception against migrants, such as migrants being a threat to their economy and being job takers.

The South African Constitution prohibits discrimination on the grounds of social origin, language, race and other statuses.<sup>79</sup> Although the Constitution prohibits discrimination on the grounds of social origin and race, discrimination against migrants for working or seeking employment still exists. It takes various forms and occurs in the public and private spheres.<sup>80</sup>

The International Labour Organisation Convention concerning Discrimination in Employment and Occupation states that:

'The term 'discrimination' includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin

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<sup>77</sup>JP Misago *et al.*, "Protection from xenophobia: An Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes" (2015) The African Centre for Migration and Society, UNHCR.

<sup>78</sup>R Mattes *et al.*, "Still waiting for the Barbarians: South Africa attitudes to Immigrants and Immigration" (1999) Policy Paper No 14 at 19

<sup>79</sup>See Act 108 of 1996, chapter 2, sec 9(3)

<sup>80</sup>J Crush *et al.*, "Migrants' Rights after Apartheid: South African Responses to the ICRMW" in R Cholewinski, P de Guchteneire & A Pecoud (eds) Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights (2008) 257



which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation'.<sup>81</sup>

As mentioned earlier, there are some laws and policies (for example the Immigration Act) in South Africa that discriminate against migrants in terms of them getting jobs and accessing the job market. There are certain jobs and domains that discriminate against migrants in that they are exclusively reserved for South African citizens or those who have been granted permanent residence. For instance, the Private Security Industry Regulatory Authority (PSIRA) requires only citizens or permanent residents to register as a security service provider; the same requirement applies for an attorney to be admitted and to practice in South Africa.<sup>82</sup>

Concerning racial discrimination, Tella argues that:

'The end of apartheid and South Africa's entry to the international arena sparked a massive inflow of African migrants into the country. This resulted in hostility and hatred towards foreigners, especially African immigrants'.<sup>83</sup>

The majority of black migrants, especially those coming from African countries dubbed 'black African migrants' are discriminated against in the labour market because of their race, colour and country of origin.<sup>84</sup> Therefore, their restriction to the labour market as black migrants constitutes a threat and a violation of their right to work and their human dignity.

Gender discrimination is another form of discrimination that disadvantages female migrants in seeking employment and accessing the job market in South Africa. Female migrants are most likely to be exposed to sexual harassment, exploitation and physical abuse in the workplace, as well to work in the informal sector or non-regulated sectors. For

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<sup>81</sup>ILO Convention concerning Discrimination in Employment and Occupation, Geneva, 25 June 1958; Article 1. Available at <https://www.ilo.org> [accessed on 21 February 2019]

<sup>82</sup>Private Security Industry Regulation Act 56 of 2001, sec 23 (1)(a).see also Attorneys Act of 1979, sec 15 (1)(b) (ii)(aa)

<sup>83</sup>Tella (n 72 above) 143

<sup>84</sup>Tella *et al.*, (n 61 above) 149

example, domestic and sexual workers mostly work in the informal sector rather than in the formal sector, where they are victims of abuse and exploitation.<sup>85</sup>

Crush *et al.* observed that '[A]lthough women constitute a significant part of cross border and internal migratory movement; they are also left behind as employment and earning opportunities favour men'.<sup>86</sup>

The vulnerability and the position of migrant women in the host country do not grant them many employment opportunities, particularly in the formal sector. Although most migrants are discriminated against when looking for employment, female migrants are most likely to be discriminated against and exposed due to them being more vulnerable than male migrants.

Indeed, South Africa is a country that protects women's rights. However, in reality, there is less protection and more violation of migrant women's right to work and access to the labour market due to the failure to report abuse, harassment or exploitation.

### **2.3.3 Denial of migrants' skills and qualifications**

Migrants who hold skills or professional qualifications are required to evaluate their documents for qualification through the South African Qualification (SAQA), which represents Foreign Qualifications Evaluation and Advisory Services in South Africa. SAQA aims to compare and recognise foreign qualifications with South African qualifications in terms of the levels of the National Qualifications Framework.<sup>87</sup>

However, some South African employers do not recognise the skills and qualifications migrants hold from their home countries.<sup>88</sup> Thus, they do not give them the opportunity to prove their skills.

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<sup>85</sup>L Phillips *et al.*, "Labour, lodging and linkages: migrant women's experience in South Africa" (2014) 73 African Studies at 413-418

<sup>86</sup>J Crush *et al.*, "Migration in Southern Africa: A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration" (GCIM)2005 at 14

<sup>87</sup><http://www.saqa.org.za>[accessed on 13 September2018]

<sup>88</sup>CoRMSA (n 8 above) 106

The process of collecting, translating and submitting these documents or qualifications to SAQA takes time and money. Thus, failing to do this and by lack of means, most of them are limited to find jobs that do match their skills or qualifications within a period of time.<sup>89</sup>

Some skilled migrants with SAQA are still facing challenges while trying to be employed because of their migrant permits. They have to be assessed and comply with all the rules and regulations in relation to their qualifications in order for them to be employed, for example, the case of health professionals and engineers.<sup>90</sup> Unlike skilled migrants, semi and low-skilled migrants are less likely to get a job because of their low standards and input in the companies and in the South African economy.

#### **2.3.4 Lack of language proficiency amongst migrants**

Language proficiency is a very important step for migrants' integration into the host country. In fact, migrants who are willing to work in South Africa, particularly in the formal sector, are required not only to speak English but to be fluent in it. Therefore, those who come from countries where they speak other languages are disadvantaged when it comes to finding a job and easily integrating into the job market because of their inability to communicate and to speak in English.

Some employers and organisations, apart from English fluency, require as a condition of the job offer the ability to speak one of South Africa's official languages.<sup>91</sup> Therefore, the period of learning and speaking one of the official languages may take time and disadvantage migrants to secure a place in the company, use their skills for the company and earn their livings. Besides, it is not as important for employers to consider South African's languages as a barrier to employ a qualified migrant whose skills can further contribute in the company because otherwise they may lose a qualified person for the job.

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<sup>89</sup>Landau *et al.*, (n 69 above) 6

<sup>90</sup>CoRMSA (n 8 above) 107

<sup>91</sup>KJ Shabanza "The Literacies of Congolese Adult Asylum Seekers and Refugees in Johannesburg: A case study", (2011), online published Research report for the Degree of masters of Arts in English Education, University of Witwatersrand, Johannesburg, South Africa, p 14. Available at <http://hdl.handle.net/10539/9777> [accessed 17 September 2018]

Consequently, migrants' inability to understand and to speak these languages limit their opportunity to the jobs being offered and to be employed.

### **2.3.5 High rate of unemployment amongst South African citizens**

The high rate of unemployment, poverty and inequality among South African citizens is a major problem in the country that should be considered.<sup>92</sup> Every year, young South African citizens are gaining qualifications and are willing to enter the labour market but they face obstacles to entering the job market due to high unemployment. Thus, the high rate of unemployed South Africans, the competition that exists between South Africans and migrants and the skills required in the labour market, in particular in the formal sector, are barriers that prevent newly qualified and skilled South Africans to apply for jobs and enter the job market.<sup>93</sup>

Bendix argues that 'where the population growth exceeds the growth in the economy, the labour market is unable to support all entrants'.<sup>94</sup> She describes it as a 'social factor' that affects the labour market. It should be noted that the growing presence of migrants in South Africa and in the labour market presents one of the obstacles that influence the labour market and the rate of unemployment among nationals.

The data report of the Quarterly Labour Force Survey (QLFS) in South Africa shows that the unemployment rate between people from 15 to 64-years-old has increased from 26.7 percent in the first quarter to 27.5 percent in the third quarter in 2018.<sup>95</sup> The increase in the

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<sup>92</sup>V Sulla & P Zikhali "Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities" (2018), Washington, DC: World Bank Group. Available at <http://documents.worldbank.org/curated/en/53048152175906534/Overcoming-Poverty-and-inequality-in-South-Africa-An-Assessment-of-Drivers-Constraints-and-Opportunities> [accessed on 30 January 2019]

<sup>93</sup>A Kraak "The collapse of the graduate labour market in South Africa: Evidence from recent studies" (2010) 15, *Research in Post-Compulsory Education* 92

<sup>94</sup>S Bendix "Labour Relations: A Southern African Perspective" (2015) 429

<sup>95</sup>Statistics South Africa; Quarterly Labour Force Survey 3: 2018 [www.statssa.gov.za](http://www.statssa.gov.za) [accessed on 30 January 2019]

unemployment rate might be an alarming situation with the unstable economic situation the country is currently experiencing.

Therefore, migrants are not privileged amongst South Africans to be employed and they are considered to be the cause of lowering wages of local labour and the unemployment rate.<sup>96</sup> Additionally, as long as the South African government struggles with its economy, the possibility of creating jobs will involve a lot of sacrifices and more funds to reduce the unemployment rate.

## 2.4 Conclusion

Migrants are participants of the society in which they live and must enjoy equal protection of their basic rights, such as the right to work and contribute to the social progress of their host country. As noted above, legal and skilled migrants are guaranteed the right to work, but most of them are limited the enjoyment of the right to work due to the legal, procedural and socio-economic challenges they are facing in South Africa.

The gaps that exist between the immigration policies and South African labour laws create controversy to migrants' right to work and access to the labour market because of their legal interpretation and lack of understanding. Likewise, the lack of proper legislation protecting migrants' rights to work constitutes a big challenge for migrants' integration into the labour market.

In addition, the existing reality migrants are facing in practice, such as xenophobia, discrimination and the rate of unemployment in South Africa prevent them from exercising their right to work and accessing the labour market.

In the next chapter, the researcher will look at how migrants' right to work is framed in South African legislation. The researcher will also examine the employment of refugees and asylum seekers in opposition to migrants' employment.

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<sup>96</sup>Tella *et al.*, (n 61 above) 149





## **Chapter Three: South African legal framework on migrants, refugees and asylum seekers' employment**

### **3.1 Introduction**

This chapter aims to examine how migrants' employment is framed in South African legislation and how these laws facilitate their integration into the labour market. It also gives an overview of refugees and asylum seekers' employment in South Africa. This distinction is made because refugees and asylum seekers are, most often, considered as migrants while their rights are differently regulated.

In Section 3.2, the researcher will examine whether the right to work is recognised for migrants in the South African Constitution and to what extent this right is guaranteed to migrants in South Africa. In section 3.3, the researcher will look at the employment of refugees and asylum seekers in South Africa, as it is important to note that their employment in South Africa does not have the same meaning and implication as opposed to migrants' employment. In Section 3.4, the researcher will examine how South Africa guarantees the right to work to migrants as their employment under immigration laws differs from refugees' laws. Finally, in Section 3.5, the researcher will look at South African laws that protect migrant workers and guarantee their right to work.

### **3.2 The right to work in the South African Constitution**

The right to work is a fundamental human right that must be guaranteed to everyone. This right enables the enjoyment of other rights.

The Constitution is the fundamental law in South Africa. It is the bedrock of the South African domestic laws, owing to the fact that it protects nationals and non-nationals' rights. Therefore, any other legislation must comply with the principles and provisions contained in the Bill of Rights. The Constitution guarantees socio-economic rights to nationals and



non-nationals, although these rights can be limited under the law in some cases.<sup>97</sup> However, there is no right to work in the Constitution. As part of socio-economic rights, the right to work is not recognised to anyone in the South African Constitution. The Constitution is silent about the right to work in the sense that it has not mentioned the right to work per se in the Bill of Rights.

The Constitution grants the right 'to choose occupation, profession or trade freely' only to South African citizens for the protection of the labour market, the interests of citizens and the development and economic growth of the country.<sup>98</sup> This right means that every South African citizen can gain access to work and carry out any gainful activity he or she prefers. However, with reference to section 22 of the Constitution, this right may be regulated by law.

Drzewicki argues that:

'Freedom of choice of occupation, work and places of performance are normally construed with regard to the principle of proportionality and necessity, and may, therefore, contain certain restrictions or even aspects of compulsion'.<sup>99</sup>

The right to choose occupation, profession or trade freely does not mean that there is no limitation concerning the freedom to perform any gainful activity or work, even if it is necessary. Consequently, any chosen activity or work must be reasonable and regulated by law.

Additionally, the right to choose employment, occupation, profession or trade, although part of socio-economic rights, is not granted to migrants and refugees in the Constitution.

It should be noted that, even if the Constitution (Bill of Rights) does not guarantee the right to work as such, it does not negate the right to work of migrants but acknowledges this right, mostly when this right is accepted and guaranteed in South African legislation and it

<sup>97</sup>Constitution of the Republic of South Africa, Act 108 of 1996, section 36

<sup>98</sup>As above, sec 22

<sup>99</sup>K Drzewicki "The Right to Work and Rights in Work" in A Eide, C Krause and A Rosas (eds) Economic, Social and Cultural Rights: A textbook (1995) 178

is consistent with the Bill of Rights.<sup>100</sup>What is restricted only to citizens is the ‘free choice of occupation, profession and trade’, but other workers’ rights are guaranteed in the Constitution. Therefore, the Constitution clarifies that international law must be considered by a court, tribunal or forum when there are gaps in the interpretation of the Bill of Rights.<sup>101</sup>

Nevertheless, the Constitution guarantees ‘the right to fair labour practices’ as a basic right to ‘*everyone*’ without any distinction and also guarantees other labour rights.<sup>102</sup>

According to Cheadle, ‘the key of the right to fair labour practices is the personal and dependent nature of the worker’s services’.<sup>103</sup>This right implies the protection of labour rights to every worker who renders any service to an employer and such rights include the right not to be unfairly discriminated against or to be dismissed.

There are existing legislation and policies in South Africa that protect and regulate the employment of migrants and refugees. These will be discussed in the following sections.

### **3.3 The employment of refugees and asylum seekers in South African law**

#### **3.3.1 Refugee’s employment under the Refugee Act 130 of 1998**

Refugees and asylum seekers are known as political migrants whose rights are protected within international law standards, regional and national laws.<sup>104</sup>In South Africa, refugees and asylum seekers’ rights are regulated in terms of the Refugee Act (the Act).

In terms of section 27(f) of the Act, a refugee is ‘entitled to seek employment’. In other words, with reference to section 27(f), a refugee who is ‘lawfully staying’ in South Africa (which means that a person who is legally recognised as a refugee under the Act and whose

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<sup>100</sup>Constitution of the Republic of South Africa, Act 108 of 1996, sec 39 (3)

<sup>101</sup>As above, sec 39 (1)(b)

<sup>102</sup>As above, sec 23

<sup>103</sup>H Cheadle *et al.*, “South African Constitution law: the Bill of Rights” (2005) 367

<sup>104</sup> See “UN Convention Relating to the Status of Refugees”: UNGA Res. 2198 (XXI) of 1951 and its protocol of 1967; and “OAU Convention Governing the Specific Aspects of Refugee Problems in Africa” of 1969

permit is valid and allows him or her to work) is legally granted the right to seek employment.<sup>105</sup>

Refugees are allowed to enter the job market without any impediment and look for jobs that are convenient to them. Therefore, by allowing refugees to seek employment, they are obliged to self-integrate into the labour market. This self-integration means that refugees are obliged to look for employment to support their needs without relying on any assistance from the South African government.

It has been observed in the Consortium for Refugees and Migrants in a South African survey that:

‘Unlike most African countries that spend millions providing assistance to refugees in purpose-built camps, South Africa encourages refugees and asylum seekers to be self-sufficient. Such a system not only promotes the human dignity and welfare of non-nationals in the country, but also that of their dependents elsewhere. It also ensures South Africa benefits from non-nationals’ contributions to society at minimal cost to the taxpayer’.<sup>106</sup>

There is no South African government policy about the welfare of refugees. Refugees are independent as they have to work and live without relying on the government’s help. Consequently, in practice, their employment and integration in South Africa become very difficult due to the fact that they do not receive any assistance or support from the government when looking for employment or for their well-being. They encounter many barriers in seeking to integrate into the South African labour market, namely, the non-recognition of the A4 format size of refugees’ permits by some employers, the short period given to them when renewing their permits at the DHA, particularly asylum seekers, as well as the lack of skills, discrimination, xenophobia etc. Sometimes jobs that are available in the job market are too demanding and do not correspond to their skills and needs.<sup>107</sup> Thus, the delay in obtaining a permit allowing refugees to look for employment or to secure

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<sup>105</sup> Act 130 of 1998, sec 1 (xv)

<sup>106</sup> CoRMSA (n 8 above) 106

<sup>107</sup> CoRMSA (as above) 85 & 106

employment affects and limits their ability to seek a job, to be productive and to self-support.

Some employers are not willing to employ refugees for the simple fact that they are using permits that are not recognised by them. Refugees are not like residents, thus, the permit that refugees use must be renewed within a timeframe to secure their employment. Consequently, if the permit is not renewed within a required time, this situation may either affect the business (company) or refugees' job, as their employment is conditional to the permit they use.

These barriers, as mentioned above, can affect refugees' dignity and well-being, because they have to survive through gainful employment to avoid starvation.

Unlike refugees, and from the definition of the term 'refugee' in the Refugee Act, asylum seekers are excluded from the right to seek employment under the Act because they have not yet been granted the status of refugees as they are still in the process of seeking asylum.<sup>108</sup>The Act entitles refugees the right to seek employment in terms of section 27(f). It gives refugees the legal right to seek employment but it does not recognise this right to asylum seekers. It is important to note that most asylum seekers are considered economic migrants. They have to leave their home countries to look for a better life or opportunities.<sup>109</sup>

The restriction on the right to seek employment for asylum seekers has been questioned and challenged by Constitutional Courts in different cases. For example, in the *Watchenuka* case, the Court linked the right to work to human dignity and self-esteem.<sup>110</sup>

The Court asserted that:

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<sup>108</sup>Act 130 of 1998, sec 1(v)

<sup>109</sup>Green Paper (n 16 above) 12

<sup>110</sup>(010/2003)[2003] ZASCA 142 (n 20 above)



'Human dignity has no nationality. It is inherent in all people - citizens and non-citizens alike - simply because they are human. And while that person happens to be in this country - for whatever reason - it must be respected and is protected, by s 10 of the Bill of Rights.<sup>111</sup>

The Court emphasised this point by stating that: '[t]he freedom to engage in productive work - even where that is not required in order to survive - is indeed an important component of human dignity(...)'.<sup>112</sup>

From this argument, we consider that the court supports asylum seekers' right to seek productive work with respect to human dignity. This said, could simply mean that without a life with dignity that is inherent to every human being, asylum seekers should not be recognised the right to work or to freely choose a productive work. Thus, they will be obliged to respect and comply with laws relating to their employment, even if these laws prohibit their employment and violate their basic rights.

However, the freedom to engage in productive work does not necessarily require access to work. It implies a means that refugees or asylum seekers may choose freely in order to generate more revenues or incomes to support themselves. The freedom to engage in productive work can occur by means of self-employment.

The right to work or to seek employment is important for both refugees and asylum seekers because it allows them to survive, to have self-esteem, to socially integrate and to support all their needs. As such, the Standing Committee for Refugee Affairs (SCRA), an independent organisation working with the DHA and dealing with refugee status, recognises 'the right to work and study' under asylum seeker temporary permit in part B(3).

According to Kavuro, the right to work stipulated in section 27 (f) of the Refugees Act is unqualified.<sup>113</sup> Under the Refugee Act, the right to work is unqualified because it does not impose any further conditions that refugees should abide by. In contrast to the Refugee Act,

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<sup>111</sup>As above para 25

<sup>112</sup>As above para 27

<sup>113</sup>Kavuro (n 74 above) 232

the freedom to choose employment, occupation, profession or trade is not absolute because it is not extended to non-citizens; it is restricted only to South African citizens in the Constitution.<sup>114</sup>

Therefore, it should be said that by authorising refugees to seek employment, the Act grants refugees certain freedoms to be self-sufficient and to choose which employment they need. Consequently, the South African government cannot be held responsible for the unemployment of refugees or asylum seekers in the country or their integration into the job market. They do not recognise the right to work but they are granted the right to seek employment, which can be exercised through self-integration.<sup>115</sup>

However, the government has an obligation to protect refugee workers and their labour rights. The government must give them favourable opportunities to work, to facilitate their integration in the labour market and to protect them from challenges they are facing in entering the labour market, through regulated laws and policies.

When the right to work means access to work and job opportunities that may be productive and freely chosen or accepted; the right to seek employment does not necessarily imply access to work opportunities. It is, however, a means that can be used to earn a living through work.

### **3.4 Migrants' right to work in South Africa**

#### **3.4.1 The right to work of migrants under the Immigration Act of 2002**

The Immigration Act is a primary policy on immigration. The Act deals with matters concerning foreigners' entry, lawful stay and employment in South Africa.<sup>116</sup>

In terms of section 38(1) of the Act, a foreign migrant who is legally recognised in the country and whose permit allows him/her to work in South Africa cannot be denied the

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<sup>114</sup>Watchenuka (n 20 above) para 30 & sec 22 of Act 108 of 1996

<sup>115</sup>As above para 32

<sup>116</sup> In terms of sec 1 of the Immigration Act, "foreigner means an individual who is neither a citizen nor a resident , but is not an illegal foreigner"



right to work because of his or her status as a migrant.<sup>117</sup>The Act does not distinguish between different categories of migrants but puts more emphasis on the legality of migrant's status. Thus, the right to work is prohibited to undocumented migrants.

According to the purpose of the Immigration Act, the employment of foreign migrants who possess the needed skills for South African economic growth is encouraged. The preamble of the Act states that:

'The Immigration Act aims at setting in place a new system of immigration control which ensures that- economic growth is promoted through the employment of needed foreign labour, foreign investment is facilitated, the entry of exceptional skilled or qualified people is enabled, skilled human resources are increased (...)'.<sup>118</sup>

Unlike the Refugee Act that allows refugees to seek employment through self-sufficiency, the Immigration Act guarantees the right to work to legal migrants under certain conditions. These conditions include critical skills and work permits.<sup>119</sup>Thus, the Immigration Act prohibits the unlawful act of employing an undocumented foreign migrant and holds the employer guilty in contravention with the Act.<sup>120</sup>

The Act, however, does not punish foreign employees with irregular status who consent or accept to work or conduct an activity for an employer. Therefore, the employer bears the responsibility to verify the legality and the validity of foreign migrants' work permits while employing or after employing them in order to avoid being prosecuted in violation of the Act.

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<sup>117</sup>Sec 38 of the Immigration Act 13 of 2002, read as follows: "Employment

*(1) No person shall employ--*

*(a) an illegal foreigner;*

*(b) a foreigner whose status does not authorise him or her to be employed by such person;*

*(c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status."*

<sup>118</sup>Preamble of the Immigration Act of 2002, para d

<sup>119</sup>(n 66 above)

<sup>120</sup> Act 13 of 2002, sec 38(1)

However, Bosh observed that ‘there is nothing in the Immigration Act expressly nullifying contracts of employment with illegal (undocumented) foreigners’.<sup>121</sup>

This means that, even though the Act prohibits the employment of undocumented migrants, it does not absolutely invalidate or nullify the contract of employment that has been concluded between the employer and an undocumented migrant employee. This is due to the fact that there is no provision in the Act providing the invalidity of the employment contract between an employer and an undocumented migrant.

Furthermore, Bosh states ‘the fact that the Immigration Act prohibits employing unauthorised workers does not erase the fact of the employment relationship’.<sup>122</sup>

Referring to Bosh’s opinions, it could be argued that the Act does not explicitly prohibit the employment of illegal migrants, depending on a case-by-case basis and the relation between the employer and an illegal employee (as this point will be discussed in the next section below). Furthermore, the Act allows an employer to prove his or her good faith when he or she employed an illegal migrant.<sup>123</sup>

Groenewald also asserts that the Act does not nullify the work contract signed by an employer and an undocumented foreign employee. It does not incriminate an irregular foreign migrant for accepting a job without a proper permit, yet it prohibits and incriminates the act of employing an illegal foreigner.<sup>124</sup>

Although the Immigration Act is the main legislation concerning foreign migrants and their employment in South Africa, it has to be read together with labour laws protecting the employment of migrants in South Africa. Therefore, the next section examines the employment of migrants in South African labour laws.

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<sup>121</sup> C Bosh “Can Unauthorized Workers Be Regarded as Employees for the Purposes of the LRA?”, (2006) 27 Industrial Law Journal 1345

<sup>122</sup>Bosh (as above) 1359

<sup>123</sup>Act 13 of 2002 sec 38 (3)

<sup>124</sup> Groenewald (n 56 above)





### 3.5 South African labour laws concerning migrants' employment and labour rights

#### 3.5.1 Migrants' rights in the Labour Relations Act

The Labour Relations Act<sup>125</sup> (LRA) regulates the relationship between employers and workers and focuses on the conditions of work. The LRA protects all employees, including migrant workers, from matters such as discrimination<sup>126</sup>, unfair dismissal and unfair labour practice.<sup>127</sup> In section 2 of the LRA, certain employees are exempt from the protection of the Act, such include: the National Defence Force, the National Intelligence Agency, the South African Secret Service and the South African National Academy of Intelligence.

The LRA is relevant to all migrant workers regardless of their legal status and protects their rights because of their vulnerability in the labour market and in the workplace. Unlike the Immigration Act, which prohibits the employment of illegal migrants, the LRA does not set a difference between the category of migrants, therefore legal and illegal migrants are afforded the same protection and rights as employees in the LRA.<sup>128</sup>

The LRA also guarantees 'the right to fair labour practices' in line with the Constitution.<sup>129</sup> Consequently, irregular migrant employees and migrant workers with a valid employment contract, who obtained irregular status after his or her work permit expired, are protected from dismissal and unfair labour practices in conformity with section 23(1) of the Constitution and are granted protection as an employee under the LRA.<sup>130</sup> Thus, the contract concluded between an irregular migrant is not considered to be null and void.

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<sup>125</sup>Labour Relations Act 66 of 1995

<sup>126</sup>Secs 5 (1) &7 of LRA 66 of 1995

<sup>127</sup>Sec 185 of LRA

<sup>128</sup> Sec 213 of LRA defines an employee as:

- (a) *"any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and*
- (b) *any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have meanings corresponding to that of 'employee'."*

<sup>129</sup>Sec 213 of the LRA 66 of 1995, and sec 23 (1) of the Constitution, Act 108 of 1996

<sup>130</sup>See M McGregor *et al.*, "Labour Law Rules!" (2017) 37

Considering the employment contract and the relationship between an employer and an employee, du Toit argues that:

‘A valid and enforceable contract of employment, therefore, is not a necessary prerequisite for workers to acquire rights under the LRA. Instead, the substance of the employment relationship, as opposed to the legal form it takes, is determinative of the rights and remedies that ensue’.<sup>131</sup>

Whether an employment contract is valid or invalid does not remove any migrant worker’s rights under the LRA, as they are the same as any other employee. As the labour relationship between an employer and his/her employee defines the employment contract concluded between them either verbally or in writing, it therefore gives an employee all labour rights.

It is from the *Discovery* case that migrants with irregular status have been granted some labour rights.<sup>132</sup> In this case, the employment relationship between employer and employee is considered to be more important than the validity of an employment contract. As the Court emphasised:

‘I do not consider that the definition of ‘employee’ in section 213 of the LRA is necessarily rooted in a contract of employment. It follows that a person who renders work on a basis other than that recognised as employment by common law may be an “employee” for the purposes of the definition. Because a contract of employment is not the sole ticket for admission into the golden circle reserved for employed him in breach of section 38 (2) of the Immigration Act did not automatically disqualify him from that status’.<sup>133</sup>

Under common law, a contract of employment between the employer and an illegal employee is considered unenforceable and void from the definition of ‘employee’ in the LRA. However, in the *Discovery* case, the contract of employment between an employer and an illegal employee was not found null and void.

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<sup>131</sup> D du Toit *et al.*, “Labour Relations Law: A Comprehensive Guide” (2015) 89

<sup>132</sup> (JR 2877/06) [2008] 7 BBLR 633 (LC) (n 31 above) paras 13 and 32

<sup>133</sup> As above para 49



The employer must fairly dismiss a foreign migrant employee, even though there is no valid employment contract. The employer is further required to be able to justify the reasons for the dismissal to avoid being in contravention of the law. As the Court summarised in the *Discovery* case:

‘The protection against unfair labour practices as provided in section 23(1) of the Constitution does not depend on a contract of employment, but extends as well to other contracts, relationships and arrangements with regards to the work performance by a person or the personal services rendered to another’.<sup>134</sup>

From the above arguments, it should be concluded that a written and valid employment contract is important, particularly when there are disputes between employers and employees, as it may influence the court’s decision. However it is not a precondition for migrants’ employment or to secure their rights under the LRA when they are employed.<sup>135</sup>

Rather all migrants, regardless of their legal status, without a formal employment contract must have a good employment relationship with their employers. Additionally, both migrant workers and employers must agree to the terms and conditions of work to enter into any contract of employment or employment relationship.

### **3.5.2 The Employment Equity Act and migrants’ employment**

The Employment Equity Act<sup>136</sup> (EEA) is amongst the labour legislation in South Africa that prohibits discrimination in the workplace and promotes fair treatment and equality of opportunities in employment. For the purposes of this research, it is important to highlight that the EEA also prohibits discrimination against all employees and job seekers in law, policy and practice<sup>137</sup>.

The EEA also emphasises the implementation of affirmative action measures to resolve inequalities and unfavourable employment conditions experienced by vulnerable people,

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<sup>134</sup>As above para 42

<sup>135</sup>Bendix (n 94 above) 81

<sup>136</sup>Employment Equity Act 55 of 1998

<sup>137</sup>Sec 1 of EEA 55 of 1998

known as 'designated groups'.<sup>138</sup> Designated groups are defined in section 1(e) of the EEA as 'black people, women and people with disabilities'.

The main purpose of implementing affirmative action was to establish equity and to create equal opportunities and representation for South African people, who historically have suffered from unfair discrimination in employment and in the workplace during apartheid time.<sup>139</sup>

In general, non-nationals, particularly black and disabled non-nationals, should be fit into the definition of designated people because the definition of designated people covers black and disabled people. But, it is unfortunate to observe that when taking affirmative action measures, black and disabled non-nationals are left out from the definition of designated people due to the barriers and prejudices mentioned earlier.<sup>140</sup> Consequently, in practice, black and disabled non-nationals' conditions affect their employment. Most of them are discriminated against and they do not qualify for job opportunities due to the priority given to qualified South African job applicants.

Migrants are often unfairly discriminated against by policies and practices when applying for jobs and in the workplace. However, the EEA protects migrant workers and job applicants from unfair discrimination, as the Act aims to prohibit unfair discrimination against any employee in law, practice and on any ground in accordance with the Bill of Rights<sup>141</sup>, though South African citizens are granted priority and advantage in seeking employment.

In granting such a priority, the EEA allows fair discrimination to be justified<sup>142</sup>:

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<sup>138</sup> Section 15(2) of EEA

<sup>139</sup> Du Toit *et al.*, (n 131 above) 653-654 & 684

<sup>140</sup> In terms of sec 1 (b) of the Employment Equity Amendment Act 47 of 2013, the definition of designated people is restricted to "South African citizens by birth or descent; person who became South African citizens before 27 April 1994; or after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies".

<sup>141</sup> See sec 6 (1) of the EEA 55 of 1998, and sec 9 (3) & (4) of the Constitution, Act 108 of 1996

<sup>142</sup> Sec 6(2) of EEA

- by taking affirmative action measures; or
- when differentiation, exclusion or preference is made to any person on the grounds of an inherent job requirement.

For instance, considering the high unemployment rate in South Africa, the priority or advantage granted to South African citizens over migrants by giving citizens employment can be justified as fair discrimination. Additionally, concerning critical skills, some migrant workers are granted the right to work when there is no South African citizen or permanent resident who qualified for the job; however they have to transfer the skills to citizens or permanent residents when employed. Therefore, discrimination in employment concerning migrants' right to work could find justification when it is proven to be fair.

### **3.5.3 Migrants' labour rights in the Basic Conditions of Employment Act**

The Basic Conditions of Employment<sup>143</sup> (BCEA) like the LRA also promotes 'economic development and social justice by giving effect to the right to fair labour practices' as set in section 23(1) of the Constitution, and to 'the obligations of South Africa as a state party to the ILO conventions'.<sup>144</sup>

It regulates the working relationship between employer and worker by setting basic conditions of employment that cannot be less favourable than those provided in the BCEA, unless these basic conditions are replaced or excluded by:

- Collective agreement (Bargaining Council)<sup>145</sup>;
- Ministerial determination<sup>146</sup>; or
- Sectoral determination.<sup>147</sup>

Though these basic conditions of employment may vary or be excluded, they must be more favourable and not less than those specified in the BCEA.

<sup>143</sup>Basic Conditions of Employment Act 75 of 1997

<sup>144</sup> Section 2 of the BCEA 75 of 1997

<sup>145</sup> Sec 49 of BCEA

<sup>146</sup> Sec 50 of BCEA

<sup>147</sup> Sec 51 of BCEA

The BCEA is relevant to all employers and employees in all spheres except those excluded from the Act.<sup>148</sup> Thus, foreign migrants who fall into the definition of an employee in the BCEA, no matter their legal status, are afforded protection from unfair labour practices and other employees' rights related to work.<sup>149</sup> They must also be afforded protection against discrimination under the BCEA, as provided for in LRA, when they are employed or they are applying for employment.<sup>150</sup>

Consequently, a migrant worker has the right to bring his or her complaint to the specific organisation in case of the violation of his or her rights by his or her employer.<sup>151</sup> Furthermore, they are entitled to make use of the CCMA when there is a labour dispute between themselves and the employer.<sup>152</sup>

### **3.5.4 The employment of migrants under the Employment Services Act**

The Employment Services Act<sup>153</sup> (ESA) is a recent labour legislation that has been enacted to promote, improve and facilitate the employment of all (nationals and non-nationals) and protect the workplace environment.<sup>154</sup>

The ESA regulates and promotes the employment of foreigners (herein migrants) while making references to the provisions of the Immigration Act.<sup>155</sup>

According to the ESA, foreign migrants have the right to be employed, although their employment comes with conditions such as:

- To give effect to the right to fair labour practices as stipulated in section 23 of the Constitution;

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<sup>148</sup> Sec 3 of BCEA

<sup>149</sup> Secs 1 and 83A of BCEA

<sup>150</sup> Secs 78 and 79 of BCEA

<sup>151</sup> Sec 79 of BCEA

<sup>152</sup> Sec 80 of BCEA

<sup>153</sup> Employment Services Act 4 of 2014

<sup>154</sup> Sec 2(1) of ESA

<sup>155</sup> See preamble of ESA

- Their participation in the South African labour market does not negatively make an impact on existing labour standards or on the rights and expectations of South African workers; and
- Their employment must contribute to the training of South African citizens and permanent residents.<sup>156</sup>

Thus, migrants' employment must positively influence South African labour laws. They are also required to transfer their skills to nationals to promote the labour market.

Besides these complementary conditions, with regards to the provisions of the ESA, a foreign migrant can only be employed when he or she holds a valid work permit provided in terms of the Immigration Act.<sup>157</sup> Consequently, the ESA protects foreign migrants from the employer for any work or act that is in contravention with their employment or to the terms of his or her work permit.<sup>158</sup>

However, to some extent, to facilitate the employment of migrants, employers must follow some procedures. These procedures must be carried by employers after the minister of labour has consulted the Board and made certain regulations:<sup>159</sup>

- To satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy, before recruiting a foreign national, though the Act does not specify the terms under which the recruitment of foreign nationals should be done;
- To make use of public employment services or private employment agencies in order to facilitate the recruitment of a suitable employee who can be a South African citizen or permanent resident;
- To prepare a skills transfer plan by employers in respect of any position in which a foreign national is employed.

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<sup>156</sup> Sec 2(1) (h) of ESA

<sup>157</sup> See sec 8 (1) of ESA

<sup>158</sup> See sec 9 of ESA

<sup>159</sup> See sec 8 (2) of ESA

In line with the LRA, the ESA also authorises a foreign migrant who is an employee, but without an appropriate work permit, to apply for any matter relating to unfair labour practices or dismissal that he 'may have in terms of any statute or employment relationship' against the employer.<sup>160</sup> It gives jurisdiction to the Labour Court to deal with matters concerning the employment of foreign migrants.<sup>161</sup>

### **3.6 Conclusion**

The South African Constitution does not guarantee the right to work to anyone, not even to South African citizens. It only guarantees the right to choose employment, profession or trade to South African citizens.

The right to work for migrants is regulated in the Immigration Act, and the right to seek employment for refugees is regulated under the Refugee Act. Both migrants and refugees are granted the right to work or to seek employment under these Acts and the Constitution grants to them the right to fair labour practices.

Refugees who have been granted asylum are recognised the right to seek employment under the Refugee Act. However, asylum seekers' right to seek employment is not guaranteed in the Refugee Act, but it has been challenged by the Courts in some cases.

The right to work is a fundamental right which is guaranteed to migrants in the Immigration Act and in different South African labour laws. The Immigration Act, therefore, guarantees the right to work only to legal migrants and prohibits the employment of illegal migrants in South Africa.

In opposition to the Immigration Act, some labour laws in South Africa protect undocumented migrants' rights in particular, and migrants' rights in general from discrimination, unfair labour practices and other inequalities they may experience in the labour market and in the workplace.

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<sup>160</sup>Sec 8(4) of ESA

<sup>161</sup>Sec48 of ESA





These laws also give migrant workers and illegal migrants who fall into the definition of an 'employee' within the LRA and the BCEA, the right to address their complaints to the CCMA or to seek justice in the Labour Courts when their rights have been violated by employers.

The ESA is another labour law which has a specific purpose to regulate and facilitate the employment of foreign migrants in South Africa.

Although these labour laws mentioned above are not sufficient to protect migrants' labour rights, they give some direction on how these rights must be respected and guaranteed to migrant workers.

Employers must respect migrants' rights and comply with the provisions of the Immigration Act (especially when employing illegal migrants). Employers should also heed labour legislation in order to avoid causing disputes and being prosecuted for the violation of migrants' rights or for being in contravention with the provisions of these laws.

In the next chapter, the researcher will examine how international standards frame the right to work of migrants and how South Africa complies with these standards.



## Chapter Four: International and regional legal framework concerning migrants' right to work

### 4.1 Introduction

This chapter analyses the most relevant international and regional law standards which extend protection to migrants and guarantee their labour rights. Secondly, it further looks at how South Africa complies with the provisions set forth in these instruments and how it incorporates them into its Constitution and other legislation. The international instruments explored here include the International Covenant on Economic, Social and Cultural Rights<sup>162</sup> (ICESCR or the Covenant); the International Labour Organisation<sup>163</sup> (ILO); the International Convention on the Protection of the Rights of All Migrants Workers and Members of their Families<sup>164</sup> (herein ICRMW) and the African Charter on Human and Peoples' Rights (ACHPR).<sup>165</sup>

Migration is an old, worldwide movement and migrants' presence is legally recognised everywhere in the world. Importantly, the right to work is a fundamental human right that is recognised by 'everyone' in several international instruments.<sup>166</sup> This includes the right of migrants to work in a country other than their own.

In the *Watchenuka case* mentioned in the previous chapter, the right to work was said to be a fundamental right because it is linked to human dignity, the right to life and to self-esteem. Work is considered to be absolutely necessary for every human being's survival as well as their human dignity. In General Comment No 18 concerning the right to work, the

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<sup>162</sup>UN General Assembly Resolution No. 2200A (XXI), 16 December 1966

<sup>163</sup>UN specialized agency created by the Treaty of Versailles, 1919

<sup>164</sup>UN General Assembly Doc. A/Res/45/158, 18 December 1990

<sup>165</sup>OAU Doc. CAB/LEG/67/3 Rev 5 of 1981

<sup>166</sup>For example: Article 23(1) of the Universal Declaration on Human Rights; article 8(3)(a) of the ICCPR; article 6 of the ICESCR; article 11(1)(a) of the CEDAW, articles 11, 25, 26, 40, 52 and 54 of the ICRMW

CESCR states that 'every individual has the right to work, allowing him/her to live in dignity'.<sup>167</sup>

Therefore, particular protection is extended to migrant workers under these international norms. These standards deal with different matters concerning migrants' labour rights, the violation of their rights and their integration in the destination countries.

South Africa has ratified some of the international instruments that guarantee labour right(s) to migrants. Therefore, it must comply with the obligations under these instruments. It must make sure that its immigration laws, labour laws and policies conform to international standards on the right to work of migrants. Alternatively, South Africa should adopt regulations and policies that will conform to these standards.

However, most South African legislation, except the Constitution (which does not guarantee the right to work to anyone), recognises the right to work only to legal migrants, particularly those with critical skills. Since the *Discovery* case, migrants with irregular status have been granted some labour rights under the LRA.

It should be noted that most of the international standards extend the right to work and labour rights to everyone, and also protect the labour rights of undocumented migrants.

Now that the international instruments have been introduced, the next section in this chapter will look at the ICESCR as an important instrument that guarantees socio-economic rights, such as the right to work. Section 4.3 will explore the rights of migrant workers under the ICRMC. Section 4.4 examines the ILO, which is the first international instrument to recognise all workers' rights. Finally, Section 4.5 will consider the right to work at the regional level in the ACHPR.

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<sup>167</sup>General Comment No 18 (n 43 above)



## 4.2 The right to work of migrants in the International Covenant on Economic, Social and Cultural Rights (ICESCR)

As mentioned previously, there are a number of international human rights instruments that protect and guarantee economic, social and cultural rights (ESCR); such as the right to work. However, Ssenyonjo considers the ICESCR (or Covenant) as being ‘the most comprehensive human rights treaty on ESCR in international law’.<sup>168</sup> The ICESCR is a more consistent and extended legal framework that contains a variety of ESCR. It gives a good understanding of certain ESCR (for example the right to work) that are not clarified in other human rights instruments.

The Covenant has an Optional Protocol (OP)<sup>169</sup> that has been adopted to deal with individual complaints concerning the non-respect of ESCR and its enforcement. The OP works with the CESCR and confers it the power to receive complaints and consider communication from individuals or groups of individuals under the state party jurisdiction, who claim to be victims of violations of their rights by the state party after they have exhausted local remedy.<sup>170</sup>

Concerning the right to work, article 6 (1) of the Covenant recognises that ‘everyone’ has the right to work, including the opportunity to gain a life through employment that everyone chooses or accepts freely, by taking appropriate steps to safeguard this right. Under this provision of the Covenant, ‘everyone’ includes citizens and non-citizens (migrants) no matter their legal status in the country, without any distinction.

When referring to article 6 as read with General Comment No 18 on the right to work, the Committee does not restrict the right to work only to citizens and legal migrants, but it extends it to other categories of migrants. The Committee further states that the labour

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<sup>168</sup>M Ssenyonjo “Economic, Social and Cultural Rights in International Law” (2009) 26

<sup>169</sup>Optional Protocol to the ICESCR, adopted by UNGA Res. 63/117 of 18 June 2008

<sup>170</sup>Ssenyonjo (n 168 above) 33-37



market cannot be restricted only to a certain amount of undocumented people, but it should be accessible to everyone under the state parties' sovereignty.<sup>171</sup>

Thus, all migrant workers are protected against discrimination in employment and have an opportunity under the Covenant as noted by the Committee in General Comment 18:

"The principle of non-discrimination as set out in article 2.2 of the Covenant and in article 7 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families should apply in relation to employment opportunities for migrant workers and their families. In this regard, the Committee underlines the need for national plans of action to be devised to respect and promote such principles by all appropriate measures, legislative or otherwise'.<sup>172</sup>

The Covenant extends protection against discrimination in employment. It includes nationality and other statuses not mentioned in the Covenant but which can be one of the prohibited grounds of discrimination. Thus, migrants cannot be discriminated against in seeking employment because of their nationality.

South Africa has recently ratified the ICESCR.<sup>173</sup> By ratifying the Covenant, South Africa has accepted to be bound by the Covenant.<sup>174</sup> Consequently, it has the obligation under the Covenant to protect migrants' employment as recognised in the Covenant.<sup>175</sup> However, South Africa must domesticate and incorporate the provision of the Covenant concerning the right to work into its domestic laws. This would allow this provision to be applied directly at the national level and to be enforceable.<sup>176</sup> The Covenant does not exclude or

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<sup>171</sup>General Comment No 18 (n 43 above) para 12 (b)

<sup>172</sup>As above para 18

<sup>173</sup>South Africa ratified the ICESCR on 12 January 2015. See <https://treaties.un.org> [accessed on 17 April 2019]

<sup>174</sup>Vienna Convention of the Law of Treaties of 1968, article 2 (b) available at:<https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf> [accessed on 5 June 2019]

<sup>175</sup>ICESCR, art 2(1)

<sup>176</sup>A Rosas *et al.*, "Implementation mechanisms and remedies" in A Eide, C Krause & a Rosas (eds) *Economic, Social and Cultural Rights* (1995) 379. See also *Azapo v President of the Republic of South Africa* 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC) para 28

discriminate against any migrant but imposes legal obligations that South Africa as a state party must respect.<sup>177</sup>

The South African Constitution also prohibits discrimination based on different grounds as listed in the Covenant; such include sex, race, social origin, birth, colour, language and religion.<sup>178</sup>

Unlike the Covenant, which lists nationality as a prohibited ground of discrimination, the South African Constitution does not mention nationality being one of the prohibited grounds of discrimination; unless the term 'nationality' as listed in the Covenant refers to the word 'ethnic or social origin' used in section 9 (3) of the Constitution.

The Constitution recognises the right to free choice of employment, occupation or trade only for its citizens. The Covenant, in contrast to the Constitution, grants the right to work and the free choice of employment to everyone. However, discriminatory differentiation in treatment concerning migrants' employment and access to the labour market can be justified (in some circumstances) if it is reasonable and objective.<sup>179</sup> In addition, in terms of article 4 of the Covenant, migrants' restrictions to the labour market may also be allowed if these limitations are justified by the general limitations clause and recognised by international law standards.<sup>180</sup>

Each state has the power to control and protect its labour market and to prioritise the interests of its citizens by putting some restrictions on migrants' employment. These restrictions can prevent competition and unemployment among citizens. However, the state must also regulate and facilitate the entry of migrants in the labour market, if it is required, to fill the gaps in the job market and find a balance between citizens and non-citizens' interests.

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<sup>177</sup>General Comment No 18 (n 43 above) para 31

<sup>178</sup>Act 108 of 1996, sec 9(3)

<sup>179</sup>CESCR, GC No. 20: *Non-discrimination in economic, social and cultural rights (art 2, para 2, of the ICESCR)*, E/C.12/GC/20, 2009, para 13

<sup>180</sup>Saul *et al.*, (n 37 above) 315

Odello and Seatzu note that the right to work as set in the Covenant, however, cannot be misinterpreted as it includes the right to provide with employment.<sup>181</sup>

It is clear that it is always a serious matter to create jobs and to provide jobs to migrants in a country where poverty and unemployment are high amongst citizens. Therefore, the Covenant gives South Africa, as one of the developing state parties, the power to decide to what extent migrants' employment can be guaranteed with a proper concern for human rights and the national economy of South Africa.<sup>182</sup>

As South Africa itself is facing a situation of high unemployment among its citizens, the realisation of the right to work requires a lot of funds, resources and a budget for its progressive realisation. Thus, although the right to work is a basic right to everyone, the realisation and the enjoyment of migrants' right to work can be limited and must not disadvantage South African citizens, or paralyse the South African economy.

The Covenant therefore guarantees the right and the opportunity to work, including the 'free choice of employment' to everyone, and obliges member states to the Covenant to do the same. However, it recognises certain limitations to the right to work and access to the labour market to migrants, particularly for those who are in an irregular situation.

#### **4.3 The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (ICRMW)**

The ICRMW (CMW or Convention) is a unique UN Convention that places interest on the protection of all migrant workers' rights, including the rights of their family members. Additionally, the Convention prevents the violation of migrant workers' rights in the receiving or destination countries.

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<sup>181</sup>M Odello *et al.*, "The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice" (2013) 244

<sup>182</sup>See ICESCR, art 2(3)

The CMW also has a ‘Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families’ whose functions are set out in the Convention.<sup>183</sup>

In Article 2(1) of CMW, a migrant worker is defined as ‘a person who is to be engaged, is engaged, or has been engaged in a remunerated activity in a State of which he or she is not a national’. The Convention applies to all migrant workers and their family members, regardless of their lawful staying in the receiving countries and covers a number of fundamental rights that must be guaranteed to all migrant workers.<sup>184</sup> The Convention also expands protection to migrant workers against discrimination on other grounds, such as ‘nationality’ as enumerated in the ICESCR; ‘marital status’; ‘conviction’, ‘property’ and ‘economic position’.<sup>185</sup>

Article 2(2) of the Convention also includes some categories of migrant workers that have not been covered by other international instruments and the two main ILO Conventions on migrant workers.<sup>186</sup> Even if these categories of migrant workers are recognised in the Convention, there are certain rights that are not guaranteed to them under the Convention.<sup>187</sup> Additionally, the CMW does not apply to certain categories of migrant workers.<sup>188</sup>

South Africa has not yet signed and ratified the CMW.<sup>189</sup> However, it guarantees the right to work to legal migrants in the Immigration Act, when the rights of migrant workers with irregular status who fall in the definition of employee, are protected under the LRA and the BCEA.

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<sup>183</sup> Arts 72 and 74 of ICRMW

<sup>184</sup> Art 1 and Part III

<sup>185</sup> Arts 1 and 7

<sup>186</sup> I Slinckx “Migrant’ rights in UN human rights conventions” in R Cholewinski, P De Guchteneire & A Pecoud (eds) *The United Nations Convention on Migrant Workers’ Rights* (2009) 146

<sup>187</sup> ICRMW, Part V

<sup>188</sup> ICRMW, art 3

<sup>189</sup> (n 49 above)



The South African Constitution guarantees the right to ‘fair labour practices’ and other labour laws to everyone, include all migrant workers, although in practice certain rights and benefits are not guaranteed to migrants. Besides, illegal migrants’ rights are not protected as most of the time they are victims of unfair labour practices such as abuse, exploitative and cheap labour and unfair remuneration.<sup>190</sup>

In *Khosa and Others* case<sup>191</sup>, only permanent residents were entitled the right to social insurance benefits as South African citizens. Some provisions in the Bill of Rights only concern citizens and in some circumstances permanent residents, as the Constitutional Court stipulated in *Khosa* case that:

‘Given that the Constitution expressly provides that the Bill of Rights enshrined the rights of ‘all people in our country’, and in the absence of any indication that the section 27(1) right is to be restricted to citizens as in other provisions in the Bill of Rights, the word ‘everyone’ in this section cannot be construed as referring only to citizens’.<sup>192</sup>

However, migrant workers also are entitled to particular social insurance benefits that include employment injuries and diseases, occupational health and retirement benefits, and motor vehicle accident insurance, but they are not protected by South Africa public health care system, unless emergency medical cases as stipulated in terms of section 27(3) of the Constitution of South Africa. Otherwise, they can access health care using private schemes which are regulated by Medical Schemes Act.<sup>193</sup>

Oliver affirms that temporary residents in South Africa who are migrant workers are excluded from unemployment insurance regarding the termination of services, illness, maternity or adoption when they have to return to their home country.<sup>194</sup>

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<sup>190</sup>Namuska (n 59 above)

<sup>191</sup>*Khosa & Others v The Minister of Social Development & Others ; Mahlaule & Others v The Minister of Social Development & Others, 2004 (6) SA 505 (CC)*

<sup>192</sup>As above, paragraph 47

<sup>193</sup>M Olivier ‘Enhancing access to South African social security benefits by SADC citizens: The need to improve bilateral arrangements within a multilateral framework’, (2011) 1, SADC Law Journal, p 142

<sup>194</sup>Olivier (as above) 142; See also Unemployment Insurance Act 63 of 2001, section 3(1)(d)

Unlike the South African Constitution, however, most of the labour rights covered in the CMW apply to citizens in the same way to migrant workers. Article 25 of the Convention guarantees the principle of equal treatment to migrant workers with nationals with regards to remuneration, conditions of work and terms of employment. Furthermore, the Convention extends the same principle of equal treatment to migrant workers regarding other labour rights in respect of:

- (a) Protection against dismissal;
- (b) Unemployment benefits;
- (c) Access to public work schemes intended to combat unemployment;
- (d) Access to alternative employment in the event of loss of work or termination of other remunerated activity...<sup>195</sup>

These labour rights, as mentioned above, are extended to migrant workers not only when they are employed but also after the end of employment.

Cholewinsky argues that:

‘As with the ILO standards, the CMW goes beyond the treatment of migrant workers in the country of employment and covers the entirety of the migration process, particularly with a view to the prevention of abuses’.<sup>196</sup>

Migrant workers’ rights are more strongly protected in the CMW than in other international instruments. They enjoy equal rights and equal treatment to nationals with regards to the protection of their labour rights.

Moreover, Article 25(3) emphasises the applicability of the principle of equal treatment by member states to irregular migrant workers, forbidding employers to deny any rights to irregular migrants with regards to their stay and employment. Thus, the responsibility is

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<sup>195</sup>ICRMW, art 54(1)

<sup>196</sup>R Cholewinski “International Labour Law and the protection of migrant workers: revitalizing the agenda in the era of globalization” in JDR Craig & SM Lynk (eds) Globalization and the Future of Labour Law (2006) 414

placed on states concerning the protection of illegal migrants' rights from exploitative and abusive labour by employers once they have entered the destination countries.

However, CMW invites state parties and states where migrant workers have passed through before coming to the destination country to work together, by taking measures that prevent and eliminate illegal migration movements. These include human trafficking, smuggling of illegal migrants and the employment of migrant workers in an irregular situation. They also have to work together to punish perpetrators of these movements, threats and abuses of illegal migrants.<sup>197</sup>

Further, in Article 79, the Convention recognises the right of member states to decide on the admission of migrant workers and their family members in their countries. Despite this, the Convention puts certain restrictions to state parties on other matters in relation to the legal situation and the treatment of migrant workers and their families.

Consequently, after being admitted in the receiving countries, migrant workers and their families are recognised as documented and they have the right to engage in remunerated activity and choose their remunerated occupation freely, for the timeframe of their work permits or for the period granted for their stay. However, this right to engage in a remunerated activity or to freely choose a remunerated occupation can be restricted under national law.<sup>198</sup>

Although South Africa has not yet ratified the CMW, in terms of section 233 of the South African Constitution, the ICMWR can be applied or can have an influence on the way courts interpret any domestic legislation. Mokgoro asserts in his article that 'when invoking international law as an interpretative tool for our domestic law, the Constitution embraces [a] broad approach by including both binding and non-binding sources of international law'.<sup>199</sup> Thus, the court should choose any legislation that is not conflicting with the ICMWR

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<sup>197</sup>ICRMW, art 68

<sup>198</sup>ICRMW, arts 49(1), 51 and 52

<sup>199</sup>JY Mokgoro "Ubuntu, the Constitution and the rights of non-citizens" (2010) 2 Stellenbosch Law Review 221

with regards to migrants' rights. The Constitution gives paramount importance to international law when courts must interpret domestic legislation. According to section 39 (1)(b) of the Constitution, the court is obliged to consider international norms when interpreting the Bill of Rights and/or when the court is deciding on any case law or legislation in relation with migrants' employment.

#### **4.4 The International Labour Organisation (ILO) and migrants' employment**

The ILO is a tripartite UN agency that works with governments, workers organisations and unions and employers. It is also composed of three bodies in which it operates through conventions and recommendations: the International Labour Conference, the Governing Body and the International Labour Office.<sup>200</sup>

The ILO is the first specialised UN agency and an important international instrument that, together with its standards (ILO conventions and recommendations) advance, promote and protect the rights of all workers, the relationship between employers and workers, as well the rights at work.<sup>201</sup>

The ILO Constitution's preamble states:

'...and whereas conditions of labour exist involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled; and an improvement of those conditions is urgently required; as, for example...the regulation of the labour supply... protection of the interests of workers when employed in countries other than their own...'.<sup>202</sup>

The ILO recognises the right to work from its preamble and emphasises the protection of the interests of migrant workers when they are employed in other countries than their own countries.

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<sup>200</sup><https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm> [accessed on 26 April 2019]

<sup>201</sup>A van Niekerk *et al.*, "Law@work" (2018) 23

<sup>202</sup> Preamble of the ILO Constitution of 1919, para 2

There are many ILO conventions that have been adopted by the International Labour Conference.

Unlike recommendations which are not binding for states, but rather provide guidelines on the regulation of certain matters, conventions adopted by the International Labour Conference have a binding force on states that ratified them.<sup>203</sup>

As noted by Van Eck and Snyman, the UN and the ILO have realised that migrant workers, particularly their families, need special protection, so they have adopted conventions which directly protect migrants.<sup>204</sup> Before the adoption of the ICRMW, migrant workers' rights were covered within the ILO conventions. Even if it takes years to adopt a particular convention that specifically protects all migrant workers and their families, the ILO conventions afforded particular protection to migrants due to their vulnerable position.

It is important to note that the ILO conventions (standards) are relevant to all employees including migrant workers, except Convention No. 111<sup>205</sup>, which does not consider nationality as being one of the prohibited grounds of discrimination.<sup>206</sup> Yet, there is a problem of nationality when referring to discrimination. It should be observed that nationality has been and is still one of the major problems that some instruments abstained from mentioning. This might be one of the reasons which justify the protection of states power and the interests of nationals.

South Africa has ratified 28 ILO conventions to date. Among these 28 are eight core conventions that grant rights to all employees.<sup>207</sup>

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<sup>203</sup>Niekerk (n 201 above) 25

<sup>204</sup>BPS Van Eck *et al.*, "Social Protection Afforded to Irregular Migrant Workers: Thoughts on the Southern Africa Development Community ( with Emphasis on Botswana and South Africa)" (2015) 59 *Journal of African Law* 299

<sup>205</sup>Convention No. 111 (C111) concerning Discrimination in Employment and Occupation of 1958, Article 1 (1) (a)

<sup>206</sup>Cholewinski (n 196 above) 411

<sup>207</sup><https://www.ilo.org> [accessed on 26 April 2019]

There are a number of ILO conventions and recommendations with regards to the protection of migrant workers, but only two conventions on migrant workers are legally binding for the member states that ratified them<sup>208</sup>. These two are Migration for Employment (revised) Convention (C97) of 1949, and Migrant Workers' Convention (C143) (supplementary provisions) of 1975.<sup>209</sup>

The Migration for Employment Convention (C97) treats the conditions regulating the employment of migrant workers and lays down the bedrock for the principle of equal treatment between nationals and legal migrant workers with regards to living and working conditions.<sup>210</sup>In opposition to the ICRMW, who defines the term 'migrant workers', the ILO Migration for Employment uses the expression 'migrant for employment' and defines migrant for employment as 'a person who migrates from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as migrant for employment'.<sup>211</sup>

Unlike Migration for Employment Convention (C97) and other ILO Conventions that partly deal with illegal migrants, the Migrant Workers' Convention (C143) applies to all migrant workers and illegal migrants and impresses upon state parties to respect migrant workers' fundamental rights.<sup>212</sup>

Illegal migrants and their family members are also granted the right to equal treatment with regards to 'rights arising out of past employment as regards remuneration, social security and other benefits'.<sup>213</sup> Nevertheless, this convention is concerned about the situation of irregular migration. It denounces migration's abuses and activities, such as

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<sup>208</sup>Niekerk (n 201 above) 25

<sup>209</sup>Cholewinski (n 196 above) 411

<sup>210</sup>Migration for Employment Convention No 97 (Revised) (C 97) of 1949, Article 6

<sup>211</sup>C97, section 11(1)

<sup>212</sup>C143, art 1

<sup>213</sup>C143, art 9(1)

smuggling and trafficking of migrants. It calls states to take measures to prevent irregular migration.<sup>214</sup>

In addition, the C143 also promotes the principle of equal opportunity and equal treatment to legal migrants and members of their families in a number of rights related to work and conditions of work. It goes beyond socio-economic rights by guaranteeing cultural rights to legal migrants.<sup>215</sup>

In Article 10 of the C143, state parties are obliged to declare and pursue ‘a national policy’ aimed to guarantee and promote the principle of equal treatment and opportunity. However, the ‘free choice of employment’ is only granted by member states to legal migrant workers resident for a maximum period that cannot exceed two years.<sup>216</sup>

South Africa has not yet signed and ratified these two conventions. However, the ‘ILO Declaration on Fundamental Principles and Rights at Work’ states that ‘state parties to the eight core ILO conventions and other ILO conventions have the duty to respect and protect migrant workers’ rights in respect to the principles set forth in all ILO conventions’.<sup>217</sup> Therefore, South Africa as a state party to some ILO conventions has an obligation to respect and protect migrants’ labour rights.

#### **4.5 The right to work of migrants in the African Charter on Human and Peoples’ Rights (ACHPR)**

The ACHPR (Banjul Charter) is a particular regional human rights instrument that promotes and protects the rights of individuals and peoples in Africa. This instrument has provisions that protect socio-economic rights of non-nationals, such as the right to work, though these provisions are not quite similar to those provided in international standards.

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<sup>214</sup>C143, arts 1-9

<sup>215</sup>C143, art 10

<sup>216</sup>C143, art 14(a)

<sup>217</sup> ILO Declaration on Fundamental Principles and Rights at Work of 1998

The Banjul Charter recognises and guarantees to everyone the enjoyment of the rights provided in the Charter on different grounds of discrimination as mentioned in different instruments, but these grounds are more extended in the African Charter.<sup>218</sup>

However, the enjoyment of these rights is limited ‘with due regards to the rights of others, collective security, morality and common interest’.<sup>219</sup>

Concerning the right to work, as read in Article 15 of the Banjul Charter, ‘[e]very individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work’.

Therefore, everyone without any distinction of any grounds as mentioned in the African Charter or legal status has the right to work whether in their country of origin or in another country.

Once again, the Banjul Charter recognises the principle of equal treatment as set forth in other international instruments mentioned above, concerning remuneration and conditions of work to all migrant workers as the same with nationals.<sup>220</sup>

However, the scope of Article 15 is very limited to the extent that it does not clarify the protection of migrants’ labour rights and their access to the labour market in receiving countries as described in some international standards.

South Africa has been a member state of the African Charter since 1996.<sup>221</sup>

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<sup>218</sup>Article 2 of the Banjul Charter

<sup>219</sup>Article 27(2) of the Banjul Charter

<sup>220</sup>African Charter, article 15

<sup>221</sup><https://au.int/en/treaties/african-charter-human-and-peoples-rights> [accessed on 3 May 2019]



In addition, in 2006, the African Union (AU) adopted a ‘migration policy framework for Africa’.<sup>222</sup> This policy was created after the decision of the OAU executive council<sup>223</sup>.

The migration policy provides guidelines that encourage member states of the AU to promote migration and development, to address the problem of migration, to manage integration, security and free movement of persons. It provides additional guidelines to prevent irregular migration, trafficking and smuggling of migrants, to develop labour migration policies and legislation, as well to reinforce cooperation within and between African regions on the subject concerning migration.

The migration policy also invites states to domesticate the provisions contained in the ILO Conventions C97 and C143 and the ICRMW in their legislation, in order to protect the rights of migrant workers.

#### **4.6 Conclusion**

Migration has been a phenomenon that existed for decades, and still exists today. It will continue to exist in the worldwide but it has become a sensitive matter that needs to be addressed and regulated.

Therefore, many instruments have been adopted at the international, regional and sub-regional level to help states regulate and protect migrants’ rights in general and their labour rights in particular.

The ILO was the first international instrument that was started in order to protect the rights of all employees. It suggests conventions to be adopted which can protect migrant workers. Among all the ILO Conventions adopted, C97 and C143 are the most important ILO conventions that bind state members and protect migrant workers; particularly ILO C143, which extends protection to illegal migrants. Despite the fact that there are eight core

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<sup>222</sup>AU “The Migration Policy Framework for Africa”, EX.CL/276 (IX) 25-29 June 2006, Banjul <https://www.unhcr.org/protection/migration/4d5258ab9/african-union-migration-policy-framework-africa.html> [accessed on 6 May 2019]

<sup>223</sup>OAU Decision CM/Dec 614 (LXXIV) of July 2001

ILO conventions, none of them are specific to migrant workers but they do protect the rights of all employees.

To enhance the provisions of the ILO conventions for migrant workers and to reinforce the protection of migrant workers' rights, the ICRMW has been adopted for the special need and protection of the rights of migrant workers and their family members. The ICRMW is the most important instrument that applies directly to migrant workers and their families. It covers most of the migrant labour rights that have not been covered in other international norms.

Despite the fact that the ICRMW has some similarities with the ILO, since they pursued almost the same objectives - the protection of migrants' labour rights; the ICRMW enhances the labour rights of all migrant workers and goes above and beyond by giving more protection to undocumented migrant workers. However, both instruments protect *all* migrant workers, particularly illegal migrants from abuses, exploitation and prevent migration movement, such as trafficking, smuggling of migrants. Together with the ICESCR, these instruments extend the right to work to 'everyone' regardless of citizenship.

Each instrument has a particularity, as these instruments have some similarities and disparities when analysing them. Although the ICRMW is still under-ratified<sup>224</sup>, it is a special and unique instrument that widely extends protection to all migrant workers and members of their families when placed in contrast to the ILO conventions and the ICESCR.

At the regional level, the ACHPR also guarantees the right to work to everyone. However, the scope of the right to work in the African Charter is not extended as it is in the international instruments.

Despite the fact that all these standards guarantee and protect migrants' labour rights, there are certain limitations set forth in each instrument regarding the exercise, the

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<sup>224</sup>Until now only 54 States have ratified the ICRMW  
[https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg\\_no=IV-13&src=IND](https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&lang=en&mtdsg_no=IV-13&src=IND)  
[accessed on 6 May 2019]

accessibility to the labour market and the full enjoyment of the right to work of migrants in the destination countries, particularly for illegal or undocumented migrants.

Additionally, South Africa has not yet ratified the two important ILO conventions on migrant workers and ICRMW. However, the South African Constitution recognises the importance of international law when interpreting any legislation. Some rights guaranteed to migrants in these instruments are also covered in South African labour laws, such as the non-discrimination and the fair labour practices, although there is a conflict between South African laws and international norms on the application of these rights to migrant workers.



## Chapter Five: Summary and recommendations

### 5.1 Summary

This study intended to outline the guarantee afforded to migrants concerning their right to work in South Africa. It also attempted to uncover the challenges migrants encounter when looking for a job and accessing the labour market.

The right to work is an important constituent of human dignity which is inherent to every human being, be citizens or non-citizens. It is essential for all human beings' life and survival, as well as for the realisation and the enjoyment of other human rights. This will be an important starting point in seeking to recognise and to grant migrants the right to work, and to protect them from barriers that prevent them from entering the South African labour market.

Migrants' right to work should be recognised and protected in South Africa, because the right to work is an integral part of human dignity and also a basic human right that is legally recognised in different instruments in the worldwide. Migrants cannot be denied the protection and the enjoyment of the right to work because they are not nationals and residents of another country. They should enjoy the right to work; although some restrictions can be set under the law to protect national interest, these restrictions should not prevent them from working or accessing the job market.

This study is significant in that it presented an overview of how migrants are discriminated against when looking for jobs and how they face many obstacles that prevent them from enjoying the right to work and to enter the South African labour market. Migrants' employment cannot only be seen as an obstacle to prevent, but it must be also considered as an opportunity for development and economic growth in South Africa. Consequently, the

legal protection of rights granted to migrants is limited, and in practice, there are challenges and violations of migrants' rights to work in seeking employment and accessing the job market.

As Chapter Two of this study demonstrated, despite the fact that there are laws and policies in South Africa which broadly protect legal and illegal migrants' right to work or not, as well as their labour rights, migrants' integration into the South African job market faces many challenges. Apart from legal challenges facing migrants, there are also socio-economic challenges they meet in accessing the labour market as explained in Chapter Two. These socio-economic challenges include xenophobia, discrimination, slowness in the service delivery in the DHA, the unemployment rate in South Africa and migrants' lack of skills. As it has been observed in this study, there is still a gap between the protection and the realisation of migrants' right to work and labour rights in laws and in practice due to many challenges as mentioned above. It should be noted that the unemployment rate in South Africa constitutes a huge challenge to migrants' right to work and access to the labour market. It is obvious that the South African government must first create jobs and ensure that its citizens are not unemployed and then facilitate the employment of migrants. This will require funds and resources in a planned way.

Regrettably, there is no right to work in the South African Constitution. This was examined in Chapter Three of this study, where the study looked at different laws at the domestic level that recognise migrants' right to work. This chapter also discussed refugees and asylum seekers' employment in South Africa. Laws and policies in South Africa, such as the Immigration Act, do not sufficiently guarantee and protect migrants' employment, particularly undocumented migrants' right to work as well as labour rights. These laws and policies provide some protection on migrants' labour rights and how these rights must be guaranteed to migrants. However, most of them do not emphasise the barriers that prevent the enjoyment of migrants' right to work. These laws restrict access to the South African labour market by determining the conditions to which migrants must comply with in order to enter the job market, for example: migrants must have a work permit, a critical or

exceptional skill, and there must be the absence of a qualified South African applicant or a permanent resident to fill the job. This lack of protection given to migrants in South African legislation is also among the challenges preventing migrants' access to the labour market.

However, as shown in Chapter Four, migrant workers are adequately protected under international instruments, particularly in the UN Convention on Migrant Workers. This Convention provides strong protection for migrants' labour rights and illegal migrants. It also guarantees equal treatment of migrants and nationals with regards to labour rights. These international standards may be considered as guidelines in South Africa when courts interpret labour legislation related to migrants' employment.

In the next section, the study concludes with some recommendations on how the right to work must be extended and granted to migrants, as well as what can be done to prevent the challenges that impede migrants entering the labour market.

## **5.2 Recommendations**

### **5.2.1 Reform, implementation and enforcement of legislation and labour laws**

Labour migration can play a significant role in the development and the economic growth of South Africa. Migrants, particularly skilled migrants, are not only job takers but job contributors because they bring new expertise that contributes to the promotion of the labour market. Thus, even if some limitations can be allowed in laws and practice to protect public or private interests of nationals, the South Africa government must encourage and facilitate the employment of migrants and their integration in the job market in the following ways:

- The South African Constitution should recognise the right to work as a fundamental human right to everyone, and then specify to what extent the employment of migrants can be granted or exercised because the guarantee and enjoyment of labour rights are linked to the right to work. The Constitution is the bedrock of laws in the country. It must acknowledge the right to work and serve as a guide to other

legislation on how the right to work can be protected and extended to migrants in South Africa.

- The government must allow and promote legislative reform to clear any gaps between immigration law and labour laws concerning the employment of legal and illegal migrants, must strongly protect migrants' employment, facilitate migrants' integration and participation in the labour market and secure migrants' labour rights.
- The government must also adopt policies that eliminate barriers that prevent the employment of migrants. These policies must also regulate the informal sector to prevent any abuse and exploitation against migrants' employment, particularly undocumented migrants and create favourable opportunity and working environments for all migrants.
- A national policy that will control the movement of migrants in South Africa is also needed to avoid illegal movement and illegal migrants within the country.
- Migrant's employment must always be managed and protected by regulated laws and policies.
- The centrepiece of migrants' employment is the need for effective implementation and enforcement of labour laws and policies. The South African government must make sure that laws and policies that exist, or must be adopted to protect migrants' employment, labour rights and their integration in the job market, are effectively implemented and enforced. This will secure migrants' employment and ensure the protection of their labour rights.

It should be said that the social protection of migrants against abuses, exploitation and all the challenges they face in accessing the job market depends on strong legislation and more on the implementation and the enforcement of these laws and policies.



### **5.2.2 Improve the service delivery of documents and work permits in the Department of Home Affairs**

The DHA must improve its service by making it easy, quick and accessible when delivering work permits which allow migrants to work. Some migrants cannot find a job or fail to secure their jobs because of the delay, the corruption and the poor service delivery of permits in the DHA. This situation can create irregularity in the status or situation of migrants in the country. From my personal experience as migrant, I have been in an irregular situation for a month because of the refusal to accept to renew my permit by officers of the DHA. Therefore, the DHA must avoid any delay in the process of renewal of permits, and facilitate the renewal of permits once they have expired to avoid putting migrants in an irregular situation.

The DHA, together with the Immigration Act, must review their policies concerning the employment and the status of undocumented migrants, while regularising their situation by granting them work permits that may help them to work in the (in)formal sector against any abuses and exploitation.

### **5.2.3 Create public awareness and information about migrants' employment**

The South African government must be responsible for the protection of migrants' right to work and access to the South African labour market. It has the obligation to make migrants' employment and integration into the labour market easy and accessible without any challenges. The government must prohibit any negative attitudes or behaviours against migrants and their employment by informing the population about the consequences of their actions, as well as by taking disciplinary measures to punish all the perpetrators of these actions.

The failure to do so and the exclusion of migrants from the job market can create social instability and insecurity in the country, increase crime and affect the South African labour market and economy. Thus, the South African population who are behind negative threats, behaviours and practices against migrants must be informed about the positive



contribution migrants bring to the country and how this contribution influences the development and the economic growth of South Africa. They should know that there are different categories of migrants who come to South Africa not only to look for job opportunities but as migrant workers, entrepreneurs and investors.

The government should value migrants' skills and qualifications by allowing them to work and to transfer skills to South African citizens.

In addition, employers must facilitate migrants' employment and respect their labour rights, particularly the labour rights of undocumented migrants, when employing them in order to avoid charges against abuse and violations of their rights at work.

#### **5.2.4 The ratification of the ICRMW and the ILO Conventions on migrant workers**

South Africa must consider signing and ratifying the ICRMW and both ILO conventions (C097 and C143) to protect migrant workers' rights effectively. After their ratification, South Africa must implement and domesticate these conventions in its legislation and labour laws in order to protect migrants' labour rights and to improve the conditions of migrant workers and their families. It must also respect and fulfil its obligations under these instruments.

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