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THE MIGRANT WORKER AND LEGISLATIVE PROTECTION. A DISCUSSION OF THE SOUTH AFRICA EXPERIENCE

Radnik imigrant i zakonska zaštita. Diskusija o iskustvu Južne Afrike[§]

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Abstract

Within the context of this paper, a migrant is defined as an asylum seeker, a refugee, a legal and or an illegal immigrant. Labour migration in South Africa has received little attention due to concerns with immigration, which are regarded as far more immediate and pressing. This consideration and others provide the impetus for this paper, which in the opinion of the authors adds to the growing concern over the issues of xenophobia and incidences of maltreatment of African immigrants in South Africa, especially against the background of the bold posture of South Africa's constitution as the most promising constitution in the world. One must note that South Africa's independence in 1994 and the prospects of a booming economy in a democratic setting unleashed a floodgate for immigration into the Republic from a variety of countries in Africa including Eastern Europe. This paper finds that despite narratives that tend to argue that migrant workers are deficiently protected in South Africa, evidence suggests that their rights within and outside of the workplace are indeed under the veil of protection by the legislation and the courts. Nonetheless, we are of the opinion that more interventions need to be in place, especially

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with regard to mitigating the levels of exploitation of migrant workers. This and many other recommendations have been put forward considering that migrant workers are susceptible to exploitation.

Keywords: *Migrant Worker, Xenophobia, Worker Exploitation, South African Constitution*

1. Introduction

Francis Wilson (1972) aptly summarises the origin of the migrant worker as follows:

“..... migrant labour is nothing new in South Africa. One hundred years ago, a decade before the birth of the Witwatersrand gold mining industry, generations before the evolution of Apartheid, the system whereby men oscillate between their home in some rural area and their place of work was already firmly established as part of the country’s way of life. During the 1870’s, if not before, farmers in the Western Cape solved the perennial problem of labour shortage- which in previous centuries had been alleviated through importation of slaves - by recruiting workers from wherever they could be found. Agents were sent to Ciskei, the Transkei, to Mozambique and South West Africa, even as far as Cornwall and Germany, to bring back labourers for the vineyards and wheat fields of the small colony.”

An analysis of the role of non-South African migrants, will undoubtedly lead to the conclusion that migrants have long been crucial in the development of the economy of South Africa, specifically the mining and agricultural sectors. The above commentary (Wilson, 1972) is testimony to this claim.

Currently there are nationals from approximately one hundred countries residing in South Africa. This, according to Adepoju (2003) is because, with the demise of Apartheid and the democratic elections of 1994, South Africa was perceived as the ideal destination for a variety of other African and eastern Europe nationals. Given this, highly skilled professionals from Nigeria and Ghana took up academic jobs as well as jobs in other professions; while tradesmen from Senegal and Mali ingeniously invigorated the informal sector through their aggressive commercial acumen. Adepoju also reported that tradesmen from the Democratic Republic of Congo (then Zaire) and Zimbabwe were also among those who filled up the informal sector. While most of these immigrants entered the country without proper documentation, many overstayed their legal residency.

Posel (2004) argues that labour migration in South Africa has received little attention due to concerns with immigration, which are regarded as far more immediate and pressing. In fact, a debate that has raged on among academics and labour practitioners is that of exactly determining how many people have entered the country in recent years (Standing et al. 2006). Until recently, legislation governing the movement of people into South Africa did not change even with the end of Apartheid, albeit the number of people entering South Africa from other African countries is thought to have increased (Posel, 2004). However, the dominant view, popularised in the press, is that illegal entry and permanently settling in the country would have adverse economic and social implications (Barker, 2003). Collinson and others (2006) seem to share in the above view by stating that over the last century South Africa’s mining and industrial centres have attracted vast numbers of labour migrants, both documented and undocumented, from rural areas and from neighbouring countries.

Current prevalence estimates indicate a minimum of 2, 5 million legal migrants, a figure likely to be underestimated, while illegal and undocumented migrants, who are seldom included in statistics, are another huge social phenomenon.

The term 'migrant' connotes 'asylum seekers, refugees, legal and illegal immigrants' (Kok, 2006). This paper adopts Kok's connotation of the term. Therefore a migrant in this paper will refer to the above four categories.

This paper is organized as follows. The next section expresses the papers position, which is based on the suggestions of previous studies on the subject. Following that is an overview of the migrant worker with particular focus on their incursion into the South African work environment including an account of the reasons for migration as well as a presentation of the employment relations laws that were promulgated since the advent of democracy in South Africa. This was intended to provide substance in the discussion of the subject matter. The other sections deal with the research design; and the points for discussion utilizing relevant case laws in South Africa. Finally we conclude the discussion with some recommendations.

2. Position of this paper

Patrick Taran's (2000) paper (on human rights of migrants) and several others (for example United Nations, 2001; International Labour Organisation (ILO), 2000; Human Rights Watch, 1997; and Stalker, 2000) provide the impetus for this paper, which in the opinion of the authors adds to the growing concern over the issues of xenophobia and incidences of maltreatment of African immigrants in South Africa, especially against the background of the bold posture of South Africa's constitution as the most promising constitution in the world. The above is the paper's position which attempts to unravel some of these issues. The authors also propose some remedial measures. Basically, research, documentation and analysis of the characteristics and extent of problems and of effective remedies remain minimal (Taran, 2000). Needless to say that the discussion of the migrant worker, migrant workers' rights and employment relations is an on-going one.

3. Overview of the migrant worker

Before we can deal with the extent of protection of the migrant worker by the South African employment legislation, it is important to deal with the most important key word in this paper and that is the migrant worker. The word migrant worker has been given diverse meanings and connotations. We however rely on the United Nations (2005) definition which regards a migrant worker 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." According to the United Nations, this definition excludes employees of international organizations, government officials, persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other cooperation programmes, investors, refugees and stateless persons, students and trainees, non-national non-resident seafarers and workers on an offshore installation. Essentially, migrant labour has long been utilized in developed and underdeveloped economies as a low cost means of sustaining economic enterprises, and sometimes entire sectors that are only marginally viable or competitive (Taran, 2000).

A migrant worker, in the lexicon of activists, is that individual who enters a foreign country for the purpose of securing a job with the consequence of earning a

decent living. The International Labour Organisation (2006) applies the euphemism 'Three-D' to illustrate the perception of several countries with reference to a migrant worker. 'Three-D' stands for dirty, dangerous, and degrading. This perception makes more logic when one looks at how the migrant worker is treated in the so-called rich nations, in which in most cases migrant workers are viewed as dirty (perhaps as a result of a long sojourn into the 'promised land'), dangerous (perhaps because they are seen as desperate and willing to engage in anything to survive) and they can take up degrading jobs that nationals reject or are not available to occupy. Taran (2000) must have considered the above statement when he stated that at the heart of the dilemma over recognition of migrants' human rights was their vulnerability to exploitation, especially in marginal, low status, inadequately regulated or illegalized sectors of economic activity. This is evident in his lamentation of the pillaging of migrants, especially those who are in irregular or unauthorized status, who are considered an ideal reserve of very flexible labour. In fact he went on to say that those without authorization for entry and or employment, enjoy very little or no protection by labour workplace safety, health, minimum wage and other standards; because they are often employed in sectors where such standards are non-existent, non-applicable or simply not respected or enforced.

It suffices to state that the rejection of the migrant worker is not a new phenomenon in South Africa, because it can be traced back to as far back as 1904 (Venter et al. 2010) when Chinese labour was introduced to alleviate labour shortage after the Anglo-Boer war. This must have heightened the fears of whites in South Africa and resulted in the passing of Mines and Works Act 12 of 1911 which essentially sought to exclude Non-Europeans from certain kinds of work. Crush (2001) paints a much more negative picture by indicating that the post 1994 new South African government became openly anti-immigration, perhaps justified primarily in terms of the threat to jobs for citizens, necessitating tighter immigration laws in the face of a litany of complaints from South African employers seeking to access the global skills market. Crush maintains that little political will and lack of appetite for immigration discussions may have also fuelled the perception of the vast majority of South Africans who still feel that too many foreign citizens are being allowed into the country. Mattes et al. (1999) in fact argued a while back that the majority of South Africans believed that immigration and migration impact unfavourably on the country. Reporting their study, Mattes et al. indicated that nearly sixty per cent of South Africans believe that foreigners weaken their society and the economy, while over sixty per cent said that foreigners put a strain on South Africa's resources.

Several reasons account for migration. These include globalization, unstable government, tribal wars and unemployment. Ukpere and Slabbert (2009) describe globalisation as a new world economic system, which prescribes and describes ways in which businesses, concepts and events are organised. Pasricha (2005) regards it as a state whereby national boundaries turn totally porous with respect to goods and capital and, to a certain extent, porous with respect to people, which is viewed in this context as cheap labour or, in some cases, cheap human capital. These descriptions go to show that the world today no longer has boundaries and therefore people are expected to move beyond their boundaries. This means that regional economies, societies and cultures thus become integrated and interdependent. When this occurs, as it is witnessed in South Africa, there is the likelihood of a rising downward spiral on wages and working conditions, job destruction and losses, work flexibility and casualization of labour.

Iwu (2014) noted that many developing countries suffer from migration because of unstable governments. In this case, an unstable government is characterized by

impoverished infrastructure, fewer and or non-existent job opportunities, stifled economy and frustration arising from all these. It has been reported severally that unstable governments bring about divisions in countries, which may result in coups and tribal wars. When the social contract between the state and its citizenry fails, war becomes inevitable. When this social contract is broken, violence and social disorder are outcomes. Those are the words of Tshitereke (2003) while tracing the origins of war in Africa. Providing some background, Mapuva (2010) used the examples of Zimbabwe and Kenya to illustrate the magnitude of the sufferings of failed states. In both examples, Mapuva noted that there was considerable bloodshed, displacement, and human suffering.

Some of the possible causes of migration mentioned above have created very high levels of unemployment, as it is the case in many of the southern African states such as Zimbabwe, Burundi, Malawi, Mozambique and even far flung countries such as Democratic Republic of Congo, Cameroun, and Nigeria. Evidently, third world countries account for most migration because the migrant worker is searching for decent living through better employment prospects in other countries which in his own view are better governed and economically stable. In today's world, migrant workers for the most part face challenges such as poor working conditions and workplace discrimination. This has resulted in them being all the time more in demand, not only for high-skilled information technology and professional jobs, but also in low-paid, less skilled jobs in the agricultural, cleaning, construction and maintenance, domestic service, and health care sectors of the economy.

In South Africa, the protection of the employee in the employment relations atmosphere is provided for by the numerous legislative enactments that have been promulgated since the advent of democracy in 1994. Central amongst those enactments was the consensus during the multi-party negotiations in South Africa that employment relations should be enshrined in the Constitution for greater protection of labour and employer rights. Section 23 of the South African constitution clearly indicates rights that should be enjoyed by employees and employers. Over and above constitutional protection, the South African legislature has codified a web of legislative enactments that ought to provide succor to the South African workforce.

Principal legislation among the employment relations laws that were promulgated since the advent of democracy in South Africa are inter alia the following:

- Employment Equity Act (EEA) No. 55 of 1998;
- Basic Conditions of Employment Act (BCEA) No. 75 of 1997;
- Labour Relations Act (LRA) No. 66 of 1995;
- Skills Development Act (SDA) No. 97 of 1998;
- Compensation for Occupational Injuries and Diseases Act (COIDA) No. 130 of 1993;
- Occupational Health and Safety Act (OHSA) No. 85 of 1993; and
- Unemployment Insurance Act (UIA) No. 63 of 2001.

Flowing from the characterizations above, we pose the following questions: (1) Does the migrant worker present any benefit to a host country? (2) Does the migrant worker enjoy any labour protection in South Africa?

4. Design

This paper is designed using discourse analysis – a relatively new and increasingly important approach in socio-political research (Burnham et al, 2008). This method is considered valuable in this paper especially because it leads to the unraveling of the often misunderstood, complex and controversial topics (Howarth, 2000) such as the one under review. Milliken (1999) had earlier indicated that discourses are systems of signification which provide meaning to contrasting social constructs; in this case the migrant worker. Secondary sources were used to augment the discussion.

The next section deals with the discussion topics.

5. Discussion

5.1 Does the migrant worker play any roles in economic development of the nations they inhabit?

It is an inevitable trend that global commuting will happen. According to ILO (2006), millions of people worldwide leave their home countries every year in search of work so that they are able to fund their families who remain in their home countries. Considering that the migrant worker is willing to settle for any job in order to survive (referring to ILO's Three-D euphemism), one can then argue that the migrant worker will present some considerable level of convenience to those who hire them to do menial jobs such as gardening, cleaning, and hawking. And because of the cheapness of migrant labour, it can be said that migrant workers contribute considerably to the economic growth of the areas they reside. ILO (2006) further argues that the migrant worker presents benefits both to source and destination countries: their income adds to the coffers of their different countries through worker remittances; they transfer capital and skills through returning migration and transfers of skills and technology, which will no doubt help in promoting the development of their homelands. Some will argue that migrant workers bring with them crimes and other untoward vices. This is possibly true. However, crime may stem from a lack of meaningful employment as well as a lack of integration of the migrant worker. Professor Hong Dayong (2003) captures it aptly by saying "The sense of feeling that they belong nowhere is not socially healthy and will do little to curb criminal tendencies".

There is abundant literature that suggests that host countries benefit immensely from migrant labour. Evidence is in the numerous professionals – doctors, engineers, architects, and academics – who are employed in government departments and institutions of higher learning.

Unpacking the definition of an employee in the South African Labour Relations Act (LRA)

In order to assess whether the term migrant is protected under South African employment relations, it is necessary to delve into the definition of 'employee' to determine whether the scope of the definition includes the migrant. The definition of employee is described by the Labour Relations Act (LRA) (1995) 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.

Statutory presumption of an employee

The following are the prescriptions of The LRA and the BCEA with regard to ‘when an employee is presumed to be an employee’: “Until the contrary is proved, a person, who works for or renders services to any other person, is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present: (a) the manner in which the person works is subject to the control or direction of another person; (b) the person’s hours of work are subject to the control or direction of another person; (c) in the case of a person who works for an organisation, the person forms part of that organisation; (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months; (e) the person is economically dependent on the other person for whom he or she works or renders services; (f) the person is provided with tools of trade or work equipment by the other person; or (g) the person only works for or renders services to one person. It is important to note that the statute includes ‘irrespective of the form of the contract’ thus suggesting that the circumstances and aspects of the employment relationship can still amount to an employment contract. Therefore, it should be expected that the migrant worker should be able to enjoy the rights of an employee as enshrined in the South African constitution. Employees’ rights according to the Constitution of South Africa are captured in the table (Table – 1) below.

Table – 1. Statutory rights of an employee in South Africa.

Right to strike	Right to annual leave	Right to work only prescribed hours
Family responsibility leave	Right to maternity leave	Freedom of speech
Right not to be unfairly dismissed	Right to safe working conditions	Right to sick leave
Right to remuneration due	Right to prescribed days off	Right to notice on termination of employment
Right to payments on employment termination	Right to enforce statutory rights; and any specific contractual agreements	Right to a certificate of service on termination, resignation, retrenchment

The South African constitution (Section 23) gives impetus to the above mentioned rights by indicating that everyone has the right to fair labour practices; to form and join a trade union; to participate in the activities and programmes of a trade union; and to strike. One can infer that ‘everyone’ (as captured in Section 23) clearly includes all people; therefore a broad definition that includes migrants. It is however worth highlighting that no specific reference is made to the term ‘migrant worker’ in the BCEA. The BCEA provides protection very broadly in terms of race, gender etc.

5.2 Does the migrant worker enjoy any labour protection in South Africa?

Mainstream media reports suggest that the migrant worker is exposed to unfair labour practices often laden with unhealthy and unsafe work environments, longer hours and very poor remuneration. In discussing whether the migrant worker enjoys any form of labour protection in South Africa, we rely on some South African case law

Relevant South African case law illustrating protection for the migrant worker

In the case of Morgan Sibande versus Commission for Conciliation, Mediation and Arbitration (CCMA) and others (The South African Legal Information Institute (SAFLII), July 2009), the facts related to an employee who was dismissed on the basis that he was an illegal immigrant. He was considered an illegal immigrant because he could not provide an original identity document. His identity document had earlier been confiscated by an immigration officer who suspected that he was an illegal immigrant from Zimbabwe. The Commission for Conciliation, Mediation and Arbitration held that his dismissal was fair. On appeal at the Labour Court, the Judge held that the Commissioner (at the CCMA) committed a gross irregularity by failing to take into consideration the certified identity document before declaring the employee an illegal immigrant.

The above case is a clear illustration that the rights of migrants in the workforce are indeed under the veil of protection by the legislation and the court.

In the case of Lan versus Department of Home Affairs Immigration Admissions (situated at the OR Tambo International Airport) (SAFLII, October 2010), the fact was that the applicant brought an urgent application to the High Court to prevent an urgent deportation on the basis of a soon-to-expire visa. She was successful in obtaining relief. However the respondents - the Department of Home Affairs failed to comply with the court order and subsequently deported her. The applicant's attorney had to approach the court again for urgent relief to order compliance with the court order and to bring a further application against the respondents for contempt of the court order. The court held that the government officials were guilty of contempt of court and were issued with a warning. It was further held that the court orders granted were justifiable as the Home Affairs Department had no grounds to deport the applicant to China.

The case of Lan (mentioned in the paragraph above) was a triumph for migrants who are in South Africa with temporary visas and also illustrated that the courts can protect the rights of migrants with the statutory instrument of the Immigration Act (Immigration Act 13 of 2002). It is apparent that the failure of officials to properly apply and interpret the law will result in court orders and severe repercussions on the integrity and reputation of the Department of Home Affairs.

In the case of Li and others versus Senior Immigration Office (SAFLII, August 2012), the facts were that the applicants had failed to apply timeously to extend their visiting visas. The court dismissed the applicants' application for urgent relief on the basis that no substantial grounds for the extension of the visas were made. It was evident from the facts that the applicants blatantly brought the urgent application to extend their time in South Africa with no legal basis.

This goes to show that the migrant must have a legal ground to approach the court and cannot abuse the court process by just using the court as a ruse to prolong his or her stay in South Africa.

In the Discovery case (SAFLII 2008) the issue was the interpretation of the definition of the employee in the BCEA and the LRA. The judge made an interesting argument that although an employee can be an 'unauthorised' employee yet an employment relationship can still exist between the parties and therefore the 'employee' should be protected under the LRA and the BCEA. The judge further analysed the jurisprudence on the issue of contention of vulnerable employees and the unfavourable statistics of the abuse of thirty million migrants fleeing their countries and experiencing abuse. If the unauthorised employees are not subject to protection, then the court makes

a perfect example of unscrupulous employers that exploit the loopholes of protection in the system.

In the case of Fang (SAFLII 2006) the facts of the case were as follows: a refugee attempted to apply for asylum seeker status to the Refugee Appeal Board, however the applicant failed to set out a proper case by not addressing the requirements as set out by the Refugee Act. The High Court confirmed the decision of the Refugee Appeal Board in the circumstance. In this instance the migrant was handed exactly what the law deemed just and fair.

6. Conclusion

Several millions of people live outside their countries. South Africa is host to some of these who have been reported to have been subjected to, among others, inadequate protection from hostile natives; abuse of their skills and knowledge; and violence from those who insist that their society is plundered by the migrants. We have adopted the definition of the migrant worker to exclude employees of international organizations, government officials, persons sent or employed by a State or on its behalf outside its territory who participate in development programmes and other cooperation programmes, investors, refugees and stateless persons, students and trainees, non-national non-resident seafarers and workers on an offshore installation. Our definition of the migrant worker is that of 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 migrant worker is exposed to all forms of negative labour practices such as unhealthy environments, abuse, longer hours and very poor remuneration. These sorts of abusive relationships exist perhaps without proper documentation in South Africa. The position of this paper is that labour law protects migrant's rights; therefore migrants must know those rights in order to ensure that they are not taken advantage of by their employers. This is viewed against the growing racist and xenophobic hostility directed at non-nationals in South Africa which has not served the country's image any good. In fact, these acts are viewed as gross denial of human rights, human dignity and security. Perhaps, what South Africa needs is a much more consolidated effort such as a migration management framework which is implemented to achieve longer term goals.

This paper has attempted to argue that despite narratives that tend to suggest that migrants are deficiently protected by labour law in South Africa, evidence suggests that the rights of migrants in the workforce are indeed under the veil of protection by the legislation and the courts. We are mindful of the fact that the migrant worker must have a legal ground to approach the court and cannot abuse the court process by simply using the court as a ruse to prolong his or her stay in South Africa. We are also mindful of the fact that the African migrant worker in South Africa continues to get the short end of the stick. Despite the migrant workers' susceptibility to exploitation, we suggest the following to mitigate the levels of exploitation.

7. Recommendations

While there are strong arguments for and against the use of immigrant labour in South Africa, we are of the opinion that if well utilized, skilled immigrants will not take South African jobs away, but will help to put the economy of the country in better shape; reduce levels of unemployment with their technical and entrepreneurial skills; and help government fight poverty by creating more jobs and reducing many social

problems. Having said this, we are also aware of the negative consequences of uncontrolled immigration. To this end, we suggest proper monitoring of migration so as to ensure that those who have found their way into South Africa are documented and treated according to the United Nations Human Rights Charter as well as the International Labour Organisation's immigration standards. It will be beneficial to the government of South Africa to provide migrant workers with more information on how to find jobs so as to protect their interests and rights in a foreign land. Many countries around the world have benefitted from skilled foreign nationals. South Africa, through the Department of Home Affairs (and in conjunction with the Department of Labour) should avail itself the opportunity of making use of African skilled foreigners who are already in the country, by improving its migration policy so as to tap into the expertise that South Africa needs to help design training programmes that would help the country improve its literacy and numeracy programmes. This will no doubt improve the education system which is still trying to overcome neglect and dysfunction suffered under Apartheid. Alternate dispute resolution mechanisms such as conciliation, mediation, arbitration and negotiation to quickly resolve disputes between the migrant workers and employer are also recommended. Finally, the South African government must provide access to migrant's constitutional rights in order to ensure that there are administrative bodies in place for full implementation of the Immigration Act. This could guarantee that the migrant workers are not in limbo because the Act does not provide for supportive mechanisms in the realisation of protection of their rights.

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Apstrakt

U kontekstu ovog rada, emigrant je definisan kao azilant, izbeglica, legalni ili ilegalni imigrant. Migracija radne snage u Južnoj Africi dobila je malo pažnje zbog zabrinutosti o migraciji koja je praćena sa mnogo više neposrednosti i pritiska. Ova ali i druga razmatranja daju podsticaj ovom radu, koji po mišljenju autora doprinosi rastućoj zabrinutosti oko pitanja ksenofobije i incidenata zlostavljanja afričkih imigranata u Južnoj Africi, posebno u odnosu na pozadinu smelog stava Ustava Južne Afrike kao najperspektivnijeg ustava na svetu. Mora se napomenuti da je nezavisnost Južne Afrike 1994. godine i izgledi za procvat ekonomije u demokratskom okruženju pokrenulo glad za migracijom u Republiku iz raznih zemalja u Africi, uključujući i Istočnu Evropu. Ovaj rad zaključuje da je, uprkos pripovedačima koji imaju tendenciju da tvrde da su prava radnika migranata netačno obezbeđena u Južnoj Africi, dokazi ukazuju da su njihova prava unutar i van radnog mesta pod velom zaštite zakona i sudova. Ipak, mi smo mišljenja da bi trebalo da bude više intervencija posebno u pogledu ublažavanja nivoa eksploatacije radnika migranata. Ove i mnoge druge preporuke su iznete s' obzirom na to da su radnici migranti podložni eksploataciji.

Ključne reči: migrant radnik, ksenofobija, eksploatacija radnika, Ustav Južne Afrike