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**Challenges to the Free Movement, Residence and Work Rights of
Foreign Migrant Workers in South Africa and Kenya:**

a comparative study

BY

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STUDENT NUMBER: 14456959

MINI-DISSERTATION

Submitted in fulfilment of the requirements for the degree of

MASTER OF LAW

In the

FACULTY OF LAW

At the

UNIVERSITY OF PRETORIA

2018

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ACRONYMS

1. AIR	Africa Institute for Remittances
2. AIDS	Acquired Immune Deficiency Syndrome
3. ANC	African National Congress
4. AU	African Union
5. CCMA	Council for Conciliation Mediation and Arbitration
6. DHA	Department of Home Affairs
7. DRA	Department of Refugee Affairs
8. DZP	Dispensation of Zimbabweans Project
9. EAC	East African Community
10. ECOWAS	Economic Community of West African States
11. ESA	Employment Services Act
12. HIV	Human Immunodeficiency Virus
13. ICCPR	International Covenant on Civil and Political Rights
14. IESCR	International Covenant on Economic, Cultural and Social Rights
15. ILO	International Labour Organisation
16. IOM	International Organisation for Migration
17. LRA	Labour Relations Act
18. LSP	Lesotho Special Permit
19. MIDSA	Migration Dialogue for Southern Africa
20. PFMP	Protocol on the Facilitation of Movements of Persons
21. PR	Permanent residency
22. RRO	Refugee Reception Officer
23. RSD	Refugee status determination
24. SA	South Africa
25. SADC	Southern African Development Community
26. SAHRC	South African Human Rights Commission
27. SCRA	Standing Committee for Refugee Affairs
28. SARS	South African Revenue Services
29. SAQA	South African Qualifications Authority
30. SME	Small Medium Enterprises
31. STI	Sexually Transmitted Infection

32. TB	Tuberculosis
33. UIF	Unemployment Insurance Fund
34. UN	United Nations
35. UDHR	Universal Declaration of Human Rights
36. UNHCR	United Nations High Commissioner for Refugees
37. UNDP	United Nations Development Programme
38. UNCTD	United Nations Convention Travel Document
39. VFS Centre	Visa Facilitation Services Centre
40. WENELA	Witwatersrand Native Labour Association
41. ZEP	Zimbabwe Exemption Permit
42. ZSP	Zimbabwe Special Permit

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DECLARATION

I declare that the work I am submitting for assessment contains no section copied in whole or in part from any other source unless explicitly identified in quotation marks and with detailed, complete and accurate referencing.

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ABSTRACT

Issues of migration are complex and are inter-related with other problems such as irregular migration, human trafficking, human rights abuse, crime and corruption. Most of the problems in the world have occurred because of migration, particularly irregular migration. In the African context, with focus on South Africa and Kenya, as they are the economic hubs in their respective regions, the root causes of irregular migration need to be identified and dealt with in a manner that benefits everyone. What causes migrants to flee to other countries? When the political and economic climate was favorable in South Africa, there were few to no complaints about foreign migrants, but because of the current problems in the country, migration has come under the spotlight and the blame shifts on to foreign migrants. Similarly, in Kenya, the issue has come under the spotlight due to the political turmoil in some countries in the region during recent years, such as in South Sudan, which has given rise to the influx of refugees to Kenya. With these issues, governments must further deal with the challenge of integration of foreign migrants into communities as they are perceived to be the root cause of all the problems and become targets of xenophobic attacks.

The South African Constitution has a Bill of Rights in terms of which everyone is guaranteed access to the rights and protection of the law. Everyone is included, both citizens and non-citizens. Illegal foreign migrants also have access to these rights, despite their non-legal status. However, given the influx of foreign migrants into the country in recent years, it has become extremely difficult to manage access to these rights, especially for undocumented foreign migrant workers who still need protection in law. Similarly, Kenya hosts a large asylum-seeking and refugee population, and the Department of Refugee Affairs (DRA) and the United Nations High Commissioner for Refugees (UNHCR) under the 2006 Refugees Act, and the 2009 Refugees Regulations govern such matters.

Against this background, the rights to work, freedom of movement and residency in South Africa will be examined, and a comparison will be made on similar rights for foreign migrant workers in Kenya.

ACKNOWLEDGMENTS

Firstly, I would like to thank the Lord Almighty for guiding me and taking me through this project. It was not easy, but I managed to see it through because of his abundant grace.

I would like to thank my Supervisor, Professor Michelo Hansungule, who has guided me throughout this journey with his expertise and knowledge on the subject matter. Thank you!

My heartfelt thanks go to my daughters, Nandipha, Naledi and Nenyasha Mutsau who inspire me to always strive for the best and never give up. They have had to endure evenings, weekends, holidays and time away from me as I worked on this thesis. As young as they are, they have been patient with me, and every day they have prayed for my success in this thesis. They are my guardian angels, and this thesis is to all of us.

To my husband (Baiwai Mutsau) who has also been patient with me throughout this journey, who has been my source of verification of information and there to listen when I vented at times when the journey got challenging, thank you.

To my father (Simon Matsvai), who has been a source of wisdom from day one, reviewing my work and giving his profound advice and guidance, I express my sincere gratitude.

To my colleagues at Ernst & Young Johannesburg who stood in for me every time I was on study leave so that I could focus on this project, my heartfelt thanks go to them as I could not have done this without their support. To my friends Privilege Chinana who spared her time to review my work and give her feedback and comments, and Beulah Muchira and Chenai Taika who have been extremely patient with me as I have shared this journey with them and who have had to endure my endless venting which I felt was too much at times, thank you!

To everyone who played a special role for the success of this project, and as I cannot mention each one of them by name, I would like to express my gratitude to them for walking this journey with me, enduring my time away from social gatherings and from everyday chats.

THANK YOU!!!

CHAPTER 1: INTRODUCTION

1.1. Introduction

Migration is a global trend which has become prominent in recent years due to volatile economics, political situations and wars in many countries. According to a 2013 report by the International Organisation of Migration (IOM)¹, there were more than 214 million people living outside their countries of origin. Peoples' reasons for leaving their home countries varied from conflict, natural disasters or environmental degradation, political persecution, poverty, discrimination, lack of access to basic services and the search for new opportunities, particularly in terms of work or education.² There are various push and pull factors, facilitating factors, inhibiting factors as well as exacerbating factors, which cause people to migrate to other countries.³ Ultimately, migration is all about empowerment. The reason for a person to leave his or her home country is to improve their individual status, including their immediate and extended families as well as improve or maintain their social, economic and physical security.

According to a 2010 World Bank report, there were an estimated 1.86 million foreign migrant workers living and working in South Africa.⁴ Of this figure, the majority were from Zimbabwe and Lesotho, and most were undocumented as they had crossed the borders illegally. However, the accuracy of this figure is questionable, partly because of the phenomenon of irregular migration and partly because of the inadequate data collection systems.⁵ It may also be said that this figure has recently risen as the political and economic climate in most African countries has been volatile, forcing many citizens to flee and seek refuge in more economically and politically stable countries such as South Africa.

¹ Established in 1951, the International Organization for Migration is the leading intergovernmental organization in the field of migration. It works closely with governmental, intergovernmental and non-governmental partners.

² International migration, health and human rights – 2013 International Organization for Migration (IOM)

³ Regional Integration and Regional Migration Trends: Home Affairs, IOM & African Centre for Migration & Society briefing – Parliamentary Monitoring Group, 05 May 2015

⁴ Africa Check “How many Zimbabweans live in South Africa? The numbers are unreliable” by Sinthia Chiumia <https://africacheck.org/reports/how-many-zimbabweans-live-in-south-africa-the-numbers-are-unreliable/> accessed 23 June 2016

⁵ n 4 above

Having many undocumented migrants, some who are contributing to the economy of the country through both formal and informal employment, results in a strain upon the resources of a country as well as posing a challenge to access basic human rights. Further, this also places the government in a predicament as tracking the access to opportunities and resources proves to be difficult with undocumented foreign individuals.

This research will focus on the migration trends in South Africa, access to rights to work, free movement and residence of foreign migrant workers and the challenges they face. It will also look at the measures and policies put in place by the South African Government to ensure full access to these rights. The issue of integration of migrants in relation to some of the temporary measures put in place by the Government will be discussed, and along with the long-term effects for migrants as most of them come to South Africa with no intention to return to their countries. Many people come to South Africa with the view to stay for a short period of time and then maybe, due to many challenges or the failure to secure a job within a few months, they realise that they should stay longer. What was meant to be a temporary measure, is extended for many years, requiring a more permanent status in the country. The migration trends as well as the work rights, freedom of movement and right to permanent residency of foreign migrant workers in Kenya will be used as a comparative study given that Kenya is considered as the economic hub of East Africa, just as South Africa is the economic hub of Southern Africa, thus attracting many migrants from all over Africa and the world. Both countries, despite their distinct geographic locations within their regions, their challenges towards the realisation of migrants' rights to work and the appropriate measures for proper integration into their communities make them the most appropriate comparison for this research.

The South African Department of Home Affairs (DHA) in 2009 and 2016 respectively, in a bid to legalise Zimbabweans and the Basotho who formed the majority of illegal and undocumented foreign migrant workers in South Africa, embarked on the "Dispensation of Zimbabweans Project," popularly known as the "DZP"⁶ project and

⁶ Integrate Immigration "New Zimbabwean Special Dispensation Permit announced" <http://www.intergate-immigration.com/blog/new-zimbabwean-special-dispensation-permit-announced/> accessed 23 June 2016

the Lesotho Special Permit (LSP) project.⁷ These two dispensation projects will be discussed and analysed, more particularly considering the new Zimbabwe Exemption Permit (ZEP).⁸ The effects of the extension of the dispensation permits, the long-term benefits for the foreign migrant workers, and the different challenges that the foreign migrant workers face will also be discussed. There will be recommendations on how to best integrate foreign migrant workers in communities while adhering to domestic, regional and international standards and still upholding the national Constitutions by protecting the rights of the citizens.

Further, the roles of the IOM as well as of other regional bodies such as the Southern Africa Development Community (SADC)⁹ and the African Union (AU)¹⁰ will be analysed in trying to establish how the rights of foreign migrant workers can be protected. Various international instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR)¹¹, Universal Declaration of Human Rights (UDHR)¹², the International Covenant on the rights of migrant workers¹³, to mention a few, will be quoted and discussed to establish South Africa's compliance with international standards on protection of foreign migrant workers' rights.

⁷ The special dispensation is for Lesotho nationals who are working, studying or running businesses in The Republic of South Africa and have been in the country in such capacity before 30 September 2015. The Lesotho Special Permit (LSP) is a permit issued by the Department of Home Affairs, South Africa to Lesotho Citizens that would like to remain in South Africa. The LSP will only be issued to those Lesotho Citizens who currently are registered in the National Population Register of Lesotho and will be valid till 31 December 2019

⁸ The new permit grants Zimbabweans who were on the Zimbabwe Special Permits (ZSP) which expired in December 2017 the right to continue working, studying or conducting their own business in South Africa for a further four (4) years.

⁹ The Southern African Development Community (SADC) is a Regional Economic Community comprising 15 Member States established in 1992.

¹⁰ The AU emerged from the Organisation of African Unity (OAU) which was established in 1963 with a charter signed by 32 countries in Addis Ababa.

¹¹ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966

¹² UN General Assembly, Universal Declaration of Human Rights, 10 December 1948

¹³ UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990

1.2 Statement of the problem

In South Africa, illegal migrant workers face numerous challenges, which range from unfair labour practices due to lack of documentation, and the assumption that they have no legal recourse in labour law; receiving low wages and working long hours with no appropriate remuneration. The illegal migrant workers encounter xenophobic treatment and attacks on the assumption that they are “stealing” the jobs from the locals and are causing the high rate of crime in the country. They further face challenges with regards to freedom of movement due to lack of documentation which is sometimes not issued to them because of lack of qualifications for the appropriate visas. If they qualify to apply for these visas, the process to obtain visas can be frustrating due to the numerous documents required and the lengthy processing times, thus becoming a tedious exercise and in the end, they give up on the system and opt to remain and work illegally in the country. They illegal migrant workers are subsequently harassed by police, and their movement rights become restricted as they can be stopped, questioned and even arrested at any time due to lack of documentation. Once arrested, the illegal migrant workers have little to no rights in prison, and they are usually never granted bail. As a result of the uncertainty of interim measures put in place to legalise these migrants, they often face the challenge of not being able to settle permanently in South Africa, and the uncertain future does not help them in planning well ahead.

In the Kenyan context, the recent rife terrorist attacks are believed to have prompted Kenya to introduce changes to its refugee policy and one such notable change was the introduction of an encampment policy requiring all asylum seekers and refugees in urban areas to relocate to designated camps.¹⁴ Previously, refugees have been allowed to engage in informal employment, but this is becoming very difficult as the encampment policy constrains their ability to move about the country¹⁵. In addition, work permits are rarely issued to refugees and while refugees are technically free to

¹⁴ <https://www.loc.gov/law/help/refugee-law/kenya.php> Refugee Law and Policy: Kenya; accessed on 28 January 2018

¹⁵ <https://www.loc.gov/law/help/refugee-law/kenya.php> Refugee Law and Policy: Kenya; accessed on 28 January 2018

apply for naturalisation if they meet specific requirements, which, at face value, are not prohibitive, in practice Kenya does not naturalise refugees.

1.3 Research questions

What problems do foreign migrant workers in South Africa and Kenya face as foreigners trying to get work, with limited free movement and absence of permanent residency? From this main question, other discussion points will emerge such as:

- To what extent has the immigration legislation in both South Africa and Kenya sufficiently and effectively protected foreign migrant workers and helped them with the process of integration?
- Have both countries adequately extended permanent residency to all migrant workers?

1.4 Research methodology

This research will take a “desk research” approach. Considering the stringent timelines within which the research project must be submitted, this is the most cost and time effective method as it is relatively quick and cheap and most of the necessary information can be easily collated. Various literature sources will be used such as scholarly articles, South African legislation and case law, regional and international instruments as well as Kenyan and South African legislation and case law.

Working in the immigration field gives access to actual raw material through various seminars and conferences with the South African DHA and information on the application processes. Further, having colleagues working in the immigration field in Kenya gives access to first-hand material and experiences from people working within the system daily. Therefore, first-hand information from the industry will be used, an actual example of what the ZSP permit looks like will be provided and an explanation given on the contents of the permit. Some comparisons will be made with migration trends in Kenya to establish how other countries have handled the challenges of having an influx of both legal and illegal migrants, and the issue of integrating the foreign migrant workers into their system and communities will be shown.

1.5 Starting point/assumptions

Due to the geographical locations and economic climates in South Africa and Kenya, these countries continue to attract many migrants, both legal and illegal, who come in search for better opportunities, which are not available or are limited in their own countries. Although local legislation is in place to manage migration trends in both countries, illegal migrants continue to flock to South Africa and Kenya due to the lack of documentation, skills and qualification to apply for the necessary visas and permits, and in search for a better life. However, once they are in the country, regardless of their illegal status, they are still human and are entitled to the basic human rights. Solving the problem of illegal foreign migrant workers with regards to their access to the right to work, freedom of movement and residency is very difficult. As illegal migrants are undocumented, and Government cannot account for every one of them and allocate resources accordingly, this problem is compounded.

The challenges faced by foreign migrant workers in accessing their rights is a problem that needs to be explored. When illegal migrants are employed, employers take advantage by paying them meagre wages, working overtime with no pay and harsh working conditions under the assumption that they have no rights or recourse in law because of their illegal status. The right to free movement is also limited in that foreign migrants are often harassed for documentation and sometimes detained illegally.

1.6 Motivation for research topic

The White Paper on International Migration (White Paper (2017))¹⁶ was published in July 2017, and it contains proposals for the overhaul of the South African immigration system, particularly proposals which impact on the right to work, freedom of movement and residency as well as the integration of foreign migrant workers. Therefore, there is motivation to contribute to the discourses and suggestions from different stakeholders, including academics, which will help in shaping the final immigration framework to be used in South Africa for years to come. Further, working in the immigration field and having first-hand experience of the knowledge and challenges that the foreign migrant workers face, makes the research worth writing as possible

¹⁶ White Paper on International Migration for South Africa July 2017; National Gazettes, No. 41009 of 28 July 2017

solutions can be put forward to eradicate these challenges drawing from what Kenya has done in its region.

1.7 Literature review

Migration has always been a complex issue which includes other matters such as human rights, economic opportunities, labour shortages, unemployment, the brain drain, multiculturalism, integration, and flows of refugees and asylum seekers.¹⁷ Furthermore, governments and policymakers must deal with issues of law enforcement, human and national security. Migration crosses both at national and regional boundaries, and it affects all policy areas, that is, economics, politics, social policy and security. It also has a strong international relations dimension. The rights of foreign migrant workers in the broader international law spectrum is an issue that cannot be ignored.

At the centre of this topic lies three main schools of thought and in the book *“The Demography of South Africa”*, there are those who are pro-migration who believe in the benefits of migration because, “opening South Africa’s doors to skilled migrants and investors who can make a substantial contribution to the country’s development” is vital for the country.¹⁸ On the other hand, there are those who are against migration because “foreign migrants take away jobs from South African nationals.” Immigration is considered an obstacle to economic integration for those who suffered under the apartheid era and need to enjoy the benefits of post-apartheid South Africa.¹⁹ Lastly, there are those that believe that large numbers of illegal migrants bring all sorts of diseases and crime into the country.²⁰ These different schools of thought give rise to the different dynamics in communities and how locals will either accept or decline the integration of foreigners. In the book *“Towards the harmonisation of immigration and refugee law in SADC,”* the authors concluded that with respect to temporary and

¹⁷ “African migration: from tensions to solutions” by Gumisai Mutume; From Africa Renewal: January 2006 <http://www.un.org/africarenewal/magazine/january-2006/african-migration-tensions-solutions> accessed 23 June 2016

¹⁸ T Zuberi & A Sibanda *The Demography of South Africa* (2005) 267

¹⁹ Zuberi & Sibanda (n 18 above) 267

²⁰ Zuberi & Sibanda (n 18 above) 267

permanent migration policies, integration of employment and immigration status is a very important feature to be considered by states when drafting these policies.²¹

South Africa is not the only country faced with an influx of foreign migrant workers. Other countries worldwide face similar challenges, and on the African continent itself, foreign migration is a very prominent issue. In a book which summarises the roundtable meeting held in Dakar in December 2009 titled "*International Migration Law and Policies: Responding to Migration Challenges in Western and Northern Africa: Round Table 8-9 December, Dakar*"²² the key challenges of migration in North Africa are dealt with in detail as well as the root causes of migration, return of migrants, regional cooperation in addressing the main challenges and opportunities of migration flows in the Western and Northern Africa Region. In 2007, Veney wrote a book on the understanding of East Africa's refugee situation by examining the conditions that gave rise to their migration and how the refugees themselves sought to reconstruct their lives.²³ This helps one have an idea of how other regions on the African continent have dealt with this issue, which is clearly not only a matter for South Africa or the SADC region alone.

In the report by Migration Dialogue for Southern Africa (MIDSA) published in the book "*Towards the harmonisation of immigration and refugee law in SADC*," the MIDSA project had four main objectives. One of these was to investigate the possibilities for harmonisation of national immigration policy and law in the SADC region.²⁴ This would help create harmony between the different immigration regimes in the SADC region and manage migration in a better way. The SADC countries committed to increase regional cooperation and integration and the Protocols and instruments drafted thereafter reflect this commitment. The domestic laws of the countries have incorporated some multilateral international instruments but those that regulate the treatment of migrant workers and their families have not been adopted. Instead,

²¹ J Klaaren & B Rutinwa *Towards the harmonisation of immigration and Refugee Law* (2004) 76

²² Round Table at Dakar *International Migration Law and Policies: Responding to Migration Challenges In Western and Northern Africa* (2009)

²³ CR Veney *Forced Migration in Eastern Africa "Democratization, Structural Adjustment, and Refugees"* (2007)

²⁴ Klaaren & Rutinwa (n 21 above) 1

bilateral agreements have been adopted, and these seem to play a more important role in the functioning of migration regimes in the SADC region.²⁵

Khan also wrote a book in 2013, entitled "*Refugee Law in South Africa*"²⁶ which describes existing laws relating to refugees as reflected in South African legislation and its growing body of refugee law jurisprudence, while also paying heed to relevant international law, which remains central to today's regime of international refugee protection and international jurisprudence. The book identifies the practice changes resulting from the government's refugee policy shift and considers what may be expected in the future. In "*Towards the harmonisation of Immigration and Refugee law*," it was ascertained that the quality of refugee legislation has an impact on the efficiency of immigration regimes.²⁷ States have a duty to find durable solutions to the plight of refugees either through repatriation, resettlement or local integration.²⁸

In Southern Africa, asylum and refugee policies have gone through three generations, and these can be summarised as; refugee policies which were characterised by the absence of specific refugee laws, using immigration laws to deal with refugee matters; those policies which were marked by the introduction of refugee-specific laws but were mainly intended to control rather than protect refugees; and then finally the introduction of protection-oriented refugee legislation which was premised on international instruments on refugees.²⁹

South Africa has enacted legislation which aims to protect the rights of refugees through the Refugees Act.³⁰ Persons who have a well-founded fear of persecution in their country of origin or were domiciled, by their race, religion, nationality, etc., are granted status in terms of this same Act.³¹

In Kenya, refugee matters are governed by the Immigration Act, and this does not adequately protect the rights of the refugees. As one of the more politically stable countries in the Great Lakes Region, Kenya attracts many refugees and is therefore

²⁵ Klaaren & Rutinwa (n 21 above) 7

²⁶ F Kahn *Refugee Law in South Africa* (2014)

²⁷ Klaaren & Rutinwa (n 21 above) 11

²⁸ Klaaren & Rutinwa (n 21 above) 11

²⁹ Legal Resources Foundation in [Lusaka] *A reference guide to Refugee Law and Issues in Southern Africa* (2002) 77

³⁰ Act 130 of 1998

³¹ Legal Resources Foundation in [Lusaka] (n 30 above) 77

bound to remain a major destination for migrants for as long as the disturbing socio-political and security situations exist in those countries.

All foreigners who want to enter legally or transit through Kenya must first obtain a Kenyan visa from a Kenyan representation abroad and be in possession of a valid passport or another travel document. The immigration system in Kenya works with permits and passes with respect to the legal sojourn of foreigners in the country.³² The key document for the issuance of these documents is the Kenyan Citizenship and Immigration Act of 2011 and the Kenya Citizenship and Immigration Regulations 2012.³³

Work and residence permits are issued for long-term specific employment, investment, trade, and profession to persons whose presence and engagement will be of benefit to Kenya.³⁴ This is like the Critical Skills Visa in South Africa, which is issued to applicants who fall under the list of critically skilled applicants.³⁵ Unfortunately, an employee cannot stay indefinitely in the country and apply for permanent status on this basis as is the current situation in South Africa. In Kenya, the right to permanent residency only applies to an employee who has held a work permit for a period of seven years and has been continuously resident in Kenya for three years immediately preceding the permanent residence application.³⁶

In the book “The City of Thorns”³⁷ the harsh realities of one of the world’s largest refugee camps, Dadaab³⁸, comes to light. In English, Dadaab means “the rocky hard place,”³⁹ and most of the inhabitants of the camp are literally caught between “a rock and a hard place’ as they flee civil war, religious extremists and famine from the neighbouring countries, only to find themselves in a lawless society. Officials get rich from smuggling illegal migrants, drunken police rape at will, security guards extract

³² F Leipfinger & A Krensel *The Corporate Immigration Law Review* (2017) 158

³³ The KCI Regulations of 2012

³⁴ Leipfinger & Krensel (n34 above) 158

³⁵ Section 19(4) Immigration Act No, 13 of 2002 (as amended)

³⁶ Leipfinger & Krensel (n34 above) 162

³⁷ B Lawrence *City of Thorns: Nine Lives in the World’s Largest Refugee Camp*

³⁸ Dadaab is the world’s largest refugee camp, home to about 350,000 people. Located on Kenya’s border with Somalia, it was established in 1992 to house around 90,000 refugees from the civil war there. Since then it has grown into a large sprawling city in the parched desert where generations of Somali refugees (and a minority from Sudan, Ethiopia and elsewhere) are born and where the majority of those will die.

³⁹ <https://www.theguardian.com/books/2016/feb/08/city-of-thorns-nine-lives-worlds-largest-refugee-camp-dadaab-kenya-ben-lawrence-review> accessed 2 February 2018

bribes, clan and religious tensions explode, and suspected villains are victimised in communities.⁴⁰ In fleeing to Kenya to seek refuge, they are faced with challenges as illegal migrants. An example in this book is the story of Guled, a boy who was orphaned in his teens living in Mogadishu Somalia with his sister. He was among the two thousand children kidnapped by the jihadist terrorist group Al-Shabaab.⁴¹ However, he managed to escape and found his way eventually to Dadaab Camp. To the Kenyans, he was a real or potential terrorist. To Al-Shabaab, he was a traitor, and while Dadaab provided him with a bare minimum of subsistence, he lived in daily fear that they would come and find him.⁴²

1.8 Challenges from reviewed literature

The issues surrounding migration have always been there. Literature has been written on this subject, but there is limited current material in authored textbooks. Mostly scholarly articles or internet articles are available. This issue merits exploration as it is affecting a large part of Africa. Particularly in the SADC region, due to the uncertain economic and political climate in Zimbabwe, despite the removal of Robert Mugabe from power in November 2017 giving rise to a new government. Political instability in some of the African countries, has a significant impact on South Africa as it is one of the most stable and fast-growing economies in Africa.

1.9 Proposed outline

Chapter One will introduce the central area of research, identify the research problem and why it is worth studying. This chapter also gives a literature review of scholarly writings on the issue of migration and challenges from the available literature on the subject is summarised. The research methodology will also be discussed.

Chapter Two will give the legal framework of the rights of foreign migrant workers in South Africa with focus on the Immigration and Refugee Acts and how these seek to

⁴⁰ <https://www.theguardian.com/books/2016/feb/08/city-of-thorns-nine-lives-worlds-largest-refugee-camp-dadaab-kenya-ben-lawrence-review> accessed 2 February 2018

⁴¹ Lawrence (n37 above)

⁴² Lawrence (n37 above)

protect the rights of migrant workers. A brief exposé on bilateral agreements will also be given, as well as the protection of foreign migrants' rights in the SADC region.

Chapter Three will analyse specific rights of foreign migrant workers who are the core of this research. The right to work, freedom of movement and residence will all be discussed in detail in line with national and international legislation and the challenges in accessing these rights highlighted.

In Chapter Four, specific case studies of the ZSP and LSP dispensation projects will be analysed in terms of the history of the dispensation projects, conditions of these permits and the long-term impact that they have on the integration of foreign migrant workers in communities. The issue of xenophobia will also be dealt with summarily.

Chapter Five deals with the rights of foreign migrant workers in Kenya and will juxtapose these with the situation in South Africa. The challenges of accessing the right to work, freedom of movement and residence in Kenya for foreign migrant workers will be identified to compare with the South African situation. A case study of the Somali refugees in Kenya will also be discussed briefly to draw comparisons and possible solutions for the South African situation on the interim measures to regularise the illegal migrants with the ZSP and LSP dispensations.

Finally, in Chapter Six, the conclusion and recommendations on the way forward will be given after having identified the challenges of foreign migrants.

CHAPTER 2: LEGAL FRAMEWORK ON THE RIGHTS OF FOREIGN MIGRANTS IN SOUTH AFRICA

2.1 Introduction

As a sovereign state, South Africa has the right to determine whom it allows through its borders and under what conditions.⁴³ The South African Human Rights Commission (SAHCR)⁴⁴ has identified immigration as one of the seven focus areas in fulfilling its mandate of promoting, protecting and monitoring the realisation of human rights in South Africa.⁴⁵

In Chapter 2 of the South African Constitution (Constitution)⁴⁶, “bill of rights” recognises the rights of everyone, and this includes both legal and illegal foreign migrant workers. Further, local legislation emphasises the equality provisions in the Constitution through the Promotion of Equality and Prevention of Unfair Discrimination Act (Equality Act),⁴⁷ which prohibits unfair discrimination as well as hate speech and harassment. The Immigration and Refugee Acts form the legal framework for immigration law in South Africa.

Although South Africa is a sovereign state which can exercise its own rights, it has ratified several international instruments governing the protection of human rights of everyone, including both legal and illegal foreign nationals within its borders. Some of these include, the International Bill of Human Rights which consists of the UDHR,⁴⁸ the ICESCR,⁴⁹ and the International Covenant on Civil and Political Rights (ICCPR).⁵⁰ Other significant instruments that South Africa has ratified include the Convention on

⁴³ White Paper on International Migration for South Africa July 2017; National Gazettes, No. 41009 of 28 July 2017

⁴⁴ The South African Human Rights Commission is an institution established in terms of Section 181 of the South African Constitution, Act 108 of 1996

⁴⁵ South African Human Rights Commission “Immigration” <<http://www.sahrc.org.za/index.php/focus-areas/immigration-equality/immigration>> (accessed 27 June 2017)

⁴⁶ Act 108 of 1996

⁴⁷ Act 4 of 2000

⁴⁸ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A III)

⁴⁹ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993,

⁵⁰ UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999

the Elimination of All Forms of Racial Discrimination⁵¹ and the African Charter on Human and Peoples' Rights.⁵² By ratification of these international instruments, it means that any laws enforced or any changes in migration policies that South Africa proposes must be in line with the international standards.

This Chapter will focus on how the workers' rights, freedom of movement, and access to permanent residency of foreign migrant workers are protected in South Africa through the Constitution, local legislation, mainly the Immigration and Refugee Acts, and international instruments which South Africa has ratified. The protection of rights of foreign migrant workers in the SADC region will also be discussed with a focus on bilateral agreements as their aim is to foster relationships between states in a bid to protect the rights of citizens.

2.2 South African immigration legislation

2.2.1 South African Constitution⁵³

There are various pieces of legislation, which provide for the protection of foreign migrant workers in South Africa. The Constitution is the supreme law of the land, and Section 1 identifies equality and the creation of a non-racial and non-sexist society as one of the founding values of South Africa's constitutional democracy. Section 9 provides for the right to equality for everyone; *"Everyone is equal before the law and has the right to equal protection and benefit of the law."* Everyone, in this case, also includes foreign migrant workers who are within the borders of South Africa.

The legislative competence of the Government to regulate the position of foreign nationals is limited to a certain degree by the Bill of Rights itself as all but three and a half of the rights in the Bill of Rights are available to foreigners.⁵⁴ South African courts have also dealt with issues of foreign migrants in relation to the right to equality, dignity,

⁵¹ Articles 2 and 3 International Convention on the Elimination of All Forms of Racial Discrimination (ICEAFRD) Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965

⁵² Articles 2 and 3 African (Banjul) Charter on Human and People's Rights (Adopted 27 June 1981, entered in to force 21 October 1986): *"Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status"*

⁵³ Act 108 of 1994

⁵⁴ C Murray *South Africa* (2014) 688

the rights for detainees and the right to freedom of movement. For example, in the *Khosa case*,⁵⁵ the court decided that permanent residents, who were former refugees from Mozambique, were entitled to equal treatment and access to social services. The assertion was that the permanent residents had access to the Section 27(1) right to social security, which was applicable to the citizens and non-citizens too.

In the case of *Lawyers for Human Rights v Minister of Home Affairs*,⁵⁶ the court found that the right to freedom and security of the person⁵⁷ and the rights of detainees⁵⁸ were integral to the very existence and dignity of a human being, and these have been set out in the South African Constitution. The basis of this case was a challenge of the Immigration Act in which there was a distinction between the treatment of illegal foreigners within the borders of South Africa and those at the ports of entry. There was more emphasis on the protection of illegal migrants within South Africa than those at the ports of entry. The court concluded that the rights to freedom and security of a person and the rights of detainees were integral to human dignity and should apply equally to all.

Similarly, in 2017 in the case of *Lawyers for Human Rights v Minister of Home Affairs*,⁵⁹ Section 34(1)(b) and (d) of the Immigration Act were declared to be inconsistent with Sections 12(1) and 35(2)(d) of the Constitution, and hence invalid. Section 34 of the Immigration Act gives an immigration official the authority to arrest or to cause the arrest of an illegal immigrant without the need for a warrant, and to detain or cause the detention of the illegal immigrant pending his or her deportation. Section 34(1)(b) of the same Act gives an illegal foreign national who has been detained, the right to request that his or her detention be confirmed by a warrant from a court. If the warrant is not issued within 48 hours, the foreign national must be released immediately.

The basis of the argument was that the Immigration Act does not require that a detained person be automatically brought before a court within 48 hours for the court

⁵⁵ *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) (4 March 2004)

⁵⁶ *Lawyers for Human Rights and Other v Minister of Home Affairs and other* (CCT 18/03) [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) (9 March 2004)

⁵⁷ (n 53 above) Section 12

⁵⁸ (n 53 above) Section 35(2)

⁵⁹ *Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22

to confirm the lawfulness of their detention, which is the case for other detained people. Furthermore, while the Immigration Act envisages a warrant being obtained from a Magistrates' Court for the continued detention of the suspected illegal foreigner, the DHA interpreted this in a way that meant that the detained person did not have to appear in person before the Magistrate concerned. The High Court declared sections 34(1)(b) and (d) of the Act constitutionally invalid and the Constitutional Court upheld the declarations of constitutional invalidity.

2.2.2 Immigration Act (Immigration Act)⁶⁰

Current policies on international migration are set out in the 1999 White Paper on International Migration, which is implemented through the Immigration Act and partly through the Refugees Act.⁶¹ The Immigration Act is the piece of South African legislation, which is responsible for regulating foreign employment in South Africa. It lays out the rules and regulations regarding the admission of foreigners into South Africa, their residence in South Africa and their departure from South Africa as well as the ability for foreigners to work within the Republic.⁶²

In terms of Sections 49(1)(a) and (b) of the Immigration Act, when entering the country, a foreigner must be in possession of a valid visa. Sections 13 to 21 of the Immigration Act provides for different types of temporary residence visas that foreign migrants can apply for and use to enter and sojourn in the country provided they are not prohibited or undesirable persons. Sections 25 to 28 of the same Act also provide for different categories of permanent residence permits that foreign migrants can apply for to reside in South Africa on a more permanent basis. Once a permanent resident, one has rights, privileges, duties and obligations of an ordinary citizen except for the right to vote and hold a South African passport.

A person who contravenes the provisions of the Immigration Act in any manner such as entering the country illegally, is liable to a fine or imprisonment. Section 9 of the Act stipulates admission requirements to be adhered to when a person enters South Africa at any port of entry. In terms of this section, a person can only enter or depart South

⁶⁰ Act 13 of 2002 (as amended)

⁶¹ Act 130 of 1998

⁶² Immigration SA "The Employment of foreigners in South Africa" March 14, 2017; <http://immigrationsa.com/2017/03/employment-foreigners-south-africa/> accessed on 22 September 2017

Africa at a designated port of entry or exit. However, because of the difficulties to obtain the relevant visas or permits, particularly for the low and or non-skilled migrant workers, the option is to enter South Africa illegally. In terms of Section 32 of the Immigration Act, these undesirable foreigners must be deported back to their countries of origin. Sections 34⁶³, 41⁶⁴, 42 and 49 provide for the arrest and deportation of undocumented migrants either by immigration officers or the police or both.

Further, Section 38(1) of the Act prohibits the employment of illegal migrants, and this shall be discussed in detail under the section on the right to work of illegal migrants. However, in line with one of the aims of the Immigration Act, which is having a “human rights-based culture of enforcement,” Section 31(2)(b) gives the Minister powers to exempt certain individuals or groups of people from being defined as undocumented or illegal migrants provided special circumstances can be proved.

In the past few years, the DHA has amended the Immigration Act and its Regulations in a bid to bridge the gap in legislation. The current immigration laws were designed with the aim to tighten the national security of the country. However, most migrants come to South Africa for economic emancipation and not asylum, which is what is provided for in the Immigration Act and the Refugees Act. Thus, because the immigration law was designed for security reasons and the migrants are coming mainly for economic reasons, there is a mismatch between the two. The White Paper (2017) tackles issues of economic migration and proposes various policies and strategies that will help in having South Africa improve its immigration laws and address the pertinent issue of economic migration. Therefore, the new immigration policies will be in line with the current changes and challenges in the migration sphere.

⁶³ Section 34 (1) provides for the arrest and detention of illegal migrants and as the South African Immigration Act was designed with a purpose for “security considerations are fully satisfied, and the State retains control over the immigration of foreigners to the Republic

⁶⁴ Section 41 of the Act gives immigration and police officers the power to request that individuals produce some form of identification on demand. In terms of Section 41(1), “...if on reasonable grounds such an immigration officer or police officer is not satisfied that such a person is entitled to be in the republic.... such immigration officer or police officer may take such person into custody without a warrant ...”

2.2.3 Refugees Act⁶⁵

The Refugees Act is the piece of legislation governing refugee affairs in the country. It substantiates the mandates of the DHA in relation to asylum seeker management, including the provision for reception into South Africa of asylum seekers; implementing effective and efficient asylum seeker and refugee management strategies and systems; regulating applications for and recognition of refugee status; providing for rights and obligations flowing from such status, which includes the necessary documentation; and engaging with partners on issues affecting local integration of refugees.⁶⁶

It is essential to distinguish the difference between an asylum seeker and a refugee for purposes of this discussion. An *asylum seeker* means a person who is seeking recognition as a refugee in the Republic.⁶⁷ This is a person who has fled his or her country of origin and is seeking recognition and protection as a refugee in South Africa, and whose application is still under consideration.⁶⁸ In case of a negative decision on his or her application, he or she should leave the country voluntarily or will be deported.⁶⁹ On the other hand, a *refugee* is “a person who has been granted asylum status and protection in terms of Section 24 of Refugee Act”.⁷⁰ In terms of the 1951 United Nations Convention,⁷¹ a refugee can be a “convention refugee” who has left his home country and has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a social group.⁷² Under the same convention, a refugee can also be a person “in need of protection” whose return to his home country would subject him personally to a danger of torture or to a risk to his life or a risk of cruel and unusual treatment or punishment.⁷³

⁶⁵ Refugees Act 130 of 1998

⁶⁶ Regional Integration and Regional Migration Trends: Home Affairs, IOM & African Centre for Migration & Society briefing – 05 May 2015 <https://pmg.org.za/committee-meeting/20779/> accessed 19 August 2017

⁶⁷ (n 65 above) Chapter 1, Definitions

⁶⁸ <http://www.home-affairs.gov.za/index.php/immigration-services/refugee-status-asylum> Refugee Status & Asylum, accessed on 28 January 2018

⁶⁹ (n 68 above)

⁷⁰ (n 68 above)

⁷¹ The 1951 Refugee Convention was ratified by 145 State parties. It defines the term ‘refugee’ and outlines the rights of the displaced, as well as the legal obligations of States to protect them.

⁷² Section 1(A) 1951 United Nations Convention

⁷³ (n 68 above)

The South African Government has an obligation to grant protection to refugees and other persons in need of protection under several UN Conventions such as the 1951 Convention Relating to the Status of Refugees. Certain requirements must be met to qualify as an asylum seeker seeking refuge in South Africa. A person must enter through a port of entry and must subsequently be issued a Section 23 permit, which is a non-renewable “asylum transit permit” of the Immigration Act. The permit is valid for a period of 14 days only and authorizes the person to report to the nearest Refugee Reception Office to apply for asylum in terms of Section 21 of the Refugee Act. The asylum seeker lodges his application in compliance with the required documents. Once approved, he or she will be issued with a Section 22 permit which is valid for a period of six months only and thereafter legalises the asylum seeker to stay in South Africa temporarily pending a final decision of his or her application for refugee status. The permit can be extended by an RRO (Refugee Reception Officer) for a further six months while the process of status determination is in progress. The holder of the Section 22 permit has the right to work and study in South Africa and is protected against deportation to his country of origin.

After this process, the asylum seeker must then apply for formal recognition as a refugee. When granted asylum (written recognition of refugee status), a refugee is generally issued with a Section 24 permit⁷⁴, which allows such a person to remain for a specified period of two years in South Africa, and it is renewable upon expiration of its validity after the review process. They can work and study during this period and are issued with an ID book for identification as well as a UNCTD (United Nations Convention Travel Document) which they can apply for from any Refugee Reception Office. After a continuous period of five years on this status and after confirmation from the Standing Committee, the refugee can then proceed to apply for permanent residence status in terms of Section 27 of the Immigration Act. Although a bureaucratic process which results in refugees receiving documents after months or even years of waiting, in principle, it is a system that upholds the rights of refugees by giving them legal status, rights and recognition in South Africa. However, despite all these efforts by the Government, the system is still marred by challenges of refugees accessing

⁷⁴ Section 24 Immigration Act No. 13 of 2002 (as amended)

basic rights. The lack of knowledge and consciousness on migration issues of the public makes it more challenging to integrate the refugees in communities.

In the case of *Watchenuka*⁷⁵, the court found technical, and administrative grounds to declare the prohibition of work or study contained in the Immigration Regulations made by the Minister of Home Affairs to be unconstitutional. The rights of asylum seekers and the extent to which they may be prohibited from being employed and from studying while they are waiting to be recognised as refugees were under consideration. It was argued that the freedom to engage in productive work, even where that is not required to survive, is indeed an important component of human dignity; for mankind is pre-eminently a social species with an instinct for meaningful association.⁷⁶ Self-esteem and the sense of self-worth – the fulfilment of what it is to be human is most often bound up with being accepted as socially useful.⁷⁷ This decision is very significant given that the process of recognition as a refugee can take more than 12 months and gives the asylum seeker the right to work or study while awaiting his or her final determination of refugee status, allowing the asylum seeker an opportunity to become economically active and self-sustaining without being a burden on the state.

Asylum seekers have been disadvantaged in that their status was not catered for in the Immigration Act. They do not qualify for any visas or permits in terms of the Act except when they become recognised refugees for more than five years and can apply for permanent residence in terms of Section 27(c) of the Act⁷⁸. However, in the ruling in *Dabone and others v the Minister of Home Affairs*⁷⁹, asylum seekers and refugees were given a reprieve, and they can now apply for temporary or permanent residence in terms of the Immigration Act. The case was brought as a challenge of certain practices of the DHA in relation to asylum seekers and refugees rights to apply for an immigration permit. The result of the challenge was an order that asylum seekers and refugees could apply for any immigration permit if they qualify. Of significance was the fact that the subsequent issue of such a permit does not result in the cancellation

⁷⁵ *Watchenuka and Another versus Minister of Home Affairs and Others* (1486/02) ZAWC 64 (15 November 2002)

⁷⁶ *Watchenuka* (n 74 above) 64

⁷⁷ *Watchenuka* (n 74 above) 64

⁷⁸ Act 13 of 2002 (as amended)

⁷⁹ *Dabone and others versus the Minister of Home Affairs and another* (case number 7526/03)

of the asylum seeker permit or refugee status.⁸⁰ The reasoning was that should, for whatever reason, the immigration permit cease to be valid, then former asylum seekers or refugees would not be deported back to the same country that they had fled from in the first place.⁸¹

2.2.4 White Paper on International Migration

The White Paper was approved by Cabinet in March 2017 and gazetted in July 2017. It is premised on the basis that South Africa's immigration laws are not aligned to the changing global economic and migration paradigms. Therefore, it places South Africa at high risk of irregular migration, which leads to unacceptable levels of corruption, human rights abuse and national security risks.⁸² There are eight main policy changes that were proposed, and they aim to bring a consistent approach to the management of admissions, departures, residency, naturalisation and, which will also help attract high-skilled migrants.

Of the key proposed changes, below are proposals, which impact this research:⁸³

i) Management of residency and naturalisation

The aim of the policy is to increase security and ensure national interest. There will no longer be an automatic progression to permanent residency (PR) or citizenship based on the length of stay in South Africa as this is not strategic for the growth of the country. Instead of PR, there will now be a long-term residence permit for critical skills professionals and business investors. There will still be certain criteria for determination on who qualifies for these visas. Further, citizenship will only be granted in exceptional circumstances.

⁸⁰ South African Immigration Directive 21- Unpacking Change of status from Refugee Status or Asylum permit by admin | May 1, 2016 | General | <http://www.immigrationspecialists.co.za/southafricanimmigrationdirective-21/> accessed 7 October 2017

⁸¹ (n 75 above)

⁸² (n 80 above)

⁸³ The information on these proposed changes in the White Paper is from notes taken at a meeting held by the British Chamber of Commerce and the DHA on discussions on the White Paper 2017 with different stakeholders on 22 August 2017 at the GGDA (Gauteng Government Development Agency) Offices in Sandton.

ii) *Management of international migration within the African context*

The aim is to eliminate visa requirements for African countries and have an Afro-centric immigration system. Currently, it is much easier for a European citizen to come into South Africa than it is for a citizen from an African country. The long-term port of entry visa for some African countries is a great initiative, and this is already in force for African academics.

There is a proposal for the introduction of the SADC work visa which will help to ease pressure on the asylum seeker regime as most of the asylum seekers are not really asylum seekers but economic migrants and mostly from neighbouring countries. This will help with the less-skilled migrants to come and legally work in South Africa provided they are not in South Africa as asylum seekers, and they comply with all other requirements. In line with this proposal is to have more bilateral labour agreements implemented in the region.

iii) *Management of the integration process for international migrants*

Currently, there are no proper records of migrants in various communities. Therefore, there is no integration process for foreign migrants. The aim is to register migrants in the different provinces so that a full record is available and to work with the local communities to integrate migrants in the different communities.

iv) *Asylum seekers and refugees*

The proposal is for the creation of asylum seeker processing centres in the different provinces where they will receive all asylum seekers and process their documentation before they even come to live in communities.

The aim is to have a fast-tracked process where recognition of refugee status will be processed faster thereby having no need to extend asylum seeker status. This will mean that asylum seekers will no longer have a right to work, study or conduct business in South Africa as the processing of the asylum papers will be made quicker due to asylum seeker centres. Furthermore, recognised refugees will obtain long-term residence visas, and there will be no automatic right to the permanent residence due to the length of stay as a refugee as is the current situation.

2.3 Bilateral and regional migration agreements

These are agreements between two States, and they describe in detail the specific responsibilities of, and actions to be taken by each of the state parties, with a view to accomplishing their goals. Additionally, they create legally binding rights and obligations between the state parties to the agreement. Some of the objectives of these agreements include strengthening of bilateral and regional ties, promotion of social and economic development, promoting cooperation in the field of labour or human resources and admission of workers, prevention of irregular migration, assisted voluntary return, integration, migration and development and fight against irregular migration.⁸⁴

Such agreements have both positive and negative legal and humanitarian implications. Some of the positive legal implications of agreements in the form of dispensation programmes include increased security and regularisation of illegal migrant workers, compliance with international migration laws by both state parties as well as an increased skilled labour market.⁸⁵ On a negative note, high bilateral migration costs could deter migration, access to social security rights and their portability for migrant workers causing a legal dilemma could be a problem thus creating economic distortions in both the receiving country and the source countries. From a humanitarian point of view, the advantage of such agreements means that human trafficking, prostitution and child labour are curbed, there is a strengthening of relations with neighbouring countries, and this promotes cultural ties.⁸⁶ Similarly, the downside on the humanitarian aspect could be viewed in light of linguistic barriers, colonial links, distance and cultural proximity due to the migration, vulnerability and discriminatory treatment of foreign migrant workers in the exercise of their rights.⁸⁷ Despite some of the disadvantages, states still enter into these agreements as there is a loftier benefit, especially in situations where high irregular migration characterises the society. The ZSP and LSP dispensations, which will be discussed in detail below,

⁸⁴ Legalities and humanitarian implications of regional and bilateral migration-related agreement (Presentation prepared by myself for Professor Michelo Hansungule (University of Pretoria) in October 2016)

⁸⁵ (n 84 above)

⁸⁶ (n 84 above)

⁸⁷ (n 84 above)

are examples of such agreements which have been entered to curb irregular migration.

2.4 Protection of rights of migrants in the SADC⁸⁸ region

Free movement of people, goods and capital in the region has been the main goal of SADC and is an integral part of the growth of the region and promoting development, poverty alleviation and prospects of greater integration.⁸⁹ Being the economic hub of the Southern Africa region, South Africa has become a major destination for the African continent and the world at large. SADC has a free movement policy between member states and has established a Draft Protocol on the Facilitation of the Free Movement of Persons;⁹⁰ however, only four of the required nine states have ratified it.⁹¹ In practice though, there is no free movement within the SADC region as in other regions. The SADC Treaty merely requires SADC member states to “*develop policies aimed at the progressive elimination of obstacles to the free movement of capital, goods and services and of the people of the region generally, among Member States.*”

Obstacles to ratification include a concern over mobility within a region marked by large economic inequalities between countries even though the Draft Protocol provides for a visa-free stay in another country for only 90 days.⁹² Although the Protocol is not operational, it makes provision for Member States to conclude bilateral agreements for visa exemptions, for example, ZSP and LSP dispensations. Most member States have exempted each other from visa requirements, for examples, citizens from specific countries such as Zimbabwe, are visa exempt to South Africa for

⁸⁸ Southern Africa Development Community is an inter-governmental organization headquartered in Gaborone, Botswana. Its goal is to further socio-economic cooperation and integration as well as political and security cooperation among 15 southern African states

⁸⁹ (n 43 above) 87

⁹⁰ One of the main objectives of the SADC Treaty is the promotion of policies that aim to eliminate obstacles to the free movement of persons in the region. A draft Protocol on the Free Movement of Persons within SADC was introduced in 1996, but was replaced by the more restrictive Protocol on the Facilitation of Movement of Persons in 1997. The restriction was due to the income disparities that create imbalances in migration flows between member States. The 1997 Protocol was further revised and adopted in 2005, which ensures granting visa-free entry, with lawful purpose, to citizens from other member States for a maximum of 90 days. The protocol is however not operational due to inadequate ratifications by member States. So far, only Botswana, Mozambique, South Africa and Swaziland have signed and ratified the Protocol.

⁹¹ Social Security and Social Protection of Migrants in South Africa and SADC; MiWORC Report June 2015 by Bob Deacon, Marius Olivier, Reason Beremauro, page 14
<http://www.miworc.org.za/docs/MiWORC-Report-8.pdf> accessed 19 August 2017

⁹² (n 91 above) 14

a maximum period of 90 days.⁹³ Further, there have been talks of a single SADC passport initiative and introduction of a new visa, specifically for nationalities from the SADC region. Currently, the pan-African passport has come into force but only for African Heads of States, foreign ministers and diplomats accredited by the AU headquarters in Addis Ababa, Ethiopia.⁹⁴ The passport will bear the AU's name, and that of the issuing country and the plan is for African governments to roll it out to their citizens by 2018.

It could be argued that South Africa should, in general, give first preference to workers from the SADC region before considering granting visas to workers from other regions and continents. For example, ECOWAS⁹⁵ and EAC⁹⁶ have similar agreements. ECOWAS adopted the Protocol on Free Movement of Persons, Residence and Establishment in 1979⁹⁷ which grants ECOWAS citizens the right to enter, reside and establish themselves in member states. Similarly, the EAC has made significant progress on visa-free movement for EAC citizens but has not implemented residence and establishment. Having free movement in the SADC region and possibly the much talked about SADC seekers work permit for the lower skilled migrant workers who currently form the bulk of illegal migrants, would be a solution to the high rise of illegal migrants in South Africa. However, to implement free movement and possibly such a visa for the SADC region would be a challenge as the economic and development gaps between the countries are extremely large compared to the countries in the ECOWAS or EAC regions where they are almost at par, or the gap is not significant. Further, most SADC countries have also not amended their policies on the free movement of people. Therefore, it becomes challenging for South Africa to amend its policies alone as there is the need for mutual benefit among member states.

⁹³ Section 31(3)(b), Act 13 of 2002 (as amended)

⁹⁴ Pan-Africa passport to open up borders; AU launches a continental passport while Brexit closes doors by Tonderai Mukeredzi From Africa Renewal: August - November 2016 <http://www.un.org/africarenewal/magazine/august-2016/pan-africa-passport-open-borders> accessed January 2017

⁹⁵ The Economic Community of West African States was established on May 28, 1975 via the treaty of Lagos, ECOWAS is a 15-member regional group with a mandate of promoting economic integration in all fields of activity of the constituting countries.

⁹⁶ The East African Community (EAC) is a regional intergovernmental organisation of five Partner States, comprising Burundi, Kenya, Rwanda, Tanzania and Uganda, with its headquarters in Arusha, Tanzania.

⁹⁷ Economic Community of West African States (ECOWAS), Protocol Relating to Free Movement of Persons, Residence and Establishment, 29 May 1979, A/P 1/5/79

Nonetheless, South Africa continues to advocate for these regional policies, and it has adopted both a bilateral and unilateral approach in removing visa conditions for citizens of SADC member states. South Africa has implemented visa waivers, which are in line with the spirit of the Abuja Treaty⁹⁸ with 11 of the 14 SADC countries. South Africa also implemented the ZSP and LSP to regularise the large numbers of illegal Zimbabwean and Lesotho nationals residing and working in South Africa irregularly. In the White Paper (2017), one of the objectives is the management of migration within the African context. The purposes of the policies are to facilitate cross-border movement for African citizens and provide a legal route for SADC migrant workers.⁹⁹

The recently adopted SADC Protocol on Employment and Labour¹⁰⁰ explicitly foresees the adoption of measures to facilitate the coordination and portability of social security benefits. These will most likely be achieved through the adoption of appropriate bilateral and multilateral agreements (such as the ZSP and LSP dispensations) providing for equality of treatment of non-citizens, aggregation of insurance periods, maintenance of acquired rights and benefits, exportability of benefits and institutional cooperation.

Although some SADC member states have not amended their immigration policies in line with the Draft Protocol on the Facilitation of the Free Movement of Persons, there have been changes in migration laws in countries such as Mozambique, South Africa, Namibia, Tanzania and Zimbabwe.¹⁰¹ In South Africa, the Immigration Act is one of the few pieces of national immigration legislation in the SADC region that mentions any of the international instruments or the category of international instruments. In fact, one of the categories of temporary residence visas provided for in the Act, that is, the

⁹⁸ The founding policy framework for the management of international migration in line with the African development agenda is the Abuja Treaty of 1991. In 1980, the OAU (predecessor of the AU) Extraordinary Summit adopted the Lagos Plan of Action as a major step towards the goal of integration. The commitments in this Plan and the Final Act of Lagos were translated into concrete form in Abuja, Nigeria in June 1991 when the OAU Heads of State and Governments signed the Treaty establishing the (AEC) during the 27th Ordinary Session of the Assembly. The aim of the AEC is to promote economic, social and cultural development as well as African economic integration to increase self-sufficiency and endogenous development and to create a framework for development, mobilisation of human resources and material.

⁹⁹ (n 16 above) v

¹⁰⁰ SADC Protocol on Employment and Labour, 2014

¹⁰¹ Klaaren & Rutinwa (n 21 above) 52

treaty visa¹⁰² is solely based upon the existence of an international agreement to which South Africa is a party.¹⁰³ Further, a part of the corporate work visa, is also intended to continue the practice of employing migrant labourers in certain industries such as farming and mining.¹⁰⁴

The issue of labour migration has been prominent in the SADC region. There have been several initiatives for greater regional integration through free movement of people residing within the region, but the emphasis has been on controlling migration instead of having more liberal policies that allow greater movement.¹⁰⁵ There are a few multilateral international instruments that appear to be used in the migration regimes of the countries of SADC, and the most important of these is the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.¹⁰⁶ In total, twenty countries have ratified the convention, and significantly, only Seychelles from of the SADC region has ratified the convention. Only eleven countries have signed the convention.

2.5 Conclusion

The White Paper (2017) has tabled proposals for policies in line with the changing migration trends to align South African immigration laws with international standards. This Chapter looked at the Constitution of South Africa, the Immigration and Refugee Acts and the White Paper (2017) and how they protect the rights of foreign migrants. As already seen through various case laws in which some of the provisions in these Acts were challenged, there is the need to overhaul the South African immigration system. The proposals in the White Paper (2017) to manage migration with skills and capital, considering migration in an African context and the revamp of the asylum seeker and refugee system will help in alleviating the challenges that are faced by foreign migrant workers in South Africa despite having a well-knit legislation in this sphere.

¹⁰² Section 14 Act 13 of 2002 (as amended)

¹⁰³ Klaaren & Rutinwa (n 21 above) 52

¹⁰⁴ Klaaren & Rutinwa (n 21 above) 52

¹⁰⁵ Makhema, 2009; Hammar, McGregor & Landau, 2010

¹⁰⁶ Adopted by the General Assembly Resolution 45/158 Of 18 December 1990

CHAPTER 3: RIGHTS OF FOREIGN MIGRANT WORKERS IN SOUTH AFRICA

3.1 Introduction

The English definition of a migrant is “a person who moves from one place to another, especially to find work.” According to the UNHCR, migrants are “persons who leave their countries of origin purely for economic reasons not in any way related to the refugee definition, or to seek material improvements in their livelihood. Economic migrants do not fall within the criteria for refugee status and are therefore, not entitled to benefit from international protection as refugees”.¹⁰⁷ The reason for leaving his or her country may be the desire for change or adventure, or for joining family or other reasons of a personal nature.¹⁰⁸ However, if a person leaves his or her country exclusively for economic considerations, they are economic migrants and neither refugees nor asylum seekers.¹⁰⁹ Further, the 1990 International Convention on the Protection of the Rights of All Migrant Workers¹¹⁰ defines the term 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.”

Chapter 2 saw a detailed expose of the South African legal framework and how it protects the rights of foreign migrants. This Chapter now looks specifically at the right to work, freedom of movement and residence in line with the legislation discussed above. As with any legislative framework which is designed with good intentions, there are always challenges with implementation and the challenges of access to these rights of foreign migrant workers will be identified in this Chapter.

¹⁰⁷ UN High Commissioner for Refugees (UNHCR), UNHCR Master Glossary of Terms, June 2006, Rev.1, <http://www.refworld.org/docid/42ce7d444.html> (accessed 12 November 2017)

¹⁰⁸ Refugees and asylum seekers: Barriers to accessing South Africa's labour market by Callixte Kavuro http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072015000100012 (accessed 12 November 2017)

¹⁰⁹ UNHCR Handbook (1992) at para 62.

¹¹⁰ International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families Adopted by General Assembly resolution 45/158 of 18 December 1990

3.2 The right to work

3.2.1 History of labour migration in South Africa

The right to work was first introduced by the 1945 Charter of the United Nations¹¹¹ as a mechanism to promote the conditions of a dignified life, socio-economic progress and development.¹¹² In terms of Article 23, everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.¹¹³ A person without work basically has no dignity as work is the very source of living. The right is entrenched in the UDHR as a fundamental right which not only promotes a high standard of living but also safeguards against unfair or exploitative labour practices.¹¹⁴ The UDHR forms part of the international customary law and domestic laws and South Africa, which ratified the twin Conventions,¹¹⁵ has an obligation to promote and protect human rights, and that includes those of foreign migrant workers within its territory.

For over a century, South Africa has been the centre of an extensive system of labour migration in the Southern African region. Foreign mine workers have traditionally made up at least forty percent of the South African mine labour force, and in the 1960s, foreigners represented eighty percent of mine workers.¹¹⁶ Countries such as Mozambique, Botswana, Lesotho, and Swaziland have historically provided the bulk of the mine labour in South Africa, with Zimbabwe and Malawi providing smaller numbers.¹¹⁷ Some labourers also came from Zambia through the recruitment agency “WENELA”.¹¹⁸ Work on the mines is one of the most important employment

¹¹¹ United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI

¹¹² Art 55(a) of the Charter of the United Nations

¹¹³ Art 23 of the UDHR, General Assembly, Res 217A(III) of 10 December 1948

¹¹⁴ Art 23(1) and (2) of the UDHR, General Assembly, Res 217A(III) of 10 December 1948

¹¹⁵ The International Covenant on Civil and Political Rights, General Assembly, Res 2200A (XXI) of 16 December 1966 (the ICCPR) and the International Covenant on Economic, Social and Cultural Rights, General Assembly, Res 2200A (XXI) of 16 December 1966, (the ICESCR).

¹¹⁶ Jonathan Crush, "Contract Migration to South Africa: Past, Present and Future," Research Paper prepared for the Green Paper on International Migration, 1997.

¹¹⁷ <https://www.hrw.org/legacy/reports98/sareport/Adv2c.htm> (accessed on 20 August 2017) (n 116 above)

¹¹⁸ As early as 1896 there was a loose association of labour employers known as the Native Labour Supply Association formed to engage labourers from Mozambique. During the AngloBoer War, when mining operations were suspended, representatives of the industry conducted preliminary meetings in Cape Town with the object of forming a joint company to engage labour and during 1901, when the war had ended, the Witwatersrand Native Labour Association (WNLA) was incorporated. WNLA was mainly concerned with the engagement of labour from Mozambique, but also sought elsewhere, far and wide, for the much-needed

opportunities available to citizens of the main source countries, and these countries depend heavily on the income produced that returns to the home country through a system of mandatory remittances¹¹⁹ or “black tax”.¹²⁰

Historically, the migration system was regulated through a highly formalized system of bilateral contracts with neighbouring countries for supplying labour to the mines and for the large farms. These bilateral intergovernmental treaties regulated the terms of employment and conditions of access to the South African labour market, including recruitment procedures, wages, mandatory remittance procedures, and the appointment of labour officials to oversee and protect the interests of foreign workers.¹²¹

3.2.2 South African legislation protecting the right to work of migrant workers

Although the right to work is not expressed directly in the Constitution, it is viewed as a core component of the rights to life and human dignity and as "one of the most precious liberties that an individual possesses" because "to work means to eat and subsequently to live."¹²² Section 32(1) of the Constitution provides that "*everyone has the right to fair labour practices and not only citizens.*" The right to work is, first, the foundation of an individual's existence. Work is a part of an individual's identity and constitutive of his or her dignity, and there is a strong link between work and the human personality, which "shapes and completes an individual over a lifetime." When it comes to the employment of foreign migrant workers, it is meant to be a short-term measure to bridge the gap in the skills shortages. The Immigration Act was designed with this in mind, but in practice, it does not work as such.

Often employers have the misconception that illegal foreign migrant workers have no rights. Therefore, they can mistreat them. Many employers have mistreated illegally

labour and the minutes of the early meetings refer to inquiries being made in such distant places as Liberia, Egypt, Uganda, German South West Africa and Mauritius. (The origins of WENELA and TEBA, researched and written by Johann Schutte)

¹¹⁹ International financial remittances are defined as the sum of workers' remittances, compensation of employees, and migrants' transfers.

¹²⁰ Black Tax is defined as the way in which blacks must work twice as hard to get what they want, other definition is illegal activities carried out in exchange of illegal goods for cash. In South Africa Black Tax refers to the responsibility employed blacks have towards helping their families especially parents and extended families

(n 116 above).

¹²² Refugees and asylum seekers: Barriers to accessing South Africa's labour market by Callixte Kavuro <http://scholar.sun.ac.za/handle/10019.1/100481> (accessed on 7 October 2017)

employed foreign migrant workers believing that they have no recourse to labour law. Illegal foreign migrant workers have been paid meager wages, have been deprived of employee benefits and some have been dismissed at will without notice.¹²³ Illegal foreign migrant workers do have rights and recourse under South African labour laws, and employers cannot ill-treat them based on the non-legal status in the country.

There are various pieces of legislation, which provide for the protection of foreign migrant workers. Article 1 of the UDHR contains the right to dignity and in terms of this provision, “all human beings are born free and equal in dignity and rights.” Section 10 of the Constitution states that “*Everyone has inherent dignity and the right to have their dignity respected and protected.*” Dignity is the very basis that all other rights are exercised and the operative term being ‘everyone’, means this right is available to all regardless of origin or citizenship, race or religion. Therefore, depriving one of the right to work is depriving them of their right to dignity, which is an inherent right.

The Immigration Act is the piece of South African legislation, which is responsible for regulating foreign employment in South Africa. The Act lays out the rules and regulations regarding the admission of foreigners into South Africa, their residence in South Africa and their departure from South Africa as well as the ability for foreigners to work within the Republic.¹²⁴ Section 38¹²⁵ of this Act lays the foundation for the employment of foreign migrant workers, and Section 49(3) goes on to state that “*anyone who knowingly employs an illegal foreigner or a foreigner in violation of the Immigration Act shall be guilty of an offence and liable to a fine or a period of imprisonment not exceeding one year for a first offence.*” From these provisions which

¹²³ The South African Labour Guide: Recent Labour Court case shows general assumption's fallacy by Ivan Israelstam <http://www.labourguide.co.za/general/396-illegally-employed-not-excluded-from-labour-laws> (accessed on 22 September 2017)

¹²⁴ Immigration SA “The Employment of foreigners in South Africa” March 14, 2017; <http://immigrationsa.com/2017/03/employment-foreigners-south-africa/> (accessed on 22 September 2017)

¹²⁵ Section 38 Immigration Act No.13 of 2002 (As amended) reads: “No person shall employ:

- “an illegal foreigner;
- a foreigner whose status does not authorise him or her to be employed by such person; or
- a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner’s status.
- In terms of section 38(2) of the Immigration Act, a duty is placed on an employer to make an effort, in good faith, to ensure that no illegal foreigner is employed by it and to ascertain the status or citizenship of the persons it employs.”

place more of the burden on the employer, it is evident that the law leans more in favour of the employee. That is, the foreign migrant worker.

The Employment Services Act (ESA)¹²⁶ also regulates the employment of foreign migrant workers in South Africa. The ESA was introduced to promote employment of foreign migrant workers in line with the Immigration Act and simultaneously decrease the unemployment rates within South Africa. Of significance is that ESA accords jurisdiction to the Labour Court to deal with issues relating to the employment of foreigners and confirms the sanctions for non-compliance as set out in the Immigration Act.¹²⁷

The Labour Relations Act (LRA)¹²⁸ governs disputes between employers and employees regardless of the legal status of the employee in South Africa, ensuring that the employee always has the necessary protection against unfair labour practices. In terms of Section 213 of the LRA, an employee is described 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.*

Considering the above provision, it means that a foreign national who is working legally or illegally in the country is still an 'employee' for purposes of the LRA and is therefore entitled to compensation in the case of unfair dismissal or any other recourse for unfair labour practices.

In the matter of *Discovery Health Limited v CCMA & Others*,¹²⁹ the above principles were confirmed. In this case, the employee was dismissed after the expiry of his work permit, and he referred an unfair dismissal dispute to the CCMA,¹³⁰ where the question

¹²⁶ Act 4 of 2014

¹²⁷ The South African Labour Guide: What employers need to know about employing foreigners in South Africa By Neil Coetzer, Partner and Shahnaaz Bismilla, Associate, Employment Law, Benefits & Industrial Relations, Cowan-Harper Attorneys <http://www.labourguide.co.za/most-recent/2412-what-employers-need-to-know-about-employing-foreigners-in-south-africa> (accessed on 22 September 2017)

¹²⁸ Act 66 of 1995

¹²⁹ *Discovery Health Limited v CCMA & Others* [2008] 7 BLLR 633 (LC)

¹³⁰ Commission for Conciliation, Mediation and Arbitration (CCMA) is an independent, juristic body that helps to resolve disputes and offers advice and training on labour relations.

of the CCMA's jurisdiction to hear the case was considered. The CCMA ruled that it had jurisdiction to determine whether the employee had been unfairly dismissed and further found that the employee's dismissal had been unfair. In view of the CCMA's ruling, the employer took the matter on review to the Labour Court. The court found that, despite being a foreign national the employee fell within the definition of an employee for the purposes of Section 213 of the LRA and as such, enjoyed the protection afforded by the LRA.¹³¹

The South African Qualifications Authority (SAQA) is the body which is responsible for the evaluation of foreign qualifications. The process entails verification of the authenticity of foreign qualifications and compares the foreign qualifications with South African qualifications.¹³² Section 13 of the National Qualifications Framework Act¹³³ sets out the scope and functions of SAQA. The evaluation and advisory service provided by SAQA forms part of a value chain for the recognition of foreign qualifications. SAQA partners with other bodies and entities to recognise foreign qualifications, particularly with the DHA whereby permission to enter South Africa is granted by the issuing of visas relating to study and work; and addressing scarce and critical skills needs of the country.¹³⁴

3.2.3 Challenges of accessing the labour market for foreign migrant workers in South Africa

Many employers have always taken advantage of employing illegal immigrants without valid work visas and in turn paying them meagre wages. This places the illegal migrant workers in a vulnerable situation, and they receive ill-treatment from employers based upon the assumption that they have no legal rights because of their lack of status. Legal security is a pillar by which foreign migrant workers can legally work in a foreign country and earn a living. Legally working in a country means one has the proper and correct documentation allowing them to do so.

¹³¹ (n 127 above)

¹³² Fact Sheet on the evaluation of foreign qualifications

¹³³ Act 67 of 2008

¹³⁴ Fact Sheet on the evaluation of foreign qualifications

People migrate for different reasons, for example, exploration of new economic opportunities such as jobs, reunification with or joining their families, study, a simple desire for a change of environment, flight from persecution, and health grounds.¹³⁵ Globalisation has had a profound effect on international migration and has increased significantly the number of people who migrate as a means of escaping poverty, unemployment and other social, economic and political pressures in their home countries.¹³⁶ States naturally have an obligation to protect their labour market, and this often conflicts with the rights of foreign migrant workers, but because migration is an integral part for the development of the economy, there has to be a balance between the two.

In terms of family life, some migrant workers have left their families back home to pursue a better living in South Africa and to be able to send money back to their families to provide for them and send their children to school. Despite all these efforts of still providing for one's family while in a foreign country, for those who have their families in South Africa, it is sometimes difficult to access educational and health facilities in South Africa by their foreign status.

Some migrant workers have been in South Africa for a significant number of years such that they are now married to South African citizens or permanent residents. In the case of the migrants on the ZSP dispensation permits (which will be discussed in detail below), before the inception of the ZEP, they could not apply in-country for change of status to the mainstream visas that they would normally be entitled to as spouses of South African citizens or permanent residents in terms of the Immigration Act. To change their visa status, the ZSP holders are required to do this in Zimbabwe through the VFS Office, and this has resulted in the disruption of both family and work life as one must await the outcome of their visa application in Zimbabwe for which the process takes at least three months. In the case of *Dawood and Others v Minister of Home Affairs and Others*,¹³⁷ the Judge observed that the institutions of marriage and the family are important social institutions that provide for the security, support and

¹³⁵ RE Kapindu 'Social protection for Malawian migrants in Johannesburg: Access, exclusion and survival strategies' (2011) (African Human Rights Law Journal)

¹³⁶ *Discovery Health Ltd v Commissioner for Conciliation, Mediation and Arbitration & Others* Case JR 2877/06 (unreported, decision of 28 March 2008, Labour Court of South Africa)

¹³⁷ *Dawood and Others v Minister of Home Affairs and Others* 2000 3 SA 936.

companionship of members of society and bear an essential role in the rearing of children.¹³⁸ Therefore, the requirement that an applicant on a ZSP had to travel to Zimbabwe to lodge an application for the change of conditions and await the outcome for at least three months caused disruption to the family unit in South Africa. Although there is no provision in the South African Constitution guaranteeing this right, several constitutional rights might still be implicated and that the primary right implicated is the right to dignity. Thus, the right to family life is recognised and protected under the South African Constitution, and the state has an obligation to respect, protect and promote this right for both citizens and foreign migrant workers. The state, therefore, is under an obligation to ensure that this right is respected, protected and promoted through its policies and practices.¹³⁹

3.3 Freedom of movement

In establishing access to freedom of movement, it is essential to determine who is at risk of having this right violated? Usually, an illegal foreigner would be the subject of the violation of this right. An illegal foreigner is a person who is in South Africa in contravention of the Immigration Act. Examples of illegal foreign migrants who are at risk of immigration detention and deportation include, undocumented migrants; that is, foreign nationals who have no documentation to authorize their presence in South Africa; asylum seekers whose applications for asylum were finally rejected, but who continue to remain in South Africa despite having received notification to leave the country and any person who has overstayed on a visa issued in terms of the Immigration Act.¹⁴⁰

Article 13 of the UDHR stipulates that “*everyone has the right to freedom of movement and residence within the borders of each state*” and that they have the right to “*leave any country, including his own and return to his own country.*” Operative words are “within the borders” therefore, the freedom is not universal in the sense of ‘free borders’ but is guaranteed only ‘within the borders of each state’. Therefore, having the right to remain in any state would mean that the right must be exercised within the ambits of the law.

¹³⁸ (n 136 above) Para 36

¹³⁹ Sec 7(2) of the Constitution

¹⁴⁰ Section 30(1)(h) read with 50(1) of the Immigration Act, no 13 of 2002 as amended)

Article 12 of the ICCPR makes specific mention of exercising this right within legal limits as “*everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*” The nature and scope of this right are further discussed by the Human Rights Committee in General Comment 27¹⁴¹ where it alludes that “liberty of movement is an indispensable condition for the free development of a person. It interacts with several other rights enshrined in the Covenant.” The Comment discusses freedom of movement, which it considers to be a basic human right. It also requires State Parties to remove any restrictions that impede this right immediately. There are permissible limitations to the exercise of this right. However, such limitations must not nullify the principle of liberty of movement, and they should be extremely necessary and consistent with the other rights in the Covenant. South Africa, as a state party to this Covenant, has enacted legislation aligned to the Covenant. Section 12 of the Constitution¹⁴² provides that “everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; to be free from all forms of violence from either public or private sources....” This section was included in the Constitution to outlaw the abuse of power and deprivation of personal freedom by guaranteeing everyone personal freedom against detention without trial as this was the norm used to suppress opposition in the apartheid era.

Section 34(1) of the Immigration Act provides for an immigration officer to arrest an illegal foreigner or cause him or her to be arrested without any warrant.¹⁴³ The Immigration Officer may detain the illegal foreigner or cause him or her to be detained pending his or her detention in a manner and at the place under the control or administration of the Department determined by the Director-General. One would ask, “what is a place under the control of the administration of the Department of Home Affairs?”

¹⁴¹ General Comment No. 27: Freedom of movement (Art.12): 02/11/99. CCPR/C/21/Rev.1/Add.9, General Comment No. 27. (General Comments)

¹⁴² Act 108 of 1996

¹⁴³ Act 13 of 2002 as amended

To answer the above question, there are specifically designated places for detention, which have been stipulated in terms of Section 34(1) of the Immigration Act.¹⁴⁴ Therefore, migrants awaiting deportation cannot be held at any police station except the stations stipulated by the DHA. However, in practice, illegal migrants are often detained at the incorrect stations, thus, violating their right to freedom of movement resulting in the violation of regulating statute by the respective officials.

The same right is also entrenched in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.¹⁴⁵ In terms of this Convention, migrant workers and members of their families are considered as documented or in a regular situation if they are authorized to enter, to stay and to engage in a remunerated activity in the State of employment pursuant to the law of that State and to international agreements to which that State is a party.¹⁴⁶

3.3.1 Challenges with the freedom of movement for foreign migrant workers in South Africa

As mentioned above, the South African Constitution applies to everyone within the country's borders, and this includes both legal and illegal foreigners. Police officers and immigration officials are authorized to request of any person to identify themselves as a citizen, resident or foreigner. If there are reasonable grounds to believe that the person is an illegal foreigner, such a person may be arrested without a warrant and detained, pending an investigation into their documentation status. It is known that if one is in the country illegally, they have violated the laws of the country and should face the full force of the law. However, when illegal migrants are arrested and detained at the deportation centres while waiting to be repatriated back to their countries, the process is marred with corruption and delays resulting in negative implications for the foreign migrants, most of whom are working and are breadwinners for their families in South Africa and back home.

¹⁴⁴ Determination of places of detention of illegal foreigners pending deportation <http://www.home-affairs.gov.za/index.php/immigration-services/places-of-detention-for-those-pending-deportation> (accessed on 24 September 2017)

¹⁴⁵ Articles 5, 8 and 39 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158

¹⁴⁶ Article 5(a) of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990, A/RES/45/158

When a police officer or immigration officer encounters someone they suspect to be an illegal immigrant, that person should be asked for documents proving their status. If they have no documentation, they may be held at a place of detention for 48 hours while their status is determined.¹⁴⁷ This verification must be done by a DHA official, and this often takes longer than 48 hours, sometimes over a week.¹⁴⁸ This is where the violation of the right to freedom of movement becomes extremely violated. Section 41 of the Immigration Act provides for the conditions for the detention of an individual at Lindela,¹⁴⁹ and Annexure B of the Regulations to the Immigration Act set out the Minimum Standards of Detention. Furthermore, everyone held at Lindela has rights under the Constitution, The National Health Act,¹⁵⁰ the National Strategic Plan on HIV, STIs and TB (2012-2016) and the Promotion of Administrative Justice Act.¹⁵¹

In the case of *Fikre v Minister of Home Affairs and Others*, the applicant, an Ethiopian national, claimed to have fled his country of birth to avoid political persecution, and that he was entitled to protection as an asylum seeker under the provisions of the Refugees Act until the outcome of a decision.¹⁵² The applicant had been held in detention since 10 September 2010, and he believed that he was being detained for purposes of deportation pending the outcome of his asylum application. However, the respondent argued that his detention was lawful as he was an illegal foreigner. This case shows the common practice in everyday life, where foreign migrants awaiting the finalisation of their asylum status are detained, and they are under the assumption that they are protected in terms of the Refugee Act.

In the *Ujde Case*, it was ruled that an arrest of an illegal foreigner under section 34(1) of the Immigration Act is subject to the exercise of discretion by an immigration

¹⁴⁷ FACTSHEET: Detention and deportation of undocumented migrants in South Africa at the Lindela Repatriation Centre; <https://africacheck.org/factsheets/lindela-repatriation-centre-migrants/> (accessed on 24 September 2017)

¹⁴⁸ (n 146 above)

¹⁴⁹ Lindela Repatriation Centre was established by the Department of Home Affairs (DHA) in 1996 as a holding facility for foreigners awaiting deportation. It is not a refugee camp. The only facility of its kind in South Africa, Lindela is in Krugersdorp West about 40 kilometres outside of Johannesburg. It has facilities for up to 4,000 people, with separate areas for men and women.

¹⁵⁰ Act 61 of 2003

¹⁵¹ Act No. 3 of 2000

¹⁵² *Fikre v Minister of Home Affairs and Others* (2011/9981) [2011] ZAGPJHC 36 (11 May 2011)

officer.¹⁵³ The discretion is to be construed in *favorem libertatis*.¹⁵⁴ Where a magistrate had granted bail to a suspected illegal foreigner, an immigration officer could not ignore this fact in the exercise of his discretion.¹⁵⁵ The decision confirmed the constitutional right of a foreign migrant not to be detained arbitrarily.

According to a research conducted by Dr Roni Amit from the African Centre for Migration and Society,¹⁵⁶ it was found that there were many human rights violations at the Lindela Detention Centre. Some of these include the DHA's failure to verify detainees' immigration status, people not being notified of their rights, the correct warrants not being obtained, and people being detained beyond the legal 120 days.¹⁵⁷ Detainees were also not receiving sufficient meals, and the standards of personal hygiene and medical treatment were unacceptable.¹⁵⁸ Thus, apart from the right of freedom of movement being violated, there was also an impact on other rights.

3.4 Permanent residency

A permanent resident in South Africa has more rights and opportunities than a foreign migrant on a temporary residence visa. One can work, study or start a business without the need for special visas or endorsements. Under the Immigration Act, there are seven different types of permanent residence permits. Of relevance to this research is permanent residence based on:

- i. Spousal/Life Partner of a Permanent Resident or South African citizen: if a migrant is married to or in a permanent relationship with a South African citizen or a foreigner with a South African permanent residence permit, then he or she qualifies to apply for this permit.¹⁵⁹
- ii. Five years continuous work in South Africa: if one can prove that they have worked continuously in South Africa for five years under a specific type of

¹⁵³ *Ulde v Minister of Home Affairs* (320/2008) [2009] ZASCA 34 (31 March 2009)

¹⁵⁴ In favour of freedom or liberty

¹⁵⁵ *Ulde* (n 145 above) 34

¹⁵⁶ The African Centre for Migration & Society is Africa's leading scholarly institution for research and teaching on human mobility dedicated to shaping global discourse on human mobility and social transformation.

¹⁵⁷ (n 147 above)

¹⁵⁸ (n 147 above)

¹⁵⁹ Section 26(b) Act 13 of 2002 (as amended)

work visa and have permanent employment, then they should qualify to apply for this type of permanent residence permit.¹⁶⁰

The rights and challenges of foreign migrant workers, in this case, arise where there are migrants on special dispensation permits such as the ZSP who have been in South Africa on these permits for seven years. Some are now married to South African citizens or permanent residents and would ordinarily qualify for permanent residency under this section by having been married or been in a permanent spousal relationship for more than five years. As a result of the specific prohibitive condition on the ZSP of not being able to apply for permanent residency, this takes away the migrants' right. Should they wish to apply for permanent residence, they would need to convert to one of the mainstream visas such as the visitor's visa to reside with spouse and/or work¹⁶¹ and thereafter apply for permanent residence.

Further, Section 26 (a) also poses a challenge in that ZSP permit holders have been on these permits for more than five years since the special dispensation programme started in 2009, and they would ordinarily have qualified for permanent residence by reason of five years continuous work in South Africa. However, as the ZSP permit does not qualify for permits considered for permanent residency under this category, together with the specific condition on these permits not to apply for permanent residency, it means that the holders of these permits have "lost" seven years of their stay in South Africa in which they could have qualified and applied for permanent residence had they been on the mainstream visas.

As a result of the foreign migrant workers not qualifying for permanent residency because they have already established lives and careers in South Africa, they should be accorded a long-term right to continue working in South Africa. However, the question remains, until when will they continue to be issued with the special dispensation permits? Speaking to some Zimbabweans on these permits, their intention was to eventually apply for permanent residency, but because it was an "easy option" at the time, they applied for the permits.¹⁶² This is also a challenge because

¹⁶⁰ Section 26 (a) of Act No.13 of 2002 (as amended) refers to a foreigner who has been in SA on a work permit for 5 years and who has received a permanent offer of employment

¹⁶¹ Section 11(6) Act 13 of 2002 (as amended)

¹⁶² This information was obtained from informal conversations held by Zimbabwean colleagues and friends on ZSP permits

even skilled professionals, those qualifying for the Critical Skills Visa, apply for these permits. However, these permits were intended for the illegal low-skilled professionals who did not qualify for mainstream visas. When the skilled professionals eventually want to apply for permanent residency, they cannot do so unless they change to one of the mainstream visas.¹⁶³

It can be argued that most dispensation projects are for a limited period, and the aim of such projects is to regularise illegal immigrants residing within the country to enable them to work, conduct business or study in the country legally. Most of the beneficiaries of these projects are low-skilled migrant workers who would not normally qualify for the mainstream visas due to lack of documents or inadequate qualifying criteria. Therefore, it is not the intention to have the migrants on these permits granted permanent residency, although, when these migrants flee to South Africa as economic migrants, it is not their intention to return to their countries. Instead, they come with the intention to reside permanently in South Africa.¹⁶⁴

3.4.1 Challenges - permanent residency for foreign migrant workers in SA

The ZSP, and now ZEP, as well as the LSP dispensations, are only a temporary measure, and there is no intention to grant holders of these permits permanent residency in South Africa as it is clearly one of the conditions of the permits. Therefore, although a temporary measure that meets the needs of the migrants at present, in the long run, there is an impact on the migrants' desire to permanently residing in South Africa should they wish to do so. Article 39 of the International Covenant on the Protection of the rights of all foreign migrant workers and their families provides that *"migrant workers and members of their families shall have the right to liberty of movement in the territory of the State of employment and freedom to choose their residence there."* The last part of this provision, that is, *"freedom to choose their residence there,"* could be limited to a certain degree in terms of long-term permanent residency in South Africa by the ZSP and LSP dispensations since these permits are

¹⁶³ This information was obtained from the line of work

¹⁶⁴ This information was obtained from a speaker who commented during a session on the "Dialogue on international migration in a secure manner in line with African Union Agenda 2063" with the Minister of Home Affairs on the 20th September 2017 held at the University of the Witwatersrand

restrictive, despite regularising the otherwise illegal migrants and providing interim relief.

Under current legislation, once a migrant has been a recognised refugee for at least five years, and they have received such recognition and confirmation from the Standing Committee for Refugee Affairs (SCRA), they may apply for permanent residency.¹⁶⁵ However, the new White Paper (2017) proposes a policy change whereby recognised refugees will obtain long-term residence visas, and there will be no automatic right to permanent residency anymore. This is a clear violation of this right especially considering that refugees cannot return to their country of origin by virtue of the refugee status. If, for example, a person fled persecution, war or famine, which would still be the case after a certain period, not granting them permanent residency after an extended period of stay in South Africa would place their existence in limbo as they have an uncertain future here and can also not return to their country.

It could be argued that the proposal in the White Paper (2017) for the creation of asylum seeker processing centres where they will receive all asylum seekers could be a remedy for the above. The aim is to have centres in the different provinces to cater for the asylum seekers throughout the country and process their documents timeously. As a result of the quick processing of documentation and subsequent determination of refugee status, asylum seekers will no longer have a right to work, study or conduct business in South Africa. The initiative for asylum centres is a great one, but practically will it work? Kenya has a similar programme with the refugee camps near the borders, and as will be seen below, this does come with many challenges¹⁶⁶.

¹⁶⁵ Section 27(c) Immigration Act 13 of 2002 (as amended)

¹⁶⁶ Refugees in Kenya primarily reside in the Dadaab refugee complex (which is in Garissa County and consists of five camps: Dagahaley, Hagadere, Ifo, Ifo II, and Kambios) and the Kakuma Refugee Camp located in Turkana County. The Dadaab refugee complex has a population of 234,346 registered refugees and asylum seekers as at the beginning of 2018.

3.5 Conclusion

This Chapter looked at the rights and challenges of foreign migrant workers in South Africa, and it has been established that South Africa does have the legislative framework to deal with migration issues, but these need to be modified to align with the changing times and needs due to global changes. The White Paper (2017) is an excellent initiative in this regard, and it has various discourses that are taking place on the different proposals in the paper. The immigration legislative framework should improve and help South Africa manage migration more effectively.

CHAPTER 4: DISPENSATION PROJECTS IN SOUTHERN AFRICA & THE PROCESS OF INTEGRATING FOREIGN MIGRANT WORKERS

4.1 Introduction

South Africa is faced with the challenge of high irregular migration, and this is compounded by the high costs of enforcement, that is, inspections, detentions and deportations.¹⁶⁷ Most of the irregular migrants come from neighbouring countries. For example, of the total number (369 726) of migrants who were deported between January 2012 and December 2016, nationals from Mozambique, Zimbabwe and Lesotho made up 88 percent of the deportations.¹⁶⁸ These statistics confirm the need to find a solution for the documentation of illegal migrants from the SADC region with lower-level skills since they account for a large proportion of the yearly deportations. To address this issue, South Africa has entered into several bilateral agreements to regulate irregular migration from neighbouring countries. Some of the examples include the local operational agreements at the Ficksburg and the Maputsoe border posts between South Africa and Lesotho,¹⁶⁹ and more recently, the special ZSP and LSP projects. Dispensations such as the ZSP and LSP take different forms in different countries, but in general, they have both security and developmental objectives. As a result of the presence of communities and individuals who are not known to the state but for whom the state must provide social security and other rights, it puts pressure on state resources, subsequently increasing the risk of social conflicts. Therefore, programmes such as the ZSP and LSP aim at regularising relationships between states and improves stability, reduces crime as well as improving conditions for economic growth for both countries.¹⁷⁰

¹⁶⁷ (n 16 above) 100

¹⁶⁸ (n 16 above) 100

¹⁶⁹ An agreement because of Lesotho's unique situation as a landlocked nation that is surrounded by South Africa. The Agreement would further the objectives of the Lesotho-RSA Joint Bilateral Commission of Cooperation especially with assisting Lesotho graduate from its Least Developed Status to that of Developing Country Border control and the movement of persons between South Africa and Lesotho was inadequate and encouraged a porous borderline therefore agreement would see to the implementation of hassle free immigration formalities for citizens of both countries who were in possession of valid national passports and a shift in focus of the Department from ports of entry to inland monitoring of immigration law compliance.

¹⁷⁰ (n 84 above)

4.2 Zimbabwe Special Permit project

The country's international migration policy has not sufficiently responded to inward mixed migration flows primarily from the immediate and regional neighbours. This is particularly about semi-skilled and unskilled economic migrants, who have been largely unable to obtain visas and permits through the mainstream immigration regime (except for corporate permits in mining and agriculture).¹⁷¹ This has had negative consequences such as the asylum seeker management system being abused and overwhelmed by economic migrants; the abuse of migrants - and by extension, South African workers - by some unscrupulous South African employers; increased trade in false documentation and petty corruption by police and immigration enforcement officials; suffering of social cohesion as citizens assume that all migrants from the rest of Africa are irregular and undesirable; and "revolving door" and costly deportations to neighbouring countries increased significantly.¹⁷²

South Africa has had to respond to these harsh realities, particularly the outbreak of violence through xenophobic attacks and has taken initiatives to improve the situation on economic migration. The special dispensations provide an opportunity for undocumented Zimbabwean and Lesotho nationals to regularise their stay in South Africa.¹⁷³ Such dispensations take different forms in different countries, but in general, they have both security and developmental objectives. In addition, the presence of communities and individuals who are not known to the state but for whom the state must provide for, puts pressure on resources and increases the risk of social conflicts. Vulnerable migrants pay bribes and are victims of extortion and human trafficking. This increases levels of corruption and organised crime. Regularising relationships between states, however, improves stability, reduces crime and improves conditions for economic growth for both countries.¹⁷⁴

The evolution of the ZEP started with the DZP then the ZSP. Under the special dispensation project, Zimbabweans with valid passports, evidence of employment, business or accredited study and a clear criminal record were given the opportunity to lodge applications in South Africa for the special permits which granted them the

¹⁷¹ (n 16 above) 123

¹⁷² (n 16 above) 123

¹⁷³ (n 16 above) 126

¹⁷⁴ (n 16 above) 127

authority to stay and work, study or run a business in South Africa. The main objectives of the DZP Project were:

- i. To regularise Zimbabweans residing in South Africa illegally;
- ii. Curb the deportation of Zimbabweans, who were in South Africa illegally;
- iii. Reduce pressure on the asylum seeker and refugee regime; and
- iv. Provide amnesty to Zimbabweans, who obtained South African documents fraudulently.¹⁷⁵

The permits issued under the DZP Project were initially for a period of four years, from December 2010 to December 2014. The DHA had received a total of 294 511 applications, 242 731 applicants were granted permits while 51 780 were either rejected or not finalised.¹⁷⁶ In 2014, the DHA announced the implementation of the ZSP Project which was put in place to grant a further extension of the DZP permits for three years until December 2017. These new permit applications were to be applied for through the local VFS¹⁷⁷ Offices. In September 2017, the government announced the new ZEP that would be a further extension to the permits.¹⁷⁸ Although initially, the ZSPs were not to be extended, the ZEP initiative was premised upon the belief that migrants play an important role in respect of economic development and enriching social and cultural life in the country thus the decision to extend the permits.

¹⁷⁵ (n 6 above)

¹⁷⁶ Parliamentary Monitoring Group “Zimbabwe Special Dispensation Permit: Department of Home Affairs update” Chairperson: Mr B Mashile (ANC) <https://pmg.org.za/committee-meeting/17791/> (accessed August 2016)

¹⁷⁷ VFS Global (Visa Facilitation Services) is an International outsourcing and technology services’ specialist for authorities and diplomatic missions world-wide. The organisation handles visa associated administrative jobs and services

¹⁷⁸ Statement by the former Minister of Home Affairs Professor Hlengiwe Mkhize on the closure of the Zimbabwean Special Permit (ZSP) and the opening of the new Zimbabwean Exemption Permit (ZEP) <http://www.dha.gov.za/index.php/statements-speeches/1034-statement-by-minister-mkhize-on-the-closure-of-the-zimbabwean-special-permit-zsp-and-the-opening-of-the-new-zimbabwean-exemption-permit-zep> (Accessed on 13 September 2017)

4.2.1 Example of the ZSP

Below is an example of what the ZSP permit looks like and the contents of the permit are explained in detail below.



1. Permission to conduct work or employment/study/conduct own business

In terms of the ZSP, there are three kinds of activities that can be carried out, these are, work or study or conduct business. With the example given above, the permit entitles the holder to conduct work or employment, which means this applicant applied for the ZSP permit under the work/employment category. Therefore, the ZSP permit would essentially reflect the category that one applied for, and if it was for studying, it would have been endorsed with a condition to study.

2. Permanent residency

Holders of the previous DZP, ZSP and now ZEP are prohibited from applying for permanent residence in South Africa. This means that all ZSP holders who are about to complete their five-year mark will now, by other means must qualify for permanent residency.¹⁷⁹ However, the ZSP holders must first apply for South African mainstream visas, complete the full five years before they may qualify for permanent residency.

¹⁷⁹ ZSP Permit News <https://www.nwivisas.com/nwi-blog/south-africa/zsp-permit-news/> (accessed on 26 June 2017)

3. Non-renewable/extendable

The condition meant that the ZSP holders could not renew their permits in South Africa. With the termination of the ZSP and inception of the ZEP, the holders of the ZEP are entitled to work, study or conduct business in South Africa for an additional three years.

4.3 Zimbabwe Exemption Permit

Under the new ZEP, the conditions are similar in nature to that of the ZSP in that the ZEP:

- Entitles the holder to work/ study and/or conduct business.
- Does not entitle the holder the right to apply for permanent residence irrespective of the period of stay in the Republic of South Africa.
- Is not renewable or extendable.
- Does not allow a holder to change conditions of his/her permit while in South Africa.¹⁸⁰

However, there are two further conditions, which did not appear on the ZSP which are now applicable on the ZEP:

- ZSP permit holders who wish to convert their status to any other mainstream visa should apply timeously for such a visa from within South Africa provided they meet all the requirements for that visa.
- A ZSP applicant will be allowed to travel using the ZEP receipt, and the expired ZSP permit until such a time the ZEP permit is issued, without being declared undesirable.¹⁸¹

It is important to note that the provision for ZSP holders to change their status in-country is a step towards the realisation of the rights of Zimbabweans as foreign migrants. Prior to the ZEP, if one wanted to change their status to a mainstream visa from the ZSP, this had to be done via the South African Mission in Harare. As a result of the lengthy processing times abroad, it meant that the ZSP holders would be out of the country for lengthy periods of time while awaiting the outcomes of their visa applications. As migrants already established and working, studying or conducting

¹⁸⁰ (n 178 above)

¹⁸¹ <http://www.thezimbabwean.co/2017/12/zimbabweans-with-expired-south-african-permits-can-travel-home/> accessed on 31 January 2018

business in South Africa, this meant absence from these activities for an extended period which had an impact upon the economy and their own personal lives. Now with this provision, it makes the situation better as the ZSP holders can submit their visa applications within South Africa and continue to work/study or conduct business while awaiting the outcome of the application.

4.4 Lesotho Special Permit project

In 2016, the South African Government embarked on a similar project to the DZP/ZSP/ZEP¹⁸² projects with regards to the illegal Lesotho migrants in South Africa. The aim of the project was similar in both cases. As with the ZSP project, the same criteria were used for the Lesotho Special (LSP) project, that is, the illegal Lesotho nationals had to be living and working, studying or conducting work in South Africa. However, an additional requirement was that the illegal Basotho living in South Africa had to have been in the country before 30 September 2015, and they had to be registered in the National Population Register of Lesotho at the time of the application. The reasoning behind this is that the governments of Lesotho and South Africa wanted to ensure that only the right Basotho living in South Africa illegally benefited from this special dispensation, and hence it was important that thorough citizenship verification was done before an applicant was even considered for the LSP permit.¹⁸³

There are an estimated 400 000 Lesotho nationals living in South Africa.¹⁸⁴ However, when the call was made for illegal Basotho to surrender fraudulent documents and legalise their stay in South Africa through the LSP project, approximately only 40 000 applications were received.¹⁸⁵ Although the deadline for submission of applications was initially the 30th June 2016, this was extended to the 30th September 2016 to allow more illegal migrants to apply for the permit. Interestingly, the meager number of applicants, raise many questions as to the success rate of this programme, which contrasts with the ZSP project which was met with great enthusiasm by the Zimbabweans in South Africa. The low volumes were attributed to the fact that not all Lesotho citizens have Lesotho Identity Documents thus they did not meet all the

¹⁸² It will be referred to as the ZSP for ease of reference

¹⁸³ VFS Global South Africa "Apply for Lesotho Special Permit"
<http://www.vfsglobal.com/lsp/southafrica/> (accessed on 28 June 2016)

¹⁸⁴ 'Deadline extended for Lesotho special permit applications' *Business Day Live* June 28, 2016

¹⁸⁵ (n 178 above)

requirements to lodge these applications. Other applicants' feared arrest relating to the amnesty process and computer access and connectivity for applicants also posed a challenge since registration was done online.¹⁸⁶ Despite the government reiterating that there would be no negative implications on illegal migrants surrendering their fraudulent documents and having issued Directives in this regard,¹⁸⁷ it seemed applicants were still hesitant to apply for the LSP.

The programme was launched on 1 February 2016, and by mid-May, almost four months later, only 117 permits had been issued by the DHA, and just over 5,460 applications had been made.¹⁸⁸ The DHA indicated that there would be a moratorium on deportations of Lesotho citizens until 31 December 2016, but the moratorium would exclude people with "negative police clearance" or who have been released from prison after serving their sentences. There was an amnesty for Lesotho nationals who voluntarily handed in fraudulent permits, South African passports or Identity Documents.¹⁸⁹

4.5 The SADC Amnesty

In early 1996, the South African cabinet agreed to grant limited amnesty to nationals of SADC countries. According to the conditions announced by then Minister of Home Affairs Mangosuthu Buthelezi on June 4, 1996 and additional conditions contained in internal Department of Home Affairs guidelines, citizens from the SADC countries would be granted permanent residence if they could prove that they had continuously lived in South Africa since at least July 1, 1991, had no criminal record, and were either economically active or married to a South African, or had dependent children who were born or were residing lawfully in South Africa.¹⁹⁰

¹⁸⁶ (n 178 above)

¹⁸⁷ In terms of Directive 25, 27 and 30 of the Republic of South Africa on the Lesotho Special Permit, all fines were waived with effect from 1 December 2015 until the applicants with fines received an LSP permit. The fines would eventually be withdrawn from the Movement Control System (e-MCS) upon receipt of the LSP Permit

¹⁸⁸ 'Minister Gigaba urges Lesotho nationals in SA to apply for special permit to stay on legally' *Times Live* 10 May 2016

¹⁸⁹ Ground Up "How to get a Lesotho Special Permit" by Tariro Washinyira, November 2015 https://www.groundup.org.za/article/how-get-lesotho-special-permit_3546/ (accessed 21 September 2017)

¹⁹⁰ Department of Home Affairs, "SADC Exemption Statistics: Grand total for the whole of South Africa," fax from the Department of Home Affairs to Human Rights Watch, dated January 27, 1998; "More than 100,000 SADC immigrants given citizenship," *Star*, April 11, 1997; "174,000

Considering the expectations of the cabinet and the DHA, the SADC amnesty proved a failure. Only 124,073 persons were granted permanent residence, out of a total of 201,602 applications, while 77,108 persons were rejected. Another 50,692 migrant workers were granted permanent residence under a separate amnesty previously announced by the Department of Home Affairs after discussions with the National Union of Mineworkers, bringing the total to about 175,000, still far short of the expected one million.¹⁹¹

4.6 Integration of foreign migrant workers and the challenges

Migrant workers often have no protection or safety and are vulnerable to discrimination, poverty, social and cultural handicaps. As such issues are important, the United Nations (UN), ILO and regional organisations have given special attention to the matter which has resulted in the adoption of some important international and regional instruments concerning migrant workers. An example is the International Convention on the Rights of all Migrant Workers and Members of their families, which came into force in July 2013. Of significance is that any person who qualifies as a migrant worker under this Convention is entitled to the rights contained therein regardless of their legal status.

SADC has expressed a purpose of enhancing economic and social integration among member states by facilitating free movement of capital and goods.¹⁹² The SADC Protocol on the Facilitation of Movements of Persons (PFMP) had not been ratified by all member states and could therefore, not be implemented. Therefore, most migrations are now being managed through bilateral agreements (see ZSP and LSP above).

At a meeting hosted by the British Chamber of Commerce in South Africa in August 2017 where the DHA was invited to comment on the White Paper on International Migration, the DHA alluded to the fact that currently there are no proper records of migrants and no integration process in communities. With the proposed policies in the White Paper, the aim is to register migrants in the different provinces so that a full record is available on how many migrants there are, and mechanisms are developed

¹⁹¹ aliens to stay," Pretoria News, September 11, 1997
(n 190 above)

¹⁹² Regional Integration and Regional Migration Trends: Home Affairs, IOM & African Centre for Migration & Society briefing – 05 May 2015

to help with the integration. Further, because of lack of proper integration systems in place, some migrants are not adhering to municipal laws, and general obligations like any other citizen, cannot fully access social services and other rights entitled to them. The DHA indicated that the aim is to work with the local communities to integrate migrants in the different communities. Currently, when refugees become recognised refugees and must be integrated in communities, there is no pre-orientation for them, no programmes to help with when they move into communities, because it is assumed that foreigners are in South Africa to steal the jobs of the locals. Hence, any foreigner in the community, whether legal or illegal, is victimised. Thus, there needs to be proper education of locals on the benefits of migration and proper integration for them.

4.6.1 Xenophobia

Xenophobia is a strong and unreasonable dislike or fear of people from other countries.¹⁹³ In the South African context, it presents itself in different ways such as derogatory name-calling, harassment and physical attacks. African foreigners are blamed for South Africa's persistent social and economic problems, a high crime rate; the spread of HIV/AIDS¹⁹⁴ and the lack of jobs.¹⁹⁵

From the Fourth Roundtable on Migration and Urbanisation in South Africa held on the 29th September 2017 in Pretoria, figures released indicated that foreign migrant workers only constituted 10% of the labour force in South Africa.¹⁹⁶ From these statistics, it is clear that foreigners are not "stealing" the jobs of the locals but when the issue is looked at from a layman's point of view, having one foreign migrant worker working in a supermarket in the township, or having one foreign-owned shop in the township would be viewed as foreigners taking the jobs of locals. This then gives rise to the hatred, envy and at times malicious looting of foreign-owned shops.

¹⁹³ COBUILD Advanced English Dictionary. Copyright © HarperCollins Publishers

¹⁹⁴ HIV is a virus that attacks the immune system. If untreated, a person's immune system will eventually be destroyed. AIDS refers to a set of symptoms and illnesses that occur at the very final stage of HIV infection.

¹⁹⁵ The rights of others – Ongoing xenophobic violence and foreign nationals in South Africa <http://www.phuhlisani.com/oid%5Cdownloads%5CForeign%20migrants%20activity%20binder.pdf> (accessed 23 September 2017)

¹⁹⁶ Notes taken at the Fourth Roundtable on Migration and Urbanisation in South Africa held on the 29th September 2017 in Pretoria

The rise of undocumented migrants since the 1990s and the social and economic tensions and violent responses associated with it, which peaked in the widespread xenophobic violence in 2008, highlights the duty that South Africa must defend and protect the rights of others.¹⁹⁷ Thus in 2008, undocumented migration was already a significant problem which needed special attention¹⁹⁸ and the SAHRC in partnership with the National Consortium on Refugee Affairs, and the UNHCR organised the 'Roll Back Xenophobia' campaign to try to counter prejudice towards foreign nationals and refugees.¹⁹⁹ The xenophobic attacks against foreign nationals in 2008, which resulted in the deaths of approximately 56 people, the displacement of scores of foreign nationals; and the outbreak of further xenophobic attacks in 2015, exposed the continued vulnerability of foreign nationals, particularly from other African countries in South Africa.²⁰⁰ These incidences of xenophobic violence and the increasing unfair discrimination against foreign nationals have necessitated that the Commission maintains its focus on immigration issues and the rights of foreign nationals.²⁰¹

Being a foreigner, whether legal or illegal does not mean that they are fair game to all and warrant the ill-treatment. Foreign migrants, both legal and illegal, are entitled to protection in terms of the South African Constitution and defence under the law. Protection of the foreign migrants is seen in the new White Paper which sets out proposed immigration policies in furtherance of human rights and dignity for all. However, having the only the White Paper will not suffice in the full protection of the rights of the foreign migrant workers. South Africa needs to ratify the two international human rights conventions, that is, the ICESCR and the Convention on the rights of migrant workers and members of their families.²⁰² Regionally, South Africa also needs to ratify the SADC Protocol on the Facilitation of Movement of Persons, signed in 2005.

¹⁹⁷ The rights of others – Ongoing xenophobic violence and foreign nationals in South Africa

¹⁹⁸ ILO / SAMAT, 1998:14

¹⁹⁹ The rights of others – Ongoing xenophobic violence and foreign nationals in South Africa

²⁰⁰ South African Human Rights Commission: Immigration, <https://www.sahrc.org.za/index.php/focus-areas/immigration-equality/immigration> (accessed on 22 September 2017)

²⁰¹ (n 191 above)

²⁰² UN General Assembly, International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, 18 December 1990

4.7 Conclusion

The ZSP and LSP have been hailed as a success because former illegal migrants were regularised and could work, study or conduct business in South Africa. This eased the burden of fearing for their freedom of movement, allowed them to have full access to the right to work and have long-residence stay in South Africa, although for a stipulated period. Through such dispensation projects, South Africa aims to strengthen the enforcement of immigration and labour laws to ensure that citizens are not disadvantaged by employers paying economic migrants lower wages. Further, irregular migration is likely to decrease, and employers' compliance with immigration and labour laws will in turn increase.

CHAPTER 5: RIGHTS AND CHALLENGES OF FOREIGN MIGRANT WORKERS IN KENYA – THE RIGHT TO WORK, FREEDOM OF MOVEMENT AND PERMANENT RESIDENCE

5.1 Introduction

Migration is an international phenomenon and has become a concern for policymakers in East Africa, and more importantly in Kenya, which is one of the most industrialised countries in East Africa and is considered as a source, transit and destination country for many migrants. Mixed migration movements into Kenya include refugees, trafficked persons, irregular and economic migrants from other African countries, particularly from East African countries, including South-Central Somalia, Ethiopia, South Sudan, Tanzania and Uganda.²⁰³ Since it became independent in 1963, Kenya has been host to refugees fleeing from its neighbours because of civil war, political unrest and upheavals that at one time or another occurred in those countries such as Ethiopia, Somalia, Sudan, Uganda and countries in the Great Lakes Region (Zaire, Burundi, Rwanda).²⁰⁴ In 2015, there were over one million migrants living in Kenya representing 2.4% of the total population²⁰⁵ and as of December 2016, the refugee and asylum seeker population stood at 494,863 with about 66% from Somalia²⁰⁶. In addition to Somali refugees, Kenya also hosts a large South Sudanese refugee population, which increased when a civil war broke out in the country in December 2013. Finally, Kenya hosts a sizeable Ethiopian refugee population, mainly from the Oromia and Ogaden regions, in addition to large numbers of undocumented Ethiopians²⁰⁷. Kenya is the hub for smuggling migrants with an estimated 20,000 Somali and Ethiopian male migrants being smuggled to South Africa, mostly via Kenya, every year.²⁰⁸

²⁰³ Regional Mixed Migration Secretariat: Kenya “Key mixed migration characteristics” <http://www.regionalmms.org/index.php/country-profiles/kenya> (accessed on 25 September 2017)

²⁰⁴ Refugees in Kenya And the Constitutional Review Process: The way forward by Ahmed Issack Hassan Commissioner, Constitution of Kenya Review Commission

²⁰⁵ United Nations Department of Economic and Social Affairs, Population Division, Migration Wall Chart (2015). At: [www.un.org/en/development/desa/population/migration/publications/wallchart/docs/Migration Wall Chart 2015.pdf](http://www.un.org/en/development/desa/population/migration/publications/wallchart/docs/Migration_Wall_Chart_2015.pdf) (accessed 25 September 2017)

²⁰⁶ (n 203 above)

²⁰⁷ (n 203 above)

²⁰⁸ (n 203 above)

Currently, Kenya is the Secretariat for the newly established Africa Institute for Remittances (AIR) Project whose core mandate is to help migrants and other stakeholders implement concrete strategies and operational instruments with a view to use remittances as a development tool for poverty eradication.²⁰⁹ With migration being a key enabler to development in Kenya, the aim is to focus on the positive elements thereof.

This chapter will deal with migration patterns in Kenya. The rights to work, freedom of movement and permanent residence of foreign migrant workers in this East African country will be analysed in comparison with the same rights of foreign migrant workers in South Africa. As Kenya is committed to ensuring the protection of the migrant workers, the different measures that have been put forward by its Government will be analysed together with integration processes put in place to help the foreign migrant workers assimilate in communities.

5.2 Who are the foreign migrant workers in Kenya?

Most of the population in Kenya, as in many other African countries, reside in the rural areas which account for the main internal migration trend in Kenya from rural to urban areas.²¹⁰ However, the subject of this research is on international migration trends in Kenya, and this is characterised by migration from its conflict-ridden neighbours mainly from Somalia, Sudan and Ethiopia. In the 2010 report by the UNHCR,²¹¹ it was estimated that there were approximately more than 374 000 refugees residing in Kenya, and many were residing in Nairobi.²¹² In the 2016 UNHCR report, six years later, the figure almost doubled as Kenya hosted nearly 600,000 registered refugees and asylum seekers.²¹³ The country hosts two of the world's largest refugee camps, that is, Dadaab, the world's largest camp with an official population of 344,000 and Kakuma camp, which accommodates 191,000 refugees.²¹⁴

²⁰⁹ Promoting Decent Work sharing government initiatives and exploring possible GFMD role in the thematic review of the post – 2015 UN Development Agenda

²¹⁰ Country Report – Kenya, page 3

²¹¹ United Nations High Commission for Refugees

²¹² UNHCR 2010

²¹³ UNHCR, Kenya Factsheet (April 2016). At:

<http://data.unhcr.org/SouthSudan/download.php?id=2736> (accessed on 25 September 2017)

²¹⁴ (n 213 above)

There are four types of urban refugees in Kenya.

- i. Recognised refugees permitted to live in urban areas and are assisted by the UNHCR;
- ii. Recognised refugees who have legal permits to live in urban areas without assistance from the UNHCR;
- iii. Recognised refugees mandated to stay in refugee camps but are living in cities and towns without permission; and
- iv. Refugees who are not recognised by the UNHCR or the Government and are living in urban areas illegally.²¹⁵

It is evident from the above that Kenya has taken steps, through help from the UN body UNHCR, to assist the refugees, who form the bulk of foreign migrants in the country. However, it is also clear that for undocumented and unrecognised migrants, they have no legal protection and consequently, cannot access certain benefits and rights within Kenya. They cannot apply for the formal work or business permits and licenses, meaning that they cannot be employed in the formal sector and are thus unable to run enterprises recognised by the state. This then has an impact on their right to work and development as individuals.

5.3 Legal framework for immigration laws in Kenya

The main national legislation on immigration in Kenya is encompassed in the Citizenship and Immigration Act²¹⁶ and Kenya Citizens and Foreign Nationals Management Service.²¹⁷ The Refugee Act²¹⁸ which provides for the right to work for migrants under the same conditions as other foreign nationals, amongst other rights; Refugee Regulations²¹⁹; and the Security Act²²⁰ which strengthens the encampment policy on the restricted movement of refugees in refugee camps, all govern the law on national asylum. Further, Kenya has also ratified several international instruments for the protection of migrants and their workers and some of them include, ICCPR, 1951 Convention and its 1967 Protocol relating to the Status of Refugees which entitle refugees, among other rights, the right to work under the same conditions as other

²¹⁵ (n 210 above)

²¹⁶ Act 2011

²¹⁷ The Kenya Citizens and Foreign Nationals Management Service Act 2011

²¹⁸ Act 2006.

²¹⁹ The Refugee (Reception, Registration and Adjudication) Regulations, 2009.

²²⁰ Act 2014.

foreign nationals ((Articles 17 to 19) and 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.

5.4 Freedom of movement

The key policy affecting vulnerable migrants in the country is the encampment policy, which aims to keep refugees in refugee camps. The Kenyan government has called for international support to help manage the influx of refugees into the country. As this does take time, in the interim the encampment policy sets out rules for relocating all refugees to camps, and under the policy, refugees can be forcibly moved from urban centres into camps.²²¹

Some scholars have argued that refugee law in Kenya is only marked as a matter of security concerns than protection considerations.²²² Refugees and illegal migrants have been and are still a transient issue as well as a threat to national security.²²³ Kenya is a transit point for people moving from Ethiopia and Uganda towards South Africa as well as for migrants from Southern African countries who transit through Kenya in search of economic opportunities in the Gulf countries, North Africa or Europe.²²⁴ The relative economic prosperity in Kenya makes it an attractive destination for people in the region who are unable to find employment in their home countries. Having the highest gross domestic product in the East Africa region and the highest human development score²²⁵, Kenya attracts numerous East African migrants.²²⁶

Freedom of movement has been limited by the Refugees Act of 2006, which sets out the legal and institutional framework for managing refugee affairs in Kenya. It makes it an offence for refugees to live outside refugee camps or transit centres without the permission of the Government. Although this specific section might be interpreted as

²²¹ Smart practices that enhance resilience of migrants – Kenya

²²² Development of Refugee Law in Kenya “The African Angle” by Andrew Maina; 29 March 2016 <http://www.worldpolicy.org/blog/2016/03/29/development-refugee-law-kenya> (accessed 12 November 2017)

²²³ (n 222 above)

²²⁴ IOM, Kenya Country Profile (2015). At: https://publications.iom.int/system/files/pdf/migration_profile_kenya.pdf (accessed 12 November 2017)

²²⁵ United Nations Development Programme (UNDP), Human Development Report (2015). At: <http://hdr.undp.org/en/2015-report> (accessed 25 September 2017)

²²⁶ Smart practices that enhance resilience of migrants – Kenya http://www.ifrc.org/Global/Publications/migration/Smart-practices-summary-report_EN.pdf (accessed 12 November 2017)

limiting the right to freedom of movement of the refugees, it is a way of protecting them before integrating them into the system without proper documentation where they will be vulnerable to the locals who believe that foreign nationals are there to take their jobs. The Government is, therefore, trying to ensure that migrants are properly documented and recorded before integrating them into the system, and this will help with allocation of resources and similar benefits.

In the High Court case of *Kituo Cha Sheria v Attorney General*,²²⁷ the Judge ruled unconstitutional a Government Directive ordering all refugees in Nairobi and other cities to move into the Dadaab and Kakuma camps near the country's northern borders with Somalia and Sudan.²²⁸ The Judge described the Government's order as a violation of the refugees' freedom of movement and right to dignity.²²⁹ However, this decision was reversed in the case of *Samow Mumin Mohamed & 9 Others v Cabinet Secretary*,²³⁰ a case which was brought by a group of Somali businessmen based in Nairobi wherein they challenged a Directive issued by the Government ordering that all refugees residing outside the designated refugee camps of Kakuma and Dadaab return to their respective camps with immediate effect.²³¹ There were no other designated refugee camps outside these areas, and any refugee found flouting this directive would be dealt with in accordance with the law. Unlike in the *Kituo Case*, the same Judge indicated that the complainants did not demonstrate with precision how the directive violated their fundamental rights and freedoms as individuals.

One of the disincentives which violates migrants' right to freedom of movement in Kenya is the government's policy of restricting officially sanctioned movement between the camps and other parts of Kenya.²³² Once registered in Dadaab's camps, refugees are not permitted to travel unless they fulfil one or more unpublished criteria for obtaining a "movement pass" co-signed by the Kenyan authorities and UNHCR. If the

²²⁷ *Kituo Cha Sheria and others v. The Attorney General, Kenya: High Court*, 26 July 2013

²²⁸ Reversal of last year's court ruling on urban refugees in Kenya is quite stunning – by Bill Frelick, 17 July 2014

²²⁹ (n 227 above)

²³⁰ *Samow Mumin Mohamed & 9 others v Cabinet Secretary, Ministry of Interior Security and Co-Ordination & 2 others* [2014] eKLR

²³¹ Press Statement by Cabinet Secretary For Interior & Coordination of National Government on Refugees and National Security issues on 26th March 2014.

²³² From Horror to Hopelessness Kenya's Forgotten Somali Refugee Crisis, March 2009, <https://www.hrw.org/report/2009/03/30/horror-hopelessness/kenyas-forgotten-somali-refugee-crisis> accessed on 25 September 2017

police stop a refugee registered in the camps traveling without a movement pass, the refugee risks being arrested and fined, and, in worse cases, detention and refoulment.

An asylum seeker is issued an asylum seeker pass upon applying for refugee status, which is replaced by a refugee identification card after his application is granted. All asylum seekers and refugees are required to live in their designated refugee camps and need a movement pass to travel anywhere outside the camp.²³³ This restriction does limit the refugee's right to freedom of movement.

Although Kenya is a signatory to the UN Convention on human rights as well as refugees, and the AU Convention on refugees, it has so far taken a "hands-off" approach on the issues of refugees.²³⁴ After a period of ten years in the country, the Government of Kenya still maintained that the refugees were aliens in transit, therefore, refusing to extend legal rights to them. Now with the recent terrorist attacks, this has prompted Kenya to introduce changes to its refugee policies. One notable change was the introduction of an encampment policy requiring all asylum seekers and refugees in urban areas to relocate to designated camps. Although refugees have been allowed to engage in informal employment in the past, this appears to be getting increasingly difficult as the encampment policy constrains their ability to move about the country. In addition, work permits are rarely issued to refugees. Similarly, while refugees are technically free to apply for naturalisation if they meet certain requirements, which on their face are not prohibitive, in practice Kenya does not naturalise refugees.²³⁵ The encampment policy confines the refugee to one camp thus limiting both their right to freedom of movement as well as right to work. If they are confined to one place, they cannot freely move to look for job opportunities elsewhere, thereby, forcing them to take up employment in that specific camp which might not be their employment of choice.

²³³ Refugee Law and Policy: Kenya; <https://www.loc.gov/law/help/refugee-law/kenya.php> accessed on 25 September 2017

²³⁴ Women, Migration and Citizenship: Making Local, National and Transnational Connections by Alexandra Dobrowolsky

²³⁵ Refugee Law and Policy: Kenya

5.5 The right to work

Kenya has ratified seven of the eight ILO Core Conventions in addition to six of the fundamental UN treaties on human rights addressing civil and political rights, economic and social rights.²³⁶ Further, Kenya is party to the African Charter and has submitted itself to the jurisdiction of the African Court for Human Rights. The Government has committed itself to implement the rights guaranteed by treaties as well as regularly report on the progress to the UN treaty bodies.²³⁷ Of interest to this research is the fact that Kenya has ratified the ILO Conventions 97²³⁸ and 143²³⁹ which basically provide for the rights and protection of migrant workers. These have been incorporated in the local legislation through the Employment Act²⁴⁰ which protects migrant workers against discrimination and the foreign contracts of service. In terms of Section 5 of the Act, the Government is required to promote, guarantee equality of opportunity and protect the rights of migrants and their families.²⁴¹

It is evident through this legislation that the Government of Kenya recognises the challenges of foreign migrant workers in obtaining decent work. In addition to legislative measures, it has put in place a Task Force to consider matters relating to the management and administration of foreign employment and labour migration to ensure that effective measures are put in place for the protection of the rights of migrants.²⁴² The main aim of the Task Force is to help identify gaps in the protection of the rights of migrants which would ordinarily affect their chances of obtaining decent work. Further, the recommendations of the Task Force aims to assist in highlighting areas of policy, legislation and administrative procedures that need to be reviewed to ensure decent work for migrants.²⁴³

²³⁶ Country Report – Kenya, page 6

²³⁷ (n 236 above) 6

²³⁸ C097 - Migration for Employment Convention (Revised), 1949 (No. 97)

²³⁹ C143 - Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

²⁴⁰ Employment Act Chapter 226 of 2012

²⁴¹ Section 5 Employment Act

²⁴² Session 1: Promoting decent work sharing government initiatives and exploring possible GFMD role in the thematic review of the post-2015 UN development agenda, page 1

²⁴³ (n 242 above) 1

In furthering the protection of the rights of the migrant workers, the Kenyan Government has taken some initiatives to upgrade their labour laws. Some of the examples include:

- I. Protection of migrant workers in the Constitution and Employment Act of 2007;
- II. Reviewing of the Labour Institutions Act and Labour Relations Act to ensure agencies do not exploit migrant workers;
- III. Negotiating bilateral and multilateral agreements to ensure that the rights of foreign migrant workers are protected; and
- IV. Adoption of the Diaspora Policy which contains measures for the protection of migrant workers and provides support to ensure effective integration upon return and the Foreign policy which provides for their protection.²⁴⁴

Work or residence permits are issued to any non-Kenyan wishing to engage in employment in Kenya whether in gainful employment or voluntary service. The work or residence permits issued by the Department are classified from A to M inclusive and are issued under Kenya Citizenship and Immigration Act 2011 of Laws of Kenya.²⁴⁵

In theory, refugees in Kenya are free to engage in any form of self-employment without the need to obtain formal authorization, and they may take paid employment after obtaining a work permit.²⁴⁶ The Kenyan Refugees Act provides that “*every refugee and member of his family in Kenya shall, in respect of wage-earning employment, be subject to the same restrictions as are imposed on persons who are not citizens of Kenya.*” Refugees and their spouses may apply for and obtain a class M work permit.²⁴⁷ Although obtaining a two-year work permit previously cost refugees US\$700, this is no longer the case as Kenya has removed this fee and made permits available free of charge.

Kenya hosts a large asylum-seeking and refugee population, mainly because of its geographical location in a conflict-prone area. This population is managed jointly by

²⁴⁴ (n 242 above) 2

²⁴⁵ Ministry of interior and coordination of national government: Directorate of Immigration and registration of persons

²⁴⁶ Refugee Law and Policy: Kenya; <https://www.loc.gov/law/help/refugee-law/kenya.php> accessed on 25 September 2017

²⁴⁷ Work permit issued to Conventional Refugees. A holder of a class M work permit “may engage in any occupation, trade, business or profession

the country's DRA and the UNHCR under the 2006 Refugees Act and the 2009 Refugees Regulations.²⁴⁸ Further, Kenya is a signatory to several international treaties applicable to individuals seeking asylum and protection, such as the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol.²⁴⁹ Kenya is also a state party to the 1969 AU Convention Governing the Specific Aspects of Refugee Problems in Africa.²⁵⁰

While refugees in Kenya may theoretically work, the practice on the ground is different. The Refugee Consortium of Kenya stated in 2012 that the government did not issue work permits to asylum seekers or refugees except in "a few isolated cases."²⁵¹ As a result, refugees and asylum seekers are forced to seek employment in the informal sector, but this is also very difficult due to the encampment policy, which restricts the ability of refugees and asylum seekers to move about the country freely.

5.6 Permanent residency and integration

In Kenya, migrants who have entered the country as refugees cannot apply for permanent residence nor citizenship and despite the legislative framework, Kenya does not grant citizenship to refugees. Further, the 2010 Kenyan Constitution²⁵² provides that "a person who has been lawfully resident in Kenya for a continuous period of at least seven years and who meets other conditions prescribed in the relevant legislation may be naturalized." Kenyan law on citizenship provides additional conditions, including the ability to speak Kiswahili or a local language and the capacity to make a substantive contribution to Kenya's development.²⁵³ Despite the legislative framework, Kenya does not grant citizenship to refugees.

²⁴⁸ (n 246 above)

²⁴⁹ 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, UNHCR

²⁵⁰ AU Convention Governing Specific Aspects of Refugee Problems in Africa, African Commission on Human and Peoples' Rights

²⁵¹ Refugee Consortium of Kenya, *Asylum under Threat: Assessing the Protection of Somali Refugees in Dadaab Refugee Camps and Along the Migration Corridor 15* (June 2012)

²⁵² The Constitution of Kenya [Kenya], 27 August 2010

²⁵³ Citizenship and Immigration Act Section 13.

5.7 Challenges for foreign migrant workers' rights in Kenya

Challenges faced by migrants normally take the same form across the world. In the context of this research, some of the migrants in Kenya face challenges as urban refugees operating businesses in Nairobi. In this environment, they informally face harassment and extortion of bribes from local government and law enforcement officials since they do not have the correct documentation to allow them to operate their businesses. Human trafficking is also rife in the neighbourhoods dominated by refugees, and this places women and children at great risk as they form the larger group which is trafficked to Kenya from neighbouring countries, including Ethiopia, Eritrea, Somalia, Uganda and Rwanda²⁵⁴.

Another serious problem in communities where foreign migrant workers integrate themselves, whether with the correct documentation or not, is the issue of xenophobia. This is not only a problem in Kenya, but it is a global issue. In Kenya, urban Somali refugees face the challenge of xenophobia from the locals, and they are also the target of arrests of illegal migrants. As a result of urban refugees living separately, integration in host communities is not always seamless. For example, in Nairobi, the Eastleigh area is known as a place where Somali refugees live.²⁵⁵

Kenya's encampment policy legally allows refugees to stay in camps and provides the refugees with access to basic services. These basic services are a positive move in helping the illegal migrants have decent living environment and access to basic services. Outside the camps, refugees can find it difficult to obtain legal permits to stay in the country thus limiting their rights to freedom of movement, permanent residence and work. Further, the encampment policy has meant that refugees in camps live in their own isolated communities. These micro-economies have their own small and medium-sized businesses, and their relative prosperity compared to surrounding rural areas has sometimes caused tensions with host communities.²⁵⁶

Kenya currently unlawfully confines refugees to camps, denying them their freedom of movement and choice of residence, in contravention of the 1951 Refugee Convention, although thousands have also registered in Nairobi. Under this policy, police arrest

²⁵⁴ (n 251 above) 5

²⁵⁵ (n 239 above)

²⁵⁶ (n 239 above)

refugees traveling without (and at times with) permission, extort money, and sometimes take them to court in Garissa where they are fined or sent to prison.²⁵⁷

Most refugees in camps are unable to generate sufficient income to sustain themselves and their families as they cannot work and heavily rely on the World Food Programme for their survival, while urban refugees struggle to find work, and if they do find work, it is in the informal sector selling goods on the streets.²⁵⁸ Funding is also a huge problem for the programmes that assist with providing for the refugees in the refugee camps.

Access to education is also another challenge faced by migrants, and more particularly, refugees as it is quite difficult to enroll their children in schools, both for refugees in and out of the refugee camps.

Another problem which is not necessarily a challenge for the migrants themselves *per se*, is that refugee camps have contributed to the degradation of the surrounding environment. The large populations in camps place a strain on the surrounding natural environment, more particularly, wood collection by refugees can have detrimental effects on the environment.²⁵⁹

Political instability leaves many camps vulnerable to attacks. The Dadaab area is threatened by armed bandits and the presence of Islamist militias such as Al-Shabaab. There are also periodic outbreaks of clan feuding. Several migrants interviewed in focus groups said that they were afraid to live in camps because they were worried about their personal safety.²⁶⁰

One of the challenges in mixed migration and protection of migrants in Kenya is the failure by law enforcement officers to distinguish between criminals, irregular migrants and asylum seekers.²⁶¹ Some of the reasons for the arrest and detention of refugees

²⁵⁷ "Welcome to Kenya" Police Abuse of Somali Refugees 17 June 2010 <https://www.hrw.org/news/2010/06/17/kenya-police-abuse-somali-refugees> (accessed 25 September 2017)

²⁵⁸ Smart practices that enhance resilience of migrants – Kenya http://www.ifrc.org/Global/Publications/migration/Smart-practices-summary-report_EN.pdf (accessed 12 November 2017)

²⁵⁹ (n 258 above)

²⁶⁰ (n 258 above)

²⁶¹ Regional Mixed Migration Secretariate: Kenya "Key mixed migration characteristics" <http://www.regionalmms.org/index.php/country-profiles/kenya> accessed on 25 September 2017

by Kenyan police stems from ignorance of the correct procedures and ineffective application of refugee law (same as in SA).

5.8 Somali refugees in Kenya

Somali refugees have stayed at the Dadaab camp for more than 25 years. The Dadaab camp which is in the north-eastern part of Kenya and not far from the Somalia border was set up in the early 90's when Somalia collapsed. Initially, the Somali's fled fighting between clans in their country, which led to massive displacement and killings of civilians.²⁶² Over the past decade, the reason for fleeing has shifted to that of a repressive and abusive rule of the Islamist armed group Al-Shabab, which continues to control large parts of Somalia, particularly rural areas.²⁶³ Then, five years ago, famine-hit Somalia and a new wave of people arrived in Dadaab, swelling the numbers in the camp further.²⁶⁴ In 2008 alone, almost 60,000 Somali asylum seekers, 165 every day, crossed Kenya's officially closed border with Somalia to escape increasingly violent conflict in Somalia and to seek shelter in three heavily overcrowded and chronically under-funded refugee camps near Dadaab town in Kenya's arid and poverty-stricken North Eastern Province.²⁶⁵ The prolonged stay of the Somali migrants is not in any way illegal, but it should be a concern to all as long-lasting solutions for them must be established as they cannot return to Somalia.²⁶⁶

Although Kenya hosts over half a million refugees, the conditions in the refugee camps are far from ideal with overcrowding common, and a strict encampment policy. In most cases, displacement is protracted, and refugees remain in the camps for years without freedom of movement and without the opportunity to access higher education, employment or to start businesses.²⁶⁷

²⁶² Nothing to Go Back to – From Kenya's Vast Refugee Camp by Birgit Schwarz 26 May 2016 <https://www.hrw.org/news/2016/05/26/nothing-go-back-kenyas-vast-refugee-camp> (accessed 25 September 2017)

²⁶³ (n 262 above)

²⁶⁴ (n 262 above)

²⁶⁵ From Horror to Hopelessness Kenya's Forgotten Somali Refugee Crisis, <https://www.hrw.org/report/2009/03/30/horror-hopelessness/kenyas-forgotten-somali-refugee-crisis> accessed on 25 September 2017

²⁶⁶ Kenya: Integrate Somali Refugees Into Kenya Society By Duke Mwanha <http://allafrica.com/stories/201507160388.html>

²⁶⁷ Regional Mixed Migration Secretariate: Kenya "Key mixed migration characteristics" <http://www.regionalmms.org/index.php/country-profiles/kenya> accessed on 25 September 2017

Kenya has been very receptive to a large population of refugees. However, the Government has not really been keen to integrate them in communities. A tripartite agreement signed in 2013 by the UNHCR, and the governments of Kenya and Somalia set out a framework for voluntary repatriation of Somali refugees. It was expected that a few Somalis, if not all, would voluntarily return home. While both civil-society organisations and the UNHCR welcomed the availability of voluntary repatriation for Somali refugees who wished to return, they strongly cautioned against large-scale refugee returns given the highly insecure nature of many areas of Somalia.²⁶⁸ At that stage prospects of local integration were highly unlikely, but this was one of the two options, of which resettlement to third countries had not been considered.

The EAC Common Market Protocol signed by the respective countries' heads of state entered into force on 1 July 2010. The Protocol allows for free movement of citizens in the East African Regions. Integrating a displacement framework into the EAC free movement regime may contribute to enhancing migration management in the region.²⁶⁹

Kenya has never officially adopted a policy requiring Somali (or other) refugees to stay in camps. However, in practice, Kenya and UNHCR have used a few disincentives to limit the number of refugees choosing to live or move outside of camps. The first disincentive is the shared policy of the Kenyan government and UNHCR that refugees cannot receive humanitarian assistance outside of camps.

A disincentive for Somalis to live outside the camps has been the UNHCR's lengthy refugee status determination procedures in Nairobi, compared to swift procedures in Dadaab's camps. In early 2009, Somalis still waited up to nine months to have their status determined, leaving them vulnerable to police abuse in the interim. In March 2009, UNHCR said it was seeking to cut the average time to two months.

²⁶⁸ Kenya: Integrate Somali Refugees into Kenya Society by Duke Mwanacha
<http://allafrica.com/stories/201507160388.html>

²⁶⁹ Kenya's implementation of the Smuggling Protocol in response to the irregular movement of migrants from Ethiopia and Somalia by Noela Barasal; Lovell FernandezII - Law democr. Dev. vol.19 Cape Town 2015

5.9 Conclusion

This Chapter gave a detailed analysis on the Kenyan immigration laws which, like South Africa to a certain degree, were designed for security needs. Illegal migrants in Kenya are mainly refugees who come from the neighbouring countries seeking refuge in Kenya as the more stable country in the region. As a result of this trend, there is a legislative framework designed to cater for refugees, but due to the changing times and with more conflicts, more issues of human rights violations and corruption mar the system, legislation needs to be adapted to suit the changing needs.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This study has examined the situation of foreign migrant workers in South Africa and Kenya in relation to their rights to work, freedom of movement and permanent residency and the challenges that they face in accessing these rights. Both legal and illegal migrants were discussed but with more emphasis on the illegal migrant workers as they are more vulnerable in communities.

Through dispensation permits, the South African Government has tried to regularise illegal migrants thus allowing them to work, do business or study in South Africa. However, this has not completely addressed their challenges as there is still the issue of integration in communities. Therefore, although migrant workers might have the right to work, communities need to be educated about the benefits of migration, development of mechanisms and systems to help integrate the foreign migrants in communities.

South Africa, because of its geographical location and vibrant economic climate within the region, hosts a large population of both legal and illegal foreign migrants. The Immigration and Refugee Acts govern the immigration matters in South Africa. The White Paper (2017) puts forward proposed policy changes to align the immigration laws with international standards. Kenya has also recently put in place a national legal framework governing refugee matters and assumed partial responsibility for the refugee status determination (RSD) process. It did this when it took a step to implement its obligations under international law by enacting the Refugees Act in 2006, and its subsidiary legislation, the Refugees (Reception, Registration and Adjudication) Regulations, in 2009 (Refugees Regulations).

It is evident that both countries have mechanisms in place to ensure adherence to international norms and standards when it comes to immigration and refugee matters. However, in practice, these policies are implemented partially or with great difficulty due to factors such as corruption, lack of knowledge and expertise of the different participating officials, financial constraints, among other problems. These have been discussed in the preceding chapters and in conclusion, recommendations will be

provided on how best to implement the legislation that is in place to advance the rights of foreign migrant workers.

Although it is a delicate balance to strike, as the unskilled migrants will find their way into the system giving rise to the migration challenges, having alternative visa options for the low-skilled migrant workers would help solve the problem of irregular migrants. There needs to be the development of an effective framework for safe and legal migration within well-managed policies. State actors and stakeholders working with refugees and migrants must be trained and empowered for them to provide effective and sufficient protection and assistance to asylum seekers coming into South Africa. Further, the Government needs to develop mechanisms for identifying and addressing vulnerabilities of migrants, through the integration processes in communities; as a starting point as there will be a base to start from.

6.2 Develop effective frameworks of safe and legal migration and well-managed migration policies

The starting point would be for the government to educate people on the importance and benefits of migration. Foreign migrant workers contribute to the economic growth of the country through skill labour and investments.

It was seen through the research that employers take advantage of undocumented migrants and often pay them meagre wages and make them work under unbearable conditions as they are under the impression that the illegal migrants have no recourse under the law. Migrant workers need to be made aware of their rights through forums that can be established. Once they know the law and their rights, they can then be confident to approach the appropriate channels without fear based on their non-documentation.

Similarly, employers must also receive information regarding the rights of foreign migrant workers and guidance on what to do and where to seek help when faced with a situation where they find themselves with an undocumented migrant worker. Both South Africa and Kenya have labour law policies that deal with recourse for unfair treatment of migrant workers, but this should be put in a starter kit, for example, when a foreigner has been offered employment, the starter kit would form part of the package that also gives guidance on visa application processes and where to seek help and guidance.

Instead of the Government incurring more costs through deportations and acting as a shuttle service to take the illegal migrants to their home countries to see their relatives and then returning to the country illegally again, they should rather identify the root cause for their migration. They should engage in dialogues with the home states and see how they can help them deal with the issues in their countries, which are causing their citizens to emigrate to Kenya and South Africa.

In South Africa, dispensation projects have been a short-term solution for an ongoing illegal migration problem. It is a true assertion that the number of illegal Zimbabweans in South Africa has increased significantly since 2009 due to the deteriorating economic and political climate in their country. Despite having the new regime which came into power after the ousting of former President Robert Mugabe in November 2017, there are still many illegal Zimbabweans in South Africa, who remain exposed as the evolution of the dispensation permits did not cater for new applicants but only those who started on the initial DZP. Therefore, to cover the whole spectrum of the low-skilled illegal migrants, perhaps dispensation programmes should be reviewed annually, instead of every three years to accommodate new applicants as the problem of illegal migrants is a long-term problem that needs a long-term solution.

In as much as dispensation projects are welcome in that they legalise the illegal migrants allowing them to work, conduct business or study in South Africa, the fact that they are issued for short periods of time does not offer security to the beneficiaries of these projects. For example, the DZP was for four years, then the ZSP was for three years, and now the ZEP is for another three years. The uncertainty in these permits leaves the beneficiaries in limbo, and it is suggested that the government consider a long-term solution such as permanent residence, as these migrants have now established their lives in South Africa and have no intention to return to their home countries.

6.3 Capacitate state actors and stakeholders working with refugees and migrants to provide effective and sufficient protection and assistance

The proposal in the White Paper is for the establishment of asylum centres in the main provinces for asylum seeker's applications to be processed quickly thereby determining their refugee status sooner. This is a good move on the part of DHA. However, as was seen from the Kenyan situation where they have refugee reception centres, which are marred with significant problems, such as delays in processing recognition of refugee status, protection of rights, integration, etc., South Africa can learn from this situation and endeavour to have well-managed asylum centres. This can be achieved through intense training for the officials who will work in these centres and put in place stringent measures to deal with issues such as corruption. For both South Africa and Kenya, it is important that when screening personnel to work at the asylum or refugee centres, the selection criteria must insist on candidates having a background in psychology or similar professions as they are dealing with vulnerable people and need to have a humanitarian approach to the entire situation. For those who will not qualify for refugee status and therefore, return to their countries, there should be counselling available for them, therefore, professionals equipped to deal with people in vulnerable situations must be positioned strategically. This would mean that the Home Affairs Departments for both countries would need to partner with other government departments and stakeholders to provide a one-stop shop at these centres.

6.4 Respect and protect rights of all migrants

Based on the Kenyan comparative study in Chapter 5 of this thesis, in addition to legislative measures, Kenya has put in place a Task Force to consider matters relating to the management and administration of foreign employment and labour migration to ensure that effective measures are put in place for the protection of the rights of migrants. South Africa could also take this approach, and as the DHA is currently holding discussions with different stakeholders over the White Paper (2017), they could identify prospective parties to the task team from these meetings, for example, lawyers, Human Rights Commission, non-governmental organisations, academics, etc. The Task Force will assist in identifying gaps in the protection of the rights of

migrants which would ordinarily affect their chances of obtaining decent work, decent living and other basic human rights. Their recommendations will help in highlighting areas in policy, legislation and administrative procedures that need to be reviewed to ensure decent work for migrants and debates on the proposals in the White Paper (2017) are a good starting point.

The mandate of the task team could extend to identifying ways to integrate migrants in communities. Currently, there are no proper records of migrants and no integration process in communities. The task team can help with registering migrants in the different provinces so that a full record is available. They should work with the local communities to integrate migrants in the different communities.

6.5 Working mechanisms for family reunifications

When dispensation programmes are implemented, they should be designed in a way to accommodate the entire family. Currently, the ZEP and LSP are mainly for people who want to work, conduct their own businesses or study in South Africa. This then leaves out the accompanying family, that is, spouses and children who are not working or studying. Further, there needs to be provisions made for children born to ZEP or LSP permit holders in South Africa to be able to apply for their permits in South Africa. As an example, a ZSP permit holder who was working in South Africa had his accompanying spouse and child who were not working or studying. They needed to apply for permits to accompany the main applicant, and they were required to travel to Zimbabwe and submit their permit applications at the South African Mission, before the VFS system begun. This disrupted the family unit and was also very costly²⁷⁰. Therefore, these issues need to be taken into consideration in the design of the dispensation projects.

6.6 Develop mechanisms for identifying and addressing vulnerabilities of migrants

With programmes such as the dispensation projects which seek to regularise the low-skilled migrant workers, instead of simply regularising them and then leaving them to their own devices, forums should be created so that these migrants can meet and voice their concerns, have experts who can correctly educate them on the

²⁷⁰ Example of case worked on during the author's work

rights available to them and how to access these rights. For example, most employers of domestic workers are not aware that they should register for UIF. Therefore, a forum where both parties can be properly educated could be established with presence in all provinces so that they are easily accessible to everyone.

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