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Undocumented migrants and the right to fair labour practices

By

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DECLARATION OF ORIGINALITY

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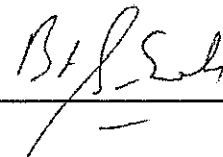
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ABBREVIATIONS

ADR	African Development Review
AEB	Africa Economic Brief
AHRLJ	African Human Rights Law Journal
AI	Africa Insight
ASR	Africa Security Review
AT	Africa Today
AU	African Union
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
EU	European Union
JAL	Journal for Africa
JEBS	Journal of Economics and Behavioural Studies
JP	Journal of Poverty
JPA	Journal of Public Administration
IJGLS	Indiana Journal of Global Legal Studies
ILJ	Industrial Law Journal
ILO	International Labour Organisation
LRA	Labour Relations Act 66 of 1995
MFR	Marriage and Family Review
OECD	Organization for Economic Co-operation and Development
RD	Redfame Publishing
RJR	Rand Joint Report
PB	Policy Beat
SADC	Southern African Development Community

SAJPS	South African Journal for Political Studies
SAMLJ	South African Mercantile Law Journal
SAMP	South African Migration Programme
SAMPJ	Southern African Migration Programme Journal
SJTPSD	The Scientific Journal for Theory and Practice of Socio-economic Development
SPS	Space Population Societies
TA	The Atlantic
TJP	Law & Equality: A Journal of Theory and Practice
TWQ	Third World Quarterly
UK	United Kingdom
UN	United Nations
USA	United States of America

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SUMMARY

Chapter 1 introduces the rationale behind and overview of this study. Chapter 2 looks at the right to fair labour practices from an international and domestic view. This involves a survey of the International Labour Organisation (ILO) and its Conventions, and the stance of the United Nations (UN), African Union (AU), and Southern African Development Community (SADC) concerning the rights and protection of irregular migrants in the workplaces of their destination countries.

The right to fair labour practices is contained in the Bill of Rights. In Chapter 3, this study considers the right from a constitutional and policy framework perspective. It takes into account the Bill of Rights, allied rights to life and equality of treatment, the actual right to fair labour practices, and the Green and White Papers on International Migration.

Chapter 4 looks at the key South African legislation regulating migrants – the Immigration Act and the Refugees Act.

Chapter 5 explores the right to fair labour practice from the context of the LRA as well as our Courts. This involves a look at seminal decisions of the Commission for Conciliation, Mediation and Arbitration and Labour Court that have defined the status of irregular migrants in relation to the South African workplace.

In Chapter 6, this study undertakes a survey of the workplace rights and regulation insofar as irregular migrants are concerned. The focus jurisdictions are Kenya and the United States of America (USA).

Chapter 7 is a summary of the entire study, highlighting the salient aspects of the right to fair labour practices and responding to the key questions that gave rise to this study. It also contains some recommendations on how the plight of undocumented migrants can be alleviated.

CHAPTER 1: INTRODUCTION

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1.1 Introduction

This study examines the right to fair labour practices envisaged in section 23 of the Constitution. The question is whether undocumented migrants are entitled to this right and any social benefits within the South African workplace.

Migration involves population movement. It is neither unique nor new to South Africa.¹ It is generally categorized into three classes, namely: labour mobility; refugee movement and permanent migration. Migrant labour falls under the category of labour mobility and it constitutes the majority of all migrants.²

Some of the identified common causes of migration are socio-cultural factors, geographical proximity, precedent, population growth and pressures, environmental factors, poverty, hunger, environmental stress, culture, local and global economic factors and political factors.³ Migration is also influenced by conflicts, famine and overpopulation in the countries of origin.⁴ Restrictive VISA requirements have also been identified been added to the list of factors.⁵

There are no accurate records of the actual number of undocumented migrants living in South Africa.⁶ They evade authorities and any attempt to count them. As a result,

¹ Baker and Aina (1995) 42; Foote *et al* (1993) 258; Castles *et al* (2014) 14.

² Kok *et al* (2005) 6.

³ Baker and Aina (1995) 11, 48, 54; Douglas and Taylor (2004) 31; Klaaren and Rutinwa (2004) 58; Foote *et al* (1993) 258, 272; Iwu *et al* *SJTSPD* 86.

⁴ Cross *et al* (2006) 25.

⁵ Akinboade *et al* *JEBS* (2017) 201; Foote *et al* (1993) 299.

⁶ South Africa has in recent years experienced an increase in the number of undocumented migrants. According to Koser (2006) 6, it was estimated that there are between 2.5 and 8 million irregular migrants in South Africa, with almost all of them from sub-Saharan African countries.

most of the data available is speculative.⁷ According to the Migration Data Portal run by the International Organization for Migration (IOM), in 2017, South Africa was home to four million immigrants. This estimate is based on the work of the Population Division of the UN's Department of Economic and Social Affairs (UNDESA). UNDESA suggested that the number of immigrants in South Africa has doubled between 2010 and 2017.⁸ Undocumented migrants are said to enter the Republic at a rate of one every ten minutes.⁹

Irregular migration exerts pressures on social services, employment opportunities, security risks and the threat to political stability.¹⁰ In developing economies, irregular migration has resulted in competition for employment and other resources between the migrants and citizens leading to hostility between the migrants and citizens.¹¹

The Bill of Rights in South Africa's Constitution¹² confers the right of freedom of movement¹³ and to leave the Republic¹⁴ on citizens and foreigners alike. The Immigration Act,¹⁵ the South African Passports and Travel Documents Act¹⁶ and the Refugees Act give expression to these rights.¹⁷ The Department of Home Affairs is vested with the responsibility of administering these pieces of legislation.

The Constitution confers the right to an environment that is not harmful to their health or well-being.¹⁸ This obviously includes the workplace. It is arguable, however, whether the practical application of these rights is consistent with the South Africa government's international obligations and those contained in the Bill of Rights.¹⁹ Undocumented migrants have also become vulnerable to exploitation and forced

⁷ Muller and Van Vuuren *Commercium* (2006) 41.

⁸ <https://africasacountry.com/2018/10/how-many-immigrants-live-in-south-africa>.

⁹ Twala (2012) 51.

¹⁰ Solomon *African Security Review* (1996) 12; Sawa (2016) 16; Godfrey Mugoti (2009) 476.

¹¹ Settler and Mpofu (2017) 2; Sagger *et al* (2012) 2.

¹² Act 108 of 1996.

¹³ Section 21(1) of the Constitution.

¹⁴ Section 21(2) of the Constitution.

¹⁵ Act 13 of 2002.

¹⁶ Act 4 of 1994.

¹⁷ Act 130 of 1998.

¹⁸ Section 24(a).

¹⁹ Meyer *SAMLJ* (2009) 833.

labour.²⁰ They are employed at significantly lower and non-competitive rates. Some employers flout legislative prescripts regarding their employment.²¹

1.2 Research problem and questions

In recent spates of xenophobic attacks, foreign nationals have been accused by South African citizens of "taking our jobs".²² In addition, they are stigmatized as criminals and responsible for the rise in violent crimes blamed as conduits for the spreading of diseases. An assertion has been made that South Africa has become increasingly xenophobic, regarding foreigners as a threat to their future economic well-being²³ and job security. Attitudes are particularly negative towards migrants from other African countries.²⁴ Muller and Van Vuuren also explain that xenophobia is a sentiment globally considered to be confined to "individuals at the lower end of the socio-economic and educational spectrum".²⁵

A 2010 survey by the Southern African Migration Programme found that 60% of South Africans believe immigrants "take jobs", whilst 55% believe that they worsen crime. These are alarming numbers for a country that has been labeled a favourite destination for migrants, specifically in Africa.²⁶ However, Cross *et al* quite correctly assert that the prosperity of countries such as South Africa, Botswana, Gabon Côte d'Ivoire and Nigeria was built by migrant labour.²⁷ Undocumented migrants from Lesotho, Zimbabwe and Mozambique worked in farms on Mpumalanga, Free State and Limpopo²⁸ and others in the mineral rich provinces of the country.

²⁰ Waite *et al* (2015) 13, 44, 57 and 215 - 216.

²¹ Baker and Aina (1995) 50.

Klaaren and Rutiwna (2004) 43; McDonald (2000) 38.

²² <https://city-press.news24.com/Voices/foreigners-are-not-taking-our-jobs-the-government-is-failing-to-create-jobs-20190416>; <https://mg.co.za/article/2019-09-04-sa-is-burning-femicide-xenophobia-and-protests>.

²³ Cross *et al* (2006) 35; Muller and van Vuuren 2006 *Commercium* 42.

²⁴ Crush and Williams "International Migration and Development: Dynamics and Challenges in South and Southern Africa" 16.

²⁵ Muller and van Vuuren *Commercium* (2006) 42.

²⁶ Chaskalson (2017) <https://www.groundup.org.za/article/do-immigrants-steal-jobs-south-africa-what-data-tell-us/>; Bhengu 2018 <https://www.timeslive.co.za/news/south-africa/2018-08-20-foreigners-steal-our-jobs-say-locals/>; Iwu *et al* SJTPSD (2015) 84.

²⁷ Cross *et al* (2006) 35; Iwu *et al* SJTPSD (2015) 84.

²⁸ Cross *et al* (2006) 37; Kok *et al* (2006) 39.

Post-apartheid South Africa received an influx of migrants who have settled in the informal sector.²⁹ The unemployment rate in South Africa rose from 27.2 percent in 2017, to 29 percent in the second quarter of 2019.³⁰ This is the highest unemployment rate since the third quarter of 2017.³¹ Are the sentiments by locals justified? Very little is known about the actual labour market effects of migration on South Africa.³²

According to Snyman, the Courts have quite correctly demonstrated "a readiness to broaden labour security provisions to include irregular migrants".³³ In the decision of *Discovery Health Limited v CCMA*³⁴ the Labour Court held that the definition of "employee" in the LRA contemplates an employment relationship that transcends an employment contract.

This study aims to answer the following questions:

- i. What are the international and regional standards that should be considered when dealing with undocumented migrants?
- ii. What labour rights are conferred to undocumented migrants within the South African legislative and policy framework?
- iii. Are these sufficient to protect the rights of undocumented migrants? If not, what should be adapted?

1.3 Aim and significance of the study

Undocumented migrants are active in the agriculture, hotel and restaurant, construction, domestic and informal trading sectors of the economy.³⁵ They are often prepared to work for extremely low rates. In addition to voluntary migration, some undocumented migrants are trafficked into the country to work.

²⁹ Cross *et al* (2006) 26; Trimikliniotis *et al Globalisation and Migrant Labour in a 'Rainbow Nation': a fortress South Africa?* 1326.

³⁰ Quarterly Labour Force Survey (QLFS) – Q2:2019.

³¹ Trading Economics 2019 <https://tradingeconomics.com/south-africa/unemployment-rate>.

³² Chaskalson 2017 <https://www.groundup.org.za/article/do-immigrants-steal-jobs-what-data-tell-us/>. south-africa-

³³ Snyman (2013) 121.

³⁴ *Discovery Health Limited v CCMA* (2008) 29 ILJ 1480 (LC).

³⁵ Solomon African Security Review (1996) 15.

At the end of the study, I endeavour to outline succinctly the rights of undocumented migrants. Where are we as a country in terms of mechanisms to give effect to those rights and what recommendations can be made to address identified shortcomings.

1.4 Research methodology

The nature of this study will be investigative and also incorporate a comparative approach on the labour rights of undocumented migrants in South Africa having regard to international standards as well. This dissertation essentially consists of a literature review, drawing information from various sources such as legislation, case law, conventions, journal articles, books, papers and web articles. The *Potchefstroom Electronic Law Journal* referencing style will be used.

1.5 Overview of Chapters

Chapter 2 contains a survey of international and regional norms concerning migration generally and undocumented migrants. It will look at organisations such as the International Labour Organisation, African Union and the Southern African Development Community.

Chapter 3 focuses on the constitutional and policy framework of the South African government concerning undocumented migrants. Chapter 4 will then traverse the specific legislation dealing with the rights of migrants within the borders of South Africa.

Chapter 5 will particularly explore the right to fair labour practices as it is given expression in the Labour Relations Act. This will also include a conspectus of relevant jurisprudence where this right has been interpreted concerning undocumented migrants within the workplace in South Africa.

In Chapter 6, this study looks at the rights of undocumented migrants in the workplace in Kenya, the United States of America and Netherlands. Finally, conclusions and recommendations are made in Chapter 7.

**CHAPTER 2:
THE INTERNATIONAL COMMUNITY AND NORMS**

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"There can be few people in either industrial or less developed countries today who do not have personal experience of migration and its effects".³⁶

2.1 Introduction

Migration significantly affects the migrants, as well as on the sending and receiving countries.³⁷ In Africa, most migrants target destinations with stronger economies such as South Africa, Botswana and Namibia.³⁸ "Illegal", "irregular", "unauthorized" or "undocumented" migrants are considered "an ideal reserve for very flexible labour".³⁹ Local workers and trade unions have been complaining that their employment, wage levels and bargaining power are threatened by "cheap labour".⁴⁰

With undocumented migrants being vulnerable to exploitation especially in marginal, low status and inadequately regulated sectors of the economy,⁴¹ there is a need for receiving states to provide protection in their policy and legislative frameworks.

³⁶ Castle *et al* (2014) 14.

³⁷ ILO Report III(B) Migrant Workers 55; Sagger *et al* (2012) 2.

³⁸ Van Eck and Snyman (2013) 1.

³⁹ Iwu *et al* *SJTPSD* (2015) 6.

⁴⁰ Hepple (2005) 9.

⁴¹ Cholewinski *et al* (2009) 6.

Mugoti (2009) 476.

Undocumented migrants face poor working conditions, discrimination, and violation of their human rights.⁴²

The chapter examines the standpoint of organizations such as the International Labour Organisation (ILO), the African Union (AU) and Southern African Development Community (SADC) in relation to undocumented migrants. South Africa has ratified 27 conventions of the ILO.⁴³ These include the 8 core conventions. These are translated into domestic laws which then become binding on employees and employers.

South Africa is also a signatory state to further international instruments such as the ILO Migration for Employment Convention,⁴⁴ the Occupational Safety and Health Convention,⁴⁵ the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights and the International Convention on the Elimination of All Forms of Racial Discrimination which is a convention of the UN.⁴⁶

2.2 The ILO

The ILO, established in terms of a Treaty of Versailles signed in 1919,⁴⁷ aims to protect the interests of workers, including migrants, employed in countries other than their own.⁴⁸ It comprises three bodies: namely, the International Conference; Governing Body; and the International Labour Office.⁴⁹

⁴² Iwu *et al* SJTPSD (2015) 87; Koser (2007) 1; Cholewinski *et al* (2009) 6.
Undocumented migrants are also prone to accept extremely precarious living and working conditions that favour discrimination and exploitation in order to live in the destination country undetected and evading the authorities.

⁴³ https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888

⁴⁴ No. 97 of 1949.

⁴⁵ No. 155 of 1981.

⁴⁶ Adopted in 1965 by the General Assembly of the UN.

⁴⁷ Van Niekerk *et al* (2018) 23.

⁴⁸ ILO Constitution, Preamble, recital 2; Biney (2016) 154.

Biney describes the ILO as a specialised UN agency with a constitutional directive to protect migrant workers.

⁴⁹ Van Niekerk *et al* (2018) 22 - 23.

The Conference is responsible for policy making and adopting new labour standards. The Governing Body is the executive arm of the ILO, whilst the International Labour Office performs the operational, day-to-day work to give effect to the mandate of the ILO.

The ILO issues conventions or recommendations. Conventions of the ILO are not automatically binding. Once a member state ratifies a convention, it has an obligation to take necessary action to give effect to the provisions of the ratified convention and submits itself to the supervisory bodies of the ILO.⁵⁰ Whilst a convention is a legally binding treaty that may be ratified by member states, a recommendation is not capable of being ratified.⁵¹

The ILO Declaration on Fundamental Principles and Rights at Work (the ILO Declaration) stipulates that all members of the ILO, including those that have not ratified the fundamental rights conventions, have an obligation to respect, promote and realize in good faith and in accordance with the ILO's Constitution, the principles concerning the fundamental rights in the conventions.⁵² It has formulated a set of universal rights for workers.⁵³

The ILO's core labour standards are laid out in its fundamental conventions.⁵⁴ These principles are freedom of association and the effective recognition of the right to collective bargaining;⁵⁵ the elimination of all forms of forced and compulsory labour;⁵⁶ the effective abolition of child labour;⁵⁷ and the elimination of discrimination in respect of employment and occupation.⁵⁸ These principles are also covered in the ILO's Declaration on Fundamental Principles and Rights at Work.⁵⁹

⁵⁰ Article 19, paragraph 5(d) of the ILO Constitution.

⁵¹ <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>; Van Niekerk *et al* (2018) 25.

⁵² International Labour Conference, 86th Session, 1998, ILO Declaration on Fundamental Principles and Rights at Work, paragraph 2.

⁵³ Biney (2016) 154.

⁵⁴ Freedom of Association and the Right to Organise Convention No. 87 of 1948; Right to Organise and Collective Bargaining Convention, No. 98 of 1949; Forced Labour Convention, No. 29 of 1930; Abolition of Forced Labour Convention, No. 105 of 1957; Minimum Age Convention, No. 138 of 1973; Worst Forms of Child Labour Convention, No. 184 of 1999; Equal Remuneration Convention, No. 100 of 195; and Discrimination (Employment and Occupation) Convention, No. 111 of 1958.

⁵⁵ Convention No. 87 & No. 98.

⁵⁶ Convention No. 29 & No. 105.

⁵⁷ Convention No. 138 & No. 182.

⁵⁸ Convention No. 100 & No. 111; Buabeng-Baidoo (2011) 18.

⁵⁹ Adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010); Biney (2016) 155.

The South African Constitution confers particular status on international law, and requires international law to be applied when interpreting South African legislation.⁶⁰ Also, international law must be taken into account when interpreting legislation, including the Bill of Rights.⁶¹

The Constitutional Court has affirmed that "the conventions and recommendations of the International Labour Organisation (the ILO), one of the existing international organisations, are important resources for considering the meaning and scope of 'worker' as used in s 23 of the Constitution".⁶² In *Bader Bop*, the Constitutional Court acknowledged the peculiar status of the ILO's conventions and recommendations within the South African framework when it reiterated that "in interpreting section 23 of the Constitution an important source of international law will be the convention and recommendations of the ILO".⁶³ One of the purposes of the LRA is to give effect to obligations incurred by South Africa as a member state of the ILO.⁶⁴

Another significant international instrument of the ILO is the Migrant Workers Convention.⁶⁵ This is not a core convention, and South Africa has not ratified same.⁶⁶ Each state that has ratified the convention undertakes to respect the human rights of all migrants,⁶⁷ irrespective of their status. These states shall further systematically determine whether there are illegally employed migrant workers in their territory,⁶⁸ and whether there is movement for employment of migrants during which they are subjected to conditions contravening relevant international multilateral or bilateral instruments or agreements, or national laws or regulations.⁶⁹ Furthermore, member

⁶⁰ Sections 39(1) and 233 of the Constitution; Van Niekerk *et al* (2018) 31; *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) para 31.

⁶¹ Snyman and van Eck (2013) 24.
Gericke *PER/PELJ* (2014) 2604; *Republic of Angola v Springbok Investments (Pty) Ltd* 2005 2 BLR 159 (HC) 162.

⁶² *South African National Defence Union v Minister of Defence* (1999) 20 ILJ 2265 (CC) 2278B – D.

⁶³ *NUMSA v Bader Bop (Pty) Ltd* (2003) 2 BLLR 103 (CC) 117E – F.

⁶⁴ Section 1(b) of the LRA.

⁶⁵ Convention No. 143 of 1975; https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C143.

⁶⁶ To date, only 23 states have ratified this Convention.

According to Biney (2016) 157, this is indicative of government's unwillingness to commit to legally enforceable rights and obligations, and implement minimum standards needed for improving the position of vulnerable migrant workers.

⁶⁷ Article 1.

⁶⁸ Article 2.

⁶⁹ Article 2.

states shall adopt all necessary and appropriate measures to suppress clandestine movement of migrants for employment and illegal employment of migrants.

Interestingly, Article 8 stipulates that where a migrant worker has legally resided in the territory of the ratifying state for purposes of employment, the migrant worker shall not be regarded as in an illegal or irregular situation by the mere fact of the loss of employment. Article 9 provides that without prejudice to measures designed to control movements of migrants for employment, the migrant worker shall, in cases in which there is non-compliance with such laws and regulations and in which his position cannot be regularised, enjoy equality of treatment for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.⁷⁰

Article 10 stipulates that the ratifying states undertake to declare and pursue a national policy designed to promote and guarantee equality of opportunity and treatment in respect of employment and occupation, social security, trade union and cultural rights, and individual and collective freedoms for migrant workers or members of their families who are lawfully within their territories. Notably, this "progressive international instrument"⁷¹ (the Migrant Workers Convention) does not extend this protection to undocumented or irregular migrants.

Although states are not prohibited from making available these protections to irregular migrants, this bears its own complexities such as infrastructure, opportunities, and the economy's capacity to accommodate the additional demand. Limited funds and at times political enthusiasm contributes to this. This in my view may serve as a deterrent especially where in a country like South Africa, workers and trade unions have been complaining that their own employment, wage levels and bargaining power are threatened by "cheap labour".⁷²

⁷⁰ Badenhorst (2016) 10.

Badenhorst writes that according to this Article, nothing prevents an employer from allowing an employee with irregular status to stay in employment whilst assisting them to establish legal standing in that receiving country.

⁷¹ Van Eck and Snyman (2015) 15.

⁷² Hepple (2005) 9.

The ILO's Constitution permits employers' or workers' organizations to report a member state's failure to secure effective observance of any convention it has ratified.⁷³ Article 26 establishes a procedure which allows a member state to report another for failure to effectively observe. Both states must have ratified the particular convention.⁷⁴

2.3 The UN, AU and SADC on undocumented migrants

2.3.1 The United Nations (UN)

The UN is an intergovernmental organisation founded in 1945 and it is made up of 193 member states, including South Africa.⁷⁵ The UN Charter⁷⁶ sets out *inter alia* the purpose and principles of the UN which include:

"to achieve international co-operation in solving international problems of economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".⁷⁷

A 1975 resolution of the UN's General Assembly discouraged the use of the word "illegal" to describe irregular migrants as it implies status of criminality.⁷⁸ This word has a negative connotation and already opens them up to hostility, rejection and discrimination. The UN defines a migrant worker as "a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national" irrespective of their immigration status.⁷⁹ The UN formally

⁷³ Article 24; Van Niekerk *et al* (2018) 29.

⁷⁴ Articles 26 – 31; Van Niekerk *et al* (2018) 30.

The Governing Body will inform the state against whom the complaint has been lodged, and allow them an opportunity to respond. It may also appoint a commission of inquiry to consider the complaint and formulate a report, and make recommendations on the steps it considers should be taken to address the complaint. The report will be published, and the government against whom the complaint was laid will be afforded 3 months to indicate whether it accepts the recommendations, or the matter is to be referred to the International Court of Justice. The Court has the power to affirm, vary or reverse the commission's findings or recommendations. Its decision shall be final.

⁷⁵ <http://www.un.org/en/about-un/>.

⁷⁶ Signed on 26 June 1945.

⁷⁷ Article 1(3).

⁷⁸ Cholewinski *et al* (2009) 23.

⁷⁹ Article 2(1).

Iwu *et al* *SJTPSD* (2015) 85.

positions the rights of migrant workers into an international human rights framework.⁸⁰

On 10 December 1948 the UN proclaimed the Universal Declaration of Human Rights. Article 7 asserts that "all are equal before the law and are entitled without any discrimination to equal protection of the law". Article 13 provides for everyone's rights to freedom of movement and residence within the borders of each state and to leave any country, including their own, and to return. Article 15 provides for the right to a nationality.

Former United Nations Secretary-General Kofi Annan once said that:

"It is time to take a more comprehensive look at the various dimensions of the migration issue, which now involves hundreds of millions of people, and affects countries of origin, transit and destination. We need to understand better the causes of international flows of people and their complex interrelationship with development".⁸¹

It is against this backdrop that on 18 December 1990, the UN signed a multilateral treaty regulating the protection of migrant workers and their families, irrespective of whether they are in a regular or irregular situation,⁸² the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (International Convention 1990).

Van Eck and Snyman note that this Convention is described as "the epitome of international human rights"⁸³ and is considered as an essential instrument for protecting one of the most vulnerable groups globally, migrant workers.⁸⁴ Guchteneire and Pécoud refer to the Convention as "the most comprehensive international treaty in the field of migration and human rights".⁸⁵

⁸⁰ Biney (2016) 147.

⁸¹ Former United Nations Secretary-General Kofi Annan, from his report on strengthening the Organization, 9 November 2002;
<http://unpan1.un.org/intradoc/groups/public/documents/un/unpan005677.pdf>

⁸² Cholewinski *et al* (2009) 1.

⁸³ Van Eck and Snyman (2013) 68.

⁸⁴ Cholewinski *et al* (2009) 1.

⁸⁵ Cholewinski *et al* (2009) 1; Cholewinski (1997) 2.

The four main purposes of the International Convention 1990 are to unify the body of law applicable to migrant workers, complement other instruments, improve the distinctive status of migrant workers and their families and reduce clandestine trafficking.⁸⁶ Sadly, no major immigration country has ratified the Convention. This is said to highlight "how migrants remain largely forgotten in terms of access to rights".⁸⁷

Documented migrants have the right to freedom of movement, residence and employment under the International Convention 1990.⁸⁸ There is concern that knowledge or awareness of the Convention is low – referring to it as "the best kept secret of the UN".⁸⁹ Article 25 provides for equality in terms of remuneration, equitable conditions of work and terms of employment including overtime, hours of work, weekly rest, holidays with pay and other conditions with work nationals.

The International Convention 1990 has not been ratified by most states and prospects of this happening now are not encouraging.⁹⁰ Within SADC, only the Seychelles has ratified the Convention.⁹¹ Cholewinski, Guchteneire and Pécoud associate this with lack of capacity and resources as the Convention deals with different sectors of the state's responsibilities such as access to healthcare, labour regulations, the education system, and legal procedures.⁹²

2.3.2 The African Union

The AU "recognizes the importance of implementing a coherent and integrated strategy regarding the social protection of migrants at continental and regional (such as SADC) levels".⁹³ It envisages an African Economic Community and recognizes 8 African regional economic pillars for building this Community. This encourages the gradual removal of obstacles to free movement of persons, goods, services and

⁸⁶ Preamble of the Convention.
Van Eck and Snyman (2013) 68.
⁸⁷ Cholewinski *et al* (2009) 2.
⁸⁸ Articles 39, 51 – 53.
⁸⁹ Cholewinski *et al* (2009) 16.
⁹⁰ Cholewinski *et al* (2009) 39.
⁹¹ Matsvai-Mutsau (2018) 36.
⁹² Cholewinski *et al* (2009) 16.
⁹³ Van Eck and Snyman (2015) 8.

capital and the right of residence and establishment. The vision is for Africa to be an Economic Community by 2028.⁹⁴ Emphasis has been placed on cooperation and integration between countries, especially in the political and economic spheres.⁹⁵

The AU adopted its policy framework for the continent in 2006. The Executive Council adopted its policy framework for the continent - the African Common Position on Migration and Development.⁹⁶ It was developed mainly in preparation for the Africa–Europe Ministerial Conference on Migration and Development (2006) and was also presented at the UN High-Level Dialogue on International Migration and Development (2006). The document covers key priority policy areas such as migration and development, human resources and the brain drain, remittances and trade.⁹⁷

The AU acknowledged that there are some countries with inadequacy of institutional capacities to address migratory flows.⁹⁸ Mismanaged or unmanaged migration can have serious negative consequences for the states' and migrants' welfare.⁹⁹ According to the AU, establishing regular, transparent and comprehensive labour migration policies, legislation and structures at national and regional levels can result in significant benefits for both the states of origin and destination.¹⁰⁰

In addition to the Common Position on Migration and Development, there is the Strategic Framework for a Policy on Migration in Africa emanating from Decision CM/Dec 614 adopted in July 2001. It amongst others, also recommends that member states incorporate provisions from the ILO Conventions No. 97 and No. 143, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families into national legislation.¹⁰¹

The Framework emphasises the critical role of migration in development and encourages member states to manage and harness migration for continental

⁹⁴ Nshimbi and Fioramonti *ADR* (2014) 54 - 55.

⁹⁵ Crush and Williams (2005) 29.

⁹⁶ The policy was adopted at the 9th ordinary session held on 25 0 29 June 2006.

⁹⁷ Abebe (2017) 12.

⁹⁸ Gambia (2006) 1.

⁹⁹ Gambia (2006) 2.

¹⁰⁰ Gambia (2006) 4.

¹⁰¹ Abebe (2017) 3.

development.¹⁰² The Framework focuses on the following nine thematic areas: labour migration, border management, irregular migration, forced displacement, human rights of migrants, internal migration, migration data, migration and development, and inter-state cooperation and partnership. Social aspects of migration such as health, environment, gender and conflict are also covered.¹⁰³ It is however non-binding.

Accordingly, in 2015 the AU adopted the Joint Labour Migration Programme (JLMP) with the objective of prioritising migration as a transformative force for Africa's development. Led by the AU, the initiative is supported by the United Nations Economic Commission for Africa, the ILO and the International Organisation for Migration. The JLMP is the first global initiative focusing on supporting effective implementation of human mobility rules as key to development and integration in the increasingly significant Regional Economic Communities.¹⁰⁴

2.3.3 The Southern Africa Development Community

The Southern African Development Coordinating Conference (SADCC), established on 1 April 1980 was the precursor of SADC. The SADCC was transformed into the SADC on 17 August 1992 in Windhoek, Namibia where the SADC Treaty was adopted. The main objectives of SADC are to achieve development, peace and security, and economic growth, to alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa, and support the socially disadvantaged through regional integration, built on democratic principles and equitable and sustainable development. Furthermore, eliminate inter alia obstacles to free movement of persons in the region.¹⁰⁵

The 1995 Draft Protocol on Free Movement of Persons in SADC targeted free regional movement for SADC citizens over a 10-year period. The protocol would confer on SADC citizens the right to free entry, residence and establishment of oneself in the territory of another member state. The prospect of complete abolition of border controls on people's movements within SADC did not bode well with some

¹⁰² Nshimbi and Fioramonti *ADR* (2014) 55.

¹⁰³ Abebe (2017) 11; Gambia (2006) 2.

¹⁰⁴ Abebe (2017) 4.

¹⁰⁵ Nshimbi and Fioramonti *ADR* (2014) 55.

members. South Africa, Botswana and Namibia in particular declined to support this Protocol, which was consequently dropped.¹⁰⁶

In 2003, SADC adopted a Charter on Fundamental Social Rights. Van Niekerk *et al* sum up its purpose as "to entrench the institution of tripartism as the preferred means to promote the harmonisation of legal, economic and social policies and programmes, and to provide a framework for the recognition of regional labour standards".¹⁰⁷

Article 4 requires member states to create an enabling environment consistent with the ILO Conventions on freedom of association, the right to organise and collective bargaining and to give effect to basic labour rights.¹⁰⁸ Article 10 further requires member states to create an enabling environment so that workers may enjoy, regardless of their status and type of employment, adequate social security benefits.¹⁰⁹

In July 2005, SADC adopted the Protocol on the Facilitation of Movement of Persons. Its main objective is to confer, promote and protect the right to enter freely and without a visa the territory of another member state for a bona fide visit for a maximum period of 90 days per year, the right to permanent and temporary residence in the territory of another member state, and the right to establish oneself and work in the territory of another member state.¹¹⁰ The Protocol was signed by 6 member states in August 2005. However for the Protocol to come into effect, 9 member states must have signed and ratified it.¹¹¹

¹⁰⁶ Nshimbi and Fioramonti *ADR* (2014) 56; <https://www.sadc.int/about-sadc/overview/sa-protocols/>.

SADC issues protocols which are legally binding documents committing Member States to the objectives and specific procedures stated within them. In order for a Protocol to enter in to force, two thirds of the Member States need to ratify or sign the agreement, giving formal consent and making the document officially valid. Any Member State that had not initially become party to a Protocol can accede to it at a later stage.

¹⁰⁷ Van Niekerk *et al* (2018) 34.

¹⁰⁸ Van Eck and Snyman (2014) 9.

¹⁰⁹ Van Niekerk *et al* (2018) 34.

¹¹⁰ Nshimbi and Fioramonti *ADR* (2014) 56.

¹¹¹ Williams and Carr (2006) 6.

2.4 Conclusion

It is evident from the above that a lot needs to be done in the continent to protect the rights of migrants, irrespective of their status. I found the submission by Crush and Williams that "attitudes are most negative towards migrants from other African countries"¹¹² most startling. Although states are not barred from extending any rights or protections to undocumented migrants, most are deterred by social, infrastructure and economic factors. With already limited resources inadequate to cater for the needs of citizens, governments are under immense pressure and not keen to add further obligations.

The AU and SADC advocate for free movement of persons and encourage the leveraging of migrant skills to enhance development. Whilst this is a noble pursuit, I am of the view that border control is necessary. In order for any government to adequately cater for all persons within its borders, it must have records of the number of people. Otherwise, insufficient resources will be allocated. This undermines government's ability to deliver services and also increases competition amongst citizens and undocumented migrants for the limited resources.

The AU, SADC and ILO further encourage the equal treatment of all persons and elimination of discrimination. This obviously includes discrimination on the basis of nationality and immigration status. In reality, however, it appears that inequality and discrimination are rife. The very exclusion from protection and any rights other than the basic human rights is a breeding ground for inequality and discrimination. The status of undocumented migrants already places them at a disadvantage. In my view, we need more reform especially on the monitoring and enforcement capacities of influential institutions such as the AU, SADC and ILO. Without any real consequences for infringing on their conventions and treaties, signatory and member states may not feel compelled to ensure compliance. Political intervention and educating residents in receiving countries about the beneficial aspect of migration is also integral.

¹¹² Crush and Williams (2005) 16.

**CHAPTER 3:
THE SOUTH AFRICAN CONSTITUTION & POLICY FRAMEWORK**

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3.1 Introduction

This Chapter examines how the international norms and standards have been incorporated into South Africa's Constitution. A further discussion on the legislative framework is covered in Chapter 4.

South Africa has a primary responsibility to respect and protect human rights of everyone within its territory. This responsibility arises because South Africa has ratified certain treaties and is a member state to organisations such as the ILO and AU. Added to this, the Constitution contains the Bill of Rights which guarantees various fundamental rights to "everyone". This includes migrants within its territory included. The Bill of Rights is the "cornerstone of democracy".¹¹³

¹¹³ Section 7(1) of the Constitution.

3.2 The Constitution and the Bill of Rights

Migration is not a new phenomenon in South Africa.¹¹⁴ Koser confirms that migration is inextricably linked with other important global issues, including development, poverty and human rights.¹¹⁵

In *Lawyers for Human Rights v The Minister of Home Affairs*¹¹⁶ the Constitutional Court established that the rights in the Constitution also protect "illegal" foreigners at ports of entry. More recently, the Constitutional Court in *Ruta v Minister of Home Affairs*¹¹⁷ (*Ruta*) held that the right to seek and enjoy asylum means more than merely a procedural right to lodge an application for asylum. While states are not obliged to grant asylum, international human rights law and international refugee law in essence require states to consider asylum claims and to provide protection until appropriate proceedings for refugee status determination have been completed. All asylum seekers are protected by the principle of *non-refoulement* and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure.

Before the adoption of the Constitution, legislation, regulations and policies regulating migration in the country were regulated under the Aliens Control Act 40 of 1973 (ACA). This apartheid era legislation was founded on the core pillars of racist policy,¹¹⁸ exploitation and the repudiation of international refugee conventions.¹¹⁹ Exclusivity was a prominent feature of immigration policy at the time.¹²⁰

The end of the apartheid era saw a rise of migration to South Africa.¹²¹ After the collapse of the apartheid regime however, "free movement" was replaced by tough migration control which has demonstrated to be inadequate to deter migrants from

¹¹⁴ Trimikliniotis et al *TWQ* (2008) 1324; Tati *SPS* (2008) 425; Crush *AT* (2001) 6.

¹¹⁵ Koser (2007) 1.

¹¹⁶ 2004 (4) SA 125 (CC).

¹¹⁷ 2019 (2) SA 329 (CC).

¹¹⁸ Trimikliniotis et al *TWQ* (2008) 1332.

Badenhorst (2016) 32.

¹¹⁹ Crush and McDonald *AT* (2001) 2; Green Paper (2016) 20.

¹²⁰ Mukonza *JPA* (2011) 1387.

The government at the time was opposed to black migrants applying for citizenship. ACA was based on the Immigrants Regulation Act 22 of 1913 that excluded blacks and was amended in 1930 and 1937 to exclude Jews.

¹²¹ Trimikliniotis et al *TWQ* (2008) 1326

entering the country in desperate search for work and a better life.¹²² Most of them settle in the unregulated informal sector.¹²³

The Constitution is the "supreme law" and is based on democratic values, social justice, fundamental human rights, freedom and equality.¹²⁴ Section 7(1) of the Constitution provides that the Bill of Rights is a cornerstone of democracy in South Africa. Section 7(2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. Even though the right to choose a trade, occupation or profession freely is only extended to citizens,¹²⁵ the right fair labour practices is afforded to "everyone".¹²⁶

The rights guaranteed in the Bill of Rights include everyone's right to life,¹²⁷ dignity,¹²⁸ equality,¹²⁹ freedom of movement,¹³⁰ an environment that is not harmful to their health and well-being,¹³¹ and protection against slavery, servitude or forced labour.¹³² Irregular migrants, as included in the notion of "everyone" within the natural language of the Constitution, can turn to the Constitution to secure protection against unfair discrimination and the right to fair labour practices, as well as the right of access to social security.¹³³ In *Khosa v Minister of Social Development*¹³⁴ the Constitutional Court held that socio-economic rights in the South African Constitution are closely connected to the constitutional founding values of human dignity, equality and freedom.¹³⁵

However, section 36 provides for a limitation of the rights in the Bill of Rights. There are some views that the government's legislative competence to regulate the position of foreign nationals is limited to a certain extent by the Bill of Rights as all but three of the rights are available to "everyone".¹³⁶

¹²² Trimikliniotis et al *TWQ* (2008) 1325; Wentzel and Tibela *HSRC Press* (2006) 72.

¹²³ Ntema and Marais *AI* (2014) 136.

¹²⁴ Hicks *IJGLS* (1999) 393.

¹²⁵ Section 22 of the Constitution.

¹²⁶ Section 23 of the Constitution.

¹²⁷ Section 11 of the Constitution.

¹²⁸ Section 10 of the Constitution.

¹²⁹ Section 9 of the Constitution.

¹³⁰ Section 21 of the Constitution.

¹³¹ Section 24 of the Constitution.

¹³² Section 13 of the Constitution.

¹³³ Biney (2016) 190.

¹³⁴ 2004 (6) SA 505 (CC).

¹³⁵ Muchiri (2016) 102.

¹³⁶ Matsvai-Mutsau (2018) 32.

3.3 The Right to Life

Dealing with the right to life, the Constitutional Court considered the abolishment of the death penalty in *S v Makwanyane*.¹³⁷ The Court held that death was an inhuman punishment which involved a denial of the executed person's humanity. The right to life is expressed in unqualified form in the Constitution. This right, together with the right to dignity are the most fundamental of all human rights.

In *Minister of Home Affairs and Others v Tsebe*¹³⁸ the Constitutional Court reaffirmed its ruling against the deportation of foreign nationals suspected of crimes to death penalty jurisdiction. In this judgement, the majority of the court held that the human rights provided for in the Constitution applied to everyone, therefore even "illegal" foreigners accused of a crime are equally protected.¹³⁹

3.4 Equality of Treatment

Regarding the right to equal protection and benefit of the law, section 9(2) stipulates that equality includes the full and equal enjoyment of all rights and freedoms. In *Labri-Odam v MEC for Education (North West Province)*¹⁴⁰ the Constitutional Court held that distinction on the basis of citizenship, although not listed, was a ground on which discrimination was prohibited. An argument was proffered that non-citizens had a reduced commitment to South Africa because there was another country to which they could go. The Court rejected this argument, and noted that this equally applied to citizens with dual citizenship. In my view, this argument that was correctly rejected demonstrates the hostility against non-citizens.

Buabeng-Baidoo argues that irregular migrants lack the basic protection guaranteed under South African law, resulting in some authors being of the view that apart from the right to life, irregular migrants are denied all human rights.¹⁴¹ I agree with this view. Irregular migrants often live in conditions that violate their human dignity. There have been numerous reports of dire conditions even at the detention facilities specifically designed to house them whilst they await remittance to their countries of

¹³⁷ 1995 (3) SA 391 (CC).

¹³⁸ 2012 (5) SA 467 (CC).

¹³⁹ Biney (2016) 191.

¹⁴⁰ 1998 (1) SA 745 (CC); Badenhorst (2016) 33; Currie and de Waal (2013) 26.

¹⁴¹ Buabeng-Baidoo (2011) 1.

origin.¹⁴² Inarguably, they are also not afforded equal treatment. This has sadly translated even into the workplace. Due to their fear of arrest and deportation and the absence of any rights or protection, they settle to work in inhumane and abusive environments.

3.5 Right to Fair Labour Practices

The right to fair labour practices is a fundamental and unusual right.¹⁴³ It is, however, not an exclusive right.¹⁴⁴ It is available to "everyone". In *NEHAWU v University of Cape Town*¹⁴⁵ Ngcobo J stated that:

"[T]he focus of section 23(1) is, broadly speaking, [on] the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. It is important to bear in mind that the tension between the interests of the workers and the interests of the employers is an inherent part of labour relations. ... It is in this context that the LRA must be construed."

Biney writes that the concept of "fair labour practices" is too broad and imprecise, making it rather difficult to delineate the precise boundaries of what in fact constitutes unfair labour practice.¹⁴⁶ Le Roux argues that subsections (2) to (4) qualify the scope of the right by limiting it to four beneficiaries: workers, employers, trade unions, and employer organisations.¹⁴⁷ This right is guaranteed to individuals, irrespective of their status, who are involved in an employment relationship.¹⁴⁸ However, Trimikliniotis *et al* assert that trade unions have failed to organise migrant workers, initially reacting defensively, but now increasingly recognising that migrant workers must be incorporated in the movement and their rights defended for the benefit of all workers.¹⁴⁹

The primary purpose of the LRA is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.¹⁵⁰ Section 23(2) guarantees the right of every "worker" to form and join a trade union, participate in the activities and

¹⁴² <https://www.refworld.org/pdfid/53706e354.pdf>.

¹⁴³ Van Niekerk *et al* (2018) 42.

¹⁴⁴ Gericke *PELJ* 2605.

¹⁴⁵ (2003) 24 ILJ 95 (CC).

¹⁴⁶ Biney (2016) 192.

¹⁴⁷ Le Roux *Acta Juridica* (2012) 48.

¹⁴⁸ Biney (2016) 192.

¹⁴⁹ Trimikliniotis *et al TWQ* (2008) 1332.

¹⁵⁰ Section 1(a) of the LRA.

programmes of a trade union, and to strike. This right pronounced in the LRA's stated purpose to provide a framework within which employees and their trade unions, and employers and their employers' organisations can *inter alia* collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest.¹⁵¹ Its protection extends to migrant workers as well.¹⁵²

3.6 South African Government's Stance and Policy Framework

As in the 1990s, the government's policy on irregular migration is still one of exclusion, strict regulation, deportation and criminalization.¹⁵³

According to Crush and McDonald, one of the significant breaks made by the post-apartheid immigration policies with the past is immigrant selection. The government abandoned racist immigration policies, and replaced them with a more universal selection system.¹⁵⁴ The new government is however perceived as indifferent towards immigration.¹⁵⁵

Buabeng-Baidoo writes that the South African immigration policy is based solely on control, exclusion and expulsion of irregular migrants.¹⁵⁶ I agree with this view which is apparent in the theme of the primary immigration legislation and policy framework. The focus appears to be on reducing and eliminating altogether the number of irregular migrants within its borders. The Constitutional Court decision in *Ruta* has introduced another dimension through its ratio that a delay in seeking asylum by an illegal foreigner does not necessarily disqualify them from later doing so. This, it is argued means that arrest will no longer be the obvious and first option where a foreigner's illegal status is discovered.

In *Kyabu v Minister of Home Affairs*¹⁵⁷ relying on *Ruta*, three foreign nationals launched an urgent application to release them from Lindela Detention Centre¹⁵⁸ on grounds that a request has been made to facilitate an application for asylum. The

¹⁵¹ Section 1(c) of the LRA.

¹⁵² Biney (2016) 193.

¹⁵³ Buabeng-Baidoo (2011) 32.

¹⁵⁴ Adjai and Lazaridis *Redfame Publishing* (2013) 192.

¹⁵⁵ Crush and McDonald *AT* (2001) 4.

¹⁵⁶ Buabeng-Baidoo (2011) 32.

¹⁵⁷ [2019] ZAGPJHC 204 (25 June 2019).

¹⁵⁸ A detention/ holding centre for undocumented migrants in South Africa awaiting deportation.

order was not granted due to the short notice (48 hours) of the demand for release provided to the Department of Home Affairs.

Some authors are of the view that the criminalization of the employment of irregular migrants has done very little to discourage employers from employing irregular migrants.¹⁵⁹ A majority of these migrants are low-skilled or semi-skilled, and do not qualify for work permits. The process of obtaining permits is often riddled with logistical and financial problems.¹⁶⁰

There is often limited or total lack of proper oversight by the government, resulting in exploitation and deprivation of fundamental labour and human rights. They are left unable to bargain for wages or basic conditions of employment.¹⁶¹ They end up either forging the documentation, or not obtaining the appropriate documentation at all.

A further enabling factor is the absence of a reporting mechanism which offers some protection to the irregular migrant. Although irregular migrants have locus standi to approach the Commission for Conciliation, Mediation and Arbitration (CCMA) in circumstances of alleged unfair dismissal and pursue processes and remedies envisaged in the LRA,¹⁶² there is fear of arrest, detention and deportation. This view is supported by Van Niekerk *et al* who express a view that unfair dismissal disputes involving migrant workers who have no work permits are seldom brought before the CCMA or courts because of their fear of deportation or criminal prosecution.¹⁶³

An unintended consequence of the criminalization of the employment of irregular migrants is the unfortunate continued exploitation and abuse.¹⁶⁴

¹⁵⁹ Buabeng-Baidoo (2011) 33.
Although the exact number of irregular migrants in South Africa is unknown, experts estimate that they are between four and eight million. The majority of irregular migrants in South Africa are low-skilled or semi-skilled workers who do not qualify for work permits.

¹⁶⁰ Waller (2004) 4.

¹⁶¹ Buabeng-Baidoo (2001) 34.

¹⁶² Biney (2016) 207.

¹⁶³ Van Niekerk *et al* (2018) 81; CCMA Practice and procedural manual (2014), para 2.5.5; <http://www.ccma.org.za/UploadedMedia/CCMA%20Practice%20and%20Procedure%207th%20Edition%202014>, accessed 10 December 2015.

In *Discovery Health v CCMA*, the CCMA's view was that no action from a dishonourable cause. An employment contract with an unauthorised foreign worker was void ab initio. However, the CCMA cannot award reinstatement or reemployment of the migrant, should the migrant successfully prove his or her dismissal unfair.

¹⁶⁴ Buabeng-Baidoo (2001) 34.

3.7 Green Papers on International Migration

According to Mukonza, immigration policies in South Africa are influenced by a number of variables including international law, internal socio-economic and political conditions, as well as external peace and security and economic and social factors.¹⁶⁵

The previous Green Paper on International Migration published in May 1997 noted that unauthorised migration was undesirable. As a sovereign state, SA would reserve the right to determine who would be allowed entry into the country, and under what conditions. At the same time, the Green Paper proposed that the design and implementation of immigration policy should be faithful to the 1996 Constitution and should be consistent with the national commitments to upholding universal human rights, administrative justice and the guarantee of certain basic rights for all people.

In June 2016, the Department of Home Affairs (DHA) published a second Green Paper on International Migration for public comment.¹⁶⁶ The Paper acknowledges that humans have always moved, and will always move, to where they are secure and can develop to their potential.¹⁶⁷ The main contention in the Paper was that the international migration policy at the time ought to have been replaced as it did not enable the state to adequately embrace global opportunities whilst safeguarding its sovereignty, and ensuring public safety and national security. It further asserts that discussions around international migration are usually limited by "us and them" thinking that either sets in opposition the rights of immigrants to the rights of citizens and the state.¹⁶⁸ There is credence to this assertion, especially in a territory characterised by increasing hostility towards migrants.

South Africa had not built consensus at policy, legislative and strategic levels on how to manage international migration for development.¹⁶⁹ The policy at the time, set out in the 1999 White Paper on International Migration which regarded international migration "as a routine administrative function of the state". The White Paper was limited to compliance, rather than managing migration strategically. The Department

¹⁶⁵ Mukonza *JPA* (2011) 1388.

¹⁶⁶ Green Paper (2016).

¹⁶⁷ Green Paper (2016) 8.

¹⁶⁸ Green Paper (2016) 9.

Badenhorst (2016) 38 – 39.

¹⁶⁹ Klaaren (2017) 220.

of Labour (DoL) stated in a National Economic Development and Labour Council (NEDLAC) Report on the previous International Migration White Paper that the "the notion of illegal immigrants posing a negative impact on provisions of service and society was replete with inappropriate assumptions".¹⁷⁰

In contrast, the Green Paper proposed that international migration be managed proactively and strategically to contribute to nation building and social cohesion, inclusive economic growth and national security. The Green Paper mentions that "SA needs to start a conversation on the importance of international migration."¹⁷¹ According to Iwu *et al*,¹⁷² skilled immigrant labour, if well utilized, will not take jobs away from South Africans,¹⁷³ but will put the economy in a better shape and help the government fight poverty by creating more jobs and reducing many social problems. At the same time, they acknowledge the negative consequences on uncontrolled immigration, and call for proper monitoring and control of migration.

It is submitted that in Southern African migration could play a developmental role in at least three areas. Firstly, it has historically played an important role in times of crises as survival strategy in a region that has very limited disaster management or social protection systems. Second, it mitigates some of the shortcomings of regional labour markets related to the gap between the number of new labour market participants and jobs created, cyclical financial shocks and poor performance of some education and training systems. Lastly, migration represents a crucial link between dying rural economies and ever expanding urban areas through monetary, informational and in-kind transfers.¹⁷⁴

The DHA stated in the Green Paper that South Africa has limited capacity to manage international migration due to lack of appreciation of its positive role and strategic importance. Capacity includes the vision understanding and attitudes that are prevalent amongst leaders and the public, policy and regulatory frameworks and the institutional and administrative resources required to implement the policies. The DHA thus motivated for a new White Paper on International Migration.

¹⁷⁰ Trimikliniotis *et al* TWQ (2008) 1333; NEDLAC, Report on the International Migration White Paper, submitted to the Department of Home Affairs, 31 January 2001; Badenhorst (2016) 37.

¹⁷¹ Green Paper (2016) 9.

¹⁷² Iwu *et al* SJTPSD (2015) 91; Barker (2003).

¹⁷³ According to Crush SAMP (2001) 110, some citizens feel under siege from the outside.

¹⁷⁴ Segatti and Landau (2011) 25.

3.8 White Paper on International Migration

Cabinet approved the White Paper in March 2017. The Paper is formulated to accord with principles adopted by international and regional bodies such as the UN, AU, the International Organisation for Migration (IOM), and the United Nations High Commissioner for Refugees (UNHCR).¹⁷⁵ It was hailed by the UNHCR as progressive in its content.¹⁷⁶ According to Trimikliniotis *et al*,¹⁷⁷ this White Paper suggestion is basically that the labour demands of workers whose conditions of employment do not comply with the prevailing conditions should be satisfied through a legal and regulated system rather than ignored and fulfilled through illegal means.

The White Paper was subsequently gazetted in July 2017. Emphasis on administrative and policy is shifted from border control to community and workplace inspection with the participation of communities and the cooperation of other branches and spheres of government. There is also intention to establish of an Immigration Services with monitoring and investigative powers at community levels. A further integral body that will be established is an Immigration Review Board whose functions shall be to conduct inspections in schools, workplaces and service providers to ensure compliance with temporary permits, to detect, track and act against temporary permit violators and other illegal aliens, and interface with the proposed immigration courts and border control patrol.

The rationale for a new international migration policy includes inter alia the adoption of the African Union's Vision 2063 which provides for a framework for national migration policies in Africa.¹⁷⁸ South Africa has become a major destination and transport hub for the continent and the world. Furthermore, the country continues to receive high volumes of individual asylum seekers from almost all regions of the world, including countries that are politically stable.¹⁷⁹ This applies within the continent as well as those as far afield as China, Bangladesh and Pakistan.¹⁸⁰

The new international migration policy (Vision 2030) envisages that South Africans must embrace international migration for development while safeguarding

¹⁷⁵ White Paper (2017) 11.

¹⁷⁶ Mukonza *JPA* (2011) 1387.

¹⁷⁷ Trimikliniotis *et al TWQ* (2008) 1334.

¹⁷⁸ White Paper (2017) 4.

¹⁷⁹ White Paper (2017) 5; Adjai and Lazaridis *Redfame Publishing* (2013) 193.

¹⁸⁰ Mukonza *JPA* (2011) 1384; Iwu *et al SJTPSD* (2015) 91.

sovereignty, peace and security. One of the key principles underpinning Vision 2030 is that South Africa's international migration policy must be responsive to the African development agenda. To achieve this, policy interventions will be introduced to facilitate cross-border movement of African citizens and provide a legal route for SADC economic migrants.¹⁸¹

The Paper provides for management of enforcements. The purpose of policy interventions in this respect is to reduce irregular migration and increase compliance with immigration and related legislation and by-laws. This includes interventions such as a risk-based deportation strategy which will prioritise deportation of high risk over low risk migrants, and the laying of criminal charges against repeat offenders and those who do not cooperate with deportation notices.¹⁸² Sutton and Vigneswaran are of the view that South Africa's deportation regime is shaped by policy makers envisaging that foreign nationals will often enter the country informally or as tourists and then subsequently seek to regularise their stay. The concern is often the long period of detention before the migrants are repatriated.¹⁸³

3.9 Conclusion

South Africa's immigration policies are influenced by a number of variables including international law, internal socio-economic and political conditions, as well as external peace and security, and economic and social factors.¹⁸⁴ This has informed not only policy considerations, but has also influenced perceptions by national and South Africa's capacity to ratify certain international instruments. Conventions such as the Migrant Workers Convention places an obligation on ratifying states to ensure that migrants for employment purposes will continue enjoying equality of treatment as nationals in respect of guarantees of security of employment, the provision of alternative employment, relief work and retraining, despite their status. With the constant battle for resources in South Africa, the sluggish economic growth and dire unemployment rate, in my view, the South African government is not in a feasible state to provide such guarantees.

¹⁸¹ White Paper (2017) 7 – 9.

This includes the elimination of VISA requirements for African citizens in a secure manner; introduction of SADC special work quota, cross-border traders and SMME visas; and review of existing bilateral labour agreements in line with the new policy.

¹⁸² White Paper (2017) 9.

¹⁸³ Sutton and Vigneswaran *Citizenship Studies* (2011) 2.

¹⁸⁴ Mukonza *JPA* (2011) 1388.

The Constitution guarantees "everyone" the right to fair labour practices. The precise definition and scope of this right insofar as it relates to irregular migrants remains vague. This issue will be examined in the chapters to follow when we look at how our courts have interpreted this right within the South African workplace.

Following the demise of the apartheid regime, South Africa became an increasingly popular destination for migration. It is however criticised for lacking sufficient protection to irregular migrants in its policy framework. Reference is still made to terms such as deportation and criminal prosecution when discussing irregular migrants. This enforcement serves to a certain extent as a deterrent against the reporting of infringement of human and labour rights of irregular migrants. The White Paper made an attempt to introduce policy interventions facilitate migrant movement and integration. The difficulty remains that the protections made available are limited to regularised migrants.

It is clear that a lot remains to be done within the South African context to protect migrants, whilst balancing the needs and interests of nationals. This is understandably a pursuit that cannot be accomplished overnight.

Finally, has *Ruta* provided a solution or merely created more problems in relation to undocumented migrants seeking asylum? In essence, asylum seekers will enjoy freedom of movement until such time as their applications have been determined. Until that happens, there is no indication of the rights, if any, that they will be entitled to. Can they take up employment? There are critical questions to be reflected upon and remain to be answered at the wake of *Ruta*.

**CHAPTER 4:
SOUTH AFRICA'S LEGISLATIVE FRAMEWORK**

4.1	Introduction	30 - 31
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4.1 Introduction

Under the apartheid regime the Aliens Control Act¹⁸⁵ consolidated different legislation, regulations and policies that regulated migration in South Africa for nearly a century.¹⁸⁶ In 1991, the ACA was repealed by the Aliens Control Act 96 of 1991 which replaced all previous legislation regarding foreigners entering, leaving or being resident in the country.

Crush and McDonald refer to this statute as "one of the final pieces of legislation to emerge from the crumbling ruins of apartheid".¹⁸⁷ It makes provision for the admission, residence in and departure of persons in South Africa. It prohibits inter alia, the harbouring of aliens,¹⁸⁸ letting or selling immovable property to aliens, and the employment of foreigners in contravention of the Act.¹⁸⁹

The new constitutional order envisages an era based on human dignity and respect for fundamental rights and freedoms. The Constitution protects most, if not all,

¹⁸⁵ Act 96 of 1991.

¹⁸⁶ Crush and McDonald *AT* (2001) 1, 2 and 10; Klaaren and Ramji *AT* (2001) 35; Klotz *TWQ* (2002) 831; Mukonza (2011) 1386; Tati *SPS* (2008) 427.

The apartheid government's immigration policies were founded on principles of racism, exploitation of migrant labour from neighbouring countries, tough enforcement legislation and the repudiation of international refugee conventions. The prominent feature was exclusion. None of these policies had regard for fundamental human rights and dignity of especially undocumented migrants. That government relied on foreign labour especially in the mining sector.

¹⁸⁷ Crush and McDonald *AI* 1.

¹⁸⁸ Defined as anyone who is not a citizen of South Africa.

¹⁸⁹ Section 32 of the Aliens Control Act.

categories of human rights ordinarily included in international instruments.¹⁹⁰ Mukonza contends that the democratic dispensation did not result in major shift in South Africa's immigration policy. Immigration was not treated as a priority – "it was not a public tool that could benefit the country".

Important developments emerged between the 1998 and 2002¹⁹¹ with the introduction of the Immigration Act¹⁹² and Refugees Act.¹⁹³ This Chapter examines the key legislation that regulates immigration in South Africa and its bearing on the workplace insofar as irregular migrants are concerned.

4.2 Immigration Act

The number of non-citizens in the country has risen significantly since 1990.¹⁹⁴ The South African government was criticised for having stalled and not being innovative when it comes to immigration reform.¹⁹⁵ In 1996, the Minister of Home Affairs defended the Aliens Control Act as providing a "sound legal base for effective alien control". There was no need for new immigration legislation.¹⁹⁶ A call for a new Act to replace the Aliens Control Act became prominent in 1997 following a Draft Green Paper on International Migration which proposed a major overhaul of the structure of migration and immigration governance.¹⁹⁷ Post-apartheid, South Africa has been criticised for "restrictive migration policy".¹⁹⁸

Section 7 of the Immigration Act empowers the Minister to make regulations related to steps to be taken to prevent entry of illegal foreigners into the country and to facilitate the tracing and identification of illegal foreigners in, and their removal from the country. All persons may only enter or depart from the Republic at a port of entry. To do so, they must be in possession of a valid passport, unless exempted by the

¹⁹⁰ Van Eck and Snyman *JAL* (2015) 13; Amit and Kriger *Kronos* (2014) 2.

¹⁹¹ Mukonza (2011) 1387.

¹⁹² Act 13 of 2002.

¹⁹³ Act 130 of 1998.

¹⁹⁴ Crush and Williams *SAMP* (2001) 1.

¹⁹⁵ Klotz *TWQ* (2000) 831; Tati *SPS* (2008) 426.

¹⁹⁶ Crush and McDonald *AT* (2001) 10.

¹⁹⁷ Crush and McDonald *AT* (2001) 11; Crush and Williams *SAMP* (2001) 2.

¹⁹⁸ Klotz *TWQ* (2000) 831; Tati *SPS* (2008) 426; Crush and Williams *SAMP* (2001) 11, 12.

Minister.¹⁹⁹ An immigration officer may without a warrant of arrest to arrest, detain and deport an illegal foreigner.²⁰⁰ The Constitutional Court recently held in *Ruta v Minister of Home Affairs*²⁰¹ (*Ruta*) that a delay in seeking asylum by an illegal foreigner does not necessarily disqualify them from later doing so, notwithstanding how long they have been within the Republic illegally. Where an intention to do so is expressed, then deportation may not be carried out. The Court however reiterated that there is no right under international conventions to enter and reside in South Africa in contravention of its laws.

According to Tati, deportation has not been effective as those deported return to the country using illegal channels shortly thereafter. Tati refers to this as "the revolving door syndrome".²⁰²

The Immigration Act further allows the Director-General to issue a work visa to foreigner who possesses critical skills or qualifications, an intra-company transfer work visa to a foreigner, and a corporate visa to a corporate applicant to employ foreigners to conduct work for the corporate applicant in the Republic.²⁰³ A significant and progressive feature of the Act is the requirement for applications for general work visas to be accompanied by a letter from the Department of Labour confirming that the salary and benefits of the applicant are not inferior to those of citizens or permanent residents. The visa will be valid for a maximum period of 5 years.²⁰⁴ Sadly, this protection is only available to regular migrants.

The Act prohibits any person from employing an illegal foreigner, a foreigner whose status does not authorise them to be employed by such a person, or employ a foreign on terms, conditions or capacity different from those contemplated in such foreigner's status.²⁰⁵ The Act provides that an employer shall make a "good faith effort" to ascertain that no illegal foreigner is employed by him or her, or to ascertain the status or citizenship of those he or she employs. The surveillance of employment

¹⁹⁹ Section 9 of the Immigration Act.

²⁰⁰ Section 34(1) of the Immigration Act.

²⁰¹ 2019 (2) SA 329 (CC).

²⁰² Tati *SPS* (2008) 433.

²⁰³ Section 21 of the Immigration Act.

²⁰⁴ <https://www.capetownmagazine.com/immigration-laws>.

²⁰⁵ Section 38 of the Immigration Act.

of irregular migrants is also criticised as a failed mechanism. Very few employers employing irregular migrants (especially in the farming sector) have been persecuted.²⁰⁶

Any person who knowingly employs an illegal foreigner or a foreigner in violation of the Act shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding one year. On second conviction, imprisonment shall not exceed 2 years (or a fine). On the third and subsequent convictions, be imprisoned for a period not exceeding 5 years without the option of a fine. Anyone who intentionally facilitates an illegal foreigner to receive public services to which such illegal foreigner is not entitled shall be guilty of an offence and liable on conviction to a fine.²⁰⁷

It is quite apparent that this statute is designed to completely avert the presence of irregular migrants. Not only are they prohibited from being in the country illegally, any person who assists, employs and even knowingly enrolls them to an institution of higher learning commits a criminal offence. According to Waller irregular migration poses a considerable problem for South Africa in migration management, population planning, infrastructure development, resource management, governance, social services, economic development and security. When entry into South Africa is clandestine or fraudulent, no proper account can be kept of the migrant's presence, movement, identity, nationality, health status or activities. Without the ability to measure the problem, the ability to address it remains elusive.²⁰⁸

Government is faced with a difficult balancing act – that is, protecting the interests of the citizens, whilst giving effect to its international obligations to protect, at least the human rights of all who are within the borders of the Republic. Undoubtedly, there has been a shift from rights and protection, towards exclusion and control. A move which Crush et al explain was inevitable in a country where the majority continue to struggle meeting their basic needs.²⁰⁹

²⁰⁶ Tati *SPS* (2008) 435.

²⁰⁷ Section 49 of the Immigration Act.

²⁰⁸ Waller (2006) 1; Karagueuzian and Verder – Chouchance *AEF* (2014) 2 and 8; Segatti and Landau (2011); Crush and Williams *SAMPJ* (2001) 4.

²⁰⁹ Crush *et al SAMP* (2017) 6.

4.3 Refugees Act

South Africa continues to receive a high volume of asylum seekers. Over 90% of them unfortunately do not qualify for refugee status.²¹⁰

When the Refugees Act was enacted in 1998, an estimated 11000 people applied for asylum. A total of 70 010 new applications were received 15 years later, in 2013. This number has continued to rise.²¹¹ In May 2015, an analysis of the national Immigration Information System (NIIS) revealed that about 1 061 812 asylum seeker permits were issued; however, only 78 339 were active. The data further revealed that 119 600 formal recognition of refugee status permits were issued, with at least 96 971 remaining active.²¹²

The purpose of the Refugees Act is to give effect to the relevant legal instruments, principles and standards related to refugees, provide for reception of asylum seekers, and regulate applications for and recognition of refugee status, and provide for rights and obligations flowing from such status.

The Constitutional Court referred to refugees as a "special category of foreign nationals".²¹³ Section 2 prohibits the refusal of entry to the Republic, expulsion, extradition or return to any other country if such a person may be subjected to persecution on account of their race, religion, gender, nationality, political opinion or particular social group, or their life, safety or freedom would be threatened as a result.²¹⁴ The Act provides circumstances under which a person may qualify for refugee status.²¹⁵ South Africa has seen a distinct deterioration in the rights-based approach to refugee protection.²¹⁶

²¹⁰ Green Paper (2016) 29.

²¹¹ Green Paper (2016), 29.

²¹² Green Paper (2016) 30.

²¹³ *Union of Refugee Women and others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC); Kavuro (2015) 6.

²¹⁴ Section 2 of the Refugees Act.

²¹⁵ Section 3 of the Refugees Act.

²¹⁶ Crush *et al SAMP* (2017) 5.

In *Ndikumdavyi v Valkenberg Hospital*²¹⁷ (*Ndikumdavyi*), a Burundian citizen who was registered as a refugee in terms of the Refugees Act obtained a nursing degree from the University of the Western Cape on 13 March 2009 was advised by the Department of Health that he could take up employment in South Africa. On 29 March 2009, the applicant received a letter from the sub-directorate: foreign workforce management of the national Department of Health, advising him that he could take up employment in the Republic.

Subsequently, on 31 August 2009, he received a national Department of Health endorsement certificate entitling him to seek employment and apply for registration, subject to certain conditions. On 16 February 2010, he received an annual practising certificate from the SA Nursing Council which was valid for the period 1 January 2010 to 31 December 2010. He was then offered permanent employment as a professional nurse and commenced employment at the Valkenberg Hospital on 1 July 2010.

On 20 July 2010, the hospital's senior medical superintendent informed him that, as the Department's Policy permitted employment of foreign health professionals on fixed term contracts only and his refugee status expired on 24 December 2010, he could only be offered a fixed term contract not extending beyond 24 December 2010. Approval of such temporary contract needed to be obtained from the national Department.²¹⁸

The Applicant referred the matter to the Labour Court, challenging the procedural and substantive fairness of his dismissal. He contended that the dismissal amounted to discrimination on grounds of his nationality and refugee status, in contravention of section 187(1)(f) of the LRA. The Court noted that its jurisdiction was restricted to deciding whether there had been a dismissal, and if so, whether same was automatically unfair.

²¹⁷ (2012) 22 ILJ 2648 (LC).

²¹⁸ Clause 15 of the Policy was revised on 25 February 2010 to stipulate that the employment of foreign health professionals recruited by the public health sector shall be limited to health facilities in designated underserved rural areas in South Africa, unless otherwise approved by the head of the provincial Department of Health and subject to endorsement by the national Department of Health. A head of a provincial Department of Health may not delegate the responsibilities in this regard.

The Labour Court considered whether the applicant was an employee of the Department. Relying on *Discovery Health Ltd v CCMA*²¹⁹ (*Discovery*) and taking into account the status of formal refugees in terms of the Act and international law obligations referred to in the statute, and that this class of persons in South Africa and the world is a particularly vulnerable group, the Court was satisfied that he was an employee. The Court reiterated the finding in *Discovery* that the definition of "employee" in section 213 of the LRA is necessarily rooted in a contract of employment.²²⁰ It follows that a person who renders work on a basis other than that recognized as employment by the common law may be an "employee" for the purposes of the definition. A contract of employment is not the sole ticket for admission into the golden circle reserved for "employees".

The Court then examined the question of whether there was a dismissal as defined in section 186 of the LRA. The Court stated that "contract of employment" may be read, not in the strict sense, to mean the wider term "employment relationship". This will give effect to the primary purpose of the LRA and provide equal protection to formal refugees and other vulnerable groups. It ruled that the Department failed to establish procedural fairness of the dismissal. It confirmed that formal refugees must be recipient of the rights afforded by the LRA.

Rabkin-Naicker J held that a reading of the provisions of the Refugees Act gives some understanding of the predicament in which refugees generally find themselves. Refugees have had to flee their homes, and leave their livelihoods and often their families and possessions either because of a well-founded fear of persecution on the grounds of their religion, nationality, race or political opinion or because public order in their home countries has been so disrupted by war or other events that they can no longer remain there. Often refugees will have left their homes in a haste and find themselves precariously in our country without family or friends, and without resources to sustain themselves. This is an accurate summation of the dire circumstances faced by refugees.

²¹⁹ (2008) 29 ILJ 1480 (LC).

²²⁰ Also refer to Bellace & ter Haar (2019) 176; Vettori UNISA (2009) 2; Khan and Schreier (2014) 227.

4.4 Conclusion

The little protection afforded to formal refugees and regular migrants is restrictive. There are grave challenges in them seeking or obtaining employment.²²¹ This is worsened by the already high unemployment rate and the fact that the Immigration Act expressly prohibits the employment of illegal foreigners. Although an irregular migrant may be an employee for purposes of the LRA, they may not necessarily enjoy the rights that flow from this as continuing their employment would be in breach of the country's laws.

The growing competition for already scarce public resources such as education, health care and shelter and employment has resulted in exclusion and a move by government to control.²²² South Africa's statutory and policy framework does not cater, at all, for irregular migrants. This is apparent from the Immigration Act and Refugees Act Their fate is arrest, detention and deportation.

The only pursuit is to detect, detain and deport irregular, often under deplorable conditions. In a bid to avoid this, irregular migrants live shy of and avoid the authorities, creating an opportunity for them to be exploited and subjected to inhumane living and working conditions due to their status. Whether or not a migrant receives protection is dependent on their status. Employers are not only obliged, but also entitled to terminate their employment once their undocumented status comes to light. Ultimately, the conclusion is that the only aspect of the right to fair labour practices is procedural fairness when their employment is terminated. They do not have the right to engage in any form of employment at all.

²²¹ Kavuro (2015) 1.

²²² Crush *et al* SAMP (2017) 6.

**CHAPTER 5:
UNDOCUMENTED MIGRANTS AND THE RIGHT TO FAIR LABOUR PRACTICES
IN THE SOUTH AFRICAN WORKPLACE**

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5.3	<i>Discovery Health Limited v CCMA</i> and other seminal decisions.....	39 - 44
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5.1 Introduction

South Africa is a sovereign state.²²³ It has the liberty to determine its own policy and statutory framework applicable within its borders. Considerations of the country's international obligations, including the duty to protect and not to harm the human rights of all persons within its borders, are integral in determining policy and legislative framework.

This chapter examines the right to fair labour practices from the context of the Labour Relations Act²²⁴ (LRA) which is one the primary labour statutes in the Republic. It further contains a conspectus of the jurisprudence stemming from our Courts on the interpretation of what rights undocumented migrants are entitled to within the South African workplace.

5.2 Labour Relations Act and other employment laws of South Africa

The Bill of Rights in the South African Constitution applies to all areas of law.²²⁵ Section 23 provides for the right to fair labour practices, "an unusual constitutional

²²³ Section 1 of the Constitution; Voster *SAJPS* (1974) 721; Maswanganyi (2010) 6; <https://hsf.org.za/publications/hsf-briefs/some-notes-on-sovereignty>.

²²⁴ Act 66 of 1995.

²²⁵ Biney (2016) 194.

right".²²⁶ This right is given expression in various pieces of legislation. The LRA is the principal statute,²²⁷ a centrepiece of South African employment law²²⁸ which gives effect to and regulates the fundamental rights conferred by section 23.²²⁹ Its purpose is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling its primary objects which include giving effect to and regulating the fundamental rights conferred by section 23 of the Constitution.²³⁰ The LRA gives effect to this constitutional right.

Protection under the LRA only extends to "employees".²³¹ Prior to 2008, migrants who had not been issued with valid work permits were not recognised as employees; therefore, did not qualify for protection or benefits flowing from the LRA.²³² The CCMA initially took the stance that an employment contract with an unauthorised migrant was void ab initio.²³³ Below is a synopsis of jurisprudence that changed the landscape for irregular migrants.

5.3 Discovery Health Limited v CCMA and other seminal decisions

"Ex turpi causa non oritur actio" is a Latin maxim meaning that one engaged in an illegal activity cannot claim damages arising out of that activity. This rule has been an integral part of South African common law. When applied to contracts of employment, it used to mean that persons who enter into unlawful contracts of employment, including in contravention of immigration laws, cannot avail themselves of the remedies provided by the LRA.

Prior to 2008, the approach of the CCMA was that an employment contract concluded in contravention of the Immigration Act was null and void.²³⁴ In *Moses v*

²²⁶ Van Niekerk *et al* (2018) 42.

²²⁷ Van Niekerk *et al* (2018) 14.

²²⁸ Biney (2016) 195.

²²⁹ Van Niekerk *et al* (2018) 41.

²³⁰ Section 1 of the LRA.

²³¹ The LRA defines an employee as 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 any other person who in any manner assists in carrying on or conducting the business of an employer.

²³² Biney (2016) 195.

²³³ Van Niekerk *et al* (2018) 81.

²³⁴ Norton *ILJ* (2009) 2; Bosch *ILJ* (2006) 30.

*Safika Holdings*²³⁵ (*Safika Holdings*) the CCMA dismissed a dismissal dispute referred by a USA citizen who had accepted employment as an advisor in South Africa subject to obtaining a work permit. The CCMA held that he was not an employee for purposes of the LRA. The employment contract was void ab initio as his status was in direct contravention of the Aliens Control Act.

Likewise, in *Vundla v Millies Fashions*²³⁶ a Zimbabwean national was dismissed after failing to produce proof of her status. She referred a dismissal dispute to the CCMA which held that there was no dismissal. The dispute was then dismissed. The Commissioner held that "the country's attitude towards illegal immigrants and those who are employing and/or harbouring them is that they should be dealt with severely".²³⁷

A different approach was introduced in *Discovery Health Ltd v CCMA*²³⁸ (*Discovery*). A foreign (Argentinean) national was employed by Discovery Health effective from 1 May 2005. At the time, he had a temporary residence permit obtained on 8 May 2003. It subsequently came to light that he was not in possession of a valid work permit. His employment was consequently summarily terminated. No disciplinary enquiry took place prior to the termination.

The CCMA found that he was an employee for purposes of the LRA and was thus entitled to have his dismissal evaluated in terms of fairness by the Commission. The definition of "employee" in the LRA contemplates an "employment relationship" that transcends an employment contract,²³⁹ and that although a contract of employment entered into with a foreign national who does not possess a valid work permit is invalid, the employment relationship is not invalid. Employees who are in an employment relationship may be protected by the LRA, the EEA and the BCEA, despite the absence of a valid employment contract. The Labour Court upheld the

²³⁵ (2001) 22 ILJ 1261 (CCMA).

²³⁶ (2003) 24 ILJ 462 (CCMA).

²³⁷ Norton *ILJ* (2009) 2; Costello and Freedland (2014) 234; In *Georgieva-Deyanova v Craighall Spar* (2004) 9 BALR 1143 (CCMA), the CCMA upheld a point in limine that it lacked to hear a dismissal dispute involving a foreign national who did not possess a work permit on the basis that the employment contract was void ab initio and the employment violated the Immigration Act.

²³⁸ (2008) 29 ILJ 1480 (LC).

²³⁹ Van Niekerk *et al* (2018) 82.

decision of the Commission. Accordingly, the constitutional right of undocumented migrants must be protected and they qualify for protection under the LRA.²⁴⁰

In *'Kylie' v CCMA*²⁴¹ (*Kylie*) a female sex worker was engaged at a massage parlour to perform various sexual services for reward. She was dismissed and referred a dispute to the CCMA which ruled it lacked jurisdiction to arbitrate the dispute as the contract of employment was for an illegal purpose and unenforceable in terms of the common law. The matter came before the Labour Court which held that the definition of employee in section 213 of the LRA was wide enough to include a person whose contract of employment was unenforceable in terms of the common law. However, a sex worker was not entitled to protection against unfair dismissal in terms of section 185(a) as it would be contrary to the common law principle that Court ought not to sanction or encourage illegal activity.

On appeal, the LAC held that the sex worker was an employee for purposes of section 185 of the LRA. The Court concurred that the brothel keeping and prostitution are criminal offences²⁴² and, invoking the principle *ex turpi causa non oritur actio*, and found that the Courts regard adultery and commercial sex as immoral and of such turpitude as to render an agreement connected with them void and unenforceable.

The Court held that the constitutional protection of fair labour practices²⁴³ would not apply to a person engaged in illegal employment. Extending this right to this category of persons would undermine the rule of law by sanctioning or encouraging legally prohibited activity. Furthermore, although the primary relief for unfair dismissal is reinstatement,²⁴⁴ an reinstatement order would sanction the illegal activity and constitute an order on the employer to commit a crime.

Following *Discovery*, there have been a number of disputes involving migrants within the South African workplace. In the unreported decision of the Labour Court sitting in

²⁴⁰ Biney (2016) 195.

²⁴¹ (2010) 31 ILJ 1600 (LAC).

²⁴² Under the Sexual Offences Act 23 of 1957.

²⁴³ Section 23 of the Constitution.

²⁴⁴ Section 193(2) of the LRA.

Cape Town, *Southern Sun Hotel Interests (Pty) Ltd v CCMA (Southern Sun Hotel)*,²⁴⁵ Ms Lynne Ernesta (Lynne), a foreign national from the Seychelles, obtained employment from Southern Sun Waterfront Hotel in Cape Town. At the time of her employment, she only had a study permit. Upon expiry of the study permit on 30 May 2008, Southern Sun instructed to obtain a valid work permit. She was subsequently suspended without pay.

By 18 September 2008, Lynne had not succeeded in obtaining a valid work permit. Southern Sun subjected her to disciplinary enquiry on 25 September 2008 which culminated in her dismissal on 7 October 2008 on the basis that she was unable to lawfully tender her services. She referred an unfair labour practice dispute to the CCMA related to her suspension without pay. Pursuant to failed conciliation, the dispute was referred to arbitration on 20 November 2008. Southern Sun objected to jurisdiction. The CCMA however ruled that it had jurisdiction to hear the dispute. Southern Sun then sought a review of that Ruling. The Court reiterated the principles in *Discovery* and *Kylie*, stating the following:

"it was held that even where the work itself is illegal – and not only the contract of employment, as in *Discovery Health* and in the case of Ernesta – the CCMA retains jurisdiction."

The review application was dismissed.

The LAC in the *State Information Technology Agency (Pty) Ltd v CCMA*²⁴⁶ iterated that the focus is no longer on the employment contract; rather the existence of an employment relationship.²⁴⁷ Added to this, in section 186 of the LRA, the words "contract of employment" were removed from the definition of dismissal.²⁴⁸

In *Sibande v CCMA*,²⁴⁹ (*Sibande*) the applicant instituted interdict proceedings against the Minister of Home Affairs in the High Court following his incarceration on suspicion of being an illegal immigrant in terms of the Aliens Control Act 96 of 1991.

²⁴⁵ (Unreported case C255/09).

²⁴⁶ [2008] 7 BLLR 611 (LAC).

²⁴⁷ Van Niekerk *et al* (2018) 65.

²⁴⁸ Section 186(1)(a) of the LRA; Van Niekerk *et al* (2018) 81.

²⁴⁹ (2010) 31 ILJ 441 (LC).

The Court held that there were good grounds for the suspicion that Mr Sibande was a prohibited person and declined to confirm the rule nisi. The Court however found that the immigration officer failed to comply with section 10(5) of the Act required him to decide whether Sibande was a prohibited person and, if so, to issue him with a notice to leave the country. He merely informed the employer, Dunwell Property Services CC (Dunwell).²⁵⁰

The Court considered the question of the validity of a contract concluded between a South African employer and an illegal immigrant. Relying on *Discovery* and *Kylie*,²⁵¹ the Court held that a disciplinary enquiry ought to have been held, and the responsible immigration officer called. Furthermore, the documents in support of the claim that Sibande was an illegal immigrant should have been produced to prove the misconduct, and Sibande afforded an opportunity to answer. Dunwell's failure to do was defective and denied Mr Sibande procedural fairness.

The Court observed that Dunwell's case was based on what it was told by the immigration officer. However, that information did not establish as a fact that Mr Sibande was a prohibited person or illegal immigrant. Its case was based on suspicion of the immigration officer that he was an illegal immigrant, which did not establish a fact or legal position that Mr Sibande was a prohibited person. The immigration officer had failed to have Mr Sibande declared a prohibited person in

²⁵⁰ Mr Sibande was employed by Dunwell as a manager. According to Dunwell's witness, Mr Xulu, he was dismissed pursuant to being informed by Dunwell that it had a problem keeping him in its employ because his citizenship was questioned by the Department of Home Affairs (DHA). He challenged the dismissal.

²⁵¹ In paragraph 24, Molahlehi J summed up the principles in the two cases as follows:

"Van Niekerk J in *Discovery Health* held firstly that even if the contract between Lanzetta and the employer was invalid, Lanzetta would still fall within the definition of an 'employee' in terms of the Labour Relations Act 66 of 1995 and accordingly the definition would have to be reconciled with the fair labour practice conferred on every employee by the Constitution. In *'Kylie'* the court held that prostitutes were entitled to constitutional protection 'as persons' but not as employees. The court found that prostitutes did not have the protection provided for in the Labour Relations Act because their activity was criminalized by the Sexual Offences Act 23 of 1957. Thus the difference between these two cases is in the nature of the work which the two people were doing. In the *'Kylie'* case the work was declared illegal by the Sexual Offences Act whereas in the *Discovery Health* case the work done by the employee was not prohibited, but the issue concerned the status of the person."

terms of the Aliens Control Act. The Court reviewed and set aside the award of the CCMA which had found that the dismissal was substantively fair.²⁵²

The decision of the Labour Court was upheld on appeal in *Dunwell Property Services CC v Sibande*.²⁵³ The LAC noted that neither the High Court nor the immigration officer had declared the employee to be an illegal immigrant or prohibited person in terms of the Aliens Control Act. The High Court had not issued a deportation order, as alleged by the company in the dismissal letter. The LAC was satisfied that there was no proof before the company that the employee had been declared to be an illegal alien and there was therefore no fair reason to justify his dismissal.

In Chapter 4, this study dealt with *Ndikumdavyi*²⁵⁴ wherein the Labour Court reaffirmed that "employment contract" in the definition of dismissal in section 186 of the LRA must be interpreted wide to mean an employment relationship.

Although the Court could not make a finding on substantive fairness on the dismissal on the basis of section 10 of the PSA, it held that notwithstanding Mr Ndikumdavyi's refugee status, he was still entitled to procedural fairness prior to being summarily dismissed. He ought to have been afforded the right to be heard. Furthermore, an illegal contract does give rise to an employment relationship. Although *Kylie* was distinguishable in that it involved the rendering of illegal services, what the law considered criminal activity.

In *Joseph v University of Limpopo*²⁵⁵ (*Joseph*) a non-South African national from India was appointed as a senior lecturer in May 1997 on a 3 year fixed-term contract which was subsequently extended for a further period of 3 years in the year 2000. He was however not re-appointed thereafter due to the expiry of his work permit. The LAC held that this did not preclude a reasonable expectation of renewal of his contract in circumstances where obtaining a work permit was reasonably anticipated. The CCMA's unfair dismissal award was upheld.

²⁵² *Iwu et al* (2015) 90.

According to Iwu et al, Sibande is a clear illustration that the rights of migrants in the workforce are indeed under the veil of protection by legislation and the courts.

²⁵³ (2011) 32 ILJ 2652 (LAC).

²⁵⁴ *Ndikumdavyi v Valkenberg Hospital* (2012) 22 ILJ 2648 (LC).

²⁵⁵ (2011) 32 ILJ 2085 (LAC).

5.4 Conclusion

The role played by the judiciary in developing the law in relation to migrants cannot be overstated. In the plethora of jurisprudence referenced above, at two three regimes are appears. Firstly, the inflexible regime during which a dismissal dispute could not arise where the complainant was unauthorised to take up employment due to either lack or expiry of their residence and/ or work permits. This regime also adopted a narrow interpretation of the definition of "employee" and restricted same to whether there was a valid employment contract concluded.

The second came about in *Discovery*. It saw a move from a narrow approach to the definition of "employee", to focussing on whether an employment relationship came into existence. In this regime, the Courts recognised that undocumented migrants were at least entitled to procedural fairness when the termination of their employment is contemplated. What the Courts have also subsequently placed emphasis on (in *Sibande*) is that an employer must establish the status of a migrant employee as a matter of fact prior to terminating their employment. This obviously offers protection against haste decisions by employers. Furthermore, makes it onerous on employers to thoroughly investigate and base their decisions on facts. This regime's flexibility was further demonstrated in *Joseph* when the LAC relied on a migrant's reasonable expectation of renewal of his work permit to uphold an unfair dismissal award.

Whilst I commend the judiciary for their role in developing the law, there is still further reform to be done in the immigration policies to afford better protection to undocumented migrants. In early 2019, the Constitutional Court extended some protection to undocumented asylum seekers in *Ruta v Minister of Home Affairs*²⁵⁶ when it held that all asylum seekers are protected by the principle of *non-refoulement* and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure. They are protected until appropriate proceedings for refugee status determination have been completed. It remains to be seen whether there will be a similar move in relation to undocumented migrants who at least approach the authorities to attempt to regularise their presence within South Africa's borders.

²⁵⁶ 2019 (2) SA 329 (CC); Discussed in Chapter 3 (paragraph 3.2).

**CHAPTER 6:
RIGHTS OF IRREGULAR MIGRANT WORKERS IN KENYA AND THE USA**

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6.1 Introduction

Migration is a global phenomenon, and certainly not unique to South Africa.²⁵⁷ This chapter examines migration from the perspective of Kenya and the United States of America (USA). The aim of the comparative study is to scrutinize the trends, regulation or control of irregular migrants within the workplace. Unsurprisingly, all three jurisdictions have similar characteristics (of exclusion and strict control) and like South Africa, appear to offer protection to regular migrants only. The only fate awaiting irregular migrants is arrest, detention and deportation. Even little is done to protect their human rights.

6.2 Kenya

Kenya is labelled one of the most industrialised countries in East Africa²⁵⁸ with an estimated population of about 52 million.²⁵⁹ The country is a regional hub for irregular migration as a destination, origin and transit country towards South Africa, the Middle East, North Africa, West Africa, Europe and North America.²⁶⁰ Until the year 2017, Kenya hosted one of the largest refugee populations in Africa in two camps, Dadaab

²⁵⁷ Tati SPS (2008) 426; Siddique 1; Crush et al (2005) 1; Kapindu *AHRLJ* (2011) 100.

²⁵⁸ Matsvai-Mutsau (2018) 64.

²⁵⁹ <https://www.worldometers.info/world-population/kenya-population/>

²⁶⁰ IMO (2015) 16; Goitom (2016) 1.

and Kakuma.²⁶¹ The majority of Kenya's labour force is engaged in informal or subsistence farming.²⁶²

Like South Africa, Kenya has two primary pieces of legislation regulating the entry and presence of foreigners within its borders – the Citizenship and Immigration Act²⁶³ and Refugees Act.²⁶⁴ It has also enacted the Employment Act²⁶⁵ which offers protection to documented migrants only. Articles 2(5) and (6) provides that "[t]he general rules of international law shall form part of the law of Kenya...Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

The Constitution of the Republic of Kenya 2010 (Constitution) provides that general rules of international law such as customary international law form part of the laws of Kenya.²⁶⁶ This is a similar characteristic of South Africa's Constitution.²⁶⁷

At the end of year 2012, Kenya introduced what has been termed a drastic change to its policy on asylum seekers and refugees. Previously, they were allowed to settle in urban areas. However, following recent terrorist attacks in urban locations,²⁶⁸ the Department of Refugee Affairs introduced and implemented the Encampment Policy which essentially required all refugees and asylum seekers in cities to relocate to refugee camps with the plan to repatriate them to their home countries. A court challenge ensued, wherein the Kenya High Court held in July 2013 that the Policy was a violation of the constitutional right of movement and the principle of non-refoulement Refugees Act.²⁶⁹

²⁶¹ IMO (2015) 17; http://www.globalcrf.org/crrf_country/kenya-2/; Rawlence (2016) 5; Menkhaus (2017) 6.

²⁶² IMO (2015) 19; Menkhaus (2017) 6.

²⁶³ Act 5 of 2007.

²⁶⁴ Act 13 of 2006

²⁶⁵ Act 11 of 2007.

²⁶⁶ Namina (2017) 1.

²⁶⁷ Section 33 of the Constitution.

²⁶⁸ Namina (2017) 2; Menkhaus (2017) 6.

²⁶⁹ The government linked the terrorist attacks to refugee migration of Somalians into Kenya. Madeline et al 270–271; *Kituo Cha Sheria & 8 Others v. Attorney General [2013] eKLR 2, paras 1 - 6*; <http://kenyalaw.org/caselaw/cases/view/84157>, archived at <https://perma.cc/E2YL-22TJ>; *Kituo Cha Sheria & 8 Others v. Attorney General*, para. 94; Namina (2017) 2.

Kenya's main national immigration legislation comprises the Citizenship and Immigration Act,²⁷⁰ Refugees Act,²⁷¹ Preservation of Public Security Act,²⁷² and the Citizens and Foreign Nationals Management Service Act.²⁷³ There are four key policy documents relevant to migration: Kenya Vision 2030, the National Migration Policy, the National Labour Migration Policy, and the National Diaspora Policy. As at 2015, however, the National Migration Policy and National Labour Migration Policy were drafts.²⁷⁴

(i) Citizenship and Immigration Act

The Citizenship and Immigration Act makes reference to the term "prohibited immigrant" who is defined as any person who is amongst others not a citizen of Kenya and is incapable of supporting himself and dependants (if any) in Kenya or fails to produce a valid passport; and dependants of prohibited immigrants.²⁷⁵ The Act further provides for the immediate removal, arrest and detention, and expulsion of persons who are unlawfully in the country.²⁷⁶

An "illegal immigrant" who engages in any employment, occupation, trade, business or profession, whether or not for profit or reward, without being authorized to do so by an entry permit or exempted under the Act commits an offence. So does any person who employs an "illegal immigrant". Such persons shall be liable to a fine not exceeding twenty thousand shillings or to imprisonment for a term not exceeding one year or to both.²⁷⁷ This provision is clearly intended to deter the employment of irregular migrants. Mbutia observed that increased fines, penalties and levies have not helped to deter offenders.²⁷⁸

Section 17 empowers the Minister to issue regulations prescribing the information to be furnished and the returns to be made by employers with respect to the persons employed by them, including in particular information as to the citizenship,

²⁷⁰ Act 5 of 2007.
²⁷¹ Act 13 of 2006.
²⁷² Act 10 of 1997.
²⁷³ Act 31 of 2011.
²⁷⁴ IMO (2015) 21.
²⁷⁵ Section 3 of the Citizenship and Immigration Act; Cheruiyot (2018) 30 – 31.
²⁷⁶ Section 8 of the Kenyan Refugees Act.
²⁷⁷ Section 13 of the Citizenship and Immigration Act; Cheruiyot (2018) 31; Mbutia (2016) 47.
²⁷⁸ Mbutia (2016) 49.

description of employment, remuneration, experience and qualifications of those persons, and as to training schemes. This appears to be a monitoring mechanism by government, through the collection of data from employers.

(ii) Refugees Act

Kenya recognizes two classes of refugees: *prima facie* refugees and statutory refugees.²⁷⁹ Section 11(3) the Kenyan Refugees Act provides that no person claiming to be a refugee shall merely, by reason of illegal entry, be declared a prohibited immigrant, detained or penalised in any way. This is obviously in contrast to South Africa's legislation which allows for arrest, detention and deportation of irregular migrants who illegally entered the country, except such a person may be subjected to persecution on account of their race, religion, gender, nationality, political opinion or particular social group, or their life, safety or freedom would be threatened as a result.²⁸⁰

Section 12 of the Kenyan Refugees Act allows a person who has applied for recognition as a *prima facie* refugee to remain in Kenya (with every member of their family) until recognised in terms of the Act. If the application is denied, they may remain until they have had an opportunity to exhaust their right of appeal. If unsuccessful, they have 90 days within which to seek admission to a country of their choice.

The Kenyan Refugees Act entitles refugees to the rights set out in international conventions to which Kenya is a party.²⁸¹ Significantly, refugees may apply for a convention travel document for employment.²⁸² Section 16(4) permits every refugee and member of their family to engage in wage earning employment subject to "the same restrictions as are imposed on persons who are citizens of Kenya."

²⁷⁹ Goitom (2016) 1.

²⁸⁰ Section 2 of the Refugees Act; Namina (2017) 3; <https://www.unhcr.org/ke/figures-at-a-glance>.

²⁸¹ Section 16 of the Kenyan Refugees Act.

²⁸² Section 34(2) of the Kenyan Refugees Act.

(iii) Employment Act

Concerning 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. It is also a party to the African Charter and has submitted itself to the jurisdiction of the African Court for Human Rights.

Kenya has ratified ILO Conventions which provide for the rights and protection of migrant workers.²⁸³ These are given expression in the Kenyan Employment Act which prohibits forced labour.²⁸⁴ It makes reference to "migrant worker" who migrates to Kenya with a view to being employed by an employer and includes any person regularly admitted as a migrant worker.²⁸⁵

Section 5 prohibits direct or indirect discrimination against an employee or prospective employee. Furthermore, the Act obliges the Minister, labour officers and the Industrial Court to promote and guarantee equality of opportunity for a person who is a migrant worker or a member of the family of the migrant worker, lawfully within Kenya. Significantly, an employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

6.3 The United States of America

Like South Africa, the USA is a recipient of large numbers of immigrants. According to Walsh, the traditional view is that they take jobs from American workers;²⁸⁶ a view that resonates with South Africa. This characteristic is one of the reasons why this study took particular interest in the USA. The President, Mr Donald Trump, has been vocal about his views on migrants. In a statement issued by the White House, it is affirmed that:

²⁸³ Matsvai-Mutsau (2018) 71.

²⁸⁴ Section 4 of the Kenyan Employment Act.

²⁸⁵ Section 1 of the Kenyan Employment Act.

²⁸⁶ Walsh *JTP* (2003) 315 – 316.

"President Trump is committed to constructing a border wall and ensuring the swift removal of unlawful entrants. To protect American workers, the President supports ending chain migration, eliminating the Visa Lottery, and moving the country to a merit-based entry system."²⁸⁷

Migrants, especially when they are deemed irregular, undocumented, illegal, find it hard to have their human rights respected.²⁸⁸ Two principal statutes regulate the status of migrants in the USA, namely: the Immigration Reforms and Control Act (IRCA),²⁸⁹ also known as "the Simpson-Mazoli Act", and National Labor Relations Act (NLRA) which was passed to protect workers' rights to bargain collectively in order to ensure industrial stability by prohibiting certain employer conduct.²⁹⁰ At its heart was the effort to control illegal immigration.²⁹¹ Both have limitation and barriers to access to public services or benefits, and employment.²⁹²

(i) Immigration Reforms and Control Act

Prior to enactment of the IRCA, the Immigration and Nationality Act prescribed immigration law and policy. It was primarily concerned with the legal admission and treatment of legal immigrants, not that of undocumented migrants.²⁹³

Notoriously labelled as the statute that altered US immigration law, section 101 of the IRCA made provision for the control of the employment of "aliens". According to Chishti *et al*, the primary goal of its sponsors and proponents was to increase border security and establish penalties for hiring illegal immigrants.²⁹⁴ It was enacted after a claim that undocumented immigrants burdened the US' welfare system.²⁹⁵ It sought to preserve jobs for American citizens and aliens authorised to work in the US.²⁹⁶ Section 247A further made it the employment of "aliens" unlawful. This provision stipulated as a general principle that it is unlawful for a person or other entity to hire

²⁸⁷ <https://www.whitehouse.gov/issues/immigration/>.

²⁸⁸ Dembour and Kelly (2011) 1.

²⁸⁹ The IRCA is also known as the Simpson–Mazzoli Act. It was passed by the 99th United States Congress and signed into law by President Ronald Reagan on 6 November 1986; Fischer (2010) 236.

²⁹⁰ Walsh *JTP* (2003) 317.

²⁹¹ Rolph and Abby *RJR* (1990) 4.

²⁹² Chumil *JP* (2009) 354.

²⁹³ Walsh *JTP* (2003) 320.

²⁹⁴ Chishti *et al PB* (2011) 1; Nyce and Bodenner *TA* (2016) 1; Rubio-Marín and Rodríguez (2010) 6.

²⁹⁵ <https://www.upcounsel.com/immigration-reform-and-control-act-of-1986>.

²⁹⁶ <https://www.bu.edu/hr/policies/federal-and-state-laws/immigration-reform-and-control-act-irca/>.

or recruit or refer for a fee, for employment in the US an alien knowing the alien is unauthorised with respect to such employment.²⁹⁷

The IRCA also made it illegal for an individual to use fraudulent entry or work documents. In addition, a person or other entity who uses a contract, subcontract, or exchange, entered into, renegotiated, or extended after the date of the enactment of this section, to obtain the labour of an alien in the US knowing that the alien is an unauthorized alien with respect to performing such labour would be considered to have hired the alien for employment in the US in violation of section 274A(1)(A).²⁹⁸ Employers were required to verify whether new hires were authorized to work in the country and made it illegal to continue to employ a person once aware of his or her unauthorized work status.²⁹⁹

A person or entity may raise a defence that it has complied in good faith with the requirements with respect to the hiring, recruiting, or referral for employment of an alien in the USA has established an affirmative defence that the person or entity has not violated section 274A(1)(A) with respect to such hiring, recruiting, or referral.³⁰⁰ Employers could also use the act of having made an attempt to verify an individual's work status as an affirmative defence against allegations of violations of this provision.

²⁹⁷ Section 274A(1)(A) of the IRCA.

²⁹⁸ Section 274A(4) of the IRCA; <https://www.upcounsel.com/immigration-reform-and-control-act-of-1986>

²⁹⁹ Section 274A(5)(b)(1) of the IRCA.
This was done by examining:

- 1) their US passport, certificate of US citizenship, certificate of naturalization, unexpired foreign passport, if the passport has an appropriate, unexpired endorsement of the Attorney General authorizing the individual's employment in the United States, or resident alien card or other alien registration card. If the card contains a photograph of the individual or such other personal identifying information relating to the individual as the Attorney General finds, by regulation, sufficient for purposes of this subsection, and is evidence of authorization of employment in the United States.
- 2) A document evidencing employment authorisation such as their social security account number card, certificate of birth in the US or establishing US nationality at birth, which certificate the Attorney General finds, by regulation, to be acceptable for purposes of this section, or other documentation evidencing authorization of employment in the US which the Attorney General finds, by regulation, to be acceptable for purposes of this section.
- 3) Documents establishing the identity of an individual such as a driver's license or similar document.

³⁰⁰ Section 274A(3) of the IRCA.

An employer was required to keep records of the verification and make them available for inspection by officers of the Service or Department of Labor for a period of 3 years (or 1 year after the date that the individual's employment is terminated).³⁰¹

In *Hoffman Plastic Compounds, Inc. v National Labor Relations Board*³⁰² (Hoffman) a Mexican national entered the US illegally and obtained employment at Hoffman Plastic Compound. He was subsequently dismissed for being involved with a trade union in the workplace.

The matter was referred to the National Labor Relations Board (NLRB) which initially held that the dismissal was unfair and unlawful, and awarded reinstatement with back-pay. At the time, the NLB was unaware of the employee's status. On appeal in the Supreme Court of Appeal, the Court overturned the NLRB's decision and held that in light of IRCA's employer sanctions provisions, unauthorized workers were ineligible to receive back pay awards even when they were unlawfully terminated under the nation's labour laws.³⁰³

It is reported that the IRCA's prohibition on national origins and citizenship discrimination was widespread. The Office of Special Counsel continues to prosecute discrimination cases.³⁰⁴ In a recent piece, Moffett sets out his views on why he considers the IRCA a failure.³⁰⁵ He writes that Simpson and Mazzoli conceded that the IRCA was a failure. It did not keep "illegal workers" from the workplace and failed to deal with at least 2 million undocumented immigrants who ignored its provisions or were ineligible. It instead encouraged more of them to come to the US through its

³⁰¹ Section 274A(5)(b)(D)(3) of the IRCA.
For non-compliant employers, the IRCA (section 274A(5)(b)(G)(4)(c)) established a system of increasing civil penalties for repeat violations:
1) for the first violation, between \$250 and \$2,000 for each unauthorized person employed;
2) for the second violation, between \$2,000 and \$5,000 for each unauthorized person employed; and
3) for subsequent violations, between \$3,000 and \$10,000 for each unauthorized person employed.
For patterns of violations, the IRCA established criminal penalties of a fine of up to \$3,000 for each unauthorized person employed and/or up to six months in prison.

³⁰² 535 U.S. 137 (2002); Walsh *JTP* (2003) 314 - 315, 324 – 329.

³⁰³ Chishti *et al PB* (2011) 3; Badenhorst (2016) 43; Costello and Freedland (2014) 216, 237.

³⁰⁴ Chishti *et al* (2011) 3.

³⁰⁵ Moffett (2019) 2.

amnesty provisions. Some companies enlisted subcontractors to avert hiring illegal migrant workers directly. Blame would then be imputed on the subcontractors.³⁰⁶ The IRCA appears to fall in line with South Africa's Immigration Act.³⁰⁷

(ii) National Labor Relations Act

The NLRA was enacted in 1935 to *inter alia* protect the rights of employers and employees, encourage collective bargaining and curtail certain private sector labour practices which could harm the general welfare of workers, businesses and the US economy.³⁰⁸ It further provides for the National Labour Relations Board.³⁰⁹

Section 1 defines an "employee" as any individual whose work has ceased as a consequence of, or in connection with, any current labour dispute or because of any unfair labour practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural labourer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act.

The NLA is silent on the rights or protection, if any, extended to undocumented migrants – aliens. Section 7 of the Act sets out the rights of employees, and section 8 defines what constitutes an unfair labour practice.

In *Hoffman Plastics*³¹⁰ Chief Justice Rehnquist, who wrote the majority opinion, drew an analogy between employees who worked without immigration authorization and employees who were ineligible for reinstatement or back-pay because, they have 'committed serious criminal acts', such as trespass or violence against the employer's property. The majority then went on to say that a back-pay award could undermine a federal statute or policy outside of the competence of the National Labor Relations Board, in this case immigration laws. The majority characterized the dismissed

³⁰⁶ Moffett (2019) 2; Moffett (2018) 1.

³⁰⁷ Badenhorst (2016) 42.

³⁰⁸ <https://www.nlr.gov/how-we-work/national-labor-relations-act>; Badenhorst (2016) 42.

³⁰⁹ Section 3 of the NLRA.

³¹⁰ 535 U.S. 137 (2002); Walsh *JTP* (2003) 328.

employee's conduct in completing the relevant immigration laws as 'criminal' and hence awarding back-pay would condone and encourage future violations of the relevant immigration laws. Justice Breyer, who dissented with three other justices, held that an award of back-pay is consistent with labour law and immigration policy as it would help to deter unlawful activity that both labour and immigration laws seek to prevent. Further, the dismissal of the employee was motivated by the employer's antiunion conduct and not by the employee's own conduct.

6.4 Comparison and conclusion

The rationale for selecting Kenya as one of the jurisdictions for purposes of this analysis was to survey what some of the trends are in other parts of the African continent. Like South Africa, Kenya has two main statutes that regulate immigration – the Citizenship and Immigration Act and the Refugees Act. The Citizenship and Immigration Act makes reference to "illegal immigrants" and makes it an offence for them to engage in any employment without prior authorisation or exemption. Furthermore, employers must account for each employee they employ and their status. Similarly, the South African Immigration Act makes reference to "illegal foreigners" and contains similar prohibitions.

The Kenyan Refugees Act stipulates that a prima facie refugee, together with their family, may remain within its borders if their application is denied until such time as they have exhausted their right to appeal. Furthermore, illegal entry into its borders is not a basis for declaring them prohibited migrants, or detaining or penalising them. This is in sharp contrast with the South African statute. It was only in early 2019 that the Constitutional Court held in *Ruta v Minister of Home Affairs*³¹¹ that all asylum seekers are protected by the principle of *non-refoulement* and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure. They are protected until appropriate proceedings for refugee status determination have been completed.

³¹¹ 2019 (2) SA 329 (CC); Discussed in Chapter 3 (paragraph 3.2).

In the US, the Immigration Reforms and Control Act seeks to control the employment of "aliens" by rendering it unlawful to employing them knowing their status. Non-compliant employers shall be liable to paying penalties. Furthermore, unauthorised "aliens" are not eligible for reinstatement or back-pay in instances of unlawful dismissals. The only distinct characteristic is that in South Africa, an undocumented migrant may be awarded compensation for procedural unfairness. Like the South African LRA, the American Labor Relations Act affords no rights or protection to "aliens".

The immigration and employment laws of the above three jurisdictions appear to be materially similar. South Africa, specifically through its judiciary, is undeniably playing an active role in developing the law to offer some protection to undocumented migrants as seen in *Ruta*. Although this is not happening rapidly, it is a positive development.

CHAPTER 7: CONCLUSION

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7.1 Introduction

This study aimed to answer the following questions:

- (i) What are the international and regional standards that should be considered when dealing with undocumented migrants?
- (ii) What labour rights are conferred to undocumented migrants within the South African legislative and policy framework?
- (iii) Are these sufficient to protect the rights of undocumented migrants? If not, what should be adapted?

Having traversed the content of the constitutional right to fair labour practice, the various policy and legislative policy framework insofar as irregular migrants are concerned within the South African workplace, this chapter concludes on the thoughts and provides recommendations. It also responds to the above three critical questions.

7.2 International and regional norms

Bodies such as the ILO, AU, UN and SADC have played a vital role concerning migrants. The ILO has issued core labour standards which include the elimination of discrimination in respect of employment and occupation. Sadly, the Migrant Workers Convention, whilst directly dealing with issues related to migrant workers, is not a core convention. Furthermore, although states are not prohibited from extending

rights only available to documented migrants to those who are irregular, it has shown onerous to do so due to incapacity and limited resources.

The ILO provides for a complaint procedure in the event of a member state failing to secure effective observance of any convention it has ratified. This may result in the appointment of a commission of inquiry to consider the complaint and file a report. The government concerned has the choice of accepting recommendations in the report or that the matter be referred to the International Criminal Court of Justice whose decision shall be final. This is an obviously protracted process. By its conclusion, the concerned migrants may have already been deported.

A key instrument of the UN is the Universal Declaration of Human Rights which stipulates that all are equal before the law and are entitled to without discrimination to equal protection of the law. Article 23 recognizes the right of everyone to work, free choice of employment, just and favourable working conditions and protection against employment.

The AU's envisages an African Economic Community. Its key instruments include the Common Position on Migration and Development, Strategic Framework for a Policy on Migration in Africa and the Joint Labour Migration Programme. The AU advocates for a well-managed migration which has the potential to yield significant results for both the country of origin and destination country.

Finally, SADC which focusses on the Southern African region supports regional integration and the removal of obstacles against the free movement of persons. There has been a move to provide a framework for the recognition of regional labour standards as articulated in the Charter on Fundamental Social Rights.

7.3 South Africa and undocumented migrants

In South Africa, irregular migrants are recognised as employees. The juxtapose is that their employment is prohibited by the Immigration Act. Thus, retaining them as employees would be in breach of our domestic law. What this then means is that they are effectively unable to enjoy any rights that flow from their recognition as

employees. Prior to the Constitutional Court's decision in *Ruta v Minister of Home Affairs*³¹² the recourse available to the authorities was to arrest, detain and deport undocumented migrants. Pursuant to this decision, expressing an intention to apply for asylum is a valid basis for not being arrested or deported. In my view, by implication, where the undocumented migrant is employed, they may continue being employed until such time as their application has been determined. This offers some protection to undocumented migrants whilst they await outcome of their endeavours to regularise their presence within the Republic's borders.

7.4 Conclusion and recommendations

In an economy that is not growing, South Africa has seen many employers shedding jobs. Group Five retrenched 1000 employees in 2018, Dunkin Donuts & Baskin Robbins shed 120 jobs in February 2019, Standard Bank cut 1200 jobs in March 2019 in addition to closing more than 100 branches, Absa cut 827 jobs in March 2019 Togaat Hullet retrenched 5000 employees in May 2019, and in June 2019 Sibanye-Stilwater said it would retrench at least .³¹³ This has even spilled over to the public sector where government is the largest employer. This obviously has a bearing when the circumstances of irregular migrants are considered. There are not enough jobs for citizens.

Irregular migrants cannot be ignored. They continue to infiltrate the informal sector as well as agricultural, mining and domestic worker sectors. Their continued segregation may contribute to the hostile treatment they face. Most of them are escaping dire conditions in their countries of origin. Various studies have shown that migration boosts production, decrease the price of basic goods relying on low-skilled labour (thus encouraging their consumption) and increase the benefits of owners of land and capital, thereby acting as agent of growth.³¹⁴

In order to respond adequately to the plight of undocumented migrants, this study firstly proposes that the enforcement mechanisms of the ILO, Au and SADC be

³¹² 2019 (2) SA 329 (CC).

³¹³ <https://www.businessinsider.co.za/total-number-of-job-losses-south-africa-retrenchment-corporate-job-losses-2019-6>

³¹⁴ Karagueuzian and Verdier-Chiuchane *AEB* Vol. 5 Issue 1 (2014) 11.

developed. It appears that until such time as a complaint reaches the International Criminal Court (ICC), there are real consequences for non-compliant states. Furthermore, the observation is that unless the violation affects a large group, individual and isolated violations rarely find their way to the ICC.

Second, reform is clearly necessary to accommodate the unique circumstances of undocumented migrants. Employers who employ them under abusive conditions most of which violate their human rights should also be penalised, and not only for employing them in breach of the country's immigration laws. This will encourage improving working conditions for migrants, irrespective of their status, and deter violation of their basic human rights in the workplace. Furthermore, this will be in line with South Africa's international obligations to respect human rights.

Finally, better border control is necessary to ensure that migrants who enter the country are documented. This will enable them to enjoy the rights and protections under the immigration and employment laws of the country. Lack of funding and being under-resourced and under-staffing have been identified as the main causes for lack of adequate border control.

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