

THE EFFECTIVENESS OF THE SOUTH AFRICAN CRITICAL SKILLS VISA IN COMPARATIVE PERSPECTIVE

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in the Faculty of Law of the University of the Western Cape

Kim-Leigh Joy Loedolf

Student number: 3145761

Supervisors:

Prof Julia Sloth-Nielsen and Prof Kitty Malherbe

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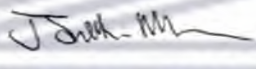


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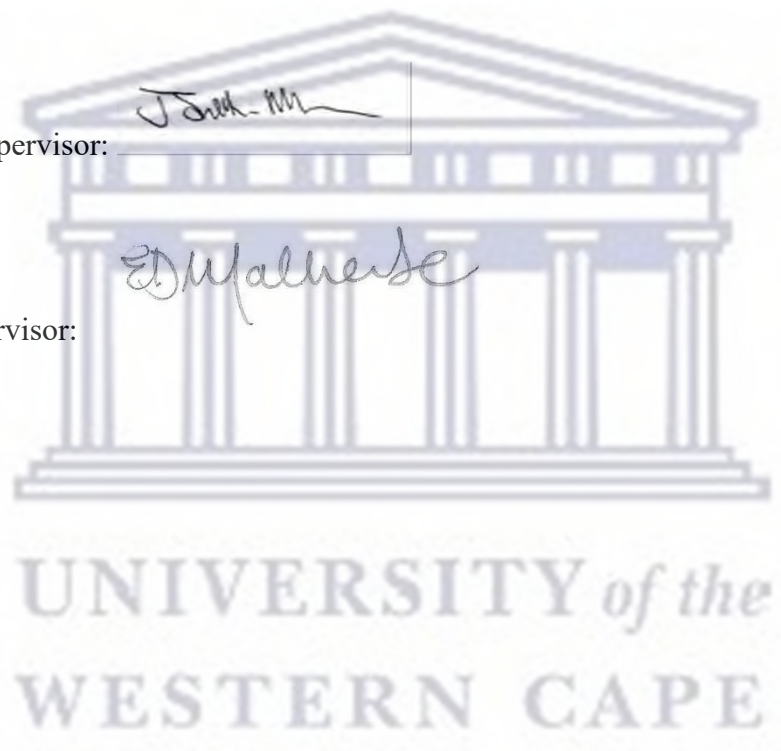
PLAGIARISM DECLARATION

I declare that *The effectiveness of the South African Critical Skills Visa in comparative perspective* is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

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DEDICATION

To the Father, the Son Jesus Christ and Holy Spirit, all honour, glory and power is Yours forever and ever.

Amen.



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May every fibre of my being continually bring praise and honour to God, who has given me the strength and grace to accomplish all things in His name. Nothing is possible apart from You. Thank you, Lord Jesus. You deserve all of the praise.

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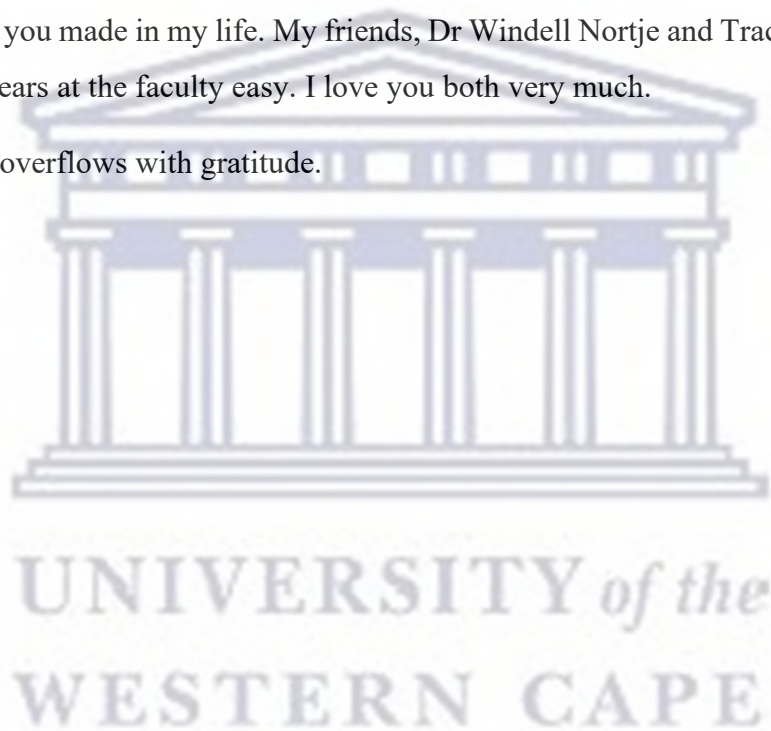
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KEYWORDS AND PHRASES

Critical Skills Work Visa

Emigration

Immigration law

Labour law

Labour rights

Migration

Skilled foreign national

Skilled migrant worker

Skills shortages



ABSTRACT

There are notable skill shortages in South Africa. This thesis explores the reasons behind the skills shortages, including the impact of apartheid on education, brain drain, brain waste, and lack of apprenticeships. Currently, there are skills shortages across many occupations, including managers, professionals, and artisans. Many employers struggle to find qualified employees to fill open positions, and citizens are unlikely to fill occupations critical to economic development soon, due to systemic issues affecting skills formation.

After the apartheid era, the South African state recognised the need for skilled migrant workers to fill critical occupations. The South African state introduced visas, with the aim of alleviating skills shortages by enabling the recruitment and employment facilitation of skilled migrant workers. Regrettably, the state did not receive a significant number of skilled migrant workers. Currently, the Critical Skills Work Visa exists to facilitate the employment of skilled migrant workers in South Africa. Merely possessing a visa is not enough to entice skilled migrant workers to work and reside in South Africa; additional measures are required. The thesis explores the factors that influence skilled migrant workers' decisions to work and live in South Africa and those that discourage them from doing so.

It is acknowledged in the thesis that skilled refugees and skilled asylum seekers may also contribute to alleviating skills shortages. While members of this group are not excluded from applying for critical skills work visas, they are confronted with additional, and significant, obstacles in their pursuit of these visas. The probability of being granted a critical skills work visa is unlikely for most of them, resulting in brain waste.

A comparative analysis is used in the thesis to compare the effectiveness of the Critical Skills Work Visa to that of similar visas in Botswana, Canada, and New Zealand. The thesis concludes with recommendations for improving the effectiveness of the Critical Skills Work Visa. It has been determined that visa requirements are not the sole factor that dissuades skilled migrant workers from selecting South Africa as their work destination. In order to attract skilled migrants, the South African state must enhance its legal framework to conform to international benchmarks, create a proactive immigration regime, and address inconsistencies between the immigration framework and how the Department of Home Affairs applies it.

ABBREVIATIONS AND ACRONYMS

Act 51 of 2009	Immigration Act 51 of 2009
ASP centres	Asylum seeker processing centres
BBBEEA	Broad-Based Black Economic Empowerment Act 53 of 2003
BCEA	Basic Conditions of Employment Act 75 of 1997
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEC	Canadian Experience Class
CESCR	UN Committee on Economic, Social and Cultural Rights
COIDA	Compensation for Occupational Injuries and Diseases Act 130 of 1993
Constitution	Constitution of the Republic of South Africa, 1996
Convention 118	Equality of Treatment (Social Security) Convention
Convention 143	Migrant Workers (Supplementary Provisions) Convention
Convention 97	Migration for Employment Convention (Revised)
CSL	Critical Skills List
CSWV	Critical Skills Work Visa
DHA	Department of Home Affairs
DHET	Department of Higher Education and Training
DOL	Department of Employment and Labour
DWA	Decent Work Agenda (ILO)
DWCP	South African Decent Work Country Programme
EEA	Employment Equity Act 55 of 1998
EOI	Expression of Interest
ESA	Employment Services Act 4 of 2014
ESWP	Exceptional Skills Work Permit
ESWV	Essential Skills Work Visa
FSTC	Federal Skilled Trades Class
FSWC	Foreign Skilled Worker Class
GCM	Global Compact for Safe, Orderly and Regular Migration, 2018
Green Paper	Green Paper on International Migration in South Africa (published in GG 40088 of 24 June 2016)
GWP	General Work Permit
IA	Immigration Act 13 of 2002

ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICTWP	Intra-company Transfer Work Permit
ILO	International Labour Organization
IOE	International Organization of Employers
IRPA	Immigration and Refugee Protection Act (S.C. 2001, c. 27)
IRPR	Immigration and Refugee Protection Regulations SOR/2002-227
JIPSA	Joint Initiative for Priority Skills Acquisition
LRA	Labour Relations Act 66 of 1995
LTSSL	Long-term Skills Shortage List
LTSSV	Long-term Skills Shortage Visa
NDP	National Development Plan 2030
NOC	National Occupational Classification
NP	National Party
OASA	Old Age Security Act
PIRLS	Progress in International Reading Literacy Study
PNC	Provincial Nominee Class
QWP	Quota Work Permit(s)
RA	Refugees Act 30 of 1998
SADC	Southern African Development Community
SANSA	South African Network of Skills Abroad
SAQA	South African Qualifications Authority
SMW	Skilled migrant worker
SMWs	Skilled migrant workers
STEM	Science, Technology, Engineering and Mathematics
TVETs	Technical and Vocational Education and Training colleges
UDHR	Universal Declaration of Human Rights
UIA	Unemployment Insurance Act 63 of 2001
UN	United Nations
VFS	Visa Facilitation Services Global
White Paper	White Paper on International Migration for South Africa (published in GG 41009 of 28 July 2017)

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Chapter One: Introduction

1.1 Research problem

After apartheid, the South African state focused on healing the wounds of the past and establishing the foundations of a constitutional democracy.¹ Attention was given to developing the skills of South African citizens in order to increase their economic activity.² Legislative efforts such as the Employment Equity Act 55 of 1998 (hereafter ‘EEA’) and the Broad-Based Black Economic Empowerment Act 53 of 2003 (hereafter ‘BBBEEA’) were taken to ensure that the workplace wrongs of apartheid were addressed through the deliberate reintegration of previously disadvantaged groups in the workplace.³ However, the 2021/2 report of the Commission for Employment Equity suggests that there are still far-ranging inequalities in the workplace. The report also suggests that there seems to be no real hope for change in this regard in the near future.⁴ The inequality in the workplace still experienced today has been caused by a lack of skills development, due to the unfair laws and policies of the apartheid regime.⁵

Despite legislative efforts to improve the skills of citizens, the South African state has failed to develop enough skilled citizens to address skills shortages. In 2021, only 25 per cent of persons employed in South Africa were considered highly skilled, such as those who would qualify for occupations such as managers, professionals and technicians.⁶ The South African state faces skills shortages in ‘managers, professionals, clerical support workers, plant and machine operators, service and sales workers, technicians and associate professionals, elementary occupations, and skilled agricultural workers’.⁷ The supply of artisans in South Africa does not meet the demand; hence, there is also a shortage of artisans in the country.⁸

¹ National Treasury *Budget Review* (2017) 9; Ngcwangu S *Bargaining Indicators 2014: Twenty Years – A Labour Perspective* (2014) 151.

² Segatti A & Landau LB (eds) *Contemporary Migration to South Africa: A Regional Development Issue* (2011) 67; Department of Higher Education and Training *Skills Supply and Demand in South Africa: Labour Market Intelligence research programme* (2022) 20 (hereafter ‘DHET (2022)’).

³ Broad-Based Black Economic Empowerment Act 53 of 2003, s 1(d) & s 2(b); Horwitz FM & Jain H ‘An assessment of employment equity and Broad Based Black Economic Empowerment developments in South Africa’ (2011) 30(4) *Equality, Diversity and Inclusion: An International Journal* 297.

⁴ Department of Labour *Commission for Employment Equity: Annual Report 2021-2022* (2022) 68-70.

⁵ DHET (2022) 65; see 2.4.1 below.

⁶ DHET (2022) 67-8.

⁷ DHET (2022) 96; Vandeweyer M & Verhagen A *Skills Imbalances in the South African Labour Market: Detailed Results from the OECD Skills for Jobs database* (2022) 19.

⁸ Mzabalazo Advisory Services *Supply and Demand of Artisans in South Africa* (2022) 67.

The impact of skills shortages is extensive. The National Development Plan 2030 (hereafter ‘NDP’) indicates that South Africa is in a severe skills crisis, stating that the economy is being ‘choked’ by skills shortages.⁹ The result is that the South African labour force is regarded as less competitive and less productive than its counterparts in the rest of the developing world; this negatively affects foreign direct investment.¹⁰ A lack of supply of quality skills stifles economic growth, and, therefore, ‘improvement in the quality of skills is critical for economic growth.’¹¹ Skills shortages hinder service delivery.¹² They also affect the government’s ability to combat crime.¹³ A failure to address skills shortages has deleterious consequences for the economy, and affects the ability of the South African state to fulfil its duties. Research is needed to explore solutions such as attracting skilled migrant workers (hereafter ‘SMWs’) to address the problem of skills shortages.

Skilled migrant workers have been defined by Farashah, Blomquist and Ariss et al. as follows: skilled migrant workers, ‘also known as qualified immigrants, are a subgroup of migrant workers and refer to individuals with a post-secondary education or equivalent training and with an intention to reside and work permanently and legally in a country other than their country of birth’.¹⁴ This group of migrants is often more educated than the native population, and are often considered a solution to skills shortages.¹⁵

Attracting SMWs, alongside the continued skills development of citizens, would alleviate the immediate pressure on the South African state to address pressing long-term systemic issues

⁹ Department of the Presidency *The National Development Plan 2030: Our future, make it work* (2012); NDP (2012) 55, 317, 323; Rasool F & Botha CJ ‘The nature, extent and effect of skills shortages on skills migration in South Africa’ (2011) 9(1) *SA Journal of Human Resource Management* 6; DHET (2022) 64-5; Department of Employment and Labour ‘Draft national labour migration policy for South Africa’ <https://www.labour.gov.za/DocumentCenter/Publications/Public%20Employment%20Services/National%20Labour%20Migration%20Policy%202021%20202.pdf> (accessed 26 December 2022) 29 (hereafter ‘DOL (2022)’).

¹⁰ Eisenberg G ‘South Africa’s Immigration System: A Reality Check’ available at <https://eisenberg.co.za/south-africas-immigration-system-a-reality-check/> (accessed on 7 December 2022) (hereafter ‘Eisenberg G (2017)’).

¹¹ Schofield A *2016 JCSE ICT Skills Survey* (2016) 28; *The Green Paper on International Migration in South Africa* (published in GG 40088 of 24 June 2016) 5 (hereafter ‘Green Paper’); *The White Paper on International Migration for South Africa* (published in GG 41009 of 28 July 2017) 48 (hereafter ‘White Paper’); DHET (2022) 13-4, 19.

¹² Article 8 of the Public Service Charter; Public service co-ordinating bargaining council *African charter on values and principles of public service and administration Public Service Charter*, PSCBC Resolution 1 of 2013; Mutula SM & Mostert J ‘Challenges and opportunities of e-government in South Africa’ (2010) 28(1) *The Electronic Library* 44; Owusu-Sekyere E, Wentzel M & Kanyane B et al. ‘Voices of critical skilled migrants in South Africa: A case study of Gauteng Province’ (2019) 11 *African Journal of Public Affairs* 23.

¹³ Allen-Ile C, Mateus AM & Iwu C ‘Skills Shortage in South Africa: Perspectives from high school educators’ (2014) 18(2) *Anthropologist* 492.

¹⁴ Farashah A, Blomquist T and Ariss A et al. ‘Perceived employability of skilled migrants: a systematic review and future research agenda’ (2023) 34(3) *The International Journal of Human Resource Management* 478-9.

¹⁵ Farashah A, Blomquist T and Ariss A et al. (2023) 479.

leading to skills shortages.¹⁶ Some of these systemic issues include the failure of the national education system,¹⁷ the failure of training systems,¹⁸ university dropout rates,¹⁹ unemployment,²⁰ and the legacy of poor education and training standards for the black majority.²¹

The South African state has acknowledged the far-reaching impact of skills shortages and the need to attract SMWs, especially for occupations critical to the economy's development.²² As such, visas aimed at facilitating the employment of SMWs were created. Despite this, South Africa received an influx of unskilled immigrants.²³

Currently, the Critical Skills Work Visa (hereafter 'CSWV'), as encapsulated in section 19(4) of the Immigration Act 13 of 2002 (hereafter 'IA'), enables foreign nationals with skills critical to the economic development of the state to enter and to work in the Republic. Simply having a visa to facilitate the employment of SMWs is not enough. Before the employment of a SMW is facilitated with a CSWV, the SMW must desire to leave their country of residence and be employed in South Africa. The Employment Services Act 4 of 2014 (hereafter 'ESA') promises to be instrumental in facilitating the employment of foreign nationals.²⁴ Overly restrictive labour regulations and a country's immigration framework are real impediments to the decision to work in a country.²⁵ Various push and pull factors also inform migrant workers' decisions to migrate to a particular country.²⁶ Hence the rules for and process of obtaining a CSWV are

¹⁶ OECD *Getting Skills Right: South Africa* (2017) 53; National Treasury *Operation Vulindlela: review of the policy framework and processes for work visas* (2023) 4 (hereafter 'National Treasury Operation Vulindlela (2023)').

¹⁷ Ngcwangu S (2014) 151; DHET (2022) 19.

¹⁸ Rasool F *The role of skills immigration in addressing skills shortages in South Africa* (unpublished PhD, North-West University, Potchefstroom 2010) 1.

¹⁹ Haffajee F 'Skills gap strands SA businesses as jobs go unfilled' available at <http://www.fin24.com/Economy/skills-gap-strands-sa-businesses-as-jobs-go-unfilled-20161004> (accessed 31 December 2022). University dropouts include persons that fail to complete their studies within the allocated timeframe.

²⁰ Eisenberg G 'South Africa's Immigration System: A Reality Check' available at <https://eisenberg.co.za/south-africas-immigration-system-a-reality-check/> (accessed on 7 December 2022).

²¹ Ngcwangu S (2014) 15. The Black Education Act 47 of 1953 provided the framework to ensure that the education of black persons was poor and sub-standard when compared with other races in South Africa.

²² Carciotto S 'The restrictiveness of migration policies in South Africa' (2021) 10(1) *African Journal of Governance and Development* 126; National Treasury *Operation Vulindlela* (2023) 4.

²³ Iwu C, Baboola R & Zenzile M (2015) 84; White Paper (2017) 30; Alimohammadi E & Muller G 'The illegal eviction of undocumented foreigners from South Africa' (2019) 19 *African Human Rights Law Journal* 796; Rugunanan P, Xulu-Gama N & Batisai K et al. *Migration in Southern Africa: IMISCOE Regional Reader* (2022) 204; see 2.3 below.

²⁴ See 4.2 below.

²⁵ Farashah A, Blomquist T and Ariss A et al. (2023) 490; National Treasury *Operation Vulindlela* (2023) 14.

²⁶ See 2.4.2 below.

part of a bigger problem, and South Africa must first be considered as a lucrative and desirable working destination before potential issues with the CWV are even considered.

The IA regulates entry into and departure from South Africa.²⁷ The IA also recognises the role of immigrants in addressing skills shortages, and envisages the contribution of human capital in the form of critical skills.²⁸ Section 19(4) of the IA states:

Subject to any prescribed requirements, a critical skills work visa may be issued by the Director-General to an individual possessing such skills or qualifications determined to be critical for the Republic from time to time by the Minister by notice in the Gazette and to those members of his or her immediate family determined by the Director-General under the circumstances or as may be prescribed.²⁹

The CSWV is issued to a person with a skill or qualification determined to be critical for the country at the time of issuance.³⁰ Section 19(4) of the IA, read with regulations 18(1) and 18(5) of the IA, stipulates that the Minister of Home Affairs may determine the skills or qualifications that are critical concerning an application for a CSWV.³¹ Once determined, these critical skills or qualifications are listed on a critical skills list (hereafter 'CSL'). The CSWV is thus issued if the person possesses a skill, or qualification, or qualifies to be employed in an occupation listed on the CSL. The DHA's interpretation of critical skills are that they are skills

deemed to be critical for improvement in economic growth and without which certain projects and work could not be undertaken, as well as high-level skills that will enhance the skills pool in the economy which in turn will encourage and potentially accelerate growth in the economy.³²

²⁷ IA, Preamble; Kruger HB & Oosthuizen H 'South Africa – safe haven for human traffickers? Employing the arsenal of existing law to combat human trafficking' (2012) 15(1) *Potchefstroom Electronic Law Journal* 298; Alimohammadi E & Muller G (2019) 807.

²⁸ *Ahmed and Others v Minister of Home Affairs and Another* (2016) ZAWCHC 123 para 30 (hereafter *Ahmed* (2016)').

²⁹ IA, s 19(4).

³⁰ *Ahmed* (2016) para 29; Magidimisha HH, Khalema NE & Chipungu L et al. *Crisis, Identity and Migration in Post-Colonial Southern Africa* (2017) 180.

³¹ Immigration Act 13 of 2002 regulations in GN 2334 GG 47182 of 2 August 2022, 3.

³² Parliamentary monitoring group 'Home Affairs, National Assembly Committee: Questions to the Minister' available at https://pmg.org.za/question_reply/491/ (accessed on 7 December 2022).

The list of skills considered critical in South Africa has changed over the years. In South Africa, CSLs were introduced on 3 June 2014 and 2 February 2022, but the most recent CSL was released on 2 August 2022.³³ The CSL released in June 2014 included skills relating to occupations that ranged from engineers, architects, software developers, welders, call-centre agents and sheep shearers.³⁴ Interestingly, professions such as dentists,³⁵ ‘chefs; productivity analysts; philosophers; business consultants; political analysts; teachers; lawyers; NGO and development consultants; business and production managers’ were not considered critical for the CSL published in June 2014.³⁶ The CSLs released to date have not mentioned sectors with well-documented shortages – for instance, only the CSL released in August 2022 makes provision for doctors.³⁷

Even though the Department of Higher Education and Training (hereafter ‘DHET’) and the Department of Employment and Labour (hereafter ‘DOL’) conducted labour market surveys, there are still remarkable disconnections between the critical skills required in South Africa and the skills which have been listed on the CSLs. For instance, the DHET reports that individuals with engineering qualifications ‘have seen the greatest increase in unemployment from 2018 to 2021’.³⁸ The latest CSL, however, lists 19 engineering occupations,³⁹ implying that those qualified with engineering qualifications may be in South Africa, but that they are unemployed or do not, for some reason, qualify for the engineering occupations listed on the CSL.⁴⁰

According to the DOL, the CSL is limited in terms of its ‘format, accuracy, measurement of vacancies and geographical breakdown’.⁴¹ According to the DHET, if CSWVs are offered too

³³ Immigration Act 13 of 2002 regulations in GN 453 GG 37716 of 3 June 2014; Immigration Act 13 of 2002 regulations in GN 1727 GG 45860 of 2 February 2022; Immigration Act 13 of 2002 regulations in GN 2334 GG 47182 of 2 August 2022.

³⁴ Immigration Act 13 of 2002 regulations in GN 453 GG 37716 of 3 June 2014.

³⁵ Vedan TA & Kotsane DF ‘Dentistry: not a critical skill?’ (2016) 71(5) *South African Dental Association* 206.

³⁶ Eisenberg G ‘South Africa stripped of Immigration Policy’ available at <https://eisenberg.co.za/south-africa-stripped-of-immigration-policy/> (accessed on 7 December 2022) - (hereafter ‘Eisenberg G (2015)’).

³⁷ Crush J ‘Southern hub: The globalization of migration to South Africa’ in Lucas REB (ed) *International handbook on migration and economic development* (2014) 220.

³⁸ DHET (2022) 13.

³⁹ The 19 engineering occupations listed on the CSL are engineering manager; industrial engineer; industrial engineering technologist; civil engineer; civil engineering technologist; mechanical engineer; mechanical engineering technologist; aeronautical engineer; aeronautical engineering technologist; chemical engineer; chemical engineering technologist; mining engineer; biomedical engineer; agricultural engineer; agricultural engineering technologist; energy engineer; energy engineering technologist; electronics engineer; electronic engineering technician; and mechanical engineering technician. Immigration Act 13 of 2002 regulations in GN 2334 GG 47182 of 2 August 2022.

⁴⁰ See 2.4.1.3 below.

⁴¹ DOL (2022) 16.

liberally, employment opportunities may be removed from citizens, while if the CSWVs are withheld too strictly, skills shortages will continue; it is thus essential to accurately define what critical skills are.⁴² The discussion defining a critical skill is undertaken later in this chapter.⁴³

The International Labour Organization (hereafter 'ILO')⁴⁴ defines a migrant worker as someone 'who migrates or who has migrated from one country to another with a view to being employed otherwise than on his own account and includes any person regularly admitted as a migrant worker'.⁴⁵ This definition, however, excludes some migrants.⁴⁶ The ILO definition of migrant worker excludes (1) frontier workers; (2) liberal professionals; (3) artists working on a short-term basis; (4) seamen; (5) migrants who have come for training or education; (6) undocumented migrants; (7) self-employed migrants; and (8) those entering the country at the request of their employer or organisation, to fulfil an assignment for a limited and defined period and who will vacate the country after the completion of that specific task. Notably, some categories of persons excluded from the ILO's definition of migrant worker, apart from categories 1, 3, 4, 7 and 8 above, may be skilled workers and possibly qualify for the CSWV.

A foreigner who is not a permanent resident may only enter South Africa with a valid visa.⁴⁷ A foreigner is not a citizen, resident, or illegal foreigner.⁴⁸ An immigrant comes to live in a foreign country.⁴⁹ Immigrants in South Africa illegally have entered the territory in contravention of the IA or in violation of the provisions of the Refugees Act 30 of 1998

⁴² Department of Higher Education and Training *Finalisation of the Critical Skills List: Technical Report* (2022) 8 (hereafter 'DHET (2022a)').

⁴³ See 1.1.1.

⁴⁴ The ILO has been involved in the protection of migrant workers since 1919. Chetail V *International Migration Law* (2019) 200; Maul D *The International Labour Organization: 100 Years of Global Social Policy* (2019) 1.

⁴⁵ Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) (Convention concerning migrations in abusive conditions and the promotion of equality of opportunity and treatment of migrant workers) Article 11. 1 (hereafter 'Convention No. 143').

⁴⁶ Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) Article 11.2(a) – (hereafter 'Convention 143'). Frontier worker 'refers to a migrant worker who retains his or her habitual residence in a neighbouring State to which he or she normally returns every day or at least once a week'. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, United Nations General Assembly resolution 45/158 (1990), Preamble (hereafter 'ICRMW'), Article 2(2)(a). Liberal professionals require specific training, while the work they do is usually closely guided and regulated by government and/or professional bodies. Examples of liberal professionals include doctors, attorneys, and accountants. European Economic and Social Committee 'Manifesto: Definitions of the concept of liberal profession at European level' <https://www.eesc.europa.eu/en/documents/manifesto-definitions-concept-liberal-profession-european-level> (accessed 30 April 2023); Convention 143, Article 11.2(b)-(e); Chetail V (2019) 202.

⁴⁷ IA, s 10(2); Van der Linde A 'Immigration and the right to respect for family life in the European context: A reflection on the states' positive obligations and possible lessons for South Africa' 2015 *De Jure* 449; Rugunanam P, Xulu-Gama N & Batisai K et al. (2022) 207.

⁴⁸ IA, s 1.

⁴⁹ Khan F, Klaaren J, Le Roux W et al. *Immigration Law in South Africa* (2018) 4-5; OECD *How Immigrants Contribute to Developing Countries' Economies* (2018) 24.

(hereafter 'RA'). Illegal foreigners may be deported in terms of the IA.⁵⁰ A foreign national may be admitted at a port of entry to the territory of South Africa legally by observing the relevant sections in the IA, RA and the regulations of these acts.⁵¹

Asylum seekers and refugees are also immigrants; therefore, it must be considered whether skilled asylum seekers and skilled refugees may be granted CSWVs. The RA determines the status of those who qualify as asylum seekers and refugees.⁵² An asylum seeker seeks recognition as a refugee, while a refugee has been granted asylum.⁵³ A dependant of any person who has been granted refugee status⁵⁴ will also qualify for refugee status.⁵⁵ This thesis does not focus on asylum seekers or refugees. However, failing to consider that asylum seekers and refugees may possess critical skills could lead to a waste of skills. If the asylum seeker qualifies, he or she may apply for asylum in the prescribed manner.⁵⁶ As with CSWVs, the Department of Home Affairs (hereafter 'DHA'), also administers the application to determine refugee status.

The IA allows refugees to apply for a status change once lawfully admitted into South Africa, which should allow refugees to apply for a CSWV.⁵⁷ The process an asylum seeker must follow to apply for a CSWV is more complex. Regulations 9(1) and 9(2) of the IA prescribe that visa applications, including the CSWV, must be made at a foreign mission of the Republic.⁵⁸ This requirement is problematic for asylum seekers who are already in South Africa. Before an asylum seeker may apply for a CSWV, he or she must first apply to the Minister of Home

⁵⁰ If the foreign national enters South Africa in contravention of these acts, he or she will be deemed an illegal foreigner. IA, s 1; IA, s 32.

⁵¹ IA, s 9; *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA) para 21.

⁵² Refugees Act, s 3.

⁵³ An individual qualifies for refugee status if the person is: fearful (a well-founded fear) of persecution because of his or her 'race, tribe, religion, nationality, political opinion or membership of a particular social group'; and if the person is outside of his or her country and is unwilling or incapable of availing himself/herself of the protection of his or her own country. Alternatively, the asylum seeker is outside of his or her country of habitual residence, not having nationality, and he or she is unable or unwilling due to a well-founded fear of returning to that country. Lastly, he or she is forced to leave his or her country or habitual residence to seek refuge elsewhere because of 'external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of [his/her] country of origin or nationality'. Refugees Act, s 3(a)-(b); *Ahmed and Others v Minister of Home Affairs and Another* (2018) ZACC 39 para 24.

⁵⁴ The list of dependants includes but is not limited to 'the spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of such asylum seeker or refugee'. Refugees Act, s 1(ix).

⁵⁵ Refugees Act, s 3(c).

⁵⁶ Asylum seekers must apply for asylum in person at any Refugee Reception Office, have their fingerprints or other prints taken, and give the officer two recent photographs (this is a requirement for persons aged 16 and older). Refugees Act, s 21(1), s 21(3).

⁵⁷ IA, s 10(6).

⁵⁸ Immigration Act 13 of 2002 regulations in GN 413 GG 37679 of 22 May 2014 (hereafter 'IA regulations in GN 413') – reg 9(1) & 9(2).

Affairs to be exempted from the requirement of applying for a visa outside of South Africa.⁵⁹ If the asylum seeker is exempted from the requirement prescribed in regulation 9(1) and 9(2), then he or she should theoretically be able to apply for a CSWV if he or she qualifies. Although the IA makes provision for both refugees and asylum seekers to apply for a CSWV, their ability to do so successfully is often unlikely and remote.⁶⁰

Once a CSWV has been granted, the rights and duties of that individual, once in the country, are another focal point. Broadly speaking, both illegal⁶¹ and regularised immigrants⁶² are entitled to most of the constitutional rights in the same manner as citizens, save for those rights conferred only on citizens.⁶³ A SMW is entitled to certain constitutional rights as provided by the Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution'). Whether SMWs may access and enjoy the constitutional rights they are entitled to in the same manner as citizens is an essential enquiry.⁶⁴ A lack of accessibility and enjoyment of these rights may deter attracting SMWs.

Since holders of the CSWV are meant to be employed in South Africa, it is essential to consider whether holders of the CSWV have access to the rights to which they are entitled as provided for in the legislation of South Africa. Foreign migrant workers are entitled to certain of the fundamental rights and privileges of citizens.⁶⁵ For instance, foreign nationals are covered by the provisos of the Basic Conditions of Employment Act 75 of 1997 (hereafter 'BCEA') by virtue of the definition of an employee as provided for in the BCEA.⁶⁶ Foreign migrant workers are not excluded from the application of the Labour Relations Act 66 of 1995 (hereafter 'LRA')

⁵⁹ *Ahmed and Others v Minister of Home Affairs and Another* (2018) ZACC, para 60. Applicants may apply for an exemption from the requirement that requires applications to be made outside of the Republic, section 31(2)(c) of the IA.

⁶⁰ *Ahmed and Others v Minister of Home Affairs and Another* (2018) ZACC, para 60.

⁶¹ Illegal migrants are migrants whose presence in the country is unlawful. *Koyabe and Others v Minister for Home Affairs and Others* (2009) ZACC 23 para 66; *Jeebhai v Minister of Home Affairs and Another* (2007) ZAGPHC 47 para 23.

⁶² *Lawyers for Human Rights and Other v Minister of Home Affairs and others* (2004) 7 BCLR 775 (CC) para 7.

⁶³ Constitutional rights are subject to limitation as per s 36 of the Constitution of the Republic of South Africa, 1996 (hereafter 'Constitution').

⁶⁴ See 4.5 below.

⁶⁵ The Bill of Rights 'enshrines the rights of [all people in our country] and affirms the democratic values of human dignity, equality and freedom'. Constitution, s 7(1). 'The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.' Constitution, s 7(3).

⁶⁶ Section 1(a) provides that an employee is 'any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer'. The Labour Relations Act 66 of 1995 (hereafter 'LRA') has a similar definition of employee in s 213. The Skills Development Act 97 of 1998 has the same definition of employee in s 1.

and are therefore offered the same protection as citizens.⁶⁷ Foreign nationals employed in the country are entitled to claim unemployment and other benefits in terms of the Unemployment Insurance Act 63 of 2001 as amended (hereafter ‘UIA’),⁶⁸ provided that the employee is employed for longer than 24 hours per month.⁶⁹ The accessibility of these rights through the labour and social security framework is therefore investigated in chapter four.

The following summarises the research problem. The South African state suffers from skills shortages which are unlikely to be addressed by citizens or other employees in South Africa in the near future. The South African state must, therefore, attract SMWs.⁷⁰ Unfortunately, other states attract SMWs, while the South African state, historically, has mostly received unskilled migrants.⁷¹ According to the DHA, only 4,876 CSWV applications were made during the 2021/22 period; only 1022 CSWVs were granted in 2021, it is uncertain how many CSWVs were granted in 2022.⁷² Simply having statutory provisions for a CSWV is not enough – South Africa must first be an attractive destination for SMWs. The CSWV forms part of a larger legislative framework in South Africa, so the effectiveness of the CSWV cannot be considered in isolation. It must be considered whether the law in South Africa hinders SMWs from choosing to work in the country, how these laws compare with the comparators of choice, and whether the laws of South Africa align with international benchmarks regarding migrant workers.

As the only visa aimed at facilitating the employment of SMWs, the CSWV must be an effective instrument to facilitate the employment of SMWs and thus contribute to alleviating skills shortages. The research in this thesis will consider whether the CSWV is effective in facilitating the employment of SMWs and, if not, how the CSWV and the surrounding legal framework may be improved to better contribute to addressing skills shortages in South Africa.

⁶⁷ Unless otherwise provided in the applicable rules for the determination of jurisdiction for resolution of employment related disputes, the LRA ‘does not apply to members of: (a) the National Defence Force; (b) the National Intelligence Agency; and (c) the South African Secret Service’. LRA, s 2.

⁶⁸ Unemployment Insurance Act 63 of 2001 (hereafter ‘UIA’), s 3.

⁶⁹ UIA, s 3(1).

⁷⁰ DHET (2022a) 57.

⁷¹ National Treasury *Operation Vulindlela* (2023) 4.

⁷² Department of Home Affairs *Annual Report 2021-2* (2022) 19; National Treasury *Operation Vulindlela* (2023)

1.1.1 Defining skills shortages in South Africa

Skill shortages exist when the demand for skilled workers is greater than the supply of workers who are qualified, able, and willing to work under existing market conditions.⁷³ Skills shortages are also associated with hard-to-fill vacancies.⁷⁴

The DHET has defined ‘skills’ as competencies workers require to perform their jobs. The word ‘skills’ may refer to ‘competencies, educational attainment or qualifications, or occupations’.⁷⁵ Job competencies refer to skills such as communication and literacy; educational attainment may refer to passing a required degree; and skills may be categorised by occupation such as nurses, engineers and electricians.⁷⁶ Skills also refer to cognitive and non-cognitive abilities.⁷⁷

In 2005, the DOL sought to reach a national consensus on the meaning and application of the terms ‘scarce’ and ‘critical’ skills. The following definitions were therefore adopted: ‘scarce skill’ refers to ‘the inability to find suitably qualified and experienced people to fill occupational vacancies either “at an absolute level of scarcity” ... or “at a relative level of scarcity”’.⁷⁸ Scarce skills thus relate to occupations with either perceived or observed scarcities of qualified and experienced persons.⁷⁹ Scarce skills are lacking where employers’ demand for an occupation surpasses the supply of employees.⁸⁰

Critical skills are specific operational skills or generic skills required within the workforce.⁸¹ According to the Finance and Accounting Services Sector Education and Training Authority,⁸²

⁷³ DHET (2022) 19, 23; Vandeweyer M & Verhagen A (2022) 6.

⁷⁴ Tshela L & Agumba JN ‘Investigating the causes of skills shortage in South Africa construction industry: a case of artisans’ 2014 *People in Construction* 102; DHET (2022) 16; Rasool F & Botha CJ (2011) 6.

⁷⁵ DHET (2022) 16; Weinar A & Klekowski von Koppenfels A *Highly-Skilled Migration: Between Settlement and Mobility* (2020) 14; Owusu-Sekyere E, Wentzel M & Kanyane B et al. (2019) 25.

⁷⁶ DHET (2022) 16.

⁷⁷ Brunello G & Wruuck P ‘Skill shortages and skill mismatch: A review of the literature’ (2021) 35 *Journal of Economic Surveys* 1146.

⁷⁸ A relative level of scarcity exists because employees cannot meet employment criteria or are unavailable in that location. FASSET Research Focus (2017) ‘Trends in employment and training in the FASSET sector’ November 2017, FASSET: South Africa 67.

⁷⁹ Department of Higher Education and Training *Call for comments on the National scarce skills list: top 100 occupations in demand* (GN 380 of 23 May 2014) para 4(1).

⁸⁰ Reddy V, Rogan M & Mncwango B et al. ‘Occupations in high demand in South Africa: technical report’ (2017) 5.

⁸¹ Critical skills are practical skills required to fulfil a particular occupation.

⁸² The finance and accounting services sector is crucial because it is the largest employer of people with financial management, accounting, and auditing skills. FASSET ‘About us’ https://www.fasset.org.za/Who_we_are.html (accessed 23 December 2022). FASSET is a public entity established in terms of the Skills Development Act of 1998. FASSET ‘FAQ General’ <https://www.fasset.org.za/general.html> (accessed 23 December 2022).

critical skills refer to specific key or generic ‘top-up’ skills necessary for an occupation. In the South African context, the Finance and Accounting Services Sector Education and Training Authority has identified two groups of critical skills. The first group refers to fundamental or generic skills, which include ‘cognitive skills (problem solving, learning to learn), language and literacy skills, mathematical skills, and working in teams’.⁸³ The second group refers to occupationally specific ‘top-up’ skills required for performance within that occupation that fills a ‘skills gap’ which may have arisen as a result of changes in technology or new forms of work organisation or structure.⁸⁴

A different interpretation of ‘critical skill’ is provided by Reddy, Bhorat and Powell; that is, for every category of skills considered critical skills, there is an underlying assumption that these occupations are strategic to the country’s development. There is also a corresponding risk to the development of the country if investments in these skills are not made.⁸⁵ A lack of critical skills, therefore, refers to the inability of an individual to fulfil roles within a job description because the person lacks the skill to do so.

Following these definitions, it appears that scarce skills refer to the situation where individuals with appropriate skills and experience to fill a position cannot be found or where they can be found but they are unavailable – ‘otherwise known as hard-to-fill vacancies’.⁸⁶ According to the Mining Qualifications Authority, there is a difference between ‘scarce’ skills and hard-to-fill vacancies;⁸⁷ hard-to-fill vacancies should take preference, as occupations listed on the scarce skills list are based only on vacancies.⁸⁸ Mamabolo, Kerrin, and Kele add that often the primary skill appears in a scarce skills list, but there are exhaustive sub-skills that do not appear as part of the list; they suggest that the sub-skills should appear as sub-skills that form part of the functionalities of a business.⁸⁹ Other terminology has also been used to refer to critical

⁸³ FASSET Research Department (2015) ‘Scarce skills guideline 2015/2016’ FASSET: South Africa 25.

⁸⁴ FASSET Research Department (2015).

⁸⁵ Reddy V, Bhorat H & Powell M et al. (2016) ‘Skills supply and demand in South Africa’, Labour Market Intelligence Partnership, Human Sciences Research Council: Pretoria 75.

⁸⁶ Mining Qualifications Authority (2016) ‘Sector skills plan for the mining and minerals sector submitted by the Mining Qualifications Authority (MQA) to the Department of Higher Education and Training Update 2017-2018’, Mining Qualifications Authority: South Africa 43.

⁸⁷ Mining Qualifications Authority (2016) 44.

⁸⁸ Mining Qualifications Authority (2016) 45.

⁸⁹ Mamabolo MA, Kerrin M & Kele T ‘Entrepreneurship management skills requirements in an emerging economy: A South African outlook’ (2017) 9(1) *The Southern African Journal of Entrepreneurship and Small Business Management* (electronic journal <https://sajesbm.co.za/index.php/sajesbm/article/view/111/78> (accessed 23 December 2022)).

skills, such as ‘pivotal skills.’⁹⁰ ‘Pivotal skills’ are the top-10 ranking occupations from each Sector Education and Training Authority.⁹¹ There are also ‘critically scarce skills’, which refer to occupations that require high levels of qualification and competencies to attract suitably qualified individuals.⁹²

1.1.2 Key research question

How effective is the South African CSWV in attracting skilled foreign nationals when compared with similar visas and the regulatory systems of Botswana, Canada and New Zealand? The following research sub-questions are addressed throughout this dissertation.

- What methods has the South African state used to attract skilled migrant workers in the past, and have these methods been successful?
- What are the causes of skills shortages in South Africa?
- Which are the most important state obligations in favour of the rights of skilled migrant workers?
- What is the current legal framework for facilitating the attraction of skilled migrant workers?
- How does the South African legal framework measure up to international state obligations and benchmarks in favour of skilled migrant workers?
- Once a CSWV has been granted, does a skilled migrant worker have access to rights in the same manner as a South African citizen?
- How can the South African legal framework be improved by lessons learned from the regulations of similar visas in Botswana, Canada and New Zealand?

1.2 Literature review

The literature is dominated by works on immigration in general, such as the textbook *Immigration Law in South Africa*.⁹³ Many sources in the field of immigration law focus on issues concerning unskilled workers. Although the literature review should reflect what has been written about the specific topic of the research, unfortunately, sources in this area tend to

⁹⁰ FASSET Research Department (2015) 25.

⁹¹ Reddy V, Bhorat H & Powell M et al. (2016) 69.

⁹² Makumbirofa S & Saayman A ‘Forecasting demand for qualified labour in the South African hotel industry’ (2018) 11(1) *Journal of Economic and Management Sciences* (electronic journal <https://jefjournal.org.za/index.php/jef/article/view/189/239> (accessed 23 December 2022)).

⁹³ Khan F, Klaaren J, Le Roux W et al. *Immigration Law in South Africa* (2018).

deal with migrants in general. Few sources discuss SMWs in South Africa, and literature concerning the CSWV is particularly sparse. Nevertheless, the following represents what has been written on the topic.

South Africa became a ‘magnet’ to foreign nationals due to the size and developing nature of its economy.⁹⁴ While South Africa became the recipient of many immigrants, the majority of those immigrants were unskilled.⁹⁵ From a policy perspective, the Green and White Paper provide that immigration in South Africa must be driven by skills and resourced persons.⁹⁶

Carciotto’s article, ‘The Restrictiveness of Migration Policies in South Africa’, provides much insight into the progression of migration policies in South Africa by analysing changes to legislation since 1948. Carciotto suggests that migration policies in South Africa, especially for SMWs, have become less restrictive as the state now follows an ‘economically-based discourse of selective skills import’.⁹⁷

The policy perspective of immigration law in South Africa has also been written about extensively, particularly in media platforms, resulting in two antithetical ideas. First, according to Reed-Sandoval and the Green Paper, the country provides preferential treatment to SMWs through the CSWV and therefore it is open to skilled foreign nationals as part of its international migration regime.⁹⁸ The second idea, as propounded by Crush, Eisenberg,⁹⁹ Iwu, Baboola, Zenzile, Liefwaard and Sloth-Nielsen, is that South Africa’s borders were always open to foreign skills until post-apartheid¹⁰⁰ or more specifically, IA that is ‘unprecedented in its inflexibility and in its exclusionism’.¹⁰¹ Furthermore, Eisenberg, Iwu, Baboola, Zenzile, Green, Kondo, and

⁹⁴ *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* (2015) ZASCA 35 para 2; Ruzungunde VS & Zhou S ‘Attitudes towards migrant workers in South Africa: A critical discourse analysis’ (2021) *Journal of Local Government Research and Innovation* 3.

⁹⁵ See 2.2 below.

⁹⁶ Green Paper 57; White Paper 3.

⁹⁷ Carciotto S (2021) 126, 141.

⁹⁸ Reed-Sandoval A ‘Toward a more inclusive understanding of the “brain drain”’ (2017) 36(1) *South African Journal of Philosophy* 95; Green Paper 32.

⁹⁹ Eisenberg is a leading South African immigration lawyer. He has written extensively about immigration law in South Africa, regularly contributes knowledge on immigration laws in media engagements, and litigates in immigration law. Eisenberg’s input on immigration laws in practice provides much value to a thesis assessing the effectiveness of the CSWV. See <https://eisenberg.co.za/news/>; <https://eisenberg.co.za/about/gary-eisenberg/>; <https://eisenberg.co.za/cases/>.

¹⁰⁰ Crush J ‘The dark side of democracy: migration, xenophobia and human rights’ (2000) 38 (6) *Issue 2 International Migration* 109.

¹⁰¹ Eisenberg G (2015); Iwu C, Baboola R & Zenzile M ‘The migrant worker and legislative protection: A discussion of the South Africa experience’ (2015) 4(7) *Socioeconomica* 86; Liefwaard T & Sloth-Nielsen J *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (2016) 366; Eisenberg G (2017).

even the DHA, hold the view that the application of the IA remains ‘sloppy’¹⁰² and bureaucratic, and that it will, in all probability, give rise to impediments for persons such as SMWs who wish to migrate to South Africa.¹⁰³

A study by Owusu-Sekyere, Wentzel and Kanyane et al. titled ‘Voices of Critical Skilled Migrants in South Africa: A case study of Gauteng Province’ brought much-needed clarity on the position of critically skilled migrants in South Africa, especially since there is a paucity of studies on SMWs in the South African context. The study confirmed that while some SMWs are attracted to South Africa, mostly due to its infrastructure, other SMWs are deterred from choosing the country as a working destination due to crime, social unrest and anti-foreigner sentiment.¹⁰⁴ The views of Owusu-Sekyere, Wentzel and Kanyane et al. are essential for this thesis, as they provide crucial findings that serve as the basis for its later arguments.

1.3 Significance of the study

This thesis will contribute to legal knowledge, since comparing the CSWV and its efficacy with similar visas is a novel topic. To date, few cases have been decided where the granting of the CSWV or not has been specifically questioned or interpreted.¹⁰⁵ Cases such as *Ahmed and Others v Minister of Home Affairs and Another*¹⁰⁶ and *Director-General of the Department of Home Affairs and others v De Saude Attorneys and Another* (hereafter ‘*DHA v De Saude*’),¹⁰⁷ while not focused entirely on the CSWV, provide some insight into the interpretation of the CSWV and the manner in which the DHA has assessed applications for CSWVs.

For this reason, legislative instruments, case studies, journal articles and internet sources feature more prominently in this dissertation than judicial precedent and case law.

Where the findings in this thesis show that similar visas in other jurisdictions are better geared to facilitating skills attraction, the thesis aims to add to the immigration and labour law

¹⁰² Eisenberg G (2017).

¹⁰³ Eisenberg G (2017); Iwu C, Baboola R & Zenzile M (2015) 90; Department of Home Affairs *Discussion paper on the repositioning of the Department of Home Affairs* (GN 442 of 19 May 2017) – (hereafter ‘DHA (2017)’) 19; Green J ‘When SA firms have to compete for skills’ <http://www.fin24.com/Opinion/when-sa-firms-have-to-compete-for-skills-20161202> (accessed on 23 December 2022); Kondo T *Law & Investment in Africa: The Governance of Foreign Direct Investment in Zimbabwe* (2021) 139.

¹⁰⁴ Owusu-Sekyere E, Wentzel M & Kanyane B et al. (2019) 22-3.

¹⁰⁵ In *Mushore v Minister of Home Affairs and Another* [2022] ZAWCHC 267, the applicant waited ‘eight years for the critical skills work visa application to be finali[s]ed’. *Mushore v Minister of Home Affairs and Another* [2022] ZAWCHC 267 para 10.

¹⁰⁶ (2016) ZAWCHC 123.

¹⁰⁷ (2019) ZASCA 46.

framework by proposing an amendment, alternative to, or improvement of the CSWV and the general labour and immigration framework. This will take the form of recommendations in the concluding chapter. The thesis identifies benchmarks to assess the suitability of the CSWV to facilitate the employment of skilled asylum seekers and skilled refugees who are already in the country.

1.4 Limitations of the study

This study does not focus on unskilled immigrants, refugees, asylum seekers and ‘vulnerable workers employed illegally’,¹⁰⁸ although some reference is made to them¹⁰⁹ for completeness, or where the situation of SMWs and these groups overlaps.¹¹⁰ Limited reference is made to skilled refugees and skilled asylum seekers to investigate whether they are eligible and able to apply for CSWVs, given their unique circumstances. If skilled asylum seekers and skilled refugees cannot meaningfully apply for a CSWV, this might amount to brain waste and contribute to the skills shortage in South Africa.¹¹¹

This study’s focus is the CSWV’s efficacy in attracting SMWs, compared to similar instruments in other countries. For this reason, research will not be conducted on other visas or other unrelated provisions in the IA.

1.5 Research methodology

Given the purpose of the study, a comparative research desktop methodology is appropriate. A comparison will be made of at least three jurisdictions to ascertain the effectiveness of the CSWV. Two selected jurisdictions, Canada and New Zealand are developed, open and democratic and easy to study given the transparency of their legal systems. The third category compares the facilitation of employment of SMWs in an African developing country.¹¹² Botswana has been chosen as it is a neighbouring country that has faced similar skills shortages as South Africa.

¹⁰⁸ *Mohlaka v Minister of Finance and Others* (2008) ZALC 152 para 28.

¹⁰⁹ *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (2006) ZACC 23 para 31.

¹¹⁰ Such as skilled refugees, which the IA and RA do not cater for expressly.

¹¹¹ See 4.3 below.

¹¹² *Bagwasi v Morueng & Another* [2005] BWHC 100; *Moatshe v The State; Motshwari and Others v The State* [2003] BWCA 24.

Similarities between South Africa, Botswana, Canada and New Zealand make them suitable comparators. Canada and New Zealand have programmes in place (legal, policy and broader) that seek to ensure that they have sufficient skilled immigrants migrating to their shores; the ease of navigating their legal and broader regulatory systems due to their similarity in having common law jurisdictions makes Canada and New Zealand suitable comparators.

The legal and broader regulatory systems of Canada and New Zealand are also comparable to South Africa's.¹¹³ Canada and New Zealand follow a common law legal system.¹¹⁴ Botswana is a democracy; however, according to Cook and Sarkin, it has undemocratic laws and political practices.¹¹⁵ Until the 1970s, Botswana was considered an impoverished migrant-sending country; after 1970, however, it seemed to attract skilled migrants and repatriate its skilled expatriate nationals.¹¹⁶ Botswana's economy is more advanced and developed than that of most other countries in the sub-Saharan African region, making it a popular destination for migrants.¹¹⁷ Botswana's approach to attracting foreign migrants, and its apparent success, may contain some lessons for South Africa for improving the CSWV. Like South Africa, Botswana also has a mixed legal system.¹¹⁸

¹¹³ The national legal systems of the comparators are developed from and made up of various sources, such as 'Roman-based civil law, English common law, customary and religious laws'. Du Plessis J 'Comparative law and the study of mixed legal systems' in Reimann M & Zimmermann R (eds) *The Oxford Handbook of Comparative Law* 2ed (2019) 1.

¹¹⁴ The province of Quebec has a system of civil law, as opposed to the rest of Canada, for which one of the legal systems is the common law. Bannerman S *Canadian Communication Policy and Law* (2020) 38; Fitzpatrick BT & Thomas RS *The Cambridge Handbook of Class Actions: An International Survey* (2021) 306.

¹¹⁵ For instance, the president is allowed unrestricted powers; the president may make decisions without consultation or input of others; the president has direct control over the police, 'the information and broadcasting sector, the Directorate on Corruption and Economic Crime, and the public service'. Cook A & Sarkin J 'Is Botswana the miracle of Africa? Democracy, the rule of law, and human rights versus economic development' (2010) 19 *Transnational Law & Contemporary Problems* 474.

¹¹⁶ Morapedi WG 'Skills acquisition and investments by Botswana migrants from southern Botswana to South Africa, 1970–2010' (2018) 63 *Historia* 131; Gribble C 'Policy options for managing international student migration: the sending country's perspective' (2008) 30(1) *Journal of Higher Education Policy and Management* 35.

¹¹⁷ Campbell EK 'Reflections on Illegal Immigration in Botswana and South Africa' (2006) 21(2) *African Population Studies* 8; International Organization for Migration *World Migration Report 2020* (2019) 62.

¹¹⁸ African Criminal Justice Reform 'Botswana' <https://acjr.org.za/resource-centre/botswana> (accessed 23 December 2022); Rautenbach C 'A family home, five sisters and the rule of ultimogeniture: Comparing notes on judicial approaches to customary law in South Africa and Botswana' (2016) 16 *African Human Rights Law Journal* 145.

There are similarities between South Africa's Constitution¹¹⁹ and that of Botswana and the Bill of Rights of Canada.¹²⁰ New Zealand does not have a formal, written constitution, but constitutional provisions are spread across legislation, legal documents, common law and conventions.¹²¹ More specifically, Botswana¹²² and New Zealand¹²³ have sections in their constitutions or legislation that provide directly for the separation of powers. In South Africa,¹²⁴ as in Canada, the separation-of-powers doctrine is not expressly entrenched in the Constitution. However, the doctrine is recognised for its normative value as a constitutional principle.¹²⁵ The constitutions of South Africa,¹²⁶ Botswana,¹²⁷ and Canada are supreme,¹²⁸ while in New Zealand, the parliament is supreme.¹²⁹

Legislation will be a primary source for examining the past and present legislative framework on the migration of skilled migrants to South Africa. Judicial precedent and case law will be powerful tools in understanding the proper interpretation of legislation and other primary sources. Secondary sources, including journal articles, books, reports, internet sources and seminar papers, will be used, as they contain valuable commentary on the stated primary sources above. These sources, furthermore, assist the researcher in ascertaining how preceding authors have approached, written about and criticised the different aspects of the topic. This is important for the generation of arguments about the efficacy of the CSWV.

¹¹⁹ Constitution of the Republic of South Africa, 1996.

¹²⁰ Phooko MR 'Evaluating Canadian and South African collaborative human rights initiatives: A preliminary analysis and research agenda' (2017) 4 *The Transnational Human Rights Review* 224; Davis DM 'Constitutional borrowing: The influence of legal culture and local history in the reconstitution of comparative influence: The South African experience' 2003 (1)2 *International Journal of Constitutional Law* 187; Albert R & Cameron DR (eds) *Canada in the World: Comparative Perspectives on the Canadian Constitution* (2018) 397.

¹²¹ New Zealand's Constitution does not contain a Bill of Rights. Bellace JR & Ter Haar B (2019) 9; Reilly A & Barrett J 'Business and labour, and human rights in New Zealand' in Bellace JR & Ter Haar B (eds) *Research Handbook on Labour, Business and Human Rights Law* (2019) 131-2.

¹²² Sections 30-56 deal with the powers of the executive, sections 57-94 provide for the powers of the parliament, and sections 95-106 of the Constitution of Botswana, 1966 provide for the powers of the judiciary.

¹²³ The provisions regarding the legislature may be found in part 3; part 2 provides for the powers of the executive, while part 4 of the Constitution Act 1986 provides for the judiciary.

¹²⁴ *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 para 18.

¹²⁵ *Canada (Governor General in Council) v Mikisew Cree First Nation* 2016 FCA 311 para 40; *Hupacasath First Nation v Canada (Foreign Affairs and International Trade Canada)* 2015 FCA 4 para 66; Oliver PC, Macklem P & Des Rosiers N *The Oxford Handbook of the Canadian Constitution* (2017) 245; *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 para 18.

¹²⁶ Constitution, s 2.

¹²⁷ *Nchindo and Others v Attorney-General of Botswana and Another* [2010] BWCA 49 para 31; *Good v AG* [2005] 2 BLR 337 (BCA) para 4.

¹²⁸ Constitution Act 1982, s 52(1).

¹²⁹ Fredman S *Comparative Human Rights Law* (2018) 81; Sweet AS & Mathews J *Proportionality Balancing and Constitutional Governance: A Comparative and Global Approach* (2019) 12.

Dugard, Du Plessis and Maluwa et al. state that any legal system requires ‘the existence of a political community and the recognition by its members of settled rules binding upon them’.¹³⁰ International law is thus a necessary system of law.¹³¹ The Constitution prescribes that international law must be considered when any tribunal, forum or court interprets the South African Bill of Rights.¹³² In addition, subject to the supremacy clause,¹³³ when interpreting any legislation, courts must also prefer an interpretation consistent with international law to one which is not.¹³⁴ According to Crawford, international law, as a system of laws, is not derived from one source but a collection of sources.¹³⁵ Multilateral agreements, non-binding international obligations, and the benchmarks identified from these will be used to assess how South Africa’s legal framework measures up to identified state obligations and benchmarks.

South African laws and regulations concerning the constitutional, socio-economic,¹³⁶ civil and political rights of skilled migrants must be assessed against international obligations and benchmarks. This enquiry will provide a real sense of how the South African state fares in the race for foreign skills.

The chosen methodology of comparative research has inherent limitations. While an empirical approach allows one to conduct surveys and interview SMWs, the comparative analysis does not allow for this. Other limitations include a limited opportunity to engage with cultural, social and other factors influencing a legal system, language, experiences that are culturally specific and difficulty in sourcing adequate data.¹³⁷

¹³⁰ Dugard J, Du Plessis M & Maluwa T et al. *Dugard’s International Law: A South African Perspective* 5 ed (2018) 9 (hereafter ‘Dugard J, Du Plessis M & Maluwa T et al. (2018)’).

¹³¹ Dugard J, Du Plessis M & Maluwa T et al. (2018) 9.

¹³² Constitution, s 39(1)(b); Tladi D ‘Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga’ (2016) 16 *African Human Rights Law Journal* 311; *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) para 97.

¹³³ Section 2 of the Constitution states that ‘[t]his Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’. Constitution, s 2.

¹³⁴ Constitution, s 233.

¹³⁵ Crawford J *Brownlie’s Principles of Public International Law* 9 ed (2019) 14. International law, in general, is derived from four sources, as stated in Article 38(1) of the Statute of the International Court of Justice. These sources are international conventions; international customs; general principles of law recognised by civilised nations; and judicial decisions. Sandholtz A & McCone JA (eds) *Research Handbook on the Politics of International Law* (2017) 110.

¹³⁶ Foreign nationals are afforded the same socio-economic rights as citizens. *Lawyers for Human Rights v Minister of Safety and Security and Others* (2009) ZAGPPHC 86.

¹³⁷ Bhat PI ‘Comparative method of legal research: nature, process and potentiality’ (2015) 57(2) *Journal of the Indian Law Institute* 168-70.

1.6 Chapter outline

Chapter 2 establishes the causes of skills shortages in South Africa. It considers the South African state's previous attempts to attract skilled foreign nationals since the end of apartheid. The chapter seeks to provide answers to sub-research questions one and two, namely, what causes skills shortages in South Africa, and what methods has the Government of South Africa used to attract skilled migrant workers in the past and have these methods been successful?

Chapter 3 focuses on multilateral agreements with international obligations concerning SMWs and skilled migration to South Africa. In South Africa, international law is applied through national law.¹³⁸ This chapter seeks to answer sub-research question three: what are the most important state obligations in favour of the rights of skilled migrant workers? The chapter forms the basis for assessing how South African laws measure up to the obligations discussed in the subsequent chapter.

Chapter 4 considers the requirements for eligibility for the CSWV and other legal instruments regulating the reception and employment of SMWs. The CSWV is considered alongside the IA, White Paper and the ESA, which seeks to facilitate foreign nationals' employment.¹³⁹ The chapter also considers whether the CSWV can facilitate the employment of skilled asylum seekers and skilled refugees; thus, brief reference will also be made to the RA. Finally, it assesses whether any impediments in the legislative framework may deter the attraction of SMWs. The chapter seeks to answer the following sub-research questions. Once a CSWV has been granted, does a skilled migrant worker have access to rights in the same manner as a South African citizen? How does South Africa's legal framework measure up to international state obligations and benchmarks in favour of skilled migrant workers?

The comparative study in chapter 5 exposes the limitations and strengths of the South African system for attracting and facilitating the employment of SMWs. In order to assess the effectiveness of the CSWV, a comparison is made with Botswana, Canada and New Zealand.

¹³⁸ Sandholtz A & McCone JA (eds) *Research Handbook on the Politics of International Law* (2017) 110. Once the national executive has signed an international agreement, it is binding on the Republic only once the National Assembly and National Council of Provinces have approved it. An exception to this is if the agreement does not require ratification or accession, or if the agreement is technical, executive or administrative in nature; then it will be binding on the Republic automatically after it has been tabled in the National Assembly and Council of Provinces. After either of these processes above has taken place, the international agreement must be enacted as national legislation. A self-executing provision (that is, one which does not require ratification) approved by parliament is considered law in the Republic if it is consistent with the Constitution. Constitution, s 231(1)-(4).

¹³⁹ Employment Services Act 4 of 2014, s 2(h).

The chapter seeks to answer the sub-research question as to how the South African legal framework can be improved by lessons learned from comparative international law.

Chapter 6 concludes the research by addressing the main research question on how effective the CSWV is in attracting SMWs when compared to similar visas in other jurisdictions. The aim of this chapter is to provide recommendations for improving the effectiveness of the CSWV in facilitating the employment of SMWs.



Chapter Two: Skills Shortages in South Africa

2.1. Introduction

Since South Africa became a union in 1910,¹⁴⁰ whenever a political change occurred in the state, a change followed in the makeup of the South African identity.¹⁴¹ For instance, the state's identity changed from colonialism to racial apartheid to the non-racial, non-sexist society that arose in the democratic era. These changes to the national identity of South Africa also affected its immigration regime, its laws, and, inevitably, its migration patterns.¹⁴² Consequently, migration management has been highly politicised and innately interconnected with sensitive issues such as state identity, race, political power, nationalism, and economic control.¹⁴³ Thus, a study of South Africa's immigration policies since its unionisation reveals a trend of inclusion and exclusion according to the nature of political power at the time.¹⁴⁴

South African immigration history is generally characterised more so by exclusion than inclusion, especially of those who did not align with the political dogma of the government of the day.¹⁴⁵ This chapter will consider the previous attempts the South African state has made to attract SMWs since the beginning of immigration regulation in South Africa. The South African state regulated migration from 1913. The purpose is to ascertain whether the South African state's previous methods for facilitating the employment of SMWs have been successful. Although immigration was only legislated from 1913, migration patterns before 1913 provide context for understanding migration laws after 1913. If previous methods for attracting skills were successful, it must be asked why the method has changed. If previous

¹⁴⁰ South Africa became a union in terms of the South Africa Act, 1909, s 4.

¹⁴¹ The identity of the state represents what the nation sees itself as; for instance, with the transition from apartheid to a democratic state, the identity of South Africa is non-sexist and gender-neutral; at least, that is a sought identity. The state's identity is comprised of the collective traditions, cultures and politics of its people and its government. State identity is also referred to as socially shared beliefs. Alexandrov M 'The concept of state identity in international relations: A theoretical analysis' (2003) 10(1) *Journal of International Development and Cooperation* 34. State identity is '[a] concept of state identity [which] generates a specific value, which in turn determines ... policymakers' preference[s] for ... particular ... [policies]'. Ashizawa K 'When identity matters: state identity, regional institution-building, and Japanese foreign policy' (2008) 10 *International Studies Review* 595; Peberdy S 'From the past to the present: regulating migration and immigration in post-apartheid South Africa' (2013) 29(4) *Journal für Entwicklungspolitik* 68.

¹⁴² Peberdy S (2013) 68.

¹⁴³ Scalabrini Institute for Human Mobility in Africa (2014) 'Migration Profile: South Africa' September, Cape Town, South Africa 4 (hereafter 'SIHMA (2014)')

¹⁴⁴ SIHMA (2014) 6.

¹⁴⁵ Mbajiorgu CM & Mbajiorgu DG (2015) Conference paper: *The challenges and effects of migration on the economic development of African states* at 'The SAAPAM 4th Annual Conference Proceedings in Limpopo' 378 <http://ulspace.ul.ac.za/handle/10386/1478>.

methods have not been successful, this can provide valuable lessons that the South African state must avoid during future reform of the immigration framework. Given the overall purpose of this thesis, which is to assess the success of the CSWV in attracting skills, the history, successes and failures of previous visas in facilitating the employment of SMWs could inform amendments to the CSWV to improve its effectiveness where necessary.

Although there are other migration patterns, such as domestic and regional migration, international migration to South Africa is the focus of this chapter. The success or failure of previous attempts to attract skilled foreign nationals will be considered; thus, of relevance is sub-research question one, which considers what methods the South African state has used to attract SMWs in the past and whether these methods have been successful. The chapter also investigates research objective two, which relates to what the causes of skills shortages in South Africa are. One of the aims of this chapter is to provide a brief background to the problem of skills shortage as a necessary precursor to determining whether a visa geared to the attraction of skills is necessary.

2.2 Previous attempts to employ skilled migrants in South Africa

2.2.1 Previous immigration legislation in South Africa

African countries that are now members of the South African Development Community (hereafter ‘SADC’) have been connected through labour migration within the region.¹⁴⁶ Due to longstanding patterns of labour migration, conflict and economic hardship in bordering countries, South Africa became a popular destination for African immigrants.¹⁴⁷ Many other immigrants come from continents and countries further afield, such as Asia, Europe, Latin America, the Caribbean, North America and Oceania.¹⁴⁸ According to Statistics South Africa, most migrants to South Africa originate from South Africa’s traditional supply areas, such as the SADC and the rest of Africa.¹⁴⁹ Since 1994, annually approved entries from the SADC into South Africa (not only for work purposes but also for study, business and holidays) have

¹⁴⁶ Munck R (ed) *Globalisation and migration: new issues, new politics* (2009) 97.

¹⁴⁷ Mahlatji MR & Dikotla MA (2015) Conference paper: *Perceptions and experiences of immigrants in South Africa: who are they?* at ‘The SAAPAM 4th Annual Conference Proceedings in Limpopo’ <http://ulspace.ul.ac.za/handle/10386/1478> 592.

¹⁴⁸ Kalitanyi V & Visser K ‘African immigrants in South Africa: job takers or job creators?’ (2010) 13(4) *South African Journal of Economic and Management Sciences* 377; Statistics South Africa ‘Community Survey 2016, Statistical release’ http://cs2016.statssa.gov.za/wp-content/uploads/2016/07/NT-30-06-2016-RELEASE-for-CS-2016-Statistical-releas_1-July-2016.pdf (accessed 23 December 2022) 27.

¹⁴⁹ Statistics South Africa *Census 2011: migration dynamics in South Africa* (2015) 124, 128; SIHMA (2014) 7.

increased, while annual numbers of permanent immigrants dropped significantly at the end of the apartheid era.¹⁵⁰

2.2.1.1 Immigration in the pre-apartheid era

South Africa used to be the continent's main destination for cheap labour migration.¹⁵¹ This changed when the entry of non-whites was prevented or limited with the introduction of the Immigration Regulation Act of 1913, which supported the political dogma of the newly unionised South Africa.¹⁵² This Act allowed Europeans to enter South Africa to the exclusion of others.¹⁵³ Indians were specifically and expressly excluded, as they were considered a threat to the white minority.¹⁵⁴

After World War I, South Africa became an attractive destination for Europeans.¹⁵⁵ At this point, white immigration was generally welcome in South Africa but was also limited at times.¹⁵⁶ For instance, the Immigration Quota Act 8 of 1930¹⁵⁷ and the Aliens Control Act of 1937 allowed most whites with 'desirable' characteristics to enter the country, except for Jewish persons.¹⁵⁸ These Acts were adopted in the context of widespread anti-Semitism due to an influx of Jewish refugees fleeing Europe to escape the emergence of Nazi Germany.¹⁵⁹

The Aliens Control Act of 1937 was the first to introduce the term 'alien'¹⁶⁰ as a means of describing foreigners, and it was also the first to introduce racial criteria for entering South Africa.¹⁶¹ Later, the Aliens Control Act of 1963 became the main instrument to control

¹⁵⁰ SIHMA (2014) 7.

¹⁵¹ Migration to South Africa also increased following the discovery of diamonds in the nineteenth century. Dodson B & Crush J 'A report on gender discrimination in South Africa's 2002 Immigration Act: masculinizing the migrant' (2004) 77 *Feminist Review* 96.

¹⁵² The Immigration Regulation Act of 1913 specifically excluded the entry of Indian immigrants, who had followed the Indians who entered South Africa upon indenture in 1860. White Paper 8; Henkes B 'Shifting identifications in Dutch-South African migration policies (1910–1961)' (2016) 68 *South African Historical Journal* 646.

¹⁵³ Peberdy S (2013) 68.

¹⁵⁴ Khan F, Klaaren J, Le Roux W et al. (2018) 84.

¹⁵⁵ Maja B & Nakanyane S (eds) *Labour migration and South Africa: towards a fairer deal for migrants in the South African economy: labour market review* (2007) Department of Employment and Labour: Pretoria 2.

¹⁵⁶ Carciotto S (2021) 125.

¹⁵⁷ Khan F, Klaaren J, Le Roux W et al. (2018) 28.

¹⁵⁸ Khan F, Klaaren J, Le Roux W et al. (2018) 84.

¹⁵⁹ Wa Kabwe-Segatti AW (2006) *Reformulating immigration policy in post-apartheid South Africa: From the Aliens Control Act of 1991 to the Immigration Act of 2002*. An IFAS Working Paper Series/Les Cahiers de l'IFAS Number 8 <https://hal.archives-ouvertes.fr/hal-00799196/document> 174.

¹⁶⁰ An 'alien' means 'a person who is not a South African citizen'. Aliens Control Act 96 of 1991, s 1.

¹⁶¹ Wa Kabwe-Segatti AW (2006) 174.

immigration (especially that of Africans) into South Africa.¹⁶² The Aliens Control Act of 1937 was a flagrant and unapologetic instrument for racial dominance and white supremacy.¹⁶³

After World War II, all white immigrants were welcomed to South Africa in order to increase the population for the purpose of maintaining white minority power.¹⁶⁴ Immigration was therefore considered a 'white issue'.¹⁶⁵ According to Khan, white immigrants were desirable as they could be assimilated into the white population or the desired identity of the state at that time, while non-white immigrants were considered valuable only as a source of cheap labour.¹⁶⁶

The Aliens Registration Act of 1939 was the first to depart from the underlying nature of the immigration policies of the previous immigration Acts. The Aliens Registration Act of 1939 subjected immigrants inside the country to greater control, whereas previous legislation emphasised control over the entry of particular immigrants into the country. As a decisive turn in policy, the Aliens Registration Act of 1939 focused on regulating entry into the country as a racial filter for South Africa, and on monitoring foreigners inside of South Africa.¹⁶⁷ The Aliens Registration Act of 1939 also gave police officers extensive powers, allowing them to use brute force as a monitoring method when dealing with immigrants.¹⁶⁸

2.2.1.2 Immigration during apartheid

During apartheid, immigration policies focused on control of national borders and the exclusion of African migrants, apart from those who entered South Africa under limited working contracts.¹⁶⁹ Apartheid immigration legislation was intentionally created to encourage the immigration of skilled white people (except British immigrants) into South Africa and keep

¹⁶² Isike C & Isike E 'A socio-cultural analysis of African immigration to South Africa' (2012) 19(1) *Alternation* 102; Alimohammadi E & Muller G (2019) 795.

¹⁶³ Isike C & Isike E (2012) 102; Alimohammadi E & Muller G (2019) 795.

¹⁶⁴ Peberdy S (2013) 69; Halvorsrud K 'The maintenance of white privilege: The case of white South African migrants in the UK' (2019) 19(1) *Ethnicities* 96.

¹⁶⁵ Moyo I *African immigrant traders in Johannesburg inner city, South Africa: Deconstructing the threatening other* (unpublished PhD, University of South Africa, 2015) 49.

¹⁶⁶ Khan F 'Patterns and policies of migration in South Africa: Changing patterns and the need for a comprehensive approach' Discussion paper on *Patterns on policies of migration* (Loreto, Italy 3 October 2007) 2 http://www.refugeerights.uct.ac.za/downloads/refugeerights.uct.ac.za/patterns_policies_migration_FKhan.doc.

¹⁶⁷ Wa Kabwe-Segatti AW (2006) 174; Alimohammadi E & Muller G (2019) 795.

¹⁶⁸ Moyo I (2015) 49; Alimohammadi E & Muller G (2019) 795.

¹⁶⁹ Khan F, Klaaren J, Le Roux W et al. (2018) 85; Carciotto S (2021) 128; Crush J 'Xenophobia denialism and the Global Compact for Migration in South Africa' (2022) 14 *Revue internationale de politique de développement* 4.

black persons out of the country.¹⁷⁰ Immigration to South Africa during this period was also curtailed to allow entry for immigrants from Germany and the Netherlands only.¹⁷¹

The apartheid government intensified the racist immigration laws by passing the Population Registration Act of 1950, classifying people into racial categories – white, black, Indian, and coloured – and requiring them to carry identification papers.¹⁷² The Population Registration Act of 1950 was also used to identify illegal immigrants.¹⁷³

In 1960, the South African state left the Commonwealth and became a Republic.¹⁷⁴ The apartheid state introduced an assisted immigration scheme to encourage white immigration.¹⁷⁵ With the formation of a new national identity as a Republic, according to Peberdy, the state saw itself as Protestant, Calvinist, and anti-communist.¹⁷⁶ The state thus excluded white immigrants outside of this identity.¹⁷⁷ Catholics (German and Dutch Catholics were welcome, but Roman Catholic southern Europeans were not), Orthodox Greeks, atheists, and agnostics were unwelcome due to the general differences in their religion with that which the apartheid state sought to align itself.¹⁷⁸ Communists, trade unionists, and progressive religious leaders were not welcome due to the threat to the apartheid state.¹⁷⁹ Four pillars thus upheld the immigration policy of the apartheid state: ‘racist policy and legislation; the exploitation of migrant labour from neighbouring countries; tough enforcement legislation; and the repudiation of international refugee conventions’.¹⁸⁰

¹⁷⁰ Carciotto S (2021) 125. The apartheid state under the National Party since 1948 saw a policy change that shifted the balance of power from the English white minority to the Afrikaans-speaking white minority; thus, Brits were excluded. Peberdy S (2013) 70-1; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 203; *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC), para 25.

¹⁷¹ Peberdy S (2013) 70-1.

¹⁷² Breckenridge K ‘The book of life: The South African population Register and the invention of racial descent, 1950–1980’ (2014) *Kronos* 227; Carciotto S (2021) 124.

¹⁷³ South African legislation created the ‘illegal immigrant’ in the sense of being contrary to the law or prohibited, in other words, against the law. Klaaren J & Ramji J ‘Inside illegality: Migration policing in South Africa after Apartheid’ (2001) 48(3) *Africa Today* 39-40.

¹⁷⁴ The Commonwealth consists of 53 independent and equal sovereign states. Affiliation with the Commonwealth is voluntary. The Commonwealth ‘About us’ <http://thecommonwealth.org/about-us> (accessed 26 December 2022).

¹⁷⁵ Carciotto S (2021) 125.

¹⁷⁶ Peberdy S (2013) 71-2.

¹⁷⁷ Peberdy S (2013) 71-2.

¹⁷⁸ Carciotto S (2021) 149.

¹⁷⁹ Peberdy S (2013) 71-2.

¹⁸⁰ Crush J & McDonald DA ‘Evaluating South African immigration policy after apartheid’ (2001) 48(3) *Africa Today* 2.

The Temporary Removal of Restrictions on Economic Activity Act 87 of 1986 allowed foreign workers to trade legally in South Africa.¹⁸¹ The Act allowed non-whites to apply for temporary and permanent residence permits.¹⁸² Foreign workers were recruited under agreements, usually between them and mining conglomerates.¹⁸³

Despite the Temporary Removal of Restrictions on Economic Activity Act 87 of 1986, the apartheid state discouraged non-white immigration into South Africa and found itself in a labour shortage, as the world price of gold had increased considerably.¹⁸⁴ As indicated above, mining labour migration from neighbouring countries to South Africa has been implanted into the tapestry of the society and economy of South Africa. Unskilled and semiskilled labourers were recruited mainly from Zimbabwe, Kenya, the Democratic Republic of the Congo, Lesotho, Malawi, Swaziland, Botswana, and Mozambique.¹⁸⁵ Migrants from these traditional sending countries often entered South Africa for work and trading-related reasons, but did not settle permanently.¹⁸⁶

The strategies of the apartheid government were therefore based primarily on using cheap foreign labour migration to achieve its goals. In addition, domestic labour migration generally took place from rural areas to the mines and industrial areas,¹⁸⁷ which was also essential to preserving the structure of South Africa's manufacturing and resource economy.

The apartheid government controlled domestic labour migration. The use of 'pass laws' was a regime for controlling the movement of black people between the country and autonomous 'homelands' or 'Bantustans'.¹⁸⁸ To maintain production levels within the mines, those from the 'homelands' or 'Bantustans' emerged as a potential source of labour. The government, however, 'internalised' labour, as it chose to use the domestic labour force instead of foreign labour; it preferred to employ those living in the 'homelands' or 'Bantustans' and South Africans. This resulted in a decline in foreign labour in the mines.

¹⁸¹ Crush J, Abel C & Skinner C (eds) *Mean streets: migration, xenophobia and informality in South Africa* (2015) 62.

¹⁸² Moyo I (2015) 50.

¹⁸³ Odiaka N 'The face of violence: Rethinking the concept of xenophobia, immigration laws and the rights of non-citizens in South Africa' (2017) 4(2) *BRICS Law Journal* 49; DOL (2022) 19.

¹⁸⁴ Khan F, Klaaren J, Le Roux W et al. (2018) 84.

¹⁸⁵ SIHMA (2014) 5; Munck R (2009) 96; Carciotto S (2021) 136.

¹⁸⁶ Mbajjorgu CM & Mbajjorgu DG (2015) 378.

¹⁸⁷ Reed H 'Moving across boundaries: Migration in South Africa, 1950– 2000' (2013) 50(1) *Demography* 80.

¹⁸⁸ SIHMA (2014) 5 – 6; Carciotto S (2021) 124-5; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 204.

Taiwanese immigrants increased in South Africa in the 1980s and 1990s due to business ties between Taiwan and South Africa, mainly regarding arms sold by Taiwan to the apartheid state. Since 1994, however, the Chinese immigrant population in South Africa has increased due to a change in policy favouring the People's Republic of China over Taiwan.¹⁸⁹

South Africa has an extensive history of receiving migrants informally from bordering countries, apart from the formal migrant labour system.¹⁹⁰ Many migrants who entered South Africa outside of the formal migrant labour system did not qualify for cheap contract labour, and consequently they worked in factories, mines, farms and white homes.¹⁹¹ Although the state was initially ambivalent in its response, and often indifferent concerning this irregular migration,¹⁹² in the 1980s it increased measures such as the arrest and deportation of migrants as they were deemed a threat to the state.¹⁹³

A new Aliens Control Act 96 of 1991 was passed in 1991, repealing the preceding Aliens Control Acts of 1937 and 1963. This Act (96 of 1991) reinforced the strict control of the flow of people across South Africa's borders.¹⁹⁴ The Aliens Control Act 96 of 1991 formalised the 'two gates' approach to immigration regulation and control.¹⁹⁵ One gate welcomed people corresponding to the white minority to reside permanently in South Africa.¹⁹⁶ The other gate had a dual function: it prevented unwanted migrants from entering the country; it also temporarily allowed migrants to enter South Africa to provide cheap and docile labour.¹⁹⁷

The Aliens Control Act 96 of 1991 has been labelled one of the 'dying acts of apartheid'.¹⁹⁸ This Act was still used as an instrument of control over immigration in the transition from the apartheid to the democratic state.¹⁹⁹ The Aliens Control Act 96 of 1991 was an unconstitutional

¹⁸⁹ Peberdy S (2013) 71-2.

¹⁹⁰ Crush J & McDonald DA (2001) 3.

¹⁹¹ Crush J & McDonald DA (2001) 3.

¹⁹² Irregular migrants are known as 'undocumented migrants or migrants with an illegal status'. Van Eck BPS & Snyman F 'Social protection afforded to irregular migrant workers: Thoughts on the Southern Africa development community (with emphasis on Botswana and South Africa)' (2015) 59(2) *Journal of African Law* 295, 308-9.

¹⁹³ Crush J & McDonald DA (2001) 3.

¹⁹⁴ SIHMA (2014) 13.

¹⁹⁵ Crush J & McDonald DA (2001) 3; Khan F, Klaaren J, Le Roux W et al. (2018) 57.

¹⁹⁶ Carciotto S (2021) 128; Adetiba TC 'Migration policy implementation and its politics in South Africa' (2022) 3 *Eureka, Social and Humanities* 96.

¹⁹⁷ Wa Kabwe-Segatti AW (2006) 173-4; DOL (2022) 18.

¹⁹⁸ Peberdy S (2013) 69; Crush J & McDonald DA (2001) 1; Carciotto S (2021) 125; Adetiba TC (2022) 96.

¹⁹⁹ Immigration Act 13 of 2002, s 51 refers to the Aliens Control Act as the previous Act. The enactment of the Immigration Act 13 of 2002 repealed the Alien Control Act 96 of 1991 and all other amendments made to it. Carciotto S & Mavura M *The evolution of migration policy in post-Apartheid South Africa: Emerging themes and new challenges* (2016) 7; Alimohammadi E & Muller G (2019) 796.

instrument for migration in post-apartheid South Africa,²⁰⁰ and resulted in a carry-over of the anti-immigrant climate into the democratic state.²⁰¹

Amendments were made to the Aliens Control Act in 1995²⁰² ostensibly to improve control of immigration and bring immigration policies in line with the Constitution.²⁰³ However, the purpose for which these amendments were brought before Parliament was not to eradicate unconstitutional provisions but rather to reinforce the draconian and unconstitutional nature of immigration during the apartheid era by tighten control of immigration in the democratic South Africa.²⁰⁴ The result of amendments to the Aliens Control Act 96 of 1991 nevertheless placed more focus on attracting SMWs.²⁰⁵ The latter was thus the first act under the democratic dispensation to provide for the specific immigration of SMWs to South Africa.

2.2.1.3 Immigration to South Africa in the democratic era

In 1997, a new national skills-based immigration policy was called for in a draft Green Paper on migration. Unfortunately, in 1999, the positive and progressive philosophy proposed in the draft Green Paper was lost, and migrants were regarded as threats.²⁰⁶ Möser, therefore, argues that the initial failure of the government to address the continuance of apartheid's influence on migration legislation resulted in and encouraged emergent anti-foreigner sentiments, which erupted early in 2008, and again in 2015, 2016, 2017, 2019 and 2022 in the form of xenophobic attacks.²⁰⁷ The pursuant policy on international migration, as provided for in the White Paper drafted in 1999, was implemented through the IA.²⁰⁸

The introduction of the IA limits permanent skilled migration and uses a range of temporary visas such as the CSWV to facilitate immigration for employment purposes to South Africa.²⁰⁹

It seems that the South African state was finally, at least from a policy and legal perspective,

²⁰⁰ Crush J & McDonald DA (2001) 1. For example, the Aliens Control Act 96 of 1991 permitted the Department of Home Affairs to make decisions which were not subject to review by a court or other tribunal. Aliens Control Act 96 of 1991, s 55; Khan F, Klaaren J, Le Roux W et al. (2018) 85.

²⁰¹ Möser RE 'South African migration policies and xenophobia after the cold war: the rising anti-foreigner sentiment and apartheid's inherited policy framework, 1994-2008' (2016) 2(1) *Global Histories: A Student Journal* 2; Alimohammadi E & Muller G (2019) 796.

²⁰² Aliens Control Amendment Act 76 of 1995, s 1.

²⁰³ SIHMA (2014) 13.

²⁰⁴ Klaaren J & Ramji J (2001) 38.

²⁰⁵ Carciotto S & Mavura M (2016) 7-8.

²⁰⁶ Carciotto S (2021) 124-5.

²⁰⁷ Möser RE (2016) 2; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 205.

²⁰⁸ White Paper 73.

²⁰⁹ DOL (2022) 19.

concerned with the attraction of critical skills for economic development. This was a clear change in the direction of policy, which had relied previously on unskilled or semiskilled workers for labour in the mining industry.²¹⁰ Even though the DHA was open to the employment of SMWs, from 1994-2002 the South African state generally prioritised the employment of South African citizens over foreign nationals.²¹¹ Despite the urgent need for skilled labour, political reluctance to receive and employ highly SMWs is still evident.²¹² With the adoption of the Constitution, the Aliens Control Act of 1991 was declared unconstitutional, and the IA replaced it.²¹³ The IA made significant legislative departures from the Aliens Control Act of 1991, particularly concerning foreign nationals' entry, residence and departure.²¹⁴ The IA became the main instrument dealing with the immigration of foreigners into the Republic.²¹⁵

Klaaren, Ramji and Carciotto contend that even though the IA was passed in the democratic era, South Africa's migration policy did not change much, except for some amendments to the legislative regime to protect human rights.²¹⁶ According to these authors, the amendments to legislation in the democratic era were miniscule and failed to make any significant impact.²¹⁷ Furthermore, the policies developed by the democratic government maintained the sentiments of its undemocratic predecessor.²¹⁸ The old strategy of divide and rule, therefore, continued in democratic South Africa, specifically concerning the perception of outsiders.²¹⁹ In favour of attracting SMWs, however, the IA was based on the need to attract SMWs through selective skills imports, especially since, at the time, many skilled South Africans migrated elsewhere.²²⁰

At the beginning of the democratic era, South Africa saw an influx of immigrants that, according to Mbajiorgu and Mbajiorgu, indicated two crucial changes. First, the new government found favour with its neighbours, and secondly, the country's policies were more human-centred than before.²²¹ This is supported by the notion that visitors came to South Africa

²¹⁰ Carciotto S (2021) 126.

²¹¹ Segatti A, Landau LB & Misago JP et al. *Contemporary Migration to South Africa: A Regional Development Issue* (2011) 67.

²¹² Segatti A, Landau LB & Misago JP et al. (2011) 67.

²¹³ SIHMA (2014) 13; *S v Ntshonyane and Another* (2014) ZAFSHC 124, para 31.

²¹⁴ Green Paper 39.

²¹⁵ Odiaka N (2017) 50.

²¹⁶ Klaaren J & Ramji J (2001) 35; Carciotto S (2021) 126.

²¹⁷ Klaaren J & Ramji J (2001) 35.

²¹⁸ Möser RE (2016) 11; Carciotto S (2021) 124-5.

²¹⁹ Möser RE (2016) 11.

²²⁰ Carciotto S (2021) 126-7.

²²¹ Mbajiorgu CM & Mbajiorgu DG (2015) 378.

to look for work, shop, visit friends and relatives, take holidays, and receive medical treatment.²²² To some, the influx of foreigners who came to work in South Africa posed a problem for resource distribution and the employment opportunities of those in South Africa.²²³

The IA was amended by the Immigration Amendment Act 19 of 2004²²⁴ to clarify issues on entry and stay in the country and officials' roles.²²⁵ According to the Scalabrini Institute for Human Mobility in Africa, the amendments clarified some technical and legal issues, such as the role of the immigration advisory board and the reduced role of civil society, but made no significant changes.²²⁶ More amendments were made to the IA in 2007 and 2011 (Immigration Amendment Act 3 of 2007),²²⁷ which dealt mainly with the clarification of technical issues.²²⁸ These amendments introduced extensive changes to the existing norms and policies of the IA; in particular, they made it more difficult for asylum seekers to be granted legal entry into South Africa.²²⁹

In general, the immigration regulations of June 2005²³⁰ (regulations of the IA) ensured that only immigrants who could contribute to the economy would be welcome to apply for permanent residence.²³¹ The immigration policy has therefore changed from one of racially discriminating restriction to one guided by openness to those who can contribute to developing the new South Africa with their skills and capital.²³² The immigration regulations of 2005, however, according to Odiaka, included more draconian measures yet to control undocumented migrants through community policing. This required citizens in effect to spy on foreign nationals and those associated with them and relay their suspicions to the authorities.²³³

The Immigration Amendment Act 13 of 2011 came into force in 2014.²³⁴ Changes made in the Immigration Amendment Act 13 of 2011 effectively revamped immigration law in South

²²² Mbajjorgu CM & Mbajjorgu DG (2015) 378.

²²³ Mbajjorgu CM & Mbajjorgu DG (2015) 378; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 58.

²²⁴ Immigration Amendment Act 19 of 2004, s 1, s 2.

²²⁵ Odiaka N (2017) 50.

²²⁶ SIHMA (2014) 32.

²²⁷ Immigration Amendment Act 3 of 2007, s 1.

²²⁸ SIHMA (2014) 33.

²²⁹ SIHMA (2014) 33. The asylum seeker transit permit has been reduced from 14 to 5 days. Khan F, Klaaren J, Le Roux W (2018) 109; Carciotto S (2021) 127; Refugee Act, as amended, s 21.

²³⁰ Immigration Act 13 of 2002 regulations in GN R616 GG 27725 of 27 June 2005.

²³¹ Immigration Act 13 of 2002 regulations in GN R616 GG 27725 of 27 June 2005, s 22, s 23; Odiaka N (2017) 50.

²³² Isike C & Isike E (2012) 102.

²³³ Odiaka N (2017) 50-1.

²³⁴ Proc R32 GG 37679 of 22 May 2014.

Africa, resulting in changes to visas and processing requirements, travel requirements, application forms, application fees, and the penalties that could be imposed for non-compliance.²³⁵ Chapter 4 will discuss the IA, as amended, in greater detail.

2.3 Occupations with critical skills shortages

In 2017, the Presidency issued the following essential and telling statement:

For both the public infrastructure and the private investment programmes, the single greatest impediment is shortage of skills.... The shortfall is due to the policies of the apartheid era and the slowness of our education and skills development institutions to catch up with the current acceleration of economic growth.²³⁶

The statement illustrates a shortage of skills caused by the former policies of apartheid and the inability of South Africa's educational institutions post-apartheid to produce skills required for the growth of the economy. As Rasool and Botha observe, 'skills shortages are major obstacles to economic growth and job creation in South Africa'.²³⁷

To facilitate the immigration of skilled persons to South Africa, a CSL was developed to cater for occupations critical to the development of the economy.²³⁸ The use of the CSL favours an interpretation of 'skill' in the South African context as occupational skills or occupational shortages. Critical skills required in South Africa have dramatically changed in recent years, as evidenced by the changes to the CSL.²³⁹

2.4 Causes of skills shortages in South Africa

To address the problem of skills shortages, it is vital to ascertain the causes of these skills shortages. The following broad causes of skills shortages are discussed: the education system, brain drain, brain waste, and a lack of apprenticeships.

²³⁵ Motlanthe K *Report of the high level panel on the assessment of key legislation and the acceleration of fundamental change* (2017) 350.

²³⁶ The Presidency of the Republic of South Africa (2017) 'Accelerated and shared growth initiative – South Africa (ASGISA)' 9.

²³⁷ Rasool F & Botha CJ (2011) 1.

²³⁸ Department of Home Affairs *Towards a white paper on International Migration in South Africa* (2016) 3.

²³⁹ See 1.1 above.

2.4.1 The failing education system

2.4.1.1 Legacy of apartheid

In 2017, the Presidency released a statement which, at least in part, blamed the policies of apartheid (discrimination in education and employment) for the shortfall or shortage of skills in South Africa.²⁴⁰ The education system under apartheid contributed to labour market discrimination (particularly for black females)²⁴¹ and racial inequality in skilled employment levels.²⁴² The National Party (hereafter ‘NP’) ensured that the education of non-whites (especially blacks) was non-academic so as to secure their subservience to Europeans.²⁴³ The inequality created by the education system under apartheid links directly to the skills deficit still experienced in South Africa today.²⁴⁴ In addition, under apartheid, with limited exceptions, black persons in South Africa were prevented from doing apprenticeships or entering artisan occupations.²⁴⁵ Inequality in South Africa under apartheid thus resulted in a limitation on the latent abilities of many black people and, ultimately, deprived South Africa of the possible benefit of many persons who otherwise would have had the opportunity to become skilled employees.²⁴⁶

The problem of skill shortages cannot be adequately considered without reference to the current education system.²⁴⁷ The education system is still affected by the years of dysfunction when little care was taken to have a well-functioning and effective system for all learners in South

²⁴⁰ ASGISA (2017) 9; Rugunanan P ‘Migration, mobility and transnational families: the case of Indian women migrating to South Africa’ (2020) 8(1) *Gender Questions* 6; DHET (2022) 19.

²⁴¹ Black females are more likely to occupy low-skilled jobs than men, while men still earn more. Department of Women *The status of women in the South African economy* (2015) 78.

²⁴² Mateus AM, Allen-Ile C & Iwu C ‘Skills shortage in South Africa: Interrogating the repertoire of discussions’ (2014) 5(6) *Mediterranean Journal of Social Sciences* 63; Gradín C ‘Occupational segregation by race in South Africa after apartheid’ (2019) 23(2) *Review of Development Economics* 555.

²⁴³ Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 204; Rakometsi MS *The transformation of black school education in South Africa, 1950-1994: A historical perspective* (unpublished PhD thesis, University of the Free State, 2008) 33; DHET (2022) 65.

²⁴⁴ Gwaravanda ET, Ndofirepi AP & Waghid Y et al. *Mediating learning in higher education in Africa: from critical thinking to social justice pedagogies* 9ed (2021) 46; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 204; National Treasury *Operation Vulindlela* (2023) 5.

²⁴⁵ Gamble J ‘“Occupation”, labour markets and qualification futures’ (2022) 74(2) *Journal of Vocational Education & Training* 316; Gamble J ‘The legacy imprint of apprenticeship trajectories under conditions of segregation and Apartheid in South Africa’ (2021) 73(2) *Journal of Vocational Education & Training* 262.

²⁴⁶ Rakometsi MS (2008) 34; Gamble J (2021) 263; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 204.

²⁴⁷ Rasool F & Botha CJ (2011) 2, 6.

Africa.²⁴⁸ The strategies of the apartheid era ensured that the education of non-whites was underfunded and sub-standard.²⁴⁹ Consequently, the vast majority of people were not allowed to obtain the knowledge and the requisite skills to fulfil the needs of the labour market.²⁵⁰

Bantwini argues that the South African state tends to reformulate the curriculum as a means 'to produce employees'²⁵¹ with skills that respond to the needs of employers.²⁵² This would imply that the skills taught in a specific era may be completely redundant for the next labour-market era.²⁵³ According to Rasool and Botha, the problems with the education system, as listed below, 'are obstacles to the production of skills the economy requires', but SMWs can remedy the situation temporarily.²⁵⁴ '[T]he impact of education on an economy's growth trajectory can be seen in the form of increased demand for skilled labour', which the education system in South Africa is not producing in its current form.²⁵⁵ While the impact of South Africa's segregationist education policies under apartheid still affects education today, SMWs are vital to assist in training and educating South African pupils and possibly South African workers. Skilled migrant workers not only influence the skills pool within South Africa, but in the context of education, SMWs themselves contribute to brain gain.²⁵⁶

2.4.1.2 Literacy and numeracy

Basic education in South Africa is poor, especially when it comes to essential school subjects such as mathematics, literacy and science.²⁵⁷ All learners must receive literacy and numeracy

²⁴⁸ Erasmus J & Breier M Skills Shortage in South Africa: Case Studies of Key Professions (2009) 1; Amnesty International 'South Africa: Broken and unequal education perpetuating poverty and inequality' <https://www.amnesty.org/en/latest/news/2020/02/south-africa-broken-and-unequal-education-perpetuating-poverty-and-inequality/> (accessed 26 December 2022).

²⁴⁹ Erasmus J & Breier M (2009) 1; DHET (2022) 65; Owusu-Sekyere E, Wentzel M & Kanyane B et al. (2019) 23.

²⁵⁰ Allais S 'Skills? What Skills? Jobs? What Jobs? The South African skills shortage.' (2014) 1(1) *Post-School Education Journal* 13; Habiyaremye A, Habanabakize T & Nwosu C 'Bridging the labour market skills gap to tackle youth unemployment in South Africa' (2022) 33(4) *The Economic and Labour Relations Review* 787.

²⁵¹ Bantwini BD 'How teachers perceive the new curriculum reform: Lessons from a school district in the Eastern Cape Province, South Africa' (2010) 30 *International Journal of Educational Development* 84,88; Mnqwazi O 'Students for social change convention: Advocating for a progressive youth agenda in the Eastern Cape' (2014) 1(1) *Post-School Education Journal* 33.

²⁵² 'Skills development and training became part of the mandate of the Department of Higher Education and Training— a function which was previously located within the Department of Employment and Labour.' Kgobe P & Baatjes I 'White paper on post school education and training: Some new policy directions' (2014) 1(1) *Post-School Education Journal* 2; Mutula SM & Mostert J (2010) 44; Mlambo VH & Adetiba TC 'Brain drain and South Africa's socioeconomic development: The waves and its effects' (2019) 19(4) *Journal of Public Affairs* 4.

²⁵³ Green Paper 46.

²⁵⁴ Rasool F & Botha CJ (2011) 6.

²⁵⁵ DHET (2022) 36.

²⁵⁶ Gwaravanda ET, Ndofirepi AP & Waghid Y et al. (2021) 47.

²⁵⁷ DHET (2022) 66.

skills.²⁵⁸ The situation is more urgent than imagined, according to the Progress in International Reading Literacy Study (hereafter ‘PIRLS’), a study on reading literacy. The PIRLS is conducted every five years to assess the reading achievement of young students in Grade 4.²⁵⁹ According to the PIRLS, 81 per cent of Grade 4 learners in South Africa cannot locate information in texts or reproduce information from texts.²⁶⁰

As the DHET stated,

Continued progress within the schooling system is important for ensuring that learners are able to successfully move through the skills pipeline. The provision of a strong foundational education level is essential for the success of learners while in the [post-school education and training] system. This, in turn, will help to improve the number of candidates and their skill level as they leave the [post-school education and training] system and enter the labour market.²⁶¹

From the DHET’s remarks, it is apparent that the formation of basic skills at a basic-education level has a significant impact on the skills formation of persons as they move through primary, secondary and tertiary education. The lack of a proper educational foundation negatively affects skills formation, resulting in employees or job seekers with little or no skills.²⁶² The failure of the government to address issues within the country’s basic education system leads directly to a lack of skills development and thus to skills shortages.

2.4.1.3 Technical and vocational education and training colleges

At the intersection of compulsory education, traditional institutions of tertiary education and the workforce, Technical and Vocational Education and Training colleges (hereafter

²⁵⁸ Department of Basic Education *Annual Report 2016/2017* (2017) 1,14.

²⁵⁹ International Association for the Evaluation of Educational Achievement ‘PIRLS 2021: Progress in International Reading Literacy Study 2021’ <https://www.iea.nl/studies/iea/pirls/2021> (accessed 26 December 2022); International Association for the Evaluation of Educational Achievement *PIRLS 2016: International Results in Reading* (2016) 3. On average, Grade 4 pupils are 9 – 10 years old. Mahlokwane J ‘UP study shows 81% of Grade 4 learners in SA have reading difficulties’ https://www.up.ac.za/faculty-of-education/news/post_3151785-up-study-shows-81-of-grade-4-learners-in-sa-have-reading-difficulties- (accessed 05 February 2024).

²⁶⁰ By scoring 288 points, South Africa lagged 212 points below the PIRLS counterpoint scale for reading and reading comprehension. Only 19 per cent of Grade 4 learners in South Africa met the low benchmarks, which means that these learners’ lack the ability to locate and reproduce information from texts. Mullis IVS, Fishbein B & Wry E et al ‘PIRLS 2021: International Results in Reading’ <https://pirls2021.org/wp-content/uploads/2022/files/PIRLS-2021-International-Results-in-Reading.pdf> (accessed 08 August 2023) 23, 71.

²⁶¹ DHET (2022) 66.

²⁶² DOL (2022) 28.

‘TVETs’)²⁶³ have been created to respond to the proven skill shortages and the skill needs of the country.²⁶⁴ Another reason for establishing TVETs is to address the social disparities created by the education system under apartheid by increasing access to education.²⁶⁵ In addition, TVETs provide an opportunity to access higher education for learners who may not otherwise qualify for university admission.²⁶⁶ According to the Centre for Development and Enterprise, the TVETs generate poor results, and the throughput has been extremely low. For instance, in 2018, only 8,135 learners, or 9 per cent of those enrolled, completed level 4.²⁶⁷

In addition, the employment prospects of those who have graduated from the TVETs are also poor.²⁶⁸ Enrolments in TVETs are decreasing, negatively impacting the development of skilled persons with mid-level skills, such as artisans, clerks and those in trade and craft occupations.²⁶⁹ Decreased enrolments in TVETs are not ideal for meeting the growing needs of South Africa’s economy, which already suffers from a significant shortage of mid-level skills.²⁷⁰

The TVETs play a role in providing access to trades.²⁷¹ According to the Centre for Development and Enterprise, regardless of improvements made to the TVETs, appraisals of the TVETs have noted weak linkages of TVETs with industry.²⁷² Chuan and Ibsen cite reasons for weak linkages between TVET graduates and industry. Employers fear losing their

²⁶³ Previously known as Further Education and Training colleges (established in terms of s 3 of the Further Education and Training Colleges Act 16 of 2006).

²⁶⁴ Stander L, Du Plooy B & Scheckle E ‘“Some of them are afraid of the language”: perceptions of TVET college staff about the relationship between English language proficiency and academic performance among engineering students’ (2022) 36(1) *South African Journal of Higher Education* 297.

²⁶⁵ Powell L ‘Reimagining the purpose of VET – Expanding the capability to aspire in South African Further Education and Training students’ (2012) 32 *International Journal of Educational Development* 645.

²⁶⁶ Powell L (2012) 645; Stander L, Du Plooy B & Scheckle E (2022) 297; Van der Bijl A & Oosthuizen, LJ ‘Deficiencies in technical and vocational education and training lecturer involvement qualifications and its implications in the development of work related skills’ (2019) 33(3) *South African Journal of Higher Education* 206.

²⁶⁷ Level 4 is equivalent to Grade 12. Centre for Development and Enterprise *South Africa’s NEETs crisis: Why we are failing to connect young people to work* (2021) 11 (hereafter ‘CDE (2021)’); Stander L, Du Plooy B & Scheckle E (2022) 297; Du Plooy B & Du Preez K ‘Perceptions of staff and students about the NC(V) model of workplace engineering artisan training offered by South African TVET colleges’ (2022) 36(1) *South African Journal of Higher Education* 97; Zulu WV & Mutereko S ‘Exploring the causes of student attrition in South African TVET Colleges: A Case of one KwaZulu-Natal Technical and Vocational Education and Training College’ (2020) 51(4) *Interchange* 386.

²⁶⁸ CDE (2021) 11; Allais S (2022) 485.

²⁶⁹ DHET (2022) 68-72.

²⁷⁰ DHET (2022) 72.

²⁷¹ National Treasury (2015) 5.

²⁷² CDE (2021) 10; Allais S, Schoer V & Marock C et al. ‘Rethinking “supply and demand” of technical and vocational education and training: insights from a company survey in three manufacturing sectors in South Africa’ (2021) 34 *Journal of Education and Work* 651.

investment as graduates, once qualified, may seek employment elsewhere.²⁷³ Another reason is that changing market needs might render firm-specific skills obsolete.²⁷⁴

2.4.1.4 Qualification versus acquired skills

At present, students enrolled for qualifications offered at tertiary institutions study subjects, or complete curricula, that do not meet the needs for filling the acknowledged skills shortages.²⁷⁵ This is evidenced by the struggle to find suitably qualified graduates²⁷⁶ ‘with complex problem-solving skills, critical thinking, good judgement and decision-making, as well as cognitive flexibility’.²⁷⁷ Rugunanan P, Xulu-Gama N & Batisai K et al. have stated that young people under the age of 35 do not possess the necessary skills to satisfy the skills needs of employers in South Africa.²⁷⁸ In the industrial engineering profession as an example, according to Schutte, Kennon and Bam, while industrial engineers are scarce, job requirements are aimed mostly at those who have studied at academic universities instead of technical universities or colleges.²⁷⁹ It therefore seems that the curriculum of technical universities fails to satisfy the skills demands of employers, and so fails to meet the skill requirements of the country.²⁸⁰ This example would imply that there may very well be a sufficient supply of industrial engineers with skills, but different job requirements, or job requirements which favour university graduates exclude a portion of those who are qualified.

On a tertiary-education level, there has been a decline in the number of enrolments in science, engineering and technology.²⁸¹ Given the importance of these qualifications for the growing needs of the economy, the DHET is concerned with the decline in numbers of graduates in the fields of science, engineering and technology.²⁸² The latest CSL lists teachers of Science,

²⁷³ Chuan A & Ibsen CL ‘Skills for the future? A life cycle perspective on systems of vocational education and training’ (2022) 75(3) *Industrial & Labor Relations Review* 639.

²⁷⁴ Chuan A & Ibsen CL (2022) 639.

²⁷⁵ NDP (2012) 317; Kruger N ‘South Africa has a skills shortage. How do we fix it?’ *World Economic Forum on Africa* 10 May 2016 <https://www.weforum.org/agenda/2016/05/south-africa-skills-shortage-how-do-we-fix-it/> (accessed 26 December 2022); Rasool F & Botha CJ (2011) 7; DHET (2022) 13.

²⁷⁶ Urban B & Naidoo R ‘Business sustainability: empirical evidence on operational skills in SMEs in South Africa’ (2012) 19(1) *Journal of Small Business and Enterprise Development* 150.

²⁷⁷ Kruger N (2016).

²⁷⁸ Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 143.

²⁷⁹ Schutte CSL, Kennon D & Bam W ‘The status and challenges of industrial engineering in South Africa’ (2016) 27(1) *South African Journal of Industrial Engineering* 14.

²⁸⁰ Schutte CSL, Kennon D & Bam W (2016) 14.

²⁸¹ DHET (2022) 74.

²⁸² DHET (2022) 74.

Technology, Engineering and Mathematics (hereafter ‘STEM’), amongst others.²⁸³ While tertiary institutions in South Africa produce enough teachers for other subjects, too few teachers specialise in subjects linked to South Africa’s development priorities.²⁸⁴ Attracting SMWs who can teach these STEM subjects is thus vital for meeting economic development needs in the future.

2.4.2 Brain drain

The loss of skilled workers is often referred to as ‘brain drain’.²⁸⁵ It is the most significant reason for the changes in government policy towards skills immigration.²⁸⁶ Brain drain is defined loosely as the migration of skilled workers, often to developed countries,²⁸⁷ which affects the skills configuration of the labour pool in the country of origin.²⁸⁸ Brain drain includes the short-term migration of young professionals, the permanent relocation of white commercial farmers, and the often undocumented migration of low or semi-skilled migrants.²⁸⁹ Brain drain is also often referred to as the permanent emigration of highly skilled professionals,²⁹⁰ which is a more relevant and appropriate definition in the context of this thesis.

The brain drain in South Africa often takes the form of skilled persons migrating to Europe and countries such as Canada, the USA, Australia, and New Zealand, affecting South Africa’s skills

²⁸³ Immigration Act 13 of 2002 regulations in GN 2334 GG 47182 of 2 August 2022.

²⁸⁴ Muremela G, Kutame A & Kapueja I et al. ‘Retaining scarce skills teachers in a South African rural community: an exploration of associated issues’ (2021) *African Identities* 12; Muremela G, Kutame A & Kapueja I et al. ‘Challenges of retaining qualified scarce skills subject teachers in rural secondary schools: Lens of stakeholders in Mutale District, Limpopo’ (2020) 17(3) *African Renaissance* 75.

²⁸⁵ Rasool F & Botha CJ (2011) 4; DHET (2022) 65.

²⁸⁶ Rasool F & Botha CJ (2011) 4; Crush J, Williams V & Peberdy S (2005) *Migration in Southern Africa*. A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration https://www.sarpn.org/documents/d0001680/P2030-Migration_September_2005.pdf 20.

²⁸⁷ The International Monetary Fund distinguishes between ‘advanced’ economies and emerging and developing economies. This classification is not based on strict criteria, economic or otherwise, and has evolved over time. Developed countries are grouped as such due to their high income. Developing countries are described as such due to their low income. World Bank *World development indicators 2016* (2016) preface III; Gwaravanda ET, Ndofirepi AP & Waghid Y et al. (2021) 42; International Monetary Fund *Statistical Appendix* (September 2011) 165.

²⁸⁸ Allen-Ile C, Mateus AM & Iwu C (2014) 495; DHET (2022) 64-5.

²⁸⁹ Segatti A, Landau LB & Misago JP et al. (2011) 70.

²⁹⁰ Anderson BO, Yu PP & Shulman LN et al. ‘Impact of merit-based immigration policies on brain drain from low- and middle-income countries’ (2020) 6 *American Society of Clinical Oncology* 185; Oliinyk O, Bilan Y & Mishchuk H ‘The impact of migration of highly skilled workers on the country’s competitiveness and economic growth’ (2021) 17(3) *Montenegrin Journal of Economics* 9.

pool.²⁹¹ People emigrate from a country for various reasons, referred to as push and pull factors. Push and pull factors are factors that influence the decision to move from one place or country to another.²⁹² According to Kline, push factors are prevalent in sending countries, while pull factors are present in receiving countries.²⁹³ Examples of push factors that are relevant in South Africa are high crime rates,²⁹⁴ high costs of living, high taxes, political instability, affirmative action, lack of employment opportunities, and poor public and commercial service delivery.²⁹⁵ Common pull factors are the higher wages offered in the receiving country, safety, better service delivery, better employment opportunities and opportunities for progress in the workplace.²⁹⁶

According to Kaplan and Höppli, '[t]here is no reliable data on the extent of South African skilled emigration and return migration'.²⁹⁷ Kaplan and Höppli also state, 'Statistics South Africa stopped collecting emigration data more than a decade ago.'²⁹⁸ Crush and Williams believe that, because of significant gaps in the data or inaccessible data, undercounting concerning the brain drain has occurred.²⁹⁹ Official statistics for emigration are difficult to come by, are not necessarily dependable, and fail to capture the magnitude and probable impact

²⁹¹ OECD *OECD Health policy studies: the looming crisis in the health: workforce how can OECD countries respond* (2008) 32; Crush J *Losing our minds: Skills migration and the South African brain drain* (2000) 1; Head T 'SA facing a skilled-worker "brain drain" as 7% of whites have emigrated since 2002' <https://www.thesouthafrican.com/sa-facing-a-skilled-worker-brain-drain-as-7-of-whites-have-emigrated-since-2002/> (accessed 26 December 2022); DHET (2022) 64.

²⁹² Kanayo O, Anjofui P & Stiegler N 'Push and pull factors of international migration: Evidence from migrants in South Africa' (2019) 8(2) *Journal of African Union Studies* 223.

²⁹³ Kline DS 'Push and Pull factors in international nurse migration' (2003) 2 *Journal of Nursing Scholarship* 108.

²⁹⁴ Daye R *Political Forgiveness: Lessons from South Africa* (2011) 35; Dastbaz M & Gorse C (eds) *Sustainable ecological engineering design: selected proceedings from the international conference of sustainable ecological engineering design for society (SEEDS)* (2016) 317; Mwakikagile G *Africa and the West* (2000) 140, 163.

²⁹⁵ Rasool F & Botha CJ (2011) 8, 9; DHET (2022) 64.

²⁹⁶ Thompson M 'Migration decision-making: a geographical imaginations approach' (2017) 49(1) *Area* 78; Erasmus J & Breier M (2009) 1-2; De Villiers JJR 'Career plans of final-year South African student teachers: Migration to "greener pastures"?' (2017) 14(3-4) *Africa Education Review* 216; Dinbabo MF & Nyasulu T 'Macroeconomic immigration determinants: An analysis of "pull" factors of international migration to South Africa' (2015) 1(1) *Afr Hum Mobil Rev* 34; Urbanski M 'Comparing push and pull factors affecting migration' (2022) 10(21) *Economies* 1-2.

²⁹⁷ Kaplan D & Höppli T 'The South African brain drain: An empirical assessment' (2017) 34(5) *Development Southern Africa* 497; DOL (2022) 16.

²⁹⁸ Kaplan D & Höppli T (2017) 497.

²⁹⁹ Crush J & Williams V 'Labour migration trends and policies in Southern Africa' <https://scholars.wlu.ca/cgi/viewcontent.cgi?article=1080&context=samp> (accessed 26 December 2022) 33; Owusu-Sekyere E, Wentzel M & Kanyane B et al. (2019) 29.

of the brain drain.³⁰⁰ Stern and Szalontai suggest that between 1989 and 2003, South Africa lost approximately 120,000 persons with professional qualifications.³⁰¹

While it is unclear how many skilled workers have left South Africa, the impacts of brain drain are clear and the prospects of retaining skills, unpropitious. Due to the brain drain, public service is becoming more inexperienced.³⁰² Moreover, skilled emigration from South Africa has a multiplier effect, as it is estimated that 10 redundancies are created for each skilled person who emigrates, thus probably resulting in lost revenue for South Africa.³⁰³ This means that each time a skilled person emigrates, the previous colleagues of the emigrant are negatively affected. For example, these previous colleagues may not be able to complete the job requirements of the emigrant, which may also lead to their job being considered redundant. Unfortunately, the intention to emigrate appears even stronger amongst young skilled workers and recent university graduates.³⁰⁴ An exodus of skills to foreign countries exacerbates skills shortages.³⁰⁵ It is submitted that, unless the South African state addresses the long-term systemic issues mentioned above³⁰⁶ that cause persons to consider emigration, the problem might increase now and in the future.

An ageing workforce advances brain drain and skills shortages in South Africa.³⁰⁷ The retirement of 'baby-boomers', those born between about 1945 and 1964, is likely to affect skills supply in South Africa.³⁰⁸ 'Baby boomers' are considered the healthiest, most long-lived, most fit and active, best educated, and most affluent group of persons in history.³⁰⁹ They represent a

³⁰⁰ Scalabrini Institute for Human Mobility in Africa (SIHMA) Migration Profile: South Africa, September 2014 Cape Town, South Africa 8; Stats SA 'Erroneous reporting of undocumented migrants in SA' <https://www.statssa.gov.za/?p=14569> (accessed 26 December 2022).

³⁰¹ SIHMA (2014) 8.

³⁰² Cameron R 'New public management reforms in the South African public service: 1999-2009' (2009) 44(4.1) *Journal of Public Administration* 935; Maramura TC, Nzewi OI & Tirivangas HM 'Mandelafying the public service in South Africa: Towards a new theory' (2020) 20(1) *Journal of Public Affairs* 4.

³⁰³ International Business Publications *South Africa investment and business guide volume 1 strategic and practical information* (2016) 67; SIHMA (2014) 8.

³⁰⁴ Segatti A, Landau LB & Misago JP et al. (2011) 73; Swanepoel D 'Measuring social cohesion in South Africa' <https://drive.google.com/file/d/1XpvT5k1Bg0hQMa9v5Ayr-bPMqLPnT2sG/view> (accessed 26 December 2022) 33; Crush J *Rethinking the Medical Brain Drain Narrative* (2019) 15.

³⁰⁵ Mutula SM & Mostert J (2010) 44; Cameron R (2009) 935.

³⁰⁶ See 1.1 above.

³⁰⁷ DHET (2022) 62.

³⁰⁸ Callanan GA & Greenhaus JH 'The baby boom generation and career management: A call to action' (2008) 10(1) *Advances in Developing Human Resources* 73; Jonck P, van der Walt F & Sobayeni NC 'A generational perspective on work values in a South African sample' (2017) 43 *South African Journal of Industrial Psychology* 2; Altman Y, Baruch Y & Manrique-de-Lara PZ et al. 'Baby boomers at the cusp of their academic career: storming ahead, hanging on, or calling it a day' (2020) 45(7) *Studies in Higher Education* 1335.

³⁰⁹ Cole MB & Macdonald KC 'Retired occupational therapists' experiences in volunteer occupations' (2011) 18(1) *Occupational Therapy International* 18.

large group of highly experienced and skilled workers.³¹⁰ In 2021, it was estimated that 47 per cent of nurses in South Africa were over 50 years old, while only 6 per cent were under 30.³¹¹ The labour force's age and subsequent retirement will probably accelerate skill shortages.³¹²

According to Rasool and Botha, white professionals constitute the majority of those who have emigrated from South Africa. Although black people have also emigrated, skills were concentrated in the white population.³¹³ Under apartheid, the NP implemented restrictive emigration policies making it nearly impossible for white South Africans to emigrate.³¹⁴ After the African National Congress came into power, 'white flight' became a major concern as radical changes in legislation abruptly relocated the balance of job opportunities from white males to previously disadvantaged groups.³¹⁵ The migration of skilled white persons is also attributed to the introduction of the EEA and the BBBEEA,³¹⁶ which created the fear that these Acts would disadvantage white people.³¹⁷ According to Owusu-Sekyere, Wentzel and Kanyane et al., the BBBEE also negatively influences migrants with critical skills from choosing South Africa as their destination country.³¹⁸ In addition, the BBBEE restricts SMWs' access to the labour market by reserving certain jobs for citizens.³¹⁹

Section 9 of the Constitution provides for the right to equality in South Africa, entailing that everyone in South Africa is equal and deserving of equal protection and benefit of the law.³²⁰ The EEA was drafted to give effect to the equality clause in the Constitution.³²¹ In South Africa, affirmative action measures may be taken to eradicate barriers of injustice deriving from

³¹⁰ Venter E 'Bridging the communication gap between Generation Y and the Baby Boomer generation' (2017) (22)4 *International Journal of Adolescence and Youth* 504; Callanan GA & Greenhaus JH (2008) 81.

³¹¹ DHET (2022) 62.

³¹² Squyres D 'Prioritizing the forgotten generation: why organizations should make boomers a key part of their talent acquisition strategy in 2020' (2020) 19(3) *Strategic HR Review* 99; DHET (2022) 62.

³¹³ Rasool F & Botha CJ (2011) 8.

³¹⁴ Bailey R *Immigration and Migration* (2008) 90.

³¹⁵ Rasool F & Botha CJ 'The nature, extent and effect of skills shortages on skills migration in South Africa' (2011) 9(1) *SA Journal of Human Resource Management* 8; Offutt S *New centers of global evangelicalism in Latin America and Africa* 63.

³¹⁶ Mwakikagile G *South Africa in contemporary times* (2008) 140.

³¹⁷ Mwakikagile G (2000) 163.

³¹⁸ Owusu-Sekyere E, Wentzel M & Kanyane B et al. (2019) 33.

³¹⁹ Zinatsa F & Saurombe MD 'Tied migrant labor market integration: Deconstructing labor market subjectivities in South Africa' (2022) 13 *Frontiers in Psychology* 5.

³²⁰ South African Human Rights Commission 'Strategic focus area: immigration' available at <https://www.sahrc.org.za/index.php/focus-areas/immigration-equality/immigration> (accessed on 7 December 2022).

³²¹ Du Toit D & Sirkhotte M 'Human rights in the evolution of South African labour law' in Bellace JR & Ter Haar B (eds) *Research Handbook on Labour, Business and Human Rights Law* (2019) 175 (Du Toit D & Sirkhotte M (2019)').

inequality created by apartheid.³²² The EEA thus promotes fair treatment and equal opportunity in employment through affirmative action measures.³²³ The EEA provides that affirmative action measures are to be implemented by designated employers.³²⁴ Once in the country with a CSWV, a SMW employed at a designated employer is excluded from affirmative action measures that apply only to citizens within certain designated groups.³²⁵ Affirmative action measures may result in SMWs being excluded from retention and skills development measures.³²⁶

Affirmative action measures through the EEA³²⁷ attempt to resolve the skills shortage problem caused by apartheid.³²⁸ According to Abel, affirmative action facilitates the successful employment of a small group of previously disadvantaged persons.³²⁹ Affirmative action, however, has had the negative result of the unemployment or underemployment of previously advantaged skilled graduates.³³⁰ According to Rasool and Botha, affirmative action has affected many skilled people, causing some of them to emigrate.³³¹ There are still far-ranging inequalities in the workplace caused by the failure of the EEA.³³² Nevertheless, the proportions of non-white race groups have increased within the skilled workforce.³³³ This implies that affirmative action measures have achieved limited success in ensuring employment equity. Affirmative action measures alone have proven insufficient and unable to address skill shortages, and contribute to skilled workers emigrating from South Africa, leaving shortages of critical skills.³³⁴

³²² Constitution, s 9(2); CDESCR: Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights: South Africa E/C.12/ZAF/1 (2017) para 48 (hereafter 'CESCR SA report (2017)'); Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' (2015) 19 *Law, Democracy & Development* 249.

³²³ EEA, s 5 & s 15.

³²⁴ EEA, s 13(1).

³²⁵ Designated groups for the application of the Act means 'black people, women and people with disabilities'. Employment Equity Act 55 of 1998, s 1, s 13(1).

³²⁶ EEA, s 15(2)ii.

³²⁷ Act 55 of 1998.

³²⁸ Van de Rheede JL *The appropriateness of equality legislation in addressing the challenges faced by black professional employees in South Africa* (unpublished PhD thesis, University of the Western Cape, 2020) 277.

³²⁹ Abel M (2017) *Labor market discrimination and sorting: Evidence from South Africa*. A Southern Africa Labour and Development Research Unit Working Paper Number 205, http://www.opensaldru.uct.ac.za/bitstream/handle/11090/867/2017_205_Saldruwp.pdf?sequence=1 5.

³³⁰ Segatti A, Landau LB & Misago JP et al. (2011) 70; Mlambo VH & Adetiba TC (2019) 7.

³³¹ Rasool F & Botha CJ (2011) 2; DHET (2022) 64.

³³² Van de Rheede JL (2020) 280; Department of Employment and Labour *Commission for Employment Equity: Annual Report 2016-2017* (2017) 64-6.

³³³ Statistics South Africa *Employment, unemployment, skills and economic growth: An exploration of household survey evidence on skills development and unemployment between 1994 and 2014* (2014) 17.

³³⁴ Rasool F & Botha CJ (2011) 2; DHET (2022) 64.

Disparities in working conditions in richer and poorer countries often pull people towards richer countries offering better working conditions.³³⁵ Moreover, poor working conditions may be an essential factor for people considering leaving a country.³³⁶ For instance, poor working conditions such as long working hours, lack of facilities and sanitation,³³⁷ particularly in the health sector,³³⁸ often encourage medical and hospital staff to seek greener pastures.

Until 2022, foreign graduates who completed their studies in a critical skills category at tertiary institutions in South Africa were offered an opportunity to apply for permanent residence once they graduated.³³⁹ Those students who did not elect to be permanent residents were issued with CSWVs.³⁴⁰ This was a positive attempt by the state to retain skilled foreign nationals.

Following a directive from the Minister of Home Affairs on 31 January 2022, the Minister withdrew the waivers, dated 21 April 2016, that allowed international students who had graduated from South African tertiary institutions with a degree in critical skills to apply for permanent residence.³⁴¹ Foreign graduates must now gain five years of working experience in a critically skilled occupation before qualifying for permanent residence. The removal of the waiver places South Africa at risk of losing these graduates to other countries, resulting in a brain drain. Through this decision, the South African state loses investments in scholarships, bursaries and the like made in educating and training these students. The South African state also loses skills and potential tax revenue that would result if the graduates were retained and employed in South Africa.³⁴² The White Paper acknowledges that the South African state should proactively retain foreign graduates.³⁴³ As the South African state has failed to amend

³³⁵ Dodani S & LaPorte RE 'Brain drain from developing countries: how can brain drain be converted into wisdom gain?' (2005) 98 *Journal of the Royal Society of Medicine* 487.

³³⁶ Gwaradzimba E & Shumba A 'The nature, extent and impact of the brain drain in Zimbabwe and South Africa' (2010) 42(1) *Acta Academica* 223.

³³⁷ Gwaradzimba E & Shumba A (2010) 236.

³³⁸ Chu K, Rosseel P & Gielis P et al. 'Surgical task shifting in Sub-Saharan Africa' (2009) 6(5) *Plos Medicine* (online) 1.

³³⁹ Department of Home Affairs 'Statement by the Minister of Home Affairs, Mr. Malusi Gigaba MP, at the media briefing on visa-related reforms in Pretoria on 25 September 2018' <http://www.dha.gov.za/index.php/statements-speeches/1186-statement-by-the-minister-of-home-affairs-mr-malusi-gigaba-mp-at-the-media-briefing-on-visa-related-reforms-in-pretoria-on-25-september-2018> (accessed 31 December 2022) – (hereafter 'Statement M Gigaba (2018)')

³⁴⁰ Statement M Gigaba (2018).

³⁴¹ DHA 'Withdrawal of waivers granted in terms of section 31(2)(c) of the Immigration Act 13 of 2002: Granting of permanent residence status in terms of section 27(b) of the Immigration Act: Graduates from SA tertiary institutions in the area of critical skills' <http://www.dha.gov.za/index.php/notices/1510-immigration-directive-02-of-2022> (accessed 26 December 2022).

³⁴² Gwaravanda ET, Ndofirepi AP & Waghid Y et al. (2021) 45 ; National Treasury *Operation Vulindlela* (2023) 4.

³⁴³ White Paper 47.

the IA to reflect the proactive policies for skilled migration envisaged by the White Paper, it is submitted that the impact of the directive does not serve South Africa's interests in attracting persons who possess critical skills, but rather contributes to a brain drain of graduates who possess critical skills.³⁴⁴

2.4.3 Brain waste

Brain waste occurs when the skills of immigrants are not recognised and, therefore, not used in the host country's labour market.³⁴⁵ Immigrants with a similar level of education may face inferior employment prospects compared to citizens, thus resulting in the skills and capabilities of migrants being lost.³⁴⁶ There are several reasons for 'brain waste' or skill mismatch. These include a lack of immigrant assimilation into the local labour market, uncertainty concerning the quality of schooling or training of the immigrant, labour market policy, and discrimination based on ethnicity, origin or stereotypes regarding migrant workers from certain countries of origin.³⁴⁷

A study by Shirmohammadi, Beigi and Stewart confirmed that SMWs were more likely to be satisfied with their work once they had a better chance of 'obtaining qualification-matched employment'.³⁴⁸ For SMWs, poor working conditions, 'a lack of career advancement opportunities, low employer support, and lower pay compared with native workers accounted for job dissatisfaction'.³⁴⁹ When skills are discounted or mismatched, SMWs have complained about mental health problems, such as 'stress, anxiety, depression, and unhappiness', and lower

³⁴⁴ DOL (2022) 19; Kahn M & Oghenetega J 'Origins and destinations known: A tracer study of international African doctoral graduates from South Africa's universities' (2021) 35(5) *Industry and Higher Education* 564.

³⁴⁵ Ehrhart H, Le Goff M, Rocher E et al. (2014) *Does Migration Foster Exports? Evidence from Africa*. The World Bank: Africa Region: Poverty Reduction and Economic Management Unit, Working Paper 6739 20.

³⁴⁶ Ehrhart H, Le Goff M & Rocher E et al. 'Does Migration Foster Exports? Evidence from Africa' (2014) *The World Bank, Africa Region, Poverty Reduction and Economic Management Unit* 106; Farashah A, Blomquist T and Ariss A et al. (2023) 481.

³⁴⁷ Doyle A, Peters AC & Sundaram A (2014) *Skills Mismatch and Informal Sector Participation among Educated Immigrants: Evidence from South Africa*. A Southern Africa Labour and Development Research Unit Working Paper Number 137, Cape Town: SALDRU, University of Cape Town http://www.lmip.org.za/sites/default/files/documentfiles/skills%20mismatch_0.pdf 4,5; Owusu-Sekyere E, Wentzel M & Kanyane B et al. (2019) 34; Human Sciences Research Council (2022) 'Baseline study to determine levels of racism, anti-foreigner sentiment, homophobia, racial incidents, inter-racial relations and perceptions of national identity' Department of Justice and Constitutional Development: South Africa 7 (hereafter 'HSRC (2022)'). See 5.4.3.1 below.

³⁴⁸ The study by Shirmohammadi M, Beigi M & Stewart J was undertaken so as to 'synthesize findings of empirical research focusing on skilled migrants' qualification-matched employment'. Shirmohammadi M, Beigi M & Stewart J (2019) 99, 110.

³⁴⁹ Shirmohammadi M, Beigi M & Stewart J (2019) 110; Farashah A, Blomquist T and Ariss A et al. (2023) 481.

earnings than citizens.³⁵⁰ The working conditions of SMWs are often determined by or depend on whether their qualifications have been recognised.³⁵¹ If their qualifications are not recognised, they may find themselves in the same unfortunate position as undocumented or low-skilled migrants.³⁵² The failure to recognise SMWs' qualifications and experience results in brain waste. Failing to assign the appropriate value to the skills, experience and qualifications of SMWs further results in brain waste, and does nothing to assist in addressing skills shortages.

There is considerable variation in the employment prospects of SMWs. Immigrants who come from advanced countries often have better job prospects than those who come from developing countries.³⁵³ This results in discrimination based on the country of origin of the immigrant. For instance, highly skilled and qualified persons from developing countries have been found working as car guards or house servants.³⁵⁴ According to Doyle, Peter and Sundaram, South African census data shows that immigrants from differently originating groups differ in the likelihood of obtaining employment in cases where skills are required.³⁵⁵ It appears that immigrants from advanced countries are preferred for employment purposes over African migrants, which suggests an underutilisation of African immigrants with high skills.³⁵⁶

The recognition of foreign qualifications is exceptionally important for skilled migrants, as the non-recognition of their qualifications may lead skilled migrants to be underpaid or expose them to exploitative labour.³⁵⁷ Non-recognition of foreign qualifications may also lead to de-

³⁵⁰ Shirmohammadi M, Beigi M & Stewart J (2019) 109-10.

³⁵¹ Stumpf F, Damelang A & Abraham et al. 'How national institutions shape skilled immigrants' chances of getting hired: evidence from harmonised factorial surveys with employers in Germany and England' (2020) 72(1) *Kölner Zeitschrift für Soziologie und Sozialpsychologie* 353; Farashah A, Blomquist T and Ariss A et al. (2023) 479.

³⁵² Farashah A, Blomquist T and Ariss A et al. (2023) 481.

³⁵³ Doyle A, Peters AC & Sundaram A (2014) 12; Hiropoulos A 'South Africa, migration and xenophobia. Deconstructing the perceived migration crisis and its influence on the xenophobic reception of migrants' (2020) 23 *Contemporary Justice Review* 113; Owusu-Sekyere E, Wentzel M & Kanyane B et al. (2019) 35; Gwaravanda ET, Ndofirepi AP & Waghid Y et al. (2021) 46.

³⁵⁴ Christie S 'The secret lives of cape town's car guards' <http://www.seanchristie.co.za/articles/the-secret-lives-of-cape-towns-car-guards/> (accessed on 26 December 2022); Zinatsa F & Saurombe MD (2022) 3; Scalabrini Institute for Human Mobility in Africa (2020) 'Labour-related experiences of migrants and refugees in South Africa: Scalabrini Institute for Human Mobility in Africa ICMC Project, The future of Work, labour after Laudato Si' 83 (hereafter 'SIHMA (2020)'); Farashah A, Blomquist T and Ariss A et al. (2023) 481.

³⁵⁵ Doyle A, Peters AC & Sundaram A (2014) 1; Zinatsa F & Saurombe MD (2022) 5.

³⁵⁶ Doyle A, Peters AC & Sundaram A (2014) 1; Braňka J *Understanding the Potential Impact of Skills Recognition Systems on Labour Markets: Research Report* (2016) 34; Zinatsa F & Saurombe MD (2022) 2.

³⁵⁷ David F, Bryant K & Larsen JJ *Migrants and Their Vulnerability to Human Trafficking, Modern Slavery and Forced Labour* (2019) 57.

skilling.³⁵⁸ The ultimate consequence for South Africa, through the failure to recognise foreign qualifications and competencies, is a loss of critical skills, which undermines the purpose of the CSWV. Unfortunately, the Health Professions Council of South Africa did not recognise the foreign qualifications of 55 South African medical doctors who studied abroad recently. In contrast, the same graduates' qualifications were recognised in Canada and Australia.³⁵⁹

Moreover, because the RA and the IA do not specifically make provision for skilled refugees and skilled asylum seekers, opportunities for 'brain waste' are created. The IA does not specifically cater for refugees and asylum seekers with critical skills; this causes a further loss of skills in South Africa, as irregularities in issuing CSWVs for asylum seekers and refugees prevent them from being issued the CSWV.³⁶⁰ The irregularities here do not stem from the CSWV, but from how the DHA assesses the applications from skilled asylum seekers.

Skilled asylum seekers should be able to apply for a CSWV if they qualify.³⁶¹ In *Ahmed and Others v Minister of Home Affairs and Another*, the court noted that qualifying asylum seekers applying for a CSWV were denied CSWVs due to a lack of documents, even though an exception had been made for asylum seekers who did not have passports or other necessary documents to apply for CSWVs.³⁶²

In *Ahmed and Others v Minister of Home Affairs and Another*, the Constitutional Court, considering the issue of whether asylum seekers should be allowed to apply for a CSWV, stated:

Asylum seekers are often not in possession of valid passports or identity documents, and not in the position to readily obtain their documents. ... [T]he Department ... instructed [its employees] ... to accept and consider applications for visas or permits made by asylum seekers not in possession of valid passports. The purpose of the [instruction] was to ameliorate the precarious position of asylum

³⁵⁸ De-skilling occurs when skilled migrants are employed in entry-level or unskilled positions, leading to a loss of skills. Shirmohammadi M, Beigi M & Stewart J 'Understanding skilled migrants' employment in the host country: a multidisciplinary review and a conceptual model' (2019) 30(1) *The International Journal of Human Resource Management* 110.

³⁵⁹ Pillay K 'Overseas-trained doctors blocked from practising' <http://themercury.newspaperdirect.com/epaper/showarticle.aspx?article=c411306b-88b4-4cdb-a9e1-d3e80fdbea98&key=ek7AXmNzOitoxzXgXga7Nw%3d%3d&issue=6403202008140000000001001> (accessed 10 April 2023).

³⁶⁰ SIHMA (2020) 84.

³⁶¹ *Ahmed and Others v Minister of Home Affairs and Another* (2018) ZACC 39, para 60.

³⁶² *Ahmed and Others v Minister of Home Affairs and Another* (2018) ZACC 39.

seekers and to afford them the opportunity to apply for visas or permits in terms of the Immigration Act without a valid passport. It must be stressed that no administrative hurdles, relating to the possession of passports and the like, may be introduced by the Department in order to disallow or discourage these kinds of applications.³⁶³

The words of a skilled asylum seeker illustrate this point:

I have been in South Africa for 12 years and in exile for 18 years. [I] [h]ave managed to get BSc, PGCE but have been no teaching positions because of the document I am using. Yes the country needs science teachers but fail to give a teaching post no matter how I managed to work on short contract for some months. I hold unused talent that the countr[y] ... [and] the world need[s] to profit from.³⁶⁴

Msabah asserts that the DHA adds to the vulnerability of asylum seekers owing to irregularities concerning their documentation, as they are told to bring ‘any proof of identification’,³⁶⁵ but often only certain forms of documentation are accepted by the DHA.³⁶⁶ The legal issue in this instance is that the Minister of Home Affairs has implemented regulations contrary to the IA and judicial precedent.³⁶⁷

Brain waste also occurs with skilled refugees and skilled spouses accompanying holders of CSWVs. The IA allows for a status change once admitted into South Africa lawfully.³⁶⁸ Refugees and skilled spouses should thus be allowed to apply for a status change; more specifically, they should be able to apply for a CSWV.

As Zinatsa and Saurombe point out, skilled migration is usually characterised by men as the primary applicant; most skilled women who accompany men automatically fall into the

³⁶³ *Ahmed and Others v Minister of Home Affairs and Another* (2018) ZACC 39, para 61; *Dabone & Others v Minister of Home Affairs & Another* (Court Order) (HC) unreported case 7526/03 https://www.refugee.co.za/documents/2003_1_11_Dabone_&_Others_v_Minister_of_Home_Affairs.pdf (accessed 26 December 2022).

³⁶⁴ Msabah BA ‘Horizons in transformational development and transnational migration: does hope matter?’ (2018) 117 *Scriptura* 10; DOL (2022) 95.

³⁶⁵ An asylum seeker may bring ‘proof of any form of a valid identification document’, and if the applicant does not have proof of identification, he or she may declare identity in writing in front of an immigration officer. Refugees Act regulations in GN 1707 in GG 42932 of 27 December 2019, Reg 8(1)(c)ii.

³⁶⁶ *Minister of Home Affairs & others v Somali Association of South Africa & another* (2015) ZASCA 35 para 2 (hereafter ‘*Somali Association of South Africa*’); Msabah BA (2018) 5.

³⁶⁷ Regulations to the IA are not Acts; instead, they are subordinate and must align with the IA. *Minister of Home Affairs v Liebenberg* 2002 (1) SA 33 (CC), para 13.

³⁶⁸ IA, s 10(6).

position of a dependant or tied migrant.³⁶⁹ The outcome of how the immigration policy is applied often differs when the applicant is a man as opposed to a woman.³⁷⁰ The implications of which are pertinent in the fight for gender equality. For both spouses to be issued with CSWVs, both must qualify; if only one spouse applies, the other will be issued with a visitor or relative visa valid for the duration of the CSWV. The visitor's visa allows spouses to work in South Africa, while the relative visa does not.³⁷¹ Due to poor immigrant assimilation in South Africa, skilled spouses often struggle to find meaningful employment in South Africa even while they have work experience and appropriate qualifications to qualify for a CSWV.³⁷² Skilled spouses have also admitted that after their qualifications were not recognised by the South African Qualifications Authority (hereafter 'SAQA'), they have had to accept employment in jobs which are not commensurate with their skills, leading to deskilling.³⁷³ Some were considered as overqualified and they would have to resort to downplaying their qualifications in certain instances in order to get a job.³⁷⁴ While it helps if skilled spouses become permanent residents, to access formal employment and expand on their employment options, this cannot be guaranteed by being granted permanent residence alone.³⁷⁵

In order to qualify for a CSWV and the renewal thereof, one's occupation must be listed on the latest CSL. Brain waste also occurs when the DHA removes certain qualifications from the CSL, and those qualifications cease to appear on the latest CSL. The CSL has been amended recently, and a number of occupations are removed every time it is amended. What happens to those SMWs after their skill is no longer listed, and they no longer qualify for the renewal of their CSWV? What are the impacts on skills transfer plans and employers? As the state has not addressed this issue, it seems as though these skills are dispensable. With each amendment to the CSL, the state has been silent on what should happen to those persons who have been granted a CSWV but who no longer qualify in terms of the amended or new CSL. Due to the inability to cater for these persons, many SMWs have been forced to return to their home

³⁶⁹ Zinatsa F & Saurombe MD (2022) 1-2; Iredale R 'Gender, Immigration policies and accreditation: Valuing the skills of professional women migrants' (2005) 36 *Geoforum* 156.

³⁷⁰ Iredale R (2005) 156.

³⁷¹ A spouse might be issued with a visitor's visa in terms of section 11(6) of the IA or a relative visa in terms of section 18 of the IA.

³⁷² Zinatsa F & Saurombe MD (2022) 3; Farashah A, Blomquist T and Ariss A et al. (2023) 493.

³⁷³ Zinatsa F & Saurombe MD 'Self-governing strategies of female tied migrants in the South African labor market' (2022) 18(1) *Journal of Global Business and Technology* 42, 48 (hereafter 'Zinatsa F & Saurombe MD (2022a)').

³⁷⁴ Zinatsa F & Saurombe MD (2022a) 48.

³⁷⁵ Zinatsa F & Saurombe MD (2022) 7.

countries or migrate elsewhere; this amounts to brain waste and may result in further brain drain for South Africa.

2.4.4 Lack of apprenticeships

In South Africa, ‘some of the trades identified as “critical” to the point of needing to attract people from abroad, are being almost completely neglected from a training point of view’.³⁷⁶ Apprenticeships on offer for artisans³⁷⁷ started to decline between 1980-1990, leading to a shortage of artisans in South Africa.³⁷⁸ It costs around R500,000 to train an artisan, while only 24-25 per cent of trained students pass the trade test every year.³⁷⁹

An apprenticeship is a model of learning that combines on-the-job training with training offered at a vocational institution.³⁸⁰ Artisans are essential for the economy as they contribute to economic growth and job creation, and without artisans, the government will fail to build infrastructure and maintain service delivery.³⁸¹

According to Kruss, Wildschut and Petersen, South Africa does not produce enough artisans to meet the demand for and goal of producing 30,000 artisans annually by 2030, as set out in the National Development Plan.³⁸² This view is contradicted by a report published by the DHET, wherein it was concluded that enough artisans are produced in South Africa. However, ‘the artisan development system is not responding in the targeted manner required’ for occupations on the CSL,³⁸³ as the systems in place to develop artisans cannot produce the number of artisans required to meet South Africa’s need.

³⁷⁶ Mzabalazo Advisory Services (2022) 23.

³⁷⁷ The term artisan was traditionally used to refer to someone who was skilled at making things by hand, later the term included reference to persons who worked with tools and machinery in crafts. Traditionally one would become an artisan after undergoing on the job training by a skilled artisan. Later, the theory component of the craft would be taught in a learning institution and then thereafter, the student will be taught the practical component at an employer. Erasmus J & Breier M (2009) 219.

³⁷⁸ Mbatha N, Wildschut A & Mncwango B (2014) ‘Towards understanding the distinctive nature of artisan training: implications for skills planning in South Africa’ 10; Puchert J, Van Niekerk R & Viljoen K ‘Apprentice selection: A systematic literature review from 1990 to 2020’ (2021) 21(1) *Acta Commercii* 3; NDP (2012) 69, 320.

³⁷⁹ Puchert J, Van Niekerk R & Viljoen K ‘An evaluation of an apprentice selection process’ (2022) 22(1) *Acta Commercii* 2.

³⁸⁰ Maia C & Anuar AM ‘Cross-country comparison of engagement in apprenticeships: A conceptual analysis of incentives for individuals and firms’ (2019) 6(3) *International Journal for Research in Vocational Education and Training* 262.

³⁸¹ Siwela S & Van der Bank F ‘Understanding intention to quit amongst artisans and engineers: The facilitating role of commitment’ (2021) 19 *SA Journal of Human Resource Management* 2.

³⁸² Kruss G, Wildschut A & Petersen I *Skills for the future: new research perspectives* (2019) 49.

³⁸³ Mzabalazo Advisory Services (2022) 23, 25.

The closing of artisan training schools and programs (particularly in the construction industry) has contributed to the decline in artisans.³⁸⁴ One of the reasons for the shortage is the negative stigma attached to training for and becoming an artisan.³⁸⁵ The decline of traditional apprenticeships has resulted in insufficient practical experience for persons interested in becoming artisans.³⁸⁶ Learnerships were developed to assist with addressing the decline in apprenticeships.³⁸⁷ A learnership is a structured learning process encompassing practical skills acquired at a workplace and theoretical knowledge acquired through a learning institution; if the learner completes his or her learnership, the result is a qualification registered on the National Qualifications Framework.³⁸⁸

The government has also used learnerships to address youth unemployment instead of addressing immediate skills needs.³⁸⁹ Learnerships also require employer buy-in through levy payments; while employers receive a portion of their levy payments back when employees are sent for training, levy payments may be regarded as a disincentive for some employers.³⁹⁰ It is doubtful whether learnerships will significantly contribute to addressing skills shortages in South Africa.³⁹¹

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³⁸⁴ Tshele L & Agumba JN (2014) 107. Programs on offer to train artisans were ceased due to the ‘recession, the removal of support and the commerciali[s]ation and private[s]ation of the state-owned enterprises’ Janse van Rensburg D, Visser M & Wildschut A et al. (2012) ‘A technical report on learnership and apprenticeship population databases in South Africa: Patterns and shifts in skills formation’ Department of Labour: South Africa 42. Some colleges closed due to a failure to renew their registration with the DHET or their registration has been cancelled. DHET ‘The register of private colleges [updated on 16 January 2024]’ https://www.dhet.gov.za/Registers_DocLib/Register%20of%20Private%20Colleges%2016%20January%202024.pdf (accessed 15 February 2024) 2.

³⁸⁵ Burnett K ‘There’s been an apprenticeship stigma for far too long’ <http://www.telegraph.co.uk/education/further-education/12193128/Theres-been-an-apprenticeship-stigma-for-far-too-long.html> (accessed 26 December 2022) – (hereafter ‘Burnett K (2016)’); Du Plooy B & Du Preez K (2022) 111; Balwanz D ‘Creating space for critical dialogue and advocacy in communities’ (2014) 1(1) *Post-School Education Journal* 21; Allais S (2022) 477.

³⁸⁶ In 1982 there were 13,000 apprenticeships in the construction industry, with only 3,400 apprenticeships offered in 2006. Tshele L & Agumba JN (2014) 102; Gamble J (2022) 316.

³⁸⁷ Gamble J (2022) 316.

³⁸⁸ Koyana S & Mason RB ‘Rural entrepreneurship and transformation: the role of learnerships’ (2017) 23(5) *International Journal of Entrepreneurial Behavior & Research* 736.

³⁸⁹ Gamble J (2022) 316; Allais S ‘Skills for industrialisation in sub-Saharan African countries: why is systemic reform of technical and vocational systems so persistently unsuccessful?’ (2022) 74(3) *Journal of Vocational Education & Training* 476.

³⁹⁰ Maia C & Anuar AM (2019) 272.

³⁹¹ Mbatha N, Wildschut A & Mnewango B (2014) 14.

2.5 Previous attempts to facilitate employment opportunities for foreign nationals

From the dawn of democracy in 1994 until 2002, the South African state was generally hostile to the movement of skilled labour. It opted instead to stimulate the employment of its own citizens.³⁹² In this regard, the South African state was predominantly concerned with addressing the effects of racial discrimination.³⁹³ With the country's developing economy, however, the government realised that the employment of SMWs would be necessary. Therefore, the post-apartheid migration policy in South Africa is based on the need to encourage economic growth and employment; this is reflected by the initiative to attract professional skills into the country from migrants who can 'add value' to South Africa.³⁹⁴ The former Director-General of Home Affairs, Mkuseli Apleni, indirectly alluded to this perception by stating that

[w]e are mindful that many people from across the globe make a valuable contribution in the country, such as captains of industry, scientists, sporting personalities and academics, and thus the changes we see in our new visa regime. The National Development Plan (NDP) also points clearly to the urgent need to attract international migrants with critical skills.³⁹⁵

According to the viewpoint above, an injection of foreign skills is necessary.³⁹⁶ The need for skills has been clearly articulated in the Joint Initiative on Priority Skills Acquisition, a vital component of the government's economic strategy.³⁹⁷ According to Crush, '[t]he Immigration

³⁹² Wa Kabwe-Segatti A (ed) & Landau L *Migration in post-Apartheid South Africa: Challenges and questions to policy-makers* (2008) 36.

³⁹³ Wa Kabwe-Segatti A (ed) & Landau L (2008) 36.

³⁹⁴ Carciotto S & Mavura M (2016) 20-1.

³⁹⁵ Home Affairs 'Overview of the new immigration laws and regulations and their implications, by Home Affairs Director-General Mkuseli Apleni' <http://www.dha.gov.za/index.php/statements-speeches/600-overview-of-the-new-immigration-laws-and-regulations-and-their-implications-by-home-affairs-director-general-mkuseli-apleni> (accessed 26 December 2022).

³⁹⁶ Carciotto S & Mavura M (2016) 20-1.

³⁹⁷ Wa Kabwe-Segatti A (ed) & Landau L (2008) 36.

Act was [also] designed to facilitate easier access by South African employers to foreign skills but on a strictly temporary basis'.³⁹⁸

Before the recent amendments to the IA, the instruments which allowed foreign immigrants to work in South Africa were the Quota Work Permit (hereafter 'QWP'), the General Work Permit (hereafter 'GWP'), the Exceptional Skills Work Permit (hereafter 'ESWP'), and the Intra-company Work Permit (hereafter 'ICWP').

2.5.1 Quota work permit

The QWP was used³⁹⁹ to facilitate the employment of specific professionals or those working in sought-after occupational classes.⁴⁰⁰ When immigrants were recruited and issued with a QWP, they were only allowed to occupy a certain number of jobs that did not exceed the quota set by the Minister.⁴⁰¹ The QWP maintained the need to employ suitable South Africans capable of doing specified jobs before immigrants were allowed to take up employment for that specific job.⁴⁰² The QWP was removed in 2011 and replaced with the CSWV.⁴⁰³

According to Mahlatji and Dikotla, the quota limitation indicates South Africa's clear prioritisation of the specific jobs that received immigrants can fill, which indicates that if the immigrant can contribute to the economy through their skills, they will be welcome in the country,⁴⁰⁴ SMWs should not, however, exceed the number of South Africans working in that

³⁹⁸ Crush J 'Complex movements, confused responses: labour migration in South Africa' <https://www.africaportal.org/publications/complex-movements-confused-responses-labour-migration-in-south-africa/> (accessed 26 December 2022) 22. As these visas mentioned above were only valid for a limited period, after which they were subject to renewal, one could imply that it was intended for employers to have access to these foreign migrant workers on a temporary basis. Most visas were not valid for a period longer than five years.

³⁹⁹ According to section 21 of the Immigration Amendment Act 19 of 2004, 'A quota work permit may be issued by the Director-General [of the DHA], as prescribed, to a foreigner if the foreigner falls within a specific professional category or within a specific occupational class determined by the Minister at least annually by notice in the *Gazette* after consultation with the Ministers of Labour and Trade and Industry, and as long as the number of work permits so issued for such category or class does not exceed the quota determined in the notice.' Immigration Amendment Act 19 of 2004, s 21. For instance, the quota for school teachers is 1,000. Immigration Act 13 of 2002 regulations in GN 362 GG 29826 of 25 April 2007 (hereafter 'Reg GN 362 GG 29826 of 25 April 2007').

⁴⁰⁰ In addition, the regulations concerning a QWP required the following: 'confirmation that the foreigner possesses the necessary qualifications, as certified by the South African Qualifications Authority, and experience for the occupation; and ... proof that the applicant complies with the registration requirements of the relevant professional body, board or council [and] [w]ithin 90 days of admission, the holder of a quota work permit shall submit to the Director-General confirmation of having secured employment within the category or class contemplated in section 19(1) of the Act and, within every 12 months thereafter, confirmation of continued employment within that category or class'. Reg GN 616 GG 27725 of 27 June 2005, reg 16 (3).

⁴⁰¹ Immigration Amendment Act 19 of 2004, s 21; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 58.

⁴⁰² Mahlatji MR & Dikotla MA (2015) 594.

⁴⁰³ Crush J (2011) 23.

⁴⁰⁴ Mahlatji MR & Dikotla MA (2015) 594.

sector. Therefore, immigrants who sought to come into the country via the QWP had to prove that they would not be occupying a position for which there were already sufficient South Africans to meet the country's needs.⁴⁰⁵

The quotas, as communicated in the government notice (effective from 12 March 2003), related to categories of education and experience.⁴⁰⁶ For instance, the first category allowed 90,000 applicants '[e]mployment opportunities in respect of which the relevant employer justifiably required a postgraduate degree and at least 5 years of professional experience'.⁴⁰⁷ There were 10 categories for which a maximum of 740,000 permits could be issued annually. Most notably, none of the categories allowed the families of permit holders to apply for residence.⁴⁰⁸ The total allocation of permits per annum changed in 2007, by notice in the Government Gazette.⁴⁰⁹ The regulations of the IA effective from 2007 dramatically reduced the amount of QWPs available.⁴¹⁰ A maximum of 30,200 QWPs were to be issued per annum, requiring the applicant to be registered with a professional body and to have at least five years of relevant experience.⁴¹¹

The benefit of applying for the QWP was that the applicant was not required to have secured employment at the time of the application or before, but the applicant could search for work while he or she was already in the country.⁴¹² Once three months had passed after the issuing of the QWP, the applicant was then required to report to the Director-General of Home Affairs that he or she had secured employment as per the requirements for the QWP; then every 12 months after that, the QWP holder should have provided 'confirmation of continued employment within that category or class'.⁴¹³ This report to the Director-General was required, but neither the IA nor the Regulations to the IA prescribed the manner and format in which this proof of employment should have been filed.⁴¹⁴

⁴⁰⁵ Khan F (2007) 4. To prove that no citizen is able to occupy the position, the employer must send a letter as well as proof to the DHA, informing the department of the efforts made to employ a citizen. The employer must also include the advertisement, details of citizens or residents who applied for the post. The employer must include the reasons why the applicants did not qualify. Immigration Act 13 of 2002 regulations in GN 487 GG 24952 of 21 February 2003, Reg 28(4)(d)iii, Reg 28(5).

⁴⁰⁶ Crush J (2011) 22.

⁴⁰⁷ Immigration Act 13 of 2002 regulations in GN 452 GG 24953 of 24 February 2003.

⁴⁰⁸ Crush J (2011) 22.

⁴⁰⁹ Reg GN 362 GG 29826 of 25 April 2007.

⁴¹⁰ Crush J (2011) 23.

⁴¹¹ Reg GN 362 GG 29826 of 25 April 2007.

⁴¹² Pokroy J 'Foreign nationals must confirm employment' (2014) 1 *HR Future* 44.

⁴¹³ Reg GN 616 GG 27725 of 27 June 2005, reg 16 (3).

⁴¹⁴ Pokroy J (2014a) 45.

Pokroy believes that ‘[s]uccinctly, you are potentially damned if you [did not] do the confirmation of employment/continued employment and you [were] sometimes ultimately damned if you [did]’.⁴¹⁵ The reasons for this lay in the practical difficulties of reporting to the Director-General. Holders of the QWP could only report to the head office of the DHA in Pretoria. Only physical lodgement, faxing or proof of registered mail was accepted. Access to the head office of the DHA was restricted after the office moved to the CBD in Pretoria, where it was further restricted by preventing members of the public from gaining access. The DHA only assisted QWP holders or their representatives who had made prior appointments. Making an appointment via telephone was impossible due to inadequate telephone systems. Fax numbers were non-functional or non-operational. Emails were generally received without response or forwarded to officials who did not respond.⁴¹⁶ To make matters worse, failing to report to the DHA would result in automatic voiding or cancellation of the permit held by the individual.⁴¹⁷

2.5.2 Exceptional skills work permit

The ESWP was created in terms of section 19(4) of the IA.⁴¹⁸ The ESWP, like the QWP, was rescinded by the government in 2011.⁴¹⁹ An ESWP was aimed at facilitating the entry of immigrants into the South African workforce by virtue of their extraordinary (but undefined)⁴²⁰ skills or qualifications; this did not imply that the person had to be highly qualified – exceptional in this context meant ‘unusual, uncommon, abnormal, extraordinary or very rare’.⁴²¹

An application for an ESWP should have been accompanied (amongst other requirements) by the following:

⁴¹⁵ Pokroy J (2014a) 45.

⁴¹⁶ Pokroy J (2014:a) 45.

⁴¹⁷ Immigration Act 13 of 2002 regulations in GN 487 GG 24952 of 21 February 2003, Reg 28(4)b.

⁴¹⁸ It is prescribed in section 19(4) that ‘[s]ubject to any prescribed requirements, an exceptional skills work permit may be issued by the Department to an individual of exceptional skills or qualifications and to those members of his or her immediate family determined by the Department under the circumstances or by regulation’. Immigration Act 13 of 2002, s 19(4).

⁴¹⁹ Crush J (2011) 23.

⁴²⁰ Crush J (2011) 23.

⁴²¹ Pokroy J ‘Exceptional skills work permit: There are ways to get this permit issued or renewed’ (2013) 6 *HR Future* 44 (hereafter ‘Pokroy J (2013b)’).

- (a) a letter from a foreign or South African organ of state or from an established South African academic, cultural or business body, confirming the exceptional skills or qualifications of the applicant;
- (b) testimonials from previous employers and a comprehensive curriculum vitae;
- (c) other proof to substantiate exceptional skills or qualifications, such as publications and testimonials; and
- (d) a letter of motivation indicating that the exceptional skill possessed by the applicant will be to the benefit of the South African environment in which he or she intends to operate.⁴²²

The criteria for the ESWP have always been that a person who meets the above criteria along with possessing a graduate qualification, postgraduate qualification, a record of having written widely on an area of expertise, who has the necessary testimonials, and can produce a letter of support from a specified institution should easily be granted the permit.⁴²³ A bureaucratic trend has emerged where departmental officials were making decisions concerning whether the person had an exceptional skill, despite the criteria set out in the IA and the regulations of the IA.⁴²⁴ The consequence of this bureaucracy is obvious: those who should have qualified for the ESWP were denied it.⁴²⁵

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⁴²² Reg GN 616 GG 27725 of 27 June 2005, reg 16 (6).

⁴²³ Pokroy J (2013b) 45.

⁴²⁴ Pokroy J (2013b) 45.

⁴²⁵ Pokroy J (2013b) 45.

2.5.3 General work permit

A GWP is provided for in terms of section 19(2) of the IA,⁴²⁶ which allows the entry of foreign nationals for work in South Africa.⁴²⁷ The GWP was issued to migrants who did not fall within the ambit of the QWP. The GWP places a great onus on the employer to prove that the employer has conscientiously searched for qualified South African employees and to provide an undertaking that the terms and conditions that are offered to the suitable migrant are not lower than those which prevail in the market for citizens. The GWP appears to have been a catch-all for individuals who did not qualify or fall under other permits.⁴²⁸

⁴²⁶ Section 19(2) states: 'A general work permit may be issued by the Department to a foreigner not falling within a category contemplated in subsection (1) if the prospective employer-

- (a) satisfies the Department in the manner prescribed that despite a diligent search, he or she has been unable to employ a person in the Republic with qualifications equivalent to those of the applicant;
- (b) produces a certificate from a chartered accountant that the terms and conditions under which he or she intends to employ such foreigners, including salary and benefits, are not inferior to those prevailing in the relevant market segment for citizens and residents, taking into account applicable collective bargaining agreements and other applicable standards, as recorded by the DOL, if any, provided that-
 - (i) a copy of such certification shall be conveyed to a prescribed office of the DOL; and
 - (ii) such certification shall lapse if objected to for a good cause by such an office of the DOL within 15 calendar days of its receipt;
- (c) has committed to notifying the Department when such foreigner is no longer employed or is employed in a different capacity or role; and
- (d) has submitted a certification from a chartered accountant of the job description and that the position exists and is intended to be filled by such foreigner.' Immigration Act 13 of 2002, s 19(2).

⁴²⁷ An application for a QWP, according to the regulations of the IA, must also be accompanied by the following: '(a) a contract of employment stipulating the conditions of employment and signed by both the employer and the applicant;

- (b) proof of qualification evaluated by the South African Qualifications Authority and translated by a sworn translator into one of the official languages of the Republic;
- (c) proof of experience and skills in line with the job offer;
- (d) a letter from the employer motivating why a citizen or permanent resident could not fill the position, as well as proof of efforts made to obtain the services of a citizen or resident, together with the particulars of the unsuccessful candidates;
- (e) proof of publication of an advertisement in the national printed media;
- (f) an undertaking by the employer to inform the Director-General should the applicant not comply with the Act or leave the employer;
- (g) if required by law, proof of registration with the relevant professional body, council or board;
- (h) full particulars of the employer, including, if applicable, proof of registration of the business with the Registrar of Companies; and
- (i) a certificate from the Department of [Employment and] Labour or an extract from the database of a salary benchmarking organisation stipulating the average salary earned by employees occupying similar positions in the Republic.' Reg GN 616 GG 27725 of 27 June 2005, reg 16(4).

⁴²⁸ Crush J (2011) 23.

2.5.4 Intra-company transfer work permit

An Intra-company Transfer Work Permit (hereafter 'ICTWP') has been prescribed⁴²⁹ by section 19(5) of the IA.⁴³⁰ The Director-General of the DHA has made the intention of the ICTWP clear: holders of an ICTWP must share their knowledge or facilitate the transfer of skills, and after their skills have been transferred, they are required to return to their home country.⁴³¹ In addition, the term of the validity of the ICTWP was reduced from four to two years without any justification.⁴³² The QWP discussed above is the only permit that allowed a person to be employed for longer than two years.

2.5.5 Success or failure of previous permits to attract skilled migrant workers

The success or failure of these permits is difficult to determine with certainty, due to a general lack of consensus across different sources concerning the number of immigrants in the country and weak data-collection systems.⁴³³ Therefore, from a statistical perspective, it is not easy to prove whether the previous attempts have failed.

The uncertainty regarding the success or failure of previous permits arises due to inadequate data collection systems and irregular migration patterns. The failure to issue sufficient permits

⁴²⁹ Section 19(5) of the IA states that an 'intra-company transfer work permit may be issued by the Department to a foreigner who is employed abroad by a business operating in the Republic in a branch, subsidiary or affiliate relationship and who, by reason of his or her employment is required to conduct work in the Republic for a period not exceeding two years provided that

(a) a chartered accountant acting on behalf of the employer of such foreigner certifies that the employer needs to employ such foreigners within the Republic and such a foreigner's job description;

(b) the employer undertakes that it will take adequate or prescribed measures to ensure that such a foreigner will at all times comply with the provisions of this Act and will immediately notify the Department if it has reason to believe otherwise; and

(c) the employer furnishes the prescribed financial guarantees to defray deportation and other costs should such foreigner fail to depart when no longer allowed to sojourn in the Republic ...' Immigration Act 13 of 2002, s 19(5).

⁴³⁰ In addition, the Regulations of the IA stipulate as follows:

'(a) the foreigners' contract of employment with the company abroad; and

(b) a letter from

(i) the company abroad confirming that that foreigner shall be transferred to a branch of that company or an affiliated company situated in South Africa; and

(ii) the South African company confirms the transfer of the foreigner contemplated in subparagraph (i), as well as specifying the occupation and capacity in which that foreigner shall be employed.

In terms of section 19(5)(a) of the IA, the relevant employer shall ensure that

(a) the passport of the foreigner is valid at all times;

(b) the foreigner is only employed in the specific position for which the permit has been issued, and

(c) the foreigner departs from the Republic on completion of his or her tour of duty.' Reg GN 616 GG 27725 of 27 June 2005, s 16(8) and reg 16(9).

⁴³¹ Pokroy J (2013a) 44.

⁴³² Pokroy J (2013a) 44.

⁴³³ Crush J (2014) 214, See 2.5 above.

is evident: in 2012, the DHA issued only 2,896 work permits, while its annual goal was to issue 50,000 work permits.⁴³⁴ Carciotto provides compelling reasons for the failure of the South African state to attract SMWs. The system in place for facilitating the employment of SMWs is short-sighted because the CSL is demand-driven; the South African state should develop a policy to attract skills and not simply react to a lack thereof.⁴³⁵ The government fails to view SMWs as human capital, as in Canada and New Zealand. Despite the objective of attracting skills and meeting market needs, South Africa's protectionist stance to ensure the employment of citizens first is reflected in the number of work permit applications rejected by the DHA.⁴³⁶ There is an evident gap between immigration policies and their implementation; for instance, within five months of introducing the 2014 Immigration Regulations, 51 per cent of visa applications were rejected, indicating administrative inefficiencies.⁴³⁷ The South African government has failed to use permanent residency as a tool to attract SWMs for the long term.⁴³⁸ From 1994 to 2014, only 382,279 permanent residence applications were approved in South Africa, while in Canada, in 2015 alone, 271,847 applicants were granted permanent residence.⁴³⁹

The government has acknowledged that skills shortages impede economic growth.⁴⁴⁰ After 1994, attempts were made to understand skills demands.⁴⁴¹ The first of these attempts was publishing scarce and critical skills lists by the DOL in 2003. The CSL was published by the DHA more recently in 2014 and 2022.⁴⁴² Periodically, these lists are produced in South Africa to determine which skill areas require intervention, through various means such as education,

⁴³⁴ Khan F, Klaaren J, Le Roux W et al. (2018) 62-3.

⁴³⁵ Carciotto S (2018) 65-6.

⁴³⁶ Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 59.

⁴³⁷ *De Saude-Darbandi S* 'Home Affairs facing years of delays due to lockdown: expert' <https://businesstech.co.za/news/business-opinion/493963/home-affairs-facing-years-of-delays-due-to-lockdown-expert/> (accessed 26 December 2022). *ZH and Others v The Minister of Home Affairs and Another* is a recent example where a CSWV was rejected, and all requirements in terms of the IA were met. *ZH and Others v The Minister of Home Affairs and Another* [2022] ZAWCHC 150 para 20.

⁴³⁸ Carciotto S (2018) 65-6; White Paper 42.

⁴³⁹ Carciotto S (2018) 66.

⁴⁴⁰ Plant K & Padotan R 'Improving skills development in the South African public sector: An internal audit perspective' (2017) 19 *Southern African Journal of Accountability and Auditing Research* 36; Mavunga G & Cross M 'The culture of employee learning in South Africa: towards a conceptual framework' (2017) 69 *Journal of Education* 304.

⁴⁴¹ Mateus AD, Allen-Ile C & Iwu CG 'Skills shortage in South Africa: Interrogating the repertoire of discussions' (2014) 5(6) *Mediterranean Journal of Social Sciences* 64.

⁴⁴² Reddy V, Borhat H & Powell M et al. (2016) 15.

training, and recruitment of foreign skills.⁴⁴³ The question that emerges is whether the requirements were too stringent, and therefore discourage applicants, whether the offer of employment in South Africa was not lucrative enough for other reasons, or whether the requirements were not too stringent but the issuing of permits was intentionally frustrated by the DHA. The permit system has failed.⁴⁴⁴ It failed because regulations were passed in 2003 but not published until 2005.⁴⁴⁵ This may be so that a distinction is not made between scarce and critical skills.⁴⁴⁶ It may also be due to the inefficient means by which the list of critical skills has been derived; it is thus unclear whether the previous lists were compiled based on proper empirical research.

2.6 Critical skills work visa

Thirteen different visas enable foreign nationals to enter SA;⁴⁴⁷ since this thesis focuses on attracting SMWs for employment in South Africa, only the work visas⁴⁴⁸ are discussed in brief, along with the CSWV, which is discussed in detail. There are three work visas: the general work visa,⁴⁴⁹ the CSWV,⁴⁵⁰ and the intra-company transfer work visa.⁴⁵¹

The requirements of the general work visa and the intra-company work visa have remained the same as in the former Immigration Act and now in the IA. The QWP and ESWP have, however, been deleted from the current IA. The CSWV is the only visa drafted with the specific aim of

⁴⁴³ Heyns G & Luke R 'Skills requirements in the supply chain industry in South Africa' 2012 *Journal of Transport and Supply Chain Management* 109; Combrink H & Venter J 'The influence of employment and occupation on a household's net equity' (2016) 9(3) 731.

⁴⁴⁴ Crush J (2014) 220; White Paper 30.

⁴⁴⁵ Crush J (2014) 220.

⁴⁴⁶ 'Critical skills are those likely to advance [the] national interest. Scarce skills are not in this category. Emphasis is on those skills lacking in the country, thus the distinction.' Home Affairs 'Overview of the new immigration laws and regulations and their implications, by Home Affairs Director-General Mkuseli Apleni' <http://www.dha.gov.za/index.php/statements-speeches/600-overview-of-the-new-immigration-laws-and-regulations-and-their-implications-by-home-affairs-director-general-mkuseli-apleni> (accessed 26 December 2022).

⁴⁴⁷ These visas are listed in the IA. Visas to temporarily stay in the Republic are Port of entry visa s 10A; Transit visas s 10B; Visitor's visa s 11; Study visa s 13; Treaty visa s 14; Business visa s 15; Crew visa s 16; Medical treatment visa s 17; Relative's visa s 18; Work visa s 19; Retired person visa s 20; Corporate visa s 21; Exchange visa s 22; and the Asylum transit visa in terms of s 23 of the IA.

⁴⁴⁸ Work includes '(a) conducting any activity normally associated with the running of a specific business; or (b) being employed or conducting activities consistently with being employed or consistent with the profession of the person, with or without remuneration or reward, within the Republic'. IA, s 1.

⁴⁴⁹ 'A general work visa may be issued by the Director-General to a foreigner not falling within a category contemplated in subsection (4) and who complies with the prescribed requirements'. IA, s 19(2).

⁴⁵⁰ IA, s 19(4).

⁴⁵¹ IA, s 19(5).

allowing SMWs to work in South Africa. The DHA issues the CSWV in accordance with the CSL as published in the Government Gazette.

The function of the CSWV is to provide a process in which persons with skills deemed critical for the economic growth of South Africa may be given access to work in South Africa. In addition, the CSWV should enable the South African state to compete for skills that are in high demand internationally.⁴⁵²

2.7 Conclusion

Immigration policies in South Africa have always focused on serving a certain vision of the state and its national identity.⁴⁵³ From the beginning of South Africa's immigration history, between 1652 and 1913, there was no legal mechanism to regulate immigration, as the labour force was retained through slavery and colonisation mechanisms. It is noteworthy to mention that the aim of migration regulation since 1913 until the creation of the IA was not focused on skills attraction but control and exclusion. The Immigration Regulation Act of 1913 regulated the criteria for entry into South Africa until 1937.⁴⁵⁴ During this period, the state was not concerned with economic growth or the attraction of skills, but rather with retaining its political power and the state identity created by that political power.

The period between 1937 and 1986 aimed at the facilitation of cheap labour, and served to align racist criteria with the 'two gates' policy. From 1986 to 1994, the gap widened between legislation and the actual entrenched practices. In the period 1994 to 2001, emphasis was placed on control and exclusion, while the legislature attempted, but failed, to eradicate discriminatory practices and policies.⁴⁵⁵

The permit system has not been successful.⁴⁵⁶ Fortunately, the CSWV has been created to allow for the employment of SMWs; the CSWV and its requirements will be discussed in detail in chapter 4. South Africa currently faces a problem of skills shortages.⁴⁵⁷ It is necessary to address long-term systemic issues, such as the education system, the effects of apartheid on the

⁴⁵² Green paper 43.

⁴⁵³ Wa Kabwe-Segatti AW (2006) 174.

⁴⁵⁴ Wa Kabwe-Segatti AW (2006) 174.

⁴⁵⁵ Crush J & McDonald DA (2001) 8.

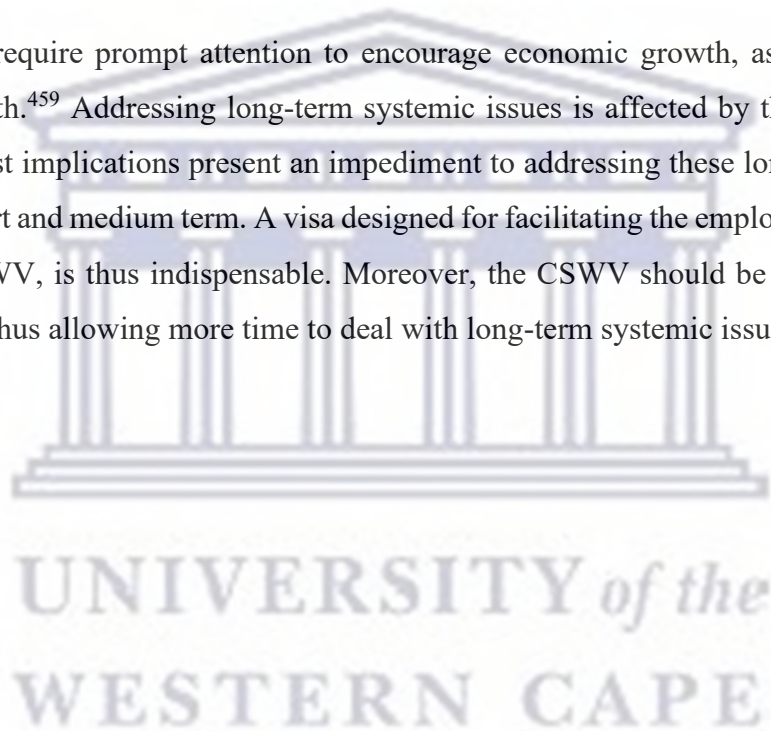
⁴⁵⁶ Crush J (2014) 220.

⁴⁵⁷ Rasool F & Botha CJ (2011) 8.

labour market, the issues resulting in brain drain and brain waste, and a lack of apprenticeships. The South African state must upgrade its education system.

The education system, including primary, secondary and tertiary education, has an essential role in forming skills to address skills shortages in the future. If the problems in the education system are not addressed, learners will not be provided with the opportunity to develop critical skills. Eventually, this leads to a lack of skilled persons entering the labour market for employment in critical skilled positions. The education system alone will not produce sufficient skilled persons in the short term; moreover, the education system alone will not resolve the problem of skills shortages in South Africa.⁴⁵⁸

Skill shortages require prompt attention to encourage economic growth, as they negatively affect that growth.⁴⁵⁹ Addressing long-term systemic issues is affected by the complexity of these issues. Cost implications present an impediment to addressing these long-term systemic issues in the short and medium term. A visa designed for facilitating the employment of SMWs, such as the CSWV, is thus indispensable. Moreover, the CSWV should be used to alleviate skill shortages, thus allowing more time to deal with long-term systemic issues properly.



⁴⁵⁸ Rasool F & Botha CJ (2011) 3; DHET (2022a) 57.

⁴⁵⁹ Rasool F & Botha CJ (2011) 1

Chapter Three: International Obligations Relevant to Skills Migration and Their Application in South Africa

3.1 Introduction

The previous chapter established the extent of skills shortages in South Africa, and considered the South African state's previous and current attempts to facilitate employment of SMWs. The purpose of this chapter is to identify the relevant obligations for the recognition and realisation of the rights of SMWs as provided for in multilateral agreements. A holder of a CSWV is not only a migrant but also a worker in South Africa. Therefore, a discussion of the labour and social security law frameworks to facilitate work for and protection of SMWs is important.

Social security and favourable labour conditions can be considered as pull factors to South Africa, the existence of these frameworks alone are insufficient, a SMW should be able to enjoy access to the benefits flowing from the existence of these legal frameworks.⁴⁶⁰ If a SMW is able to access the benefits flowing from these frameworks, they may consider working in South Africa and applying for a CSWV, thereby possibly influencing the effectiveness of the CSWV. Being mindful that the CSWV is simply an instrument allowing SMWs to work in South Africa, SMWs consider the actual visa process, working conditions, and access to rights they are entitled to when deciding to work and reside in South Africa.⁴⁶¹ As the ultimate goal is to consider the effectiveness of the CSWV to attract SMWs, a discussion of rights, and specifically whether SMWs can effectively access these rights, is essential when considering the effectiveness of the CSWV in attracting SMWs. Discussing whether SMWs are able to enjoy the rights they are entitled to is both a functional necessity to achieve the aims of this thesis, as well as to ensure that SMWs are really able to benefit from these rights, and, hence this discussion is also one which is an ethical consideration.⁴⁶²

Non-binding instruments and instruments which the South African state has not ratified are discussed first. The ILO Decent Work Agenda is also discussed under the non-binding category. Thereafter the binding instruments follow. The obligations and benchmarks identified in this chapter will be used in chapter 4 to consider whether the current South African legal framework concerning SMWs measures up to international obligations in favour of

⁴⁶⁰ Kanayo O, Anjofui P & Stiegler N (2019) 223,228.

⁴⁶¹ Farashah A, Blomquist T and Ariss A et al. (2023) 470-1.

⁴⁶² Farashah A, Blomquist T and Ariss A et al. (2023) 470-1.

SMWs. In doing so, the overall point of the thesis, which is to establish the effectiveness of the CSWV, is taken further.

3.2 Non-binding instruments

3.2.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (hereafter ‘UDHR’)⁴⁶³ is an extraordinary historical document commonly referred to in the constitutions of many states.⁴⁶⁴ The UDHR underpins all international human rights and strives to stand up for the rights of humanity and to protect and promote the rights of equality and non-discrimination of all people.⁴⁶⁵ The UDHR is written in aspirational language and therefore it is non-binding on states, but it has been used as a standard against which to measure their conduct.⁴⁶⁶ Soon after the creation of the UDHR, steps were taken to codify its principles in various treaties,⁴⁶⁷ such as the International Covenant on Economic, Social and Cultural Rights (hereafter ‘ICESCR’) and the

⁴⁶³ Universal Declaration of Human Rights, United Nations General Assembly resolution 217 (1948) – (hereafter ‘UDHR’).

⁴⁶⁴ In February 1947, a committee started drafting the International Bill of Human Rights. The UDHR was created by the committee with little dissent. South Africa, however, abstained from the vote which affirmed the creation of the UDHR, as voting in favour of the UDHRs formation would have opposed South Africa’s stance on racial segregation and the practice of apartheid at the time. United Nations ‘Drafting of the Universal Declaration of Human Rights’ <http://research.un.org/en/undhr/draftingcommittee> (accessed 31 December 2022); Campbell PJ, MacKinnon A & Stevens CR *An Introduction to Global Studies* (2010) 95; Kuwonu F ‘Africa’s freedom struggles and the Universal Declaration of Human Rights’ <https://www.un.org/africarenewal/magazine/december-2018-march-2019/africa%E2%80%99s-freedom-struggles-and-universal-declaration-human-rights> (accessed 29 December 2022); Many African states have also used the UDHR as marking their exit from colonialism. Johnson MG & Symonides J *The Universal Declaration of Human Rights: A History of its Creation and Implementation 1948–1998* (2018) 67; United Nations ‘The Foundation of International Human Rights Law’ <https://www.un.org/en/about-us/udhr/foundation-of-international-human-rights-law#:~:text=%20The%20Universal%20Declaration%20of%20Human%20Rights%20is,body%20of%20legally%20binding%20international%20human%20rights%20treaties> (accessed 29 December 2022).

⁴⁶⁵ The South African Human Rights Commission ‘South Africa celebrates the 70th Anniversary of the Universal Declaration of Human Rights (UDHR)’ <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1686-south-africa-celebrates-the-70th-anniversary-of-the-universal-declaration-of-human-rights-udhr> (accessed 29 December 2022); Hertel S *Unexpected Power: Conflict and Change Among Transnational Activists* (2006) 21; Sweet W (ed) *Philosophical Theory and the Universal Declaration of Human Rights* (2003) 1; Dugard J, Du Plessis M & Maluwa T et al. (2018) 460; Rudman A ‘The Value of the Persistent Objector Doctrine in International Human Rights Law’ 22 (2019) *PELJ* 8; Ssenyonjo M & Baderin MA (eds) *International Human Rights Law: Six Decades After the UDHR and Beyond* (2016) 3; Kamga SD & Ajoku OO ‘Reflections on how to address the violations of human rights by extractive industries in Africa: a comparative analysis of Nigeria and South Africa’ (2014) 17(1) *PELJ* 493.

⁴⁶⁶ Dugard J, Du Plessis M & Maluwa T et al. (2018) 460-1. Conversely, ‘[w]hile the UDHR is a declaration and not a formal agreement’, there are arguments to the effect that the UDHR ‘has assumed the position of *jus cogens*, and therefore it is now binding due to its recognition as part of customary international law’. Addaney M, Chuma N & Moyo CG ‘Legal capacity of and access to justice for refugees with disabilities in Africa’ (2019) 17 *De Jure* 339.

⁴⁶⁷ A treaty is a written agreement between states that is governed by international law. Vienna Convention on the Law of Treaties, United Nations, 1969, Article 2(1)(a).

International Covenant on Civil and Political Rights.⁴⁶⁸ Even though the UDHR promotes respect for all individuals in society, many still do not enjoy the rights set out in the UDHR.⁴⁶⁹

3.2.1.1 Discussion of specific rights

Article 7 of the UDHR states that all persons are equal before the law, entailing that all are able to be fully protected by the law without discrimination. Any discrimination and incitement to discrimination is a violation of the UDHR.⁴⁷⁰ The UDHR ensures equal treatment for everyone, irrespective of national or social origin, birth or other status.⁴⁷¹ Therefore, no discrimination is to be tolerated based on nationality. According to Chetail, ‘the prohibition of discrimination constitutes the cornerstone upon which the whole edifice of human rights protection is built;’ and furthermore, the principle of non-discrimination is an international legal norm sanctioned by all member states of the UN.⁴⁷²

Article 23 of the UDHR provides that each person has the right to work, which includes the right to choose his or her employment, to be protected against unemployment, and to just and fair working conditions.⁴⁷³ Article 23 represents a ‘concise restatement of [labour] rights as human rights were understood in 1948’.⁴⁷⁴ The UDHR also provides the general right to equal work for equal pay.⁴⁷⁵ Just and favourable remuneration is also provided for in the UDHR to

⁴⁶⁸ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) BCLR 240 (CC) para 19; Msuya NH ‘Challenges surrounding the adjudication of women’s rights in relation to Customary Law and practices in Tanzania’ (2019) 22 *PELJ* 3; Campbell PJ, MacKinnon A & Stevens CR (2010) 95.

⁴⁶⁹ Bočorišvili, Sweet and Ahern hold the view that since the adoption of the UDHR, respect for the UDHR and the rights it contains has been limited; this is evidenced by bloody civil wars, totalitarian and single-party states; colonialism which has often been replaced by elusive forms of imperialism, and the widening gap between the rich and the poor. Bočorišvili T, Sweet W, & Ahern DR (eds) *Politics, Ethics and Challenges to Democracy in ‘new Independent States’* (2005) 47-8.

⁴⁷⁰ UDHR, Article 7.

⁴⁷¹ The UDHR also prescribes that no distinction may be made based on any ‘political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty’. UDHR, Article 2.

⁴⁷² Chetail V ‘The Global Compact for safe, orderly and regular migration: A kaleidoscope of international law’ (2020) 16 *International Journal of Law in Context* 257.

⁴⁷³ UDHR, Article 23(1); Forere M ‘The relationship between the right of access to education and work, and sub-regional economic integration in Africa’ (2011) 11 *African Human Rights Law Journal* 596.

⁴⁷⁴ Swebston L *The Development in International Law of Articles 23 and 24 of the Universal Declaration of Human Rights: The Labor Rights Articles* (2014) 15. The meaning of certain aspects of the right to work as a concept is unclear, as stated by Mantouvalou: ‘The further right to protection against unemployment contained in Article 23(1) is both vague and conceptually unclear. It could mean that everyone should be given a job, no matter how pointless or exploitative the work may be, or it could mean that all that is required from a government is an adequate social security system for the jobless. But the latter meaning to the right to subsistence payments from the government in cases of necessity is surely not derived from the right to work. It is a failure to uphold the right to work that necessitates a further right to social support ... The right to protection against unemployment, as associated with the right to work, therefore suggests that having a job matters, not welfare benefits.’ Mantouvalou V (ed) *The Right to Work: Legal and Philosophical Perspectives* (2015) 23.

⁴⁷⁵ Davies ACL *Perspectives on Labour Law* (2004) 144; UDHR, Article 23(2).

ensure that each person lives a life worthy of human dignity that may be supplemented by social protection.⁴⁷⁶ The last part of Article 23 provides that each person has the right to form and join a trade union.⁴⁷⁷

3.2.2 New York Declaration for Refugees and Migrants

The New York Declaration for Refugees and Migrants was adopted in 2016 by the United Nations General Assembly. The New York Declaration for Refugees and Migrants aims to ensure complete respect and protection for the human rights and freedoms of refugees and migrants.⁴⁷⁸ It is recognised that all states have the right to manage and control their borders; however, signatories agree to improve their border management by, inter alia, making it safer for those crossing borders and eradicating corruption, terrorism and illegal trade at border posts.⁴⁷⁹ The New York Declaration for Refugees and Migrants is still relevant and has not been replaced or updated since its creation. Concerning employment, the application of minimum labour standards, such as working hours, leave and minimum wage, should be granted to migrant workers regardless of their status.⁴⁸⁰

3.2.3 Global Compact for Safe, Orderly and Regular Migration

The Global Compact for Safe, Orderly and Regular Migration (hereafter the ‘GCM’) is a global, non-binding co-operative framework⁴⁸¹ for member states of the New York Declaration for Refugees and Migrants.⁴⁸² The GCM sets out 23 objectives with 187 related actions to

⁴⁷⁶ UDHR, Article 23(3).

⁴⁷⁷ UDHR, Article 23(4).

⁴⁷⁸ New York Declaration for Refugees and Migrants, United Nations General Assembly Resolution 71/1 (2016) Article.22 (hereafter ‘A/RES/71/1’).

⁴⁷⁹ A/RES/71/1, Article 24.

⁴⁸⁰ A/RES/71/1, Article 57.

⁴⁸¹ As the GCM is non-binding, the commitments of member states are aspirational. Chetail V (2020) 267; Rother S ‘Global migration governance from below in times of COVID-19 and “Zoomification”: civil society in “invited” and “invented” spaces’ (2022) 10(1) *Comparative Migration Studies* 3; Chirwa DM & Chenwi L ‘Direct protection of economic, social and cultural rights in international law’ in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 61-2; Hoflinger T (2020) 663.

⁴⁸² Global Compact for Safe, Orderly and Regular Migration, 2018, United Nations General Assembly Resolution 73/195 (2018) clause 7 (hereafter ‘UN Global Compact (2018)’); Van Riemsdijk M & Panizzon M ‘A collective commitment to improving cooperation on migration: analysis of a thematic consultation session for the Global Compact for Migration’ (2022) *Third World Quarterly* 2172; Oelgemöller C & Allinson K ‘The responsible migrant, reading the Global Compact on Migration’ (2020) 31 *Law and Critique* 186; McAdam J ‘The global compacts on refugees and migration: A new era for international protection?’ (2018) 30(4) *International Journal of Refugee Law* 573.

achieve the commitments of the states as set out by the 23 objectives.⁴⁸³ The GCM calls for shared understanding and responsibility among states concerning the challenges and opportunities of migration.⁴⁸⁴ All objectives of the GCM are important for migration; however, only objectives 3 to 6, 12 and 18 are discussed, as they are relevant to SMWs. Regarding objective 3, member states agree to ‘[p]rovide accurate and timely information at all stages of migration’ between States, communities and migrants.⁴⁸⁵ Member states must strive to publicise, via a national website, all information relevant to immigration policies and laws,⁴⁸⁶ including legal advice.⁴⁸⁷

Regarding objective 4, member states commit to ‘[e]nsure that all migrants have proof of legal identity and adequate documentation’ before migrating.⁴⁸⁸ On local levels, states must build on existing practices that facilitate participation in community life, such as through interaction with authorities with respect to services and the issuing of registration cards which contain the basic personal information of migrants.⁴⁸⁹ According to Pécoud, the GCM calls for an exchange

⁴⁸³ Chetail V (2020) 254. The adoption of the GCM set in motion actionable commitments agreed upon at the International Conference for Safe, Orderly and Regular Migration, which was held in Morocco in 2018; Kraly EP & Hovy B ‘Data and research to inform global policy: the Global Compact for safe, orderly and regular migration’ (2020) 8(11) *Comparative Migration Studies* 29; Hoflinger T ‘Non-binding and therefore irrelevant? The Global Compact for Migration’ (2020) 75(4) *International Journal* 663; Desmond A ‘Migrants’ rights finally front and centre of the international agenda? Exploring the perils and possibilities of the SDGs and the GCM’ (2020) 16 *International Journal of Law in Context* 217; Desmond A ‘A new dawn for the human rights of international migrants? Protection of migrants’ rights in light of the UN’s SDGs and Global Compact for Migration’ (2020) 16 *International Journal of Law in Context* 223 – (hereafter ‘Desmond A (2020a)’).

⁴⁸⁴ Chetail V (2020) 267; Van Riemsdijk M & Panizzon M (2022) 2170; Oelgemöller C & Allinson K (2020) 185.

⁴⁸⁵ UN Global Compact (2018) clause 19.

⁴⁸⁶ Including application formalities; fees; conversion criteria; credential assessment and equivalences; study and training and opportunities, and related costs and conditions of living. UN Global Compact (2018) clause 19(a). Member states commit to: improve and promote dialogues and cooperation to extend information on migration; establish open and easily accessible, gender-responsive information points along migration routes which provide: information; support and counselling; human rights information; opportunities for communication with consular representatives; protection and assistance; information and pathways for regular migration and information on the possibility of return in a language which the migrant or person understands. UN Global Compact (2018) clause 19(c) & clause 19(b).

⁴⁸⁷ Member states commit to providing new migrants with legal and comprehensive advice on their rights and obligations. Including compliance with laws, obtaining work and residence visas, ‘status adjustments, registration with authorities, access to justice to file complaints about rights violations, as well as on access to basic services’. Multilingual, evidence-based information and training must be promoted in the countries of origin. This is to be done for people before migrants embark on migrating. Migrants must also be warned of the risks of irregular and unsafe migration methods. UN Global Compact (2018) clause 19(e) & clause 19(d).

⁴⁸⁸ UN Global Compact (2018) clause 20. To ensure that migrants have adequate documents before migrating, member states must commit to: improve their civil registry systems and capacity to reach unregistered persons; harmonise travel documents consistent with the International Civil Aviation Organization to ensure universal recognition of travel documents; make consular documentation available to their nationals residing in other countries; provide access to personal documentation; reinforce processes to reduce statelessness; reconsider requirements to prove nationality to ensure that migrants without proof of identity are not denied basic human rights and services. UN Global Compact (2018) clause 20(a)-(e).

⁴⁸⁹ UN Global Compact (2018) clause 20(g).

of information, much as is done with big data technologies, to assist in fighting irregular migration.⁴⁹⁰ Objective 4 of the GCM is instrumental in ensuring that migrants are informed of the laws that protect them from unfair discrimination and exploitation.⁴⁹¹ Laws should ensure that migrants receive no less favourable treatment than nationals concerning working conditions and remuneration.⁴⁹²

In terms of objective 5, each state commits to '[e]nhance availability and flexibility of pathways for regular migration'.⁴⁹³ To achieve this, member states commit to developing labour mobility schemes for migrants, based on human rights.⁴⁹⁴ Member states must also evaluate and review regular migration to optimise skills-matching.⁴⁹⁵ In addition, member states must encourage skills-matching in national economies by including local authorities and stakeholders such as trade unions and the private sector.⁴⁹⁶ The actions required in terms of objective 5 are crucial for SMWs; therefore the actions, particularly skills-matching, are discussed in detail.

According to Appleby, academic institutions can assist in regularising migration and improving migration pathways through data collection, research and analysis. Appleby argues that tertiary institutions can foster academic exchanges and promote academic mobility through agreements to facilitate exchanges, student exchanges, training programmes and research opportunities.⁴⁹⁷ Appleby also argues that NGOs can engage with member states on policy issues, including increasing legal pathways for migration.⁴⁹⁸ Chetail argues that objective 5 is the most 'promising avenue for the progressive development of international law'.⁴⁹⁹ If the South African state is serious about attracting critical skills, it must, as an imperative, implement and enforce the state actions envisaged by objective 5 of the GCM. Objective 5 of the GCM is fundamental to attracting critical skills; for this reason, further recommendations to give effect to objective 5 of the GCM are discussed in the concluding chapter.

⁴⁹⁰ Pécoud A 'Narrating an ideal migration world? An analysis of the Global Compact for safe, orderly and regular migration' (2021) 42(1) *Third World Quarterly* 28.

⁴⁹¹ Committee on Economic, Social and Cultural Rights, United Nations, General Comment No. 23: The right to just and favourable conditions of work E/C.12/GC/23 (2016) para 47 (v) – (hereafter 'General Comment No. 23 (2016)').

⁴⁹² General Comment No. 23 (2016) para 47 (v).

⁴⁹³ UN Global Compact (2018) clause 21.

⁴⁹⁴ UN Global Compact (2018) clause 21(a).

⁴⁹⁵ UN Global Compact (2018) clause 21(c).

⁴⁹⁶ UN Global Compact (2018) clause 21(e).

⁴⁹⁷ Appleby JK 'Implementation of the Global Compact on safe, orderly, and regular migration: A whole-of-society approach' (2020) 8(2) *Journal on Migration and Human Security* 219.

⁴⁹⁸ Appleby JK (2020) 221.

⁴⁹⁹ Chetail V (2020) 266.

Objective 6 of the GCM deals with recruitment and conditions to ensure decent work.⁵⁰⁰ To ensure that objective 6 is achieved, signatories agree to build on existing frameworks that have succeeded, become best practices, and promote the human and labour rights of migrants.⁵⁰¹ States must provide migrants with the same remunerated and contractual labour rights as those afforded to nationals in the same sector.⁵⁰² Objective 6 is thus crucial for SMWs. Moreover, the observance of objective 6 may improve the South African state's ability to attract SMWs with the CSWV. The GCM calls for partnerships with all stakeholders in objective 6. The private sector and trade unions can play a role in ensuring that migrants are paid adequate wages, labour rights are honoured, conditions for decent work are met, and abuse and exploitation are prevented.⁵⁰³ The actions to realise objective 6 incorporate the principle of equality before the law.⁵⁰⁴

Objective 12 concerns the strengthening of legal certainty and predictability in migration procedures. This will be achieved by developing human rights-based mechanisms for proper screening and assessment of migrants.⁵⁰⁵ To achieve this, there must be transparency and accessibility in migration procedures.⁵⁰⁶ Objective 12 also addresses the screening and assessment of migrants. Screening refers to mechanisms to identify migrants, provide migrants with information and inform them of relevant policies.⁵⁰⁷

In terms of objective 18, member states commit to invest in skills development and facilitate the mutual recognition of qualifications and competencies to benefit from the employment of migrants, and to ensure decent work in labour migration.⁵⁰⁸ Member states commit to developing standards and guidelines for the 'recognition of foreign qualifications and non-formally acquired skills in different sectors'.⁵⁰⁹ The ultimate aim of objective 18 is to ensure worldwide compatibility of qualifications and competencies based on existing models and best practices.⁵¹⁰

⁵⁰⁰ UN Global Compact (2018) clause 22.

⁵⁰¹ UN Global Compact (2018) clause 22(b).

⁵⁰² UN Global Compact (2018) clause 22(i).

⁵⁰³ Appleby JK (2020) 225.

⁵⁰⁴ Chetail V (2020) 258.

⁵⁰⁵ UN Global Compact (2018) clause 28.

⁵⁰⁶ UN Global Compact (2018) clause 28(a).

⁵⁰⁷ Pécoud A (2021) 26-7.

⁵⁰⁸ UN Global Compact (2018) clause 34.

⁵⁰⁹ UN Global Compact (2018) clause 34(a).

⁵¹⁰ UN Global Compact (2018) clause 34(a).

States also commit to promoting the transparency of certificates and the compatibility of national qualifications structures by agreeing to standard criteria. Member states agree to conclude agreements or to recognise provisions in existing agreements to provide for the equivalence or comparability of qualifications and competencies in national systems.⁵¹¹ Objective 18 of the GCM is thus crucial to any research on attracting and fully benefiting from the skills possessed by SMWs.

States also commit to using digitisation and technology to evaluate and mutually recognise skills based on formal credentials, and skills and competencies not formally acquired at all skill levels.⁵¹² States commit to establishing or joining global partnerships to strengthen the training capacities of national authorities and relevant stakeholders.⁵¹³ The private sector can assist migrant workers by preparing them for occupations in sending and destination countries.⁵¹⁴ The skills development of workers in the countries of origin and of migrants should be fostered to prepare trainees for employment.⁵¹⁵

Member states agree to promote inter-institutional networks and programmes between educational institutions and the private sector in the countries of origin and destination, enabling skills development opportunities for communities, partners and migrants.⁵¹⁶ Member states commit to promoting skills development, mobility and circulation after the successful completion of programmes⁵¹⁷ in order to engage in entrepreneurship and search for work.⁵¹⁸

In addition, member states commit themselves to enabling an easier transition from one employer or job to another, by making documentation available that acknowledges the skills acquired on the job or via training.⁵¹⁹ To enable employers to evaluate the person's suitability in the recruitment process, member states commit to promoting documentation and information tools, in collaboration with stakeholders, to provide an overview of migrants' credentials and

⁵¹¹ UN Global Compact (2018) clause 34(c).

⁵¹² UN Global Compact (2018) clause 34(d).

⁵¹³ UN Global Compact (2018) clause 34(e).

⁵¹⁴ Appleby JK (2020) 225; Van Riemsdijk M & Panizzon M (2022) 2178.

⁵¹⁵ UN Global Compact (2018) clause 34(e).

⁵¹⁶ UN Global Compact (2018) clause 34(f).

⁵¹⁷ Such as scholarships, apprenticeships and exchange programmes.

⁵¹⁸ UN Global Compact (2018) clause 34(g). Member states commit to making available easily accessible, gender-responsive, remote or online skills-matching and development programmes to migrants at all skills levels, which 'includes early and occupation-specific language training, on-the-job training and access to advanced training programmes' to enhance the employability and economic empowerment of women. UN Global Compact (2018) clause 34(h).

⁵¹⁹ UN Global Compact (2018) clause 34(i).

qualifications.⁵²⁰ To meet objective 18, member states commit to establishing mechanisms to screen the credentials of migrants.⁵²¹ Member states further commit to providing information to migrants before their departure on how their skills and qualifications will be assessed, including recruitment processes soon after the arrival of the migrant, to improve their employability.⁵²²

The GCM clearly articulates measures for action concerning its 23 objectives.⁵²³ States can be held to account (at least politically) to these frameworks through the formal review mechanisms of the GCM, which is the International Migration Review Forum.⁵²⁴ Moreover, any progress on the implementation of the GCM will be discussed every four years at the International Migration Review Forum, starting from 2022, while an (as yet unidentified) network of the UN will ‘work to ensure effective and coherent system-wide support to implementation, follow-up, and review’.⁵²⁵

Member states are to develop action plans to implement the objectives of the GCM at a national level. Action plans must identify policies to be improved and strategies to achieve stated improvement measures. Action plans should treat the objectives of the GCM as a floor and not as a ceiling to improve migration.⁵²⁶ This means that member states should strive to use the GCM as minimum standards. Member states must improve on these minimum standards to make migration and related processes more favourable, more easily accessible, and more responsive to migrants. It is recommended that member states establish working groups to harmonise the GCM with their national laws. Working groups are to represent a wide range of interests, such as faith-based organisations, migrant organisations, and trade unions.⁵²⁷

Pécoud criticises the GCM for being silent on highly skilled migration.⁵²⁸ While the GCM is an excellent framework for migration as a whole, it does not explicitly address highly skilled migration. The benefits for SMWs are perhaps implied since the GCM may still benefit SMWs if a state chooses to implement the actions of the GCM. The ease of migration processes is an

⁵²⁰ UN Global Compact (2018) clause 34(l).

⁵²¹ UN Global Compact (2018) clause 34(k).

⁵²² UN Global Compact (2018) clause 34(k).

⁵²³ Harouna S & Nyambe H ‘Environmental degradation and human mobility nexus in Africa’ in Adepoju A, Fumagalli C & Nyabola N (eds) *Africa Migration Report: Challenging the Narrative* (2020) 71.

⁵²⁴ McAdam J (2018) 573; Oelgemöller C & Allinson K (2020) 187.

⁵²⁵ McAdam J (2018) 574; Van Riemsdijk M & Panizzon M (2022) 2171; Desmond A (2020a) 233.

⁵²⁶ Appleby JK (2020) 226.

⁵²⁷ Appleby JK (2020) 226.

⁵²⁸ Pécoud A (2021) 24.

essential consideration to a SMW in the decision about whether to migrate to one state as opposed to another. Since the aim of the GCM is to improve regular pathways for migration, if the South African state implements the objectives of the GCM, it may be in a better position to attract SMWs. As the GCM is not a treaty, the real question is whether states will implement it, as its success rests on states fulfilling the commitments of the GCM.⁵²⁹

3.2.4 ILO Decent Work Agenda

The instruments of the ILO (conventions,⁵³⁰ recommendations,⁵³¹ declarations and resolutions)⁵³² call for and promote international cooperation to ensure a rights-based approach to the employment of nationals and migrant workers.⁵³³ The ILO encourages social dialogue between states, employers and workers to set labour standards and develop policies and programmes.⁵³⁴ The ILO aims to promote social justice, human and labour rights, along with

⁵²⁹ McAdam J (2018) 574; Hoflinger T (2020) 672.

⁵³⁰ If a state ratifies a convention, it will have the same legal force as a treaty. If a state decides not to ratify a convention, it may still bring its legislation in line with the convention to draft law and policy. A refusal to ratify a convention does not mean that the country will not adopt or use the standards of the convention. This is important since the role of international labour standards is to 'serve as targets for harmoni[s]ing national law and practice'. Dugard J, Du Plessis M & Maluwa T et al. (2018) 489; International Labour Organization 'How international labour standards are used' <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm> (accessed 29 December 2022).

⁵³¹ The ILO sets out recommendations that serve as guidelines that supplement legislation, policy and practice. International Labour Standards Department *Handbook of Procedures Relating to International Labour Conventions and Recommendations* (2019) 3.

⁵³² Swebston L 'How the ILO embraced human rights' in Bellace JR & Ter Haar B (eds) *Research Handbook on Labour, Business and Human Rights Law* (2019) 296.

⁵³³ Conventions or protocols are binding treaties subject to ratification by states. International Labour Organization *Rules of the Game: An Introduction to the Standards-Related Work of the International Labour Organization* 4 ed (2019) 18, 90 (hereafter 'ILO Rules of the Game (2019)').

⁵³⁴ Swebston L (2019) 295; International Labour Office *Fundamental Rights at Work and International Labour Standards* (2003) 1; The ILO accomplishes its work through three main bodies: (1) the International Labour Conference; (2) the executive body of the ILO; and (3) the International Labour Office. The ILO conference is held annually and delegates represent each member state. Delegates are comprised of two government officials, one workers' delegate, one employer delegate, and several additional advisors. Delegates vote on issues arising from the agenda of the conference. Aeberhard-Hodges J 'Workplace gender equality as a human right: the ILO approach' in Bellace JR & Ter Haar B (eds) *Research Handbook on Labour, Business and Human Rights Law* (2019) 278. International Labour Organization 'About the ILC' <https://www.ilo.org/ilc/AbouttheILC/lang--en/index.htm> (accessed 29 December 2022); The executive body is responsible for taking decisions on policies of the ILO; deciding on the agenda of the International Labour Conference; adopting the drafts of programmes and budgets for submission to the International Labour Conference; finally, the executive body is also responsible for electing the Director-General. International Labour Organization 'About the ILO' <https://www.ilo.org/gb/about-governing-body/lang--en/index.htm> (accessed 29 December 2022); The International Labour Office is responsible for the overall activities of the ILO and fulfils these functions under the governing body and leadership of the Director-General. International Labour Organization 'Departments and offices' <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/lang--en/index.htm> (accessed 29 December 2022).

its founding mission which states that social justice is indispensable in achieving universal and lasting peace.⁵³⁵ South Africa is a member state of the ILO.⁵³⁶

In the context of the UDHR, GCM, ICESCR, and the ILO Decent Work Agenda (hereafter 'DWA'), work must amount to decent work.⁵³⁷ The DWA is not an international law instrument but rather a strategy. The strategies of the DWA are interrelated, interdependent and inseparable.⁵³⁸ As a concept, decent work is multidimensional and goes beyond merely having a job.⁵³⁹ The strategies of the DWA are: '(i) promoting employment by creating a sustainable institutional and economic environment; (ii) developing and enhancing measures of social protection; (iii) promoting social dialogue and tripartism and (iv) respecting, promoting and realizing the fundamental principles and rights at work'.⁵⁴⁰

The strategies of the DWA relevant to migrants have been integrated specifically into goals eight, 10 and other goals of the 2030 agenda for sustainable development.⁵⁴¹ Sustainable Development Goals and their indicators or measures for progress serve as general strategies for states to implement in order to achieve decent work to achieve the strategies of the DWA. Goal 8.8 is to protect 'labour rights and promote safe and secure working environments for all workers, including migrant workers'.⁵⁴²

Goals 10.3 and 10.4 are aimed at reducing inequality and ensuring decent work.⁵⁴³ The indicators of progress regarding goals 10.3 and 10.4 are measured by the number of persons who have felt discriminated against or harassed in the last 12 months; and by whether the labour

⁵³⁵ Swepston L (2019) 296.

⁵³⁶ International Labour Organization 'Member States' <https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/member-states/lang--en/index.htm> (accessed 29 December 2022); *Engen Petroleum Limited v Commissioner for Conciliation Mediation and Arbitration and Others* [2007] 8 BLLR 707 (LAC) para 88.

⁵³⁷ Objective 18 of the GCM requires work to be decent work. General Comment No. 18 (2006) para 7.

⁵³⁸ International Labour Organization *ILO Declaration on Social Justice for a Fair Globalization* (2008) 11 (hereafter '*ILO Declaration on Social Justice for a Fair Globalization* (2008)').

⁵³⁹ ILO 'Promoting decent work for migrant workers' https://www.ilo.org/wcmsp5/groups/public/---ed_protect/--protrav/--migrant/documents/publication/wcms_344703.pdf (accessed 29 December 2022) 2.

⁵⁴⁰ *ILO Declaration on Social Justice for a Fair Globalization* (2008) 9-11.

⁵⁴¹ Goal 8 of the 2030 agenda for sustainable development is to '[p]romote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all'. Goal 10 of the DWA is to reduce 'inequality within and among countries'. Transforming our world: the 2030 Agenda for Sustainable Development, United Nations General Assembly resolution A/RES/70/1, 19, 21.

⁵⁴² Transforming our world: the 2030 Agenda for Sustainable Development, United Nations General Assembly resolution A/RES/70/1, 20.

⁵⁴³ Goal 10.3 is to '[e]nsure equal opportunity and reduce inequalities of outcome, including by eliminating discriminatory laws, policies and practices and promoting appropriate legislation, policies and action in this regard'. Goal 10.4 is to '[a]dopt policies, especially fiscal, wage and social protection policies, and progressively achieve greater equality'. Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development, United Nations General Assembly resolution A/RES/71/313, 14.

market shares in the gross domestic product reflect the achievement of greater equality.⁵⁴⁴ Halstien suggests that in 2019 there were approximately 294,417 skilled immigrants in South Africa.⁵⁴⁵ Assessing the labour market share of SMWs is nearly impossible, since the South African state does not keep accurate records of SMWs employed in the country.

Goal 10.7 is to ‘[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies’.⁵⁴⁶ There are two indicators to measure progress made with goal 10.7, geared towards lowering recruitment costs and well-managed migration policies.⁵⁴⁷

In terms of the DWA, member states may consider, inter alia, (i) developing strategies for decent work, and (ii) setting targets or indicators to monitor progress and work toward meeting these targets.⁵⁴⁸ The South African state has set out its strategy to implement the DWA in the South African Decent Work Country Programme (hereafter ‘DWCP’).⁵⁴⁹ The first priority of the DWCP is ‘[t]o promote more and better jobs’.⁵⁵⁰ The first priority does not ensure decent work for SMWs, but focuses on women, youth and persons with disabilities.⁵⁵¹ While the first priority of the DWCP includes migrant entrepreneurs, overall, the focus is on ensuring decent work for those employed in the informal economy, thus excluding holders of the CSWV employed in an occupation on the CSL.⁵⁵² The second priority of the DWCP is ‘[t]o broaden social protection coverage’, especially for vulnerable groups, including SMWs.⁵⁵³

Assessing the progress the South African state has made in this regard is difficult, since the target of introducing a National Social Security Fund is only to be realised by mid-2023. The South African state has released a Green Paper on Comprehensive Social Security and

⁵⁴⁴ Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development, United Nations General Assembly resolution A/RES/71/313, 14.

⁵⁴⁵ Halstien J ‘Skilled labour emigration in South Africa: Exploring the long-term implications’ <https://sa-tied-archive.wider.unu.edu/sites/default/files/SA-TIED-WP173.pdf> (accessed 29 December 2022) 3.

⁵⁴⁶ Transforming our world: the 2030 Agenda for Sustainable Development, United Nations General Assembly resolution A/RES/70/1, 21.

⁵⁴⁷ Indicator 10.7.1 states that ‘Recruitment cost borne by employee as a proportion of yearly income earned in country of destination’, 10.7.2 states ‘number of countries that have implemented well-managed migration policies’. Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development, United Nations General Assembly resolution A/RES/71/313, 14.

⁵⁴⁸ *ILO Declaration on Social Justice for a Fair Globalization* (2008) 13; *ILO Declaration on Social Justice for a Fair Globalization* (2022) 8.

⁵⁴⁹ CESC SA report (2017) para 72.

⁵⁵⁰ International Labour Organization ‘Republic of South Africa Decent Work Country Programme 2018 – 2023’ WCMS 674579 (2018) 21 (hereafter ‘DWCP (2018)’).

⁵⁵¹ DWCP (2018) 22.

⁵⁵² DWCP (2018) 24.

⁵⁵³ DWCP (2018) 21; Farashah A, Blomquist T and Ariss A et al. (2023) 479; see 3.2.4.

Retirement Reform that will include provisions for migrant workers; however, the Green Paper was withdrawn shortly after its publication.⁵⁵⁴

The last priority of the DWCP, which tasks the South African state to promote ‘strong and representative employers’ and workers’ organizations’, does not make specific provision for SMWs, but focuses instead on organisations.⁵⁵⁵ It may be inferred that SMWs will benefit from this priority if they form part of an employers’ or workers’ organisation. However, the priority does not extend protection or improve access to these organisations for SMWs falling outside of these organisations. As a result of the foregoing, the DWCP is not well aligned with the DWA with respect to migrant workers and fails to extend decent work to SMWs specifically.

3.3 Unratified instruments

The section starts off with a discussion of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (hereafter ‘ICRMW’). The discussion of ILO conventions (1) Migration for Employment Convention (Revised), 1949 (No. 97) (hereafter ‘Convention 97’); (2) Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) (hereafter ‘Convention 143’) and (3) Equality of Treatment (Social Security) Convention, 1962 (No. 118) (hereafter ‘Convention 118’) follows thereafter.

3.3.1 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

The ICRMW has been drafted to ensure that the rights of migrant workers⁵⁵⁶ and their families receive international protection.⁵⁵⁷ The ICRMW extends rights to migrant workers and members of their families who have entered or reside in a state illegally; however, protecting

⁵⁵⁴ *Green Paper on Comprehensive Social Security and Retirement Reform* (published in GG 45006 of 18 August 2021) 46; Department of Social Development ‘Department of Social Development withdraws the Green Paper on Comprehensive social security and retirement reforms’ <https://www.dsd.gov.za/index.php/21-latest-news/393-department-of-social-development-withdraws-the-green-paper-on-comprehensive-social-security-and-retirement-reforms-2?highlight=WvJ3aXRozHJhdyIsImdyZWWuliwicGFwZXIiLCJncmVlbiBwYXBldiJd> (accessed 29 December 2022).

⁵⁵⁵ SDWP (2018) 21.

⁵⁵⁶ For the purposes of the ICRMW, the term ‘migrant worker’ refers to ‘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’. ICRMW, Article 2 (1); Chirwa DM & Chenwi L (2016) 47.

⁵⁵⁷ Chirwa DM & Chenwi L (2016) 47.

these migrants is uncommon, and thus the provision does not feature prominently in the legal frameworks of many states.⁵⁵⁸

The ICRMW applies to all migrant workers and their families without any distinction.⁵⁵⁹ The principle of non-discrimination is applicable to all stages of the migration process,⁵⁶⁰ 'preparation for migration, departure, transit and the entire period of stay and remunerated activity in the state of employment as well as return to the state of origin or the state of habitual residence'.⁵⁶¹ With respect to the right to work concerning migrant workers, the principle of non-discrimination, as set out in Article 2.2 of the ICRMW, is applicable.⁵⁶² Article 7 of the ICRMW provides that state parties are to ensure that the rights contained in the ICRMW are applied without distinction of any kind to all migrants and their families.⁵⁶³ Moreover, the ICRMW seeks to protect migrants by prohibiting discrimination on the grounds of 'sex, race, colour, language, religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status'.⁵⁶⁴

Foreign nationals, including SMWs, are a vulnerable group.⁵⁶⁵ Foreign nationals frequently exist at the margins of mainstream society and lack political power.⁵⁶⁶ They are outside the legal protection of their countries of nationality and often unfamiliar with national languages, laws and practice. Foreign nationals also lack familiar social networks, making them less able than others to know and assert their rights.⁵⁶⁷ While it may be argued that migrants in an irregular situation are more vulnerable⁵⁶⁸ than SMWs and regular migrants,⁵⁶⁹ SMWs are still

⁵⁵⁸ *Discovery Health Limited v CCMA & others* (2008) 7 BLLR 633 (hereafter '*Discovery Health Limited*'), para 46.

⁵⁵⁹ ICRMW, Article 1.1.

⁵⁶⁰ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families & Committee on the Rights of the Child, United Nations, Joint General Comment No. 3 & No. 22: General principles regarding the human rights of children in the context of international migration CMW/C/GC/3-CRC/C/GC/22 (2017) 5.

⁵⁶¹ ICRMW, Article 1.2; Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families, United Nations, General Comment No. 1: Migrant domestic workers CMW/C/GC/1 (2011) 2.

⁵⁶² General Comment No. 18 (2006) para 18.

⁵⁶³ ICRMW, Article 7.

⁵⁶⁴ OHCHR 'The International Convention on Migrant Workers and its Committee' 2005 Fact Sheet No. 24 (Rev.1) 5.

⁵⁶⁵ *Khosa v Minister of Social Development* 2004 (6) SA 505 (CC) para 74 (hereafter '*Khosa*'); Olivier M & Govindjee A (2013) Conference paper: *Labour Rights and Social Protection of Migrant Workers: In Search of a Coordinated Legal Response* at 'Inaugural conference of the Labour Law Research Network (LLRN), Barcelona, Spain, 13-15 June 2013' https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_OlivierxGovind.pdf/fd58864e-aa42-4400-b854-5767063ffb8d; Desmond A (2020a) 226.

⁵⁶⁶ Desmond A (2020a) 223.

⁵⁶⁷ *Andrews v Law Society of British Columbia* 1989 CanLII 2 (SCC) 12; Olivier M & Govindjee A (2013) 9-10.

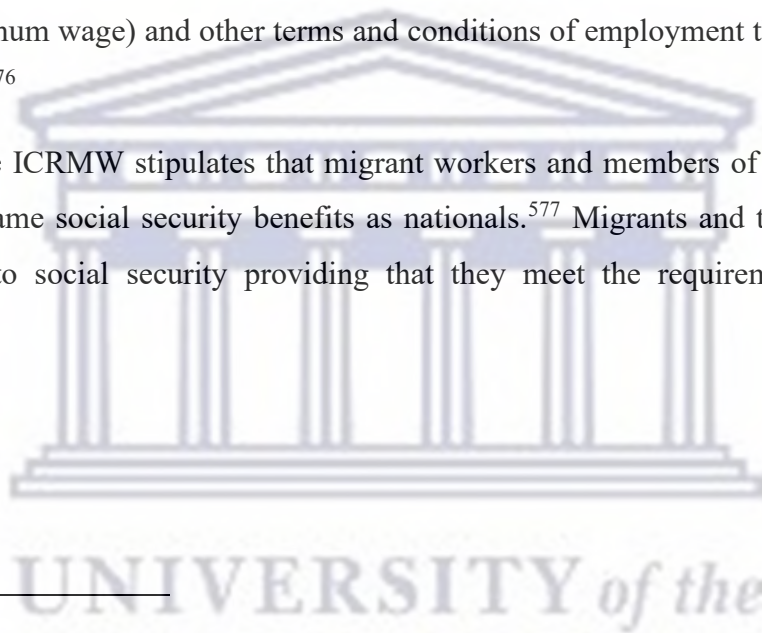
⁵⁶⁸ General Comment No. 23 (2016) 13; David F, Bryant K & Larsen JJ (2019) 11.

⁵⁶⁹ Olivier M & Govindjee A (2013) 11.

vulnerable and more vulnerable than citizens.⁵⁷⁰ Skilled migrant workers are vulnerable simply by virtue of being non-national.⁵⁷¹ For this reason, SMWs deserve protection, in this case by ratification and domestication of the ICRMW.⁵⁷² Considering the precarious situation migrants face, consistent with the requirement of non-discrimination, state parties are to pay attention to the practical barriers and obstacles vulnerable groups may experience in the enjoyment of their rights.⁵⁷³

The ICRMW does not explicitly provide for the right to work but rather for rights at work.⁵⁷⁴ The ICRMW also entitles migrants, irrespective of immigration status, to no less favourable treatment.⁵⁷⁵ No less favourable treatment is contemplated with respect to remuneration (including minimum wage) and other terms and conditions of employment that are applicable in national law.⁵⁷⁶

Article 27 of the ICRMW stipulates that migrant workers and members of their families are entitled to the same social security benefits as nationals.⁵⁷⁷ Migrants and their families will receive access to social security providing that they meet the requirements of national



⁵⁷⁰ Office of the United Nations High Commissioner for Human Rights ‘Migration and development: a human rights approach’ <https://www2.ohchr.org/english/bodies/cmw/docs/HLMigration/MigrationDevelopmentHC%27spaper.pdf> (accessed 29 December 2022) para 61-2.

⁵⁷¹ *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) BCLR 1655 para 23.

⁵⁷² Olivier M & Govindjee A (2013) 9-10.

⁵⁷³ Committee on Economic, Social and Cultural Rights, United Nations: Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights E/C.12/2017/1 (2017) para 7.

⁵⁷⁴ Sarkin J & Koenig M ‘Developing the right to work: intersecting and dialoguing human rights and economic policy’ (2011) 33 *Human Rights Quarterly* 20-21.

⁵⁷⁵ Cohen A, Gest J & Kysel I et al. ‘International Migrants Bill of Rights, with commentary’ (2013) 28(23) *Georgetown Immigration Law Journal* 96; Touzenis K & Sironi A *Current Challenges in the Implementation of the UN international Convention of the Rights of All Migrant Workers and Members of Their Families* (2013) 10.

⁵⁷⁶ ILO Policy Advisory Committee on Fair Migration in the Middle East ‘Minimum wages and wage protection in the Arab States: Ensuring a just system for national and migrant workers’ https://www.ilo.org/wcmsp5/groups/public/---arabstates/---ro-beirut/documents/publication/wcms_660002.pdf (29 December 2022) 2; Serena F & Annoni A (eds) *The Changing Role of Nationality in International Law* (2013) 169; ICRMW Article 25(1)(a); Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, United Nations, General Comment No. 2: on the rights of migrant workers in an irregular situation and members of their families CMW/C/GC/2 (2013) para 62.

⁵⁷⁷ ICRMW, Article 27(1).

legislation and applicable treaties.⁵⁷⁸ The ICRMW is, therefore, also aimed at ensuring access to social security.⁵⁷⁹

Where a migrant worker has made payments in anticipation of benefits provided for in the ICRMW, but national legislation prevents him or her from enjoying the benefit, state parties must consider the possibility of paying back the contribution made in anticipation of benefits.⁵⁸⁰ Compensation must be calculated in accordance with the benefits given to nationals in comparable circumstances.⁵⁸¹

Migrant workers have the right to choose their own remunerated activity subject to certain conditions or restrictions.⁵⁸² According to Sarkin and Koenig, free choice of employment does not imply that states are to provide an individual with the exact job he or she desires. Rather it means that each worker should be provided with the opportunity to be employed in positions suitable to his or her skill and qualifications.⁵⁸³ The host state may restrict access to certain categories of employment in the interests of the state and in terms of national legislation.⁵⁸⁴ State parties may also give preference to nationals in respect of certain remunerated activities; however, '[a]ny such limitation shall cease to apply to a migrant worker who has resided lawfully in its territory for the purpose of remunerated activity for a period of time prescribed in its national legislation that should not exceed five years'.⁵⁸⁵

The ICRMW is hailed as a significant gain for the achievement of the human rights of migrant workers and for the combating of exploitation faced by migrant workers and their families⁵⁸⁶ 'without dictating any particular immigration policy framework'.⁵⁸⁷ While the ICRMW would arguably be the best instrument to protect migrant workers, the ratification thereof has been

⁵⁷⁸ Touzenis K & Sironi A (2013) 11; United Nations Human Right Office of the High Commissioner *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation* (2014) – (hereafter 'OHCHR (2014)') 102-3.

⁵⁷⁹ Mpedi LG & Nyenti MAT *Key International, Regional and National Instruments Regulating Social Security in the SADC A General Perspective* (2015) 9.

⁵⁸⁰ ICRMW, Article 27(2).

⁵⁸¹ ICRMW, Article 27(2).

⁵⁸² ICRMW, Article 52(1).

⁵⁸³ Sarkin J & Koenig M (2011) 10.

⁵⁸⁴ ICRMW, Article 52(2)(a).

⁵⁸⁵ ICRMW, Article 52(3)(b).

⁵⁸⁶ Ruhs M *The Price of Rights: Regulating International Labor Migration* (2013) 1; Desmond A (2020a) 226.

⁵⁸⁷ Lyon B 'The unsigned United Nations migrant worker rights convention: an overlooked opportunity to change the "brown collar" migration paradigm' (2010) 42 *International Law and Politics* 397.

very poor.⁵⁸⁸ The ICRMW is the least ratified of all major treaties.⁵⁸⁹ None of the states with significant numbers of migrants are party to the ICRMW.⁵⁹⁰ For the ICRMW to have the most impact in protecting the rights of SMWs, more states must ratify it. No significant destination country in the West has ratified the ICRMW, thus reducing the potential protection afforded to SMWs.⁵⁹¹ The South African state has also not ratified the ICRMW at the time of writing.⁵⁹² Nevertheless, as the chapter aims to identify the international obligations in favour of SMWs in South Africa, the ICRMW must therefore be considered, regardless of whether the South African state has ratified it or not. Nothing prevents a country from aligning its national legislation with international instruments it has not formally ratified. More importantly, section 233 of the Constitution provides that South African courts must favour an interpretation of legislation that aligns with international law.

3.3.2 Migration for Employment Convention (Revised), 1949 (No. 97)

Convention 97 has not been ratified by the South African state at the time of writing, which is concerning, since the aim of the Convention 97 is to safeguard the right of migrant workers, particularly against discrimination.⁵⁹³ In terms of Convention 97, member states undertake to provide treatment no less favourable than that which is given to nationals with respect to (i) remuneration and other related issues such as overtime and hours of work; (ii) trade union membership and collective bargaining and (iii) accommodation; (iv) member states also

⁵⁸⁸ Kysel IM 'Promoting the recognition and protection of the rights of all migrants using a soft-law International Migrants Bill of Rights' (2016) 4(2) *Journal of Migration and Human Security* 31; Desmond A (2020) 217.

⁵⁸⁹ Ruhs M 'Protecting migrant workers: The case for a core rights approach' https://publications.iom.int/system/files/pdf/protecting_migrant_workers.pdf (29 December 2022) 2; Yau J 'Promise and prospects of the UN's Convention on Migrant Workers' <https://www.migrationpolicy.org/article/promise-and-prospects-uns-convention-migrant-workers> (29 December 2022); Desmond A (2020a) 227.

⁵⁹⁰ Kittichaisaree K 'International human rights treaty obligations: is everyone protected?' in Kittichaisaree K *International Human Rights Law and Diplomacy* (2020) 186. At the time of writing, only 40 states had ratified the ICRMW. United Nations 'International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families' https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4 (29 December 2022). Trindade is of the view that the small number of ratifications is not a mere coincidence, but perhaps an indication of a mentality concerning migration that needs to be changed and that there has not been a proper acknowledgement of the values of the ICRMW. Trindade AAC 'Uprootedness and the protection of migrants in the International Law of Human Rights' (2008) 51(1) *Revista Brasileira de Política Internacional* 150.

⁵⁹¹ Pécoud A 'The UN convention on migrant workers' rights and international migration management' (2009) 23(3) *Global Society* 338; Rother S (2022) 3; Desmond A (2020a) 226.

⁵⁹² Dugard J, Du Plessis M & Maluwa T et al. (2018) 481; Human Rights Council, United Nations, Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante A/HRC/17/33/Add.4 (2011) 5; *Rahim v The Minister of Home Affairs* [2015] 3 All SA 425 (SCA) para 19.

⁵⁹³ International Labour Organization 'C097 - Migration for Employment Convention (Revised), 1949 (No. 97)' https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312242:NO (accessed 29 December 2022).

undertake to apply no less favourable treatment, without discrimination on the basis of race, nationality, religion, and sex, to immigrants lawfully within its territory.⁵⁹⁴ Equality of treatment in terms of Convention 97 applies to permanent and temporary migrant workers such as holders of a CSWV.⁵⁹⁵ According to the Committee of Experts on the Application of Conventions and Recommendations (hereafter ‘CEACR’), equality of treatment ‘allows an application of treatment which, although not identical, would be equivalent in its effects to that enjoyed by nationals’.⁵⁹⁶

Member states must not discriminate against migrants with respect to social security, subject to the limitations below:⁵⁹⁷ arrangements for the maintenance of social security rights and ‘rights in the course of being acquired’⁵⁹⁸ or benefits or parts thereof which are payable entirely from public funds, and benefits paid to persons who do meet the requirements to qualify for a normal pension.⁵⁹⁹ The CEACR has noted that Convention 97 does not automatically exclude any ‘category of migrant workers from social security benefits’.⁶⁰⁰

3.3.3 Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

The ILO member states that ratified Convention 143 undertake to respect all the basic human rights of all migrant workers.⁶⁰¹ The South African state has not ratified Convention 143 at the time of writing.⁶⁰² Convention 143 is concerned with migrants in abusive conditions, the prevention of illegal immigration, and the control of surplus labour due to migration by establishing rules to reduce the exploitation and trafficking of migrants from a rights-based perspective.⁶⁰³ Convention 143 supplements Convention 97 which only applies to ‘legal’

⁵⁹⁴ Migration for Employment Convention (Revised), 1949 (No. 97) *Convention concerning Migration for Employment* Article 6(1)(a)(i)-(iii) hereafter ‘Convention 97’; Convention 97 Article 6(1).

⁵⁹⁵ Chetail V (2019) 210.

⁵⁹⁶ International Labour Conference (87th session) Report III (1B) Migrant workers: General Survey on the Reports of the Migration for Employment Convention (Revised) No.97 para 371 <https://www.ilo.org/public/english/standards/relm/ilc/ilc87/r3-1b5.htm> (ILC session 87).

⁵⁹⁷ Strydom EML (ed), Le Roux P & Landman AA et al. *Essential Social Security Law* (2006) 289; Valticos N *International Labour Law* (1979) 208.

⁵⁹⁸ Convention 97 Article 6(1)(b)(i); ILC session 87 para 431.

⁵⁹⁹ Convention 97 Article 6(1)(b)(ii); ILC session 87 para 431.

⁶⁰⁰ ILC session 87 para 431.

⁶⁰¹ Convention 143, Article 1.

⁶⁰² International Labour Organization ‘Up-to-date Conventions and Protocols not ratified by South Africa’ http://oit.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102888 (accessed 29 December 2022).

⁶⁰³ Taran PA ‘Globalization, migration and labour: imperatives for a rights based policy’ (2011) 2(1) *Journal of Globalization Studies* 67; Rahel M & Chowdhury TM ‘Migrant workers under the domestic law and International Labour Organization (ILO) Convention in perspective of Malaysia’ (2017) 7(2) *International Journal of Business and Technopreneurship* 161.

migrants.⁶⁰⁴ Convention 143 is the first convention to extend protection to irregular migrants by addressing the rights of undocumented migrants and members of their family.⁶⁰⁵ Convention 143 refers to persons employed illegally instead of using the term illegal to refer to migrants themselves.⁶⁰⁶

Article 8 of Convention 143 allows migrants to enjoy equality of treatment with nationals with respect to, inter alia, security of employment and alternative employment and retraining.⁶⁰⁷ According to the International Organization of Employers (hereafter 'IOE'),⁶⁰⁸ Article 8 is a significant barrier to the ratification of Convention 143, especially for states which do not offer nationals and migrants the same protection.⁶⁰⁹

States are to ensure that their national policies promote equality of opportunity and treatment to migrant workers with respect to employment, occupation, social security, trade unions, cultural rights, and individual and shared freedoms for migrants and their families who have entered the territory in conformity with national laws.⁶¹⁰ According to the IOE, the national policies of the member state may be designed by methods appropriate to national conditions and practice.⁶¹¹ Article 14 of Convention 143 allows restrictions on the equality of treatment.⁶¹² The article provides that a member state may allow the employment of a migrant subject to the condition that the migrant has resided in the territory legally for employment for a period that does not exceed two years. Alternatively, if a fixed-term contract provides for a period less than two years, the state may require that the migrant complete his or her first work contract before allowing the migrant the free choice of employment.⁶¹³ According to the IOE, Article 14 of Convention 143 is both positive and negative:

⁶⁰⁴ Terminski B *Economic Migrants in International Law and Policy: Selected Issues and Challenges* (2018) 102.

⁶⁰⁵ Chetail V (2019) 208; *Discovery Health Limited* para 47; Ruhs M 'Rethinking international legal standards for the protection of migrant workers: the case for a "core rights" approach' (2017) 111 *AJIL Unbound* 173.

⁶⁰⁶ ILO *International labour migration: A rights-based approach* (2010) 31.

⁶⁰⁷ Convention 143, Article 8(2).

⁶⁰⁸ The IOE is the only representative of business for debates taking place in the ILO, UN, G20 and other forums regarding social and employment policies. International Organisation of Employers 'About us' <https://www.ioe-emp.org/en/about-us/> (accessed 29 December 2022).

⁶⁰⁹ IOE 'Migrant Workers (Supplementary Provisions) Convention, 1975 (NO. 143)' <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=109490&token=aee841e913438b82fb9d6afedba30d499bdf7bf0&L=0> (accessed 29 December 2022) 8 (hereafter 'IOE 'Migrant Workers Convention').

⁶¹⁰ Convention 143, Article 10.

⁶¹¹ IOE Migrant Workers Convention 10-11.

⁶¹² IOE Migrant Workers Convention 14.

⁶¹³ Convention 143, Article 14(a).

Where employers depend on migrant labour to work for long-term contracts, that is, greater than two years, choice of employment may cause employers to lose workers after two years have passed. However, free choice of employment after a shorter period of time can make the country a more attractive market for workers and attract workers with a higher skill set, as migrant workers seek ... [the] quickest route to be able to remain in a country. Employers that offer two year contracts may attract a greater pool of workers than employers in a country that requires a longer term prior to a free choice of employment.⁶¹⁴

After consultation with relevant employers' and workers' organisations, the member state may also make rules and regulations for the recognition of occupational qualifications, including certificates and diplomas which have been acquired outside of the member's territory.⁶¹⁵ The member state may restrict the categories of employment available to be taken up by migrant workers if it is in the interest of the state to do so.⁶¹⁶ It is, however, in the best interests of employers to advocate for policies that recognise international qualifications similar to those offered in the host country.⁶¹⁷

3.3.4 ILO Equality of Treatment (Social Security) Convention, 1962 (No. 118)

Convention 118 may be accepted by a state that already has the listed statutory schemes of Convention 118 as a part of its national legislation.⁶¹⁸ The listed social security schemes covered by Convention 118 are medical care; sickness; maternity; invalidity benefits; old age; survivors; employment injury; unemployment; and family benefits.⁶¹⁹

Member states must treat any national of another member state equally and in the same manner that it provides for its nationals in legislation.⁶²⁰ Equality of treatment is expected to apply without being conditional on the migrant being a resident in the host country unless residence is a condition for nationals of the member state as well.⁶²¹ According to the CEACR,

⁶¹⁴ IOE Migrant Workers Convention 14.

⁶¹⁵ Convention 143, Article 14(b).

⁶¹⁶ Convention 143, Article 14(c).

⁶¹⁷ IOE Migrant Workers Convention 14.

⁶¹⁸ The full name is the ILO Equality of Treatment (Social Security) Convention, 1962 (No. 118) (*Convention concerning Equality of Treatment of Nationals and Non-Nationals in Social Security*), (hereafter 'Convention 118').

⁶¹⁹ Convention 118, Article 1.

⁶²⁰ Convention 118, Article 3.

⁶²¹ Convention 118, Article 4.1.

Convention 97 and Convention 143 prescribe equality of treatment for foreign nationals regardless of whether they are nationals of a country that has ratified Convention 97 or Convention 143, respectively,⁶²² whereas Convention 118 ‘prescribes equality of treatment only for nationals of the countries which have ratified’ Convention 118.⁶²³ Convention 118 also applies equally to refugees and stateless persons without the condition of reciprocity.⁶²⁴

3.4 Binding instrument

3.4.1 International Covenant on Economic, Social and Cultural Rights (ICESCR)

The ICESCR aims to ‘protect human dignity by establishing both negative and positive obligations for States’.⁶²⁵ The ICESCR recognises, inter alia, the right to work; just and favourable conditions of work; establishment and joining of trade unions; social security and social insurance; protection of the family unit; maternity leave and associated benefits; protection against child labour; an adequate standard of living; enjoyment of the highest achievable standard of mental and physical health; education; participation in the cultural life of one’s choice; the ability to enjoy the benefits of scientific progress and the application thereof; and the right of everyone to ‘benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author’.⁶²⁶ The ICESCR is grounded in universal aspirations and as such it applies to nationals and SMWs.⁶²⁷

Before the Optional Protocol to the ICESCR was adopted for the protection of economic, social and cultural rights, allowing the UN Committee on Economic, Social and Cultural Rights

⁶²² ILC session 87 para 432.

⁶²³ ILC session 87 para 432.

⁶²⁴ Convention 118, Article 10.1.

⁶²⁵ United Nations *Transitional Justice and Economic, Social and Cultural Rights* (2014) 7; *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 para 27 (hereafter ‘*Grootboom*’). A negative obligation requires a state to refrain from doing something. A positive obligation requires a state to do something.

⁶²⁶ International Covenant on Economic, Social and Cultural Rights, United Nations General Assembly Resolution 2200A (1966) (‘ICESCR’), Articles 6- 15, Article 15(1)(c).

⁶²⁷ Lougarre C ‘The protection of non-nationals’ economic, social and cultural rights in un human rights treaties’ (2020) 9 *International Human Rights Law Review* 257.

(hereafter ‘CESCR’)⁶²⁸ to enforce these rights and provide remedies for victims, the implementation of the provisions of the ICESCR was monitored through state reporting.⁶²⁹ State parties are to submit reports on the progress that has been made and measures adopted in accordance with the ICESCR.⁶³⁰ The CESCR and other specialised bodies assess state party reports.⁶³¹ The South African state ratified the ICESCR on 12 January 2015, but has not ratified the Optional Protocol to the ICESCR.⁶³²

The ICESCR provides states with general, specific, minimum core and key obligations.⁶³³ The key obligations implicit in Article 2(1) are: (1) state parties must take appropriate steps; (2) to progressively realise economic, social and cultural rights; (3) to the maximum of their available resources; (4) which is the individual duty of each state party and a collective duty achieved through international assistance and cooperation.⁶³⁴

According to Chirwa and Chenwi, to take appropriate steps, state parties must take measures (legislative, administrative, social and other remedies such as judicial remedies) within a reasonably short period of time after the ratification of the ICESCR to realise social, economic and cultural rights. The steps must be deliberate, concrete and targeted.⁶³⁵ What is considered ‘appropriate’ is analogous to ‘reasonableness’ as articulated in *Government of the Republic of South Africa and Others v Grootboom and Others* (hereafter ‘*Grootboom*’).⁶³⁶ Although the

⁶²⁸ To interpret the ICESCR, the comments of the CESCR are referred to throughout the thesis. The comments of the CESCR are non-binding, but it is widely regarded as authoritative in interpreting the ICESCR. The CESCR’s general comments create a jurisprudential structure for the rights articulated in the ICESCR. Vonk G & Olivier M ‘The fundamental right of social assistance: A global, a regional (Europe and Africa) and a national perspective (Germany, the Netherlands and South Africa)’ (2019) 21(3) *European Journal of Social Security* 227; Sarkin J & Koenig M (2011) 13.

⁶²⁹ Chirwa DM & Chenwi L (2016) 34, 63-4, 67. The purpose of the Optional Protocol is to create a complaints procedure to enforce the ICESCR at an international level. Until the Optional Protocol is ratified, the ICESCR remains judicially unenforceable at an international level. Scheinin M ‘Indirect protection of economic, social and cultural rights in international law’ in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 73.

⁶³⁰ ICESCR, Article 16(1).

⁶³¹ ICESCR, Article 16(2)a-b.

⁶³² Office of the United Nations High Commissioner for Human Rights ‘Status of ratification interactive dashboard’ *OHCHR Dashboard* (accessed 29 December 2022); Chirwa DM & Chenwi L ‘The protection of economic, social and cultural rights in Africa’ in Chirwa DM & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 9; Committee on Economic, Social and Cultural Rights, United Nations: Concluding observations on the initial report of South Africa E/C.12/ZAF/CO/1 (2018) – (hereafter ‘CESCR: Concluding observations SA (2018)’); Kittichaisaree K *International Human Rights and Diplomacy* (2020) 171.

⁶³³ Ikawa D ‘The International Covenant on Economic, Social and Cultural Rights and the Optional Protocol’ in Dugard J, Porter B, Ikawa D et al. (eds) *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (2020) 18.

⁶³⁴ ICESCR, Article 2(1); Chirwa DM & Chenwi L (2016) 48.

⁶³⁵ Chirwa DM & Chenwi L (2016) 49.

⁶³⁶ 2000 (11) BCLR 1169.

term ‘appropriateness’ is not defined, reasonable review, as set out in *Grootboom*, may be used to determine the extent that the South African state has satisfied its obligations in terms of the ICESCR.⁶³⁷

According to Chirwa and Chenwi, progressive realisation of economic, social and cultural rights allows state parties to give effect to rights over time, and has qualitative elements that imply that existing services are to be improved, and quantitative elements implying that access is to be provided for more people.⁶³⁸ State parties are to use financial, human, technological and infrastructural resources, and resources from international cooperation and assistance.⁶³⁹ Even when there is a shortage of resources, state parties are still obligated to ensure the widest enjoyment of rights possible, and to protect marginalised and disadvantaged groups.⁶⁴⁰

The Constitutional Court in South Africa has consistently rejected the notion of ‘minimum core obligations’ on state parties, and has opted instead for a ‘reasonableness’ review.⁶⁴¹ Reasonableness has been used as the constitutional yardstick for assessing measures taken to give effect to economic, social and cultural rights in South Africa.⁶⁴² The persistent refusal by the courts to use ‘minimum core obligations’ is questionable, since the South African state has ratified the ICESCR, which clearly articulates the ‘minimum core obligations’ approach with respect to state party obligations.⁶⁴³

Yeshanew suggests that the CESCR has created a combination of the minimum core and reasonableness review approach.⁶⁴⁴ The CESCR may have endorsed the combined approach by allowing state parties to justify their failure to meet core obligations.⁶⁴⁵ The combined approach is a nuanced approach to the justiciability of socio-economic rights, involving an analysis of rights and obligations which are considered with an evaluation ‘of measures taken by a state against standards to be derived from such analysis’.⁶⁴⁶ The combined model is

⁶³⁷ Chirwa DM & Chenwi L (2016) 49.

⁶³⁸ Chirwa DM & Chenwi L (2016) 51-2.

⁶³⁹ Chirwa DM & Chenwi L (2016) 53.

⁶⁴⁰ Chirwa DM & Chenwi L (2016) 53.

⁶⁴¹ Vonk G & Olivier M (2019) 236.

⁶⁴² Vonk G & Olivier M (2019) 236.

⁶⁴³ Vonk G & Olivier M (2019) 236.

⁶⁴⁴ Yeshanew S ‘Combining the “minimum core” and “reasonableness” models of reviewing socio-economic rights’ 9(3) *ESR Review* (2008) 11.

⁶⁴⁵ Committee on Economic, Social and Cultural Rights, Report on the thirty-eighth and thirty-ninth sessions (2008) E/2008/22 E/C.12/2007/3 http://www.bayefsky.com/general/e_2008_22.pdf para 60; Committee on Economic, Social and Cultural Rights, Thirty-eighth session (2007) E/C.12/2007/1 <https://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf> para 8, 9.

⁶⁴⁶ Yeshanew S (2008) 12.

capable of monitoring both negative and positive obligations effectively which is commensurate with the minimum core and reasonableness review approach, but it remains to be seen, if and how this combined approach will be implemented.⁶⁴⁷

The specific obligations of state parties are to respect, protect and fulfil the economic, social and cultural rights of persons within their jurisdiction.⁶⁴⁸ A brief discussion of the key obligations of the ICESCR is undertaken here, while the state parties' specific obligations are discussed only in relation to the right to work, social security and the right to just and favourable conditions of work. The following obligations in the ICESCR will be discussed: non-discrimination, the right to work, social security, and just and favourable conditions of work. The discussion of these rights is relevant to this thesis, as work conditions are a pull factor for SMWs.

3.4.1.1 Non-discrimination

State parties undertake that the rights in the ICESCR will be exercised without discrimination.⁶⁴⁹ State parties cannot interfere with the enjoyment and realisation of the rights in the ICESCR.⁶⁵⁰ To protect the rights in the ICESCR, signatories must also prevent third parties from interfering with the enjoyment of these rights.⁶⁵¹ Moreover, state parties must fulfil the rights contained in the ICESCR by adopting necessary measures to ensure that conditions are created for the full realisation of these rights.⁶⁵² To comply with international obligations regarding non-discrimination, states are required to introduce legislation in a manner that does not result in discrimination.⁶⁵³

3.4.1.2 Right to work

The ICESCR recognises the right to work.⁶⁵⁴ According to Gomes, the ICESCR is the most comprehensive of all international covenants setting out the right to work, and rights at work.⁶⁵⁵

⁶⁴⁷ Committee on Economic, Social and Cultural Rights, Thirty-eighth session (2007) E/C.12/2007/1 <https://www2.ohchr.org/english/bodies/cescr/docs/statements/Obligationtotakesteps-2007.pdf> para 11; Yeshanew S (2008) 12.

⁶⁴⁸ OHCHR (2014) 33; Ikawa D (2020) 18.

⁶⁴⁹ ICESCR, Article 2(2).

⁶⁵⁰ OHCHR (2014) 33.

⁶⁵¹ OHCHR (2014) 33.

⁶⁵² OHCHR (2014) 33.

⁶⁵³ *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC) para 44.

⁶⁵⁴ ICESCR, Article 6.

⁶⁵⁵ Gomes VB 'The right to work and rights at work' in Dugard J, Porter B, Ikawa D et al. (eds) *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (2020) 227.

Defining the right to work is necessary as it acts as an enabler for many other rights.⁶⁵⁶ The ICESCR stipulates that the right to work is ‘the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’.⁶⁵⁷ The CESCR recognises the following quote as the definition of the right to work.⁶⁵⁸ The normative context to define the right to work is best described by the CESCR as follows:

The right to work is an individual right ... and is at the same time a collective right. It encompasses all forms of work ... [and], should not be understood as an absolute and unconditional right to obtain employment. ... It includes the right of every human being to decide freely to accept or choose work. This implies not being forced ... to exercise or engage in employment and the right of access to a system of protection guaranteeing ... access to employment. It also implies the right not to be unfairly deprived of employment⁶⁵⁹

As stated above, the right to work does not imply a right to gain employment.⁶⁶⁰ It implies that everyone has the right to earn a living through the occupation of his or her choice.⁶⁶¹ The right to work should be protected,⁶⁶² as it provides protection against unemployment, and allows the aspiration for full employment.

Moreover, work must be ‘decent’ work.⁶⁶³ The CESCR has stated that decent work respects and protects the fundamental rights of workers. Decent work provides an income that is enough to support the worker and their families as per Article 7 of the ICESCR. The ICESCR further stipulates that the right to work includes ‘the right of everyone to the opportunity to gain his living by work ...’⁶⁶⁴ An obligation is thus created for states to generate job opportunities

⁶⁵⁶ Govindjee A & Dupper O ‘Constitutional perspectives on unemployment security and a right to work in South Africa’ (2011) 22(3) *Stellenbosch Law Review* 792; Sarkin J & Koenig M (2011) 3.

⁶⁵⁷ ICESCR, Article 6(1).

⁶⁵⁸ Committee on Economic, Social and Cultural Rights, United Nations, General Comment No. 18: The Right to work E/C.12/GC/18 (2006) para 6 (hereafter ‘General Comment No. 18 (2006)’).

⁶⁵⁹ General Comment No. 18 (2006) para 6.

⁶⁶⁰ General Comment No. 18 (2006) para 6.

⁶⁶¹ ICESCR, Article 6(1).

⁶⁶² Programme on Women’s Economic, Social and Cultural Rights *International Covenant on Economic, Social and Cultural Rights: A Handbook* (2015) 37.

⁶⁶³ General Comment No. 18 (2006) para 7.

⁶⁶⁴ ICESCR, Article 6(1).

while simultaneously improving existing employment and ensuring that all work is decent work.⁶⁶⁵ Anyone may also refuse an opportunity to work.

With respect to the right to work, the CESCR has taken a conservative approach. Rather than requiring states to ‘guarantee’ a right to work, the right to work is only to be implemented if work is available. State parties must therefore aim to make work available over time.⁶⁶⁶ In accordance with the principle of non-discrimination, states are obliged to treat migrant workers no less favourably than citizens.⁶⁶⁷ The principle of non-discrimination is at the core of the ICESCR, and for this reason, migrants should be able to gain their living by work.⁶⁶⁸

The right to work, as stated in Article 6 of the ICESCR, is developed through and along with Articles 7 and 8 of the ICESCR.⁶⁶⁹ While Article 6 of the ICESCR is more concerned with the value of employment itself,⁶⁷⁰ Articles 6, 7 and 8 of the ICESCR are interconnected and interdependent.⁶⁷¹ State parties are expected to respect, protect and fulfil the right to work. The right to work also includes the following interconnected and essential features: ‘availability, accessibility, acceptability and quality’, which are also international benchmarks.⁶⁷²

The benchmark of availability requires states to assist individuals to find employment in the form of specialised services made available for this cause.⁶⁷³ The benchmark of accessibility requires a state to open its labour market to all within its jurisdiction, without discrimination. The accessibility benchmark is multidimensional. The three dimensions are non-discrimination in accessing or maintaining employment on prohibited grounds;⁶⁷⁴ physical accessibility,

⁶⁶⁵ International Commission of Jurists ‘Submission to the committee on economic, social and cultural rights in advance of the examination of South Africa’s initial periodic report under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights’ <https://www.icj.org/wp-content/uploads/2018/08/SouthAfrica-ICJSubmissionCESCR-Advocacy-Non-legal-submission-2018-ENG.pdf> (accessed 29 December 2022) 7.

⁶⁶⁶ Sarkin J & Koenig M (2011) 16.

⁶⁶⁷ General Comment No. 18 (2006) para 31.

⁶⁶⁸ Chirwa DM & Chenwi L (2016) 44.

⁶⁶⁹ Gomes VB (2020) 231. Article 7 of the ICESCR provide for the right to the enjoyment of just and favourable working conditions and Article 8 provides for the right to establish and join trade unions.

⁶⁷⁰ Sarkin J & Koenig M (2011) 13.

⁶⁷¹ Gomes VB (2020) 231.

⁶⁷² General Comment No. 18 (2006) para 12; OHCHR (2014) 111; ESCR-Net ‘The right to work and workers’ rights’ <https://www.escr-net.org/rights/work> (accessed 29 December 2022); Chenwi L ‘Delineating the content of the right to social security’ (2008) 9(3) *ESR Review* 24.

⁶⁷³ OHCHR (2014) 111.

⁶⁷⁴ Prohibited grounds include ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation, or civil, political, social or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality’. General Comment No. 18 (2006) para 12(b)i.

especially for persons with disabilities; and access to information.⁶⁷⁵ The benchmark of accessibility is one of the most important benchmarks for this thesis, and is thus expanded on in chapter 4. The concepts of acceptability and quality of work require signatories to ensure that all are given access to just, safe and favourable working conditions⁶⁷⁶ that are aligned with the concept of decent work in the ICESCR. States' obligations to respect, protect and fulfil the right to work are discussed below.

The obligation to respect the right to work requires state parties to refrain from directly or indirectly interfering with the enjoyment of the right to work.⁶⁷⁷ State parties must prohibit compulsory or forced labour.⁶⁷⁸ The obligation to respect the right to work also obliges state parties to refrain from limiting or denying 'equal access to decent work for all persons', particularly marginalised and disadvantaged groups such as SMWs.⁶⁷⁹

The obligation to protect the right to work obliges state parties to introduce measures that prevent third parties from interfering with employees' enjoyment of the right to work.⁶⁸⁰ The obligation to protect the right to work requires, inter alia, that states pass legislation or other measures to ensure equal access to training and work. State parties must also ensure that privatisation measures do not undermine worker rights. The obligation to protect the right to work requires increased flexibility in labour markets that can make work more stable or increase worker protection. Lastly, the obligation to protect the right to work requires state parties to 'prohibit forced or compulsory labour by non-state actors'.⁶⁸¹

In terms of the obligation to fulfil the right to work, state parties are to provide, facilitate and promote the right to work. This implies that state parties are obliged to adopt legislative, budgetary, judicial and other measures to realise the right to work fully.⁶⁸² State parties must recognise the right to work through legislation, the adoption of policies, and planning to realise the right to work.⁶⁸³ An employment policy must be formulated and implemented to stimulate

⁶⁷⁵ General Comment No. 18 (2006) para 12(b)*i-iii*.

⁶⁷⁶ OHCHR (2014) 111.

⁶⁷⁷ General Comment No. 18 (2006) para 22.

⁶⁷⁸ Gomes VB (2020) 231.

⁶⁷⁹ Gomes VB (2020) 231.

⁶⁸⁰ General Comment No. 18 (2006) para 22; Gomes VB (2020) 231.

⁶⁸¹ General Comment No. 18 (2006) para 25.

⁶⁸² General Comment No. 18 (2006) para 22; Gomes VB (2020) 231.

⁶⁸³ General Comment No. 18 (2006) para 26.

economic growth and development, increase living standards, meet workforce requirements, and overcome unemployment and underemployment.⁶⁸⁴

The CESCR emphasises the importance of compensation mechanisms in the event of the loss of employment.⁶⁸⁵ State parties can also realise the obligation to fulfil the right to work by engaging in positive measures that will enable and assist persons to enjoy the right to work, and by implementing ‘technical and vocational education plans to facilitate access to employment’.⁶⁸⁶ Programmes should also be established to instil public awareness concerning the right to work.⁶⁸⁷ All persons should have the opportunity to gain their living by work.⁶⁸⁸

According to the CESCR, the ICESCR contains a core obligation for state parties to ensure, at the very least, satisfaction with the minimum essential levels of each right.⁶⁸⁹ The core obligation in the context of the right to work ‘encompasses the obligation to ensure non-discrimination and equal protection of employment’.⁶⁹⁰ In the case of disadvantaged and marginalised groups, including SMWs, the core obligations of the ICESCR require state parties to ensure the right to access employment, avoid any measure resulting in discrimination and unequal treatment, and implement a national employment strategy geared at ensuring that disadvantaged and marginalised groups’ right to work is progressively realised. The plan should also include indicators and benchmarks to measure progress, which is to be reviewed periodically.⁶⁹¹

The general obligation for the right to work requires state parties to ‘ensure the progressive realisation of the exercise of the right to work’.⁶⁹² The ICESCR acknowledges that constraints caused by a limitation in states’ available resources may impact on a state’s ability to realise Article 6 of the ICESCR fully. The ICESCR provides immediate obligations in relation to the right to work. The immediate obligations include that the right to work must be exercised

⁶⁸⁴ Theron J ‘What is decent about “decent work”? An argument for the right to work in South Africa’ in Busby N, Brodie D & Zahn R (eds) *The Future Regulation of Work: New Concepts, New Paradigms* (2016) 188; Gomes VB (2020) 231.

⁶⁸⁵ General Comment No. 18 (2006) para 26.

⁶⁸⁶ General Comment No. 18 (2006) para 27.

⁶⁸⁷ General Comment No. 18 (2006) para 28; Gomes VB (2020) 232.

⁶⁸⁸ ICESCR, Article 6(1).

⁶⁸⁹ Committee on Economic, Social and Cultural Rights, United Nations, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, para 1, of the Covenant) E/1991/23 (1990) para 10 (hereafter ‘General Comment No. 3 (1990)’).

⁶⁹⁰ General Comment No. 18 (2006) para 31.

⁶⁹¹ General Comment No. 18 (2006) para 31 (a)-(c).

⁶⁹² General Comment No. 18 (2006) para 19.

without discrimination of any kind, and that states must immediately take steps to ensure the full realisation of the right to work.⁶⁹³ While state parties are to progressively realise the right to work, they must move effectively and expeditiously to fully realise the right to work in terms of Article 6.⁶⁹⁴

3.4.1.3 Right to social security

While there is no internationally accepted definition of social security⁶⁹⁵ in terms of the ICESCR, everyone has the right to social security, which includes social insurance.⁶⁹⁶ The right to social security encompasses the right to access and maintain benefits without discrimination based on nationality.⁶⁹⁷ Foreign nationals should receive social security benefits insofar as they have contributed to social security schemes, even if they leave the host state.⁶⁹⁸

The right to social security is crucial, as it guarantees human dignity for all persons, especially when circumstances do not allow persons to fully realise and enjoy rights contemplated or set out in the ICESCR.⁶⁹⁹ According to Stamm, the right to social security in the ICESCR encompasses all articles within the ICESCR.⁷⁰⁰ Due to the importance of the right to social security, it must be protected and enforced by courts and other legal institutions to enforce rights.⁷⁰¹ The right to social security includes the ability to access and maintain benefits to secure protection against, inter alia, ‘(a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; (b) unaffordable access to health care; and (c) insufficient family support, particularly for children and adult dependents’.⁷⁰²

⁶⁹³ General Comment No. 18 (2006) para 19.

⁶⁹⁴ General Comment No. 18 (2006) para 20.

⁶⁹⁵ Zamani SG & Evin AA ‘The right to social security under international law’ (2016) 7(5) *Mediterranean Journal of Social Sciences* 48.

⁶⁹⁶ ICESCR, Article 9.

⁶⁹⁷ Committee on Economic, Social and Cultural Rights, United Nations, General Comment No. 19: The right to social security E/C.12/GC/19 (2008) para 2 and para 36 (hereafter ‘General Comment No. 19 (2008)’).

⁶⁹⁸ General Comment No. 19 (2008) para 36.

⁶⁹⁹ General Comment No. 19 (2008) para 1.

⁷⁰⁰ Stamm I ‘The human right to social security and its impact on socio-political action in Germany and Finland’ (2017) 2 *Journal of Human Rights and Social Work* 26.

⁷⁰¹ Curtis C *Courts and the Legal Enforcement of Economic, Social and Cultural Rights: Comparative Experiences of Justiciability* (2008) 43.

⁷⁰² General Comment No. 19 (2008) para 2.

States are obliged to take effective measures to the maximum of their available resources to progressively and fully recognise the right to social security,⁷⁰³ without any discrimination, in a manner that guarantees at the very least, ‘a minimum enjoyment of this human right’.⁷⁰⁴ While the ICESCR recognises that the right to social security must be progressively realised and is subject to the available resources of the state, it also places an immediate obligation on states to guarantee that social security rights will be exercised without discrimination of any kind.⁷⁰⁵

Three specific obligations are imposed on states: the obligation to respect, to protect, and to fulfil the right to social security.⁷⁰⁶ State parties are obligated to formulate legislation and policies that ensure compliance with the ICESCR in relation to the right to social security.⁷⁰⁷ To fulfil the obligations of the right to social security, state parties must introduce monitoring indicators, and benchmarks are to be established to assess states’ compliance with the actions of the ICESCR.⁷⁰⁸ The obligations to respect, protect and fulfil the right to social security are discussed below.

In terms of the obligation to respect the right to social security, state parties are to refrain from interfering with the enjoyment of the right to social security.⁷⁰⁹ The obligation to respect the right to social security creates a negative obligation on states which includes desisting from participating in any practice that denies or limits equal access to social security, refraining from unreasonably interfering with ‘self-help or customary or traditional arrangements for social security’, and arbitrary interfering with institutions that have been established to provide social security.⁷¹⁰

⁷⁰³ Panel of Constitutional Experts ‘The meaning of “progressive” (sections 25 and 26)’ <https://www.justice.gov.za/legislation/constitution/history/LEGAL/CP006026.PDF> (accessed 29 December 2022) para 5(1).

⁷⁰⁴ General Comment No. 19 (2008) para 4; Committee on Economic, Social and Cultural Rights, United Nations, Statement on social protection floors: an essential element of the right to social security and of the sustainable development goals E/C.12/54/3 (2015) para 10.

⁷⁰⁵ General Comment No. 19 (2008) para 40; Liebenberg S ‘Social security as a human right’ <http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module11b.htm> (accessed 29 December 2022).

⁷⁰⁶ General Comment No. 19 (2008) para 43; Vonk G & Olivier M (2019) 228.

⁷⁰⁷ General Comment No. 19 (2008) para 67.

⁷⁰⁸ General Comment No. 19 (2008) para 74.

⁷⁰⁹ Social Protection & Human Rights ‘Introduction to the right to social security’ <https://socialprotection-humanrights.org/introduction-to-the-right-to-social-security/> (accessed 29 December 2022).

⁷¹⁰ General Comment No. 19 (2008) para 44; *Grootboom* para 34.

In terms of the obligation to protect the right to social security, state parties must ‘prevent third parties from interfering ... with the enjoyment of the right to social security’.⁷¹¹ The obligation to respect the right to social security includes adopting legislative measures prohibiting third parties from denying equal access to social security schemes, and prohibiting third parties from failing to pay required contributions for employees and other beneficiaries.⁷¹² In the instance where social security schemes are operated or controlled by third parties, state parties are responsible for administering the national security system to ensure that third parties do not interfere with access to and enjoyment of the right to social security.⁷¹³ State parties must establish regulatory systems which prevent abuse, and ensure independent monitoring, genuine participation by the public, and penalties for non-compliance.⁷¹⁴ In terms of the obligation to fulfil the right to social security, state parties are required to adopt measures directed at fully realising the right to social security.⁷¹⁵ The obligation to fulfil the right to social security is further divided into the obligations to facilitate, promote and provide.⁷¹⁶

The obligation to facilitate the right to social security is a positive obligation on states to assist people by, inter alia, (a) recognising the right to social security in their national legal systems; (b) adopting strategic plans to realise the right; and (c) ensuring that the social security system is adequate, accessible to all and covers risks and contingencies.⁷¹⁷ The obligation to promote the right to social security requires state parties to raise public awareness and provide education regarding social security schemes.⁷¹⁸ When individuals or groups cannot realise the right to social security due to circumstances beyond their control, state parties are obliged to provide the right to social security within their available resources and existing social security framework.⁷¹⁹ State parties should also establish non-contributory schemes for those who

⁷¹¹ General Comment No. 19 (2008) para 45.

⁷¹² General Comment No. 19 (2008) para 45. Maastricht University & International Commission of Jurists ‘Maastricht principles on extraterritorial obligations of states in the area of economic, social and cultural rights’ <http://www.icj.org/wp-content/uploads/2012/12/Maastricht-ETO-Principles-ENG-booklet.pdf> (accessed 31 December 2022) 5.

⁷¹³ General Comment No. 19 (2008) para 46.

⁷¹⁴ General Comment No. 19 (2008) para 46; International Commission of Jurists ‘State obligations stemming from international law’ <https://www.icj.org/chapter-2-esc-rights-under-international-law-and-the-role-of-judicial-and-quasi-judicial-bodies-2/2-3-identifying-breaches-of-international-obligations-of-states-pertaining-to-esc-rights/2-3-1-state-obligations-stemming-from-international-law/> (accessed 31 December 2022).

⁷¹⁵ General Comment No. 19 (2008) para 47.

⁷¹⁶ Amnesty International *Human rights for human dignity: A primer on economic, social and cultural rights* 2ed (2014) 65.

⁷¹⁷ General Comment No. 19 (2008) para 48; Amnesty International (2014) 65.

⁷¹⁸ General Comment No. 19 (2008) para 49.

⁷¹⁹ General Comment No. 19 (2008) para 50.

cannot make contributions to ensure their own social protection.⁷²⁰ According to the CESCR, social security schemes must provide for disadvantaged and marginalised groups, even when state parties have limited capacity to finance social security.⁷²¹

State parties have core obligations in terms of the right to social security to ensure, at the very least, that the essential levels of the rights are satisfied.⁷²² The core obligation requires state parties to provide a minimum essential level of benefits such as health care and education; ensure non-discrimination by ensuring access to social security schemes, especially to disadvantaged and marginalised individuals and groups; protect social security schemes already in existence from unreasonable interference; and adopt national social security strategies, particularly with respect to disadvantaged and marginalised individuals and groups. State parties must take targeted steps to ensure access to social security schemes and monitor the extent of the realisation of the right to social security.⁷²³

3.4.1.4 Right to just and favourable conditions of work

In terms of Article 7 of the ICESCR, everyone has the right to the enjoyment of just and favourable working conditions.⁷²⁴ According to the CESCR, the right to just and favourable conditions of work should also be provided for migrant workers in the same manner as provided for citizens, reaffirming the principle of non-discrimination.⁷²⁵ Due to the general vulnerability of migrant workers, state parties are to ensure, through legislation and policies, that migrant workers enjoy no less favourable treatment than citizens and other workers.⁷²⁶

⁷²⁰ General Comment No. 19 (2008) para 50; Vonk G & Olivier M (2019) 223.

⁷²¹ General Comment No. 19 (2008) para 51.

⁷²² General Comment No. 19 (2008) para 59; Vonk G & Olivier M (2019) 228.

⁷²³ General Comment No. 19 (2008) para 59.

⁷²⁴ The right to the enjoyment of just and favourable working conditions means that:

- (1) remuneration must be fair, especially when work done is of equal value; and apply without any distinction of any kind;
- (2) equal pay and working conditions must apply for men and women;
- (3) working conditions are to ensure a decent standard of living;
- (4) all workers should enjoy safe and healthy working conditions;
- (5) all employees should have an equal opportunity to be promoted and
- (6) all workers are entitled to the enjoyment of leisure, rest and the 'reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays'. Remuneration includes salary; wages; direct or indirect cash. It also includes remuneration in kind, such as grants; food allowances; child-care facilities; housing allowance; and contributions to health insurance. General Comment No. 23 (2016) para 7. In the consideration of promotion, only seniority and competence must be considered when promoting to an appropriate higher level. ICESCR, Article 7(c); ICESCR, Article 7.

⁷²⁵ General Comment No. 23 (2016) para 5.

⁷²⁶ General Comment No. 23 (2016) para 47(e).

The right to just and favourable conditions of work protects the right to work.⁷²⁷ Migrants were severely affected by the Covid-19 pandemic. State parties should therefore adopt targeted measures to mitigate against the impact of the pandemic and similar disasters on vulnerable groups.⁷²⁸ The CESCR has also listed factors that increase the vulnerabilities faced by migrant workers,⁷²⁹ such as where an employer has control over the migrant's residence status if the migrant is tied to a certain employer, and if migrants cannot speak the national language(s).⁷³⁰

Due to the vulnerability of migrant workers, state parties are not only required to ensure that migrant workers enjoy no less favourable treatment than nationals, but also to adopt special measures for the protection of undocumented migrant workers to ensure that potential abuses due to the vulnerability of migrant workers are addressed.⁷³¹ The general working conditions faced by many migrants are low-income 'unsafe working environments, the non-payment of wages, a virtual absence of social protection, the denial of freedom of association and workers' rights, discrimination and xenophobia'.⁷³²

Across the globe, the realisation of the right to just and favourable working conditions is still limited for some. In certain instances, workers do not enjoy just and favourable working conditions at all.⁷³³ In addition, the CESCR has expressed concerns regarding the insufficient level of funding for labour inspectors, and the shortage of qualified labour inspectors.⁷³⁴ The CESCR has recommended that the South African state increase funding for labour inspectors, secure qualified labour inspectors, and ensure that compliance orders issued by labour

⁷²⁷ Desierto D 'Calibrating human rights and necessity in a global public health emergency: revive the UN OHCHR's ICESCR compliance criteria' <https://www.ejiltalk.org/calibrating-human-rights-and-necessity-in-a-global-public-health-emergency-revive-the-un-ohchrs-icescr-compliance-criteria/> (accessed 31 December 2022).

⁷²⁸ Committee on Economic, Social and Cultural Rights, United Nations, Statement on the coronavirus disease (COVID-19) pandemic and economic, social and cultural rights E/C.12/2020/1 (2020) para 5 & para 15.

⁷²⁹ Committee on Economic, Social and Cultural Rights, United Nations: Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights E/C.12/2017/1 (2017) para 13.

⁷³⁰ Committee on Economic, Social and Cultural Rights, United Nations: Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights E/C.12/2017/1 (2017) para 13.

⁷³¹ Committee on Economic, Social and Cultural Rights, United Nations: Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights E/C.12/2017/1 (2017) para 13.

⁷³² Ngandwe PJ 'The paradox of migration and the interests of the atomistic nation-states: The Southern African perspective' (2013) 16(1) *PELJ* 435.

⁷³³ General Comment No. 23 (2016) 2.

⁷³⁴ CESCR: Concluding observations SA (2018) para 43.

inspectors are implemented.⁷³⁵ The protection of workers through legislative measures in South Africa is discussed further in chapter 4.

Article 7 of the ICESCR requires member states to establish a national minimum wage to provide all workers with the chance to make a decent living for themselves and their dependents.⁷³⁶ The minimum wage may not apply to many SMWs employed in an occupation listed on the CSL, but even if it applied to SMWs, the amount to be earned as a minimum wage is insignificant and will not result in a decent standard of living for anyone earning it.⁷³⁷ While it is too early to speculate on what the CESCR may find in terms of the new minimum wage in South Africa, the regulations of the National Minimum Wage Act do not apply the minimum wage across all sectors.⁷³⁸

The general obligations arising from Article 7 of the ICESCR require state parties to comply with the core obligations of Article 7 while taking intentional, concrete and targeted steps towards the progressive realisation of the right.⁷³⁹ State parties must also regulate and enforce the right to just and favourable working conditions, and sanction third parties who are in violation of the right.⁷⁴⁰ State parties are not to take any deliberate retrogressive measures without justification; if this is unavoidable, they must prove that such retrogressive action is temporary, necessary and non-discriminatory.⁷⁴¹ State parties must guarantee that the right is exercised without discrimination of any kind.⁷⁴²

3.5 Conclusion

The chapter aimed at identifying the rights of SMWs as expressed in the selected international instruments. Section 233 of the Constitution allows the courts the ability to consider all

⁷³⁵ CESCR: Concluding observations SA (2018) para 44.

⁷³⁶ ICESCR, Article 7.

⁷³⁷ The regulations of the National Minimum Wage Act 9 of 2018 provide that the current minimum wage in South Africa is set at R21.69 per hour, which also applies to foreign nationals who are employees. In 2017, in response to South Africa's report to the CESCR, the CESCR noted concerns that the minimum wage of R20 at the time was insufficient and that the minimum wage is not applicable across all sectors. National Minimum Wage Act 9 of 2018 regulation in GN 76 GG 44136 of 8 February 2021, reg 1; National Minimum Wage Act 9 of 2018, s 3(1); CESCR: Concluding observations SA (2018) para 39.

⁷³⁸ Domestic workers and public works programme workers earn a minimum wage below R21.69 per hour. Domestic workers' minimum wage is R19.09 per hour, and public works programme workers' minimum wage is R11.93 per hour.

⁷³⁹ General Comment No. 23 (2016) para 51.

⁷⁴⁰ General Comment No. 23 (2016) para 51.

⁷⁴¹ General Comment No. 23 (2016) para 52.

⁷⁴² General Comment No. 23 (2016) para 53.

international instruments, binding or not, in the interpretation of legislation and the court must prefer an interpretation in line with international law in general.⁷⁴³ As such, the principles identified in binding, non-binding and non-ratified instruments are used to assess the South African position in chapter 4. Non-binding and non-ratified instruments form important frameworks that may be used to improve the South African state's ability to attract SMWs. The GCM, for example, provides important principles for improving migration and migration processes. The GCM will also, therefore, serve as a basis upon which the South African framework for migration will be assessed later.

The ICESCR is the only instrument reviewed above that the South African state is bound to implement. The benchmarks set by the CESCR, 'availability, accessibility, acceptability and quality', will be used in the next chapter to evaluate the South African legal framework. Important rights for SMWs identified in the ICESCR are the right to social security, right to work, right to just and favourable conditions, and the concept of decent work.

The principles of non-discrimination and decent work find application across non-binding, non-ratified and binding instruments. Non-discrimination or equality of treatment is both a right, benchmark and state obligation, supported by non-binding, non-ratified and binding instruments discussed in this chapter. In the next chapter, reference is made to non-discrimination or equality of treatment to compare the realisation and enjoyment of rights as experienced by citizens and SMWs. Decent work is specifically provided for by the strategies in terms of the DWA and other non-binding instruments. The right to work as provided for by the ICESCR, and as interpreted by the CESCR, indicates that work in the context of the ICESCR must be decent work. Like non-discrimination, decent work finds application across non-binding and non-ratified instruments, as well as through ratified and thus binding instruments.

Chapter 4 takes the research further by assessing whether the South African state meets its obligations for recognising and realising the rights of SMWs as identified by the multilateral agreements discussed in this chapter. The effectiveness of the CSWV is improved when the rights of migrants are protected by national legislation and meet international obligations. More importantly, SMWs should have access to those rights in the same or similar manner as citizens.

⁷⁴³ *S v Makwanyane and Another* 1995 (6) BCLR 665 para 35.

Chapter Four: Regularising the Status of Foreign Nationals, Particularly Holders of the Critical Skills Work Visa

4.1 Introduction

Chapter 2 gave the history of immigration to South Africa, and discussed the South African state's attempts to facilitate employment of SMWs. This chapter sets out the eligibility requirements for the CSWV in terms of the IA that was assented to on 31 May 2002. The purposes of the IA are to regulate the admission and departure of foreign nationals and to create a system of immigration control for South Africa.⁷⁴⁴ Some of the objectives of the IA⁷⁴⁵ are to ensure that

economic growth is promoted through the employment of needed foreign labour, foreign investment is facilitated, the entry of exceptionally skilled or qualified people is enabled, skilled human resources are increased, academic exchanges within the Southern African Development Community is facilitated ...⁷⁴⁶

The objective of the IA is to ensure that SMWs can work in South Africa.⁷⁴⁷ The South African state must attract SMWs, but its approach to immigration is still citizens first.⁷⁴⁸ The preamble to the IA states that 'the contribution of foreigners in the South African labour market [must] not adversely impact on existing labour standards and the rights and expectations of South African workers'.⁷⁴⁹ In line with this objective, under the direction of the Minister of Home Affairs, the Director-General of the DHA must implement the IA.⁷⁵⁰ The Minister of Home Affairs also has the authority to publish regulations consistent with the IA to implement the IA.⁷⁵¹ Alongside the IA, the chapter also covers other related legislation and rights pertaining to the employment of SMWs.⁷⁵²

⁷⁴⁴ IA, preamble; Alimohammadi E & Muller G (2019) 807.

⁷⁴⁵ IA (as amended), effective from 26 March 2014: Proc R33 GG 37679 of 22 May 2014.

⁷⁴⁶ IA, preamble, (d).

⁷⁴⁷ Isike and Isike confirm that the IA is meant to facilitate an easy flow of skilled foreign nationals and investors into South Africa for the benefit of economic growth. Isike C & Isike E (2012) 102.

⁷⁴⁸ IA, s 7(1)(m) states that 'the Minister may, after consultation with the Board, make regulations relating to the steps to be taken to ensure proper exploitation of the local labour market before a work visa is issued in terms of section 19'. Statement M Gigaba (2018).

⁷⁴⁹ IA, preamble (i).

⁷⁵⁰ IA, s 1; s 3; s 4(5); *A.K and Others v Minister of Home Affairs and Another* [2023] ZAWCHC 52 para 5.

⁷⁵¹ IA, s 7.

⁷⁵² Employment Services Act 4 of 2014, s 2(h) - (hereafter 'ESA').

In addition, the chapter considers whether the stated requirements and regulations of the CSWV as an instrument, and the surrounding socio-economic landscape in South Africa, are sufficient to attract SMWs to fill critical occupations in South Africa as their destination of choice. This chapter investigates the following sub-inquiries: What is the current law for attracting skilled foreign nationals? Does the South African state meet international obligations regarding SMWs? Once a CSWV has been granted, does a SMW have access to rights in the same manner as citizens?

The chapter also discusses skilled asylum seekers and skilled refugees. To prevent further brain waste, it is vital to determine whether the CSWV can be used, realistically, to employ skilled asylum seekers and skilled refugees who are already in the country. If the CSWV is ineffective in facilitating the employment of skilled asylum seekers and skilled refugees to be employed for an occupation on the CSL, why is this so?

Finally, it assesses whether any impediments exist within South Africa's legislative framework, including access to rights and their enforcement, that may deter the attraction of SMWs to South Africa. Section 19(4) of the IA provides for the CSWV. The CSWV has been implemented to facilitate the employment of SMWs. The question in this thesis is whether the CSWV is effective in facilitating employment for SMWs, thus attracting SMWs to South Africa. The central question is whether the CSWV and its determination processes are the most discouraging factor for SMWs. Therefore, the chapter questions whether working conditions and access to rights may be eliminated as potential factors discouraging SMWs from choosing to migrate to South Africa.

4.2 Legal requirements for skilled migrant workers entering South Africa

In sum, the objectives of the IA are to attract investors, attract skilled employees, attract tourists, maximise economic and labour opportunities for South African citizens through migration,⁷⁵³ and to foster the integration of migration of the NDP and other national strategies

⁷⁵³ Labour opportunities may be maximised for citizens through the exchange of academic staff for study, research, and training. Maximising labour opportunities for citizens are also achieved through skills transfer programs from SMWs to citizens. IA, s 2(1)(j)(i) *ee*, s 2(1)(j) *ii*.

where relevant.⁷⁵⁴ The steps for legal entry into the country are stipulated in the IA.⁷⁵⁵ The IA plays a vital role in nation-building and social cohesion by determining the status of foreign nationals and protecting the rights of foreign nationals, as the Constitution guarantees.⁷⁵⁶

Section 19(4) of the IA allows persons with critical skills and members of their families to be issued with a CSWV. If the applicant meets all the requirements for the CSWV as set by the IA, the regulations thereof, and the formalities required by the DHA,⁷⁵⁷ the applicant should be issued with a CSWV. Once issued, the CSWV is valid for a period not longer than five years.⁷⁵⁸ If a holder of the CSWV has a spouse or dependent children,⁷⁵⁹ the spouse or dependent

⁷⁵⁴ IA, s 2 (1).

⁷⁵⁵ A foreign national who is a major seeking admission or departure from the Republic must enter or exit at a designated port of entry unless exempted by the Minister of Home Affairs. The foreign national must have a valid passport. An immigration officer must record the admission or departure of foreign nationals. The documents of the foreign national must then be examined or an immigration officer must interview the foreign national. If the foreign national does not have a permanent residence permit, he or she must be in possession of a valid visa as prescribed by the IA. All persons applying for visas must do so outside of the country. A major is someone who has reached the age of 18 years old. Children's Act No 38 of 2005, s 17; IA, s 9(1); IA, s 9(3)(a)–(d); IA, s 9(4)(a)–(b); *Minister of Home Affairs v Ahmed* 2017 (6) SA 554 (SCA) para 10; *Ahmed and Others v Minister of Home Affairs* (2018) para 29.

⁷⁵⁶ Motlanthe K (2017) 347.

⁷⁵⁷ The Minister of Home Affairs has set out additional requirements to accompany an application for a CSWV. These include:

- passport valid for 30 days after the expiry of the visit;
- medical report which is not older than six months;
- marriage certificate or proof of official recognition of the spousal relationship which was issued by the foreign country of the applicant;
- where there is a spousal relationship with a citizen or resident of South Africa, an affidavit is required with documentation proving cohabitation, the extent of shared financial responsibilities and if there are children, the particulars of the children must also be provided;
- proof of recognised union in accordance with the Customary Marriages Act 120 of 1998, if applicable;
- decree of divorce, if applicable;
- legal separation order, if applicable;
- proof of custody order, if applicable;
- written consent of parents and/or sole custody parent and proof of sole custody where applicable;
- proof of legal adoption, if applicable;
- death certificate where there is a late spouse, if applicable;
- a yellow fever vaccination if the applicant travels or intends to travel to or transit through a yellow fever endemic area; and
- proof of payment of the application fee with an additional VFS service fee of R1 550 to be paid before the application may be submitted.

Requirements to accompany the CSWV application as described above are set out in IA regulations in GN 413, reg 9; reg 18(1)a-b; Department of Home Affairs *Annual Report 2017-8* (2018) – (hereafter 'DHA (2018)'); The CSWV application fee is R1 520, and the VFS service fee is R1 550. VFS Global 'Visa information: Critical skills visa' <https://visa.vfsglobal.com/one-pager/dha/southafrica/english/index.html#critical-skills-visa> (accessed 31 December 2022).

⁷⁵⁸ IA regulations in GN 413, reg 19(6).

⁷⁵⁹ Applicants are all required to pay the application fee of R1,520 per person and the Visa Facilitation Service (VFS) service fee of R1,550 per person, if they make applications for permanent residence and permits together with the application for the CSWV.

children will be issued with a visa to reside in the country for a period not exceeding the validity of the CSWV issued to the holder.⁷⁶⁰

The regulations to the IA establish the requirements to be issued with a CSWV.⁷⁶¹

- The submission of a written undertaking by the employer⁷⁶² who accepts responsibility for the costs of deportation of the foreign national and his or her dependents should deportation become necessary.⁷⁶³
- All applications in terms of the CSL of 2 August 2022 must be accompanied by a valid offer of employment.⁷⁶⁴
- A police clearance certificate.⁷⁶⁵
- The employer must ensure that the passport of the foreign national is always valid during the period of employment.⁷⁶⁶
- The application for a CSWV must be accompanied by proof that the applicant falls within a critical skills category as it appears on the CSL in the form of:
 - confirmation in writing by an organisation recognised by the SAQA or any relevant department confirming the skills or qualifications of the applicant and their post-qualification experience;⁷⁶⁷
 - ‘if required by law, proof of application for a certificate of registration with the professional body, council or board recognised by SAQA in terms of section 13(1)(i) of the National Qualifications Framework Act’;⁷⁶⁸

⁷⁶⁰ IA regulations in GN 413, reg 19(7).

⁷⁶¹ IA regulations in GN 413.

⁷⁶² Where there is no employer yet, the applicant must provide proof of sufficient financial means to the minimum value of R3,000, in the form of three months’ bank statements. Immigration Act 13 of 2002 regulations in GN 453 GG 37716 of 3 June 2014.

⁷⁶³ IA regulations in GN 413, reg 18(1)(a).

⁷⁶⁴ DHA ‘Director-general’s immigration directive no.1 of 2022’ <http://www.dha.gov.za/images/notices/DGs-Directive-No.-1-of-2022-critical-skills.pdf> (accessed 24 February 2023).

⁷⁶⁵ The police clearance certificate must be issued by the police or the security authority of each country where the applicant has resided for 12 months or longer since the applicant reached the age of 18 years, ‘during the five years immediately preceding the date of the application.’ The certificate must reflect the criminal record, if any, and the applicant’s character. The certificate must not be older than six months at the time of submission. DHA (2018); IA regulations in GN 413, reg 1(b); DHA ‘Immigration directive no.5 of 2023: waiver - radiological report and partial waiver - police clearance certificate’ <https://assets.ctfassets.net/xxg4p8gt3sg6/2DFMwShSznYcgfRdXugs2R/8c30101196311fa48594746dc7133355/ew-Immigration-Directive-No-5-of-2023-Police-Clearance-and-Radiological-Reports.pdf> (accessed 08 August 2023).

⁷⁶⁶ IA regulations in GN 413, reg 2.

⁷⁶⁷ IA regulations in GN 413, reg 18(5)(a).

⁷⁶⁸ IA regulations in GN 413, reg 18(5)(b); National Qualifications Framework Act 67 of 2008, s 13(1)(i).

- o proof that the qualification was evaluated by SAQA, and if necessary, the qualification must be translated into one of the official languages of the Republic.⁷⁶⁹

Applicants for the CSWV experience complexities and challenges when applying for a CSWV due to inconsistencies in the manner in which the DHA processes applications.⁷⁷⁰ For this reason, a discussion concerning the implementation and processing of the CSWV by the DHA is necessary.

Section 38 of the IA regulates the employment conditions of foreign nationals, making it illegal to employ a foreign national whose status does not allow for employment in South Africa.⁷⁷¹ Section 49(3) of the IA goes further by criminalising any contravention of section 38 of the IA.⁷⁷² Biney believes that section 38 and section 49(3) of the IA differentiate between skilled, low-skilled and unskilled migrants by creating unequal opportunities that have repercussions for the social protection and human capability of some foreign migrants.⁷⁷³ However, section 38 of the IA merely differentiates between the employment of foreign nationals who have entered the country legally and those who have entered illegally. Section 49(3) establishes the consequences employers will face for employing foreign nationals who have entered the country illegally. Therefore, sections 38 and 49(3) do not differentiate between skilled and unskilled migrants.

Migrants may be in South Africa legally with little or even no skills. In the instance of unskilled refugees who can work in South Africa, their status as refugees allows for legal employment.⁷⁷⁴ Conversely, it is possible to be in South Africa illegally while being highly skilled. For instance, this might include skilled asylum seekers who do not yet possess an asylum seeker transit visa or a SMW who did not enter the country via one of the official ports of entry. Section 38 of the IA deals with the employment of illegal foreign nationals. Section 38 does

⁷⁶⁹ IA regulations in GN 413, reg 18(5)(c).

⁷⁷⁰ Owusu-Sekyere E, Wentzel M & Kanyane B et al (2019) 36.

⁷⁷¹ Section 38 of the IA stipulates that '[n]o person shall employ an illegal foreigner; a foreigner whose status does not authori[s]e him or her to be employed by such person; or a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner's status'. IA, s 38.

⁷⁷² Section 49(3) of the IA provides that 'anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year ...' IA, s 49(3).

⁷⁷³ Biney E *Inequality of opportunity: The plight of foreign workers in South Africa* (unpublished PhD thesis, University of Cape Town, 2016) 115.

⁷⁷⁴ Khan F, Mbatani S & Marais C 'Trusting democracy: the law can work for refugees, but what the system needs is an "injection of humanity"' (2021) 56 *Journal of Asian and African Studies* 56; Khan F 'Does the right to dignity extend equally to refugees in South Africa?' (2020) 20 *African Human Rights Law Journal* 279.

not place an onus on employers to refuse to employ unskilled foreign nationals. The onus on employers requires them to refuse to employ illegal foreign nationals, skilled or unskilled.

The ESA seeks to facilitate and regulate the employment of foreign nationals in accordance with the objectives of the ESA and the IA.⁷⁷⁵ The purposes of the ESA in relation to foreign nationals are to

facilitate the employment of foreign nationals in the South African economy, where their contribution is needed in a manner— (i) that gives effect to the right to fair labour practices contemplated in section 23 of the Constitution; (ii) that does not impact adversely on existing labour standards or the rights and expectations of South African workers; and (iii) that promotes the training of South African citizens and permanent residents.⁷⁷⁶

Section 8(2)(a) of the ESA states that

the Minister may, after consulting the Board, make regulations to facilitate the employment of foreign nationals, the regulations may include that ... [t]he employers must satisfy themselves that there are no other persons in the Republic with suitable skills to fill a vacancy, before recruiting a foreign national.

Section 8(2) of the ESA is not preemptory, as inferred by the wording of the section that states that the Minister *may* make certain regulations to regulate the employment of foreign nationals.

Nothing prevents the legislature from justifiably limiting foreign nationals' access to certain occupations, especially when such occupations do not require skills and may be filled by citizens. At the same time, requiring employers to first search for suitable citizens before hiring a foreign national may also serve as a deterrent to a skilled foreign national considering taking up employment in South Africa.⁷⁷⁷ This requirement also has the impact of discouraging employers from employing foreign nationals as it is not clear how employers are to satisfy themselves that no other persons are available in South Africa with suitable skills to fill a vacancy.⁷⁷⁸ In *Mukuru Financial Services (Pty) Ltd and Another v Department of Employment*

⁷⁷⁵ ESA, Preamble.

⁷⁷⁶ ESA, 2(1)(h).

⁷⁷⁷ *Rafoneke and Others v Minister of Justice and Correctional Services and Others (Makombe Intervening)* [2022] ZACC 29 para 75-7, 82.

⁷⁷⁸ Mubangizi JC 'Xenophobia in the labour market: A South African legal and human rights perspective' (2021) 21(2) *International Journal of Discrimination and the Law* 148.

and Labour,⁷⁷⁹ the Western Cape High Court did not provide a solution as to how employers are to satisfy themselves that there are no suitable citizens as envisioned in section 8(2) of the ESA; however, the court held that excluding South African citizens from employment opportunities constituted unfair discrimination.⁷⁸⁰ Employing citizens is a legitimate government purpose; thus employers must be cognizant of the provisions of the ESA before seeking to employ an SMW with a CSWV for a skill listed on the CSL, instead of a skilled citizen.

The ICRMW provides that the host state may restrict access to some occupations if the qualification(s) of the migrant was acquired outside of the territory.⁷⁸¹ States must, however, attempt to provide for the recognition of these qualifications.⁷⁸² The ESA seems to articulate this, in that employment of foreign nationals must not adversely impact on the rights of citizens, and where the employment of a foreign national is needed, it should promote the training of citizens and permanent residents.⁷⁸³

4.3 Critical skills work visas for asylum seekers and refugees

The amendment to the RA allows for the creation of asylum seeker processing centres (hereafter ‘ASP centres’), where they will undergo a risk-based assessment and be detained during the adjudication of their asylum application.⁷⁸⁴ The creation of ASP centres is concerning as they appear to be a euphemism for a ‘de facto detention centre’.⁷⁸⁵ Asylum

⁷⁷⁹ (2022) 43 ILJ 1171 WCC).

⁷⁸⁰ *Mukuru Financial Services (Pty) Ltd and Another v Department of Employment and Labour* (2022) 43 ILJ 1171 WCC) para 28.

⁷⁸¹ ICRMW, Article 52(2)(b).

⁷⁸² ICRMW, Article 52(2)(b).

⁷⁸³ For a detailed discussion on the ESA, See 4.2 above.

⁷⁸⁴ The creation of asylum seeker processing centres and the revocation of the right to seek employment is intended to reduce the pull factor to SA, thereby reducing the number of asylum applications. The basic needs of asylum seekers will be met in the centre, which serves as the justification for removing their right to seek employment. Meeting asylum seekers’ basic needs, however, is a pull factor causing a further delay to the already backlogged asylum-seeker list of applications. While in the processing centre, asylum seekers will not be allowed to work, unless they are subject to exceptions. Department of Home Affairs *Annual Report 2017-8* (2018) 23; Carciotto S, Gastrow V & Johnson C (2018) ‘Manufacturing illegality: the impact of curtailing asylum seekers’ right to work in South Africa’ The Scalabrini Institute for Human Mobility in Africa: Cape Town 15; Van Lennep T ‘The state of the South African refugee protection regime – current status’ <https://hsf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-i-current-status> (accessed 31 December 2022) – (hereafter ‘Van Lennep T (2018)’); Ziegler R ‘Access to effective refugee protection in South Africa: legislative commitment, policy realities, judicial rectifications?’ (2020) 10 *Constitutional Court Review* 96; DHA ‘White paper on international migration for South Africa’ (2017) 61; The *White Paper on Home Affairs* (published in GG 42162 of 18 January 2019) 46.

⁷⁸⁵ Ekambaram SS ‘Foreign nationals are the “non-whites” of the democratic dispensation’ in Satgar V, Dunbar-Ortiz R, Manji F et al. in *Racism After Apartheid: Challenges for Marxism and Anti-Racism* (2019) 227.

seekers have been allowed to work in South Africa since the creation of the RA, but upon the creation of the ASP centres, asylum seekers will lose their right to seek employment automatically after being issued with an asylum seeker visa.⁷⁸⁶ The creation of the ASP centres will not create a total ban on the right to seek employment, as asylum seekers may apply for an endorsement allowing them to seek employment.⁷⁸⁷ If the right to seek employment is endorsed on the asylum seeker visa, the holder of such visa must furnish the DHA with a letter of employment within 14 days of being employed.⁷⁸⁸ Removing the right to seek employment in South Africa while seeking asylum will leave asylum seekers dependent on their family members or civil society organisations.⁷⁸⁹ Furthermore, the United Nations High Commissioner for Refugees has already stated that it will not finance the needs of asylum seekers in South Africa.⁷⁹⁰

While the ASP centres have not yet been established, the White Paper proposes that the establishment of ASP centres is to be implemented by 2030.⁷⁹¹ This is worrying, as the right to seek employment is connected to the right to human dignity.⁷⁹² Human dignity should be afforded to citizens and foreign nationals alike.⁷⁹³ In *S v Dodo*, while discussing sentencing in a criminal trial as a deterrent to prospective offenders, the Constitutional Court held that

[h]uman beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence,

⁷⁸⁶ Van Lennep T (2018).

⁷⁸⁷ The right to seek employment may not be endorsed: the right to seek employment in South Africa may not be endorsed on asylum seekers' visas if the asylum seekers are able to sustain themselves and their dependants; if they are offered shelter by the United Nations High Commissioner for Refugees or any other charity organisation or person; if they seek to extend the right to seek employment in South Africa after they have failed to provide a letter of employment, provided that the letter is subsequently produced while an application in terms of section 21 of the Refugees Act is pending. Refugees Amendment Act 11 of 2017, s 18(8)a-c.

⁷⁸⁸ Should the employer fail to produce the letter of employment or do so fraudulently, they will be guilty of an offence and liable upon conviction to a fine of up to R20,000. If, after the visa has been granted, the holder cannot prove that he has been employed after six months from the date of the endorsement of the right to seek employment, the Director-General of Home Affairs must revoke any right to seek employment. Refugees Amendment Act, s 9-11.

⁷⁸⁹ Refugees Amendment Act, s 7; Studies in Poverty and Inequality Institute & Open Society Initiative to Southern Africa (2012) 'Access to socio-economic rights for non-nationals in the Southern African Development Community' Studies in Poverty and Inequality Institute & Open Society Initiative to Southern Africa 21.

⁷⁹⁰ Van Lennep T (2018); Scalabrini Centre of Cape Town (2016) 'Submission on the Green Paper on International Migration' The Scalabrini Centre: Cape Town 42.

⁷⁹¹ The *White Paper on International Migration for South Africa* (published in GG 41009 of 28 July 2017) 31, 34.

⁷⁹² Constitution, s 10; *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) BCLR 569 (CC) paras 52, 104 & 114.

⁷⁹³ *Lawyers for Human Rights and Other v Minister of Home Affairs and other* 2004 (4) SA 125 (CC) paras 26-7.

which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender's dignity assailed.⁷⁹⁴

The principle noted here is that human beings possess inherent worth.⁷⁹⁵ Where a law is imposed only because of its deterrent effect on others, the person affected by the law is being used as a means to an end. Following the approach by the Constitutional Court in *S v Dodo*, it becomes clear that trying to prevent other asylum seekers from seeking asylum because many others have abused the system of asylum should be frowned upon. The RA, as amended regarding the removal of the right to seek employment, should therefore be considered unconstitutional. By removing the right to seek employment, asylum seekers' rights to human dignity are violated.⁷⁹⁶ The RA as amended goes against the precedent set in *Minister of Home Affairs and others v Watchenuka and Others*,⁷⁹⁷ which posits that the right to seek employment is implicit in the right to human dignity.⁷⁹⁸ As stated in *Affordable Medicines Trust and Others v Minister of Health and Another*,

[w]hat is at stake is more than one's right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One's work is part of one's identity and is constitutive of one's dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and the human personality as a whole [which] ... shapes and completes the individual over a lifetime of devoted activity [and forms] ... the foundation of a person's existence.⁷⁹⁹

⁷⁹⁴ *S v Dodo* 2001 (3) SA 382 (CC) para 38.

⁷⁹⁵ *Dawood v Minister of Home Affairs* 2000 (8) BCLR 837 (CC) para 35.

⁷⁹⁶ *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (2014) ZASCA 143 para 43.

⁷⁹⁷ (2003) ZASCA 142.

⁷⁹⁸ *Minister of Home Affairs and Others v Watchenuka and Others* case (2003) ZASCA 142, para 27; Mfubu P 'What does the 2017 Refugee Amendment Act mean for asylum seekers and refugees living in South Africa?' <https://www.saferspaces.org.za/blog/entry/what-does-the-2017-refugee-amendment-act-mean-for-asylum-seekers-and-refugee> (31 December 2022).

⁷⁹⁹ *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) para 59.

It is apparent from case law that the revocation of the automatic right to seek employment will not pass constitutional muster, as the ability to seek employment is integral to the right to human dignity.

The asylum transit visa, in terms of section 22 of the IA, is valid for five days, allowing asylum seekers to apply for asylum in terms of the RA, at a Refugee Reception Office.⁸⁰⁰ The five-day period may be extended if the application is subject to judicial review.⁸⁰¹ Concerning the section 22 permit, Landau writes that

asylum seekers are issued with a single piece of paper (the ‘Section 22’ permit), often with hand-written amendments and conditions. Few employers or government agents, including the police and many health care workers, recognise this document’s legitimacy. Moreover, after a few months in a coat or trouser pocket, the document itself can become worn and illegible. It can also be easily lost or destroyed.⁸⁰²

Asylum seekers still struggle to find work even though they are in possession of a valid section 22 visa.⁸⁰³ According to Msabah, employers often strictly require a green bar-coded South African identity document or the new identity document card.⁸⁰⁴ Employers often also refrain from employing asylum seekers as visas are granted for a short duration, and asylum seekers must often take leave to renew these visas.⁸⁰⁵ Without a green bar-coded identity document or passport, asylum seekers are prevented from opening bank accounts, getting cell phone SIM cards, entering into credit agreements, and engaging in economic activities that require proof of identity.⁸⁰⁶ Without valid documents, asylum seekers and refugees cannot register with professional bodies as is required by the regulations of the IA for the issuing of a CSWV,⁸⁰⁷ and ultimately applying for the CSWV is done with great difficulty.

⁸⁰⁰ *Ahmed and Others v Minister of Home Affairs* (2018) para 35.

⁸⁰¹ Matlala D ‘Law Reports’ (2018) 589 *De Rebus* 42.

⁸⁰² Landau LB (2005) 1123.

⁸⁰³ *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (2014) ZASCA 143 para 5; SIHMA (2020) 79.

⁸⁰⁴ Msabah BA (2018) 8; SIHMA (2020) 80.

⁸⁰⁵ The South African Human Rights Commission ‘SA legislation on migrants takes wrong path’ <https://www.sahrc.org.za/index.php/sahrc-media/news/item/1416-sa-legislation-on-migrants-takes-wrong-path> (31 December 2022); SIHMA (2020) 79.

⁸⁰⁶ Amicus curiae application (CCT 273/2017) para 29; DOL (2022) 95; *Director-General of the Department of Home Affairs and others v De Saude Attorneys and Another* (2019) ZASCA 46 para 32 (hereafter *DHA v De Saude*’).

⁸⁰⁷ Kavuro C (2015) 255.

Asylum seekers should be able to apply for a CSWV if they qualify.⁸⁰⁸ At present, the IA and RA do not provide specifically for the skills integration or specific status determination of skilled asylum seekers through the CSWV, as their status has not yet been determined. The IA allows for a status change once admitted into South Africa lawfully, so this would thus only apply for refugees.⁸⁰⁹ Asylum seekers are allowed to work in South Africa, but if they wish to participate in an occupation listed on the CSL, they must comply with the same requirements for the CSWV. When applying for a CSWV, the DHA is supposed to allow certain exceptions when asylum seekers do not have access to identity documents or documents to prove their qualifications.⁸¹⁰ The *Ahmed and Others v Minister of Home Affairs and Another* decision⁸¹¹ made it clear that the DHA still denied these applications from asylum seekers, even though an exception had been created. Refugees and asylum seekers are not the focus of this study, but it is submitted that the failure on the part of the legislature to include a section specifically providing for the employment of asylum seekers with the CSWV widens the ambit of brain waste. Indeed, immigrants including refugees and asylum seekers are relatively skilled and well-educated, with two-thirds of them holding a high school diploma or higher.⁸¹² This supports the view that the legislator's failure to provide specifically for skilled refugees or asylum seekers in the country adds to brain waste.⁸¹³

Genuine asylum seekers often endure extraordinary challenges that increase their vulnerability in general.⁸¹⁴ Some of these challenges include language difficulties, shortage of skills because of conditions in their country of origin, xenophobic prejudice, and competition with citizens for jobs.⁸¹⁵ In addition, alleged corruption in the asylum and immigration system leads to

⁸⁰⁸ *Ahmed and Others v Minister of Home Affairs and Another* (2018) ZACC, para 60.

⁸⁰⁹ IA, s 10(6).

⁸¹⁰ See 2.4.3 above.

⁸¹¹ *Ahmed and Others v Minister of Home Affairs and Another* (2018) ZACC 39.

⁸¹² Kalitanyi V & Visser K (2010) 381; DHET (2022) 64.

⁸¹³ See 2.4.3 above.

⁸¹⁴ Zanfrini L 'Europe and the refugee crisis: A real challenge to our civilization' <https://www.un.org/en/academic-impact/europe-and-refugee-crisis-challenge-our-civilization> (31 December 2022); Msabah BA (2018) 2.

⁸¹⁵ *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (2014) ZASCA 143 para 6.

extortion, abuse, and exploitation of foreign nationals who have no documents, or who have obtained them fraudulently.⁸¹⁶

The amount of time it takes to determine whether an asylum seeker qualifies for refugee status creates a massive barrier to asylum seekers engaging in meaningful employment.⁸¹⁷ Regulation 3(1)⁸¹⁸ provides that applications for asylum ‘will generally be adjudicated by the Department of Home Affairs within 180 days of filing a completed asylum application with a Refugee Reception Officer’.⁸¹⁹ Although the turnaround time should be around 180 days, the determination process usually takes between five to 10 years, and sometimes even longer.⁸²⁰ During the 5–10-year period, asylum seekers are in limbo as they wait for the final determination of their refugee status.⁸²¹ While they await their status determination, they are issued with a temporary asylum transit visa in terms of section 22 of the IA. This visa entitles them to sojourn in South Africa lawfully, protects them from deportation, allows them to seek employment and access to educational and health-care facilities.⁸²² The possession of the section 22 visa is thus essential.⁸²³ Until the asylum seeker is issued with a section 22 visa, such a person is considered an illegal foreigner and subject to apprehension, detention, and deportation.⁸²⁴ Furthermore, asylum seekers may appeal to the Refugee Appeal Board if they

⁸¹⁶ Parliamentary Monitoring Group ‘The rights of refugees in the Western Cape and challenges to migration: briefing by Africa Unite and Global Migration South Africa’ <https://pmg.org.za/committee-meeting/11257/> (31 December 2022); Department of Home Affairs *Annual Report 2016-7* (2017) 81-2 (hereafter ‘DHA AAR (2017)’). In a recent High court judgement, one of the parties admitted to paying a sum of R12,000 to an immigration official to obtain a work visa fraudulently. *TR and Others v The Minister of Home Affairs and Others; RA and Others v The Minister of Home Affairs and Others* [2022] ZAWCHC 115 para 7.

⁸¹⁷ Mukumbang FC, Ambe AN & Adebiy BO ‘Unspoken inequality: how COVID-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa’ (2020) 19 *International Journal for Equity in Health* 2; SIHMA (2020) 78.

⁸¹⁸ Refugees Act regulations in GN 418 GG 6779 of 6 April 2000.

⁸¹⁹ Amicus curiae application (CCT 273/2017) para 20.

⁸²⁰ Amicus curiae application (CCT 273/2017) para 21; *DHA v De Saude* para 32; Msabah BA (2018) 8; Mukumbang FC, Ambe AN & Adebiy BO (2020) 2.

⁸²¹ *DHA v De Saude* para 18; *Kiliko and Others v Minister of Home Affairs and others* (2006) 4 SA 114 (C) para 25; Ramjathan-Keogh K ‘The rights of refugees and migrant workers’ in Veriava F, Thom A & Hodgson TF et al. *Basic Education Rights Handbook – Education Rights in South Africa* (2017) 130; DOL (2022) 95; SIHMA (2020) 78.

⁸²² *Tafira and Others v Ngozwane and Others* (2006) ZAGPHC 136, 166; *Saidi and Others v Minister of Home Affairs and Others* (2018) ZACC, para 13; *Arse v Minister of Home Affairs* (2012) 3 All SA 261 (SCA) para 19.

⁸²³ *Eisenberg & Associates & others v Director-General, Department of Home Affairs & others* 2012 (3) SA 508 (WCC) para 75.

⁸²⁴ *Somali Association of South Africa* (2015) para 3; Landau LB ‘Urbanisation, nativism, and the rule of law in South Africa’s “Forbidden” Cities’ (2005) 26(7) *Third World Quarterly* 1121.

want to appeal their status determination.⁸²⁵ This is of little help, since the Refugee Appeal Board seems to be in crisis as it struggles to work through a massive backlog of cases.⁸²⁶

Asylum seekers may be disadvantaged in applying for a CSWV because their status has been determined through the RA instead of being regarded as foreigners in terms of the IA. Even if an asylum seeker eventually defies the odds of securing meaningful employment within their profession, or an occupation listed on the CSL, his or her work in South Africa while issued with the section 22 visa will not count towards the required five years of relevant work experience imperative for applying for permanent residence.⁸²⁷ Permanent residents enjoy all rights, privileges, obligations, and duties of citizens save for those specifically ascribed to citizens only.⁸²⁸ An asylum seeker does not enjoy these rights until he or she has been granted asylum.⁸²⁹ Nothing, however, prevents an asylum seeker from applying for temporary residence in terms of the IA⁸³⁰ even if his or her application for asylum has been rejected.⁸³¹

4.4 Latest migration policy trends in South Africa

South Africa's migration policy, as articulated in the White Paper, determines how the South African state allows or disallows foreigners from entry. The migration policy and IA also determine who may become residents and citizens.⁸³² The migration policy is linked to the government's desire to obtain a skilled workforce by actively seeking talent, strengthening national security by implementing immigration controls, and contributing to the development

⁸²⁵ Refugees Act, s 11.

⁸²⁶ Application to be admitted as an amicus curiae in the Constitutional court of South Africa, Case No: CCT 273/2017

<https://collections.concourt.org.za/bitstream/handle/20.500.12144/34593/05Founding%20Affidavit%20Application%20for%20Admission%20as%20Amicus%20Curiae%20%28Lawyers%20for%20Human%20Rights%29.pdf?sequence=31&isAllowed=y> para 9 (hereafter 'Amicus curiae application (CCT 273/2017)').

⁸²⁷ Amicus curiae application (CCT 273/2017) para 30.

⁸²⁸ *Union of Refugee Women and Others v Private Security Industry Regulatory Authority and Others* [2006] ZACC 23 para 99; *Kiliko and others v Minister of Home Affairs and others* 2006 (4) SA 114 (C) 115; *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (2006) ZACC 23 para 99; *Rafoneke and Others v Minister of Justice and Correctional Services and Others (Makombe Intervening)* [2022] ZACC 29 para 80.

⁸²⁹ *Majola v MEC, Department of Public works and the Northern Province and others* unreported case no. 10/2003 (2003-09-26) para 3.

⁸³⁰ *Ahmed v Minister of Home Affairs* 2017 (2) SA 417 (WCC) para 45, 53.

⁸³¹ SA Migration International 'Asylum seekers win legal right to apply for SA permits' <http://www.sami.co.za/articles.php?TextNo=4572> (31 December 2022).

⁸³² Carneson J *South Africa's changing migration policies* in South Africa's Migration Policies: A regional perspective, Centre for Development and Enterprise workshop no.8 (2011) 13.

of Africa.⁸³³ To create a labour market more responsive to economic opportunities, the South African state has acknowledged its need for skilled immigration into the country.⁸³⁴

South Africa has been described as a magnet to foreign nationals due to the developing nature of its economy.⁸³⁵ Unskilled workers are at the bottom of South Africa's priority list.⁸³⁶ This may be due to a general assumption or popular opinion that unskilled migrants make it more difficult for unskilled citizens to get jobs, seen against South Africa's high unemployment rate.⁸³⁷ It is assumed that unskilled foreign nationals negatively affect the 'social services, wage levels, employment opportunities, crime, health, and poverty alleviation' of citizens.⁸³⁸

Biney contends that the IA concerning labour migration still focuses on control and exclusion, as it is selective of the types of foreigners that it allows to enter South Africa, and it criminalises unauthorised migrants and their employers.⁸³⁹ Each sovereign state has the right to decide who will enter its territory.⁸⁴⁰ The requirement to enter legally is an instrument to maintain the national security and the safety of South Africa's citizens. 'Control and exclusion' have a different meaning from the previous immigration legislation and policies. Control and exclusion in the context of the current IA are rather to be understood in the sense that a sovereign state has the right to choose, in favour of its national interests, who may cross its borders and enter its territory.⁸⁴¹ In the South African context, the South African state has reduced the skills listed on the CSL with each amendment, signalling that it still uses control and exclusion to control and exclude those with skills from being issued with a CSWV and entering South Africa on that basis.

⁸³³ Carneson J (2011) 13.

⁸³⁴ Department of the Presidency (2012) 41.

⁸³⁵ Kapindu R *Towards a More Effective Guarantee of Socioeconomic Rights for Refugees in Southern Africa* (unpublished PhD thesis, University of Witwatersrand, 2014) 23; Reed HE 'Moving Across Boundaries: Migration in South Africa, 1950–2000' (2013) 50(1) *Demography* 72.

⁸³⁶ Mabudusha S *The policing of undocumented foreign nationals in South Africa* (unpublished PhD thesis, University of Pretoria, 2014) 44.

⁸³⁷ Dias-Abey M 'Determining the impact of migration on labour markets: the mediating role of legal institutions' (2021) 50 *Industrial Law Journal* 532; DOL (2022) 17; Hiropoulos A (2020) 112.

⁸³⁸ Dassah M 'Socio-economic impacts of intra and extra-regional Southern African Development Community migration on South Africa' (2017) 14 *Ghana Journal of Development Studies* 267; International Organization for Migration 'The Human Rights of Migrants' (2001) 38(6) *International Migration* 4.

⁸³⁹ Biney E (2016) 116.

⁸⁴⁰ Carciotto S (2018) 71; *Nandutu and Others v Minister of Home Affairs and Others* [2019] ZACC 24 para 73.

⁸⁴¹ *TR and Others v The Minister of Home Affairs and Others; RA and Others v The Minister of Home Affairs and Others* [2022] ZAWCHC 115 para 21.

4.5 Rights of holders of Critical Skills Work Visas

One of the objectives of the IA is to facilitate selective skills importation into the country.⁸⁴² Although the South African state is interested in and willing to allow SMWs into the country, Möser asserts that protecting their rights, dignity, and well-being appears to be very low among the government's priorities.⁸⁴³ For a society founded on equality, human dignity and the advancement of human rights and freedoms, protecting the rights of all foreign nationals, including SMWs, is important.⁸⁴⁴ It is undisputed that SMWs are entitled to most rights and the full protection of the law, save for those rights conferred with citizenship.⁸⁴⁵ As the overall aim of the thesis is to consider the effectiveness of the CSWV to attract SMWs, it is important to assess whether SMWs have access to the rights to which they are entitled. The following section thus discusses the rights of SMWs both as provided for in the international obligations pertinent to SMWs that have been identified in chapter 3 and as expressed in national law. All discussions concerning the rights of SMWs are focused on employment rights, since the CSWV is a work visa.

4.5.1 Equality

The right to equality is afforded to all persons within South Africa.⁸⁴⁶ The Constitution instructs the legislator to enact legislation to prevent or prohibit unfair discrimination.⁸⁴⁷ The Promotion of Equality and Prevention of Unfair Discrimination Act (hereafter 'PEPUDA')⁸⁴⁸ prohibits unfair discrimination, seeks to implement section 9 of the Constitution, and provides for the designation of Equality courts.⁸⁴⁹ Section 34(1) of the PEPUDA states that the Minister of Justice and Constitutional Development must consider including nationality as a prohibited ground upon which a claim of unfair discrimination may be based.⁸⁵⁰ While nationality is

⁸⁴² IA, s 2(1); Möser RE (2016) 12.

⁸⁴³ Mahlatji MR & Dikotla MA (2015) 595; Möser RE (2016) 12.

⁸⁴⁴ Constitution, s 1(a); Mangu AM 'Foreigners' Rights to work and fair labour practices in South Africa: A review of the South African labour legislation and jurisprudence' (2020) 35(1) *South African Public Law* 1.

⁸⁴⁵ Mangu AM (2020) 4.

⁸⁴⁶ Constitution, s 9.

⁸⁴⁷ Constitution, s 9(4).

⁸⁴⁸ 4 of 2000.

⁸⁴⁹ CESCR: Concluding observations SA (2018) para 47; The Promotion of Equality and Prevention of Unfair Discrimination Act, s 2(a) (hereafter 'PEPUDA').

⁸⁵⁰ PEPUDA, s 34(1)(a); Mubangizi JC (2021) 146.

defined in the PEPUDA, it is not a prohibited ground.⁸⁵¹ As nationality is not a prohibited ground, a court would first have to determine whether differentiation based on the unspecified ground amounts to discrimination and, if so, whether the discrimination is unfair.⁸⁵² Including nationality as a prohibited ground means that the state recognises nationality as a significant cause of discrimination, and foreign nationals will be provided with a practical mechanism in the form of a claim for unfair discrimination on the grounds of nationality.⁸⁵³

Providing protection for SMWs against unfair discrimination on the grounds of nationality is important if they have been victims of xenophobia. Protection against xenophobia and anti-immigrant sentiments is vital in South Africa, where SMWs face xenophobia from a society which predominantly perpetuates anti-immigrant attitudes and sentiments.⁸⁵⁴ It is unclear whether sections of the PEPUDA will provide recourse or a remedy to a foreign national who seeks relief in a claim of unfair discrimination. More importantly, a failure to specifically protect against discrimination on the grounds of nationality in legislation amounts to a failure to act in accordance with the benchmarks of accessibility and non-discrimination.⁸⁵⁵

The strategies in terms of the DWA, and Sustainable Development Goals 10.3 and 10.4, are measured by the number of persons who have felt discriminated against or harassed in the last 12 months and whether the labour market shares in the gross domestic product reflect the achievement of greater equality.⁸⁵⁶ A recent report by the Human Sciences Research Council indicates that 10 per cent of foreign nationals reported discrimination based on their language, and 6 per cent, discrimination based on their ethnicity, within the last 12 months before the

⁸⁵¹ Prohibited grounds are '(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth; or (b) any other ground where discrimination based on that other ground- (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).' PEPUDA s 1. The PEPUDA defines nationality as 'ethnic or national origin and includes practises associated with xenophobia and other adverse assumptions of a discriminatory nature but does not include rights and obligations normally associated with citizenship'. PEPUDA, s 1.

⁸⁵² *Larbi-Odam and Others v Member of the Executive Council for Education (North-West Province) and Another* 1997 (12) BCLR 1655 para 19, 23.

⁸⁵³ Albertyn C, Bruintjies C, Finn M et al. 'Submission to the Department of Justice and Constitutional Development on Amendments to the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000' <https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/sarchi-equality-chair/SARChISubmission.pdf> (accessed 31 December 2022) 11.

⁸⁵⁴ Albertyn C, Bruintjies C, Finn M et al. (2022) 9-11.

⁸⁵⁵ See 3.3 and 3.4 above.

⁸⁵⁶ Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development, United Nations General Assembly resolution A/RES/71/313, 14; see 3.2.4 above.

undertaking of the study.⁸⁵⁷ Farashah, Blomquist and Ariss et al. opine that SMWs ‘are more likely to be targets of employment discrimination the more skilled they are’.⁸⁵⁸ In the South African context, it is difficult to assess the exact number of SMWs who have felt discriminated against or harassed, but the impending discussion of xenophobia, anti-immigrant sentiments and government scapegoating resulting in institutional xenophobia may lend itself to the conclusion that SMWs regularly feel harassed and possibly discriminated against.⁸⁵⁹

The principle of non-discrimination is inherent in many of the international instruments which were discussed in chapter 3. Article 2 of the ICESCR provides for the principle of non-discrimination, which also applies to all rights in the Constitution.⁸⁶⁰ According to Ngandwe, while the Constitution guarantees equal treatment regardless of nationality, in practice migrants are to a large extent marginalised in relation to what are perceived as national interests.⁸⁶¹ The CESCR has thus expressed a concern that the PEPUDA imposes an obligation on all members of society to promote equality in terms of section 24(1), but the section has not yet been implemented, thus violating the principle of non-discrimination in the ICESCR.⁸⁶² According to Sarkin and Koenig, ‘[t]hrough Article 2(2) of the ICESCR requires “the Covenant to apply equally to nationals and non-nation[al]s”’, the ICESCR permits states to draw distinctions on the right to work of nationals and non-nationals, which is often based on economics.⁸⁶³ The CESCR has noted concerns with respect to asylum seekers’ right to seek employment, which will be denied in terms of the RA once ASP centres have been established. Furthermore, the CESCR has noted that the establishment of ASP centres in border areas may restrict asylum seekers’ access to social assistance.⁸⁶⁴

In South Africa, SMWs do not have the same access to employment as citizens do. Applicants for the CSWV only have access to specific occupations on the CSL, and the ESA allows citizens to take preference over SMWs. While the application of the ESA does not amount to

⁸⁵⁷ The HSRC formulated its opinion based on the Socio-Economic Justice for All Survey; the sample size was 24,897 adults. The other study used was the South African Social Attitudes Survey, and the sample size was 3,000 people. HSRC (2022) 2, 99-100.

⁸⁵⁸ Farashah A, Blomquist T and Ariss A et al. (2023) 479.

⁸⁵⁹ See 4.6 below.

⁸⁶⁰ CESCR SA report (2017) para 42.

⁸⁶¹ Ngandwe PJ (2013) 432.

⁸⁶² CESCR: Concluding observations SA (2018) para 21; see 4.5.1 above.

⁸⁶³ Sarkin J & Koenig M (2011) 21.

⁸⁶⁴ CESCR: Concluding observations SA (2018) para 25.

discrimination, the South African state has not drafted any plans to ensure that the right to work as expressed in the ICESCR is realised for SMWs.

4.5.2 Choice of employment

Foreign nationals' choice of employment in South Africa is limited by section 22 of the Constitution. The question is whether section 22 complies with the benchmark of accessibility. Section 22 of the Constitution is limited to citizens only. The section states that '[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law'. The right to freedom of choice regarding trade, occupation and profession⁸⁶⁵ is a fundamental right guaranteed by the Constitution to all citizens of South Africa.⁸⁶⁶ Section 22 of the Constitution is to be interpreted in two parts: (1) the choice and (2) the practice of the trade, occupation and profession.⁸⁶⁷ The freedom to choose a vocation as per section 22 of the Constitution is fundamental to a society that values and finds its foundation in the respect for human dignity.⁸⁶⁸ Section 22 of the Constitution should be interpreted as a right which guarantees citizens the opportunity to occupational freedom, not the delivery thereof; by implication, section 22 of the Constitution cannot be interpreted as constituting a right to work.⁸⁶⁹

Skill or the lack thereof is not a listed ground, but the principle of accessibility prohibits discrimination on the grounds of any status 'which has the intention or effect of impairing or nullifying the exercise of the right to work on a basis of equality'.⁸⁷⁰ Although section 22 of the Constitution is based upon the right to human dignity, the freedom to choose a vocation may be limited if the limitation is justifiable. In *Rafoneke and Others v Minister of Justice and Correctional Services and Others (Makombe Intervening)*,⁸⁷¹ the Constitutional Court confirmed that protection of the choice of employment, as anticipated in section 22 of the Constitution, is not afforded to foreign nationals.⁸⁷² The choice element of section 22 may be

⁸⁶⁵ Bellace JR & Ter Haar B 'Perspectives on labour and human rights' in Bellace JR & Ter Haar B (eds) *Research Handbook on Labour, Business and Human Rights Law* (2019) 4.

⁸⁶⁶ Constitution, s 22.

⁸⁶⁷ Currie I & De Waal J *Bill of Rights Handbook* 6ed (2013) 463; *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* (2017) ZACC para 65.

⁸⁶⁸ *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) para 59.

⁸⁶⁹ Currie I & De Waal J (2013) 468.

⁸⁷⁰ General Comment No. 18 (2006) para 12(b)i.

⁸⁷¹ [2022] ZACC 29; *Rafoneke and Others v Minister of Justice and Correctional Services and Others (Makombe Intervening)* [2022] ZACC 29 para 76.

⁸⁷² *Rafoneke and Others v Minister of Justice and Correctional Services and Others (Makombe Intervening)* [2022] ZACC 29 para 73.

limited by laws prohibiting certain individuals from entering certain trades or professions.⁸⁷³ In this instance, the CSL limits SMWs choice of employment to skills listed on the CSL. Skilled migrant workers applying for the CSWV may only choose between occupations considered critical for the country's development; therefore, the legislation under which the CSWV is created is constitutional and does not violate the benchmark of accessibility.

Limitations of section 22 of the Constitution are not to be tolerated lightly.⁸⁷⁴ When reading section 22 with section 36 of the Constitution, the right to choose an occupation, trade or profession is not limited or cannot be limited to citizens, but the practice thereof may be limited and regulated by law for both citizens and foreign nationals.⁸⁷⁵ Although other barriers may prevent people from choosing a certain vocation, legal limitations or impediments may only be imposed when it is justifiable in the broader public interest, such as limiting the right of SMWs to choose occupations which are not listed on the CSL.⁸⁷⁶

The IOE has noted that allowing SMWs free choice of employment after two years may make a country more attractive to SMWs.⁸⁷⁷ In South Africa, SMWs who are not permanent residents do not have the right to free choice of employment. A SMW may only receive free choice of employment for occupations other than those listed on the CSL once he or she becomes a permanent resident. While the views of the IOE on this matter may make sense to those states which are not in dire need of critical skills in the same manner as South Africa, in South Africa it makes more sense to keep SMWs employed in occupations listed on the CSL. The reason for this lies in the rationale for having a CSWV, which is that those employed with a CSWV have critical skills essential to meet the country's skills and national development needs, without which the South African state runs the risk of stifling economic growth.

⁸⁷³ *South African Diamond Producers Organisation v Minister of Minerals and Energy N.O. and Others* (2017) ZACC para 68.

⁸⁷⁴ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* (2005) ZACC para 657.

⁸⁷⁵ *Chundrakumar v MEC for Transport, Kwazulu-Natal, and Others* (2012) ZAKZPHC para 37.

⁸⁷⁶ *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) concerned a leave to appeal against an order dismissing certain aspects of a licensing scheme which prevents medical practitioners from dispensing medicines unless the medical practitioner has been issued with a licence to dispense medicines. The powers of the Director-General of the Department of Health to prescribe conditions for the issuance of licences link the dispensing of medicine to certain premises, and factors to be considered in an application for a dispensing licence were challenged. *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC) para 1 and para 60.

⁸⁷⁷ IOE Migrant Workers Convention 14.

On the other hand, it can be argued that the South African state should do everything possible to make the country more attractive to skilled workers, especially given the current shortage of such workers. Conversely, if a SMW is given permission to change jobs after two years, and moves to a job that is not listed on the CSL, it can be argued that the state will still have benefitted from having the SMW work in a CSL occupation for two years, rather than not having anyone in that occupation at all. Furthermore, it is unlikely that the SMW will move to a lower-skilled job, which would likely pay less, and their skills is well-suited to the CSL occupation, which is in high demand.

4.5.3 Fair labour practices

The Constitution entrenches the right not to be subjected to slavery, servitude or forced labour, thus guaranteeing the obligation to respect the right to work through section 13 of the Constitution.⁸⁷⁸ Section 23(1) of the Constitution envisages legislation to give effect to the provisions of the section.⁸⁷⁹ The LRA regulates and fulfils the objects of the right to fair labour practices.⁸⁸⁰ Section 23 of the Constitution makes it clear that every worker in South Africa is guaranteed the right to fair labour practices.⁸⁸¹ While section 23 is comprehensive,⁸⁸² the term ‘fair labour practices’ is not defined by the Constitution, as it is not capable of a being defined precisely.⁸⁸³ Although this right may be limited, limitations must be reasonable and justifiable.⁸⁸⁴ An interpretation of the word ‘everyone’ as used in section 23 (1) of the Constitution applies to employees and employers.⁸⁸⁵ ‘Not everyone who works is a worker for the purposes of section 23’.⁸⁸⁶ Not everyone who works is protected by section 23. This includes business owners; independent contractors; persons who are self-employed; judges; partners; and cabinet ministers.⁸⁸⁷ Some SMWs may qualify as workers for the purposes of

⁸⁷⁸ Constitution, s 13.

⁸⁷⁹ *Kylie v Commission for Conciliation Mediation and Arbitration and Others* (2010) 7 BLLR 705 (LAC) para 16.

⁸⁸⁰ *Majola v Cricket South Africa and Others* (2013) 12 BLLR 1236 (LC) para 41; *Chirwa v Transnet Limited and Others* 2008 (4) SA 367 (CC) para 106; *National Union of Metalworkers of South Africa obo Its Members in the employ of the Respondent v Transnet SOC Ltd* (2019) 2 BLLR 172 (LC) para 148; *Denel Informatics Staff Association and Another v Denel Informatics (Pty) Ltd* (1998) ZALC 38 para 19.

⁸⁸¹ Constitution, s 23.

⁸⁸² *Du Toit D & Sirkhotte M* (2019) 173.

⁸⁸³ *National Entitled Workers Union v Commission for Conciliation Mediation and Arbitration and Others* (2003) ZALC 177 (unreported case).

⁸⁸⁴ *South African National Defence Union v Minister of Defence and Others* 2007 (8) BCLR 863 (CC) para 93.

⁸⁸⁵ *Mbatha v University of Zululand* 2014 (2) BCLR 123 (CC) para 57. *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* 2009 (1) SA 390 (CC) para 34.

⁸⁸⁶ *Kylie v Commission for Conciliation Mediation and Arbitration and Others* [2008] 9 BLLR 870 (LC) para 54.

⁸⁸⁷ *Kylie v Commission for Conciliation Mediation and Arbitration and Others* [2008] 9 BLLR 870 (LC) para 54.

section 23 of the Constitution while others will not. If section 23(1) of the Constitution is applicable, it applies equally to qualifying citizens and foreign nationals.⁸⁸⁸ There is no clear indication from the terms of section 38(1) of the IA or any of the IAs or other provisions that the legislator intends to limit the labour rights of immigrants once employed in the country.⁸⁸⁹ Foreign workers including undocumented migrant workers are not excluded from the application of the LRA and are therefore offered the same protection as citizens.⁸⁹⁰ In this regard, the legislature and judiciary of South Africa have extended protection to SMWs in the same manner as for citizens.

The BCEA was also drafted with the purpose of giving effect to section 23 of the Constitution.⁸⁹¹ In South Africa, the BCEA regulates aspects of the right to the enjoyment of just and favourable working conditions by providing minimum conditions for employment that may be made more favourable for the employee.⁸⁹² Foreign nationals are covered by the provisos of the BCEA by virtue of the definition of employee⁸⁹³ provided in the BCEA.⁸⁹⁴

4.5.4 Access to social security

The obligation to respect, protect and fulfil the right to social security has been enshrined in the ICRMW, Convention 118 and ICESCR. Even though the right to social security is provided for in many international law instruments, migrant workers are often disadvantaged in social

⁸⁸⁸ *Sithole v Metal and Engineering Industries Bargaining and Others* (2017) ZALCJHB 434 para 13.

⁸⁸⁹ *Discovery Health Limited v CCMA & others* (2008) 7 BLLR 633 para 29.

⁸⁹⁰ The LRA 'does not apply to members of (a) the National Defence Force; (b) the National Intelligence Agency; and (c) the South African Secret Service'. LRA, s 2; *Southern Sun Hotel Interests, Southern Sun Waterfront Hotel v CCMA* (2011) 32 ILJ 2756 (LC) paras 16-9; *Ndikumdavyi v Valkenberg Hospital and Others* [2012] 8 BLLR 795 (LC) para 17; *Discovery Health Limited v CCMA & others* (2008) 7 BLLR 633 para 29.

⁸⁹¹ Du Toit D & Sirkhotte M (2019) 175.

⁸⁹² Act 75 of 1997, BCEA, s 4(a), (c).

⁸⁹³ The BCEA defines who an employee is in section 1(a) 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 (b) any other person who in any manner assists in carrying on or conducting the business of an employer'. The Labour Relations Act 66 of 1995 (hereafter 'LRA') has a similar definition of employee in s 213 along with the Skills Development Act 97 of 1998, which has the same definition of employee in s 1.

⁸⁹⁴ Employees are entitled to annual leave, which is 21 days' consecutive leave or one day of leave for every 17 days worked. For sick leave in South Africa, during a period of 36 months, employees are entitled to six weeks' paid sick leave. Employees who are pregnant may take four consecutive months maternity leave. With respect to family responsibility leave, all full-time employees are entitled to three days' paid leave when a child is born or sick, or if a close relative has passed away. In South Africa, apart from maternity leave, other parents are entitled to at least 10 consecutive days unpaid parental leave. Parents can claim benefits from the unemployment insurance fund for the duration of the leave. Provided that foreign nationals are qualifying employees in terms of the provisions of the BCEA, foreign nationals are entitled to leave in the same manner as citizens. BCEA s 20(2)a, s 22, s 25, s 27(2); s 25A(1). Basic Conditions of Employment Act 75 of 1997 regulations in GN 39 GG 42965 of 22 January 2020, reg 3.2, reg 3.3, reg 3.4, reg 3.5; Unemployment Insurance Act 63 of 2001, s 24; Unemployment Insurance Act 63 of 2001 regulations in GN 1421 GG 42821 of 4 November 2019, reg 2.

security coverage and benefits when compared with national workers.⁸⁹⁵ Prior to the advent of democracy, the social security regime in South Africa was characterised by inequality.⁸⁹⁶ Today, even while aspects of the right to social security are entrenched in the Constitution, poverty and inequality are still among the most serious issues affecting people in South Africa, including many SMWs.⁸⁹⁷ As discussed below, the Constitution does not provide for the right to social security as expressed in the international agreements discussed previously, but rather for the right to access social security.

Section 27(1)(c) of the Constitution provides that '[e]veryone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance'.⁸⁹⁸ In accordance with section 27(2) of the Constitution, the state has a constitutional duty to take reasonable legislative and other measures to progressively realise the right to access social security within the ambit of its available resources.⁸⁹⁹ The realisation of the right of access to social security in South Africa is thus dependent upon the availability of state resources.⁹⁰⁰

According to Olivier and Jansen Van Rensburg, section 27 of the Constitution implies four duties on the state and courts. First, there is a negative state and court duty that implies that the rights of individuals to access social security are not to be interfered with unjustly. Secondly, there is a positive duty on the state and courts to protect, promote and fulfil the right to access social security, which includes accessible frameworks that allow individuals to realise their rights without undue influence. Thirdly, the state is required to promote and fulfil the rights of everyone, which means that the 'beneficiary has the right to require positive assistance, or a benefit or service from the state.'⁹⁰¹ Lastly, the state must act in good faith and provide reasons where it has failed to carry out its obligations.⁹⁰² Olivier and Jansen Van Rensburg sum up the constitutional obligation in relation to section 27 in this telling quote:

⁸⁹⁵ Hirose K, Nikač M & Tamagno E *Social Security for Migrant Workers: A Rights-Based Approach* (2011) 2.

⁸⁹⁶ *Mashavha v President of the Republic of South Africa and Others* 2004 (12) BCLR 1243 (CC) para 51.

⁸⁹⁷ Liebenberg S 'The judicial enforcement of social security rights in South Africa: Enhancing accountability for the basic needs of the poor' in Reynaud E, Riedel E & Langford M et al. *Social Security as a Human Right Drafting a General Comment on Article 9 ICESCR - Some Challenges* (2007) 70.

⁸⁹⁸ Constitution, s 27(1)(c).

⁸⁹⁹ Olivier M & Jansen Van Rensburg L 'Protection and enforcement of the right to social security' 2009 *Law, Democracy and Development* 88; *Certification of the Constitution of the Republic of South Africa* 1996 (10) BCLR 1253 (CC) para 77.

⁹⁰⁰ Constitution, s 27(2).

⁹⁰¹ Olivier M & Jansen Van Rensburg L (2009) 89.

⁹⁰² Olivier M & Jansen Van Rensburg L (2009) 89.

It is clear that what is protected by section 27 of the Constitution is the right to access to social security. This means that the [S]tate may not deny anyone access to these benefits. [B]ut it does not mean that everyone has the right to social security since the availability of this service is dependent on the resources at the disposal of the [S]tate The constitutional approach is pragmatic, not only in terms of the availability of resources but also in terms of the time frame for delivery.⁹⁰³

In *Grootboom*, the Constitutional court rejected the notion that section 27 of the Constitution imposed a core obligation on the state which entitled individuals to the provision of minimum levels of goods and services directly from the state.⁹⁰⁴ In *Mazibuko v City of Johannesburg* (hereafter ‘*Mazibuko*’),⁹⁰⁵ the court adopted a model of reasonableness review by which state compliance with the positive duties imposed by socio-economic rights may be assessed.⁹⁰⁶

Liebenberg argues that *Mazibuko* narrowed the views on progressive realisation as articulated in *Khosa v Minister of Social Development* (hereafter ‘*Khosa*’)⁹⁰⁷ and *Grootboom*.⁹⁰⁸ In *Grootboom*, the Constitutional Court confirmed that section 27(1) of the Constitution imposes a negative obligation.⁹⁰⁹ According to Liebenberg, the court has confirmed ‘the high degree of protection it would afford people against negative violations of their socio-economic rights’.⁹¹⁰

With respect to the right to social security as expressed in international instruments in chapter 3, South Africa’s courts have ‘developed useful jurisprudence on the justiciability of economic, social and cultural rights (based on the model of reasonableness review)’.⁹¹¹ Despite the useful

⁹⁰³ Olivier M & Jansen Van Rensburg L (2009) 95.

⁹⁰⁴ *Grootboom*, paras 23-33; Liebenberg S ‘Direct constitutional protection of economic, social and cultural rights in South Africa’ in Chirwa D & Chenwi L (eds) *The Protection of Economic, Social and Cultural Rights in Africa: International, Regional and National Perspectives* (2016) 314.

⁹⁰⁵ 2010 (4) SA 1 (CC).

⁹⁰⁶ ‘If government takes no steps to realise the rights, the courts will require government to take steps. If government’s adopted measures are unreasonable, the courts will similarly require that they be reviewed so as to meet the constitutional standard of reasonableness ... a measure will be unreasonable if it makes no provision for those most desperately in need. If government adopts a policy with unreasonable limitations or exclusions ... the Court may order that those are removed. Finally, the obligation of progressive realisation imposes a duty upon government continually to review its policies to ensure that the achievement of the right is progressively realised.’ *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC), para 67.

⁹⁰⁷ 2004 (6) SA 505 (CC).

⁹⁰⁸ Liebenberg S (2016) 317-8; General Comment No. 3 (1990) para 9.

⁹⁰⁹ *Grootboom*, para 34.

⁹¹⁰ Liebenberg S (2007) 76.

⁹¹¹ Ssenyonjo M ‘The Influence of the International Covenant on Economic, Social and Cultural Rights in Africa’ (2017) 64 *Netherlands International Law Review* 278.

jurisprudence, the courts clearly do not intend to apply the notion of the minimum core rights as expressed in the ICESCR.⁹¹² This is evidenced by the fact that the courts rejected arguments based on the general comments (3 and 14) of the CESCR in *Grootboom* and *Minister of Health and Others v Treatment Action Campaign and Others (No 2)*.⁹¹³

4.5.4.1 Social assistance

Social assistance and social insurance are regulated separately by the South African state. The Social Assistance Act 13 of 2004, with the South African Social Security Agency Act 9 of 2004, provides a national framework for the provision of social assistance.⁹¹⁴ The Social Assistance Act 13 of 2004 aims to ‘provide for the administration of social assistance and payment of social grants’.⁹¹⁵ Social assistance includes the child support grant; disability grant; older person’s grant; war veterans grant; grant-in-aid;⁹¹⁶ and social relief of distress.⁹¹⁷ Social assistance is provided for South African citizens and permanent residents only, in terms of the Social Assistance Act 13 of 2004.⁹¹⁸

Since the significant decision taken in *Khosa*, permanent residents, provided they meet the other requirements for social grants, are entitled to access social assistance.⁹¹⁹ Non-citizens other than permanent residents and refugees are still not entitled to social assistance. The Covid-19 pandemic proved that foreign nationals, including SMWs and holders of the CSWV may occasionally require social assistance.⁹²⁰ In this regard, the ILO stated that migrant workers were amongst the most vulnerable and are often ‘excluded from national COVID-19

⁹¹² Ssenyonjo M (2017) 278.

⁹¹³ 2002 (10) BCLR 1033 (CC) para 35; Ssenyonjo M (2017) 279.

⁹¹⁴ CESCR SA report (2017) para 79.

⁹¹⁵ Social Assistance Act 13 of 2004, s 3(a).

⁹¹⁶ Social Assistance Act 13 of 2004, s 4(a)-(g), s 1, s 12.

⁹¹⁷ Social Assistance Act 13 of 2004, s 1, s 13.

⁹¹⁸ Social Assistance Act 13 of 2004, s 5(1)c; *Khosa* para 98.

⁹¹⁹ *Khosa* para 92. The court resolved the issue with the read-in remedy of the words ‘permanent resident’. See also Langford M ‘The right to social security and implications for law, policy and practice’ in Reynaud E, Riedel E & Langford M et al. *Social Security as a Human Right Drafting a General Comment on Article 9 ICESCR – Some Challenges* (2007) 47; Curtis C (2008) 56.

⁹²⁰ Mukumbang FC, Ambe AN & Adebay BO (2020) 3; International Labour Organization *Extending Social Protection to Migrant Workers, Refugees and Their Families: A Guide for Policymakers and Practitioners* (2021) 118.

policy responses, such as wage subsidies, unemployment benefits or social security and social protection measures'.⁹²¹

The minority judgment in *Khosa* by Ncgobo J, with Madala J concurring,⁹²² arrived at the conclusion that the state was justified in limiting the realisation of the right to access social security and the access to social grants to citizens only. Ncgobo J reasoned that the applicants' lack of citizenship was temporary as they become eligible for citizenship after a period of five years.⁹²³ Ncgobo J held that by limiting the realisation of the right to access social security to citizens only, 'the statute provides a legitimate incentive for an alien to become a citizen'.⁹²⁴

Ncgobo J's views are unconvincing for the following reasons. First, the limitation of the right goes against the international law principle and benchmark of non-discrimination based on nationality, which is enshrined by all international instruments previously discussed, including the ICESCR that the South African state has ratified.⁹²⁵ Secondly, foreign nationals who do not presently qualify for social assistance, even holders of the CSWV, are denied access to social assistance for five years. Any period of time, even worse, a period of five years, is too long to be deprived of the right to access social security, particularly since the realisation of human dignity is linked to social security.⁹²⁶ Thirdly, access to social assistance is also important for SMWs. Skilled workers are not immune to being destitute. For instance, the lockdown instituted to reduce the spread of the COVID-19 virus left many destitute and in need of social assistance or, at the very least, in need of social relief of distress as provided for in the Social Assistance Act.⁹²⁷

4.5.4.2 Social insurance

Just like citizens, SMWs also require social insurance; they may also become pregnant, unemployed, ill or injured. According to Lougarre, migrant workers are often the first to be

⁹²¹ ILO 'Protecting migrant workers during the COVID-19 pandemic: Recommendations for policy-makers and constituents' https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_743268.pdf (accessed 31 December 2022); Ruzungunde VS & Zhou S (2021) 4.

⁹²² 2004 (6) SA 505 (CC).

⁹²³ *Khosa* para 115.

⁹²⁴ *Khosa* para 130.

⁹²⁵ UDHR, Article 7; ICESCR, Article 2.2

⁹²⁶ General Comment No. 19 (2008) para 2.

⁹²⁷ Social Assistance Act 13 of 2004, s 13; Kondo T 'Providing for the unwanted in a time of crisis: The socio-economic rights of migrant workers in South Africa during the Covid-19 pandemic' in Kondo T, Mburu L & Miyandazi V et al. *COVID-19 Pandemic and Socio-Economic Rights: In Selected East and Southern African Countries* (2020) 12.

laid off.⁹²⁸ Social insurance schemes in South Africa consist of mandatory and voluntary insurance schemes. Both mandatory and voluntary insurance schemes require contributions from the recipient.⁹²⁹ Mandatory social insurance schemes are regulated through the Unemployment Insurance Act 63 of 2001 as amended (hereafter ‘UIA’)⁹³⁰ and the Compensation for Occupational Injuries and Diseases Act (hereafter ‘COIDA’).⁹³¹

Foreign nationals employed in the country are, where applicable, entitled to claim unemployment and other benefits in terms of the UIA,⁹³² provided that the employee is employed longer than 24 hours per month at a particular employer.⁹³³ Migrant workers did not always receive unemployment insurance benefits in South Africa; fortunately, a series of court decisions now ensures that migrant workers should not be denied benefits from the Unemployment Insurance Fund.⁹³⁴ Holders of temporary visas, such as holders of a CSWV, struggled to receive unemployment insurance payments during Covid-19 due to the non-recognition of passport numbers used for the processing of payments.⁹³⁵ Foreign nationals also faced additional delays as their unemployment insurance payments were subject to clearance by the DHA.⁹³⁶

Voluntary occupational retirement funds are merely regulated by the state. Pension and provident funds are voluntary in nature and the choice of joining is up to the employer.⁹³⁷ In South Africa, there is no public retirement insurance. The implication is that only those employed by an employer who has chosen to participate in retirement insurance schemes will have access to retirement insurance through employment. Where employers do not participate in retirement insurance schemes, employees do not have access to retirement insurance through their employer.

⁹²⁸ Lougarre C (2020) 259.

⁹²⁹ Govindjee A & Van Der Walt A(eds) *Labour Law in Context* 2ed (2017) 277.

⁹³⁰ For ‘employees who become unemployed or their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful economic and social effects of unemployment’. Unemployment Insurance Act 63 of 2001, s 2.

⁹³¹ Compensation for Occupational Injuries and Diseases Act 130 of 1993, s 23(1).

⁹³² Unemployment Insurance Act 63 of 2001 (hereafter ‘UIA’), s 3.

⁹³³ UIA, s 3(1)a; Govindjee A ‘Social protection and vulnerable workers in South Africa’ in Westerveld M & Olivier M *Social Security Outside the Realm of the Employment Contract: Informal Work and Employee-like Workers* (2019) 125.

⁹³⁴ Kondo T (2020) 25.

⁹³⁵ Ruzungunde VS & Zhou S (2021) 4; Kondo T (2020) 25.

⁹³⁶ Kondo T (2020) 25.

⁹³⁷ Malherbe K ‘Alleviating poverty through retirement reforms’ in Durojaye E & Mirugi-Mukundi G (eds) *Exploring the Link Between Poverty and Human Rights in Africa* (2020) 146.

Employers offering retirement insurance access often compel employees to join and make compulsory contributions. Most occupational provident, pension and retirement annuity funds are regulated by the Pension Funds Act 24 of 1956, while the pension funds of public servants and state-owned entities are regulated by separate legislation.⁹³⁸ Private health insurance schemes are regulated by the Medical Schemes Act 72 of 1967 and are voluntary in nature unless the health insurance is made compulsory by an employer under certain conditions.⁹³⁹

The scope of statutory social insurance schemes is limited, as access is attained only through employment.⁹⁴⁰ The absence of mandatory social insurance fund memberships denies social insurance to all who are employed by employers who have chosen not to form part of a social insurance scheme.⁹⁴¹ The social security framework in South Africa is fragmented,⁹⁴² and the voluntary nature of social insurance renders the framework incapable of upholding the social security rights of nationals and migrants who are employed.

According to Sarkin and Koenig, to fully recognise the right to work there must be rights to safety at work.⁹⁴³ Benefits for death, illness or injury out of and in the course of employment are regulated by the COIDA. Section 23(3)(b) of COIDA includes foreign nationals in the protection provided by COIDA, provided that the foreign national has been employed for longer than 12 months in South Africa.⁹⁴⁴ If the foreign national has been employed for a period less than 12 months, he or she will not be eligible to submit a claim in terms of the COIDA, but if the impact of the illness is such that the foreign national is no longer able to work, he or she may be eligible to submit a claim to the unemployment insurance fund.⁹⁴⁵

4.5.5 Right to work

The obligation to respect, protect and fulfil the right to work in South Africa has only been partially satisfied, first in the sense that the legal framework in South Africa does not provide

⁹³⁸ Government Employees Pension Law, 1996, s 1; Govindjee A & Van Der Walt A (eds) *Labour Law in Context* 2ed (2017) 293.

⁹³⁹ M'bouafou F, Buch E & Olorunju S 'Perceived knowledge of scheme members and their satisfaction with their medical schemes: a cross-sectional study in South Africa' (2022) 22 *BMC Public Health* 1.

⁹⁴⁰ Basson Y 'Selected developments in South African labour legislation related to persons with disabilities' (2017) 20 *PELJ* 2.

⁹⁴¹ Malherbe K (2020) 148.

⁹⁴² Malherbe K (2020) 147.

⁹⁴³ Sarkin J & Koenig M (2011) 19.

⁹⁴⁴ Section 23(3)*b* of the COIDA states: 'An employee referred to in paragraph (a) who is so temporarily employed in the Republic for a continuous period of more than 12 months, shall be deemed to be ordinarily employed by such employer in the Republic.'

⁹⁴⁵ UIF, s 19, s 20.

for a right to work as expressed in the international law instruments discussed above.⁹⁴⁶ Sections 22 and 23 of the Constitution contain some aspects of the right to work as per the ICESCR,⁹⁴⁷ but sections 22 and 23 have not been interpreted to claim the existence of the right to work in the South African context.⁹⁴⁸ Section 23 of the Constitution is therefore best described as rights at work rather than a right to work.⁹⁴⁹ The rights at work, as expressed by section 23 of the Constitution, apply similarly to citizens and SMWs, with only a few exceptions.

In order to fulfil the right to work, states are required to generate employment opportunities and improve their existing employment opportunities and working conditions.⁹⁵⁰ By 2017 the South African state had spent more than R100 billion on employment programmes.⁹⁵¹ In 2018, the Youth Employment Service was launched to create 1 million jobs for unemployed youths, but only 55,361 job opportunities were created.⁹⁵² According to the CESCR, the amendment of the Skills Development Act 97 of 1998 and the ESA have allowed for the development of skills, registration and the placement of employees, thereby fulfilling some of the state's duty to facilitate job creation of which SMWs are included.⁹⁵³ The CESCR has also expressed concerns regarding the high unemployment rate.⁹⁵⁴ The South African state must, as an imperative, secure that more people have access to jobs and better quality jobs.⁹⁵⁵ Linked to the topic, the initiatives stated above are almost entirely implemented with the view of addressing the high unemployment rate of citizens. These initiatives have little, if any, impact on SMWs or applicants for the CSWV. The failure to extend initiatives for employment creation, and the failure to assist SMWs in identifying and finding suitable employment, offends the benchmark of availability of the right to work.⁹⁵⁶

⁹⁴⁶ Theron J 'Decent work and the crisis of labour law in South Africa' (2014) 35(7) *Industrial Law Journal* 2.

⁹⁴⁷ Committee on Economic, Social and Cultural Rights, Consideration of reports submitted by States parties under articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights Initial reports of States parties due in 2017: South Africa E/C.12/ZAF/1 (2017) https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fZAF%2f1&Lang=en para 66 (hereafter 'Committee on Economic, Social and Cultural Rights, E/C.12/ZAF/1 (2017)').

⁹⁴⁸ Govindjee A & Dupper O (2011) 793.

⁹⁴⁹ South Africa does not have a right to work. International Commission of Jurists (2018) 5; CESCR SA report (2017) para 66.

⁹⁵⁰ International Commission of Jurists (2018) 7.

⁹⁵¹ Committee on Economic, Social and Cultural Rights, E/C.12/ZAF/1 (2017) para 68.

⁹⁵² General Notice 41975 of 12 October 2018; The Centre for Development and Enterprise *South Africa's NEETs crisis: Why we are failing to connect young people to work* (2021) 7.

⁹⁵³ Committee on Economic, Social and Cultural Rights, E/C.12/ZAF/1 (2017) para 69.

⁹⁵⁴ CESCR: Concluding observations SA (2018) para 28.

⁹⁵⁵ CESCR: Concluding observations SA (2018) para 29.

⁹⁵⁶ See 3.4.1.2 above.

4.6 Factors rendering South Africa unattractive to skilled migrant workers

The etymological meaning of ‘xenophobia’ is ‘foreigner’ or ‘stranger’ and ‘dislike or fear’.⁹⁵⁷ In this context, xenophobia may be understood as the irrational and excessive fear of foreigners or an attitude of hostility. This tends to foster anger, hatred, and in some instances, violence towards foreigners or those perceived as foreigners.⁹⁵⁸ It is very rare for literature concerning SMWs to be connected to xenophobia; this may be because discussions concerning xenophobia are often focused on the outward expression of xenophobic attitudes or anti-immigrant sentiments, which often result in physical attacks on migrant groups, often in townships. As xenophobia is expressed in emotive language or descriptive of feelings such as ‘fear, dislike, anger, hatred’, it must be considered whether SMWs are affected by xenophobia. While xenophobia is prevalent primarily in informal settlements and townships,⁹⁵⁹ SMWs and other migrants also experience xenophobia every day, such as in places of work.⁹⁶⁰ Violence emanating from xenophobia is only one dimension of xenophobia. It is also present in the form of pervasive negative attitudes, particularly against other Africans, hostile rhetoric, hate speech, attitudes, language and general ill-treatment of migrants.⁹⁶¹ Adjai and Lazaridis argue that xenophobia is a form of new racism.⁹⁶² According to Adjai and Lazaridis, xenophobia stems from apartheid and post-apartheid policies and legislation.⁹⁶³ Skilled migrant workers are also affected by the ‘fear, dislike, anger, hatred’ towards them in different ways, even though they

⁹⁵⁷ Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 202.

⁹⁵⁸ Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 202-3; HSRC (2022) 14.

⁹⁵⁹ Kanayo O, Anjofui P & Stiegle N ‘Analysis of ramifications of migration and xenophobia in Africa: review of economic potentials, skills of migrants and related policies in South Africa’ (2019) 6(2) *Journal of African Foreign Affairs* 71; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 204-6.

⁹⁶⁰ Ogujiuba K & Patience A ‘Migration dynamics in Africa: Expectations and lived experiences of immigrants in South Africa’ (2021) 56(3) *Journal of Asian and African Studies* 582; SIHMA (2020) 59, 89.

⁹⁶¹ Crush J, Tawodzera G & Chikanda A ‘Migrants in countries in crisis (MICIC) South Africa case study: the double crisis – mass migration from Zimbabwe and xenophobic violence in South Africa’ https://www.africaportal.org/documents/18112/SA_Case_Study_FINAL.pdf (accessed 31 December 2022) 21; Gordon S ‘Associational life and “the dark side” of social capital in South Africa: A quantitative analysis of anti-immigrant behaviour’ (2020) 148(2) *Social Indicators Research* 475; HSRC (2022) 3; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 206.

⁹⁶² Moyo K & Zanker F ‘No hope for the “foreigners”’: The conflation of refugees and migrants in South Africa’ (2022) 20(2) *Journal of Immigrant & Refugee Studies* 262; ‘New racism’ is rejected by Tsheola, Ramoroka & Muzondi because ‘there are no rules enforced for reproduction of such societal attitudes of xenophobia’. Tsheola J, Ramoroka T & Muzondi L ‘Xenophobic societal attitudes in a “new” South Africanism: Governance of public perceptions, national identities and citizenship’ (2015) 11(4) *The Journal for Transdisciplinary Research in Southern Africa* 243.

⁹⁶³ Adjai C & Lazaridis G ‘Migration, xenophobia and new racism in post-apartheid South Africa’ (2013) 1(1) *International Journal of Social Science Studies* 192-3; Tella O ‘Understanding xenophobia in South Africa: the individual, the state and the international system’ (2016) 8(2) *Insight on Africa* 143; Mgogo Q & Osunkunle O (2023) 2.

may not experience the outward expression of xenophobia, such as physical attacks and violence at all or often.⁹⁶⁴

Anti-immigrant sentiments by the general public in South Africa have been consistently high, and it seems as though no government or public awareness campaign has been able to change the negative attitudes many South Africans have towards foreign nationals.⁹⁶⁵ According to Carciotto and Mavura, while the Constitution is liberal in guaranteeing rights to foreign nationals, the constitutional framework seems to be at odds with political and social rationales, which view migrant workers as undesirable and expendable competitors for jobs and social services.⁹⁶⁶ Even though SMWs occupy positions requiring critical skills that benefit the economic growth of South Africa, they may still be victims of xenophobia, prejudice and unfair treatment.⁹⁶⁷

Media reporting on xenophobia can potentially incite xenophobia violence.⁹⁶⁸ According to the Human Sciences Research Council, '[i]t would appear that the broadcast media, the main source of trusted information on non-nationals, has failed to adequately redress ... dangerous and unfounded stereotypes' regarding foreign nationals.⁹⁶⁹ The IA refers to migrants in an irregular situation as 'illegal foreigners', and many government officials have unashamedly connected immigrants to criminality, regardless of their documentation status. The use of this term is inappropriate and contributes to stigmatising this group of people and 'associating them with criminality'.⁹⁷⁰

⁹⁶⁴ SIHMA (2020) 59,89.

⁹⁶⁵ DOL (2022) 39; Ruzungunde VS & Zhou S (2021) 2; HSRC (2022) 66.

⁹⁶⁶ Carciotto S & Mavura M *The evolution of migration policy in post-Apartheid South Africa: Emerging themes and new challenges* (2016) 5; Hiropoulos A (2020) 108-9; Crush J (2020) 9; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 64; HSRC (2022) 4.

⁹⁶⁷ Ruzungunde VS & Zhou S (2021) 2.

⁹⁶⁸ Mgogo Q & Osunkunle O 'Xenophobia in South Africa: An insight into the media representation and textual analysis' (2021) 19 *Global Media Journal* 1; Mgogo Q & Osunkunle O 'Students' perceptions of the influence of media on perpetuating xenophobia in South African universities' (2023) *The Journal for Transdisciplinary Research in Southern Africa* 3; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 207.

⁹⁶⁹ HSRC (2022) 74.

⁹⁷⁰ Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, United Nations, General Comment No. 2: on the rights of migrant workers in an irregular situation and members of their families CMW/C/GC/2 (2013) para 4; Hodgson TF 'Promoting non-citizens' right to work in South Africa' <https://www.icj.org/wp-content/uploads/2020/04/South-Africa-Non-Citizens-Right-to-Work-Advocacy-Analysis-Brief-2020-ENG-.pdf> (accessed 11 April 2023); Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 207.

Government officials have used foreign nationals as scapegoats for government failures, leading to xenophobia and anti-immigrant sentiments towards foreign nationals.⁹⁷¹ Hiropoulos further argues that the construction of migration as a crisis contributes to the marginalisation, exclusion and victimisation of migrants.⁹⁷² To address xenophobia and anti-immigrant sentiments with a view to increasing skilled migration to South Africa, the narrative created by government officials who have framed migration as a crisis must change.⁹⁷³

Kanayo, Anjofui, and Stiegler provide compelling insights on this issue:

[T]he inflow of migrants to South Africa has been a threat to South African citizens and its reputation as a safe haven for migrants and refugees has been scarred by outbursts of xenophobia, violence, widespread corruption and allegations of discriminatory practises and human rights abuses by Home Affairs and immigration officials... All of these have become a thorn in the flesh of migrants.⁹⁷⁴

Severe eruptions of xenophobic attacks occurred in 2008.⁹⁷⁵ During this time, 62 people were killed, 670 people were injured, and an unknown amount of property was destroyed and looted.⁹⁷⁶ The 2008 eruption also highlighted the increasing violence against migrants, particularly in townships.⁹⁷⁷ Xenophobic eruptions again took place in South Africa in 2010, 2015,⁹⁷⁸ 2017, 2019 and 2022.⁹⁷⁹ While xenophobic eruptions are sporadic, according to the Scalabrini Institute for Human Mobility in Africa, tensions over the presence of foreign

⁹⁷¹ Hiropoulos A (2020) 113; Moyo K 'South Africa reckons with its status as a top immigration destination, apartheid history, and economic challenges' <https://www.migrationpolicy.org/article/south-africa-immigration-destination-history> (accessed 31 December 2022); Crush J *Deadly Denial: Xenophobia Governance and the Global Compact for Migration in South Africa* (2020) 5; Moyo K & Zanker F (2022) 258; Khan F, Klaaren J, Le Roux W et al. (2018) 79; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 207; Kanayo O, Anjofui P & Stiegler N (2019) 71.

⁹⁷² Hiropoulos A (2020) 113.

⁹⁷³ Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 207.

⁹⁷⁴ Kanayo O, Anjofui P & Stiegler N (2019) 230.

⁹⁷⁵ Mgogo Q & Osunkunle O (2023) 2; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 205.

⁹⁷⁶ SIHMA (2014); Mgogo Q & Osunkunle O (2023) 2.

⁹⁷⁷ Munshi N 'Lived experiences and local spaces: Bangladeshi migrants in post-apartheid South Africa' (2013) 67 *New Contree* 125; Manyaka RK & Madzivhandila TS (2015) 62.

⁹⁷⁸ Bond P 'Who really "state-captured" South Africa? Revealing silences in poverty, inequality and structurally-corrupt capitalism' in Durojaye E & Mirugi-Mukundi G (eds) *Exploring the Link Between Poverty and Human Rights in Africa* (2020) 84; Mgogo Q & Osunkunle O (2023) 2.

⁹⁷⁹ DHA AAR (2017) 86; Crush J (2020) 12; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 17.

nationals remain high, and attacks have intensified since the country became a democracy, and thus remain a threat to the safety of foreign nationals in South Africa.⁹⁸⁰

Due to the increasing occurrence of violence due to xenophobic attitudes, xenophobia and the repercussions thereof are a deterrent to SMWs coming into South Africa.⁹⁸¹ Unfortunately, South Africa has been hailed as the most hostile country in the world in its treatment towards migrants.⁹⁸² It is submitted that xenophobia is a push factor which may lead SMWs to avoid coming to South Africa.⁹⁸³ The violence, often stemming from a xenophobic eruption, causes some foreign nationals, whether skilled or not, to be fearful of coming to South Africa, thus forcing them to consider other countries to migrate to instead.⁹⁸⁴ If the government does not adequately address xenophobia, migrants will continue to face deleterious and deadly consequences.⁹⁸⁵

4.7 Characteristics of the Critical Skills Work Visa

4.7.1 Positive characteristics affecting applicants and holders of the Critical Skills Work Visa

According to various authors, the following characteristics of the CSWV are regarded as positive aspects. The IA does not distinguish between working and residing; residence is, therefore, implicit after the right to seek employment through the CSWV has been granted. In addition, having a CSWV makes the holder eligible for permanent residency after working for a period of five years,⁹⁸⁶ therefore, holding the CSWV contains a possible measure for the retention of the skilled person in South Africa. Secondly, the CSWV is valid for five years.⁹⁸⁷ Lastly, employers do not have to prove that they could not find a suitable citizen to fill the

⁹⁸⁰ Tewari DD (2015) Conference paper: *The xenophobic attacks in South Africa: reflections and possible strategies to ward them off* at 'The SAAPAM 4th Annual Conference Proceedings in Limpopo' <http://ulspace.ul.ac.za/handle/10386/1478> 1; SIHMA (2014) 7; Mgogo Q & Osunkunle O (2023) 1; *Gila v S* [2023] ZAWCHC 8 para 1.

⁹⁸¹ Mlambo VH & Adetiba TC (2019) 4; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 209.

⁹⁸² Kanayo O, Anjofui P & Stiegler N 'Analysis of ramifications of migration and xenophobia in Africa: review of economic potentials, skills of migrants and related policies in South Africa' (2019) 6(2) *Journal of African Foreign Affairs* 69; Mgogo Q & Osunkunle O (2023) 3; HSRC (2022) 4; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 206.

⁹⁸³ Hiropoulos A (2020) 110; Owusu-Sekyere E, Wentzel M & Kanyane B et al. (2019) 31,33; Crush J (2020) 18-9; Mlambo VH & Adetiba TC (2019) 4.

⁹⁸⁴ Moyo K & Zanker F (2022) 261.

⁹⁸⁵ Crush J (2020) 20; Rugunanan P, Xulu-Gama N & Batisai K et al. (2022) 205-8.

⁹⁸⁶ IA regulations in GN 413, reg 23(5).

⁹⁸⁷ IA regulations in GN 413, reg 18(6).

position as is required for the general work visa, because this is not needed for the CSWV.⁹⁸⁸ Clearly, the legislature had intended that work that does not require a critical skill should be reserved for citizens or permanent residents.⁹⁸⁹ The IA and ESA, however, are silent on the instances where an employer has found a suitable citizen but the citizen is unwilling to fill the position that the employer is offering.

4.7.2 Negative characteristics affecting applicants and holders of the Critical Skills Work Visa

Migrants with sought-after skills face barriers to employment in South Africa.⁹⁹⁰ The challenges identified with regard to the CSWV are legislative, practical and policy-centred. First, the policy issues will be discussed, and then the practical barriers to attracting SMWs as a consequence of the IA and its regulations regarding the CSWV.

According to Crush, South Africa's borders were open to skilled foreigners until after apartheid.⁹⁹¹ More specifically, the IA restricts and controls persons allowed to enter the country.⁹⁹² The IA does not give preference to the skilled citizens of regional states within SADC over skilled foreign nationals of other countries outside the region. As a practical measure to achieve this preference for skilled foreign nationals within the SADC, regional member states would benefit greatly from skills and vacancy databases within the region to encourage skilled persons to consider employment opportunities within the region rather than regions like Europe or Asia.⁹⁹³ Based on this, an African collaborative approach that facilitates clear brain gain for South Africa without causing brain drain to the rest of the continent is appropriate.⁹⁹⁴ The government is unlikely to create the labour market that it needs to meet its objectives for development without the implementation of a policy that recognises the regional

⁹⁸⁸ Khan F, Klaaren J, Le Roux W et al. (2018) 117.

⁹⁸⁹ *Rafoneke v Minister of Justice and Correctional Services and Others* 2022 (1) SA 610 (FB), para 48.

⁹⁹⁰ Souza EM & Flippen CA 'Immigrant men's labour market incorporation in South Africa: Regional and national origin differences' (2021) 59(4) *International Migration* 179; Farashah A, Blomquist T and Ariss A et al. (2023) 481.

⁹⁹¹ Crush J 'The dark side of democracy: migration, xenophobia and human rights' (2000) 38 *International Migration* 109.

⁹⁹² Liefgaard T & Sloth-Nielsen J *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (2016) 366.

⁹⁹³ Makochekanwa A & Maringwa J (2009) *Increasing temporary movement of natural persons in the SADC region: What should be done?* Report prepared for University of Mauritius for the services sector development in SADC and ESA region project https://extranet.sadc.int/files/4313/5359/4565/Increasing_Temporary_Movement_in_SADC_by_TIPS_2009.pdf 40.

⁹⁹⁴ Isike C & Isike E (2012) 113.

needs of states surrounding South Africa.⁹⁹⁵ The South African state will be more effective in attracting SMWs if it changes its political discourse on citizenship by constructing a new inclusive notion of citizenship which is tied to the vision of development for the region.⁹⁹⁶

Application processing turnaround times by the SAQA and registration with professional bodies may also hinder foreign nationals from seeking to work in South Africa or act as a barrier to employment.⁹⁹⁷ The SAQA attempts to verify foreign qualifications within 15 days, but this is not guaranteed due to SAQA's dependency on external responses.⁹⁹⁸ In reality the processing time to verify foreign qualifications may take between four weeks and four months.⁹⁹⁹ There is only one SAQA office, in Pretoria. In the past, this meant that foreign nationals would be forced travel to Pretoria specifically, or send their original documents via post.¹⁰⁰⁰ Fortunately, since 1 April 2021, applications for the evaluation of foreign qualifications may be submitted online.¹⁰⁰¹ In addition, applicants of the CSWV may also be required to register for membership with a professional body, council or board.¹⁰⁰² Each professional body, council or board has its own registration requirements, which may take up to a year to complete successfully.¹⁰⁰³

Indeterminate administrative and overly bureaucratic practices by the DHA, and a lack of synergy and contradiction between government institutions responsible for assessing applications for CSWVs, deter SMWs from choosing to work in South Africa.¹⁰⁰⁴ There are problems with the way the DHA has been found to deal with applications for CSWVs. Irregularities in the application of rules by officials in different offices of the DHA lead to a

⁹⁹⁵ Segatti A, Landau LB & Misago JP et al. (2011) 71.

⁹⁹⁶ Isike C & Isike E (2012) 113.

⁹⁹⁷ SIHMA (2020) 83.

⁹⁹⁸ South African Qualifications Authority 'The directorate: foreign qualifications evaluation and advisory services' <http://www.saqqa.org.za/show.php?id=5741> (accessed 31 December 2022) – (hereafter 'SAQA').

⁹⁹⁹ National Treasury *Operation Vulindlela* (2023) 22.

¹⁰⁰⁰ The cost for verifying foreign qualifications is as follows. The applicant must pay an application screening fee which costs R320, thereafter it will cost R1 700 upon the first submission, a secondary submission costs R850. There may also be additional fees if an external body requests of the SAQA to provide a certificate of authenticity, this will also be for the applicants account. SAQA 'Notice of implementation of non-refundable fees relating to evaluation of foreign qualifications effective from 1 July 2023' <https://www.saqqa.org.za/wp-content/uploads/2023/06/Non-refundables-Fees-FQ-2023-.pdf> (accessed 08 August 2023); *DHA v De Saude* (2019) ZASCA 46 para 18; Owusu-Sekyere E, Wentzel M & Kanyane B et al (2019) 36.

¹⁰⁰¹ SAQA 'Evaluation of foreign qualifications: notice of implementation of application payment and submission modes' <https://www.saqqa.org.za/wp-content/uploads/2023/02/Application-payment-and-submission-mode-1-April-2021.pdf> (accessed 08 August 2023).

¹⁰⁰² IA regulations in GN 413, reg 18(5)(b); National Qualifications Framework Act 67 of 2008, s 13(1)(i).

¹⁰⁰³ National Treasury *Operation Vulindlela* (2023) 22.

¹⁰⁰⁴ Farashah A, Blomquist T and Ariss A et al (2023) 491; National Treasury *Operation Vulindlela* (2023) 4.

myriad of differing outcomes for the CSWV.¹⁰⁰⁵ Insufficient and inadequately trained staff, and high levels of corruption and fraud, severely impact the possible success of legally being issued with a CSWV.¹⁰⁰⁶ There is a general lack of transparency in the procedures of the DHA, as decisions are not accounted for and the decision-making process is cloaked in secrecy.¹⁰⁰⁷ While Eisenberg opines that the way the DHA assesses applications for the CSWV is problematic, a recent report by the National Treasury showcases that the numerous requirements of the CSWV is excessive when compared with other countries and international best practices.¹⁰⁰⁸

The inadequacy of the DHA is a serious issue for immigrants in particular.¹⁰⁰⁹ In *Gauteng Gambling Board & Another v MEC for Economic Development, Gauteng*,¹⁰¹⁰ it was held that the state should be the model of compliance; it must not frustrate the enforcement of constitutional rights.¹⁰¹¹ Objective 12 of the GCM concerns strengthening legal certainty and predictability in migration procedures. To achieve this, there must be transparency and accessibility in migration procedures.¹⁰¹² This is of particular importance for South Africa, as discretion exercised by officials, and abuse of power with respect to immigration in general, have eroded predictability and certainty in how migration procedures are applied.

The DWA aims to ensure decent work by lowering recruitment costs.¹⁰¹³ Recruitment costs in South Africa are the sole responsibility of the SMW, not the employer. Costs are also extensive and a barrier to SMWs when deciding to work in South Africa with a CSWV. The costs involved in applying for a CSWV and required documents have been considered a deterrent to SMWs from choosing South Africa as a place to work and reside.¹⁰¹⁴ The front desk visa services, which the DHA is responsible for, have been outsourced to Visa Facilitation Services

¹⁰⁰⁵ Eisenberg G (2017); Iwu C, Baboola R & Zenzile M (2015) 90; Owusu-Sekyere E, Wentzel M & Kanyane B et al (2019) 36; National Treasury *Operation Vulindlela* (2023) 15.

¹⁰⁰⁶ DHA (2017) 19; Carciotto S (2018) 73.

¹⁰⁰⁷ *DHA v De Saude* (2019) ZASCA 46 para 44,58, 64; SIHMA (2020) 78.

¹⁰⁰⁸ Eisenberg G (2017); National Treasury *Operation Vulindlela* (2023) 22.

¹⁰⁰⁹ *Firth v Director-General Department of Home Affairs and Others* [2022] ZAGPPHC 65 para 15.

¹⁰¹⁰ 2013 (5) SA 24 (SCA).

¹⁰¹¹ *Gauteng Gambling Board & another v MEC for Economic Development, Gauteng* 2013 (5) SA 24 (SCA) para 52.

¹⁰¹² UN Global Compact (2018) clause 28(a).

¹⁰¹³ Indicator 10.7.1 states: 'Recruitment cost borne by employee as a proportion of yearly income earned in country of destination'; 10.7.2 states: 'Number of countries that have implemented well-managed migration policies.' Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development, United Nations General Assembly resolution A/RES/71/313, 14.

¹⁰¹⁴ Owusu-Sekyere E, Wentzel M & Kanyane B et al. (2019) 36.

Global (hereafter ‘VFS’) since 2014.¹⁰¹⁵ Outsourcing the work in this manner to VFS has also led to an increase in visa fees.¹⁰¹⁶ In addition to adding to the costs borne by a SMW applying for a CSWV, the appointment of VFS has created a bureaucratic barrier preventing applicants from dealing with the DHA directly.¹⁰¹⁷ This point was illustrated in *DHA v De Saude* where it was stated that the VFS had not been of any assistance in addressing delays in adjudicating CSWV applications, a responsibility which lies with the DHA.¹⁰¹⁸ Instead of successfully facilitating the processing of visa applications timeously, the VFS has become a hindrance and barrier in dealings with the DHA.¹⁰¹⁹

South Africa is open to skilled foreign nationals as part of its international migration regime.¹⁰²⁰ The CSWV has been designed to assist in attracting skills.¹⁰²¹ Reed-Sandoval submits that the South African state provides preferential treatment to skilled foreign nationals entering the country in terms of the IA.¹⁰²² It is submitted that the DHA may have stated that it would provide preferential treatment to SMWs, but it has not actually treated SMWs with any preference regarding the issuing of CSWVs. A recent case decided by the Supreme Court of Appeal, *DHA v De Saude*,¹⁰²³ indicates how the DHA, in its adjudication of CSWVs, has treated potential SMWs unfavourably or without any preference or urgency, thereby failing to act according to South Africa’s national priorities.¹⁰²⁴

In *DHA v De Saude*, the DHA sought an appeal to dismiss the order granted in favour of its opponent, De Saude attorneys, in the Western Cape High court. De Saude attorneys, a specialist immigration law firm, sought relief in the court *a quo* in favour of its clients whose visa applications had been unnecessarily and ‘disgracefully’ delayed by the DHA.¹⁰²⁵ De Saude attorneys had brought forth the applications of 323 persons who had suffered from the DHA’s

¹⁰¹⁵ DOL (2022) 34.

¹⁰¹⁶ DOL (2022) 34; Owusu-Sekyere E, Wentzel M & Kanyane B et al. (2019) 36.

¹⁰¹⁷ *DHA v De Saude* (2019) ZASCA 46 para 21.

¹⁰¹⁸ *DHA v De Saude* (2019) ZASCA 46 para 20.

¹⁰¹⁹ *DHA v De Saude* (2019) ZASCA 46 para 20-1.

¹⁰²⁰ Green paper 32.

¹⁰²¹ The Department of Trade and Industry & Deloitte South Africa *South Africa: Investor’s Handbook 2014/15* (2016) 24.

¹⁰²² Reed-Sandoval A ‘Toward a more inclusive understanding of the “brain drain”’ (2017) 36(1) *South African Journal of Philosophy* 95.

¹⁰²³ (2019) ZASCA 46.

¹⁰²⁴ *DHA v De Saude* para 22-31.

¹⁰²⁵ The DHA has also been held liable in a recent case in which the court held that it was uncooperative and unresponsive and had failed to inform the applicant of the reasons for its delay and lack of response to the applicant’s permanent residence application. *Firth v Director-General Department of Home Affairs and Others* [2022] ZAGPPHC 65 paras 15-9.

failure to process their applications timeously. Two notable instances of unnecessary delay mentioned in *DHA v De Saude* regarding the applications for the CSWV are the cases of Ms Batty and Mr Nzembe.

Ms Batty is a nurse holding a master's degree in Primary Health Care. Ms Batty applied for a CSWV on 4 May 2015. The DHA declined the application on 9 July 2015. Ms Batty appealed on 22 July 2015. She waited 15 months before receiving a response from the DHA about her appeal application. Ms Batty had faced immense hardship caused by the failure of the DHA to process her appeal application timeously. For instance, she was not allowed to work, was constantly in danger of being arrested and deported, and the bank had frozen her accounts.¹⁰²⁶

Mr Nzembe applied for a CSWV on 23 October 2014, on the basis of being a corporate general manager, a skill listed on the CSL. The DHA rejected Mr Nzembe's application on 4 December 2014. He appealed on 9 December 2014. At the hearing on 8 March 2019, the DHA had not furnished Mr Nzembe with a response to his appeal application.¹⁰²⁷

With regard to the 323 applications, the Western Cape High Court ordered the DHA to determine and inform the applicants of the DHA's decision within 30 days of the date of the judgment.¹⁰²⁸ The same was ordered for other applications, but the DHA was given 60 days.¹⁰²⁹ In the instance where applications were misplaced or unavailable to the DHA, the DHA was ordered to inform the applicants within two weeks of the judgment which applications were misplaced and to provide copies of applications at the expense of the DHA.¹⁰³⁰ An order of costs was also delivered in favour of the applicants.¹⁰³¹ The Supreme Court of Appeal upheld the decision of the Western Cape High Court and dismissed the appeal with costs.¹⁰³² The case, *DHA v De Saude* is evidence that the South African state, and specifically the DHA, does not timeously communicate with migrants throughout all stages of the migration process, as states commit to do in terms of objective 3 of the GCM.

Although the preference of skilled over unskilled foreign nationals is desirable, it is questionable whether SMWs receive preferential treatment when their applications for CSWVs

¹⁰²⁶ *DHA v De Saude* para 22-6.

¹⁰²⁷ *DHA v De Saude* para 27-9.

¹⁰²⁸ *DHA v De Saude* (2019) ZASCA 46 para 3.

¹⁰²⁹ *DHA v De Saude* (2019) ZASCA 46 para 3.

¹⁰³⁰ *DHA v De Saude* (2019) ZASCA 46 para 3.

¹⁰³¹ *DHA v De Saude* (2019) ZASCA 46 para 3.

¹⁰³² *DHA v De Saude* (2019) ZASCA 46 para 65.

are considered. Migration legislation and policies reflecting this preference would be in the interests of economic development.¹⁰³³

At present, an application for the CSWV depends on an existing employment offer and is valid for five years. Before 2022, SMWs could apply for a CSWV without a job offer; in this instance, the CSWV would have been valid for 12 months.¹⁰³⁴ This means that the CSWV as a form of job-seeker visa has fallen away. Removing the job-seeker version of the CSWV is not a positive development, as the South African state fails to receive the SMW until employment has been secured, and fails to receive any economic contribution or revenue through spending that would accrue from the SMW while he or she seeks employment in South Africa.

Since 2022, in accordance with an immigration directive by the Director-General of Home Affairs, the applicant, in order to be granted a CSWV, should have secured employment or received an offer for employment.¹⁰³⁵ In addition to removing the job-seeker characteristic of the CSWV, the new requirement as per the immigration directive poses a further hurdle to all SMWs, especially to skilled asylum seekers.¹⁰³⁶ According to Eisenberg, the CSWV may now be considered employer-specific.¹⁰³⁷ This means that if the SMW's employment contract is terminated, the SMW may have to apply for a new CSWV if the details of the specific employer were endorsed on the CSWV as a condition.¹⁰³⁸ In these instances where a specific employer is listed as a condition for issuing the CSWV, the SMW will lack employment portability rights. This is a matter of concern, as migrant workers are more vulnerable to abuse if the validity of their visa is tied to a specific employer.¹⁰³⁹

The nature of this immigration directive, as described above, already excludes the majority of asylum seekers who realistically would not have been able to secure employment or an offer for employment before fleeing to South Africa. The nature of their status, as those that have

¹⁰³³ NDP (2012) 105. This argument is expanded on in Chapter 6.

¹⁰³⁴ Khan F, Klaaren J, Le Roux W et al. (2018) 103.

¹⁰³⁵ DHA 'Director-general's immigration directive no.1 of 2022' http://www.dha.gov.za/images/notices/DGs-Directive-No.-1-of-2022_-critical-skills.pdf (accessed 24 February 2023).

¹⁰³⁶ DHA 'Director-general's immigration directive no.1 of 2022' http://www.dha.gov.za/images/notices/DGs-Directive-No.-1-of-2022_-critical-skills.pdf (accessed 24 February 2023).

¹⁰³⁷ Eisenberg G 'Critical Skills Work visa South Africa' <https://eisenberg.co.za/services/immigration-services/work-visa/critical-skills-work-visa/> (accessed 11 April 2023).

¹⁰³⁸ Eisenberg G 'Critical Skills Work visa South Africa' <https://eisenberg.co.za/services/immigration-services/work-visa/critical-skills-work-visa/> (accessed 11 April 2023).

¹⁰³⁹ Committee on Economic, Social and Cultural Rights, United Nations: Duties of States towards Refugees and Migrants under the International Covenant on Economic, Social and Cultural Rights E/C.12/2017/1 (2017) para 13; Farashah A, Blomquist T and Ariss A et al (2023) 491.

come to South Africa fleeing from their own country, that is, doing so in a hurry, does not usually lend itself to the opportunity to apply for an occupation listed on the CSL before fleeing from persecution.¹⁰⁴⁰ Moreover, the country from which the asylum seeker is fleeing may not have the necessary frameworks, or the asylum seeker may not have access to these institutions to acquire the necessary documentation to apply for an occupation listed on the CSL in the first place.¹⁰⁴¹ So, while *Ahmed and Others v Minister of Home Affairs and Another* clarifies that there is an exemption allowing skilled asylum seekers to apply for CSWVs while in the country,¹⁰⁴² the IA, RA, its directives, and the regulations thereof are wholly out of touch with the struggles of genuine asylum seekers, who require far more than an exemption in order to apply meaningfully for a CSWV to work in an occupation listed on the CSL.

Given the vulnerable position of genuine asylum seekers and refugees, the nature and requirements for an application for the CSWV effectively put it out of reach for this group of foreigners. To consider a meaningful application for a CSWV, one must assume that the country of origin of the asylum seeker and refugee was able to furnish the applicant with these documents in the first place, and that the applicant has been able to bring the documents. The CSWV is the only visa geared at facilitating the employment of SMWs in South Africa, yet by its very nature it is unsuitable for applicants who are vulnerable due to the situation in their countries of origin. It is problematic that the CSWV, realistically, will only be within reach to a small number of asylum seekers and refugees. A large number of those who would not qualify would be excluded because of the situation in their country of origin and not necessarily because they lack the skills to qualify to work in an occupation listed on the CSL.

Granting a CSWV is contingent upon a job offer and limited to an occupation on the CSL. This approach ignores the fact that there are also skills that are required in order to produce the skills that appear on the CSL. The failure to attract persons responsible for the formation of skills listed on the CSL demonstrates lack of foresight. For instance, while STEM teachers are

¹⁰⁴⁰ Rampersad P ‘Skilled refugees and asylum seekers are an untapped resource for South African healthcare’ [https://www.dailymaverick.co.za/opinionista/2023-01-26-tap-into-skilled-refugees-asylum-seekers-for-sa-healthcare/?tl_inbound=1&tl_groups\[0\]=80895&tl_period_type=3?token=MEdiczVNYUpZeFBuZmN2SkdvOUJXTzdsa3V3MW5wTHdtYmRaWjd1TisrNEcvNnFpNmh0N29DRktFmIk4eEUrNUIrSUhpSTIxc1JtSm5jTWFOYVJpRlhIZkVZVUhrWVRnSElrZ0RoakV2SzdqZWFJNmJrVXpaRjNOZS9Ld011amI=&utm_medium=email&utm_campaign=Afternoon%20Thing%202027%20January&utm_content=Afternoon%20Thing%2027%20January+CID_0024a78cb3532f8dd66ad8ac142ad309&utm_source=TouchBasePro&utm_term=Skilled%20refugees%20and%20asylum%20seekers%20are%20an%20untapped%20resource%20for%20South%20African%20healthcare](https://www.dailymaverick.co.za/opinionista/2023-01-26-tap-into-skilled-refugees-asylum-seekers-for-sa-healthcare/?tl_inbound=1&tl_groups[0]=80895&tl_period_type=3?token=MEdiczVNYUpZeFBuZmN2SkdvOUJXTzdsa3V3MW5wTHdtYmRaWjd1TisrNEcvNnFpNmh0N29DRktFmIk4eEUrNUIrSUhpSTIxc1JtSm5jTWFOYVJpRlhIZkVZVUhrWVRnSElrZ0RoakV2SzdqZWFJNmJrVXpaRjNOZS9Ld011amI=&utm_medium=email&utm_campaign=Afternoon%20Thing%202027%20January&utm_content=Afternoon%20Thing%2027%20January+CID_0024a78cb3532f8dd66ad8ac142ad309&utm_source=TouchBasePro&utm_term=Skilled%20refugees%20and%20asylum%20seekers%20are%20an%20untapped%20resource%20for%20South%20African%20healthcare) (accessed 08 February 2023).

¹⁰⁴¹ Rampersad P (2023).

¹⁰⁴² (2018) ZACC 39; see 1.1 above.

required to educate students in STEM subjects, only the latest CSL includes STEM teachers. One should ask whether the South African state has realised that STEM teachers are critical due to their role in skills formation and that there is a shortage of them. To address skills shortages in the long term, the formation of skills throughout the skills pipeline must be addressed. To do so in a logical manner rather than fortuitously, the South African state must be proactive and include those skills necessary for the formation of skills listed on the CSL.

A CSWV may not include employment portability rights. This means that when seeking to change employers, SMWs may incur considerable costs, such as returning to their country of origin and applying for a new CSWV.¹⁰⁴³ In accordance with the state commitments in objective 18 of the GCM, member states must enable easier transition from one employer or job to another by making documentation available that acknowledges the skills acquired on the job or via training.¹⁰⁴⁴ As a consequence of the CSWV's being contingent on a job offer, this means that, for the CSWV to continue to be valid in some instances a SMW may be tied to a specific employer. This may be added as a condition for the granting of a CSWV.¹⁰⁴⁵ As previously noted, for the sake of South Africa's national development needs, SMWs must remain employed in occupations listed on the CSL at least for the period for which the CSWV is valid, but a lack of employer portability rights exposes the holder of the CSWV to abuse.¹⁰⁴⁶

4.8 Conclusion

The first research sub-question in this chapter considered the current law for attracting SMWs. In this section, the IA and ESA were discussed as the principal legislation dealing with the employment of SMWs. The RA was also discussed to highlight the lack of specific provisions in the IA and RA to allow for the employment of skilled refugees and asylum seekers already in the country. While *Ahmed and Others v Minister of Home Affairs and Another* has clarified that asylum seekers are entitled to apply for a CSWV, practical impediments, predominantly caused by the DHA, hinder skilled asylum seekers from the realisation of applying for a CSWV, potentially leading to brain waste. To remedy this, the IA must include a provision

¹⁰⁴³ Eisenberg G 'Critical Skills Work visa South Africa' <https://eisenberg.co.za/services/immigration-services/work-visa/critical-skills-work-visa/> (accessed 11 April 2023).

¹⁰⁴⁴ UN Global Compact (2018) clause 34(i); see 3.2.3 above.

¹⁰⁴⁵ DHA 'Director-general's immigration directive no.1 of 2022' <http://www.dha.gov.za/images/notices/DGs-Directive-No.-1-of-2022-critical-skills.pdf> (accessed 24 February 2023); Eisenberg G 'Critical Skills Work visa South Africa' <https://eisenberg.co.za/services/immigration-services/work-visa/critical-skills-work-visa/> (accessed 11 April 2023).

¹⁰⁴⁶ Farashah A, Blomquist T and Ariss A et al (2023) 491; see 4.7.2.

specifically catering for the unique positions of skilled asylum seekers and skilled refugees when applying for CSWVs.

The removal of the automatic right of asylum seekers to seek employment after the creation of ASP centres may lead to further brain waste, as asylum seekers may be confined to ASP centres or de facto detention centres until their status is determined. Given the significant delay in assessing asylum applications, many skilled asylum seekers may find themselves at the mercy of a system which is not designed for them to be employed in occupations listed on the CSL in the first place. Swift, thorough evaluation of asylum applications is of utmost importance to prevent skilled asylum seekers from being left vulnerable and without adequate protection.

The IA is clear on the requirements for a CSWV, as evidenced by *DHA v De Saude*, but the assessment of CSWV applications by the DHA and other related bodies such as the SAQA presents real barriers to SMWs applying for a CSWV being granted a CSWV within the appropriate timeframe. The recent imposition of the CSWV requirements, which necessitate a job offer and potentially tie the visa's validity to a specific employer, is problematic, and is likely to deter or prevent SMWs from choosing to work in South Africa. The chapter has shown that systemic and administrative issues prevent the CSWV system from reaching the stated goal, which is to facilitate migration by SMWs. Moreover, the CSWV as an instrument has been designed not to attract SMWs but merely to facilitate their employment. Since the research sub-question concerned legislation to attract SMWs, it was necessary to mention which factors act as deterrents to the attraction of SMWs. It may be added that anti-immigrant sentiments and attitudes, government-scapegoating amounting to institutional xenophobia, and xenophobia, act as deterrents to SMWs and must be addressed to attract more SMWs to South Africa.

The second research sub-question sought to establish whether SMWs enjoy access to rights in the same manner as citizens. SMWs are entitled to the right to equality, but it is not clear whether a SMW may succeed in a claim of unfair discrimination founded on the provisions of the PEPUDA. This offends the principle and benchmark of non-discrimination. Including nationality as a prohibited ground in the PEPUDA will serve as a remedy where a foreign national has been a victim of xenophobia, or has suffered unfair discrimination rooted in anti-immigrant sentiments or attitudes. With respect to the principle of non-discrimination, the ESA provides that nationals are to be preferred and considered before foreign nationals are employed. South Africa's legislation, for the most part, provides for non-discrimination with

respect to remuneration, working conditions and social insurance. In the light of this, legislation complies with the benchmark of accessibility for the right to work. Section 6(4) of the EEA addresses the issue of equal pay for equal work or work of equal value.¹⁰⁴⁷ The CESCR expressed concerns regarding South Africa's labour laws and collective agreements, insofar as they did not incorporate the principle of equal pay for work of equal value as articulated in Articles 3, 6 and 7 of the ICESCR. In this context, non-discrimination is not provided for in relation to equal pay for equal value.¹⁰⁴⁸

With respect to equal opportunity, section 22 of the Constitution is extended only to citizens. The implication is that, if section 22 is interpreted narrowly, then SMWs do not have equal opportunities in the same way as citizens do with respect to employment opportunities. Fortunately, the Bill of Rights provides a floor of rights with nothing to prevent legislation from extending the opportunity of choosing a profession to SMWs. The legal framework in South Africa did not formally recognise flexible working arrangements until the Covid-19 pandemic, but now employers are allowed to formalise flexible working arrangements through various administrative measures.¹⁰⁴⁹ In South Africa, legislation and policies do not prevent foreign workers from benefiting from flexible working arrangements in the same manner as citizens.

The BCEA recognises aspects of the right to the enjoyment of just and favourable working conditions. The CESCR has observed that low wages, gender inequality, working hours above 40 hours per week, work-related accidents and fatalities¹⁰⁵⁰ diminish the realisation of the right to just and favourable working conditions. While the observation of the CESCR was of a general nature, these issues are prevalent in South Africa, even though the BCEA covers many aspects of Article 7 of the ICESCR. Article 7 of the ICESCR undeniably applies to both nationals and SMWs, but many do not actually enjoy just and favourable working conditions.¹⁰⁵¹

¹⁰⁴⁷ Section 6(4) of the EEA states: 'A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed on subsection (1), is unfair discrimination.'

¹⁰⁴⁸ CESCR: Concluding observations SA (2018) paras 41-2.

¹⁰⁴⁹ Disaster Management Act 57 of 2002 regulations in GG 479 GN 43257 of 29 April 2020 reg 16; Nkate J 'The effect of Covid-19 on the work arrangements in the South African public service' (2020) 3(1) *Africa Journal of Public Sector Development and Governance* 149.

¹⁰⁵⁰ General Comment No. 23 (2016) 2.

¹⁰⁵¹ General Comment No. 23 (2016) 2, 3.

The South African state meets the benchmarks of accessibility and of acceptability and of quality of the right to work in the context of the application of the LRA and BCEA, which apply equally to SMWs and citizens who are employees.¹⁰⁵² The South African state complies best with the benchmarks of acceptability and quality of available work and working conditions, as the right to fair labour practices and applicable working conditions apply equally to citizens and SMWs.

Social assistance is limited to South African citizens, permanent residents and refugees. Holders of the CSWV are therefore not eligible to receive social assistance from the state. As SMWs form part of disadvantaged and marginalised groups, the South African state is failing in its specific obligation to fulfil the right to social security with respect to social assistance, as expressed in the ICESCR.

As discussed in the chapter, the rights of migrants, as provided for by the international instruments discussed in chapter 3, are given only partial effect in South African national legislation. In the instances where legislation, and consequently the rights stemming from it, is comprehensive, enjoyment of and access to these rights is often elusive. As mentioned above, access to rights and working conditions are important considerations to SMWs contemplating migrating to South Africa. A reduction in any entitlement or enjoyment of rights may therefore be considered a factor reducing the attraction of SMWs to South Africa in general and thus reduce the efficacy of the CSWV as a means to facilitate employment of SMWs.

The next chapter, chapter 5, takes the research further by considering how the legal frameworks of Botswana, Canada and New Zealand are set up to attract SMWs. The aim of the next chapter is to consider whether these jurisdictions provide any valuable lessons for the South African state on improving the effectiveness of the CSWV.

¹⁰⁵² See 4.5.3 above.

Chapter Five: Regulation of Immigration Laws in Botswana, Canada and New Zealand

5.1 Introduction

The previous chapters discussed skills shortages in South Africa and dealt with the laws and regulations governing immigration into South Africa. Chapter 3 identified international obligations and benchmarks for migration of SMWs, while chapter 4 assessed how South African immigration laws and policies measure up to international obligations and benchmarks concerning SMWs. The purpose of this chapter is to assess the CSWV against comparable visas or like instruments that serve to facilitate skilled immigration to Botswana, Canada and New Zealand. The chapter takes the research further by answering research objective six, which questions how the South African legal framework may be improved by lessons learnt from comparative international law.

On a macro and micro level, there are definite similarities between the legal framework of South Africa and those of the comparators, rendering them suitable for comparative analysis.¹⁰⁵³ For the purposes of this comparative analysis, the format and structure of the discussion in this chapter mirror the structure of chapter 4.

As the overall point of this thesis is to determine the effectiveness of the CSWV, it is important to discuss the rights and legal framework in each country, as a visa is merely an instrument to allow migrants to enter, work and reside in the country. The legal framework in a country, and specifically its provisions, acts as a push or pull factor.¹⁰⁵⁴ Favourable legislation may attract SMWs to a particular state. It is thus imperative to discuss the legal frameworks pertaining to the rights of SMWs, and skilled refugees and skilled asylum seekers already in the country, to ascertain in which state the legal framework is most favourable.

¹⁰⁵³ See 1.6 above.

¹⁰⁵⁴ Farashah A, Blomquist T and Ariss A et al. (2023) 490.

5.2 Botswana

5.2.1 Historical development of the law and policy of migration in Botswana

Since Botswana gained independence in 1966, it has progressed from being the second poorest country in the world to one that may be classified as an upper middle-income country.¹⁰⁵⁵ Historically, Botswana's economy was dependent on diamond extraction.¹⁰⁵⁶ After the decline in the demand for diamonds, the Government of Botswana sought other means to develop the economy. However, it faced several limitations, including underdeveloped infrastructure, no start-up capital, a population of less than 1 million people in the 1980s, and a mostly unskilled workforce.¹⁰⁵⁷ Even with such a relatively small population, Botswana's gross domestic product still managed to exceed that of countries with much larger populations from its independence until around 2000.¹⁰⁵⁸

During the 1970s–1990s, the Government of Botswana developed an open migration policy to combat the limitations to its economic growth and to attract human resources to develop the economy.¹⁰⁵⁹ Many immigrants¹⁰⁶⁰ coming into Botswana were Zimbabwean professionals with skills in high demand in Botswana.¹⁰⁶¹

5.2.1.1 Immigration Act 19 of 1966

Botswana's Immigration Act 19 of 1966 allowed people to enter Botswana, and simultaneously prohibited only a few categories of persons from entering the country. Prohibited persons were (a) persons who were likely to become a public charge,¹⁰⁶² (b) persons such as an 'idiot or epileptic, or any person who is insane or mentally deficient, or any person who is deaf and

¹⁰⁵⁵ Sinkamba RP 'Migration and health care: The case of HIV and AIDS in Botswana' (2015) 6 *Southern African Social Protection Experts Network* 1; Pourazar E *Spaces of Vulnerability and Areas Prone to Natural Disaster and Crisis in Six SADC Countries* (2017) 41.

¹⁰⁵⁶ Fessehaie J & Rustomjee Z 'Resource-based industrialisation in Southern Africa: Domestic policies, corporate strategies and regional dynamics' (2018) 35(3) *Development Southern Africa* 413.

¹⁰⁵⁷ Lefko-Everett K 'Botswana's changing migration patterns' <https://www.migrationpolicy.org/article/botswanas-changing-migration-patterns/> (accessed 31 December 2022).

¹⁰⁵⁸ Leith J *Why Botswana Prospered* (2005) 3.

¹⁰⁵⁹ Cross C, Gelderblom D & Mafukidze J et al. (eds) *Views on Migration in Sub-saharan Africa: Proceedings of an African Migration Alliance Workshop* (2006) 186.

¹⁰⁶⁰ The Immigration Act of 2011 defines an immigrant as a person who is not a citizen of Botswana.

¹⁰⁶¹ Campbell E & Crush J (ed) *Unfriendly Neighbours: Contemporary Migration From Zimbabwe To Botswana* (2012) 4; Thebe V 'Two steps forward, one step back: Zimbabwean migration and South Africa's regularising programme (the ZDP)' (2017) 18 *International Migration & Integration* 618.

¹⁰⁶² Due to 'an infirmity of body or mind', or persons who were unable to prove that they have sufficient funds to support themselves and their dependents. Immigration Act 19 of 1966, s 7(a).

dumb, or deaf and blind¹⁰⁶³ or otherwise afflicted physically;¹⁰⁶⁴ (c) a person afflicted, infected or suffering from a prescribed disease;¹⁰⁶⁵ (d) a prostitute or person benefitting or who has benefitted from the proceeds of such prostitution, including a person who ‘has procured women or girls for immoral purposes’;¹⁰⁶⁶ (e) any person who has not received a free pardon for a crime committed;¹⁰⁶⁷ (f) a person who was declared an undesirable inhabitant or visitor by the President;¹⁰⁶⁸ (f) the wife, children under 18 years old and dependants of any person who had been declared a prohibited immigrant;¹⁰⁶⁹ and (g) any person or class described in a prescribed notice.¹⁰⁷⁰

The Immigration Act 19 of 1966 allowed relatively unrestricted entry to visitors, tourists and employment-seekers.¹⁰⁷¹ In terms of the Immigration Act 19 of 1966, SMWs who sought to be employed in Botswana were not part of the list of excluded persons provided above. While the Immigration Act 19 of 1966 failed to prevent illegal immigration, it did not prohibit people from entering Botswana for the purposes of employment.¹⁰⁷²

Foreign investment was also encouraged through incentives to stimulate immigration for the benefit of Botswana.¹⁰⁷³ While the Immigration Act 19 of 1966 regulated immigration in general, to attract SMWs the Government of Botswana provided incentives to SMWs such as attractive salaries, subsidised housing, health insurance and free education for the children of SMWs and skilled expatriates.¹⁰⁷⁴ Migrant labour, therefore, became a key part of the labour force of Botswana¹⁰⁷⁵ to fill skills shortages that were critical to the development of the economy.¹⁰⁷⁶

¹⁰⁶³ Immigration Act 19 of 1966, s 7(b).

¹⁰⁶⁴ These persons were not allowed to enter or remain in Botswana unless proof could be provided that they were able to permanently support themselves in Botswana or that they had enough funds for their removal from Botswana at the minister’s request. Immigration Act 19 of 1966, s 7(b).

¹⁰⁶⁵ Unless such person receives the written consent of an immigration officer and complies with the stipulated conditions therein, if any. Immigration Act 19 of 1966, s 7(c).

¹⁰⁶⁶ Immigration Act 19 of 1966, s 7(d).

¹⁰⁶⁷ Where the sentence was imprisonment without the option of a fine. Immigration Act 19 of 1966, s 7(e).

¹⁰⁶⁸ Immigration Act 19 of 1966, s 7(f); *Williams v The State* [1989] BWCA 30.

¹⁰⁶⁹ Immigration Act 19 of 1966, s 7(g).

¹⁰⁷⁰ Immigration Act 19 of 1966, s 7(h).

¹⁰⁷¹ Lefko-Everett K (2019).

¹⁰⁷² Lesetedi GN & Modie-Moroka T *Reverse xenophobia: Immigrants attitudes towards citizens in Botswana: A paper presented at the African migrations workshop: Understanding migration dynamics in the continent at the Centre for migration studies, University of Ghana, Legon-Accra, Ghana, September 18th – 21st 2007* (2007) 7.

¹⁰⁷³ Lefko-Everett K (2019).

¹⁰⁷⁴ Cross C, Gelderblom D & Mafukidze J et al. (2006) 200.

¹⁰⁷⁵ Hillbom E & Bolt J *Botswana – A Modern Economic History: An African Diamond in the Rough* (2018) 100.

¹⁰⁷⁶ International Monetary Fund Botswana: 2002 Article IV Consultation— Staff Report; Staff Statement; and Public Information Notice on the Executive Board Discussion IMF Country Report 02/244 (2002) 11.

Simultaneously, the Government of Botswana also invested substantially in the skills of nationals to ensure the continuation and longevity of the country's economic growth without the continued reliance on foreign skills.¹⁰⁷⁷ For instance, Botswana has faced notable skills shortages in the health-care profession in particular.¹⁰⁷⁸ To remedy this, the country's first medical school and health faculty was established in 2009 with the view to producing enough health-care workers who are citizens to meet its need.¹⁰⁷⁹ A localisation programme was also established that invited expatriates to train nationals.¹⁰⁸⁰ The localisation programme resulted in a growing supply of local skills, and many foreign firms adopted a long-term trend towards employing locals in skilled positions.¹⁰⁸¹

With the above strategy, growth and development were expedited.¹⁰⁸² The Government of Botswana attracted SMWs with the promise of real income growth, especially in highly skilled occupations.¹⁰⁸³ From 1997 to 1999, 'more than half of the skilled migrants in Botswana ... came from Southern Africa', thus indicating that Botswana was a very real competitor and threat to the skills pool in South Africa.¹⁰⁸⁴ In the late 1990s, after achieving the desired economic development needs of the country when nationals of Botswana were able to continue meeting the development needs of Botswana, the country adopted restrictive protectionist immigration laws.¹⁰⁸⁵ The shift to a more restrictive Act and policy was also prompted by the failure of the Immigration Act 19 of 1966 to prevent illegal immigration.¹⁰⁸⁶ The Immigration Act of 2003 thus served the purpose of imposing stricter regulations for immigration to Botswana.

¹⁰⁷⁷ Oucho J, Campbell E & Mukamaambo E *Botswana: Migration Perspectives and Prospects* (2000) 37; Cross C, Gelderblom D & Mafukidze J et al. (2006) 200.

¹⁰⁷⁸ Nkomazana O, Peersman W & Willcox M et al. 'Human resources for health in Botswana: The results of in-country database and reports analysis' (2014) 6(1) *African Journal of Primary Health Care & Family Medicine* 2.

¹⁰⁷⁹ Motlhatlhedhi K & Nkomazana O 'Home is home—Botswana's return migrant health workers' (2018) 13(11) *Plos One* 2.

¹⁰⁸⁰ Lefko-Everett K (2019).

¹⁰⁸¹ United Nations *Investment Policy Review: Botswana* (2003) 18.

¹⁰⁸² Lefko-Everett K (2019).

¹⁰⁸³ Kok P, Oucho J & Gelderblom D et al. *Migration in South and Southern Africa: Dynamics and Determinants* (2006) 78.

¹⁰⁸⁴ Kok P, Oucho J & Gelderblom D et al. (2006) 59.

¹⁰⁸⁵ Cross C, Gelderblom D & Mafukidze J et al. (2006) 200.

¹⁰⁸⁶ Lesetedi GN & Modie-Moroka T *Reverse xenophobia: Immigrants' attitudes towards citizens in Botswana: A paper presented at the African migrations workshop: Understanding migration dynamics in the continent at the Centre for migration studies, University of Ghana, Legon-Accra, Ghana, September 18th – 21st 2007* (2007) 7.

The Immigration Act of 2003 introduced more regulations for immigration, such as imposing severe penalties for illegal entry into Botswana.¹⁰⁸⁷ Botswana's current Immigration Act 3 of 2011, to be read with the Immigration Regulations 85 of 2011, deals with the entry of immigrants into Botswana. Refugees and asylum seekers are regulated by the Refugees (Recognition and Control) Act of 1968, which allows political refugees to seek asylum in Botswana.¹⁰⁸⁸

5.2.2 Legal requirements for foreign nationals entering Botswana

In terms of the Immigration Act 3 of 2011, a foreign national may not reside in Botswana for the purposes of working for a reward or profit if he or she has not been granted a valid work permit.¹⁰⁸⁹ To work in Botswana, foreign nationals must also apply for a residence permit, separate from the work permit. Usually, applicants submit applications for work and residence permits simultaneously.¹⁰⁹⁰ Any person who works in Botswana without a valid work permit will be liable to a fine or imprisonment which does not exceed four years, or to paying a fine and simultaneously serving a custodial sentence.¹⁰⁹¹ It is also illegal to employ a foreign national in Botswana who does not hold a valid work permit.¹⁰⁹² The employer who employs such a foreign national will be liable to pay a fine or being sentenced to imprisonment for no longer than five years, or the employer may be liable to pay the fine and simultaneously be sentenced to imprisonment as stated above.¹⁰⁹³

Botswana does not have a CSL; rather, a point-based system is used when considering applications for a work permit, one which allows individuals with scarce or critical skills to score higher than others without sought-after skills.¹⁰⁹⁴

¹⁰⁸⁷ Cross C, Gelderblom D & Mafukidze J et al. (2006) 200.

¹⁰⁸⁸ Refugees (Recognition and Control) Act of 1968, s 4(1).

¹⁰⁸⁹ Immigration Act 3 of 2011, s 22(1)(a).

¹⁰⁹⁰ Immigration Act 3 of 2011, s 18(c); IBN Immigration Solutions 'Botswana Immigration and visas' <https://www.ibn.co.za/botswana/> (accessed 31 December 2022).

¹⁰⁹¹ Fine not more than P4 000. Immigration Act 3 of 2011, s 22(2).

¹⁰⁹² Immigration Act 3 of 2011, s 22(3)(a).

¹⁰⁹³ Fine to the maximum of P5 000. Immigration Act 3 of 2011, s 22(4). At the time of writing P5000 equals to 6,913.21 South African Rand, 486.522 Canadian Dollar and 590.275 New Zealand Dollar. Oanda 'Oanda Currency Converter' <https://www.oanda.com/currency-converter/en/?from=BWP&to=NZD&amount=5000> (accessed 16 February 2024).

¹⁰⁹⁴ IBN Immigration Solutions (2019).

5.2.2.1 Requirements for a work permit

The points system is calculated as follows:

‘Eligibility Requirements	Scores
English / Setswana Language Competence	10
Educational Qualifications	15 (maximum)
Degree or equivalent qualification	15
Diploma or equivalent qualification	10
Employer Justification	25
Scarce skills	30
Relevant Work Experience (years)	40 (maximum)
≤5 years	10
6-10 years	15
11-20	30
≥21 years	40
Maximum points	120
Percentage needed to apply	60% (72) ¹⁰⁹⁵

Applicants must secure at least 60 per cent.¹⁰⁹⁶ Along with the application, the applicant must also provide supporting documents.¹⁰⁹⁷ Once submitted, the work permit application is supposed to take 14 working days to be finalised¹⁰⁹⁸ and the cost thereof is P1,500.¹⁰⁹⁹ The

¹⁰⁹⁵ Botswana Investment and Trade Centre ‘Standard criteria for assessment of work & residence permit renewal applications’ <https://www.gobotswana.com/standard-criteria-assessment-work-residence-permit-renewal-applications> (accessed 31 December 2022).

¹⁰⁹⁶ Salt L & Goldberg D ‘Talent has no borders: Seconding employees to Botswana’ <http://bakerxchange.com/rv/ff002924e27fcf197a5993bc914ca9627a2c205e> (accessed 31 December 2022) - (hereafter ‘Salt L & Goldberg D (2016)’).

¹⁰⁹⁷ Immigration Regulations 85 of 2011, s 6(1); Republic of Botswana ‘Work Permit Application’ <https://www.gov.bw/residency-and-work/work-permit-application> (accessed 31 December 2022).

¹⁰⁹⁸ Republic of Botswana ‘Work Permit Application’ <https://www.gov.bw/residency-and-work/work-permit-application> (accessed 31 December 2022).

¹⁰⁹⁹ Immigration Regulations 85 of 2011, s 6(2). At the time of writing P1500 equals to 2,051.76 South African Rand, 145.956 Canadian Dollar and 177.082 New Zealand Dollar. Oanda ‘Oanda Currency Converter’ <https://www.oanda.com/currency-converter/en/?from=BWP&to=NZD&amount=5000> (accessed 16 February 2024).

work permit is not a job-seeker permit as such applicants may only apply for a work permit if they have been offered a job in Botswana.¹¹⁰⁰

The submission process for the work permit is as follows: the application for the work permit must be accompanied by the prescribed fee and submitted to an authorised officer.¹¹⁰¹ The Immigration Board will decide if an application is successful or not, and the authorised officer must communicate this decision to the applicant in writing. The officer communicating the decision does not need to provide reasons for the decision.¹¹⁰² In deciding on the application, the Immigration Board may also request further information from the applicant.¹¹⁰³

As the Immigration Board is not required to provide reasons, this may lead to a lack of transparency in the decision-making process.¹¹⁰⁴ There are, however, some objective criteria to assess the application. The objective criteria are (a) whether the education, qualifications, training and experience of the applicant will render the applicant sufficiently skilled to do the work he or she proposes to do in Botswana as set out in the eligibility requirements; (b) the applicant's prospects of attaining the employment or having enough capital to engage in the proposed activity;¹¹⁰⁵ (c) whether the applicant is able to support him- or herself and his or her dependants without taking up the job offer, profession, occupation or business for reward or profit;¹¹⁰⁶ (d) if the issuance of the permit would affect the opportunities of citizens in respect to the employment or engagement for reward or profit;¹¹⁰⁷ and (e) where an application has been made for employment, the strategies which have been put in place or will be put in place by the employer to train a citizen to eventually replace the foreign national who is applying for the work permit.¹¹⁰⁸

¹¹⁰⁰ IBN Immigration Solutions (2019). A contract of employment is required as part of the list of requirements when applying for a work permit. Government of Botswana 'Work Permit application' <https://www.gov.bw/residency-and-work/work-permit-application> (accessed 31 December 2022).

¹¹⁰¹ The authorised officer considers the application and sends the application along with his or her recommendations to the Immigration Board. To make the recommendation, the authorised officer may request the applicant to send further documentation or present him- or herself for examination by the authorised officer. Immigration Act 3 of 2011, s 23(1)-(3).

¹¹⁰² Immigration Act 3 of 2011, s 23(5).

¹¹⁰³ Immigration Act 3 of 2011, s 23(6).

¹¹⁰⁴ This is discussed in more detail in 6.2.3.2 below.

¹¹⁰⁵ Immigration Act 3 of 2011, s 23(7)(a).

¹¹⁰⁶ Immigration Act 3 of 2011, s 23(7)(b).

¹¹⁰⁷ Immigration Act 3 of 2011, s 23(7)(c).

¹¹⁰⁸ Immigration Act 3 of 2011, s 23(7)(d).

The Immigration Board will consider the factors listed above when assessing an application for a work permit. The positive and negative factors concerning the immigration regime in Botswana are discussed below.

5.2.2.2 Positive characteristics of immigration to Botswana

To the benefit of Botswana nationals, citizens' employment is encouraged.¹¹⁰⁹ When foreign companies apply for work permits for their employees, granting work permits is contingent upon proof of localisation efforts from the foreign company, such as the training of a citizen or employment of citizens as stipulated in the Immigration Act.¹¹¹⁰ Localisation efforts not only benefit citizens through training and by providing employment opportunities, but also help to develop the economy to the extent that the government is able to rely on its own citizens. Employers are also responsible for informing SMWs of their obligation to impart skills and knowledge to citizens of Botswana who are employed with the same employer.¹¹¹¹ In addition, the government may require evidence to show that a citizen is in the process of being trained to assume the duties that a SMW currently fulfils.¹¹¹²

5.2.2.3 Negative characteristics of immigration to Botswana

According to the International Monetary Fund, Botswana's immigration legislation is overly restrictive.¹¹¹³ Some issues with Botswana's immigration legislation include unclear processes for requesting a permit as regulations are not easily accessible, and the broad discretion granted to the Immigration Board when assessing qualifications. Work permits are overcomplicated and there are administrative bottlenecks.¹¹¹⁴ In addition, due to the extensive autonomy of

¹¹⁰⁹ International Business Publications *Botswana Taxation Laws and Regulations Handbook Volume 1 Strategic Information and Regulations* (2008) 176.

¹¹¹⁰ Immigration Act 3 of 2011, s 23(7)(d); International Business Publications *Botswana Taxation Laws and Regulations Handbook Volume 1 Strategic Information and Regulations* (2008) 176.

¹¹¹¹ Trade Disputes Act (Cap. 48:02) regulations in GN 483 GG 63 of 10 October 2008 reg 21.2.

¹¹¹² US Department of State *Botswana: Investment Climate Statement 2015* (2015) 12; US Department of State *Botswana: Investment Climate Statement 2020* (2020); Botswana Immigration Act, s 23(7)d.

¹¹¹³ International Monetary Fund, African Department Botswana: Selected Issues IMF Country Reports 17/250 (2017) 25; Jefferis K 'Technical Report: Proposals for Business-friendly Immigration Reform in Botswana' https://www.satradehub.org/images/stories/downloads/pdf/technical_reports/proposals%20for%20business-friendly%20immigration%20reform%20in%20botswana.pdf (accessed 3 February 2022) 5.

¹¹¹⁴ Qureshi MS, Te Velde DW *Working Smart and Small: The Role of Knowledge-based and Service Industries in Growth Strategies for Small States* (2008) 54.

immigration officers, there are varying processes and processing times for applications.¹¹¹⁵ Immigration officers also have the ability to decide on further requirements that are not listed or prescribed.¹¹¹⁶

The process of applying for residence is often tedious and confusing.¹¹¹⁷ The granting of permanent residence or citizenship is a discretionary process, making it difficult for migrants to gain residence legally.¹¹¹⁸ Applications are continually postponed, and immigration officers often request bribes to expedite the process of applying for a work permit.¹¹¹⁹

The process of applying for a permit may take three to six months, and possibly longer if registration with a professional body is required.¹¹²⁰ After the employee or employer makes submissions to the Immigration Board, the board may determine the time that the permit will be valid for to a maximum period of five years.¹¹²¹ Immigration officers may investigate, examine and inquire of anyone they deem suspicious to provide certain information; they may also search persons, property and transport vessels without a search warrant.¹¹²² In sum, many of the issues with the immigration process stem from the wide discretion allowed to immigration officers by legislation.

It is submitted that the general lack of transparency and the autonomy of immigration officers in the decision-making process are problematic. Immigration officers are not required to furnish applicants with reasons for their decisions. Whenever a decision is made without giving an account of the reasons for the decision, this opens the door to the possibility of arbitrary decision-making and a lack of accountability and transparency. As no reasons are provided for decisions, there is no certainty for the applicant or employer, or for setting precedents for future

¹¹¹⁵ International Monetary Fund, African Department Botswana: Selected Issues IMF Country Reports 17/250 (2017) 25; Jefferis K 'Technical Report: Proposals for Business-friendly Immigration Reform in Botswana' https://www.satradehub.org/images/stories/downloads/pdf/technical_reports/proposals%20for%20business-friendly%20immigration%20reform%20in%20botswana.pdf (accessed 3 February 2022) 5.

¹¹¹⁶ Intergate Immigration 'Work Permit for Botswana' <https://www.workvisabotswana.com/work-permit-for-botswana/> (accessed 31 December 2022).

¹¹¹⁷ Expat Arrivals 'Visas for Botswana' <https://www.expatarrivals.com/africa/botswana/visas-botswana> (accessed 31 December 2022); International Monetary Fund, African Department Botswana: Selected Issues IMF Country Reports 17/250 (2017) 25.

¹¹¹⁸ Landau LB, Misago JP & Majidi N et al. (2018) 'Free & safe movement in Southern Africa: Report to inform advocacy promoting safe and unencumbered movement of people across Southern Africa's international borders' African Centre for Migration & Society: Johannesburg 29.

¹¹¹⁹ Makochehanwa A, Kambarami P & Bariagaber A (ed) *International Migration and Development in Eastern and Southern Africa* (2014) 43.

¹¹²⁰ Salt L & Goldberg D (2016).

¹¹²¹ Salt L & Goldberg D (2016).

¹¹²² Landau LB, Misago JP & Majidi N et al. (2018) 80.

applications. In addition, without reasons, applicants will not know how to improve their applications for resubmission or appeal. Furthermore, a lack of transparency does not meet the best practices stipulated in objective 12 of the GCM, which requires member states to commit to ensuring legal certainty and predictability throughout the migration process.¹¹²³

While considering the application, the Immigration Board must act with the interests of Botswana in the foreground in considering the applicant's character.¹¹²⁴ It is submitted that considering a person's character may be subjective. No further guidance is provided in Botswana's immigration legislation as to how the character of the applicant is to be assessed. Certain questions come to mind on the point of assessing the character of the applicant. How many persons on the Immigration Board are responsible for making this decision? Could a dominant person influence the votes of others on the board? What are the rules with respect to the voting process? Has the decision reached come about as a result of a quorate meeting? The Government of Botswana could improve its immigration framework by committing to objective 12 of the GCM and, in this context, establishing objective criteria to assess an applicant's character.

Botswana's immigration legislation appears to be unfriendly to migrants and focused on 'enforcement, control and exclusion'.¹¹²⁵ This is illustrated by an incident regarding a migrant¹¹²⁶ who was declared a prohibited immigrant by the President because he criticised the Government of Botswana.¹¹²⁷ Other migrants who were also 'perceived as inclined to critici[s]e the government' were required to obtain visas prior to entering Botswana, which is not otherwise required.

¹¹²³ See 3.2.3 above.

¹¹²⁴ Immigration Act 3 of 2011, s 23(7).

¹¹²⁵ Crush J, Williams V & Peberdy S (2005) *Migration in Southern Africa*. A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration https://www.sarpn.org/documents/d0001680/P2030-Migration_September_2005.pdf 24.

¹¹²⁶ Although the right to freedom of conscience and the right to hold free political opinions is enshrined in the Constitution of Botswana, 1966, the government expelled Professor Kenneth Good for criticising the government. *Zachariah and Another v Botswana Power Corporation* [1996] BWCA 15; Cook A & Sarkin J (2010) 476.

¹¹²⁷ *Kenneth Good v Republic of Botswana* 313/05 ACHPR (2010) para 3; Botlhomilwe MZ, Sebudubudu D & Maripe B 'Limited freedom and intolerance in Botswana' (2011) 29(3) *Journal of Contemporary African Studies* 333-4.

The Refugees (Recognition and Control) Act of 1968 allows political refugees to seek asylum in Botswana.¹¹²⁸ Refugees and asylum seekers reside¹¹²⁹ in closed camps.¹¹³⁰ At the discretion of the Minister of Nationality, Immigration and Gender Affairs, refugees are able to engage in wage-earning employment.¹¹³¹

5.2.3 Rights of skilled migrant workers in Botswana

5.2.3.1 Constitutional rights

The fundamental rights and freedoms of individuals are provided in sections 3-16 of the Constitution of Botswana, 1966.¹¹³² Everyone in Botswana, including immigrants and refugees,¹¹³³ is guaranteed fundamental rights and freedoms.¹¹³⁴ As illustrated below, the rights of non-citizens are limited in Botswana. To become a permanent resident in Botswana, a foreign national must lawfully be in Botswana for five years.¹¹³⁵ Likewise, becoming a citizen is challenging, as the waiting period for naturalisation is up to 10 years,¹¹³⁶ and even after the

¹¹²⁸ A refugee is an immigrant whom the Minister of Nationality, Immigration and Gender Affairs has recognised as a political refugee. A prescribed committee's role is to determine who qualifies for recognition as a political refugee in Botswana. In determining this status, the committee has wide discretionary powers. If refugee status has not been granted, the Minister of Nationality, Immigration and Gender Affairs may instruct the committee to reconsider the inquiry or to submit further reports. If the person is not recognised as a political refugee, the person shall be removed from Botswana in terms of the Immigration Act 3 of 2011. Refugees (Recognition and Control) Act of 1968, s 4(1), s 4(2), s 2; *Sefu & Others v The Attorney General of Botswana* [2005] BWHC 65 para 28; The committee's prescribed powers include the ability to summon the person who wishes to be considered as a political refugee; summon any person to appear or provide information to assist the committee in the determination of the status of the person; examine by oath or otherwise the person who has appeared before the committee; and call on any person who may assist the committee in their inquiry to provide information or any documents. Refugees (Recognition and Control) Act of 1968, s 5(1)(a)-(d), s 8(1)(c), s 8(2).

¹¹²⁹ Asylum seekers are detained in Francistown pending the determination of their refugee status. Once successfully granted such status, they are moved to the Dukwi refugee camp. Landau LB, Misago JP & Majidi N et al. (2018) 81.

¹¹³⁰ If a refugee or asylum seeker desires to leave the camp, he or she must obtain permission from a camp manager. Landau LB, Misago JP & Majidi N et al. (2018) 5.

¹¹³¹ Refugee (Recognition and Control) Act, s 14.

¹¹³² *Botswana Railways Organisation v Setsogo and Others* [1996] BWCA 17.

¹¹³³ *Attorney General v Dow* BLR 119 (CA) (1992) 135.

¹¹³⁴ Constitution of Botswana, 1966, s 3; non-citizens in Botswana are thus entitled to the right to life; personal liberty; protection from slavery and forced labour; protection from inhumane treatment; protection from deprivation of property; privacy; provisions to secure protection of the law; protection of freedom of conscience; protection of freedom of expression; protection of freedom of assembly and association; protection of freedom of movement (subject to limitation in terms of s 14(3)(b) of the Constitution of Botswana, 1966); and protection from discrimination (subject to limitation in terms of s 15(4)(b) of the Constitution of Botswana, 1966; sections 3-15 of the Constitution of Botswana, 1966).

¹¹³⁵ Government of Botswana 'Permanent residence application' <https://www.gov.bw/residency-and-work/permanent-residence-application> (accessed 31 December 2022).

¹¹³⁶ Citizenship Act 8 of 1998, s 13(c).

period of naturalisation has passed, a foreign national has no guarantee that he or she will be granted citizenship.¹¹³⁷

5.2.3.2 Social security

The Constitution of Botswana, 1966, does not mention or protect socio-economic rights.¹¹³⁸ Socio-economic rights were deliberately excluded from the Constitution owing to fiscal constraints.¹¹³⁹ Due to the absence of a rights-based framework, the social security system is focused on citizens, while the Government of Botswana has no agreements with other SADC countries that pertain to benefits for workers who are foreign nationals.¹¹⁴⁰ Provisions for social insurance are discussed here.

The Government of Botswana has not ratified the two ILO conventions relating to unemployment benefits.¹¹⁴¹ Unemployment benefits are granted to citizens only.¹¹⁴² In response to the Covid-19 pandemic, the Government of Botswana provided businesses in certain sectors with a wage subsidy to the equivalent of 50 per cent of an employee's normal wages for up to three months.¹¹⁴³ Foreign nationals were not eligible to receive the wage subsidy.¹¹⁴⁴ Skilled migrants working in Botswana during the pandemic would thus not qualify for the wage subsidy, possibly leaving some without any income, depending on the sector in which the skilled foreign national was employed.

¹¹³⁷ Escudero DJ, Marukutira T & McCormick A et al. 'Botswana should consider expansion of free antiretroviral therapy to immigrants' (2019) 22 *Journal of the International AIDS Society* 1.

¹¹³⁸ *The Attorney General & Others v Dickson Tapela; The Attorney General & Others v Gift Brendan Mwale* CACGB-096-14 (unreported) & CACGB-076-15 para 73.

¹¹³⁹ *The Attorney General & Others v Dickson Tapela; The Attorney General & Others v Gift Brendan Mwale* CACGB-096-14 (unreported) & CACGB-076-15 para 73.

¹¹⁴⁰ Millard D 'Migration and the portability of social security benefits: The position of non-citizens in the Southern African Development Community' (2008) 8(1) *African Human Rights Law Journal* 44.

¹¹⁴¹ Convention 102 and Convention 168. C102 – Social Security (Minimum Standards) Convention, 1952 (No. 102) has not been ratified by Canada, South Africa or New Zealand. Also, C168 – Employment Promotion and Protection against Unemployment Convention, 1988 (No. 168) has not been ratified by Canada, South Africa or New Zealand. International Labour Organization 'International labour standards on social security' <https://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang-en/index.htm> (accessed 31 December 2022).

¹¹⁴² Van Eck BPS & Snyman F (2015) 309.

¹¹⁴³ Devereux S 'Social protection responses to COVID-19 in Africa' (2021) 21(3) *Global Social Policy* 426.

¹¹⁴⁴ International Labour Organisation 'Special protection spotlight: Unemployment protection in the COVID-19 crisis: Country responses and policy considerations' https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---soc_sec/documents/publication/wcms_754741.pdf (accessed 31 December 2022) 6; Ministry of Finance and Economic Development 'Guidelines for Botswana Covid-19 pandemic (Coronavirus) relief fund' https://www.finance.gov.bw/images/NEWS/COVID-19_GUIDELINES_FINAL.pdf (accessed 31 December 2022) 14.

Maternity leave and maternity benefits are provided for private and public sector employees.¹¹⁴⁵ As maternity benefits depend on an employment relationship, SMWs who are employed should qualify for maternity benefits.¹¹⁴⁶ Maternity leave is for a duration of 12 weeks.¹¹⁴⁷ Employers are responsible for providing maternity benefits or wages at 50 per cent of the employees' normal wage.¹¹⁴⁸ According to the ILO, only employers in certain areas of the country are mandated to provide maternity benefits.¹¹⁴⁹

Botswana's Constitution does not protect foreign nationals from discrimination.¹¹⁵⁰ While pregnancy is not a listed ground, the ILO states that there are no 'prohibiting discriminatory measures when, hiring, promoting, training or remunerating work of women and men that perform the same work and because of sex, pregnancy and civil status'.¹¹⁵¹ The absence of provisions that prevent discrimination against foreign nationals in general, and more specifically on the grounds of pregnancy, allows foreign nationals to be discriminated against.

The Workers Compensation Act 23 of 1998 provides for compensation to workers who have been injured, have suffered from occupational disease, or have died in the course of employment.¹¹⁵² The Workers Compensation Act 23 of 1998 makes no distinction between citizens and foreign nationals in the cases of injuries, illness or death incurred in the course of employment. Employers are liable to pay the insurance costs to cover their employees in the

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¹¹⁴⁵ Employment Act 1982, s 2(1).

¹¹⁴⁶ Mogapaesi T 'An overview of maternity protection in Botswana: A critique of the Employment Act through the International Labour Organisation's Maternity Protection Convention lens' 2022 *De Jure Journal* 63.

¹¹⁴⁷ To qualify for maternity leave, notice along with a medical certificate must be provided to the employer. Employment (Maximum Period of Employment Security Arising from Pregnancy) Order 1984, s 2; Employment Act 1982, s 113; Mogapaesi T (2022) 64.

¹¹⁴⁸ Employment Act 10 of 2010, s 113(5); International Labour Organization *World Social Protection Report 2017–19: Universal Social Protection to Achieve the Sustainable Development Goals* (2017) International Labour Office: Geneva 257 (hereafter 'ILO *World Social Protection Report* (2017)'); Mogapaesi T (2022) 67.

¹¹⁴⁹ International Labour Organization *Maternity and Paternity at Work: Law and Practice Across the World* (2014) 141 (hereafter 'ILO *Maternity and Paternity at Work* (2014)').

¹¹⁵⁰ Constitution of Botswana, 1966, s 15.

¹¹⁵¹ ILO 'Botswana-maternity protection-2011' https://www.ilo.org/dyn/travail/travmain.sectionReport1?p_lang=en&p_structure=3&p_year=2011&p_start=1&p_increment=10&p_sc_id=2000&p_countries=BW&p_countries=LV&p_print=Y (accessed 31 December 2022); Mogapaesi T (2022) 70-1.

¹¹⁵² The Workers Compensation Act 23 of 1998 also provides compensation when a death has occurred because of an injury or occupational disease contracted during employment. Workers Compensation Act 23 of 1998, long title.

event of injury, disease or death; the same applies in South Africa.¹¹⁵³ Foreign nationals or their dependants are thus able to claim compensation for injury, occupational disease or death that has occurred in the course of employment.

The state runs the social assistance programmes in Botswana. These are the Destitute Persons' Programme;¹¹⁵⁴ Orphan Care Programme; Community Home Based Care; primary and secondary school feeding programmes; Vulnerable Groups Feeding Scheme; Remote Area Development Programme; Disability Allowance; Universal Old-Age pension (only citizens);¹¹⁵⁵ Ipelegeng (public works);¹¹⁵⁶ and World War II Veterans Allowance.¹¹⁵⁷

The social assistance programmes in Botswana are discussed here. None of the social protection programmes in Botswana are statutory.¹¹⁵⁸ According to Seekings, the lack of any statutory protection prevents any entitlement to the benefits of social assistance programmes.¹¹⁵⁹ The effectiveness of these programmes is thus difficult to assess, as most programmes have outdated guidelines or lack comprehensive policies and guidelines. In addition, only three of the social assistance programmes are regulated by formal policies, while the rest are dependent on guidelines, if any.¹¹⁶⁰

¹¹⁵³ International Labour Organization 'Global Programme employment injury insurance and protection | GEIP contributing to decent work and the social protection floor guarantee in the workplace' https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/documents/publication/wcms_573083.pdf (accessed 31 December 2022) 20 (hereafter 'ILO GEIP (2017)'); Solo K & Ntseane DM 'Towards adoption of a human rights based framework for social protection in Botswana' (2020) 1(2) *Studies in Social Science Research* 11.

¹¹⁵⁴ The government aids those who need to change their livelihoods because of loss of support from family members as a consequence of urban migration. Emmanuel B, Lekorwe M & Bashi M et al. *A Political Economy Analysis of Social Protection Programmes in Botswana* (2015) 12.

¹¹⁵⁵ Botswana's elderly citizens who are otherwise unable to support themselves qualify for pension through the Universal Old Age Pension when they reach 65 years of age. Mpedi LG & Smit N *Access to Social Services for Non-Citizens and the Portability of Social Benefits Within the Southern African Development Community* (2011) 17; Muzondo E & Rusero M *Social Security in Mabvurira V, Fahrudin A & Mtetwa E (eds) Professional Social Work in Zimbabwe, Past Present and the Future* National Association of Social Workers of Zimbabwe: Harare 147; International Labour Organization *Universal Social Protection: Country Cases* (2016) 33; Seekings J (2018) 'Rights-based social protection in Africa: A review of approaches, challenges and possibilities' report for *Friedrich Ebert Stiftung* 26.

¹¹⁵⁶ Ipelegeng aims to provide short-term employment and the development of skills for those with limited skills. Unskilled and semi-skilled persons who can work with tools are targeted to maintain public facilities such as fences and stormwater drains. Emmanuel B, Lekorwe M & Bashi M et al. (2015) 11.

¹¹⁵⁷ Maundeni T & Mupedziswa R 'Social assistance programmes in Botswana: Efficiency and effectiveness' (2017) 6(7) *International Journal of Development and Sustainability* 428.

¹¹⁵⁸ ILO *World Social Protection Report* (2017) 256.

¹¹⁵⁹ Seekings J, (2016) *Building a conservative welfare state in Botswana*. CSSR Working Paper No. 388 Legislating and Implementing Welfare Policy Reforms December 2016 http://www.cssr.uct.ac.za/sites/default/files/image_tool/images/256/files/WP%20388%20Seekings_0.pdf 7.

¹¹⁶⁰ Maundeni T & Mupedziswa R (2017) 438.

Social assistance is reserved mainly for citizens.¹¹⁶¹ Foreign nationals do not have the right to enforce a claim for benefits from any social assistance programme in Botswana. Only extremely vulnerable foreign nationals may be assisted by social workers on an ad hoc basis.¹¹⁶² The lack of provision for foreign nationals may affect them adversely, especially since migrants are at greater risk of suffering income loss, facing insecurity with respect to health care, and uncertainty in relation to their legal status.¹¹⁶³ The outbreak of the Covid-19 pandemic has shown that even SMWs fall on hard times and may, in certain instances, require social assistance.

Foreign nationals may be assisted on a temporary basis under the Programme for Destitute Persons¹¹⁶⁴ for up to six months.¹¹⁶⁵ Foreign nationals who qualify for assistance may be provided with, inter alia, 'cash, food rations, access to social services, ... provisions for funeral expenses, and shelter'.¹¹⁶⁶ While social assistance would generally not be considered relevant for SMWs, the effects of the Covid-19 pandemic and lockdown showed that, in certain instances, even SMWs may require social assistance.

Botswana has a public health-care system. Foreign nationals pay subsidised fees, or may access health care through contributory medical aid schemes.¹¹⁶⁷ Free emergency medical services are provided for migrants in critical condition who have no means to pay.¹¹⁶⁸ The Public Health

¹¹⁶¹ Seekings J 'The effects of colonialism on social protection in South Africa and Botswana' in Schmitt C (ed) *From Colonialism to International Aid: External Actors and Social Protection in the Global South* (2020) 126.

¹¹⁶² Landau LB, Misago JP & Majidi N et al. (2018) 83. According to Chinyoka and Ulriksen, social assistance policies in Botswana have not changed fundamentally since their conservative origins in the ruling Botswana Democratic Party. Chinyoka I & Ulriksen MS 'The limits of the influence of international donors: Social protection in Botswana' in Schmitt C (ed) *From Colonialism to International Aid: External Actors and Social Protection in the Global South* (2020) 247; Kiwanuka M & Monson T (2009) 'Zimbabwean migration into Southern Africa: new trends and responses' Forced Migration Studies Programme, Wits University 66.

¹¹⁶³ United Nations, Socio-Economic Impact Analysis of Covid-19 in Botswana (2020) Policy Brief 1 *United Nations* <https://www.undp.org/sites/g/files/zskgke326/files/migration/africa/43c39dfdca841471176b888eee372144ba19528815c00715838f7b9805138162.pdf> 13.

¹¹⁶⁴ In 1980 the National Policy on Destitute Persons was adopted to ensure that the government aids destitute persons. A destitute person is defined as an individual who has insufficient income or assets due to a disability or chronic health condition; who, due to old age, disability or ill health, is unable to participate in sustainable economic activity; and who is a child in need but does not qualify for care under the Orphan Care Programme. Van Eck BPS & Snyman F (2015) 308.

¹¹⁶⁵ Mpedi LG & Smit N *Access to Social Services for Non-Citizens and the Portability of Social Benefits Within the Southern African Development Community* (2011) 8.

¹¹⁶⁶ Mpedi LG & Smit N (2011) 8.

¹¹⁶⁷ Tapera R, Moseki S & January J 'The status of health promotion in Botswana' (2018) 9 *Journal of Public Health in Africa* 7; Mpedi LG & Smit N (2011) 9.

¹¹⁶⁸ Kiwanuka M & Monson T (2009) 46.

Act, 2013 deals with claims for personal injury arising from accidents in Botswana. The Public Health Act, 2013 makes no distinction between citizens and foreign nationals.

5.2.3.3 Employment

The Employment of Non-Citizens Act 11 of 1981 allows foreign nationals to be employed in Botswana provided that they are in possession of a valid work permit.¹¹⁶⁹ Migrants' rights with regards to employment are covered by the Botswana Employment Act, 1982, which, in its definition of an employee, makes no specific exclusions of foreign nationals.¹¹⁷⁰ Even though migrants are protected in terms of the Botswana Employment Act, 1982, they are, according to the UN, still vulnerable to exploitative conditions, which implies that there may be a difference between the practical enforcement of the Botswana Employment Act, 1982 for migrants and citizens.¹¹⁷¹

5.3 Canada

Canada recruits large numbers of skilled migrants from Africa at large, the SADC region, and other parts of the world.¹¹⁷² The federal state¹¹⁷³ has been exceptionally successful in attracting skilled migrants due to its laws and policies that favour skilled migrants.¹¹⁷⁴ Canada may be considered an immigrant society as its development has been based largely on an influx of migrant workers over time.¹¹⁷⁵ In addition, its laws are favourable to immigrants in that they

¹¹⁶⁹ Employment of Non-Citizens Act 11 of 1981, s 4(1)(a).

¹¹⁷⁰ Section 2(1)(c) of the Botswana Employment Act, 1982 states that an employee 'means any person who has, either before or after the commencement of this Act, entered into a contract of employment for the hire of his labour'.

¹¹⁷¹ United Nations High Commissioner for Refugees '2016 Country Reports on Human Rights Practices – Botswana' <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=country&docid=58ec8a6713&skip=0&coi=BWA&querysi=migrant&searchin=fulltext&sort=date> (accessed 31 December 2022).

¹¹⁷² Sabadie JA, Avato J & Bardak U et al. *Migration and Skills: The Experience of Migrant Workers from Albania, Egypt, Moldova, and Tunisia* (2010) 48; Crush J & Frayne B 'The migration and development nexus in Southern Africa Introduction' (2007) 24(1) *Development Southern Africa* 14; Boyd M 'Recruiting high skill labour in North America: Policies, outcomes and futures' (2014) 52(3) *International Migration* 40.

¹¹⁷³ The Parliament of Canada, the provincial and territorial legislatures make laws within their jurisdiction. Government of Canada 'The Canadian Constitution' <https://www.justice.gc.ca/eng/csjsic/just/05.html> (accessed 31 December 2022).

¹¹⁷⁴ Ghosh S 'A passage to Canada: The differential migrations of South Asian skilled workers to Toronto' (2014) 15 *International Migration & Integration* 715; Beine M, Burgoon BB & Crock M et al. 'Measuring immigration policies: Preliminary evidence from IMPALA' (2015) 61(3) *CESifo Economic Studies* 537; Gliberman S *Highly Educated Immigrants: Economic Contributions and Implications for Public Policy* (2019) 8; Wickramasekara P 'Globalisation, international labour migration and the rights of migrant workers' (2008) 29(7) *Third World Quarterly* 1251.

¹¹⁷⁵ Connell J & Burgess J 'Migrant workers, migrant work, public policy and human resource management' (2009) 30(5) *International Journal of Manpower* 415.

are included in Canada's Charter of Rights and Freedoms and are treated equally.¹¹⁷⁶ Canada's success in attracting SMWs may therefore provide lessons for the South African state to adopt in order to improve its immigration legal framework and policies.

5.3.1 Historical development of the law and policy of migration in Canada

For the Foreign Skilled Worker Class (hereafter 'FSWC'), a points-based system was introduced in 1967 that allowed persons to migrate to Canada.¹¹⁷⁷ Prior to 1967, Canada's immigration laws were restrictive, discriminatory and strongly geared towards only admitting immigrants from Britain or northern Europe.¹¹⁷⁸

In the mid-1990s, the selection criteria for skilled immigrants emphasised formal education.¹¹⁷⁹ Until 2002, the points in the points-based system centred on labour shortages and skills needs. In 2002 however, changes to the Immigration and Refugee Protection Act (S.C. 2001, c. 27), (hereafter 'IRPA') emphasised human capital, and points were broadened to focus as well on professional experience and competency in the languages spoken in Canada.¹¹⁸⁰ The human capital model introduced after the 2002 amendment of the IRPA treated skilled immigration as an integral part of long-term economic growth.¹¹⁸¹

In addition to making changes to laws in favour of SMWs or easing access for already skilled migrants to Canada, the government has outlined strategies to attract international students. They are attracted through financial incentives, branding campaigns, immigration programmes geared to attracting students, and expediting study permit applications, thereby enhancing student access to the labour market during and after their studies.¹¹⁸² Bridge training is also offered in certain occupations to assist students and migrants in gaining professional

¹¹⁷⁶ Liston M & Carens J 'Immigration and integration in Canada' 2008 *Allard Research Commons* 6; The Canadian Charter of Rights and Freedoms is similar to South Africa's Bill of Rights. The Canadian Charter of Rights and Freedoms forms part of Canada's Constitution Act, 1982, Constitution Act, 1982, s 1.

¹¹⁷⁷ Tani M 'Migration policy and immigrants' labor market performance' (2020) 54(1) *International Migration Review* 36; Ongley P & Pearson D 'Post-1945 International migration: New Zealand, Australia and Canada compared' (1995) 29(3) *The International Migration Review* 771.

¹¹⁷⁸ Trebilcock M 'The puzzle of Canadian exceptionalism in contemporary immigration policy' (2019) 20 *Journal of International Migration and Integration* 824.

¹¹⁷⁹ Reitz JG, Curtis J & Elrick J 'Immigrant skill utilization: Trends and policy issues' (2014) 15 *Journal of International Migration and Integration* 2.

¹¹⁸⁰ Finotelli C 'Change of paradigms? A comparison of Canadian and Spanish labour migration models' (2013) 15(4) *Journal of Comparative Policy Analysis: Research and Practice* 335.

¹¹⁸¹ Ellermann A *The Comparative Politics of Immigration: Policy Choices in Germany, Canada, Switzerland, and the United States* (2021) 214.

¹¹⁸² She Q & Wotherspoon T 'International student mobility and highly skilled migration: a comparative study of Canada, the United States, and the United Kingdom' (2013) 2(1) *SpringerPlus* 3.

experience.¹¹⁸³ Attracting students who may later qualify for skilled occupations supports the human capital model.

In terms of the IRPA,¹¹⁸⁴ immigrants to Canada are now selected based on their ability to contribute to Canada's economy.¹¹⁸⁵ Skilled workers are selected and categorised in terms of Canada's economic classes.¹¹⁸⁶ Skilled workers may generally apply to work in Canada on one of four Express Entry programmes, the FSWC; Federal Skilled Trades Class (hereafter 'FSTC'); Canadian Experience Class (hereafter 'CEC') and the Provincial Nominee Class (hereafter 'PNC'). In 2021 and 2022, Canada welcomed 139,459 skilled migrants through the FSWC, FSTC and CEC, and 54,000 skilled migrants through the PNC.¹¹⁸⁷ Canada offers broad, easy access and settlement for migrants through these programmes without the need for an offer of employment in certain instances.¹¹⁸⁸

The regulations of the FSWC, FSTC and CEC, as in the Immigration and Refugee Protection Regulations SOR/2002-227 (hereafter 'IRPR'),¹¹⁸⁹ are discussed in detail in this chapter, while the PNC is not. The PNC is not geared towards the attraction of skilled workers; rather, it allows a province to nominate individuals¹¹⁹⁰ to reside within the province for work.¹¹⁹¹ The PNC allows provinces to meet their local labour market needs and does not serve to allow SMWs to migrate to Canada in general.¹¹⁹²

5.3.2 Legal requirements for foreign nationals entering Canada

The IRPA covers immigration and related matters. In addition, it governs the processes of seeking asylum and related matters concerning refugees and asylum seekers. To enter Canada,

¹¹⁸³ Finotelli C (2013) 339.

¹¹⁸⁴ (S.C. 2001, c. 27).

¹¹⁸⁵ Government of Canada 'Eligibility for express entry programs' <https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility.html> (accessed 31 December 2022) – (hereafter 'Government of Canada (2020)').

¹¹⁸⁶ 'Economic classes' refers to categories that immigrants are placed in on the basis of their skills. Immigration and Refugee Protection Regulations SOR/2002-227, reg 70(2)(b) – (hereafter 'IRPR').

¹¹⁸⁷ Immigration, Refugees and Citizenship Canada *2022 Annual Report to Parliament on Immigration (2022)* 22, 24 (hereafter 'IRCC (2022)').

¹¹⁸⁸ She Q & Wotherspoon T (2013) 4.

¹¹⁸⁹ SOR/2002-227.

¹¹⁹⁰ IRPR, reg 87(2)(a).

¹¹⁹¹ IRPR, reg 87(2)(b).

¹¹⁹² Government of Canada (2020).

a foreign national must apply for a visa.¹¹⁹³ Any foreign national who wishes to work in Canada must be authorised to do so in terms of the IRPA¹¹⁹⁴ unless the person is authorised to work without a permit in terms of regulation 186 of the IRPR.¹¹⁹⁵ Applicants are selected according to their ability to become economically established in Canada.¹¹⁹⁶ This has shifted the focus from addressing labour shortages to occupations that ensure economic adaptability.¹¹⁹⁷ The IRPR provides the regulations for applying for work permits. The IRPA allows the state of Canada to regulate selection criteria; the weight, if any, attributed to criteria; procedures to be followed in evaluating criteria; and the circumstances, if any, which may allow an officer to ‘substitute for those criteria their evaluation of the likelihood of a foreign national’s ability to become economically established in Canada’.¹¹⁹⁸ Similar to Botswana, Canadian officials are allowed at their discretion to substitute criteria for their own evaluation of a foreign national’s ability to become economically established. This discretion may be too wide and lack transparency.¹¹⁹⁹

5.3.2.1 Foreign Skilled Worker Class

In 2002, the FSWC was created in terms of the IRPR.¹²⁰⁰ The FSWC uses a points-based system to admit skilled immigrants.¹²⁰¹ The points system has changed over time as far as the factors considered to allocate points and their relative weights are concerned.¹²⁰² This system contains the qualifications necessary to be considered a skilled worker in Canada as per the FSWC.¹²⁰³ For the FSWC, the skills of the SMW must match a list of 26 occupations where a labour

¹¹⁹³ IRPA, s 11.1. References to ‘Immigration and Refugee Protection Act (S.C. 2001, c. 27)’ do not conform to the UWC Law Faculty’s style and reference guide. To avoid confusion, Canada’s legislation and regulations have been referenced according to the country’s conventions for referring to legislation and regulations. The same applies to New Zealand’s legislation and regulations.

¹¹⁹⁴ IRPA, s 30(1).

¹¹⁹⁵ IRPR, reg 186.

¹¹⁹⁶ ‘Economically established’ means the intention and ability to support him- or herself fully by entering the labour market) IRPA, s 12(2). Government of Canada ‘Operational bulletin 499 – February 1, 2013’ <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/bulletins-2013/499-february-1-2013.html> (accessed 31 December 2022).

¹¹⁹⁷ Variyam MN ‘Canada’s skilled worker immigration regulation and its impact on the Canadian economy’ (2007) 13(2) *Law and Business Review of the Americas* 471.

¹¹⁹⁸ All applications must be submitted in writing; be signed by the applicant; include all documents, evidence and information required by the IRPR; be accompanied by evidence of payments, if applicable; and indicate who the principal applicant is. IRPA, s 3(1); Variyam MN (2007) 473; IRPR, reg 10.1(a)-(e).

¹¹⁹⁹ See 5.2.3 above.

¹²⁰⁰ Variyam MN (2007) 473.

¹²⁰¹ Boyd M (2014) 42.

¹²⁰² Boyd M (2014) 42; George U ‘Mexican migration to Canada: case study report’ (2008) 6(3) *Journal of Immigrant & Refugee Studies* 466.

¹²⁰³ Variyam MN (2007) 471.

market need is present.¹²⁰⁴ The list of occupations has been created based on wide negotiation, and may be ignored only in cases where the applicant has an existing offer of employment.¹²⁰⁵ Language proficiency is tested in accordance with the benchmarks set in the Canadian Language Benchmark.¹²⁰⁶

In 2013, new admissions criteria to the FSWC were introduced. According to the current regulations in the IRPR, an individual will be deemed to be a skilled worker and consequently qualify for permanent residence if the conditions below as per the IRPR, reg 75(2) are met.¹²⁰⁷ The requirements for the FSWC are that the applicant must have at least one year of continuous work experience in the occupation, and the work experience must have been acquired not more than 10 years before the application of the visa. During the period of employment, the applicant must have fulfilled the functions of the occupation as per the National Occupational Classification (hereafter 'NOC').

During the period of employment, the applicant must fulfill the occupation's main duties and essential functions as per the NOC. The applicant must have submitted satisfactory language results that are not older than two years, in either English or French. The applicant must submit Canadian educational credentials or his or her certificate or foreign diploma. Lastly, the credential and the equivalency assessment must be less than five years old when the application is made. To determine whether an SMW will become economically established in Canada for the purposes of the FSWC, the worker will be assessed against certain criteria or points set out in the IRPR.¹²⁰⁸ To be considered under the FSWC, applicants must score at least 67 points.¹²⁰⁹

¹²⁰⁴ Finotelli C (2013) 337.

¹²⁰⁵ Finotelli C (2013) 337.

¹²⁰⁶ IRPR, reg 74(2).

¹²⁰⁷ IRPR, reg 75(2)(a)-(e)i-ii.

¹²⁰⁸ IRPR, reg 76(1). The points are broken down as follows: a maximum of 25 points may be rewarded for education; 24 points may be awarded for proficiency in English or French; 15 points may be awarded for work experience in a relevant occupation which corresponds to an occupation listed in the NOC; 12 points may be awarded for the age of the applicant; younger applicants are preferred; 10 points may be awarded for applicants who have an existing offer of employment referred to as 'arranged employment' in the IRPR; and 10 points may be awarded for the adaptability of the applicant. Applicants who are between 18-36 years old will be allocated a maximum of 12 points, while points are reduced for applicants older than 36 years. No points are allowed in this category for applicants younger than 18 or older than 47 years old at the time of the application. The allocation of the applicant's adaptability is calculated according to the following factors: the language proficiency of a common-law partner or spouse accompanying the applicant; an applicant will be more adaptable if he or she has studied and/or worked in Canada for a minimum of one year previously; the applicant is deemed more adaptable if related to a person living in Canada; and, lastly, whether the applicant has arranged employment. IRPR, regs 78(1), 79(3), 80(1), 80(5), 81 (a)-(m), 82(2), 83(1), 83(1)(a)-(e).

¹²⁰⁹ Variyam MN (2007) 474.

5.3.2.2 Canadian Experience Class

The CEC allows applicants who have acquired work experience in Canada to become permanent residents if they are able to become economically established in Canada.¹²¹⁰ An applicant for permanent residence will qualify for the CEC if the applicant meets the requirements set out in the IRPR, reg 87.1(2).¹²¹¹ These requirements are stated here. Within three years of making the application, the applicant must acquire at least a full year of work experience in ‘in an occupation listed in “Skill Type 0 Management Occupations or Skill Level A or B of the [National Occupational Classification matrix],¹²¹² exclusive of restricted occupations”’. The applicant must perform the functions for the occupation in the NOC. The applicant must perform a substantial amount of the main duties of the listed occupation. Lastly, the applicant’s language proficiency must be tested, and the applicant should meet a sufficient standard of proficiency in English and/or French.

The CEC allows skilled workers who have worked on a temporary basis to apply for permanent residency on the basis of their experience gained in Canada.¹²¹³ The CEC is therefore not a job-seekers visa since, with the CEC, applicants are already working in Canada but seeking to become permanent residents. In 2021, 27,000 candidates were welcomed after applying for permanent residence through the CEC.¹²¹⁴

5.3.2.3 Federal Skilled Trades Class

The FSTC allows persons who are skilled in trade occupations, such as ‘electrical, industrial, and construction trades’,¹²¹⁵ ‘maintenance and equipment operation trades’,¹²¹⁶ and chefs,¹²¹⁷ to work and permanently reside in Canada if they are able to become economically

¹²¹⁰ IRPR, reg 87.1(1).

¹²¹¹ IRPR, reg 87.1(2)(a)-(d).

¹²¹² NOC skill level 0 include managerial jobs such as ‘[a]dvertising, marketing and public relations managers, [a]rchitecture and science managers [and] [b]anking, credit and other investment managers’. Skill type A includes professional jobs such as ‘[f]inancial auditors and accountants, [f]inancial and investment analysts [and] [s]ecurities agents, investment dealers and brokers. Skill type B includes ‘[a]ccounting and related clerks, [a]dministrative assistants and [b]anking, insurance and other financial clerks’. My visa source ‘What type of jobs qualify as CEC work experience?’ (accessed 5 January 2024).

¹²¹³ Perry JA ‘Barely legal: racism and migrant farm labour in the context of Canadian multiculturalism’ (2012) 16(2) *Citizenship Studies* 200.

¹²¹⁴ IRCC (2022) 23.

¹²¹⁵ IRPR, reg 87.2(1)(a).

¹²¹⁶ IRPR, reg 87.2(1)(b).

¹²¹⁷ IRPR, reg 87.2(1)(e).

established.¹²¹⁸ The FSTC visa allows SMWs to become permanent residents in Canada.¹²¹⁹ Since the FSTC is geared at allowing the SMW to become a permanent resident instead of simply allowing him or her to work like the CSWV, the requirements of the FSTC are also not discussed in detail.

5.3.3 Positive characteristics of Canada's skilled visas

The Government of Canada is not solely responsible for the recognition of foreign credentials and qualifications. If an occupation is regulated, a provincial or territorial regulatory authority will be responsible for assessing the foreign qualification.¹²²⁰ If an occupation is not regulated, then such recognition of the qualification is at the employer's discretion.¹²²¹ The services of provincial offices¹²²² and non-profit organisations to assess foreign academic credentials are also used.¹²²³ The more institutions that are responsible for recognising foreign credentials and qualifications, the faster applications that require the recognition of credentials and qualifications can be dealt with, as more than one institution is able to assist with this. However, the existence of multiple institutions responsible for assessing foreign credentials and qualifications has its drawbacks, as explained in the next section.

5.3.4 Negative characteristics of Canada's skilled visas

As Canada does not have a central office responsible for assessing foreign qualifications and credentials, applicants usually navigate through a lengthy, complex, costly and frustrating process.¹²²⁴ Applicants may have to approach one or all of the following institutions: '(1)

¹²¹⁸ IRPR, reg 87.2(1), reg 87.2(2).

¹²¹⁹ IRPR, reg 87.2(2).

¹²²⁰ Regulated occupations require a licence, while people in non-regulated occupations do not require a licence to practise.

¹²²¹ Canadian Information Centre for International Credentials 'Work in Canada' <https://www.cicic.ca/858/work.canada> (accessed 31 December 2022); The Alliance of Sector Councils 'Who does what in foreign credential recognition: An overview of credentialing programs and services in Canada' http://en.copian.ca/library/research/tasc/foreign_credential_recognition/foreign_credential_recognition.pdf (accessed 31 December 2022) 23.

¹²²² Six provincial offices are responsible for conducting evaluations of foreign credentials and qualifications. Manitoba Provincial Nominee Program 'Learn about academic credential assessments' <https://immigratemanitoba.com/settle-in-manitoba/credential-assessment/> (accessed 31 December 2022). For example, the International Qualifications Assessment Service, is responsible for providing information and assessing foreign credentials for the province of Alberta. Government of Alberta 'International Qualifications Assessment Service (IQAS)' <https://www.alberta.ca/international-qualifications-assessment.aspx#jumplinks-0> (accessed 31 December 2022).

¹²²³ Finotelli C (2013) 339.

¹²²⁴ Guo S 'Difference, deficiency, and devaluation: tracing the roots of non-recognition of foreign credentials for immigrant professionals in Canada' (2009) 22(1) *The Canadian Journal for the Study of Adult Education* 41.

provincial and territorial credential assessment services, (2) regulatory or professional bodies, (3) educational institutions, and (4) employers'.¹²²⁵

Guo notes that the assessment of the same foreign credential as facilitated by different institutions often reaps inconsistent results.¹²²⁶ It is noteworthy to mention that, due to the Covid-19 pandemic, several provinces in Canada enabled temporary licences for foreign medical doctors, indicating that in the right circumstances, provinces are able to expedite the process for faster integration with the labour market.¹²²⁷

The FSWC is criticised for the following reasons. Once an immigrant is in possession of a FSWC, there is no guarantee of employment. Restrictions from regulatory bodies and the requirement of work experience limit applicants from finding employment and act as a basis for discrimination.¹²²⁸ Also, applications for the FSWC are processed slowly.¹²²⁹

According to Bashir, while the points-based system for the FSWC, and immigration law in Canada, have effectively attracted highly skilled and well-educated immigrants, the integration of SMWs into the labour market and society has not been catered for sufficiently.¹²³⁰ When immigrants arrive in Canada, there is no guarantee that they will be employed in their area of expertise or occupation, as it is not guaranteed that their qualifications will be recognised; this often results in underemployment.¹²³¹ While there is more than one office for the recognition of foreign credentials and qualifications, more often than not SMWs face protracted delays in the recognition of their foreign credentials and experience.¹²³²

Skilled immigrants are vulnerable to 'a number of perils after the migrant lands' due to the possible non-recognition of foreign credentials and work experience, which is discounted by

¹²²⁵ Guo S (2009) 41.

¹²²⁶ Guo S (2009) 41.

¹²²⁷ OECD 'What is the impact of the COVID-19 pandemic on immigrants and their children?' <https://www.oecd.org/coronavirus/policy-responses/what-is-the-impact-of-the-covid-19-pandemic-on-immigrants-and-their-children-e7cbb7de/> (accessed 31 December 2022) 15.

¹²²⁸ Applicants are required to have worked in Canada to meet the Canadian experience requirement. Kaushik V & Drolet J 'Settlement and integration needs of skilled immigrants in Canada' (2018) 7(76) *Journal of Social Sciences* 5.

¹²²⁹ Finotelli C (2013) 336.

¹²³⁰ Kaushik V & Drolet J (2018) 2.

¹²³¹ Kaushik V & Drolet J (2018) 5; Joshee R 'The Unmaking of citizenship education for adult immigrants in Canada' (2005) 6(1) *Journal of International Migration and Integration* 77; Farashah A, Blomquist T and Ariss A et al. (2023) 481.

¹²³² Kaushik V & Drolet J (2018) 5.

employers.¹²³³ The devaluation of foreign credentials and experience amounts to skills discounting.¹²³⁴ Non-recognition of foreign credentials and work experience has the most significant impact, particularly on the wage differences between Canadians and immigrants.¹²³⁵

5.3.5 Rights of skilled immigrants in Canada

5.3.5.1 Constitutional rights

During the drafting of the Canadian Charter of Rights and Freedoms, immigrant and ethnocultural political activism had a significant influence on the contents of the Charter, and this may be one of the leading reasons for the inclusivity of and equality that immigrants enjoy under the Charter.¹²³⁶ Liston and Carens state bluntly that immigrants are fully recognised as members of the community in Canada. However, the truth may be more nuanced.¹²³⁷ Canada's legal framework provides migrants' rights and freedoms that are almost equivalent to citizens, with only a few exceptions.¹²³⁸ Specific rights applicable to immigrants are discussed below.

The Canadian Human Rights Act prohibits discrimination.¹²³⁹ Prohibited grounds of discrimination include race, national or ethnic origin, colour and family status.¹²⁴⁰ In practice, however, minority groups, such as women and migrants, often experience discrimination.¹²⁴¹ While migrants are entitled to many of the same rights as citizens, in reality migrants do not

¹²³³ Somerville K & Walsworth S 'Vulnerabilities of highly skilled immigrants in Canada and the United States' (2009) 39(2) *American Review of Canadian Studies* 147.

¹²³⁴ Somerville K & Walsworth S (2009) 152.

¹²³⁵ Bashir A *Immigration of skilled workers to Canada: The underutilized potential* (Master of Arts in International Studies unpublished thesis, Lahore University of Management Sciences, 2009) 46.

¹²³⁶ Liston M & Carens J (2008) 6.

¹²³⁷ Liston M & Carens J (2008) 19.

¹²³⁸ Liston M & Carens J (2008) 19; Immigrants do not have the right to vote, the right to freely move in and out of Canada, or the right to hold a public office and to be employed in the federal civil service. Constitution Act 1982, s 3, s 6(1).

¹²³⁹ The Canadian Human Rights Act expressly extends the law to ensure equal opportunities to persons who may have suffered from discriminatory practices. These discriminatory practices are based on prohibited grounds. Canadian Human Rights Act R.S.C., 1985, c. H-6, s 2.

¹²⁴⁰ Prohibited grounds of discrimination include 'race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered'. Canadian Human Rights Act R.S.C., 1985, c. H-6, s 3(1).

¹²⁴¹ Basok T & Carasco E 'Advancing the rights of non-citizens in Canada: A human rights approach to migrant rights' (2010) 32(2) *Human Rights Quarterly* 344; Godley J 'Everyday discrimination in Canada: prevalence and patterns' (2018) 43(2) *Canadian Journal of Sociology* 133; Little W *Introduction to Sociology – 2nd Canadian Edition* 2ed (2016) 447, 455; Moyce SC & Schenker M 'Migrant workers and their occupational health and safety' (2018) 39 *Annual Review of Public Health* 355; Vang ZM & Chang Y 'Immigrants' experiences of everyday discrimination in Canada: unpacking the contributions of assimilation, race, and early socialization' (2019) 53(2) *International Migration Review* 602.

enjoy or experience the same enjoyment of rights as citizens.¹²⁴² Some examples of everyday discrimination reported by immigrants in Canada are receiving poorer public services, earning less, being treated with less respect or courtesy, and being treated as though they are not as intelligent as Canadian citizens.¹²⁴³

5.3.5.2 Social security

The social insurance legal framework in Canada is discussed here. The Old Age Security Act R.S.C., 1985, c. O-9 (hereafter ‘OASA’)¹²⁴⁴ provides for a pension for persons over the age of 65.¹²⁴⁵ Regarding the OASA, recipients must reside in Canada; the OASA applies to citizens and foreign nationals who possess a valid visa.¹²⁴⁶

The Employment Insurance Act regulates employment insurance.¹²⁴⁷ The payable amount depends on the number of hours the employee has worked.¹²⁴⁸ Employment insurance is administered by the federal state¹²⁴⁹ and funded through mandatory contributions from both employees and employers, but employment benefits differ from region to region in Canada.¹²⁵⁰ Differences between regional employment insurance schemes result in employees being treated differently depending on where the employee lives.¹²⁵¹ In this instance, the UIA in South

¹²⁴² Basok T & Carasco E (2010) 352.

¹²⁴³ Vang ZM & Chang Y (2019) 614, 624.

¹²⁴⁴ R.S.C., 1985, c. O-9.

¹²⁴⁵ Old Age Security Act R.S.C., 1985, c. O-9 (hereafter ‘OASA’) s 3(1)*b*.

¹²⁴⁶ In Canada, the old age pension has two components. One is a universal pension which is paid out at a flat rate at the age of 65. The other component is an earnings-related pension (Canada pension plan) which is available from age 60. Those who continue to work past retirement age also receive a post-retirement benefit. OASA, s 3(1) & s 4; Old Age Security Regulations C.R.C., c. 1246, s 22; Béland D & Waddan A ‘Unidentical twins: recent social policy developments in Canada and the United States’ (2019) 35(1) *Journal of International and Comparative Social Policy* 2; Canada Pension Plan R.S.C., 1985, c. C-8, s 44(1); Laun T & Wallenius J ‘Social insurance and retirement: A cross-country perspective’ (2016) 22 *Review of Economic Dynamics* 88; Canada Pension Plan Regulations C.R.C., c. 385, reg 78(3), 78(4); ILO *World Social Protection Report* (2017) 343.

¹²⁴⁷ Canada refers to unemployment insurance as employment insurance. Fuss J & Globerman S *The Issues Facing Canada’s Employment Insurance Program* (2020) 2; Bista CP & Carter J *Unemployment Protection: A Good Practices Guide and Training Package Experiences From ASEAN* (2017) 37; S.C. 1996, c. 23, s 7(1).

¹²⁴⁸ Employment insurance may not be claimed in the instance of dismissal due to misconduct or if the employee chose to resign. S.C. 1996, c. 23, s 7(2), s 30(1); Fuss J & Globerman S (2020) 2.

¹²⁴⁹ The Employment Insurance system has been in crisis, this has been exacerbated due to the Covid-19 pandemic. Ferdosi M ‘Canada’s unemployment insurance in crisis’ (2021) 30 *International Journal of Social Welfare* 190-1.

¹²⁵⁰ Fuss J & Globerman S (2020) 2-3.

¹²⁵¹ Fuss J & Globerman S ‘Canada needs an employment insurance system for the 21st century’ <https://www.fraserinstitute.org/article/canada-needs-an-employment-insurance-system-for-the-21st-century> (accessed 31 December 2022).

Africa, being a national act, at the very least ensures that qualifying citizens and SMWs have the same access to unemployment benefits.¹²⁵²

The Covid-19 pandemic demonstrated that even SMWs may find themselves in need of employment insurance. Migrant workers are often the first employees to suffer the effects of an economic downturn. If migrant workers become unemployed due to operational requirements, they may face repatriation and as a result may not be able to support their families.¹²⁵³ While SMWs are eligible to apply for employment insurance benefits, less than 1 per cent of migrant workers are able to claim employment insurance benefits in reality.¹²⁵⁴

The Employment Insurance Act provides for maternity benefits.¹²⁵⁵ The duration of maternity leave is a maximum of 17 weeks.¹²⁵⁶ Provinces may, however, determine their own period of maternity leave.¹²⁵⁷ Generally, across the regions of Canada women receive 55 per cent of their wages while on maternity leave.¹²⁵⁸ As stated by the ILO, all women receive effective coverage for maternity cash benefits.¹²⁵⁹ Temporary workers, such as SMWs, are eligible for maternity leave but not maternity cash benefits.¹²⁶⁰ This may adversely affect SMWs who are employed on a temporary basis and lead to hardship if the SMW does not have access to other funds to support herself during maternity leave. In addition, employees, including SMWs, should have worked for a minimum of 420 hours before qualifying for employment insurance benefits, which thus excludes those who have worked for fewer hours.¹²⁶¹

Migrant workers and SMWs are more likely to be exposed to negative, unhealthy and unsafe occupational conditions.¹²⁶² In Canada, the employer is responsible for paying the entire cost of insurance to cover occupational injuries and associated matters.¹²⁶³ The Canada Labour Code sets out the rights and responsibilities of employees and employers in relation to

¹²⁵² Unemployment Insurance Act 63 of 2001.

¹²⁵³ MacLaren B & Lapointe L 'Employment insurance: How Canada can remain competitive and be fair to migrant workers' <https://policyoptions.irpp.org/magazines/after-copenhagen/employment-insurance-how-canada-can-remain-competitive-and-be-fair-to-migrant-workers/> (accessed 31 December 2022).

¹²⁵⁴ MacLaren B & Lapointe L (2022).

¹²⁵⁵ S.C. 1996, c. 23, s 22.

¹²⁵⁶ S.C. 1996, c. 23, s 22(2).

¹²⁵⁷ Quebec for example, provides a choice between benefits; 'maternity benefits are 70% of covered earnings paid for 18 weeks or 75% of covered earnings for 15 weeks'. ILO *World Social Protection Report* (2017) 272.

¹²⁵⁸ S.C. 1996, c. 23, s 14; ILO *World Social Protection Report* (2017) 262.

¹²⁵⁹ ILO *World Social Protection Report* (2017) 134.

¹²⁶⁰ ILO *Maternity and Paternity at Work* (2014) 37-8.

¹²⁶¹ S.C. 1996, c. 23, s 7.

¹²⁶² Moyce SC & Schenker M 'Migrant workers and their occupational health and safety' (2018) 39 *Annual Review of Public Health* 353.

¹²⁶³ ILO GEIP (2017) 35.

workplace health and safety. While the Canada Labour Code is much like the COIDA in South Africa, the principle difference is that COIDA is a national scheme that provides for employees irrespective of the province in which the employee is employed, while the Canada Labour Code applies only to workplaces under federal jurisdiction.¹²⁶⁴ Workers under federal jurisdiction are workers in the public service.¹²⁶⁵ Depending on where an SMW resides, the occupational health and safety benefits he or she may be entitled to will differ according to provincial legislation.¹²⁶⁶ No universal framework or programme provides for workers' rights regarding occupational health and safety.¹²⁶⁷

According to Cedillo, Lippell and Nakache, enforcing occupational health and safety standards is largely dependent upon whether the SMW is aware of his or her rights, and whether the SMW is able to complain when standards are not met.¹²⁶⁸ According to these authors, temporary migrant workers such as SMWs hardly ever complain, and when they do, complaints rarely go beyond the workplace, which renders the enforceability of occupational health and safety standards for migrants ineffective, all the more so in instances where migrants are not unionised.¹²⁶⁹ More specifically, SMWs holding a FSTC work permit are vulnerable because they are limited to working for a specified employer only. They are thus unlikely to report when the workplace is unsafe and where the employer fails to fulfil occupational health and safety standards, due to fears of being dismissed and then deported.¹²⁷⁰

Skilled migrants with disabilities may claim a disability benefit if they have contributed to the Canada Pension Plan.¹²⁷¹ The disability benefit is for those with prolonged disabilities that prevent them from working on a regular basis.¹²⁷² Becoming disabled does not affect the validity of a migrant's visa or legal status in general, so qualified SMWs are eligible to receive

¹²⁶⁴ Canada Labour Code (R.S.C., 1985, c. L-2), s 123(1)-(2).

¹²⁶⁵ Federal Public Sector Labour Relations Act (S.C. 2003, c. 22, s. 2), s 240.

¹²⁶⁶ Government Employees Compensation Act, RSC 1985, c G-5, s 2, s 6-7; The Workers Compensation Act C.C.S.M. c. W200, s 5(1) – s 5(3); Workplace Health, Safety and Compensation Act RSNL1990 CHAPTER W-11, s 49-51; Jansen Van Vuuren JP *A legal comparison between South African, Canadian and Australian Workmen's Compensation Law* (unpublished LLM thesis, Unisa, 2013) 130-2.

¹²⁶⁷ Kazia MR, Ferdousa M & Rumanab N et al. 'Injury among the immigrant population in Canada: exploring the research landscape through a systematic scoping review' (2019) 11 *International Health* 211.

¹²⁶⁸ Occupational rights for health and safety include 'the right to refuse dangerous work, the right to protective equipment, the right to receive training and information about hazards, and the right to participate in OHS matters at work'. Cedillo L, Lippell K & Nakache D 'Factors influencing the health and safety of temporary foreign workers in skilled and low-skilled occupations in Canada' (2019) 29(3) *Journal of Environmental and Occupational Health Policy* 448.

¹²⁶⁹ Cedillo L, Lippell K & Nakache D (2019) 424.

¹²⁷⁰ Cedillo L, Lippell K & Nakache D (2019) 424.

¹²⁷¹ Workplace Health, Safety and Compensation Act RSNL1990, CHAPTER W-11, s 49-51.

¹²⁷² Jansen Van Vuuren JP (2013) 130-2.

employment insurance for disability.¹²⁷³ According to the ILO, despite the provisions of the Income and Employment Support Act (SNL2002 Chapter I-0.1), and similar provisions in other provincial legislation,¹²⁷⁴ in Canada, only two-thirds of those who suffer from severe disabilities actually have access to legislated employment benefits.¹²⁷⁵ More specifically, the bureaucracy of workers' compensation, issues with required documentation, and lack of proper care from health-care providers diminishes immigrants' access to claiming disability benefits.¹²⁷⁶

The section below discusses social assistance in Canada. For persons with disabilities, the Canada Disability Savings Act S.C. 2007, c. 35, s. 136,¹²⁷⁷ promotes long-term savings through a registered savings plan to cater for the financial security of persons with severe and prolonged impairments.¹²⁷⁸ Any contributions made to the savings plan will be matched to a maximum of 300 per cent in terms of the Canada Disability Savings Grant.¹²⁷⁹ No distinction is made between citizens and foreign nationals; foreign nationals who are disabled should thus be able to benefit from the Canada Disability Savings Grant.

Canada has a universal health-care system.¹²⁸⁰ Permanent residents qualify for Canada's public health system,¹²⁸¹ while refugees, protected persons and refugee claimants may be granted temporary health insurance through the Interim Federal Health Program.¹²⁸² Entitlements to

¹²⁷³ Employment Insurance Act (S.C. 1996, c. 23) s 7(1)-(2).

¹²⁷⁴ In the province of Newfoundland and Labrador, the Income and Employment Support Act supports persons with disabilities such that they are able to access training and develop skills. One of the purposes of the Income and Employment Support Act is to assist persons to acquire employment support; skills; training; access to job opportunities; and experience to enter and remain employed in the workforce. Income and Employment Support Act (SNL2002 CHAPTER I-0.1), s 3(3)a; Canadian Disability Policy Alliance (2017) 40.

¹²⁷⁵ ILO *World Social Protection Report* (2017) 135. The proportion of disabled persons who do not receive any benefit and who are not employed was higher than 20 per cent. United Nations *Promoting Inclusion through Social Protection Report on the World Social Situation 2018* (2018) 69 (hereafter '*Social Protection Report* (2018)').

¹²⁷⁶ Senthanaar S, Koehoorn M, Tamburic L et al. 'Differences in work disability duration for immigrants and Canadian-born workers in British Columbia, Canada' (2021) 18 *International Journal of Environmental Research and Public Health* 3.

¹²⁷⁷ S.C. 2007, c. 35, s. 136.

¹²⁷⁸ S.C. 2007, c. 35, s. 136, s 3.

¹²⁷⁹ S.C. 2007, c. 35, s. 136, s 6(2). The registered Disability Savings Plan until 49 years of age. Canadian Disability Policy Alliance (2017) 3ed 'A Review of Disability Policy in Canada' Canadian Disability Policy Alliance: Canada 30.

¹²⁸⁰ Richter S, Vallianatos H & Green J et al. 'Intersection of migration and access to health care: experiences and perceptions of female economic migrants in Canada' (2020) 17 *International Journal of Environmental Research and Public Health* 7.

¹²⁸¹ Canada Health Act (R.S.C., 1985, c. C-6), s 4.

¹²⁸² Government of Canada 'Understand how health care works in Canada' <https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/new-life-canada/health-care-card.html#system> (accessed 31 December 2022).

health care for temporary residents, including SMWs, depend on each province, and consequently, on where the migrant resides.¹²⁸³ Skilled migrants are vulnerable to barriers preventing them from receiving adequate health care in Canada.¹²⁸⁴ Migrants have to be formally accepted by a doctor; once a migrant qualifies for health care and has been furnished with a health-care card, access to health care, including preventative care, is relatively cheaper in general, but in certain instances out-of-pocket expenses are hard to cover and cause certain forms of health care to be inaccessible without private medical aid.¹²⁸⁵

5.3.5.3 Employment

Labour and employment regulations typically fall within the provincial and territorial jurisdiction of Canada's 10 provinces, while only certain industries are regulated by the federal government.¹²⁸⁶ Much like South Africa's BCEA, employment legislation per province in Canada sets out minimum entitlement provisions.¹²⁸⁷ The differences between the minimum entitlement provisions per province have potential benefits and drawbacks. Suppose the foreign national is allowed to choose the province where he or she would like to be employed. In that case, he or she can choose the province that provides the most generous minimum employment provisions. The disadvantage of not having a national scheme or legislation is that SMWs may be treated less favourably in certain provinces.

¹²⁸³ In the province of British Columbia, temporary residents who have been resident for six months or longer may qualify for the health-care system as provided in the province. Medicare Protection Act [RSBC 1996] Chapter 286, s 1.

¹²⁸⁴ Richter S, Vallianatos H & Green J et al. (2020) 1; Shommu NS, Ahmed S & Rumana N et al. 'What is the scope of improving immigrant and ethnic minority healthcare using community navigators: A systematic scoping review' 2016 *International Journal for Equity in Health* 2; Pandey M, Maina RG, Amoyaw J et al. 'Impacts of English language proficiency on healthcare access, use, and outcomes among immigrants: a qualitative study' (2021) 21 *BMC Health Services Research* 2.

¹²⁸⁵ One cannot go to just any doctor. Richter S, Vallianatos H & Green J et al. (2020) 5-6; Turin TC, Rashid R & Ferdous M 'Perceived challenges and unmet primary care access needs among Bangladeshi immigrant women in Canada' (2020) 11 *Journal of Primary Care & Community Health* 7.

¹²⁸⁶ National, international and inter-provincial industries are regulated by the federal state. Bayne R 'Employment law overview Canada 2019-2020' <https://knowledge.leglobal.org/wp-content/uploads/sites/2/LEGlobal-Employment-Law-Overview-Canada-2019-2020.pdf> (accessed 14 May 2021) 1; Canada Labour Code R.S.C., 1985, c. L-2.

¹²⁸⁷ New Brunswick Regulation 2018-25 under the Employment Standards Act (O.C. 2018 102) reg 6(1); Wage Regulations, RRNWT 1990, c. L-7, reg 2(1); Canada Labour Standards Regulations C.R.C., c. 986, s 6; Employment Standards Act, 2000 S.O. 2000, Chapter 41, s 18(3); Employment Standards Act RSY 2002, c.27, s 12(1); Employment Standards Act [RSBC 1996] CHAPTER 113, s 36(1)a; Act Respecting Labour Standards chapter N-1.1, s 52; Labour Standards Regulations under the Labour Standards Act (O.C. 96-261), reg 9(1).

5.4 New Zealand

5.4.1 Historical development of the law and policy of migration in New Zealand

Historically, New Zealand¹²⁸⁸ has been open to immigrants from predominantly English-speaking countries.¹²⁸⁹ In the 1970s, the Government of New Zealand introduced a policy that granted preference to migrants from traditional source countries such as Britain and Ireland.¹²⁹⁰ Migrants' ability to speak English was tested on the International English Language Testing System (IELTS) scales. Statutory registration requirements for professionals and annual targets were also instituted.¹²⁹¹ The requirement of being able to speak English, and successfully pass an English language ability test, was to the disadvantage in particular of Asian migrants and resulted in a decline in Asian immigrants to New Zealand.¹²⁹² In 1999, the immigration policy and legislation were repositioned to select skilled migrants proactively.¹²⁹³ Since then, New Zealand's immigration policy has been skill-based,¹²⁹⁴ with a very strong emphasis placed on 'permanent high-skilled migration'.¹²⁹⁵

A points-based system was introduced and has been used since 1991 to assess whether immigrants have qualified for residence in New Zealand.¹²⁹⁶ Since the introduction of the

¹²⁸⁸ 'New Zealand is an independent sovereign nation. Because it is a monarchy, New Zealand is called a "Realm."' New Zealand Government 'New Zealand's Constitution' <https://gg.govt.nz/office-governor-general/roles-and-functions-governor-general/constitutional-role/constitution/constitution#:~:text=New%20Zealand%20is%20an%20independent,is%20called%20a%20%22Realm.%22&text=The%20Queen%20appoints%20the%20Governor,a%20term%20of%20five%20years> (accessed 31 December 2022).

¹²⁸⁹ Hercog M & Van de Laar M 'Europe as unlikely immigrant destination: location choice for internationally mobile students in India' (2016) 6(4) *European Journal of Higher Education* 359.

¹²⁹⁰ Kahn LM 'Immigration, skills and the labor market: International evidence' (2004) 17 *Journal of Population Economics* 501-34; Simon-Kumar R 'Neoliberalism and the new race politics of migration policy: changing profiles of the desirable migrant in New Zealand' (2015) 41(7) *Journal of Ethnic and Migration Studies* 1175.

¹²⁹¹ Simon-Kumar R (2015) 1176.

¹²⁹² Simon-Kumar R (2015) 1176.

¹²⁹³ Simon-Kumar R (2015) 1177.

¹²⁹⁴ Nathan M 'The wider economic impacts of high-skilled migrants: a survey of the literature for receiving countries' (2014) 3(4) *IZA Journal of Migration* 14.

¹²⁹⁵ Brickenstein C 'Impact assessment of labour migration in Australia and New Zealand: A win-win situation?' (2015) 24(1) *Asian and Pacific Migration Journal* 110.

¹²⁹⁶ Selvarajah C 'Equal employment opportunity: acculturation experience of immigrant medical professionals in New Zealand in the period 1995 to 2000' (2004) 23(6) *Equal Opportunities International* 51.

points system, New Zealand has received a large number of SMWs.¹²⁹⁷ The focus on skilled migration has thus facilitated the entry of many migrants from a wide range of countries.¹²⁹⁸

The government thereafter sought to address its specific labour market needs and labour shortages through the Expression of Interest model (hereafter 'EOI').¹²⁹⁹ With the EOI, applicants enter their details on an online database and an immigration officer pre-screens applicants and makes their details available to potential employers, who are then able to assess the suitability of the applicant to vacant positions.¹³⁰⁰ After being selected from the EOI pool, applicants are invited to apply for permanent residence.¹³⁰¹

Temporary visas are also offered alongside permanent migration.¹³⁰² Temporary visas were created with the expectation that temporary migrants would become permanent skilled residents.¹³⁰³ The temporary entry of migrants also serves to amass human capital, much as in Canada.¹³⁰⁴ For instance, in the late 1990s, to retain skilled migrants, the Government of New Zealand adopted policies to enable the migration of foreign students after the completion of their studies; this in turn also 'created a powerful incentive for international students to study in New Zealand'.¹³⁰⁵ International graduates represent a significant part of New Zealand's talent acquisition, and many graduates remain in the country after their studies.¹³⁰⁶ Moreover,

¹²⁹⁷ Pernice R, Trlin A & Henderson A et al. 'Employment status, duration of residence and mental health among skilled migrants to New Zealand: Results of a longitudinal study' (2009) 55(3) *International Journal of Social Psychiatry* 272.

¹²⁹⁸ Meares C, Bell A & Peace R 'Migration, gender and economic integration: international scholarship (2006–09) and an Aotearoa New Zealand research agenda' (2010) 5(2) *Kōtuitui: New Zealand Journal of Social Sciences Online* 63.

¹²⁹⁹ Kolbe M & Kayran EN 'The limits of skill-selective immigration policies: Welfare states and the commodification of labour immigrants' (2019) 29(4) *Journal of European Social Policy* 488; Act 51 of 2009, s 92(1); Akbari AH & MacDonald M 'Immigration policy in Australia, Canada, New Zealand, and the United States: An overview of recent Trends' (2014) 48(3) *International Migration Review* 808.

¹³⁰⁰ Akbari AH & MacDonald M (2014) 808.

¹³⁰¹ Immigration Act 51 of 2009, s 92(1)- (hereafter 'Act 51 of 2009').

¹³⁰² Such as visas for students; work-to-residence visas and talent visas. Act 51 of 2009, s 77(4)b; Immigration New Zealand Immigration Operational Manual: Temporary part 1 (Issue date 27 May 2019) BG1.5 (e) hereafter 'Immigration New Zealand Immigration Operational Manual: Temporary part 1'); Immigration New Zealand Immigration Operational Manual: Temporary part 1 Reg 5.65(c)iii.

¹³⁰³ Simon-Kumar R (2015) 1177.

¹³⁰⁴ Sabharwal M 'Introduction: Immigration and its impact on human capital development' (2013) 15(4) *Journal of Comparative Policy Analysis: Research and Practice* 294.

¹³⁰⁵ Chiou B 'Two-step migration: A comparison of Australia's and New Zealand's policy development between 1998 and 2010' (2017) 26(1) *Asian and Pacific Migration Journal* 85.

¹³⁰⁶ Berquist B, Hall R & Shields H et al. 'Global perspectives on international student employability' <https://cdn.auckland.ac.nz/assets/auckland/study/international-students/About-the-International-Office/Director/global-perspectives-on-international-student-employability.pdf> (accessed 31 December 2022).

international students in New Zealand are given preference under the skilled migrant visa category when applying for permanent immigration.¹³⁰⁷

5.4.2 Legal requirements for foreign nationals entering New Zealand

In terms of the Immigration Act 51 of 2009 (hereafter ‘Act 51 of 2009’), the Minister of Immigration may issue instructions in relation to an applicant’s eligibility to work in New Zealand.¹³⁰⁸ An individual may not work in New Zealand if he or she is in the country illegally.¹³⁰⁹ Holding a permanent residence visa in New Zealand entitles an individual to work.¹³¹⁰ In New Zealand, an applicant is entitled to work if the applicant qualifies to be a permanent resident in New Zealand. As such, New Zealand’s skilled visas are called residence from work or residence class visas.¹³¹¹ There was a significant drop in the number of residence class visas granted in 2022 compared to the previous year. In 2021, 7,872 SMWs were granted residence, while in 2022, only 657 were granted.¹³¹² Despite a decrease in numbers, New Zealand still received more SMWs than South Africa during the same period.¹³¹³

Residence class visas may encourage SMWs to remain in New Zealand for longer, especially since they are granted permanent residence. In 2016, the number of points required for selection in the ‘skilled migrant category for residence approval’ was set to 160 points.¹³¹⁴



¹³⁰⁷ Tremblay K ‘Academic Mobility and Immigration’ (2005) 9(3) *Journal of Studies in International Education* 213.

¹³⁰⁸ Immigration Act 51 of 2009, s 22(1)(c)ii.

¹³⁰⁹ Act 51 of 2009, s 21(a).

¹³¹⁰ Act 51 of 2009, s 73(d).

¹³¹¹ Act 51 of 2009, s 71(1)(b)ii.

¹³¹² FigureNZ ‘People granted residence for New Zealand under the Skilled Migrant substream 2013–2022’ <https://figure.nz/chart/iaQN5q1Jxj4H6EwZ> (accessed 28 April 2023).

¹³¹³ See 1.1 above.

¹³¹⁴ Immigration New Zealand Operational Manual: Residence part 2 (Issue date 27 May 2019) reg SM2.5 (hereafter ‘Immigration New Zealand Operational Manual: Residence part 2’). Immigration instructions or regulations are contained in various operational manuals approved by the Minister of immigration. Ministry of business, innovation and employment ‘Immigration instructions’ <https://www.immigration.govt.nz/about-us/policy-and-law/how-the-immigration-system-operates/immigration-instructions> (accessed 31 December 2022); Bedford R & Didham R ‘Immigration: an election issue that has yet to be addressed?’ (2018) 13(2) *Kōtuitui: New Zealand Journal of Social Sciences Online* 178-9.

Refugees to and in New Zealand are also regulated by Act 51 of 2009. Recognised refugees and protected persons are eligible to apply for residence.¹³¹⁵ The Ministry of Business, Innovation and Employment in New Zealand assists refugees to settle in the country by encouraging them to work, to learn the language, and to receive access to health care and housing.¹³¹⁶ Skilled refugees may thus work in a skilled occupation after becoming residents.

5.4.2.1 Long term Skills Shortage Visa

The Long-term Skills Shortage Visa (hereafter ‘LTSSV’) forms part of the ‘residence from work’ category or ‘residence class’ visas.¹³¹⁷ The requirements of the LTSSV are the applicant must have the required qualifications; work experience; occupational registration to work in an occupation which is listed in the Long-term Skills Shortage list (hereafter ‘LTSSL’); and he or she must have worked in that occupation for two years.¹³¹⁸ The LTSSV aims to allow those employed in New Zealand on an occupation listed on the LTSSL to reside and work in New Zealand. Applicants may be granted permanent residence after two years.¹³¹⁹ Furthermore, all applicants must be of good character and not pose a security risk to New Zealand.¹³²⁰ In assessing the applicant’s character, applicants must obtain a police certificate from all countries

¹³¹⁵ Refugees are placed in different categories: quota refugees asylum seekers or spontaneous refugees who apply for refugee status once they arrive in New Zealand and family members of refugees who are residents in New Zealand. Immigration New Zealand Operational Manual Refugees and protection (issue date February 2021) reg C5.15.1(a). Quota refugees are chosen by the government of New Zealand to be settled in New Zealand while they are still abroad. New Zealand Human Rights Commission (2010) 337. New Zealand accepts a total of 1,500 refugees per annum. Ministry of Business, Innovation and Employment ‘New Zealand refugee quota programme’ <https://www.immigration.govt.nz/about-us/what-we-do/our-strategies-and-projects/supporting-refugees-and-asylum-seekers/refugee-and-protection-unit/new-zealand-refugee-quota-programme> (accessed 31 December 2022); Act 51 of 2009, s 126; Act 51 of 2009, s 125(1), s 133; New Zealand Human Rights Commission ‘Section Four – Rights of specific groups’ https://www.hrc.co.nz/files/3914/2388/0522/HRNZ_10_rights_of_refugees.pdf (accessed 31 December 2022) 337 (hereafter ‘New Zealand Human Rights Commission (2010)’).

¹³¹⁶ New Zealand Immigration ‘Refugee and protection’ <https://www.immigration.govt.nz/about-us/what-we-do/our-strategies-and-projects/supporting-refugees-and-asylum-seekers/refugee-and-protection-unit> (accessed 31 December 2022).

¹³¹⁷ Immigration New Zealand Operational Manual: Residence part 2 reg; Ministry of Business, Innovation and Employment ‘Skill shortage list checker’ <https://skillshortages.immigration.govt.nz/assets/uploads/long-term-skill-shortage-list.pdf> (accessed 31 December 2022).

¹³¹⁸ Ministry of Business, Innovation and Employment ‘Information about: Long Term Skill Shortage List Work Visa’ <https://www.immigration.govt.nz/new-zealand-visas/apply-for-a-visa/about-visa/long-term-skill-shortage-list-work-visa> (accessed 31 December 2022).

¹³¹⁹ Immigration New Zealand Operational Manual: Administration (Issue date 17 December 2018) reg A4.5 (b)(i-iii); Immigration New Zealand Operational Manual: Residence part 2 reg RW4(a); reg RW4(b)(i); reg RW4(b)(ii); RW4(c); RW4(d); reg RW4.5.

¹³²⁰ Immigration New Zealand Operational Manual: Administration (Issue date 17 December 2018) reg A5.1 (a-b).

the applicant has resided in for 12 months or longer. In addition, the applicant must also obtain a police or equivalent certificate from the state where the applicant is a citizen.¹³²¹

5.4.2.2 Essential Skills Work Visa

To apply for an Essential Skills Work Visa (hereafter ‘ESWV’), the applicant must have an offer of employment in New Zealand.¹³²² The following requirements must also be met to qualify for an ESWV. The employment must be acceptable;¹³²³ no New Zealand resident or citizen must be available for the work;¹³²⁴ and the employer must meet prerequisite requirements.¹³²⁵ The ESWV is similar to the CSWV, as both visas allow SMWs to work temporarily in an occupation that requires essential or critical skills.¹³²⁶

5.4.2.3 Positive characteristics of New Zealand’s skills visas

The employer requirements for the skilled category visas (LTSSV and ESWV) are very stringent, ensuring that the SMWs in the same or similar position are treated like New Zealand citizens. The ESWV require employers to pay the SMWs not less than the minimum salary specified, and to comply with legal obligations when recruiting migrants.¹³²⁷ From a human rights perspective, this is in favour of the SMW as, at the very least, the SMW will receive a legislated minimum salary or more, which should be on par with that offered to citizens in the

¹³²¹ Immigration New Zealand Operational Manual: Administration (Issue date 18 February 2021) reg A5.5(b)i-ii.

¹³²² Immigration New Zealand Immigration Operational Manual: Temporary part 1 reg WK1.5.

¹³²³ Immigration New Zealand Immigration Operational Manual: Temporary part 1 reg WK1.5(b)(i). Acceptable employment complies with relevant employment laws in New Zealand; the offer of employment must be a genuine offer which is sustainable and full-time for the duration of the employment as set out in the employment agreement; payment must be in the form of wages or a salary, and the rate of payment is market-related and not less than what is paid to New Zealand employees in the same occupation. Immigration New Zealand Immigration Operational Manual: Temporary part 1 reg WK3.5.

¹³²⁴ Immigration New Zealand Immigration Operational Manual: Temporary part 1 reg WK1.5(b)(ii).

¹³²⁵ Immigration New Zealand Immigration Operational Manual: Temporary part 1 reg WK1.5(b)(iii). Prerequisite requirements for employers are: the employer is directly responsible for the payment of salaries; PAYE tax instalments; ensuring conditions of employment are sufficient and meet New Zealand’s employment standards and the daily supervision of the employee; the employer must be compliant with all relevant employment and immigrations laws; where the employer has previously employed holders of ESWVs, the employer has paid the holder the remuneration which is required for holders of ESWVs, and the employer complies with employment laws and should not be listed as non-compliant as per the determination of the labour inspectorate. Immigration New Zealand Immigration Operational Manual: Temporary part 1 reg WK3.15(a)(i)-(iv); Immigration New Zealand Immigration Operational Manual: Temporary part 1 reg WK1.5(b)(iv).

¹³²⁶ Immigration New Zealand Immigration Operational Manual: Temporary part 1 reg W2.5.1(c).

¹³²⁷ Immigration New Zealand Immigration Operational Manual: Temporary part 1 reg WK3.15(a)(i)-(iv); Joseph MGC ‘From students to permanent residents: The role of social networks in the immigration transition of Indians in New Zealand’ (2016) 25(2) *Asian and Pacific Migration Journal* 170.

same or similar occupation. This complies with the equal-treatment and equal-opportunity state obligation and the benchmark of non-discrimination, as identified in chapter 3.¹³²⁸

According to Bedford and Spoonley, the EOI model is arguably the most successful policy in the competition for SMWs since the creation of the points-based system.¹³²⁹ The EOI model was developed in an environment that placed emphasis on ‘efficiency and transparency in selection processes and which prioritised the rapid integration of migrants into the labour market in jobs that made use of their skills’.¹³³⁰ Analysis of data collected over 30 years in New Zealand has revealed that the skilled migrant category is the key pathway to migration and settlement in the country.¹³³¹

5.4.2.4 Negative characteristics of New Zealand’s skills visas

Work experience must match substantially with the New Zealand Standard Classification of Occupations description.¹³³² The skills matching requirement is not negative in itself. The problem is that no clear guidelines are provided as to how clear evidence is to be produced and what type of evidence is regarded as acceptable. As a result, applications may fail as clear evidence of the skill level is required for the category of skilled migrant.¹³³³

5.4.3 Rights of skilled immigrants in New Zealand

5.4.3.1 Constitutional rights

Generally, civil and political rights are guaranteed for everyone in New Zealand in terms of the New Zealand Bill of Rights Act 1990, irrespective of immigration status.¹³³⁴ The only rights the Act reserves for citizens are electoral rights,¹³³⁵ although not exclusively. Permanent

¹³²⁸ See 3.2 ; 3.3 and 4.5.1 above.

¹³²⁹ Bedford R & Spoonley P ‘Competing for talent: Diffusion of an innovation in New Zealand’s immigration policy’ (2014) 48(3) *International Migration Review* 893.

¹³³⁰ Bedford R & Spoonley P (2014) 893.

¹³³¹ Opara O ‘Trends and patterns of post-communist migration from Russia to New Zealand since the 1990s’ (2017) 26(4) *Asian and Pacific Migration Journal* 485.

¹³³² Joseph MGC (2016) 179.

¹³³³ Joseph MGC (2016) 179.

¹³³⁴ New Zealand Human Rights Commission ‘Section four– rights of specific groups: rights of migrants’ https://www.hrc.co.nz/files/8014/2388/0518/HRNZ_10_rights_of_migrants.pdf (accessed 31 December 2022) 327 (hereafter ‘New Zealand Human Rights Commission: Rights of Migrants (2010)’).

¹³³⁵ New Zealand Bill of Rights Act 1990, s 12.

residents have been eligible to vote since 1975.¹³³⁶ Migrants' freedom of movement in and out of New Zealand is also limited.¹³³⁷

Discrimination on the grounds of sex; marital status; race; national or ethnic origins or beliefs; religion; colour; disability; age; political opinion; employment status; family status; and sexual orientation are prohibited by the Human Rights Act 82 of 1993.¹³³⁸ While discrimination is prohibited, migrants report that they continue to face discrimination.¹³³⁹ According to the Centre for Applied Cross-cultural Research, discrimination is a barrier to migrants' finding employment.¹³⁴⁰ Migrants have faced discrimination due to their appearance, national or ethnic origin, their accent and the way they do things.¹³⁴¹

5.4.3.2 Social security

As regards social insurance provisions, New Zealand's Health and Safety in Employment Act 96 of 1992 ensures that employees work in a safe and healthy environment, much as South Africa's Occupational Health and Safety Act 85 of 1993 does. The object of the Act is to prevent harm to employees and matters related thereto, and the Act is applicable by virtue of an employment relationship.¹³⁴² In New Zealand, as regards insurance for loss of income due to employment injuries, employers are liable for securing this insurance and paying 100 per cent of contributions to a private insurer.¹³⁴³

All persons who have attained the age of 65 qualify for superannuation; however, it is a requirement that at the time of the application, the applicant must be a resident of New Zealand.¹³⁴⁴ After reaching the age of 20 years, the applicant should have been resident and

¹³³⁶ Shaw J *The People in Question: Citizens and Constitutions in Uncertain Times* (2020) 174.

¹³³⁷ New Zealand Bill of Rights Act 1990, s 18.

¹³³⁸ Human Rights Act 82 of 1993, s 21(1)(a)-(m).

¹³³⁹ New Zealand Human Rights Commission: Rights of Migrants (2010) 331.

¹³⁴⁰ The Centre for Applied Cross-cultural Research (2018) 'Meeting the Needs and Challenges of Migrants and Former Refugees in the Nelson and Tasman Regions' Nelson Multicultural Council: New Zealand 14.

¹³⁴¹ The Centre for Applied Cross-cultural Research (2018) 15; For instance, Filipinos were regarded as 'good house cleaners', while Pacific islanders were not considered good tenants by property owners. The Centre for Applied Cross-cultural Research (2018) 15.

¹³⁴² Employment Act 96 of 1992, s 5.

¹³⁴³ ILO GEIP (2017) 35; the Injury Prevention, Rehabilitation and Compensation Act provides insurance cover for no-fault injuries through the Compensation Corporation scheme. The Injury Prevention, Rehabilitation and Compensation Act 49 of 2001, s 3, s 20 & s 259.

¹³⁴⁴ New Zealand Superannuation and Retirement Income Act 84 of 2001, s 7 & s 8 (hereafter 'Act 84 of 2001'). Historically, formal discrimination excluded Maoris from receiving the old-age pension until the 1930s, while those who received a pension frequently received up to two-thirds less than other pensioners of European descent. *Social Protection Report* (2018) 103.

present in New Zealand for a period of 10 years at least.¹³⁴⁵ If the person has reached the age of 50, the applicant should have been resident and present in New Zealand for at least five years to qualify for pension.¹³⁴⁶ In addition, all persons who qualify for the New Zealand Superannuation also receive a SuperGold card that provides the holder access to various subsidised or discounted products and services.¹³⁴⁷ New Zealand Superannuation may be beneficial to SMWs who are qualified for the benefit, as New Zealand Superannuation is non-means-tested and non-contributory.¹³⁴⁸ However, SMWs who do not meet the residency requirements above must wait five or 10 years before qualifying for the New Zealand Superannuation.

Social assistance provisions in New Zealand are discussed here. New Zealand provides job-seeker support which is a weekly payment that assists those who are looking for jobs in New Zealand.¹³⁴⁹ A person is a job-seeker if the person has a work gap;¹³⁵⁰ is available to work; is at least 18 (without a child) or 20 years old (in any other case); meets the residence requirement as stated below; and has no or very little income.¹³⁵¹ Job-seeker support is available to all citizens and persons who hold a residence class visa.¹³⁵² At the time of the application, the applicant should have resided in New Zealand for at least two years after becoming a citizen or resident, or the applicant should be recognised as a protected person or refugee in New Zealand.¹³⁵³

The Social Security Act allows a disability allowance to be paid to persons who are disabled for six months or longer.¹³⁵⁴ According to the ILO, 80 per cent of persons with severe disabilities receive effective coverage of disability benefits in New Zealand. This number includes SMWs who qualify.¹³⁵⁵

¹³⁴⁵ Act 84 of 2001, s 8(b).

¹³⁴⁶ Act 84 of 2001, s 8(c).

¹³⁴⁷ International Labour Office *Universal Social Protection for Human Dignity, Social Justice and Sustainable Development* (2019) 209.

¹³⁴⁸ International Labour Office (2019) 209.

¹³⁴⁹ Social Security Regulations 2018, reg 17(2).

¹³⁵⁰ A work gap obtains when a person is not employed in a full-time job, or the person is employed but, due to a health condition or injury, is losing earnings. Act 32 of 2018, s 21(1)a-b.

¹³⁵¹ Act 32 of 2018, s 20 & s 23 a-b.

¹³⁵² Social Security Act 32 of 2018, s 16(2)a (hereafter 'Act 32 of 2018'); *Social Protection Report* (2018) 43.

¹³⁵³ Act 32 of 2018, s 16(2)(a)i-ii.

¹³⁵⁴ Act 32 of 2018, s 85.

¹³⁵⁵ ILO *World Social Protection Report* (2017) 152.

Since 1938, the Inland Revenue Department has provided maternity benefits.¹³⁵⁶ Employees, including SMWs, are entitled to primary carer leave payment (maternity leave)¹³⁵⁷ which is for a continuous period of 26 weeks,¹³⁵⁸ provided that the primary carer has been employed for a duration of six months, or for a duration of 12 months or more.¹³⁵⁹ Interestingly, in New Zealand persons who are self-employed and those who have adopted children also qualify for parental leave payments.¹³⁶⁰ A single pregnant woman may also be paid maternity job-seeker support.¹³⁶¹

Non-contributory schemes in New Zealand are the sole source of funding in New Zealand for employment-related maternity cash benefits,¹³⁶² while in South Africa, maternity, adoptive, parental and commissioning leave payments derive from social insurance, which employed foreign nationals are also entitled to claim.¹³⁶³ Single parents, including SMWs who are holders of residence class visas, who have been continuously resident in New Zealand for a minimum of two years at any time, may receive an alternative means-tested benefit.¹³⁶⁴ To qualify for parental leave, the employee should have worked for six months at least. Those who have been employed for less than six months will, however, only receive one week paternity leave.¹³⁶⁵ Employees qualify for parental leave and parental leave payments if they have worked for at least 10 hours per week for a period of six months, or for a period of twelve months at a lesser number of hours.¹³⁶⁶

¹³⁵⁶ ILO *World Social Protection Report* (2017) 264.

¹³⁵⁷ A primary carer is the biological mother who is pregnant or who has given birth to a child, or a spouse or a partner of the biological mother, or 'a person, other than the biological mother or her spouse or partner, who takes permanent primary responsibility for the care, development, and upbringing of a child who is under the age of 6 years'. Parental Leave and Employment Protection Act 1987, s 7(1).

¹³⁵⁸ Parental Leave and Employment Protection Act 1987, s 9(1).

¹³⁵⁹ The six-month employment test is met when 'the employee will have been employed by the same employer for at least an average of 10 hours a week in the 6 months immediately preceding the expected date of delivery of the child ... or ... assumption of responsibility for the care of the child'. The same applies for the 12-months test, with the only difference being that the duration of the employment has been 12 months. Parental Leave and Employment Protection Act 1987, s 8(1)b, s 2BA(1) a-b.

¹³⁶⁰ Parental Leave and Employment Protection Act 1987, s 7(1)c, s 71CB(1)a-b.

¹³⁶¹ ILO *World Social Protection Report* (2017) 272.

¹³⁶² ILO *Maternity and Paternity at Work* (2014) 24.

¹³⁶³ The employee contributes 1 per cent of his or her salary to the unemployment insurance fund, from which he or she may claim from when taking maternity, parental, adoptive leave as applicable. Unemployment Insurance Amendment Act 10 of 2016, s 3(1); Labour Laws Amendment Act 10 of 2018, s 3; Basic Conditions of Employment Act, 1997, s 25A.

¹³⁶⁴ Social Security Act 1964, s 74AA(1), s 20A.

¹³⁶⁵ ILO *Maternity and Paternity at Work* (2014) 57.

¹³⁶⁶ Parental Leave and Employment Protection Act 1987, s 2BA(1)a-b.

The New Zealand Public Health and Disability Act provides for a state-subsidised public health-care system.¹³⁶⁷ Citizens, residents, or persons who hold a residence-class visa that is valid for at least two years, are eligible for subsidised health care.¹³⁶⁸ The benefit of a state-subsidised public health-care system ensures that, should SMWs require medical treatment or medical care, they will be eligible to receive this benefit. This benefit may make New Zealand more attractive to skilled migrants.

5.4.3.3 Employment

The Employment Relations Act 24 of 2000,¹³⁶⁹ much like South Africa's LRA and BCEA, applies to persons on the basis of their employment relationship or by virtue of being an employee¹³⁷⁰ as defined by section 6 of the Employment Relations Act. New Zealand employment law applies equally to migrants, New Zealand citizens and residents. Employers must offer work conditions to migrants that are no less than the minimum legal standards offered to New Zealanders.¹³⁷¹

Similar to South Africa with its BCEA,¹³⁷² New Zealand has 'minimum entitlement provisions' that grant minimum entitlements and payments for annual and statutory holidays and minimum wage pay.¹³⁷³ The Equal Pay Act 118 of 1972 serves to ensure that wage discrimination is prevented in the workplace.¹³⁷⁴ In addition, the Wages Protection Act 143 of 1983 ensures that no unlawful or unreasonable deductions are made from the employee's salary or wages.¹³⁷⁵ To the benefit of most employees, the Minimum Wage Act 115 of 1983 ensures that wages are no less than the minimum amount prescribed to all employees, to the exclusion of a few categories

¹³⁶⁷ Act 91 of 2000, s 3(1).

¹³⁶⁸ Ministry of Business, Innovation and Employment 'Insurance in New Zealand - a guide for migrants' <https://www.newzealandnow.govt.nz/resources/insurance-in-new-zealand-a-guide-for-migrants> (accessed 31 December 2022).

¹³⁶⁹ The Employment Relations Act 24 of 2000 creates certain rights for employees, such as the right to join a trade union (s 7), make arrangements or requests for flexible working hours (s 69AA), make arrangements or requests for flexible working hours when the employee has been affected by family violence (s 69AB), strike (s 83), rest and have meal breaks (s 69ZC-69ZH).

¹³⁷⁰ An employee 'means any person of any age employed by an employer to do any work for hire or reward under a contract of service' Employment Relations Act 24 of 2000, s 6(1)a.

¹³⁷¹ Ministry of Business, Innovation and Employment 'Employment law' <https://www.immigration.govt.nz/employ-migrants/explore-your-options/your-responsibilities-obligations/law-immigration-employment/employment-law> (accessed 31 December 2022).

¹³⁷² 75 of 1997, s 4.

¹³⁷³ Anderson G & Kenner L 'Enhancing the effectiveness of minimum employment standards in New Zealand' (2019) 30(3) *The Economic and Labour Relations Review* 349. Minimum wage is currently NZD17.70 per hour.

¹³⁷⁴ The Equal Pay Act 118 of 1972, s 2A(1).

¹³⁷⁵ Wages Protection Act 143 of 1983, s 4 & s 5A.

of employees only.¹³⁷⁶ The Minimum Wage Act ensures, at the very least, that migrants are not exploited in terms of their wages while working in the same occupation as citizens.

The Holidays Act 129 of 2003 ensures that immigrants and citizens alike have a healthy work-life balance and to that end, the Act provides for minimum entitlements in relation to annual holiday;¹³⁷⁷ public holidays;¹³⁷⁸ sick leave;¹³⁷⁹ bereavement leave;¹³⁸⁰ and family violence leave.¹³⁸¹ While South Africa has a favourable legal system that guarantees minimum entitlements for annual holiday, sick leave, and bereavement leave, South Africa does not have a legal framework providing for family violence leave. If an employee experiences family violence, it seems preferable to be resident and employed in New Zealand rather than in South Africa.

5.5 Conclusion

This chapter examined how South Africa's legal framework may be improved by lessons learnt from comparison with the regulation of immigration, specifically regarding SMWs, in other jurisdictions. Like Botswana, the South African state must invest in skills for its citizens. Education and skills training must be addressed with urgency. The development in Botswana shows that, when necessary, seeking skilled immigrants is worthwhile, but that developing the citizens of a country is more beneficial in the long term. Remarkably, the most significant lesson is that both the South African state and the state of Botswana require skilled immigrants' employers to ensure that a transfer of skills takes place and provide proof of the transfer of

¹³⁷⁶ Employees who are excluded: certain apprentices, inmates of any charitable institution and employees who fall under the Home and Community Support Settlement Act. Minimum Wage Act 115 of 1983, s 9.

¹³⁷⁷ Holidays Act 129 of 2003, s 16(1).

¹³⁷⁸ The employee is entitled to have fully paid days off on public holidays, or if an employee works on a public holiday, he or she is entitled to 1.5 times the rate paid to him or her for a normal working day and is entitled to a day off on a non-public holiday day. Holidays Act 129 of 2003, s 50.

¹³⁷⁹ Holidays Act 129 of 2003, s 65(2).

¹³⁸⁰ Between one to three days are allocated to bereavement leave. The number of bereavement days for which an employee will qualify depends on several factors, such as whether the deceased person is a family member, the relationship between the employee and the deceased, and the number of responsibilities the employee has undertaken concerning ceremonies relating to the death. Holidays Act 129 of 2003, s 69, s 70.

¹³⁸¹ Holidays Act 129 of 2003, s 3(a)-(e). Family violence leave is also referred to as domestic violence leave. Domestic violence occurs between persons in a domestic relationship, and it encompasses physical, sexual and psychological abuse. Domestic Violence Act 86 of 1995, s 3(1) & (2). Employees affected by domestic violence have a statutory right to make a request for a variation of their working arrangements or have such variation made on their behalf to allow the employee to deal with the effects of domestic violence. Domestic Violence—Victims' Protection Act 21 of 2018, s 69AB(a); Employment New Zealand 'Domestic violence leave' <https://www.employment.govt.nz/leave-and-holidays/domestic-violence-leave/> (accessed 31 March 2022).

such skills to citizens.¹³⁸² Like Botswana, the South African state should attract SMWs with a long-term view of up-skilling and training citizens. While Botswana does not have a dedicated work visa, the government used incentives to attract SMWs rather than merely facilitate their employment, as with the CSWV. The draft regulations of the ESA in South Africa only require a skills transfer plan to be furnished by the applicants or work visas and corporate visas, thus including such a plan for an applicant for the CSWV.¹³⁸³ In addition, a skills transfer plan is required only for the following work categories: junior, middle, senior and top management.¹³⁸⁴

Canada offers bridge training in certain occupations,¹³⁸⁵ which assists migrants in gaining professional experience.¹³⁸⁶ It is not a requirement in South Africa. Offering bridge training to immigrants allows the employer to train the employee towards the specific needs of the employer and thus to acquire the specific crucial skill that is lacking or needed.

As in Canada, the South African state should consider having more than one governmental department responsible for assessing foreign credentials, which may allow foreign credentials to be assessed faster. This could expedite the number of applications being processed and allow a more rapid inflow of SMWs to South Africa. Currently, in South Africa only the SAQA is responsible for this, as mentioned in chapter 4; as a result, there are notable delays in the assessment of foreign qualifications and credentials. To avoid the pitfalls Canada has experienced regarding multiple bodies for the assessment of foreign qualifications and credentials, the South African state should ensure that all offices follow a national guideline with clear and objective criteria.

Canada's Express Entry programmes expedite the immigration process for SMWs. This is to the benefit of the SMW and the country receiving the skills. This model may benefit South Africa, as currently all applications for the CSWV are administered through one application and one process. By splitting the applications into different categories and levels of urgency,

¹³⁸² Employment of Non-Citizens Act 11 of 1981, s 5 (6)(b): 'where the application relates to employment, the arrangements made or to be made by the employer to train a citizen of Botswana to replace the person in respect of whom the application is made in the event of a work permit being issued to him or his existing work permit being renewed'.

¹³⁸³ Draft regulations to the Employment Services Act 4 of 2014 in GN 1433 in GG 42140 of 28 December 2018 Reg 4(1).

¹³⁸⁴ Draft regulations to the Employment Services Act 4 of 2014 in GN 1433 in GG 42140 of 28 December 2018 Reg 4(3).

¹³⁸⁵ Kaushik V & Drolet J (2018) 5-6.

¹³⁸⁶ Finotelli C (2013) 339.

the South African state would be able to expedite the process of attracting SMWs and responding to applications faster for the most critical positions required by South Africa.

Compared with the CSWV, the requirements of the FSWC, FSTC, and CEC are clear and easily accessible. Canada and New Zealand have many helpful websites and institutions aimed at informing immigrants and ensuring immigrant assimilation and integration, thus fulfilling objective 3 of the GCM, which calls on states to commit to publishing all relevant information regarding migration processes.¹³⁸⁷ The South African state must facilitate the integration or assimilation of migrants. This would also assist in eradicating xenophobia.¹³⁸⁸ Both Canada and New Zealand separate their skilled visas into categories.

The contribution of skilled migrant workers to economic development in Canada and New Zealand is appreciated and understood. This is not so in South Africa, where migrants of all skill levels are predominantly seen as a public threat and in competition for jobs and public resources, when in fact the opposite is true.¹³⁸⁹ The legal framework in Canada, particularly with respect to the rights of immigrants, is very generous due to the value ascribed to immigrants in general as a part of the tapestry and historical development of the state.¹³⁹⁰ New Zealand offers immigrants substantially the same rights as citizens. More specifically, in the case of immigrants who are not yet employed, they may qualify for job-seeker support. Job-seeker support makes New Zealand stand out from the other comparators, including South Africa.

Chapter 6 will conclude by including focused recommendations, based on the lessons derived from Botswana, Canada and New Zealand, to assist in improving the effectiveness of the CSWV and the legal framework in South Africa for attracting SMWs.

¹³⁸⁷ HSRC (2022) 97-8; see 3.2.3 above.

¹³⁸⁸ Department of Justice and Constitutional Development 'National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance' <https://www.justice.gov.za/nap/docs/NAP-20190313.pdf> (accessed 12 April 2023) 4.

¹³⁸⁹ Stern M & Szalontai G 'Immigration policy in South Africa: does it make economic sense?' (2006) 23(1) *Development Southern Africa* 137; HSRC (2022) 68; The World Bank Group (2018) 'Mixed Migration, forced displacement and job outcomes in South Africa' The World Bank Group: Washington DC 4; Alimohammadi E & Muller G (2019) 796; see 4.6 above.

¹³⁹⁰ Green DA & Worswick C 'Canadian economics research on immigration through the lens of theories of justice' https://econ2017.sites.olt.ubc.ca/files/2018/01/GreenPaper_CJE-Aug2-2017-2.pdf (accessed 31 December 2022) 37.

Chapter Six: Conclusion and Recommendations

6.1 Summary of findings

This chapter will conclude the research objective to question the effectiveness of the South African critical skills work visa in comparative perspective. The chapter outlines the main original contributions made by the thesis, and provides recommendations for improving the CSWV regime.

Critical skills were defined in chapter 1 as occupations that are strategic to the country's development. There is also a risk to the country's development if investments in these skills are not made.¹³⁹¹ A lack of critical skills, therefore, refers to the inability of individuals to fulfil roles within a job description because they lack the skill to do so.¹³⁹² To facilitate the immigration of skilled persons to South Africa, a CSL was developed to cater for occupations in high demand.¹³⁹³ Recent CSLs were introduced on 3 June 2014 and 2 February 2022, and the most recent CSL was released on 2 August 2022.¹³⁹⁴ The CSLs to date have not mentioned sectors with well-documented shortages.¹³⁹⁵ According to the DOL, the CSL is limited in terms of its 'format, accuracy, measurement of vacancies and geographical breakdown'.¹³⁹⁶

While the causes of skills shortages in South Africa are well documented across literature,¹³⁹⁷ the thesis contributes to the knowledge of the causes of skills shortages that are specifically relevant to SMWs. In response to the failing education system,¹³⁹⁸ the immigration regime should be developed to make it proactive in attracting those skills critical to the formation of skills throughout the skills pipeline, not just to attract a skilled person once a skills shortage presents itself in a particular occupation. For example, STEM teachers were considered critical skills only in the current CSL rather than in former CSLs. It is imperative to address the formation of critical skills by attracting teachers responsible for developing these skills. The

¹³⁹¹ Reddy V, Bhorat H & Powell M et al. (2016) 75.

¹³⁹² See 1.1.2 above.

¹³⁹³ Department of Home Affairs *Towards a white paper on International Migration in South Africa* (2016) 3; DHA (2018).

¹³⁹⁴ Immigration Act 13 of 2002 regulations in GN 453 GG 37716 of 3 June 2014; Immigration Act 13 of 2002 regulations in GN 1727 GG 45860 of 2 February 2022; Immigration Act 13 of 2002 regulations in GN 2334 GG 47182 of 2 August 2022.

¹³⁹⁵ Crush J 'Southern hub: The globalization of migration to South Africa' in Lucas REB (ed) *International handbook on migration and economic development* (2014) 220.

¹³⁹⁶ DOL (2022) 83-4.

¹³⁹⁷ See 2.4 above.

¹³⁹⁸ See 2.4.1 above.

South African state must cast its net wider than STEM teachers and also include teachers and lecturers responsible for the skills formation of all other occupations listed in the CSL.¹³⁹⁹ Another original proposition highlighted in chapter 2 is that SMWs not only influence the skills pool of those within South Africa, but, in education, contribute to brain gain and develop brain gain.¹⁴⁰⁰ The government's failure to address skills formation adequately within the country's basic education system has a direct impact on skills shortages as it causes a lack of skills development.¹⁴⁰¹

Chapter 2 also highlighted that affirmative action measures and the application of the BBBEEA deter SMWs with critical skills from choosing South Africa as their destination country, as SWMs are excluded from retention, development and skills development policies.¹⁴⁰² Until 2022, foreign graduates who had completed their studies in a critical skills category at tertiary institutions in South Africa were offered an opportunity to apply for permanent residence once they had graduated.¹⁴⁰³ The South African state is now in danger of losing these skills, along with the investments made in educating and training these students through scholarships, bursaries and the like. The South African state may also lose skills and possible tax revenue that would result if the graduates were to be retained and employed in South Africa.¹⁴⁰⁴ Rejecting the opportunity to retain these students after they have graduated results in brain waste, and reflects the short-sighted nature of the immigration regime in retaining skills developed in South Africa.¹⁴⁰⁵

Canada and New Zealand are actively recruiting and retaining international students, and it would be beneficial for South Africa to do the same. The failure to recognise SMWs' foreign qualifications and experience results in brain waste. Failing to assign the appropriate value to the skills, experience and qualifications of SMWs further results in brain waste, and does nothing to assist in addressing skills shortages.¹⁴⁰⁶ Skills are lost when a new CSL excludes skills formerly listed on the previous CSLs. There is no absorption plan for skills previously considered critical or previously listed on the CSL. As such, SMWs are sometimes forced to migrate elsewhere after they no longer qualify for the renewal of their CSWV. Failing to absorb

¹³⁹⁹ Allais S (2014) 1(1) 13; see 2.4.1 above.

¹⁴⁰⁰ Gwaravanda ET, Ndofirepi AP & Waghid Y et al. (2021) 47; see 2.4.1 above.

¹⁴⁰¹ See 2.4.1.2 above.

¹⁴⁰² EEA, s 15(2)ii; Owusu-Sekyere E, Wentzel M & Kanyane B et al. (2019) 33.

¹⁴⁰³ Statement M Gigaba (2018).

¹⁴⁰⁴ Gwaravanda ET, Ndofirepi AP & Waghid Y et al. (2021) 45.

¹⁴⁰⁵ See 2.4.2 above.

¹⁴⁰⁶ See 2.4.3 above.

these skills into the labour market results in brain waste and brain drain and serves as a premium platform to offer up experienced SMWs to other receiving countries, making South Africa a stepping stone or short-term gateway destination.¹⁴⁰⁷ The administrative hurdles created by the DHA in assessing the CSWV applications of asylum seekers cause brain waste.¹⁴⁰⁸ The CSWV has failed as an instrument that may be used meaningfully to absorb the skilled asylum seekers and skilled refugees already in the country into the labour market.

The previous permit system that allowed for the facilitation of employment of SMWs was unsuccessful.¹⁴⁰⁹ The current regime for facilitating the employment of SMWs through the CSWV has not been successful either, and will continue to fail for the following reasons.¹⁴¹⁰ There is no system or legal framework in place for attracting SMWs. The expectation that simply having a visa will facilitate the employment of SMWs is short-sighted, and will not attract SMWs. The CSL is demand-driven and based on current shortages. It does nothing to address the problem of skills shortages in the long term. The government needs to view SMWs as human capital, as in Canada and New Zealand, but the CSL is only seeking specific skills. In contrast, the human capital model adopted by Canada and New Zealand considers the skilled person as capital. Hence, skills in general are sought by these states, rather than specific skills where skills shortages have been noted. There is an evident gap between immigration policies and their implementation. The White Paper has addressed many of these issues and provided workable solutions not reflected in the IA and its regulations.¹⁴¹¹ For instance, the South African state has failed to use permanent residency as a tool to attract SWMs in the long term.¹⁴¹²

The original contribution in chapters 3 and 4 relates to the international benchmarks and obligations that were identified and applied to assess the South African legal framework concerning the rights of SMWs. Xenophobia, institutional xenophobia and government scapegoating are real impediments to SMWs and tend to dissuade them from choosing South Africa as a destination of choice for employment. This research has shown that xenophobia is directed not only at foreigners with low or no skills but so too at SMWs.¹⁴¹³ It is hence

¹⁴⁰⁷ See 2.4.3 above.

¹⁴⁰⁸ See 2.4.3; 4.3 above.

¹⁴⁰⁹ Crush J (2014) 220; White Paper 30; see 2.5.5 above.

¹⁴¹⁰ See 2.5.5 above.

¹⁴¹¹ National Treasury *Operation Vulindlela* (2023) 14.

¹⁴¹² Carciotto S (2018) 65-6; White Paper 42; see 2.5.5 above.

¹⁴¹³ See 4.6 above.

problematic that the PEPUDA does not provide a remedy for foreigners who have been victims of xenophobia.¹⁴¹⁴

The South African framework regarding the right to fair labour practices and social insurance applies equally to SMWs. However, accessibility issues act as a hindrance to the realisation of the rights provided for by South Africa's legal framework.¹⁴¹⁵ In line with the state's obligation to progressively realise the right to access social security, it is possible to extend social security to other groups.¹⁴¹⁶ Section 5 of the Social Assistance Act opens the door to the progressive realisation of social security claims of migrant workers who are not refugees or permanent residents in that it states that the Minister of Social Development may prescribe that other groups are eligible for social assistance.¹⁴¹⁷ As such, nothing in the Social Assistance Act precludes the Minister of Social Development from broadening the scope of social assistance to specific groups of non-citizens such as holders of the CSWV and other skilled immigrants.¹⁴¹⁸ It is submitted that broadening the scope of social assistance to include other groups is necessary to cater for situations where SMWs require social assistance.¹⁴¹⁹

In South Africa, some aspects of social insurance, such as provisions made by the UIA and COIDA, apply equally to SMWs and citizens. It is problematic, however, that these benefits may be accessed through formal employment only. The South African state also fails to meet its specific obligations for social insurance regarding retirement funds. Skilled migrant workers can only participate in retirement funds through their employer if they are formally employed with employers who have chosen to participate in social insurance schemes. Other retirement funds, such as retirement annuities, may be accessed outside of the employment relationship, just as citizens can do.

An overhaul of the DHA is required, as it has been proven that the DHA is unable to accurately assess and properly administer CSWVs, and within an acceptable timeframe. The DHA has been compromised to the extent that integrity, accountability and transparency are rare when

¹⁴¹⁴ See 4.5.1 above.

¹⁴¹⁵ See 4.5.4.2 above.

¹⁴¹⁶ Constitution, s 27(2); see 4.5.4.1 above.

¹⁴¹⁷ Social Assistance Act 13 of 2004, s 5(1)(c).

¹⁴¹⁸ In *Scalabrini Centre of Cape Town and Another v Minister of Social Development and Others*, the High Court extended social assistance through the Covid-19 social relief of distress grant to asylum seekers and special permit holders. The grant was initially intended to serve citizens, permanent residents and refugees only. *Scalabrini Centre of Cape Town and Another v Minister of Social Development and Others* 2021 (1) SA 553 (GP) para 38.

¹⁴¹⁹ See 4.5.4.1 above.

dealing with applications for CSWVs. The DHA also does not deal with CSWV applications with any sense of urgency, which contributes to the delay in assessing applications within acceptable timeframes.¹⁴²⁰

Finally, the main research question must be answered: How effective is the South African CSWV in attracting skilled foreign nationals compared to similar visas and the regulatory systems of Botswana, Canada and New Zealand?

While the Immigration Act 3 of 2011 does not expressly limit SMWs from being employed in Botswana, the application of the Act does not make Botswana's immigration legislation for attracting SMWs more effective than the CSWV. The visas of Botswana and South Africa have a similar problem: neither does anything to attract SMWs, but instead merely facilitates their employment. The CSWV as an instrument is more effective in facilitating employment of SMWs than visas in Botswana due to its objective criteria and set requirements for applying for the CSWV.

Canada and New Zealand can identify sought-after SMWs¹⁴²¹ through their points-based systems.¹⁴²² With their proactive immigration laws and policies,¹⁴²³ these states successfully attract many more SMWs than South Africa.¹⁴²⁴ Thanks to its skills-orientated policies, New Zealand has the highest share of tertiary-level educated immigrants than any other country.¹⁴²⁵ The South African state will benefit from adopting the EOI model used in New Zealand. New Zealand actively recruits skilled desired immigrants, while in South Africa there is yet to be a programme or mechanism for profiling, targeting, attracting, and recruiting SMWs.¹⁴²⁶ The South African state could improve its CSWV and legislation by developing proactive skills recruitment policies and amending legislation for the purpose of attracting SMWs.

Immigration in New Zealand is aimed at long-term rather than short-term migration, as the ability to work is linked to permanent residence. In New Zealand, an immigrant may not work without being a permanent resident. This suggests that skilled immigration is aimed at longer-

¹⁴²⁰ See 4.7.2 above.

¹⁴²¹ Simon-Kumar R (2015) 1178.

¹⁴²² Kar S 'Recession, terms of trade, and immigrants' (2013) 16(4) *Journal of Economic Policy Reform* 370.

¹⁴²³ Tremblay K (2005) 206.

¹⁴²⁴ See 1.1; 5.3.1; 5.3 and 5.4 above.

¹⁴²⁵ Orefice G 'Skilled migration and economic performances: Evidence from OECD countries' (2010) 146 (4) *Swiss Society of Economics and Statistics* 788; Globerman S (2019) 5.

¹⁴²⁶ Human Sciences Research Council (2016) 'A critical skills attraction index for South Africa: "voices of migrants and stakeholders" fieldwork report' Human Sciences Research Council: South Africa 9.

term migration that benefits the country with the immigrant's skills over the long term. Adopting New Zealand's long-term approach to skilled migration may have the effect of retaining SMWs in South Africa for longer. According to the DOL, issuing temporary residence visas such as the CSWV is not attracting SMWs who will contribute to the economy's growth.¹⁴²⁷ Indeed, the South African state can learn from Botswana, Canada and New Zealand to improve the effectiveness of the CSWV. The visas and regulatory framework allowing for skills attraction in Canada and New Zealand are more effective than the CSWV. To improve the CSWV, the recommendations below are made to the government.

6.2 Recommendations

Recommendations with a shared theme are grouped together.

6.2.1 Recommendation 1: Suggestions to improve skills formation

- Amend the CSL to attract teachers and lecturers of all skills listed on the CSL to build the foundation for developing these skills throughout primary, secondary and tertiary education.
- The South African government should encourage expatriates to return to South Africa and train its citizens. It could offer incentives to attract skilled returned expatriates.

6.2.2 Recommendation 2: Amendment to the Immigration Act and its subsidiary legislation

- The directive issued by the Director-General should be withdrawn to the extent that it does not allow foreign nationals who have graduated with skills or qualifications listed on the CSL from a South African institution to apply for permanent residence after graduation.¹⁴²⁸
- Create directives or regulations to allow foreign graduates who have graduated in fields that qualify them to work in occupations listed on the CSL to apply for the CSWV immediately after graduation.

¹⁴²⁷ DOL (2022) 30.

¹⁴²⁸ See 2.4.2; DHA 'Withdrawal of waivers granted in terms of section 31(2)(c) of the Immigration Act 13 of 2002: Granting of permanent residence status in terms of section 27(b) of the Immigration Act: Graduates from SA tertiary institutions in the area of critical skills' http://www.dha.gov.za/images/directive_on_withdrawal_of_blanket_waiver.pdf (accessed 26 December 2022).

- A specific provision should be created in the IA and its regulations that allows for skilled asylum seekers and skilled refugees to apply for the CSWV with ease if they qualify. It is suggested that the following text should be added and situated within section 19 of the IA: ‘The Minister may exempt any refugee or asylum seeker possessing skills or qualifications determined to be critical, as contemplated in section 19(4) of this Act, from one or more requirement(s) for the issuance of the critical skills work visa.’
- Currently, section 26(a) of the IA stipulates that ‘the Director-General may issue a permanent residence permit to a foreigner who – (a) has been the holder of a work visa in terms of this Act for five years and has proven to the satisfaction of the Director-General that he or she has received an offer for permanent employment’. Given the administrative delays faced by asylum seekers in applying for CSWVs and even section 22 visas, if a skilled asylum seeker possesses skills or qualifications in an occupation listed on the CSL, the years that they have worked in an occupation listed on the current or previous CSL, irrespective of the visa they hold at the time, should count towards the five-year requirement to qualify the skilled asylum seeker for permanent residence. The visa held, or status as determined by the IA or RA, should not prevent a person qualifying to work in an occupation listed on the CSL from being granted a permanent residence visa as per sections 25, 26 and 27 of the IA if they otherwise qualify. It is suggested that the text in square brackets be added to section 26(a) of the IA: ‘The Director-General may issue a permanent residence permit to a foreigner who – (a) has been the holder of a work visa [or worked in an occupation listed on a previous or current critical skills list] in terms of this Act for five years and has proven to the satisfaction of the Director-General that he or she has received an offer for permanent employment.’
- Employment portability rights should be allowed for holders of CSWVs, provided that the SMW remains employed in an occupation listed on the CSL. At the very least, if employment is terminated, holders of CSWVs should be able to apply easily for a change of conditions when the conditions of their CSWV include a specific employer or employment contract.
- Since the aim of the CSWV is to attract SMWs who with their skills will contribute to economic development, the burdens that the requirements of the CSWV places on employers should be lifted. Employers are not the only beneficiaries of the skills of

SMWs but the development of the country in general. Excessive burdens on employers have the potential to discourage employers from employing holders of CSWVs.

- Allow the CSWV to be a job-seeker visa again. Genuine SMWs while searching for a job will likely contribute to the economy in other ways, ie, paying tax through VAT. Since a holder of a CSWV must first qualify for a CSWV before being granted one, it makes little difference whether that person has a job or not at the time of being granted the visa, the applicant would have already met all the requirements and possess the skills and experience to work in an occupation listed on the CSL. These visas granted while the holder has not yet secured employment of a job listed on the CSL may be revoked within a reasonable time if the holder fails to secure employment of a job listed on the CSL.

6.2.3 Recommendation 3: Amendments to address xenophobia

- Nationality should be added as a listed ground to ensure that victims of xenophobia may also use the PEPUDA as a remedy for a claim concerning unfair discrimination.
- To address xenophobia and government scapegoating, the South African state must establish explicit media reporting guidelines for broadcast, publishing and internet media, especially when reports concern or involve foreign nationals. The portrayal of immigrants in the media tends to consist of sweeping generalisations without considering their documentation status or skill level. It is essential to refer to all migrants in a manner that is respectful and fitting for a society based on fundamental respect for all people. From a legislative perspective, to avoid solidifying negative stereotypes further, the way that migrants are referred to in the media must be addressed. One way to prevent negative portrayal of immigrants would be to refer to ‘undocumented immigrants’ instead of using the term ‘illegal foreigner’.¹⁴²⁹ It is suggested that the language of the IA be amended to refer to them as migrants in an ‘irregular situation’. Legislation must be drafted that guides how foreign nationals are referred to, especially in media.

¹⁴²⁹ IA, s 1.

6.2.4 Recommendation 4: Suggestions to improve skills retention in South Africa

- It is submitted that if the South African state offers bridge training in occupations listed on the CSL, especially for international graduates, employers may be placed in a position to train individuals to achieve professional experience for occupations listed on the CSL. Given the requirements of the ESA and the IA, employers in South Africa are not required to train foreign graduates. For this reason, the ESA should be amended in a manner that forces employers to train foreign graduates, especially for occupations listed on the CSL, to ensure that South Africa meets its skills needs.
- Offer incentives to foreign graduates who will be employed in occupations listed on the CSL to be employed and remain employed in South Africa. The South African state may consider offering housing subsidies to foreign graduates; Botswana used this as a powerful incentive to attract skills.¹⁴³⁰
- When skills are removed from the CSL, those who were issued with CSWVs based on skills listed on the previous CSLs should be allowed to renew their visa to allow South Africa to retain the skill. This recommendation would allow the IA to encompass the human capital model. The IA regulations should be amended to allow for this.
- In instances where the spouse of a CSWV holder is also skilled, the skilled spouse should be allowed to apply to be employed in a skilled occupation. If both spouses are employed in South Africa, both contribute to economic development, and it may be more likely to retain both spouses in the country.

6.2.5 Recommendation 5: Suggestions to improve skills attraction processes

- Canada's Express Entry programmes expedite the immigration process for SMWs. These programmes benefit the SMW and the country receiving the skills. This model may benefit South Africa, as currently all applications for the CSWV are administered through one application and one process. By splitting the applications into different categories and levels of urgency, the South African state would be able to expedite the process of attracting SMWs and process their applications faster for the most critical positions required by South Africa. Both Canada and New Zealand have done this, and successfully recruited SMWs.

¹⁴³⁰ See 5.2 above.

- Permanent residency must be used strategically to attract SMWs. Holders of the CSWV must qualify for permanent residency immediately after five years of being issued with a CSWV.
- The ESA and EEA should be read together to allow employers to make provision for appointments of SMWs and skill transfers in their employment equity plans. Employers should be able to indicate that positions listed on the CSL would not necessarily be employment equity positions.
- Adding more SAQA offices or like offices or institutions should be considered to assess the foreign credentials, qualifications and experiences of SMWs to improve the time frame it takes to consider foreign credentials.
- In line with objective 5 of the GCM, under which member states commit to optimise skills-matching, the South African state must create, and enter into agreements with other SADC states to establish frameworks to ensure the skills-matching of foreign nationals' qualifications.
- The appointment of the VFS has not assisted in dealing with visa applications effectively. The DHA must consider auditing the VFS, or removing the VFS and allowing applicants to deal with the DHA directly, or find another contractor to deal with the front desk services required of the DHA.
- The EOI model used by New Zealand to proactively target, profile and integrate SMWs should be adopted.
- In instances where both spouses qualify for a CSWV, the DHA must allow for a reduction of application fees.
- Further research, particularly through empirical research will assist to identify gaps in knowledge regarding why SMWs do not choose South Africa as a destination of choice.

6.2.6. Recommendation 6: Social relief of distress in times of disaster

- The regulations for social relief of distress should be amended to expressly include social relief for SMWs in times of disaster.

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